

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2015/0447

BETWEEN:

ISSA NICHOLAS (GRENADA) LIMITED

Claimant

and

[1] TIME BOURKE HOLDING (GRENADA) LIMITED

[2] THE ATTORNEY GENERAL OF GRENADA

Defendants

THE ATTORNEY GENERAL OF GRENADA

Ancillary Claimant

TIME BOURKE HOLDING (GRENADA) LIMITED

Ancillary Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Mr. Kadeem Strachan, Ms. Skeeta Chitan and Mrs. Crystal Braveboy-Chetram
for the Claimant

Mrs. Afi Ventour de Vega and Ms. Yurana Phillip for the First Defendant and
Ancillary Defendant

Mr. Adeybayo Olowu for the Second Defendant and Ancillary Claimant

2022: June 13
August 3

JUDGMENT

[1] **ACTIE J:** This claim concerns the breach of a term in a lease agreement and whether the purchaser of the reversionary interest is liable for indemnification of the landlord for the said breach.

- [2] The claimant, Issa Nicholas (Grenada) Limited is the tenant in possession of a parcel of land situate at Grand Anse, St. George, upon which it operates a hotel, pursuant to a lease with the Government of Grenada as landlord.
- [3] Clause 3(iv) of the lease contains a covenant requiring the Government of Grenada (landlord) to: “keep free and clear from obstruction all drains in the control of the Landlord bounding or adjoining the demised premises and further not to extend or permit the extension by others of the drainage system of which the storm drain now located on the Demised Premises forms a part and not to enlarge or permit enlargement by others of the catchment area served by such storm drain system whereby the flow of storm water through such system would or could be increased.”
- [4] By deed of conveyance dated 7th July 2008, the first defendant, Time Bourke Holding (Grenada) Limited, purchased the freehold reversion interest in the land from the Government of Grenada. The purchase was made subject to the lease in favour of Issa Nicholas (Grenada) Limited.
- [5] By amended claim form filed 1st February 2016, the claimant claimed:
- (1) A declaration that the defendants have an obligation under the Clause 3(iv) Covenant contained in a Lease of premises at Grand Anse in the parish of St. George, in the State of Grenada dated 11th December 1997 between the Government of Grenada and the claimant (hereafter “the 1997 Lease”) the reversion of which was assigned to the first defendant by a conveyance from the Government of Grenada dated 7th July 2008.
 - (2) A declaration that the first defendant by its refusal, neglect or failure to perform the obligation under the said Clause 3(iv) Covenant is in breach of the 1997 Lease.

Alternatively

An order directing the first defendant in its capacity as landlord to keep free and clear from obstructions all drains bounding or adjoining the demised premises in its control.

(3) An order directing the second defendant in its capacity as contractual lessor to keep free and clear from obstruction all drains bounding or adjoining the demised premises in its control.

(4) Damages for breach of contract.

(5) Interest with costs and such further or other relief.

[6] The claimant contends that Time Bourke Holding (Grenada) Limited covenanted to observe and perform the covenants on the part of the Government of Grenada in the 1997 Lease, and that Clause 3(iv) touches and concerns and runs with the tenanted land.

[7] The claimant further contends that the Government of Grenada in its capacity as contracting party has a continuing obligation to perform Clause 3(iv) or cause it to be performed. The claimant states that as original covenantor, the second defendant remains liable under the lease for the non-performance of Clause 3(iv).

[8] The claimant avers that the failure by the defendants to perform the obligation under the 1997 Lease to clean the adjoining drain has caused a build-up of stagnant water, debris and mosquito larvae in the storm drain. The claimant further contends that the failure, neglect or refusal to clear the drains in breach of the obligation and covenant has caused and continues to cause the claimant loss and damage, in that it has resulted in significantly increased costs to maintain the drains.

First Defendant's case

- [9] By amended defence filed 20th November 2015, Time Bourke Holding (Grenada) Limited avers that the covenant in Clause 3(iv) is collateral and does not run with the land as it also benefits other land affected by or served by the said drains.
- [10] Time Bourke Holding (Grenada) Limited also contends that it has never been in control of the drains, and that the nature of the covenant is such that it is clear that the original parties must have intended the covenant to remain binding only for so long as the Government of Grenada remained landlord.
- [11] Time Bourke Holding (Grenada) Limited denies that the burden of Clause 3(iv) was transferred to it and also denies that it is obliged to indemnify the Government of Grenada.

Second Defendant's case

- [12] In defence filed 23rd February 2016, the Second defendant (Government of Grenada) contends that by Clause 2 of the Testatum of the deed of conveyance dated 7th July 2008, Time Bourke Holding (Grenada) Limited as purchaser covenanted with the vendor so far as is relevant as follows: "to observe and perform the covenants on the part of the Vendor and conditions in the said Lease and to keep the Vendor and his assigns and effects indemnified from all claims in respect thereof."
- [13] The Government further contends that its interest, estate and obligations were transferred to the first defendant by virtue of the deed of conveyance, and that it retains no land or interest therein, and no continuing obligation to perform Clause 3(iv) of the 1997 Lease.
- [14] By ancillary claim form filed 23rd February 2016, the second defendant claims against Time Bourke Holding (Grenada) Limited indemnity in relation to the claimant's claim.

Legal Analysis

Whether the covenant contained in Clause 3(iv) has been breached

[15] Clause 3(iv) of the 1997 Lease states:

“keep free and clear from obstruction all drains in the control of the Landlord bounding or adjoining the demised premises and further not to extend or permit the extension by others of the drainage system of which the storm drain now located on the Demised Premises forms a part and not to enlarge or permit enlargement by others of the catchment area served by such storm drain system whereby the flow of storm water through such system would or could be increased.”

[16] According to the evidence of Kelvon Burke, witness for the second defendant, a storm drain is located on the demised premises. It is the claimant’s evidence that the drain into which the storm drain runs, which is the drain adjoining Grand Anse beach, (hereafter “the said drain”) has not been kept clear. The claimant has had to devise its own measures to clear the said drain.

[17] Mr. Burke contends that there is the backing up of water from the storm drain caused by blockage of the Grand Anse beach adjoining drain, and that as such, flooding occurs several times each year. The claimant states that such flooding is a direct consequence of the failure to design and implement a system to keep the Grand Anse Beach adjoining drain clear and unimpeded at all times.

[18] It is also the claimant’s evidence that due to the lack of regular cleaning, there is a continuous and continuing build-up of silt in the Grand Anse Beach adjoining drain, the end result being that the leased property floods more easily and the flooding is heavier than it was before.

[19] Mr. Kennedy Perriman, FIT Manager for the claimant in excess of twenty years, states that he has the responsibility to clean the storm drain. He states that there are connecting drains from the streets leading unto the Grand Anse beach. He said all the drains are channelled into the storm drain. He states that depending on the state of the adjoining drains the storm drain can become clogged with

debris. He states that the storm drain connects to the Grand Anse beach and entries, and exits are constructed by the Government and controlled by the government. He speaks of a connecting drain leading to the Grand Anse beach adjoining the storm drain which used to be cleaned by the claimant. However, this is no longer possible as the Ministry of Works placed some heavy concrete slabs at the end of the storm drain. He admits that the Government through the Ministry of Works is not doing a good job at maintaining the drains. He admits that he never had cause to call Time Bourke Holdings to assist in the cleaning of the drains.

[20] According to the claimant, the failure of either of the defendants to perform the obligation under the clause to clean the Grand Anse Beach adjoining drain has caused flooding on the leased property which causes water damage from time to time to vehicles parked in the car park and driveway, and also to the tennis courts and spa located on the property. It has caused and continues to cause the claimant increased costs to maintain the storm drain and continues to expose guests and employees to health and safety hazards.

[21] The evidence of the claimant's witnesses is compelling that there has been a breach of the covenant to maintain the drain which has resulted in significant damage and discomfort to the claimant especially having regard to its operations as a hotel.

Whether the Second Defendant Remains Liable to perform the covenant contained in Clause 3(iv)

[22] It is without argument that the Government of Grenada is responsible for breaches to the covenant in Clause 3(iv) which occurred between the years of 1997 and 2008, before the 1997 lease was reassigned to Time Bourke Holding (Grenada) Limited on 7th July 2008.

[23] The claimant citing the decision in **Stuart and Others v Joy and Anr**¹ argues in addition that an original landlord who contracts a lease agreement remains liable under the expressed covenants of the lease for the duration of the lease even after he sells or assigns the reversion². According to Cozens-Hardy LJ:

“The consequence of holding that a landlord can escape from all liability upon his express covenants in the lease by assigning to a pauper would be alarming. In my opinion, the position of the lessor with respect to covenants running with the reversion is now precisely similar to the position of the lessee with respect to covenants running with the lease. In neither case is liability extinguished by assignment.”³

[24] Furthermore, Gilbert Kodilinye in **Commonwealth Caribbean Property Law**⁴ stated:

“The principles may be summarized as follows: where there is privity of contract between the parties, both are bound. There is privity of contract between the original lessor and the original lessee. This relationship, created by the contract of lease itself, continues to subsist between lessor and lessee despite any assignments of their respective interests.”

[25] Moreover, in **City and Metropolitan Properties Ltd v Greycroft Ltd**⁵ it was held that an assignment of a lease did not exclude an assignor, in this case the tenant, from seeking a remedy from past breaches of a covenant by its landlord. It was stated at page 1087 of the judgment of John Mowbray QC:

“It is common ground... that a tenant who has assigned his lease again remains liable to the landlord for breaches of covenant which he committed while tenant... Both this liability and the benefit of the landlord’s covenants run with the lease at common law by privity of estate... I take the view that, by this analogy, the landlord’s liability to the tenant for existing breaches survives the assignment of the lease, in the same way as the tenant’s liability to the landlord.”

[26] Given the above law, and applying same to the facts before this court, this court finds for the claimant that the Government of Grenada remained liable to fulfil the

¹ [1904] 1 KB 362

² *Stuart and Others v Joy and Another* [1904] 1 KB 362

³ *Stuart and Others v Joy and Another* [1904] 1 KB 362

⁴ (4th Edn, Routledge 2015)

⁵ [1987] 1 WLR 1085

obligation contained in the covenant to clear the said drain, although the reversion was assigned to Time Bourke Holding (Grenada) Limited.

Whether the first defendant inherited the burden of the covenant contained in Clause 3(iv) so that it is liable to perform it

[27] By clause 2 of the operative part of the 2008 Conveyance, the first defendant covenanted to:

“observe and perform the covenants on the part of the Vendor and conditions in the said Lease and to keep the Vendor and his assigns and effects indemnified from all claims in respect thereof.”

[28] The claimant argues that according to that clause, Time Bourke Holding (Grenada) Limited obtained the benefit of the reversion in the tenanted property and undertook to observe and perform all the covenants under the lease, thus making it liable for the performance of the covenant.

[29] The claimant argues that Clause 3(iv) forms part of the package of burdens which run collateral to the package of benefits that Time Bourke Holding (Grenada) Limited agreed to receive by executing the 2008 Conveyance and accepting the lease formerly between the Government of Grenada and the claimant. The claimant states that Time Bourke Holding (Grenada) Limited in obtaining the benefit of the lease held by the claimant was conditional on its acceptance of the obligations of the Government of Grenada under the lease. By expressly covenanting as it did in clause 2 of the 2008 Conveyance, Time Bourke Holding (Grenada) Limited accepted both the burden of the covenant and the benefit of the lease and therefore became obligated to perform the Clause 3(iv) covenant.

[30] Time Bourke Holding (Grenada) Limited in response argues that the clause does not apply to it as the covenant is collateral and does not run with the demised premises, and as it benefits other lands affected by and served by the said drain. Time Bourke Holding (Grenada) Limited also argues that the drains have never been in its control. Time Bourke Holding (Grenada) Limited further states that

there was no privity of contract between itself and the claimant, but only privity of estate.

[31] It is settled law that where a lease or the reversion has been assigned, there is privity of estate between the original party and the assignee. The Text **Gilbert Kodilinye, Commonwealth Caribbean Property Law** states “where there is privity of estate, only covenants that touch and concern the land are enforceable⁶.

[32] It was held in **Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd**⁷:

“Covenants that touch and concern land are covenants that affect the landlord in his normal capacity as landlord, or the tenant in his normal capacity as tenant⁸. In order to bind the assignee, the covenant must either affect the land itself during the term, such as those which regard the mode of operation, or it must be such as per se, and not merely from collateral circumstances, affect the value of the land at the end of the term⁹. A covenant may very well have reference to the land, but unless it is reasonably incidental to the relation of landlord and tenant, it cannot be said to touch and concern the land so as to be capable of running therewith or with the reversion¹⁰.

[33] Their Lordships in **Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd**¹¹ stated:

“To say that the obligation to 'return' the amount of the deposit is 'inextricably bound up with' covenants which touch and concern the land in the sense in which the expression was used by McMullin V-P in the instant case, ie that, in order to determine whether or not the obligation to pay could have arisen against anyone, it would be necessary to survey the other covenants, does not, in their Lordships' view, answer the critical question of whether it itself touches and concerns the land. It certainly does not per se affect the nature, quality or value of the land either during or at the end of the term. It does not per se affect the mode of using or enjoying that which is demised. And to ask whether it affects the landlord qua landlord or the tenant qua tenant is an exercise which begs the question. It does so only if it runs with the reversion or with the land respectively.”

⁶ Gilbert Kodilinye, *Commonwealth Caribbean Property Law*, (4th Edn, Routledge 2015)

⁷ [1987] 1 All ER 1110

⁸ [1987] 1 All ER 1110

⁹ *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] 1 All ER 1110

¹⁰ *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] 1 All ER 1110

¹¹ [1987] 1 All ER 1110

[34] In **Systems Floors Ltd v Ruralpride Ltd**¹², the court referenced Mayor of Congleton v Pattison¹³ wherein it is stated:

“the covenant must either affect the land itself during the term, as such those which regard the mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affect the value of the land.”

[35] **Section 29 of the Conveyancing and Law of Property Act**¹⁴ states:

“(1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money, or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act imply, an obligation to do the act to or for the benefit of the survivor or survivors of them, and to or for the benefit of any other person to whom the right to sue on the covenant, contract, bond or obligation devolves.”

[36] The first defendant raises the case of **Half Moon Bay Homeowners Company Ltd v Platinum Properties Inc**¹⁵ in which the court stated:

“a successor in title to the original covenantor did not incur a liability to perform a positive covenant unless it had some relation to a right granted in his favour under the conveyance which right, he did wish to exercise.”

[37] This case held, further, that the condition of discharging the burden must be relevant to the exercise of the rights that enable the benefit to be obtained¹⁶.

[38] The said drain, in this court’s view affects the quality of the land and its value, given the propensity of the property to flood as a result of the said drain becoming blocked.

[39] The argument of Time Bourke Holding (Grenada) Limited of not being in control of the said drain is of no moment, as the company assumed responsibility for the clearing of same upon executing the 2008 Conveyance.

¹² [1995] 1 EGLR 48

¹³ (1808) 10 East 130

¹⁴ CAP 64

¹⁵ SKBHCVP2014/0003

¹⁶ SKBHCVP2014/0003 Half Moon Bay Homeowners Company Ltd v Platinum Properties Inc.

[40] However, with respect to the law as stated in **Half Moon Bay Homeowners Company Ltd v Platinum Properties Inc**¹⁷, although the covenant has relation to the right to ownership which was conveyed by the 2008 conveyance, neither the claimant nor the Government has demonstrated how the condition of discharging the burden of the covenant is relevant to the exercise of the rights that enable the benefit to be obtained.

[41] The assignment of the lease does nothing to disturb the direct liability of the Government of Grenada under the lease for the whole term. The enduring liability extends to all covenants contained in the original lease.

[42] The assignment of the reversionary interest did not exonerate the government of its statutory responsibility to maintain and clear the public drains leading into the storm drain. Neither did the burden of such obligation passed on to Time Bourke Holding (Grenada) Limited by virtue of the assignment of the reversionary interest in the freehold and the lease. It is a settled law that benefits but not the burden of a contract is assignable. The burden to maintain the connecting drains is integral to the Government's public function through the Ministry of Works. The court accepts the evidence that the water running into the storm drain are run offs from the main Grand Anse Road and other adjoining drains. It is also the evidence that the Government of Grenada through the Ministry of Works placed some heavy concrete slabs at sea head making it difficult for the claimant to clean the drain at that end. It stands to reason that Time Bourke Holding (Grenada) Limited is not liable to perform the covenant which is beyond its control and statutory responsibility of the Ministry of works.

Whether the first defendant is liable to indemnify the second defendant

[43] In addition, the Government seeks indemnity from Time Bourke Holding (Grenada) Limited for any damages that may be payable as a consequence of non-performance of the provisions of the 1997 Lease for the period that it was the owner of the property.

¹⁷ SKBHCVP2014/0003

- [44] Time Bourke Holding (Grenada) Limited argues however that the indemnification clause indemnifies the Government of Grenada only to the extent that that company is in breach of a condition on the part of the Government in relation to the 1997 Lease. As the covenant does not touch and concern the land, it is not a condition to be performed by the company under the 2008 deed.
- [45] The court finds merit in the arguments of counsel for Time Bourke Holding (Grenada) Limited that the company having been found not being liable to perform the covenant, is not liable to indemnify the second defendant. The contract did not transfer a burden that was not within the scope or ability of Time Bourke Holding (Grenada) Limited to perform.
- [46] The court finds that there has been breach of the covenant by the second defendant, who is liable for said breach.
- [47] There is no evidence before the court besides the assertions made by the claimant as to the flooding of the drains. Furthermore, the claimant's documents fail to corroborate its statements, as what is provided to the court is quotations, and a schedule of costs supposedly incurred from the clearing of the said drain. No receipts were provided to assist the court in its determination. Accordingly, an assessment of damages to prove the damages suffered by the claimant.

ORDER

- [48] It is therefore ordered and declared as follows:
- (1) Judgment is entered for the claimant against the second defendant.
 - (2) The claim against the first defendant is dismissed.
 - (3) The second defendant shall pay damages to the claimant to be assessed if not agreed within twenty-one (21) days of today's date.

- (4) Failing agreement, the claimant shall file and serve witness statements, submissions with authorities in support of the assessment on or before 15th October 2022.
- (5) The second defendant shall file and serve witness statements, submissions with any authorities in response on before 15th November 2022.
- (6) The assessment of damages shall be conducted on a date to be arranged by the court upon application by the claimant.
- (7) Liberty to file a consent order on damages.
- (8) The claimant shall pay the first defendant's prescribed costs in the sum of \$7500.00 pursuant to CPR 65.5 (2) (b).

Agnes Actie
High Court Judge

By the Court

Registrar