Trinity Term
[2025] UKPC 27
Privy Council Appeal No 0097 of 2023

JUDGMENT

Cayman Shores Development Ltd and another (Respondents) *v* The Proprietors, Strata Plan No.79 (known as Lion's Court) and others (Appellants) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Hodge
Lord Briggs
Lord Sales
Lord Hamblen
Lord Richards

JUDGMENT GIVEN ON
23 June 2025

Heard on 30 April and 1 May 2025

Appellants
Mark Sefton KC
Joseph Ollech
Nick Dunne
Daisy Boulter
Alexandra Stasiuk
(Instructed by Walkers (Cayman) LLP and Blake Morgan LLP (London))

Respondents
Jonathan Seitler KC
Emer Murphy
David Lee
Susan Fallan
(Instructed by Appleby (Cayman) Ltd and Seddons LLP (London))

LORD BRIGGS:

1. This appeal raises the question whether the attempted registration of recreational rights as encumbrances upon title to the former Britannia resort at Seven Mile Beach in Grand Cayman was vitiated by what, with the benefit of a little hindsight, was the mistaken mis-labelling of the rights as restrictive agreements rather than easements. If registration was vitiated by that mis-labelling, then the second question is whether that mistake can be cured by rectification of the Register. The answer to the appeal turns mainly upon the true construction of the Registered Land Act of the Cayman Islands ("the RLA") which introduced a Torrens system of registration of title to land throughout the Islands.

2. The Britannia Resort was originally laid out and developed in the late 1980s and early 1990s as a holiday complex including a hotel, golf course, tennis courts and beach club (for watersports), together with a range of residential villas and condominiums. It was planned that both the hotel guests and the owners and occupiers of the villas and condominiums ("residential units") would have shared use of the recreational facilities, i.e. the golf course, tennis courts and beach club, and the developers intended that rights to that shared use ("the Rights") would run with the ownership of the residential units and bind successors in title to the recreational parts of the resort, thereby enhancing the sale value of the residential units.

3. The hotel, golf course and tennis courts were laid out and constructed on parcels of registered land now consolidated into Block 12D Parcel 108 of the West Bay Beach South registration section ("12D 108"). The beach club was developed, along with some additional suites forming part of the hotel, upon Block 12C Parcel 27 of the West Bay Beach South registration section ("12C 27"). Together, 12D 108 and 12C 27 constitute the intended servient tenements in relation to the Rights.

4. The residential units were successively developed in four phases, namely:

(i) Phase I, consisting of a strata development of condominiums on Block 12D Parcel 25, Strata Plan No. 79, known as Lion's Court;

(ii) Phase II, consisting of another strata development of condominiums on Block 12D Parcel 40, Strata Plan No. 147, known as Regent's Court;

(iii) Phase III, consisting of 22 separate parcels, each containing a separate residential villa in a private gated community, known as Britannia Estates; and

(iv) Phase IV, consisting of a further strata development on Block 12D Parcel 80, Strata Plan No. 215, known as King's Court.

The residential units, amounting to some 193 in total, are the intended dominant tenements in relation to the Rights, although the rights intended to benefit the condominiums are held on behalf of their proprietors by their respective strata corporations. It is common ground that, as intended by the developers of the resort, the original purchasers of the residential units would have paid a premium referable to the assumption that the Rights were to be proprietary rights attached to the units through successive ownership, and binding on successive owners of the servient tenements.

5. First registration of the servient tenements (12D 108 and 12C 27) took place in 1984 and 1986 respectively. By the early 1990s the registered owner of the golf course, tennis courts and beach club was Cayman Hotel and Golf Inc ("Cayman Hotel"). The developer and original owner of the residential units was Ellesmere Britannia Ltd ("Ellesmere"), a company associated with Cayman Hotel, both within the group of companies owned by Agra Industries Ltd ("Agra").

6. The Rights were specified in a series of similarly worded instruments ("the Instruments") for each of the residential phases described above, in May 1992 (for Lion's Court and Regent's Court), in March 1997 (for King's Court) and for each separate unit within Britannia Estates between May 1992 and 2001. The detailed terms of the Instruments will be summarised below.

7. In 2003 the land by then including the hotel and golf course (12D 108) was sold to Embassy Investments Ltd ("Embassy") and the land on which lay the beach club and beach suites (12C 27) was sold to Grand Cayman Beach Suites Ltd ("GCBS"), a subsidiary of Embassy.

8. In 2004 the resort was badly damaged by Hurricane Ivan. The hotel was put out of action and has remained derelict ever since. The tennis courts have not been in use since 2004. The golf course was damaged but restored and put back into operation, while the beach suites and beach club were also restored and later re-opened as a separate hotel called the Grand Cayman Beach Suites.

9. Between 2005 and 2007 a road improvement scheme was constructed partly on the disused tennis courts, which greatly reduced the ease of pedestrian access between the residential units and the beach club.

10. The current dispute arose out of the purchase of parcels 12D 108 and 12C 27 by Cayman Shores Development Ltd ("Cayman Shores"), first respondent to this appeal, from Embassy and GCBS respectively in May and August 2016. Cayman Shores is a subsidiary of Dart Realty (Cayman) Ltd ("Dart Realty"). Initially Embassy continued to manage the golf course and the beach club for Cayman Shores. Dart Realty proposed to the then owners of the residential units ("the Lot Owners") that the golf course and beach club would after closure and redevelopment be made available to Lot Owners, but only as licensees. In reply, the Lot Owners asserted that the Rights conferred by the Instruments were property rights.

11. The golf course was closed in September 2016. The beach club and suites were redeveloped, following which the land on which lay the beach club and suites (12C 27) was transferred by Cayman Shores to Palm Sunshine Ltd, another Dart Group company, in November 2018, and reopened as Palm Heights. Prior to the issue of these proceedings in January 2019, there was a temporary arrangement in which Cayman Shores permitted the Lot Owners to continue using the beach club between about 12 Apil 2017 and 11 October 2018.

12. The Instruments are at first sight in rather complicated composite form, arising from the fact that a large number of separate proprietors (the strata corporations on behalf of the condominium owners and the individual villa owners in Britannia Estates) were being granted the Rights over what were then separate parcels comprising the golf course, the tennis courts and the beach club. But fortunately it is common ground that these complexities are of no consequence to the issues before the Board, so that the structure can be briefly summarised, albeit at some cost to precise accuracy.

13. Each Instrument consisted of one or more of two types of document. The first (described as a "First Document") dealt with one of the parcels to be burdened. The second, described as a "Written Agreement", dealt with a single parcel to be benefited (either a single Strata Plan or a single villa in Britannia Estates). There is a variation in this structure for the Instruments made in 1992, but nothing turns on the detail.

14. The First Documents are all in a largely common form, based (but with important variations) on the then standard form issued by the Cayman Islands Land Registry ("the Registry") for the creation of an incumbrance in the form of an easement, namely forms RL12/RL 15. The example First Document used at the hearing before the Board was that relating to the golf course (as the burdened land) then being Block 12D 23, but now part of 12D 108. Under the general heading "CAYMAN ISLANDS…The Registered Land Law, 1971", it is headed "RESTRICTIVE AGREEMENT", in place of "GRANT OF EASEMENT" as appears on the standard form. It then continues:

"WE CAYMAN HOTEL AND GOLF INC OF [*address*]

in consideration of CI$1.00

(the receipt of which is hereby acknowledged) HEREBY MAKE AGREEMENT

with the Proprietors of Strata Plan Nos. 79 & 147, and Ellesmere Britannia Ltd.

of [*addresses*] the proprietors of the interest comprised in Parcel Nos 25, 40(b), 38 and 39

in accordance with the attached documents.

Dated [*etc*]"

There then follow signature details. The parcels 25, 40(b), 38 and 39 are the then parcels for two of the Strata Plans and two of the Britannia Estates villas.

15. The "attached documents" referred to above are the Written Agreements. These are in bespoke form, and may be summarised as follows, by reference to the example used at the hearing, which was that used for Lion's Court (Strata Plan 79, Block 12D Parcel 25). Nothing turns on the slight differences between any of them.

16. That Written Agreement takes the form of a signed contract, dated 28 May 1992 and made between (1) Ellesmere, (2) Cayman Hotel and (3) the Proprietors of Strata Plan 79 (described as "the Proprietors"). Recitals 1 to 3 and 7 describe Ellesmere as the developer of the residential units, and Cayman Hotel as the registered owner of the hotel, the beach club and the golf course, and the resort as offering both hotel and condominium facilities for transient guests and condominium owners. Recital 4 records that Ellesmere and Cayman Hotel are related companies, each benefiting from the development of the resort by the other.

17. Recitals 5 and 6 deserve quoting in full:

> "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."

18. Clause 1 contains definitions, of which the following are relevant:

(i) Parcels 27, 23 and 24 are identified as the parcels on which are situated respectively the beach club, the golf course and the hotel (including the tennis courts).

(ii) "Rights" are defined as including individually and/or collectively the Beach Club Rights, the Golf Playing Rights and the Tennis Court Rights (as defined).

Each of those classes of Rights are defined as follows:

> "'Beach Club Rights'
>
> means the non-exclusive right together with Cayman Hotel its agents, servants, licensees, invitees, the guests of the Hyatt Hotel and other Britannia condominium owners to enter upon the Beach Club property and enjoy the restaurant, beach and watersport facilities situated thereon upon payment of any fees, charges, or costs in force from time to time in respect thereof including but not limited to any fees payable by virtue of any by-law applicable to a strata lot.

‘Golf Playing Rights’

means the 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 a 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 personally by the owner or by the 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.

‘Tennis Court Rights’

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

The Proprietors are defined as meaning the Proprietors of Strata Plan No. 79 from time to time including their successors in title.

19. Clause 2 provides:

> "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 practicable) parcels 23, 24 and 27 for the benefit of The Proprietors hereby grants Beach Club Rights, Golf Playing Rights and Tennis Court Rights to all such proprietors upon the terms and conditions herein contained."

20. Clause 3 contains a covenant by the Proprietors (for themselves and their successors in title) to exercise the Rights in accordance with rules and regulations in force from time to time, and subject to the right of Cayman Hotel or its successors in title to modify the facilities or their location and to suspend the Rights for the purpose of carrying out repairs or maintenance.

21. Clause 4 needs quoting in full:

> "REQUEST TO REGISTRAR
>
> 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 parcels are subject to a restrictive agreement in relation to Beach Club Rights, Golf Playing Rights and Tennis Court Rights respectively."

22. Clause 5, headed Avoidance of Doubt, provides that the Rights shall not affect the ability of Cayman Hotel or its successors in title to deal with parcels 27, 23 and 24 by sale, lease, charge or otherwise, without obtaining the consent of the Proprietors or Ellesmere. Clause 6, headed Waiver of Right to Caution, contains a covenant by Ellesmere and the Proprietors that neither they, their successors in title nor any of the strata owners will register any caution against parcels 27, 23 and 24 in respect of the Rights.

23. Pursuant to the requests contained in clause 4 of each of the Written Agreements the Registrar did register the Rights, both as appurtenances to each of the strata and villa titles, and as incumbrances for each of parcels 27, 23 and 24. The form of the registered incumbrance entries is of central importance to the respondents' case, and must be described in detail, using the entries for the golf course land 12D 108 (into which the originally separate parcels 23 and 24 had been consolidated, by the time of the sale to Cayman Shores). The Cayman Register is divided into three sections: A Property, B Proprietorship and C Incumbrances. Cayman Shores is registered as the proprietor in the Proprietorship section.

24. The Incumbrances section is divided into six columns. Column 1 contains the Entry number, column 2 the Date (of registration), column 3 the Instrument number, column 4 the Nature of the Incumbrance, column 5 Further Particulars (of the Incumbrance) and column 6 the typed signature of the Registrar. The relevant entry for the Instrument used as an example and described above is no. 4, dated 02/06/92, for two Instruments, the first of which is No. 3061/92, which is added in the registry in manuscript in a box at the top right-hand corner of the first page of the Instrument itself.

25. In column 4, under Nature of Instrument, is written "Rest.Agmnts". In column 5, under Further Particulars, is written "The rights as described in the filed instrument in favour of (*inter alia*) parcel 12D 25", which is the parcel benefited by the Written Agreement for Lion's Court described above. Column 6 is signed S Brown (who was the Registrar in 1992).

26. Mirror entries are contained in the Property section of the Register for parcel 12D 25 so as to record the Rights as appurtenances to that title. Nothing turns on them, so they do not need to be described in detail.

The Registered Land Act ("RLA")

27. It is now necessary to describe the relevant features of the RLA in some detail. As already noted, it lays down a Torrens system of land registration, under which title derives from the entries in, and documents filed with, the Register, backed by a form of state guarantee, rather than from any other conveyance, transfer or other document the existence of which is merely registered or noted in the Register. Subject to rectification, the title displayed by the registered entries and filed documents is conclusive.

28. This basic principle is enshrined in section 23, which provides:

> "Subject to section 27, 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register:"

Nothing turns on sections 27 or 28. The main question raised by this appeal is whether the Rights (as defined above) are "incumbrances…shown in the register".

29. The same principle is, to an extent, bolstered by section 3, which provides, subject to an irrelevant proviso:

> "Except as otherwise provided in this Law, 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 Law……"

That provision is firmly applied by the Cayman Islands courts: see e.g. *Mums Inc v Cayman Capital Trust Co* [2000] CILR 131, per Georges JA at 134. After referring to section 3, and to section 164 (which provides that matters not provided for in the Act relating to land, leases and charges registered under the Act shall be decided in accordance with the principles of justice, equity and good conscience), he said:

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

30. Section 37(1) provides that:

> "No land, lease or charge registered under this Law shall be capable of being disposed of except in accordance with this Law, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Law shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge."

In *Paradise Manor Ltd v Bank of Nova Scotia* 1984-85 CILR 437, 480, Henry JA said of section 37:

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

31. Incumbrance is not a defined term under the RLA, but section 9(2)(c) requires the register of every parcel to include "the incumbrances section, containing a note of every incumbrance and every right adversely affecting the land or lease". The structure of Division 5 of Part V (sections 92 to 98) suggests that incumbrances include (at least) easements, restrictive agreements and profits, but not licences. The implication is (and this is the natural meaning of the word) that an incumbrance is a right or obligation in relation to land which binds successors in title of the original grantor. This is uncontentious.

32. Section 2 contains the following relevant definitions:

> "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;
>
> "profit" means the right to go on the land of another and take a particular substance from that land, whether the soil or products of the soil;

> "to register" means to make an entry, note or record in the register under this Law, and "registered", "unregistered" and "registration" bear a corresponding meaning.

33. The phrase "restrictive agreement" is defined in section 93(1) as:

> "an agreement (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land".

This broadly corresponds with the common law concept of a restrictive covenant, but it is now common ground that nothing turns on its precise meaning. No-one now suggests that the Rights are or include restrictive agreements, although the appellants did in the courts below.

34. As already noted, the main provisions dealing with the creation and registration of incumbrances are contained in Division 5 of Part V of the RLA. Sections 92, 93 and 94 deal in turn with easements, restrictive agreements and profits. Section 95 deals with releases of all three types on incumbrance. Section 96 provides the court with power to extinguish or modify easements, restrictive agreements or profits which have become obsolete or of no utility. Section 97 preserves natural rights to light, support, air or access to a highway, and ancillary rights necessary for the enjoyment of an easement. Finally section 98 makes licences non-registrable but provides for their effect against bona fide purchasers by lodging a caution under section 127.

35. For present purposes sections 92 and 93 are the most important. The relevant parts of each are set out below:

> "92. (1) The proprietor of land or a lease may, by an instrument in the prescribed form, grant an easement over his land or the land comprised in his lease, to the proprietor or lessee of other land for the benefit of that other land.
>
> (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.

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

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

(3) The note of a restrictive agreement in the register does not give the restrictive agreement any greater force or validity that it would have had if it had not been registrable under this Law and had not been noted.

(4) 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."

36. Finally, section 105(1) requires that:

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

Section 11(1) makes provision for first registration of a parcel by (*inter alia*) the signing by the Registrar of the particulars of ownership and incumbrances, if any, appearing on the register created for that parcel. Subsection (2) provides that subsequent registration shall be effected by an entry in the register in such form as the registrar may from time to time direct.

The Issues

37. The parties' claims and responses have changed significantly during the course of this litigation, within the general framework that the appellants assert, but the respondents deny, that the Golf Playing Rights and the Beach Club Rights bind the respondents as successors in title of Cayman Hotel respectively to parcels now designated as 12D 108 (the golf course) and 12C 27 (the beach club). The Tennis Court Rights appear to have fallen by the wayside due to the incursion on the site of the tennis courts by the four-lane highway scheme.

38. Although it was not initially their primary or only case, the appellants now squarely assert that the Rights were and are easements, and they no longer assert any case that the Instruments were or included restrictive agreements. Thus Issue 1 in the Statement of Facts and Issues (whether the Court of Appeal was wrong to have held that the Instruments did not contain a "restrictive agreement" for the purposes of section 93 of the RLA) has gone away. It is now common ground that the Court of Appeal was right so to have held.

39. Issue 2 was originally formulated as follows:

> ISSUE 2: Was the Court of Appeal wrong to have held overall that the Instruments did not grant easements for the benefit of the Appellants' land that were binding on the Respondents?

ISSUE 2(1): Was the Court of Appeal wrong to hold that the Instruments failed to create easements binding on the Respondents because of non-compliance with the statutory requirements of section 92 of the Registered Land Act?

ISSUE 2(2): Was the Court of Appeal wrong to hold that the parties did not intend the Instruments to grant easements that would be binding on successors in title to the burdened land?

ISSUE 2(3): Was the Court of Appeal right to hold that the rights granted by the Instruments fell within the statutory definition of an "easement" in section 2 of the Registered Land Act?

ISSUE 2(4): Was the Court of Appeal right to have held that the rights granted by the Instruments satisfied the four common law requirements for an easement?

Issue 2, expressed in its general terms remains the primary and decisive issue on this appeal. Issue 2(1) remains the primary bone of contention between the parties. Both the trial judge and the Court of Appeal held that the Rights were not binding because they were not properly registered as easements.

40. As for Issue 2(2) the respondents now accept that the Rights were intended by the parties to bind the successors in title to the golf course and the beach club. But they submit that the Rights were not intended to be easements, but only restrictive agreements.

41. Issues 2(3) and 2(4) were grouped together, and the only two points taken by the respondents against the Court of Appeal's affirmative conclusion that the Rights were (subject to registration) in the nature of easements are as follows:

(i) That the Golf Playing Rights do not accommodate the residential units because their proprietors may authorise their use by persons not in occupation of the units, and

(ii) That none of the Rights granted to the Strata corporations for the three condominium groups of units (Lion's Court, Regent's Court and King's Court) accommodated the residential condominiums, but only the common parts of those buildings, the use of which did not, separately from the residential units, benefit in any practical way from recreational easements.

42. These points were rejected in the courts below. Both the trial judge (Segal J) and the Court of Appeal (Goldring P, Field and Beatson JJA) held that the Rights were, subject only to difficulties about their registration, inherently capable of being easements, and the Court of Appeal held that the Instruments were not, and did not include, restrictive agreements.

43. Having both held that the Rights were not properly registered, the courts below divided on Issue 3, namely whether (if so) there should be rectification so as to make them binding on the respondents as successors in title. The trial judge granted rectification but the Court of Appeal refused it, on the ground (among others) that the requirement in section 140(2) of the RLA that the respondents should have known of the mistake constituted by registering the Rights as restrictive agreements rather than as easements was not satisfied on the evidence.

44. It is logical and convenient to begin with the question, raised by Issues 2(3) and (4), whether apart from any defects in their registration, the Rights were easements, either under the RLA or at common law. Since both the respondents' points supportive of their case that the Rights were not easements asserted in different ways why they did not accommodate the supposed dominant tenement, it might be thought necessary to ask whether in this respect recourse to the common law requirement that they should do so is permissible, as a means of qualifying the definition of easement under section 2. That definition requires only that the right to use the servient tenement is enjoyed by the proprietor of the dominant tenement, not (at least expressly) that the exercise of the right should accommodate the dominant tenement in the sense of contributing to its use and enjoyment.

45. But counsel for the appellants did not take that point. Rather they started with a *Devi v Roy* point ([1946] AC 508), that accommodation of the dominant tenement was a question of fact about which the courts below had made concurrent findings, and they followed that up with the submission that the Rights did accommodate the residential units as dominant tenements in any event. Having heard full argument on the accommodation issue, the Board prefers to deal with it on its merits, and on the assumption, but without needing to decide, that the definition of easement in the RLA is sufficiently closely (but in a summary form) based upon the common law requirements of an easement for the accommodation requirement to be an implied part of it.

46. The first point, that the Golf Playing Rights do not accommodate the dominant tenement, arises from clause 1 of the standard form Written Agreement which (at sub-clause (c)) permits the proprietor of the residential unit, if a company or partnership, to nominate no more than two individuals to enjoy the golf course, without providing that either of them should be, or behave like, occupants of the unit. The Board rejects this point. The question whether a particular right accommodates the dominant tenement must

be addressed by reference to the right (or rights) as a whole. The fact that the drafting may possibly enable someone with no connection with the dominant tenement to use the rights granted will not deprive the rights of the quality of an easement if accommodation of the dominant tenement is in substance what they confer. The plain purpose of sub clause (c) was to enable the corporate entity (or partnership) to identify by nomination up to two persons who probably would be occupying the relevant residential unit as licensees or guests of the proprietor. Looking at the Golf Playing Rights as a whole, and bearing in mind the propinquity of all the units to the golf course, their effect in enhancing the enjoyment of each residential unit is obvious. Furthermore, to the extent that it could be shown that any part of the Rights did not qualify as an easement within the statutory meaning, a proprietor's title would not be subject to it.

47. The second point is more technical but, on analysis, of no greater merit than the first. The standard form Written Agreement used for the condominium blocks held under Strata Plans defined "the proprietors" as the proprietors of the relevant plan from time to time including their successors in title. But following the sale of each of the condominium units, the Strata corporation would be left owning only the common parts of the block, not the relevant residential units. Thus it was submitted for the respondents that the Rights were conferred upon persons who in the capacity described owned no residential units. Although those might have been accommodated by the Rights, the common parts (staircases etc) could not sensibly be said to be accommodated by recreational rights.

48. The short answer to this ingenious submission is that section 16 of the Strata Titles Registration Act enables the strata corporation to hold rights on behalf of the owners of strata lots, and that the proprietors of the relevant Strata Plan at any particular time would consist of all the owners of the individual residential units comprised within the Plan. Thus the Rights would in fact accommodate the residential units which they each owned.

49. The conclusion that the Rights satisfy all the common law and statutory conditions for qualifying as easements is one which is now (and has been since November 2018) much easier to reach than it was when the Rights were first created, or even when the respondents became the owners of the golf course and beach club parcels. It was only in the English litigation which culminated in the judgment of the UK Supreme Court in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2019] AC 553 that the question whether recreational rights to use the facilities of a resort (there a country club) could be granted to owners of adjacent residential units (there time-share apartments) in the form of easements which would endure as property rights over successive ownership of the dominant and servient tenements was finally resolved in the affirmative. Although the leading authority justifying that conclusion, *In re Ellenborough Park* [1956] Ch 131, was well respected, and formed the basis of affirmative judicial conclusions at all levels in *Regency Villas*, it is well understandable that conveyancers in the Cayman Islands in the 1990s seeking to achieve the same result may have been uncertain which of the categories of incumbrance recognised by the RLA best described

the Rights. Records shown to the court of the registration of similar rights over another resort on Seven Mile Beach in 2006 as restrictive agreements show that those responsible for the conveyancing at the Britannia Resort were not alone in thinking that restrictive agreement might be a better label than easement to describe the rights which they were seeking to create.

50. That is not to suggest that those conveyancers were seeking to use the restrictive agreement label in preference to the easement label for some specific conveyancing reason, thinking that they could validly use either, but seeking some different legal consequence by using one rather than another. The RLA does not prescribe different legal consequences as flowing from restrictive agreements as opposed to easements, although the precise registration technique is slightly different. If properly registered, either has essentially the same consequence of being, at the same time, both an appurtenance to the dominant parcels (the residential units) and an incumbrance as against the servient parcels (golf course, beach club and (originally) the hotel and tennis courts). In less technical language the Rights would, under either label, qualify as property rights benefiting and burdening land, rather than just personal rights. In the Board's view, all that the parties and their conveyancers were seeking to do by using restrictive agreement rather than easement to describe the Rights was to use what they mistakenly thought was the right descriptor or label for the Rights, available under the scheme laid down by the RLA.

51. Nor does the mis-labelling of easements as restrictive agreements in the Instrument or in the Incumbrances section of the registers for the relevant servient parcels have any consequence adverse to the purposes of the registration scheme laid down by the RLA. The relevant purpose of the scheme in relation to incumbrances is to enable persons contemplating buying, leasing or lending against parcels of land to know precisely what rights or obligations will then bind or otherwise affect them, and to prevent any unregistered rights (with certain very limited exceptions) having that binding effect. That purpose is not achieved merely (or at all) by the label of easement or restrictive agreement used in the Instrument or in the Incumbrances section of the register. The label tells the reader virtually nothing about the substance of the rights. That can only be ascertained by reading the whole of the Instrument which is required to be filed with the register, and which is available for scrutiny on payment of a search fee.

52. Thus for example, if all that the register of the beach club parcel stated in its Incumbrances section (or all that the searcher bothered to read) was that it was subject to an easement in favour of a nearby parcel, the searching reader would not know whether it was just a pedestrian right of way to the public part of the beach, or a right to walk a dog, or a right to lay or maintain a drain, or (as here) a right to enjoy recreational facilities. Similarly, all that a reader would be told by a reference on the Incumbrances section to a restrictive agreement was that it might prevent some wholly unspecified building on, or use or enjoyment of, the servient parcel. The restriction could prevent any building at all, or just building of a particular type or height, or any one or more of a potentially unlimited

different types of use and enjoyment. In short, no one searching the Register who, or whose client, was contemplating buying or taking any interest in the servient land would fail to scrutinise the filed Instrument, where the relevant rights or restrictions would be fully set out. All that the labels easement or restrictive agreement (or for that matter profit) would do is give the searching reader some slight advance notice of the broad type of right or restriction he was about to discover by reading the filed instrument.

53. And plainly the legal effect of those rights or restrictions, and their propensity to bind successors in title to the servient land as incumbrances, would depend upon the substance of the rights (or restrictions) set out in the Instrument as a whole, and not on the labels which the parties may have chosen to put on them: see eg *Street v Mountford* [1985] AC 809. This is expressly set out in relation to restrictive agreements in section 93(3) of the RLA. Although not expressly set out in section 92, the same would in the Board's view be true of a right labelled as an easement. The substance of the right (as revealed by the Instrument) would have to qualify under the statutory definition of an easement, including (if appropriate) additional common law requirements, such as the need for the right to accommodate the dominant tenement.

54. The Board emphasises the considerations set out in the five foregoing paragraphs not merely (or even primarily) because they might have a bearing on the availability of rectification of the Register, but because they go directly to the question whether mis-labelling incumbrances as restrictive agreements rather than easements invalidates their registration, and therefore their effect upon successors in title to the servient parcels, as the respondents claim and both the courts below held. It is one thing to hold that the misuse of a particular descriptor of a right which has concrete consequences in terms of legal effect, or which could detract from the purposes of the statutory scheme, renders the registration of the right invalid. It is quite another to hold that a mere mis-labelling which has no such consequences has that draconian effect.

55. The respondents put their case on this central issue (Issue 2(1)) in a number of overlapping ways. Adopting the order used by Mr Seitler KC in his oral submissions, they first submit that the parties to the Instruments did not intend to create easements, and so the RLA should not be construed as having enabled them to have done so.

56. In the Board's view this submission misdescribes what the parties sought to achieve by the Instruments, and by their registration. As the respondents accept, the parties did intend to create rights which would bind successors in title to the servient parcels, i.e. what the RLA calls incumbrances. Their intent was to create the Rights (as set out in detail in the Written Agreements in the form of three types of recreational rights, Golf, Beach and Tennis) and that those Rights should all be incumbrances. They chose the label restrictive agreements in the mistaken belief that this, rather than easements, was the appropriate label for the Rights. But the Rights which they intended to create were, in

law, easements and not restrictive agreements, and the use of the wrong label for them did not alter their true classification in law.

57. Secondly the respondents submit that the Rights were invalidly registered because of non-compliance with the statutory requirements for registration of easements. They say that:

> (i) Section 23 subjects the ownership rights of the proprietor of registered land only to "incumbrances…shown in the register". For an easement to bind the land it must be shown as an easement in the incumbrances section of the register, and not as a restrictive agreement.
>
> (ii) Section 92(1) provides that an easement may only be granted by an instrument in the prescribed form. Although the then prescribed form (RL12) was used as a template, it was impermissibly altered by replacing the title "easement" with "restrictive agreement".
>
> (iii) The entry in column 4 of the Incumbrances section of the register for each servient parcel was "Rest. Agmnts" whereas it should have been "easement". This was a requirement imposed by a direction of the Registrar pursuant to the authority conferred by section 11(2) of the RLA made in paragraph 5.14 of the Manual of Registry Procedure (1981 edition) ("the 1981 Manual").

58. The Board does not accept this submission. Taking it stage by stage, section 23 subjects the rights of proprietors (*inter alia*) to "incumbrances …shown in the register". This section is concerned with incumbrances generally rather than with specific types of incumbrance, and requires that, to bind the proprietor, an incumbrance must be "shown" in the register. In the Board's view that means that the relevant incumbrance must be one which is revealed by a search of the Incumbrances section of the register for the relevant parcel. It is "shown" not merely by being noted or recorded as a numbered entry, nor merely by being described as a particular type of incumbrance (eg easement, restrictive agreement or profit) but by having the Instrument by which it is created filed and thereby made available for inspection under the rights conferred by section 35. Everything in the Instrument is "shown" in the register for that purpose once it is filed.

59. This interpretation of section 23 is confirmed (in relation to easements) by the express requirement in section 92(4) that the instrument creating the easement be filed. Summarising the procedural requirements in section 92, the easement must be created by an instrument in the prescribed form, and then completed by "its" registration as an incumbrance in the register of the burdened land and in the property register of the land

which benefits, and by filing the instrument. Section 92 does not require that a grant (or reservation) which in law creates an easement (like the Rights in the present case) be registered as an easement, but only that it be registered as an incumbrance.

60. The Board accepts that the alteration of the prescribed form for the creation of easements by the change in its title from easement to restricted agreement would mean, without more, that the Instruments were not in the prescribed form, because that departure was more than de minimis. But this submission ignores section 105(1) (quoted above) which enables the Registrar to approve the use of any other form in any particular case of a disposition of land. The Instruments in the present case were all dispositions (as defined by section 2) because they were made (*inter alia*) by the then proprietor of the servient parcels, and affected its rights as such.

61. Each of the entries in the Incumbrances section of the registers for the servient parcels by which the Rights were sought to be registered was signed by the then Registrar. Since the requirement for a prescribed form is, on its face, something designed primarily to assist the Registrar and his or her staff in the management of the Registry, the Board considers that by signing the relevant entries, all of which incorporated the Instruments by filing them, the Registrar gave approval pursuant to section 105(1) for the departure from the prescribed form reflected in each of the relevant filed Instruments. Had it been necessary, the Board would regard the act of filing the Instruments as a sufficient consent by the Registrar to the form actually used, even if the entry was not then actually signed.

62. Finally, it is true that paragraph 5.14 of the 1981 Manual does state that the entry of an easement in the Incumbrances section of the register should include the use of the word “easement” in column 4, whereas the acronym “Rest. Agmnts” was actually used. The respondents submitted that paragraph 5.14 of the 1981 Manual was in this respect a direction by the Registrar as to the form in which any subsequent registration (after the first) should be made, so that all the entries actually made to register the Rights fell foul of it.

63. The essential problem with this submission is that it does not appear that the 1981 Manual was ever published, so as to bring it into the public domain, although its successor in 2010 was. It appears to have been designed and used as a purely internal procedure guide for Registry staff. The Board would regard it as implicit in section 11(2) that any direction by the Registrar as to the form of registered entries be published, if it were to have the force of statutory authority capable of affecting the rights of those affected by the Register and its contents. This would at least be necessary if non-compliance with such a direction would have the effect of invalidating an otherwise valid registered entry. No one affected by registered entries could know for sure, in ignorance of the terms of the 1981 Manual, whether they were validly made.

64. There are two reported cases in which a different provision of the 1981 Manual has been produced in court and treated as a potential direction made under section 11(2). The first is *The Proprietors of Strata Plan No. 66 v RP Developments Ltd* (unreported) 29 August 1988. Collett CJ held (at p 11) that "this manual was intended to operate as a direction in terms s.11(2) of the Law and in my judgment does so." He records that the 1981 Manual was exhibited to an affidavit sworn by the then Registrar, Mr Martin Connolly. The fact that it had to be put in evidence in that way tends to confirm the conclusion that it was not in the public domain, but it does not appear to have been submitted that its non-publication made it unauthorised as a direction under section 11(2).

65. The second is *Jones v Registrar of Lands* [1998] CILR 71. At p 82 Smellie J made oblique reference to the 1981 Manual as having been intended to serve as directives pursuant to section 11(2), but his decision was that the registry practice (of refusing to put pending applications in the Applications Book, whereby they gained priority over subsequent dispositions, (*inter alia)* pending payment of fees) was ultra vires. Again, there was no submission that an unpublished manual could not satisfy the requirements of section 11.

66. The Board does not consider itself constrained by those two authorities from reaching the clear conclusion that for a direction to have statutory authority, and therefore the force of law, under section 11(2) it must have been published. Nor does the reference to the 1981 Manual in those two cases cast real doubt upon its unpublished status. In the first case it had to be exhibited to an affidavit by the Registrar and in the second the Registrar was a party to the proceedings.

67. That analysis assumes that non-compliance with such a direction would have invalidated the entry, despite the full recitation of the easements granted and being registered in the filed Instruments. There having been no such authoritative direction, this is not a point which the Board has to decide, but it should not be assumed that a labelling defect of this kind which, for reasons already given, in no way detracted from the effectiveness of the registration of the Rights as incumbrances in serving the purposes of the RLA, would have invalidated it.

68. The Board has thus far addressed this central issue by analysing the respondents' submissions about it. Put in positive terms the Board considers that the registration of the Rights did comply with the statutory requirements for the registration of easements. The Rights were fully set out in the Instruments (specifically in the Written Agreements which formed part of them) and they did constitute easements. The Instruments departed to a more than de minimis extent from the then prescribed form for the registration of easements, but by signing the entries and filing the Instruments the Registrar approved their form pursuant to section 105(1). The grant of the Rights was completed by its being registered as an incumbrance in the register of the servient parcels pursuant to section

92(4) and the Instruments were duly filed. That process of grant and registration fully discharged the purpose of the RLA by bringing home to anyone inspecting the register and studying the filed Instruments that property rights in substance in the nature of easements were being granted so as to bind successors in title to the servient parcels. The mis-labelling of the Rights as restrictive agreements, both in the Instruments and in the registered entry in column 4 of the Incumbrances section of the Register, did nothing to detract from the complete fulfilment of that purpose.

69. The Board does not lightly depart from the contrary view about this issue reached by both the courts below. The reasons for the Board's different view, on what is a pure question of law, sufficiently appear from a comparison between this opinion and the careful analysis of Segal J on this point, at paras 159-162 of his judgment, with which the Court of Appeal agreed, although the Court of Appeal also relied (wrongly in the Board's view for the reasons already given) upon paragraph 5.14 of the 1981 Manual. At the heart of this disagreement is the different emphasis given to the terms of the filed Instruments as forming part, in the Board's view much the most important part, of the registered entries. The judge and the Court of Appeal thought that these terms, and the fact that in substance they created easements, went only to rectification, rather than compliance with the statutory requirements. For the reasons given, the Board respectfully disagrees.

70. Those conclusions about Issue 2 mean this it is unnecessary for the Board to resolve the question, upon which the courts below disagreed, whether if the registered entries were invalid for the purpose of binding successors in title, they (including the filed Instruments) should be rectified as claimed by the appellants. These conclusions also require that the order of the Court of Appeal that the registers of the servient parcels be rectified by the removal of all reference to the Rights be set aside.

71. The courts below were agreed that there was a rectifiable mistake, of which the trial judge concluded that the respondents had the requisite knowledge. But the Court of Appeal held that the knowledge requirement was insufficiently evidenced. To embark on a full analysis of the rectification issue would necessarily be obiter, but it would also require the Board to make the assumption, contrary to its conclusion as above, that there was a sufficient mistake to vitiate the registration of the Rights as incumbrances. The Board does not consider that any useful purpose would be served by embarking upon that necessarily lengthy and counter-factual exercise.

72. Nonetheless it may be worth mentioning, for the attention of the Registrar, that the current form of the registered entries (and perhaps similar entries relating to other resorts) although legally effective to give full effect to the Rights as incumbrances, might be said to be at least inelegant, even if without affecting anyone's legal rights, because of the mis-labelling in column four of the Incumbrances section and in the Instruments of what are really easements as if they were restrictive agreements. Section 139(1)(a) of the RLA

gives the Registrar power to rectify both the register and any instrument presented for registration in the case of errors or omissions not affecting the interests of any proprietor. Now that *Regency Villas* has cleared away the previous uncertainty whether recreational rights of this kind qualify as easements, the Registrar might think it appropriate to consider exercising that power in this, and perhaps other, similar cases.

73. The Board will therefore humbly advise His Majesty that this appeal be allowed.