IN THE CAYMAN ISLANDS COURT OF APPEAL
FROM THE GRAND COURT FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 017 of 2021
(ON APPEAL FROM FSD 143 OF 2019 (NSJ))

(1) CAYMAN SHORES DEVELOPMENT LTD.

(2) PALM SUNSHINE LTD.

Appellants (Plaintiffs below)

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 Re-Amended Originating Summons)

Respondents (Defendants below)

BEFORE:

The Rt. Hon. Sir John Goldring, President
The Hon Sir Richard Field, Justice of Appeal
The Rt. Hon. Sir Jack Beatson, Justice of Appeal

Hearing on the Papers: **12 May 2023**

Judgment handed down: **4 July 2023**

RULING ON COSTS OF THE APPEAL AND BELOW

The Rt Hon Sir John Goldring, President

1. In paragraph [182] of the judgment on the appeal herein, the Court expressed the preliminary view that the Appellants should have 70% of their costs of the appeal and their costs below. The parties were given liberty to apply for an order different from that proposed.

2. The reason given for limiting the award to 70% of the costs of the appeal was that the Appellants did not succeed on the substantial issue of whether the Rights at issue in the proceedings were to be characterised as easements ("the easements issue").

3. The Court of Appeal Rules (2014 Revision) provide at rule 28 that 'the powers and discretion of the Court under section 24 of the Judicature Law… [relating to costs] shall be exercised subject to and in accordance with GCR Order 62'.

4. In relevant part, Ord 62, r 4 provides:

> (2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.
>
> (5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.
>
> (7) The orders which the court may make under this rule include an order that a party must pay - (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; and (g) interest on costs (at the prescribed rate for Cayman Islands dollars) from or until a certain date, including a date before judgment.

5. By Order 62, r10, the Court in exercising its discretion to make an order for costs 'shall' take into account offers made 'without prejudice save as to costs', where the party making the offer could not have protected his position by payment into court (Order 22, r 14).

6. On 6 April 2023, the Respondents known as "the Walkers Respondents" (hereinafter "the W-Respondents") served written submissions contending that the Appellants should also have only 70% of their costs below on the ground that at trial they had also lost on the easements issue.

7. The W-Respondents also submit that the return of the interim payment on costs of US$420,000 they had received pursuant to an order of the trial judge, Segal J, should be made free of interest given "the near impossibility of realising any reliable commercial return on monies during that

period and the substantial financial prejudice which they have suffered by reason of the proceedings that have resulted in the decision that the Rights relied on should be removed from the Register".

8. In addition, the W-Respondents contend that the Court should not award interest on the costs awarded to the Appellants, notwithstanding that interest was awarded below on the costs awarded to them. It is argued that the differing positions of the respective parties justifies such an approach. In the W-Respondents' submission, the Appellants are a well-resourced commercial developer which purchased land in the knowledge that litigation seeking court-ordered rectification would be required to remove entries on the Register, whereas the W-Respondents were part of a residential strata plan funded by contributions from its residents, "many of whom purchased their units in reliance on legal advice that the rights were binding, who never expected to face a claim of this nature, and who had little realistic opportunity to avoid being drawn into this litigation at the behest of an aggressive purchaser." The W-Respondents also submit that "expansive costs orders" against defendants in the position in which they are in poses a risk of operating "as a deterrent to private individuals resisting incursions into their registered rights."

9. The Appellants' reply submissions were served on 12 May 2023. No further costs submissions have been served by any of the parties.

10. Whilst they somewhat reluctantly accept the Court's proposal that they be paid 70% and not 100% of their costs of the appeal, the Appellants oppose the W-Respondents' contention that the Appellants should only be awarded 70% of their costs below. This opposition is founded on two contentions. First, it is argued that a 30% reduction of the costs below is disproportionate to the importance of the easements issue at trial. In advancing this submission, the Appellants refer to the ten issues on which Segal J pronounced in paragraph [55] of his judgment and contend that the easements issue constituted only part of one those issues, namely: whether the rights constituted easements and whether such rights had been completed by registration and, if not, whether they were binding on the Plaintiffs in the absence of rectification of the register. The Appellants also lay emphasis on the time taken below on the Respondents' extensive damages counterclaim for alleged nuisances to the easements based upon alleged interference by the Appellants with the Golf Playing Rights as a result of (i) interference with the turf on the golf course; (ii) damage to a flushing pump servicing the lakes on the golf course; and (iii) removing parts of the golf course irrigation system.

11. As the Appellants point out, in paragraph [78(d)] of his Consequentials Judgment, Segal J noted that the considerable discovery and witness evidence at trial was 'devoted primarily to the

counterclaim' and (when deciding on an appropriate payment on account of costs) he worked on the basis that 35% of the parties' costs had been generated by the counterclaim. The result of this Court's judgment is of course that the alleged easements are not binding on the Appellants and accordingly the damages counterclaim now fails in its entirety.

12. The second of the Appellants' contentions is that a 30% reduction of the trial costs would be inappropriate in the light of a rejected *Calderbank* offer sent by the Appellants on 20 October 2020 to the W-Respondents' attorneys by which they offered to settle the proceedings, "on the basis that your clients consent to the court making the declarations sought by our client and the consequent order for rectification of the register, that your clients discontinue their counterclaims against ours and each party bear their own costs".

13. In our judgment the *Calderbank* offer, under which each party was to pay their own costs, is not a reason for refusing the W-Respondents' claim that the Appellants' costs below be reduced to reflect the outcome of the easements issue.

14. We are further of the view that the easement issue below was of such significance that a reduction of the costs below is justified in accordance with the approach taken by the Court of Appeal in *re Elgindata Ltd (No.2*).[1] In the light of many counterclaim issues that were heard below but not on appeal, we conclude that the Appellants' costs below should be reduced by 20%.

15. The Appellants also reject the W-Respondents' contentions that they should not be obliged to pay interest on the interim payment on account of costs they have been ordered to return, or on the costs awarded to the Appellants below and on the appeal. In our opinion, the Appellants are entitled to interest on the interim payment. The Court is empowered to award interest under Ord. 62r.4(7)(g) (which indisputably includes a power to award interest on any repaid interim costs payment) and we reject the W-Respondents' contention based on the assertion that it was nearly impossible to realise any reliable return on the interim period during the relevant period of almost 16 months. We also reject the submission that no interest should be payable by reason of the "substantial financial prejudice which owners have already suffered by reason of the proceedings and the ultimate decision to direct the removal of the registered rights". Many of the W-Respondents enjoyed the putative rights that were registered for a good number of years and they had the free use of the US$420,000 for almost 16 months. In our judgment, for the foregoing reasons (quite apart from the Appellants' conceptual settlement proposal contained in an open letter dated 24 June 2022 that involved the grant of rights over a green space, golf membership and beach access) justice requires that the W-Respondents pay interest on the interim payment.

[1] [1992] 1 WLR 1207

16. We are also of the view that the W-Respondents should be ordered to pay interest on the costs awarded to the Appellants under the power conferred by Ord. 62.4(7)(g). In our judgment none of the W-Respondents' submissions related in paragraph [7] above provides a good reason for relieving the W-Respondents from being subject to the usual order in commercial litigation that interest be paid on the costs awarded against a losing party from the date those costs were incurred to payment.

17. In our view, the appropriate rate of interest in respect of both the interim payment and the awarded costs is 2.375% p.a. which is the rate adopted in Segal J's costs order.

The Rt Hon Sir Jack Beatson, Justice of Appeal

18. I agree

The Hon Sir Richard Field, Justice of Appeal

19. I also agree.