



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015 : No. 183

B E T W E E N:-

DIANA ELIZABETH WILLIAMS

Plaintiff

and

ALLISTER WILLIAMS

(in the capacity of trustee for the estate of Donald James Williams)

1st Defendant

-and-

CHRISTOPHER WILLIAMS

(in the capacity of trustee for the estate of Donald James Williams)

2nd Defendant

-and-

TITO WILLIAMS

(in the capacity of trustee for the estate of Donald James Williams)

3rd Defendant

JUDGMENT

Date of Hearing: 22nd February 2016

Date of Judgment: 24th March 2016

Mr. John Hindess, Marshall Diel and Myers, for the Plaintiff

Ms. Nancy Vieira, Maclellan and Associates, for the Defendants

Section 22 of the Conveyancing Act 1983 – whether burden of a covenant runs with the land – effect of orders made in divorce jurisdiction – whether such orders are personal to the parties

1. In these proceedings, Diana Elizabeth Williams ("Mrs. Williams"), the Plaintiff, seeks judgment against Alastair Williams, Christopher Williams and Tita Williams, in their capacity as Trustees of the estate of Donald James Williams ("Mr. Williams"), the Defendants, for damages for breach of a covenant to repair and insure certain residential property as set out in a Deed dated 30 November 1999 made between Mr. and Mrs. Williams. The claim is based upon the proposition that the covenant contained in the Deed runs with the land and is enforceable against the Defendants as they are Mr. Williams' successors in title.

Background

2. The factual background giving rise to Mrs. Williams' claim is uncontroversial. Mr. and Mrs. Williams were divorced in the Divorce Jurisdiction of the Supreme Court of Bermuda (case number 138 of 1997) and Decree Absolute was granted with respect thereto on 20 May 1999.
3. Financial arrangements between the parties in the divorce proceedings were dealt with by two Orders of the Supreme Court. By Order made on 16 April 1999, it was ordered that:-
 - (i) That the Respondent [Mr. Williams] do pay to the Petitioner [Mrs. Williams] a lump sum of \$300,000.
 - (ii) Upon payment of the said sum, the Petitioner shall convey to the Respondent her one half share of the property Catlin, Between the Walls, Pitts Bay Road, Pembroke and the Respondent shall grant the Petitioner a life interest in Catlin Cottage.
 - (iii) The Petitioner shall be entitled to the rents of Catlin Cottage from time to time when the Petitioner is not in occupation thereof.

- (iv) These orders shall be in full and final settlement of the claims of the Petitioner and the Respondent to ancillary relief and proceedings under the Partition Acts commenced by the Petitioner are dismissed.
4. By a subsequent Order dated 8 October 1999, it was ordered that the Order dated 16 April 1999 shall include the following provisions:-
- (a) The Respondent [Mr. Williams] shall be responsible for and shall pay for the exterior maintenance of Catlin Cottage; and
- (b) The Respondent shall be responsible for securing and paying for the on-going insurance obligations in respect to Catlin Cottage.
5. The above Orders were given effect to by a Deed made between Mr. & Mrs. Williams dated 30 November 1999. The Deed recited that (i) the Grantor (Mr. Williams) and the Grantee (Mrs. Williams) were divorced in the Divorce Jurisdiction of the Supreme Court of Bermuda; (ii) by an Order of the Supreme Court dated 16 April 1999, the Grantee was ordered to transfer her interest in the Property to the Grantor upon payment by the Grantor to the Grantee of a lump sum of \$300,000, whereupon the Grantor was to grant the Grantee a life interest in the Property; (iii) by a further Order of the Supreme Court dated 7 October 1999, the Grantor was ordered to be responsible for the exterior maintenance and the on-going insurance obligations in respect of the Property; and (iv) as a result of the recited divorce, to carry out the terms of the said Orders of the Supreme Court regarding the conveyance of the land as well as the maintenance and insurance obligations, the Grantor and the Grantee have agreed to execute the Deed.
6. The operative part of the Deed provides:-

"In pursuance of the Order of the Court, the Grantor does hereby grant to the Grantee a right of use and occupation of Catlin Cottage... and the rents and profits thereof for

the remainder of her life and the Grantor covenants with the Grantee that he will be responsible during the Grantee's lifetime for the exterior maintenance and the on-going insurance obligations in respect to Catlin Cottage."

7. Mr. Williams passed away on 22 March 2000. Since his death, Mrs. Williams maintains that the Defendants have refused to pay for any costs for the repair or maintenance of the exterior of the property or to meet the insurance obligations referred to in the Deed.

Rival Contentions

8. On behalf of Mrs. Williams, it is argued that the Deed expresses a positive obligation on Mr. Williams to maintain the exterior of the property and pay for maintenance of the property during the lifetime of Mrs. Williams. It is further argued that the positive covenant not only binds Mr. Williams, but also his successors in title as a result of the operation of Section 22 of the Conveyancing Act 1983 (the "Act"). Section 22 provides:-

"(i) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors or other persons were expressed. This sub-section extends to a covenant to do some acts relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

(i) For the purposes of this Section, in connexion [sic] with covenants restrictive of the user of land "successor in title" shall be deemed to include the owners and occupiers for the time being of such land".

9. Mrs. Williams also relies upon the enforcement of a positive covenant in equity and in that regard relies upon Wilkinson and Others v Kerdene Ltd [2013] EWCA Civ. 44.

10. The Defendants argue that the Deed in question accurately reflected the two Orders of the Supreme Court made in respect of the divorce of Mr. & Mrs. Williams. The short point taken by the Defendants is that the maintenance and insurance obligations referred to in the Order of 8 October 1999 were personal obligations of Mr. Williams and they ceased to be operative upon the death of Mr. Williams. The Defendants accept that Mr. Williams was obliged to comply with the covenant for the "lifetime" of Mrs. Williams but only as long as he continued to live. The Defendants argue that the obligations referred to in the Order of 8 October 1999 were never intended to run with the land. The Defendants also contend, in any event, that the particular covenant relied upon in the Deed is incapable of running with the land under Section 22.

11. The Court is concerned with the running of covenants with freehold land. In this context, a conceptual distinction is drawn between the enforceability of the benefit of covenants by the covenantee and his successors in title, and the enforceability of burden of covenants made by the covenantor and his successors in title. The position relating to the benefit of covenants relating to land is governed by Section 21 of the Act, and the position in relation to burden of covenants relating to land is governed by Section 22 of the Act. In respect of enforceability, a distinction is also made between a positive covenant, requiring something to be done, or a negative covenant, preventing the covenantor from doing something. The starting point of the analysis in this context is that covenants are primarily contractual in nature and as a consequence of the doctrine of privity of contract, only the parties to the covenant can enforce it. Such contractual rights can only be enforced by a third party, such as a successor in title, if there is a statutory provision which provides for that result or the limited circumstances where equity caters for the same position.

12. I am unable to accept that Section 22 of the Act is capable of binding the covenantor's successors in title in relation to a positive (as opposed to negative) covenant. Section 22 of the Bermuda Act is derived from, and is in identical terms to, Section 79 of the English Law of Property Act 1925. It is now settled law that Section 79 of the

English Law of Property Act 1925 does not permit enforcement of a positive covenant against a successor in title of the covenantor. In Rhone v Stephens [1994] 2 A.C. 310 (House of Lords), Lord Templeman stated at 322B:-

"... I do not consider that it follows that Section 79 of the Act of 1925 had the corresponding effect of making the burden of positive covenants run with the land. In Jones v Price [1965] 2 Q.B. 618, 633, Willmer L.J. repeated that: "A covenant to perform positive acts ... is not one the burden of which runs with land so as to bind the successors in title of the covenantor: see Austerberry v Oldham Corporation".

In Sefton v Tophams Ltd. [1967] 1 A.C. 50, 73, 81, Lord Upjohn and Lord Wilberforce stated that Section 79 of the Law of Property Act 1925 does not have the effect of causing covenants to run with the land. Finally, in Federated Homes Limited v Mill Lodge Properties Limited [1980] 1 W.L.R. 594, 605 – 606, Brightman J. referred to the authorities of Section 78 of the Act of 1925 and said that "Section 79, in my view, involves quite different considerations and I do not think that it provides a helpful analogy".

13. The covenant on the part of Mr. Williams to maintain the exterior of the property and to effect insurance is clearly a positive covenant and in light of the House of Lords decision in Rhone v Stephens, does not bind the successors in title of Mr. Williams under Section 22 of the Act.
14. Rhone v Stephens is also a leading authority relating to enforcement of positive covenants in equity. In that case, the House of Lords held that a negative covenant was enforceable in equity on the ground that it deprived the owner of a right over property, and his successor in title was to be prevented from exercising a right which he had never acquired. In contrast, enforcement of a positive covenant against a successor in title would contradict the common law rule that a person could not be made liable upon a contract unless he was a party to it and that there was no principle requiring a party deriving benefit from a conveyance to accept any burden in the same conveyance. Equity does allow enforcement of positive covenants against successors in title of the covenantor provided that there is a sufficient degree of correlation between the covenant to pay and the grant to be enforced against successors in title

with whom there is neither privity of contract nor privity of estate. Lord Templeman, at p. 322E, said that:-

"I am not prepared to recognise the "pure principle" that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Sir Robert Megarry V-C relied upon the decision of Upjohn J. in Halsall v Brizell [1957] Ch. 169. In that case, the Defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the Defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be attached to the exercise of a power in express terms or by implications. Halsall v Brizell was just such a case and I have no difficulty in whole-heartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successors in title every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In Halsall v Brizell, there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers. In the present case, clause 2 of the 1960 conveyance imposes reciprocal benefits and burdens of support but Clause 3 which imposed an obligation to repair the roof is an independent provision. In Halsall v Brizell, the Defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case, the owners of Walford House could not in theory or in practice be deprived of the benefit of mutual rights of support if they fail to repair the roof."

15. In Wilkinson and Others v Kerdene Ltd., Patten LJ emphasised the requirement of a sufficient correlation between the covenant to pay and the grant to be enforced against successors in title and explained at [27]:-

"What Lord Templeman emphasised in Rhone v Stephens was that a successor in title to the original covenantor did not incur a liability to perform a positive covenant such as the covenant to repair in that case unless it had some real relation to a right granted in his favour under the conveyance which he did wish to exercise. Reference in his speech to the exercise of those rights being conditional upon the performance of the positive obligation is not, as he made clear, limited to cases in which it is expressly so conditional. In Halsall v Brizell, the owners of houses on an estate

covenanted to pay a due proportion of the cost of maintaining and keeping in good repair the roads, sewers, promenade and seawall serving the estate. There was nothing in the conveyance itself which in terms made the enjoyment of these facilities conditional upon the payment of the maintenance charge and the charge was payable under the terms of the conveyance for their maintenance and not for the exercise of the right to enjoy and make use of them. But Upjohn J. said of the owners of the houses who were successors in title to the original covenantors:

"If the Defendants did not desire to take the benefit of this deed, for the reasons I have given, they could not be under any liability to pay the obligations thereunder. But, of course, they do not desire to take the benefit of this deed. They have no right to use the sewers which are vested in the Plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road. The Defendants cannot rely on any way of necessity or any right by prescription for the simple reason that when the house was originally sold in 1931 to their predecessor in title, he took the house on terms of the deed of 1851 which contractually bound him to contribute a proper proportion of the expenses of maintaining the roads and sewers, and so forth, as a condition of being entitled to make use of those roads and sewers. Therefore, it seems to me that the defendants here cannot, if they desire to use this house, as they do, take advantage of the trusts concerning the user of the roads, contained in the deed and other benefits created by it without undertaking the obligations thereunder. Upon that principle, it seems to me that they are bound by this deed, if they desire to take its benefits"."

16. The successors in title to Mr. Williams, the present Defendants, do not come within the limited exception referred to by Upjohn J. in Halsall v Brizell, Lord Templeman in Rhone v Stephens and Patten LJ in Wilkinson v Kerdene Ltd. The fact that one of the Defendants may have received insurance money relating to damage sustained at the property, which he has not accounted for, does not bring this case within the equitable exception. The failure to account for the insurance monies is not a relevant benefit under the Deed.
17. In the circumstances, I am bound to conclude that the covenant to repair and effect insurance referred to in the Deed, does not bind the Defendants in their capacity as successors in title to the covenantor, Mr. Williams. Neither Section 22 of the Act nor

the limited exception in equity concerning enforcement of positive covenants assists Mrs. Williams in this regard.

18. Finally, and in any event, the two Orders made in the Divorce Jurisdiction were, in my judgment, made personally against Mr. Williams. Mr. Williams was obliged to maintain the exterior of the property and effect insurance in relation thereto during Mrs. Williams life time. However, that obligation, came to an end upon his death. The wording in the Deed reflects the two Orders made in the Divorce Jurisdiction. If it was intended to bind the estate of Mr. Williams, or to bind his successors in title, clear language was needed to have that effect. The words used in the two Orders made in the Divorce Jurisdiction and the subsequent Deed do not, in my judgment, either bind Mr. Williams' estate or his successors in title to the Property.
19. In the circumstances, I am bound to dismiss this action against the Defendants.
20. I will hear the parties in relation to the issue of costs if such an application is pursued.

DATED THIS day of March 2016

Narinder K. Hargun
Assistant Justice