EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAMCVAP2015/0004

Between:

WESTERHALL POINT RESIDENTS ASSOCIATION LIMITED

Appellant

and

ANTHONY BATIHK

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Alban John, with him, Ms. Thandiwe Lyle and Mr. Sasha Courtney for the Appellant
Ms. Kim George, with her, Ms. Sheriba Lewis for the Respondent

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2016: January 27;
May 3.

Magisterial Civil Appeal – Covenants affecting land – Maintenance of estate road by residents' association - Positive covenant in deed of conveyance to contribute to maintenance – Benefit and burden principle – Whether purchaser's successor in title bound by covenant

The appellant is the residents' association ("the Association") of a residential development ("the Development") at Westerhall Point, Grenada. The respondent is the present owner of Lot 101 of the Development. Prior to the respondent's ownership of Lot 101, the

developers of the Development had sub-divided the Development into residential lots and imposed covenants on all lots. By Deed of Indenture, Lot 101 was sold and conveyed to Dr. Jacques Peraya ("the Peraya Deed") which included a covenant that the purchaser share proportionately in the maintenance and upkeep of the road to access the lots in the Development ("the Estate Road"), but the Deed did not say that the covenant is binding on the purchaser's successors in title and assigns. Dr. Peraya subsequently sold Lot 101 to a company which in turn sold and conveyed it to the respondent. The respondent's conveyance incorporated the Peraya Deed.

The Estate Road, the only means of access to the properties in the Development, is maintained by the Association and is used by the respondent. The Association carries out the maintenance of the Estate Road and the cost of the maintenance is passed on to the owners of properties in the Development. The respondent has refused to pay his share of the maintenance costs. The respondent's refusal led to the Association filing a claim against him in the Magistrate's Court for recovery of his share of the maintenance costs.

The Association contended in the lower court that the respondent, as owner of property in the Development, was a member of the Association and was liable to contribute to the maintenance costs. The respondent admitted that he uses the Estate Road but denied that he is a member of the Association and that he is otherwise obliged to contribute to the costs of maintenance of the Estate Road. The learned magistrate found that the Association had failed to prove its case and dismissed the Association's claim. The Association appealed against the learned magistrate's decision.

Held: allowing the appeal; setting aside the decision of the learned magistrate; ordering the respondent to pay the arrears of maintenance of $7,690.00 within 21 days; and ordering the respondent to pay costs of $500.00 in the court below and $1,000.00 on the appeal within 21 days, that:

1. As a general rule, a positive covenant is a matter of contract between the parties to the contract and does not run with the land. However, the rule is not absolute and is subject to the exception that a person who takes the benefit of a positive covenant must also subscribe for the burden attached to the covenant, but only where the benefit is related to and conditional upon the burden. The burden as a condition for enjoying the benefit of the covenant can be made in express terms or by implication.

   Halsall and others v Brizell and another [1957] 1 All ER 371 applied; **Rhone v another v Stephens (Executrix of May Ellen Barnard, decd.)** [1994] 2 AC 310 applied.

2. In the present case, the covenants in the Peraya Deed conferred benefits on Dr. Peraya and imposed related burdens on him and other residents of the Development to pay for the maintenance and upkeep of the Estate Road and other common facilities. Although there was nothing in the Peraya Deed that said that the use of the Estate Road is conditional on the payment of maintenance costs, it is clear that the parties to the Deed intended that the purchaser's use of the Estate Road was not gratuitous but that it was conditional on the payment of a proportionate share of the maintenance costs. That the Deed does not state that the positive covenants were to be binding on Dr. Peraya's successors in title is of no moment. What is of consequence is that the right to use the Estate Road is related to and conditional upon paying the proportionate share of the maintenance costs. In the circumstances, the learned magistrate erred in her decision regarding the obligation to contribute to the maintenance of the Estate Road.

Halsall and others v Brizell and another [1957] 1 All ER 371 applied; **Rhone v another v Stephens (Executrix of May Ellen Barnard, decd.)** [1994] 2 AC 310 applied.

JUDGMENT

[1] **WEBSTER JA [AG.]:** It is not very often that the Court of Appeal hears an appeal from the Magistrate's Court involving the finer points of the law relating to covenants affecting land. This is one such appeal. What started as a money claim for arrears of maintenance charges has evolved into an analysis of the rules relating to the enforceability of positive covenants.

Introduction

[2] The appellant is a non-profit company carrying on business as the residents' association of a residential development at Westerhall Point, Grenada. The appellant is referred to in this judgment as "the Association" and the Westerhall residential development as "the Development".

[3] The respondent is the owner of Lot 101 of the Development and uses the road serving the Development ("the Estate Road") to get to and from his property. The Estate Road requires maintenance and upkeep from time to time. The Association carries out the required maintenance and passes on the cost to the owners of property in the Development. The respondent has refused to pay his proportionate share of the maintenance costs. On 23rd October 2013, the Association filed a claim against him in the Magistrate's Court for $7,690.00 being maintenance charges due to the Association for the period 2007 to 2012. The respondent denied the claim and the action was dismissed by the learned magistrate. This is an appeal against the magistrate's decision. The background to the claim is set out below.

Background

[4] The Development was originally owned by Westerhall Point Limited ("the Developer"). Prior to 1961, the Developer sub-divided the property into residential lots and imposed covenants on all the lots.

[5] By Deed of Indenture dated 3rd February 1961, the Developer sold and conveyed Lot 101 to Dr. Jacques Peraya subject to the covenants in the said Deed ("the Peraya Deed").

[6] By Deed of Conveyance dated 10th May 1969 the Developer conveyed the Estate Road and other common areas of the Development to the Association. The Association is governed by the company's memorandum and articles of association ("the Bylaws"). It is responsible for levying and collecting from the owners of the lots in the Development dues and charges for maintaining the common areas of the Development, including the Estate Road. The Estate Road provides the only access to the properties in the Development and the respondent is bound to use it to access his property.

[7] In 1990, Dr. Peraya sold Lot 101 to Bluebeard Enterprises Limited and on 23rd October 1996 Bluebeard Enterprises Limited sold the lot to the respondent. The Third Schedule of the conveyance from Bluebeard Enterprises Limited to the respondent incorporates the Peraya Deed and the first recital of the conveyance states that Lot 101 is subject to 'the restrictions and stipulations set out in [the Peraya Deed]'. Further, clause 2 of the conveyance provides that:

> "The Purchaser [the respondent]…covenants with the Vendor that the Purchaser and the persons deriving title under him will at all times hereafter observe the said restrictions and stipulations contained in the Conveyance [the Peraya Deed] so far as the same relate to the Property [Lot 101] and are still subsisting and capable of being enforced."

This is a reference to the restrictive covenants affecting the Development.

[8] The Association incurred expenses in maintaining the Estate Road during the period leading up to the filing of the claim in October 2013. The Association demanded payment from the respondent of his proportionate share of the costs of maintaining the Estate Road on the ground that as an owner of property in the Development the respondent was a member of the Association and is therefore liable to contribute to the maintenance costs of the Estate Road. The respondent admits using the Estate Road. In fact, it is the only way for him to get to and from his property. However, he denies that he is a member of the Association and that he is otherwise obliged to contribute to the cost of maintaining the Estate Road.

[9] The learned magistrate found that the Association failed to prove that the respondent was a member of the Association and that he was obliged by covenant to pay the maintenance costs. She dismissed the claim. The Association appealed on the grounds that the learned magistrate was wrong in finding that the

respondent was not a member of the Association and that he was not obliged by covenant to contribute to the cost of maintaining the road. The issues on the appeal are therefore:

(1) was the respondent a member of the Association and as such liable to contribute to the cost of maintaining the Estate Road; and

(2) even if the answer to the first issue is no, was the respondent obliged by the covenants in his title documents to contribute to the maintenance costs.

Respondent a Member

[10] The Association submitted in its written submissions that the covenants predate the respondent's acquisition of Lot 101 and that its Bylaws are in a public document to which the respondent is deemed to have access. As such, he is deemed to have purchased and taken up residence in the Development subject to the rules of the Association which include the obligation to contribute to the maintenance costs. Counsel for the Association, Mr. Alban John, did not pursue this ground of appeal in his oral submissions, and rightly so. The magistrate was correct in finding that there was no evidence that the respondent was a member of the Association or had agreed to be bound by the Bylaws, or that membership of the Association can be deemed by ownership of a lot in the Development. This ground of appeal therefore fails.

Breach of Covenant

Mr. John went on to submit that the sole issue in the appeal was whether the respondent is bound by the positive covenant in the Peraya Deed to contribute to the cost of maintaining the Estate Road on the basis that he enjoys the benefit of using the Road and must therefore share in the burden of keeping it in good

repair. It is therefore important to review the covenants in the documents affecting Lot 101 and the relevant law.

[11] Lot 101 was first conveyed by the Developer to Dr. Peraya by the Peraya Deed. The repair covenant is in clause 3 of the Deed. It reads:

> "(3) In order to retain and maintain the exclusive and private nature of the Development Area of which the lot hereby conveyed form part The Company hereby Covenants with the Purchaser that the Company will at its own expense maintain for a period of three years from the date of completion all roads laid down in the present Development and shown on the layout plan AND The Purchaser covenants with The Company that thereafter The Purchaser will share proportionately in the maintenance and upkeep of the said Roads."

This is a positive covenant imposing on the Developer the obligation to maintain the Estate Road for three years after completion and thereafter for the purchaser (Dr. Peraya) to pay a proportionate share (with the other homeowners) for the maintenance and upkeep of the Estate Road. The covenant does not say that it is binding on the purchaser's successors in title and assigns.

[12] This is followed by clause 4 which imposes negative or restrictive covenants:

> "4. For the benefit and protection of the lands comprised in the said Development Scheme or any part or parts thereof other than the land hereby conveyed and so as to bind so far as may be the property hereby conveyed into whosoever hands the same may come The Purchaser hereby covenants with The Company that The Purchaser and the persons deriving title under him will at all times hereafter observe and perform the restrictions and stipulations set out in the Schedule hereto but so that The Purchaser shall not be liable for a breach of covenant occurring on or in respect of the property hereby conveyed or any part of parts thereof after he shall have parted with all interest therein."

The restrictive covenants are set out in the Schedule to the Peraya Deed and are not relevant to this appeal.

[13] Counsel for the parties, Mr. Alban John for the Association and Ms. Kim George for the respondent, are generally agreed on the basic principles regarding covenants affecting land. The substance of the agreed position is that the contract contained in a conveyance of land is generally binding on the parties to the conveyance because of the common law rules relating to privity of contract. The successors in title of the parties are not bound by the terms of the conveyance unless it can be shown that the provision or covenant in question falls under an exception to the common law rules relating to privity. One notable exception to the common law rules is that equity regards restrictive covenants as covenants that deprive an owner of rights over his own property and such covenants are said to run with the land as a matter of property and bind the parties to the conveyance and their successors in title and assigns. This is the long standing and well known rule in **Tulk v Moxhay**.[1]

[14] It is in the area of positive covenants that the parties have divergent views of the legal position and its application to the facts. The starting point is that as a general rule a positive covenant is a matter of contract between the parties and it does not run with the land. In **Rhone and another v Stephens (Executrix of May Ellen Barnard, decd.)**,[2] Lord Templeman opined that:

> "Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it. Enforcement of a positive covenant lies in contract..."[3]

[1] [1848] 41 ER 1143.
[2] [1994] 2 AC 310.
[3] At p. 318.

[15] Ms. George for the respondent submitted that the general rule applies in this case and the respondent is not bound by the positive covenant to contribute to the cost of maintaining the Estate Road, even though he uses it to get access to his property. On the other hand, Mr. John for the Association submitted that the rule that a positive covenant is not enforceable against the covenantor's successors in title is not absolute and there is at least one exception to the rule that is relevant to this appeal.

[16] In its simplest form the relevant exception is that a person who takes the benefit of a positive covenant must also subscribe for the burden attached to the covenant.[4] Mr. John submitted that this principle applies to the facts of this case and the respondent cannot take the benefit of the repair covenant (the use of the Estate Road) without subscribing for the burden associated with using the Road (paying his share of the maintenance costs). Mr. John relied on **Halsall and others v Brizell and another**[5] in support of his position. The property developers in **Halsall v Brizell** acquired property, divided it into building lots and imposed covenants on each lot. The conveyances recited that the purchasers and their successors in title were entitled to the use of the roads and other common areas and the purchasers covenanted that they and their successors in title would contribute to the cost of maintaining the roads and the main drains and sewers. On the issue whether the defendants, as the successors in title of one of the original purchasers, were obliged to contribute to the maintenance costs, Upjohn J noted firstly that the defendants could not be sued on the covenant to contribute because it was a positive covenant that did not run with the land. However, the defendants could not choose to take the benefit of the deed without subscribing for the burden. This is how the learned judge rationalised the defendants' position:

[4] Halsall and others v Brizell and another [1957] 1 All ER 371 at 376 (Per Upjohn J).
[5] [1957] 1 All ER 371.

> "If authority is required for that proposition, I refer to one sentence during the argument in Elliston v Reacher (1) ([1908] 2 Ch 665), where Sir Herbert Cozens-Hardy MR said (ibid, at p 669):
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> > "It is laid down in COKE ON LITTLETON, 230b, that a man who takes the benefit of a deed is bound by a condition contained in it though he does not execute it."
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> If the defendants did not desire to take the benefit of this deed, for the reasons that I have given they could not be under any liability to pay the obligations thereunder. They do desire, however, 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 nor on any right by prescription, for the simple reason that, when the house was originally sold in 1851 to their predecessor in title, he took the house on the 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 their house, as they do, take advantage of the trusts covering the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations thereunder. On that principle it seems to me that they are bound by this deed, if they desire to take its benefits."[6]

Upjohn J was careful to point out that this was not simply a case of a successor in title taking the benefit of a covenant and *ipso facto* obliging himself to discharge the burden of the covenant. He said that the original owner took the house in terms of the 1851 deed which bound him to contribute to the maintenance expenses as a condition of using the roads and sewers. If the defendant/successor in title chose to take the benefit by using the road, he was bound to shoulder the burden by contributing to the cost of maintenance. In other

[6] At p. 377.

words, his liability to contribute was based on the benefit and burden principle as applied to a deed and not the strict enforcement of the covenant to contribute.

[17] The principle of the benefit and burden of a positive covenant was considered by the House of Lords in 1994 in **Rhone v Stephens**. The case involved the division of a house into two units with a party wall and a common roof. The original owners sold one unit (the cottage) and covenanted to keep the entire roof in good repair. The cottage owner's successor in title brought an action against the original owners' successor in title to repair the roof over the cottage. The House of Lords dismissed the cottage owner's appeal against the Court of Appeal's dismissal of the claim on the ground that the original owners covenant to keep the roof in good repair was a positive covenant that was not enforceable by the cottage owners. The decision of their Lordships was delivered by Lord Templeman who underscored the importance of not extending the rules about positive covenants so as to impose financial burdens on persons who are not parties to the original contract. He went on to recognize the principle of the benefit and burden of a positive covenant as set out in **Halsall v Brizell** and made the point that the condition (payment in our case) must be relevant to the exercise of the right (use of the Estate Road). The relevant passage in his judgment reads:

> "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. [in Tito v Waddell (No 2) [1977] 1 Ch. 106, 301 et seq] relied on 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 implication. *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 successor in title of 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 [Rhone v Stephens] 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."[7] (My emphasis).

The House of Lords found on the facts that the benefit was the right of support from the party wall and it was independent of the obligation to repair the roof and therefore the benefit and burden principle did not apply. Their Lordships dismissed the appeal.

[18] In my opinion the benefit and burden principle applies to this case but before coming to a final conclusion on this issue there are two aspects of the principle that I would like to consider, namely:

(a) the relationship between the benefit and the burden; and

(b) the requirement that the covenantor's successor should have no alternative but to accept the burden.

Benefit and Burden on the Facts

[19] In **Rhone v Stephens** Lord Templeman made the point that accepting the burden of the positive covenant must be a condition of enjoying the benefit of the covenant, and that '[c]onditions can be attached to the exercise of a power in express terms or by implication.'[8] I have reviewed the covenants in the conveyance set out in Mr. Justice Upjohn's judgment in **Halsall v Brizell** and it is clear that the obligation to pay for the use of the road and sewers was not expressly made a condition of enjoying the benefits from these facilities. This is

[7] At p. 322.

[8] At page 322 and see para 18 above.

confirmed by the judgment of Patterson LJ in **Wilkinson and others v Kerdene Ltd**[9] when he referred to **Halsall v Brizell** and said:

> '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."[10]

Notwithstanding the absence of a direct link between the benefit and the burden in the conveyance, Upjohn J found that there was conditionality between the benefit and the burden of the covenants[11] and this finding was confirmed by Lord Templeman in **Rhone v Stephens**.[12]

[20] Similarly, in this appeal there is nothing in the Peraya Deed that says that the use of the Estate Road is conditional on the payment of a maintenance fee. However, the Deed places the obligation to pay for the maintenance and upkeep of the road squarely on the shoulders of the residents of the Development after the first three years.[13] I am satisfied that the parties to the Deed intended that the purchaser's use of the Estate Road was not gratuitous and the intention was that when expenses were incurred for its maintenance and upkeep the residents of the Development would pay their proportionate share of those expenses. In other words, the use of the Road and drains was conditional, in the sense contemplated by Upjohn J in **Halsall v Brizell**, on the payment of a proportionate share of the maintenance costs.

Options of the Covenantor

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[9] [2013] EWCA Civ 44.
[10] At para 27.
[11] See the passage from the judgment of Upjohn J at paragraph 17 above.
[12] See the passage from the judgment of Lord Templamn at paragraph 18 above.
[13] See paragraph 12 above.

[21] The other aspect of the benefit and burden principle that I would like to examine is the requirement that it must be shown that the person against whom the obligation to pay is being enforced (the covenantor or his successor) has to have an alternative to using the facility with the result that the enjoyment of the benefit is optional. In **Rhone v Stephens** Lord Templeman said that the defendant in **Halsall v Brizell** had a choice and did not have to use the roads and sewers:

> "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."[14]

However, it is not clear to me reading the facts of **Halsall v Brizell** that this option was available to the defendant other than in theory as stated by Lord Templeman. There is no indication that there was an alternative road to the defendant's property, far less a separate system for dealing with drainage. His only alternative on the reported facts, at least in theory, was to not use the roads, drains and sewers, which must mean that he would not be able to use his house. This is only a theoretical choice but one that appears to be sufficient for the benefit and burden principle to apply to the respondent in this appeal. Following the decision in **Halsall v Brizell**, which was approved by the House of Lords in **Rhone v Stephens,** the respondent has the alternative of not using the Estate Road and not paying for such use. But if he chooses to use the Road, as he has been doing, he must contribute to the maintenance charges.

Successors in Title

[22] Ms. George also submitted that the respondent could not be bound by the payment covenant in the Peraya Deed because it is a positive covenant and it is not stated to be binding on the Dr. Peraya's successors in title. She submitted that

[14] At p. 322 – 323.

this distinguishes the case from **Halsall v Brizell** where the purchasers entered into the covenant to contribute to the cost of maintaining the roads, drains, sewers and other common facilities on their own behalf and on behalf of their "heirs, executors, administrators and assigns". But, contrary to Ms. George's submission, **Halsall v Brizell** was not decided on this principle and if it was it would mean that the fundamental principle that the burden of a positive covenant does not run with the land could be circumvented by simply stating in the deed that the covenant is binding on the purchaser and his successors in title.

[23] What the learned judge found in **Halsall v Brizell** was that the repair covenant was enforceable against the original purchaser's successors in title because on a true construction of the original deed the right to use the common facilities (the roads etc) was related to and conditional upon contributing to the cost of maintaining the facilities. If that link was not present the court would not have found that the positive covenant was enforceable and it would not have mattered that the covenant was stated to be binding on the purchaser's successors in title.

[24] The learned magistrate accepted Ms. George's submission on this point and as a result ruled incorrectly in favour of the respondent.

Conclusion

[25] On the facts of this case the covenants in the Peraya Deed conferred benefits on Dr. Peraya and imposed related burdens on him and the other residents of the Development to pay for the maintenance and upkeep of the Estate Road and other common facilities. The respondent cannot continue to enjoy these benefits unless he shoulders his proportionate share of the cost of maintaining the facilities.

[26] The learned magistrate did not have the benefit of the very full submissions that were made in this Court and she did not come to the correct decision regarding the obligation to contribute to the maintenance of the Estate Road and her decision must be set aside.

[27] I would allow the appeal and set aside the decision of the magistrate, with costs here and in the court below to the Association.

[28] On the issue of costs, the practice of this Court is to order two thirds of the costs that was awarded in the lower court. However, we have discretion under rule 65.13(2) of the Civil Procedure Rules 2000 to make such other order as we see fit. The learned magistrate awarded costs of $500.00. Applying the general rule, this would result in the costs of the appeal being approximately $334.00. Based on the amount of work that must have gone into the preparation of this appeal, I think this is an appropriate case to exercise discretion under CPR 65.13(2) and award costs of the appeal in the sum of $1,000.00.

Order

[29] The Court's order is as follows:

(1) The appeal is allowed

(2) The decision of the learned magistrate is set aside.

(3) The respondent is ordered to pay the arrears of maintenance of $7,690.00 within 21 days.

(4) The respondent is ordered to pay costs of $500.00 in the court below and $1,000.00 for the appeal within 21 days.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal