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

**CICA (Civil) Appeal No. 17 of 2021**
**(On Appeal from FSD 143 OF 2019 (NSJ))**

**BETWEEN:**

**(1) CAYMAN ISLANDS SHORES DEVELOPMENT LTD**

**(2) PALM SUNSHINE**

Appellants (Plaintiffs below)

**-and-**

**(1) 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** and the Re-Amended Originating Summons)

Respondents (Defendants below)

**BEFORE:**

**The Rt Hon. Sir John Goldring (President)**
**The Hon Sir Richard Field JA**
**The Rt Hon Sir Jack Beatson JA**

**Appearances:** **Jonathan Seitler KC, Peter McMaster KC and Conal Keane of Appleby on behalf of the Appellants**

**John Randall KC and Nicholas Dunne, Daisy Boulter and David Lee of Walkers on behalf of the Walkers Defendants**

**Nicholas Dixey of Nelsons on behalf of White Dove**

**Date of hearing:** **11, 12, 13 May 2022**

**Date draft judgment circulated:** **17 February 2023**

**Judgment Delivered:** **7 March 2023**

**JUDGMENT**

**The Rt Hon Sir John Goldring, President**

**Introduction**

1. This is the judgment of the Court to which all members have contributed.

2. This is an appeal from a judgment dated 9 June 2021 of Segal J ("the judge") in which the central issue was whether rights, purportedly granted in instruments dating from 1992 to 2001 to play golf, to play tennis and to enjoy facilities on certain land in and around West Bay Road in Grand Cayman, and associated restrictive agreements are, or ought to be, binding upon the current owners of that land. The judge found that those rights bound the Appellants (the Plaintiffs at first instance), subject to the need for rectification of the land register to add express reference to one legal aspect of them, namely as easements. He ordered that the land register be rectified accordingly.

**The background**

*The property*

3. The site of the area of land in dispute was previously known as the Britannia Resort. As relevant, it comprised a hotel, the Hyatt Regency Grand Cayman, a golf course situated on land adjoining the hotel (the Britannia golf course), two tennis courts situated to the west of the hotel, a beach club adjacent to Seven Mile Beach (later developed into a separate hotel with beach club facilities), three phases of residential strata developments, namely Lion's Court, Regent's Court and King's Court (phases I, II and IV), and vacant parcels of land sold for the construction of private homes, known as Britannia Estates. The hotel, golf course and tennis courts were situated on what is now registered as Block 12D, Parcel 108 ("12D 108") in the West Bay Beach South registration section. The properties were first registered on 14 August 1984. The beach club has at all relevant times been registered as Block 12C, Parcel 27 ("12C 27"). First registration was on 29 October 1986. As the judge observed, the issues raised in these proceedings affect the proprietors of some 171 units in the three strata corporations and of 22 non-stratified lots.

*The parties*

4. The first appellant is the registered proprietor of 12D 108. The second appellant is the registered proprietor of 12C 27. (12C 27 and 12D 108 are collectively referred to below as "the Properties"). Both appellants, who were represented by Mr Jonathan Seitler KC, are companies within the Dart Group, a major landowner and developer in the Cayman Islands. The first respondent is the Registrar of Lands in the Cayman Islands, the second, third and

fourth respondents are the strata corporations registered under the Strata Titles (Registration) Act in relation to Lion's Court, Regent's Court and King's Court. The fifth respondent comprises the proprietors of properties within the Britannia Estates, most of whom are members of the Britannia Estates Home Owners Association Ltd ("BEHOAL"). The first respondent has played no active part in the proceedings, although she did give evidence at the trial. The second to the fourth respondents and a majority of the registered proprietors comprising the fifth respondent were represented by Mr John Randall KC. White Dove, another Britannia proprietor, adopted the position taken by Mr Randall, two other proprietors indicated that they did not contest the proceedings, and a third decided not to participate. Hereafter, subject to any indication to the contrary, any reference to 'the respondents' is to the second to fifth respondents who are occasionally referred to as "the Lot Owners".

*A brief chronology*

5. Following registration, the hotel, the golf course, the tennis courts and the beach club were built. The hotel (sometimes referred to below as the "Hyatt Hotel") was at first run by the Hyatt hotel chain. In the early 1990s Cayman Hotel and Golf Inc ("Cayman Hotel") owned the hotel and the facilities. In the late 1980s and early 1990s, a related company, Ellesmere Britannia Ltd ("Ellesmere") carried out a phased development of the residential properties which form part of the Britannia Resort. The use of the hotel's amenities and the golf course were held out as attractions to potential and actual purchasers of the residential properties within the Britannia Resort. The first set of instruments were entered into on 28 May 1992. There followed a series of broadly similar instruments reflecting the phased development of the land.

6. In the early 1990s there were various changes to the beach facilities. 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)", a subsidiary of Embassy. In 2004 Hurricane Ivan hit Grand Cayman. The hotel was damaged and has never been restored. It is now derelict. Apart from the tennis courts, the other facilities were restored. Between 2005 and 2007 a highway was constructed through the Britannia Resort. Part of the site of the tennis courts was demolished. Access from the Britannia Resort to the beach facilities was made difficult. It now involved crossing a four-lane highway.

7. In May 2016 the first appellant purchased Blocks 12D 108 and 12C 27. It was registered as proprietor on 25 August 2016. Embassy continued to manage and operate the facilities for a short time. On 5 May 2016 Dart Realty (Cayman) Ltd ("Dart Realty") informed the strata corporations and BEHOAL by letter that plans were being considered for redeveloping the properties and offered to make the beach facilities and golf course available for use by the strata Lot Owners and Britannia Proprietors as licensees. They responded that they had property rights. On 22 July 2016, by a further letter, Dart stated that legal proceedings would

be taken to determine the legal position and that pending resolution the golf course and the beach facilities would be closed. In or around 2018 the beach facilities were redeveloped. In October 2018 the first appellant transferred 12C 27 to the second appellant. Subsequently the beach facilities were re-opened.

**The instruments**

8. The instruments normally followed a consistent form, albeit that on some, for present purposes, immaterial, occasions there were slight variations in content. We take the first set of documents as an example.

9. What the judge described as the First Document has as its heading, "CAYMAN ISLANDS, The Registered Land Law 1971 [now referred to as the Registered Land Act 1971], RESTRICTIVE AGREEMENT." The document reference number is RL 12 (or sometimes, 12). There is a "REGISTRATION SECTION" such as West Bay Beach South, and thereafter reference to the block and parcel of land to which the document refers. It then states:

> *"WE CAYMAN HOTEL AND GOLF INC in consideration of CI$1 (the receipt of whereof is hereby acknowledged) HEREBY MAKE AGREEMENT with the proprietors of Strata Plan Nos. 79 and 147 and Ellesmere Britannia Ltd…*
>
> *the proprietors of the interest comprised in Parcel Nos. 25.40(b) 38 and 39 in accordance with the attached documents."*

10. The document is signed and witnessed on behalf of Cayman Hotel, the proprietors of the strata plans and Ellesmere. At the foot of the first page, under the heading "FOR OFFICIAL USE ONLY," it states:

> *"I, the Registrar of Lands in the Cayman Islands hereby certify that this document was received by me for registration on the 2nd day of June 1992 and that stamp duty…[has] been paid."*

11. It is then signed by the Registrar of Lands.

12. As the judge said (at [27(g)]), each of these documents covers and relates to a number of parcels in respect of which the relevant proprietors have an interest, but only one of the parcels is owned by Cayman Hotel (either the golf course, the tennis courts or the beach club).

13. The "attached documents" comprise an "AGREEMENT" between Ellesmere, Cayman Hotel and the proprietors of the relevant strata plan (hereinafter referred to as "the Agreement" or "the Agreements"). Although the Agreements are similar, they are not identical. For the

purpose of the trial the parties selected a number as representative of the totality. One of the agreements made on 28 May 1992 recites as follows:

> *"WHEREAS*
>
> 1. *Ellesmere is the developer of the Britannia Condominium Complex of which Phase 1 is complete and Phase II is in the course of construction…*
>
> 2. *Cayman Hotel is the owner of the Hyatt Hotel, a Beach Club facility and a Golf Course which together with the complex referred to in 1 above, comprises the Britannia Resort in Grand Cayman.*
>
> 3. *The Britannia Resort is a planned community offering both hotel and condominium facilities with amenities for transient guests and condominium owners.*
>
> 4. *Ellesmere and Cayman Hotel are related companies…*
>
> 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.*
>
> 7. *Cayman Hotel is the registered proprietor [of the land]…*
>
> *NOW IT IS HEREBY AGREED as follows:-*
>
> 1. *<u>Definitions</u>*
>
> *…*
>
> *"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…*

*"Golf Playing Rights"*

*means the right 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. Such rights may be exercised by the owner personally or by an occupant of the strata lot upon giving notice in writing to Cayman Hotel PROVIDED however that:-*

*(a) The rights hereby granted shall extend to the owner/occupier's spouse and no more than two of his or her children under the age of 18 years; and*

*(b) The owner/occupier may elect by notice in writing to Cayman Hotel as to whether the playing rights will be used by the owner or by an occupant from time to time of the strata lot.*

*(c) In the event the owner/occupier is a company or partnership the rights hereby granted shall extend to no more than two individuals nominated by the owner/occupier in writing. Such nomination shall enure for a minimum period of one month.*

*"The Proprietors"*

*means the Proprietors of Strata Plan No. 79 from time to time including their successors in title.*

*"Rights"*

*means individually and/or collectively the Beach Club Rights, the Golf Playing Rights and the Tennis Court Rights.*

*"Tennis Court Rights"*

*means non-exclusive right to play tennis on the Hyatt Hotel tennis courts …upon payment of the current established fee. Hyatt Hotel*

*guests shall have priority over strata lot proprietors in respect of court reservations…"*

*CONSIDERATION*

2. *Cayman Hotel, in consideration of US$1.00 paid to it by Ellesmere (the receipt whereof is hereby acknowledged) to the intent and so as to bind (so far as is practicable) [the] parcels…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.*

*MODIFICATION OF RIGHTS*

3. *The proprietors hereby covenant on their own behalf and that of their successors in title and assigns to exercise such 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.*

*REQUEST TO REGISTRAR*

4. *The Registrar of Lands is hereby requested to:*

*(1) Note in the appurtenances section of the Register for parcel 25 in Block 12D of the West Bay Beach South Registration Section that The Proprietors are entitled to certain Beach Club Rights over parcel 27, certain Golf Playing Rights over parcel 23 and certain Tennis Court Rights over parcel 24 in accordance with this filed instrument; and*

*(2) Note in the incumbrances section of the Register for parcels 27, 23 and 24 that such subject parcels are subject to a restrictive agreement in relation to Beach Club Rights, Golf Playing Rights and Tennis Courts Rights, respectively.*

*AVOIDANCE OF DOUBT*

5. *For the avoidance of doubt, it is expressly agreed…that all such Rights shall not affect the ability of Cayman Hotel or its successors in title or assigns to deal with [the parcels]…and that [they] shall not be obliged to consult with or obtain the consent of The*

*Proprietors or Ellesmere or their successors in title or assigns prior to any dealing with such parcels…*

*WAIVER OF RIGHT TO CAUTION*

6. *In consideration of the grant of the Rights herein contained 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 [the]…parcels…in respect of such Rights and the Registrar of Lands is hereby requested to note that there is no right for any strata owner to register a caution restriction, inhibition or any other similar entry against title to such parcels in respect of such Rights."*

14. The document is signed on behalf of the parties to the agreement.

**The entries in the Land Register in respect of the instruments**

15. The instruments were entered in the Land Register ("the register") on the basis that they contained "Restrictive Agreements" which qualified to be noted in the incumbrances section of the Land Register.

16. Although the entries are not in each instance identical, they follow a general pattern which can sufficiently and conveniently be described in the following way.

17. Firstly, there are the entries relating to the land held by the appellants, for example, 12C 27. The first part ("A") is the "PROPERTY SECTION" and ("B") the "PROPRIETORSHIP SECTION." There follows (at "C") the "INCUMBRANCES SECTION" in respect of the land in question. That section contains a date, a reference to the instrument number and columns entitled "NATURE OF INCUMBRANCE" and "FURTHER PARTICULARS." The nature of the incumbrance is said to be "Rest Agmnts" and the further particulars are variously described in terms of "Subject to Restrictive Agreements as listed in filed instrument," or "The Rights as described in the filed instrument in favour of…"

18. Secondly, there are the entries relating to the land held by the respondents. That contains within the "PROPERTY SECTION" a column entitled "APPURTENANCES" identifying the parcel and instrument numbers. It refers to "The benefits of the facilities and rights over parcel … (See Instrument …)". Those benefits do not appear on the titles for the individual strata units. They appear as a benefit to the common parts.

**The Registered Land Act 1971**

19. The entries in the land register were intended to reflect the requirements of the Registered Land Act 1971 ("the RLA"), as revised. There was no real issue about the importance of certainty of title in respect of land. Registration has the effect of protecting the registered owner, avoiding title to land, or a right in it, having to be proved each time a disposition is made, and making dealing with land simpler and more economical. A purchaser of land will know that the rights he or she has, or to which he or she is subject, are the rights that are shown in the register. As the judge set out, the RLA, which for the first time provided for land registration in the Cayman Islands, was enacted in 1971 and came into force in 1972. It was based on the Kenya Registered Land Act, 1963. There have subsequently been many amendments to the Cayman Islands legislation. The 1995 Revision is agreed to be the appropriate provision for present purposes. Mr Seitler, in our view rightly, described the RLA as a formalised comprehensive code. He submitted that this case is about the integrity of the land registration system on these Islands.

20. The RLA is supported by rules, the Registered Land Rules ("RLR") and a Land Registry Procedural Manual which describes the practice of the Land Registry in relation to procedural matters, which we consider after setting out the material provisions of the RLA.

21. By section 2 of the RLA:

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

22. By section 3 of 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 Law so far as it is inconsistent with this [Act].*
>
> *Provided that, except where a contrary intention appears, nothing in this [Act]…shall be construed as permitting any dealing which is forbidden by express provisions of any other law or as overriding any other law requiring the consent or approval of any authority to any dealing."*

23. Section 4 of the RLA requires that there be established and maintained a land registry in which, among other things, there is to be a land register. By section 9(2), each register must contain a brief description of the land with particulars of its appurtenances, plus a reference to the Land Registry map and filed plan. The proprietorship section of the register must contain the name and where possible address of the proprietor and a note of any inhibition, caution or restriction affecting the right of disposition: section 9(2)(b). The incumbrances section of the register must contain "a note of every incumbrance and every right adversely affecting the land..."

24. Section 23 of the RLA deals with the effect of registration:

> *"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]..."*

25. 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.

26. By section 37 of the RLA:

> *"(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..."*

27. By section 92 of the RLA:

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

*(2) Any proprietor transferring or leasing land, or a lease may in the transfer or lease grant an easement, for the benefit of the land transferred or leased over land retained by him, or reserve an easement for the benefit of land retained by him.*

*(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.*

28. Section 93 of the RLA concerns restrictive agreements. It provides:

*"(1) Where an instrument…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 the 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…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…burdened by it or on anybody acquiring the land…*

*(3) The note of the 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 Act and had not been noted.*

*(4) Insofar 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."*

29. Section 105 (1) of the RLA provides:

*"Every disposition of land...shall be effected by an instrument in the prescribed form or in such other form as the Registrar in any particular case may approve, and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits."*

30. Part X of the RLA deals with "Rectification and Indemnity." Sections 140 to 144 concern rectification by the court and make provision for a right of indemnity. As presently relevant, they provide:

"140 (1) *Subject to the Land Adjudication Act 1971 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.*

140 (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…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 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.*

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

*(a) any rectification of the register under this [Act];*

*(b) any mistake or omission in the register which cannot be rectified under this [Act]…, other than a mistake or omission in the first registration; or*

*(c) …*

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

(3) *No indemnity shall be payable…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.*

31. Section 164 of the RLA states:

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

**The Registered Land Rules**

32. Before the judge was the version of the RLR from 1996. The version of the Land Registry Procedural Manual put in evidence dated from 2010. The version from September 1981 has now been located.

33. The RLR, among other things, require (in [2]) that: "*A register shall be in one of the forms prescribed in the First Schedule*." [4] states that "*Other forms required to be used under the [Act] shall be in the forms prescribed in the Third Schedule*." The First Schedule sets out the forms relating to the property, the proprietorship and the incumbrances. The Third Schedule, among other things, sets out "FORM R.L. 12 (which later became Form RL 15)." It states:

*"THE REGISTERED LAND LAW*
*GRANT OF EASEMENT"*

34. There is then set out the detail of the form applicable to the registration of easements. In the present case no such form was completed at any stage.

**The Land Registry Procedural Manual (1981 version)**

35. The introduction states that:

> *"This procedural manual is designed specifically for the Cayman Islands Land Registry. It is confined to procedural matters only…"*

36. [2.6], [2.7] and [2.9] concern the need for a separate entry number for every separate entry, state that an entry is only valid if signed by the Registrar and require that notes on the register be initialled and dated by the Registrar.

37. [2.10] concerns the "Wording and positioning of notes." Among other things, it sets out what is required to register the benefit and incumbrance of a restrictive agreement.

38. Chapter 3 deals with the "Procedures applicable to entries in property section of registers."

39. [3.8] relates to "New parcel registers and new editions." It states that:

> *"The centre panel of parcel registers is for appurtenances, i.e. rights which benefit the property and are attached to the land, e.g. easements, restrictive agreements, profits…Appurtenances should either be reproduced in full or a reference made to a filed instrument…They should never be summarised…"*

40. By [3.13]:

> *"Easements, restrictive agreements…require an entry, or, in the case of restrictive agreements, a note in the property section…of the land which benefits (the dominant tenement)…*

41. [5.1.1] and [5.14] read:

> "*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..."* [5.1.1]

> *"Easements are created by instrument of grant of an easement in prescribed form or by the a proprietor reserving in an instrument of transfer … an easement for the benefit of the land retained by him or by granting in an instrument of transfer … a benefit for the land transferred… Registration of a grant or reservation of an easement is effected by entering in the incumbent section of the land, burdened by the easement (servient tenement) with a reference to the instrument or the transfer or lease in the 'Nature of encumbrance' column, the words 'Grant (or reservation) of easement'. In the column headed 'Further particulars' enter the reference of the land, strata lot or lease benefiting from the easement and a brief description of it, e.g. 'Right of way shown on Registry Map in favour of 204E 210'. Easements should not be summarised; if there is insufficient space, enter such words as 'in favour of parcel 24E 20. See instrument'. The entry must be accorded a separate entry number".*

> *Easements are always 'appertunant to' land. An entry of an easement in the incumbrances section of the servient tenement always requires an entry as an appertenance in the property section of the dominant tenement. (For procedures for entry of appurtenance see [3.8],[3.9], [3.13] …"* [5.14]

42. Chapter 11 is entitled "INSTRUMENTS." [11.1] and [11.2] state:

> *"11.1 'instrument' means any document which 'requires or is capable of registration, i.e. which will lead to an entry, note or cancellation in the register…An instrument is always required to support the making of any new entry…Where the law provides, as it does for most usual dealings, that an instrument must be presented in prescribed form, the printed RL forms or a copy of them must be used (RLL s.105). Where the law does not so provide, the Registrar must approve the form of instrument in each case, unless he has already approved a standard form…"*
>
> *11.2 "Acceptance or rejection of instruments presented is a most important function of Registry staff…"*

**The judge's decisions on the principal issues tried below and in this appeal.**

(1) The Restrictive Agreements Issue

43. The appellants contended below that the Agreements contained in the instruments did not satisfy the definition of a restrictive agreement provided for in section 93(1) of the RLA because they did not restrict the building or the user or other enjoyment of Cayman Hotel's land.

44. The respondents argued that it was implicit in the grant by Cayman Hotel of the Rights under the Agreement that Cayman Hotel would not build on or develop its land ("the Covenant Not to Build or Develop"), such a covenant being the necessary consequence of the grant of the Rights under the Agreement.

45. The judge rejected the respondents' case that the instruments contained the Covenant Not to Build or Develop but decided that the Agreements satisfied the requirements of section 93(1) of the RLA on the ground that they contained a restrictive agreement not to modify the facilities or change their location other than for the purpose of repair or maintenance. He also held that the references to the instruments in the incumbrances section of the register for the titles held by Cayman Hotel together with the description of the incumbrance in the nature of

incumbrance column as a restrictive agreement was sufficient to satisfy the requirements of sections 93(2) of the RLA.

(2) The Easements and Rectification Issues

46. The judge went on to uphold the respondents' case that the Agreements created easements but held that the easements had not been registered in accordance with the requirements of section 92 of the RLA ("the Easements Issue"). He then went on to hold that the register could be rectified to record the Rights specified in the instruments as easements ("the Rectification Issue").

47. The appellants appeal each of the aforementioned decisions of the judge save for his rejection of the respondents' Covenant Not to Build or Develop case. We shall proceed by taking each decision in turn and deciding whether the appeals against them succeed or fail before moving on to the next issue. In the course of dealing with the Restrictive Agreements Issue we shall also address the Covenant Not to Build or Develop Issue pleaded in Ground 1 of the Respondents' Notice.

**The Restrictive Agreements Issue**

*The judge's decision*

48. The judge rejected the respondents' case for the Covenant Not to Build or Develop. His view is encapsulated by the following extracts from [89] and [91] of his judgment:

> *"89…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…*
>
> *91… The core problem with the submissions [on behalf of the respondents]…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 [respondents]…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."*

49. However, the judge went on to find ([95] and following) that Clause 3 of the Agreements, interpreted in light of the language of the clause and the First Documents and Agreements as a whole, including in particular recital 6, can and should be interpreted as referring to and including an agreement that Cayman Hotel and its successors 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.

50. In making this finding the judge had regard to the following:

(1) Recital 6 which, as we have seen, states that the parties wished to "*register covenants*" (and not the Rights) these "*covenants protecting [the Rights]*", and the covenants were stated to be "*in favour of all present and future [Lot Owners].*"

(2) Clause 4(2) of the Written Agreements which 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],*" this reference to a restrictive agreement being equivalent to a reference to (restrictive) covenants. (See [2.3.6] of the Manual where it is noted that 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*").

(3) The reference in the Agreements to restrictions to which Cayman Hotel were to be subject, including the reference in Clause 3 (headed "Modification of Rights") to Cayman Hotel and its successors having the "*right*" to "*modify the facilities or the location thereof as constitute such Rights for the purpose of carrying out repairs and maintenance in respect thereto*."

51. At [95 (c)], [96] and [98] the judge said:

*"It is … implicit in this right or permission given to Cayman Hotel and its successors [conferred by Clause 3] 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)". [95 (c)]*

*"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."* [96]

*"The Plaintiffs argued and the [respondents]…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."* [97]

52. The judge reached a second and alternative conclusion that if, as he had found, the Restrictive Agreement Term was not an express term, it amounted to an implied term, leading to the same consequences if the term was an expressed term. He reached this conclusion having referred to a number of authorities, including: (a) the dictum of Jones J in *Primeo Fund (in Official Liquidation) v Bank of Bermuda Cayman) Ltd and HSBC Securities Services (Luxembourg)* SA [2017 (2) CILR 334] at [211] ("*Primeo");* (b) *Marks & Spencer plc* v. *BNP Paribas Securities. Services. Trust Co. (Jersey) Ltd* [2015] UKSC 72 *("M&S*"); (c) *Oriental Steamship Co. v Taylor [1893] 2 QB 518 per Stirling J* and (d) *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2 (*"Ali").*

53. The judge had regard in particular to the opinion expressed by Lord Hughes in *Ali* 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 it was so obvious that it went without saying; and/or that it was necessary to give the contract business efficacy. In the judge's view, the Restrictive Agreement Term would have been treated by a reasonable reader of the instruments, at the time that the Agreements and the First Documents were executed and entered into, as so obvious that it went without saying and, in any event, implication of the term was necessary for business efficacy in the sense that it is needed to make sense of the limited permission given in Clause 3 and to ensure that the protections provided thereby were fully effective. [106]-[107]

**The appellants' submissions challenging the judge' decision on the Restrictive Agreements Issue.**

[A] Procedural unfairness

54. Neither the appellants nor the respondents contended below that Clause 3 of the Agreement should be interpreted as the judge interpreted it, namely, that the owners of the land on which the facilities were located are prohibited 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. Instead, without hearing submissions on his proposed interpretation of Clause 3, the judge went ahead and interpreted the clause as he did.

[B] The true nature of the Agreements

55. The Agreements grant rights in the nature of licences governed by section 2 of the RLA and are not restrictive agreements under the general law or for the purposes of section 93(1) of the RLA.

56. In reality, the rights granted by the Agreements were only expected to endure whilst the hotel continued to exist and it was expected that the resort would exist for a long time.

57. The Agreements say nothing about the rights continuing if the hotel ceases to exist and contain no obligations on the Cayman Hotel to continue to operate the resort or to maintain the golf course, or the tennis courts or the beach; there is also no covenant by the Cayman Hotel in relation to its use of the land or to obtain direct covenants from anybody to which it sells the resort to abide by the agreement and keep the resort open. Accordingly, the rights granted to the Lot Owners were simply an agreement to put them on a par with hotel guests in relation to the facilities in question. Properly advised, as it must be assumed that they were, the Lot Owners would have known when buying a unit that as a matter of reality he or she would be able to use the facilities of the hotel as long as they were there.

58. Further, the rights granted are in the nature of positive covenants, not negative covenants, which they would have to be to constitute restrictive covenants recognised at common law and under section 93(1) of the RLA. Nor do the rights give rise to a restrictive agreement restricting the building on or the user, or other enjoyment of Cayman Hotel's land to the benefit of the Lot Owners' land as required by section 93(1).

[C] The judge's misconstruction of Clause 3

59. The judge's finding that the Agreements were Restrictive Agreements for the purposes of section 93(1) of the RLA was founded on his construction of Clause 3 that the facilities, or the location thereof, could only be modified for the purpose of carrying out repairs or maintenance thereto. It follows that, if the judge's construction of Clause 3 was erroneous, his finding that the Agreements satisfied the requirements of section 93(1) of the RLA must be set aside.

60. The appellants submitted that the judge should have read the rights reserved to Cayman Hotel and its successors in title or assigns, in the proviso in Clause 3 disjunctively. The error concerned the words coming after the "subject at all times" proviso, namely, "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". For the reasons summarised in the following two paragraphs they submitted that the judge should have found that the words "for the purpose of carrying out repairs or maintenance" applied only to the right to suspend the Rights and not to the right to modify the facilities or the location thereof.

61. This disjunctive interpretation is the natural and ordinary meaning of Clause 3. One might suspend the Rights to carry out repairs to the underlying facilities, but one would not naturally look to modify or relocate facilities in order simply to repair or maintain them. There are many other situations in which Cayman Hotel might have wanted to modify the facilities regardless of whether they were in need of repair and/or maintenance. The parties would also have known that long-term Rights were being granted over existing hotel facilities and will have anticipated those Rights changing over time by modification or change of location on the site.

62. The heading of Clause 3 is "Modification of Rights" not "modification of rights in order to carry out repairs", or similar. Clause 5 (which provides that Cayman Hotel is free to deal with its land without any consultation of the Lot Owners or Ellesmere) also supports a broad interpretation of Cayman Hotel's right to modify and relocate facilities. So do: (a) Recital 1 (which records that the Britannia Condominium Complex was still in the process of being constructed); (b) Recital 3 which records that the complex includes hotel facilities, which could be expected to change over time; (c) the broad definition of (in particular) the Beach Club Rights, including a right "to enjoy the restaurant, beach and water sport facilities", which facilities one would anticipate changing and being modernised over time; and (d) the fact that the Rights were granted over particular parcels of land (so each facility could only be relocated within its own parcel): see Clause 4(1).

63. In addition, there is no need to read the power to modify in the proviso to Clause 3 narrowly to avoid undermining the Rights intended to be granted. This is because the Lot Owners are already protected in this regard by the principle from non-derogation of grant which would prevent any modification or relocation of the facilities that was such as to wholly undermine the exercise of the Rights.

[D] The Restrictive Agreement Term cannot arise as a matter of construction.

64. It was not open to the judge to conclude that the Agreements were subject to the Restrictive Agreement Term as a matter of construction, rather than by implication. Interpreting a contract involves considering the words used, rather than implying additional words: see *M & S* at [26] applied in this jurisdiction in relation to implied terms in *Primeo* at [211]. There are no words in Clause 3 which can be construed as meaning "*Cayman Hotel hereby agrees not to modify the facilities or their location, or to suspend the exercise of the Rights other than for the purpose of carrying out repairs or maintenance in respect thereto*". Clause 3 is concerned with limitations and provisos to the Rights granted; there are no words of agreement or promise by Cayman Hotel at all.

[E] Even if the judge's construction of Clause 3 was correct, the judge was wrong to imply the Restrictive Agreement Term

65. It is not necessary to give business efficacy to Clause 3, or to the Agreements or Instruments more generally, to treat the parties as also having agreed that Cayman Hotel would not modify the facilities, relocate the facilities or suspend the Rights other than for the permitted purposes of repair or maintenance. If Cayman Hotel modified or relocated facilities and there was substantial interference with the Rights as a result, the Lot Owners would already have a cause of action against Cayman Hotel for breach of contract.

66. In addition, the Restrictive Agreement Term is not so obvious that it goes without saying.

[F] The response to the respondents' case for the Covenant Not to Build or Develop contended for in ground 1 of the Respondents' Notice

67. The judge did not err in dismissing the appellants' case for the Covenant Not to Build or Develop. The judge's reasoning in reaching this conclusion is compelling.

68. The Covenant Not to Build or Develop is reverse engineered. This is clear from the fact that whilst the instruments describe themselves as "restrictive agreements", they contain no promise restricting or limiting what Cayman Hotel can do with its land.

69. At the heart of the respondents' case under Ground 1 of the Respondents' Notice is the proposition that where there is a grant of rights of the sort granted in the Agreements, the grantor is subject to a term that he or she will not interfere with the exercise of that right. This proposition is novel, unsupported by any authority and wrong in principle for the reasons the judge gave in his judgment.

70. Further, on its true construction as contended for by the appellants, Clause 3 is fatal to the submission that the Covenant Not to Build or Develop can be implied into the Agreements. The reason for this is that by Clause 3, Cayman Hotel is expressly empowered to build on, or otherwise develop or carry out works on the Properties in a manner that prevents or substantially interferes with (but does not wholly undermine) the exercise of the Rights. Indeed, the proposed restrictive agreement is inconsistent with the right of Cayman Hotel to suspend the Rights for the purpose of carrying out repair or maintenance works, even if these interfere with the Rights.

**The respondents' case in support of the judge's conclusion that the Agreements contained the Restrictive Agreement Term.**

71. The judge was correct to conclude that the Agreements contained the Restrictive Agreement Term for the reasons he gave in his judgment. The appellants' disjunctive interpretation of

Clause 3 suffers from the fundamental problem that its effect is to elevate and transform the first limb of the "subject to" proviso to a covenant by the Lot Owners into a freestanding express grant of a right to the Lot Owners which is not in the nature of a proviso to that covenant and which does not limit the scope of Cayman Hotel's obligations thereunder. Such a freestanding express grant to Cayman Hotel would not naturally belong in a clause by which the Lot Owners give a covenant to Cayman Hotel to comply with rules and regulations.

72. The heading of Clause 3 cannot properly be used to turn one limb of a proviso to the covenant given by the Lot Owners ("the dominant owners"), into a freestanding express grant of a right to Cayman Hotel ("the servient owners"), which is not in the nature of a proviso.

**The respondents' case for the Covenant Not to Build or Develop pleaded in Ground 1 of their Respondents' Notice**

73. It is well established that a grant or covenant which is affirmative in its express terms may, as a matter of construction or implication, include a covenant which is negative.

74. There is a negative obligation on Cayman Hotel (the grantor of Rights) which is the corollary of the grant of the Rights not to prevent or substantially interfere with the exercise by the grantees of the Rights or their successors in title that necessarily restricts the grantors' freedom to build on or otherwise develop or carry out works on the Properties in a manner which would do so. In other words, by making the grants the grantors were necessarily thereby restricting their (and their successors') own freedom thereafter to use their land in a manner which would prevent or substantially interfere with the exercise of the Rights which they chose to grant. If the grantors were to remain free after the grant to build on or otherwise develop or carry out works on the Properties in a manner which would prevent or substantially interfere with the exercise of the Rights, the grant of the Rights would thereby be rendered futile and the obvious and express intention of the parties would not be given effect. To construe the Rights in that way would infringe the validation principle (*'ut res magis valeat quam pereat'*).

75. The judge erred in rejecting the arguments expressed in [74] above, and in failing to apply the reasoning which he accepted as supporting the Restrictive Agreement Term as also supporting the Covenant Not to Build or Develop (which it does).

**The respondents' new submission advanced in their skeleton argument**

76. The respondents submit that the words that follow "subject at all times to" in Clause 3 ("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") – amount to a qualification or a proviso to the dominant owners' covenant to comply with rules and regulations. It follows that, since these

words are in the nature of a proviso, and given the opening words are "the right of Cayman Hotel or its successors in title or assigns" (the servient owners) one would naturally expect the content of the servient owners' 'right' which follows to limit the scope of the dominant owners' obligations under their covenant to comply. This means that the natural reading of Clause 3 is that the limited permitted purpose of "carrying out repairs or maintenance" applies to both limbs of the proviso which follows (as the judge construed it), and not only to the second limb. Hence Cayman Hotel and its successors, as servient owners, can only impose or require compliance with rules and regulations which modify the facilities or the location which constitute the Rights, or which suspend the Rights altogether, for the limited purpose of effecting repairs or maintenance.

**Discussion and decision**

77. In our view, the judge erred in adopting an interpretation of Clause 3 which had not been advanced by either party without giving the parties the opportunity of responding to his proposed interpretation. However, the parties have now responded in this appeal and the Court is in a position to decide whether the judge's construction was the right one.

78. We are not persuaded by the appellants' submissions summarised in [55] – [60] above which the appellants also advanced on the Easement Issue and which we reject in [132] below, when finding that the Rights were to be characterised as easements.

79. However, we accept the appellants' submission that the judge misconstrued Clause 3 and thereby erred in finding that the Agreements contained the Restrictive Agreement Term. In our opinion, the judge's construction of Clause 3 is at variance with the natural and ordinary meaning of the words used in the clause construed against the background of the whole Agreement. It is also at variance with what we are satisfied would have been the parties' contemplation at the time the Agreements were concluded, namely, that the facilities would be available for the foreseeable future for at least as long as Cayman Hotel or its successors continued to operate the resort, and that over such time the facilities might well be modified or moved and not just for repairs and maintenance. The judge's construction also flies in the face of the fact that the Agreements do not contain any promises by Cayman Hotel not to do anything on its land.

80. We also consider that the judge's construction of Clause 3 does not accord with commercial common sense. This is because its consequence is that Cayman Hotel is prohibited from creating a new, larger and better facility such as a swimming pool, in a different location on the site from where the existing pool is located, in order to raise the attractiveness of the swimming facility at the resort.

81. We also accept the appellants' submission that even if Clause 3 means what the judge said it meant, he was wrong to hold that the Restrictive Agreement Term was to be implied into the

Agreements. In our opinion, applying the approach to the implication of terms authoritatively laid down in *M&S* and *Ali*, the Restrictive Agreement Term was not a term that the parties would have regarded as being too obvious to need to be expressed in the Agreement; nor was its implication necessary to give the Agreement business efficacy.

82. We do not accept the respondents' submissions in favour of the Covenant Not to Build or Develop pleaded in Ground 1 of the Respondents' Notice. We agree with the appellants' submission that at the heart of the respondents' case on Ground 1 of the Respondents' Notice is the proposition that, where there is a grant of rights of the sort granted in the Agreements, the grantor is subject to a term that he or she will not interfere with the exercise of that right. In our view the judge was right to reject this proposition for the reasons he gives in [89] and [91] of this judgment, see [48] above.

83. We are also not persuaded by the respondents' "new" submission referred to in [76] above. In our judgment, this interpretation of Clause 3 conflicts with the ordinary and natural meaning of the clause because, as the appellants submit, it is strained and unnatural to read the words "subject to" as a limitation on the rules and regulations that can be imposed by the dominant owners. The words that follow "subject to" function to place a limitation on the exercise of the Rights, not a limitation of the rules and regulations that can be imposed.

84. It follows that, for the reasons given above, we find that the Agreements were not restrictive agreements for the purpose of section 93(1) of the RLA and therefore the Rights granted were incapable of being registered as incumbrances in the register.

**The Easements Issue**

*Introduction*

85. The respondents contended below that the Rights granted by the Agreements constituted easements. It would appear that they so contended because even if the Agreements were restrictive agreements for the purposes of section 93(1) RLA, the restrictions that would bind Cayman Hotel's successors in title would only be the negative restrictions in the form of the Covenant Not to Build or Develop or in the form of the Restrictive Agreement Term.

86. As related in [21] and [27] above:

Section 2 of the RLA defines an easement as:

> *"…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…"*

Section 92 of the RLA provides:

> *"(1) The proprietor of land or a lease may, by an instrument in the prescribed form, grant an easement over his land…to the proprietor…of other land for the benefit of that other land.*
>
> *(2) Any proprietor, transferring or leasing land, or a lease may in the transfer or lease, grant an easement, for the benefit of the land transferred or leased over land retained by him or reserve an easement for the benefit of land retained by him*
>
> *(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*."

87. The common law requirements for the establishment of an easement are set out in [26-004] of *Megarry & Wade, The Law of Real Property*, 9th Ed ("*Megarry & Wade*") as follows:

> *"Four requirements must be satisfied before there can be an easement. First, there must be a dominant tenement and a servient tenement. Secondly, the easement must confer a benefit on (or "accommodate") the dominant tenement. Thirdly, the dominant and servient tenement must not be owned and occupied by the same person. Fourthly, the easement must be capable of forming the subject matter of a grant…"*

(As is related in [80] of the appellants' skeleton argument, this paragraph (that appeared in materially the same form in the eighth edition) was endorsed by the Grand Court in *Proprietors Strata Plan #126 v Lowe* (unreported) Cause No. G0013/2018 at [104]).

88. The decision of the Supreme Court in *Regency Villas Title Ltd and others v Diamond Resorts Europe, Ltd and others* [2018] UKSC 57 ("*Regency Villas*") is of major significance to the

Easements Issue. As Lord Briggs said at the start of his judgment, the appeal "*offered an opportunity for the court to consider, for the first time, the extent to which the right to the free use of sporting and recreational facilities provided in a country club environment may be conferred upon the owners and occupiers of an adjacent timeshare complex by the use of freehold easements".*

89. *Regency Villas* involved a timeshare development under which the owners of the timeshare units were granted the right to use, free of charge, a range of leisure facilities consisting of a swimming pool, squash courts, tennis courts, a golf course and formal gardens located in surrounding park land ("the Park"). Individual timeshare owners claimed a declaration that they were entitled, by way of easement, to the free use of all the sporting or recreational facilities from time to time provided within the Park, and an injunction restraining interference with them by the defendants who were the current freehold and leasehold owners of the Park. The defendants denied that the claimants had the benefit of any easement in relation to the facilities and counterclaimed for a *quantum meruit* in respect of the provision of those facilities in and after 2012, to the extent not paid for, or not paid for in full.

90. It was the principally the second of the *Megarry & Wade* requirements for the creation of an easement that was in issue and the question was whether a right to use the recreational facilities "accommodated" the dominant tenement of the timeshare owners. Lord Briggs (with whom Lady Hale and Lords Kitchen, Kerr and Sumption agreed) said in [44] of his judgment:

> *"The main controversy in the present case arises because the Facilities Grant conferred recreational and sporting rights, the enjoyment of which may fairly be described as an end in itself, rather than a means to an end (ie to the more enjoyable or full use of the dominant tenement). The origin of the controversy lies in the Roman law doctrine that a ius spatiandi cannot constitute a servitude: see per Evershed MR giving the judgment of the Court of Appeal in In re Ellenborough Park, at p 163. For present purposes that Latin phrase may simply be translated as meaning a recreational right to wander over someone else's land. The difficulty arises as an aspect of the requirement that the right must accommodate the dominant tenement precisely because, generally speaking, the sporting or recreational right will be enjoyed for its own sake, on the servient tenement where it is undertaken, rather than as a means to some end consisting directly of the beneficial use of the dominant tenement".*

91. In *Re Ellenborough Park* [1956] Ch 131 ("Ellenborough Park") the Court of Appeal decided that the grant by the owners of a park to purchasers of plots surrounding the park of the right to full enjoyment of a pleasure ground to be erected in the park, with the purchasers covenanting to pay towards the upkeep of the garden, constituted an easement enforceable against subsequent owners of the park. The Supreme Court held that *Ellenborough Park* had been correctly decided and was dispositive of the issue of whether the right to use the recreational

facilities granted to the timeshare owners accommodated the dominant tenement to the extent that it was not fatal to the recognition of a right as an easement that it is granted for recreational (including sporting) use, to be enjoyed for its own sake on the servient tenement.

92. In [52] and [53] of his judgment, Lord Briggs said:

> "52. *This careful and compelling judgment of the court* [in Ellenborough Park] *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."*

**<u>The sub-issues before the judge</u>**

93. The appellants argued below that the instruments did not create and the Rights did not constitute easements. They advanced 5 separate arguments as follows:

(1) 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 Issue)*.

(2) 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 Issue*).

(3) The Rights are not easements as defined by section 2 of the RLA (*the Failure to Satisfy Section 2 Issue*).

(4) 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 Issue*).

(5) 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 Issue*).

94. We propose to consider each Issue in turn concluding with a decision whether the judge's decision thereon is or is not to be upheld.

*The Failure to Satisfy the Mandatory requirements of section 92 of the RLA.*

95. Section 92(1) of the RLA provides: *"[T]he proprietor of land or a lease may, by an **instrument in the prescribed form** grant an easement over his land …"* [Emphasis supplied].

96. Section 105(1) of the RLA provides: *"Every disposition of land … 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."*

97. As related in [128] of the appellants' skeleton argument, revised versions of the Registered Land Rules (RLR) were produced in 1976, 1996, 1998 and 2000. In the 1976 revision, r 5 provided: 'Other forms required to be used under the Law are prescribed in Third Schedule' and the relevant form for the grant of an easement was RL 12. From the 1996 Revision of the RLR onwards, during the relevant period (up to 2001), r 4(1) provided 'Other forms required to be used under the Law shall be in the forms prescribed in the Third Schedule'. The forms for the grant of an Easement in Schedule 3, as they read at the time the instruments and Agreements were executed, contained in the top left hand corner "RL 12" (or "RL 15" in the case of the later instruments and Agreements). Beneath these letters and numbers are the words "REGISTERED LAND LAW"; beneath this are the words "GRANT OF EASEMENT"; next down are the words " I/We" and a space in which the identity of the grantor is to be set out; beneath that are the words "in consideration of" and a space in which the consideration for the grant is to be specified, underneath which are the words "(receipt whereof is hereby acknowledged) **hereby grant** to," followed by a space for the details of the grantee and then

the words “the proprietor of the interest comprised in parcel number [space] the following easements” followed by a space for their specification. At the bottom of the form there are designated spaces for the insertion of the date and the signatures of the Grantor and the Grantee.

98. The forms actually completed and signed on behalf of Cayman Hotel and the Lot Owners were as follows. They had either “RL 12” or “RL 15” in the top left hand corner, but in place of the words **GRANT OF EASEMENT** are the words **RESTRICTIVE AGREEMENT** and following the words identifying Cayman Hotel, and the description of the consideration “receipt of which is hereby acknowledged”, appear the words **“hereby make agreement”** rather than “**hereby grant**” [Emphasis supplied). Nowhere in the forms does the word “easement” appear.

99. The appellants submitted at trial that the respondents had failed to comply with the mandatory requirement to use the “prescribed form” and accordingly, pursuant to section 37 of the RLA, the instruments and Agreements were ineffective to create rights in the nature of easements. The appellants also contended that there was a failure to comply with section 92(4) of the RLA because the instruments were not registered as granting easements in the title of the land burdened (12D 108 and 12C 27); instead the incumbrances section of the register for those titles identifies the ‘nature of the incumbrance’ imposed by the instruments as ‘Rest. Agmnts’ i.e. restrictive agreements.

100. The judge concluded that it is not mandatory to use the form prescribed by the Registrar. He stated in [149(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*”.

101. In so concluding, the judge observed at [149(b)] that this view was consistent with the Registrar’s evidence that she and the officials dealing with an application for registration had a discretionary power to decide whether or not to accept an adapted form and at [149(c)] he found that section 105(1) gives the Registrar unqualified power to approve and permit the use

of any form of application made to her. He then went to decide in [149(g)] that as a matter of fact the Registrar had not exercised the power conferred by section 150(1) to cure the failure to use the prescribed form.

102. In [149 (e) & (f)] the judge adopted the approach that the *"use of the wrong form made little difference"* and *"accordingly, to the extent that the entries made by the Registrar on the register, after having treated the forms and the 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".*

103. At [149(h)] the judge stated that *"the form and terms of the instruments as they related to the Rights were substantially similar to the prescribed form for the grant of easements so that the Registrar would have been entitled to accept them as sufficient to permit the registration of the Rights as easements .. the failure to use the word "easement" or the failure to refer to the grant of easements in the Agreements was not a fatal flaw although 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 …"*

104. The respondents submit that the judge's decision that the use of the wrong form by the parties was not material is supported by the judgments in *Conolly (as Personal Representative of the Estate of A McF. Conolly, deceased) v Rankine* at first instance in the Grand Court ([1998] CILR 133) and on appeal ([1999] CILR 390). In that case, Ms A, who had been granted Administration of the testator's estate, took steps to transfer the land in question to the respondent, using a form of transfer which was appropriate to transfer an interest by a personal representative to a person beneficially entitled under a will, or on intestacy. However, the transfer form used was not the correct one because the transferee had no specific benefit conferred on him by the will. The appellant relied on this mistake in the Grand Court when applying for rectification of the land register under section 140 of the RLA. Douglas, Ag J declined to treat this mistake as justifying rectification of the register, holding that the use of the wrong form gives rise to no remedy. This decision was approved by Collett JA on appeal who said that the use of the wrong form "made little difference". The administratrix, who had power to transfer the land, did so to a person who had an option to acquire the land under the terms of the will and the transferee was also a bona fide purchaser for value. The use of the incorrect form did not vitiate the transfer: *falsa demonstrato non nocet*. In fact, the use of the wrong form was not relied on in the appeal. Instead, it was contended that the transferor did not have the legal right to transfer the proprietorship to the Respondent and the Court of Appeal decided that this was an error of law and as such it was not within section 140 of the RLA.

105. We postpone ruling on the appellants' submission that the judge erred in finding that use of "the prescribed form" was not mandatory for the creation and registration of easements until

we come to deal with the Rectification Issue. We move on to deal with the appellants' submission that the instruments were not registered *as easements* in the incumbrance section of the title of the burdened land which was a failure to comply with section 92(4) of the RLA.

106. The view of the judge at [157] was that the registration of an easement as contemplated in section 92(4) 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. The preferred way of doing this was for the entry in the register to use the word "*easement"*. This was what the Registrar's practice in the Manual required. He observed that paragraph 4.11.2 of the 2010 Manual[1] stated that the practice is to include the 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. However, it seemed to the judge that the Registrar's practice represented the "gold standard" and it would 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".*

107. Paragraph [112] of the appellants' skeleton argument contains copies of: (a) the entry made in the Incumbrances Section against the servient parcels in the registration against 12C 27, the Beach Club land, as a representative example of the relevant entries in the register; and (b) the format of the registration in the case of many of the other instruments. In both copies in the column headed "Nature of Incumbrance" appear the words "Rest Agmtns" and the "Further Particulars" column in the first copy contains the words "The rights as described in the filed instrument in favour of 12D, 38-40" and, in the second copy, the words in the Further Particulars column are: "Subject to the Restrictive Agreements as listed in filed instrument".

108. In [158] the judge held that the entry in the incumbrances section of the register did not record or constitute the registration of easements. The register recorded that the nature of the incumbrance was a restrictive agreement and parties searching the register must, when considering what has been registered be able to rely on entries made in the register. To treat

[1] This paragraph is to the same effect as [5.14] of the 1981 version of the Manual: see [41] above.

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.

109. The respondents argue in accordance with Ground 2 of their Respondents' Notice that the judge erred when concluding that the grant of the Rights as easements had not been completed by registration in accordance with the RLA and therefore, in the absence of rectification, such easements were not binding on the appellants. They submit that in order for the grant of an easement to be completed by registration, the only statutory requirement under the RLA is provided for in section 92(4), which includes the words, "…its registration as an incumbrance in …" They contend that the judge correctly held that requiring the word "easement" be used would be unjustifiably technical and that 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 section 92 has been met: what is required is to look at the substance not the form, see *Bilkus v London Borough of Redbridge* (1968) 207 EG 803 at 805. In the respondents' submission, the entries made in the Incumbrances section of the Land Register for the Properties which stated in column 5 ("Further Particulars"): *"The rights as described in the filed instrument [which was identified by the filing number in column 3] in favour of [the benefitting parcel(s) in question]"* allowed any reader who looked at the filed instrument incorporated into them to see that rights in the nature of easements had been granted and registered. Whilst these entries did also state in column 4 'Nature of Incumbrance' "Rest. Agmts", reading the instruments would immediately reveal that this reflected the heading that appeared on them.

110. We reject the respondents' argument that the judge erred in finding that the Rights had not been properly registered in accordance with the requirements of the RLA. In our view, putting on one side the appellants' submission that for the creation of easements it was mandatory to use the prescribed form and there had to be completion by registration, the judge's approach of adopting the criterion whether the register clearly records that an easement has been granted and registered, 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, is much to be preferred to the approach contended for by the respondents. That said, we are of the opinion that the judge should have held that the entries did not constitute the registration of easements because they did not conform to the requirements of clause 5.14 of the Manual,[2] which is part of the Law, and therefore the registration was ineffective pursuant to section 37 of the RLA.

*The No Intention to Bind Successors Issue*.

[2] See [41] above.

111. The appellants submitted below that, on the correct construction of the instruments, the parties to them did not intend to grant an easement binding on the successors in title of the Cayman Hotel, a conclusion that was supported by the waiver of any right to lodge a caution against the parcels held by Cayman Hotel (Clause 6). They contended that if the grant of easements had been intended, the RL 12 form would not have been completed in the way it had been; the professionally drafted Agreements did not mention the word "easement," expressly stated that the parties wished "to register covenants," and asked the Registrar to note in the Incumbrances Section of the register relating to Cayman Hotel's title "that such parcels are subject to a restrictive agreement" (Clause 4 (b)).

112. At [167]-[169], the judge stated that the fact that the parties intended the instruments and the Rights to be registered under the RLA in the Incumbrances Section and the language used in the Written Agreements, were powerful indicators that they intended the rights to be binding property rights. This was 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). He also considered that the formalities surrounding the grant of the Rights and the steps taken to ensure that they would be registered or noted on the register, was evidence that all the parties regarded registration as critical and had it in mind and accepted that the rights were capable of an intention to bind Cayman Hotel's successors in title. Taking the wording of recital 6 and clauses 2 and 3 of the Written Agreements as examples, he referred to the repeated references that the Rights were to be binding on and attached to the land owned by Cayman Hotel and not merely personal covenants.

113. The appellants submit on appeal that the judge erred in concluding that from an objective point of view, the parties intended that the Rights were property rights in the nature of easements that were intended to be binding on Cayman Hotel's successors in title.

114. We accept this submission. In our judgment it is to be inferred from: (i) the way in which the required form RL 12 and later form RL 15 for easements was completed by the parties; (ii) the wording of the Agreements that had been drafted professionally; (iii) the request the parties made to the Registrar only to note restrictive agreements in Clause 4 (b); and (iv) the waiver of any right to lodge a caution against the parcels held by Cayman Hotel (Clause 6), that a reasonable person, with knowledge of the forms and documents in issue and the applicable requirements for the registration of restrictive agreements and easements, would undoubtedly have concluded that the parties did not intend to register the grant of any easements but intended only to register restrictive agreements. We return to the significance of this finding when dealing below with the Rectification Issue.

*The Failure to Satisfy Section 2 Issue*

115. The appellants argued below that the Rights did not fall within the definition of an easement contained in Section 2 of the RLA because they were not "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." In the submission of the appellants, the Rights conferred 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." At the relevant time – the point of registration – the only right in play was a right to acquire a right to use the land for a limited purpose against the payment of a fee or waiver of that requirement. Further, the Golf Playing Rights fell outside the statutory definition because they gave rights to persons other than the Proprietor of the benefitted land including the owner's wife and two children, "Proprietor" being defined as the person registered under the RLA as the owner of the land or a lease or a charge.

116. The judge held at [166] that the Rights in the instrument were drafted so "*as to take immediate effect*" and "*to be registered immediately",* and that "*the Written Agreements incorporated an unqualified "grant" of the Rights*". The Written Agreements incorporated an unqualified "*grant*" of the Rights and the fees and charges which the Lot Owners were required to pay did not perform the function of a payment for the grant of the Rights. They arose as part of and are incidental to the exercise of the Rights. The Rights were granted to Lot Owners in return for and pursuant to their purchase of their properties. The requirement to pay the fees and charges was not, when the Agreements were properly construed and understood, a separate pre-condition which needed to be satisfied before the grant took effect. Indeed, no payment is required in relation to some of the Rights.

117. At [177] the judge said that the test for accommodation set out in *Regency Villas* had clearly been satisfied in this case. Under that test it had to be established on the facts of each case that the right in question had something to do with the enjoyment of the dominant tenement and the Court was required to consider the "normal use" of the dominant tenement, whether an actual or contemplated use.

118. In [179] the judge expressed the view that the nature and location of the development in the instant case demonstrated 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. Some of the units were occupied by Lot Owners only when on vacation, others were occupied by permanent residents, but nonetheless, recreation could 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).

119. The submissions advanced by the appellants before us in support of their case that the judge erred in rejecting their Failure to Satisfy Section 2 Issue were essentially the same as those that had been advanced below. In our view, those submissions were somewhat artificial and

technical, and in part were inconsistent with the Supreme Court's conclusion in *Regency Villas* that recreational facilities to be enjoyed by the owners and in some cases occupiers of the timeshare units, were capable of constituting common law easements. In our opinion the judge's reasoning in rejecting the contention that the grant of the Rights did not satisfy the requirements of the definition of an easement in section 2 of the RLA should be upheld.

*The Limited Duration Issue*.

120. The appellants submitted below that the parties' intention, objectively ascertained, was that the Rights were to bind only so long as a resort was operating on the burdened land and thus the Rights would cease when the operation of the resort on the burdened land ceased, which it had, the Hyatt Hotel having closed after Hurricane Ivan and the golf course having ceased to be operational. The recitals presupposed the continued existence of the hotel; and whilst the clauses of the Agreements granting the Rights referred to rights to the successors in title of the Lot Owners, they made no mention of Cayman Hotel's successors in title.

121. The judge at [171] stated that in order to conclude that the rights were only granted for so long as a hotel and resort were being operated on the burdened land, the Appellants had to establish that on the wording of the instruments and their relevant factual background there was an express or implied term to that effect. At [175] he said that where:

> " *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*".

122. His conclusion was that in this case the Rights were not dependant on the continued operation of the Hyatt Hotel and were not granted on terms that required them to terminate if and when the Hyatt Hotel ceased to operate [172]. The Written Agreement could have, but did not state 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 they terminated when the hotel or a successor hotel ceased to operate [173]. 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 for a limited duration or capable of termination, in the absence of clear words or a clear indication in the factual background to that effect [175]. He noted that that approach had been adopted in other agreements, including the Ritz Carlton Agreement. Moreover, the Rights were not drafted so as to be parasitic or to depend upon action taken by the Hyatt Hotel or any successor. While hotel guests may use the facilities, the exercise of the rights was not dependent on there being such guests or on particular activities being undertaken by the hotel [174].

123. On appeal, Mr Seitler for the appellants submitted that, given the wording of the Agreement, Recitals 1, 3 and 5 in particular, the hotel's continued existence was a presupposition of the Agreement. He further contended that there were five significant things that were not in the Agreement that reinforced the appellants' case. First, there is nothing in the Agreement about the Rights continuing if there is no longer any hotel on parcel 12D. Second, there is no obligation on Cayman Hotel to continue to operate the resort at all. Third, there is no obligation on Cayman Hotel or its successor to maintain the golf course or the tennis courts or the beach, which meant that after Hurricane Ivan, there was no breach of the Agreements through not opening the resort, not maintaining the golf course, not restoring the tennis courts and not running the hotel that hosts the facilities. Fourth, whilst there is a positive duty on Cayman Hotel to allow the Lot Owners to use hotel facilities, that assumes that the hotel is extant because without the hotel continuing to operate, the Rights as they are drafted are not viably stand alone. Fifth, the Rights were an agreement to put the Lot Owners on a par with hotel guests in relation to the specified facilities: if there are no hotel guests anymore, the Rights fall away.

124. Notwithstanding the force of Mr Seitler's submissions on this topic, we were not persuaded by them. We uphold the judge's decision that the Rights were not terminable should there cease to be a hotel and/ or a functioning golf course on the subservient land.

*The Failure to Constitute an Easement Issue*

125. In addition to the submissions they advanced in support of their case that the Rights granted did not satisfy the statutory definition of an easement because they were in the nature of options to acquire a licence to use the facilities and the right to play golf was not limited to the proprietors of the dominant land, the appellants argued that the grant of the Rights made in the Agreements did not constitute an easement at common law or satisfy the statutory definition of an easement. They did so for the following reasons: (i) the instruments are entered into by the strata corporations which own the common parts such as the stairs and the walk ways and it is impossible to see how the Rights serve or accommodate the use of this common property; (ii) the Rights were too precarious to satisfy the fourth Megarry & Wade requirement in that they required payment of a fee or charges and were subject to any rules in force and the playing of golf was subject to securing a pre-reservation; (iii) the Rights were inconsistent with the "mere passivity principle" because Cayman Hotel was obliged to facilitate bookings, to stipulate rules for the playing of golf, to accept the payment of fees and the enjoyment of the Rights depended on the facilities being managed and maintained, there being no realistic prospect of Lot Owners being able to step-in and maintain and run the facilities.

126. The judge's reasons for rejecting the Failure to Constitute an Easement Issue begin in [143] where he said that it was convenient at this stage to deal in general terms with the appellants' 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 appellants' land. He went on to state in [143]:

> *"… 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 … 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".*

127. He stated in [145] that it seemed to him that it was assumed and anticipated that maintenance and repair of the facilities would be taken care of by the hotel and in [146] –[147] he considered that the position in this case was similar to that in *Regency Villas* where *"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 so long as the grantor remained the owner of the park or vulnerable to an early demise on the sale of the park … 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".*

128. As to "accommodation", the judge considered (at [177]) that the test in *Regency Villas* that the Right had to have something to do with the enjoyment of the dominant tenant rather than simply adding value to it and the court had to consider the actual or contemplated "*normal use*" of the dominant tenement was *"clearly satisfied"*. The question whether a particular grant of rights accommodated a dominant tenement was primarily a question of fact. In [179] he stated:

> *"… the nature and location of the development in this case … 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 … Defendants refer to the importance of the "recreational lifestyle" offered by the development … and the use of their properties for vacations. Some of the properties were purchased as vacation homes … or to be rented out as vacation properties ….. 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…. 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."*

129. The judge also concluded that the Rights were not precarious in the relevant sense of being liable to be taken away at the whim of the servient owner. At [182] he rejected the appellants' argument that because they were entitled to require the payment of fees and charges as a condition to the exercise of the Rights and to increase those fees and charges to a level that would make the exercise of the rights prohibitively expensive, the Rights were too weak to constitute property rights. He did not consider that the requirement to pay fees and charges was inconsistent with the creation of property rights. But he recognised that the position might differ if, on the proper construction of the instruments and Agreements, the fee 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 will to any amount chosen: see [186]. That, however, was not the position in this case. The judge stated at [182] that it was clear "*that what the parties intended was that the usual charges levied on hotel guests for using the restaurant, beach and water sport facilities and playing tennis would be payable and the fees could be increased when the amounts charged to hotel guests were increased"*. It was "*inconceivable*" that the parties to the Written Agreement contemplated "*that the servient owners would or could impose a charge on hotel guests that was so high as to make the recreational and sporting immunities unavailable or unattractive to most if not all guests"* and 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.

130. Addressing the position where there is no hotel being operated on the servient land, the judge stated (at [183]) that on one reading if there were no hotel guests, Lot Owners would not be obliged to pay any fees or charges and it would be for the Lot Owners to exercise their easements and their rights to repair at their own expense. But he saw the strength of the

argument that the Agreement should be interpreted as permitting the servient owner to require payment of a reasonable sum representing an equal or equivalent amount to that charged by similar hotels for the use of similar facilities.

131. The judge also rejected the appellants' argument that the Lot Owners could make no meaningful use of the right and the facilities without management and maintenance being performed by the servient owner so that the "mere passivity principle" was infringed [187] ff. Applying the analysis of Lord Briggs in *Regency Villas,* at [188]-[189] he stated that the key issue was 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 Appellants. He concluded that the Lot Owners are and will be able to make such use of the facilities. He stated that it was clear that the maintenance costs of the golf course have been and are likely to remain significant but rejected the appellants' submission that there was no realistic prospect of Lot Owners agreeing to pay the required level of ongoing costs: [190]-[191]. He recognised that what the Lot Owners would be able to pay for was likely to be much below an independently run championship course but concluded that *"they 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"* [193].

**Conclusion on the Easement Issue.**

132. In our judgment, having regard to the substance of what is recorded in the instruments and the "Agreements", the wording used in these documents was capable of creating rights in the form of easements because it fell within the definition of an "easement" in section 2 of the RLA and conformed to the four requirements prescribed by Megarry & Wade and the requirements of section 92 (3) of the RLA. This said, these rights were not easements in the full sense since they had not been perfected by registration as required by section 92(4), the parties having deliberately decided not to create or register easements, as we have held in [114] above.

**The Rectification Issue**

133. At the trial both sides sought rectification of the register. The appellants applied for the register to be amended so as to delete the entries referring to the instruments and the Rights that appeared in the incumbrances section of the register. The respondents applied for rectification to the extent necessary to ensure that the Rights and any restrictive agreements contained in the instruments were properly registered and to record and register the Rights as easements. The judge granted the respondents' rectification application. Consistently with his decision that the Agreements constituted "restrictive agreements", he refused the rectification application made by the appellants.

134. As recorded in [30] above, in relevant part section 140 (1) & (2) of the RLA provide:

> (1) *Subject to the Land Adjudication Act 1971 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 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 in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act or default.*

135. In [215] the judge observed:

> *"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".*

136. At [225] - [227] the judge concluded that: (i) the entries on the register were incorrect because they omitted a reference to valid easements that were granted by and included in the instruments; (ii) 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; (iii) in all the circumstances it could be inferred that the reason why no application for registration of the Rights as easements was due to legal advice received by the Lot Owners (and possibly Cayman Hotel and Ellesmere) that such registration was not permissible or appropriate in the circumstances; (iv) the omission to note that the properties owned by Cayman Hotel were subject to an incumbrance in the nature of easements was the result of a mistake by the Registrar who failed to appreciate that the instruments created easements; (v) the Registrar's mistake was caused by the mistaken failure of those applying for registration to ask for registration of easements and instead just to ask for the noting of restrictive agreements; (vi) if the Registrar had appreciated that the instruments included and that the Rights were easements, she would have decided and have been bound, subject only perhaps to receiving confirmation that an application was being made for the registration of easements, to register the Rights as easements; and (vii) the Registrar's mistake was a mistake of fact since her decision was based on an assumption that the instruments did not create easements.

137. In response to the appellants' contention that they had no knowledge of the omission, fraud or mistake in consequence of which the rectification is sought and accordingly the respondents' rectification application should fail in accordance with section 140(2) of the RLA, the judge held at [233] that the appellants had knowledge of the omission, fraud or mistake in consequence of which rectification was being sought by the respondents. He based this finding on the evidence that the appellants had conducted due diligence before purchasing the Properties and were aware that it was at least arguable that the entries on the register were incomplete and in error in failing to refer to and register the Rights as easements [231]. The particular evidence relied on by the judge was that given in cross examination by Ms Jacqueline Doak who was a director of both the first and the second appellants and was President of Business Development at Dart Realty. In the course of her cross examination, Ms Doak accepted that during the due diligence exercise the relevant instruments had been looked at and she was asked to confirm that legal advice had been taken on those instruments. The transcript recording her answer to that question and the following questions and answers reads:

> *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."*

138. The judge went on to conclude at [233] that: (a) the appellants will have 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; (b) and it was highly likely, if not inevitable, that the appellants 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.

139. Lastly, at [235], the judge gave three principal reasons for exercising his discretion in favour of granting the respondents' application for rectification. First, in his view, not to order

rectification would cause substantial injustice to the Lot Owners, it being wholly unclear whether they would have any claims or would recover their substantial losses from their legal advisers. Second, the entries made on the register include a substantial part of the information which would be included if registration had been properly completed. Third, whilst the appellants would be prejudiced by the order for rectification, they had 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 and incomplete. They took a risk that was factored into their decision making as to price and whether to proceed with the purchase and such prejudice they will suffer would be considerably less than that suffered by the Lot Owners if rectification were refused.

**The appellants' case that the judge erred in ordering the rectification of the register so as to record that the Rights constituted easements binding on 12D-108 and 12C-27 in favour of the Lot Owners.**

140. We begin by noting the submissions advanced by the appellants in their skeleton argument in support of their contention that the judge erred in finding that there was a rectifiable mistake made by the Registrar constituted by her failure to appreciate that the instruments created easements[3] and that, had she appreciated that the instruments included Rights that were easements, she would have decided and have been bound to decide, subject only perhaps to receiving confirmation that an application was being made for the registration of easements, to register the Rights as easements.

141. The appellants submit first that the instruments did not create easements because: (i) the grant thereof had not been perfected by registration as required by section 92(4); (ii) the "prescribed form" had deliberately not been used, when its use was mandatory, see section 92(1), section 105(1), rule 4 RLR "(other forms required to be used under the Law shall be in the forms prescribed in the Third Schedule"); (iii) section 37 (any attempt to dispose of registered land other than in accordance with the RLA is ineffectual to create rights); and (iv) in registering the restrictive covenants as incumbrances the Registrar had not exercised the power under section 105 to cure the failure of the parties to use the prescribed form to register an easement.

142. Accordingly, at the time of the appellants' purchase of the servient tenements (12D 108 and 12C 27) in 2016 and 2018 respectively, there were no legally effective binding easements which could have bound the appellants. Further, if the correct conclusion were (as it should have been) that the parties had failed to create an easement by reason of their failure to use the prescribed form, then the absence of any reference to the grant of an easement in the register would not be a mistake but correct, subject to whether the Registrar could and would have exercised the power to cure conferred by section 105(1). In other words, it cannot be

[3] The judge found not only in [226] but also in [1] and [142] that the instruments were effective to create easements and that, following execution of the instruments, the servient properties were subject to an incumbrance in the nature of easements.

said that the Registrar failed to appreciate that instruments created easements because (without the application of the section 105 cure via registration), they did not.

143. Thus, there would only be a mistake to rectify if the Registrar should have (consistently with her legal duties) applied the section 105(1) power to cure and registered the instruments as easements, notwithstanding the parties' failure to use the form prescribed by the RLA and r.4 RLR.

144. Turning to the question whether the Registrar should, consistently with her legal duties, have registered the instruments as easements, the appellants contend that the judge erred in [149(c)] in holding that section 105(1) gave the Registrar unlimited power to approve and permit the use of any form of application made to her. In their submission, against the legal framework constituted by:

(i) section 5(1) of the RLA which requires the Registrar to administer the Land Registry in accordance with the Law;

(ii) section 92(1) of the RLA that requires use of the prescribed form; and

(iii) rule 4 of the RLR: "other forms required to be used under the Law shall be in the forms prescribed in the Third Schedule";

the circumstances in which the Registrar can the use the section 105(1) curative power must be limited.

145. To give the Registrar a completely free hand would run counter to: (a) section 37 RLA; (b) section 3 RLA, which provides *"Except as otherwise provided in this Law, no other law and no practice of procedure relating to land shall apply to land registered under this Law so far as it is inconsistent with this Act"…;* (c) Section 139 (1) (which gives the Registrar an express power to rectify the register or any instrument presented for registration in only limited circumstances, which would be a redundant conferment of power if the Registrar could exercise the curative power of section 105(1) without limitation; and (d) the certainty objective that the use of prescribed forms targets.

146. Mr Seitler also submitted that since the postulated easements had not been registered (as held by the judge) the curative power in section 105(1) was not available because an easement will only be a "disposition"[4] for the purposes of that sub-section if its creation has been perfected by its registration.

[4] Defined in section 2 of the RLA as "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".

147. Joining issue with the respondents' contention that the only statutory requirements for the effective registration of the grant of an easement are those set out in section 92(4) of the RLA, Mr Seitler submitted that the requirements specified in Clause 5.14 of the Manual had also to be complied with for the registration to be on the right side of section 37 RLA. He referred us to the decision of Collet CJ in *The Proprietors, Strata Plan No. 66 v R P Developments Ltd* (Cause no. 56 of 1988, 29 August 1988). In this case it was argued that, in contrast to section 11(1) RLA that requires that the first registration of a parcel must be signed by the Registrar, a subsequent entry of registration need not be signed by the Registrar in the light of section 11(2) RLA that provides: "Every subsequent registration shall be affected by an entry in the register in such form as the Registrar **may from time to time direct,** and by the cancellation of the entry." [Emphasis supplied] Collett CJ rejected this contention holding that for the purposes of section 11 (2) the 1981 Manual was a direction by the Registrar, Chapter 2 of which stated that no entry in the proprietorship of section of the register had validity until it was signed in the incumbrance section by the Registrar.

148. It follows, submit the appellants, that the judge was wrong to conclude in [212]-[213] that the Registrar would *"be entitled and probably bound"* to register the instruments upon a request for registration with a confirmation that the Rights constitute easements. Rather, the Registrar would have been entitled and possibly bound to refuse to register the instruments as containing easements, without some modifications being made to the instruments themselves, given that: (i) the instruments did not use form RL 12 or RL 15; (ii) Clause 4(2) of the Agreements requested the Registrar to "note in the incumbrances section of the register for [the servient parcels] that such parcels are subject to a restrictive agreement in relation to [the Rights]"; (iii) Recital 6 stated, "Ellesmere and Cayman Hotel now wish to register covenants protecting such rights … as incumbrances against" the servient parcels; and (iv) nowhere are the Rights expressly identified or described as easements. In these circumstances, to have registered the instruments would have exceeded the Registrar's legislative purpose provided for in section 5 of the RLA and put her in breach of section 19(1) of the Cayman Islands Constitution Order that provides "[a]ll decisions and acts of public officials must be lawful, rational, proportionate, and procedurally fair".

149. When making his oral submissions, Mr Seitler advanced a simplified argument. He contended that by including the caveat that the Registrar would have had to seek confirmation from the parties that they wished to register the Rights as easements before including easements in the registration, the judge imposed a requirement that was impossible to establish and thereby made in serious error. Mr Seitler referred us to that part of [149] where the judge said:

> *"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)".*[Emphasis added]

150. This caveat is also referred to in the following additional paragraphs of the judgment:

> *"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"****.* [212] [Emphasis supplied]

> *"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".*** *In my view in these circumstances, the Court has jurisdiction to order the register be rectified by correcting the omission of the registration of the Rights as easements".* [226]-[227] [Emphasis supplied]

151. Mr Seitler submitted that it was unclear whether it was the original parties to the Agreements or the current owners of the land in question (Cayman Hotel, Ellesmere and the Strata corporations) who would have had to request or confirm that they wished the Rights to be treated as easements prior to the Registrar registering the instruments, but he concluded that the judge must have meant the original parties. He then asked rhetorically, who knows what the parties would have said back in 1992, given there was no evidence from the Registrar in post when the entries were made as to what she would have done if she had appreciated that the Rights constituted easements and no evidence was given on behalf of the Cayman Hotel, Ellesmere and the Strata corporations as to whether they would have confirmed that they wished the Rights to be treated as including easements. Moreover, given Clause 4 (2) of the Agreements by which the Registrar was requested to "*note in the incumbrances section of the Register for parcels 27, 23 and 24 subject parcels are* ***subject to a restrictive agreement*** *in relation to Beach Club Rights, Golf Playing Rights and Tennis Courts Rights, respectively,"* how can it be said that the Registrar could have accepted the instrument as containing easements?

152. The appellants contend that the judge further erred in holding that the appellants "*had knowledge of the … mistake in consequence of which rectification is sought"* at the time they acquired the servient tenements and thus were precluded from the protection against rectification afforded to "*a proprietor who is in possession…and acquired the land for valuable*

*consideration."* Mr Seitler submitted that the natural reading of the words *"had knowledge of the … mistake in consequence of which rectification is sought"* was that the proprietor had to have had knowledge of the omission, fraud or mistake at the time the omission, fraud or mistake was made. He relied on the words "*or caused such omission, fraud or mistake or substantially contributed to it by his act or default"* later in the sub-subsection, submitting that they are clearly concerned with matters occurring at the time the relevant omissions/fraud/mistake occurred and pointed out there are no words declaring that the knowledge referred to earlier in the sub-section can include historic knowledge. Similarly, section 141(2) is concerned with facts and matters at the time of the relevant omission/fraud/mistake.

153. It was further submitted on behalf of the appellants that the fact that the protection afforded by section 140(2) extends to the proprietor for the time being does not compel the conclusion that the knowledge of the omission, fraud or mistake must be knowledge at the time the proprietor acquired his interest because it is quite possible that a subsequent purchaser could have had such knowledge at the time of the occurrence of the omission, fraud or mistake.

154. The appellants also observe that, if the judge was right as to the time when the knowledge is acquired, the following unattractive consequences would result: (i) a party who diligently searches the register before purchasing the land and notices a potential mistake having been made in the past is in a worse position than a purchaser who remained ignorant by making no investigations; (ii) the availability of rectification would come and go depending on the acquired knowledge of the particular proprietor in possession from time to time which would lead to considerable uncertainty; and (iii) the proof of historic knowledge acquired during the acquisition of the land could well run into the substantial obstacle of legal professional privilege.

155. Next, the appellants submit that the judge erred in concluding that on the evidence the appellants knew at the time they acquired the Properties of the postulated mistake by the Registrar of failing to appreciate that the servient properties were subject to incumbrances in the nature of easements which had been omitted from the register. In the appellants' submission, the evidence given by Ms Doak established only that that the appellants had received legal advice as to enforceability of the so-called restrictive agreements and as to whether their registration had been made in error. There was no evidence before the court that the appellants had been advised of the risk that the instruments created easements which might have already been registered or might be added to the register on the back of an order for rectification. Indeed, there was no direct evidence at all as to the content of the advice received by the appellants prior to their purchase of the servient properties, no doubt because the advice would be the subject of legal privilege. The judge should have found that it was entirely possible that the appellants were not advised of a possible risk that the instruments created easements that might already have been registered or which might be added to the register by an order for rectification for the following reasons: (i) according to

the judge, the instruments were "puzzling documents" whose interpretation and impact occupied over a week of court time at the trial; (ii) the instruments are headed "Restrictive Agreements", they describe themselves as creating restrictive agreements and the word "easement" is not mentioned at all; (iii) there was no evidence that the instruments were a major consideration in the appellants' decision to purchase the servient properties over four years earlier. Ms Doak testified that the real attraction in purchasing these properties was their proximity to the Dart development at Camana Bay and there was no evidence that the appellants carried out separate valuations of the servient land with and without the Rights as was suggested by the respondents. Finally, and in any event, even if the appellants were advised of the risk that the Rights gave rise to easements which were registered or might become registered, that was not sufficient to give the appellants knowledge of the mistake the judge found in [225] was made by the Registrar, namely, failing to recognise that valid easements had been granted and included in the instruments.

156. Finally in respect of the Rectification Issue, the appellants argue that even if none of their grounds of appeal canvassed above were well founded, the judge nonetheless erred in exercising his discretion to grant the respondents' application for rectification of the register by failing to take into account relevant considerations, exceeding the generous ambit of his discretion or was "plainly wrong". In support of this contention the appellants make the following points:

(1) The judge ignored the fact that the Registrar was deliberately only asked to register restrictive agreements. If the parties had wanted to grant and register easements they could quite simply have done so, as Cayman Hotel had done in granting a right of way to Ellesmere employing the correct form.

(2) The judge should have taken into account the fact that the respondents had failed to provide any evidence as to why there was no attempt to register the instruments as containing easements when they were first presented for registration.

(3) The judge failed to apply against the respondents the same reasoning he adopted against the appellants as to the respondents' knowledge of the risk that the instruments did not protect the Rights which they were aware of from many challenges to the effectiveness of the instruments made by the lawyers for purchasers of the strata units that were not persisted in (see the testimony of Mr Prasad Day 4, p. 74/14-22). See also Ms Doak's evidence that Embassy shared with Dart information that implied that the instruments may not be enforceable (Day 4, p.87/12-21).

(4) The judge erred in taking into account his finding in [235] that the appellants purchased the Properties with "a full appreciation of the issues surrounding potential inadequacies of the registration and the possibility that the entries on the register were incorrect or incomplete" since this finding is not supported by the evidence.

(5) The judge failed to take into account or failed to give adequate weight to the potential remedies available to the Lot Owners for the failure to register easements including possible claims other than those against their legal advisers, including a claim for an indemnity from the Government under section 141 of the RLA.

(6) The judge failed to give adequate weight to his finding that the persons primarily responsible for the omitted registration of easements were the lawyers who drafted and arranged for registration of the instruments as restrictive agreements only and accordingly the judge should have decided that these lawyers should bear primary responsibility for the consequences of their mistake.

(7) The judge failed to take into account or give adequate weight to the detriment the appellants will suffer if the register is rectified to register the Rights as easements because the Lot Owners will then have the right to enter on the appellants' land which will hamper any redevelopment of the servient parcels which is likely to benefit the Lot Owners as well as the appellants given the current state of 12 D 108.

(8) The judge placed excessive weight on the current registration position which he said in [235] "made 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". In fact, many of the instruments were registered in a form that stated simply "Subject to the Restrictive Agreements as listed in the filed instrument".

(9) The judge erred by failing to take into account the fact, as the Rights were not properly registered as easements, absent registration they did not bind the successors in title of Cayman Hotel, Embassy and GCBS to whom the servient tenements were sold in 2003[5].

**The respondents' case for upholding the judge's order that the register be rectified for the purpose of registering the Rights as easements.**

157. The respondents support the judge's reasoning at [211] – [235]. They contend that, because section 92(4) of the RLA makes completion of the grant of an easement one and the same thing as the registration of the easement, it is not possible to maintain a "bright line" distinction between the grant and the registration of an easement under section 92(4). Thus, provided the grant has been completed by registration sufficient to satisfy section 92(4), no cure under section 105(1) is needed if the wrong form was used. In any event, in practice, if there has been a registration of an easement that satisfies section 92(4), that will trigger the cure whether or not it is needed.

[5] See [6] above

158. The respondents further submit that the Court has jurisdiction to order rectification where the Registrar would have been entitled (and not only bound) to approve and register a form of grant of easement which did not fully comply with the prescribed form (and would thereby have triggered the section 105(1) cure, whether or not needed), provided that, in the Court's view, the Registrar's omission to do so was mistaken. It follows, contend the respondents, that the judge's order for rectification should be upheld on the basis of his findings that: (a) the Registrar would have been entitled (even if not bound) to approve the instruments as a form of grant of easements, albeit one which did not fully comply with the prescribed form (and proceed to register them accordingly); (b) the Registrar's omission to do so was caused by her mistake in missing the fact that the Rights were easements, (at [227]); and/or (c) failing to appreciate that the instruments created easements (at [226]).

159. Alternatively, if the test in this case for a rectifiable mistake is that the Registrar could only, consistently with her duties, have applied the section 105(1) cure (as contended by the appellants) or something similar, the respondents argue that the judge's rectification order should be upheld as one which could be and was properly made on the basis of the judge's findings as a whole, by which he concluded that the Registrar (absent her said mistake) should and so could only properly have approved the instruments as a form of grant of easement, albeit that there had not been full compliance with the prescribed form (and proceeded to register them accordingly).

160. The respondents submit that the necessary fair reading of the judge's findings involves bearing in mind that, in the unusual and complex circumstances of this case, at the time of delivering his main judgment, the judge was being careful, as a matter of procedural fairness to the first defendant (the Registrar), to preserve her having the opportunity to indicate whether she wished to object to rectification of the register on the basis that the instruments were not in an acceptable form and to make submissions in support of the position that she took on this issue (in effect giving her an opportunity to challenge or comment on his findings or assumptions as to her position and his views as to the manner in which she was required to exercise her powers), before making an order for rectification, see Consequentials Judgment [7]. This arose because the point had not arisen in precisely this way at the trial. Thus the manner in which the judge expressed himself on this topic in his main judgment was somewhat circumspect, because he had decided that he should give the Registrar the opportunity to make further submissions about the position before finalising his view and the terms of such related order as he decided to make. Bearing that in mind, the principal paragraphs to which reference may be made for the judge's findings as a whole are [55(e)], [149] (including (a)-(c) and (e)-(h)), [157], [212]-213] & [225]-[229] (delivered before the Registrar had had the opportunity, which the Judge had decided she should be given), and (after she had had that opportunity, and he had considered the submissions which had been made on her behalf) in his Consequentials Judgment in [6] and [13].

161. In the respondents' submission, on such a fair reading it is apparent that the judge found: (i) that the Registrar would have been entitled (even if not bound) to approve the instruments as a form of grant of easement, albeit one which did not fully comply with the prescribed form (and proceed to register them accordingly); and (ii) that the Registrar (absent her mistake) should (and so could only properly) have approved the instruments as a form of grant of easement, albeit which did not fully comply with the prescribed form (and proceeded to register them accordingly).

162. Turning to the appellants' contention that the judge erred in holding that the appellants' knowledge at the time they acquired the Properties was relevant for the purposes of section 140(2) RLA, the respondents submit the judge was correct to proceed on the basis that the relevant knowledge was not limited to the time the omission, fraud or mistake was made but included knowledge at the time the land in question was acquired, given the words, *"… as to affect the title of a proprietor who is in possession … and acquired the land … for valuable consideration, unless such proprietor had knowledge of …"* [Emphasis supplied]

163. The respondents cite three reasons why the appellants' construction of section 140(2) is "*highly improbable":*

(1) It would greatly restrict the availability of a statutory remedy even for fraud where a person acquired the registered land knowing of the fraud at the time of his acquisition, leaving the wronged party to show that the acquirer also knew of the fraud when it was originally committed on the Registrar.

(2) It would also mean that any registered proprietor vulnerable to rectification because of a fraud, could defeat the wronged party's rectification claim by selling the property for valuable consideration even to someone who knew of the fraud at the time he acquired it provided only that he had not known of the fraud at the time it was originally committed (or the wronged party could not show that).

(3) A person considering the acquisition of a registered parcel, the title to which he or she knows is affected by an omission, fraud or mistake, neither needs nor deserves statutory protection under section 140(2) since he or she can readily protect himself or herself by not acquiring the parcel or not doing so until the defect in the title has been sorted out. The fact that a person who caused or substantially contributed to the original omission, fraud or mistake by his act, neglect or default is also disentitled from the protection of section 140 (2) does not negate this point.

164. Responding to the appellants' challenge to the judge's exercise of his discretion in favour of ordering rectification of the register, the respondents submit that the grounds relied on by the appellants fall far short of meeting the high threshold that must be established before the exercise of the wide discretion conferred on the judge will be overturned by an appellate court.

**Discussion and decision**

*The challenge to the judge's decision that there was a rectifiable mistake*

165. In our opinion, the judge erred in ordering rectification in favour of the respondents on the basis that the Registrar had made a mistake in not registering easements in the incumbrance section of the register, this mistake having been caused by the Registrar's mistake in failing to appreciate that the Rights granted easements as well as being protected by restrictive agreements.

166. Although the judge did not formally adopt the test for a rectifiable mistake proposed in Megarry & Wade (at [6-133]): *"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",* his conclusion that a rectifiable mistake had been made involved him in considering what the Registrar would have done if she had appreciated that the Rights were to be characterised as easements as well as being protected by restrictive agreements.

167. In our judgment, if the Registrar had appreciated that the Rights could be characterised as easements, she most certainly would not have been entitled to proceed without more to register the easements in the appropriate sections of the register. Instead, at the very least, given in particular that she was requested by Clause 4(2) of the Agreements only to note restrictive agreements in the incumbrance section of the register, she would have had to have sought the confirmation of the parties that they wished to apply for the registration of easements. We say this because it is fundamental to the registration machinery created by the RLA and to the duties of the Registrar, to ensure that the Registrar and her or his staff accord a free choice to applicants as to which rights they wish to apply to have registered, in this case, restrictive agreements and/or easements. Indeed, we think these considerations may well have been in the judge's mind when, as noted by Mr Seitler in his oral submissions, the judge expressed the view in his judgment[6] that the Registrar would probably have had to have sought the applicants' confirmation that they wished to register easements. And if the parties had held to their decision to seek registration solely for restrictive agreements, the Registrar would in our view have been bound to proceed on that basis. As it happens, no evidence was given by or on behalf of the original parties to the Agreements or from the lawyers who acted for them as to how in this pre-*Regency Villas* era they would have responded to a request for confirmation that they wished to apply for the registration of easements and, in our view, no inference can be safely drawn from the material before the court that the parties (no doubt after having taken advice from their legal advisers) would have authorised the registration of easements. It follows, in our opinion, that the judge should have held that the respondents had failed to prove that the Registrar would have made the necessary entries in the register to register the easements granted by the Rights if she had

[6] See [226]

correctly concluded that the Rights were in the nature of easements. His failure to do so means that the rectification order made by the judge must be set aside.

168. Even if the parties would have confirmed to the Registrar that they wished to apply for the registration of easements, the Registrar would still, in our view, have had to consider whether she could cure, pursuant to section 105(1), the failure of the parties to use the prescribed form for easements and whether there should be any amendments made to instruments and the Agreements. We think that Mr Seitler's textual point, founded on the definition of a "disposition", that the section 105(1) curative power is not available in respect of unregistered easements, has considerable force, but we cannot accept that it was the legislative intention to exclude inchoate easements from what is manifestly a general provision intended to save transactions from failing on technical grounds.

169. In our judgment, assuming as we do that it was open to the Registrar to consider exercising the curative power, the Registrar could not have lawfully concluded that the parties' failure to use the prescribed form should thereby be excused. In our judgment the judge erred in holding that a decision to cure by the Registrar is unchallengeable and we accept the appellants' submissions related in [144] – [145] above that the Registrar would have had to exercise this power consistently with her duty under section 5(1) of the RLA to administer the Land Registry in accordance with the Law, which would include the non-acceptance of documents containing confusing and/or misleading information. Given that: (i) the instruments did not use form RL 12 or RL 15; (ii) the manner in which the parties worded the forms they did use show a clear intention not to seek the registration of easements; (iii) Clause 4(2) of the Agreements requested the Registrar "to [n]ote in the incumbrances section of the Register for [the servient parcels] that such parcels are subject to a restrictive agreement in relation to [the Rights]"; (iv) Recital 6 stated, "Ellesmere and Cayman Hotel now wish to register covenants protecting such rights … as incumbrances against [the servient parcels]"; and (v) nowhere are the Rights explicitly identified or described as easements, we find that the Registrar would, at the very least, have been duty bound before she registered easements as well as restrictive agreements in the appropriate sections of the register to require the parties to amend the wording of the forms they had submitted and the Agreements so as clearly to show that registration was being sought for easements as well as for restrictive agreements.

170. The respondents did not seek rectification of the forms and the Agreements that the Registrar would, in our view, have been bound to require and the judge proceeded to order rectification limited simply to amending the nature of incumbrance section by adding the words "and easements" after the words "restrictive agreements". It follows that the judge's rectification order cannot stand in the light of his failure to find that the Registrar would have been bound to require that the forms and the Agreements be amended so as expressly to state that the parties were seeking the registration of easements as well as restrictive agreements on the basis of the Rights set out in the Agreements.

*Was the judge correct to proceed on the basis that the knowledge referred to in section 140(2) of the RLA included knowledge acquired before the proprietor acquired the land some time after the occurrence of the omission, fraud or mistake?*

171. On this issue, we prefer the respondents' submissions to those advanced by the appellants and we find that the judge correctly construed section 140(2) to mean that the knowledge of the postulated proprietor referred to in the sub-section includes knowledge possessed by the proprietor at the time he, she or it acquired the land in question. In our judgment, it is most unlikely that it was the legislative intention to limit the knowledge referred to in the sub-section to knowledge acquired at the time the omission, fraud or mistake occurred, given that the protection afforded by section 140(2) is not just to the original grantor/grantee, but to a proprietor in possession for the time being who in many cases may have acquired the land well after the original registration of the incumbrance in question.

*The challenge to the judge's finding that the appellants knew of the mistake in consequence of which the rectification was sought at the time they acquired 12D – 108 and 12C – 27.*

172. We accept the appellants' submission that the evidence elicited from Ms Doak on which the judge relied when making his challenged finding that the appellants knew of the Registrar's mistake relied on for the rectification application established only that the appellants had received legal advice as to the enforceability of the registered restrictive agreements and whether their registration was an error. In particular, we agree that there was no evidence before the Court that the appellants had been advised of the risk that the instruments created easements which might already have been registered or which might be added to the register pursuant to an order for rectification. Accordingly, we find that on the evidence before the Court, the judge should have held that the appellants did not have knowledge of the mistake in consequence of which the rectification was sought and therefore should have dismissed the respondents' rectification application.

*The challenge to the judge's exercise of discretion*

173. The appellants accept that, on the authority of this Court's decision in *Llhasa Investments Limited et v International Credit and Investments Company (Overseas) Ltd (In Liquidation)* [1994 – 1995] CILR 293, the judge's exercise of his discretion in favour of ordering rectification of the register can only be set aside if he was "plainly wrong".

174. With great respect to the judge, we have concluded after careful consideration that he was clearly wrong in not taking into account and giving very considerable weight to the fact that the parties to the original transactions, acting on advice given by their lawyers, had deliberately decided only to seek registration of restrictive agreements and not to plump for easements or easements in addition to restrictive agreements. This proposition is the essence of the submission advanced by the appellants in [167.1] – [167.3] of their skeleton argument. In our judgment, there is a powerful argument, founded on the long-accepted benefits that

flow from commercial certainty, for holding the respondents to their election, which should have been weighed in the balance by the judge giving it the very considerable weight it merited. As a result of the parties' freely taken decision to register restrictive agreements, the register recorded entries only for restrictive agreements and parties inspecting the same would have been well entitled to conclude that it was restrictive agreements and only restrictive agreements that had been registered. The whole point of the system created by the RLA was that entitlement to land and related interests therein are to be determined by entries in the register and that people should be able to rely on the entries to determine and vindicate their real property interests.

**The relief claimed by the appellants**

175. The appellants seek a declaration that the Rights are not binding on them and rectification of the register by directing that, pursuant to section 140(1) of the RLA:

(1) the register for the land registered as Block 12 D Parcel 108 be rectified by cancelling and deleting from the Incumbrances Section the registration of the Restrictive Agreements, particulars of which are set out in Schedule 2 of the Originating Summons;

(2) the register for the land registered as Block 12 C Parcel 27 be rectified by cancelling and deleting from the Incumbrances Section the registration of the Restrictive Agreements, the particulars of which are set out in Schedule 2 of the Originating Summons;

(3) the Appurtenance Section of each of the registers listed in Schedule 2 of the Originating Summons as benefitting from the Restrictive Agreements be rectified to cancel or delete the registration of, or reference to, any rights noted as arising from or by virtue of the registration of the Restriction Agreements.

176. The respondents contend that the Court should exercise its discretion against making the proposed rectification order. The grounds relied on are essentially similar to their submissions in support of the judge granting their rectification application, including the three factors accepted by the judge in [234] as favouring the exercise of his discretion given in [235], in each case *mutatis mutandis.* They also submit that the proposed order for cancellations and deletions would unfairly deprive the owners of 200 or so parcels or strata units of the Rights which they had reasonably believed they were acquiring with their own properties, and for which they had paid a premium, whilst giving the appellants a considerable windfall despite their being on notice of the Rights from the outset and taking the risk of being bound by them.

177. The respondents further submit that, the Lot Owners having relied on the registration of Restrictive Agreements for 25 - 30 years, it would be unjust to order rectification all this time later when neither of the original parties have any interest in the affected land and one of them has ceased to exist and the other is no longer registered in the Cayman Islands.

178. It is also separately argued that the appellants' claim for deletion of the entries in the register should be denied or else the appellants will make an unjustified windfall because it is to be expected that the price for which they paid for the land was reduced by reason of the entries in the register and the cancellation of those entries will unlock or enhance development value in the Properties, particularly for the Dart Group, with its Camana Bay development close by.

**Discussion and decision**

179. In our judgment the appellants are entitled to the declaration and order for rectification they seek. As things currently stand, the register contains entries registering agreements that do not qualify for registration by reason of failing to satisfy the definition of restrictive agreements provided for in section 93(1) of the RLA. Those entries are accordingly grossly inaccurate and give a very misleading impression. In our view the case for their deletion is overwhelming.

**Conclusions**

180. For the reasons given above, the appellants' appeals against:

(a) the judge's decision that the restrictive agreements noted in the Incumbrances Section of the register satisfied the definition of restrictive agreements provided for in section 93(1) of the RLA; and

(b) the order made by the judge for rectification of the register on the application of the respondents,

are allowed.

181. The Court has well in mind that the outcome of this appeal will have a profoundly negative impact on some 193 proprietors who, when purchasing their properties, are likely to have paid a premium for the Rights that they would have assumed had been securely protected by restrictive agreements registered in the register. However, as we were driven to conclude, the apparent restrictive agreements that the parties to the original instruments and Agreements deliberately decided, on legal advice, should be the sole mechanism for protecting the Rights, lacked the essential ingredient plainly and obviously required by section 93 (1) of the RLA, namely that of restricting building on or the user or other enjoyment of the land owned by the Resort. The die was therefore cast at the very moment that the requested entries were recorded in the register, and it is most unfortunate that the proprietors must bear the consequences of the mistaken selection of this defective mechanism for the protection of the Rights.

182. The preliminary view of the Court is that the appellants should have their costs below and 70% of their costs of this appeal, bearing in mind that the appellants did not succeed on the substantial issue of whether the Rights were to be characterised as easements.

183. If the parties wish to contend for a costs order different from that stated in [182] above, they may do so on condition that they file their opening skeleton arguments within 3 weeks from the issuance of this judgment and serve any submissions in response to submissions served by the opposite side within two weeks of having received the same.