



**IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
**FINANCIAL SERVICES DIVISION**

**FSD CAUSE NO: 143 OF 2019**  
**(FORMERLY CAUSE NO 13 OF 2019)**

**IN THE MATTER** of an Application by Cayman Shores Development Ltd and Palm Sunshine Ltd under section 140(1) of the Registered Land Act (Revised) (the Act) or alternatively under section 96 of the Act

**AND**

**IN THE MATTER** of an Application by Cayman Shores Development Ltd and Palm Sunshine Ltd, pursuant to section 96 of the Act, that certain rights under certain restrictive agreements registered against Block 12D 108 and Block 12C 27 be wholly or partially extinguished or modified

**BETWEEN:**

**(1) CAYMAN SHORES DEVELOPMENT LTD**

**(2) PALM SUNSHINE LTD**

**Plaintiffs**

**-AND-**

**(1) THE REGISTRAR OF LANDS**

**(2) THE PROPRIETORS, STRATA PLAN NO. 79**  
**(known as LION'S COURT)**

**(3) THE PROPRIETORS, STRATA PLAN NO. 147**  
**(known as REGENT'S COURT)**

**(4) THE PROPRIETORS, STRATA PLAN NO. 215**  
**(known as KING'S COURT)**

**(5) THE BRITANNIA PROPRIETORS**  
(being the persons whose names and addresses are set out in Section B of Schedule 1 to the  
Originating Summons)

**Defendants**

## IN OPEN COURT

### Appearances:

**Jonathan Seidler QC, Peter McMaster QC and Mehreen Siddiqui of Appleby on behalf of the Plaintiffs**



**John Randall QC, Colette Wilkins, Nick Dunne and Daisy Boulter of Walkers on behalf of the Walkers Defendants**

**Colm Flanagan, Nicholas Dixey, Alice Carver, and Allyson Spiers of Nelsons on behalf of White Dove**

**Anne-Marie Rambarran of the Attorney General's Chambers on behalf of the Registrar**

### Before:

**The Hon. Mr Justice Segal**

### Heard:

**24-27 November, 2020 and 14 and 15 December, 2020**

### Post-trial Submissions:

**23 December 2020 – 5 January 2021**

### Draft judgment Circulated:

**31 May 2021**

### Judgment Delivered:

**9 June 2021**

## HEADNOTE

*Registered land – restrictive agreements and easements – extent to which instrument created restrictive agreements – implication of restrictive agreement into instrument – whether instrument created recreational easements – the nature of and test for easements – what constitutes effective registration – rectification of the register pursuant to section 140 of the Registered Land Act – the discharge of easements pursuant to section 96 of the Registered Land Act – interference with easements*

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## JUDGMENT

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### Introduction

1. This is my judgment following trial of (a) the Plaintiffs' originating summons issued on 25 January 2019 (and amended on 12 February 2019) seeking declarations that they are not bound by certain rights which the Second to Fifth Defendants claim affect and attach to land now owned by the Plaintiffs and (b) the counterclaims made by the Second to Fifth Defendants seeking, if



necessary, rectification of the entries made in the Land Register with respect to their claimed rights and for damages for interference with those rights (but only covering the issue of liability and not quantum).

2. The dispute relates to a large residential development formerly known as the Britannia Resort. The rights on which the Second to Fifth Defendants rely were granted pursuant to various agreements (which stated that they were “*restrictive agreements*”) entered into between 1992 and 2001 by previous owners of the land (which agreements are registered as incumbrances on the registered titles to the properties now owned by the Plaintiffs in favour of the Second to Fifth Defendants, and also as appurtenances to the Second to Fifth Defendants’ respective registered titles). The key dispute concerns whether these rights (which include rights to play golf, to play tennis and to enjoy beachfront facilities) are binding upon the Plaintiffs (as restrictive agreements within the meaning of and pursuant to section 93 of the Registered Land Act - the **RLA** - or easements within the meaning of and pursuant to section 92 of the RLA). The Plaintiffs deny that they are so bound and seek declarations to that effect together with rectification of the Land Register to remove the current registration of and references to the agreements. The Second to Fifth Defendants assert that those rights bind the Plaintiffs and, by way of counterclaim, allege that the Plaintiffs’ conduct has interfered with or breached those rights in various respects.
3. The site is situated in and around West Bay Road, Grand Cayman. Previously, the resort comprised (among other things) a hotel, the Hyatt Regency Grand Cayman; a golf course, situated on land adjoining the hotel (the Britannia golf course); tennis courts, situated on the west side of the hotel; a beach club adjacent to Seven Mile Beach (later developed into a separate hotel with beach club facilities) and four phases of residential properties being:
  - (a). phase I, a strata development on Block 12D Parcel 25, Strata Plan No. 79, known as Lion’s Court (***Lion’s Court***).
  - (b). phase II, a second strata development on Block 12D Parcel 40, Strata Plan No. 147, known as Regent’s Court (***Regent’s Court***).
  - (c). phase III, 25 vacant parcels of land sold for the construction of private homes as part of a private gated community, known as the Britannia Estate (***Britannia Estate***).



(d). phase IV, a third strata development on Block 12D Parcel 80, Strata Plan No. 215, known as King's Court (*King's Court*).

4. The hotel, tennis courts and golf course were situated on what is now Block 12D Parcel 108 of the West Bay Beach South registration section (*12D 108*), following various combinations and re-parcelling of a number of parcels over time. At the date of the agreements, the site of the hotel and the tennis courts was Block 12D Parcel 24 and the golf course land was Block 12D Parcel 23 (then parcel 41, then parcel 79, then 79REM1). The beach club was at all relevant times situated on Block 12C Parcel 27 of the West Bay Beach South registration section (*12C 27*).

### The parties

5. The First Plaintiff, Cayman Shores Development Ltd (*Cayman Shores*), is the registered proprietor of 12D 108. The Second Plaintiff, Palm Sunshine Ltd (*Palm Sunshine*), is the registered proprietor of 12C 27. Cayman Shores and Palm Sunshine are companies within the Dart Group, a major landowner and property developer in the Cayman Islands. I refer to the Plaintiffs' land and titles (12D 108 and 12C 27) together as the *Properties*.
6. The First Defendant is the Registrar of Lands (the *Registrar*). The Registrar's defence largely consists of non-admissions and she indicated to the Court and the parties prior to the trial that she did not intend actively to participate in the proceedings as a defendant although she did give evidence.
7. The Second, Third and Fourth Defendants are the strata corporations registered under the Strata Titles (Registration) Act in relation to Lion's Court, Regent's Court and King's Court respectively (collectively, the *Strata Corporations*). The Fifth Defendants comprise the proprietors of properties within the Britannia Estate (the *Britannia Proprietors*). Most, but not all, of the Britannia Proprietors are members of the Britannia Estates Home Owners Association Ltd (*BEHOAL*). The strata titles comprise 171 units and there are 22 non-stratified lots held by the Fifth Defendant. Mr. John Randall QC (instructed by Walkers) appeared on behalf of the Strata Corporations and the majority of the registered proprietors of the non-stratified lots (together the *Walkers Defendants*). The other registered proprietors of the non-stratified lots are White Dove International Limited (*White Dove*) who was represented by Nelsons; Kristen Lomas



and Ian Lomas, who indicated that they did not wish to contest the proceedings and Sheila Aronfeld who although aware of the proceedings decided not to participate.

### **The background and events leading up to the commencement of these proceedings**

8. As noted above, this dispute concerns properties forming part of what was historically known as the Britannia Resort. The properties now registered as 12D 108 and 12C 27 were first registered on 14 August 1984 and 29 October 1986 respectively and there came to be built on this site a hotel (initially run by the Hyatt hotel chain), a golf course and a beach club. In the early 1990s, the Hyatt Hotel, the golf course and the beach club were owned by a company known as Cayman Hotel & Golf Inc. (***Cayman Hotel***). A company related to Cayman Hotel, Ellesmere Britannia Ltd (***Ellesmere***) was the developer of the Britannia condominium complex, a range of residential properties forming part of the Britannia Resort. This development was carried out in the phases mentioned above, in and around the late 1980s and 1990s, and led to the building of Lion's Court, Regent's Court, and King's Court, and the sale of various individual plots for residential development (the Britannia Estate). It appears that the use of the hotel amenities and the golf course were held out as attractions to potential and actual purchasers of residential properties within the Britannia Resort.
9. In the early 1990s, the beach facilities comprised a beach club (known as the Britannia Beach Club) incorporating a restaurant called Hemingways, a fitness club and a water sports operator known as Red Sail. In or around 1998, separate hotel suites known as the Hyatt Beach Suites were constructed and some of the beach club facilities (including the water sports operator and fitness centre) moved into that new building. Hemingways remained in its original location. In 2003, the land containing the hotel and golf course was sold to Embassy Investments Limited (***Embassy***) and the beach club/beach suites land (12C 27) was sold to Grand Cayman Beach Suites Limited (***GCBS***). In 2004, Hurricane Ivan hit Grand Cayman damaging the hotel, the golf course and the beach suites/beach club. The golf course and the beach suites/beach club were restored and resumed operations, with the latter operating as the Grand Cayman Beach Suites. The hotel previously run by the Hyatt was never restored by Embassy and has remained in a derelict state since 2004. The tennis courts have not been operational since 2004. Between 2005 and 2007, the Cayman Islands government constructed a four-lane extension of the Esterley Tibbetts Highway (the ***Highway***) through the Britannia Resort. It is agreed by the Plaintiffs and the Walkers Defendants that at least part of the tennis courts was demolished for the purposes of that extension. The Highway also rendered pedestrian access from the residential properties on



the Britannia Resort to the beach facilities more difficult, as that now involved having to cross a four-lane highway. Pedestrian access was further hindered by the installation of a chain-link fence around the (now derelict) hotel by Embassy.

10. Cayman Shores purchased both 12D 108 and 12C 27 in May 2016 from Embassy and GCBS respectively and was registered as proprietor on 25 August 2016. 12D 108 is bordered to the south by Camana Bay, a mixed-use waterfront community. Camana Bay is also owned by Cayman Shores, and it was developed and is managed by the Dart Group. Following the purchase, Embassy continued to manage and operate the Beach Club facilities for Cayman Shores.
11. By letter dated 5 May 2016, Dart Realty (Cayman) Ltd (***Dart Realty***), the parent company of Cayman Shores, wrote to the Strata Corporations and BEHOAL advising that plans were being considered for the redevelopment of the properties and offering to make the beach facilities and the golf course available for use by the strata lot owners and the Britannia Proprietors (collectively, including the Strata Corporations, the ***Lot Owners***) as licensees. In response, representatives of the Strata Corporations and BEHOAL, in reliance upon the agreements, asserted that the Lot Owners had property rights in accordance with those agreements.
12. By a letter dated 22 July 2016, Dart Realty sent a letter to the Strata Corporations, BEHOAL and the Lot Owners informing them that legal proceedings would be taken to determine the legal status of the agreements and that, pending the conclusion of the proceedings, the golf course and beach suites/beach facilities would be closed. In 2017, licence agreements were entered into which provided some Lot Owners with access to the beach suites and gym facilities, without prejudice to the parties' position in this litigation. The licences terminated on 11 October 2018.
13. In late 2016, turf was removed from parts of the golf course, predominantly for use at another Dart development (namely the Kimpton Seafire). The impact of this removal, and the extent of any regeneration, are matters in dispute in these proceedings.
14. In or around 2018, the beach suites and related facilities (previously owned by GCBS) were redeveloped. In October 2018, Cayman Shores transferred 12C 27 to Palm Sunshine. Palm Sunshine was registered as proprietor thereof on 20 November 2018. The redeveloped beach suites and facilities reopened in late 2018/early 2019, under the name Palm Heights and are



operated by a third party. A restaurant called Tillies now operates in the space previously occupied by Hemingways.

15. Several complaints have been made about the maintenance and state of the old golf course since the Plaintiffs' purchase of 12D 108. The Walker Defendants and White Dove assert that the Plaintiffs have breached the terms of the agreements or committed a nuisance to the easements

enjoyed by the Lot Owners on the Britannia Resort by removing parts of the irrigation system and damaging and/or removing parts of the flushing pump system on the golf course.

### **The trial and the evidence**

16. The trial, because of the impact of the COVID 19 pandemic, involved a hybrid hearing in which the local attorneys, some of the parties and some of the witnesses were present in Court while I and Leading Counsel for the Plaintiffs and the Walkers Defendants joined remotely by Zoom. There were some significant connectivity issues which slowed the proceedings down at various points but none of the problems was so serious as to prevent the evidence of the witnesses affected from being properly taken or substantially to interfere with their ability to give their evidence and for counsel and me to hear clearly what they had to say. I am satisfied that I did hear all of the evidence that each witness had to give, and that I was and am able to assess the evidence of the various witnesses properly. I would note that the practicalities of managing this aspect of the hearing were handled with skill and patience by counsel and the technicians controlling the remote link (as well as the witnesses themselves). I would further add that counsel and the Court were greatly assisted by the skill of the technical team (particularly Mr Coates) who controlled the electronic hearing bundle and the presentation of documents on the screens used in the proceedings.
17. Those witnesses who gave evidence from locations other than the Court did so pursuant to a protocol agreed (at my suggestion at the start of the hearing) by the parties and approved by me. They gave evidence from unsupported locations where there was no-one to assist them in giving their evidence (and where the usual functionality of a hearing room was less evident than usual) and without having any of the hearing bundles (which were voluminous) or other materials with them. They were each required to adjust the cameras on their computers before giving their evidence to show their location and that no-one else was present or could communicate with them while they did so.



18. As the Plaintiffs noted, although there was a substantial volume of evidence before the Court, this largely related to the counterclaim and the central disputes in the case involved points of law. Even when witnesses were called and cross-examined, they were on the stand for only a relatively short period. In addition to the witness evidence, the parties helpfully arranged for a video of the land which is the subject of the dispute (including the beach, tennis court and golf course areas) to be filmed and put in evidence, so that I was able to see the current state of the land and these areas (even though I was unable to make a physical inspection). There were also a number of helpful photographs put in evidence.
19. The Plaintiffs called six witnesses. In the order in which they were called they were:
- (a). Mr Starling Kelly. Mr Kelly is the Head Golf Course Superintendent and Agronomist at the North Sound Golf Course (this is another golf course operated by the Dart Group). He has held this position since August 1, 2015. His responsibilities include overseeing all aspects of upkeep and maintenance of the North Sound Golf Course (such as the landscaping and maintenance of the greens and fairways, including operation of the irrigation system and maintenance of the lakes). He is employed by Waterworks Ltd DBA North Sound Golf Club, a subsidiary of Active Capital Ltd which is owned by Dart Enterprises.
  - (b). Mr Robert Weekley. Mr Weekley is the the Senior Vice President of Development Planning for Dart Realty. In 2016 he was managing the Britannia Resort and oversaw the removal of turf from the property and the subsequent planting of trees on the golf course (Mr Weekley and the Plaintiffs' other witnesses referred to this as the former golf course since the Plaintiffs wished to emphasise that the land was no longer used and in their view fit to be used as a golf course but I generally just refer to the golf course).
  - (c). Mr Kevin Line. Mr Line is the Chief Building Engineer at Dart Realty and has held this position since May 2018. His responsibilities include managing the facilities maintenance team.
  - (d). Ms Jacqueline Doak. Ms Doak is a director of both the First Plaintiff and the Second Plaintiff. She is President of Business Development at Dart Realty.



- (e). Mr Kevin Grzybouski. Mr Grzybouski is employed by Dart Realty as a senior property manager, with responsibility for managing the golf course.
  - (f). Ms Linda Podlaski. Ms Podlaski is the Senior Vice President, Property Management, of Dart Realty. Her responsibilities include the oversight of the property management team of Dart Realty which, in turn, was responsible for maintaining a number of properties, including the golf course. She has been in this position since 2016.
20. I found all of these witnesses to be truthful and helpful witnesses. The Walkers Defendants were critical of these witnesses on the basis that, as a general matter, they had no personal knowledge of the matters on which they gave evidence and manipulated their evidence so as to convey the impression that the Plaintiffs sought to act as good neighbours to the Walkers Defendants (when in fact, the nature of the Plaintiffs' actions showed a different story). I reject these criticisms. While on occasions, particular witnesses had no or only limited personal knowledge of the matters raised with them, they generally were able to give relevant evidence and speak to matters of which they had a sufficient personal knowledge and understanding. Furthermore, while I understand the Walkers Defendants' strength of feeling and serious concerns over the way they feel that they have been treated, the action they believe that the Plaintiffs have taken and as to the impact on them of the unavailability of the facilities and the state of the golf course and lakes, I consider that the Plaintiffs' witnesses sought to present their evidence fairly and in a balanced manner.
21. The Walkers Defendants called nine witnesses. In the order in which they were called they were:
- (a). Mr Timothy Hepburn. Mr Hepburn is the Strata Manager of Lion's Court and King's Court.
  - (b). Mr Frank Holmes. Mr Holmes is a director of Filbert Holdings I Limited which owns a villa at unit 823 situated in Regent's Court. He is also a director of Filbert Holdings III Limited, which owns a property known as Villa Le Grand on Block 12D, Parcel 56. Villa Le Grand is not part of a strata corporation, but is one of the private properties located in the Britannia Estate. Villa Le Grand is Mr Holmes' home for part of the year when he is in the Cayman Islands.



- (c). Mr John MacKenzie. Mr MacKenzie, with his wife Sheila, owns and live in a villa in unit 816 of Regent's Court. They purchased this villa in 2016 and have occupied the property on a full-time basis ever since as their sole principal residence. Mr MacKenzie was also appointed as a director of the Executive Committee of Regent's Court in 2017.
- (d). Mr Michael Pilling. Mr Pilling and his wife are owners of unit 421 Britannia Villas in Lion's Court. From September 1993 to October 1997 they rented another unit in Lion's Court before purchasing unit 421 in October 1997, which they have occupied on a full time basis since then.
- (e). Ms Glenda Ebanks-Lee. Ms Ebanks-Lee is the Strata Manager of Regent's Court.
- (f). Mr Kim Lund. Mr Lund is the proprietor of a property in King's Court. He first became aware of the proposed development that became the Britannia Resort in 1984 or 1985 when he was working in property management. Subsequently, in 1991 or 1992, he became involved in the sale of a unit in the Britannia Resort when a potential purchaser contacted him and expressed an interest in purchasing a condominium in phase 1. He was so impressed with the Britannia Resort development that he purchased a unit there in around 1998. The first unit he acquired was in Regent's Court. Thereafter, in 2002, he bought his property in King's Court and sold the Regent's Court property, which has been his main residence since then.
- (g). Ms Linda Lopez. Ms Lopez is the joint owner of a property located in Regent's Court. She and her husband have used this property every year since January 1995 during December to April. Until the closure of the golf course her husband played golf regularly (often bringing guests) and she would visit the beach every day, weather permitting.
- (h). Michael Casseb is the owner of a unit in Lion's Court. He purchased his property in March 2008 and has occupied it on a part time basis ever since. His permanent place of residence is Texas in the USA where he practises as an attorney, specialising in private client and real estate matters.
- (i). Mr Stewart Siebens is the beneficial owner of a property (a house) located at 484 Britannia Drive, within the Britannia Estate. The property is owned by HDS Holdings Limited, a Cayman Islands company, which is the registered proprietor of Block 12D, Parcel 70



which is the land upon which the property is situated. Mr Siebens and his wife have lived in this property since November 1998.

22. I found all of the Walkers Defendants' witnesses to be honest and helpful. Their evidence revealed their understandable concerns and strength of feeling and was largely based on their own observations, experiences and beliefs as owners and occupiers. On occasions, some of the witnesses were shown during cross-examination to have only weak foundations for some of their beliefs (for example, Mr Mackenzie's acknowledgement that he could not, in fact remember whether he had seen the flushing pump in operation in July 2016, on day 3 at page 129 of the transcript). Furthermore, during cross-examination it became apparent that on occasions the Walkers Defendants' belief that the Plaintiffs (and the Dart Group generally) had adopted a policy of calculated neglect in order to pressure the Lot Owners to settle their claims to have enforceable rights was not balanced by and did not take into account the work done and material expense incurred on maintenance which was revealed by the documentary record that had resulted from discovery during these proceedings and the failure of the Lot Owners to undertake or take over responsibility for the golf course maintenance (see for example the cross-examination of Mr Hepburn on day 3 at pages 61-66).
23. Mr Suresh Prasad, who is the sole director and shareholder of White Dove, also gave evidence. White Dove owns a property at 523 Britannia Dr., Britannia Estate known as the Blue House, which is where Mr Prasad resides. Mr Prasad was employed by Ellesmere in 1986 as its Chief Financial Officer and was subsequently appointed as President and Chief Operating Officer in 1992. He was also President of Cayman Hotel, the company that owned the hotel and golf course. As the president of both companies, he was responsible for the overall management and redevelopment of the Britannia Resort. Mr Prasad was involved in the documentation of the Rights and signed the Instruments on behalf of Cayman Hotel and Ellesmere. I found Mr Prasad to be an honest witness who provided some useful background on the early history and marketing of the Britannia Resort, the legal team that had been involved in preparing the Instruments and the circumstances surrounding the sale of the resort in 2004 by Cayman Hotel to Embassy. However, he was unable to provide much assistance on the issues in dispute and, as the Plaintiffs submitted, the evidence he purported to give as to the *subjective* common intention of the parties to the Instruments was irrelevant and inadmissible on the question of the proper construction of those Instruments (and has been disregarded by me for this purpose although, as Mr Randall QC invited me to do, I have borne Mr Prasad's evidence in mind to the extent relevant to issues of discretion with respect to rectification).



24. The current Registrar, Ms Sophia Williams also gave evidence. I found her to be an impressive and helpful witness.

### **The Agreements**

25. The first agreements relevant to these proceedings are dated 28 May 1992. One series of agreements was entered into between Cayman Hotel, Ellesmere and the Second Defendant (the Proprietors of Strata Plan No. 79, Lion's Court). A second series of agreements was entered into on the same date by Cayman Hotel, Ellesmere and the Third Defendant (the Proprietors of Strata Plan No. 147, Regent's Court). These agreements note that at that time phase I (Lion's Court) was complete and phase II (Regent's Court) was in the course of construction. A further series of similar agreements was then entered into between Cayman Hotel and Ellesmere (without a third party signatory), between May 1992 and 2001, in relation to the various lots comprising the Britannia Estate (phase III) and in relation to the third strata development, King's Court. The agreement relating to King's Court (dated 7 March 1997) noted that it (i.e. phase IV) was at that time in the course of construction.
26. In relation to the agreements relating to Lion's Court and Regent's Court there are three signatories, namely Cayman Hotel, Ellesmere, and the relevant strata corporation. The other agreements have only two signatories, namely Cayman Hotel and Ellesmere.
27. Each agreement is in two parts.
- (a). the first part is a printed document (the **First Document**) with typed additions and the signatures of the signatories. The printed heading is "*CAYMAN ISLANDS The Registered Land Law, 1971.*" Under that is a typed addition "*Restrictive Agreement*". In the top right hand corner is a box headed "*Instrument No*" and a number has been inserted in manuscript. On the top left hand side in some copies is "*RL 12*" or just "*12.*"
  - (b). under this wording is a series of printed headings, "*REGISTRATION SECTION*" "*BLOCK*" and "*PARCEL*". Below the first heading "*WEST BAY BEACH SOUTH*" has been typed in and then the relevant block and parcel numbers are added.



- (c). below these headings the First Document states that:

*“We [Cayman Hotel] in consideration of CI\$1.00 (the receipt whereof is hereby acknowledged) HEREBY MAKE AGREEMENT with the proprietors and [Ellesmere] ....in accordance with the attached documents.”*

The words “We”, “in consideration of” and “(the receipt whereof is hereby acknowledged)” are pre-printed text whereas “HEREBY MAKE AGREEMENT” and “in accordance with the attached documents” are typed additions.

- (d). at the bottom of the First Document there is a heading “FOR OFFICIAL USE ONLY” and below that there is a certification signed on behalf of the Registrar of Lands certifying the date on which the document was received for registration.
- (e). attached to the First Document is another (typed) document called an agreement (the **Written Agreement**) between three parties, namely Ellesmere, Cayman Hotel and the relevant proprietors.
- (f). I refer to the composite document comprising the First Document and the related Written Agreement as the **Instrument**.
- (g). each First Document covers and relates to (i) a number of parcels in respect of which the relevant proprietors have an interest but (ii) only one of the parcels owned by Cayman Hotel (either the golf course, the tennis courts or the beach club). Thus, for example, there are First Documents numbered 3061/92, 3062/92 and 3063/92, each of which was executed at the same time. They are each for the benefit of and state that they are an agreement with the registered proprietors of four lots (all within block 12D), namely parcels 25 (strata plan 79), 40(b) (strata plan 147), 38 (now 105) and 39 (now 106). One First Document relates to the golf course; one to the tennis courts and one to the beach club.
28. The various Written Agreements are similar but not identical. For the purpose of the trial, the parties selected and agreed to refer to a number of Written Agreements as being representative of the totality and this judgment is based on and relates to those Written Agreements. They include the First Documents numbered 3061/92, 3062/92 and 3063/92 and the Written Agreements attached thereto.

29. The key terms of the Written Agreement are as follows (underlining added).

(a). the recitals note that Ellesmere is the developer of the Britannia Condominium Complex, that Cayman Hotel is the owner and registered proprietor of the Hyatt Hotel, the beach club facilities and the golf course, and that Ellesmere and Cayman Hotel are related companies.

(b). they further recite as follows:

“3. *The Britannia Resort is a planned community offering both hotel and condominium facilities with amenities for transient guests and condominium owners.*

.....

5. *In order to market the Resort and specifically the sale of condominium units owned by Ellesmere, Ellesmere and Cayman Hotel have granted certain Rights in respect of the use of the Golf Course, the Beach Club and certain Tennis Courts located within the Resort to the owners of condominium units in Phase I and Phase II of Britannia and intend to grant similar Rights to purchasers of additional units in Phase II and adjacent undeveloped lands owned by Ellesmere.*

6. *Ellesmere and Cayman Hotel now wish to register covenants protecting such rights in favour of all present and future owners as incumbrances against the lands on which the Hyatt Tennis Courts, the Beach Club facility and the Golf Course are situated with the intent that such rights shall become a registered appurtenance in the title to the common property held by the Proprietors.*”

(c). in clause 2, under the heading “*Consideration*”, Cayman Hotel grants certain rights in consideration of US\$1 paid by Ellesmere. The clause states that:

*“Cayman Hotel .... to the intent and so as to bind (so far as practicable) parcels 23, 24 and 27 for the benefit of The Proprietors hereby grants Beach Club Rights, Golf Playing Rights and Tennis Court Rights to all such proprietors upon the terms and conditions herein contained.”*

(d). the definitions of Beach Club Rights, Golf Playing Rights and Tennis Court Rights (together the **Rights**) appear in clause 1 as follows:

*“Beach Club Rights*

*means the non-exclusive right together with Cayman Hotel its agents, servants, licensees, invitees, the guests of the Hyatt Hotel and other Britannia condominium owners to enter upon the Beach Club property and enjoy the restaurant, beach and*



*watersport facilities situated thereon upon payment of any fees, charges or costs in force from time to time in respect thereof including but not limited to any fees payable by virtue of any by-law applicable to a strata lot.*

#### *Golf Playing Rights*

*means the rights on a non-exclusive pre-reservation basis to play golf on the Britannia golf course without payment of green fees, or other dues save for cart fees established from time to time subject to such rules as Cayman Hotel shall stipulate from time to time as to priorities in booking tee times, availability of the course for play or otherwise in their absolute discretion [there then follows a confirmation that*

*these rights may be exercised by the owner personally or by an occupant of the strata lot subject to certain conditions].*

#### *Tennis Court Rights*

*means the non-exclusive right to play tennis on the Hyatt Hotel tennis courts situated on parcel 24 upon payment of the current established fee. Hyatt Hotel guests shall have priority over strata lot proprietors in respect of court reservations but strata lot proprietors shall have priority in reservation of court time over non-proprietors save for such hotel guests as aforesaid."*

- (e). clause 1 also defines the "Rights" as "*individually or collectively the Beach Club Rights the Golf Playing Rights and the Tennis Court Rights.*"
- (f). in clause 3 (under the heading "*Modification of Rights*") the proprietors covenant (for themselves and successors in title/assigns) to exercise the Rights in accordance with any rules and regulations in force from time to time in respect thereof:

*"subject at all times to the right of Cayman Hotel or its successors in title or assigns to modify the facilities or the location thereof as constitute such Rights or to suspend such Rights for the purpose of carrying out repairs or maintenance in respect thereto."*

- (g). clause 4 contains a request to the Registrar to note (i) in the appurtenances section of the register for the registered parcels of the proprietors, that the proprietors are entitled to the Rights and (ii) in the incumbrances section of the register, that the burdened parcels "*are subject to a restrictive agreement in relation to the [Rights].*"
- (h). clause 5 (under the heading "*Avoidance of Doubt*") provides:



*“For the avoidance of doubt it is expressly agreed between the parties that all such Rights shall not affect the ability of Cayman Hotel or its successors in title or assigns to deal with parcels 27, 23 and 24 whether by sale, lease, charge or otherwise and that Cayman Hotel shall not be obliged to consult with or obtain the consent of The Proprietors or Ellesmere or their successors in title prior to any dealing with such parcels of land.”*

- (i). clause 6 (under the heading “*Waiver of Right to Caution*”) provides:

*“In consideration of the grant of the Rights ...the proprietors and Ellesmere covenant on their behalf and that of their successors in title and assigns to waive*

*and hereby waives any and all rights which they now have or may at any time hereafter have to register cautions against [Cayman Hotel’s titles]”.*

### **The RLA and the registration of the Instruments**

30. The first land registration legislation in the Cayman Islands was enacted in 1971, and came into force in 1972. This was the Registered Land Law, 1971. It was not based on the English Land Registration Acts, but rather on the Kenya Registered Land Act of 1963. This legislation has been amended on many occasions subsequently. During the period relevant to these proceedings the applicable provisions remained unaltered and the parties have referred to the RLA as it was in the 2004 revision (this predates the significant amendment recently made to section 93 - section 93(3) of the RLA (2018 Revision) – which now expressly provides for positive covenants to be registered which may bind a successor in title). The RLA is supported by rules, the Registered Land Rules (**RLR**), of which there have been a number of revisions since they were first introduced in 1972. However, the relevant parts of the different revisions of the RLR are either identical or similar. I refer to the 1996 version of the RLR, unless otherwise mentioned. In addition, there is the Land Registry Procedural Manual (the **Manual**), published by the Registrar (the 2010 version of which was put in evidence). The Manual describes the current practice of the Land Registry and covers procedural matters only (see paragraph 2.2.1 of the Manual for more detail on the background to the introduction in 1971 of the package of laws - the Land Adjudication Law, the Land Surveyors’ Law and the Registered Land Law - which established the legal framework for the comprehensive survey, adjudication and registration of title to lands in the Cayman Islands).



31. The RLA makes provision for the creation of property rights over registered land and sets out how such rights may be created and registered. Section 37 provides as follows:

- ‘(1) No land, lease or charge registered under this [Act] shall be capable of being disposed of except in accordance with this [Act], and every attempt to dispose of such land, lease or charge otherwise than in accordance with this [Act] shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.*
- (2). Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract...’*

32. Section 2 defines “disposition” and “instrument” as follows:

*“disposition” means any act inter vivos by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer lease or charge’.*

*“instrument” includes any deed, judgment, decree, order or other document requiring or capable of registration under [the RLA].”;*

33. Section 23 of the RLA deals with the effect of registration. It states as follows:

*‘Subject to section 27 [transfer without valuable consideration], the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject:*

- (a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register, and*
- (b). [to overriding interests] ...’*

34. Section 30 of the RLA provides that every proprietor acquiring land shall be deemed to have had notice of every entry in the register relating to that land.

35. Section 3 of the RLA provides that only the RLA is to govern land registered under the RLA:

*“Except as otherwise provided in this [Act], no other law and no practice or procedure relating to land shall apply to land registered under this [Act] so far as it is inconsistent with this [Act]: Provided that, except where a contrary intention appears, nothing contained in this [Act] shall be construed as permitting any dealing which is forbidden by express provisions of any other law or as overriding any provision of any other law requiring the consent or approval of any authority to any dealing.”*

36. Section 164 makes provision for matters not covered by the RLA. It states that:

*“Any matter not provided for in this or any other law in relation to land, leases and charges registered under this Law, and interests therein, shall be decided in accordance with the principles of justice, equity and good conscience.”*

37. In accordance with the RLA, each register must be divided into three sections. These are first, the property section, containing a brief description of the land or lease, together with particulars of its appurtenances plus a reference to the Land Registry map and filed plan; secondly, the proprietorship section, containing the name and address of the proprietor and a note of any inhibition, caution or restriction affecting his right of disposition; and thirdly the incumbrances section, containing a note of every incumbrance and every right adversely affecting the land or lease. Easements, as we shall see shortly, are registered while restrictive agreements are merely noted in the incumbrances section of the register. The Manual explains (at pages 23 and 25, underlining added), after having noted that if registered with an absolute grade of title, the registered proprietor gains rights which are comprehensively guaranteed by law, the treatment of and practice with respect to easements and restrictive agreements as follows:

**“2.3.6      *Incumbrances***

*The [RLA] allows the principal classes of subsidiary property rights affecting land to be registered in the Incumbrances Section of the land register for the parcel to which they relate. The recognised classes of registered incumbrances include: leases, charges, easements, profits, and restrictive agreements.*

.....

***Easements and Profits***

*These are entered in the Incumbrances Section of the register of the burdened land and in the Property Section of the register of the benefitted land; as such, they too benefit from the legal guarantee of validity.*

***Restrictive agreements***

*(which are also known in practice as ‘restrictive covenants’, despite the fact that in the Cayman Islands there is no requirement that they be created by means of a covenant in a deed). These are also noted in the Incumbrances Section of the register for the land burdened. They differ from easements and profits as restrictive agreements are not registered but merely noted, and there is no guarantee of their validity: the note does not confer any greater force or validity on the restrictive agreement than it would have had if it had not been noted on the register.*

38. Easements are defined in section 2 of the RLA and the creation and registration of easements is governed by section 92 of the RLA:



(a). section 2 defines an easement as follows: “*“easement” means a right attached to a parcel of land which allows the proprietor of the parcel either to use the land of another in a particular manner or to restrict its use to a particular extent, but does not include a profit...*”

(b). section 92 provides as follows as to the creation of an easement by grant (underlining added):

“(1) *The proprietor of land or a lease may, by an instrument in the prescribed form, grant an easement over his land or the land comprised in his lease, to the proprietor or lessee of other land for the benefit of that other land.*

(2) *[grant/reservation in transfer/lease]*

(3) *The instrument creating the easement shall specify clearly- (a) the nature of the easement, the period for which it is granted and, any conditions, limitations or restrictions intended to affect its enjoyment; (b) the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened; and (c) the land which enjoys the benefit of the easement, and shall, if required by the Registrar, include a plan sufficient in the Registrar’s estimation to define the easement.*

(4) *The grant or reservation of the easement shall be completed by its registration as an incumbrance in the register of the land burdened and in the property section of the land which benefits, and by filing the instrument.”*

39. Restrictive agreements are governed by section 93 of the RLA. As in force in 1992-2001, section 93 RLA provided (underlining added):

‘93(1) *Where an instrument, other than a lease or charge, contains an agreement (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land, and is presented to the Registrar, the Registrar shall note the restrictive agreement in the incumbrances section of the register of the land or lease burdened by the restrictive agreement, either by entering particulars of the agreement or by referring to the instrument containing the agreement, and shall file the instrument.*

(2). *Unless it is noted in the register a restrictive agreement is not binding on the proprietor of the land or lease burdened by it or on anybody acquiring the land or lease.*



- (3). *The note of a restrictive agreement in the register does not give the restrictive agreement any greater force or validity that it would have had if it had not been registrable under this Law and had not been noted.*
- (4). *In so far as the restrictive agreement is capable of taking effect, not only the proprietors themselves but also their respective successors in title shall be entitled to the benefit and subject to the burden of it respectively, unless the instrument otherwise provides.”*

40. The RLR stipulate, in rule 4(1), that “Other forms [that is forms other than a land certificate and certificate of lease] required to be used under the [RLA] shall be in the forms prescribed in the Third Schedule” (as the Plaintiffs pointed out, rule 5 of the 1976 RLR was drafted slightly differently and stated that “Other forms required to be used under the [RLA] are prescribed in [sic] Third Schedule”). The Third Schedule includes a form relating to the grant of an easement. This is headed on the top left hand side FORM RLI5. The form provides as follows:

*REGISTERED LAND LAW (1995 Revision)*

*GRANT OF EASEMENT*

*REGISTRATION SECTION*

*BLOCK*

*PARCEL*

*I/We*

*in consideration of*

*(the receipt whereof is hereby acknowledged)*

*hereby grant to [ ]*

*of [ ]*

*the proprietor of the interest comprised in parcel number [ ] the following easements [ ]*

*Dated [ ]*

*Signed by the Grantor in the presence of [ ]*

*Signed by the Grantee in the presence of [ ]”*

41. Section 105(1) of the RLA deals with the forms to be used for “dispositions” (and has the side heading “Forms of Instruments”). It states as follows:

*“Every disposition of land. a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve,*



*and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits.”*

42. The prescribed form for the registration of easements had up until the 1970s been numbered RL12 but from 1996 it was numbered RL15. However, as was confirmed by the current Registrar, Ms Williams, in cross-examination and was common ground between the parties, there was no prescribed form to be used when applying to register (technically, to have noted on the register) a restrictive agreement.

43. In her Amended Witness Statement, Ms Williams said as follows (underlining added):

“6. *The practice at the Land Registry is in accordance with section 93 of the Registered Land Law, that is, when parties, generally through their Attorneys-at-Law present documents to the Land Registry, creating covenants or agreements, a note is made on the Land Register by its entry in the incumbrance section of the land burdened by the notation, as agreed by the parties.*

7. *Therefore, if a Restrictive Agreement appears to include a restrictive covenant or a negative covenant, the Crown servants, agents and/or employees of the Land Registry /Registrar of Lands are required to make a note of the Restrictive Agreement in the Land Register in the incumbrances section.*

8. *The duties of the Registrar of Lands as per section 93 (1) of the Registered Land Law are as follows: ‘93. (1) Where an instrument, other than a lease or charge, contains an agreement (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land, and is presented to the Registrar, the Registrar shall note the restrictive agreement in the incumbrances section of the register of the land or lease burdened by the restrictive agreement, either by entering particulars of the agreement or by referring to the instrument containing the agreement, and shall file the instrument.’*

9. *The relevant Instruments in the instant case included the following request to the then Registrar of Lands: “The Registrar of Land is hereby requested to note in the incumbrances section of the register for parcels...that such parcels are subject to a restrictive agreement in relation to Beach Club Rights, Golf Playing Rights and Tennis Court Rights respectively”.*

.....

11. *To my knowledge, it is a matter of law whether a ‘Restrictive Agreement’ includes restrictive covenants or positive covenants, which the Crown servants of the Land Registry may not be qualified to determine, as they are not attorneys.*

12. *The Crown servants, agents, and/or employees of the Land Registry/ Registrar of Lands are also not authorised to provide legal advice in relation to these applications submitted to the Land Registry or prepared by attorneys, with respect*



to registration. The relevant parties submitting the Instruments to be registered are presumed, at all material times, to have had the benefit of legal advice.

13. The Attorneys-at-Law who prepared and/or submitted the applications are understood by the Registrar of Lands based on common law presumptions, as owing to her a fiduciary duty of care in relation to the veracity of the representations made in the applications presented for registration of the covenants to the Land Register. I also understand as Registrar of Lands and as an Attorney-at-Law that such Attorneys know or ought to know that the Registrar of Lands/Department would rely upon such representations.
14. The above-outlined process in the Land Registry has been so designed and applied to accord with our customary understanding of our statutory duty and responsibility to not include verification of information or their truthfulness of contents as submitted by the relevant parties to the Land Registry, but is limited to effecting the registration by merely accurately recording the notation in the incumbrances section of the land register.
15. From all indication, the instant registration by the Land Registry was done in accordance with the information provided by the applicants and strictly conformed to the aforementioned process. The registration was duly effected and notation accurately recorded in the incumbrance section of the Register, without verification of the truthfulness of its contents, in carrying out statutory duties as understood.
16. In my opinion as Registrar, the Registrar of Lands was duty bound in the circumstances to register/note the said request.
- .....
18. The instant Restrictive Agreements in question are found in the Instruments identified in Schedule 2 (inclusive of their Recitals), known as, "Beach Club Rights, the Golf Playing Rights, and the Tennis Court Rights" (Rights).
19. At all material times when the Land Registry handled this registration, it was and still is an underpinning customary understanding by the Crown servants and Land Registry that the stipulated processes are designed with appreciation that the mere noting of a restrictive agreement in the register does not give it any greater force or validity than had it not been so registered or noted."

44. During her cross-examination, Ms Williams confirmed a number of aspects of the practice adopted by the Land Registry when dealing with documents purporting to create restrictive agreements. She accepted that the Land Registry had not prescribed a form to be used when applying for a note to be made in the incumbrance section of the Land Register of a restrictive agreement and that in practice some attorneys adapted a particular Land Registry form to make it suitable for such a filing. She confirmed that when such an adapted form is filed, it will be for the relevant official at the Land Registry dealing with the application to decide whether or not to accept the form and make the relevant entry on the register. She considered that the Registrar had



a discretionary power to accept the application and make the entry, as well as approve amendments to the Land Registry's forms. In the present case, the Registrar was to be treated as having approved the use of the (adapted) form used by the Lot Owners when making their application. What usually happened in practice was that the Land Registry's staff will look to see if there is land that is burdened, if there is land that is benefited and if certain operative words are used indicating that there is a restrictive agreement and then they will register the restrictive agreement once those requirements had been satisfied.

45. The Instruments were entered in the incumbrances section of the titles held by Cayman Hotel and remain on the title for 12D 108 and 12C 27. For example, the incumbrance section of the register for 12C 27 adopts the following format (omitting the final column referring to the signature of the registrar):

| Entry No. | Date     | Instrument No | Nature of Incumbrance | Further Particulars                                                    |
|-----------|----------|---------------|-----------------------|------------------------------------------------------------------------|
| 8         | 02/06/92 | 3063/92       | Rest. Agmnts          | The Rights as described in filed Instrument in favour of 12D 25, 38-40 |

46. It is evident from the register that the nature of incumbrance column always states '*Rest. Agmnts*' i.e. 'restrictive agreements'.
47. The Instruments were also generally registered as appurtenances on the title of the Strata Corporations and the Britannia Proprietors (although there are some gaps, for example, the benefit of the Instruments does not appear on the titles for the individual strata units). For example, in the property section of the register for 12D 80, the following narrative appears:

*"The benefits of the facilities and rights over parcel 12D 24 (Instr. #2007/97) [the tennis courts], 12D 79 (Instr #2008/97) [the golf course] & 12C 27 (Instr.# 2009/97) [the beach club]"*

48. The RLA also makes provision for rectification of the register. Section 140 provides as follows:

*"(1) Subject to the Land Adjudication Law (1997 Revision) and to subsection (2), the court may order rectification of the register by directing that any registration be*



*cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.*

- (2). *The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."*

49. In the event that rectification is granted, any person suffering damage by reason of the rectification has a right to an indemnity from the Government. This right arises under section 141 of the RLA, which is in the following terms:

*"(1) Subject to this and any law relating to the limitation of actions, any person suffering damage by reason of-*

- (a) *any rectification of the register under this Law;*  
(b). *any mistake or omission in the register which cannot be rectified under this Law, other than a mistake or omission in a first registration;*

*.....  
shall be entitled to be indemnified by the Government...*

- (2). *No indemnity shall be payable under this Law to any person who has himself caused or substantially contributed to the damage by his fraud or negligence, or who derives title (otherwise than under a registered disposition made bona fide for valuable consideration) from a person who so caused or substantially contributed to the damage."*

50. In these proceedings the Walkers Defendants and White Dove have each made a third party claim against the Registrar for such an indemnity. However, it was agreed and I made an order confirming that these third party claims be stayed until after this judgment has been delivered.

### **The marketing of homes in the Britannia Resort**

51. Mr Lund is, as I have noted, a joint proprietor of a property situated in King's Court. He, like a number of the other witnesses, gave evidence concerning the documents prepared by Ellesmere describing the resort and the benefits that were available to lot owners. In his witness statement he said as follows:

*"15. In the early days of marketing, Suresh Prasad of Ellesmere would give a presentation to prospective owners, though sometimes the presentation was given by another sales staff member of Ellesmere or Eric Bosch of Cambridge. There was also a unit available as a model show home.*



16. *The presentation to potential purchasers made much of the access to the Beach and the Golf Course. In addition to offering access to the Beach, the Beach Club offered a pool on the beach side of the development. Beach Chairs, loungers and towels were made available, and there was a restaurant (Hemingways) and bars. There were also the Tennis Courts by the main Hyatt Hotel which were available to Britannia residents.*
17. *The right to use the Golf Course and to have unrestricted access to the Beach and the facilities available there was presented as a key attraction to purchasing in the Britannia Resort. The right to play golf was expressly said to be transferable with the sale of a unit. There was never any suggestion that access to the Beach, the Golf Course at the centre of the development, or the ability to use the Tennis Courts could be terminated. Quite the contrary.*
18. *I have been shown a brochure titled "The Village of Britannia" at pages 5 to 14 which is typical of the sales material made available to support sales in the Britannia Resort in the 1990s. It notes at page 11 that the Britannia village development spans from Seven Mile Beach to the North Sound: "the Village lands stretch all the way from the Spectacular Seven Mile Beach to the Sheltered waters of the North Sound".*
19. *Another brochure headed "An Adventure in Luxury" is at pages 15 to 22. On the front there was a copy of the Hyatt Hotel, and the next photograph shows the amenities by the Beach Suites on Seven Mile Beach, the swimming pool there and the restaurant at Hemingways. To the left in this photograph is the Beach where the beach chairs were located. The page headed "Join the Village of Britannia" at page 18 notes that: "The Britannia domain is ninety acres of delight stretching from spectacular Seven Mile Beach to the reef-protected waters of the North Sound". The plan on this page shows that this was from about the mid—1990s, with just the Phase I and Phase II units on the map, though reference is made to Phase III. As can be seen, the Beach on the left of that drawing is depicted as part of "the Village", as are the Tennis Courts and then the Golf Course which, as can be seen, covered most of the area. The material goes on to say that "Britannia's high quality and standards are preserved by our protective covenants. Thus, your home is also an excellent investment as the value is well protected. "*

## **The issues**

52. The Plaintiffs submit that the following four main issues arise for decision:

- (a). do the Instruments bind the Plaintiffs:
  - (i). on the basis that they include or give rise to restrictions on the user of the Plaintiffs' land which are to be characterised as restrictive agreements within the meaning of and pursuant to section 93 of the RLA; and/or



- (ii). on the basis that that the Rights granted pursuant to the Instruments (and set out in the Written Agreements) constitute easements within the meaning of and pursuant to section 92 of the RLA?
- (b). if the answer to the first issue is that the Instruments do not include or give rise to restrictive agreements, should the Land Register be rectified pursuant to section 140 of the RLA to remove or amend the references to restrictive agreements or the Instruments? Alternatively, if the Instruments do not include or give rise to restrictive agreements but the Rights constitute easements, does the Land Register need to be rectified by deleting the entries referring to the restrictive agreements and adding entries referring to and registering the Rights as easements in order to make the easements binding on the Plaintiffs and should the Court order such rectification?
- (c). if the answer to the first issue is that the Instruments do include or give rise to restrictive agreements, what is the form and content of such restrictive agreements (this sub-issue is added by me) and assuming that the Tennis Court Rights are treated as binding on the Plaintiffs by reason of or in consequence of the restrictive agreements or because the Rights (including the Tennis Court Rights) constitute easements (and any necessary rectification of the Land Register is ordered by the Court), should the Tennis Court Rights be wholly or partially discharged or modified pursuant to section 96 of the RLA?
- (d). if the Instruments include or give rise to restrictive agreements and/or the Rights are easements binding on the Plaintiffs, have the Plaintiffs committed a breach of the restrictive agreements or an actionable nuisance to the easements? The Walkers Defendants and White Dove make allegations in this regard in relation to three matters on the golf course, namely (i) the removal of turf; (ii) interference with the flushing pump system and (iii) the removal of parts of the irrigation system (and White Dove allege an interference with their Beach Club Rights although this issue was not the subject of submissions by White Dove during the trial and so is not dealt with in this judgment).
53. The Walkers Defendants submit that this way of formulating the issues marginalises the significance of the fact that the Rights (and the Instruments) are currently registered as incumbrances on the titles of the servient parcels. They say that there are two principal issues for decision, namely first, whether the Plaintiffs can satisfy the Court that a qualifying or relevant



mistake has been made in the registration of the Rights (and Instruments) and secondly, if so, how the Court should exercise its discretion under section 140 of the RLA.

54. I have some sympathy with the point made by the Walkers Defendants. The Rights and the Instruments are registered (noted) as incumbrances and described as restrictive agreements. Proper weight needs to be given to this fact and the legal effect of such registration (noting on the Land Register). The core issues are whether the entries in the Land Register can and should be deleted or amended, whether rectification is available and if it is whether it should be granted. However, in order for the Court to have the power (jurisdiction) to rectify the Land Register, there must be a relevant mistake, and in order to decide whether the registration was made by mistake, it is necessary in this case to consider and decide on the nature of the rights and obligations created by and the proper construction of the Instruments. Furthermore, the noting on the register of restrictive agreements is not determinative of their validity and effect. Section 93(3) of the RLA stipulates, as I have noted, that noting on the register does not guarantee their validity (as the Manual says, “*the note does not confer any greater force or validity on the restrictive agreement than it would have had if it had not been noted on the register.*”). Accordingly, the juridical nature and legal effect of the Instruments outside the registration regime needs to be considered before analysing whether there are grounds for rectification of the Land Register. So that is where I intend to begin, without ignoring or reducing the significance of the fact and legal effect of the current entries on the Land Register.

### **Summary of my decision**

55. My conclusions on the various applications made in these proceedings can be summarised as follows:
- (a). the Written Agreements include a restrictive agreement (either expressly or by implication). This is an agreement not to modify the “*facilities as constitute the Rights*” or their location or to suspend the exercise of the Rights for any purpose other than the purpose of carrying out repairs and maintenance in respect of such facilities. I label this restrictive agreement, the Restrictive Agreement Term.
  - (b). I reject the submissions of the Walkers Defendants and White Dove that the Written Agreements (and the Instruments) included a restrictive agreement “*not howsoever to build*



*on or otherwise develop or carry out works on the Properties in a manner that prevents or substantially interferes with the exercise of” the relevant Right.*

- (c). the Instruments were properly registered as, or as including, restrictive agreements. The Restrictive Agreement Term is also properly registered and binding on the Plaintiffs.
- (d). the Rights constitute easements. However, the grant of the Rights as easements has not been completed by registration in accordance with the RLA. In the absence of an order for rectification of the Land Register, they are not binding on the Plaintiffs.
- (e). I consider that in the circumstances of this case the Land Register should be rectified to add and include a reference to the Rights as easements. I discuss below the contents of the amendments to be made to the Land Register. In consequence of the rectification order, the Rights become binding on the Plaintiffs.
- (f). the Tennis Court Rights should be extinguished. I am satisfied the grounds set out in subsections (a) and (c) of section 96 of the RLA are made out in this case and that in the circumstances the Plaintiffs' application for an order that the Tennis Court Rights be extinguished should be granted.
- (g). the removal of turf by the Plaintiffs constituted an actionable interference with the Walkers Defendants' (and White Dove's) Golf Course Rights as easements. The Walkers Defendants' (and White Dove's) counterclaim on this issue succeeds. The Plaintiffs are liable to the Walkers Defendants (and White Dove) for damages, the quantum of which falls to be determined in further proceedings.
- (h). the Walkers Defendants and White Dove have not proved that the flushing pump was removed by the Plaintiffs and therefore any damage caused to the lakes and golf course as a result of the pump's removal and absence is not the Plaintiffs' responsibility. The Walkers Defendants' (and White Dove's) counterclaim on this issue is dismissed.
- (i). the Walkers Defendants and White Dove have also not proved that the Plaintiffs removed items other than the controller faceplates and output control boards from the irrigation system or that the removal of those items resulted in a substantial interference with the



Golf Playing Rights. Therefore, the Walkers Defendants' (and White Dove's) counterclaim on this issue is also dismissed.

- (j). the Walkers Defendants and White Dove have failed properly to plead their counter claims for interference with their step in rights and their application for permission to re-amend their counterclaims are dismissed.

56. I would be grateful if counsel for the parties could prepare and if possible agree a draft order to give effect to the decisions set out in this judgment and for directions with respect to any consequential matters, and to file this with the Court for my review and approval within 28 days from the date on which this judgment is handed down.

**Are the Instruments (or do the Instruments include) restrictive agreements within the meaning of and pursuant to section 93 of the RLA?**

***The Plaintiffs' submissions***

57. The Plaintiffs argued that the Instruments did not include or create covenants or rights which satisfied the requirements of section 93 RLA and were not properly registered as restrictive agreements.
58. Section 93(1) refers to "*an instrument, other than a lease or charge [that] contains an agreement ... by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land*" (which I shall refer to as the "**statutory criteria**"). Such an instrument is labelled a "*restrictive agreement*." The Plaintiffs noted that the Instruments, both in the First Document and the Written Agreements, identified themselves as "*restrictive agreements*" and were registered as such against the titles for 12D 108 and 12C 27. The issue was therefore whether the Instruments were properly so registered. The Plaintiffs argued that they were not.
59. Section 93(3) made it clear that the mere use of the term restrictive agreement in a document was insufficient to create property rights binding on successors in title. It was necessary for the Instruments, properly construed, to set out agreed restrictions on building, user or enjoyment of the servient owner's land and to satisfy as a matter of substance the statutory criteria in order to achieve the result that the restrictions would bind successors in title. Section 93 reflected the



position at common law, whereby the burden of a restrictive (that is a negative but not a positive) covenant touching and concerning the covenantee's land could run with the land, and whether a covenant was negative or positive was a question of substance rather than form (the Plaintiffs cited *Megarry & Wade*, The Law of Real Property, 9th ed. (*Megarry & Wade*) at [31-032] and [31-041]).

60. In their Amended Points of Defence and Counterclaim (the *Defence*), (at [9]) the Walkers Defendants stated that “*the Rights are to be taken to include or imply covenants that are negative in nature*” (underlining added). The negative covenants included or implied were said to be covenants “*not howsoever to build on or otherwise develop or carry out works on the Properties in a manner that prevents or substantially interferes with the exercise of the Rights*” (the “*Covenant Not to Build or Develop*”). Accordingly, the Walkers Defendants argued that the statutory criteria were satisfied because the Covenant Not to Build or Develop was imposed by the Instruments, either pursuant to the Instruments' express terms or the pursuant to an implied term.
61. The Plaintiffs' submissions addressed the following issues, which I shall consider in turn:
- (a). the operation and construction of the relevant provisions of the RLA.
  - (b). the construction and effect of the express terms in the Instruments.
  - (c). the law governing the implication of terms into documents such as the Instruments and whether the Covenant Not to Build or Develop could have been and was implied into the Instruments.
62. The Plaintiffs submitted that the correct way to approach the question of whether the Rights were binding on them was to consider whether the Rights had been created and registered in accordance with the RLA. This approach was required because the RLA provided a comprehensive code for determining whether land registered in the Cayman Islands was burdened by an incumbrance (as confirmed by sections 3 and 164 of the RLA):
- (a). in *Myles and Winton v Prospect Properties Limited and Woolf* [1994-5 CILR 1] the Court of Appeal held (at 20 - 21) that the RLA “*furnishes all that may be required to determine*



[the] priority of interests” and provided a “complete regime” and in *Mums Incorporated v Cayman Capital Trust Company* [2000 CILR 131] (*Mums*) the Court of Appeal also held (at 134) that:

*“It would appear from these provisions that the [RLA] is intended to cover completely the matters pertaining to the registration of land and dealings in registered land with which it purports to deal. While concepts of English land law both before and after 1925 may provide a useful backdrop against which to view the [RLA], they should not be permitted to intrude upon its interpretation.”*

- (b). in order to create a right “in or over” registered land, it was necessary to act “in accordance with” the RLA. If one failed to do so, no right over property was created:
  - (i). the RLA made provision for the creation of property rights over registered land. It set out how such rights may be created and registered (see section 37).
  - (ii). if there was a failure to act “in accordance with” the RLA, no right over property would be created. Section 37 stipulated that there could only be a disposition of registered land, a registered lease or a registered charge if it was “in accordance with [the RLA]” and that a disposition of such land, lease or charge “otherwise than in accordance with [the RLA]” was ineffective “to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.”
  - (iii). as was held by the Court of Appeal in *Mums* (at 134):

*“These sections [ss. 2 and 37 of the RLA] were considered by Henry, J.A. in Paradise Manor Ltd. v Bank of Nova Scotia ... and he concluded (1984–85 CILR at 480):*

*“By applying the definition of ‘disposition’ to s.37, the meaning that emerges is that no right of a proprietor in or over his land, lease or charge registered under the [RLA] shall be capable of being affected [except] in accordance with the [RLA] and the system of registration established by it.”*

*I accept this dictum as accurately expressing the position.”*



- (iv). accordingly, in order to determine whether the Rights bind the Plaintiffs, the Court must consider whether they were created and registered “*in accordance with*” the RLA. Part V (Dispositions), Division 5 (Easements, Restrictive Agreements, Profits and Licences) of the RLA set out how to affect registered land with rights and obligations of the sort with which this case was concerned so that the Walkers Defendants and White Dove must establish that the Plaintiffs were bound by a right created and registered in accordance with those provisions.
- (v). the effect of registration as proprietor of a parcel of land was set out in section 23 of the RLA.
- (vi). section 30 of the RLA, as noted above, provides that every proprietor acquiring land shall be deemed to have had notice of every entry in the register relating to that land, so that when the Plaintiffs were registered as proprietors of 12D 108 and 12C 27 in 2016 and 2018, they became absolute owners of those parcels free from “*all other interests and claims whatsoever*” but subject to the “*incumbrances...shown in the register.*”

63. The Plaintiffs submitted that, as regards the express terms of the Instruments, and having regard to the Rights as drafted, there was no credible argument that the Instruments were to be treated as being or containing express agreements “*by one proprietor [Cayman Hotel] restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land*”. The Instruments purported to grant rights to the strata proprietors/individual Lot Owners to play golf, to use the beach facilities and to play tennis on Cayman Hotel’s land, subject to the payment of a fee and other conditions. There were no promises given by Cayman Hotel at all let alone an express agreement by Cayman Hotel to restrict building, restrict user or restrict the other enjoyment of its land. In the absence of such terms the Court could not construe the Instruments as *including* the Covenant Not to Build or Develop. In all of the English authorities cited by the Walkers Defendants in which superficially positive covenants were found to contain restrictive covenants binding on successors in title to the servient tenement (including *Re Ellenborough Park* [1956] Ch. 131 (*Ellenborough Park*) at 168) the court found that restrictive covenants



were to be implied (rather than existing as a matter of construction). The Walkers Defendants' (and White Dove's) case therefore stood or fell on establishing that the Covenant Not to Build or Develop was an implied term.

64. As regards the implication of such a term, the Plaintiffs argued that:

- (a). it was wrong in principle to treat the Covenant Not to Build or Develop as an implied term in this case. First, the Court should not, or at least should be very slow to, imply terms where there was no clear foundation for doing so in the Instruments. Section 23 of the RLA, as noted above, provides that the registration as proprietor vests absolute ownership "*free from all other interests and claims whatsoever*" subject only to matters on the register and overriding interests. The object of that section would be undermined and defeated if restrictive agreements were implied so that the registered proprietor became (unexpectedly) subject to obligations not disclosed on the register (or giving rise to an overriding interest). Secondly, it was and could not be the case that every positive right or covenant was to be treated as implying a restrictive agreement (or covenant). To adopt such an approach would nullify the common law rule that the burden of positive covenants did not bind successors in title.
- (b). in any event, the test for implying the Covenant Not to Build or Develop as a term into the Instruments was not satisfied in the present case.
- (c). the law governing the implication of terms was set out by the UK Supreme Court in *Marks & Spencer plc v. BNP Paribas Secs. Servs. Trust Co. (Jersey) Ltd* [2016] AC 742 (**M&S**) at [15] - [32]. The Supreme Court's analysis had been applied in this jurisdiction in *Primeo Fund (In Official Liquidation) v Bank of Bermuda (Cayman) Limited* [2017 (2) CILR 334] (**Primeo**) per Jones J at [211]:

*"The applicable principles relating to the implication of contractual terms were recently restated by the UK Supreme Court in [M&S] ... For a term to be implied, it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be so obvious that "it goes without saying"; it must be capable of clear expression; and it must not contradict any express term of the contract."*



- (d). the importance of the necessity requirement was recently emphasised by the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] ICR 531 at [7]:

*“A term is to be implied only if it is necessary to make the contract work and this it may be if (i) it is so obvious that it goes without saying ...and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition.”*

- (e). these principles applied as much to instruments purporting to create property rights as any other contract. The contracts in issue in *M&S* were leases and the argument in *Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and others* [2019] AC 553 (***Regency Villas***) that an obligation to contribute to maintenance on the part of the timeshare owners should be recognised as forming part of the easement granted, was dismissed as the alleged implied terms did not meet the necessity test (see [30]).
- (f). there were three reasons why the Covenant Not to Build or Develop should not be implied in the present case.
- (g). first, the Covenant Not to Build or Develop was inconsistent (at least without substantial modification) with clauses 3 and 5 of the Written Agreements. Clause 3 expressly permits Cayman Hotel and its successors in title “*to modify the facilities or the location thereof as constitute such Rights or to suspend such Rights for the purpose of carrying out repairs or maintenance in respect thereto.*” Cayman Hotel was thereby expressly empowered for example to move the tennis courts, and to build, develop and carry out works on the original site. Further, clause 5 expressly recognised the ability of Cayman Hotel and its successors in title to deal with (what is now) 12D 108 and 12C 27 notwithstanding the Rights.
- (h). secondly, there was no need to imply the Covenant Not to Build or Develop in order to give the Instruments (and in particular the Written Agreements) business efficacy. The Instruments would not lack practical or commercial coherence without the implied term. The plain intention behind the Instruments was that Lot Owners were granted the right to use Cayman Hotel’s beach facilities (for a fee), to play golf on the Britannia golf course (paying the cart fees) and to use hotel’s tennis courts (for a fee). Such rights could sensibly be granted without the grantor (Cayman Hotel) undertaking to keep the facilities open and



available and to avoid any and all building, development and/or works on the land that might interfere with the use of those facilities. If the facilities became unavailable, the Lot Owners would simply no longer pay to use them.

- (i). thirdly, the inclusion of the Covenant Not to Build or Develop was not so obvious as to go without saying. If an officious bystander had asked the parties whether a Covenant Not to Build or Develop formed part of their agreement (see *M&S* at [16]), it was far from clear that they would have said “*of course*”, particularly in light of factors indicating that the parties did not intend the Rights to continue if no hotel operated on the hotel land. None of the authorities relied on by the Walkers Defendants came close to what they and White Dove invited the court to do in this case, namely to spell out of a purported grant of rights, negative covenants not to build, use or otherwise enjoy the purported servient tenement in a way that would interfere with the reasonable exercise of the Rights. It was important to note that there had been no attempt in *Regency Villas* to argue that the easements at issue could take effect as restrictive covenants. Furthermore:

- (i). in *Abbey v Gutteres* (1911) SJ 364 (***Abbey***) the promise in issue was to the effect that the lower sashes of certain windows would be glazed with opaque glass and permanently closed. An injunction was granted restraining the defendant from opening the windows.
- (ii). in *Ellenborough Park* there was an express covenant by the vendors “*to keep [the park] as an ornamental pleasure ground*” and not at any time thereafter to “*erect or permit to be erected any dwelling-house or other building... [so] that the same shall at all times remain as an ornamental garden or pleasure ground.*” Against this background, the implication of a negative covenant preventing any use by the vendors of the park other than a garden was unsurprising and of no assistance in this case, as the Instruments contain no similar covenant (or indeed any covenant) by Cayman Hotel.
- (iii). in *Cryer v Scott Bros (Sunbury)* (1986 55 P&CR 183) (CA) (***Cryer***) there was a covenant requiring the covenantors to submit plans to the covenantees’ surveyor before building work was commenced. It was, however, common ground (at 191) “*that a negative stipulation ...must be imported ...by necessary implication*”



preventing any building work until plans had been submitted and approved. *Cryer* was far removed from the positive grant of rights with which the Instruments are concerned.

- (j). if any covenants were to be implied they would be positive in substance and therefore could not (in 1992-2001) bind Cayman Hotel's successors in title. The essence of the Instruments from Cayman Hotel's perspective was a promise by Cayman Hotel to allow Lot Owners to have access to and use certain hotel facilities, notwithstanding the fact that they were not guests of the hotel. The (implicit) promise was one to endow the Lot Owners with the privileges of hotel guests, on payment of the required fees and on certain terms. This was reflected in the recitals to the Written Agreements, which expressly recognised that the Britannia Resort was an integrated hotel and residential development: "*The Britannia Resort is a planned community offering both hotel and condominium facilities with amenities for transient guests and condominium owners*" (recital 3). A promise to treat Lot Owners like hotel guests (albeit with priorities established in relation to reservations) was, substantively, a positive covenant. It was not a promise by Cayman Hotel not to do something on its own land and effect could not be given to the Rights by means of the "*land itself*" (the Plaintiffs referred to *Preston & Newsom, Restrictive Covenants Affecting Freehold Land* (11th ed. 2020) (*Preston & Newsom*) at [3-008]).
- (k). furthermore, the following confirmed the substantively positive nature of the covenants entered into by Cayman Hotel. First, in relation to the Golf Playing Rights, Cayman Hotel was required to stipulate rules as to tee times and the availability of the course for play (Golf Playing Rights were defined as meaning that Cayman Hotel agreed to permit Lot Owners "*to play golf on the Britannia golf course ...subject to such rules as Cayman Hotel shall stipulate from time to time as to priorities in booking tee times, availability of the course for play or otherwise in their absolute discretion...*"). Secondly, the Golf Playing Rights were only exercisable on a "*pre-reservation basis*", which meant that Cayman Hotel had to set up and run a reservation system (a similar point arose in relation to the Tennis Court Rights, the definition of which set out the order of priorities for court reservations, necessitating a court reservation system to be set up and run by Cayman Hotel). Thirdly, Cayman Hotel was prevented from charging Lot Owners any fees in relation to the Golf Playing Rights apart from cart fees, therefore requiring it to forgo the (substantial) fees ordinarily charged to the general public by way of membership and/or green fees. The foregoing of income rendered the agreement to grant such rights substantively positive in nature.



### ***The Walkers Defendants' submissions***

65. The Walkers Defendants (and White Dove) argued that the Rights were properly registered as restrictive agreements pursuant to section 93(1) of the RLA. As such, they were effective without further order and the Plaintiffs' claim for rectification, cancellation or deletion of the Rights, by way of deleting the reference to restrictive agreements from the incumbrances section of the register, ought to be dismissed.
66. The Walkers Defendants (and White Dove) asserted that each Right was made up of two distinct legal aspects. First, negative covenants that were part of the express terms of or implied from the Instruments, which were properly registered as restrictive agreements within the meaning of section 93(1) of the RLA and secondly easements, being the corollary of the negative covenants (that satisfied and fell within the definition of an easement in sections 2 and 92 of the RLA).
67. In the Walkers Defendants' Defence they denied that the Rights gave rise to covenants that were (only) positive in nature. Rather, on their true construction, the Rights were to be taken to "include or imply" covenants that were negative in nature. At [9] and [10] of the Defence, the Walkers Defendants' case was put as follows (underlining added):

"9. As to paragraph 7, it is denied that the Rights give rise to covenants that are positive in nature. On their true construction, the Rights are to be taken to include or imply covenants that are negative in nature. Without prejudice to the generality of the foregoing:

- a. The Golf Playing Rights give rise to a covenant not howsoever to build on or otherwise develop or carry out works on the Properties in a manner that prevents or substantially interferes with the exercise of the said Golf Playing Rights
- b. The Tennis Court Rights give rise to a covenant not howsoever to build on or otherwise develop or carry out works on the Properties in a manner that prevents or substantially interferes with the exercise of the said Tennis Playing Rights;
- c. The Beach Club Rights give rise to a covenant not howsoever to build on or otherwise develop or carry out works on the Properties in a manner that prevents or substantially interferes with the exercise of the said Beach Club Rights.



10. The said covenants and each of them are restrictive covenants within the meaning of section 93(2) of the Law, enforceable against the Plaintiffs as successors in title of the original covenantors by the Walkers Defendants as owners and occupiers of

*their respective Registered Titles set out in Schedule 2 hereto pursuant to section 93(2) aforesaid, and properly registered as restrictive agreements.”*

68. The Walkers Defendants submitted that the effect of the Rights was to restrict “*the building on or the user or other enjoyment of [the Plaintiffs’] land*” within the meaning of section 93(2) of the RLA. The Rights *necessarily* restricted the building on, the use of, or the other enjoyment of the Properties by the Plaintiffs. The ability of the Lot Owners to enter upon the land of Cayman Hotel (and its successors) in itself constituted a restriction on the user or enjoyment of that land. As a result, the Rights must be treated as giving rise (either or by way of the proper construction of the Rights or by way of an implied term) to an obligation, negative in substance, not to build on the servient land or otherwise use it in such a way as to prevent or substantially interfere with the reasonable exercise of the relevant Rights. So construed (or with the necessary implication), the Rights and each of them were restrictive agreements within the meaning of section 93(2) of the RLA. They were therefore enforceable against the Plaintiffs as successors in title of the original covenantors by the owners and properly registered as restrictive agreements.
69. The Walkers Defendants submitted that:
- (a). a negative, or restrictive, covenant was one which is “*a burden not on the owner’s pocket but on his land: he can comply with it by complete inaction*” (citing *Preston & Newsom*, at [3-10]).
  - (b). in determining whether a covenant was to be viewed as negative or positive “*the question is whether the covenant is negative in substance: it is immaterial whether the wording is positive or negative*” (citing *Megarry & Wade*, at [31-041]).
  - (c). *Tulk v Moxhay* (1848) 2 Ph. 774, 41 ER 1143 remained the leading authority on this point. There the covenant in question was expressed largely in positive terms, namely to “*keep and maintain the said piece of ground and square garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order*”. Nonetheless, the covenant was “*negative in nature, for it merely bound the covenantor from building*” (citing *Megarry & Wade* at [31-041]). Similarly, in *London &*



*Southwestern Railway v Gomm* (1882) 20 Ch. D 562 (CA), Jessell MR explained (at 583) that the covenant in *Tulk v Moxhay* “was affirmative in its terms, but was held by the court to imply a negative”. Preston & Newsom (at [6-020]) cited as an example that “a covenant to build houses only (which is positive in form) is taken as including a covenant not to build any buildings other than houses (which is negative)” and noted that where the negative aspect of the covenant was not immediately apparent from the grant in question “difficult questions can arise where the claimed restriction is not immediately apparent from the instrument. The negativity can however be found as a matter of construction or implication”.

- (d). *Ellenborough Park* was of particular relevance to the present case. There the English Court of Appeal had concluded that the terms of a grant could result in the implication of a negative covenant. The relevant grant provided that (see the judgment at 165-166) (underlining added):

*“each of the vendors for himself and his successors in title covenanted with the purchaser and his successors in title and all other persons to whom the right of enjoyment of the pleasure ground ... may be granted at all times hereafter (to) keep as an ornamental pleasure ground the plot of ground hereinbefore referred to and situate in front of and partly encircled by the said Ellenborough Crescent,” and also that they would not at any time thereafter “erect or permit to be erected any dwelling-house and other building (except any grotto bower summer-house flower-stand fountain music-stand or other ornamental erection) within or on any part of the said pleasure ground ... but that the same shall at all times remain as an ornamental garden or pleasure ground.”*

Sir Raymond Evershed MR held (at 168) that:

*“As a complement to the rights of enjoyment of the garden, subject to the condition of contribution, was the covenant by the vendors against building on the park and to the effect that the park should at all times remain as an ornamental garden. Mr. Cross did not seriously challenge Mr. Goff’s contention that, in their context, the words of the covenant to which we have last referred could fairly be construed as implying a negative covenant on the vendors’ part against any user by them of the park otherwise than as a garden. There is clear authority that, if such be the substantial effect of the covenant, its benefit and burden will run with the land. The last consideration appreciably reinforces the view which we take of the meaning and intention of the deed, to attach the garden rights in all respects like the rights of way and drainage to the land conveyed.”*



- (e). there were other examples of cases in which a negative covenant had been implied, importantly for the present case where an apparently positive covenant was restrictive of enjoyment of the relevant land. In *Abbey* a covenant to glaze the lower windows of a block of flats with opaque glass was held to be impliedly negative in nature. As Warrington J explained (underlining added), *“it is said the covenant is not restrictive because not negative. Now, a restrictive covenant is one that restricts the enjoyment of land. When a person in possession of land binds himself to maintain a building, or part thereof in a certain condition he enters into an obligation restrictive of his full enjoyment of the land. It is not necessary that there should be an express negative covenant; a negative may be implied. I think, therefore that this covenant is restrictive.”* In the present case, the ability of the Lot Owners to enter upon the land of Cayman Hotel (or its successors) in itself constituted a restriction on the user or enjoyment of that land.
- (f). in addition, a negative covenant would be implied where a positive covenant required approval of a particular action and so brought with it an implied prohibition against acting without such approval. In *Cryer* at 191-92, a covenant that *“all building or other plans are to be submitted to the surveyor of the Transferors for their approval before building work is commenced”* was taken to imply a covenant that no building works should be carried out until plans had been so approved.
- (g). in construing the Instruments, the Court was entitled to have evidence of all material facts at the time of the execution of the Instrument, so as to place the Court in the situation of the parties (see Upjohn LJ in *Johnstone v Holdway* [1963] 1 QB 601 at 612). As stated by Danckwerts LJ in *The Shannon Ltd v Venner Ltd* [1965] Ch 682 at 692, the Court is *“entitled to have the benefit of the evidence of the surrounding circumstances. A document intended to have legal effect is not executed in a vacuum. It is drafted and executed to deal with the situation in which the parties find themselves. Of course, if the words used in the deed are perfectly clear, they must be given their meaning, and extrinsic evidence is not admissible, because that would be contradicting the terms of the deed. ... Of course the deed must be looked at, and then, if the meaning is not plain, the court is entitled to consider the surrounding circumstances so as to see whether light as to the construction is to be gained from these.”*



- (h). since the Rights derived from an express grant, a benevolent approach to construction was to be taken. Furthermore, the Court will apply the validation principle where permissible to give effect to the parties' intention. As Danckwerts J said in *Ellenborough Park* (at page 150): "*I must confess that I have a leaning towards the intentions of the parties to transactions being carried out, if that is legally possible, and a dislike of seeing them defeated by the technicalities of suggested rules of law.*" This approach was followed by Lord Briggs in *Regency Villas* when he said (at [25]) that (underlining added by me):

*"it is abundantly plain that, whether successfully or not, the parties intended to confer upon the facilities grant the status of a property right in the nature of an easement, rather than a purely personal right. It was expressed to be conferred not merely upon the transferee, but upon its successors in title, lessees and occupiers of what was to become a timeshare development in multiple occupation. That being the manifest common intention, the court should apply the validation principle ("ut res magis valeat quam pereat") to give effect to it, if it properly can"*

- (i). in this case the common intention of the parties to the Written Agreements was clear beyond all argument. The Walkers Defendants relied (see [49] of the Walkers Defendants' trial skeleton and [6c] of the Defence) in particular on the statements made in recitals 5 and 6 of the Written Agreements.
- (j). the modern contract cases dealing with the law governing implied terms referred to by the Plaintiffs were not intended to over-rule this long-established body of case law relating to proprietary covenants. In any event, the implied negative covenants held to exist in these cases and the Covenant Not to Build or Develop passed the test established by the recent decisions on implied terms. They were implied to make the grant work, as a matter of necessity to give business efficacy to the grant, and because they were so obvious that they went without saying. Accordingly, the grant in *Re Ellenborough Park* of "*the full enjoyment . . . at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land . . . in the centre of the square called Ellenborough Park*" would not have worked if the owner for the time being of that plot of land were free thereafter to build on it or otherwise to "*use it otherwise than as a garden*".
- (k). the Walkers Defendants rejected that Plaintiffs' argument that the essence of the Instruments was nothing more than a "*promise to treat Lots Owners as hotel guests*" or that the validity of the Rights was dependent upon the operation of the Hyatt Hotel. The



closure of the Hyatt Hotel proved to be no bar to the Lot Owners continuing to exercise their Beach Club Rights and the Golf Playing Rights and they, in fact, continued to enjoy those facilities for many years after Hurricane Ivan in 2004 until the Plaintiffs unilaterally prevented them from doing so in 2016. The Plaintiffs had made much of the fact that the former Hyatt Hotel, which they had yet to reinstate, was no longer operational but a distinction had to be drawn between the Rights which were registered on the one hand, and the amenities and privileges offered by the Hyatt Hotel while it was in operation such as the laundry service, discounts and room service on the other. The latter were privileges/amenities which required the continued operation of the Hyatt Hotel. There was no attempt to register those privileges. The Rights, on the other hand, were rightly treated quite differently. The Written Agreements recorded (in recital 5) that they were registered to protect the interests of present and future Lot Owners.

70. It was unnecessary for an instrument containing a restrictive agreement to be created, or presented, in any particular form. A restrictive agreement could be contained in any “*instrument*”, which was widely (and non-exhaustively) defined in section 2 of the RLA as “*includ[ing] any deed, judgment, decree, order or other document requiring or capable of registration under [the RLA]*”. Any such document containing a restrictive agreement within the meaning of section 93 could be presented to the Registrar in which case he/she “*shall note [it] in the incumbrances section of the register of the [servient parcel]*” by one of the methods set out in section 93(1) of the RLA. Such noting was crucial if the restrictive agreement was to be binding on the grantor or their successors in title (see section 93(2) of the RLA). In practice, Form RL15 (formerly RL12) had been adapted as a means of presenting an agreement containing the grant of a restrictive agreement to the Registrar for such noting, incorporating in the top right hand corner a box enabling the Registrar easily to record its allocated instrument number, and at its foot, under the caption “FOR OFFICIAL USE ONLY”, a pro-forma provision enabling the Registrar to record its receipt, the assessment/adjudication and payment of stamp duty and of Land Registry fees, and the fact of registration.
71. The Walkers Defendants rejected the Plaintiffs’ argument that there were a number of features of the Rights which demonstrated that viewed overall they were too precarious to constitute binding property rights which bind/run with land, and should instead be construed as mere contractual licences.



### ***The Registrar's position***

72. In in her Points of Defence, the Registrar, after referring to the terms of the Written Agreements and their recitals (including recital 6), set out her position as follows:

- (a). that the Plaintiffs' land was “ *subject to restrictive agreements registered on the [Plaintiffs'] title... The First Defendant says that the restrictive agreements, appears [sic] to directly control the use of land of the covenantor and benefits [sic] the land of the covenantee and it appears that the intention of the parties creating them intended same to run with the land*” (at [3]).
- (b). that “*the grant of the said Rights appears to include both covenants which are negative in nature and easements*” (at [9]).

### ***Analysis and decision - Is the Covenant Not to Build or Develop a term of the Instruments?***

#### ***The issue***

73. The Walkers Defendants (supported by White Dove) asserted in the Defence that the Rights were to be taken to “*include or imply*” the Covenant Not to Build or Develop (that is a negative covenant “*not howsoever to build on or otherwise develop or carry out works on the Properties in a manner that prevents or substantially interferes with the exercise of*” the relevant Right). The Walkers Defendants claimed that the Covenant Not to Build or Develop was a term of the Instruments either because as a matter of construction of the Rights (or, I think, the Instruments), the Covenant Not to Build or Develop should be understood as part of what the parties agreed or alternatively because it was an implied term.
74. Accordingly, there were two lines of argument. The first was based on what the Walkers Defendants said was the meaning to be given to the language of the Instruments (including or as interpreted having regard to the recitals in the Written Agreements). The second, put forward in the alternative, was based on the incorporation of an implied term.
75. In support of the first argument, the Walkers Defendants mainly relied on the proposition that the Rights were to be characterised, in substance, as restrictions on the user or enjoyment of the



Plaintiffs' land, and that these restrictions were negative in nature. Cayman Hotel and its successors had to permit the Lot Owners to enter on their land for the purpose of exercising the Rights. These restrictions were inherent in or perhaps a corollary of the Rights, which on their face were only positive in nature. The restrictions were to be understood as preventing Cayman Hotel and its successors building on or otherwise developing or carrying out works on the Properties in a manner that prevented or substantially interfered with the exercise of the Rights. On this basis, the Instruments contained and were properly treated by the Registrar as restrictive agreements. The Walkers Defendants also relied heavily on recital 6 in the Written Agreements in support of the argument that the parties understood and agreed that the Written Agreements included, and that the Written Agreements should be interpreted by a process of construction as including, covenants binding on Cayman Hotel and the Properties.

76. In support of the second line of argument, the Walkers Defendants submitted that the Covenant Not to Build or Develop was to be implied into the Instruments in order to give business efficacy to the grant (to make it work) and because it was so obvious that it went without saying (that is, to quote from the judgment of MacKinnon LJ in *Shirlaw v Southern Foundries* [1939] 2 KB 206 “*if, while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement they would testily suppress him with a common “Of course.”*”).
77. The Plaintiffs on the other had argued that the Covenant Not to Build or Develop could only take effect if it was an implied term but that it did not satisfy the requirements for implication of a term as set out in the relevant, particularly the modern English, case law.

*The proper approach to the construction of, and the implication of terms in instruments containing, covenants*

78. The Walkers Defendants, as I have noted, relied on [6-020] in *Preston & Newsom* where it is said that “*difficult questions can arise where the claimed restriction is not immediately apparent from the instrument. The negativity can however be found as a matter of construction or implication*”. It is worth quoting the relevant paragraph in full together with the opening lines of the next paragraph (underlining and emphasis added):

*“6.20 Equity looks to the substance of a covenant rather than to its form. A covenant that is negative in form may yet be positive.... Yet, negative substance can often be*



*found in covenants that are positive in form and the negative part enforced. For example, a covenant to build houses **only** (which is positive in form) is taken as including a covenant not to build any buildings other than houses (which is negative). Similarly, a covenant to obtain approval of plans before carrying out works may be taken as a covenant not to start works without prior approval of plans for them. In the absence of straightforward translations of this sort difficult questions can arise where the claimed restriction is not immediately apparent from the instrument. The negativity can however be found as a matter of construction or implication.*

*A covenant decision which appears to have been wholly on construction was Wright [v Berry] where Byrne J and the Court of Appeal refused to grant an injunction to prevent occupation of certain houses except as private residences. The restriction was that: “No building of any kind other than a detached or semi-detached house with appropriate offices ... shall be erected on any plot.” While the scheme distinguished between “residential plots” and “shop plots” it did not distinguish between “residential plots” and “private residential plots”. Romer LJ said that there was nothing to show that the houses on the residential plots were to be for all time used only as private residences...*

6.21 *Where the covenant is on its face positive in form and substance, it can nevertheless be said that, taking the instrument as a whole, there is a restriction, either included or implied. But such an implication is less likely to exist where the deed itself treats positive and negative covenants differently....”*

79. In an earlier chapter (chapter 3), Preston & Newsom made a similar point as follows (underlining and emphasis added):

“3-011 *Occasionally a negative covenant can be implied as a **corollary** of an express positive covenant. Thus covenants to erect a building of a particular kind have in some cases been held to imply a covenant to keep the building so erected as a building of that particular kind. Covenants to produce title deeds may be of this sort. The learned editors of Williams on Vendor and Purchaser said: “It is now considered that the burden thereof does not run at law with the lands retained by the covenantor. It is thought, however, that in equity the covenantor’s successor in title to the deeds (other than purchasers for value without notice of the covenant) would be affected by the duty of production; for this seems to resemble a restriction upon the free use of the deeds rather than an obligation positively affirmative, such as a liability to lay out money.....”*

3-012 *Restrictive covenants can also be divided into those which impose an absolute prohibition on some particular use of the land, and those which permit another use if, but only if, some condition is complied with.”*

80. At the end of [6-020], Preston & Newsom refer to the judgment of Stirling J in *Holford v Acton Urban DC* [1898] 2 Ch. 240 (**Holford**). In this case, the Acton Local Board, who were the predecessors in title of the defendants, put up certain property for sale in several lots. Buyers of each lot were required to covenant (in the 9th condition of sale) that they would “erect within two



years from the day of sale ..... a shop and dwelling-house of not less value at prime cost than [a specified amount].” Only one lot was sold to the plaintiff. The defendants, who had become successors to the Acton Local Board, after failing to sell the remaining lots obtained planning permission for the erection of a building to be used as a fire station (for a prime cost above the minimum amount specified in the 9th condition). The plaintiff alleged that the defendants were thereby infringing the building scheme, on the faith of which he bought his property and sought an injunction to restrain the defendants from erecting the building. Stirling J dismissed the application. He concluded that, having regard to the absence of any express provision as to the maintenance of the buildings which the lot owners were required to construct pursuant to the 9th condition as shops and dwelling-houses, no negative stipulation ought to be implied that nothing but shops and dwelling-houses should be erected on the lots in question. In considering the approach to be adopted in deciding whether to imply the negative covenant that the plaintiff relied on, he said as follows (at pages 246-247) (underlining added):

*“The next question is what restriction arises out of this 9th condition? Now it was pointed out, and it is an important observation, that no express stipulation or condition is to be found with respect to the user of the buildings when once erected. It is not, however, I apprehend, necessary, in order to impose on the defendants an obligation of this kind, that there should be an express stipulation that the user of the property should be confined in a particular way, or that a particular use should not be made of the property. The general rule on the subject is very briefly and tersely stated by Bowen L.J. in one sentence in the case of Oriental Steamship Co. v. Tylor, namely, that, “where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual.” Many illustrations may be given of the application of that rule. I may refer to two. One is the case of Leader v. Moody, before Sir George Jessel, where it was held that where a lease had been granted of a box in the opera-house the lessor was not at liberty afterwards to make structural alterations in the opera-house with the view of adapting it for use for religious services. Another, and more recent case, is Hudson v. Cripps, before North J., where a building had been erected and was being let out in flats to private tenants, and it was held that where one flat had been let the owner of the rest of the property was not at liberty to convert it into a club, and make structural alterations for that purpose. It appears to me plain that it may be discovered from an examination of all the facts and circumstances that the meaning of the parties was that a particular thing should not be done; but the Court must be very careful not to imply restrictions unless it is satisfied that these were fairly within the contemplation of the contract, judging from the terms in which it is expressed.”*

81. He went on (at pages 248- 249) to consider whether to imply a negative covenant in the case before him and said this:



*“Now, ought I to imply from the conditions of sale that there is any stipulation that nothing but separate buildings shall be erected, or that nothing but shops and dwelling-houses shall be erected upon the land? It is to be observed that there is no covenant - no express stipulation that the buildings to be erected shall be maintained for ever as shops and dwelling-houses. There is nothing, as it seems to me, to prevent a person who bought all the lots from erecting in the first instance buildings which were shops and dwelling-houses, and afterwards throwing them into one by alterations of the party walls between them, or from using the single building so formed otherwise than as a shop or dwelling-house. Such a restriction ought not to be implied except when the contract as expressed in writing would, in the language of the Lord Justice, be futile, or would not carry out the intention of the parties. It does not seem to me that such a restriction could fairly be said to have been within the contemplation of the parties, or that the condition as it stands is futile, and does not carry out the intention of the parties. That being so as regards the shops and dwelling-houses when once erected, I do not think I ought to infer a negative stipulation that nothing but shops and dwelling-houses should be erected. No doubt this is a departure from the conditions of sale; but I cannot see that is such a departure as would render the whole transaction futile, as it would be rendered futile, for example, by the erection of a shop or a manufactory upon property which had been sold for residential purposes. In my judgment it would be going too far to imply any such restrictive condition....”*

82. As can be seen from the first extract from Stirling J’s judgment, he referred to the judgment of the Master of the Rolls in *Leader v Moody* (1875) L.R. 20 Eq. 145. There Sir George Jessel was prepared to imply a negative covenant (in a sub-lease in which the sub-lessor had given a covenant for quiet enjoyment) prohibiting the lessor from taking action which prevented the sub-lessee from having the benefit of the rights granted to him by the sub-lease. The facts in the case were as follows. The lease of a theatre contained a covenant on the part of the lessee “*not to convert the theatre, or any part thereof, to any use other than for acting or performing of operas, plays, concerts, balls, masquerades, assemblies, and such theatrical and other purposes as had been usually given therein.*” The lessee, for valuable consideration, sub-demised certain boxes and pit stalls, together with free and uninterrupted access to and use of the boxes and stalls during all nights when the theatre should be open for public performances or exhibitions of any opera or any entertainment, reserving a right of access to the boxes and stalls for the purposes of repair. The underlease contained a covenant for quiet enjoyment of the demised premises but no covenant on the part of the grantor of the underlease to observe or perform the covenants of the original lease. Subsequently, the lessee agreed to let the theatre for three months for the purpose of holding religious meetings. In order that the theatre might be converted into a convenient place for holding such meetings, the divisions between the boxes were removed, and the pit (including the site of the plaintiff’s stalls) was boarded over (for the three-month period). Sir George Jessel MR said as follows (at page 152) (underlining added):



“It surely never could be contended that the man who had taken money for boxes and stalls in a theatre, could the day after destroy the theatre, and turn it, for example, into a stable, if he got a license from his superior landlord. It seems to me that would be altogether extravagant. When the lessor covenants for quiet enjoyment of the thing demised as against his own acts, he must mean that he will keep it as a theatre, ready to be used at all times for theatrical purposes, and so as to enable the person who has taken the sub-demise from him to have the benefit of that sub-demise by using the boxes and stalls during theatrical performances. Therefore, I am of opinion that any permanent alteration of the theatre so as to convert it to purposes which are not theatrical, and do not allow of its being used as a theatre, is a breach of a covenant on the part of the lessor which I find clearly implied throughout the indenture of demise.”

*The Walkers Defendants’ argument based on construction of the Instruments*

83. I take the Walkers Defendants first line of argument to involve the proposition that the provisions in the Written Agreements which grant the Rights to the Lot Owners must be interpreted *to mean* that Cayman Hotel and its successors were (and had agreed to be) subject to the Covenant Not to Build or Develop, applying the proper principles for interpreting a written contract. The argument is that the Covenant Not to Build or Develop was expressly agreed even though the language used in the Written Agreements did not spell this out.
84. I note that the relationship between the interpretation of the words which the parties have used in their agreement and the implication of terms into the contract has been a controversial issue and the subject of differing judicial views at the highest level (see generally the discussion in *Lewison, The Interpretation of Contracts* 7th ed., 2021 (**Lewison**) at [6.28] - [6.44]). However, while there are some dicta to the effect that courts should avoid too rigid or sequential an approach to the processes of consideration of the express terms and consideration of the possibility of an implication, the authorities indicate that the correct, or at least the currently preferred, approach is that the question of implying terms follows the process of interpreting the contract (see *Lewison* at [6.44] citing the UK Supreme Court’s judgment in *Duval v 11-13 Randolph Crescent* [2020] 2 WLR 1167). As Sir Kim Lewison summarises the position (at page 340, underlining added) “*Although (i) interpreting the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract, interpreting the words used and implying additional words are different processes governed by different rules.*”



85. So it is necessary to start with the issue of interpretation of the words and language used in the Instruments in general and the Written Agreements in particular.
86. The basic principles of contract interpretation are now well established and do not need to be rehearsed in detail. The relevant recent authorities, including *M&S* and *Wood v Capita Insurance Services Ltd* [2017] AC 1173, tell us that:
- (a). the job of the court in working out what a document means is not to work out what either party itself thought it meant, but what a reasonable person would have understood the contracting parties to have meant by the language used.
  - (b). that reasonable person is taken to be someone who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. This exercise involves looking at the words used in the context of the contract overall, and bearing in mind any factual background. The exercise also involves looking at the result which rival interpretations yield, in terms of whether they make business sense.
  - (c). the essential question of construction (as Preston & Newsom note at [6-009]) is the meaning that the instrument would convey to a reasonable person having all the background knowledge that would have been reasonably available to both parties in the situation in which they were at the time of the contract. This includes knowledge to be gained from the whole instrument and also such other background knowledge as the reasonable person would consider relevant, and it is good practice for a party to plead the extrinsic matters on which it relies.
87. The Instruments are puzzling documents:
- (a). the Written Agreements appear, as a matter of first impression, to grant rights over Cayman Hotel's land for the benefit of the owners of the adjacent properties and units, which rights appear to be connected with the normal enjoyment of their properties and units. In other words, the Written Agreements appear to involve a grant of easements (I discuss below whether the Instruments were actually effective in law to create and were properly registered as easements).



- (b). furthermore, the parties appear to have used for the purpose of making an application for registration a form based on the Registry's standard form for *granting* an easement.
- (c). nonetheless, the First Documents are headed with a reference to and are described as restrictive agreements, the recitals to the Written Agreements state that the parties wish to register covenants as incumbrances against Cayman Hotel's land and the operative terms of the Written Agreements include a request to the Registrar to note in the incumbrances section of the register relating to Cayman Hotel's registered title that its land is subject to a restrictive agreement in relation to the Rights. It appears that the parties clearly thought that they were entering into and registering restrictive agreements.
- (d). however, the Written Agreements do not contain, as one might expect, a clear operative provision pursuant to which Cayman Hotel agrees that it and its successors, and its land, will be subject to certain restrictive agreements. There is no clause headed "*Restrictive Agreements*" which defines the restrictive covenants to which Cayman Hotel's land is to be subject and which sets out the agreements and covenants that are to be noted in the incumbrances section of the register for Cayman Hotel's registered title. The covenants which the parties appear to have considered to be a core feature of the arrangements documented in the Instruments are not spelled out.
- (e). it is also unclear why the First Document was drafted in the form of an agreement, with a statement of a nominal consideration of CI\$1. The agreement as recorded in the First Documents was to be bound by the terms of the Written Agreements, which appear to have been executed previously as deeds, were in any event clearly binding and also refer to the same nominal consideration. Assuming that the parties were proceeding on the basis that Cayman Hotel's land was to be subject to restrictive agreements, the First Document could have been in the form of a request for registration of the restrictive agreements which were included in the Written Agreements, which request would have incorporated all the particulars that the Registrar required for the purpose of registration of restrictive agreements (and copies of the Written Agreements could have been annexed to such a request).

88. As I have noted, the Walkers Defendants' first and main argument is (and their pleaded Defence avers) that the grant by Cayman Hotel of the Rights brought with it an agreement by Cayman



Hotel restricting its right to build on, use or enjoy its land. In his oral closing submissions, Mr Randall QC submitted that it was “*necessarily inherent in the grant of the [Rights] that the servient owner will not then build on or otherwise howsoever use the servient land over which he is given the grant in a manner which prevents the [Rights] from being exercised.*” The basis for this claim appears to be the argument that in granting the Rights over its land, Cayman Hotel necessarily *agreed* to restrict its own rights, because it must be taken to have *agreed* to allow the Lot Owners to exercise their Rights and that it was not permitted to stop them doing so. The Court needed to interpret *the Rights* and the Covenant Not to Build or Develop was to be seen as a necessary consequence of those Rights. The Rights gave rise to a restriction on user of Cayman Hotel’s land so they must also bring with them Cayman Hotel’s agreement not to interfere with the exercise of the Rights, and so the Rights (or at least the restrictions on user inherent in and to be derived from the Rights) were negative in nature.

89. I find this argument unconvincing. It is, of course, correct that by granting the Rights, Cayman Hotel became subject to the Rights and was required to permit them to be exercised. But it does not follow that the terms of the Written Agreements must be understood as meaning that Cayman Hotel had agreed to be bound by or as including an *additional* agreement or covenant not to act in any particular way. Cayman Hotel granted and became bound by the Rights and if the Rights were effective as easements and therefore were property rights, Cayman Hotel’s successors in title would take the Properties subject to the Rights. The Lot Owners have the right to enforce the Rights and interference (at least substantial interference) with the exercise of the Rights would result in an actionable nuisance (in the case of Cayman Hotel there would have been a breach of contract while in the case of successors in title, an interference with a property right). But by granting the Rights, Cayman Hotel did not assume a separate (negative) covenant not to breach them. If Cayman Hotel acted in a manner that prevented the Lot Owners from exercising their rights, Cayman Hotel would be liable in the manner I have described. But there is no separate obligation *on or assumed by* Cayman Hotel. The grantor of a property right does not, by making his/her land subject to a property right, of necessity agree and assume an obligation not to interfere with or breach the right granted. I am reminded of Wesley Newcomb Hohfeld's analysis of fundamental legal conceptions, where he refers to a claim right and its correlative duty. To say that X (a Lot Owner) has a legal claim-right means that he is legally protected from interference by Y (Cayman Hotel and its successors). Conversely, Y, who is to abstain from interference, is under a correlative duty to do so. But it does not follow that Y, merely by virtue of being subject to a correlative duty, has assumed an additional and separate obligation (or covenant) to X not to act in a manner that prevents X exercising his claim-right. As the Plaintiffs submitted, it cannot



be that every positive right or covenant can be construed as including or implying a restrictive covenant since this would nullify the common law rule that the burden of positive covenants cannot bind successors in title.

90. *Leader v Moody* might be said to provide some support for the submissions made by the Walkers Defendants (and White Dove). As I have noted, in that case it was held that where a lease had been granted of a box in the opera-house the lessor was not at liberty afterwards to make structural alterations in the opera-house with a view to adapting it for use for religious services. The decision (which was based on the implication of a term rather than on a finding of an express term based on the interpretation of the underlease) could be seen as supporting the argument that a covenant will be incorporated where required to prevent a party from having the benefit of his rights taken away or from being deprived of his rights. The lessor was held to be bound by a negative covenant which prohibited him from taking action which prevented the sub-lessee from having the benefit of the rights granted to him by the sub-lease. However, I do not consider that the case can be regarded as authority for the wide proposition for which the Walkers Defendants (and White Dove) argue, namely that a restrictive agreement or covenant will be incorporated into the instrument pursuant to which rights are granted by which the grantor agrees not to take any action which interferes with the exercise of those rights. *Leader v Moody* was a case involving leases which incorporated a covenant of quiet enjoyment by the lessor and the negative covenant which was held to be incorporated derived from (the interpretation of) that covenant. Sir George Jessel based his decision on the effect of that covenant:

*“When the lessor covenants for quiet enjoyment of the thing demised as against his own acts, he must mean that he will keep it as a theatre, ready to be used at all times for theatrical purposes, and so as to enable the person who has taken the sub-demise from him to have the benefit of that sub-demise by using the boxes and stalls during theatrical performances. Therefore, I am of opinion that any permanent alteration of the theatre so as to convert it to purposes which are not theatrical, and do not allow of its being used as a theatre, is a breach of a covenant on the part of the lessor which I find clearly implied throughout the indenture of demise.”*

91. There is no equivalent of an express general covenant for quiet enjoyment in the Instruments and in my view the granting of the Rights did not by and of itself result in Cayman Hotel agreeing to be bound by and to subject its land to a restrictive agreement that prohibited use of that land in a manner that prevented the Rights from being exercised. The core problem with the submissions of the Walkers Defendants (and White Dove) to the effect that restrictive agreements could be derived from what was, to use Mr Randall QC’s words, “*inherent in the grant of the [Rights]*” is that they fail to establish a basis for holding that Cayman Hotel *agreed* to create property rights



in the nature of restrictive *agreements*. Restrictive agreements take effect as property rights. They give rise to an equity which is attached to the property and binds third parties. But they must be created by agreement and the party who wishes to subject his land to a restrictive agreement or covenant must agree to be bound by the terms of the agreement or covenant, initially in contract. The Walkers Defendants (and White Dove) have failed to establish *that merely by granting the Rights*, Cayman Hotel entered into and agreed to be bound by the terms of a restrictive agreement.

92. As Farwell J said in *In re Nisbet and Potts' Contract* [1905] 1 Ch. 391 at 396-397 (underlining added) (quoted with approval by Lord Templeman in *Rhone v Stephens* [1994] 2 AC 310 at 320):

*“Covenants restricting the enjoyment of land, except of course as between the contracting parties and those privy to the contract are not enforceable by anything in the nature of action or suit founded on contract. Such actions and suits alike depend on privity of contract, and no possession of the land coupled with notice of the covenants can avail to create such privity: Cox v. Bishop, 8 De G.M. & G. 815. But if the covenant be negative, so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached to the property of such a nature that it is annexed to and runs with it in equity: Tulk v. Moxhay 2 Ph. 774. This equity, although created by covenant or contract, cannot be sued on as such, but stands on the same footing with and is completely analogous to an equitable charge on real estate created by some predecessor in title of the present owner of the land charged...effect is given to the negative covenant by means of the land itself. But the land cannot spend money on improving itself, and there is no personal liability on the owner of the land for the time being, because there is no contract on which he can be sued in contract.”*

93. In substance, although not put in these terms, these submissions of the Walkers Defendants (and White Dove) on this aspect of their case amount to a claim based on (or analogous to) the rule against derogation from grant. The Walkers Defendants (and White Dove) seek to spell out solely from the grant of the Rights a contractual term binding on the grantor of the Rights (and intended to bind the grantor's land) not to do anything which hampers the exercise by the grantee of the Rights. But this is impermissible. The restrictions imposed on a grantor of rights (in a sale of land or relating to land) pursuant to the rule against derogation from grant do not arise by reason of any covenant or agreement on the part of the grantor. As Megarry & Wade note (9th. ed. 2019 at [26-048]):

*“The doctrine is not confined to cases of landlord and tenant: it may apply as well to a sale as to a lease. Indeed it applies to all forms of grant and is not confined to real property. It is sometimes said to rest upon an implied promise; but it is in truth an independent rule of law and has nothing to do with restrictive covenants...”*



94. However, the Walkers Defendants (and White Dove) also argued that the Covenant Not to Build or Develop should be treated as incorporated or implied into the Written Agreements on the basis of the proper construction of the *Instruments* as a whole. It seems to me that properly understood, the Walkers Defendants' (and White Dove's) case included this claim, and not just the claim that the Covenant Not to Build or Develop should be treated as incorporated or implied into the Written Agreements on the basis of the proper construction of the Rights alone. In [42] of their trial skeleton argument, the Walkers Defendants argued that "*negative covenants ... are to be construed or implied from the Instruments.*" They argued (at [49] of the skeleton argument) that "*In this case it is clear beyond all argument [from the Instruments including the recitals to the Written Agreements] what the parties' intentions were.*" They also relied in their submissions on the references to a restrictive agreement in the heading to the First Documents and to the reference in clause 4.2 of the Written Agreements to the parcels being "*subject to a restrictive agreement in relation to the [the Rights]*". Mr Randall QC in his oral submissions argued that these references (in parts of the Instruments other than and out with the definition and grant of the Rights) to restrictive agreements were "*a telling indication of what intention is to be attributed to the parties.*" It seems to me that this argument was open to the Walkers Defendants even though [9] of the Defence states that covenants that are negative in nature are to be treated as included in or implied by (and derived from) "*the Rights.*" [6c] of the Defence quotes recitals 5 and 6 in full and states that the Walkers Defendants will rely on the full terms and effect of the recitals at trial and it seems to me that the Walkers Defendants clearly asserted and signalled that they relied on the construction of the Instruments as a whole to establish the incorporation of the Covenant Not to Build or Develop. The Plaintiffs also considered and made submissions as to the proper interpretation of the Instruments (and the Written Agreements) in general and as to the effect and construction of clause 3 of the Written Agreements in particular.
95. In my view, clause 3 of the Written Agreements, interpreted in light of the language of the clause and the First Documents and Written Agreements as a whole, including in particular recital 6 of the Written Agreements, can and should be interpreted as referring to and probably including an agreement that Cayman Hotel and its successors, and their land, would be subject to certain restrictions. These restrictions related to the action which the owners of the land on which the facilities were located were permitted to take and prevented the owners from taking any action which would have the effect of *modifying* the facilities or their location (or which would result in the exercise of the Rights being suspended) other than for the permitted purpose of carrying out repairs and maintenance:



- (a). recital 6 states in terms that the parties wish to “*register covenants*” (and not the Rights). They are “*covenants protecting [the Rights]*” and the covenants are said to be “*in favour of all present and future [Lot Owners]*.”
- (b). there is also a reference to covenants in the operative provisions of the Written Agreements which record the request to the Registrar to make entries in the incumbrances section of the register for Cayman Hotel’s land. Clause 4(2) of the Written Agreements contains a request to the Registrar to note in the incumbrances section of the register for Cayman Hotel’s land that the land is “*subject to a restrictive agreement in relation to the [Rights]*.” The reference to a restrictive agreement can be treated as equivalent to a reference to (restrictive) covenants (as the Manual notes at [2.3.6], restrictive agreements are “*also known in practice as “restrictive covenants” despite the fact that in the Cayman Islands there is no requirement that they be created by means of a covenant in a deed*”).
- (c). there is also an important reference to restrictions to which Cayman Hotel and its successors were to be subject. Clause 3 (headed “*Modification of Rights*”) refers to Cayman Hotel and its successors having the “*right*” to “*modify the facilities or the location thereof as constitute such Rights or to suspend such Rights for the purpose of carrying out repairs and maintenance in respect thereto.*” It is, in my view, implicit in this right or permission given to Cayman Hotel and its successors that they were not permitted to modify the facilities or their location for any other purpose or in any other way. The permission granted was to modify the facilities and their location *only* for the designated purpose. To that extent, I think it can properly be said that restrictions on the activities of Cayman Hotel and its successors were part of what was agreed. The heading to clause 3, as I have noted, refers to the circumstances in which the Rights are capable of being modified, and the right and permission given to Cayman Hotel and its successors is drafted as a proviso to the Lot Owners’ covenant to exercise the Rights in accordance with any rules and regulations in force from time to time. While this drafting suggests that all that clause 3 does is to qualify the Lot Owners’ Rights (and their entitlement to exercise the Rights), it seems to me that it is reasonably and sufficiently clear that the language of clause 3, as understood in light of recital 6 (with its references to covenants protecting the Rights), and clause 4(2) (with its reference to a restrictive agreement in relation to the Rights) shows that there was a clear understanding and agreement that Cayman Hotel and its successors were to be, and agreed that their land should become, subject to restrictions



on the manner in which they could take action which had the effect of modifying the facilities or their location (or suspended the exercise of the Rights).

- (d). it is true that the operative provisions of the Written Agreements which record the request to the Registrar to make entries in the appurtenances section of the Lot Owners' titles refers to the Rights and not to covenants (i.e. the restrictive agreements). Clause 4(1) states that the Registrar is requested to note in the appurtenances section that the Lot Owners' land is "*entitled to [the Rights] in accordance with this filed instrument.*" If the burden of the covenants (i.e. the restrictive agreements) was to be noted in the incumbrances section of the register, then it should follow that the benefit of the covenants (i.e. the restrictive agreements), rather than the Rights, would be noted in the appurtenances section of the Lot Owners' titles. However, I do not regard this anomaly as decisive and of such weight as to undermine or preclude the construction I have given to clause 3.
- (e). in my view, clause 3 can be construed as including an agreement by Cayman Hotel that its land would be subject to a restriction as to user (binding on it and its successors) that prevented any action which would have the effect of modifying the facilities or their location, or of suspending their use, for any purpose other than to carry out repairs and maintenance. This is a restrictive agreement within the meaning of section 93(1) of the RLA, which satisfies the statutory criteria. It seems to me that, properly interpreted, this is what the parties expressly agreed. For this reason, this restrictive agreement is to be understood as part of clause 3 and was therefore part of an express term of the Written Agreements. However, I accept that the distinction in this context between an express term (which results from the interpretation of the wording of a written term but is not explicitly set out in the written term) and an implied term (which is incorporated by applying the accepted techniques and methods for implying terms) is a narrow one. As I explain below, I consider that in this case, if the restrictive agreement I have identified does not take effect as an express term, it does so and should be treated as an implied term.
96. In my view, the restrictive agreement that must be understood as being part of clause 3 is in the form of a covenant that only relates to the type of action which clause 3 itself covers. It states that the owners of the facilities and the land on which they are located are permitted to modify the facilities or their location or to suspend (the exercise of) the Rights for the permitted purpose. The restrictive agreement (or covenant) is not to modify the facilities or their location or to suspend the exercise of the Rights in any other way (I shall refer to this formulation of the restrictive agreement as the ***Restrictive Agreement Term***). This restriction must cover any action which would have this effect. However, this term is not the same as the Covenant Not to Build



or Develop. In my view, the Walkers Defendants (and White Dove's) formulation of the restrictive agreement that is part of the Written Agreements is too broad. It will be recalled that this agreement or covenant is formulated as follows:

*“not howsoever to build on or otherwise develop or carry out works on the Properties in a manner that prevents or substantially interferes with the exercise of the Rights”*

This language goes beyond a restriction affecting the modification of the facilities or their location and a suspension of the Rights. While a substantial interference with the exercise of the Rights can, if the Rights are properly characterised as easements, allow the grantee of the easement to bring an action for disturbance of the easement, the term incorporated into the Written Agreements (whether by construction of an express term or by implication of another term) is based on what was agreed. Not every action which constitutes a disturbance of the positive Rights granted to Lot Owners can be treated as prohibited and covered by the restrictive agreement entered into by Cayman Hotel, to which its land was to become subject.

97. I have said that the Restrictive Agreement Term is a covenant and agreement not to modify the facilities or their location or to suspend the exercise of the Rights in any way save for the purpose of carrying out repairs and maintenance thereto. Clause 3 of the Written Agreements refers to *“the facilities or the location thereof as constitute such Rights”*. So the facilities concerned are those that (as) constitute the Rights.
98. The Plaintiffs argued and the Walkers Defendants (and White Dove) accepted that the parties' references to a restrictive agreement were not on their own determinative. That is right. But the various references in the Instruments to restrictive agreements and in the requests to the Registrar to register covenants protecting the Rights and to make an entry in the incumbrances section of the Land Register referring to restrictive agreements are permissible and significant aids to the interpretation of clause 3 of the Written Agreements and the (objective) intention of the parties.

*The Walkers Defendants' argument based on the implication of a term into the Instruments*

99. In my view, as I have already mentioned, the Restrictive Agreement Term, if I am wrong that it is to be treated as an express term of the Written Agreements based on the construction of clause 3 of the Written Agreements, is to be treated as an implied term.



100. The applicable law governing the implication of terms was not in dispute. They were neatly summarised by Jones J in a passage in his judgment in *Primeo* relied on by the Plaintiffs which is worth quoting again:

*“For a term to be implied, it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be so obvious that “it goes without saying”; it must be capable of clear expression; and it must not contradict any express term of the contract.”*

101. As both parties noted, the approach to the implications of terms in the older authorities relating to proprietary covenants was essentially the same. That approach was summed up, as noted by Stirling J in *Holford*, by Bowen L.J. in *Oriental Steamship Co. v. Tylor* as follows:

*“where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual.”*

102. As Preston & Newsom note (at [6-018]), *“The core test for efficacy or for obviousness is whether notional reasonable people in the position of and with the same background knowledge as the parties at the time of the agreement would have said the term was necessary for commercial efficacy or was so obvious that it goes without saying and that without it the contract lacked commercial or practical coherence... the requirements are stringent.”*

103. But as Stirling J also noted in *Holford*:

*“It appears to me plain that it may be discovered from an examination of all the facts and circumstances that the meaning of the parties was that a particular thing should not be done; but the Court must be very careful not to imply restrictions unless it is satisfied that these were fairly within the contemplation of the contract, judging from the terms in which it is expressed.”*

104. The Walkers Defendants relied in particular on *Ellenborough Park*. As I have noted, there the vendors covenanted to keep the relevant plot as *“an ornamental pleasure ground”* and not at any time thereafter to *“erect or permit to be erected any dwelling-house and other building (except any grotto bower summer-house flower-stand fountain music-stand or other ornamental erection) within or on [the plot] .... but that the [plot] shall at all times remain as an ornamental garden or pleasure ground.”* Sir Raymond Evershed MR accepted that in their context the words in the covenant that the park should at all times remain as an ornamental garden were to be construed as implying a negative covenant on the vendors' part against any user by them of the park otherwise than as a garden. It is clear that the negative covenant arose because the positive



covenant was in the form of an imperative direction as to user, so that the use of the relevant land was to be for a specified and exclusive purpose. The land was to be used for the specified purpose and no other. Only that which was specified was permitted so that what was not permitted can be understood as being prohibited. The same principle applied to a covenant to build houses only, which was taken to include a covenant not to build anything other than houses (this is the example given in *Preston & Newsom* at [6-020]). In *Abbey* the builder covenanted to do something specific, namely that the building's windows would be glazed and permanently fixed. The covenant required the windows to remain closed and as Warrington J said, involved a person in possession of land who had bound himself to maintain part of a building in a certain condition. Such a covenant was negative in substance, or a negative covenant was to be implied, because the builder (covenantor) had agreed that the buildings on his land must remain in a certain condition. There was an imperative direction as to user.

105. These authorities establish the principle which when applied in the present case justifies the incorporation of the Restrictive Agreement Term as an implied term into clause 3 of the Written Agreements. In my view, as I have explained above, clause 3 of the Written Agreements is to be interpreted as, or as implying, an imperative direction as to user. Activity on the Properties which had the effect of modifying the facilities or their location or of suspending the exercise of the Rights could only be undertaken for the purpose of carrying out repairs or maintenance. Any user of and activity on Cayman Hotel's land which had the effect of modifying the facilities or their location or suspended the (exercise of the) Rights was permitted for the specified purpose of maintenance and no other. In my view, adopting Stirling J's language, "*an examination of all the facts and circumstances [in this case establishes] that the meaning of the parties was that a particular thing should not be done.*" The modification of the facilities or their location and the suspension of the exercise of the Rights for purposes other than the specified purpose should not be done. Only that which was specified was permitted so that what was not permitted can be understood as being prohibited. I note Stirling J's words of caution ("*the Court must be very careful not to imply restrictions unless it is satisfied that these were fairly within the contemplation of the contract, judging from the terms in which it is expressed*") but it seems to me that in this case it is right to imply the Restrictive Agreement Term since I am satisfied that it was fairly within the contemplation of the Written Agreements (and the Instruments) judging from the terms in which it they were expressed. The restriction on the user of the land on which the facilities were located was for a defined and limited purposes from which the negative covenant can be derived.



106. I note and have regard to the test for implication, including the proper approach to the need to satisfy the necessity requirement, as articulated by the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* (above). There, as I have noted above, Lord Hughes stated that a term was only to be implied if it was necessary to make the contract work and this could be established if it was established on the facts that was so obvious that it went without saying “*and/or*” that it was necessary to give the contract business efficacy. These are two alternative tests. This point was also made clear by Lord Neuberger in *M&S* (at [23]) where he said that (underlining added):

*“... the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy.”*

107. It seems to me that the Restrictive Agreement Term would have been treated by a reasonable reader of the Instruments, at the time that the Written Agreements and the First Documents were executed and entered into, as so obvious that it went without saying. I would also hold that it was necessary for business efficacy in the sense that the Restrictive Agreement Term is needed to make sense of the limited permission given in clause 3 and to ensure that the protections provided thereby were fully effective.

#### *Conclusion on the incorporation of a restrictive agreement into the Instruments*

108. It seems to me that the incorporation of the Restrictive Agreement Term (as an express or implied term) is in accordance with the wording used in the Instruments and the objective intention of the parties to be derived therefrom. I accept that, as I have said, the drafting of the Instruments was puzzling and created various conundra. Why, for example, were the restrictive covenants protecting the Rights which the parties said they wished to register not expressly included in the Written Agreements? Why were the Written Agreements not drafted so as to refer to the Rights as easements and to include separate and related restrictive covenants restricting and limiting activity on the Properties which could interfere with the exercise of the Rights? No explanation was provided by the parties. It may be that at the time that the Written Agreements and the Instruments were entered into there were doubts as to whether recreational rights of the kind granted in this case could constitute easements in law (which uncertainty was only removed following the delivery a couple of years ago of the UK Supreme Court's judgment in *Regency*



Villas), so that the parties and their legal advisers wished to avoid relying on the creation and registration of easements to which related and noted restrictive agreements were ancillary. However, this is merely speculation on my part, which can play no role in the interpretation of the Instruments in this case. I must, and have sought to, base my decision on the wording used by the parties in those documents, understood having regard to the terms of the Instruments as a whole and the relevant background factual matrix.

**Is the Restrictive Agreement Term noted on the register and binding on the Plaintiffs as an incumbrance?**

109. I have held that the Written Agreements are to be treated as incorporating the Restrictive Agreement Term and that the Restrictive Agreement Term is a restrictive agreement that satisfies the requirements of section 93 of the RLA. In my view, the references to the Instruments in the incumbrances section of the register for 12D 108 and 12C 27, together with the description of the incumbrance in the nature of incumbrance column as a restrictive agreement, is sufficient to satisfy the requirements of sections 93(1) and 23 of the RLA.

110. The entries in the incumbrances section of the register for 12D 108 and 12C 27, as I have noted above, are as follows:

| Entry No. | Date     | Instrument No | Nature of Incumbrance | Further Particulars                                                    |
|-----------|----------|---------------|-----------------------|------------------------------------------------------------------------|
| 8         | 02/06/92 | 3063/92       | Rest. Agmnts          | The Rights as described in filed Instrument in favour of 12D 25, 38-40 |

111. Section 93(1) of the RLA, as I have also noted above, is in the following terms (underlining added):

*“Where an instrument, other than a lease or charge, contains an agreement (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land, and is presented to the Registrar, the Registrar shall note the restrictive agreement in the incumbrances section of the register of the land or lease burdened by the restrictive agreement, either by entering particulars of the agreement or by referring to the instrument containing the agreement, and shall file the instrument.”*



112. Section 93(1) refers to both an instrument and the restrictive agreement (or covenant) within it. When the instrument is presented to the Registrar, she must note the restrictive agreement either by entering particulars of the restrictive agreement *or* by referring to the relevant instrument. In the present case, the Registrar has entered particulars of the Instruments. She has referred to the Rights as described in the Instruments. She has also identified the incumbrances noted in the register as being restrictive agreements. The entry in the further particulars column might be taken to suggest that the restrictive agreements that have been noted are the Rights. However, I do not consider that the entries in the Land Register must be strictly construed as if they were the terms of an instrument or other binding agreement. Critically, the entries refer to the filed Instruments and restrictive agreements. The Restrictive Agreement Term is a term, as I have held, of the Written Agreements (which are part of the Instruments). This is sufficient to satisfy the requirement for noting of the restrictive agreement by referring to the instrument containing the agreement. The reference to the Rights could be understood as being, in effect, a shorthand reference to the Walkers Defendants' submissions in this case that the Rights create and give rise to the restrictive agreements, and therefore incorrect or misleading in view of my decision that restrictive agreements are not created by and derived from the grant of the Rights. However, I do not think that is the right approach to understanding the entries. It will be recalled that clause 4 of the Written Agreements contains a request to the Registrar to note in the appurtenances section of the register that the proprietors are entitled to the Rights and in the incumbrances section of the register, that the burdened parcels "*are subject to a restrictive agreement in relation to the [Rights].*" It seems to me that the entries made by the Registrar are to be understood in light of and as giving effect to this request. Recital 6 is also consistent with this approach (as it refers to covenants protecting the Rights).
113. As I note below, these entries do not appear to be in accordance with the practice for recording restrictive agreements described in the Manual since the reference to the restrictive agreements appears in the nature of incumbrance column rather than the further particulars column (and the words "*subject to*" are not included). The reference to the restrictive agreements is included where the reference to easements would appear, according to the Manual. But I do not consider that this failure to follow the practice in the Manual invalidates the noting of the restrictive agreements (contained in the Instruments) in the incumbrance section of the register.
114. If I am wrong about the interpretation and effect of the reference to Rights, I would be prepared to order the rectification of the further particulars column to insert before the reference to "*The Rights*" the words "*The Restrictive Agreements and.*" I see no need in this case to remove the



reference to restrictive agreements in the nature of incumbrance column, unless the Registrar considers that to be necessary. I discuss in detail below the Court's jurisdiction under section 140 of the RLA to rectify the register. For present purposes, I can just record that it seems to me that the reference to the Rights in the further particulars column is a clear mis-translation or mis-transcription of the request made to the Registrar in the Written Agreements. The Registrar has made a mistake when making the entries and giving effect to the request. This is a mistake of fact and not of law and sufficient to give the Court jurisdiction to order the rectification of the register. In my view, it would be appropriate to make such an order to correct the Registrar's misreading of the Written Agreements in circumstances where the entries made clearly identify that restrictive agreements have been noted and refer a reader of the register to the Instruments containing the restrictive agreements. I am also satisfied that the requirements of section 140(2) of the RLA are satisfied in that the Plaintiffs are to be taken as having had "*knowledge of the .... mistake in consequence of which the rectification is sought*" since they were referred to and could inspect the Instruments, from which they would be able to see the contents of clause 4 (and recital 6) of the Written Agreements and understand what the Registrar was asked to register. And Ms Doak's evidence made it clear that the Plaintiffs had done legal due diligence at the time they purchased their properties and inspected the Land Register.

115. It also follows that the requirements of section 23 are also satisfied. A registered proprietor takes subject to an incumbrance "*shown in the register*" and for these purposes that includes a restrictive agreement contained within the Instruments.

**Do the Instruments create easements within the meaning of and pursuant to section 92 of the RLA?**

***The Plaintiffs' submissions***

116. The Plaintiffs argue that the Instruments did not create and the Rights do not constitute easements. They submit that instead the parties to the Instruments attempted to create a special (*sui generis*) property right, similar to an easement (but more precarious), protected by way of covenants, binding only so long as a hotel operated from 12D 108. Since the Instruments cannot and do not take effect as easements under section 2 of the RLA, or as restrictive agreements under section 93 of the RLA, they must take effect as licences, as defined by section 2 of the RLA ("*licence*" means a permission given by the proprietor of land ... which allows the licensee to do some act



*in relation to the land ...which would otherwise be a trespass, but does not include an easement or profit*"). In accordance with section 98 of the RLA, the Instruments do not bind the Plaintiffs as successors in title to Cayman Hotel and as *bona fide* purchasers for valuable consideration of 12D 108 and 12C 27. Section 98 stipulates that a licence relating to the use or enjoyment of land is not capable of registration and is only binding against a *bona fide* purchaser for valuable consideration if the licensee has protected his/her interest by lodging a caution under that section 127 of the RLA, which consistently with clause 6 of the Written Agreements, was not done in this case.

117. The Plaintiffs relied on five arguments, as follows:

- (a). neither the Instruments nor the manner in which they were registered complied with the mandatory requirements of section 92 of the RLA (*the Failure to Satisfy Mandatory Requirements Point*).
- (b). the Rights are not easements as defined by section 2 of the RLA (*the Failure to Satisfy Section 2 Point*).
- (c). on their true construction, the parties to the Instruments did not intend, as objectively understood, to grant an easement binding on all successors in title to Cayman Hotel (*the No Intention to Bind Successors Point*).
- (d). even if the Court concludes that the parties did intend to create easements, the parties only intended (as objectively understood) the Rights to bind for so long as a hotel and its related amenities operated from the burdened land, and thus they did not intend the Rights to bind all successors in title to Cayman Hotel (*the Limited Duration Point*).
- (e). in any event, the Rights were not easements and did not satisfy the four core requirements for the existence of an easement (*the Failure to Constitute an Easement Point*).

118. As regards the Failure to Satisfy Mandatory Requirements Point:

- (a). the parties to the Instruments failed to seek to create the Rights by way of an "*instrument in the prescribed form*" as required by section 92 RLA. The Instruments did not use form RL12/RL15 as required. The heading "*grant of easement*" was removed and the crucial



words of grant set out in RL12/RL15 (“*I ... hereby grant...the following easements*”) were not employed.

- (b). the Plaintiffs submitted that the use of the prescribed form is mandatory. This proposition was to be derived from the combined effect of section 92(1) of the RLA (“*The proprietor of land or a lease may, by an instrument in the prescribed form, grant an easement over his land...*”); rule 4 of the RLRs (which stipulates that the “*forms required to be used under the [RLA] shall be in the forms prescribed in the Third Schedule*”) and importantly section 37 of the RLA (which states that any attempt to dispose of registered land other than “*in accordance with*” the RLA is ineffectual to create rights).
- (c). the use of the prescribed form was a strict legal requirement and the failure to comply with it was fatal to an argument that the Instruments constituted the grant of an easement pursuant to section 92 of the RLA. The Plaintiffs relied on *Paradise Manor Limited (in liquidation) v Bank of Nova Scotia* [1984-85 CILR 437] (***Paradise Manor***) at 480-1.
- (d). in that case, a company borrowed funds from a bank for the purpose of constructing apartments on certain land (registered as parcels 9 and 10, Block 13A). The loan was secured by a debenture containing *inter alia* a floating charge over the assets of the company and collateral charges over the land on which the apartments were to be built. Subsequently separate collateral charges were created in favour of the bank in respect of other lands (registered as parcels 124, 11, 12, 14, 125 H61 and 125 H80 of Block 13B) (the ***other lands***), as additional security. All the collateral charges were duly registered under the RLA then in force. Following a failure to repay the loan and interest, the bank made a written demand on the company and sought to enforce the collateral charges over the other lands. It ultimately found a purchaser (after the company had gone into liquidation) and after having obtained the necessary leave of the Court under section 98 of the Companies Act, the bank applied to the Court for approval of the sale. A question arose as to whether the bank had complied with the mandatory provisions of the RLA (in section 64(2) and section 72) which governed the notices required to be given by a chargee when enforcing its security, and consequently whether it had acquired a power to sell the charged property by private treaty. Section 64 provided that:

“(1) *A proprietor may, "by an instrument in the prescribed form, charge his land or lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a*



*condition, and the instrument shall contain a special acknowledgement that the chargor understands the effect of section 72, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.*

- (2). *A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.”*

- (e). the bank, having complied with section 64(2), was required to serve a notice under section 72 of the RLA which stated that:

*“(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.*

- (2). If the chargor does not comply within three months of the date of service, with a notice served on him under subsection (1), the chargee may—*

- (a) appoint a receiver of the income of the charged property; or*  
*(b) sell the charged property;*

*Provided that a chargee who was appointed receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.”*

- (f). the bank failed to serve a notice under section 72. It was argued against the bank that consequently its power of sale was not in the circumstances exercisable. One of the arguments advanced on behalf of the bank was that the failure to give such a notice was not a problem since it had been given by the debenture the power to appoint a receiver and to sell the lands in the event of default by the company and that these powers were exercisable independently of the provisions of the RLA as regards registered land. The bank, it was said, had the power to sell the lands notwithstanding any restrictions imposed by the RLA.



- (g). the judge and the Court of Appeal rejected that argument. Henry J.A. in his judgment, in the passages relied on by the Plaintiffs, noted that section 64 provided for the charge to be in the prescribed form, quoted section 37, section 105 and the definition of “*disposition*” in section 2 of the RLA and then said this (underlining added by me):

*“By applying the definition of “disposition” to section 37, the meaning that emerges is that no right of a proprietor in or over his land, lease or charge registered under the [RLA] shall be capable of being affected in accordance with the [RLA] and the system of registration established by it. This does not prevent a proprietor from entering into an agreement to transfer, lease or charge registered land but where such an agreement is unregistered or is otherwise not in accordance with the [RLA] it can only operate as a contract. Any attempt to affect the right of the proprietor otherwise than in accordance with the [RLA] is ineffectual for that purpose. It seems clear therefore that the intention is that only those charges in the prescribed form which are registered under the [RLA] should have effect for the purpose of affecting the rights of a proprietor of registered land. An unregistered instrument can have effect only as a contract. As a contract it may be enforced by applying to the court for specific performance compelling the other-party to the contract to execute an instrument in the prescribed form containing the relevant terms of the contract and registering it under the [RLA]. But it cannot by itself and independently of the [RLA] confer any power affecting the rights of a proprietor of registered land.....In the instant case the debenture was not in the prescribed form and was not registered under the Law. It could therefore operate as a contract with the consequences I have indicated, but any power of sale conferred by it would not extend to registered land and any attempt to sell the lands by the purported exercise of such a power independently of the [RLA] would by virtue of section 37(1) be “ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land . . .” For these reasons the [bank’s argument] could not succeed.....”*

- (h). even if substantial compliance with the statutory requirement to use the prescribed form (RL12/RL15) was sufficient, the Instruments in this case did not constitute substantial compliance in view of the material deviation from and failure to follow RL12/RL15, as noted above.
- (i). furthermore, there had also been a failure to comply with section 92(4) of the RLA. This was because the Instruments were not registered as easements in the title of the land burdened (i.e. now 12D 108 and 12C 27). Any attempt to create rights over 12D 108 and 12C 27 in the Instruments was therefore not done “*in accordance with*” the RLA as required by section 92 of the RLA. Pursuant to section 37 of the RLA, the Instruments were therefore ineffective to create any easement over parcels 12D 108 and 12C 27. Whilst the Instruments (and the Written Agreements in particular) may have bound the parties as contracts, they did not bind the Plaintiffs as successors in title to Cayman Hotel. The



incumbrances section of the register for those titles only identified the “*nature of the incumbrance*” imposed by the Instruments as “*Rest. Agmnts.*” The Manual (at [4.11.2]) made it clear that registration of an easement required the words “*Grant of easement*” or “*Reservation of easement*” to be added to the register for the servient tenement (and it was a fair assumption that previous versions of the Manual, before 2010, will have said the same thing). Paragraph 4.11.2 of the Manual states as follows, under the heading “*Registration of Easement*”:

*“To register a grant or reservation of an easement, the following steps are taken. In the ‘Nature of incumbrance’ column of the incumbrances section of the register for the land burdened by the easement (servient tenement), a reference is made to the instrument or the transfer or lease which creates the easement, and the words ‘Grant of easement’ or ‘Reservation of easement’ are added. In the column headed ‘Further particulars’, the reference of the parcel, strata lot or lease benefiting from the easement is entered, along with a brief description of the easement; for example, ‘A 6-foot wide pedestrian Right of Way shown on Registry Map in favour of 24E 210’. If the description of the easement is lengthy it will usually be necessary to add, ‘For further details see instrument’.*

*Easements are always ‘appurtenant to land’. An entry of an easement in the incumbrances section of the register for the burdened land always requires a corresponding entry as an appurtenance in the appurtenances panel of the land benefiting (the dominant tenement). Easements are either reproduced in full or a reference made to a filed instrument. For example: ‘A 30-ft vehicular Right of Way over parcel 71A 99 as shown on the Registry Map.’”*

119. As regards the Failure to Satisfy Section 2 Point:

- (a). the definition of easement in section 2 of the RLA required there to be a right attached to a parcel of land which allowed the proprietor of the parcel either to use the land of another in a particular manner or to restrict its use to a particular extent. The Rights did not fall within this definition.
- (b). the Rights granted the Lot Owners a mere right of participation in certain resort amenities, upon reservation and payment of a fee. These were not rights attached to land entitling the Lot Owners to use Cayman Hotel’s land in a particular manner or restrict its use. Only those Lot Owners who book and pay the required fee acquire the right to use the relevant facilities. Lot Owners who did not do so had no rights to use those facilities. Even on booking and payment of the required fee, the right may then lapse after a matter of hours. By means of the Rights, all that the Lot Owners acquired was a *right to acquire* a



contractual licence to use the beach club, play golf and play tennis, not a direct right to “*use the land...or to restrict its use.*” The Plaintiffs submitted that the position had to be considered at the point of registration of the supposed easement. At that point, there was no right for the strata corporations/individual Lot Owners to use the land upon which the amenity sits, attached to the land that benefits from the agreement. The only right was a right to acquire a right to use the land for a limited period against payment of a fee (or waiver of that requirement). This was a point of crucial distinction with the easement considered by the Supreme Court in *Regency Villas*. In that case, the timeshare owners were granted the right “*to use the swimming pool, golf course [etc.] ... on the transferor’s adjoining estate*” for free.

- (c). furthermore, the Golf Playing Rights fell outside the statutory definition because they gave rights to parties other than the *proprietor* of the benefitted land. “*Proprietor*” was defined as the person registered under the RLA as the owner of land or a lease or a charge. Rather, an occupant of the strata lot/freehold lot could exercise the Golf Playing Rights as an alternate for the owner. Further, if the owner/occupier was an individual, the right to play golf extended to his/her spouse and two of his/her children, and if the owner/occupier was a company or partnership, the Golf Playing Rights are exercisable by “*no more than two individuals nominated by the owner/occupier in writing.*” There was no requirement for family members or nominated individuals to reside in the benefitted property or to have anything to do with it.

120. As regards the No Intention to Bind Successors Point:

- (a). on their true construction, applying the relevant rules of construction referred to above, the parties to the Instruments did not intend to grant an easement binding on all successors in title to Cayman Hotel.
- (b). the Court was permitted to and should take into account the following matters which were relevant to the factual matrix and background relevant to the interpretation of the Instruments (including the Written Agreements):
  - (i). recital 3 to the Written Agreements set out that Ellesmere and Cayman Hotel were developing a planned resort community, “*offering both hotel and condominium facilities with amenities for transient guests and condominium owners*”. As had been stated in the evidence of Ms Ebanks-Lee, the Britannia Resort operated (and, as was clear from the recitals it was intended to operate) much like tourist accommodation.



- (ii). the recitals to the Written Agreements made it plain that the parties' concern was to ensure that purchasers of the strata lots and of the lots in the Britannia Estate (not themselves parties to the Written Agreements) took the benefit of the Rights, as these Rights had been granted "*In order to market...the sale of condominium units by Ellesmere.*"
  - (iii). the use of the hotel amenities (not limited to the Rights) was an attraction to purchasers of residential properties within the Britannia Resort, a fact which was self-evident from the very location of those properties and which had been emphasised in the promotional literature. Such broader amenities would, however, only be available for so long as a hotel operated from the Britannia Resort.
  - (iv). the Instruments (including the Written Agreements) were drafted with legal assistance, a fact evident from the structure thereof and the language used. This was further supported by the evidence of Mr Prasad (formerly a high-ranking employee of both Cayman Hotel and Ellesmere), who gave evidence that Ritch & Conolly, a firm of Cayman attorneys, advised Cayman Hotel, Ellesmere and the initial Strata Corporations on the Instruments.
  - (v). Cayman Hotel had previously granted what was without doubt an easement (a right of way) to Ellesmere over the hotel and golf course land, employing the correct form (RL12 at the time) and noting in the schedule that any alterations had to be registered "*at the Land Registry in the prescribed form.*" This right of way had been registered appropriately as an easement against Cayman Hotel's title to 12D 108.
- (c). as noted above, the statements made by Mr Prasad about the subjective common intention of the parties to the Instruments, were irrelevant and should be disregarded in their entirety. In addition, the evidence of subsequent conduct, as to the operation of the Rights over the years, given mostly by parties other than those who signed the Instruments, was irrelevant to the proper interpretation of the Instruments.



- (d). the Plaintiffs submitted that, having regard to the terms of the Instruments and this background, a reasonable person would not conclude that the parties intended to grant easements in the form of the Rights:
- (i). the use by the parties of the forms entitled “*Restrictive Agreement*” was crucially important. Form RL12/RL15 could have been used had an easement been intended. But the parties deliberately changed that form so that the First Document was entitled “*restrictive agreement*” (rather than a “*grant of an easement*”) and referred to making an “*agreement...in accordance with the attached document*” rather than to granting “*the following easements.*”
  - (ii). the Written Agreements, bespoke agreements drafted to capture the parties’ bargain, made no mention of the word “*easement*”, notwithstanding the fact that they were, as noted, drafted with legal assistance. Rather, they expressly stated that the parties wished to “*register covenants*” (recital 6) and requested the Registrar to note in the incumbrances section of the register relating to Cayman Hotel title “*that such parcels are subject to a restrictive agreement*” (clause 4(b)). The reference to a restrictive agreement (rather than an easement) in a document drafted with legal assistance was significant. The Plaintiffs relied on *IDC Group v Clark* (1993) 65 P. & C.R. 179.
  - (iii). the content of the Rights was such that they effectively granted Lot Owners the option to participate in certain facilities on the resort, upon payment of a fee, with no obligation on the part of Cayman Hotel to keep the facilities open. The grant of such options was not consistent with an objective intention by the parties to grant binding property rights in the nature of easements.
  - (iv). this interpretation was supported by the waiver of any right to lodge a caution against the parcels held by Cayman Hotel (clause 6), which right would only have arisen if a right other than an easement (e.g. an unregistrable interest or a licence) had been granted.

121. As regards the Limited Duration Point:

- (a). the essence of the Instruments was the grant of certain resort rights. The parties’ intention, objectively and properly ascertained, was that the Rights were to bind only so long as a



resort was operating on the burdened land. The parties intended the Rights to cease when the operation of the resort on the burdened land ceased. As the Hyatt Hotel had long closed and the golf course was no longer operational, the Rights were no longer available to the Lot Owners.

- (b). In order to make good this point, the Plaintiffs relied on the following matters:
- (i). the recitals to the Written Agreements and the definitions of the various Rights presupposed the continued existence of the Hyatt hotel and were not apt to apply if no hotel operated from 12D 108.
  - (ii). the clauses granting the Rights contained repeated references to the successors in title of the proprietors of Strata Plan No. 79/147 (i.e. the Strata Corporations) and Ellesmere as owner of the Britannia Estate. The evident objective was to ensure that the Rights would pass with each Lot Owner's unit. By contrast, the clauses granting the Rights made no mention of Cayman Hotel's successors in title or binding such successors. Indeed, Cayman Hotel's successors in title were only mentioned in clauses 3 and 5 of the Written Agreements (in clause 3, confirming the ability of Cayman Hotel "*or its successors in title*" to modify or suspend the facilities and in clause 5, confirming "*for the avoidance of doubt*" that the Rights would not affect the ability of Cayman Hotel or its successors in title to deal with their land). Cayman Hotel's successors in title were therefore only referred to in clauses confirming Cayman Hotel's freedom of action in the future. The powers of successors in title were confirmed but they were placed under no duties.
  - (iii). the continued existence of a hotel on the beach club land (12C 27) did not assist the Walkers Defendants (and White Dove). The "*planned community offering both hotel and condominium facilities*" as set out in recitals 2 and 3 of the Written Agreements (consisting of the Hyatt Hotel, the golf club and the beach club) no longer exist. In any event, the continued existence of facilities on the beach club land could only be relevant and assist the Lot Owners in relation to the Beach Club Rights.

122. As regards the Failure to Constitute an Easement Point, the Plaintiffs said that it was common ground that there are four core characteristics that need to be established in order for there to be an easement, namely:



- (a). there must be a dominant tenement;
  - (b). an easement must confer a benefit on (or “*accommodate*”) the dominant tenement;
  - (c). the dominant and servient owners must be different persons; and
  - (d). the right must be capable of being the subject matter of a grant.
123. The Plaintiffs submitted that the second and fourth requirements were not satisfied in the present case.
124. As regards the second requirement, the Plaintiffs argued that a right cannot exist as an easement unless it confers a benefit on the dominant tenement *as such*. The Plaintiffs submitted, as I have noted, that properly examined the Rights were no more than options to pay to use resort facilities, potentially on very similar terms to those available to the general public. So viewed, it was difficult to see how the Rights could properly be said to accommodate the dominant tenements at all. Further, the Plaintiffs argued, as I have also noted above, that the Golf Playing Rights were granted, not simply to the Lot Owners, but also to their family members and/or persons nominated by them, with no restriction requiring that the persons enjoying the rights had to be staying in, or have any link with, the Britannia Resort at all. The Rights therefore did not accommodate the strata/freehold lots as such. In addition, in relation to the Instruments and Written Agreements entered into with the Strata Corporations, it was difficult to see how the Rights benefitted the common property owned by the Strata Corporations (i.e. the land not included in any strata lot) as such. The Written Agreements recorded the intent for the Rights to become registered appurtenances in the title to the common property (recital 6 and clause 4), rather than the individual strata units and that appeared to be how the Rights had been registered. There was no entry in relation to the Instruments on the registers for the individual strata lots.
125. As regards the fourth requirement, the Plaintiffs noted the comments of Lord Briggs in *Regency Villas* at [58] and [60] (underlining added by me):

“58. *The fourth requirement (the easement must be capable of forming the subject matter of a grant) has come to be a repository for a series of miscellaneous requirements which have been held to be essential characteristics of an easement. They include the requirements that the right is defined in sufficiently clear terms, that it is not*



purely precarious, so as liable to be taken away at the whim of the servient owner, that the right is not so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement, and that the right should not impose upon the servient owner obligations to expend money or do anything beyond mere passivity.....

60. .... These requirements serve the common public policy purpose of preventing freehold land being permanently encumbered by proprietary restrictions and obligations which inhibit its utility to an unacceptable degree.”

126. The Plaintiffs submitted that the Rights were precarious in the relevant sense and therefore could not be characterised as easements. The Rights were also inconsistent with the mere passivity principle.

127. In relation to the claim that the Rights were purely precarious, the Plaintiffs relied on *Burrows v Lang* [1901] 2 Ch. 502 at 511 where Farwell J said that where the alleged easement depended on the will of the servient owner, and the servient owner can put a stop to the alleged easement, there “is really no easement, because the very idea of right which necessarily underlies an easement is negated.” In that case the owner of an ancient mill and a farm used to water his cattle at an ancient watercourse diverted from a natural stream that was on the mill property alongside the farm. But it was constructed and maintained solely for the purpose of the mill. The owner conveyed the farm to a purchaser without mentioning any water right. The court held that the purchaser had acquired no right (either by implied grant or under the general words of section 6 of the Conveyancing Act, 1881) to have the watercourse continued for his benefit, and the watercourse being therefore precarious, he could have no right to the use of the water in it. Farwell J asked himself whether the purchaser could have any right to use water in the pond when he had no right to compel the defendant to supply any. He concluded that the purchaser could not. It was impossible to create a new burden that was something short of an easement, that is an easement to be enjoyed *nec per vim nec clam sed precario* (not by force, nor stealth, nor the licence of the owner). Where the relevant user was consistent only with permission to enjoy what the supposed grantor did not want, if and so long as that user might be consistent with the rights of third parties, and also with the grantor's right to use his own property from time to time in a reasonable manner, it could never have been as of right (quoting from the judgment of Walker L.J. in *Hanna v Pollock* [1900] 2 I. R. 671).

128. The Plaintiffs relied on the following facts and matters in support of their submission that the Rights were too precarious in nature to constitute easements:



- (a). clause 3 of the Written Agreements contained an important right for Cayman Hotel and its successor in title *“to modify the facilities or the location thereof as constitute such Rights”*. The ability to change the very content of the Rights demonstrated their inherently precarious nature.
- (b). each of the Rights required the payment of a fee or charges. There was nothing to stop Cayman Hotel raising the fees to such an extent as to make the use of the Rights prohibitive.
- (c). the Golf Course Rights were only exercisable on a pre-reservation basis, subject to *“such rules as Cayman Hotel shall stipulate from time to time as to priorities in booking tee times, availability of the course for play or otherwise in their absolute discretion.”* There was nothing preventing Cayman Hotel from introducing a reservation system or rules to make it effectively impossible for Lot Owners to play golf. Similarly, the Tennis Court Rights definition provided that the *“Hyatt Hotel guests shall have priority...in respect of court reservations”*. Again, there was nothing to prevent the tennis courts being booked out at all times for Hyatt Hotel guests, thereby rendering it impossible for Lot Owners to use them.
- (d). clause 3 of the Written Agreements also provided that the Rights were all to be exercised subject to *“any rules and regulations in force from time to time in respect thereof.”* There was, once again, nothing to prevent Cayman Hotel from setting rules that rendered the exercise of the Rights futile or impossible.
- (e). the precarious nature of the Rights was also supported by the terms of one of the purchase agreements (relating to a purchase of two building lots by HDS Holdings Limited and dated 21 October 1993) which provided that *“the right to the use of the Beach Club facility shall cease upon the Purchaser being in arrears of payment of such monthly fee”* (clause 9(c)(iii)).
- (f). in substance, the Rights only grant the Lot Owners the option to purchase a contractual licence to use the beach facilities for a given period of time, to play golf at given time, or to play tennis at a given time. Lot Owners who do not book and do not pay the fee have *no rights* to use those facilities. That being the case, the Rights cannot properly be considered



rights to use Cayman Hotel's land. The right to play attaches to the booking (where required) and the payment of a fee (just as a licence or the right to acquire a licence does not confer an interest in land). This was the proper construction of the Rights rather than a construction that treats the Lot Owners as presently enjoying proprietary rights subject to an obligation to pay the fee, because:

- (i). the Beach Club and Tennis Court Rights are expressly said to arise “upon payment” of the requisite fees (and thus not before).
  - (ii). all the Rights are granted in clause 2 of the Written Agreements “upon the terms and conditions herein contained”, which terms included the payment of the fee and (in relation to the Golf Playing and Tennis Court Rights) the making of reservations.
  - (iii). the Written Agreements grant the ability to use the Hyatt Hotel's recreational facilities. It was natural to view an ability to play golf, play tennis or use the beach club as arising once (and only once) the necessary reservation and payment were made.
- (g). the Plaintiffs relied on the decision in *Gardner v Hodgson's Kingston Brewery Company, Limited* [1903] A.C. 229 (HL) (**Gardner**). They submitted that, while not determinative of the issue with which I have to deal, the case supported their contention that a payment for the use of rights which are optional, so that if there is no payment there are no rights, sits uncomfortably with the recognition of the Rights as property rights, in particular easements (but also as restrictive agreements binding on successors). *Gardner* was authority for the proposition that where the exercise of a right required the permission of the grantor of the right, the right could not be a proprietary right or give rise to a proprietary interest. In that case, the owner of a house (P) used for more than forty years without interruption a cart way from his stables through the yard of an adjoining inn to the public road, paying each year 15s. to the owners of the inn yard (Ds). There was no agreement in writing, and no conclusive evidence as to the origin of or the consideration for the payment. Ds served notice on P requiring her to give up use of the yard followed by a further notice to quit and discontinue user of the yard “on the expiration of the year of [her] tenancy, which shall expire next after the expiry of one half-year from the service of this notice.” P instituted proceedings claiming a declaration that she was entitled to a right of way. Cozens Hardy J held that P had acquired an indefeasible right of way by prescription but the Court of



Appeal (with Rigby LJ dissenting) reversed his decision and dismissed P's claim. The House of Lords affirmed the decision of the majority of the Court of Appeal. Five out of the six Law Lords gave reasoned speeches. The facts in the case were to use Lord Ashbourne's phrase, "*meagre and inconclusive*." The only proof given by P in support of the right of way claimed as the fact that for many years she and her predecessors had crossed the yard along the same path.

- (h). the Plaintiffs relied on the following passages from the speech of the Lord Chancellor, Lord Halsbury (at page 231) (underlining added by me):

*"One of the most common modes of preventing such a user growing into a right is to insist upon a small periodical payment, and if such evidence as we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed....."*

*I cannot help thinking there has been a certain play upon words in commenting upon them. In a certain sense a man has a right to enjoy what he has paid for, and, therefore, if the appellant here at any time during the year when she had paid for the right to use this way had been hindered, she would have had a right to complain that what I will call her contract had been broken, and that during the year she had a right to use the way. I do not think that this would have established a right in the proper sense, because, being but a parol licence, it might be withdrawn, and her action would be for damages, but she would have no right to the way."*

- (i). they also relied on the following passage from the speech of Lord Ashbourne (at page 232):

*"..... everything turns on the one fact, what is the annual payment of 15s. to be ascribed to? But for this payment the case of the plaintiff would be clear. It now stands distinctly in her way."*

- (j) and they relied on the following passage from the speech of Lord Macnaghten (at pages 234 and 235) (underlining added by me):

*"On the bare facts with which your Lordships have to deal there arise, as it seems to me, two questions: (1) What was the sum of 15s. a year, which was paid regularly year by year, paid for ? Well, I think any layman and most lawyers would answer, "For the use of the way, of course." Then comes the only other question: (2) Can a person who uses a way across his neighbour's land, and pays for the use of it year by year, be said to use the way "as of right"? Again, I think every layman and most lawyers would answer, "Certainly not."*

....



I think the fallacy in the judgments of the learned judges who were in favour of the appellant comes from the manner in which they have looked at the facts of the case. I do not think that you can legitimately separate the use of the way from the payment made in respect of the way. The use of the way explains the payment. The payment explains and qualifies the use. But the learned judges appear to sever two things which seem to me to be inseparable. They first take the way. They say: "Here is a way which has been used for forty years without interruption. That gives an indefeasible right under the Prescription Act." Then they look at the payment and they ask, how is that to be explained? And various hypotheses are suggested which seem to me mere guesswork. Cozens-Hardy J. goes further. He would hold that an

annual licence (for such he takes it to be) coupled with an annual payment, if the arrangement originated more than forty years ago and is continued for forty years, confers an indefeasible right, provided there is no break or change or new departure, but things are left to go on just as they did before. This view seems to give the go-by to the words "claiming right thereto" and "as of right," which are certainly not the least important words in the Prescription Act."

- (k). they submitted that the Walkers Defendants (and White Dove) were seeking to introduce the kind of formidable innovation referred to by Lord Halsbury and push the law into new territory. The key distinction was between the right to use the way and the right to the way. The former is not in the nature of an easement, while the latter is. Lord Ashbourne was reflecting the fact that the very payment puts the status of the right claimed as an easement into doubt. He had considered the possibility that P's obligation to pay was perpetually attached to an original grant of the right of way, but if that was the case the dominant owners (P) would have been required to pay that sum every year, and that was not the case. The payments were intended to be entirely optional. Both Lord Halsbury and Lord Macnaghten were saying that it was wrong in principle to separate the analysis of the right from the payment obligation. The right approach is to ask what the payment obligation says about the character of the alleged right.
- (l). after Mr Seitler QC's reference to and submissions on *Gardner*, I indicated that I had found, as a result of a very brief search of the case law and commentary (it had struck me as odd that there were not more authorities and commentary on the question of whether it was permissible to create an easement or other property right or interest the exercise of which was in some way conditional, whether upon payment of a fee or otherwise) one case and a passage in Halsbury's Laws that might be relevant and worthy of submissions, which I wished to draw to the attention of Mr Seitler QC and Mr Randall QC. These were dicta in the judgment of Paul Baker QC sitting as a High Court judge in *London & Blenheim Ltd*



*v Ladbroke Parks Ltd* [1992] 1 WLR 1278 (***London & Blenheim***) at 1287-1288 (a judgment that had been appealed but the Court of Appeal's judgment did not appear to deal with this issue) and a passage in Halsbury's Laws, Volume 87 (2017) at [896] (***Halsbury***). I requested counsel to consider this judgment and text and to undertake some further research in order to establish whether there were further relevant authorities or materials that should and could usefully be cited and to file further written submissions dealing with *London & Blenheim* and Halsbury and any further cases or materials that counsel located. These further written submissions were to be filed on 22 December 2020 and 5 January 2021.

(m). the relevant passage in *London & Blenheim* is as follows (my underlining):

*"The grant in the present case is more elaborate. It presupposes that there are and will continue to be retail shops and businesses conducted on the retained or servient land whose customers, clients and employees are provided with parking facilities. If that ceased to be so either because the shops ceased to exist as such, or because their parking facilities were closed down or transferred elsewhere, the right to park annexed to the shops and businesses on the transferred land would also cease to exist. That circumstance indicates to my mind that the right claimed is dependent on the continued existence of car parking facilities on the servient land. It would be open to the owner of that land to remove the car parking facilities of the shops and businesses on the retained land and thereupon the facilities provided for the transferred land would also cease. The passage in Keefe v. Amor [1965] 1 Q.B. 334, 347, to which I was referred, deals with a different point: that the grantee of a right of way cannot complain of obstructions in some part of the way so long as his right is not substantially interfered with. In the present case the right on its true construction is dependent on the continued existence of car parking facilities for other persons. That leaves the main point under this head, whether the right to park cars can exist at all as an easement. I would not regard it as a valid objection that charges are made, whether for the parking itself or for the general upkeep of the park. The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant. The rights sought in the present case do not appear to approach anywhere near that degree of invasion of the servient land. If that is so - and I emphasise that I have not gone into the facts - I would regard the right claimed as a valid easement."*

(n). the Plaintiffs noted that the ability to park was granted in relation to, and potential charges were to be imposed upon, "*customers, clients or other employers of any retail shop or other business on the transferred land*" (that is not on the transferee). The fee was payable by those persons. The transferee by way of contrast only had to pay only a reasonable share of the costs of maintenance. A fee can include an element of profit or uplift whereas a



payment in respect of maintenance is inherently limited to the “cost” of maintenance. So Judge Baker’s comments, which were in any event *obiter* and given without explanation or reasoning, related to or were at least made in the context of an obligation to contribute to the maintenance of the car park. The Rights however were different and each involved a requirement to pay a fee, the amount of which was not limited or restricted. No Lot Owner was obliged to pay the fee; a Lot Owner who did not pay the fee had no entitlement to use the relevant facility (tennis, golf, beach club) and a Lot Owner who did not pay the fee had no right to use the land on which the facility sits in any way for any purpose.

129. The Plaintiffs relied on the following facts and matters in support of their submission that the Rights were inconsistent with the mere passivity principle.

- (a). the Golf Playing Rights are only granted on a non-exclusive pre-reservation basis. This requires Cayman Hotel to facilitate the making of reservations. A similar point applied in relation to the Tennis Court Rights. The definition of these Rights set out an order of priority for court bookings, which must mean that Cayman Hotel was obliged to facilitate bookings in accordance with this order of priority.
- (b). in addition, the definition of Golf Playing Rights provided that they were subject to “*such rules as Cayman Hotel shall stipulate from time to time as to priorities in booking tee times, availability of the course for play or otherwise in their absolute discretion.*” The language of “*shall*” was mandatory so that Cayman Hotel was required by the Written Agreements to stipulate such rules. The requirement to do so meant that something more than mere passivity was required on the part of Cayman Hotel.
- (c). since the Rights required the payment of a fee, a burden was placed on Cayman Hotel the burden to accepting this fee, which in itself breached the mere passivity principle.

130. Furthermore, the Lot Owners could make no meaningful use of the Rights and the facilities to which they related without management and maintenance being performed by the servient owner. If the Rights were effectively exercisable only for so long as Cayman Hotel decided to keep the resort open, then they were too precarious in nature to be easements or the mere passivity principle was violated. The Plaintiffs argued that the parties to these proceedings agreed that the Written Agreements did not impose an obligation on Cayman Hotel (or anyone else) to keep the resort open or to operate the same. Even if (which was denied) the parties objectively intended the Rights to bind even if the resort and its facilities was no longer operational, no meaningful use of the Golf Playing Rights and Beach Club Rights could be enjoyed by Lot Owners if the



servient owner discontinued the operation of the resort and those facilities, given the extent of the maintenance required and given the difficulties of collecting the sums required from the individual Lot Owners towards that maintenance. The Plaintiffs referred to the discussion of this issue by Lord Briggs in *Regency Villas* at [71]-[73].

131. In *Regency Villas* a country house estate had been converted into a country club comprising recreational facilities on the lower floors of the main mansion house, leasehold timeshare apartments above, and a golf course and other outdoor leisure and sporting facilities in the surrounding parkland (the leisure complex). In 1981 the owners sold the villa, a smaller house on the estate, to an associated company for conversion into more timeshare apartments which would have free rights of usage of the leisure complex's facilities. The legal mechanism used to effect the arrangement involved the associated company transferring the villa to a nominee company to hold it for the benefit of an unincorporated association comprising the purchasers of the timeshare units converted or built within the development at the villa. The transfer included the grant of rights, recorded at the UK Land Registry on the property register in respect of the title to the villa and on the charges register against each of two titles for the leisure complex, including "*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 [lower] floors of the . . . mansion house, gardens and any other sporting or recreational facilities . . . on the transferor's adjoining estate*". It was intended that the ongoing costs of maintaining the leisure complex would be met by users drawn from members of the public, so that the timeshare owners could have free usage, but that proved to be a miscalculation. The leisure complex was sold to the defendants and the timeshare apartments within the mansion house ceased to exist following the expiry of the lease. The defendants started to charge the villa timeshare owners to use some of leisure complex facilities. The nominee freehold owner and the timeshare owners issued proceedings against the defendants for a declaration that the claimants were entitled, by way of easement, to the free use of all the sporting or recreational facilities within the leisure complex. In the passage relied on by the Plaintiffs, Lord Briggs had noted that the appellants had submitted that the facilities grant was no more than illusory as a grant of rights of practical utility unless the owners for the time being of the park undertook responsibility to the dominant owners for the substantial cost of management, maintenance, repair and renewal. They had relied on Lord Scott's example of the swimming pool (although it was only obiter) in *Moncrief v Jamieson* [2007] 1 WLR 2620 at [47] where he said that "*the grant of a right that required some positive action to be undertaken by the owner of the servient land in order to enable the right to be enjoyed by the grantee could not...be a servitude*" and had given as an



example of such a right a right to use a neighbour's swimming pool. Lord Briggs went on (underlining added by me):

- “70. .... The courts below rejected this on the facts, concluding that some meaningful use, even of the golf course and the swimming pool, could be enjoyed by the RVOC timeshare owners, even if the appellants or their successors as owners of the park were altogether to discontinue the business of operating the relevant part of the park as a leisure complex. Greens and even fairways on the golf course could be mown. The swimming pool could be kept full of water. Timeshare owners could provide their own nets for the tennis courts, hoops for the croquet lawn and (if necessary with the use of a generator) lighting for the squash courts. The appellants submitted with force that this would be nothing like the proffered use of a high-quality leisure complex held out to prospective timeshare owners in and shortly after 1981, but nothing in their submissions provided a basis upon which this court could properly depart from the factual findings of the courts below that some less attractive but still worthwhile use could be made of the facilities in those circumstances. This conclusion, that meaningful use of the rights granted did not depend upon the continued provision of management, maintenance, repair and renewal by the servient owners, is also sufficient to confirm that use of the facilities was granted by way of right, rather than merely by way of temporary offering, revocable by the servient owners at any time, by discontinuing management and maintenance.
72. It is not difficult to imagine recreational facilities which do depend upon the active and continuous management and operation by the servient owner, which no exercise of step-in rights by the dominant owners would make useable, even for a short period. Free rides on a miniature steam railway, a covered ski slope with artificial snow, or adventure rides in a theme park are examples which would probably lie on the wrong side of the line, so as to be incapable of forming the subject matter of an easement. But the precise dividing line in any particular case will be a question of fact.
73. It is in this context to be borne in mind, as already explained, that the facilities grant extended only to such sporting or recreational facilities as existed within the park from time to time. It did not oblige the servient owner to maintain or operate any particular facilities, or any facilities. It is perfectly possible that, in relation to some of them, the exercise by the dominant owners of step-in rights, after discontinuation of operation and maintenance by the servient owners, would not make them useable by the dominant owners indefinitely. That was an inherent limitation in the value of the facilities grant, but it does not deprive it of the character of an easement.”

132. The Plaintiffs submitted that in this case there was no realistic prospect of the Lot Owners being able to step in and maintain and run the relevant facilities associated with the exercise of the Golf Playing Rights and the Beach Club Rights:

- (a). in relation to the Golf Playing Rights, meaningful use required the continued provision of management and maintenance and the step-in rights of the Lot Owners could not



realistically make the golf course playable. In respect of the level of management and maintenance required, a golf course in the Caribbean had more in common with the artificial ski slope example given in *Regency Villas*. In terms of maintenance, for golf courses the Caribbean the climate was a most aggressive one such that the very survival of the course required an expensive input of resources. In addition to very frequent cutting and treatment of the grass, the course needed to be watered very frequently and regularly treated for insects. The costs involved in this maintenance, in particular the water required, was prohibitive, as was demonstrated by the evidence filed in this case. An extract from the financial statements relating to the cost of maintenance of the course for the last full year of operation (2015) showed that the total golf expenses (excluding sales and payroll expenses) were \$746,874. While some of the expenses listed could be avoided by the Lot Owners (for example, sales promotions costs of \$3,694, discounts of \$4,106, the costs of uniforms of \$1,795 and the cost of works permits & licences of \$24,497, this would still leave expenditure of \$712,782, including some \$524,876 required for water (and the evidence suggested that only the bare minimum was being done in terms of maintenance, so that the figure of \$712,782 was only indicative of the costs of basic maintenance for the golf course to keep it playable).

- (b). there was no realistic prospect of all the Lot Owners agreeing to pay this level of ongoing costs, when many will have no interest in playing golf. Assuming 200 Lot Owners, the 2015 costs would have cost each Lot Owner approximately \$300 each per month. The evidence of the Walkers Defendants (and White Dove) witnesses who asserted that the Lot Owners could pay for maintenance was revealed on cross-examination to be nothing more than conjecture. The witnesses were asserting that this could and would happen without first having properly considered what would be required to achieve it. They had given no thought to the actual sums involved or the likelihood that other Lot Owners would agree to bear those sums. Given this omission, they were unable to put before the Court any plausible route to achieving what they asserted. The Plaintiffs noted that Mr Holmes was unable to say more than “*I think the Stratas would have to determine whether that was of benefit to them and if they made that decision they would come up with the funds*” and Mr Mackenzie was only able to say that “*It is up to all the Stratas to make a decision.*” Furthermore, there was no realistic prospect of these costs being collected from the strata Lot Owners. The strata corporation by-laws required strata unit owners to pay contributions to the maintenance of the strata common property and make express



provision for the payment of the Beach Club Fees. To collect substantial sums for maintenance of the golf course, the by-laws would have to be amended, and it was not realistic to consider that the requisite two-thirds majority would be achievable in the circumstances. In addition, the Golf Course was in dire need of investment, in particular in relation to the irrigation system. As Mr Seitler QC had addressed with some of the witnesses in evidence, in October 2016 Dart estimated the costs of a “*quick fix*” solution (to last no more than five years) at US\$1.6m. It was inconceivable that the Lot Owners could or would agree to put up this large sum.

- (c). in relation to the Beach Club Rights, the essence of the Rights was the use of the “*restaurant, beach and watersport facilities*” situated on 12C 27 rather than simply entry on to the land. The Plaintiffs submitted that it would not be possible for the Lot Owners to step in and run these facilities, both in terms of the costs and practicalities of doing so and because to do so would lead to ouster of Plaintiffs from their property, which was inconsistent with an easement. Mr Randall QC had sought to separate out what he said were the three limbs of the Beach Club Rights, namely the restaurant, the beach and the watersport facilities and had accepted that there could be no relevant step-in rights in relation to the restaurant but asserted that none were needed for the beach and that step in rights could effectively be used in relation to the watersport facilities. However, this approach was unsustainable. The grant of the Beach Club Rights was compendious and it was not appropriate to cherry pick the limbs which will fulfil the easement requirements and seek to rely upon them alone. To do so entirely distorted the sense of the rights granted. Step in rights could not effectively be used in relation to the watersport facilities, since on its true construction, the grant related to the provision of a watersports operator, manned with staff and equipment. In the same way as the restaurant, such an operator could not be run by the Lot Owners as a matter of practicality and without offending the ouster principle.

### ***The Walkers Defendants’ submissions***

133. The Walkers Defendants argued that the Rights granted were in any event in the nature of easements and not mere contractual licences, and that they fell within the description of easements in sections 2 and 92 of the RLA. They submitted that:

- (a). the Rights are properly capable of being granted as easements.



- (b). they were so granted by the Instruments.
  - (c). the Rights were registered against the servient parcels with only minor departures from the required form, such that *in substance* the Rights were registered as incumbrances against the servient parcels as easements.
  - (d). the Plaintiffs either were, or ought to have been aware of the nature of the Rights as easements when they purchased the Properties subject to the Rights.
  - (e). the Rights ought to be given effect as easements, given their registration in these circumstances.
134. The Walkers Defendants accepted that the four characteristics of easements identified by the Plaintiffs needed to be established and that in this case, the main issues for the Court were whether the Rights could be said to “*accommodate*” the dominant parcels, and whether the Rights were capable of being the subject matter of a grant.
135. As regards the Failure to Satisfy Mandatory Requirements Point, the Walkers Defendants submitted that:
- (a). the requirement for use of a prescribed form was substantially complied with, and that the adaptations were not such as to negate the fact that the very prescribed form, obtained from the Land Registry, was indeed used, if adapted.
  - (b). clause 2 of the Written Agreements contained express words of grant (“*hereby grants [the Rights] to [The] Proprietors*”), and such agreements were attached to and incorporated into the filed Instruments. The fact that the words of grant were incorporated into the front page of the First Document by express reference, rather than retained as pre-printed text on that page, was of no weight.
  - (c). compliance with the minutiae of the prescribed form should in any event be regarded as directory and not mandatory.



- (d). the Court should follow the approach of Collett JA in *Connolly v Rankine* [1999] CILR 390 (Court of Appeal) (**Connolly**) (“*in my view, the use of a wrong form makes little difference*”).
  - (e). the fact that the incumbrances section of the Land Register referred to "*Rest. Agmnts*" did not affect this conclusion. The filed numbers of the Instruments, all of which were and are filed at the Land Registry, were also expressly referred to, and these filed Instruments set out the full terms of the easements. Section 92(4) of the RLA only required registration "*as an incumbrance in the register of the land burdened and in the property section of the land which benefits*" (emphasis added), together with filing of the Instrument, which was required to complete the grant of an easement. There was no requirement for registration in either "*as an easement.*"
  - (f). in any event, even if the Plaintiffs were correct, so that it could be said that there had been a failure to use the prescribed form, this failure and any deficiencies had been cured when the instrument was registered. This was by virtue of section 105(1) of the RLA which permitted use and registration of "*such other form as the Registrar may in any particular case approve.*"
  - (g). the dicta of Henry JA in *Paradise Manor* relied on by the Plaintiffs did not assist their case as *Paradise Manor* was distinguishable. There was nothing in the report to suggest that any attempt had been made to use the prescribed form for a charge and the case was not about the degree of any adaptation of a prescribed form. The (purported) charge in that case had not been registered and therefore the potential curative effect of section 105 of the RLA did not arise.
136. As regards the Failure to Satisfy Section 2 Point, the Walkers Defendants (and White Dove) argued that the Rights satisfied and came within the definition in section 2 of the RLA.
137. As regards the No Intention to Bind Successors Point, the Walkers Defendants (and White Dove) submitted as follows:
- (a). the fact that the Instruments, including the Written Agreements did not use the word, or legal label, "*easement*" (and were drafted by legal advisers) was not determinative or of



great weight (and it was to be noted that *IDC v Clark* depended on the presence and meaning of a recognised legal label, not the absence of one). The other factors and matters bearing on the intention of the parties to be discerned from the Instruments all favoured the conclusion that the parties did intend to create binding property rights which can correctly (if perhaps more readily after *Regency Villas*) be labelled “*easements*.”

- (b). such an intention was one aspect of the natural reading of the descriptions and definitions of the Rights themselves. On any remotely realistic construction of these Instruments and the Written Agreements, they were intended to confer registrable rights. Mr Seitler QC, in his submissions, had accepted that in the past “*some big promises [had] been made ... not by [his] clients but they may have been made without the full appreciation of the [RLA] issues which [were] now live. That [had] ... resulted in Lot Owners thinking that they had these rights in perpetuity..... [The Plaintiffs] say that it is the gap between those promises and the true working of the [RLA] that has caused this case to be so intractable.*” But it was the construction for which the Walkers Defendants contended that fitted the underlying substance of the “*big promises*” referred to by Mr Seitler QC and only the Plaintiffs’ wholly unrealistic construction of the Instruments and the Written Agreements in particular that would render this case “*intractable*”. This is not, and need not be, a case in which all the many purchasers of the Britannia properties have been misled as to whether they have effectively registered rights, and in which all their legal advisers failed to spot a fatal flaw in what their clients thought they were buying.
- (c). such an intention was strongly supported by the terms of recitals 5 and 6 in the Written Agreements and recitals were an important aid to the construction of deeds (as regards the effect of recitals, reliance was placed on the previous edition of *Lewison*, the 6th edition at [10.11] and [10.15], which paragraphs are the same as those I have discussed above from the current 7th edition, where it is noted that recitals can import an obligation to carry a recited intention into effect). Recital 6 included five elements (underlining added by the Walkers Defendants):

*“Ellesmere and Cayman Hotel now wish (i) to register covenants (ii) protecting such rights (iii) in favour of all present and future owners (iv) as incumbrances against the lands on which the Hyatt Tennis Courts, the Beach Club facility and the Golf Course are situated (v) with the intent that such Rights shall become a*



*registered appurtenance in the title to the common property held by the Proprietors.”*

On the Plaintiffs’ suggested construction, none of the underlined features of the five elements of recital 6 could or would be achieved, and no such registration as requested in clause 4(2) of the Written Agreements could lawfully be made.

- (d). once again the point was made that clause 2 of the Written Agreements contained express words of grant (“*hereby grants [the Rights] to [The] Proprietors*”), and such agreements were attached to and incorporated into the filed Instruments. The fact that the words of grant were incorporated into the front page of the First Document by express reference, rather than retained as pre-printed text on that page, was of no weight.
- (e). there were several references in the Written Agreements to successors in title (of both grantor and grantee), though given the clear and express intention that the instrument be registered as a restrictive agreement in the incumbrances section of the registers for the Properties (the burdened parcels), such references were largely otiose by virtue of section 93(4) of the Law.
- (f). the various features relied on by the Plaintiffs as indicating that the Rights were so precarious that the parties could not (contrary to their clearly recited intentions) be taken to have intended that they be binding property rights (i.e. easements) did not establish that the parties had no intention to create property rights.
- (g). so far as the form used could be relied on in determining the parties’ intentions, the parties did use the form for grant of easements, RL12 or later RL15 as the base for the instrument presented to the Registrar albeit that it was adapted (consistently with the terms of the request set out in clause 4(2) of the Written Agreements).
- (h). indeed, the very fact that the parties intended the Instruments and the Rights to be registered under the RLA in the incumbrances section of the registers for the Properties (recital 6 and clause 4(2) of the Written Agreements) was a powerful indication that the parties intended them to be binding property rights, and not mere personal rights. The importance to the Lot Owners, as purchasers, of having effectively registered rights over the Properties was a material factor to be taken into account when considering the factual



matrix. Such importance was an obvious inference from the factual matrix and from the words of the documents themselves. Although Mr Seitler QC had attempted during his cross examination of the defendants' witnesses to suggest that the facilities and services provided by and the continued operation of the Hyatt hotel, and not the Rights, was of particular importance to the Lot Owners when purchasing their property, it was clear from the witness evidence that having the benefit of the registered Rights was of critical importance to them.

- (i). the general approach to the construction of deeds and instruments purporting to create property rights, which the Walkers Defendants relied on in their submissions concerning whether the Instruments were properly to be treated as restrictive agreements, also supported the Walkers Defendants' submissions in relation to the easement issue. The terms of a grant were in general to be construed against the grantor and the intention to create property rights should be given effect if it can be (as Lord Briggs held in *Regency Villas* at [25]).

138. As regards the Limited Duration Point, the Walkers Defendants argued, for the reasons summarised above, that on the proper construction of the Rights, they were to be treated as granting property rights of unlimited duration, which were not subject to the continued presence of the Hyatt or any other hotel.

139. As regards the Failure to Constitute an Easement Point and the Plaintiffs' argument that the Rights failed to satisfy the second requirement, the Walkers Defendants submitted as follows:

- (a). in *Regency Villas*, the Supreme Court had held that rights granted to use recreational facilities were effective as easements and that the package of rights to use such facilities (which included a golf course, tennis courts, a swimming pool and others) properly accommodated the ordinary use of timeshare apartments. Lord Briggs had confirmed that as regards the requirement that an easement must accommodate the servient tenement:

- (i). the right must have something to do with the enjoyment of the dominant tenement, rather than, for example, simply adding value to it (see [40] of his judgment).
- (ii). the Court must consider the “normal use” of the dominant tenement, whether an actual use or a contemplated use ([41]).



- (iii). it was not an impediment to the grant of an easement that it involved the use of some chattel on the servient tenement ([42]), and
  - (iv). the question of whether a particular grant of rights accommodates a dominant tenement was primarily a question of fact ([43]).
- (b). in the present case, as was reflected in the recitals to the Written Agreements, the parties clearly thought that the Rights would accommodate the dominant parcels, and that accorded with the factual position at the time of all the various grants:
- (i). as regards the burdened or servient parcels, the golf course comprised land laid out as such, and intended to be used for that purpose, close by and with easy access to and from the dominant parcels, and overlooked by them; the tennis courts comprised land laid out as such, and intended to be used for that purpose, close to and with easy access to and from the dominant parcels and the beach club parcel comprised land on the beachfront, easily accessible to and from the dominant parcels. All the parcels were regarded as forming part of a single Britannia Resort (see recitals 2 and 3), which by incorporating both the golf course and the beach club parcel ran from the Caribbean Sea to the North Sound.
  - (ii). as regards the benefitted or dominant parcels, these comprised condominium units, and later (predominantly in phase III) individual residences within a gated community, all forming part of the same Britannia Resort. In the case of the three strata corporations, comprising the majority of the units, they were organised into groupings; the properties were administered for vacation rentals and were developed for that purpose by an associated company in the same group as the grantor and hotel/resort operator (which was similar to the position between grantor and grantee in *Regency Villas*).
  - (iii). the same approach applied to the grants in favour of the strata corporations. While the parcels to which the Rights were attached were the common property of the strata corporations, from registration the common property of a registered strata corporation belonged to all its members as proprietors in common in shares proportionate to the unit entitlement of their respective strata lots (section 13(1) of



the Strata Titles Registration Act (*STRL*) and the common property was to be controlled, managed and administered for the benefit of all proprietors.

(c). in the case of each of the strata corporations and the owners at Britannia Estates, the Rights are exercisable by the "*Britannia condominium owners*" (in relation to the Beach Club Rights); the owner or occupant (in relation to Golf Playing Rights) and the lot owner or proprietor (in relation to Tennis Court Rights). The fact that the Golf Playing Rights were also stated to extend to the owner's family members did not detract from the fact that they accommodated the dominant tenement. Contrary to the assertion by the Plaintiffs, those rights were granted to those who owned or occupied the homes in the Britannia Resort and should be construed as such. It was artificial for the Plaintiffs to contend that the Golf Playing Rights extended to any individual without "*any link with, the Britannia Resort or at all.*" In particular:

- (i) the Rights were granted to the "*owner/occupier's spouse*" and to his "*children*" (which, in all but one case in relation to strata 147, expressly limited the age of children to "*under the age of 18 years*"). In either case, such persons were limited to those for whom the owner possessed legal responsibility.
- (ii). some of the agreements included an additional sub-clause (b), which emphasised that a nomination could be made as to whether the owner or the occupier could exercise the Rights. Such a provision incorporated a degree of flexibility to enable the units to be rented and for the tenant of such a unit to enjoy the Rights associated with that unit.
- (iii). in the event that the owner/occupier was a company or partnership, the Rights can extend to no more than two individuals nominated by the owner or occupier (many of the homeowners acquired their properties in the names of companies).

140. As regards the Failure to Constitute an Easement Point and the Plaintiffs' argument that the Rights failed to satisfy the fourth requirement because they were purely or otherwise sufficiently precarious, the Walkers Defendants submitted as follows:



- (a). it was well recognised that proprietary rights could be made conditional upon payments being made, provided the payments were relevant to the exercise of the right. The Walkers Defendants submitted that this proposition was supported by *Gale* at [1-119] (which is in a section of the text headed “*Recovery of the costs of repairs*”). There reference was made to the speech of Lord Templeman in *Rhone v Stephens* [1994] 2 AC 310 at 322F-H (*Rhone v Stephens*) where he said that conditions could be attached to the exercise of a power if it was “*relevant to the exercise of the right.*” *Gale* states that (citing as supporting authority *Thamesmead Town Ltd v Allotey* [1998] 3 EGLR 97 and *Wilkinson v Kerndene* [2013] 2 EGLR 163, which are both said to be applying *Rhone v Stephens*):

*“It is now settled that there are two requirements for the enforceability of a positive covenant against a successor in title to the covenantor under the doctrine; first, the condition of discharging the burden, must be relevant to the exercise of the rights to enable the benefit to be obtained; secondly, the successor must have the opportunity to choose whether to take or renounce the benefit and thereby escape the burden. So a successor does not have to contribute to the cost of a facility which he is either not entitled to or chooses not to enjoy.... Where the charge is not a fluctuating charge by reference to the cost of the facility but is a fixed charge ... and the charge is not apportionable, then the charge will still be in return for the enjoyment of the rights if it relates at least in part to the enjoyment of the rights.”*

- (b). under the express terms of the Rights, the servient owners would not be entitled to set punitive or prohibitive fees to be paid only by the dominant owners, different from those charged to other users. They were only entitled to levy “*any fees, charges or costs in force from time to time in respect of [the restaurant, beach and watersport facilities]*” (the Beach Club Rights); “*the current established fee*” (the Tennis Court Rights); and “*cart fees established from time to time*” (the Golf Playing Rights).
- (c). further and in any event, the law of easements imposed a requirement of reasonable conduct as between dominant and servient owners which would apply to the Plaintiffs:
- (i) as Norris J said in *Bradley v Heslin* [2014] EWHC 3267 (Ch.) at [84] “*The law expects neighbours to behave reasonably toward one another and that the rights they have over each other’s lands will be reasonably exercised and reasonably allowed. The Court cannot write a rulebook for what may or may not be done in every eventuality.*”



- (ii). this was supported by dicta in the Court of Appeal in *Regency Villas* where the court spoke (at [16]) of the “*Give and take [which] was required between shared users of the rights and the servient owner.*”
- (iii). this proposition was consistent with the wider principle of law that where contractual terms gave one party to a contract the power to exercise a discretion, the exercise of which would affect the rights and obligations of both parties, the court will seek to ensure that the power is not abused by implying a term in appropriate cases that the power should be exercised not only in good faith but also without being arbitrary, capricious or irrational (*Braganza v BP Shipping* [2015] 1 WLR 1661).
- (d). as Gale noted (at [1-119] citing *Duncan v Louch* (1845) 6 QB 904), there was no authoritative decision of general application as to whether in the event of a default in making the required payment the right simply determines, or was merely suspended until the default was made good. Contrary to the Plaintiffs’ submissions, the effect of a default in this case did not (save perhaps as a matter of contract while Cayman Hotel remained the servient owner) depend on the terms of the Lot Owners’ purchase contracts, but rather on the true construction of the registered Instruments.
- (e). with reference to *London & Blenheim* and the passage from the judgment of Paul Baker QC quoted above and the Plaintiffs’ acknowledgement that they had not seen any case on the legal impact of a requirement to pay for usage, the Walkers Defendants submitted that:
  - (i). the passage was very much in point and had been cited in Gale without any suggestion that its accuracy should be questioned or doubted.
  - (ii). the passage had also been approved and applied by Newey J (as he then was) in *De Le Cuona v Big Apple Marketing* [2017] EWHC 3783 (Ch.).
  - (iii). the facts of *London & Blenheim* involved an initial grant where payment both for exercise of the right and by way of contribution to the costs of maintenance and landscaping was expressly provided for. Yet no challenge was brought to that initial grant, and neither the Judge, nor the Court of Appeal, said anything



whatever calling into question its validity.

- (iv). as referenced in *Gale* at [9-131] alongside *London & Blenheim, Montrose Court Holdings v Shamash* [2006] EWCA Civ 251 was another case in which the servient owner whose land was subject to a parking right was entitled to impose fees for parking in exercise of an easement. There the first instance judge so held and declared; neither the appeal nor the cross-appeal questioned those aspects of his decision; and nothing whatever was said in the Court of Appeal calling them into question.
- (f). it was also not an obstacle to the grant of a proprietary right and easement that the dominant owners' use was non-exclusive and shared with a range of other users (an obvious example of such a right was a right of way along a private road shared with a number of other users). The Walkers Defendants submitted that the present case was no different from the position in *Regency Villas* where at the time of the grant the relevant facilities were already enjoyed by the occupiers for the time being of eighteen timeshare apartments. The Walkers Defendants cited a passage from the judgment of HHJ Purle QC at first instance ([2016] 4 WLR 61) where he said:
- “50. [Counsel] 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. ... the Defendants are not prevented from altering the layout 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...”
- (g). furthermore, the requirement in clause 3 of the Written Agreements that the Lot Owners exercise the Rights “in accordance with any rules and regulations in force from time to time in respect thereof” was not an obstacle to the effective grant of a proprietary right. In *Ellenborough Park*, Sir Raymond Evershed MR had noted that the right granted to walk



on the pathways was subject to restrictions in the ordinary course in the interest of the grass and the right to use the parts of the garden which were set apart for particular recreations such as tennis or bowls, was subject in the ordinary course to the provisions made for their regulation. HHJ Purle QC in *Regency Villas*, relying on and applying the dicta from *Ellenborough Park* said (at [47]) that “*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...*” In the present case, the provisions for reservations within the Golf Playing Rights and the Tennis Court Rights could not sensibly be construed as mandatory requirements, such that in the absence of a reservation system being operated by the servient owner the rights automatically lapsed. If that were the case, the grantor (or its successors) could have immediately negated the Rights. The proper construction of the Golf Playing Rights was that their exercise was subject to complying with such provisions (if any) of the nature specified as the servient owner shall stipulate from time to time. So far as concerns the Tennis Court Rights, the express terms of the grant were readily operable without difficulty. At times when there were hotel guests and a reservation system was in operation, the prioritisation was to be as stated. If there were no hotel guests, or there was no reservation system in operation, the rights could be exercised in accordance with the general principles of reasonable conduct and give and take between dominant and servient owners. In respect of both the Golf Playing Rights and the Tennis Court Rights, the construction put forward by the Plaintiffs that the absence of a reservation system would negate or otherwise suspend the operation of these Rights would involve the Court reaching a finding which directly contradicted an express clause of the Written Agreements, in particular, clause 3 which provided that the Rights could only be suspended by Cayman Hotel or its successors in title for the purpose of “*carrying out repairs or maintenance*”. There was no provision for Cayman Hotel or its successors otherwise to suspend the operation of the Rights, merely because they decided to cease operating a reservation system.

- (h). the power of Cayman Hotel or its successors under clause 3 to modify the facilities or their location was also no obstacle to the effective grant of a proprietary rights. The Walkers Defendants referred to a passage in *Gale* and a number of authorities which they submitted supported the proposition that similar and indeed on occasions more extensive powers to



modify had been held not to prevent the grant of an easement. In *Regency Villas* the fact that the grant as construed by HHJ Purle QC and the Supreme Court entitled the servient owner from time to time to modify the facilities or their location was recognised as supporting the construction of the grant as a realistic and sensible grant to have been made as a permanent proprietary right (see HHJ Purle QC's judgment at [44] and Lord Briggs's judgment at [26]). Gale noted (at [13-21]) that (underlining added by the Walkers Defendants):

*"It is quite common, particularly in leases, to find the grant of an easement qualified by a reservation of a right to develop or alter the servient tenement in such manner as the servient owner shall think fit, notwithstanding that the access of light or air to the dominant tenement and (sometimes) any other easement appurtenant to the dominant tenement may be obstructed or interfered with. The effect of such a provision is a matter of construction in each case but the court will lean against a construction which would entitle the servient owner to deprive the dominant tenement of all access of light and air or the whole benefit of any other easement such as a right of access."*

- (i). the Plaintiffs' contention that the absence of a positive covenant to operate the resort resulted in the Rights being precarious echoed an argument which had been heavily relied on by the appellants and rejected in *Regency Villas*. The Supreme Court did not accept that the (inferred) fact that, at the time of the grant, the parties had a shared expectation that the servient owner would in fact continue to undertake the management, maintenance and repair of the servient tenement was inherently incompatible with the grant constituting an easement. Lord Briggs (at [69]) had held that:

*"There is therefore nothing inherently incompatible with the recognition of a grant of rights over land as an easement that the parties share an expectation that the servient owner will in fact undertake the requisite management, maintenance and repair of the servient tenement, and of any structures, fittings or even chattels located thereon. The only essential requirement (imposed to prevent land being burdened to an extent contrary to the public interest) is that the servient owner has undertaken no legal obligation of that kind to the dominant owner."*

141. As regards the Failure to Constitute an Easement Point and the Plaintiffs' argument that the Rights were inconsistent with the mere passivity requirement, the Walkers Defendants accepted that there were some recreational facilities which necessarily required active and continuous management (and noted the examples given by Lord Briggs in *Regency Villas* at [72]) but submitted that none of the Rights fell into that category:



- (a). whilst no doubt Cayman Hotel (and indeed the Plaintiffs' other predecessors in title) anticipated that they would continue to spend significant sums on managing and maintaining the facilities that were the subject of the Rights, nothing within the terms of the grant obliged them so to do. Notwithstanding that the Plaintiffs currently choose not to maintain some of the facilities granted by the Rights (the golf course and the surviving tennis court), by virtue of their property rights over the servient parcels, the Lot Owners remained entitled to exercise them, and if necessary in order to enjoy those expressly granted rights, exercise the necessary step-in rights in support of them.
- (b). the Lot Owners might take such steps as were necessary to render the golf course into a playable state. Several of the Walkers Defendants' witnesses gave evidence to the effect that the Lot Owners were likely to be willing and able to do so. For example, Mr Hepburn in his second witness statement said (at [11]) as follows:

*"In paragraph 70 of her witness statement, Ms Doak [one of the Plaintiffs' witnesses] suggests that the Britannia owners are unwilling to maintain the Golf Course. At no stage to my knowledge did the Plaintiffs offer the Defendants the chance to step in and exercise their rights to maintain the Golf Course and by their initial actions, and subsequent inaction, the Plaintiffs have caused the condition of the Golf Course to deteriorate to an alarming extent. I am confident that the Executive Committees of the Stratas, and in particular the Executive Committees of Lion's Court and King's Court (with whom I regularly discuss matters pertaining to the Golf Course) would be able and willing to undertake such maintenance as is required to maintain the Golf Course in a playable condition. Contributions to such*

*ongoing costs would be collected from unit owners (as was previously done with the Beach Club fees)."*

- (c). the Walkers Defendants submitted that this evidence was not surprising. There are approximately two hundred residences which were purchased for substantial (in some cases, very substantial) sums, whose amenity, as well as value, was seriously diminished by the Lot Owners being precluded from exercising the Rights. Whether or not the golf course would thereby regain all its former glory was not to the point. So long as reasonable steps were taken to render the golf course effectively playable, the Lot Owners were entitled to take them, in order to be able to exercise their Golf Playing Rights (which never were exclusive rights, but nevertheless were of real value). If water was needed, they may supply it; if electricity is needed, they may if necessary use a generator.

- (d). in *Regency Villas* the right to use a golf course was held (at first instance and in both appeals) not to infringe the mere passivity principle and the Walkers Defendants relied on the judgment of Lord Briggs on this point at [66]-[73]. As Lord Briggs had stated (at [71]) (underlining added by the Walkers Defendants):

*"The appellants submitted none the less that the facilities grant was no more than illusory as a grant of rights of practical utility for an unlimited period unless the owners for the time being of the park undertook responsibility to the dominant owners for the substantial cost of management, maintenance, repair and renewal. They relied on Lord Scott's example of the swimming pool, although it was only an obiter observation in a case about parking rights. The courts below rejected this on the facts, concluding that some meaningful use, even of the golf course and the swimming pool, could be enjoyed by the RVOC timeshare owners, even if the appellants or their successors as owners of the park were altogether to discontinue the business of operating the relevant part of the park as a leisure complex. Greens and even fairways on the golf course could be mown. The swimming pool could be kept full of water. Timeshare owners could provide their own nets for the tennis courts, hoops for the croquet lawn and (if necessary with the use of a generator) lighting for the squash courts. The appellants submitted with force that this would be nothing like the proffered use of a high-quality leisure complex held out to prospective timeshare owners in and shortly after 1981, but nothing in their submissions provided a basis upon which this court could properly depart from the factual findings of the courts below that some less attractive but still worthwhile use could be made of the facilities in those circumstances. This conclusion, that meaningful use of the rights granted did not depend upon the continued provision of management, maintenance, repair and renewal by the servient owners, is also sufficient to confirm that use of the facilities was granted by way of right, rather than merely by way of temporary offering, revocable by the servient owners at any time, by discontinuing management and maintenance."*

- (e). Lord Briggs' dicta could be applied directly to the golf course and tennis courts in the present case. There was the additional difficulty here with respect to the tennis courts arising from the fact that it was covered by large containers. But that could be resolved by using a fork lift truck and, in any event, the placing of such containers on the servient land over which the Lot Owners had rights would constitute a substantial interference with those rights entitling the Lot Owners to recover any resulting losses. The Beach Club Rights gave Lot Owners the right to *"To enter upon the beach club property and enjoy the restaurant, beach and water sports facilities ..."* The opportunity to enter on and use the beach, particularly a private beach in Grand Cayman, was of obvious value and the evidence showed that access could be obtained via a narrow public footpath (or Palm



Heights). As regards the restaurant, the Plaintiffs were under no obligation to open or operate a restaurant, but if they chose to do so, the Lot Owners could attend and use it (obviously upon payment for the food consumed). This was a right of real value (while most restaurants solicit custom from members of the public, some restaurants are members only) although at times when there was no restaurant operating there was nothing for the Lot Owners to use and no relevant step in rights in such circumstances.

- (f). the Walkers Defendants rejected the Plaintiffs submission that the Lot Owners could make no meaningful use of the Rights and the facilities to which they related without management and maintenance being performed by the servient owner. Meaningful use of the rights in *Regency Villas* did not depend on the continued provision of management, maintenance, repair and renewal by the servient owners.
- (g). in this case, even after a hypothetical total closure of the resort:
  - (i). the private beach area (above the high water line) on 12C 27 could be beneficially used, without any operational restaurant or watersports facility, by the Lot Owners (including, if they so wished, by bringing their own watersport equipment with them), affording them at least “*some meaningful use*” of the Beach Club Rights.
  - (ii). the Britannia golf course could be kept or rendered playable by (but for the Plaintiffs’ turf stripping activities and removal and/or damage to the pump and irrigation system) mowing, rolling and other basic maintenance, affording the Lot Owners at least “*some meaningful use*” of the Golf Playing Rights.
  - (iii). the Lot Owners could make “*some meaningful use*” of the eastern tennis court, by (if necessary) moving the metal containers and other items currently stored there away from the court area, providing their own net, and perhaps netting around the northern and western sides of the court to keep stray tennis balls within the court and off the Highway.

***Discussion and analysis - do the Instruments create easements within the meaning of and pursuant to section 92 of the RLA?***

*Conclusion*



142. In my view, the Instruments were effective to create easements. However, the Rights have not been properly registered as easements and do not and cannot bind the Plaintiffs in the absence of an order rectifying the Land Register by adding a reference to there having been a grant of easements. I shall explain my reasoning by reference to the various arguments relied on by the Plaintiffs.
143. Before dealing with the merits of the Plaintiffs' submissions and the responses of the Walkers Defendants (and White Dove), it is convenient to deal in general terms with the Plaintiffs' core challenge to the Rights as property rights which were intended to subsist beyond the life and continuation of the Hyatt Hotel or a successor hotel on the Plaintiffs' land. It seems to me that the language of the Written Agreements makes it clear that the parties intended that the Lot Owners be granted rights (to use the relevant facilities and the land on which they were located) which would subsist indefinitely and permanently attach to the land on which the facilities were located and to the Lot Owners' properties. Recital 6 talks in terms of "*incumbrances against the lands on which*" the facilities are situated with the intent that the Rights become a registered appurtenance in the Lot Owners' titles. Clause 2 of the Written Agreements talks in terms of granting rights with the intention of binding the land on which the facilities are located. Clause 2 does qualify the reference to the land being bound by adding in parenthesis "*so far as practicable*" but this reference to practicalities does not affect the main idea that the land itself is to be subject without limitation in time or otherwise to the Rights. The Instruments are prepared so that they and the Rights can be registered in the incumbrances section of the registered titles for the land on which the facilities are situated. The statement in the recitals of the parties' intentions and the drafting of the Written Agreements and of the First Documents speak and refer to important long term rights which are to be binding on third parties and not just Cayman Hotel. The Instruments, and these provisions in particular, do not fit with the Plaintiffs' construction and approach. In my view, it would be wholly inconsistent with the Instruments and the parties' intentions to be derived therefrom to conclude that Lot Owners were only being given personal contractual rights against Cayman Hotel which were defeasible in the event of the cessation or withdrawal of operations by the Hyatt Hotel and were only of utility for so long as the Hyatt Hotel or a successor continued in operation.
144. I accept that the Rights are drafted by reference to the Cayman Hotel and the Hyatt Hotel and anticipate that a hotel will continue to operate and have paying guests who will wish and be entitled to use the facilities. But the Rights are not in their nature and are not drafted so as be



dependent upon the continued operation of the Hyatt Hotel (or another hotel). Essentially, they are rights to have access to a beach (one of the best known and sought after beaches on the Island), to play golf on a golf course and play tennis on tennis courts in a particular location and, as I have already explained, the Instruments clearly indicate an intention to grant long term and enduring property rights which were to subsist whether or not the Hyatt Hotel or a successor hotel remained in operation.

145. It seems to me to be likely that at the time when the Instruments were entered into and the Rights granted it was assumed (or there was an expectation) by all parties that the Hyatt, as a major international hotel chain and brand, would continue to operate on the site for many years and that if it ceased to do so another hotel would take over. It was therefore assumed and anticipated that maintenance and repair of the facilities would be taken care of by the hotel (indeed clause 3 of the Written Agreements makes that assumption explicit by giving Cayman Hotel and its successors the right to modify the facilities or their location for the purpose of carrying out repairs or maintenance). It is also likely, although there is no evidence on this point, that the hotels regarded the expense incurred in maintaining the facilities as being justified because they needed to offer such facilities in order to be able to attract guests and regarded the revenue generated by the relatively modest fees charged to hotel guests for the use of the facilities as being a way to generate additional revenue from guests, which may, or may not, have been seen as making a minor contribution to the maintenance and repair costs. The requirement to pay the fees and charges in order to exercise the Rights may therefore have been understood as involving indirectly a small contribution towards the costs of maintenance and repair of the facilities, but the Instruments did not include a direct and explicit obligation on the Lot Owners to make such a contribution.
146. The position in this case is similar, although not identical, to that in *Regency Villas*. In *Regency Villas* the grantor of the rights did covenant to maintain the sporting and recreational facilities but this only had contractual effect and no steps were taken to ensure that successors assumed a similar obligation. In addition, the right to use the sporting and leisure facilities was unconditional and the grantees of the rights were not required to make payments in order to use the facilities. They were also not under an obligation to contribute to the cost of operating, maintaining, renewing and replacing facilities. Furthermore, there was a separate right of way over the roadways at the site. Lord Briggs said (at [11]) that it appeared that the promoters of the development of the park and parties envisaged that the operation of the leisure complex within the park as a golf course and country club would attract sufficient paying members other than the



timeshare owners to fund the ongoing operating costs. But that expectation was not fulfilled. Lord Briggs concluded (at [32]) that a common intention was to be inferred that the parties were content to take the commercial risk that the leisure facilities in future would fail to be self-financing.

147. The failure to make successors of the grantor liable to maintain the sporting and recreational facilities did not result in the facilities grant being treated as only being available and of utility for as long as the grantor remained the owner of the park or vulnerable to an early demise on the sale of the park. Nor did the existence of defeated expectations that someone other than the grantees would be responsible for and undertake the necessary maintenance and repair work affect the validity of the grant as easements. So in the present case, it does not follow from the references to Cayman Hotel and the Hyatt Hotel in the Written Agreements, and the existence of an assumption and expectation that the Hyatt Hotel or a successor would continue to operate on the site and maintain the facilities, that the Rights were dependent on and intended only to subsist for so long as the Hyatt Hotel or a successor did continue in operation.
148. There is no doubt that when recreational rights are granted as easements and they relate to substantial facilities meant to be used by many parties, as is now clearly permitted after the strong indorsement in *Regency Villas*, and provision is not made for the continued upkeep and maintenance of the facilities (for example by establishing a chain of covenants assumed by and binding on successive owners of the servient land) considerable difficulties will be faced by the owners of the dominant land if and when the owners of the servient land decide, as they are at liberty to do, not to continue to pay the costs of the upkeep and maintenance. No doubt, ideally, it would be desirable in the case of such recreational rights to address this issue clearly in the documents. But, as *Regency Villas* makes clear, if the parties to the original grant choose not to deal with the issue of the costs of maintenance and upkeep, they are likely to be taken, depending of course on the facts of each case, to have decided to assume the risk that the servient land owners' circumstances will change in the future and that at that point there will either need to be a new agreement as to how to cover the costs or the owners of the dominant land will have to decide what maintenance to undertake and assume the costs themselves – but, subject to the need to show that in these circumstances, as I discuss further below, that the owners of the dominant land can (or can reasonably be expected to be able to) make “*some meaningful [or worthwhile] use*” of their Rights and the facilities to which they relate, these problems do not, as a matter of principle, undermine the existence of valid easements.



*The Failure to Satisfy Mandatory Requirements Point*

149. The first issue is whether the Lot Owners' failure to use the form prescribed for the granting of easements of itself prevents the Rights being treated as validly having been registered and as easements or incumbrances that bind the Plaintiffs pursuant to section 23 of the RLA. In my view, a failure to use the prescribed form does not of itself have that effect. I reject the Plaintiffs' submission that the use of the form prescribed by the Registrar for the granting of an easement is mandatory.

- (a). in my view, section 105(1) of the RLA applies to the grant of easements and qualifies the requirement in section 92(1) to use the prescribed form for that purpose. Its effect is that the right to reject an application to register a disposition because of a failure to use the prescribed form is vested in the Registrar. If the Registrar decides to accept the application based on the forms used by an applicant, there can be no objection by others based on a failure to use the prescribed form. Section 105(1) states, as the Walkers Defendants point out, that every disposition must be effected using the prescribed form or "*such other form as the Registrar may in any particular case approve.*" Registration of a disposition (whether by way of registration of an easement in the incumbrances section of the register or registration by noting a restrictive agreement in the incumbrance section of the register) is evidence that approval has been given, and confirms that the form used to apply for registration has been approved, by the Registrar.
- (b). this view, and this construction of section 105(1) of the RLA, is consistent with the evidence of the Registrar. As I noted above, she confirmed during her cross examination that when adapted forms are filed, it is for the relevant official at the Land Registry dealing with the application to decide whether or not to accept the form and make the relevant entry on the register. She considered that the Registrar had a discretionary power to accept the application and make the entry, as well as approve amendments to the Land Registry's forms and that, in the present case, the Registrar was to be treated as having approved the use of the (adapted) form used by the Lot Owners when making their application.
- (c). it is true that the Registrar's evidence was given with respect to applications for noting restrictive agreements, for which the Land Registry has not prescribed a form, but I do not



consider that the position is different with respect to forms used for applications to register an easement. Section 105(1) applies to every “*disposition*” of land, which as noted above covers “*any act inter vivos by a proprietor whereby his rights in or over his land ... are affected*” and therefore includes both the granting of an easement and entering into a restrictive agreement (both of which must be made by or contained in an “*instrument*”). Section 105(1) gives the Registrar the unqualified power to approve and permit the use of any form of application made to her.

- (d). in my view *Paradise Manor* is of no assistance to the Plaintiffs. I have summarised the facts above. Henry J.A., in the passage relied on by the Plaintiffs, was dealing with the question of whether a power of sale under the *unregistered* debenture was effective and could be exercised and relied on by the bank. It was the fact that the debenture was unregistered that was key and that prevented the power of sale granted therein from being enforceable. There had been no attempt to register the debenture, and so no issue arose as to the form of the debenture used and whether the use of the wrong form would prevent the rights granted to the bank being enforceable. The reference in Henry J.A.’s judgment to the need for the debenture to be in the prescribed form was purely descriptive (of the basic statutory requirement to use the prescribed form) but incomplete (since there was no reference to the effect of section 105(1)).
- (e). furthermore, I agree with the Walkers Defendants (and White Dove) that Collett JA’s statement in *Connolly* that in his view “*the use of a wrong form makes little difference*” is also consistent with the approach I have adopted.
- (f). accordingly, to the extent that the entries made by the Registrar on the register, after having treated the forms and documents filed as sufficient to permit and justify the making of such entries, are sufficient to constitute and are to be treated as the registration of the Rights as easements, the failure to use the form prescribed for the grant of an easement does not affect the validity and effectiveness of the registration.
- (g). however, as I explain below, I have decided that the entries made by the Registrar on the register are not sufficient to constitute and be treated as the registration of the Rights as easements. It follows that the Registrar cannot be treated as having approved the Instruments as being acceptable for the purpose of the registration of easements. Indeed, in her evidence, the Registrar explained that she considered that the Land Registry in this case had followed the practice for dealing with applications to note restrictive agreements on the register (she noted in paragraphs 6 and 7 of her Amended Witness Statement that



when parties present documents to the Land Registry which appear to include a restrictive covenant or a negative covenant, the Crown servants, agents and/or employees of the Land Registry /Registrar of Lands are required to and will make a note of the restrictive agreement in the Land Register in the incumbrances section). There is, unsurprisingly since no application to register easements was made, no suggestion that the Registrar considered at the time that the application was made whether to accept the Instruments as being sufficient for the purpose of registering easements. Having said that, I note that the Registrar does state in [9] of her Points of Defence that “*the grant of the ... Rights appears to include both covenants which are negative in nature and easements.*” It therefore seems that the Registrar has acknowledged that the Instruments may be treated, no doubt subject to the decision of the Court in these proceedings, as including easements.

- (h). in my view, the form and terms of the Instruments as they relate to the Rights are substantially similar to the prescribed form for the grant of easements so that the Registrar would have been and is entitled to accept them as sufficient to permit and justify the registration of the Rights as easements. I accept the submissions of the Walkers Defendants (and White Dove) on this issue. I do not consider that the failure to use the word “*easement*” or the failure to refer to the grant of easements in the Written Agreements is a fatal flaw although I accept that it would be reasonable for the Registrar to ask for a confirmation from the parties that they had granted and wanted to register easements before making entries on the Land Register (a clear reference in the documents granting the relevant rights to the fact that the parties intend to grant easements is obviously desirable and preferable). In my view, it is also likely that the Lot Owners would be entitled to require the registration of the Rights as easements although I do not want to offer a final view on whether, if the Registrar chose not to register the Rights as easements because of alleged inadequacies in the form of the Instruments, I should nonetheless order her to do so. Before making such an order I would wish to give the Registrar the opportunity to make submissions and to explain and seek to justify any such decision.
- (i). finally, I would note that the parties did not raise or make submissions as to whether there could be a challenge to the Registrar’s decision to accept an application which did not use the prescribed form (by way of judicial review or otherwise) so that issue does not arise in this case.



150. But the Plaintiffs' submissions give rise to two further and related issues. First, does, as the Plaintiffs' submitted, the failure to register the Instruments (or Rights) as easements mean that the Instruments were not properly registered (so that the Rights cannot bind the Plaintiffs as easements pursuant to section 23 of the RLA since they were not "*shown in the register*" as easements as required by that section)? Secondly, can the Rights be treated as easements binding on the Plaintiffs under section 23 where, in accordance with the Lot Owners' (and Cayman Hotel's and Ellesmere's) request, the Registrar accepted an application for the noting of restrictive agreements and only made the entries required for and consistent with a restrictive agreement?
151. The Plaintiffs submitted that because the Instruments were not registered *as easements* in the incumbrance section of the title of the burdened there had been a failure to comply with section 92(4) of the RLA, so that the Rights could not be treated as validly registered. Section 92(4) required that the "*grant or reservation of the easement shall be completed by its registration as an incumbrance in the register of the land burdened and in the property section of the land which benefits, and by filing the instrument.*" Section 37 of the RLA required that "*every attempt to dispose of [registered land] .... otherwise than in accordance with [the RLA]*" was ineffective "*to create ... or affect any estate, right or interest in the land.*" The Plaintiffs argued that the need for a reference on the register to the incumbrance being an easement was confirmed by the Registrar's practice as set out in paragraph 4.11.2 of the Manual which showed that the words "*grant of easement*" were to be included under the nature of incumbrance column. The Walkers Defendants (and White Dove) responded by saying that there was no requirement for registration "*as an easement.*" Section 92(4) of the RLA only required there to be a registration of the relevant rights and instruments in the incumbrance section of the title of the land burdened and in the property section of the land which benefits and that it was sufficient if the rights were described as incumbrances.
152. It seems to me that the critical issue is whether the entries made in the incumbrance section of the register for the Properties (the record) are sufficient to enable the Rights to be treated as "*incumbrances shown in the register*" for the purpose of section 23, so that the Plaintiffs would be bound by the Rights.
153. In order to decide this issue, it is first necessary to consider whether the Rights have been entered on the Land Register in the manner required for easements. As the Walkers Defendants (and



White Dove) pointed out, the *statutory* requirement with respect to *completion* of the registration of an easement (in section 92(4) of the RLA) was only that the “*grant or reservation of the easement shall be completed by its registration as an incumbrance in the register of the land burdened and in the property section of the land which benefits, and by filing the instrument.*” There is of course an additional statutory requirement (in section 92(3)) with respect to the content of the instrument granting the easement (namely that it clearly specify the nature of the easement, the period for which it is granted and, any conditions, limitations or restrictions intended to affect its enjoyment; the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened; and the land which enjoys the benefit of the easement and that the instrument should, if required by the Registrar, include a plan sufficient in the Registrar’s estimation to define the easement). However, the Plaintiffs did not challenge the effectiveness of the Rights as easements on the ground that the Instruments failed to satisfy section 92(3) of the RLA.

154. But the Manual sets out in greater detail than section 92(4) the practice adopted by the Registrar:

- (a). as regards easements, as is explained in paragraph 4.11.2 of the Manual, the Land Registry’s practice is to include *in the nature of incumbrance* column the words “*grant of an easement*” or “*reservation of an easement*” in the incumbrance section and there also will or may be an entry on the Registry Map to show the location of the easement (and there will also of course be a corresponding entry in the appurtenances panel of the dominant tenement). I have quoted paragraph 4.11.2 above but it is helpful to set out here the relevant statements made (underlining added):

“In the ‘Nature of incumbrance’ column of the incumbrances section of the register for the land burdened by the easement (servient tenement), a reference is made to the instrument or the transfer or lease which creates the easement, and the words ‘Grant of easement’ or ‘Reservation of easement’ are added. In the column headed

‘Further particulars’, the reference of the parcel, strata lot or lease benefiting from the easement is entered, along with a brief description of the easement; for example, ‘A 6-foot wide pedestrian Right of Way shown on Registry Map in favour of 24E 210’. If the description of the easement is lengthy it will usually be necessary to add, ‘For further details see instrument’.”

- (b). as regards restrictive agreements, as is explained in paragraph 4.11.7 of the Manual, a reference is made to the restrictive agreement *in the further particulars column* in the



incumbrance section of the register of the burdened land. Paragraph 4.11.7 states as follows (underlining added):

*“When an instrument of transfer contains a restrictive agreement by one proprietor restricting the use of his land for the benefit of the proprietor of other land, or when an instrument is presented other than on transfer, which creates such a restriction, then the restrictive agreement must be entered in the register. This is done by entering in the ‘Further particulars’ column of the incumbrances section of the land burdened by the restrictive agreement the words ‘Subject to restrictive agreement instrument no...’ and, if space permits, brief details of the restriction may be added. No entry number is given.”*

155. In this case, as noted above, the following entries are recorded:

| Entry No. | Date     | Instrument No | Nature of Incumbrance | Further Particulars                                                    |
|-----------|----------|---------------|-----------------------|------------------------------------------------------------------------|
| 8         | 02/06/92 | 3063/92       | Rest. Agmnts          | The Rights as described in filed Instrument in favour of 12D 25, 38-40 |

156. As I have noted above, these entries appear not to be in accordance with the practice for recording restrictive agreements described in the Manual since the reference to the restrictive agreements appears in the nature of incumbrance column rather than the further particulars column (and the words “*subject to*” are not included). The reference to the restrictive agreements is included where the reference to easements would appear, according to the Manual.

157. Section 92(4), as I have said, requires in order for there to be a completed entry on the register, that (as regards the entry to be made in the register of the burdened land) the “*grant or reservation of the easement shall be completed by its registration as an incumbrance in the register of the land burdened.*” It seems to me that this requires an entry to be made in the incumbrances section of the register which records that an easement has been granted over the burdened land. Section 92(4) requires the registration of the easement as an easement – “*it*”, that is the easement, has to be registered. The preferred way of doing so is for the entry in the register to use the word “*easement*” and this is what the Registrar’s practice in the Manual requires. As I have noted, paragraph 4.11.2 of the Manual states that the practice is to include words “*grant of an easement*” or *reservation of an easement*” in the nature of incumbrance column and that an additional brief



description of the easement is to be included in the further particulars column. It seems to me that the Registrar's practice represents the gold standard and, as I say, the preferred approach. However, in my view, it would also be sufficient to comply with section 92(4) of the RLA if the entry made by the Registrar contained a description of the incumbrance which makes it clear, by a description of rights granted over the servient land, that an easement had been granted and registered. Requiring that the word "*easement*" be used would be an unjustifiably technical and narrow approach. The purpose behind section 92(4) is to ensure that the register clearly records that an easement has been granted and registered as such so as to give notice to those who inspect the register and to confirm that the rights granted have the benefit of the state guarantee. Under the registered land regime the Land Register is the official record of rights to and over the registered title and it is important that entries be understandable and reliable. Parties dealing with registered land or searching the register must, when considering what has been registered, and subject to the availability and effect of rectification, be able to rely on entries made in the register. So it must be clear from any entry that an easement has been granted and registered. Provided that the entry allows the reader to see that rights in the nature of an easement have been granted and registered, the purpose of the section is met.

158. In my view, the entry made in the present case in the incumbrances section of the register does not record or constitute the registration of easements. In accordance with the request made by those applying for registration, the register records that the nature of the incumbrance which the Registrar has noted is a restrictive agreement. This makes clear what the Registrar considered was being recorded in the register. As I have said, parties searching the register must, when considering what has been registered (subject to rectification of the register), be able to rely on entries made in the register. To treat an entry which describes the recorded incumbrance as a restrictive agreement as an effective registration of an easement (even the noting of a restrictive agreement and the registration of an easement) would result in the register being misleading and inconsistent with this principle. As is noted at paragraph 5.1.1 of the Manual:

*"The processing of instruments is the core function of the Land Registry and it is important to the integrity of the land register and the public confidence in it that only instruments which are in proper registrable form are accepted for registration and used as the basis for altering the land register..."*

159. It is true that the Land Registry did not precisely follow the practice as set out in the Manual since where a restrictive agreement is being noted an entry is not usually included in the nature of



incumbrance column to the Instruments being restrictive agreements. It may be that the practice described in the Manual is intended to differentiate between the registration of an easement (by a reference to an easement being made in the nature of incumbrance column) and the noting of a restrictive agreement (by a reference to a restrictive agreement being made in the further particulars column). But I do not consider that the inclusion of the reference to restrictive agreements in the nature of incumbrance column is material or affects the analysis of what has been recorded in the register. There is also reference to the Rights as described in the Instruments. Reading the Instruments would reveal the grant of rights which though not described as easements were capable – or perhaps at any time before the handing down of the UK Supreme Court's judgment in *Regency Villas*, arguably capable - of constituting easements. However, in view of the clear reference to the recorded incumbrances being restrictive agreements, and there being no statement or indication that other incumbrances are also being recorded and registered, I do not consider that this reference can be treated as evidence that the Registrar intended to and did register the Rights as easements or as sufficient to constitute the registration of the Rights as easements (in addition to the noting of the restrictive agreements). This view is consistent with the Registrar's position in her Points of Defence and evidence in these proceedings (although I note that the Registrar did say, at [9] of her Points of Defence, that "*the grant of the said Rights appears to include (at [9]) both covenants which are negative in nature and easements*").

160. There is an important reason for requiring that a clear reference be made to the fact that an easement is being registered. This is because an easement is to be registered in and not merely noted on the register and registration of the easement results in the rights granted benefitting from the state guarantee of validity. Therefore, registration of an easement has a particular substantive legal effect which suggests that the entry recording the registration of an easement should be explicit and clear. Noting of the restrictive agreement also has a substantive effect (in essence, giving notice to and by operation of section 27 of the RLA binding registered proprietors) but the substantive effect is different from that of registration of an easement.
161. The Walkers Defendants and White Dove argue that the reference to the Rights, to the Rights being in certain identified instruments and to the fact that those instruments were available for inspection amounts to registration in substance. In other words, it was possible to ascertain from reading the entries in the incumbrance section of the register and by reading the Written Agreements that rights had been granted which, properly understood constituted easements. While this seems to me an important point which is relevant to the issue of rectification of the



Land Register, it is not sufficient to overcome the statutory requirements for properly completing the registration of an easement.

162. In my view therefore, it cannot be said that the Rights (and the Instruments) have been entered on the Land Register in the manner required for easements. The grant of the Rights as easements, assuming that they can otherwise be treated as easements, has not been completed by registration in accordance with section 92(4) of the RLA.
163. Furthermore, it seems to me that it follows that the Rights (and the Instruments) cannot without more, unless rectification of the register is permitted, be treated as binding on the Plaintiffs as easements pursuant to section 23 of the RLA. Section 23 stipulates that a registered proprietor acquires an absolute title “*subject ... to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register.*” The reference to “*other incumbrances ... shown in the register*” must, in my view, refer only to incumbrances such as easements or restrictive agreements whose registration (or noting) has been properly completed. For rights constituting easements to be binding under section 23, their registration must be completed in accordance with section 92(4) of the RLA. While the reference to “*other incumbrances*” is to each of the rights which is capable of being recorded in the incumbrances section of the register, what is “*shown in the register*” is the particular right which has been properly entered in the register and whose grant has been completed by the appropriate entries.
164. The Walkers Defendants noted that the titles to the Properties were first registered on 14th August 1984 (the parcels now comprised in 12D 108 40) and 29th October 1986 (12C Parcel 2741); that the Rights were both created and registered after this time (between 1992 and 2001) and that the Plaintiffs acquired ownership of the registered title to the Properties on 25th August 2016. They argued that even if the legal characterisation of the Rights in column 4 of the incumbrances section of the Land Register for the Properties as “*Rest. Agmnts*” was inaccurate, because the Rights take effect as easements, nonetheless, the Plaintiffs remained bound by the Rights by virtue of them being “*other incumbrance[s] shown on the register.*” The incumbrance section referred to the Rights, which as easements are “*incumbrances*” and this was sufficient to engage section 23. But, as I have noted, I do not accept this argument. It cannot be right that, absent rectification, a registered proprietor takes subject to and is to be treated without more as bound by an easement which has not been properly registered merely because the Instrument containing the easement is referred to and available for inspection (and there is a general reference to rights). While, as I explain below, these circumstances are highly relevant to the question of whether



rectification should be granted, they do not result in a registered proprietor being bound by a non-registered easement under section 23 of the RLA.

165. It follows that even if the Rights are properly characterised as easements, as the Walkers Defendants (and White Dove) contend, they do not and cannot bind the Plaintiffs unless the Land Register is amended by rectification to add a reference to there having been a grant of easements. Nonetheless, it is necessary to go on to consider the dispute over the nature of the Rights since if they are properly characterised as easements, the claim for rectification will need to be addressed (and, of course, I need to consider this issue in case I am wrong on the interpretation of sections 92(4) and 23 of the RLA and the effect of the failure to record the granting of easements in the incumbrances section of the register).

*The Failure to Satisfy Section 2 Point*

166. The Plaintiffs argued that because the Rights were conditional on payment of various fees and charges, until the fees and charges were paid, the Lot Owners had no right to use the land on which the facilities to which the Rights related were situated. As they put it, by means of the Rights, all that the Lot Owners acquired was a *right to acquire* a contractual licence to use the beach club, play golf and play tennis, not a direct right to “*use the land...or to restrict its use.*” This argument was closely linked to, and indeed was another formulation of, the Plaintiffs’ further argument that the content of the Rights was such that they effectively granted Lot Owners *the option* to participate in certain facilities on the resort, upon payment of a fee. These arguments rely on the proposition that the Instruments envisage a two stage process whereby there is initially a unilateral agreement which imposes no immediate obligation on either party to do anything, which is subsequently converted into a grant of the Rights upon payment of the fees and charges. Initially, the Lot Owners have the choice of whether or not to pay the fees and charges and only when they exercise that choice and make the payment is the grant of the rights made and does the grant become effective. Ultimately, this is a question of the construction of the Instruments and the Rights and, in my view, the Instruments and the Rights were not drafted so as to operate and should not be interpreted as operating in this way. The Rights are drafted so as to take immediate effect. Furthermore, the Rights are to be registered immediately. They are immediately to be entered in the incumbrances section of the register. There is no indication that the Instruments are initially to be treated as involving a two stage process pursuant to which initially no rights are created or granted. The Written Agreements incorporate an unqualified “*grant*” of the Rights. In addition, the fees and charges which the Lot Owners are required to pay



do not, in my, perform the function of a payment *for the grant* of the Rights. They arise as part of and are incidental to the exercise of the Rights. The Rights are granted to Lot Owners in return for and pursuant to their purchase of their properties. The requirement to pay the fees and charges is not, when the Written Agreements are properly construed and understood, a separate pre-condition which needs to be satisfied before the grant takes effect. Indeed, no payment is required in relation to some of the Rights. The Golf Club Rights can be exercised *without* the payment of green fees or other dues save for cart fees, which can in be treated in my view as *de minimis*.

#### *The No Intention to Bind Successors Point*

167. In my view, the submissions of the Walkers Defendants (and White Dove) on this issue are to be preferred. It seems to me to be clear, as the Walkers Defendants (and White Dove) contend and applying the principles of contractual interpretation I have summarised above, that the Instruments (and in particular, the terms of the Written Agreements) evidence an intention that the Rights were property rights binding on Cayman Hotel's successors in title. This is what a reasonable person would have understood the contracting parties to have meant by the language used, bearing in mind the factual background (ignoring any evidence as to the subjective and private intention of some of the parties).
168. I accept that the fact that the parties intended the Instruments and the Rights to be registered under the RLA in the incumbrances section of the registers for the Properties, and the language used in the Written Agreements (in particular the statement of the intention of the parties in recital 6) are a powerful indication that they intended the Rights to be binding property rights, and not mere personal rights. I also accept that the formalities surrounding the grant of the Rights and the steps taken to ensure that the Rights would be registered or noted on the Land Register were evidence that all the parties regarded registration as critical and had it in mind and accepted that the Rights were capable of and intended to be binding Cayman Hotel's successors in title.
169. There are repeated references in the Written Agreements to the fact that the Rights were to be binding on and attach to the land owned by Cayman Hotel and were not merely to be personal covenants of Cayman Hotel. This is clear from the words of the grant in clause 2 of the Written Agreements ("*Cayman Hotel .... to the intent and so as to bind (so far as practicable) parcels 23, 24 and 27 for the benefit of The Proprietors hereby grants ...*") and from the wording of recital 6 ("*Ellesmere and Cayman Hotel now wish to register covenants protecting such rights in favour*



*of all present and future owners as incumbrances against the lands on which the Hyatt Tennis Courts, the Beach Club facility and the Golf Course are situated... ”). There is also direct evidence that it was intended that Cayman Hotel’s successors were to be affected and bound by the Rights. Clause 3 of the Written Agreements deal with the right to carry out repairs and maintenance work on the facilities at and property on which the Rights are to be exercised and acknowledges that the right is needed not just by Cayman Hotel but also by its successors (“*subject at all times to the right of Cayman Hotel or its successors in title or assigns to modify the facilities or the location thereof as constitute such Rights or to suspend such Rights for the purpose of carrying out repairs or maintenance in respect thereto*”).*

#### *The Limited Duration Point*

170. I reject the Plaintiffs’ submissions on this issue. I do not consider that the Instruments can be interpreted as granting the Rights only for so long as a hotel and resort were being operated on the burdened land.
171. It seems to me that in order to conclude that the Rights were only granted for a limited period the Plaintiffs need to establish that (based on the wording in the Instruments and the relevant factual background) there was an express or implied term to that effect. I do not consider that they have been able to do so.
172. The Rights were granted in the context of the existence and operation of the Hyatt Hotel at a time when that hotel was maintaining and operating the relevant facilities and the land on which they were located and offering hotel guests the opportunity to use these facilities (together with associated amenities). But I consider that the Rights were not dependent on the continued operation of the Hyatt Hotel and were not granted on terms that required the Rights to terminate if and when the Hyatt Hotel ceased to operate. As Lord Briggs said in *Regency Villas* at [71], easements can be granted and subsist as of right if it is established on the facts of a particular case that a meaningful use of the rights granted did not depend on the continued provision of management, maintenance, repair and renewal by the servient owners. It therefore does not follow from the mere fact that the Rights were granted in a context and setting which involved the Hyatt Hotel performing the functions I have described that it must have been intended that the Rights should determine when the Hyatt Hotel ceased to operate, or that a term to this effect must be implied (having regard to the requirements for implying a term as summarised above).
173. The Written Agreements could have stated but did not stipulate that the Rights were granted only for so long as the Hyatt Hotel (or a successor hotel) operated on the land on which the facilities

were located or that the Rights terminated if and when the Hyatt Hotel (or a successor hotel) ceased to operate. By way of illustration only, I note that this approach has been adopted in other cases. The Ritz Carlton documents which have been put in evidence and put to some of the witnesses appear to adopt a different approach, at least with respect to certain of the rights granted to the proprietors (who are the Ritz Carlton equivalents of the Lot Owners in the present case). Clause 4.1 of the agreement dated 15 December 2005 (the ***Ritz Carlton Agreement***) states that (underlining added):

*“The Proprietors shall only be entitled to the use of the Hotel Use Rights, Resort Common Property and the facilities thereon, and to exercise the use of the Rights, for so long as the Proprietors of the Resort Master Strata Corporation shall contribute jointly with Hotelco their portion of the Resort Common Expenses, as hereinafter provided and only for so long as the Resort, the Resort Common Property, the Resort Strata Lots, the Sub- Strata Corporations and the Sub-Strata Common Property continues to be managed and administered by Hotelco or its designee. In the event the said management and administration by Hotelco or its designee is terminated all rights granted to the Proprietors hereunder by Hotelco may be terminated by Hotelco.”*

174. Not only is there no express stipulation that the Rights are of limited duration in the present case but there is no indication in the drafting of the Rights that this was intended. The Rights are not drafted so as to be parasitic or depend upon action taken by the Hyatt Hotel or any successor. It is accepted that hotel guests may also use the relevant facilities but the exercise of the Rights is not dependent on there being such guests or on particular activities being undertaken by the hotel. The Rights are capable of being exercised in the absence of hotel guests, in which event there will be no need for anyone other than the Lot Owners to maintain a reservation and booking system for playing golf or tennis.
175. In my view, in the case of a grant of rights which are capable of being characterised as and appear to be intended to take effect as property rights without a time limit, it will be difficult for a party to establish that the rights are in fact of limited duration or capable of termination, in the absence of clear words or a clear indication in the factual background to that effect. As I have explained, I consider that in this case the Plaintiffs have been unable to demonstrate that the Rights are of limited duration in the manner they suggest.

*The Failure to Constitute an Easement Point – do the Rights satisfy the second requirement?*



176. I accept the submissions of the Walkers Defendants (and White Dove) on this issue. In my view, the Rights do satisfy the second requirement for the existence and validity of easements.
177. I have already rejected the Plaintiffs' argument that the Rights should be construed and characterised as options. They provided benefits not available to the general public (for example the right to play golf without paying green fees) and in my view the test for accommodation set out by Lord Briggs in *Regency Villas* is clearly satisfied in this case, for the reasons given by the Walkers Defendants (and White Dove), as explained above. I make the following additional points to explain the main part of my reasoning.
178. As Lord Briggs held, it must be established on the facts of each case that the right in question has something to do with the enjoyment of the dominant tenement and the Court is required to consider the "*normal use*" of the dominant tenement, whether an actual use or a contemplated use. *Regency Villas* establishes that recreational rights such as the Rights in this can constitute and give rise to property rights as easements in appropriate circumstances. After discussing and quoting from the Master of the Rolls judgment in *Ellenborough*, Lord Briggs said as follows (underlining added):

“52 *This careful and compelling judgment of the court repays reading in full. I have cited the above passages because they demonstrate the following points. First, and contrary to the main submission for the appellants in the present case, the Court of Appeal's conclusion did not depend upon the rights granted being essentially private in nature. On the contrary, they were described as broadly similar to those enjoyed by the public over well-known parks and gardens in London. Secondly, the rights granted were essentially recreational, although they included limited sporting elements. Thirdly, the reason why the accommodation requirement was satisfied was not because the rights were recreational in nature, but because the package of rights afforded the use of communal gardens to each of the townhouses to which the rights were annexed. They provided those houses with gardens, albeit on a communal basis, and gardens were a typical feature serving and benefiting townhouses as dominant tenements.*

53 *In the present case the dominant tenement was to be used for the development, not of homes, still less townhouses, but of timeshare apartments. Although in terms of legal memory timeshare is a relatively recent concept, timeshare units of this kind are typically occupied for holidays, by persons seeking recreation, including sporting activities, and it is to my mind plain beyond a doubt (as it was to the judge) that the grant of rights to use an immediately adjacent leisure development with all its recreational and sporting facilities is of service, utility and benefit to the timeshare apartments as such, just as (although for different reasons) the grant of rights over a communal garden is of service, utility and benefit to a townhouse.*



179. In my view, the nature and location of the development in this case (originally known as the Britannia Resort) demonstrates that the Lot Owners' properties (whether stratified or non-stratified) were built to provide access to recreational facilities and would be occupied by persons seeking recreation, including sporting activities, such that their normal use would include recreation. This case does not, as *Regency Villas* did, involve the exclusive occupation of the properties by parties under timeshare arrangements, which involve relatively short term occupation by parties whose permanent residence is elsewhere and who are on vacation. In this case, some of the units were occupied by Lot Owners only when on vacation but others were occupied by permanent residents. Nonetheless, it seems to me that recreation can be regarded as integral to the use of a property located in a Caribbean Island such as the Cayman Islands, which is adjacent to one of the major recreational locations on the Island (Seven Mile Beach) and which property is granted rights to use, and marketed as part of a resort complex providing, a variety of recreational facilities such as a beach, tennis courts and a golf course. The witnesses for the Walkers Defendants refer to the importance of the "*recreational lifestyle*" offered by the development (see the First Witness statement of Ms Lopez at [5]) and the use of their properties for vacations. Some of the properties were purchased as vacation homes (see once again the First Witness statement of Ms Lopez at [5] and the First Witness statement of Mr Holmes at [19]) or to be rented out as vacation properties (see, again, the First Witness statement of Mr Holmes at [21]). As the Walkers Defendants pointed out, in the three strata corporations, comprising the majority of the units, the properties were administered for vacation rentals. Some of the properties were occupied as retirement homes in circumstances where the owners would have time for and wish to use the facilities for the purpose of recreation, exercise and relaxation (see the First Witness Statement of Mr MacKenzie at [14]). It seems to me that, even in the case of the private homes that form part of the Britannia Estate, in the context of this type of development, it can be said that the normal use of the homes will include recreational activities.

*The Failure to Constitute an Easement Point – do the Rights satisfy the fourth requirement? The purely precarious objection*

180. I reject the Plaintiffs' argument that the Rights fail to constitute easements because they are precarious in the relevant sense.



181. As Lord Briggs noted when formulating the requirement in *Regency Villas* at [58], the right must not be “*purely precarious, so as [to be] liable to be taken away at the whim of the servient owner*” (although the purely precarious issue did not arise in *Regency Villas*). The same point is made in *Burrows v Lang* (cited above). So it is not any condition or qualification to the existence or exercise of the right which makes it purely precarious: the condition or qualification that is claimed to make the right precarious must effectively undermine it by allowing the servient owner to terminate it whenever he/she chooses or to deprive the dominant owner of the ability to exercise it. The Plaintiffs argued that this test was satisfied in the present case because the servient owner not only was entitled to require the payment of fees and charges as a condition to the exercise of the Rights but because the servient owner had the power to increase those charges to a level that would make the exercise of the Rights prohibitively expensive or uneconomic. They said that rights that were conditional on the payment of fees the amount of which was to be determined by the servient owner but not fixed and limited by being referable to and quantified by a requirement to reimburse the servient owner for maintenance and repair costs, were too weak to constitute property rights. Putting the point another way, the Plaintiffs’ power in the present case to increase the fees to a prohibitive sum meant that, in reality, the exercise of the Rights required the Plaintiffs’ permission and as *Gardner* made clear, such a right could not be a proprietary right or give rise to a proprietary interest.
182. However, I do not consider that the Rights are qualified to this extent so that they can be taken away at the whim of the Plaintiffs. First, as I have noted, the Golf Club Rights can be exercised without the payment of green fees and it cannot seriously be argued that the Plaintiffs have the right to raise the charge for golf carts (assuming that the Lot Owners need to use and cannot play golf without using a cart) to a level above a reasonable rate, perhaps established by reference to what is charged by other similar courses. I would regard that conclusion as based on what must be taken to have been the intention of the parties (and therefore incorporated into the Written Agreements as an express or implied term). Secondly, I agree with the Walkers Defendants (and White Dove) that as regards the other Rights, the Plaintiffs as servient owners did not have an unqualified and unlimited power to raise the fees and charges to whatever amount they decided was appropriate. In relation to the Beach Club Rights, there is a requirement to pay “*any fees, charges or costs in force from time to time in respect [of the restaurant, beach and watersport facilities] including but not limited to any fees payable by virtue of any by-law applicable to a strata lot.*” In relation to the Tennis Court Rights, there is a requirement to pay “*the current established fee.*” It seems to me to be clear that what the parties intended was that the usual



charges levied on hotel guests for using the restaurant, beach and watersport facilities and playing tennis would be payable. The fees could therefore be increased when the amounts charged to hotel guests were increased. It is inconceivable that it could have been contemplated (taking the perspective of reasonable person with the relevant background knowledge would have understood the parties to the Written Agreements to have meant by the language they used) that the servient owners would or could impose a charge on hotel guests that was so high as to make the recreational and sporting amenities unavailable or unattractive to most if not all guests. The Lot Owners were granted the Rights to play tennis and use the beach facilities subject to the payment of the amount payable by hotel guests which would have been understood as being a modest amount at a level usually charged by similar hotels for the use of similar facilities.

183. What is the position, and what is the meaning and extent of the condition applying to the exercise of the Rights, where there is no hotel on and being operated on the servient land? One reading of the wording used regarding the fees and charges payable is that Lot Owners are not required to pay anything as the references (in relation to the Beach Club Rights) to “*any fees, charges or costs in force from time to time in respect [of the restaurant, beach and watersport facilities] including but not limited to any fees payable by virtue of any by-law applicable to a strata lot*” and (in relation to the Tennis Court Rights) to “*the current established fee*” are to be understood as only being to amounts currently being charged to hotel guests (and other invitees of the relevant hotel) for the use of the facilities. The definitions of both the Beach Club Rights and the Tennis Court Rights refer to hotel guests (and such others) and it could be said that the fees payable by Lot Owners were only the sums from time to time charged to those parties. If there were no hotel guests (or other invitees of a hotel operating on the site) and no amounts set by a hotel operating on the site as being payable by such parties, then Lot Owners would not be obliged to pay any fees or charges themselves. There would be no need for any payment since the requirement to pay charges was intended only as a means of generating additional revenue for, and possibly a small contribution to the maintenance and repair costs incurred by, an operating hotel. In such circumstances, absent a new agreement between the owners of the site on which the facilities are located and the Lot Owners, the facilities would presumably not be maintained (the owners of the site not being obliged to maintain and repair and generally being unable to recover the costs of repairs from the servient owners – see Gale at 1-119 – and the Lot Owners not being obliged to contribute to any sums expended by owners of the site). So it would be for the Lot Owners, as the dominant owners, to exercise their ancillary easements and their right to



repair at their own expense (see *Gale* at 1-112 and the further discussion on this issue below). In my view, this reading and construction is to be preferred, at least in a case where following the cessation of operations by the hotel on the site, the servient owners are not incurring costs in maintaining the facilities and the land on which they are located. If they are doing so, then I can see the strength of the argument that the Written Agreements should be interpreted as permitting the servient owner to require payment of a reasonable sum representing and equal or equivalent to the amount charged by similar hotels (which do make a charge) for the use of similar facilities. Otherwise, if the servient owners incurred expense to ensure that the facilities were maintained and available for use, the Lot Owners would be able fully to exercise their Rights without being required to pay the fees and charges required and as contemplated by the Written Agreements, which would be inconsistent with the terms of the grant.

184. The Plaintiffs, as I have noted, relied on *Gardner* as authority for the proposition that where the exercise of a right required the permission of the grantor of the right, the right could not be a proprietary right or give rise to a proprietary interest. The Plaintiffs argued that the principle recognised in *Gardner* could be applied by analogy in the present case or at least explained why rights which were subject to and could only be exercised on payment of a sum fixed by the grantor of the rights could never be regarded as property rights. But in my view, *Gardner* is distinguishable and does not assist the Plaintiffs in the present case. There, the annual payment by A to Ds for use of the cart way was only made in return for a year's user. It represented the full price for and value of the right to use the cart way for a year. At the end of the year, Ds were under no obligation (since there was no evidence that they had agreed) to renew the arrangement and could either refuse to give access to the cart way or increase the amount that they required be paid (and there was no agreement, on the facts, that regulated or affected the sum they could demand for another year's user). A had no prior entitlement to a new or continuing right to use the cart path and in each year there was a fresh grant. Indeed, as Lord Halsbury explained (at page 231), the whole purpose of Ds insisting on a "*small periodical payment*" was to prevent the user being treated as of right for prescription purposes and thereby negative the creation of property rights. What would have been a "*formidable innovation*" in Lord Halsbury's eyes was a decision by the court in those circumstances and in view of the absence of any evidence of an agreement that A should have a permanent right to use the cart path, that the payment was to be treated as representing a sum payable in consequence of a pre-existing and permanent right to use the cart path. That is why he said:



*“One of the most common modes of preventing such a user growing into a right is to insist upon a small periodical payment, and if such evidence as we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed.”*

If A was required to pay each year the full value of the right, the inference was that the payment was only in return for the year’s user and nothing above and beyond that. The payment could not be regarded as evidence of an additional agreement by Ds, over and above the right to use the cart path for a year, to the effect that A had a right to and could use the path indefinitely, year on year, on payment of an unchanging and fixed sum. That was why Lord Macnaghten had said (at pages 234 and 235):

*“On the bare facts with which your Lordships have to deal there arise, as it seems to me, two questions: (1) What was the sum of 15s. a year, which was paid regularly year by year, paid for? Well, I think any layman and most lawyers would answer, “For the use of the way, of course.” Then comes the only other question: (2) Can a person who uses a way across his neighbour’s land, and pays for the use of it year by year, be said to use the way “as of right”? Again, I think every layman and most lawyers would answer, “Certainly not.”*

185. The present case is different. The Written Agreements make it clear, as I have held, that the Rights were intended to be and were granted as long term and permanent rights of user, to which the requirement to pay fees and charges, where they applied, were ancillary. For the reasons I have given, this is not a case in which the granting or exercise of the Rights required the permission of the grantor of the right or in which, to use the language of *Burrows v Lang*, the alleged easement depended on the will of the servient owner, and the servient owner could put a stop to the user at will.
186. The Plaintiffs accepted that making the exercise of the Rights conditional on a payment was not of itself objectionable. Where the payment was a contribution to the costs of maintenance and repair it was unobjectionable and did not prevent the Rights constituting property rights. The distinction they drew was between an obligation to make such a payment and an obligation to pay a fee. A fee, they said, could include an element of profit or uplift whereas a payment in respect of maintenance was inherently limited to the cost of maintenance, by reference to sums paid or payable for maintenance. However, for the reasons I have given above, I do not consider that the requirement to pay the fees and charges referred to in the Written Agreements is inconsistent with the creation and existence of property rights. The proposition that it is not inimical to property rights or otherwise objectionable to make the exercise of rights conditional on the grantee making a payment was accepted by Lord Briggs, at least implicitly, at [32] when

he noted that “*Plainly the imposition of a payment obligation on the timeshare owners would have had a dampening effect on the purchase prices likely to be obtained*” and by the dicta of Judge Paul Baker in *London & Blenheim*. I can see that if, in a case like the present, rights were granted which were subject to and their exercise was conditional on the payment of a substantial sum which, on the proper construction of the relevant agreements, was to be fixed by the grantor without limit or reference to any independent and objective criteria which would constrain his/her determination and could be raised at his/her will to any amount that he/she chose, the *Burrows v Lang* test would be satisfied and the existence, continuation and exercise of the rights would then depend on the will of the servient owner, who could put a stop to the user at will. But that is not this case.

187. I also reject the Plaintiffs’ argument that the Lot Owners could make no meaningful use of the Rights and the facilities to which they related without management and maintenance being performed by the servient owner. I accept the submissions made by the Walkers Defendants (and White Dove) on this issue.
188. The dicta and analysis of Lord Briggs in *Regency Villas* (at [70]-[73]) are obviously key. At [70], he noted that the courts below had found *on the facts of that case* that even if the appellants or their successors as owners of the park were altogether to discontinue the business of operating the relevant part of the park as a leisure complex some meaningful use, even of the golf course and the swimming pool, could be enjoyed by the RVOC timeshare owners. He went on as follows (I have quoted these paragraphs above but they bear further quotation here):

*“Greens and even fairways on the golf course could be mown. The swimming pool could be kept full of water. Timeshare owners could provide their own nets for the tennis courts, hoops for the croquet lawn and (if necessary with the use of a generator) lighting for the squash courts. The appellants submitted with force that this would be nothing like the proffered use of a high-quality leisure complex held out to prospective timeshare owners in and shortly after 1981, but nothing in their submissions provided a basis upon which this court could properly depart from the factual findings of the courts below that some less attractive but still worthwhile use could be made of the facilities in those circumstances. This conclusion, that meaningful use of the rights granted did not depend upon the continued provision of management, maintenance, repair and renewal by the servient owners, is also sufficient to confirm that use of the facilities was granted by way of right, rather than merely by way of temporary offering, revocable by the servient owners at any time, by discontinuing management and maintenance.”*

189. Accordingly, the key issue is whether on the facts of this case, the Lot Owners are and will be able to make “*some less attractive but still worthwhile use ... of the facilities*” without the



management and maintenance of the facilities, and some investment in the golf course, being undertaken and paid for by the Plaintiffs. In my view they are and will be.

190. As regards the golf course, it is clear that the maintenance costs have been and are likely to remain significant and in view of the location and nature of the course they may be difficult to reduce by substantial amounts. The evidence of the Plaintiffs' witnesses made it clear that the sums spent by the Plaintiffs in the period immediately prior to the closure of the course in 2016 on maintenance, even limited maintenance, were large. The 2015 costs incurred by Embassy indicated that approximately \$700,000 (including approximately \$500,000 for water) was likely to be a reasonable albeit rough estimate of the annual expenditure on maintenance that would be needed, assuming a relatively low level of maintenance work (and assuming that costs have not risen substantially since 2015). With approximately 200 Lot Owners, if they all agreed to contribute to these costs they would have to pay approximately \$3,500 per year (or around \$300 per month). The Plaintiffs said that there was no realistic prospect of all the Lot Owners agreeing to pay this level of ongoing costs, when many had no interest in playing golf and there was no means of requiring strata unit owners to pay contributions unless the by-laws were amended which would require the support of the requisite two-thirds majority. The Plaintiffs also argued that the evidence of the Walkers Defendants witnesses on this issue was nothing more than conjecture and ill considered. They had given no thought to the actual sums involved or the likelihood that other Lot Owners would agree to bear those sums and had been unable to put before the Court any plausible route to achieving what they asserted. Beyond the cost of maintenance, the Plaintiffs noted the likely need for further expenditure on the investment that is needed to restore the golf course to good working order and make it sustainable and operational in the longer term. As I have noted, the Plaintiffs' evidence was that in October 2016 Dart estimated the costs of a "*quick fix*" solution (to last no more than five years) at US\$1.6m.
191. I am unable to accept the Plaintiffs' submissions. I do accept that the Walkers Defendants did not present their own estimate of the annual maintenance costs that were likely to be payable (either based on their own assessment in light of the Plaintiffs' evidence or on the opinion of a suitable expert). Nor did they provide evidence of the number of Lot Owners who would be willing to contribute to the maintenance costs and a confirmation that there were sufficient Lot Owners who had indicated a willingness to fund the costs at the level anticipated based on the 2015 expenditure. Their case would obviously have been stronger had they done so. But I do not regard their failure to present such evidence as fatal to their claim that they will be able to undertake and pay for a level of maintenance (and further investment) that meets their requirements for the golf course, and that will result in them being able to make worthwhile use of the course.



192. A number of the Walkers Defendants' witnesses said that they considered that the Lot Owners would be willing to consider funding the necessary maintenance costs and had the means to do so. Mr Hepburn, as the Walkers Defendants pointed out, stated that he was "*confident*" that the executive committees of the Strata Corporations would be able and willing to pay the maintenance costs required to maintain the golf course in a playable condition. In view of the number of Lot Owners and the sum payable by each of them if they shared the annual maintenance costs, even if continued at the level of the 2015 expenditure (as outlined above), it seems to me that the Plaintiffs' assertion that there was no realistic prospect of the Lot Owners being willing or able to cover the maintenance costs is itself based only on conjecture. An annual payment of approximately \$3500 per annum is not insubstantial but also not so high as to be clearly beyond the means of Lot Owners who have spent substantial sums in purchasing their properties and appear to be financially secure and reasonably wealthy, who have, through their participation in these proceedings, made clear that they regard the restoration of the golf course into a playable state as an important objective.
193. While, as I have noted, it may be right that the annual maintenance costs cannot be substantially reduced below the 2015 costs, it remains to be established what a maintenance programme run by the Lot Owners would involve and cost and the extent to which it could be adjusted, at least for an initial period, so as to keep costs down. It seems to me that it is likely that the Lot Owners will be able to develop a plan for sufficient maintenance to meet their needs and to allow them to play golf in conditions which are no doubt much below an independently run championship course but which are acceptable and worthwhile to them. Furthermore, it remains to be established what level of further investment the Lot Owners would need to make in order to maintain the course in this acceptable but reduced condition, if they were in control of the process. It seems to me that the Lot Owners have the right, and should be given the opportunity, to put in place an acceptable level of maintenance and investment to ensure that they can make meaningful use of the course.
194. I also accept the Walkers Defendants' submissions in relation to the use of the beach and tennis courts (subject, in relation to the tennis courts to the section 96 of the RLA issue, which I deal with below).
195. Furthermore, I accept and agree with the submissions made by the Walkers Defendants (and White Dove), as summarised above, in response to the Plaintiffs' other arguments in support of



their case that the Rights failed to satisfy the fourth condition. I see no need to elaborate, or merit in me elaborating, on their reasoning beyond the summary I have provided above.

## **Rectification**

196. I must now deal with the Plaintiffs' and the Walkers Defendants' (and White Dove's) applications for rectification of the register. The Plaintiffs sought a declaration that the Rights were not binding on them and a consequential order for rectification by deleting the entries referring to the Instruments and the Rights that currently appear in the incumbrances section of the register. The Walkers Defendants (and White Dove) opposed that application but made their own applications for rectification. They sought rectification of the register to the extent necessary to ensure that the Rights (and any restrictive agreements contained in the Instruments) were properly registered and binding on the Plaintiffs.
197. The decisions I have made above narrow and define the issues that arise on the rectification applications. These decisions can be summarised as follows:
- (a). the Written Agreements (and therefore the Instruments) are to be interpreted as incorporating the Restrictive Agreement Term or the Restrictive Agreement Term was incorporated into the Written Agreements (and therefore the Instruments) as an implied term; that the Restrictive Agreement Term is properly characterised as a restrictive agreement within the meaning of section 93(1) of the RLA so that the Instruments were capable of being noted on the incumbrances section of the register for the Properties on the basis that they included a restrictive agreement; the Restrictive Agreement Term, being a term of the Instruments, has been validly noted in the incumbrances section of the register for the Properties and is binding on the Plaintiffs pursuant to section 23 of the RLA.
  - (b). if my conclusion that the reference to Rights in the further particulars column of the incumbrances section of the register does not prevent the Instruments and the Restrictive Agreement Term from being treated as having been properly noted on the register, is wrong, then I would be prepared to order the rectification of the further particulars column to insert before the reference to "*The Rights*" the words "*The Restrictive Agreements and.*"



- (c). the Rights granted by the Written Agreements (and the Instruments) are properly characterised as a matter of law as easements which satisfy the requirements of section 2 of the RLA whose grant could have been completed by registration in accordance with section 92(4) of the RLA in the incumbrances section of the registered titles for 12D 108 and 12C 27, but was not.

198. Since I have already held that the Instruments incorporated a restrictive agreement (the Restrictive Agreement Term) which has been properly noted on the register (and in the alternative that if the reference to Rights in the further particulars column of the incumbrances section of the register would affect and invalidate the noting of the Restrictive Agreement Term, I shall order rectification of the register to insert before the reference to “*The Rights*” the words “*The Restrictive Agreements and*”), no further issue arises as to rectification with respect to restrictive agreements. The Plaintiffs’ application for rectification by cancelling and deleting the noting of the Instruments as restrictive agreements therefore falls to be dismissed.
199. However, the question arises as to whether the register can and should be rectified to record and register the Rights as easements.

### ***The Plaintiffs’ submissions***

200. In their Re-Amended Originating Summons, the Plaintiffs claimed (in [1]) declarations that as a matter of law the Rights had the status of rights under a contractual licence; that as a result or in any event the Rights did not bind the Plaintiffs and that the Rights ought never to have been registered as incumbrances and rectification of the register under section 140 of the RLA. The Plaintiffs also sought (in [1A]) an order that the rectification take the form of a cancellation or deletion of the registration of, or reference to, any rights noted as arising from or by virtue of the registration of the Instruments. In [8] and [9] of the Re-Amended Originating Summons the Plaintiffs averred that the Rights were positive in nature and therefore did not bind them, and accordingly the Rights ought never to have been registered as incumbrances.
201. In their closing submissions, the Plaintiffs argued that if the Court concluded, as I have done, that the Rights were to be regarded as easements that had not been properly registered, the Court could not and should not order rectification by a simple order to the Registrar to note the Instruments as giving rise to easements in addition to restrictive agreements. In support of this submission, the Plaintiffs argued as follows:



- (a). non-compliance with the mandatory provisions of section 92(1) of the RLA remained a bar to rectification of the Register. That section required an easement to be granted in the prescribed form. Since there were no section 92 compliant easements the Register was accurate and there had been no mistake in omitting to refer to easements. To correct the failure of the Instruments to comply with section 92 of the RLA would require an action for rectification of the Instruments by the original parties and there was no power in section 140 to rectify the underlying instruments presented for registration. Rectification of the Instruments would be necessary before rectification of the Land Register could be made to reflect the Rights as easements, and no proceedings for rectification of the Instruments had been brought.
- (b). the decision and dicta in *Connolly* to the effect that the use of the wrong form did not matter were distinguishable. In that case, A, although she had authority to dispose of the land, had used the wrong form of transfer and this was relied upon at first instance (unsuccessfully) in a rectification application seeking to unwind the transfer. A had, though, used a form of transfer, whereas in the present case the Walkers Defendants (and White Dove) had used a form seeking to create a different legal right than an easement. Further, the relevant application in *Connolly* sought to unwind the transfer as a result of use of the wrong form while in the present case the Walkers Defendants (and White Dove) positively sought to have the Rights registered as easements notwithstanding their failure to comply with the mandatory formalities set down by section 92 of the RLA.
- (c). in any event, since a rectification of the Land Register to recognise the Rights as easements would affect the Plaintiffs' title, and since the Plaintiffs were in possession of 12D 108 and 12C 27, rectification could only be ordered if the requirements of section 140(2) of the RLA were satisfied. However, the Court had heard no evidence directed to this point. On a proper reading of that sub-section, the requirement that the proprietor "*had knowledge*" of the omission, fraud or mistake must mean knowledge at the time of the omission, fraud or mistake, and there could be no allegation against the Plaintiffs of that nature. This reading of section 140 was supported by the manner in which the claim for rectification had been put in *Connolly* (at 395).



202. The Plaintiffs also argued that the factors and matters relied on by the Walkers Defendants (and White Dove) in support of their claim that the Court should exercise its discretion to rectify the Land Register did not bear the weight placed on them or justify such an order:

- (a). the Walkers Defendants (and White Dove) had relied heavily on what they claimed to be a perception that other resorts in the Cayman Islands had used restrictive agreements to grant resort rights, in a similar manner to the Written Agreements. But, the frequency of this practice was far from clear. The Registrar's evidence was only that she knew of "*a few*" resort type rights structured in this way, but she could not offer a proportion or a number. Insofar as such a practice existed, this appeared to be the first case in which its appropriateness has been considered by the Court and its existence was a basis for the Court refusing to exercise its discretion to allow rectification. The Court should not permit or sanction by judicial decision the creation of property rights other than in accordance with the RLA.
- (b). for this reason, the Ritz-Carlton arrangements do not support the Walkers Defendants' (and White Dove's) position. Further, the Ritz-Carlton agreements were materially different from the Instruments used in the present case (and the different drafting of those agreements supported the Plaintiffs' submissions):
  - (i). they contained provisions which were undoubtedly restrictive agreements within the definition in section 93 of the RLA L (restricting "*the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land*") including clause 4.2 of the Ritz Carlton Agreement which stated that:

*"No wall, fence, hedge or any other type of property-boundary divider shall be placed, constructed, grown or maintained on the Resort Common Property or the Resort Strata Lots without the prior written approval Hotelco, or its designee."*
  - (ii). the Ritz-Carlton expressly recognised that they granted "*agreements, easements, licences, restrictions and restrictive agreements*" and described the benefits granted



as both rights and licences. Clause 2.3.3 of the Ritz Carlton Agreement stated as follows:

*“HEREBY GRANT to Hotelco its guests and other licensees the right and licence to enter upon, pass over and generally use and enjoy in common with Resort Master Strata Corporation, Condoco, Villasco, North Tower Corporation and South Tower Corporation and all Proprietors and authorised Occupants the Sub- Strata Common Property, Resort Common Property (and all resort facilities located thereon, including, without limitation, the Golf Course), Resort Community Systems and the Resort generally upon the terms and conditions herein contained and subject to the Rules and Regulations and upon payment of fees governing such use as from time to time may be imposed by the Executive Committee or its designee and for the purposes of executing its powers and duties of management and administration of the Resort.”*

(iii). furthermore, the arrangements expressly provided, in clause 4.1 of the Ritz Carlton Agreement that proprietors were only be able to use the various rights for so long as they contributed to the cost thereof and *“only for so long as the Resort.... continues to be managed and administered by Hotelco or its designee. In the event the said management and administration by Hotelco or its designee is terminated all rights granted to the Proprietors hereunder by Hotelco maybe terminated by Hotelco.”*

(c). the Walkers Defendants (and White Dove) could not draw support from the fact that various attorneys in the Cayman Islands had advised on or adopted the alleged practice of registering resort rights as restrictive agreements. The Court did not know the content of any advice given by those attorneys, which advice was privileged; and even if that advice was supportive of this practice, it was no more than opinion evidence which was not determinative since it was for the Court (not the various firms of attorneys) to decide whether the Instruments bind the Plaintiffs. In any event, Ms Doak gave evidence that Embassy had shared with Dart Realty information casting doubt on the enforceability of the Instruments (see the transcript for day 2, page 87, lines 10-21). Further, Mr Prasad’s evidence was that Cayman Hotel and Ellesmere were frequently challenged by attorneys acting for purchasers in relation to the Rights. The most that could be said was that differing views had been taken as to the appropriateness of this practice.



- (d). in response to the argument that Lot Owners had no reason to doubt the efficacy of the registration of the Rights when they bought their properties and paid a premium for them, the Court should bear in mind that the Lot Owners had other potential remedies resulting from the failure to obtain enforceable property rights, including their claim for an indemnity from the Registrar, potential negligence actions against their conveyancing attorneys and (for those who have purchased more recently) potential remedies against their vendors for misdescription of the property sold. In addition, in relation to value, Mr Holmes and Mr Lund had accepted in their evidence that the value of their properties had been impacted by the loss of the Hyatt Hotel and the general deterioration of the resort since Hurricane Ivan. Uncertainty over the enforceability of the Rights was not the only factor that affected value. Further, the individual circumstances surrounding the purchase by each Lot Owner were not before the Court and the Court was not aware of all the legal or other advice received in each case.
- (e). there was no basis for the assertion that the Plaintiffs would benefit from a windfall if successful in these proceedings. The evidence undercuts the claim that the Plaintiffs negotiated a lower price when purchasing from Embassy on the assumption that the Rights were binding, and now opportunistically seeking to establish that the Rights are not binding. The evidence indicated that no separate valuation of the property with and without the Rights had been obtained and that the questionable legal status of the Rights had been known to Embassy before the sale (as confirmed by the evidence of Ms Doak - transcript day 2, p. 87, lines 10-21). Further, Ms Doak's evidence was that the real attraction of the properties purchased by the Plaintiffs was their proximity to Camana Bay.

### ***The Walkers Defendants' submissions***

203. At [19] of their counterclaim, the Walkers Defendants included a claim for rectification in the following terms (underlining added):

*"If, contrary to paragraphs 14(a) and (b) above, there has been a mistake which engages section 140 of the Law, and the Court does therefore have the (discretionary) power to order rectification of the register, and if the Court were not to exercise its discretion by declining to make any order for rectification (contrary to the Walkers Defendants' first case at paragraph 15(c) above), then the Court should exercise its discretion by directing that the register be amended by correcting the legal description of the Rights to either 'Easements & Restrictive Agreements' or 'Easements' (as it may determine)."*

204. The reference in this paragraph to “*paragraphs 14(a) and (b) above*” must have been intended to be a reference to paragraphs 15(a) and (b) of the Defence. Paragraph 15 is in the following terms:

“*As to paragraph 9:*

- a. *It is denied that the Rights ought never to have been registered as incumbrances and averred that they were properly so registered;*
- b. *Further or alternatively, it is denied that there has been a mistake so as to engage section 140 of the Law because:*
  - i. *No mistake has been made. The Instruments have been properly registered as restrictive agreements on the basis that they confer both covenants which are negative in nature and easements; or*
  - ii. *The only mistake (if any) is a mistake of law by way of legal description, in that the relevant entries in the register should, whether additionally or alternatively to describing the Rights as restrictive agreements, have described the Rights as easements. Only mistakes of fact give rise to the power of rectification.*
- c. *If, contrary to (a) and (b) above, there has been a mistake which engages section 140 of the Law, giving rise to the (discretionary) power in the Court to order rectification of the register, the Court should exercise its discretion either by declining to make any such order, or by directing that the register be amended by correcting the legal description of the Rights (as claimed at paragraph 19 of the Points of Counterclaim below).*



205. In circumstances where I have held that the Rights are easements that have not been properly registered, the Walkers Defendants’ application for rectification takes the form of an application for an order directing that the register “*be amended by correcting the legal description of the Rights to .... Easements and Restrictive Agreements...*”

206. The Walkers Defendants submitted that it was open to the Court to make such an order. They submitted that the following factors should lead the Court to exercise its discretion to do so:

- (a). there had been a mistake in that the legal description of the incumbrances recorded in the incumbrances section of the Plaintiffs’ registered titles was incomplete. The nature of the incumbrance column omitted a reference to the Rights as easements.
- (b). the wording of the further particulars column (“*The Rights described in...*”) was accurate, and because the underlying instrument had been filed, anyone inspecting the Land Register was free and able fully to inform themselves as to what rights had been granted.



- (c). the Instruments lodged for registration used the form prescribed under section 92 of the RLA and the RLR for the grant of easements, albeit using the words “*Restrictive Agreement*” rather than “*Grant of Easement*” as a heading. There had been some adaptation of the other wording in that form, but the parties continued to be referred to as grantor and grantee and indeed even the form number (RL12 or 15) still appeared in the top left hand corner. In any event, as observed by Collett JA in *Connolly* (at page 394, lines 16-17) “*the use of a wrong form makes little difference.*”
- (d). there was no additional fee payable for registration of an easement and the noting of a restrictive agreement. The fee for registration or filing prescribed in the Fourth Schedule of the RLR, and duly paid (as was acknowledged at the foot of the form) had throughout been the same both for easements and for restrictive agreements.
- (e). given that the Instruments referred to in the further particulars column were identified and filed, the Plaintiffs cannot have been misled as to the nature of the Rights granted (and had not so suggested in their evidence in these proceedings).
- (f). on the other hand, the Lot Owners, and the various attorneys acting for them, saw, and the Walkers Defendants submitted at the time reasonably saw, no reason to doubt the efficacy of the registrations they made in the form and manner in which they made them.
- (g). it was clear from the number of attorneys involved in the various grants and transfers in this case, with no evidence that any of them had raised any concerns as to the form of agreement and instrument being used, and the form of registration at the Land Registry, that the registration of the Instruments and Rights only as restrictive agreements rather than as restrictive agreements and easements cannot have been unusual in practice. Furthermore, whilst it was not possible to obtain a complete picture of the number of similar cases relating to hotels and other properties in the Cayman Islands, evidence had been produced of one other significant example of the same approach having been adopted at another high profile resort. This was shown by the certified copy documents which had been obtained from the Land Registry in respect of the Ritz Carlton resort. In 2005, agreements granting similar rights to the Rights had been entered into and the parties had requested that a “*note be made in the incumbrances section of the Land Register for the relevant parcels that such parcels were subject to a restrictive agreement in*



*relation to the various rights set forth in” the agreement (see, for example, clause 6.1 of the Ritz Carlton Agreement). These agreements had also included a waiver of the right to lodge a caution. The Land Registry had acceded to this request and (as was shown by a copy of an extract from the Land Registry for one of the relevant titles that had been put in evidence) made an entry in the nature of incumbrance column in the relevant incumbrance section of the register once again only to “Rest. Agmnts.”*

207. The Walkers Defendants submitted that in all the circumstances, justice would be served by the Court exercising any discretion which had arisen under section 140 of the RLA by directing that the entry in the nature of incumbrance column should be amended to read “*Easements and Restrictive Agreements*.” The fair and appropriate course, assuming that the Court held that the Rights were properly characterised and took effect as easements and not as restrictive agreements, was simply to amend the Land Register of the (two) Properties by making the requisite alterations and thereby correcting the relevant legal description in the nature of incumbrance column. There was no need to alter the registrations of the Rights as appurtenances in the property sections of the Lot Owners’ numerous registered titles. Any other course, assuming that such alterations were needed to make the Rights effective and binding as easements, would unfairly deprive a large number of Lot Owners of rights which they had reasonably believed they were acquiring with their properties, and for which they had paid a premium while simultaneously giving the Plaintiffs a considerable windfall, despite their having been on clear notice of them from the outset.
208. The question arises as to the basis on which the Walkers Defendants claimed that the Court was able and had jurisdiction to order rectification in the manner sought. As I have noted, their submissions were based on there having been a mistake in the legal description of the incumbrances recorded in the incumbrances section of the register since the nature of the incumbrance column omitted a reference to the Rights as easements. In their trial skeleton the Walkers Defendants put this point as follows:

*“The only mistake, if any was made at all, in the entries in the Incumbrances section of the Plaintiffs’ registered titles is in the legal description of the nature of the incumbrance in column 4. Further, for the reasons submitted in sections E and F above, it is submitted that any error was not in the words which did appear (i.e. the short form Rest.Agmnts.”), but only in omitting reference to “Easements” in addition (so, for example, “Easements and Rest. Agmnts.”).*



209. This appears to base the claim for rectification on a mistake by the Registrar by omission of the relevant wording from the entry made in the register. I assume that the Walkers Defendants took the position that this was a mistake of fact rather than a mistake of law although they did not deal with this point explicitly and clearly. I say this because, as is clear from the extract set out above, the Walkers Defendants (and White Dove) had asserted in paragraphs 15(b) of the Defence, in the context of their opposition to the Plaintiffs' application for rectification, that rectification under section 140 of the RLA was only available in respect of a mistake of fact, rather than a mistake of law. I take it that their position remained, even in relation to their own application for rectification, that a mistake of law was insufficient.
210. Since there is an issue as to whether a mistake of law is sufficient to give the Court the power to rectify the register under section 140, it is important to record the Walkers Defendants' argument on this point. In their submissions, they relied in particular on two cases in support of this proposition:
- (a). in *Juneau v Gynell* (1984) 85 CILR 1 (**Juneau**) (Summerfield CJ), the Court was concerned with a case where there were competing claims to ownership of a parcel of land. The land had been first transferred in 1953 by PT and HT to AT and ET then subsequently in 1962 transferred again by PT and HT to the respondent. In 1971 the parcel had been transferred by AT and ET to the applicant. Following the coming into force of the Registered Land Act 1971 and the Land Adjudication Act 1971 (in April and February 1972 respectively), owners of or claimants to land were required to submit their claim to the records officer for adjudication under the Land Adjudication Act 1971. In 1973 the respondent submitted her claim and it was accepted, so that she was registered as absolute owner of the land. The applicant failed to submit a claim and his title documents were not considered by the records officer when adjudicating on the respondent's claim. The applicant claimed that he had been unaware of the need to make such a claim under the Land Adjudication Act 1971. He then sought rectification of the register on the ground that the first registration of the respondent as proprietor had been made by mistake. The applicant's application was dismissed. In his judgment Summerfield CJ observed that (page 7 at lines 20-22):

*"In my view, ignorance of the law cannot be a foundation for mistake under s.140(1) of the [RLA]. It must be a mistake based on fact. I cannot see how a court can allow*



*the re-opening of the adjudication proceeding – because that is what this amounts to – by a different route merely because someone was ignorant of the process under the Land Adjudication Law. That could lead to endless cases being re-opened and defeat one of the main purposes of that Law – to ensure quiet titles”*

- (b). *Connolly* involved a transfer of a parcel of land by A to the respondent. A was one of three children of her deceased father (the other children being L and I). In his will, the father left the land to his wife for her lifetime and after her death to the three children in equal shares. I predeceased his mother. Thereafter the respondent, who was A’s nephew, made various payments to A and L for their interests in the land. After her mother died, A in 1983 transferred the land to the respondent using the form for use between a personal representative and a person entitled to the relevant land under the will and the land was registered in his name. The appellant later became the personal representative of the father’s estate and challenged the validity of the transfer to the respondent. He claimed that since I had been granted a vested interest in the land under the will, ownership of and the right to transfer the land had not been vested only in A and L. Since the respondent had been aware of I’s interest, he was not a *bona fide* purchaser and took subject to I’s rights and the register should be rectified. It was also argued that the respondent was not properly registered as the transfer to him had used the wrong form. Once again, the application for rectification was dismissed by this Court and the Court of Appeal. Collett JA, giving the judgment of the Court of Appeal, considered the passage from *Juneau* cited above, noted that it had already been cited with approval in decisions of the Court of Appeal, and indicated his own agreement with it (page 396 at lines 14-25). In doing so, he stated that (page 397 at lines 5-11):

*“... it has been observed more than once judicially that the protection afforded by the [RLA] to registered proprietors by way of what has been called ‘inviolability of title’ is markedly less here than in other jurisdictions where the Torrens system of land registration prevails. To further weaken that protection by enlarging the ambit of the expression ‘mistake’ in s.140 would therefore be an undesirable development of law.”*

## ***Discussion and decision***

### *Issues*

211. Five main issues arise. First, is rectification to add a reference to the Rights as easements precluded because the Instruments do not comply with the mandatory provisions of section 92(1)



of the RLA? Secondly, when does the Court have jurisdiction to order rectification for mistake? Thirdly, was there a relevant mistake in this case? Fourthly, does section 140(2) of the RLA preclude rectification so as to affect the Plaintiffs' title? Fifthly, if there was a relevant mistake and section 140(2) does not preclude rectification, should the Court exercise its discretion to grant rectification in this case?

*The section 92(1) point*

212. As I have noted above, I have rejected the Plaintiffs' argument that the Rights cannot be registered as easements since they were not created using the form prescribed by the RLR and in compliance with the mandatory provisions of section 92(1) of the RLA. I have concluded that while Rights have not yet been so registered and the Registrar has yet to finally adjudicate on an application for their registration, the Registrar would be entitled and probably bound to register them upon receipt of a request for registration with a confirmation that the Rights constitute easements.
213. As regards the impact of this issue on the rectification claim made by the Walkers Defendants (and White Dove) it seems to me that the right approach is as follows. If I conclude that the application for rectification made by the Walkers Defendants (and White Dove) is to be granted, I should declare that the Rights are easements and that the register should be rectified in the manner they seek (namely by amending the nature of incumbrance section to refer to "restrictive agreements and easements") subject to the Registrar confirming that she is prepared to do so based on the Instruments in their current form. In the event that she was not satisfied that she should or was required to accept the Instruments in their current form it would be necessary for her to explain what more was needed and for the parties and the Registrar to consider whether the Registrar's requirements could be dealt with by agreement or whether further orders would be required from the Court.

*Jurisdiction to rectify – what types of mistake are covered?*

214. Section 140(1) allows the Court to order rectification "*where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.*" Accordingly, (a) there must be an incorrect registration (obtained) or entry (made) on the register or an entry that should have been made but is missing (omitted) from the register and (b) the reason why the incorrect registration or entry was made or the correct entry was not made (and



was omitted) was fraud or mistake (the cause of the incorrect entry, whether the error is in what is included on the register or left off the register, is fraud or mistake).

215. Section 140(1) appears to focus on the entry made on the register by the Registrar and the reasons why, in a case where the entries can and have been shown to be in error, the error was made by the Registrar. It is where the Registrar's error was caused by fraud or mistake that rectification is permitted. The Registrar must have been misled by the fraud of an applicant for registration or must have made a mistake when making the relevant entries.
216. I note that *Megarry & Wade* (at [6-133]) offer the view that under the English (and Welsh) regime *"there will be a mistake whenever the registrar would have done something different had he or she known the true facts at the time at which the relevant entry in the register was made or deleted."* I do not regard this formulation of the test as directly relevant or of weight for the purpose of construing section 140(1) in these proceedings. The RLA is not, as I have noted, based on the English regime, may be subject to different policy goals from that regime and the statutory grounds for rectification under the English Land Registration Act 2002 are drafted differently from those under section 140(1) of the RLA. Under paragraph 2(1)(a) of schedule 4 to the Land Registration Act 2002, the court may make an order for rectification *"for the purpose of correcting a mistake."* Nor did either party rely on the English authorities (or seek to explain how the Kenyan legislation on which the RLA was based related to the English legislation). However, the test suggested by *Megarry & Wade* is consistent with my view, as noted above, of the proper construction of and the test to be applied on an application for rectification based on mistake under section 140(1) and at least shows how a different system deals with mistake based rectification claims.
217. The question arises as to whether section 140(1) only permits rectification in the case of a mistake of fact and not a mistake of law. This was, as I have noted, the Walkers Defendants' case in opposition to the Plaintiffs' rectification application. This was not part of the Plaintiffs' positive case in opposing the Walkers Defendants' application for rectification. Instead, they said as follows (at [122] – [124] of their closing submissions) (underlining added) when addressing the nature of the mistake in the present case (an issue to which I shall turn shortly):

"122.        *The first issue is to identify the mistake that was made. [The Plaintiffs'] case is that the [Written Agreements] were wrongly registered as restrictive*



agreements incumbering titles 12D 108 and 12C 27, as the [Written Agreements] did not contain 'an agreement...by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land' pursuant to s. 93 [RLA]. It appears that both the parties to the [Written Agreements] and the Registrar were mistaken in believing that the [Written Agreements] contained 'an agreement' of the kind covered by s. 93, and registration thereof was mistaken as a consequence: see the Registrar's Defence at [13]. So far as the Registrar is concerned, it is not difficult to conceive of how the mistake might have happened; she explained that all the officials in the Registry will look for is a parcel to be burdened, a parcel to be benefitted, and certain operative words, which no doubt they found in this case: [Transcript Day 3, p. 31 line 22 – p. 32 line 4].

123. An agreement either contains 'an agreement by one proprietor restricting the building on or the use or other enjoyment of his land for the benefit of the proprietor of another land' or it does not. Once the relevant agreement has been construed (which is a question of law), it is a simple factual query to determine whether that agreement (as construed) contains such a restriction or not. A mistake in relation to that latter question cannot properly be described as a pure 'mistake of law' so as to engage the authorities relied upon by the Active Defendants in Walkers' Defendants' Skeleton Argument at [95].

124. Further and in any event, this mistake was not simply one of 'legal description'. For all the reasons set out above, the Agreements did not give rise to easements over the land held by Cayman Hotel; in particular, there was a failure to comply with s. 92, there was no intention to create easements and the rights as granted do not fulfil the essential requirements of an easement. This was not simply a matter of the wrong 'property right label' being used to describe the content of the Agreements. As set out above, the Agreements could only take effect as contractual licences, which create no property rights and do not bind successors in title."

218. Accordingly, the Plaintiffs submitted that the mistake on which they relied in this case was not a mistake of law. They made no submissions as to the correctness of nor relied on *Juneau* or *Connolly*.

219. It seems to me that the wording of section 140(1) is wide and only qualified by the terms of section 140(2). On the face of the section, there is no distinction drawn between mistakes of fact and law, and absent authority to the contrary I would be disinclined to introduce one.

220. In my view, *Juneau* and *Connolly* stand as authority for the proposition only that some types of mistake of law cannot ground a claim for rectification under section 140(1) of the RLA. *Connolly* is a decision of the Court of Appeal and obviously I am bound by it and to apply the *ratio* of and principles approved by the decision.



221. While both *Juneau* and *Connolly* include clear statements, as the Walkers Defendants pointed out, that there must be a mistake of fact (and as Summerfield CJ put it in *Juneau* “*ignorance of the law cannot be a foundation for mistake under s. 140(1)*”), in both cases it was held that there was no relevant mistake of any kind. In *Juneau*, Summerfield CJ noted (page 7, lines 3-7) that “*nowhere in the originating summons or supporting affidavits is the mistake relied on spelt out with any precision. Obviously, the foundation for the contention is the existence of the applicant’s documentary title and the fact that the documents were not considered or given effect to by the Records Officer.*” He subsequently stated (at page 9, lines 4-5) that “*I do not see how any mistake comes into it.*” It appears that the Court was addressing one possible formulation of the applicant’s grounds for seeking rectification, based on the applicant’s mistake in failing to submit a claim to the records officer for the purpose of the adjudication under the Land Adjudication Law 1971. Such mistake by the applicant had nothing to do with the application for registration and did not allege a mistake by the Registrar when making entries in the register. It was therefore hardly surprising that Summerfield CJ went on to say, as noted above, that he could not see “*how a court [could] allow the re-opening of the adjudication proceeding – because that is what this amounts to – by a different route merely because someone was ignorant of the process under the Land Adjudication Law. That could lead to endless cases being re-opened and defeat one of the main purposes of that Law – to ensure quiet titles.*” It seems to me that Summerfield CJ decision was that such a mistake of law was insufficient to entitle a claimant to apply for rectification under section 140(1) and was confined to such a mistake. In *Connolly* Collett JA noted that the appellant had argued that the relevant mistake relied on was the mistake made by A in 1983 in transferring the land to the respondent without I’s consent (page 395 at lines 18-22). But there was and could have been no mistake because the court held that A had “*ample power and ample justification*” for executing the transfer. Collett JA said that he was not satisfied that there was jurisdiction to grant rectification “*upon the basis of such a mistake as has occurred in the present case.*” He did, it is true, deal explicitly with the principle of whether a mistake of law could be sufficient and rejected the argument that a distinction between mistakes of law and of fact was contrary to the direction of recent authority. He also noted that it would be undesirable to further weaken the protection afforded to registered proprietors by enlarging the expression “mistake”. But it seems to me that this was a reference to the type of mistake of law that had been relied on in this case. Collett JA concluded (at page 397 line 1-4) that “*To give effect to counsel’s submissions in the present appeal, this court would be obliged to hold that the respondent - because he had knowledge of facts which if he had been a Chancery lawyer, would have led him to the conclusion that there was an outstanding beneficial interest - must be deprived of the*



*ownership of the land for which he has paid and for which he has been registered over the past 16 years, on the ground of his ignorance of the law, with only a doubtful hope of obtaining compensation from the state to console him. Only a decision directly on point (that s.140 of the [RLA] had to be interpreted in such a fashion) and binding on us could lead me to an unhappy conclusion of that kind, which would seem repugnant to any principle of equity and fair dealing.”*

222. The mistake (ignorance of the law) considered in *Juneau* was a mistake by the applicant in not seeking to establish his title independently of registration pursuant to the separate adjudication process. In *Connolly* the mistake related to the asserted failure of the transferor (A) to appreciate that as a matter of law she was unable to transfer the property without the consent of another person and by the transferee (the respondent) to appreciate that without such consent, the transfer would be invalid. In my view, for the reasons I set out below, even if the mistake in the present case must be characterised as or involving a mistake of law, it is wholly different from the types of mistake of law considered in and rejected by *Juneau* and *Connolly*.

*The mistake in the present case*

223. As I have noted above, the Walkers Defendants relied on the Registrar’s mistake in omitting to refer to easements in the nature of incumbrances section of the register. As I have also said, I have assumed that they submit that this was a mistake of fact rather than a mistake of law. The logic and formulation of the Plaintiffs’ case on their own application for rectification indicates that they accepted that, if the Court rejected their submissions and held that the Rights were and that the Written Agreements were to be interpreted as incorporating easements, the mistake in this case was a mistake of fact.
224. Paragraphs [122] – [124] of the Plaintiffs’ closing submissions indicate that their position was that the Court had first to interpret the Written Agreements and then consider whether the Registrar had made a mistake when making entries on the register in light of its conclusions as to the proper construction of the Written Agreements. If the Written Agreements did not, as they contended, incorporate a restrictive agreement, and the Registrar had erroneously noted restrictive agreements on the register, then he had made a mistake of fact in not properly recording (transcribing) the true effect and terms of the Written Agreements in the register. As they submitted, “*An agreement either contains ‘an agreement by one proprietor restricting the building on or the use or other enjoyment of his land for the benefit of the proprietor of another land’ or it does not. Once the relevant agreement has been construed (which is a question of*



*law), it is a simple factual query to determine whether that agreement (as construed) contains such a restriction or not. A mistake in relation to that latter question cannot properly be described as a pure 'mistake of law'...*" In my view, the logic of this submission must apply in the case where the Court has held that the Rights are and the Written Agreements incorporate easements. Once the Written Agreements have been interpreted, the issue is whether the Registrar correctly recorded in the register the incumbrances which the Court has held were created by those agreements and if she has failed to do so, she is to be treated as having made a mistake, and a mistake to be characterised as a mistake of fact.

225. In my view, the position in this case is to be analysed as follows. The entries on the register are incorrect because they omit a reference to valid easements which were granted by and included in the Instruments; this omission was made because the Registrar was not asked to register the Rights as easements and did not perform her own assessment as to whether the Instruments included easements; the reason why no application for registration of the Rights as easements was made was not clear from the direct evidence but I am satisfied that in all the circumstances it can be inferred that it was based on legal advice received by the Lot Owners (and possibly Cayman Hotel and Ellesmere) that such registration was not permissible or appropriate in the circumstances.
226. The Properties were, following the execution of the Instruments, subject to an incumbrance in the nature of easements, which incumbrance has been omitted from the register. This omission was the result of a mistake by the Registrar. She failed to appreciate that the Instruments created easements. She is obviously not to be criticised in the circumstances of this case for mistakenly concluding that they did not include easements which she was required to register. Her mistake was caused by the failure of those applying for registration to ask for registration of easements and instead just to ask for the noting of restrictive agreements. The Registrar was induced to make her mistake by the mistake made by those applying for registration. This is a case, to use Megarry & Wade's test, where the Registrar would have done something different had she known the true facts at the time when the Instruments were presented for registration. Had she appreciated that the Instruments included and that the Rights were easements, she would have decided and been bound, subject only perhaps to receiving confirmation that an application was being made for registration of easements, to register the Rights as easements.
227. In my view, in these circumstances, the Court has jurisdiction to order that the register be rectified by correcting the omission of the registration of the Rights as easements. It seems to me that it is



the Registrar's mistake that is critical and that this can, as the Plaintiffs themselves suggested, be characterised as a mistake of fact. She did not form a view on any legal issue, let alone base her decision as to what to register on a legal opinion or proposition of law. She and her staff reviewed the documents presented to them in light of their terms and the request to register restrictive agreements and based the decision on what to register on what they took to be included in the Instruments. They missed the fact that the Rights were easements. The Registrar assumed that the Instruments did not create easements. Of course, whether the Rights were to be characterised as easements involved a legal question but the Registrar's error in failing to register the easements was not based on forming a view on that legal question. An entry in the register recording A as the proprietor of land can be deleted by rectification where it is subsequently established that the transfer to A was void. This would not be precluded on the basis that the Registrar's decision to register the transfer must have been based on a legal opinion that the transfer was valid, so that any mistake must be characterised as a mistake of law. The Registrar's decision was based on an assumption that the transfer was valid, and it is that factual assumption that is subsequently shown to be based on a mistake.

228. If I am wrong that the operative mistake in this case, (namely the Registrar's mistake in failing to appreciate and assuming that the Instruments contained easements that fell to be registered) is to be characterised as a mistake of fact, and that instead it should be treated as a mistake of law, I would conclude that it is nonetheless a type of mistake within section 140(1) of the RLA which gives the Court jurisdiction to order rectification of the register. As I have noted above, the mistake in the present case is fundamentally different from the mistakes of law discussed in *Juneau* and *Connolly*. A mistake by those applying for registration and the Registrar when reviewing such an application as to whether rights granted by an instrument are as a matter of law registerable seems to me the kind of mistake which section 140(1) is aimed at. Such a mistake is directly related to the right to and process of registration and results in a fundamental error on the register which should be capable of being corrected. Whether such an error will justify rectification being ordered will depend on the facts of the case and the exercise of the Court's wide discretion which arises where there is jurisdiction to rectify. The existence of such a wide discretion which responds to the facts of the case suggests to me that there is no need to take or justification for taking a narrow view of the statutory reference to mistake (the jurisdictional threshold).



229. I have carefully considered whether (a) the absence of direct evidence from the Walkers Defendants (and White Dove) as to the reason for their failure to apply for registration of the Rights as easements or (b) the fact that they took a decision only to apply for registration of restrictive agreements should affect my finding that there has been a relevant mistake. I have concluded that on balance they should not. It does seem to me that evidence of the basis on which the decision was made to treat the Instruments as only giving rise to restrictive agreements and not restrictive agreements and easements would have been both admissible and helpful on the rectification issue. But I can understand that adducing such evidence would have involved disclosing privileged legal advice that could have been regarded as at least tactically damaging to the Walkers Defendants' (and White Dove's) case. Furthermore, it was not wholly unreasonable for the Walkers Defendants (and White Dove) to invite the Court to infer and to rely on the Court inferring that prior to the handing down of the UK Supreme Court's judgment in *Regency Villas* the legal uncertainty surrounding the nature and status of recreational easements resulted in difficult judgment calls being made as to how to label and register such rights and that it was these difficulties that resulted in the decision being made in this case (and apparently other cases) as to how to draft the Instruments and frame the application for registration. I also do not consider that the fact that the failure to register the easements resulted from the Lot Owners' own application of itself precludes a finding that they and the Registrar made a relevant mistake. The application itself can be viewed as based on a mistake, which as I have explained, caused and induced the Registrar to make her own operative mistake.

*Does section 140(2) of the RLA preclude rectification so as to affect the Plaintiffs' title?*

230. I accept the submissions of the Walkers Defendants and White Dove on this issue.

231. Section 140(2) prevents the rectification of the register as against a proprietor in possession unless they had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought. It seems to me that the evidence in this case demonstrates that the Plaintiffs had conducted due diligence before purchasing the Properties and were aware that it was at least possible that the entries on the register were incomplete and in error in failing to refer to and register the Rights as easements.

232. Ms Doak's evidence was clear on this point and confirmed during her cross-examination during which the following exchange occurred (underlining added):



- “Q. The first item listed on this page of the incumbrances section which we can see has been there since 2 June 1992, would disclose instrument 3063/92 was registered as an incumbrance over this property in favour of four property titles, 12D 25, 12D 38, 39 and 40. Do you see that?”*
- A. I do see that.*
- Q. Presumably as part of the due diligence, the filed instrument 3063/92 will have been looked at?*
- A. That is correct.*
- Q. If we can look please in the next tab to 6, page 795. You see this is the land registered for 12D 108, the other parcel you were buying?*
- A. I do. 12D 108 are the derelict facilities and the golf course.*
- Q. Correct. Over the page, if you look at the entry number 4 on F796 about halfway down. Since 2 June 1992 instruments 3061 and 3062/92 have been registered as (inaudible) over this property in favour of various properties but starting with the same four, 12D 25, 38 to 40?*
- A. That is correct.*
- Q. Again as part of the due diligence those filed instruments will have been looked at?*
- A. I am sorry, you broke up a bit. I believe you said those instruments would have been looked at?*
- Q. Correct.*
- A. Yes, that is correct.*
- Q. Presumably, you will have taken legal advice about those instruments?*
- A. When we were looking to acquire the property, we had discussions with Embassy. Part of the due diligence that they shared with us was information on whether the restrictive agreements that you are speaking to here would be enforceable. So with that information we were aware that there were documents on title that were registered as rest. agreements, restrictive agreements, that we had information from both Embassy's, I guess due diligence investigation into the enforceability as well as we took our own advice on the same.*
- Q. Yes. So by the time you had purchased these properties, you were aware of the features of these agreements and instruments which in this case are being suggested make their registration a mistake?*
- A. I am aware that -- yes, that it is, I guess asserted that the registration was an error or a mistake, yes.*
- Q. And you were aware of the reasons why it is being, the essence of the reasons why it is being said it was a mistake at the time you had bought these properties?*



A. *That is correct.*”

233. Ms. Doak’s candid answers (about which Mr Seitler QC did not consider that it was necessary or appropriate to ask further questions in re-examination) make it clear that the Plaintiffs were aware that there were questions and legal issues as to whether the entries on the register were correct or the result of mistakes, and whether the restrictive agreements were enforceable. It appears that the Plaintiffs conducted detailed legal due diligence based on the legal advice obtained by Embassy and their own legal advice. Ms Doak refers to questions being raised as to validity of the registration and the enforceability of the restrictive agreements but it seems to me that, based on her evidence, the Court can conclude that the Plaintiffs will have reviewed and received advice generally as to the legal effect and effectiveness of the Instruments and the Rights created thereby and as to the impact and possible legal consequences of the mistakes which had been identified and may have been made. It seems to me highly likely, if not inevitable, that the Plaintiffs will have been advised as to and considered the risk of rectification and that the Rights gave rise to easements which might already have been registered or which might be added to the entries on the register pursuant to an order for rectification. In these circumstances, it seems to me that the Plaintiffs had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought in this case and that rectification is not precluded by section 140(2). It follows that I reject the Plaintiffs’ submission that the Court had heard no evidence directed to this point and that there could be no allegations against the Plaintiffs sufficient to support a finding that section 140(2) did not apply.

*Should the Court exercise its discretion to grant rectification in this case?*

234. I also accept the submissions of the Walkers Defendants and White Dove on this issue. I consider that I should exercise my discretion to order the rectification of the register so that the nature of the incumbrance section of the register refers both to restrictive agreements and easements and the further particulars column identifies the easements as being the Rights set out in the filed Instruments and the restrictive agreement as being the Restrictive Agreement Term. I invite counsel to consider the most appropriate wording to be included in the order giving effect to this judgment. It may be that it is appropriate to set out the Restrictive Agreement Term in full and refer in the further particulars column to (and to file with the Registrar) a copy of that order but I will leave the precise drafting to counsel and deal with any further questions when reviewing the form of draft order submitted to me for approval.



235. It seems to me that there are three particularly important factors in the present case, to which I attach substantial weight when deciding to exercise the discretion to rectify. First, that important and valuable rights, which I have held to be easements and incumbrances, have been omitted from the register such that a failure to rectify the register would cause substantial prejudice to the Lot Owners. I have taken into account the impact of possible claims and recourse that the Lot Owners might or would have against their legal advisers and the possibility that they might or would be able to recover their losses, in the event that I refused rectification, from them. However, it is wholly unclear whether the Lot Owners would have any claims and whether they might or would be able to recover a substantial part of their losses. The prospect of making recoveries against the Lot Owners' legal advisers is at this stage speculative. I have also taken into account the argument that justice requires that those legal advisers take primary responsibility for the inadequacies and errors of the Lot Owners' application for registration (and the drafting of the Instruments), and that they should be made to bear the losses rather than impose the effect of rectification on the Plaintiffs. Secondly, what currently appears on the register (the entries made on the register) while not fully complying with the requirements for registration of an easement, includes a substantial part of the information which would be included if registration had been properly completed. The entries make a reference to rights (and therefore refer not merely to obligations and negative covenants affecting the registered titles) and direct those searching the register to the Instruments which set out the Rights, which on their face arguably have the characteristics of easements. Thirdly, while the Plaintiffs will be prejudiced by the order for rectification, the evidence shows that they purchased the Properties with a full appreciation of the issues surrounding the potential inadequacies of the registration and the possibility that the entries on the register were incorrect or incomplete. They took the risk when they purchased the Properties and can be assumed to have factored that risk in to their decision making as to price and whether to proceed with the purchase. To that extent, the prejudice they will suffer has been substantially reduced and is considerably less than the prejudice that would be suffered by the Lot Owners if rectification were refused.

#### **The Plaintiffs' claim under Section 96 of the RLA in relation to the Tennis Courts**

236. In paragraph 2 of their Re-amended Summons the Plaintiffs seek an order pursuant to section 96 of the RLA, in the event that the Court decides that the Tennis Court Rights are properly characterised as easements, that:



*“the Tennis Court Rights purportedly granted under the Restrictive Agreements, be wholly or partially extinguished or modified on the grounds that:*

- (a). the Tennis Court Rights are obsolete by virtue of changes in the character of the lands registered as Block 12D Parcel 108 and Block 12C Parcel 27 (together the Properties), or of the neighbourhood;*
- (b). the continued existence of the Tennis Court Rights impedes the reasonable user of the Properties without securing any practical benefits to other persons; or*
- (c). the extinguishment or modification of the Tennis Court Rights will not injure the persons entitled to benefit of the Restrictive Agreements.”*

237. The Plaintiffs seek an order wholly or partially extinguishing or modifying the Tennis Court Rights. Their primary case is that an order extinguishing the Tennis Court Rights altogether should be made.

238. The Walkers Defendants and White Dove did not oppose the making of an order under section 96(1)(a) of the RLA in respect of that part of 12D 108 (formerly Block 12D Parcel 24 over which the Tennis Court Rights were originally granted) which has been incorporated into the Highway. However, they submitted that there was no good or sufficient reason to make such an order in respect of the remaining part of the parcel, which included the entirety of the eastern court as it was originally laid out. They accepted that the Hyatt Hotel had remained closed and that the courts had not been used for tennis, however, they submitted that it could and should not be assumed that it will never be restored in conjunction with neighbouring buildings.

239. The parties accepted that the current version of section 96 RLA applied to the Plaintiffs' application. It is in the following terms:

*“96(1). The court shall have power, on the application of any person interested in land affected by an easement, profit, positive or restrictive covenants by order wholly or partially to extinguish or modify any such easement, profit, positive or restrictive covenants (with or without payment by the applicant of compensation to any person suffering loss in consequence of the order), on being satisfied that –*

- (a). by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the court deems material, the easement, profit, positive or restrictive covenants ought to be held to be obsolete;*
- (b). the continued existence of the easement, profit, positive or restrictive covenants impedes the reasonable user of the land for public or private*



*purposes without securing practical benefits to other persons or, as the case may be, will unless modified so impede such user to a different extent, from that which could reasonably have been foreseen by the original parties to the easement, profit, positive or restrictive covenant at the time of its creation; or*

(c). *the proposed discharge or modification will not injure the person entitled to the benefit of the easement, profit, positive or restrictive covenants.”*

240. The parties agreed that the sub-sections in section 96(1) of the RLA were to be construed disjunctively so that the Plaintiffs only had to satisfy one of them (relying on *Ebanks v Reynolds* [1996 CILR 393] (**Ebanks**) at 397). The Plaintiffs accepted that the onus was on them to satisfy the Court that no “*real*” injury (having a “*present substance*”) to the legitimate interests of the Lot Owners would result from the extinguishment of the Tennis Court Rights (relying on the approach set out in *Murmarson Limited v Eldemire* [1988-89 CILR 61] (**Murmarson**) at 71 which had been endorsed in *Ebanks* at 400-401).

241. The Plaintiffs submitted that:

(a). sub-section (a) was satisfied in the present case. There had been a change in the character of the property and neighbourhood such that the Tennis Court Rights ought to be held to be obsolete. The Hyatt Hotel had not reopened following Hurricane Ivan in 2004 and in or around 2012 Embassy had partially demolished the hotel buildings, stripping them down to their structural shells. As a result, the Britannia Resort was no longer a community “*offering both hotel and condominium facilities*” as it had been when the Written Agreements were entered into (and as described in recital 3 thereto). Mr Pilling and Mr Lund had both agreed that the character of the Britannia Resort had changed considerably over the years. As a result of these changes, the Tennis Court Rights were now obsolete. The parties agreed that the tennis courts had not been used and had remained in a derelict state since Hurricane Ivan in 2004 (some 16 years). Aerial photos of the tennis courts before, during and after the construction of the Highway were put in evidence and confirmed that while the footprint of one of the courts appeared to remain intact, it was no longer accurate to describe that land as containing a tennis court. The area on which the tennis courts had been located no longer provided a safe or enjoyable place to play tennis. The photographs made plain the close proximity of the busy four-lane Highway and, even though a concrete verge provided some protection for players, that protection was limited and the location was no longer suitable for standalone tennis courts. It was insufficient for



the Walkers Defendants to claim that there remained a possibility that the eastern court would be rebuilt (they had argued in their trial skeleton, as I note below, that “*it cannot be assumed [the eastern court] will never be restored in conjunction with neighbouring buildings*”). The Plaintiffs were, as the defendants accepted, under no obligation to restore the tennis courts and the mere off chance that they might decide to do so did not prevent the Tennis Court Rights from being obsolete and of no practical benefit.

- (b). sub-section (b) was satisfied since the continued existence of the Tennis Court Rights impeded the Plaintiffs’ reasonable user of the land on which the Tennis Courts had been located. The Dart Group is a property development group and is interested in redeveloping the whole of 12D 108. It was self-evident that the continued existence of the Tennis Court Rights would impede this user. Either the land on which the (remaining unused) court was situated could not be redeveloped or an alternative location would have to be provided. Either way, Dart Realty’s reasonable use of (part) of 12D 108 would be inhibited. This

inhibition on redevelopment impeded the user to a greater extent than the parties to the Written Agreements had reasonably anticipated upon entering into them. At the time that the Written Agreements were concluded, a functioning hotel with adjoining tennis courts operated on 12D 108 and it was no real impediment to Cayman Hotel to permit the Lot Owners to use those tennis courts as well as hotel guests.

242. The Walkers Defendants submitted that the burden was on the Plaintiffs to establish that the defendants would suffer no injury, and that the burden was not an easy one to discharge (citing *Murmarson* at page 400, line 40). Furthermore, they submitted, section 96(1) of the RLA was not designed to enable one owner to get a benefit by being freed from the restrictions imposed upon his/her property in favour of a neighbouring owner merely because in the view of the person who desired the restriction to go, it would make his property more enjoyable or more convenient for his own private purposes (citing *Murmarson* page 398, line 5). In relation to sub-section (c), whether objectors do in fact take advantage of the benefits in question is not always an essential factor (*Murmarson* page 399, line 25) and very little was necessary to demonstrate injury under subsection (c) (citing *Proprietors of Strata Plan No. 41 v Universal Secs Ltd*, Grand Court Case No. 445/90, unreported, Harre J).



243. The Walkers Defendants and White Dove accepted that for some time, free access to the tennis courts had been restricted, but they pointed out that this had not been at the hand of or with the consent of the Lot Owners. In around 2012, Embassy had erected a six-foot-high chain-link fence around the Hyatt Hotel and the tennis courts, and partially demolished the related buildings; the First Plaintiff had subsequently repaired and enhanced the fence and more recently, Decco (a Dart company) had stored items there, in disregard for the Lot Owners' registered rights. However, the proper vindication of the Tennis Court Rights as part of these proceedings (together with their clarification in respect of that part of the courts that have been incorporated into the Highway) was likely to increase demand for their use.

244. The Walkers Defendants submitted that:

- (a). the Tennis Court Rights were not obsolete (save in respect of the court that now lies under the Highway). There had been no changes in the character of the neighbourhood of the remaining court, or other material circumstances that would render it obsolete. The courts did not rely upon the existence of the Hyatt Hotel for their utility and the fact that the Hyatt Hotel is in disrepair cannot render them obsolete. At any point, the land may be redeveloped (incorporating the remaining tennis court).
- (b). the continued existence of the Tennis Court Rights over the remaining tennis court did not impede the reasonable user of the land for public or private purposes. In fact the true position was quite the opposite given that there was no present use being given to the land, and it could not be shown that it does not secure practical benefits to other persons (the Lot Owners).
- (c). the proposed discharge or modification will injure the Lot Owners, as persons entitled to the benefit of the Tennis Court Rights over the remaining court.
- (d). the property rights granted by the Instruments should not lightly be removed by the Court exercising its powers under section 96 of the RLA.

245. I accept the Plaintiffs' submissions that the Tennis Court Rights (including the rights as they relate to the whole of the land on which the tennis courts were situated and not just the land and court that is now under the Highway) should be extinguished on the grounds set out in subsections (a) and (c) of section 96(1) of the RLA:



- (a). neither of the parties sought to explore in any depth, or cited any authorities dealing with, the meaning of “*obsolete*” for the purposes of sub-section (a) (neither *Murmarson* nor *Ebanks* involved claims for relief under section 96(1)(a)). It seems to me that an easement can be regarded as “*obsolete*” when its original purpose can no longer be served or when owing to circumstances which have occurred since it was entered into the object for which the rights were granted cannot be attained or achieved. If it is established that the easement can be said no longer to serve any useful purpose, it is obsolete.
- (b). it seems to me that in view of the construction of the Highway, it is no longer possible to use the land on which the tennis courts were located for the purpose of playing recreational tennis. As the Plaintiffs submitted, the aerial photographs (and the video) of the current configuration of the land on which the tennis courts were located make it clear that playing tennis on the tennis court not under the Highway would involve, even after the containers which currently obstruct the playing of any tennis were removed, playing right next to the Highway (with all the noise and pollution to which that gives rise) and in what is now effectively a light industrial zone. It seems to me that the Walkers Defendants’ (and White Dove’s) claims that there has been no change in the character of the neighbourhood of the remaining court and that the Lot Owners could continue to play tennis for recreation and relaxation under the conditions to which the remaining court is subject were wholly unreal and fanciful.
- (c). as regards sub-section (c), the judgment of Collett CJ provides some helpful guidance on the approach to be adopted when considering an application under that sub-section. At pages 71-72, he noted as follows (underlining added):

*“Although the word “injure” in s.96(c) Of the Cayman Law is not qualified by the word “substantially” as it is in the comparable wording of the English s.184, Mr. Ritch submitted that upon the true construction of it, such a qualification might be implied. However, in Re Mason, a New South Wales decision where the applicable statute included the word “substantial,” Jacobs, J. observed that the word does not in context mean a large or considerable injury but rather an injury which has present substance, that is to say, not a theoretical injury but something which is real and which has present substance. I am content to adopt this formulation and to approach the present question with a view to deciding whether the defendants’ proposed modification will entail any real injury to the legitimate interests of the plaintiffs or whether, as Mr. Ritch contends, the injury suggested is purely theoretical because, properly considered, the plaintiffs will be getting as good or*



*better and a more convenient right of way than that which the present registered easements afford to them in every material respect.”*

- (d). in my view, for the reasons I have given, the injury to the Lot Owners’ legitimate interests that will be suffered if the Tennis Court Rights are extinguished will not be real and material, in the manner described by Collett CJ. The remaining court is in reality and as a matter of substance not of any practical use to the Lot Owners as a tennis court. In my view, the fact that it has not been used for years is evidence of and reflects this fact. Furthermore, the Walkers Defendants’ and White Dove’s argument that the Lot Owners would suffer real injury because at some indeterminate date in the future the Plaintiffs might decide to develop the relevant land in a way that might make it suitable for playing recreational tennis again, even when they have no obligation to do so, is fanciful and without foundation. I bear in mind, but do not consider relevant in the present case, the principle that section 96(1) is not designed to enable the owner of the servient land to obtain a benefit by being freed of the relevant restrictions and rights merely because in his view the removal of the restriction or right would make his property more enjoyable or convenient for his private use.

**The Walkers Defendants’ and White Dove’s counterclaims in relation to the damage allegedly done to the Golf Course**

***The nature of the counterclaims and the defendants’ position – only liability in issue at this stage***

246. Both the Walkers Defendants and White Dove have filed counterclaims. Both counterclaims claim damages in relation to the various wilful acts of damage and destruction which they say the Plaintiffs have committed to the golf course. They claim that the Plaintiffs have committed a wilful interference with their Rights by closing the golf course, stripping substantial amounts of turf from key areas of the golf course, damaging and removing the substantial and heavy flushing pump (or parts of it) on the golf course, whose purpose was to clean the lakes on the golf course by pumping fresh seawater into them from the nearby canal and by interfering with the irrigation system. They both seek an order for damages to be assessed in respect of the costs to them of the works of replacement and restoration of turf, pumping and irrigation systems (and interim measures to mitigate the effects of the same) already carried out and to be carried out by them or on their behalf. Their pleadings are similar albeit not identical. White Dove also claims for an interference with their easement relating to the Beach Club Rights but since no submissions were made by White Dove with respect to this claim during the trial I have not dealt with it in this judgment. Because White Dove’s claim for interference with their Golf Club Rights is essentially the same as the Walkers Defendants’ claim and because they supported the submissions made by



the Walkers Defendants', I shall focus on and consider the Walkers Defendants' counterclaim and submissions.

247. On 25 November 2019 the parties consented to, and I made, an order for a split trial of the counterclaims. I directed that the counterclaims be tried together with the Plaintiffs' claims but separately from and before the issue of quantum of damages (including the Walkers Defendants' and White Dove's claims for interest) claimed in the counterclaims. Accordingly, at this stage the Court is only required to consider the issue of liability.

248. The Walkers Defendants' and White Dove's counterclaims are based on two causes of action, namely that the Plaintiffs' conduct resulted in them (a) committing a nuisance to the easements claimed by the Walkers Defendants and White Dove and (b) breaching the restrictive agreements which they claimed to have been incorporated into the Instruments (the Covenant Not to Build or Develop). As regards the counterclaim based on the interference with the Lot Owners' easements, the Walkers Defendants asserted a claim based on (a) an interference with the Rights as easements and (b) an interference with their secondary step-in easements. However, the Plaintiffs objected (in their closing submissions and in Mr Seitler's opening of his case) to the Walkers Defendants being able to rely on the second element of this claim, based on an interference with their secondary step-in easements since, they submitted, it had not been properly pleaded. The Walkers Defendants' position was that their pleading was sufficient but that if the Court were to reject that submission, they would apply for permission to re-amend their counterclaim pursuant to GCR Order 20, rule 5. In light of this, I said that, rather than delay the progress of the trial, I would direct that the parties file written submissions (and in the case of the Walkers Defendants that they confirm the re-amendment they sought permission to make) so that I could deal with the issue when preparing this judgment. In accordance with those directions, the Walkers Defendants filed on 15 December 2020 a note setting out their submissions in support of their primary position that their pleading was adequate and also in support of their conditional application for permission to re-amend. The Plaintiffs subsequently filed submissions and on 23 December 2020 the Walkers Defendants filed submissions in reply. It will be convenient to deal with this issue after explaining the Walkers Defendants counterclaims and submissions.

### ***The Walkers Defendants' submissions***

249. The Walkers Defendants' claims are pleaded in [20] to [23] of their counterclaim and particulars of the loss and damage which the Walkers Defendants claim to have suffered are pleaded at [24].

250. In [19] of their counterclaim, the Walkers Defendants repeated and relied on [1] – [17] of their Defence. Paragraphs [20] to [23] of the counterclaim are in the following terms:

*“20. The Plaintiffs, having ceased to operate and maintain the Britannia golf course aforesaid with effect from 1 September 2016, by their servants or agents committed various wilful acts of damage and destruction to it by:*

- a. Cutting and removing turf from various greens, approaches and tee boxes on the golf course in about September 2016, including (but not limited to) the turf at the practice green, the tee block at hole 5/14 and at hole 1/10 and at the 8/17, 4/13 and 9/18 holes, which the Plaintiffs have failed to replace or even re-seed, adequately or at all; and*
- b. Damaging and/or removing parts of the flushing pumping and/or parts of the flushing pump system which clean the lakes on the golf course by pumping fresh seawater into them from the canal. In or around July/August 2016 this was turned off, resulting in the lakes on the golf course becoming covered with algae and the water levels dropping significantly. In or around February/March 2017, the flushing pump was removed and part of it was left discarded near the Cayman Water Company compound by the golf course. Whilst the Plaintiffs later (in late 2017) sought to resolve the issue of algae accumulation by applying an algacide (apparently a copper sulphate concentrate solution), this caused the death of very significant amounts of marine life. In or around late 2018 or early 2019, the Plaintiffs installed a new pump, but this failed some months later. The Plaintiffs subsequently installed replacement pumps, which were insufficient for their purpose and failed and/or remain out of operation for more of the time than they operate;*
- c. Removing other parts of the irrigation system (which, together with the flushing pump, were fixtures forming part of the land) including, in particular, sprinkler heads, pumps, satellite boxes and electrical components.*

21. *By their said actions, the Plaintiffs have deliberately, directly and substantially interfered with the Walkers Defendants' aforementioned rights to play golf on the golf course (thereby committing a nuisance to their easement pleaded in paragraph 11(a) above [the claimed easement in respect of the Golf Playing Rights]), and breached the restrictive covenant pleaded in paragraph 9(a) above [the claimed restrictive agreement, in the form of the Covenant Not to Build or Develop, in respect of the Golf Playing Rights].*

22. *By the letter from the Walkers Defendants Attorneys' dated 5th April 2019 to the Plaintiffs' Attorneys, the Walkers Defendants called on the Plaintiffs to take immediate steps to make good the damage they had done, namely by:*

- a. replacing any and all turf which the Plaintiffs had removed with turf of comparable quality; and*





- b. *restoring and reconnecting as necessary all those parts of the irrigation system which the Plaintiffs had damaged or removed (including but not limited to replacing all the removed sprinkler heads), so that such system is restored to the fully operable condition in which it was before the Plaintiffs took such action.*

23. *However, the Plaintiffs have failed and neglected to do so, as requested or at all, inter alia in their Attorneys' reply to the said letter dated 17 April 2019."*

251. [24] states as follows:

*"24. In the premises, the Walkers Defendants have suffered loss and damage.*

*PARTICULARS*

*The Walkers Defendants seek an order for damages to be assessed in respect of the costs to them of having the works of replacement and restoration of turf, pumping and irrigation systems (and interim measures to mitigate the effects of the same) already carried out and to be carried out by them or on their behalf."*

252. As regards the closure of the golf course:

- (a). in their written submissions for the trial and their closing submissions, the Walkers Defendants asserted claims based on the closure of the golf course.
- (b). the closure of the golf course had been notified to Lot Owners in writing by the Plaintiffs on 22 July 2016 (the **22 July Letter**) and subsequently had been unilaterally implemented, despite protests from attorneys instructed for the Lot Owners at the end of August 2016.
- (c). the Plaintiffs had erected signs to the effect that the golf course was closed, which had the effect of preventing, or substantially interfering with, the use of the golf course as such (and therefore prevented the Lot Owners from exercising and enjoying the Golf Playing Rights, not least because they could not expect to do so safely when others would be entitled to consider the golf course closed).

253. As regards the damage done to the golf course turf, the position of the Walkers Defendants was as follows:



- (a). the Plaintiffs had admitted having harvesting at least 27,000 sq. ft. of sod for use at their associated property at the Kimpton Seafire Resort. In [13.1] of their Amended Reply and Defence to Counterclaim the Plaintiffs had stated as follows:

*“It is admitted and averred that in September and October 2016 sod was removed, principally in order to complete landscaping at the Kimpton Seafire, which was scheduled to open in the late fall of 2016. The estimated harvest was about 20,000 sq. ft. and the total harvest about 27,000 sq. ft. The harvested areas have now regenerated.”*

- (b). the effect of the turf removal was seriously to damage the surface of large parts of the golf course and thereby to make those parts and the course as a whole unplayable. The Walkers Defendants relied on various photographs which were put in evidence which showed the extent and nature of the damage. They also say that the Plaintiffs’ witnesses had fairly accepted this in their evidence. Mr Weekly, when shown the effect of the turf harvesting during his cross examination, had acknowledged that the golf course was unplayable:

*“Q I am simply asking you to agree that as we see it in those pictures, that is not a playable golf green?”*

*A Correct. If it was a golf course, correct.”*

- (c). the Walkers Defendants denied that harvested areas had regenerated, save in the sense that in some of the affected areas (such as the 9th green), though not others (such as the 4th green) there was the appearance of a green colour from a distance. They relied on the evidence of Mr Podlaski, Mr Kelly and Mr Weekley on this issue. There had been no attempt to replace the depth of soil removed as part of the turf harvesting process. Although re-seeding was considered, the documentary and witness evidence indicated that this was not done. Such greening of the affected areas as had occurred was in large part down to weed growth.
- (d). furthermore, the Plaintiffs were wrong to assert that the Walkers Defendants could not have played on the golf course in any event, even before the stripping of the turf. This was established by the fact that 4,500 rounds had been played on the golf course in the first eight months of 2016 and the (unchallenged) evidence of several witnesses that golfers were playing the course up to its closure.

- (e). even if this was not correct, the extent of the work required to be done by the Walkers Defendants when exercising their secondary step-in easements in order to render the course playable had been made far more extensive by the turf stripping undertaken by the Plaintiffs. Without the effect of the turf having been stripped, the golf course could be put into a playable condition with little more than mowing the grass. For example, Mr Pilling, in re-examination, had said as follows:



*“Q If that was the case, with no turf stripping but maintenance as you have described, three or four months after the course had closed, what would have been necessary to make it playable again?”*

*A. Well, there would have to have been a complete mowing of the entire course, all the fairways, all the tees and all the greens would have to have been mown down to the required length, rolled and everything else.”*

254. As regards the flushing pump:

- (a). the Walkers Defendants claimed, as I have noted, that the Plaintiffs damaged and removed the flushing pump (or parts of it) thereby preventing the process of cleaning the lakes on the golf course taking place.
- (b). the effect of this was to cause the water in the lakes to become murky and covered in algae. Mr MacKenzie dealt with this in his First Witness Statement (at [37]-[39]). He said as follows:

*“37. In early 2016 and up to mid-July 2016, the Lakes on the Golf Course were crystal clear and clean with healthy marine life and bird life was abundant around the Lakes. I remember taking my first walk around the Golf Course after purchasing Villa 816 and recall thinking how beautiful it was. You could see to the bottom of the Lakes and no algae was present. People were still playing golf at that time and the grass was in good shape.*

*38. Unfortunately ... the condition of the Lakes has dramatically deteriorated since the closure of the Golf Course. The flushing pump (which cleans the Lakes by pumping fresh seawater into the Lakes from the canal) stopped operating in around late July 2016 or early August 2016. It appeared to have been turned off. In around February or March 2017, the flushing pump was removed and part of it was left discarded near to the Golf Course.*

*39. The water levels dropped significantly and the Lakes became murky green and covered with algae. There was a substantial increase in underwater weed growth and surface algae in addition to algae boom in the water column producing a murky opaqueness due to the change in water quality from*



*stopping the flushing seawater flow from the canal and allowing an imbalance of stagnant fresh water from the rain and run off drainage to occur. This was at a time when the Cayman Islands had a serious Zika virus outbreak concern and pregnant mothers were leaving the country to avoid the risks to the unborn from this virus ....”*

- (c). the lakes were an integral part of the golf course and their appearance and condition significantly impacted on the condition of the course and the enjoyment and experience of golf. This had been explained and demonstrated by the unchallenged evidence of Mr MacKenzie and Mr Pilling (who was a regular golfer). Mr MacKenzie stated as follows in his First Witness Statement (at [36]):

*"Lakes and other water features form an integral part of the design of the golf course and constitute water hazards or penalties as part of the rules of the game. In a similar way to sand bunkers or small hills on a golf course, lakes and other water features make the game much more interesting for the players. In addition, lakes also provide a means to capture the run off of rain water and assist with the overall drainage on the course from irrigation watering and during times of heavy rain. In effect, the lakes form part of the drainage system and plumbing around a golf course. They also become a haven for marine and bird life. The proper maintenance of lakes on the Island is very important for health and hygiene reasons. If lakes or ponds are allowed to become stagnant, then they operate as a breeding ground for mosquitoes (which can spread the Zika virus)."*

- (d). while the Plaintiffs had asserted in correspondence before the trial that the lakes did not form part of the golf course, Mr Kelly had accepted during his cross-examination that water hazards were a common feature of golf courses and that the lakes on the golf course in this case had been significant features of Jack Nicklaus' design of the golf course, and an “*integral part*” of it.
- (e). the Court was invited to find as a fact, based on the evidence presented during the trial, that the Plaintiffs had been responsible for removing and interfering with the flushing pump:
- (i). the Walkers Defendants’ evidence showed that in or around July/August 2016, the original flushing pump had been turned off (as Mr MacKenzie had said in his First Witness Statement at [38] – see above). The result had been that the water level in the lakes on the golf course dropped significantly and became covered with algae. Later, probably in February/March 2017, the flushing pump was removed altogether (which would have required machinery such as a mobile crane and a small truck, or



else a forklift with an extension bar or forks), and part of it was left discarded at a covered storage area next to the golf course (where the Plaintiffs had stored golf carts with facilities for re-charging their electric batteries, prior to the closure of the golf course and their removal to another Dart Realty owned course), opposite what was described as a Cayman Water Company (*CWC*) compound. At that stage, the flushing pump could not simply be re-installed as the stainless steel metal top casing structure was missing (as asserted by Mr MacKenzie in his First Witness Statement at [54]).

- (ii). the Plaintiffs' position and evidence were unsatisfactory and insufficient to rebut the overwhelming inference to be drawn from the Walkers Defendants' evidence, that the Plaintiffs had been responsible for removing and interfering with the flushing pump. In their Amended Reply and Defence to Counterclaim the Plaintiffs had stated (at [13.3]) that:

*"[they] denied that the Plaintiffs damaged the flushing pump or parts of the flushing pump system as alleged. The Plaintiffs do not admit that the pump was turned off: they admit that it was not operating in September 2016 (but not when it first stopped operating) and admit that the pump was removed. They are unable to identify the exact reason for removal or the person responsible, but aver that the most likely explanation for its removal is that it had stopped working and was removed in an attempt to effect repairs to it. It is not admitted that the pump was a fixture."*

- (iii). the Plaintiffs had failed to provide any positive explanation of what had happened to the flushing pump. They did not admit that it had been turned off, but did admit that it was not operating. They had admitted that it was removed but said that they did not know why or by whom. Nonetheless, it appeared to have found its way to the Plaintiffs' premises adjoining the golf course.
- (iv). the Plaintiffs' evidence did not take matters any further since the witness statements provided by their witnesses were primarily limited to conduct in relation to the various replacement pumps after 2018. The closest that the Plaintiffs' witnesses had

come to dealing with this issue was in Mr Kelly's Third Witness Statement, in which he confirmed that he had taken a photograph of what has been identified as the flushing pump but had been unable to say with any certainty what that object was.



- (v). there were two reasons in particular supporting the inference from the evidence that it was and must have been the Plaintiffs who had removed and interfered with the flushing pump. First, the weight of the pump was such that it could not easily be moved. As the Plaintiffs' witnesses accepted, the pump was substantial and heavy item that would require some form of machinery to move it. Mr MacKenzie's evidence was that the pump and casing were around 5.8 ft. in height and of such weight that a heavy lift mobile crane would be required to lift, handle and move it (see his First Witness Statement at [53]). It was highly likely that it was moved by the Plaintiffs' workers and representatives who had access to such equipment. Secondly, the pump seems to have been moved more than once and ended up in the Plaintiffs' storage area adjacent to the golf course. The following exchange during the cross-examination of Mr Podlaski between Mr Randall QC and the witness sets out the Walkers Defendants position and Mr Podlaski's response, on which they rely:

*"Q. ... So we have this heavy piece of equipment which came to this storage area (inaudible) at least twice, which as of March 2018 was seen to have an important part missing. Now, you are the senior person in the property management team and nobody else says they are able to explain this, so what I have to suggest to you is realistically it must have been somebody from your company who moved this big, heavy pump from its normal position or operational position up to this storage area, at least twice. The reason I put that to you, it is a heavy piece of equipment requiring something, crane, forklift whatever, but not human body, to lift it. It ended up in your storage area and I suggest it would seem a very unlikely thing that a trespasser would wanted to involve themselves in, let alone then to leave it in your storage area. For those reasons I suggest to you it must have been somebody from your company who moved it up there. Can you see any alternative explanation for this?"*

*A. I have no knowledge of it other than if it was moved there or put there prior to us taking ownership."*

- (vi). furthermore, it was Mr Mackenzie's evidence that the pump was in situ and in operation when he moved in, in July 2016; that after he had received the 22 July 2016 Letter, the water levels in the lakes had dropped by around two to three feet over the coming months and he noticed that no salt water was being pumped from



the pipe into one of the lakes (lake 3); so he decided to inspect the flushing pump and found that although it was still there, on inspecting the breaker panel and the electrical box at the pumping station, it was obviously not operating and from his initial inspection, he could see no obvious problems with the pump and it appeared to him that the pump had been switched off; that in February/March 2017 he noticed that the pump was no longer in its normal location but instead was in the nearby compound. Mr Mackenzie said that (at [52] of his First Witness Statement):

*“When I was out walking my dog in about late February or early March 2017, I discovered the electrical driven submersible axial centrifugal Flushing Pump together with its electrical power cable and the stainless steel lower pump casing, was discarded under cover, inside the [CWC] compound at the Golf Course (which was where golf equipment was once stored).”*

- (vii). the Walkers Defendants also relied on the video evidence. This they said showed a circle on the floor of the compound and it was a fair inference that this was caused by the flushing pump having previously been sited there.
- (viii). in addition, further damage to the lakes had been caused by the Plaintiffs when in late 2017, they had sought to resolve the problems caused by the build-up of algae by applying an algaecide, which they admitted was a copper sulphate concentrate solution. The effect of this was to cause the death of very significant amounts of marine life. While Mr Kelly in his evidence was not prepared to accept that the introduction of the copper sulphate had been responsible for the death of marine life in the lakes, this was completely unconvincing since the death of the marine life had followed shortly after the introduction of the copper sulphate and the timing was such as not to allow for any other explanation. During his cross-examination, Mr Kelly had said the following:

*“Q. I mean this is the consequence of grossly excessive use of copper sulphate, isn't it?”*

*A. I think that is a perception. I don't know, I would have to see a test report and do some -- that would require that. You just can't say the lake is anaerobic, oxygen levels could be too depleted, the marine life would suffer from that as well.”*

.....



*Q. You are accepting there that copper sulphate would affect aquatic life if it was used indiscriminately. Then you say: "We recommended a lower dosage application rate to minimise risks." When did do you that, Mr Kelly?"*

*A. When handing over the product to the applicator or obviously in this case (inaudible) obviously that is standard practice to give the recommendation for the use of the product.*

*Q. The word "lower" suggests that you acknowledged that they didn't take your advice and they used too much?*

*A. I wouldn't say that either, because I know, I have a good idea of the surface area of the water and the lakes in the property and we didn't get them that level or dosage of product in quantity to create that kind of damage, in my view anyway. We use copper sulphate quite frequently, not quite frequently, but as needed at North Sound and we never came close to this kind of attack so furthermore consultants, consulting with a consultant who oversees water bodies as well and the product is used as per specifications. We wouldn't do anything differently.*

*Q. But in the wrong quantity it has potentially very bad side effects?*

*A. Yes. But again they were in my view not, provided that level of product, I mean a couple, three or four bags of it. Usually it is a couple of bags per an acre surface area of lake, so Britannia obviously has much larger surface area on their lakes than the product that was given to create a poisoning effect, in my point of view."*

(ix). the Walkers Defendants said that Mr Kelly had been unable to confirm the dosage actually used as he was not the contractor employed to carry out the spraying of the copper sulphate. Such works had been carried out by a contractor called Earthworks. Aside from the uncertainty as to whether Mr Kelly's recommendation had been followed, it was unknown whether any such recommendation took into account the significant reduction in the water levels of the lakes due to the removal of the pump (which gave rise to the treatment of algae in the first place). In any event, Mr Kelly had subsequently acknowledged that he was "*Not an expert in the area*" when asked about the effects of large quantities of dead and rotting fish.

(x). in mid-2018, the Plaintiffs had installed a new pump, but just a few months later it failed. Replacement pumps were installed but they were insufficient for their purpose and either failed or were out of operation for more time than they operated.

(xi). the Walkers Defendants noted that the Plaintiffs had pleaded in their Re-Amended Defence to Counterclaim that the flushing pump "*became [the First Plaintiff's]*



*property when the land was acquired.”* However, they submitted that this was irrelevant. All they had to establish was some positive action taken by the Plaintiffs that had had the effect of causing a substantial interference with the exercise of the Golf Playing Rights. This they had done by showing that the effect of the Plaintiffs' dealings with the flushing pump was such as to have a real consequence upon the lakes on the golf course (particularly in circumstances where the lakes form an intrinsic part of the golf course itself).

255. As regards the irrigation system:

- (a). the Walkers Defendants claimed that the Plaintiffs had also removed parts of the irrigation system at the golf course, most notably, satellite boxes and electrical components.
- (b). the Plaintiffs had made limited admissions with respect to the removal of parts of the irrigation system at [13.2] of the Plaintiffs' Amended Reply and Defence to Counterclaim where they said that:

*“As regards irrigation, other than to promote the regrowth of grass on areas where sod was removed (and then for only a short period after the removal), the irrigation system has not been utilised and a basic landscaping maintenance applied to control vegetation growth has been utilised instead. The Plaintiffs made that decision acting upon advices received from experts in landscaping and property management, competently appointed, to the effect that the irrigation system was no longer cost-effective in light of its condition and the level of use. The system is approximately 30 years old and the grounds were in poor condition for a golf course. For the avoidance of doubt, notwithstanding the Plaintiffs' decision to not utilise the irrigation system, there has been no management decision to modify, remove or damage the irrigation system and the Plaintiffs are not aware that any portions of the irrigation system have been damaged or removed; In fact, save to a very limited extent and then only at the end of 2017, no parts of the irrigation system were removed from the golf course by the Plaintiffs. The only parts removed were irrigation controller faceplates and output control boards. These items were salvaged from a property that was no longer being used as a golf course to be used at the North Sound Golf Club. It is denied that anything removed was a fixture.”*

- (c). the Walkers Defendants submitted that those items and elements of the irrigation system which were damaged or removed (and taken by the Plaintiffs to be used at the North Sound Golf Course) were fixtures on the land such that interference with them was interference



with the land itself, and such interference gave rise to an actionable interference with the exercise of the Rights over that land.

- (d). they submitted that whether an article was a fixture depended primarily upon two factors. First, the degree of annexation to the land and secondly the purpose of that annexation (see *Megarry & Wade* at [22-005] to [22-010]). An article will *prima facie* be a fixture if it has some substantial (physical) connection with the land.
- (e). the Walkers Defendants submitted that the parts of the irrigation systems that were removed from the golf course were so physically connected to the land as to become fixtures. They were not just loose chattels situated upon and separate to the fabric of the golf course, but rather were built into and attached to the land itself. This therefore gave rise to a *prima facie* case that they were fixtures. On the question of the purpose of that annexation, the issue was whether the purpose of the annexation was to enhance the use of the chattel as such, or to enhance or improve the land permanently. In the case of the irrigation system, it was no part of their place on the golf course to be used independently as chattels – in fact by their very nature they were present on the golf course for the purpose of facilitating and improving the use of the land as a golf course.
- (f). *Borwick Development Solutions Ltd v Clear Water Fisheries Ltd* [2019] EWHC 2272 (Ch.) was of assistance in the present case. There the court considered whether or not solar panels attached to the land were to be treated by law as fixtures which pass to the purchaser on sale. Judge Hodge QC (sitting as a High Court judge) had held (at [88]) that “*the purpose of the solar panels was not for their use independently of the land, but for their use as an integral part of the land itself.*” In the present case, the purpose of the irrigation system was not its use independently of the land, but as an integral part of the golf course.

256. The Walkers Defendants also argued that the Plaintiffs’ conduct constituted an actionable interference with their secondary or ancillary rights (step-in rights). These secondary rights were referred to in *Regency Villas* (at [67] to [69]) and recognise the dominant owners’ ability to effect necessary repair and maintenance. This was a corollary to the absence of any obligation on the servient owner to undertake positive steps to maintain the subject matter of an easement, save in a case where an express obligation had been agreed (citing *Carter v Cole*, above). Disturbance of these secondary rights also gave rise to an actionable interference. The Walkers Defendants (and White Dove) relied on the following passage in *Gale* (at [13-20]):



*“An action lies as well for a disturbance of the secondary easements, without which the primary one cannot be enjoyed, as for a disturbance of the primary easement itself. So acts will be restrained which would interfere with the right of the dominant owner to go onto the servient land to repair the subject-matter of the easement.”*

257. The Walkers Defendants (in their submissions) claimed that the Plaintiffs had interfered with their secondary rights in the following manner:

- (a). by refusing access to the golf course by way of closing it and erecting signs to the effect that it was closed, which had prevented the Walkers Defendants from accessing the servient tenement to undertake any such maintenance to the golf course that would enable their enjoyment of the land as such.
- (b). by preventing them (as a result of the Plaintiffs’ interference with the flushing pump) from using the pump to ensure that the lakes remained in such a condition that the use of the golf course was not impeded.
- (c). by preventing them (as a result of the Plaintiffs’ interference with the irrigation system) from maintaining and using the irrigation system such that the use of the golf course was not impeded.

258. The Walkers Defendants argued that they had sought to vindicate their rights in respect of the golf course by requiring that the Plaintiffs make good the damage that they had caused and the interference that they had committed but the Plaintiffs had refused to do so. They submitted that the refusal by itself represented an interference with the proper exercise of their Golf Playing Rights.

### ***The pleading issue***

259. As noted above, in paragraph 21 of their counterclaim, the Walkers Defendants had pleaded as follows (underlining added):

*“By their said actions, the Plaintiffs have deliberately, directly and substantially interfered with the Walkers Defendants’ aforementioned rights to play golf on the golf course (thereby committing a nuisance to their easement pleaded in paragraph 11(a) above) ....”*



260. The Walkers Defendants submitted that the natural meaning of “*easement*” in the underlined wording was the identified (golf playing) easement or right, *including* its inherent ancillary aspects or rights. The Walkers Defendants said that their claimed step-in rights, which they assert have been interfered with, are part of the easement granted to them. The grant of the easement brought with it the grant of the step in rights, which are rights ancillary to the easement (and ancillary rights are expressly preserved by section 97 of the RLA). In support of this proposition they relied on the following passage in Gale (at [1-111]):

*"The grant of an easement is also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Where the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. The ancillary right arises because it is necessary for the enjoyment of the right expressly granted."*

261. The Walkers Defendants argued that the basic principle of pleading was that a party was required to plead the facts relied on to constitute his alleged cause of action, but not the law. The wording in parenthesis and underlined in [21] may therefore strictly have been unnecessary. However that wording could not sensibly be read as limiting the claim which the facts pleaded would otherwise disclose to a claim only for interference with the primary aspect of the golf playing easement, and excluding from its scope interference with the ancillary aspect.

262. In the alternative, the Walkers Defendants sought permission to re-amend the counterclaim by amending [21] and [24] of their counterclaim. The proposed re-amendment to [21] is as follows: (the re-amended wording is in bold type):

*"By their said actions, the Plaintiffs have deliberately, directly and substantially interfered with the Walkers Defendants' aforementioned rights to play golf on the golf course (thereby committing a nuisance to their easement pleaded in paragraph 11(a) above **including, for the avoidance of doubt, the ancillary or 'step in' rights necessary for its effective enjoyment**), and breached the restrictive covenant pleaded in paragraph 9(a) above."*

The re-amendment to [24] (which avers that the Walkers Defendants have suffered loss and damage and sets out under the heading “*particulars*” the application for an order for damages to be assessed in respect of such loss) is as follows (once again the re-amended wording is in bold type):

*"The Walkers Defendants seek an order for damages to be assessed in respect of the costs to them of having the works of replacement and restoration of turf, pumping*



*and irrigation systems (and interim measures to mitigate the effects of the same) already carried out and to be carried out by them or on their behalf.”*

263. The Plaintiffs did not accept that the reference to the word “*easement*” in [21] of the counterclaim was sufficient to plead the Walkers Defendants’ case that their step-in rights had been breached. The fact that, as a matter of law, an easement carried with it ancillary legal rights did not mean that a reference to a breach of the former in a pleading necessarily pleaded a breach of the latter. They submitted that a reasonable reader considering [21] of the counterclaim would not understand that paragraph to carry with it an allegation that the facts pleaded in [20], as well as interfering with the right to play golf itself, also interfered with the ancillary step-in right to maintain the golf course. The Walkers Defendants’ allegation was that the actions pleaded in [20] of the counterclaim interfered with the “*rights to play golf on the golf course*” and “*thereby*” amounted to a nuisance to the easement.
264. The Plaintiffs argued that furthermore, a pleading was required to contain a statement in summary form of the material facts on which the party pleading relied for his claim (GCR Order 18, r. 7(1)) and they did not accept that a mere reference to the ancillary step-in rights (if such could be treated as implicit within [21] of the counterclaim) would have been sufficient to plead the case that the Walkers Defendants’ have sought to run in their closing submissions. To do that, the Walker Defendants would also have had to plead the ~~fact~~ fact that the act complained of (turf removal, interference with flushing pump, removal of parts of the irrigation system) had made it more difficult or costly for them to exercise their step-in rights and maintain the course. That appeared to be a necessary factual component of how the case was put by the Walkers Defendants (who had asserted at [111(c)] of their closing submissions, that “*any exercise of those [step-in] rights was made substantially more difficult as a result of the turf stripping exercise*”). In addition, the Walkers Defendants appeared to have alleged that even if no breach of the primary golf-playing rights was established, breach of the step-in rights was enough to establish their cause of action. If that was the case, it was all the more important that the Plaintiffs were made aware of the nature of the case that was being alleged against ~~him~~ (it would unfair to them if the ancillary elements ended up founding ~~the~~ cause of action, when the clear thrust of the pleading was a complaint that the primary right to play golf and not the ancillary right to carry out maintenance, had been interfered with).
265. The Plaintiffs also opposed the Walkers Defendants’ application for permission to re-amend. First, they submitted that it was insufficient for the Walkers Defendants merely to add a reference



to the ancillary step-in rights as proposed, without pleading further facts. The proposed amendment omitted any reference to the fact (essential on the Walkers Defendants' case) that the alleged acts relied upon made it more difficult or costly for them to exercise their step-in rights. Secondly, they said that had they known the content of the case prior to trial, they may well have wished to carry out additional factual investigations and file further factual evidence on which they would have wanted to rely, to challenge the allegation that any acts relating to turf removal, the flushing pump or the irrigation system made it more difficult or more costly for the Walkers Defendants to exercise their step-in rights (they noted that since they had been unaware that the Walkers Defendants were claiming a breach of step-in rights, the issue had not been addressed in their trial skeleton). They provided two examples:

- (a). in relation to the allegation that items were removed from the irrigation system, it appeared that the parts (admittedly) removed had no impact on the manual operation of the system and would have needed replacing in any event, even if the Walkers Defendants tried to exercise their step-in rights. Mr Kelly had given some evidence on these points in cross-examination, but these were important points that the Plaintiffs would have had the opportunity of investigating further had the matter been properly pleaded.
- (b). in relation to turf removal, they had accepted that such removal would have substantially interfered with playing golf in early September 2016. However, had they known about the allegation in relation to step-in rights, they could have investigated to what extent (if at all) removal of turf really made the step-in rights more difficult to exercise, given the indications in the evidence that much of the turf needed replacing in any event.

266. In opposing the Walkers Defendants' application, the Plaintiffs also relied on the fact that the failure to plead the interference with step in rights properly had resulted in the issue of such alleged interference not being properly addressed by the Plaintiffs' witnesses. The only reason step-in rights had featured in the evidence at all was because some of the Walkers Defendants' witnesses wished to refute Ms Doak's comment in her First Witness Statement that neither the strata corporations nor the Britannia Proprietors would be able to maintain the golf course. The witness evidence did not directly consider how and to what extent the alleged turf removal, flushing pump interference and irrigation system interference impacted upon the alleged step-in rights. They also submitted that it had been inappropriate for the Walkers Defendants to wait until oral closing submissions to make their application (which did not feature in their written closing submissions) and that it would not be in accordance with the overriding objective to



permit the amendments sought at such a late stage, which would cause real injustice to the Plaintiffs.

267. I accept, the Plaintiffs' submissions both as to the inadequacy of the Walkers Defendants' pleading and as to the Walkers Defendants' application for permission to re-amend.

268. The fundamental rule is that the claimant must state in his pleading facts that establish a complete cause of action. The test is whether the facts relied on would, if proved, entitle the claimant to the remedy they seek (or possibly to a different remedy). The ultimate purpose of the pleading is to inform the other party of the case against him/her. The fact that the pleading leaves the precise ambit or extent of the relief sought to argument does not of itself justify a refusal to allow the claim to be argued at trial provided that the basic allegations are sufficiently clear.

269. I agree with the Plaintiffs that the Walkers Defendants' pleading of the claim based on an interference with their step-in rights is deficient. It is at best cryptic and elliptical. While a reference to an easement can as a matter of law and depending on the context in which the reference appears, be taken to include a reference to the ancillary rights that flow from the grant of an easement (that are given to the grantee when an easement is granted), the ancillary rights are different from the rights to enjoy the easement itself. The easement gives the relevant right over the servient land. The ancillary rights entitle the dominant owner to take action to preserve or maintain the primary right (by for example going on to the servient land to repair the subject matter of the easement). The facts giving rise to a claim for interference with the primary easement can and often will be different from the facts giving rise to a claim for interference with the ancillary rights. In this case they are. In order to ensure that the other party is given proper notice of the claim he/she has to meet, the relevant facts relied on need to be pleaded with sufficient particularity. In this case, in my view, they were not. As the Plaintiffs' submitted, the Walker Defendants rely on the allegation (and asserted fact) that the act complained of (turf removal, interference with flushing pump, removal of parts of the irrigation system) had made it more difficult or costly for them to exercise their step-in rights and maintain the course. This fact was not pleaded (in the original amended counterclaim). The Plaintiffs were not given adequate notice of an important factual allegation.

270. I also consider that the Walkers Defendants' application for permission to re-amend should be dismissed. If the application were granted at the very late stage at which it was made, the Plaintiffs' ability to defend the claim for interference with step-in rights and to obtain and file further factual evidence for the purpose of their defence would be materially prejudiced. I also



agree that the Walkers Defendants' re-amended pleading remains deficient in failing to plead the asserted fact that the acts complained of had made it more difficult or costly for them to exercise their step-in rights. While the Court should be slow to deprive a party of an opportunity to put their case fully before the Court and slow to refuse to give permission to amend a pleading to permit a good point and case to be argued, in this case the Walkers Defendants failure to be clear and explicit that they made a claim for interference with their step in rights and as to the basis of and facts relied on to support such a claim prejudiced the position of the Plaintiffs such that it would not be just or fair to allow the Walkers Defendants during the trial to re-amend their pleading and rely on the claim.

### ***The Plaintiffs' submissions***

271. The Plaintiffs made a number of preliminary points before responding to the specific counterclaims made by the Walkers Defendants and White Dove.

- (a). they submitted that in order to succeed in their counterclaims, assuming of course that the Court decided in favour of the defendants with respect to their claim that the Instruments included a restrictive agreement and that the Rights constituted easements, the defendants needed to prove that there had been a substantial interference with their rights (and, as regards the easements, a substantial interference and some sensible diminution of enjoyment of the dominant tenement - citing Gale at [13-02]). It was irrelevant whether the alleged acts of interference related to items that were fixtures, affixed to the servient land.
- (b). the Plaintiffs also noted that the parties had accepted that the Plaintiffs had no obligation to maintain 12D 108 and 12C 27 (the alleged servient tenements). Accordingly, in order to make out the causes of action alleged, the defendants had to rely on and establish some positive conduct by the Plaintiffs and that this conduct substantially interfered with the Golf Playing Rights. In the absence of an obligation to maintain, the Plaintiffs would be well within their rights to permit the golf course to deteriorate entirely and to undertake no maintenance whatsoever. Despite this, the Walkers Defendants had made allegations that the Plaintiffs had acted improperly in failing to maintain the golf course and then used the maintenance issue as a way of prejudicing the Court against the Plaintiffs and the Dart group more generally. They referred to the statements made in the Walkers Defendants trial skeleton argument (at [26]) where reference had been made (as I have already noted)



to the Plaintiffs having allowed “*matters to deteriorate through their continued failure to carry out basic maintenance and management of the land*” and an allegation made that the Plaintiffs’ conduct had been “*all part of tactics to wear down the Defendants and to force through their desired and doubtless highly profitable redevelopment of the Golf Course.*” The Plaintiffs strongly rejected this allegation and submitted that what they labelled the “*conspiracy theory*” that they were using a lack of maintenance as a tactic to wear down the defendants had not been made out on the evidence. Mr Grzybouski, who is employed by Dart Realty as a property manager and has responsibility for managing the golf course property, had given evidence that made it clear that substantial maintenance had been carried out over several years costing many hundreds of thousands of dollars. He said he had taken on this role in December 2018 and that at this time:

*“the former golf course was being maintained by a local vendor called Earthworks under a contract that had started in September 2016 under which they were contracted to visit the site bi-monthly and carry out mowing, hedge trimming, weeding and edging of all gardens and pathways, tree trimming, pruning, monitoring for pests, disease and nutritional requirements and treating accordingly, blowing all parking areas and walkways clean and removing of cut, clipped and collected debris. They were also to provide trimming of coconut trees and palm trees once a year. The contract price in September 2016 was \$76,700 a year with additional charging for tree trimming and adding fertilizer. That contract was for one year from 1 October 2016 and came to end on 30 September 2017. It does not appear to have been formally renewed, but Earthworks continued to provide bimonthly services at the golf course.”*

- (c). Mr Grzybouski had put in evidence in his Second Witness Statement a copy of the transaction report which listed expenses recorded against the old Hyatt Hotel and golf course, the spreadsheet of maintenance activity extracted from that report and the supporting invoices for the maintenance activity. Mr Holmes had been wrong in his Third Witness Statement to critique this evidence.
- (d). the Plaintiffs’ evidence had demonstrated that the decision by Dart Realty to maintain the old Hyatt Hotel and golf course land had in fact been for the very opposite reason to that suspected by the Walkers Defendants. The Project Initiation Proposal (**PIP**) dated 8 July 2017 prepared by Dart Realty set out details of the proposed project for restoring “*the water flow and culvert system throughout the Britannia pond and canal network and removing the sediment that had built up over the years from the canals and the culverts [and replacing] the make-up pump system that refills the network*” (which eventually led



to US\$36,000 being spent on a replacement flushing pump). The PIP also stated that the business objective of the project was *“to improve relations with the various Britannia strata corporations during license negotiation period.”* The Plaintiffs noted that this was an internal Dart Realty document which had been prepared years before this litigation started and thus was persuasive as to Dart Realty’s motivations. Mr Lund’s insinuation in his evidence that this document was not genuine and was prepared in order to enhance Dart Realty’s standing in this litigation was entirely baseless and ought to be rejected.

- (e). furthermore, the move to as needed landscaping services on the golf course (which had been explained by Mr Grzybowski in his First Witness Statement at [7]-[8]) did not support the Walkers Defendants’ allegation of a plan to wear the Lot Owners down. The internal emails leading to this change revealed only a concern to save money (the Dart group having obligations to its shareholders), not any attempt to use lack of maintenance to grind the Lot Owners down (the Plaintiffs relied on an exchange of emails in February 2019 between Ms Podlaski and Mr Grzybowski in which Ms Podlaski sought a *“full picture”* of the costs of maintaining the golf course). Further, this change did not occur until February 2019, which was two and a half years after Dart Realty had announced the closure of the golf course. In addition, frequent landscaping services were still applied to the golf course from February 2019 onwards (in March, April, June, July, August, September and December 2019 and in June, August and October 2020 – Cayman had been in lockdown between March and June 2020).
- (f). there had also been a real mismatch between the Lot Owners’ expectations of the level of maintenance Dart Realty would provide and Dart Realty’s plans and intentions. On 9 September 2016 Dart Realty had written to the Lot Owners and said (in part) as follows (underlining added):

*“We would like to share with you some interim updates on the golf, beach and fitness amenities for Britannia residents, and to keep you informed about some of our Property Management projects.*

*The decision to close Britannia Golf Club was based on a financial reality that is unfortunately shared by many golf clubs around the world today. The high cost of maintaining the course, together with the investment required to restore it to its former standard, is not matched by membership dues and visitor green fees.*

*We will continue to maintain the walking trails and landscaping around the Britannia golf course so that you can continue to use the space for non-golf activities. Pest control treatments will be conducted on a regular basis and we*



will also treat the lakes for algae. Several of the filter pumps have not been working for some time and will need replacing. We will do this as quickly as we reasonably can. In the event that we consider future changes to pathway and greenspace use, we will endeavor to discuss this with Owners.

*We are planning to make some improvements to the entrance of Britannia: resurfacing sections of the roadway, removing the fencing near the roundabout, adding lighting and signage, and landscaping the pathways. We are also looking at ways to improve the aesthetics of the security fencing. We*

*have received input from Owners on safety and security issues and welcome further comments and suggestions.”*

Some of the Lot Owners, the Plaintiffs said, appeared to have read the reference to Dart maintaining “*the walking trails and landscaping around the Britannia golf course so you can continue to use the space for non-golf activities*” as involving an undertaking to maintain the golf course to its previous standards as a golf course, which it clearly was not.

- (g). the criticism of Dart Realty by the Walkers Defendants also appeared in part to be driven by a comparison made by some of the witnesses between the level of maintenance at Dart Realty's (active) developments like Camana Bay and that at the old golf course. Such a comparison was however a false one. The proper comparator, the Plaintiffs submitted, would be the maintenance carried out at Dart Realty's other undeveloped properties. As Ms Doak had explained in her evidence, Dart owns a number of raw land parcels on Grand Cayman which are maintained, like the golf course land, on an as-needed basis. There had been no singling out of the Britannia properties for poor maintenance.
- (h). Ms Doak's evidence, in which she showed by reference to internal emails responding to maintenance complaints in 2019 that she felt frustrated that complaints kept being made despite the fact that Dart Realty was under no obligation to maintain the golf course, was wholly inconsistent with there having been any scheme to use poor maintenance at the golf course to put pressure on the Lot Owners.
- (i). the evidence of the Walkers Defendants had been deprived of a balanced and objective perspective by an unjustified sense of grievance resulting from their misunderstanding that Dart Realty was subject to but had flagrantly breached an obligation to maintain the golf course.



272. In response to the Walkers Defendants' asserted claim based on the closure of the golf course, the Plaintiffs argued that the Walkers Defendants had not pleaded that the closure itself (with effect from 1 September 2016) gave rise to a substantial interference with the Golf Playing Rights. The allegations therefore fell outside of the scope of the matters that the Court had to determine and the Walkers Defendants were not entitled to pursue a claim on this basis.
273. In response to the Walkers Defendants counterclaim based on the alleged damage done to the golf course turf, the Plaintiffs' position was as follows:
- (a). the golf course became unplayable in circumstances which did not involve a breach by the Plaintiffs of any obligation. They had no obligation to maintain the course, so that a failure to maintain it was not, as noted above, actionable. The removal of turf from an unplayable golf course could not prevent golf being played on or materially affect the playability of the course. The removal of the turf, which the Plaintiffs admitted in their Reply, therefore could not have caused and did not interfere with the Lot Owners' Golf Playing Rights or cause them any loss.
  - (b). the fact that the course had become and remained unplayable was established by the oral evidence of various witnesses, including Mr Grzybowski, Mr Holmes Mr Pilling and Mr Casseb.
  - (c). the Plaintiffs relied on their submissions that there was no realistic prospect of the Lot Owners being able effectively to exercise any step in rights and cover the cost of maintaining the course.
  - (d). they accepted that the removal of the turf would have substantially interfered with playing golf had the course remained open (and the Plaintiffs had made no positive assertion to the contrary in their Reply), although they noted that while the course had been just about playable on 1 September 2016, it was in poor condition and in need of urgent refurbishment.
274. In response to the Walkers Defendants' counterclaim based on the alleged removal of the flushing pump, the Plaintiffs' position was as follows:



- (a). in their Reply (at [13.3]), the Plaintiffs had averred that they did not know who turned off or who removed the flushing pump. However, based on the evidence presented at trial, they invited the Court to conclude that on the balance of probabilities the flushing pump had been turned off and removed from its location in the dock by Regent's Court prior to the First Plaintiff's purchase of 12D 108 in May 2016 (and therefore turned off and removed by someone else). On the balance of probabilities, this had been done when the pump was moved to the area by the CWC where it had remained ever since.
- (b). the Plaintiffs' relied on the following facts and matters in support of this submission:
  - (i). the photograph taken by Mr Kelly on 16 May 2016 showing the flushing pump in the Covered Area, which was the same area in which the flushing pump was located during the video site visit on 17-18 November 2020. The Walkers Defendants did not admit the authenticity of the 16 May 2016 photo and required its authenticity to be proved at trial. In response, Mr Kelly filed his Third Witness Statement in which he explained the provenance of the photograph and exhibited an email supporting his recollection that the photograph was taken on the occasion of a site visit around the time of Purchasers' purchase of the golf course. The Plaintiffs submitted that there was no reason to doubt the date or authenticity of the photograph.
  - (ii). the contemporaneous evidence supported the explanation that the pump had been removed prior to Plaintiffs' purchase of the property as it had stopped working. For example, a report produced in 2013 recorded that the pump was not working (stating "*Get lake transfer pump working*").
  - (iii). given the weight and size of the pump and the equipment probably required to move it any substantial distance, it was likely that any removal of the flushing pump to or from the Covered Area after May 2016 would have been noticed by Mr MacKenzie; (who lives close-by and takes an interest in these matters) or would have been discussed internally in Dart Realty emails. There were no such emails, which was telling given how people appeared to communicate within Dart Realty and the large number of emails discussing the repairs and works to the pumps undertaken in 2018 and 2019.



- (iv). the slightly different position of the flushing pump in the 2016 photo and its 2020 position did not prove that the pump was moved out of the Covered Area and back in again. The most likely explanation was that the flushing pump was simply moved over slightly; which explanation was consistent with the fact that the orientation of the pump was the same in the 2016 and 2020 images.
- (v). Mr Mackenzie's evidence that the flushing pump was working when he moved into his condominium in July 2016, but stopped shortly thereafter, and that he saw the flushing pump in the canal by Regent's Court in the summer of 2016, was unreliable. The Plaintiffs invited the Court to conclude that Mr Mackenzie had misremembered the timeline. Mr MacKenzie's evidence was that he attended Regent's Court several times in early to mid-2016 and that he observed the flushing pump on those occasions. However, given the evidence now available, it seemed likely he was recalling those earlier (pre-16 May 2016) occasions in his statement at [42]-[43] and [47]. In any event, he had accepted during his cross-examination that he did not know the exact date when the pump stopped working. He had said that he didn't *"know the exact date – [he didn't] go and check the pump every single day or every single week for instance. [He did] not know the exact time that the pump stopped..."* It appeared that Mr MacKenzie had identified the July 2016 date because that was when he noticed the water level dropping. As explored in evidence with Mr Hepburn however, it was possible that the water levels may have been sustained for some time by rainfall during the rainy season. Further, his recollection was unreliable. During his cross-examination he had said that, as to his inspection of the flushing pump *in situ* at that time, he could not *"remember, you know, the details of how it looked in all that time ago"*.
- (vi). furthermore, the other evidence did not establish that the pump had been moved after the Plaintiffs' purchase of the golf course site. Mr Hepburn had written an email on 3 September 2016 referring to the pumps having been switched off but in evidence he accepted that he had no personal knowledge of this and that the water levels may have been sustained for some time by rainfall during the rainy season. Furthermore, the fact that Mr Mackenzie had noticed the flushing pump in the covered area in February 2017 says nothing beyond the fact that the pump was (still) there as at that date. Finally, Ms Yate's email of 7 July 2017 stating that *"it was discovered that the pump was removed from the canal side for a period of time but*



*has since been put back*” was clearly a misapprehension on her part, as had been pointed out a few weeks later by Mr Mackenzie in his reply email of 1 August 2017.

- (vii). unless the Walkers Defendants could establish that the Plaintiffs had damaged or removed the original flushing pump, the fact that the Plaintiffs later took steps to mitigate the consequences of the pump’s absence (both by treating the lakes and installing replacement pumps) could not found a cause of action against them for breach of the restrictive agreement or for nuisance to the easement. If the flushing pump had stopped working and was removed before the Plaintiffs’ tenure, all they had done (with at least some success) was try to help, when they were under no obligation to do so.
- (viii). even if the action taken by the Plaintiffs could ground a claim, there was no basis for such a claim. The Plaintiffs admitted the use of an algacide (copper sulphate) to try to address the algae accumulation and in their Reply they admitted that this “*may*” have led to dead fish. However, the evidence supported the Plaintiffs’ case that copper sulphate is an established means of controlling algae in golf course lakes and no criticism could fairly be made of the Plaintiffs for using it to try to improve the condition of the lakes. Furthermore, the dead fish were cleaned up shortly after being reported to the Plaintiffs.
- (ix). the Plaintiffs admitted that they had installed a new pump in 2018 which had failed some months later. However, they argued that they could not be criticised for spending substantial sums on a replacement pump that they were under no obligation to supply and could not be blamed for its failure. As regards the second and third replacement pumps installed by the Plaintiffs, they denied that these pumps were insufficient or had failed. They were adequate for their purpose and ensured that the lakes remain filled to an acceptable level.
- (x). even if the Walkers Defendants could show that the Plaintiffs had damaged or removed the flushing pump, the Plaintiffs actions did not amount to substantial interference with the Golf Playing Rights. The Lot Owners have the right “*to play golf on the Britannia golf course.*” Any drop in the water levels of the lakes, the growth of algae or loss of marine life in the lakes, will not impact substantially upon



the ability of the Lot Owners to play golf (as Mr Pilling had accepted during his cross-examination). It may make the golf course a slightly less pleasant place to go for a walk, but that is not what the Golf Playing Rights give permission to do. This argument was strengthened by clause 3 of the Written Agreements which permitted the Plaintiffs to “*modify the facilities...as constitute*” the Golf Playing Rights. The Plaintiffs were therefore permitted to modify any aspects of the golf course, including the lakes, without this giving rise to any cause of action. Further, given that the Lot Owners have no right to expect the flushing pump system to be kept running (as this would impose a positive burden on the Plaintiffs) and thus no right to expect the lakes to be in a condition commensurate with a running flushing pump, removal or interference with the flushing pump system by the Plaintiffs could not amount to substantial interference with the Lot Owners’ Golf Playing Rights.

275. In response to the Walkers Defendants counterclaim based on the alleged interference with the irrigation system, the Plaintiffs’ said as follows:

- (a). the Plaintiffs noted that the Walkers Defendants alleged in their counterclaim that the Plaintiffs had committed a wilful act of damage or destruction to the golf course by removing “*other parts of the irrigation system...including, in particular, sprinkler heads, pumps, satellite boxes and electrical components.*” The items were alleged to have been fixtures. These acts were said to have substantially interfered with the Golf Playing Rights. In the Walkers Defendants’ skeleton argument, it had been further alleged that removal of the listed parts of the irrigation system (i) breached the Covenant Not to Build or Develop with respect to the Golf Playing Rights, as it damaged the extent to which the irrigation system might have been adopted by the Lot Owners and (ii) amounted to an interference with the Lot Owners’ secondary step in rights arising by virtue of their easement to play golf, by preventing them from maintaining and using the irrigation system such that the use of the golf course was not impeded.
- (b). the Plaintiffs also noted that there were further allegations made in the Walkers Defendants’ skeleton argument but since these had not been pleaded they did not arise for decision in these proceedings.
- (c). the Plaintiffs admitted that that they had removed the controller faceplates and output control boards (as confirmed in their Reply and Mr Kelly’s First Witness Statement at [13]-



[14]), however they argued that the Walkers Defendants had provided no evidence that any other parts of the irrigation system had been removed.

- (d). the Plaintiffs submitted that the removal of the controller faceplates and output control boards (and indeed the removal of the other parts of the irrigation system which the Walkers Defendants claimed they had removed) was not capable of amounting to substantial interference with the Golf Playing Rights. As the Lot Owners had no entitlement to be provided with a functioning or running irrigation system, removal of any parts of the system which might result in the system not working could not amount to substantial interference with the Lot Owners' right to play golf. The provision of such a system would require the Plaintiffs to incur substantial expenses and they had taken a decision, legitimately and within their rights, not turn the system on. It could also not be said that removal of parts of the irrigation system gave rise to a breach of the Covenant Not to Build or Develop since such removal could not be regarded as the carrying out of *"works on the Properties in a manner that [prevented] or substantially [interfered] with the exercise"* of the Golf Playing Rights. The irrigation system, or the benefit of the irrigation system, was not part of the Golf Playing Rights. The Lot Owners had no right to adopt parts of Plaintiffs' irrigation system for the purpose of exercising those rights.
- (e). in any event, the removal of the controller faceplates and output control boards had no impact on the Lot Owners' ability manually to operate the irrigation system under their step in rights, should they wish to do so. As Mr Kelly had said during his cross-examination, the system remained capable of being turned on and off manually (to turn it on electronically would involve replacing at these parts). In fact, the irrigation system had not been *"fully operable"* as at the date of removal of these items (as alleged in the Walkers Defendants' counterclaim at [22(b)]) since, by late 2016 when the irrigation system was turned off, the majority of the system could only be operated manually and the automatic programming system no longer worked. Furthermore, had the Lot Owners wished to repair the automatic operation of the irrigation system, the evidence was that the removed items would have had to be replaced in any event.

### ***Discussion and decision***



276. The Walkers Defendants’ asserted claim based on the closure of the golf course was not pleaded and therefore, as the Plaintiffs’ submitted, the Walkers were not entitled to pursue a claim on this basis.

277. I consider that the Walkers Defendants’ counterclaim for interference with their Golf Playing Rights based on the alleged damage done to the golf course turf is made out:

- (a). to be actionable, there has to be a substantial interference with the right. As Gale points out (at [13-02]):

*“It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance. There must be some sensible abridgement of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total destruction of the easement. The injury complained of must be of a substantial nature in the ordinary apprehension of mankind and not one arising merely from the caprice or peculiar physical constitution of the party aggrieved.”*

- (b). in my view, the evidence demonstrates that there has been a substantial interference with the Walkers Defendants’ Golf Playing Rights. Substantial quantities of turf were removed from the golf course by the Plaintiffs and this had a substantial effect on the condition of the golf course. I accept the Walkers Defendants’ submissions that the evidence showed that the effect of the turf removal had been seriously to damage the surface of large parts of the golf course and thereby to make those parts and the course as a whole completely unplayable. The photographs graphically revealed the significant impact of and extent of the damage done by the turf removal. Furthermore, the removal had taken place at important and not merely at peripheral locations on the course.
- (c). I find that on the evidence, the golf course had been in a condition prior to its closure and the removal of the turf that permitted golfers to play golf on it. I accept that this was established by the number of rounds that had been played on the golf course in the first eight months of 2016 (even if that number was not as high as was to be found at other courses) and the evidence of several witnesses, which I accept, that golfers were playing the course up to its closure. The Plaintiffs had accepted that even though it was in poor condition and in need of urgent refurbishment, the course had been “*just about playable*” on 1 September 2016. The fact that the course was in poor condition did not prevent it from being playable or prevent the Lot Owners from being able to enjoy a round of golf



on it. Playing golf on a course in poor condition does not allow the full enjoyment of the Golf Playing Rights but it still did involve and permit the exercise of such rights to a reasonable extent. The poor condition of the course prior to the removal of the turf therefore did not, as a matter of causation, prevent the removal of the turf from substantially interfering with the Lot Owners' exercise of their Golf Playing Rights.

- (d). the fact that the Plaintiffs had no obligation to maintain the course is no defence to this counterclaim. The cause of action is based not on the Plaintiffs' failure to take action to maintain the course but on the action which it took to damage the surface of the course.
- (e). I am also satisfied that the greening of the areas of the course from which the turf was removed is not a defence to the Walkers Defendants' counterclaim. The growth of new grass and even weeds may reduce the damage done by the removal of the turf and improve the playability of the course, but it does not preclude the removal from being an interference with the Golf Playing Rights or, on the evidence, from the interference being when made substantial. The greening of the course is an issue going to the quantum of damages – as I have said, to the extent that grass has regrown and the surface has regrown and been repaired, the extent of the interference may have been reduced – and I am not concerned at this stage with the quantum question.

278. I consider that the Walkers Defendants' counterclaim for interference with their Golf Playing Rights based on the alleged removal by the Plaintiffs of the flushing pump fails. In my view, the Walkers Defendants have failed to prove on the balance of probabilities that the pump had been moved after the Purchasers' purchase of the golf course site. I accept the Plaintiffs' submissions, as summarised above, on this issue:

- (a). I give substantial weight to the photograph taken by Mr Kelly which I accept was taken on 16 May 2016. I find this, together with the documentary evidence that the pump was not working well before the purchase of the golf course by the Plaintiffs (in particular the 2013 report relied on by the Plaintiffs) to be strong evidence that the pump had been removed prior to Plaintiffs' purchase of the property. This conclusion is supported by the Plaintiffs' witnesses, who I found convincing, and the absence of any documentary (email) evidence indicating that the Plaintiffs had given instructions for the removal of the pump. It did not follow from the fact that the flushing pump could only be moved with heavy lifting equipment that it was moved by the Plaintiffs. In these circumstances and in the absence



of any reliable evidence that the pump had been moved by the Plaintiffs, I find that they were not responsible for its removal and therefore cannot be and are not liable for any interference with the Walkers Defendants' Golf Playing Rights that resulted therefrom.

- (b). while I accept the sincerity of Mr MacKenzie's evidence and recollections, he was unable to be precise as to the date when the pump stopped working and acknowledged that he struggled to recall the details of what had happened a long time ago. He was also unable to say that he had seen or was aware that the pump had been removed by the Plaintiffs. His view, and the Walkers Defendants' case, that the Plaintiffs had been responsible for its removal were based on circumstantial evidence and the need for the Court to infer that it was likely that the Plaintiffs had been so responsible. I do not consider that, on the facts as proved, it is permissible or appropriate to draw that inference.
- (c). even if I am wrong on this point, and the proper conclusion is that the evidence has established that the Plaintiffs were responsible for the removal of the pump, I am not satisfied that on the facts proved at the trial the Walkers Defendants have established a claim for interference with their Golf Playing Rights. The Plaintiffs were under no obligation to continue to maintain the course and the lakes on the course. They were not obliged to incur the cost of maintaining the pump. They were at liberty to remove the pump in order to avoid further expenditure (although I do not consider that the Plaintiffs could rely on clause 3 of the Written Agreement to justify their removal of the pump, unless it was removed for the purpose of having it repaired with the intention of replacing it). If the pump had been working properly at no cost to the Plaintiffs, its removal could amount to a substantial interference with the Golf Playing Rights if the result was to create a serious health hazard that could affect the golfers, seriously damage the condition of the course, or so blight the lakes so that playing golf next to them would become offensive and seriously unattractive. However, the evidence filed in these proceedings did not support any finding as to the purpose of the removal of the pump by the Plaintiffs or a sufficiently substantial interference with the Golf Playing Rights.
- (d). nor do I consider that the Plaintiffs can be held liable for interfering with the Walkers Defendants' Golf Playing Rights by reason of the damage to the lakes in late 2017. I am not satisfied that it has been proved on the balance of probabilities that the Plaintiffs were responsible for the death of significant amounts of marine life. I am not in a position and

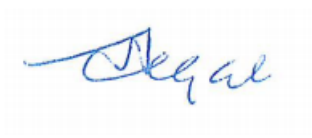


am not prepared to reject Mr Kelly's evidence only on the basis of the proximity in time between the introduction of the copper sulphate and the death of the marine life. I would need to see further evidence, including probably, expert evidence as to what was likely to have caused the death of the marine life in the circumstances and as to the condition of the lakes, before being able to do so.

279. I also conclude that Walkers Defendants' counterclaim for interference with their Golf Playing Rights based on the alleged removal of items of the irrigation system should be dismissed. I do not consider that the Walkers Defendants have established that the Plaintiffs removed items other than the controller faceplates and output control boards or that the removal of those items resulted in a substantial interference with the Golf Playing Rights, in circumstances where the evidence shows that the irrigation system remained capable of being turned on and off manually. I therefore accept the Plaintiffs' submissions on this point.

280. I would add that I do not consider that the evidence in this case has established the Walkers Defendants' allegation of a plan by the Plaintiffs and other members of the Dart group to wear down and put unjustifiable pressure on the Lot Owners with a view to pressuring them to settle these proceedings. This is a very serious allegation which, in order to be upheld, would require considerably more evidence than that produced by the Walkers Defendants. It is clear that the Lot Owners, as I have said, have faced significant difficulties, disruption and disturbance as a result of the Plaintiffs' decision not to maintain the golf course and take steps to make available alternative beach club facilities and tennis courts equivalent to those covered by the Rights. I have considerable sympathy for them. However, the Plaintiffs were not obliged to maintain the course or offer these alternative facilities and the evidence has demonstrated that the maintenance costs involved were substantial and that the Plaintiffs' plan for the use of their land does not involve a development that would involve constructing and making available such alternative facilities. The Plaintiffs had legitimate economic reasons for not incurring and continuing with the expense of maintaining the golf course and appear to have incurred not insignificant sums in undertaking some albeit limited maintenance pending the resolution of these proceedings and a determination of the nature, status and enforceability of the Lot Owners Rights and the Instruments. It is to be hoped that following the handing down of this judgment it will be possible for the Plaintiffs and all the defendants to co-operate and reach agreement on a suitable *modus vivendi* and make arrangements to permit the Lot Owners to exercise their Rights and minimise the disruption to which they have been subject. I would also add that I would have wished this judgment to be completed sooner but unfortunately I had a number of substantial judgments on

other matters which had been heard shortly before the trial in these proceedings to deal with together with a number of urgent applications after the trial, which have resulted in some delay in completing the judgment.



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**Mr. Justice Segal**  
**Judge of the Grand Court, Cayman Islands**

