EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2014/0003

BETWEEN:

HALF MOON BAY HOME OWNERS COMPANY LIMITED

Appellant

and

PLATINUM PROPERTIES INC.

Respondent

Before:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal

Appearances:

Ms. Keisha Spence for the Appellant
Mr. Fitzroy Eddy for the Respondent

2017: June 14;
2018: June 15.

Civil appeal – Easement – Enforcement – Covenant – Covenants affecting land – Positive covenant – Covenant to maintain – Covenant to contribute to maintenance – Whether covenant runs with the land – Building development – Benefit and burden principle – Whether purchaser successor's in title bound by covenant – Title by Registration Act of the St Kitts and Nevis – Declaratory relief

The appellant, Half Moon Bay Home Owners Company Limited ("Half Moon Bay"), is owned by Half Moon Bay Ltd and was formed to manage a development located at Frigate Bay (the "Development"). The respondent, Platinum Properties Inc. ("Platinum") is the owner of villa no. 14 which it purchased from one Derniela Dordurain on 6th August 2010. The villa owners agreed to sign a maintenance agreement pursuant to which they were required to pay certain maintenance fees to Half Moon Bay for the maintenance of the Development. In 2011, Half Moon Bay requested Platinum pay US$ 11,285.06 in

maintenance fees for the period 31st October 2009 to 3rd January 2012. The respondent did not comply. Subsequently, Half Moon Bay filed a claim against Platinum and sought an order requiring Platinum to pay maintenance fees and a declaration that Platinum's villa could be disconnected from the sewage system until the maintenance fees were paid.

Half Moon Bay's case was that Platinum's rights pursuant to the endorsement on Platinum's certificate of title, including the use of the sewage system was dependent on the payment of maintenance fees. Platinum, in its defence, denied the claim stating it was not the proprietor of villa no. 14 during the period stated and it was not using any easements to access villa no. 14. Platinum also filed a counterclaim in which they sought several reliefs including a declaration as to what charges, if any, Half Moon Bay Limited could levy on the defendant.

The learned judge dismissed the claim and made various orders and declarations. His main reason for doing so was that Platinum did not sign the maintenance agreement and there was therefore no legal basis for Half Moon Bay to recover maintenance fees.

Being dissatisfied, Half Moon Bay appealed against the decision of learned judge.

Held: allowing the appeal, setting aside the judgment of the learned judge; ordering Platinum to pay the maintenance fees to Half Moon Bay from 6th August 2010; declaring that Half Moon Bay is entitled to disconnect Platinum's property from the sewage system of the Development unless and until all outstanding maintenance fees and the cost of reconnection are paid and ordering that Platinum pay the costs of the proceedings in the court below, such costs being prescribed costs and the costs of the appeal being two thirds of the costs below, that:

1. The general principle which has existed for centuries is that a positive covenant is a matter of contract between the covenantor and the covenantee and therefore it does not run with the land. However, with the passage of time, exceptions have developed to this general rule. One such the exception is that a person who takes the benefit of a positive covenant must also subscribe to the burden attached to the covenant, but only where the benefit is related to and conditional upon the burden.

   Austerberry v Corporation of Oldham (1885) 29 Ch D 750 applied; **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; **Westerhall Point Residents Association Limited v Anthony Batihk** GDAMCVAP2015/0004 (delivered 3rd May 2016, unreported) followed.

2. There are two requirements for the enforcement of a positive covenant against a successor in title to the covenantor. Firstly, the condition of discharging the burden must be relevant to the exercise of the rights that enable the benefit to be obtained. Conditionality may be express or implied. Secondly, the successor in title must have the opportunity to choose whether to take the benefit or having taken it to renounce it, even if only in theory and thereby to escape the burden.

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.

3. In the present case, the benefit of using the sewage system and the burden of paying for the maintenance of the sewage system are reciprocal. The endorsement on Platinum's certificate of title expressly stated the exercise of the rights were conditional on the payment of maintenance fees to Half Moon Bay. Platinum had a choice whether to exercise the rights granted in the deed and pay the maintenance fees or opt to use an alternative method such as a private sewage system. Platinum, having opted to exercise the right to use the sewage system, is obliged to pay maintenance fees.

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

4. Where, having regard to the manner of computation of the maintenance fees, it is not possible to apportion the fees based on the number of benefits utilised, the entire fee is payable provided that the fee is related to the benefit utilised and the owner had the option (at least in theory) to decide not to take the benefit. While Platinum did not utilise all of the benefits pursuant to the endorsement on its certificate of title, Platinum made use of the benefit of the sewage system on the Development. The maintenance fee was related to the maintenance of, among other things, the sewage system, and the manner of computation of the maintenance fee as outlined in the maintenance agreement having been fixed on the number of bedrooms in a villa, it was not possible to apportion the maintenance fees. Platinum is therefore liable to pay the entire maintenance fee.

   Wilkinson & Others v Kerdene Limited [2013] EWCA Civ 44 applied.

5. The general principle is that the power to grant declaratory relief is discretionary. The discretion must be exercised judicially with due care and caution having regard to all of the circumstances of the case. The party seeking a declaration must satisfy the court that he either has a right which is established or he is entitled to a right which the court is empowered to grant.

JUDGMENT

[1] **THOM JA**: This is an appeal against the decision of the learned judge in which he dismissed the claim of the appellant ("Half Moon Bay") where they sought among other reliefs, payment of maintenance fees and a declaration that they are entitled to prevent the respondent, Platinum Properties Inc. ("Platinum") from using the sewage system in the Half Moon Bay Villas Development situate at Frigate's Bay.

[2] The background to this appeal is that Half Moon Bay Ltd, a private company, subdivided an area of land which it owned at Frigate Bay and constructed several villas thereon. The area is referred to as Half Moon Bay Villas Development (the "Development"). Half Moon Bay Ltd established a management company called Half Moon Bay Home Owners Association Company Ltd, the appellant, which serves as the management company of the Development. Several of the villas were sold to various persons. Villa no. 14 was sold to one Derniela Dordurain who subsequently sold it to Platinum on 6th August 2010.

[3] Villa owners were required to sign a Standard Maintenance Agreement (the "Maintenance Agreement"), which provides among others things for Half Moon Bay to maintain the Development and it establishes a methodology for villa owners to pay certain maintenance fees to Half Moon Bay.

[4] Endorsements were made on each certificate of title which granted certain rights to the villa owners. The following is one of the endorsements which was included on the certificate of title of Ms. Dordurian and was also incorporated on the certificate of title of Platinum:

> "Easements of Half Moon Bay Development:
>
> A. The Registered Proprietor's (sic) have full right and liberty in common with Half Moon Bay Limited and all other persons having a like right and subject to the rules of Half Moon Bay Villa Development as may be prescribed from time to time, the Management Company of the said development and conditional upon the payment of the Registered Proprietor to

the said Management Company of maintenance fees in accordance with the Standard Management of the said development (hereinafter called "the maintenance agreement"):-

(i) To go pass the roads, paths and walks ways of the said development to gain access to the land hereby transferred.

(ii) To use the sewage system to which the said development is from time to time connected."

[5] In 2011, Half Moon Bay requested from Platinum payment of maintenance fees in the sum of US$11,285.06 for the period 31st October 2009 to 3rd January 2012. Platinum failed to pay the fees.

[6] Platinum having failed to pay the fees, Half Moon Bay instituted proceedings in which it sought the following reliefs:

(a) A declaration that it can lawfully disconnect Platinum's villa from the sewage system of the Development until Platinum paid all maintenance reconnection fees.

(b) Payment of maintenance fees of US$11,285.06.

(c) Interest on the said sum and costs.

[7] In the High Court, Half Moon Bay contended that Platinum's rights pursuant to the "Easement A"; including the use of the sewage system was on condition that Platinum pays the maintenance fees as computed in accordance with the Maintenance Agreement.

[8] In its defence, Platinum denied that Half Moon Bay was entitled to the reliefs sought as it did not owe the fees claimed since it was not the proprietor of villa no. 14 during the period 31st October 2009 to 3rd January 2012. It only became the registered proprietor on 6th August 2010. Further, Platinum's access to villa no. 14

is from the public main road. Platinum does not access its property via the roads of the Development or make use of the roads, paths or walkways of the Development. Platinum also filed a counterclaim in which they sought several reliefs including a declaration as to what charges, if any, that Half Moon Bay Limited could levy on the defendant.

[9] The learned judge at paragraph 45 of his judgment identified the following as the issues to be determined:

(i) Whether by virtue of the content of Easement A (ii) noted on the defendant's certificate of title and the legal import of the Standard Maintenance Agreement the claimant can lawfully disconnect or otherwise deny villa no. 5[1] of half Moon Bay Development use of the sewage system of the development.

(ii) Whether the defendant is indebted to the claimant in the sum of US$11,285.06 or any amount plus interest thereon being the arrears for maintenance fees with respect to the period of 31st October 2009 to 3rd January 2012.

(iii) Whether the defendant is entitled to succeed on its counterclaim.

[10] The learned judge, having heard the matter, dismissed Half Moon Bay's claim. The learned judge's reasons for doing so are firstly, since the maintenance fees are payable pursuant to the Maintenance Agreement and having regard to the evidence of Mr. Scott Jaynes for Half Moon Bay who under cross examination stated: 'I have no idea as to where the agreement might be between Platinum and Half Moon Bay. I do not know of the existence of one' along with the evidence of Platinum's witness Ms. Sonia Carr in which she denied that Platinum had signed the Maintenance Agreement, the learned judge found that Platinum had not

[1] The learned judge meant villa no. 14.

signed the Maintenance Agreement and was therefore not bound by the terms of the Maintenance Agreement. There was no obligation on Platinum to pay the maintenance fees claimed and there was no legal basis on which Half Moon Bay could recover maintenance fees as prescribed by the Maintenance Agreement.

[11] Secondly, the learned judge found that Platinum was not the owner of villa no.14 from 31st October 2009 to 3rd January 2012 since Platinum's certificate of title showed that title to no. villa 14 was conveyed to Platinum on 6th August 2010. Title having been conveyed on 6th August 2010, the learned judge found that Platinum was not liable for the maintenance fees claimed.

[12] Thirdly, the learned judge was of the view that the provisions of clauses 5(x) and (xi) of the Maintenance Agreement and paragraph 2 of the endorsements on the certificate of title provided a remedy in the event of failure to pay the maintenance fees, which remedy includes a charge on the property but does not provide for preventing the owner from using the sewage system as a remedy. Half Moon Bay was therefore not entitled to the declaration sought. Clauses 5(x), 5(xi) and paragraph 2 read as follows:

> "5(x). Failure by the Unit Owner to pay any maintenance costs when due or any sum payable by him pursuant to clauses 4(i), 4(iii) and 4(iv) shall give rise to a charge on the Unit which charge shall be enforceable as an encumbrance and shall give the Management Company a sufficient interest in the Unit to sustain a caveat on the Certificate of title to the Unit.
>
> (xi). The Unit Owner shall not sell assign or transfer his interest in the Unit until all maintenance charges and all sums due pursuant to clauses 4(i), 4(iii) and clause 4(iv) are paid in full to the Management Company.
>
> Paragraph 2 of the Endorsements – That failure by the Purchasers or their successors in title to pay any maintenance costs or other sum due to them under the Maintenance Agreement shall give rise to a charge on the land and building hereby transferred which charge shall be enforceable as an encumbrance and shall give the Management Company a sufficient interest in land and building hereby transferred to sustain a caveat on the Certificate of Title to the said land and building."

[13] Having so found, the learned judge made the following orders:

(1) Easement A (ii) as endorsed on the defendant's certificate of title has attached to it a methodology to enforce payment of maintenance fees as prescribed under the Standard Maintenance Agreement which does not include preventing the use of the sewage system by the defendant.

(2) There is no evidence that the mandatory Maintenance Agreement was executed by the defendant which removes the basis for the recovery of such fees which are prescribed under that Agreement.

(3) The defendant is not indebted to the claimant in the amount of US$11,285.06 or at all.

(4) The court exercises judicial restraint with respect to the defendant's counterclaim because some of the remedies sought are not properly before this court and the rulings while others are addressed by the said rulings.

(3) The claimant must pay the defendant prescribed costs based on the value of the claim.

[14] Half Moon Bay, being dissatisfied with the decision of the learned judge, appealed the decision on several grounds. These grounds raise the following issues:

(a) Whether Half Moon Bay could enforce the provision in "Easement A" to pay maintenance fees against Platinum.

(b) If Platinum is liable to pay maintenance fees should the fees be apportioned.

(c) Whether Half Moon Bay should be granted a declaration that it could disconnect Platinum from its sewage system for non-payment of maintenance fees.

[15] Platinum did not file a counter appeal in relation to the judge's findings on the counterclaim.

Issue 1 – Payment of Maintenance Fees

[16] At the hearing of the appeal, Ms. Spence readily conceded that Platinum was not the owner of villa no. 14 from 31st October 2009 as stated in the claim form and therefore could not be liable for maintenance fees from 31st October, 2009 as alleged by Half Moon Bay. Rather, Platinum only became owner of villa No. 14 on 6th August 2010 and therefore could only be liable for maintenance fees from that date.

[17] Ms. Spence submitted that the learned judge erred when he found that in the absence of a signed Maintenance Agreement, there was no basis for the recovery of maintenance fees since the obligation to pay the fees arose as a result of the Maintenance Agreement. In support of her contention Ms. Spence advanced three main arguments. Firstly, that the endorsements on Platinum's certificate of title including "Easement A" were indefeasible. Secondly, that Half Moon Bay's case was based on enforcement of "Easement A". Thirdly, Half Moon Bay's case fell squarely within the principle in **Halsall and Others v Brizell and Another**.[2]

[18] In relation to her first argument that the endorsement in "Easement A' was indefeasible, Ms. Spence submitted that the land compromising the Development having been registered under the **Title by Registration Act**;[3] the effect of section 8 and having regard to the definition of "indefeasible" and "note" in the First

[2] [1957] Ch. 169.
[3] Cap 10.19 of the 2009 Revised Laws of the Federation of St Christopher and Nevis.

Schedule of the Act is that the title of a registered proprietor and all notations on the certificate of title are indefeasible. These provisions read as follows:

> "'Indefeasible'
>
> > 'the word used to express that the certificate of title issued by the registrar of titles and the notings by him or her hereon, cannot be challenged in any court of law on the ground that some person, other that the person named therein as the registered proprietor, is the true owner of the land therein set forth or on the ground that the mortgages or encumbrances in the notings thereon are not mortgages on encumbrances on the said land; except on the ground of fraud connected with the issue of such certificate of title or the noting of such mortgages or encumbrances, or the title of the registered proprietor had been superseded by a title acquired under the Limitation Act, Cap 3.09 by the person making challenge. The word also means that, the certificate of title being issued by the Government of the State, the Government of the State is, with the exceptions above mentioned prepared to maintain the title in favour of the registered proprietor, leaving anyone justly aggrieved by its issue to bring an action for money damages against the Government of the State.'
>
> 'Note'
>
> > 'The word used to denote the writing and markings with figures which Registrar of Titles makes upon the certificate of title in register, and on the duplicate issued to the registered proprietor, to show the mortgages and encumbrances which are upon the land, and also the transfers and discharges of such mortgages and encumbrances, and the caveats, or the withdrawal or removal of caveats. The notings made by the Registrar of Titles upon a certificate of title are indefeasible as the title upon which they are marked, that is, that anyone, in dealing with the land may take it as guaranteed by the Government of the State that no other mortgages or encumbrances affect the land than those on the certificate of title, and that the existing mortgages and encumbrances correctly set forth.'"

[19] Ms. Spence further contended that "Easement A" being noted on the certificate of title of Platinum, the validity of the easement cannot be challenged in any court of law on the ground that it is not an encumbrance on the land, except on the ground of fraud connected with the issue of the certificate of title, or the noting, or that the title of the registered proprietor has been superseded by a title acquired under the

Limitation Act[4] by the person making the challenge. I agree. Mr Eddy for his part did not dispute the legal effect of the statutory provisions.

[20] Ms. Spence next submitted that Half Moon Bay's case was based on enforcement of "Easement A" and not on enforcement of a maintenance agreement between Half Moon Bay and Platinum.

[21] Mr. Eddy for Platinum submitted in response that the maintenance fees claimed by Half Moon Bay were payable in accordance with the Maintenance Agreement which was not signed by Platinum and since Platinum did not sign the Maintenance Agreement Platinum was not bound by its terms.

[22] Mr. Eddy further contended that while there was mention of the Maintenance Agreement on Platinum's certificate of title, the provisions of the Maintenance Agreement were not outlined on the Certificate of Title and therefore those provisions do not amount to a "note" within the meaning of the provision of the **Title by Registration Act**. A matter can only have the effect of a "note" if it is outlined on the certificate of title. The provisions being onerous, a purchaser must be given notice of such provisions before he could be bound by them.

[23] Having examined Half Moon Bay's pleaded case, I am of the opinion that Half Moon Bay's case was not based on breach of a contractual relationship with Platinum. The core of Half Moon Bay's pleaded case is outlined in paragraphs 3 – 6 of the statement of claim:

> "3. The Claimant being the property management company for the said development is entrusted with the management of the said development which includes the responsibility to collect maintenance fees in respect of each Villa at Half Moon Bay Villa Development.
>
> 4. Easement A (ii) of the Easements of Half Moon Bay Villa Development endorsed on the Defendant's Certificate of Title states that:

[4] Cap 5.09, Revised Laws of the Federation of St Christopher and Nevis 2009.

> 'The Registered Proprietors' have full right and liberty in common with the Half Moon Bay Limited and all other persons having a like right and subject to the rules of Half Moon Bay Villa Development as may be prescribed from time to time the Management Company of the said development and conditional upon the payment of the Registered Proprietors' to the said Management Company of maintenance fees in accordance with the standard Maintenance Agreement of the said development (hereinafter called 'the maintenance agreement'):-
>
> (iii) To use the sewage system to which the said development is from time to time connected.'
>
> 5. The Defendant has failed to pay maintenance fees for the period 31st October, 2009 to 3rd January 2012 despite delivery of invoices to the said Claimant demanding payment.
>
> 6. Despite several oral requests urging the Defendant to pay the said maintenance fees for Lot No. 14 it has failed to do so."

I agree with Ms. Spence that Half Moon Bay is seeking to enforce a positive covenant which is endorsed on Platinum's certificate of title under the caption "Easements A", the terms of which are outlined in paragraph 3 quoted above. So the fact that Platinum did not sign the Maintenance Agreement has no effect on Half Moon Bay's case. In my view the learned judge erred when he treated the case as one purely of enforcement of the Maintenance Agreement rather than enforcement of the positive covenant endorsed on Platinum's deed of conveyance.

[24] I am also of the view that the fact that the terms of the Maintenance Agreement were not spelt out in the deed of conveyance is of no moment. Platinum was made aware by the terms of the deed of conveyance of the covenant to pay the maintenance fees and Platinum was also made aware that the methodology of computing the maintenance fees was outlined in the Maintenance Agreement. Platinum therefore had notice of the Maintenance Agreement and was responsible for familiarizing itself with the details of the maintenance fees before it decided to make use of the benefits under the deed of conveyance.

[25] Ms. Spence also submitted that although it is a well-established principle as outlined in **Austerberry v Corporation of Oldham**[5] that positive covenants do not run with the land, this case falls within the exception to the principle as stated in the case of **Halsall v Brizell**. **Halsall v Brizell** was affirmed by the House of Lords in **Rhone and another v Stephens (Executrix of Mrs M. Barnard, deceased)**[6] and was applied by this Court in **Westerhall Point Residents Association Limited v Anthony Batihk**.[7]

[26] Mr. Eddy in response contended it is an established principle that the covenant to pay, being a positive covenant does not run with the land. He sought to distinguish the decision of this court in **Westerhall Point** on the basis that in **Westerhall Point** there was a Home Owners Association, while in this case there is a management company owned by Half Moon Bay Ltd; the Rules of the Association were public, whereas the Maintenance Agreement was a private document; the road was the only access to the respondent's land, whereas Platinum did not use any of the roads, paths or walkways to access its land. Mr. Eddy argued that it was in those circumstances that this Court deemed the respondent to have taken possession subject to the Rules of the Association.

[27] I agree with Mr. Eddy that the facts of the **Westerhall Point** case are different from the facts of this case. However, it was the same principle that was stated in the cases of **Halsall v Brizell** and **Rhone v Stephens** that were applied in **Westerhall Point.** In **Westerhall Point**, the appellant sought to enforce a covenant which was included in the respondent's successors in title deed and which was incorporated in his deed of conveyance. The covenant provided for the respondent to share proportionately in the maintenance and upkeep of the sole access road to the development where the respondent's property was situated. There was no dispute that the respondent made use of the access road. This

[5] (1885) 29 Ch D 750.
[6] [1994] UKHL 3.
[7] GDAMCVAP2015/0004 (delivered 3rd May 2016, unreported).

Court found applying the principle in **Halsall v Brizell** and **Rhone v Stephens** that the respondent was required to pay a proportion of the maintenance cost on the basis that the respondent right to use the road was conditional upon him paying a proportion of the maintenance cost of the road. While it was not expressly stated in the respondent's deed or the deed of his predecessors that the use of the road was conditional on the payment of a proportion of the maintenance cost, the Court found that such condition was to be implied having regard to the circumstances of the case.

[28] The general principle which has existed for centuries as outlined in the case of **Austerberry v Corporation** is that a positive covenant is a matter of contract between the covenantor and the covenantee and therefore it does not run with the land. However, with the passage of time, exceptions have developed to this general rule. One such is the principle outlined in the case of **Halsall v Brizell** that a person who accepts a benefit from a conveyance must also accept the burden associated with the benefit.

[29] In **Halsall v Brizell** about 40 acres of land was subdivided by the owners and sold to various persons. The owner retained ownership of the roads, a promenade along a sea wall, street lighting, and also sewers which were under the road, for the benefit of the purchasers. The purchasers entered into several covenants, the seventh of which made provision for the purchasers to contribute to the maintenance of the roads, lighting, the promenade and the sewers. The claimants were the trustees of the original owners of the land and the defendant was the executor of the purchaser of lot 22. The covenants including the seventh covenant were included in the defendant's deed. A dispute arose as to the payment of maintenance cost. Upjohn J determined there were two issues to be determined. Only the first issue is relevant to this appeal. He identified the first issue and resolved it in this way:

> "First, in so far as the deed of 1851 purports to make the successors of the original contracting parties liable to pay calls, is it valid and

enforceable at all? I think that this much is plain: that the defendants could not be sued on the covenants contained in the deed for at least three reasons. First, a positive covenant in the terms of the seventh covenant does not run with the land. Secondly, these particular provisions with regard to the payment of calls plainly infringed the rule against perpetuities. Of course, these parties are not parties to the contract. Finally, it is conceded that the provision for distraining on failure to pay is not valid. A right to distrain can only be annexed to a rent-charge, which this certainly is not. But it is conceded that it is ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder. If authority is required for that proposition, I need but refer to one sentence during the argument in *Elliston v Reacher*, where Lord Cozens-Hardy M.R. observed that:

> 'it is laid down in Co. Litt 230b, that a man who takes the benefit of a deed is bound by a condition in it, though he does not execute it.'

If the defendants did not desire to take the benefit of this deed, for the reasons I have given, they could not be under any liability to pay the obligations there under. But, of course, they do desire to take the benefit of this deed. They have no right to use the sewers which are vested in the plaintiffs, and I cannot see that they have any right, apart from the deed, to use the roads of the park which lead to their particular house, No. 22, Salisbury Road. The defendants cannot rely on any way of necessity or on any right by prescription, for the simple reason that when the house was originally sold in 1931 to their predecessor in title he took the house on the terms of the deed of 1851 which contractually bound him to contribute to proper proportion of the expenses of maintaining the roads and sewers, and so forth, as a condition of being entitled to make use of those roads and sewers. Therefore, it seems to me that the defendants here cannot, if they desire to use this house as they do, take advantage of the trusts concerning the user of the roads contained in the deed and the other benefits created by it without undertaking the obligations hereunder. Upon that principle it seems to me that they are bound by this deed, if they desire to take its benefits."[8]

[30] The principle in **Halsall v Brizell** was considered by the House of Lords in **Rhone v Stephens.** The House of Lords re-affirmed the long established Common Law rule that the burden of a positive covenant does not run with the land. While the House of Lords agreed with the decision, it did not confirm a general principle

[8] At p.77.

often referred to as the "pure principle" that once a party is enjoying a benefit in a deed, then he must accept every burden in the deed. Rather, the House of Lords confirmed that 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. In other words, the exercise of the right must be relevant and conditional upon the performance of the positive covenant.

[31] The facts of **Rhone v Stephens** can be summarised as follows: the vendors and purchasers granted and retained mutual rights of support in respect of the roof of part of the building sold. The vendor also covenanted to repair the roof including that part of the roof which protected the purchaser's property. Both properties were subsequently sold. The purchaser's successor in title sought to enforce the covenant to repair against the vendor's successor in title. In dismissing the claim, Lord Templeman stressed the need for there to be a sufficient degree of correlation between the covenant to pay and the grant of the relevant property rights such as an easement, before equity will allow the burden of the covenant to pay, to be enforced against a successor in title with whom there is no privity of contract. At pages 7-8 he stated:

> "Mr Munby also sought to persuade your Lordships that the effect of the decision in the *Austerberry* case had been blunted by the 'pure principle of benefit and burden' distilled by Sir Robert Megarry V-C from the authorities in *Tito v Waddell* **(**No.2) [1977] 1Ch. 106, at 301 et seq. 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 relied on the decision of Upjohn J in **Halsall v Brizell** [1957] Ch. 189. 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."

[32] Lord Templeman distinguished **Halsall v Brizell** in the following way:

> "In **Halsall v Brizell** there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers. In the present case Clause 2 of the 1960 conveyance impose reciprocals benefits and burdens of support but Clause 3 which imposed an obligation to repair the roof is an independent provision. In **Halsall v Brizell** the defendants could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of Salford House could not in theory or in practice be deprived of the benefit of the mutual rights or support if they failed to repair the roof."

[33] The principle in **Halsall v Brizell** would thus not be applicable where the party against whom the burden is to be invoked does not enjoy any rights or services related to the burden or has no interest in making use of the benefits.

[34] Based on the decisions in **Halsall v Brizell** and **Rhone v Stephens** there are two requirements for the enforcement of a positive covenant against a successor in title to the covenantor. Firstly, the condition of discharging the burden must be relevant to the exercise of the rights that enable the benefit to be obtained. Conditionality may be express or implied. Secondly, the successor in title must have the opportunity to choose whether to take the benefit or having taken it to renounce it, even if only in theory and thereby to escape the burden.

[35] In order to succeed, Half Moon Bay was required to prove that: (a) the payment of maintenance fees was conditional to the enjoyment of the right to use the sewage system; and (b) Platinum has a right, even if in theory only, to not exercise that right and consequently to not comply with the condition of paying the maintenance fees.

[36] In this case, there can be no dispute that the payment of the maintenance fee was both relevant and conditional on the exercise of the rights outlined in "Easement A". The provisions of "Easement A" expressly state in paragraph (ii) that one of the rights granted is the use of the sewage system by the registered proprietor. A sewage system requires maintenance. The maintenance cost has to be met by someone. The deed provides for those who use the sewage system to pay for its maintenance. The benefit of using the sewage system and the burden of paying for the maintenance of the sewage system are in my view reciprocal. The provisions also expressly state that the exercise of the rights were conditional on the payment of the maintenance fees to Half Moon Bay. The relevant part reads:

> "The Registered Proprietor's (sic) have full right and liberty in common with Half moon Bay Limited and all other persons having a like right …and conditional upon the payment of the Registered Proprietor's (sic) to the said Management Company of maintenance fees in accordance with the standard Maintenance Agreement…".

Unlike the **Westerhall Point** Case where conditionality was implied by the court, in this case conditionality is expressed.

[37] In relation to the second requirement, Platinum had a clear choice of whether to exercise the rights granted under the deed and pay the maintenance fees or not to exercise the rights and not pay maintenance fees. Platinum opted to exercise the right to use the sewage system. In **Rhone v Stephens,** the House of Lords was of the opinion that in **Halsall v Brizell** the defendant had a choice at least in theory whether to use the roads and sewers, however in **Rhone v Stephens** the respondent could not in theory or in practice be deprived of the right of support if they failed to repair the roof. Similarly, in **Westerhall Point** it was acknowledged by the Court that the right of the respondent was in theory only since there was only one access to his residence which was by using the access road of the development. In my view, in the instant appeal, the respondent has more than an option in theory. Indeed Mr. Eddy referred the Court to clause 3(d) of the Maintenance Agreement where it is acknowledged the villa owners may have

private sewage systems, in which case they would not be maintained by Half Moon Bay. No doubt if Platinum had chosen another methodology than using the sewage system in the Development, Platinum would have had to meet with the approval of the relevant Health and Environmental Authorities. For the reasons stated above, I find that Platinum has satisfied both requirements for the enforcement of the covenant to pay maintenance fees.

Issue 2 – Apportionment of Maintenance Fees

[38] Mr. Eddy argued alternatively, in the event that the Court was of the view that the Respondent was liable to pay maintenance fees to Half Moon Bay, that since the maintenance fees claimed by Half Moon Bay were for a wide range of services provided by Half Moon Bay pursuant to the Maintenance Agreement which was not limited to the maintenance of the sewage system but included maintenance costs for servicing roads, lighting, garden, plumbing, and removal of trash, insurance for Half Moon Bay, employment of security personnel, facilities manager and an accountant, and further since Platinum did not utilise all of the benefits contained in the deed, but only made use of the sewage system, then Platinum should only be required to pay a proportion of the maintenance fees corresponding to the use of the sewage system.

[39] It is not disputed by Half Moon Bay that the maintenance fees claimed is not limited to the use of the sewage system but are also for the other services referred to by Platinum such as maintenance of roads, employment of security personnel, gardening, removal of trash etc. However, Ms. Spence contended that it is not possible to apportion the fees.

[40] Under section 5 of the Maintenance Agreement the maintenance fees are computed as follows:

> "The expenses incurred by the Management Company in carrying out its duties and functions under this agreement, which costs can vary from time

to time, and its management fees therefore (sic) (hereinafter called "the maintenance costs" shall be borne as follows:

(i) The current costs the Management Company in carrying out its duties and functions under the agreement, which costs can vary from time to time and its management fees therefore (hereinafter called "the maintenance costs") shall be borne as follows:

One Bedroom Unit US $330.00/quarter
Two-Bedroom Unit US $480.00/quarter
Three-Bedroom Unit US $630.00/quarter
Four-Bedroom Unit US $780.00/quarter

(ii) Thereafter the unit owners shall share in the proportions set out in sub-clause (iii) and (iv) of this clause.

(iii) The maintenance costs shall be borne between the units on a pro rata basis dependant on the total number of bedrooms of each unit.

(iv) The Management Company shall not later than one month prior to expiry of the period referred to in sub-clause (i) of this clause and prior to the commencement of each calendar year thereafter prepare a budget of the maintenance costs of the Development for the succeeding year (or part thereof in the case of the year in which the period referred to in sub-clause (i) expires) and the maintenance costs payable by each unit owner shall be assessed on the basis of such budget which must be approved by the Board of the Owners Association and at the end of each calendar year the actual cost shall be determined by audit.

(v) The management Company shall be entitled to charge reasonable fees for its services. If such fees are not agreed between the Management Company and the Board of the Owners Association prior to the commencement of each calendar year such fees shall be determined by an audit."

[41] The issue of apportionment was considered in the case of **Wilkinson & Others v Kerdene Limited**.[9] The appellants were bungalow owners in a holiday village. The respondent's predecessors in title being the owners had retained some part of the village over which they constructed various leisure facilities including a swimming pool, pub, shop. They also retained ownership over the several roads and footpaths and sewer in the village. The deed of conveyance contained

[9] [2013] EWCA Civ 44.

covenants by the purchasers to pay an annual fixed sum for the cost of maintaining the facilities. Over time and change of ownership the leisure facilities and the roads fell into disrepair. The swimming pool was closed. The owners refused to pay the annual maintenance fee. At the hearing before the Court of Appeal it was common ground that the fees charged could not be apportioned. However, some of the owners argued that the original obligation to pay had been in respect of several facilities and services some of which are no longer available such as the swimming pool and therefore there was no relation between the benefit and the burden such that the covenant being positive had not run with the land and was unenforceable. The Court was of the view that provided the maintenance fee related to at least some of the benefits taken and the owners had (at least in theory) the option to decide not to take some benefits, then the entire maintenance fee was payable.

[42] In the instant appeal, while the Maintenance Agreement refers to several services on which the maintenance fees are based, the deed of conveyance on which Half Moon Bay's case is based outlines in paragraphs (i) and (ii) of "Easement A" the rights which are granted to Platinum in common with other home owners. These are the right to use the roads, pathways and walkways to gain access to its property and to use the sewage system. As stated earlier, these rights are conditional on the payment of the maintenance fees. The cost of maintenance of the roads, pathways, walkways and sewage system is included in the maintenance fees outlined in the Maintenance Agreement. While it is not disputed that Platinum does not make use of all of the benefits on which the maintenance fee is based, it is common ground that Platinum has chosen to use at least one of the benefits being the sewage system. Quite like in the case of **Wilkinson** the maintenance fee is fixed based on the number of bedrooms in the Villa. In my view in those circumstances it would not be possible to apportion the maintenance fee.

[43] Half Moon Bay having satisfied all of the requirements for the application of the principle in **Halsall v Brizell** and **Rhone v Stephens,** Platinum is liable to pay the maintenance fees from the date the property was conveyed to it being the 6th August 2010.

Issue 3– Declaratory Relief

[44] The issue which remains is whether Half Moon Bay should in addition to an order for Platinum to pay the maintenance fees, be granted a declaration in the terms sought in its claim form, being essentially that Half Moon Bay is entitled to disconnect Platinum from the sewage system if Platinum fails to pay the maintenance fees.

[45] Ms. Spence submitted that since there was no challenge to the validity of "Easement A" and Platinum having availed itself of the benefit of the easement, such benefit being conditional on the payment of the prescribed maintenance fees, Half Moon Bay should be granted a declaration that they have the right to deny Platinum the enjoyment of the sewage system.

[46] Mr. Eddy in response submitted that the Court should consider the environmental and health impact in determining whether to grant a declaration. Mr. Eddy also referred the court to paragraph 2 of the endorsements on Platinum's certificate of title and paragraph 5(x) and 5(xi) on which the learned judge relied and which provided that failure to pay the maintenance fees would give rise to a charge on the land.

[47] The general principle is that the power to grant declaratory relief is discretionary. The discretion must be exercised judicially with due care and caution having regard to all of the circumstances of the case. The party seeking a declaration must satisfy the court that he either has a right which is established or he is entitled to a right which the court is empowered to grant.

[48] Platinum has no right to use the sewage system except pursuant to the terms of its deed of conveyance. The right to use the sewage system as found earlier is conditional on the payment of maintenance fees. Should Platinum fail to pay the maintenance fees then Platinum is not entitled to continue to use the sewage system. The provisions in paragraph 2 of the endorsements and clause 5(x) and 5(xi) merely provide one method of enforcement for non-payment of the maintenance fees. The provisions do not exclude all other remedies. In my opinion, the learned judge erred in placing too narrow a construction on the provisions. Having regard to the circumstances of this case where Platinum's use of the sewage system is conditional on the payment of the maintenance fees, and Platinum's failure and/or refusal to pay the fees, I am of the opinion that the declaration sought should be granted.

[49] For the reasons outlined above, I will allow the appeal and make the following orders:

(i) the order of the learned judge is set aside;

(ii) Platinum is liable to pay to Half Moon Bay maintenance fees from the 6th August 2010;

(iii) Half Moon Bay is entitled to disconnect Platinum's property being villa no. 14 from the use of the sewage system of the Development unless and until all outstanding maintenance fees are paid to Half Moon Bay and the cost associated with the reconnection of the said sewage system;

(iv) Platinum shall pay Half Moon Bay the costs of the proceedings in the court below, such costs being prescribed costs, and the costs of the appeal being two thirds of the costs below.

I concur
Louise Esther Blenman
Justice of Appeal

I concur
Mario Michel
Justice of Appeal

By the Court

Chief Registrar