IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

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

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

AND

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

BETWEEN:

(1) CAYMAN SHORES DEVELOPMENT LTD

(2) PALM SUNSHINE LTD

Plaintiffs

-AND-

(1) THE REGISTRAR OF LANDS

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

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

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

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

Defendants

IN CHAMBERS

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Jonathan Seitler QC with Peter McMaster QC and Conal Keane of Appleby (Cayman) Ltd on behalf of the Plaintiffs**
	John Randall QC with Colette Wilkins QC, Nick Dunne, and Daisy Boulter of Walkers on behalf of the Walkers Defendants
	Nigel Gayle, Crown Counsel (Civil), on behalf of the First Defendant
	Nicholas Dixey of Nelsons on behalf of White Dove
Heard:	**7-8 December 2021**
Draft judgment distributed:	**19 January 2022**
Judgment delivered:	**28 January 2022**

CONSEQUENTIALS JUDGMENT

Introduction

1. This is my judgment dealing with various consequential matters and issues that arise out of my judgment dated 9 June 2021 (the ***Judgment***), following a hearing on 7 and 8 December 2021 (which was conducted remotely via a video link). Reference should be made to the Judgment for the relevant background (and for the defined terms, which I also use in this judgment).

2. Prior to the hearing, the Plaintiffs had issued a notice of appeal dated 23 June 2021 supported by grounds of appeal dated 22 July 2021 (the appeal is listed to be heard by the Court of Appeal on 11-13 May 2022) and (on 15 October 2021) issued a summons seeking a stay pending the outcome of the appeal of the order to be made following the Judgment for rectification of the register.

3. Prior to the hearing the parties had discussed and substantially agreed the form of order to be made to give effect to the Judgment. However, there were a number of issues on which they were not agreed which needed to be dealt with by the Court. For the purpose of the hearing, the parties filed a draft order which identified the points in dispute and the wording proposed by the Plaintiffs and the Walkers Defendants.

4. I would note that, as at the trial, White Dove was represented separately by Nelsons (and that Mr Dixey of Nelsons appeared and made brief submissions at the hearing) but that White Dove generally supported and adopted the position taken by the Walkers Defendants on the basis that any orders made in respect of the Walkers Defendants should apply to White Dove, with one exception. As Mr Dixey confirmed during the hearing, White Dove was not seeking a payment on account of its costs (but did wish to claim that it was entitled to recover pre-issue costs). In addition, the First Defendant was represented at the hearing by Mr Gayle from the Attorney General's Chambers, who made brief but helpful submissions regarding the First Defendant's position just before the hearing ended.

The issues

5. The issues in dispute with which I have to deal are as follows:

   (a). how to record and deal in the order with the position of the First Defendant with respect to the form of the Instruments and the rectification of the register for the purpose of registering the Rights as easements.

   (b). whether the stay of the order for rectification should be made conditional on the Plaintiffs giving various undertakings sought by the Walkers Defendants and White Dove.

(c). the scope of the instructions to be given to the experts on golf course management who are to be instructed by the Plaintiffs and the Walkers Defendants in connection with the assessment of the damages payable by the Plaintiffs in respect of the nuisance to the easement constituting the Golf Playing Rights caused by the removal of turf.

(d). costs:

(i). whether the costs of the claim and counterclaim should be assessed separately or together as a whole.

(ii). the costs of the claim as between the Plaintiffs, the Walkers Defendants and White Dove.

(iii). the costs of the counterclaims as between the Plaintiffs, the Walkers Defendants and White Dove.

(iv). whether an order should be made at this stage that any taxable costs payable to the Walkers Defendants should include pre-action costs.

(v). whether an order should be made for the payment of a reasonable sum by way of costs on account and if so, what is the reasonable sum?

(vi). if a payment on account is to be made, how should the payment be held or dealt with pending the outcome of the appeal?

The first issue – the First Defendant's position

6. In the Judgment, I held that the Walkers Defendants (and White Dove) were entitled to rectification of the register for the purpose of registering the Rights as easements and that the Rights had validly been granted as easements even though the instrument creating the easements was not in the prescribed form. In my view, where the relevant instrument was in a substantially similar form to the prescribed form and otherwise unobjectionable (and where it had been accepted and thereby approved for the purpose of registering the Rights as restrictive agreements), so that there appeared to be no grounds on which the First Defendant would have

wished to refuse or could properly have refused to accept the instrument on it being delivered for the purpose of registering the Rights as easements, the failure to use the prescribed form should and did not prevent a valid easement having been granted or the Court ordering the rectification of the register so as to allow for the registration of the Rights as easements (if otherwise appropriate). I also considered that the First Defendant should, in the proper exercise of her powers, have approved the Instruments if they had been so delivered for this purpose and that it was likely that the Walkers Defendants (and White Dove) could have required her to do so.

7. However, while the First Defendant had not objected to the form of the Instruments when previously presented for the purpose of recording the restrictive agreements or at the trial, it appeared to me (as I indicated in particular at paragraphs 149(h) and 213 of the Judgment) that, as a matter of procedural fairness (since the point had not arisen in precisely this way at the trial) I should give the First Defendant an opportunity to indicate whether she wished to object to rectification of the register on the basis that the Instruments were not in an acceptable form and to make submissions in support of the position that she took on this issue (in effect giving her an opportunity to challenge or comment on my findings or assumptions as to her position and my views as to the manner in which she was required to exercise her powers), before making an order for rectification. If she did have objections, a further hearing would probably have been needed to deal with them and it may have been appropriate to give directions for the filing of further submissions by the parties. If she did not, then the order for rectification could be drawn up and made.

8. After the handing down of the Judgment, there were discussions between the First Defendant and the other parties regarding the First Defendant's position and whether the First Defendant should refrain from providing any formal confirmation of her position on this issue pending the outcome of the appeal (as I said at the December hearing, in my view it would have been helpful if the parties had sought the listing of a further and separate hearing promptly after it became clear that there were disagreements and uncertainties as to how the First Defendant should act, to give the First Defendant the opportunity promptly to seek further guidance from the Court as to what was expected from her and to give the parties the opportunity to seek further directions as appropriate).

9. These discussions culminated in an email dated 1 December 2021 sent by Mr Gayle to the attorneys for the other parties. Mr Gayle said as follows (the words in bold and underlined were in the original email):

> *"We appear for the Registrar of Lands, the First named Defendant and provide the following information prior to the imminent hearing, to provide, among other reasons, clarity. The statement does <u>not</u> and is not in any way, intended to address or prejudice the issue of stay of the paragraph 213 request or the terms on which such confirmation from the Registrar may be given, pending final disposition of the appeal.*
>
> *<u>Statement of the Registrar of Lands' position at this point</u>*
>
> *The Registrar of Lands hereby **confirms** that, subject to any further and/or consequential orders, directions and/or clarification by the Grand Court, and/or appellate court, **she is prepared to and will** in compliance with the relevant court order(s) and in accordance with, inter alia, paragraph [213] of the Judgment - take no objection as a matter of form, to the registration of the Instruments as containing easements <u>if so ordered</u>, by way of rectification of the register (by amending the nature of incumbrance section to refer to "restrictive agreements and easements"), based on the Instruments in their current form. The Registrar however reserves the right to, at the hearing (if necessary), seek clarity with respect to the terms of and/or any aspect of such order(s) or request, to ensure full compliance, when or if becomes necessary."*

10. The Plaintiffs argued that it was important that it be made clear in the order that nothing that the First Defendant now said, post-Judgment, should prejudice their appeal. They also argued that the stay which they sought should be treated as extending to any action and confirmations that the First Defendant might take and give after and in response to the Judgment.

11. In particular, they submitted that it would be wrong for the First Defendant to provide a confirmation of her position, in response to my invitation to the First Defendant to indicate whether she objected to the rectification of the register, which could be construed as a new, post-Judgment, approval of the Instruments for the purpose of section 105(1) of the Act. That subsection deals with the forms to be used for "*dispositions*" and states 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."*

12. The Plaintiffs had therefore initially drafted a recital to the draft order based on the First Defendant's statement in Mr Gayle's email of 1 December and which stated that "*on the basis of the Judgment and subject to the outcome of the [appeal] and without prejudice to the appeal and*

any arguments that may be made therein and subject to any further and/or consequential orders, directions and/or clarification by the [Court] and/or [the Court of Appeal] herein, she is prepared to and will in compliance with the relevant court order(s) and in accordance with, inter alia, paragraph 213 of the Judgment take no objection as a matter of form to the registration of the Instruments as containing easements if so ordered by way of rectification of the register (by amending the nature of incumbrance section to refer to "restrictive agreements and easements"), based on the Instruments in their current form" and that the Walkers Defendants acknowledged that this confirmation did not constitute "*a fresh or separate approval by the First Defendant] of the form of the Instruments for the purpose of section 105(1) of the Act.*"

13. My decision to order rectification despite the Instruments not being in the prescribed form was based on the proposition that a further approval by the First Defendant was not required to validate the grant (of the Rights as easements) or to permit and justify rectification in the circumstances (and that the other Defendants could require the First Defendant to give her approval if she refused to do so and if such approval were needed). The Plaintiffs wish to challenge my decision that rectification should be ordered and wish to be able to argue that absent a further approval of the Instruments there was and could be no valid grant of an easement since at the time that the Instruments were entered into and executed, the First Defendant had not in fact given her approval of the Instruments (and as I had held, her subsequent acceptance of the Instruments for the purpose of recording the Rights as restrictive agreements was insufficient to constitute and did not amount to approval of the Instruments for the different albeit related purpose of registering the Rights as easements), so that section 105(1) had not been satisfied or complied with.

14. The Walkers Defendants (and White Dove) objected to the inclusion of the form of the recital drafted by the Plaintiffs. They submitted that the First Defendant should be allowed to give such confirmation or indications sought from her at paragraph [213] of the Judgment as she wished, and that the Court should proceed to make an order for rectification on such terms as it considered appropriate in light of the First Defendant's position. The Judgment, and the Court's order made pursuant to it, are and will be binding unless and until reversed by the Court of Appeal. The fact that there was an appeal pending was not a reason for preventing the proceedings at first instance being completed and concluded. The Judgment had determined that rectification should be granted in favour of the Walkers Defendants (and White Dove), and an order for such

rectification, in such terms as the Court determined to be appropriate, should therefore be made. It was important for the Court's decision on rectification to be final and clear so that the Court of Appeal would know exactly what order was being appealed against and so that the parties to the appeal were able to formulate their submissions on the appeal.

15. Having reviewed the First Defendant's statement of her position and the related correspondence and having heard the submissions made by the Plaintiffs and the Walkers Defendants (and White Dove), I informed the parties during the second day of the hearing that:

> "*One approach, as I suggested off the top of my head yesterday, would involve recording the [First Defendant's] position as being one in which she has made no submissions on the point which in my judgment I suggested she might wish to make submissions on. It does occur to me that there's an alternative way of doing it as follows and I am not saying that this is the only way or the way I will conclude [should be adopted] but I will invite Mr Seitler and Mr Randall and if appropriate Mr Gayle to comment on this.*
>
> *If we were to include a recital that doesn't specifically refer to or quote from the 1 December email but said the following:*
>
> > *Upon the [First Defendant] indicating that, having regard to the references to the [First Defendant's] position in paragraphs 149(h) and 213 of the Judgment, she did not wish to object to an order being made for the rectification of, and directing her to rectify, the register by including references to and registering the as easements in the manner set out in paragraph 1 of this Order [and] the [First Defendant's] non-objection shall not affect and shall be without prejudice to the appeal."*

16. The Plaintiffs said that they considered this approach and wording to be acceptable but submitted that it would still be appropriate to include their suggested wording that confirmed that the First Defendant's statement of her position and her non-objection should not be treated as "*a fresh or separate approval by the First Defendant] of the form of the Instruments for the purpose of section 105(1) of the Act.*" The Walkers Defendants also did not object to the approach and wording I had proposed but pointed out that if the order was to include, as the Plaintiffs had requested, a statement regarding the status and effect of the First Defendant's non-objection, to the effect that there had been no new approval by the First Defendant of the form of the Instruments, it would be necessary to decide (and for the Court to make clear) whether the Court's order was based on a finding by the Court that the First Defendant's statements and conduct did not, in fact and as a matter of law, constitute or take effect as an approval of the Instruments.

17. As I have noted, Mr Gayle appeared on behalf of the First Defendant at the hearing. He heard my suggested drafting of the recital to the order. I also put to him my understanding of the First Defendant's position, as follows (see pages 59-62 of the transcript):

> *"What the judgment does say is that the Court considered that it had the power to order the rectification of the register so as to register the Rights as easements even in a case in which the instrument creating the easements was not in the prescribed form and has yet to be approved by the [First Defendant]. That the Court considered that it can do that and should do that in circumstances where the form that had been used is substantially similar to the prescribed form and in the Court's view in all the circumstances [the form was] sufficient to justify registration and that if presented to the [First Defendant] the form is of a kind that [the [First Defendant] should, exercising her powers, have been prepared and should be prepared to accept as appropriate. Now that's the nature of the decision and it was in that context that the Judgment recorded that the Court would wish to give the [First Defendant], should she wish to do so, ……. an opportunity to indicate whether she or not she had any submissions to make or points to raise …[and] to say from my point of view there is some fundamental problem with this … decision ….*
>
> *Now I take it that the [First Defendant] for entirely understandable reasons is not wishing post-judgment to take a decision which could in any way affect the outcome of the case or to affect the Court's determination. She doesn't feel that that is her role and that is not what she is doing, but I do take it, and this is why I thought it was appropriate to redraft the wording of the recital overnight, I do take it [that] having seen the judgment and I hope now understanding the basis of the order and the basis on which the court was, as a matter of courtesy, inviting the [First Defendant], or giving [her] the opportunity, to say anything if she wished to do so, it is clear that the [First Defendant doesn't wish to object to an order for rectification being made in [these] circumstances, There's nothing that she feels that she needs to draw to the Court's attention relevant to making that order and therefore she is not objecting to the order being made in the terms set out in the draft order but that her position is certainly that whatever she says or doesn't say is not to have an effect upon the Plaintiff's appeal."*

18. At the conclusion of Mr Gayle's submissions, the following exchange took place:

> "*MR GAYLE* *So I believe - we believe, your Lordship, that the recital that your Lordship has proposed would be appropriate with the amendments as proposed to make reference to the non-objection and make it clear that it is not that there is a fresh decision or that the [First Defendant] is in fact exercising her discretion under section 105(1) because [the First Defendant] did not deem that she had that power, given the order, unless or until overruled. So, we do concur with your Lordship's summary that in fact the [First Defendant's] non-objection and statement is, in fact, that she concurs and would not be objecting to the fact that one the register can be rectified in accordance with the order and in keeping with the Instruments in the form that they are in but not that [the First Defendant] had approved those forms prior but it is just that she is conforming to the order made by*

the Court.

THE JUDGE *Good. That's very helpful and very clear….*

MR GAYLE *The second point, a small point, just to make clear, is also that the non-objection is not the [First Defendant] confirming that she is not objecting to any order that she was required at the material time to have registered the Instruments and as we had construed it, as you Lordship explained, [the First Defendant] construed it correctly, because it is not that the Court in [paragraph] 213 was actually ordering that [the First Defendant] was required to have accepted the instruments at the material time but that in keeping with [the Judgment] that she would be obliged as far as it is practical and she has confirmed that practically it may be done by way of rectification."*

19. It seems to me that Mr Gayle may still have not fully appreciated that I had, as I have explained, concluded that the Instruments were both substantially similar to the prescribed form and that there was nothing materially objectionable about the Instruments, so that the First Defendant would have had no proper basis for refusing to approve the Instruments, and in circumstances where the Instruments created rights which were properly to be construed as easements and had already been delivered to the First Defendant (for the purpose of recording the Rights as restrictive agreements) it was just and appropriate to order rectification of the register and to treat the Instruments as having been in a proper form (so as validly to effect the grant of the Rights as easements). If I am wrong on this, and the circumstances are such that the Instruments were not in a form which resulted in the grant of the Rights as easements, then the question would arise as to whether the Walkers Defendants (and White Dove) are, as I considered to be the case, entitled to require the First Defendant to approve the form of the Instruments and need to obtain such an approval or order requiring the First Defendant to give her approval, before an order for the rectification of the register should or can be made. It might have been possible to direct that additional submissions be filed on and to list a further hearing to consider this issue in advance of the filing of the appeal but since the notice of appeal and the grounds of appeal, and the respondents' notice, were filed well in advance of the listing of the consequentials hearing, it is clear that this is a procedural path that the parties did not wish, and one that it would no longer be appropriate, to traverse.

20. In any event, what is absolutely clear is that the First Defendant does not wish to make further submissions on the reasoning and conclusions set out in the parts of the Judgment that deal with

rectification and her position, to object to the making of the order for rectification or to take a position which could affect or prejudice the appeal or the parties' rights. In these circumstances, and taking into account the parties' submissions on the appropriate form of the recital, it seems to me that the recital to the order should be in the following form:

> ***"AND UPON** the Plaintiffs' appeal to the Cayman Islands Court of Appeal and the Walkers Defendants respondents' notice filed therein (the **Appeal**)*
>
> ***AND UPON** the First Defendant indicating that, having regard to the references to the Registrar's position in paragraphs 149(h) and 213 of the Judgment, she did not wish to object to an order being made for the rectification of, and directing her to rectify, the register by including references to and registering the Rights (as defined in the instruments set out at Schedule 2 appended hereto ("**the Instruments**") ("the **Rights**") as easements in the manner set out in paragraph 1 of this Order **AND UPON** all parties acknowledging and agreeing that the First Defendant's decision not to object to such an order shall not affect and shall be without prejudice to the Appeal and shall not be treated as constituting an approval by her of the form of the Instruments for the purpose of section 105 of the Act."*

21. It seems to me that the best way of dealing with the effect, for the purpose of these proceedings and the appeal, of the position adopted by the First Defendant is for the recital to record that all parties (including the First Defendant) acknowledge and accept that her decision not to object to the making of the order for rectification is not intended to affect and shall not be treated as affecting the appeal or as constituting an approval for the purpose of section 105(1) of the Act (I think that is sufficient to refer to "*approval*" rather than "*fresh or separate approval*"). This is clearly the First Defendant's position and as I understand it the approach which I have adopted will be acceptable to the Walkers Defendants and White Dove (and in any event, it seems to me that there is no proper basis on which an objection could be sustained).

The second issue – the undertakings sought by the Walkers Defendants and White Dove

22. The Walkers Defendants (and White Dove) argued that as a condition of granting the stay sought by the Plaintiffs, the Plaintiffs should be required to give cross-undertakings that they will compensate these Defendants for any loss caused by the stay and that, during the period of the stay, they will not (without the prior permission of the Court) sell, transfer, charge, dispose of or otherwise deal with their interests in the burdened land.

23. They submitted that the Court should require these undertakings as a term of the stay, in order to

produce a balanced and just outcome between the parties. They argued that until such time as the rectification took effect, it would be open for the Plaintiffs to deal with the land in such a way that disadvantaged the Walkers Defendants with regard to the binding nature of their easements. In determining whether to grant a stay pending appeal, the Court should bear in mind that a successful party is *prima facie* entitled to the fruits of his judgment (and therefore that the onus in justifying the stay was with the applicant) and should consider the balance of convenience, with particular reference to where the interests of justice lay (the Walkers Defendants referred for discussions of the Court's approach to granting a stay and the importance of the balance of convenience having regard to the interests of the parties to the judgment of Smellie J (as he then was) in *Quintin v Phillips* (unreported, 17 November 1997, Cause No. 177 of 1997 (ASJ)), at pages 2, 3, 5-6 and *Deputy Registrar v Day* [2019 (1) CILR 510] (CICA) at [15] and [24] per Goldring P).

24. The Plaintiffs accepted that a stay can be granted subject to conditions (citing *Shanda Games v Maso Capital Investments Limited* (unreported) Civil Appeal No 12 of 2017, 18 August 2017 at [29]) but submitted that the undertakings and conditions sought by the Walkers Defendants (and White Dove) were unusual and unjustified.

25. As regards the cross-undertaking in damages, the Plaintiffs said that most of the cases in which such a cross-undertaking was required related to injunctions, and this was clearly not such a case. Furthermore, and importantly, the balance of convenience was plainly in favour of a stay pending the appeal, and it was difficult to see what (if any) substantial damage the stay would cause to the Walkers Defendants (and White Dove) so that it was inappropriate to require the Plaintiffs to give the cross-undertaking as to damages sought.

26. As regards the undertaking regarding and restricting dispositions of the Plaintiff's own property, it was important to take into account the terms of the Instruments on which the Walkers Defendants (and White Dove) relied upon for their Rights. Clause 5 of the Written Agreements provided as follows:

> *"For the avoidance of doubt it is expressly agreed between the parties that all such Rights shall not affect the ability of Cayman Hotel or its successors in title or assigns to deal with parcels 27, 23 and 24 [now 12D 27 and 12C 108] whether by sale, lease, charge or otherwise and that Cayman Hotel or its successors in title or assigns shall not be obliged*

> *to consult with or obtain the consent of The Proprietors or Ellesmere or their successors in title or assigns prior to any dealing with such parcels of land"*

27. The Plaintiffs submitted that it would be wrong to restrain them from doing (by requiring them to give an undertaking not to do) that which they were contractually entitled to do.

28. Furthermore, the Plaintiffs denied that there was any real risk to the Walkers Defendants (and White Dove) during the period of the stay. The Plaintiffs were already bound by the Restrictive Agreement Term and consequentially, unless and until the Judgment was overturned on appeal, neither they nor any successors in title would be able to modify the facilities or their location, or suspend the exercise of the Rights, other than for the permitted purpose of carrying out repairs and maintenance (see the Judgment at [95]-[96]). That being the case, it was entirely unclear what the Plaintiffs could do to disadvantage the Walkers Defendants (to use the Walkers Defendant's terminology) "*with regard to the binding nature of their easements"* pending the appeal.

29. However, the Plaintiffs did, during the hearing, indicate that they would be prepared to give an undertaking in the following terms:

> "*during the period of the stay, the Plaintiffs will not, without the prior permission of this Court or the Cayman Islands Court of Appeal, sell, transfer, charge, dispose of or otherwise deal with their respective interests in Block 12C Parcel 27 and 12D Parcel 108 save for where the Plaintiffs procure from any counterparty to the transaction an undertaking to be bound by paragraphs 1 to 3 of this Order in a form which is reasonably satisfactory to the Walkers Defendants, with liberty to apply."*

30. In their written reply submissions, the Plaintiffs noted that although they had no legal obligation to permit access to their land unless and until the register was rectified so as to refer to easements, they had permitted the Lot Owners to have access to the golf course and the beach itself (past the high water mark), that the restaurant thereon remained publicly accessible and that they had taken steps to arrange for the Lot Owners to access the beach club facilities pending the outcome of the appeal, in liaison with the hotel operator currently operating on the site (and said that discussions were continuing).

31. In my view, in order to maintain the *status quo* and protect and balance the interests of the parties pending the outcome of the appeal, it should be a condition of the granting of the stay that the

Plaintiff undertake (a) to act in accordance with the Restrictive Agreement Term (save that the exercise of the Rights shall be suspended pursuant to the stay) (the ***first undertaking***); (b) not to create or grant any rights over or in relation to the burdened land (Block 12C Parcel 27 and 12D Parcel 108) which would interfere with (or have the effect of interfering with) the exercise of the Rights as easements upon and following rectification of the register, or would otherwise prevent the Rights being registered as easements, in the event that the appeal is unsuccessful (the ***second undertaking***) and (c) only dispose of or deal with the burdened land (Block 12C Parcel 27 and 12D Parcel 108) subject to the Rights as easements, to the extent that the appeal is unsuccessful (the ***third undertaking***).

32. The effect of the stay should be to ensure that in the event that the Plaintiffs' appeal fails, the Walkers Defendants (and White Dove) are in the same position as they would have been in had the register been rectified and the Rights registered as easements following the making of the order to give effect to the Judgment. Prior to rectification, the Walkers Defendants (and White Dove) are unable to exercise the Rights (as against the Plaintiffs) and the effect of the stay will be to maintain this position. The Plaintiffs will during the stay be bound by the Restrictive Agreement Term (an agreement not to modify the "*facilities as constitute the Rights*" or their location or to suspend the exercise of the Rights for any purpose other than the purpose of carrying out repairs and maintenance in respect of such facilities) but the obligation not to suspend the exercise of the Rights has no force or effect while the Rights are not registered and enforceable as easements. But it is not clear what effect the Restrictive Agreement Term has during the period in which the Rights are not enforceable (and, of course, in the event that the appeal is successful and there is no order for rectification). The Plaintiffs have not argued that the Restrictive Agreement Term will not be binding on them during the period of the stay and as I understand it, they accept that they will be bound thereby during the stay. Nonetheless, it seems to me that it would be appropriate, to avoid any uncertainty regarding the effect of the Restrictive Agreement Term during the stay to include an undertaking from the Plaintiffs to observe and be bound by it during the stay (without prejudice to their rights in the event that the appeal is successful).

33. In my view, it is also necessary and appropriate to include an undertaking not to create or grant new rights which would interfere with the exercise of the Rights if the appeal fails, the register is then rectified, and the Rights are subsequently registered as easements. It seems to me that

there is a risk that the Plaintiffs could, in theory, grant rights over the burdened land during the period of the stay which would then take priority over or interfere with the Rights once registered as easements. It may be that the grant of other easements or rights would be prohibited by the obligation not to modify the "*facilities as constitute the Rights*" in the Restrictive Agreement Term but it seems to me that this is arguable and that there should be no uncertainty on the point during the period of the stay. For this reason, it seems to me that the second undertaking is required.

34. I note that the Walkers Defendants (and White Dove) have not sought any assurance from the First Defendant that during the period of the stay she will not without giving notice to the Walkers Defendants (and White Dove) register any further rights which would affect the priority or exercise of the Rights in the event that the register is rectified, and the Rights are registered as easements. This may well be because the Walkers Defendants (and White Dove) have sought and been prepared to rely entirely on an undertaking in damages from the Plaintiffs, but as I explain below, I consider that negative undertakings are less onerous, and their scope and effect are clearer and more precise than a broadly drafted cross-undertaking in damages.

35. It also seems to me to be necessary and appropriate to include an undertaking that prevents the Plaintiffs from disposing (or purporting to dispose) of the burdened land or their interest therein free of the Rights. The *status quo* would clearly not be preserved if the Plaintiffs were able during the period of the stay (when the Rights as easements are not protected by registration) to transfer (or create a charge over) the burdened land or their interest therein to a third party who would not be subject to the Rights as easements in the event that the appeal fails, and rectification takes place. For this reason, the third undertaking is required.

36. I agree with the Plaintiffs to this extent. Requiring a cross-undertaking in damages outside cases involving interlocutory injunctions is relatively unusual and must be justified. None of the cases relied on by the Walkers Defendants (and White Dove) involved such a cross-undertaking or discussed the basis of the jurisdiction to grant them (and the authorities relied on by the Plaintiffs related to injunction cases). Nonetheless, it seems to me to be clear that the Court has jurisdiction to require a cross-undertaking in damages as a condition to granting a stay. The Court has, as the Plaintiffs accepted, a wide discretion as to when to grant a stay and when considering

whether to exercise its discretion it is open to the Court to determine that in the absence of a cross-undertaking it would not be just to order a stay. Furthermore, it seems to me that the Court can make an order subject to conditions pursuant to its case management powers (see, for an analysis of when the Court can impose conditions in the context of making an order for security for costs in England and Wales under the CPR – which of course contain CPR 3.1(3) which gives an express right to make an order subject to conditions - the judgment of Popplewell LJ in *Rowe v Ingenious Media* [2021] EWCA Civ 29, [2021] 1 W.L.R. 3189 at [35] – [43]).

37. However, as I have already explained, I consider that in the present case it is less onerous and sufficient, in order to protect the position and interests of (and minimise the risk of prejudice to) the Walkers Defendants (and White Dove) for the Plaintiffs to give undertakings in negative form.

38. I would add that in my view clause 5 of the Written Agreements does not assist the Plaintiffs. It does not permit and cannot be interpreted as permitting the Plaintiffs to dispose of the burdened land free of the Rights and that the undertakings that I have discussed are not inconsistent with that clause and the Plaintiffs rights thereunder.

39. I have set out the three undertakings that the Plaintiffs must provide as a condition to obtaining the stay they seek in the form of order attached to this judgment.

The order granting permission to appoint experts

40. The parties agree that there should be permission for each party to rely upon an expert report from one expert in the field of golf course management. However, the Plaintiffs' position is that the expert should opine only on the costs of replacement and restoration of the turf while the Walkers Defendants' position is that the expert should opine on the costs "*to replace and restore the damage to the golf course caused by the removal of turf."*

41. In their counterclaim the Walkers Defendants pleaded that:

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

a. *Cutting and removing turf from various greens, approaches, and tee boxes on the golf course in about September 2016, including (but not limited to) the turf at the practice green, the tee block at hole 5/14 and at hole 1/10 and at the 8/17, 4/13 E 9/18 holes, which the Plaintiffs have failed to replace or even re-seed, adequately or at all; and*

b. *Damaging and/or removing the flushing pump and/or parts of the flushing pump system which clean the lakes on the golf course by pumping fresh seawater into them from the canal. In or around July/August 2016 this was turned off, resulting in the lakes on the golf course becoming covered with algae and the water levels dropping significantly. In or around February/March 2017, the flushing pump was removed and part of it was left discarded near the Cayman Water Company compound by the golf course. Whilst the Plaintiffs later (in late 2017) sought to resolve the issue of algae accumulation by applying an algaecide (apparently a copper sulphate concentrate solution), this caused the death of very significant amounts of marine life. In or around late 2018 or early 2019, the Plaintiffs installed a new pump, but this failed some months later. The Plaintiffs subsequently installed replacement pumps, which were insufficient for their purpose and failed and/or remain out of operation for more of the time than they operate;*

c. *Removing other parts of the irrigation system (which, together with the flushing pump, were fixtures forming part of the land) including, in particular, sprinkler heads, pumps, satellite boxes and electrical components.*

21. *By their said actions, the Plaintiffs have deliberately, directly, and substantially interfered with the Walkers Defendants' aforementioned rights to play golf on the golf course (thereby committing a nuisance to their easement pleaded in paragraph 11(a) above), and breached the restrictive covenant pleaded in paragraph 9(a) above.*

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

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

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

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

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

PARTICULARS

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

42. The Plaintiffs noted that the Walkers Defendants had pleaded (at [20(a)]) that the Plaintiffs had cut and removed turf from the golf course; that (at [22(a)]) the Walkers Defendants had requested the Plaintiffs to make good the damage they had done, "*namely by … replacing any and all turf which the Plaintiffs had removed with turf of comparable quality"* and (at [24(a)]) that the Walkers Defendants sought "*an order for damages to be assessed in respect of the cost to them of having the works of replacement and restoration of turf…carried out."* The Plaintiffs argued that in these circumstances the Walkers Defendants' draft wording regarding the scope of the expert's opinion was broader than their pleading and sought an order that the expert opine not just on the cost to replace and restore the removed turf, but the cost to "*replace and restore the damage to the golf course caused by the removal of turf."* The Plaintiffs said that it appeared that the Walkers Defendants were seeking (retrospectively) to expand the quantum of the turf removal counterclaim, so as to require the Plaintiffs to restore the golf course *in toto* to its 2016 state. The nuisance to the easement pleaded in the counterclaim and established at trial was based upon removal of turf. In order to put the Walkers Defendants (and White Dove) back in the position they would have been in but for the removal of turf, the Plaintiffs were required to compensate them for the cost of replacing and restoring that which was removed. The Plaintiffs had no general responsibility to maintain the golf course and no liability to pay the costs of restoring any part of the course outside of the parts where turf had been removed.

43. The Walkers Defendants submitted that their counterclaim sought (at [24]) damages to be assessed in respect of the costs to them of having the works of replacement and restoration of turf (that had been cut and removed) carried out. They argued that in these circumstances, the proper scope of the expert evidence in relation to quantum was the cost of replacing and restoring the damage to the golf course caused by the removal of turf. The Plaintiffs argued for a scope of evidence that was limited to the replacement and restoration of the removed turf. However, this was too restrictive since it could, for example, result in expert evidence that only considered the cost of turf covering the area of turf that had actually been removed. However, damages in respect of the cost of just replacing the removed turf would not properly compensate the Walkers Defendants if, for example, as a result of some damage, for example to a green, the turf on the whole of that green had to be replaced in order for the green to be playable again.

44. The counterclaim averred that the Plaintiffs had committed various wilful acts of damage and destruction to the golf course by, *inter alia*, cutting and removing turf from various locations, that the Plaintiffs had as a result interfered with the Walkers Defendants' Golf Course Rights, and that the Walkers Defendants had suffered loss and damage as a result. In giving the particulars of that loss and damage the Walkers Defendants stated that they sought an order for damages to be assessed in respect of the costs to them of doing the necessary work to replace and restore the turf. In these circumstances, it seems to me to be unobjectionable that the expert be instructed to opine on the costs of the work required to replace the turf removed and to restore the area from which the turf has been removed and replace turf in and to restore any adjacent areas on the golf course that were damaged by reason of the removal of the turf or whose repair is otherwise needed so as to make the affected parts of the course playable again (to the extent required in order to allow the Walkers Defendants to exercise their Golf Playing Rights).

45. The Walkers Defendants have claimed damages caused by the Plaintiffs' interference with their Golf Playing Rights, which arose as a result of the cutting and removal of turf from various locations on the golf course. They have identified and relied on the abatement measure. The underlying principle is that if the injured party exercises his right to abate a nuisance, he can recover the reasonable cost of so doing. The Walkers Defendants seek compensation for the costs of repairing and restoring the course to remedy the damage done (caused) by the removal of turf, so as to ensure that the Golf Course rights can be properly exercised. If in order to make the course playable again in the areas affected by the turf removal it is necessary to do more than just replace turf from the place from which it was removed but also to restore the adjacent area or reinstate a discrete unit or part of the course (such as a green) of which the area from which the turf was removed formed part, then it will be relevant and of assistance to have the expert evidence address this (and the parties will then be able to make submissions as to whether as a matter of law the relevant cost is recoverable and can be considered as loss caused by the interference with the Golf Playing Rights). The causation and quantification issues will be the subject of further argument and in due course a decision by the Court made after a further hearing. By expanding the scope of the expert evidence, I am not prejudging the outcome of these questions but only ensuring that the expert evidence covers all the territory that will be relevant and may assist the Court in disposing of these issues.

Costs – the basis on which the assessment should be made

46. There is no dispute between the parties as to the appropriate basis for taxation. It is agreed that the standard basis should apply.

Should the costs of the claim and the counterclaim be assessed separately or together?

47. In the prayer for relief in the counterclaim, the Walkers Defendants sought:

> *"(1) A Declaration that the Rights give rise to restrictive covenants and easements in favour of the Walkers Defendants in accordance with paragraphs 8 to 15 above, but subject to paragraph 16(d)(i) above.*
>
> *(2) Subject as stated in paragraph 19 above, an Order directing that the register be amended by correcting the legal description of the Rights to either "Easements & Restrictive Agreements' or 'Easements' (as the Court may determine), but subject to paragraph 16 above.*
>
> *(3) Damages under paragraph 24 above to be assessed.*
>
> *(4) Interest as aforesaid.*
>
> *(5) A Declaration that the Walkers Defendants, their servants, or agents, are entitled to enter on the Britannia golf course aforesaid for the purposes of and as necessary for carrying out the works of replacement and restoration set out under paragraph 24 above.*
>
> *(6) Costs*
>
> *(7) Such further relief as the Court shall think necessary or just"*

48. The Plaintiff submitted (and it was agreed that) the follow-the-event principle was the starting point from which the Court can readily depart when determining what costs order to make in the exercise of its general discretion under section 24(1) of the Judicature Act (2021 Revision) (citing GCR O.62, r.4(2) and *Coban v Josephs* (CICA appeal no. 23 of 2019, 28 September 2020, unreported) at [45]). The Plaintiff argued that a counterclaim will ordinarily be treated as a separate event for these purposes and relied on *Sagicor General Insurance (Cayman) Limited & others v Crawford Adjusters Cayman Limited* [2011 (2) CILR 471] at [28]. There, Henderson J held that "*Sagicor was the successful party in the trial of the counterclaim. Ordinarily, it would*

be entitled to its costs on the standard basis because costs follow the event. Sagicor can be denied part or even all of its costs if I am satisfied that it caused a significant increase in the length or cost of the proceedings." The Plaintiffs submitted that in this case the counterclaims (save those covered by paragraphs (1) and (2) of the prayer, which sought relief in the event that the Walkers Defendants successfully defended the Plaintiffs' claims) (the counterclaims covered by paragraphs (3), (4) and (5) of the prayer were referred to by the Plaintiffs as the factual counterclaims and I shall do the same). The Plaintiffs submitted that the factual counterclaims raised entirely separately issues, asserting that the Plaintiffs were guilty of interfering with the Rights in various ways.

49. In contrast, the Walkers Defendants submitted that the costs of the Plaintiffs' claims and the costs of the counterclaim should be dealt with together so as properly to reflect the manner in which the proceedings and the trial were conducted, with all issues being considered together, as well as the parties' respective successes. They argued that considerable challenges would arise in the taxation process and the preparation of the parties' bills of costs if the Court were to make separate orders in respect of the costs of the claim and counterclaim. This would be a particular problem in relation to heads (1) and (2) of the Walkers Defendants' counterclaim which largely if not wholly overlapped with the Plaintiffs' unsuccessful claims. They accepted that, since it had been agreed that the relief claimed under head (5) of the counterclaim (and whether the declaration sought there should be granted) was to be dealt with by way of a separate and subsequent hearing, and had therefore not been considered at the trial, there were no relevant costs to be assessed for this part of the counterclaim at this stage.

50. In response, the Plaintiffs said that treating the claim and counterclaim as separate for the purpose of assessing costs was appropriate. While the claim and counterclaim had been tried together the factual counterclaims had entailed a separate order for discovery, extensive witness evidence and cross-examination, very little of which would have been required if the claim had been tried alone. Furthermore, dealing with the costs collectively would not of itself facilitate a fairer assessment process or properly reflect the different outcomes of the claim and counterclaim, since the Plaintiffs had lost most (but not all) of their claim while the Walkers Defendants had lost most of the (time consuming) factual counterclaims. The Plaintiffs also argued that the declaration sought in paragraph (1) of the prayer had not featured in the body of the Walkers Defendants' counterclaim and the order for rectification sought in paragraph (2) was not

addressed separately in the Walkers Defendants' skeleton argument for trial or in their closing submissions. Therefore, they argued, this part of the counterclaim cannot have given rise to any substantial costs on the part of the Walkers Defendants, separate from the costs of defending the Plaintiffs' claim. The Plaintiffs submitted that the bulk of the counterclaim (as reflected by the Walkers Defendants' submissions) related to the factual counterclaims and the costs incurred in relation to the factual counterclaims ought to be relatively straightforward to separate out from those incurred in the claim given the different factual elements relevant to them.

51. I agree with the Plaintiffs. In my view, the claim and counterclaim raised different issues and the costs should be dealt with separately. As Mr Randall QC noted during his oral submissions, GCR O.62, r.4(7) allows the Court to make an order in respect of the "*costs relating to a distinct part of the proceedings*" so that if the Court regarded the counterclaim as a distinct part of the proceedings in this case, distinct from the claim, that would be a basis for making two separate orders. I do and it seems to me that the costs of the claim and counterclaim should be assessed and dealt with separately.

The costs of the claim

52. The Plaintiffs accepted that they should pay most of the Walkers Defendants' and White Dove's costs of the claim but argued that such payment should be capped at 75% of the taxed figure. They argued that a 25% reduction in the recoverable costs of the Walkers Defendants (and White Dove) was appropriate in light of (i) the claims in relation to which the Walkers Defendants (and White Dove) were unsuccessful; (ii) their loss on the central issue of the Covenant Not to Build or Develop and (iii) the Walkers Defendants' unreasonable refusal to mediate and to respond to the Plaintiffs' without prejudice save as to costs offer to settle made on 20 October 2020. In that offer, the Walkers Defendants were invited to consent to the declarations and orders sought by the Plaintiffs and to discontinue the counterclaims, with each party to bear their own costs.

53. The Plaintiffs argued that they had been successful in two of their claims, namely the claim for a declaration that the Rights were not binding upon them as easements and their claim for an order pursuant to section 96 of the RLA to modify or discharge the Tennis Court Rights. They submitted that they ought to be entitled to their costs of these claims (or issues) but accepted that given the difficulties in separating out the costs of these elements (especially the first), it was

more appropriate to make a proportionate reduction in the costs order made in favour of the Walkers Defendants and White Dove to reflect both the non-recoverability of their costs of unsuccessfully defending these claims and the award of costs to the Plaintiffs that would otherwise have been made in relation to these claims. In addition, a further discount was required to reflect the failure of Walkers Defendants and White Dove pleaded defences in relation to restrictive agreements (which were based upon the Covenant Not to Build or Develop). Furthermore, the Plaintiffs argued that a further discount was appropriate to reflect the unreasonable conduct of Walkers Defendants in refusing to engage in a mediation in response to the Plaintiffs' offer dated 13 October 2020 or to respond to the Plaintiffs' without prejudice save as to costs offer to which I have already referred.

54. The Walkers Defendants (and White Dove) argued at the hearing that the Plaintiffs should pay 85% of the Walkers Defendants' and White Dove's costs of the claim and counterclaim. As regards the claim, they submitted that they had been almost entirely successful. They had defeated the Plaintiffs' claims that the restrictive agreements were not properly so-called, that they were not properly registered and the Plaintiffs' claim for rectification in respect of restrictive agreements. Further, they had defeated the Plaintiffs' claims that the Rights were not easements. The only exception to this was in respect of the Tennis Court Rights, where their rights over the area of both courts, rather than only one, had been extinguished. In these circumstances, they said, it was difficult to see how the Walkers Defendants (and White Dove) could be described as anything other than the winners in respect of the claim and so should be entitled to all their costs.

55. The authorities in this area emphasise the importance in the exercise of the discretion on costs of determining who was the winning party (these authorities were summarised in the judgment of Hickinbottom LJ in *Kupeli and others v Cyprus Turkish Airlines* [2019] 1 WLR 1235). However, in deciding whether to apply the general rule, the Court is entitled, having regard to all the circumstances, to consider whether there are good reasons to depart from the general rule, including whether the successful party lost (and the losing party succeeded) on one or more issues which had a material impact on the conduct of the trial and costs such that it would be just to reduce the costs otherwise to be awarded to the successful party. In such a case, the Court is required to bear in mind that almost invariably overall success involves losing on some issues.

56. In the present case, as both parties accepted, the Walkers Defendants are to be treated as the successful parties in respect of the claim. They succeeded in establishing that the Instruments included restrictive agreements which are binding on the Plaintiffs and easements that are binding on the Plaintiffs, albeit only upon rectification of the register. The Plaintiffs sought to establish that they were not bound by the Rights created by the Instruments and failed to do so. However, the Walkers Defendants lost on significant issues which had a material impact on the parties' costs of preparing for and at the trial.

57. The Plaintiffs *failed* to establish that the Instruments did not include restrictive agreements that were binding on them and to establish that the Instruments did not include easements but *did succeed* in showing that the easements were not binding on them unless rectification was ordered but *failed* to establish that rectification should not be granted. The Defendants *succeeded* in establishing that the Instruments included restrictive agreements that were properly registered and binding on the Plaintiffs but *failed* to establish that the restrictive agreements were in the terms for which they contended and *succeeded* in establishing that the Instruments included easements but *failed* to establish that the easements were properly registered and binding on the Plaintiffs but then *succeeded* in establishing an entitlement to rectification.

58. In my view, in these circumstances, the appropriate order is that the Plaintiffs pay 80% of the costs of the Walkers Defendants (and White Dove) incurred in relation to (and of and incidental to) the claim. In my view an 80/20 split fairly reflects the significance, extent, and impact on costs of the issues on which the Walkers Defendants succeeded and failed. Having reviewed the relevant correspondence and surrounding circumstances, I have concluded that the Walkers Defendants' refusal to mediate or to respond to the Plaintiffs' offer was not unreasonable.

The costs of the counterclaim

59. The Plaintiffs submitted that the counterclaim involved four separate claims, namely a claim in rectification, and three alleged nuisances to the Walkers Defendants' easement by reason of (i) the removal of turf (ii) the removal of the flushing pump and (iii) removal of items from the irrigation system. The Plaintiffs said that the Walkers Defendants and White Dove had succeeded in their rectification counterclaim, and in establishing a nuisance to the easement by reason of the turf removal but had failed on the remaining parts of the counterclaim.

60. The Plaintiffs argued that the rectification counterclaim did not take up substantial time in trial preparation or at trial. The bulk of the argument had related to the Plaintiffs' rectification claim and the rectification counterclaim had not been addressed in any substantive way in the witness statements or in discovery. The scope of the dispute on turf removal (on which the Walkers Defendants and White Dove had succeeded) had been narrow (it was not in dispute that turf had been removed and the only issue had been the impact of that removal). By contrast, the disputes in relation to the flushing pump and the irrigation system had raised a number of factual matters. In terms of discovery, the majority of the documents disclosed related to matters postdating the turf removal in September 2016. Most of the witness evidence and an even greater proportion of the live cross-examination related to elements of the counterclaim in relation to which the Walkers Defendants (and White Dove) had been unsuccessful. Many witnesses had mentioned the turf removal, but there had been only a limited amount to say in relation to this. The focus of the evidence had been on the other elements of the factual counterclaims. The Plaintiffs argued that while it was impossible to be precise, a rough estimate of the allocation of the time spent (both before and at trial) on the three core claims in the counterclaim would be 35% for turf removal, 45% for the flushing pump issue and 15% for the irrigation system issue.

61. In addition, the Plaintiffs argued that the costs order should also reflect the fact that the Walkers Defendants and White Dove had failed on a central allegation running through the heart of their counterclaim submissions, namely that the reductions in the level of maintenance at the golf course were "*all part of tactics to wear down the Defendants and to force through their desired and doubtless highly profitable redevelopment of the Golf Course.*"

62. The Plaintiffs said that in these circumstances the Court should start from the position that the Plaintiffs should pay the Walkers Defendants' and White Dove's costs of the rectification and turf removal counterclaims and that the Walkers Defendants and White Dove should pay the Plaintiffs' costs of the balance of the counterclaim; however, in order to avoid a complex taxation and orders that would inevitably result in the setting-off of the sums assessed, there should be no order as to the costs of the counterclaim.

63. The Walkers Defendants and White Dove accepted that they had only been successful in respect of one of the heads of damage alleged but submitted that the turf removal issue, on which they had been successful, had been by far the most contentious of those issues and that it had occupied

the most time at the trial and generated the most documents and argument. It was, they said, also the most obvious and therefore the most significant element of damage to the golf course as a whole. The Walkers Defendants and White Dove sought to apply their 85/15% allocation of costs to the counterclaim as well as to the claim and did not offer a more detailed analysis of how the costs of the counterclaim should be allocated (although it appears that since the reduction of 15% which the Walkers Defendants and White Dove accepted should be applied was based on the impact of their lack of success in relation to the Tennis Court Rights and the counterclaim and they argued that the costs of dealing with the Tennis Court Rights was low, most of 15% related to the counterclaim).

64. In my view, the Walkers Defendants (and White Dove) are to be treated as the successful parties in respect of the counterclaim. They succeeded in establishing that the Plaintiffs were liable for an actionable interference with the Walkers Defendants' (and White Dove's) Golf Course Rights as easements. However, their failure on the other claims made in the counterclaim, which on any view resulted in a substantial part of discovery and witness evidence and of the time spent at the trial of the counterclaim, justified a substantial discount to the amount of costs which the Walkers Defendants (and White Dove) are entitled to recover. It seems to me that the Plaintiffs' admittedly broad-brush allocation of 35%, 45% and 15% is not wholly unreasonable although the rather self-serving relatively low allocation of time to the turf removal issue seems to me to be unjustified. I would treat the turf removal issue as giving rise to at least 50% of the time spent both before and at trial (with the flushing pump issue taking approximately 40% of the time and 10% of the time being allocated to the irrigation issue). In the circumstances, weighing and taking into account all the relevant factors, it seems to me that the Plaintiffs should pay 20% of the Walkers Defendants' (and White Dove's) costs of and incidental to the counterclaim. It seems to me that material weight should be given to the fact that the Walkers Defendants (and White Dove) were the successful parties, and this justifies an order that results in them being paid at least some of their costs, and in the circumstances 20% seems to me to be a just and fair figure. I have taken into account the fact that the Walkers Defendants (and White Dove) failed to make good their allegations that the Plaintiffs' litigation tactics were inconsistent with the overriding objective and abusive by seeking to grind them down, although I do not consider that this justifies a substantial reduction in the amounts to be awarded to the Walkers Defendants (and White Dove).

Pre-commencement costs

65. The Walkers Defendants sought an order pursuant to Order 62 r 4(7)(d) that the Walkers Defendants' taxable costs *"be deemed to include all legal costs incurred by them in relation to the dispute on or after 5 May 2016*." The Plaintiffs argued that such an order was inappropriate, and that the recoverability of such costs was a matter to be determined, on an item-by-item basis, during the process of taxation.

66. The Walkers Defendants argued that there had been a significant period of time before the issue of proceedings during which there had been correspondence involving legal advisers regarding the issues in dispute between the parties, written against a background of threatened court proceedings. In their written skeleton argument they set out a brief chronology and listed the main items of correspondence. For example, they noted that there had been a dispute between the parties as early as May 2016, when in their letters dated 5th May 2016, the Plaintiffs first sought to contend that the Britannia owners were mere "*licensees*," and that this had led to Bodden & Bodden being instructed to dispute this claim and to assert that the Rights were restrictive agreements. The Walkers Defendants submitted that in these circumstances, the pre-action costs could not sensibly be divorced from the litigation (since the correspondence to which they referred was directed at precisely the issues in dispute in these proceedings, and from July 2016 onwards took place against the background of the Plaintiffs' expressly stated intention of commencing these proceedings) and were to be treated as directly relevant to the proceedings as ultimately constituted, so that, on the authorities, the Walkers Defendants were entitled to recover their pre-action costs on taxation.

67. The Plaintiffs argued that there was insufficient evidence before the Court safely to support the conclusion that *"all legal costs incurred by [the Walkers Defendants] in relation to the dispute on or after 5 May 2016"* were properly to be considered costs *'"of and incidental to*" the present proceedings. Furthermore, the Plaintiffs submitted, there were issues in dispute which required further evidence and submissions. For example, as Mr Hart had noted in his Second Affidavit, the Plaintiffs did not accept that the fees paid or due to Bodden & Bodden were recoverable in circumstances where the litigation had been conducted by Walkers on behalf of the Walkers Defendants. These were matters to be addressed on an item-by-item basis during taxation and the Walkers Defendants would not be prejudiced by leaving the issue to the taxation process.

68. I agree with the Plaintiffs. It would be inappropriate and premature to make the order sought by the Walkers Defendants at this stage. The orders for costs will cover the costs of and incidental to the claim and counterclaim and so will be capable of covering pre-issue costs. It will be a matter for the taxing officer to consider and decide. Where the costs were incurred in contemplation of the litigation or for the purpose of generating material that was used in the proceedings (and such use was reasonable in the circumstances), the taxing officer may well allow the costs to be recovered in the assessment.

Should the Court make an order for a payment on account and if so in what amount?

69. GCR O.62, r.4(7)(h) provides as follows (underlining added by me):

> *"(7) The orders which the court may make under this rule include an order that a party must pay-*
>
> *(h) where the Court orders the paying party to pay costs subject to taxation, a reasonable sum on account of costs, such sum to be assessed summarily."*

70. The Plaintiffs do not oppose a payment on account of costs pursuant to GCR O.62, r 4(7)(h). The only issue between the parties is the appropriate quantum of that payment on account. What is a "*reasonable sum*" in the circumstances?

71. In my recent judgment in *Jafar v Abraaj Holdings (in official liquidation)* (14 January 2022, unreported) I summarised the approach which the Court should take when assessing a reasonable sum for the purposes of a payment on account (referring to the judgment of Kawaley J in *Al Sadik v Investcorp Bank BSC* [2019 2 CILR 585]:

> *"89. The approach which the Court should take when determining a reasonable sum (and the quantum of the payment on account) was clearly summarised by Kawaley J in Al Sadik by reference to the judgment of Vos J in United Airlines, as follows (underlining added):*
>
> *"26 Ms. White properly conceded that the court "should be conservative in making its [summary] assessment" for the purposes of an interim costs order (written submissions, para. 5.10). She referred the court to a helpful passage in the transcript of a costs hearing before Vos, J. (as he then was) in United Airlines Inc. v. United Airways Ltd. (6). A permanent injunction restraining the defendants from using certain signs by way of summary judgment in a*

passing-off action. The entitlement of the plaintiff to an interim costs award was not challenged. The transcript concluded as follows:

> *"This is an application for an interim payment of costs in this case. The bill of costs provided by the Claimant shows that they have incurred in this whole action the total sum of $191,871, or £117,482. What Mr Jones says in answer to this application is that the bill is wholly disproportionate . . . I think it would be very hard for me to say, looking at this bill, that it is in any way disproportionate or unreasonable.*

That said, there has not been an opportunity to consider the bill in detail, and there is always the possibility that on an assessment the Defendants will manage to establish that the bill is on the high side.

What I have to determine is not the irreducible minimum that is likely to be ordered, but a reasonable estimate of what is likely to be awarded. I intend to take a fairly conservative view of that . . . I am going to assess the amount that should be paid by way of interim payment at the sum of £50,000, to be paid within 35 days."

27 In United Airways, just less than 50% of the total costs claimed was awarded by way of interim costs, although the total costs claimed did not appear to the judge to be excessive. This guidance was particularly helpful because the principal challenge to the present application was also that in global terms the sum claimed was excessive. The principles governing the broad approach to summary assessment which the first defendant commended to the court were not challenged. I accordingly found that—

(a) the aim of summary assessment was to reasonably estimate the amount of the likely final award;

(b) in carrying out that assessment, the court should adopt a conservative approach, allowing for a reduction on taxation even if the instinctive feeling of the court was that the impugned claim was not unreasonable."

90. In United Airlines Vos J awarded 42.5% of the total sum claimed by the claimant. In Al Sadik Kawaley J awarded, erring as he said on the side of caution, an interim payment of 40% of 85% of the amount of indemnity costs claimed by the first defendant. In Perry I decided (at [72(e)]) that the payment on account should be 20% of the sums claimed. But these decisions are merely indicative of the approach to be followed and not precedents since each case is fact sensitive and must be decided on its facts having regard to the relevant circumstances and a balancing of the risks of prejudice to both the Plaintiff and the Defendants."

72. In the present case, the Walkers Defendants seek a payment on account calculated on the following basis. First, the amount of their costs, calculated on the basis that any assessment will be on the standard basis, is to be discounted by 15% (to establish 85% of those costs) and then secondly, a further 40% discount is to be applied (to establish 60% of the 85%). In their

supplemental submissions, filed with my permission after the hearing, the Walkers Defendants argued that if separate awards were made in respect of the claim and the counterclaim, then for the purpose of quantifying the amount of a payment on account of costs, 70% of the Walkers Defendants' recoverable costs should be apportioned to the claim, and 30% to the counterclaim. The Walkers Defendants said that in the time available they had been unable to apportion time as between the claim and the counterclaim in a mathematically precise way (and that it was not easy to do so because there had been a significant overlap in terms of the factual matrices of the claim and the counterclaim and of the fact that they were tried together). They submitted that the most practical approach, which was also sufficiently accurate so as to be objectively justifiable, was to use an analysis of the core documents, namely the pleadings, the written submissions, and the Judgment. Those materials encompassed both the factual and legal elements of the overall case and were a more direct reflection of the parties' approach to the various issues, in terms of both relative importance and also legal complexity. In their supplemental submissions the Walkers Defendants produced a table analysing the number of paragraphs in these documents dealing with the claim, the counterclaim and general matters and concluded that the preponderance of both parties' time and resources were expended on issues relating to the claims (which they submitted was unsurprising given the extensive and complex legal arguments engaged by those claims, together with the potentially wide ranging implications of the findings by the Court in respect of the Rights). They submitted that a 70/30 split in respect of the claim and counterclaim respectively would properly reflect the justice and practical reality of the case in the round and assist in providing the reasonable estimate which the Court had to make for the purposes of quantifying a payment on account.

73. The details of the Walkers Defendants' costs were set out in the Second Affidavit of Ms Daisy Boulter (***Boulter 2***). Ms Boulter said that the Walkers Defendants expected their costs recoverable upon taxation to be just over US$2.6m (see table B at [9] of Boulter 2 and the supporting schedules at pages 2 to 5 of Exhibit DCB-2). This figure was calculated by, *inter alia,* capping the hourly rates of the relevant fee earners and Leading Counsel in accordance with paragraph 3 of Practice Direction No.1/2011, excluding the fees of UK junior counsel and excluding fees of Leading Counsel prior to the date of his limited admission. The total comprised US$1,719,057.19 for Walkers' fees; US$75,442.07 for Walkers' disbursements; US$449,730 for Leading Counsel's fees, US$ 362,880.93 for Bodden & Bodden's fees and US$2080.98 for Bodden and Bodden's disbursements.

74. Accordingly, using the amounts claimed and the methodology proposed by the Walkers Defendants:

(a). US$1.82m is to be allocated to the costs of the claim (representing 70%) and US$780,000 is to be allocated to the costs of the counterclaim (representing 30%).

(b). these figures are to be discounted by 15% so that US$1.547m is to be allocated to the costs of the claim and US$663,000 is to be allocated to the costs of the counterclaim.

(c). I have ordered that the Walkers Defendants are entitled to recover 80% of their taxed costs of the claim, so that US$1,237,600 represents the amount payable in respect of the claim; and I have ordered that the Walkers Defendants are entitled to recover 20% of their taxed costs of the counterclaim, so that US$132,600 represents the amount payable in respect of the counterclaim.

(d). the Walkers Defendants claim that 60% of these sums represent a reasonable sum which is to be paid on account, namely US$742,560 for the claim and US$79,560 for the counterclaim (giving a total of US$822,120).

75. The Plaintiffs submitted that the Walkers Defendants' approach was too generous. The figure of 85% as the estimate for the amount of their costs that was likely to be recoverable on taxation was too high and 60% as the appropriate discount to be applied in determining the reasonable sum to be paid on account was too low. They submitted that the Walkers Defendants had failed to allow for any discount to reflect the reduced recovery likely on a standard taxation, as indicated was required in *Al Sadik* at [29]. The Plaintiffs did not, however, argue that the Walkers Defendants had failed to provide sufficient particulars of their costs to justify a payment on account.

76. The Plaintiffs also challenged the reliability and reasonableness of the Walkers Defendants apportionment of costs as between the claim and counterclaim. They said that even if it was reasonable to adopt the Walkers Defendants' approach, and accept that 70% of the costs of the pleadings, written submissions and the trial arose from the claim (and noted that at this stage neither the Plaintiffs nor the Court had any means of verifying the material which might underlie

such an estimate), it would be necessary to make an adjustment and allowance for the substantial costs relating to the counterclaim with respect to discovery (discovery by list only took place in relation to the counterclaim) and witness evidence.

77. The Plaintiffs submitted that the payment on account should be calculated:

(a). by ignoring any pre-issue costs and the sums charged by Bodden & Bodden.

(b). by assuming that 50% of the Walkers Defendants costs were incurred in relation to the claim and 50% were incurred in relation to the counterclaim.

(c). by assuming that 65% of the costs claimed will be recovered on taxation on the standard basis.

(d). by calculating 40% of the resulting sum to apply the same, conservative, discount as was applied by Kawaley J in *Al Sadik*.

(e). with the result that the reasonable sum should be no more than US$270,000.

78. I have decided that the reasonable sum to be paid on account in the present case, adopting what I consider to be a suitably conservative approach having regard to all the circumstances, is US$420,000. There are a number of material uncertainties which need to be reflected by appropriate discounts (including, as I note below, some uncertainty as to whether the Plaintiff might face some practical difficulties and additional cost in recovering any overpayment in the event that its appeal is successful although I do not regard this as material). The methodology and thought process I have followed to determine this sum can be summarised as follows:

(a). the total claimed by the Walkers Defendants excluding Bodden & Bodden's fees and disbursements is US$2,244,229.26 (as I understand it this sum excludes any pre-issue costs).

(b). in view of the challenge to and uncertainty surrounding the recoverability of these sums I shall apply a discount of 70% to Bodden & Bodden's fees and disbursements and include 30% of these amounts, being US$109,488.57 (US$364,961.91 x 30% = US$109,488.57).

In my view it is appropriate to include a modest percentage of their fees and disbursements to take account of the possibility that they will be included in the taxation.

(c). this produces a sub-total of US$2,353,717.83.

(d). in my view, a 65/35 apportionment as between the costs of the claim and counterclaim is reasonable in the circumstances. I consider that a 65/35 split represents a fair and reasonable allocation of costs as between the claim and the counterclaim, even though it is based on a broad-brush approach rather than a full and detailed analysis of the relevant data. This takes into account in particular the amount of time spent on the technically complex and authority heavy issues relating to the claim (in my view the parties legal teams devoted a substantial amount of time and resources to dealing with the complex legal issues and extensive citation of authority arising on the claim which took up a substantial amount of the time at trial) but gives due weight to the fact that discovery and the witness evidence was devoted primarily to the counterclaim. I have carefully considered the Walkers Defendants' methodology and the challenge made to it by the Plaintiffs. In my view, the 65/35 apportionment represents a preferable and a fair and reasonable apportionment in all the circumstances. Accordingly, I shall use this apportionment for the purpose of calculating the reasonable sum. 65% of US$2,353,717.83 is therefore attributable to the claim (and equals US$1,529,916.59) and 35% is attributable to the counterclaim (and equals US$823,801.24).

(e). to determine the amount of the total claimed that will be determined to be payable on a taxation on the standard basis I shall apply a discount of 25% (and use 75% of the total sums claimed). This seems to me to be a reasonable discount in the circumstances. 75% of US$1,529,916.59 is US$1,147,437.44 and 75% of US$823,801.24 is US$617,850.93.

(f). 80% of US$1,147,437.44 represents the estimate of the Walkers Defendants' taxed costs on the claim payable by the Plaintiffs and is US$917,949.95. The Plaintiffs are liable for 20% of the Walkers Defendants taxed costs on the counterclaim, that is 20% of US$617,850.93 which is US$123,570.19. The total is US$1,041,520.14.

(g). finally, I consider that a further discount of 60% should be applied to this total sum, so that the payment on account is equal to 40% of the aggregate estimated taxed costs payable to the Walkers Defendants on the claim and counterclaim. This (40%) figure is US$416,608.06 which I have rounded up to US$420,000.

79. This, as I have said, is a summary of my methodology. The determination of a reasonable sum involves an exercise of judgment taking into account all the circumstances and adopting a conservative approach with a view to finding a figure that fairly and reasonably represents an estimate of the likely final award of costs. This is what I have sought to do.

80. The sum of US$420,000 must be paid within 21 days of the date of the order drawn up to give effect to this judgment.

How should the payment on account be held or dealt with pending the outcome of the appeal?

81. The Plaintiffs noted that the Walkers Defendants (and White Dove) included three strata defendants (comprising a total of over 170 units) and the majority of the owners of the non-stratified lots on the Britannia Estates (some 20 units). The Plaintiffs said that they were therefore concerned that if the payment on account was made and distributed among the various owners of these units, and the Plaintiffs were subsequently successful in their appeal so that some or all of the payment had to be repaid, there could be difficulties in recovering the payment, either because of the need to enforce an order for repayment from so many parties or because some of the parties might have spent and become unable to fund the repayment of the payment on account.

82. The Plaintiffs proposed three alternative methods for ensuring that their contingent right to recover the payment on account was protected. First, that the Walkers Defendants were each made jointly and severally liable to repay the total payment on account. This was their preferred solution. Secondly, that the payment on account be held by Walkers pending the final determination of the appeal. Thirdly, the Plaintiffs said that they were willing to accept an order apportioning the repayment obligation among a limited number of entities. The Walkers Defendants had, the Plaintiffs said, indicated that a similar order might be acceptable on the basis that the repayment obligation be apportioned in accordance with the number of unit holders as follows: the Second Defendant (Strata Plan No 79, Lion's Court): 29%; the Third Defendant

(Strata Plan No 147, Regent's Court): 39%; the Fourth Defendant (Strata Plan No 215, King's Court): 23% and the Fifth Defendant (Britannia Proprietors): 9% (apportioned equally between the 17 proprietors of Britannia Estates). The Plaintiffs accepted that the proportions suggested in relation to the Second to Fourth Defendants were reasonable but argued that they would have difficulties in enforcing any repayment obligation against the strata corporations after they had distributed their share of the payment on account to their Lot Owners. Accordingly, the Plaintiffs invited the Court, if this approach were to be adopted, to order that any part of the payment on account paid to the Second to Fourth Defendants should be retained by those Defendants and not paid on to their Lot Owners pending the final disposal of the appeal. The Plaintiffs also sought an order that the 18 Britannia Estates owners that are part of the Fifth Defendant be jointly and severally liable in relation to repayment of 9% of the payment on account since, otherwise, in circumstances where the Plaintiffs had won the appeal and an order had been made requiring repayment of the payment on account, the Plaintiffs would have to pursue eighteen individuals for their aliquot share of that payment. The Plaintiffs said that they were content that the terms of any order for the repayment of the payment on account be left to the Court of Appeal in the event that their appeal was successful.

83. The Walkers Defendants argued that the Court should decline to make any of the orders sought by the Plaintiffs. They were both unnecessary and unfair to the Walkers Defendants. Mr Randall QC during his oral submissions said that none of the Walkers Defendants were overseas defendants and that they all owned property of substantial value within the jurisdiction of this Court. He submitted that it was fanciful for the Plaintiffs to argue that they would struggle to recover the payment on account if they succeeded on the appeal. Enforcement over the Walkers Defendants' real estate and immoveable property would not give rise to serious problems. Mr Randall QC also said that he was authorised to say that the Walkers Defendants intended to use the payment on account to discharge current and future legal bills for this litigation. Furthermore, the Walkers Defendants argued that the terms on which any repayment had to be made in the event of a successful appeal could and should be left to the Court of Appeal.

84. The Walkers Defendants, in any event, opposed an order making each of them jointly and severally liable to repay the payment on account. They said that each of the Walkers Defendants had been required to contribute sums towards the payment of costs in respect of this litigation and the payment on account was designed to indemnify and compensate them for those costs.

None of them was entitled to the benefit of the whole of the interim payment, as opposed to a share of it depending upon what had been paid by them or on their behalf and in these circumstances, it would be unfair to require that any one of the Walkers Defendants should be called upon to repay the entirety of the interim payment (even, I would add, if they had rights of indemnity against the other Defendants or Lot Owners).

85. They further submitted that the second alternative (the payment on account to be retained by Walkers pending the outcome of the appeal) was inappropriate and unfair. Mr Randall QC said that making an order for a payment on account on terms that required the funds to be retained by the successful parties' attorneys involved taking away with one had what the Court had given with the other. The Walkers Defendants would be deprived of substantially all of the benefit of the order, since the order would no longer provide the early cashflow assistance that the successful litigant was entitled to.

86. In their written submissions, the Walkers Defendants had indicated (as was mentioned by the Plaintiffs) that if, contrary to their primary case that no orders should be made, the Court was minded to make an order that imposed a form of collective liability on the Walkers Defendants to repay the payment on account, it would be preferable to adopt a "*rough and ready apportionment*" based on and to impose joint and several liability in the proportions I have set out above.

87. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC566 (Comm) at [24], Christopher Clarke LJ said as follows (underlining added):

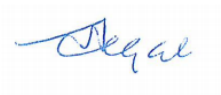
> *"In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."*

88. The fact that a paying party would have difficulty in recovering any overpayment (for example because of the limited financial resources or solvency of the receiving party) is a factor that the Court may take into account in deciding whether to order a payment on account at all or when deciding on the quantum of the payment. In my view, it is also the case (and it follows) that, if

there is evidence that the paying party is likely to have difficulties (or perhaps if there is a material risk that the paying party will have difficulties) recovering any overpayment, the Court can make orders that remove or diminish that risk by, for example, ordering that all or part of the payment on account be retained by the receiving party's attorneys.

89. In this case, the Plaintiffs have relied on generalised allegations and "*concerns*". They have not filed any evidence to particularise or substantiate these concerns and to my mind they have not shown that there is any real risk that they will be unable to recover the full amount of the payment on account, particularly in light of the relatively modest amount of the payment, even if they are completely successful on appeal and the whole of the order for the payment on account is reversed by the Court of Appeal. I can see that in view of the number of parties involved, recovering the payment might prove to be expensive and might not be expeditious if the Walkers Defendants resisted repayment, but there is no evidence that the Walkers Defendants would not have the financial resources to repay (particularly as it seems likely that their interest in their properties will be worth substantially more than the amount of the payment on account) or that the procedural difficulties associated with enforcement of an order to repay would result in serious problems for or be unduly onerous on the Plaintiffs.

90. In these circumstances, I decline to make any of the orders sought by the Plaintiffs although, as I have noted above, I have given some albeit limited weight to the risk of procedural complications in determining the appropriate quantum of the payment of account. It seems to me that it would not be just or proportionate to make these orders having regard to the prejudice that would be suffered by the Walkers Defendants.



Mr Justice Segal
Judge of the Grand Court, Cayman Islands
28 January 2022