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Land use and property rights: lessons from the Cayman Islands Court of Appeal's Britannia decision

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On 7 March 2023, the Cayman Islands Court of Appeal delivered its judgment in *Cayman Shores Development Ltd et al* v *Registrar of Lands et al*. The Court allowed the appeal by Cayman Shores Development Ltd and another member of the Dart Group, (together, **Dart**), from the first instance decision of Justice Segal.

Contrary to the first instance decision, it held

- that despite indications on the face of transaction documents that future owners of land would be bound by the original parties' agreements, the instruments in question were "restrictive agreements" within the meaning of in the Registered Land Law (now the Registered Land Act) ( ) as it read when they were created
- the Registrar of Lands had made a mistake. Rectification to add "easements" to the incumbrance section of Dart's land registers was not an available remedy and instead the land registers should be rectified by removing the incumbrances altogether

The 193 property owners who were the unsuccessful respondents to the appeal, are currently considering their options. A further appeal to the Privy Council is possible.

Background

This matter has been a long-running and bitterly fought legal battle between Dart, which in 2016 bought the area of land previously known as the Britannia Resort, and the respondents, who are property owners in the neighbouring Britannia Estates.

The dispute arose out of transaction documents dating from 1992 to 2001, between the former owner of the Britannia Resort and the respondents and/or their predecessors.

The transaction documents purported to grant to the respondents or their predecessors rights to play tennis, to play golf and to enjoy facilities. At first instance the judge held that the tennis

court rights were extinguished following the construction of a highway over part of the former tennis court site. The appeal, therefore, concerned the remaining rights to play golf and to enjoy facilities (together, the **Rights**).

On 5 May 2016, following the purchase of the former Britannia Resort, a Dart company wrote to the respondents informing them that plans were being considered for redeveloping the site and offering to make the beach facilities and golf course available for use by them as licensees. They responded that they had property rights (ie they did not need to be granted a licence as they had existing rights).

Rights in dispute

In simple terms, the issue was whether the Rights are property rights (and not merely contractual rights) that are, or ought to be, binding upon the Dart companies that currently own the former resort site.

It must be noted that property rights run with the land. They benefit and burden incoming owners of the affected land. By contrast, contractual rights are, with limited exceptions, only enforceable by the parties to the relevant contract.

It must also be noted that property rights are limited to those recognised by the law; it is not open to parties to create property rights of a type that the law does not recognise as such.

There were two types of property rights in question in the case: (i) "restrictive agreements" within the meaning of section 93(1) of the RLA (which are akin to restrictive covenants at common law) and (ii) "easements" as defined in section 2 of the RLA and that conform to the requirements of an easement at common law.

Restrictive agreements

Under section 93(1) as it read at the relevant time, an instrument only qualified as a "restrictive agreement" if it "*restrict[ed] the building on or the user or other enjoyment of [the burdened] land for the benefit of the proprietor of the [benefitted] land*". The Rights *per se* did not impose such a restriction. Nevertheless, at first instance the judge decided that the requirements of the section were satisfied on the ground that the relevant instruments contained a restrictive agreement not to modify the facilities or change their location other than for the purpose of repair or maintenance.

The Court of Appeal disagreed. Its judgment is complex, given that the parties argued every available legal point. Suffice to say that the Court concluded that, neither as a matter of construction nor under accepted principles for the implication of terms, did such a restriction against modification exist. Hence, in its view, the instruments in question were **not** "restrictive

agreements".

It is evident from the first instance decision, and it is implicit from the Court of Appeal's judgment that, had the instruments been drafted differently, they could have created "restrictive agreements" that were capable of binding future owners. In this instance, they did not.

Easements

When the instruments in question were created, there was doubt about whether as a matter of law the Rights could be the subject matter of an easement, but the UK Supreme Court in *Regency Villas Title Ltd & Ors* v *Diamond Resorts Europe, Ltd & Ors* [2018] UKSC 57 held that the free use of sporting and recreational facilities could be the subject matter of an easement.

The Court of Appeal agreed with the first instance decision that the wording used in the transaction documents was capable of creating rights in the form of easements because it fell within the definition of an "easement" in section 2 of the RLA and conformed to the requirements of an easement at common law and in the RLA.

In short, the relevant instruments could have been registered as easements, but they were not so registered. At first instance the judge found that the Registrar of Lands had made a mistake in failing to appreciate that the Rights granted easements and held that the land register could be rectified. The Court of Appeal disagreed. Again, Dart raised a myriad of arguments and the Court addressed these in detail. In short, it held that rectification was **not** available because the Registrar had **not** made a relevant mistake – as the parties to the original transactions had not sought to register the Rights as easements. In the words of the Court, "it is most unfortunate that the proprietors must bear the consequences of the mistaken selection of this defective mechanism for the protection of the Rights".

Comment

Property rights are valuable. However, legal skill and care is required to ensure they are properly created and effectively registered. As the case shows, it may take many years for any deficiencies to become evident.

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