

**IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2016/0488

BETWEEN:

CEDAR VALLEY SPRINGS HOMEOWNERS ASSOCIATION INCORPORATED

Claimant

and

[1] KENNETH MEADE

[2] HILDA MEADE

Defendants

CONSOLIDATED WITH

CLAIM NO. ANUHCV 2015/0721

BETWEEN:

CEDAR VALLEY SPRINGS HOMEOWNERS ASSOCIATION INCORPORATED

Claimant

and

[1] KENNETH MEADE

[2] HILDA MEADE

Defendants

CONSOLIDATED WITH

CLAIM NO. ANUHCV 2016/0489

BETWEEN:

CEDAR VALLEY SPRINGS HOMEOWNERS ASSOCIATION INCORPORATED

Claimant

and

HYACINTH PESTAINA

Defendant

CONSOLIDATED WITH

CLAIM NO. ANUHCV 2015/0722

BETWEEN:

CEDAR VALLEY SPRINGS HOMEOWNERS ASSOCIATION INCORPORATED

Claimant

and

HYACINTH PESTAINA

Defendant

Appearances:

Jason Martin, Counsel for the Claimant

Hugh Marshal Jr. appearing with Chantal Thomas, Counsel for the Defendants

2021: November 16th, 17th
2022: June 17th (Written Submission)
2023: January 20th

JUDGMENT

- [1] **ROBERTSON, J.:** These are consolidated proceedings. The Claimant initiated these proceedings seeking declarations and damages for breach of a restrictive covenant and stipulations registered against real property which form part of a building scheme. Specifically, the Claimant seeks declarations that the Defendants are obligated to pay equal shares in all maintenance costs, expenses, and the costs of replacements to the common property of the Cedar Valley Springs Development, and that the Defendants are in fact in breach of their obligations. The Claimant is also seeking an order directing the Defendants to pay the said maintenance costs.

Relevant Background.

- [2] The Claimant is a non-profit company incorporated on 15th December 1999. The Claimant administers the affairs of the building scheme known as Cedar Valley Springs Development (the “Development”).

The properties of each of the Defendants are within the Development. The Defendants, Kenneth Meade and Hilda Meade, are owners of parcels identified as Registration Section: Cassada Gardens & New Winthropes; Block Number 42 1894A Parcel 1150 and 1151. The Defendant, Hyacinth Pestaina, is the owner of parcel 1196 and recorded as Registration Section: Cassada Gardens & New Winthropes; Block Number 42 1894A; Parcel 1196.

- [3] On 10th October 1996 Stanford Development Company Limited (hereinafter called "SDC Limited") acquired parcel 1113 of land described as Registration Section: Cassada Gardens & New Winthropes, Block: 42 1894A. The parcel became a building development scheme. Parcel 1113 was subdivided on 29th May 1997 and 60 parcels were created to be sold as residential plots within the Development. The parcels were transferred subject to restrictive covenants. Restrictive covenants with respect to parcels 1150 and 1151 and parcel 1196 were registered as incumbrances on the Incumbrances Section of the Land Register pursuant to section 94(1) of the Registered Land Act CAP 374.
- [4] By Transfer Instrument dated 8th February 2001 the Stanford Development Company Limited (herein after "SDC Limited") transferred to the Claimant, subject to the restrictive covenants therein contained, a parcel of land within the Development and recorded as parcel 1205. By virtue of the entry number 1 in the Incumbrancers Section of the Land Register the Claimant acquired the property subject to the incumbrances.
- [5] Kenneth Meade and Hilda Meade purchased parcels 1150 and 1151 from SDC Limited. This is evidenced in the Instrument of Transfer dated 30th September 1998. Kenneth Meade and Hilda Meade admit acquiring the absolute proprietorship of parcels 1150 and 1151 from SDC Limited which, at the time of the Defendants' acquisition, owned the common areas. The common areas were the roads, sidewalks and other common spaces including the areas which housed communal facilities for the Development.
- [6] The Defendants, Kenneth Meade and Hilda Meade, agreed by a restrictive covenant between SDC Limited and these Defendants to pay a portion of the cost of maintaining the common areas. It is the Defendants' position that the benefit of the covenant was to the common lands which now comprise the roads, sidewalks and the areas for the communal facilities which were owned and operated by SDC Limited.
- [7] Hyacinth Pestaina purchased parcel 1196 from third persons, who are not party to these proceedings, by Instrument of Transfer dated 15th March 2001. The Instrument of Transfer specifically indicated that the parcel was transferred 'subject to the restrictions and stipulations noted on the register and which run with the lands'.
- [8] The Defendants, Kenneth Meade, Hilda Meade and Hyacinth Pestaina dispute that the Claimant is a successor to SDC Limited in respect of the lands that have the benefit of the covenant in question and therefore dispute that the Claimant is entitled to enjoy or enforce the benefits of the restrictive covenant.

The Defendants further contend that the restrictive covenant was intended to apply to the common lands and not neighbouring lands. The Defendants have also challenged the Claimant's computation of the sums owed.

The Evidence.

[9] Winston St. Agathe gave evidence on behalf of the Claimant. Kenneth Meade gave evidence in support of the case of Kenneth Meade and Hilda Meade. Hyacinth Pestaina gave evidence in support of her case. The evidence of Nechelle Peters was also given in support of the case Defendants.

[10] Winston St. Agathe is the director of the Cedar Valley Springs Homeowners Association (the Claimant/the Association) and the President of the Board of Directors of the Association. The evidence of Mr. St. Agathe is that:

- (a) The Claimant is a non-profit company incorporated on 15th December 1999 for the management and supervision of the Development. In October 1999 SDC Limited acquired parcel 1113 which was approximately 18 acres from the Government of Antigua and Barbuda with the intention that parcel 1113 would be transformed into a building scheme and residential community comprising 60 lots.
- (b) A master plan of the Development was developed which detailed the expectation of SDC Limited for the management and operation of the Development. The Master Plan was registered against parcel 1113 on 11th July 1997 and was subsequently removed from the Land Register on application of the SDC Limited dated 11th May 1998.
- (c) Parcel 1113 was subdivided on 29th May 1997 to create individual lots for the Development. When the free hold interests of the lots or parcels in the Development were sold the Transfer Instrument effecting the sale contained identical restrictive agreements of both a positive and negative/restrictive nature. Specifically, in the Third Schedule of the Transfer Instruments were covenants, restrictions and stipulations and included an obligation by each member of the Cedar Valley Springs Homeowners Association to contribute equally to all costs, expenses and to the costs of replacements to the common property within the Development.
- (d) The Association is comprised of all the owners in fee simple of lots forming part of the Development. There is a management committee of the Association which supervises and ensures that all the roads, walkways, curbs are kept clean and ensures that the streetlights and electrical facilities are maintained. The Association ensures that the trees around the houses and in the park/green space are well maintained and are cut before the hurricane season. Additionally, the Development includes a park with a pond both of which are maintained by the Association. The maintenance of the pond is critical since the water runoff from the roads flows through the storm drains and into the pond.
- (e) The Association has a person employed as a project manager and accountant.
- (f) Each Transfer Instrument contained the aforementioned restrictive agreement with the obligation to contribute equally to the maintenance of the common property of the Development.

The restrictive agreement was registered in the Encumbrance Section of the respective Land Register.

- (g) The Defendant, Hyacinth Pestaina, purchased parcel 1196. Hyacinth Pestaina did not purchase the parcel from the developer, SDC Limited, but from other persons who purchased the property from the SDC Limited. The Transfer Instrument between the SDC Limited and the third parties contained the restrictive agreement with the obligation to contribute equally to the maintenance of the common property in the Development. The easements and the restrictive covenants were registered on the Land Register for the parcel on 12th August 1998. The Transfer Instrument between the third parties and Hyacinth Pestaina dated 15th March 2001 indicates that the transfer is 'subject to the restrictions and stipulations noted on the register'.
- (h) On 21st February 2001, SDC Limited transferred ownership of a parcel of land within the Development, parcel 1205, to the Claimant. The Transfer Instrument for parcel 1205 indicates that the parcel is subject to the same covenants, restrictions and stipulations as contained in the other restrictive agreements and the restrictive agreement for parcel 1205 was registered against the said parcel.
- (i) The Defendants are in arrears of their maintenance fees. Kenneth and Hilda Meade's arrears at January 2013 stood at \$26,550.00. The evidence of this witness is that Mr. Meade began making payments regularly then stopped making regular payments. Kenneth Meade resumed making payments but did not address the arrears which was built up when there was non-payment.
- (j) Hyacinth Pestaina for the period April 2001 to April 2018 made 15 payments so that the outstanding balance at April 2019 was \$30,400.00.
- (k) The audited financial statements from 2001 to 2017 showed that maintenance and landscaping work were, over the period, carried out by the Claimant.

[11] The evidence of Kenneth Meade and Hyacinth Pestaina is indicated hereunder.

- (a) Kenneth Meade presents evidence for himself and Hyacinth Pestaina. The parcels 1150 and 1151 were acquired by Instrument of Transfer dated 30th September 1998.
- (b) The evidence of Kenneth Meade is that the properties were purchased with the understanding that SDC Limited would maintain the common areas, and this was done until sometime in February 2009 and thereafter service became irregular. This Defendant indicates that 'as a community minded individual the proper upkeep of the neighbourhood was important' and therefore, he made payments to the Claimant for the upkeep of the community areas. However, he ceased making payments because he was of the view that areas in the community including areas by this Defendant's property were not being regularly maintained. Kenneth Meade like Hyacinth Pestaina disputes the ability of the Claimant to enforce the provisions of the covenant and disputes the sum as stated by the Defendant as being owed.
- (c) The evidence of Hyacinth Pestaina is that she acquired parcel 1196 by Instrument of Transfer dated 15th March 2001 and when acquired from third parties it was acquired with the understanding that SDC Limited would maintain the common areas and that such regular

maintenance was done until the latter part of 2008. Thereafter, Hyacinth Pestaina indicated that service on the common areas became irregular. Hyacinth Pestaina also states that she was never completely satisfied with the maintenance service, but the service offered before 2008 was better than the service thereafter. Hyacinth Pestaina contends that she is advised that the Claimant does not own any lands which have the benefit of the covenants and that the Claimant is simply another property owner in the Development and therefore not entitled to the benefit of the covenant.

- (d) Hyacinth Pestaina also indicates that although Clause 2 of the Covenants, Restrictions and Stipulations of the Instrument of Transfer for the property makes clear that all costs and expenses and replacements to the common property are to be shared equally by all members of the Association, she is not a member of the Association and notes that the Association does not have shareholders. Further, Hyacinth Pestaina states that she has not been provided with information regarding how the stated debt owed was derived.
- (e) During cross-examination Hyacinth Pestaina indicated that at the time of purchase she was attracted to the property since it was relatively new and ready for occupation. Ms. Pestaina also indicated that at the time of purchase she was not aware that the property was subject to restrictive covenants and that she was not aware that the developer maintained the common areas. This witness admits that she did make payments to the Claimant representing the maintenance fee but maintained that she was not satisfied with the quality of the service provided by the Claimant and by the Claimant's predecessor.

[12] Certain statements given by Hyacinth Pestaina during cross-examination contradicted her evidence in chief. Regarding the assertion by this witness of lack of knowledge of the restrictive covenant this Court notes that, not only does the Transfer Instrument signed by this witness indicates that she took the property subject to, among other things, restrictive covenants but the witness also indicated in her evidence in chief that she was aware that SDC Limited maintained the common areas and that this maintenance was done until the latter part of 2008.

[13] Nechelle Peters, licensed land surveyor, indicated that the road network and common areas of the Development are part of the original parcel 1113. The Land Register for parcel 1113 has been closed. The ownership of the road network and the common areas were never transferred and therefore remain part of parcel 1113 and owned by SDC Limited.

Issues.

[14] In the submissions filed, the Counsel for the Defendant conceded that the Defendants purchased the properties in the Development subject to covenants and that the Defendants do enjoy the benefits that flow from the covenants. Counsel also indicated that on this basis the Defendants are obliged to pay maintenance fees and expenses. However, Counsel contends that the questions for the Court are what fees are to be paid and to whom they should be paid. These, Counsel indicates are the only matters for the Court's consideration. The Counsel indicates that the covenant is not enforceable by the Claimant

in the absence of an assignment from SDC Limited or a direct contract with the Defendants to pay the maintenance fees to the Claimant.

[15] Thus, the issues before this Court are:

- (a) Whether the Claimant can enforce the restrictive covenant regarding the payment of maintenance costs, expenses, and the costs of replacements to the common property within the Development.
- (b) If enforceable, what sums are owed?

The Law.

[16] It is settled that at common law the burden of a positive covenant does not attach to freehold land and does not pass to the successors in title of the original covenantor to the freehold¹. This rule may be alleviated by the operation of the equitable benefits and burdens principle². The equitable benefits and burdens principle is an exception to the law that the burden of a positive covenant does not pass to the successor of the covenantor in title. The Claimant submits that in this case the general operation of this principle alleviates the common law position so that Claimant is in a position to enforce the restrictive covenant.

[17] The equitable benefits and burdens principle was applied in the case of **Halsall v Brizell**³. In **Halsall v Brizell** the court determined that a party may not take the benefit of a right granted without accepting the corresponding burden which is associated with the right. The relevant law with respect to the enforcement of such covenant against a successor in title to the covenantor under the benefit and burdens principle has been stated by our Court of Appeal in the case of **Half Moon Bay Home Owners Company Limited v Platinum Properties Inc.**⁴ and can be summarized as:

- (a) The benefit must be related to and conditional upon the burden. The condition may be expressed or implied.
- (b) The successor in title must have the opportunity to choose whether to take the benefit or having taken the benefit to renounce it, even if only in theory, and thereby escape the burden⁵.

[18] In the circumstance of this case the benefits and burdens are within the Instrument of Transfer. The Instrument of Transfer which conveyed the parcels 1150 and 1151 from SDC Limited to Kenneth Meade

¹ **Half Moon Bay Limited v Crown Eagle Hotels Limited**, [2002] UKPC 24 at paragraph 17. See also **Austerberry v Corporation** (1885) 29 Ch.D. 750.

² **Halsall v Brizell** 1957] 1 All ER 371.

³ [1957] 1 All ER 371.

⁴ [2018] ECSCJ No. 164.

⁵ The principles were also summarized in **Davis v Jones** [2009] EWCA Civ 1164 [27].

and Hilda Meade indicated, among other things, that “The Transferees HEREBY COVENANT with the Transferor to the intent and so as to bind the Demised Premises hereby transferred into whomsoever hands the same may come and for the benefit and protection of the Transferor’s adjoining lands or any and every part thereof being a sub-division of Parcel 1113, Block: 42 1894A, Registration Section: Cassada Gardens & New Winthropes (hereinafter called “the adjoining lands”) to observe and perform all and singular the covenants, restrictions and stipulations specified in the Third Schedule hereto”.

[19] The Third Schedule, Covenants, Restrictions and Stipulations, indicates that:

“1. The Transferees and all future purchases of the Demised Premises shall become members of the Cedar Valley Springs Homeowners Association to be formed to serve the purposes hereinafter set forth or implied and such other purposes as may be performed within the scope of the Association’s By-Laws.

2. The Cedar Valley Springs Homeowners Association shall be responsible for the maintenance, general upkeep, repairs and replacements to the common property and to things thereon including but not limited to pipes, drains, conduits, utilities perimeter fences, streetlights, lawns, parks, playgrounds, roadways, curbs and sidewalks. All costs and expenses and replacements to the common property shall be shared equally by the members of the Homeowners Association. The “common property” shall mean the property within the Cedar Valley Springs Development utilized for the benefit and enjoyment of all property owners therein and more specifically delineated in red on the attached plan.

3. The Transferee...”

[20] The portion of the attached plan delineated in red represents a park or green space and identified as parcel number 1205 and the roadways within the development.

[21] By Instrument of Transfer SDC Limited transferred parcel 1205 to the Claimant. The said transfer was effected together with the rights and easements contained in the First Schedule to the transfer and the Claimant covenanted with SDC Limited that the Demised Premises thereby transferred into whosoever’s hands the same may come and for the benefit and protection of SDC Limited’s adjoining lands or any and every part thereof being a sub-division of Parcel 1113 to observe and perform all the covenants, restrictions and stipulations specified in the Third Schedule.

[22] The First Schedule indicates that:

- (a) The full right and liberty (in common with the SDC Limited and all other persons who may or who hereafter may have a like right) at all time and for all purposes reasonably connected with the use of the Demised Premises to go pass and repass with or without motorcars or other suitable vehicles over and along the roads now existing or at any time constructed and used in connection with the Demised Premises or the adjoining lands.

- (b) A right of way on foot only (in common with SDC Limited and all other persons who may have or who hereafter may have a like right) over all pathways or footways now existing or any time constructed and used in connection with or for the better enjoyment of the Demised Premises or the adjoining lands.
- (c) The free and uninterrupted right to and passage of running water, sewage, telephone, electricity, gas and other essential services into and through the pipes, drains, sewers, water courses, wires, cables and service installations now constructed or installed or to be constructed or installed in over or under the adjoining lands.

[23] The First Schedule is in similar terms to the First Schedules in all the Instruments of Transfer for parcels in the Development.

[24] The Claimant's By-Laws indicate that there shall be one class of membership namely ordinary members being all owners in fee simple of lots forming part of the Development and which said lots are a subdivision of parcel 1113. A member shall cease to be such on ceasing to be a lot/parcel owner and the new owner of the said lot/parcel shall become a member. The By-Laws also indicate at clause 4.7 that, "The members collectively shall be responsible for, inter alia, the maintenance, general upkeep, repairs and replacements to the common property in the Development and to things thereon including but not limited to pipes, drains, conduits, utilities, perimeter fences, streetlights, lawns, parks, playgrounds, roadways, curbs and sidewalks. All costs and expenses associated with the maintenance, general upkeep, repairs and replacements to the common property shall be shared equally by the members prorated in accordance with the ownership of the respective lots".

[25] It is also clear from the provisions of the Instrument of Transfer that the obligations were intended to be reciprocal and to be attached to the demised premises. The responsibility of the Association for the maintenance and general upkeep of the common areas was to be financed by equal contributions from the members of the Association who were the owners of the properties within the Development. The receipt and enjoyment of the benefit is specifically linked to the burden which is imposed. In fact, the benefit can only be sustained if the burden is honoured. The benefits conferred are for the benefit and the protection of the land and are conferred to all owners of parcels within the Development as the benefit affects the nature, quality of enjoyment and use of all of the properties within the Development.

[26] Counsel for the Defendants indicate that the Claimant is not the successor in title to SDC Limited since the Claimant has only shown evidence that the Claimant purchased a parcel in the Development and has not shown that it has proprietary interest in the common areas over which the maintenance costs are charged. Thus, the Counsel contends that the purchase of parcel 1205 does not make the Claimant a successor in title to the restrictive covenants for the Development over which the maintenance costs are being charged.

[27] On this matter the question for the Court is whether the Claimant retains ownership of property within the Development which is capable of enjoying the benefit of the covenant. This is a question of fact. In

the circumstances of this case the Claimant owns parcel 1205. Parcel 1205 is not only part of the common area, in that it is the green space in the Development but also the evidence of Winston St. Agathe is that it holds the pond which retains the drainage from the Development. The evidence of this witness is that the water is drained to the storm drain and then into the pond. It is clear that the maintenance of one affects the other. Additionally, in this Court's view the easements and the green space are contiguous and therefore capable of having the benefit of the covenant even if the roadways are not owned by the Claimant.

[28] On the matter of opportunity to reject the benefit this Court notes that the Defendants, Kenneth Meade and Hilda Meade purchased the property in a Development with knowledge that a body was responsible for maintenance and the general upkeep of the common area in the Development. The Defendants committed, upon execution of the Instrument of Transfer, to become members of the Association and committed to remaining members of the Association for as long as the Defendants held fee simple interest in property in the Development. When the Association assumed duties, the Defendants could, in theory, choose to establish their own sewage system, lighting for their property, maintenance regime for their trees but this course was not adopted. The Defendants continued to enjoy the benefits of the services offered by the Association. There are other benefits such as the Association's management of drainage which cannot be disaggregated, which benefit the Defendants would not, in theory, be able to reject. However, it is noted that the Defendants did not attempt to reject the benefits which could have been rejected.

[29] As it relates to Hyacinth Pestaina it is noted that the parcel 1196 was transferred by third parties to Hyacinth Pestaina subject to the restrictions and stipulations noted on the register and which run with the lands. The evidence of the Claimant is that the restrictions and stipulations noted on the register are the same as those noted in the Instrument of Transfer for Kenneth Meade and Hilda Meade. Despite the responses given during cross-examination this witness did indicate in her examination in chief that she was aware at the time of purchase that the property was in a development and that the property was being maintained by the developers. The Claimant was incorporated in December 1999 and the By-Laws effected in January 2020. Hyacinth Pestaina purchased parcel 1196 in March 2001. As in the case of the other defendants, Kenneth Meade and Hilda Meade, Hyacinth Pestaina, also had an opportunity, in theory at least, to reject the benefit.

[30] It is noted that the restrictive covenants in respect of all of the transfers were registered in accordance with the provisions of section 94⁶ of the Registered Land Act 374. This Court has determined that the restrictive agreement is capable of taking effect and therefore the Claimant can enforce the covenant.

⁶ Section 94 (1) provides: "(4) In so far as the restrictive agreement is capable of taking effect, not only the proprietors themselves but also their respective successors in title shall be entitled to the benefit and subject to the burden of it respectively, unless the instrument otherwise provides."

The Sums Owed.

- [31] The provisions of the Instrument of Transfer and the By-Laws of the Association outline the payment required by property owners in the Development. The covenant as stated in the Third Schedule to the Instrument of Transfer indicates that "all costs and expenses and replacements to the common property shall be shared equally by the members of the Home Owners Association". Similarly, clause 4.7 of the By-Laws indicates that, the members collectively shall be responsible for the maintenance, general upkeep, repairs and replacements to the common property in the Development. Such costs and expenses shall be shared equally by the members prorated in accordance with the ownership of the respective lots. The members are the fee simple owners of property in the Development.
- [32] The evidence of the claimant is that although the services were provided the defendants have not paid their share of the maintenance costs. The claimant has not produced the audited statements of sums incurred. The claimant has produced the financial statements for Kenneth Meade and Hilda Meade and the financial statement for Hyacinth Pestaina.
- [33] The Defendants have acknowledged making payments but indicated that they stopped making payments when they formed the view that the service provided by Association was sub-standard and inadequate. The Defendants indicated that the service offered by the Association deteriorated in or about 2009. However, Counsel for the Claimant points out and the records support that Kenneth Meade and Hilda Meade incurred maintenance fee arrears for the period 1st January 2005 and 1st January 2009 and no payments were made in 2005, 2006 and 2007 when the defendants indicated that they were receiving good service from the Association. A similar position is seen with respect to the non-payments by Hyacinth Pestaina. Hyacinth Pestaina indicated that the service became sub-standard from the latter part of 2008 yet the financial records indicate that the payments for Hyacinth Pestaina were not regularly made prior to 2008 when the service was deemed to be acceptable.
- [34] It is noted that Kenneth Meade has accepted that the return cheques to the Association have been reflected in the statement provided by the Claimant as representing his account. Although Hyacinth Pestaina indicates that the Claimant has not set out in detail how the Claimant arrived at the sum it alleges to be owed, Pestaina has not seriously challenged the statement admitted into evidence as detailing the sums owed to the Claimant.
- [35] This Court has determined that the elements in the equitable benefits and burdens principle have been established in this case and the Claimant is entitled to enforce the restrictive covenant. This Court has determined that the Defendants are liable to the Claimant for maintenance fees for the period in which the Defendants held a fee simple interest in property in the Development. The Defendants, being in arrears, are in breach of the obligation. The sum in arrears for Kenneth Meade and Hilda Meade stands at EC \$26,550.00. The outstanding balance as at April 2019 for Hyacinth Pestaina is EC\$30,400.00.
- [36] The Defendants, Kenneth Meade and Hilda Meade, are to pay the prescribed costs to the Claimant.

[37] The Defendant, Hyacinth Pestaina, is to pay the prescribed costs to the Claimant.

Justice Marissa Robertson

High Court Judge

By The Court

Registrar