

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

GRENADA

CLAIM NO. GDAHCV2016/0292

BETWEEN:

ISSA NICHOLAS (GRENADA) LIMITED

Claimant

and

**[1] THE ATTORNEY GENERAL OF GRENADA
[2] TIME BOURKE HOLDING (GRENADA) LIMITED**

Defendants

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
Mr. Adeybayo Olowu for the First Defendant
Mrs. Afi Ventour de Vega and Ms. Yurana Phillip for Time Bourke Holding (Grenada) Limited

2022: May 31;
August 3

JUDGMENT

- [1] **ACTIE J.:** This is a claim concerning the interpretation of a clause in a lease agreement and damages for breach of contract.

Background

- [2] The claimant is the tenant in possession of a parcel of land situate at Grand Anse in the parish of St. George, Grenada (hereafter “the tenanted land”), on which it operates a hotel, currently trading under the name “Radisson”, but previously trading as “Renaissance Grenada Resorts” (hereafter “the Hotel”).

- [3] The claimant's occupation and possession was pursuant to a lease dated 11th December 1997 for a period of 99 years made between the claimant as lessee and the Government of Grenada as landlord (hereafter "the 1997 Lease").
- [4] The 1997 Lease contained a covenant whereby the landlord promised that the tenant will be granted a license to import into Grenada materials to be used in the construction, expansion and upgrading of the Hotel and the equipment to be used in connection with the construction upgrading and equipping thereof, free from customs duties.
- [5] By deed of conveyance dated 7th July 2008 (hereafter "the 7th July conveyance"), the freehold reversion in the land subject to the 1997 Lease was transferred by the Government of Grenada to Time Bourke Holding (Grenada) Limited. The 1997 Lease was furthermore assigned to Time Bourke Holding (Grenada) Limited who covenanted to observe and perform all the covenants which would otherwise be obligations on the part of the Government of Grenada in the 1997 Lease.
- [6] The claimant in a claim form filed 4th August 2016 seeks the following:
- (1) A declaration that the first defendant is obliged pursuant to a covenant contained in clause 8(b) of a lease of premises situate at Grand Anse in the parish of St. George, Grenada dated 11th September 1997 between the Government of Grenada and the Claimant to grant the claimant a "license to import into Grenada free from customs duties materials to be used in the construction, expansion and upgrading of the hotel and equipment to be used in connection with the construction upgrading and equipping thereof";
 - (2) A further declaration that despite the transfer of the freehold in the land to Time Bourke Holding (Grenada) Limited that the first defendant is and remains liable for the obligations under the covenant as a contractual obligation given to support and continue to support the development of the land in the interests of the Government of Grenada.
 - (3) In the alternative a declaration that either clause 8(b) aforesaid touches, concerns and runs with the tenanted land and Time Bourke Holding (Grenada) Limited therefore inherited the obligation to perform or provide the claimant with the benefit of the said clause 8(b) covenant or that in receiving the freehold of the land for no consideration, it was the intention of the first and second defendant that Time Bourke Holding (Grenada) Limited would (as Time

Bourke Holding (Grenada) Limited agreed in the conveyance of the freehold) indemnify the first defendant against all and any liabilities arising under the lease between the Government of Grenada and the claimant as part of an intended payment for the freehold interest in the land;

(4) Special damages of \$669,078.98;

(5) General damages for breach of covenant, Interest and Costs

[7] The claimant avers that the Government of Grenada remains liable under the provisions of the 1997 Lease in so far as the Government had committed to refund government revenues to the claimant. The claimant avers further that the Government of Grenada in its capacity as contracting party has a continuing obligation to perform the said Clause 8(b) covenant or cause to benefit of the covenant to be conferred on it.

[8] In the alternative, the claimant contends that the Clause 8(b) covenant touches and concerns and runs with the tenanted land, making Time Bourke Holding (Grenada) Limited responsible for its performance.

[9] The claimant avers that it has suffered special damages in the sum of \$669,078.98 being monies paid as customs duties to the Government by virtue of the breach of the Clause 8(b) covenant.

First Defendant's case

[10] In its defence filed on 2nd September 2016, the first defendant avers that the interest, estate and obligations of the Government of Grenada relative to and referable to the subject property of which the claimant is a tenant have been transferred to Time Bourke Holding (Grenada) Limited by virtue of the deed of conveyance.

[11] The first defendant states that the undertaking has been faithfully performed by the Government of Grenada in that the customs duties referred to in the lease from which the claimant is exempted have never been charged by the Government of Grenada on any material equipment which form part of the class of goods which are exempt under Clause 8(b) of the 1997 Lease.

- [12] The first defendant states that the Government of Grenada is not liable for the breaches alleged by the claimant.

Second Defendant's case

- [13] Time Bourke Holding (Grenada) Limited in its defence filed on 2nd September 2016, avers that the reversion of the 1997 Lease that was assigned to it by the 7th July Conveyance.
- [14] Time Bourke Holding (Grenada) Limited asserts that although it covenanted to perform and observe the covenants on the part of the Government and conditions contained in the 1997 Lease, it denies that it covenanted to perform and observe all covenants which would otherwise be obligations on the part of the Government in the 1997 Lease. Time Bourke Holding (Grenada) Limited further states that the Clause 8(b) undertaking is such that it is clear that the original parties to the 1997 Lease must have intended for that undertaking to be binding on the original landlord, that is the Government of Grenada, only. Moreover, the nature of the Clause 8(b) undertaking is such that no other person or entity to which the reversion of the 1997 Lease is assigned, can perform the same, as only the Government of Grenada can grant a licence exempting payment of custom duties on the materials and equipment imported by the claimant into Grenada.
- [15] Time Bourke Holding (Grenada) Limited avers that there exists privity of contract between the claimant and the Government as they were the original parties to the 1997 Lease. This relationship continues to subsist despite the assignment of the Government's reversionary interest in the subject land.
- [16] Time Bourke Holding (Grenada) Limited further asserts that the Clause 8(b) undertaking does not relate to the land, nor does it affect the nature quality or value of the land demised, or the mode of using or enjoying the land demised. The Clause 8(b) undertaking is not one which affects the landlord in its normal capacity as landlord or the tenant in its normal capacity as tenant, and therefore it is not annexed to nor does it run with the subject land.
- [17] Time Bourke Holding (Grenada) Limited states that all that exists between itself, and the Government of Grenada is privity of estate, and in the circumstances, only covenants that touch and concern the land are enforceable against Time Bourke Holding (Grenada) Limited, and Clause 8(b) does not touch and concern the land.

Legal Analysis

- [18] At the commencement of the trial, Mr. Adeybayo Olowu, Counsel for the Attorney General, raised preliminary points both orally and in written submissions filed on 29th April 2022.
- [19] With respect to the interpretation of Clause 8(b), the first defendant argues that it is inconceivable that the Government would bind itself to give such concessions for 99 years in the absence of clear and express language, and that the intention of Clause 8(b) was to provide for the exemption from customs duties in respect of the expansion, upgrade, construction and development works which were specified in the Schedule of the 1997 Lease.
- [20] With respect to the institution of proceedings being a breach of contract, the first defendant submits that where in an agreement the parties have determined that disputes must go to arbitration, it is a breach of contract to attempt to litigate such disputes, and that any legal proceedings brought in respect of such disputes ought to be stayed. The first defendant relies on Section 3 of the Arbitration Act CAP 19 and Clause 10(v) of the 1997 Lease. Counsel for the first defendant further raises the issue of the arbitration clause at the commencement of trial as an oral application to stay the proceedings.
- [21] The starting point is that there is no application filed by Counsel to engage the court. Secondly, it is settled law that a party is bound by its pleadings and cannot raise any matter not pleaded in submissions.
- [22] . Blenman JA in the case of **George W Bennet Bryson's & Co. Ltd. v George Purcell**¹ summarised this legal principle, stating therein that:

“...the function of pleadings is to ‘give fair notice of the case which has to be met’ and ‘to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.’ It is duty [sic] of the court to firstly examine the pleadings and then to decide the case in view of, or more properly, on the basis of the pleadings.”²

¹ [2018] ECSCJ

² para 33

[23] Further, **CPR 10.5 (1)** requires that the defence must set out all the facts on which the defendant relies to dispute the claim. In **Leon O. Taylor v Wilfred Julien et al**³ Baptiste JA stated:

“A pleading must make clear the general nature of the case of the pleader since it is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has no fair warning”.

[24] Baptiste JA further held that **CPR 10.7** provides the consequences of not setting out a proper defence. The defendant may not rely on any allegation or factual argument which is not set out in the defence but could have been set out there.

[25] Counsel for the first defendant cannot now, in legal submissions and at the commencement of the trial of a matter filed since 2016, raise a fundamental defence and legal issue not previously pleaded in its defence or canvassed in witness statements or pre-trial memoranda. These submissions by the first defendant evidently take the claimant and the second defendant by surprise, as submissions filed on behalf of the parties do not address the court on said issues.

[26] Counsel’s belated attempt to challenge jurisdiction is a matter that should have been raised at the preliminary stage of the claim in keeping with CPR 9.7 since the arbitration clause is a clause in the lease agreement which is the subject of the claim. The Attorney General chambers filed a defence and ancillary claim on behalf of the Government of Grenada. The lease is the subject of two claims before this court and with many case management conferences and were referred to mediation as an alternative dispute resolution mechanism. It is an abuse of process for counsel to be postulating such a view at the trial stage seeking a stay. This is a blatant attempt to further stultify the matter which is not in keeping with the overriding objective of CPR 2000. Consequently, the court is not able to give credence to the arguments put forward by the first defendant on these issues, as it is fundamentally unfair to do so in the circumstances.

Whether the first defendant is in breach of the terms of its obligations set out in Clause 8(b) of the 1997 Lease

[27] Clause 8(b) of the 1997 Lease states:

³ GDAHCVAP2016/0019

“... without prejudice to the covenant contained in Clause 3(iv) above the Tenant will be granted a licence to import into Grenada free of customs duties materials to be used in the construction, expansion and upgrading of the Hotel and the equipment to be used in connection with the construction upgrading and equipping thereof”

[28] The claimant avers that despite the covenant contained in Clause 8(b), the claimant has been made to pay custom duties by the Government of Grenada through the Customs Department, on goods and equipment imported into Grenada for use in connection with the construction, expansion and upgrading of the Hotel and the equipment to be used in connection with the construction, upgrading and equipping of the Hotel.

[29] It is the claimant's evidence that after Hurricane Ivan in September 2004, the claimant embarked on renovating and upgrading the Hotel. Nevertheless, from that year onwards, the Government of Grenada refused to allow the claimant to import items which are covered under the terms of Clause 8(b), without it paying customs duties.

[30] The claimant is the original tenant and the first defendant, the original landlord. Given the agreement contained in the 1997 Lease, the first defendant is bound to oblige that which is contained in Clause 8(b). This is in spite of the 1997 Lease being assigned to Time Bourke Holding (Grenada) Limited, as there remains between the claimant and the first defendant privity of contract⁴.

[31] Gilbert Kodilinye in **Commonwealth Caribbean Property Law**⁵ states that:

“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.”

[32] The transfer of the reversion does not affect the privity of contract between the first defendant as original landlord and the claimant as the original tenant⁶. Thus, the obligation of the first defendant to perform the covenant contained in Clause 8(b) was not extinguished by virtue of the 2008 sale of the freehold reversion to Time Bourke Holding (Grenada) Limited. The first defendant maintained the capacity and authority to perform the obligation as contained in the covenant.

⁴ Allied London Investments Ltd v Hambro Life Assurance Ltd [1984] 1 EGLR 62

⁵ (4th edn, Routledge 2015) page 39

⁶ Halsbury's Laws of England (5th edn, 2016) Volume 62 para 448

- [33] Consequently, for as long as the first defendant continued to levy and collect customs duties from the claimant in respect of goods which ought to have otherwise been exempted pursuant to Clause 8(b) of the 1997 Lease, it continued to breach the covenant and remained liable to compensate the claimant for resulting damages.

Whether Clause 8(b) is a covenant touching and concerning the demised premises so as to be capable of running therewith or with the reversion

- [34] The first defendant argues that Time Bourke Holding (Grenada) Limited is bound by the terms of the lease, and that it (the first defendant) has no further obligations contractually, as those contractual obligations are transferred to the new owner of the land. Time Bourke Holding (Grenada) Limited denies that it inherited the obligation to grant to the claimant a license to import materials and equipment to be used in the construction, expansion and upgrading of the hotel free from customs duties.

- [35] There being no privity of contract between the claimant and Time Bourke Holding (Grenada) Limited, there exists privity of estate between the parties as original tenant and assignee. Consequently, privity of estate exists between the claimant and Time Bourke Holding (Grenada) Limited for covenants that touch and concern the land.

- [36] As was stated in **Halsbury's Laws of England**⁷:

“As between persons other than landlord and tenant the benefit of a covenant, whether positive or negative, may run with the land at law if it touches and concerns the land. The covenantee, at the time of making the covenant, must have had a legal estate in the land which is to be benefited, and the assignee claiming the benefit must be able to show that he is a successor in title of the covenantee, or a person deriving title under the covenantee or under his successors in title... There must be an intention that the benefit should run with the land owned by the covenantee at the date of the covenant...”

- [37] Gilbert Kodilinye in **Commonwealth Caribbean Property Law**⁸ defines covenants that touch and concern land as:

⁷ (2019) volume 32 para 448

⁸ (4th edn, Routledge 2015) page 40

“...one that affects the landlord in his normal capacity as landlord, or the tenant in his normal capacity as tenant.”

- [38] The learned author goes on to discuss covenants that are not ones which touch and concern the land, and states:

“On the other hand, personal or collateral covenants do not touch and concern the land, since they are not directly relevant to the relationship of landlord and tenant”⁹

- [39] Furthermore, their Lordships in the **Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd**¹⁰ decision stated with regard to a covenant concerned with the landlord returning a security deposit to the tenant at the end of the lease:

“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.”

Conclusion

- [40] Applying the learning of the Privy Council in **Hua Chiao Commercial Bank**, it is clear that an undertaking to grant a license to the claimant to import materials free of customs duties is not one which affects the nature, quality or value of the land, nor the mode of using or enjoying the land, so as to bind Time Bourke Holding (Grenada) Limited to its execution. Furthermore, this obligation does not affect Time Bourke Holding (Grenada) Limited in its normal capacity as landlord, or the claimant in its normal capacity as tenant.
- [41] It could not have been intended by Time Bourke Holding (Grenada) Limited to assume contractual responsibility for the granting of a license to import material into the State of Grenada free of customs duties. Time Bourke Holding (Grenada) Limited is not a governmental institution. It is a company, incapable of having the capacity to grant such duty-free concessions on imports. This is a power vested in the Government of Grenada which could not have been transferred to a private company.
- [42] Consequently, the first defendant remains liable to fulfil the obligation as contained in Clause 8(b). The only issue left to be determined is whether the items claimed fall within the description of

⁹ G. Kodilinye, *Commonwealth Caribbean Property Law*, (4th edn, Routledge 2015) page 40

¹⁰ [1987] 1 All ER 1110

concession granted by the Government of Grenada. The claimant pleaded a total sum but has failed to sufficiently particularize the items. The sum due and owing to the claimant can only be determined in an assessment of damages in keeping with established principles.

[43] Based on the foregoing, the court finds that the claimant has proven its claim against the first defendant but has failed to prove the claim against, the second defendant, Time Bourke Holding (Grenada) Limited.

ORDER

[44] Accordingly, it is therefore ordered and declared as follows:

- (1) Judgment is entered for the claimant against the first defendant.
- (2) The claim against the second defendant, Time Bourke Holding (Grenada) Limited is dismissed.
- (3) The first defendant shall pay damages to the claimant to be assessed, if not agreed within twenty-one (21) days from today's date.
- (4) Failing settlement, the claimant shall file and serve witness statements, submissions with authorities in support of the assessment of damages on or before 15th October 2022.
- (5) The first defendant shall file and serve witness statements, submissions with any authorities in response on or before 15th November 2022.
- (6) The assessment of damages shall be conducted on a date to be arranged by the court office upon application by the claimant.
- (7) Liberty to file a consent on damages.

(8) The claimant shall pay Prescribed Costs to the second defendant, Time Bourke Holding (Grenada) Limited on the pleaded sum of \$669,078.98 pursuant to CPR 65.5, unless otherwise agreed.

Agnes Actie
High Court Judge

By the Court

Registrar