COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2020/CLE/gen/01359

IN THE MATTER OF a Grant of Easement by deed dated 22 July 2004 between Chub Cay Resorts Limited of the first part, Chub Cay Associates Limited of the second part AND Cynthia S Brouwer et al (collectively called the Grantees) of the third part, recorded in the Registry of Records in book 11394 at pp. 435 to 454.

BETWEEN

(1) RICHARD ESCOBAR AND PAMELA ESCOBAR
(2) CHARLES VOSE JR.
(3) MSAIRNSEA LLC

Plaintiffs

-AND-

CHUB CAY REALTY LLC

Defendant

Before: The Honourable Madam Justice Indra H. Charles, Senior Justice

Appearances: Mr. John KF Delaney QC and Mr. Edward J Marshall II of Delaney Partners for the Plaintiffs
Mr. Carlson H. Shurland QC of Shurland & Co. for the Defendant

Hearing Date: 4 November 2021, 3 December 2021

Land law - Easement – Recreational easements - Dominant and servient tenement – Four criteria - Whether the rights could amount to easements in law – Whether the absence of words of futurity in a document granting the easements excludes additional and/or replacement facilities

The Plaintiffs, who are lot owners on a resort island, Chub Cay, commenced this action against the Developer of Chub Cay, seeking a Declaration that they are entitled to access the Club and other facilities notwithstanding that they are not members of the Club. The Plaintiffs ground their assertion as to entitlement to the facilities in a Grant of Easements Deed. They also seek Declarations that the Developer cannot compel them to enter the

Amended Deed, which would have the effect of relinquishing their rights under the Grant of Easements. They also seek a Declaration that the Developer be prevented from restricting their use of vehicles that are not golf carts.

The Developer denies that the Plaintiffs are entitled to access the facilities without being members of the Club. The Developer further alleges that the Grant of Easements does not have the effect of granting access to the current facilities and that the rights of way asserted are not capable in law of being easements.

HELD: Finding that the Plaintiffs are entitled to use some of the facilities without being members of the Club and that the rights conferred amount in law to easements

1. The intention of the Grant of Easements was to give access to the kind of facilities that grantees and their guests might expect to enjoy on a resort island.

2. The absence of the words of futurity in the grant does not mean that the grant is limited to the actual facilities that existed at the time of the grant. Additional and replacement facilities could be included: **Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and others** [2018] UKSC 57 and **Cayman Shores Development Ltd et al v the Registrar of Lands et al** No. 143 of 2019 applied.

3. As the island is a resort island, the right to enjoy certain facilities accommodates Chub Cay as the dominant tenement: **In Re Ellenborough Park** [1956] Ch. 131 and **Regency Villas** applied.

4. The right of the Plaintiffs and their visitors to use the Club-like facilities would not substantially deprive the Developer of its legal possession thereof because the right is clearly stated as a right to use the facilities in the same way that non-members and guests of the Club would, and use the facilities in the way they are intended to be used: **Re Ellenborough Park** and **Regency Villas** applied.

5. Recreational easements are now considered as conferring utility and benefit on those who undertake it: **Regency Villas** and **Cayman Shores** applied.

JUDGMENT

Charles Sr. J:
Introduction

[1] This case relates to the law of easements and specifically recreational easements. It also raises a novel question of whether the recent English Supreme Court decision in **Regency Villas Title Ltd et al v Diamond Resorts (Europe) Limited** [2018] UKSC 57 reflects the common law of The Bahamas in determining whether

the right to use, subject to the payment of fees and charges common to other users, recreational facilities which are provided in a club environment on a private resort island in The Bahamas may be conferred by the use of freehold easements upon the owners and occupiers of adjacent freehold lots.

[2] In the present case, the Plaintiffs seek a Declaration that, as owners in fee simple in possession of certain lots on the Island of Chub Cay, a resort island in the Berry Islands, they are entitled to use the Chub Cay Club and other facilities notwithstanding that they are not members of the Club. In support of their assertion, they rely on the Grant of Easements dated 22 July 2004, by which they say, they were granted an easement to access the said facilities.

[3] The Defendant, the current developer of the resort island, denies that the Plaintiffs are entitled to access the Club and some of the facilities on two grounds namely: (I) the Grant of Easements did not have the effect of granting a right to the facilities constructed after the execution of that deed and, in any event, (ii) the rights alleged are not capable in law of being easements.

[4] The Defendant has therefore excluded the Plaintiffs from the use of the Club and the other facilities on the basis that they are not members of the Club. Guests of Club members and guest of the Club hotel are permitted to use the Club and other facilities.

The evidence

[5] The evidence was presented in the form of affidavit evidence.

[6] The Plaintiffs relied on the following affidavits: (i) Affidavit of Richard Escobar (1st Escobar Affidavit) filed 15 April 2021; (ii) Affidavit of Lance Walker ("Walker Affidavit) filed 15 April 2021; (iii) Affidavit of Charles Vose Jr. ("Vose Affidavit") filed 15 April 2021 and, (iv) Affidavit of Richard Escobar ("2nd Escobar Affidavit") filed 21 September 2021.

[7] The Defendant relied on the following affidavits: (i) Affidavit of George Bishop ("Bishop Affidavit") filed 31 March 2021; (ii) Affidavit of David Renaud ("1st Renaud Affidavit") filed 6 April 2021 and (iii) Affidavit of James Greer (Greer Affidavit") filed 30 August 2021.

Salient facts

[8] The following facts are agreed between the parties. Chub Cay is a private resort island. It is approximately 37 miles northwest of Nassau and 150 miles southeast of Fort Lauderdale, Florida. It boasts the prestigious Chub Cay Club ("the Club") which has been the exclusive retreat for a very select membership. There is also a pristine beach, an air strip, a marina and dock, roads, restaurant, shops and other facilities which, altogether, creates a recreational environment for lot owners, guests and vacationers.

[9] The Plaintiffs are not members of the Club. However, they are owners in fee simple in possession of certain lots ("Plaintiffs' lots") on the island. The history of the Plaintiffs' property ownership on Chub Cay started with Mr. Vose in 1982, followed by the Escobars in 2000 and the Walkers in 2009. Prior to purchasing their lot in 2009, the Walkers had purchased a slip in the marina that same year.

[10] The Defendant is a company incorporated under the laws of The Bahamas and since 25 July 2014, the current owner of the developer's interests with respect to Chub Cay. The Defendant is ultimately beneficially owned and/or controlled by George H. Bishop ("Mr. Bishop") of Texas, USA. The original developer was Crown Colony Club Limited.

[11] On 13 May 1974, the original developer sold Chub Cay to Chub Cay Investments Ltd.

[12] Sometime in or about 1978, the interests of Chub Cay Investments Ltd. were acquired by Chub Cay Associates Limited ("Associates") and Chub Cay Resorts Limited ("Resorts"). This was the start of the Associates and Resorts period of ownership ("Associates and Resorts period") which lasted until 2005.

[13] In or around 2004, the owners of Associates and Resorts had decided to sell their interests in Chub Cay to a third party.

[14] By deed dated 22 July 2004, the Grant of Easements ("the GOE") was executed between Resorts of the first part, Associates of the second part and Cynthia S. Brouwer et al of the third part. The GOE was first recorded on 18 October 2004 in the Registry of Records and again on 24 June 2011 at Volume 11394 pages 435-454. The GOE confers rights of easements in favour of all grantees.

[15] The GOE came into existence as a result of the contemplated sale with a view to resolving doubts as to the rights of way and easements.

[16] Each of the Plaintiffs are "grantees" under the GOE. "Grantees" is defined in the GOE to include the heirs, successors in title and assigns of the named grantees.

[17] At the time of the GOE, Associates was the owner in fee simple in possession of the land comprising the western portion of Chub Cay, including the Chub Cay Club and Marina ("Associates' land"). Resorts was the owner in fee simple in possession of a piece parcel or strip of land within Associates land between Lots M and N and the Remainder of Chub Cay ("Resorts' land"). By the GOE, Resorts' and Associates' land was expressly subject to rights of way and easements created in relation thereto and subject to an airport, marina, restaurant and club facility in addition to roads, fields, water supply and other utilities. Amongst other provisions of the GOE, at Recital G, it is stated:

> **"(G) Doubts have arisen as to the exact location of the rights of way granted to the Grantees and as to whether rights of way were in fact granted over Associates' land and further as no rights or easements were given in relation to use of the facilities on Associates' land or Resorts' land which rights of way and easements Associates and Resorts have at all times allowed the Grantees and each other respectively to use and at the request of Resorts and for the avoidance of any doubts and in consideration of the release by the Grantees of all other rights not previously granted to them by a document in writing that they may now enjoy over Associates land and over Resorts land Resorts and Associates have agreed to execute this document for the purpose of granting confirming the rights of way and easements now enjoyed by the Grantees and**

Resorts as herein contained and for the purpose of confirming the exact location of the rights of way already granted."

[18] At paragraph 1 of the GOE, rights of way are expressly conferred over Associates land –

> **"…for the purposes of accessing the Club and other facilities on Associates land…"**

[19] Further according to the terms of the Grant of Easements, the nature and extent of the rights of way and easements granted to the Plaintiffs and the other lot owners include (but are not limited to) the following:

> **"2. In pursuance of the said agreement and for the consideration aforesaid Associates AS BENEFICIAL OWNER hereby grants unto Resorts and the Grantees full and free right and liberty for Resorts and the Grantees and the owners and occupiers for the time being of Resorts' land and the Grantees' land or any part thereof their tenants servants visitors and licensees (in common with all other who have or who may hereafter have the like right) at all times hereinafter by day or by night subject as herein set forth for purposes connected with the use and enjoyment of the said hereditaments and every part thereof:-**
>
> **a) <u>To use that portion of the Club and other facilities on Associates land which are open to non-members of the Club and to guests of the Club (including without limiting the generality of the foregoing the bar restaurant club hotel beach and common areas and pathways)</u> in the manner in which the Club is intended to be used;**
>
> **b) …..**
>
> **TO HOLD the said rights and privileges unto and to the use of Resorts and the Grantees in fee simple as appurtenant to Resorts land and the Grantees land SUBJECT TO the same terms and conditions as the Club Marina Utilities and other facilities are made available to other property owners on Chub Cay and to non-members of the Club including the payment of fees and other charges common to other users of the Club Marina Utilities and other facilities AND SUBJECT ALSO TO the right of the Grantor from time to time to impose reasonable rules to regulate the use of any or all of the aforesaid facilities.**
>
> **…**

> **3. In pursuance of the said agreement and in consideration of the further sum of Ten dollars (US$10.00) in the currency of the United States of America and in consideration of other goods and valuable consideration the sufficiency whereof Resorts hereby acknowledges Resorts AS BENEFICIAL OWNER hereby grants unto the Grantees full and free right and liberty for the Grantees and the owners and occupiers for the time being of the Grantees' land or any part thereof their tenants servants visitors and licensees (in common with all other who have or who may hereafter have the like right) at all times hereinafter by day or by night subject as herein set forth for purposes connected with the use and enjoyment of the said hereditaments and every part thereof :-**
>
> **(a) To go pass and repass with or without carts carriages motor cars and other vehicles over upon and along the roads and paths shown on the Current plan and thereon colored Brown which are situate on Resorts' land;**
>
> **…**
>
> **…**
>
> **9. <u>Associates hereby covenants for the benefit of Resorts and the Grantees that Associates will not so lay out the roads and the public areas of the Club and other public facilities on Associates land so as to prevent access by Resorts and the Grantees to the Club or public facilities on Associates land</u>."** [Emphasis added]

[20] In or about 2005, the Kaye Pearson group ("Kaye Pearson Group") purchased the share ownership of Associates and Resorts.

[21] On 29 September 2005, Associates and resorts under the direction and control of the Kaye Pearson Group executed a Declaration of Covenants, Conditions, Easements and Restrictions for Chub Cay Club ("the 2005 Declaration") which imposed positive and negative covenants on certain lots within the Chub Cay development.

[22] By virtue of its contents, the effect of the 2005 Declaration would have required the Plaintiffs to relinquish vested property rights established under the GOE. Of significance, the additional positive and negative covenants that were imposed did not apply to the Plaintiffs' lots.

[23] Shortly after executing the 2005 Declaration, Associates and Resorts each entered into two separate Debentures and Legal Mortgages with Scotiabank (Bahamas) Limited ("Scotiabank") each dated 28 July 2006 and secured by Resorts' and Associates' land.

[24] In or around 2008, the Kaye Pearson Group experienced financial difficulties and both Associates and Resorts were placed into receivership under the security held by Scotiabank.

[25] On 25 July 2014, Scotiabank exercised its power of sale under the terms of the said Debentures and Legal Mortgages by selling the assets of Associates and Resorts, including Associates and Resorts' land to the Defendant.

[26] The Defendant became the new owner of the island. The Defendant's title expresses that, among other things, it is subject to the GOE.

[27] On 30 June 2019, the Defendant and Gekabi Chub Cay Limited amended the 2005 Declaration by executing a Restated and Amended Declaration of Covenants, Conditions, Easements, Charges, Liens and Restrictions ("2019 Amended and Restated Declaration").

[28] The Plaintiffs and the Plaintiffs' lots are not subject to the 2005 Declaration or the 2019 Amended and Restated Declaration.

[29] The various owners (from time to time) of the developer's interest of Chub Cay have consistently, since at least as early as 1995, entered into Heads of Agreement ("HOA") made under the Hotels Encouragement Act of The Bahamas ("the HEA"). By the HOA dated 11 February 2003, the Escobars' Lot 8 was specifically contemplated in connection with the building of a guest cottage and included within the developer's interest's Hotel Facility through a rental management agreement.

[30] The Defendant has entered into a Heads of Agreement with the Government of The Bahamas under the HEA respecting its ownership of developer interests.

[31] Chub Cay and its real estate have long been marketed by its developer (from time to time) in promotional material as being a recreational resort.

[32] In April 2019, the Defendant issued a letter to each of the Plaintiffs requesting them to join the 2005 Declaration and, later, that they join the 2019 Amended and Restated Declaration. The Plaintiffs have declined the requests.

[33] Since April 2019, the Defendant –

a. Stated, by letter dated 5 July 2019, that its management will incorporate a private non-equity club to regulate the use of its facilities to registered paying guest and new members only;

b. mandated that membership in the Club is conditional upon the entry into the 2019 Amended and Restated Declaration and concurrently, denied the Plaintiffs' (including their guests, invitees and licensees) use of the Club and other facilities on the basis that they are non-members, while continuing to permit guests of members to use the Club and other facilities;

c. repudiated the rental agreement under which it managed the Escobars' guest house on Lot 8 under the framework of an HOA; and

d. restricted the Plaintiffs' use of the roads of Chub Cay by prohibiting the Plaintiffs' use of cars, trucks and/or any vehicle larger than a golf cart.

Matters not in issue

[34] The following matters are not in issue between the parties:

1. Rights of way over road reservations (with the exception that the Defendant puts in issue by asserting an ability to limit the foregoing rights of way so as to prohibit motor vehicles above the size of golf carts);

2. Access to the sea;

3. Access to other facilities on the Defendant's land inclusive the use of the fuel dock and dump site for the disposal of refuse;

4. Access to utilities (electricity, cables, water, supply pipes, sewer pipes, telephone, other utility cable wires and pipes) within 21 years of the date of the GOE;

5. Access to the marina, inclusive of the boat ramp, and other facilities for taking of fuel and other business usually carried on at marinas;

6. Access to other facilities inclusive of restaurants, ship store or other places of sale of food, drinks or provisions; and

7. Access to the airport.

The primary issue

[35] The parties have agreed that the primary issue to be determined is:

> "Being non-members of the Club, whether the Plaintiffs (including owners and occupiers of the Grantees' land, their tenants, employees, visitors, and licensees) are entitled to access the Club and other facilities insofar as the same are made available to guests of members, and guests of the Club hotel and; if so, whether there is any limit as to the duration of the existence of such rights".

Additional issues

[36] There are three additional issues that the parties wish this Court to determine namely:

1. Whether lawfully, as a condition to enjoying existing freehold rights appurtenant to the Plaintiffs' lots (as conferred under the GOE), the Plaintiffs may be compelled by the Defendant (by means of entering into the 2019 Amended and Restated Declaration or otherwise) to relinquish such rights;

2. Whether freehold rights of the Plaintiffs (as conferred under the GOE) to use the roads of Chub Cay are qualified in a manner such as to exclude cars, trucks and/or any vehicle larger than a golf cart;

3. If the answer to question 2 is in the negative, whether the Defendant, acting unilaterally, may lawfully qualify, limit, or reduce the right of the Plaintiffs (as conferred under the GOE) to use the roads of Chub Cay in a manner such as to prohibit on such roads the Plaintiffs' use of cars, trucks, or any vehicle larger than a golf cart.

Grant of Easement ("GOE") and its provisions

[37] As already stated, the GOE was made by deed dated 22 July 2004. It confirms and confers rights of easement in favour of the Plaintiffs lots over the developer's land, thereby affecting the developer's interests.

[38] The parties do not question the existence or accuracy of any of the provisions contained in the GOE.

[39] Each of the Plaintiffs' lots is within the meaning of the term 'Grantees' land' and, correspondingly, each of the Plaintiffs is within the meaning of the term "Grantees", as such terms are defined in the GOE.

[40] The 'Grantees land' is identified in the First Schedule of the Grant of Easements by reference to 'the Current Plan' as thereon coloured Green and Yellow. Each of the Plaintiffs' lots (i.e. Lot B, Lot 8 and Lot 4) is so coloured and as such identified in the Current Plan as being within the meaning of Grantees land.

[41] Mr. Vose and the Escobars had already owned their respective lots at the time of the GOE. As such, they are also expressly named as Grantees in the parties clause of the GOE.

[42] The term "Grantees" is expressed to include the named Grantees' respective heirs, successors in title and assigns.

[43] At the time of entry into the GOE:

(i) Associates was the owner in fee simple in possession of land comprising the western portion of Chub Cay, including the Chub Cay Club and Marina (as more particularly defined in the 2004 GOE;

(ii) Resorts was the owner in fee simple in possession of a piece parcel or strip of land within Associates land between Lots M and N and the Remainder of Chub Cay (as more particularly defined in the 2004 GOE;

(iii) Resorts' and Associates' land was expressly:

> **"**…SUBJECT TO such rights of way and easements as now exist in relation thereto…**"**
>
> **"**SUBJECT ALSO TO the said restrictions on some part or parts of Associates land and Resorts land which has been or is being constructed or laid out roads well fields and water supply pipes electrical generators and cables wires and or pipes for the provision of utilities and other services an airport and a marina restaurant and club facility.**"**

(iv) Further, a club and a marina (then called the Chub Cay Club and Marina) was situated on part of Associates land.

[44] The GOE granted the Grantees rights of easement over Resorts' and Associates' land to hold the same unto and to the use of the Grantees as appurtenant to the Grantees' land, respectively.

[45] By a Conveyance dated 25 July 2014, recorded in the Registry of Records in Volume 12298 at pages 500 to 511, the Defendant was conveyed the fee simple in possession title to the Resorts' and Associates' land expressly subject to the GOE, amongst other things. Importantly, other restrictions upon the Defendant's title include rights appurtenant to the Plaintiffs lots vested under their respective document of title, the root of which is headed by a conveyance from the Original Developer.

The law on easements

[46] Cheshire and Burn's **Modern Law of Real Property**, 13th Edn, at page 488 B, defines easement as: *"a privilege without a profit, that is to say, it is a right attached to one particular piece of land which allows the owner of that land (the dominant owner) either to use the land of another person (the servient owner) in a particular manner, as by walking over or depositing rubbish on it, or to restrict its user by that other person to a particular extent, but which does not allow him to take any part of its natural produce or its soil*": **Manning v Wasdale** (1836) 5 A & E 758. An easement confers upon its owner no proprietary or possessory right in the land affected. It merely imposes a particular restriction upon the proprietary rights of the owner of the servient land.

[47] The four conditions/characteristics of an easement were laid down in the leading case of **In re Ellenborough Park** [1956] Ch. 131, [1955] 3 All ER 667 which includes:

1. **There must be a dominant and a servient tenement -** The right must relate to two separate plots of land: The dominant tenement is the plot of land whose owner enjoys the right constituted as an easement while the servient tenement is the plot of land over which the easement is exercised or the land burdened by an easement.

2. **The easement must accommodate the dominant tenement -** It is a fundamental principle that an easement must not only be appurtenant to a dominant tenement, but must also be connected with the normal enjoyment of that tenement. There must be a direct *nexus* between the enjoyment of the right and the user of the dominant tenement.

3. **The dominant and servient owners must be different persons** – This means that the dominant and servient tenement must be either owned or occupied by different persons. It has long been accepted that you cannot own an easement over your own land.

4. **A right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant –** Apart from statute, every easement must originate in a grant, either express, implied or presumed. There must be a capable grantor and grantee, the right itself must be sufficiently definite and the right must be in the nature of an easement: **Phipps v Pears** [1965] 1 QB 76.

[48] Both parties relied on the cases of **Re Ellenborough Park** and the subsequent English Supreme Court decision in **Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and others** [2018] UKSC 57 which explored the second and fourth conditions of an easement.

Re Ellenborough Park

[49] In **Re Ellenborough Park**, Ellenborough Park, which was part of a larger estate called the White Cross Estate, was sold in fee simple together with certain easements for the use as roads and footpaths and of drains made on the estate "*and also the full enjoyment…at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground set out and made in front of the said plot of land…in the centre of the square called Ellenborough Park…subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground*."

[50] The conveyance contained covenants by the vendors for themselves and their heirs executors and administrators and assigns to keep the park as an ornamental pleasure ground and not build on it, and covenants by the purchaser to build on the plot conveyed to him and pay a fair proportion of the expenses of keeping the pleasure ground in a good state of repair. The land surrounding the Park was built upon and the owners of the plot asserted that they had rights over the park.

[51] Preliminarily, the Court of Appeal determined that it was clear from the deed(s) that the original common vendors were engaged in a scheme to develop that part of

the estate to produce a common experience whereby a row of uniform houses facing inwards on the park which was intended to form (and actually formed) an essential characteristic belonging to each of them. The Court then had to determine whether the rights granted accorded with the second and fourth conditions for easements.

[52] On the question of whether the servient tenement accommodated the dominant tenement, the Court determined that it did. The Court held that it is a question of fact which largely depends on the nature of the alleged dominant tenement and the nature of the right granted. The Court reasoned that the 1864 Conveyance showed that the property conveyed was to be used for residential and not commercial purposes, the park was to be kept and maintained as an ornamental garden and the vendors covenanted not to build on the garden. The test was whether the park constitutes in a real sense the garden of the houses to which the enjoyment is annexed.

[53] The real question was with respect to the fourth condition: whether the sporting and recreational rights were capable of forming the subject-matter of a grant, the question of its satisfaction depended on three questions: (i) whether the right is expressed in language which is too wide and vague; (ii) whether it is inconsistent with the proprietorship or possession of the alleged servient owners and (iii) whether it is a mere right of recreation possessing no quality of utility or benefit. The first two were resolved by reference to the deed and only the latter question required extensive discussion. The Court reasoned that although a garden is a pleasure, it was not a right having no utility or benefit. Rather, it is an attribute beneficial to a house as ordinarily understood. Its use for exercise, rest and normal domestic purposes is not a mere recreation or amusement and is clearly beneficial to the premises to which it is attached.

[54] In conclusion, the Court held that the purchasers of the plots had easements over the collective garden. The right to use a garden or a park as a private pleasure ground for recreational purposes is capable of constituting a valid easement.

Regency Villas

[55] In 2018, the UK Supreme Court in **Regency Villas** considered 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 adjacent timeshare complex by way of freehold easements. The decision was ground-breaking and, by a majority, found that the right to use sporting facilities can amount to an easement.

[56] The facts of the case are **Regency Villas,** a country estate, Broome Park, had been, prior to 1967, commonly owned. It consisted of a Mansion House at its heart and a much smaller house, Elham House, nearby. In early 1967, Elham House and its surrounding land was conveyed off and its separate title was first registered on 30 March 1967. In relation to the easement subject of that case, Elham House was the dominant tenement and the remainder of Broome Park (including the Mansion House), which was retained by the vendor, was the servient tenement. Sometime in or around 1979 the Park was acquired by Gulf Investments for the purpose of developing a timeshare and leisure complex. This included the creation of (i) timeshare apartments in the Mansion House; (ii) a club house for the timeshare owners and other paying members of the public in the Mansion House, including a restaurant TV, billiards and a gym and (iii) the construction and laying out within the surrounding grounds of the Park of sporting and recreational facilities including a golf course, an outdoor heated swimming pool, tennis and squash courts and formal gardens. The development was a success and in 1980 Gulf Investments acquired Elham House as well with a view to constructing further time share apartments.

[57] As part of this process, in 1981, Gulf Investments transferred Elham House to an associated company. There was a further transfer the following day to a trustee for the intended trustee owners. The relevant grant of rights stated that: "*the Transferee its successors in title its lessees and the occupiers from time to time of the property to use the swimming pool, golf course, squash courts, tennis courts,*

the ground and basement floors of the sporting or recreational facilities…on the Transferor's adjoining estate."

[58] At the time of the 1981 Transfer, most of the relevant recreational and sporting facilities had been built including the golf course, the outdoor heated swimming pool, three squash courts, two tennis courts, a restaurant, billiard/snooker room and TV room, gym, sauna and solarium. There were also Italianate gardens, a putting green, a croquet lawn, an outdoor Jacuzzi/spa pool, an ice/roller skating rink, platform tennis courts, a soft ball court and riding stables.

[59] Over the years, many of the facilities fell into disrepair or disuse – the swimming pool was filled in, the riding stables demolished and the putting green, croquet lawn, Jacuzzi and roller skating rink closed. Between 1983 and 2012, the timeshare owners at Elham House had from time to time made contributions towards the cost of the facilities while reserving their position. Eventually, this arrangement broke down and a dispute arose whether the time share owners at Elham House were obliged to pay towards the facilities.

[60] Those with an interest in Elham House brought proceedings, claiming a declaration that they were entitled, under an easement, to free use of all the sporting and recreational facilities from time to time provided by the Park. They also sought the return of sums paid for use of the facilities since 2008.

[61] The defendants' position, amongst other things, was that the access to and use of the leisure facilities did not satisfy the 'accommodation' requirement of the four characteristics/conditions laid down in **Re Ellenborough Park** asserting that, whilst access might add to the timeshare owners' enjoyment, it was not of practical use or benefit to their land.

[62] At first instance, the claimants were successful, save only for the recovery of payments made for the use of facilities before 2012, which the Judge found had been made by agreement rather than under protest. The Judge also found that the

original 1981 Transfer created easements to use the grounds, sporting and recreational facilities on the original Broome Park Estate complex.

[63] On appeal to the Court of Appeal, it was held, amongst other things that, while the right to use the recreational facilities did amount to an easement, the 1981 Transfer only granted rights to the facilities that were in existence at that time of the 1981 Transfer together with any new, improved or replacement facilities of the same kind on the same areas of land.

[64] In the Supreme Court, the appellants/defendants pursued their contention that the 1981 Transfer granted no enduring rights in the nature of easements in relation to any of the facilities within the Park. By a majority decision (Lord Carnwath dissenting), the Court found that the trial judge's interpretation of the law of the 1981 Transfer had been correct noting the following at paras. [25], [26],[30] and [32]:

> **[25] Construed against that contextual background, the following points emerge as aspects of the true construction of the Facilities Grant in the 1981 Transfer. First, it is abundantly plain that, whether successfully or not, the parties intended to confer upon the Facilities Grant the status of a property right in the nature of an easement, rather than a purely personal right. It was expressed to be conferred not merely upon the Transferee, but upon its successors in title, lessees and occupiers of what was to become a timeshare development in multiple occupation. That being the manifest common intention, the court should apply the validation principle ("*ut res magis valeat quam pereat*") to give effect to it, if it properly can.**
>
> **[26] Secondly, and although reference is made to a number of different specific facilities within the Park, the Facilities Grant is in my view in substance the grant of a single comprehensive right to use a complex of facilities, and comprehends not only those constructed and in use at the time of the 1981 Transfer, but all those additional or replacement facilities thereafter constructed and put into operation within the Park as part of the leisure complex during the expected useful life of the *Regency Villas* timeshare development for which the 1981 Transfer was intended to pave the way. It is, in short, a right to use such recreational and sporting facilities as exist within the leisure complex in the Park from time to time….**
>
> **……..**

> **[30] Thirdly, there is no express provision requiring the grantee or its successors or timeshare owners to contribute to the cost of operating, maintaining, renewing and replacing facilities, and there has been no challenge to the judge's conclusion that an attempt to discover them by way of implied term would fall foul of the necessity test. Nor is there, in the Facilities Grant itself, any such obligation imposed upon the grantor, although there is a separate, purely personal, covenant to that effect elsewhere in the 1981 Transfer.**
>
> **……**
>
> **[32] … In my judgment the common intention to be inferred from the absence of any provision in the Facilities Grant itself for such maintenance or funding obligations is that the parties to the 1981 Transfer (both of which were timeshare experts) were content to leave that as a matter of commercial risk, while seeking to maximise the capital receipts expected to be derived from the sale of timeshare units in connection with the Regency Villas apartments shortly thereafter to be constructed. Plainly, the imposition of a payment obligation on the timeshare owners would have had a dampening effect on the purchase prices likely to be obtained."**

[65] Of the four conditions to a valid easement, the second and fourth were identified as being those with which the court was more concerned for purposes of the case.

[66] In considering the second requirement that the easement should accommodate the dominant tenement, The Court stated, at paras. [39] to [43], that:

> **[39] Save only for easements of support (which may be said to benefit the land itself), <u>easements generally serve or accommodate the use and enjoyment of the dominant tenement by human beings</u>….**
>
> **[40] The following general points may be noted. First, it is not enough that the right is merely appurtenant or annexed to the dominant tenement, if the enjoyment of it has nothing to do with the normal use of it. Nor is it sufficient that the right in question adds to the value of the dominant tenement…..**
>
> **[41] Secondly, the "normal use" of the dominant tenement may be a residential use or a business use. Further, since easements are often granted to facilitate a development of the dominant tenement, the relevant use may be not merely an actual use, but a contemplated use: see for example *Moncrieff v Jamieson* [2007] 1 WLR 2620, per Lord Neuberger of Abbotsbury, at paras 132-133.**

> **[42] Thirdly, it is not an objection to qualification as an easement that the right consists of or involves the use of some chattel on the servient tenement. Examples include a pump (*Pomfret v Ricroft* (1668) 1 Saund 321), a lock and a sluice gate (*Simpson v Godmanchester Corpn* [1897] AC 696), and even a lavatory (*Miller v Emcer Products Ltd* [1956] Ch 304).**
>
> **[43] Fourthly, although accommodation is in one sense a legal concept, the question whether a particular grant of rights accommodates a dominant tenement is primarily a question of fact: see per Evershed MR in *In re Ellenborough Park* at p 173.** [Emphasis added]

[67] The Court acknowledged at para. 44 that "*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.*"

[68] The Court applied compelling points from **Re Ellenborough Park** (para. 53):

1. The Court of Appeal's decision had not turned on the rights granted being private in nature. Rather, the rights were describes as broadly similar to those enjoyed by the public over parks and gardens in London.

2. The rights granted were essentially recreational, although they included limited sporting elements.

3. 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 connected. They offered houses with gardens, albeit communal gardens and gardens were a typical feature serving and benefitting townhouses as dominant tenements.

[69] The Court reasoned that the facilities were to be used for the development of the timeshare apartments, which were occupied for holidays by persons seeking recreation, including sporting activities. Further, they said it was obvious beyond doubt that the grant of rights to use an immediately adjacent leisure development is of service and utility to the timeshare apartments. They acknowledged that the reason why the easement accommodated the dominant tenement was different from the reason in **Re Ellenborough Park.**

[70] With respect to the fourth condition that the right be capable of forming the subject-matter of the grant, the Court stated that, at para. 59 that "*[i]t used to be said that this fourth condition included the proposition that a "mere right of recreation and amusement" which conferred no quality of utility or benefit, could not be an easement…If the accommodation test is satisfied, then the fact that it may be a right to use recreational or sporting facilities does not, as* ***Re Ellenborough Park*** *makes clear, disable it from being an easement"*. Further, they stated, the advantages to be gained from recreational and sporting activities are now universally regarded as being of real utility and benefit. At para. 81, the Supreme Court continued:

> **[81] …Where the actual or intended use of the dominant tenement is itself recreational, as will generally be the case for holiday timeshare developments, the accommodation condition will generally be satisfied. Whether the other conditions, and in particular the components of the fourth condition, will be satisfied will be a question of fact in each case. Whatever may have been the attitude in the past to "mere recreation or amusement", recreational and sporting activity of the type exemplified by the facilities at Broome Park is so clearly a beneficial part of modern life that the common law should support structures which promote and encourage it, rather than treat it as devoid of practical utility or benefit".** [Emphasis added]

[71] The Court found that a single easement had been granted to the Regency Villas timeshare owners that permitted them to use the leisure facilities in the original complex regardless of when those facilities might be built.

Additional different or future facilities

[72] Lord Briggs in **Regency Villas** also addressed the question of the Facility Grant extending to additional or different facilities in the future in the context of the rule against perpetuities. Referring to an apparent concern that the grant may be void for perpetuity, Lord Briggs stated at paras. [27] to [29]:

> **[27] In my judgment that concern of the claimants and submission of the appellants is misplaced, in relation to what appears to me to be a single grant of rights over a leisure complex comprising sporting and recreational facilities, which may be changed and adjusted from time to time to suit customer demand without giving rise to separate and distinct grants of rights taking effect only in the future.**
>
> **[28] The main authorities relied upon by the appellants in support of their submission on perpetuity are *Dunn v Blackdown Properties Ltd* [1961] Ch 433 and *Adam v Shrewsbury* [2006] 1 P & CR 27. They show that where (in the case of a pre-2010 instrument) there is a grant of a future easement, or (which is in substance the same thing) a present easement which can only be enjoyed if and when, in the future, something is done on the servient land to make the easement useable, then the rule against perpetuities applies. In the *Dunn* case the grant was of sewerage rights, but no sewers existed at all at the time of the grant. In the *Adam* case the grant was the use of a garage yet to be constructed, on ground to be excavated by the grantor, accessible only from a roadway which was only partly constructed, at the time of the grant. In both cases the grants failed for perpetuity.**
>
> **[29] In the present case, by contrast, the grant consisted of an immediately effective grant to use the sporting and leisure facilities in a leisure complex which existed as a complex at the time of the grant. The fact that the precise nature and precise location of those facilities within the Park might change thereafter, but the grant still apply to the complex as a whole, does not bring the grant within the rule. If by analogy there had already been a sewerage system on the servient land at the time of the grant in the *Dunn* case, the drainage easement would not have been defeated or rendered subject to perpetuity merely because, thereafter, the dominant owner made a change to the routeing of the pipework.**

[73] Then, at paras. 85-86, Lord Briggs had this to say:

> **"[85] I have already indicated my clear preference for the judge's simple and common-sense analysis. There is in my view no answer to the judge's pithy observation that to construe the rights as limited**

> **to the actual facilities on site or planned in 1981 is unrealistic, and that it would be likely to inhibit the servient owner from introducing improvements or replacements, or adding facilities, for the benefit of all users of the leisure complex in the Park. In my view the Court of Appeal's approach, looking at the facilities grant as if it were a grant of separate rights to each facility, affecting separate and distinct parts of the complex, failed to see the wood for the trees.**
>
> **[86] … I have also explained why, in my view, the absence of express words of futurity in the Facilities Grant is more than compensated for by the nature of the subject matter, namely rights to use sporting and recreational facilities in a leisure park on an indefinite basis. The timeshare owners in the Mansion House were plainly granted rights to use all such facilities as might be there from time to time, and it makes no sense at all to think that the parties to the grant of rights to the Regency Villas timeshare owners over the same leisure complex actually intended that they should have a steadily reducing set of rights, as alterations, replacements and improvements were made to the leisure complex over time".**

[74] Regarding the law of easements evolving continuously to keep pace with the requirements of society, Lord Briggs stated at para. 76:

> **"Before expressing a conclusion, I must briefly identify factors pointing in favour of, and against, this extension of the law to recognise this new species of easement. In favour of doing so is the principle that the common law should, as far as possible, accommodate itself to new types of property ownership and new ways of enjoying the use of land. The timeshare development, which is quintessentially for holiday and recreational use, is just such a new type, and the common law should accommodate it as far as it can".**

[75] The Supreme Court noted that '*the facilities granted in the present case undoubtedly broke new ground within the context of easements, beyond that established in* ***Re Ellenborough Park*** [para.74]. Against the recognition of recreational rights over a leisure complex as easements, the Court noted two significant factors namely:

1. First, if annexed to a freehold, they are indeterminate in length, whereas a timeshare structure is frequently set up for a limited number of years. Furthermore, the rights conferred are likely to burden the servient land long

after the leisure complex in question had outlived its natural life [para. 79] and;

2. Secondly, the use of easements as the conveyancing vehicle for the conferring of recreational rights for timeshare owners upon an adjacent leisure complex is hardly ideal, given that there is no way in which enforceable obligations of that kind may be imposed upon the servient owners so that the burden of then runs with the servient tenement.

[76] Nonetheless, a majority found that the Supreme Court should affirm **Re Ellenborough Park** and gave a clear statement that the grant of purely recreational (including sporting) rights over land which genuinely accommodate adjacent land may be the subject matter of an easement, provided always that they satisfy the four well-settled conditions for an easement.

[77] The appeal was dismissed with Lord Carnwath dissenting, noting at paras. [95] - [96] that:

> **[95] The important qualification relates to the nature of the right asserted. An easement is a right to do something, or to prevent something, on another's land; not to have something done (see *Gale on Easements*, 20th ed (2017), para 1-80). The intended enjoyment of the rights granted in this case, most obviously in the case of the golf course and swimming-pool, cannot be achieved without the active participation of the owner of those facilities in their provision, maintenance and management. The same may apply to a greater or lesser degree to other recreational facilities which have been or might be created, such as the skating-rink or the riding stables (who provides and keeps the horses?). Thus the doing of something by the servient owner is an intrinsic part of the right claimed.**
>
> **[96] …Neither principle, nor any of the 70 or so authorities which have been cited to us, ranging over 350 years, and from several common law jurisdictions, come near to supporting the submission that a right of that kind can take effect as an easement. This point is if anything underlined by Lord Briggs' use of such expressions as "country club" and "leisure complex" (paras 1, 83) to describe the enterprise. In effect what is claimed is not a simple property right, but permanent membership of a country club…."**

Other common law decisions on recreational easements

[78] In delivering the decision of the Supreme Court, Lord Briggs mentioned other common law jurisdictions, namely Canada and Australia where those courts have recognized recreational easements: paras. [77] - [78].

[79] Not so long ago, in June 2021, the Grand Court of the Cayman Islands applied **Regency Villas** in **Cayman Shores Development Ltd et al v the Registrar of Lands et al** No. 143 of 2019 protecting certain recreational and sporting rights of residential owners at the Britannia development.

[80] The brief facts are the Plaintiffs, Cayman Shores Development Ltd and Palm Sunshine Ltd, are the registered owners of a golf course adjoining the Britannia development, together with a nearby hotel and beach resort on Seven Mile Beach (formerly the Hyatt Beach Suites, now Palm Heights). From the early 1990s, the 2nd to 5th Defendants ("the relevant Defendants") were granted rights pursuant to the so-called 'restrictive agreements' between 1992 and 2001. The rights included to play golf, to play tennis and to enjoy beachfront facilities.

[81] At issue was whether the rights were binding on the Plaintiffs as restrictive agreements within the meaning of the local Land Registration Act. Aside from a number of issues pertaining to requirements under the Land Registration Act, the question had to be decided as to whether the rights under restrictive agreements constituted easements.

[82] The Plaintiffs argued that the rights did not constitute easements because the second and fourth conditions of the four conditions necessary to constitute a valid easement were not satisfied. The Plaintiffs closed the golf course and subsequently instituted proceedings against the relevant Defendants asking the Court to order that the rights to use the golf course, the beach resort and the tennis courts were mere licences and such rights should be deleted from the Land Register.

[83] With respect to the second condition, the Plaintiffs argued that the rights did not accommodate the dominant tenement because they were no more than options to pay to use resort facilities. Further, it was argued, such rights were not only to freehold lot owners but also to their family members or person nominated by them. As such, the rights did not accommodate the freehold lots.

[84] With respect to the fourth condition, the Plaintiffs argued that the rights were precarious in the relevant sense and therefore could not be characterized as easements. They relied on **Burrows v Lang** [1901] 2 Ch. 502 at 511 where Farwell J said that where the alleged easement depended on the will of the servient owner and the servient owner can put a stop to the alleged easement, there "*is really no easement, because the very idea of right which necessarily underlies an easement is negatived*.**"**

[85] The relevant Defendants countered (amongst arguments relative to the Land Registration Act) that the rights were capable of being granted as easements, they were so granted by the instruments and they ought to be given effect as such.

[86] The key findings of the Court are:

1. The written agreements include a restrictive agreement within the meaning of Section 93 of the Registered Land Act. The owner of the golf course and the beach resort may not modify the *"facilities as constitute the Rights"* (namely the rights to play golf and to use the beach resort) or their location, and may not suspend the exercise of the rights for any purpose other than to carry out repairs and maintenance in respect of the facilities. The agreements were properly registered at the Land Registry and are binding on the Plaintiffs as owner of the golf course land and beach resort.

2. The relevant Defendants' right to use the golf course and beach resort granted by the written agreements were properly characterised as easements. Although these were not registered as easements, the Land

Register should be rectified to include a reference to the rights as easements.

3. The Plaintiffs substantially interfered with the relevant Defendants' rights to play golf by removing large quantities of turf from the golf course causing serious damage, which rendered the course unplayable. The quantum of damages payable by the Plaintiffs fall to be determined in further proceedings, if not agreed.

[87] Of significance, in his reasoning of the finding of a valid recreational easement, Segal J stated the following at para. 143 of the Judgment:

> **"143. ….It seems to me that the language of the Written Agreements makes it clear that the parties intended that the Lot Owners be granted rights (to use the relevant facilities and the land on which they were located) which would subsist indefinitely and permanently attach to the land on which the facilities were located and the Lot Owners' properties. Recital 6 talks in terms of 'incumbrances against the lands on which' the facilities are situated with the intent that the Rights become a registered appurtenance in Lot Owners' titles. Clause 2 of the Written Agreements talks in terms of granting rights with the intention of binding the land on which the facilities are located. Clause 2 does qualify the reference to the land being bound by adding in parenthesis 'so far as practicable' but this reference to practicalities does not affect the main idea that the land itself is to be subject without limitation in time or otherwise to the Rights. The Instruments are prepared so that they and the Rights can be registered in the incumbrances section of the registered titles for land on which the facilities are situated. The statement in the recitals of the parties' intentions and the drafting of the Written Agreements and of the First Defendants 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 the 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."**

Bahamian law relating to perpetuity

[88] On any question of law pertaining to perpetuity under the laws of The Bahamas, the following are to be noted:

1. In July 2004 (i.e., as at the date of the Grant of Easements), the applicable statute law in The Bahamas governing the avoidance of future interests in property on the grounds of remoteness was the *Perpetuities Act*, *Ch. 114.* That Act provided that a disposition of a non-vested interest in property became void if the interest disposed of failed to vest within the perpetuity period. The Act further provided that every disposition of a non-vested interest in property would be treated as if such disposition were not subject to the rule against perpetuities until such time as it became established that the vesting would not take place within the perpetuity period. In effect, this created a *wait and see* period, which was a change from the pre-1995 rule, where such a disposition would have been void from the start if there were the possibility that the rule against perpetuities might be offended.

2. At the material time, the applicable statutory perpetuity period would have been eighty years.

3. In 2011, by the *Rule Against Perpetuities (Abolition) Act, 2011*, the rule against perpetuities was abolished respecting: (a) a disposition of an interest in property made on or after the commencement of the Act; and (b) a disposition of property to a trust made before the commencement of the Act where the Supreme Court of The Bahamas makes an order to that effect.

Discussion: Application of the law to the facts

[89] The resistance to the Plaintiffs' claim is two-fold namely:

1. The right to access the facilities does not extend to the Plaintiffs as non-members of the Club and does not refer to the current facilities, which were constructed after the GOE; and

2. The right is not capable in law of being an easement.

Construction of the GOE

[90] The Plaintiffs' contention is that the right to use the facilities is premised on the GOE. In the present case, I shall proceed to firstly ascertain the effect of the GOE as was done in **Re Ellenborough Park** when the courts first constructed the Conveyances and in **Regency** Villas, the Facilities Grant, both of which contained the rights that were asserted as easements. Which facilities were granted and to whom?

[91] Mr. Delaney QC, who appeared as Counsel for the Plaintiffs, submitted that, on the ordinary construction of the GOE, it is plain that the grantees, including the Plaintiffs, were granted a right to use the facilities, including additional and replacement facilities constructed after the GOE. He relied on Recital D of the GOE, which he says. provides context:

> **"(D) Associates land comprised the Western portion of Chub Cay on part of which is situate the Chub Cay and Marina (hereinafter respectively referred to "the Club" and "the Marina") and within Associates land are various pieces parcels or lots and strips of land comprising some of the Grantees' land and a strip of Resorts' land;"**

[92] According to him, clause 2(a) is relevant. It provides:

> **"2. In pursuance of the said agreement and for the consideration aforesaid Associates AS BENEFICIAL OWNER hereby grants unto …the Grantees full and free right and liberty for … the Grantees and the owners and occupiers for the time being of … the Grantees' land or any part thereof their tenants servants visitors and licensees (in common with all other who have or who may hereafter have the like right) at all times hereinafter by day or by night subject as herein set forth for purposes connected with the use and enjoyment of the said hereditaments and every part thereof:-**
>
> **a) <u>To use that portion of the Club and other facilities on Associates land which are open to non-members of the Club and to guest of the Club (including without limiting the generality of the foregoing the bar restaurant club hotel beach and common areas and pathways</u>) in the manner in which the Club is intended to be used;**

b) ….

c) ….

TO HOLD the said rights and privileges unto and to the use of Resorts and the Grantees in fee simple as appurtenant to Resorts land and the Grantees land SUBJECT TO the same terms and conditions as the Club Marina Utilities and other facilities are made available to other property owners of Chub Cay and to non-members of the Club including the payment of fees and other charges common to other users of the Club Marina Utilities and other facilities AND SUBJECT ALSO TO the right of the Grantor from time to time to impose reasonable rules to regulate the use of any or all of the aforesaid facilities".

[93] Learned Queen's Counsel Mr. Delaney contended that the Plaintiffs were given the right to use the facilities by virtue of being grantees, to whom the rights were granted. According to him, this is manifested by the fact that the rights were memorialized in a formal document called the "Grant of Easements". Further, Mr. Delaney relied on several features of the GOE, which he urged the Court to find gives credence to *the Grantees' right to use the Club and other facilities*:

(i) The Club and other facilities being introduced in Recitals C and D;

(ii) Rights of way in the roadway easements of clause 1 being expressly stipulated for the purpose of accessing the Club and other facilities;

(iii) Separate treatment of the right to use the Club and other facilities at clause 2(a) and the habendum of clause 2;

(iv) Clause 2(a) identified (expressly, without limiting the generality of the terms "the Club and other facilities") the bar, restaurant, club, hotel, beach, common areas and pathways; and

(v) A protective covenant stipulated by the developer at clause 9 that roads will not be laid out in a manner so as to prevent access by the Grantees to the Club and other facilities.

[94] The facilities that were granted to the Grantees was the portion of the Club and other facilities on the developer's land which was open to non-members of the Club and to guests of the Club. As such, I agree with the Defendant that the grant to Grantees generally (not being members of the Club, as the Plaintiffs) was somewhat limited. It seems that the intention was to confer upon Grantees the right to use some parts of the Club and some of the facilities and that some parts of the Club and some of the facilities were reserved exclusively for members. Those areas were defined by an non-exhaustive list, as it stated that the facilities included but were not limited to those listed: "guests of the bar, restaurant, club hotel, beach and other common areas and pathways". It appears that the intention was to give access to the kind of facilities that grantees and their guests might expect to be able to enjoy on a resort island.

[95] With respect to the facilities granted, Mr. Delaney QC submitted that the Plaintiffs are entitled to access facilities that have been added and/or have replaced those which existed at the time of the GOE notwithstanding that it was not expressly stated to so include additions or replacements.

[96] On the other hand, Mr. Shurland QC, who appeared as Counsel for the Defendant, submitted that the rights identified in the GOE must be stated in unambiguous and certain language and, in the absence of express words to that effect, the GOE would not be construed as entitling the Plaintiffs to use any facility that might be constructed anywhere on the Defendant's land including those facilities which relates to extensions to existing facilities and where facilities are substituted or moved from one place to another. He explained that, at the time of the GOE, one single structure housed the restaurant, bar and convenience store, which was called "the Club" to distinguish it from other buildings on Chub Cay. As there was no swimming pool, golf course, squash or tennis courts or any other recreational facility at the time of the GOE, it was not contemplated by the GOE.

[97] In **Regency Villas,** the Respondents cross-appealed, challenging the finding of the Court of Appeal that the grant were limited to the actual facilities on site in

1981, at the time of the Transfer. The Supreme Court agreed with the Respondents. The Supreme Court found that the Court of Appeal was wrong to have viewed the various facilities as if they were separate rights to separate facilities. The Supreme Court stated that the Court of Appeal "*failed to see the wood for the trees"*: At para. 85, Lord Briggs, who delivered the Judgment, stated:

> **"I have already indicated my clear preference for the judge's simple and common-sense analysis. There is in my view no answer to the judge's pithy observation that to construe the rights as limited to the actual facilities on site or planned in 1981 is unrealistic, and that it would be likely to inhibit the servient owner from introducing improvements or replacements, or adding facilities, for the benefit of all users of the leisure complex in the Park. In my view the Court of Appeal's approach, looking at the facilities grant as if it were a grant of separate rights to each facility, affecting separate and distinct parts of the complex, failed to see the wood for the trees."** [Emphasis added]

[98] The Court reasoned that, in the circumstances, the absence of express words of futurity in the Facilities Grant did not prevent that grant from including additional or replacement facilities because the absence of the words was compensated by the nature of the subject matter and because it was plain that timeshare owners had been granted rights to use all such facilities. At para. 86, Lord Briggs continued:

> **"It is fair comment that counsel for the respondents provided less than full-blooded support during oral argument for the judge's simple analysis, although they did in subsequent written submissions. This reluctance was apparently because of a concern about the effect of the law relating to perpetuities upon what, on one view, might be regarded as the grant of future easements. But this concern was, in my view, misplaced for the reason which I have already given. I have also explained why, in my view, the absence of express words of futurity in the Facilities Grant is more than compensated for by the nature of the subject matter, namely rights to use sporting and recreational facilities in a leisure park on an indefinite basis. The timeshare owners in the Mansion House were plainly granted rights to use all such facilities as might be there from time to time, and it makes no sense at all to think that the parties to the grant of rights to the Regency Villas timeshare owners over the same leisure complex actually intended that they should have a steadily reducing set of rights, as alterations, replacements and improvements were made to the leisure complex over time."** [Emphasis added]

[99] In my judgment, **Regency Villas** is distinguishable from the present case relative to the addition of facilities. While the bar, restaurant, hotel, beach and other common areas and pathways were granted to the Plaintiffs regardless of their relocation, the pool, golf course, tennis and squash courts and other sporting facilities were not granted to them unless they are members of the Club.

[100] In **Regency Villas**, the Facilities Grant listed the sporting and recreational facilities to which the grant related along with other sporting and recreational facilities. It was clear, therefore, that the grantees had been granted use of whichever sporting and recreational facilities might exist at the time. In the present case, the GOE is not as wide. The facilities in clause 2(a) were listed to define "the Club" which is the subject of the GOE. Sporting and recreational facilities such as the pool, golf course, courts, gym etc. are not of the same kind contemplated in the GOE. It is not the absence of the express words of futurity, but rather the difference between the subject matters of the instant grant in the GOE and the **Regency Villas** grant. The finding that the grant included the additional facilities turned on the fact that the grant was for "*any other sporting and recreational facilities*" in addition to those expressly stated whereas the grant was not of facilities of the same kind granted.

[101] Further, the GOE distinguishes between members and non-members and limits the grant in respect of facilities to those parts of the Club that are available to non-members of the Club and guests of the Club. It is plain that, on the basis of being Grantees, they were being granted some degree of access but that there could be facilities which would be reserved for members of the Club. No distinction between members and non-members arose in **In re Ellenborough** and **Regency Villas**.

[102] Clause 2 of the habendum provides that the rights are subject to the right of the Grantor to impose reasonable rules to regulate the use of any and all of the mentioned facilities. There was no distinction between members and non-members.

[103] The rights of way to the Club and Marina were granted subject to the Grantor's right to impose reasonable rules to regulate the use of those facilities:" **AND SUBJECT ALSO TO the right of the Grantor from time to time to impose reasonable rules to require the use of any or all of the aforesaid facilities."**

[104] The swimming pool, golf course, squash and tennis courts along with the other sporting facilities are of a different kind of recreational facilities granted in the GOE. The payment of fees in order to use the recreational facilities is not an unreasonable requirement for its use. In this regard, Mr. Shurland QC's submission on mere passivity is relevant.

[105] Mr. Shurland QC submitted that the maintenance and operation of the facilities are onerous and it follows that the Plaintiffs cannot be permitted to use them free of charge. In **Regency Villas**, in determining whether the grant of the right to use the recreational facilities was capable of being an easement, the Court clarified the meaning of the principle that easements do not require anything more than mere passivity on the part of the servient owner: **Jones v Price** [1965] 2 QB 618. At para 67 and 69, the Court stated:

> **67. This does not mean that easements cannot be granted if they involve the use of structures, fixtures or chattels on the servient tenement, which, in the ordinary course, the parties to the grant expect that the servient owner will manage and maintain. All it means is that the grant of the easement does not impose upon the servient owner an obligation to the dominant owner to carry out any such management or maintenance. The servient owner may do so because he wishes to use the structures, fixtures or chattels for the same purpose as the dominant owner, and has both the possession and control of the servient tenement and more resources than the dominant owner with which to do so. The grantor may or may not choose to make enjoyment of the easement conditional upon the dominant owner making a contribution towards the cost of management and maintenance, but no such contribution obligation will lightly be implied. There may, as in the present case, be a commercial expectation that the servient owner will undertake the cost and other burdens of management and maintenance, but the fact that the shared commercial expectation may have been (as in the present case) built upon sand rather than rock, so that those burdens prove uneconomic for the servient owner, will not affect the question whether the grant of the relevant rights constitutes an easement.**

…..

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

[106] Whether the recreational facilities subject of the grant require active and continuous maintenance by the servient tenement owner that could have the effect of disqualifying it from being an easement is a question of fact. The Supreme Court in **Regency Villas** reasoned that although it was *possible* for some of the facilities to require action by the dominant owners after the discontinuance of maintenance by the servient owners, it did not deprive the easement of the character of mere passivity because generally, the facilities did not require the servient owner to maintain or operate them. At paras. [72] –[73], Lord Briggs stated:

"72. It is not difficult to imagine recreational facilities which do depend upon the active and continuous management and operation by the servient owner, which no exercise of step-in rights by the dominant owners would make useable, even for a short period. Free rides on a miniature steam railway, a covered ski slope with artificial snow, or adventure rides in a theme park are examples which would probably lie on the wrong side of the line, so as to be incapable of forming the subject matter of an easement. <u>But the precise dividing line in any particular case will be a question of fact</u>.

73. It is in this context to be borne in mind, as already explained, that the Facilities Grant extended only to such sporting or recreational facilities as existed within the Park from time to time. It did not oblige the servient owner to maintain or operate any particular facilities, or any facilities. It is perfectly possible that, in relation to some of them, the exercise by the dominant owners of step-in rights, after discontinuation of operation and maintenance by the servient owners, would not make them useable by the dominant owners indefinitely. That was an inherent limitation in the value of the Facilities Grant, but it does not deprive it of the character of an easement".

[107] In my judgment, the facilities in dispute in the present case are strikingly similar to those in **Regency Villas**. The facilities on the first and ground floors of Mansion House included a restaurant, TV, billiards and a gymnasium along with sporting and recreational facilities on the surrounding grounds including a golf course, swimming pool, tennis and squash courts and gardens.

[108] I do not accept Mr. Shurland's suggestion that the GOE is vague. It is clear that the GOE intended to grant to the Grantees (and their visitors) the right to use the Marina and whichever Club-like facilities might exist that are of the kind expressly listed. The only ambiguity, which I have already resolved, is whether the sporting facilities, which did not exist at the time of the GOE, are of the kind listed so as to be included in the GOE.

[109] Accordingly, the Plaintiffs have access to the Club and Marina by virtue of being lot owners. However, they do not have access to the sporting facilities, which were not contemplated by the GOE.

The Second Condition

[110] The rights to use recreational facilities on a resort island where persons are seeking recreation is of service, utility and benefit to the Plaintiffs' property. I agree with Mr. Delaney QC that the nature of the island as a resort island strengthens the point.

The Fourth Condition

[111] The questions relevant to this consideration were stated in **Re Ellenborough**: whether the rights purported to be given are expressed in terms of too wide and vague character; whether if and so far effective, such rights would amount to rights of joint occupation or would substantially deprive the owners of the servient tenement or proprietorship or legal possession; whether, if and so far effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot qualify as easements.

[112] I have already stated that the grant of the right to access the Club-like facilities was specific and clear. The right of the Plaintiffs and their visitors to use the Club-like facilities would not substantially deprive the developer of its legal possession thereof because the right is clearly stated as a right to use the facilities in the same way that non-members and guests of the Club would and the use is granted to use the facilities in the way they are intended to be used. I have already alluded to the case of **Regency Park,** which both parties relied upon: that it is outdated to consider recreation as not conferring utility and benefit on those who undertake it. It follows that the instant easements, conferring a right of way to use Club-like facilities satisfies the condition that the easement is capable of forming the subject-matter of the GOE.

Additional questions

[113] Both parties agreed that two additional issues need to be answered by the Court namely:

1. Whether lawfully, as a condition to enjoying existing freehold rights appurtenant to the Plaintiffs lots (as conferred under the GOE), the Plaintiffs may be compelled by the Defendant (by means of entering into the 2019 Amended and Restated Declaration or otherwise) to relinquish such rights and;

2. Whether freehold rights of the Plaintiffs (as conferred under the GOE) to use the roads of Chub Cay are qualified in a manner such as to exclude cars, trucks, and/or any vehicle larger than a golf cart;

3. If the answer to (2) is in the negative, whether the Defendant, acting unilaterally, may lawfully qualify, limit or reduce the right of the Plaintiffs (as conferred under the GOE) to use the roads of Chub Cay in a manner such as to prohibit on such roads the Plaintiffs' use of cars, trucks, or any vehicle larger than a golf cart.

Whether the developer can compel the Plaintiffs to enter into the 2019 Amended Declaration

[114] Succinctly put, the Plaintiffs' rights under the GOE are vested rights.

Whether freehold rights of the Plaintiffs to use the roads of Chub Cay are qualified in a manner such as to exclude cars, trucks, and/or any vehicle larger than a golf cart

[115] The easements are subject to the right of the Grantor to impose reasonable rules:

> **"...AND SUBJECT ALSO TO the right of the Grantor from time to time to impose reasonable rules to require the use of any or all of the aforesaid facilities."**

[116] It is apposite to state that the basic principles of contract interpretation are well established. Unquestionably, the starting point is that words are to be given their ordinary and natural meaning. This is not necessarily the dictionary meaning of the word but that in which it is generally understood. The courts assume that the parties have used language in a way that reasonable persons ordinarily do. So terms are:

> **"…to be understood in their plain, ordinary, and popular sense, unless they have generally in respect of the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special or peculiar sense".**

[117] Mr. Delaney QC correctly submitted that, on the ordinary interpretation of the language used in the expresses provisions of the GOE, they do not contemplate a unilateral alteration of the rights of the Grantees by the Grantor, except where and to the extent expressly agreed and stipulated, such as with respect to the re-routing of roads from time to time: clause 1 of the GOE. As Lord Briggs said at para. 58 in **Regency Villas**, it would be repugnant to the essential nature of easements if it were that the servient owner could revoke it at a whim.

[118] In my opinion, it would be a wrongful derogation from the grant if unilaterally the Grantor were to impose a reduction, alteration or a requirement upon the Grantees to relinquish rights vested pursuant to the GOE.

[119] Therefore, the additional questions posed must be answered in the negative.

Conclusion

[120] As in **Regency Villas** and **Cayman Shores** (presently under appeal), the GOE is of the status of a property right, in the character of an easement. The Plaintiffs are entitled to use the Club and other facilities including those specifically identified in clause 2(a) as being connected with the Club, subject to the payment of fees and charges common to other users, in the manner in which the Club is intended to be used. As a matter of construction, fees and other charges are required to be reasonable. They may not go contrary to the rights conferred under the GOE or misapplied in a discriminatory or arbitrary manner such as would undermine the object and intent of the easements.

[121] Similarly, such easements are not subject to the Plaintiffs being required by the Defendant to relinquish or modify them as a condition for exercising them. Neither are such rights by way of easements subject to be qualified or reduced in scope by the unilateral actions of the Defendant, as in the case of limiting the use of roadways by vehicles no larger than a golf cart.

[122] As Mr. Delaney QC reminded the Court, Chub Cay is a resort island. The island and its roadways are very small. This was observed by the Court during its visit. So, in my opinion, it does not seem unreasonable for the Defendant to restrict the use of vehicles to avoid congestion and to preserve the charm of the island. However, the Defendant cannot act unilaterally and any regulation with respect to this ought to be exercised reasonably.

Relief and Declarations

[123] The Order of the Court is as follows:

1. A Declaration that the rights of way and easements granted and confirmed in the 2004 Grant of Easements are valid in law and equity and enforceable as against the Defendant by each of the Plaintiffs and the owners and occupiers for the time being of the Plaintiffs' lots or any part thereof their tenants, servants, visitors and licensees;

2. A Declaration that pursuant to clause 2(a) of the Grant of Easements, the Plaintiffs are entitled to use that portion of the Club and other facilities which are open to non-members of the Club and to guests of the Club (including the bar, restaurant, club, hotel, beach and common areas and pathways;
3. A Declaration that the Defendant cannot compel the Plaintiffs to enter into the 2019 Amended and Restated Declaration or otherwise) to relinquish such rights;

4. An injunction restraining the Defendant whether by itself, licensees, agents or any of them from doing any act whereby the Plaintiffs or any of them, their tenants, servants, visitors or licensees may be hindered or obstructed in their use and enjoyment of the rights and privileges granted under the 2004 Grant of Easements; and

5. Costs to the Plaintiffs to be taxed if not agreed.

Costs

[124] As a general rule, the unsuccessful party should pay the costs of the successful party. In this case, there is no reason for the Court to depart from this principle. Costs must also be reasonable. The Plaintiffs are therefore entitled to their costs which must be reasonable.

[125] In determining what is reasonable costs, a convenient starting point is Order 59, rule 3(2) of the Rules of the Supreme Court ("RSC") which provides:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when**

> **it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[126] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[127] Order 59, rule 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"

[128] Costs are always in the discretion of the Court. The Judge is required to exercise his/her discretion judicially, that is, in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd** [1986] 2 All ER 529 at pages 536-537.

[129] In deciding what would be reasonable the Court must take into account all the circumstances, including but not limited to:

a) any order that has already been made;

b) the care, speed and economy with which the case was prepared;

c) the conduct of the parties before as well as during the proceedings;

d) the degree of responsibility accepted by the legal practitioner;

e) the importance of the matter to the parties;

f) the novelty, weight and complexity of the case; and

g) the time reasonably spent on the case.

[130] Prior to the delivery of the Judgment, I requested and both parties provided their respective Bills of Cost. Prima facie, I consider the Plaintiffs' Bill of Costs to be excessive. Therefore, I shall hear the parties on a date convenient to them if this discrete issue remains unresolved.

[131] Last but not least, I am grateful to both Mr. Delaney QC and Mr. Shurland QC for their industry and helpful written submissions on an area of law which is not very familiar to me. It is no doubt a ground-breaking judgment for The Bahamas as it was for the UK and Cayman Islands.

Dated this 8th day of June, 2022

Indra H. Charles
Senior Justice