COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2009/CLE/GEN/FP0098

BETWEEN

PRINCESS VILLA LIMITED

Plaintiff

AND

ERICH WITTMANN

First Defendant

And

BAHAMA ISLE HOMEOWNERS ASSOCIATION LIMITED

Second Defendant

BEFORE: The Honourable Mrs Justice Estelle G. Gray Evans

Appearances: R. Rawle Maynard for the plaintiff

Frederick R.M. Smith QC and W. Christopher Gouthro for the defendants

2011: 11 April

Written closing submissions on behalf of defendants received 4 May 2011

JUDGMENT

Gray Evans, J.

1. This action stemmed from the purported re-entry and re-possession by the second defendant of Lots 19 and 19A Block 41 Princess Isle Subdivision, Freeport, Grand Bahama ("the said properties") as a result of the non-payment of service charges by the plaintiff.
2. The plaintiff, Princess Villa Limited, claims to be the owner of the said properties having purchased the same from Princess Realty Limited in or about 1999.
3. The first defendant, Erich Wittmann, is and was at all times the president and a director of the second defendant, Bahamia Isle Homeowners Association Limited, a limited liability company incorporated under the laws of The Bahamas for the purpose of administering Princess Isle, a gated community of approximately 60 lots in the Bahamia Subdivision, Freeport, Grand Bahama.
4. By an originating summons filed herein on 12 March 2009 the plaintiff seeks the Court's determination on the following questions and relief, namely:

    (1) Whether the second defendant has a reversion or any interest in the plaintiff's land being Lots 19 and 19A Block 41 Princess Isle Subdivision, including a right to immediate possession?

    (2) Whether the Bahamia Isle Homeowners Association Limited have a right to charge the plaintiff fees and levy assessments for services rendered or to be rendered to Homeowners in the Bahamia Subdivision, the plaintiff not being a homeowner?

    (3) Damages for

        (a) Negligent misstatement

        (b) Trespass

        (c) Mesne Profits

        (d) Slander

    (4) Further or other relief as to the Court seems just.

    (5) That provision may be made for the costs of this application.

5. At the trial, the plaintiff abandoned its claim for damages for negligent misstatement and slander of title.
6. The originating summons was supported by the affidavit of Gail Valderine Gibson filed on 30 April 2009.

7. The defendants' affidavits in reply, both sworn by the first defendant, were filed on 7 August 2009 and 7 April 2011 respectively.

8. The facts leading up to the commencement of this action, as gleaned from the aforesaid affidavits, are not disputed.

9. The plaintiff purchased the said properties from Princess Realty Limited as evidenced by a conveyance dated 22 April 1999 and recorded in the Registry of Records of The Bahamas in Volume 7612 at pages 521 to 537 ("the conveyance").

10. At the date of the conveyance the said properties were already part of a development scheme known as "Princess Isle."

11. By recital (D) of the conveyance Princess Realty Limited, as vendor, agreed to sell and the plaintiff, as purchaser, agreed to purchase the said properties "being a portion of Princess Isle for an estate in fee simple in possession subject as aforesaid, subject to the Restrictions and subject to the uses and exceptions and reservations" as therein provided "but otherwise free from incumbrances at the price of $510,000.00."

12. By clause 1 of the conveyance, Princess Realty Limited, as beneficial owner, granted and conveyed the said properties unto the plaintiff in fee simple subject to the following uses:

    (1) That the vendor may henceforward receive during the Service Charge Period out of the said hereditaments the following service charges:

        (a) an Annual Bahamia Service Charge for maintenance of Princess Isle;

        (b) an Annual Homeowner's Maintenance Fee for common expenses for Princess Isle;

        (c) Individual Special Assessment Charges;

        (d) Collective Special Assessment Charges;

        (e) Interest on Service Charges where in default;

        (f) Late Payment Administration charges;

        (g) All legal fees and costs on a full indemnity basis in enforcing remedies for collecting Service Charges."

    (2) That if one or more of the Service Charges or any part or parts thereof shall be unpaid after any of the days hereinbefore appointed for the payment thereof then and in every such case it

shall be lawful for the Vendor to enter upon the said hereditaments or any part or parts thereof and to distrain for the arrears of the said Annual Service Charge and the distress or distresses there taken to dispose of according to law as in the case of distresses for rent reserved on a lease to the intent that such arrears and all expenses incurred in such distraint or by reason of such non-payment shall be fully paid."

(3) That if one or more of the Service Charges or any part or parts thereof shall be unpaid for Thirty (30) days after any of the days hereinbefore appointed for the payment thereof (and the requirement for a demand is hereby expressly waived by the Purchaser) then and in every such case although there shall not have been any legal demand therefor it shall be lawful for the Vendor to enter into and upon the said hereditaments or any part or parts thereof in the name of the whole and to receive the rents and profits thereof until thereby or otherwise not only the arrears of the said Service Charge and the costs and expenses attending to such entry possession and receipt or incurred by reason of such non-payment but also so much of the Service Charge as shall have become due during such possession or receipt shall be fully satisfied ..."

(4) [...]

(5) That if:- One or more of the Service Charges or any part or parts thereof shall at any time or times be unpaid for One Hundred Twenty (120) days after any of the days hereinbefore appointed for the payment thereof; or,

[...]; or

[...].

THEN it shall be lawful for the Vendor, or the Association or its assigns at any time or times during the life of the survivor of the issue now living of either Princes William and Harold of Windsor or within Twenty-one (21) years after the death of such survivor (hereinafter referred to as "the Service charge Period") into and upon the said hereditaments or any part of the same in the name of the whole to enter and the same to have again repossess and enjoy as if these presents had never been executed..."

(6) To the use of the purchaser in fee simple.

13. By a Declaration of Rights dated 21 February 1996 and recorded in volume 6653 at pages 229 to 336 ("the declaration") Princess Realty Limited as the Declarant, declared at Article V section 14 as follows:

(a) For avoidance of doubt, the yearly service charge set forth in clause 1(1)(a) of the Conveyance (along with appropriate interest, late payment, administration charges and legal fees) shall always, or until otherwise assigned, belong to and inure to the benefit of the Declarant for the maintenance of Princess Isle as part and parcel of its overall scheme of development within Bahamia. All other service charges shall likewise belong to the Declarant to be used for the purposes set forth in the Declaration until the turn-over date. Thereafter, the same shall belong to the Association for the like purposes.

(b) For the avoidance of doubt it is hereby declared that after the turn-over date the Association shall own the right to charge and collect Service Charges other than that set forth in Clause 1(1)(a) of the Conveyance. Consequently, the Association shall be entitled to enforce collection of Service Charges by all remedies available to the Declarant and specifically may repossess any lot for non-payment. Subject as aforesaid, the Declarant shall assign all its right, title, interest and estate in and to the service charges contemporaneously with turn over."

14. By an indenture dated 13 December 2005 made between Bahamia Realty Limited (formerly Princess Realty Limited) and the second defendant recorded in the said Registry of Records in volume 9589 at pages 601 to 605 ("the deed of assignment") Bahamia Realty Limited as beneficial owner granted and conveyed to the second defendant:

> "all its estate and interest in the parcels or Lots of land in the Princess Isle Subdivision arising out of indentures of conveyances made between the vendor and the respective purchasers for the payment of service charges excepting as provided in paragraph 1(1)(a) of the Conveyances unto the second defendant to hold absolutely..."

and thereby assigned "all its rights benefits and entitlements to the said service charges" unto the second defendant as grantee.

15. The plaintiff failed to pay the service charges to the second defendant, who, after serving the plaintiff with a demand for arrears of service charges for a period in excess of seven years, on 4 April 2008, entered upon the properties and re-possessed them. The affidavit of re-possession sworn by the first defendant on 15 May 2008 is recorded in the said Registry of Records in volume 10445 at pages 575 to 581.

16. The plaintiff's position, as I understand it, is that as the service charge is neither an estate nor interest in land and the plaintiff having purchased, and the vendor having conveyed to the plaintiff, the fee simple estate in the properties, there was no estate or interest left in the vendor, Princess Realty Limited, which could be assigned to the second defendant. Therefore, in entering upon the said properties as aforesaid the first defendant committed a trespass thereupon.

17. The plaintiff says further that it has paid the Annual Bahamia Service Charges but challenges the obligation imposed on it by the conveyance to pay the "other service charges", which the plaintiff contends it is not obligated to pay to the second defendant as the plaintiff is neither a homeowner in the Princess Isle Subdivision nor the beneficiary of homeowner's services. Therefore, the plaintiff says, it is not indebted to the second defendant. In any event, counsel for the plaintiff contends that there is no privity of contract nor privity of estate between the plaintiff and the second defendant that would entitle the second defendant to enforce payment of the service charge by entering upon and repossessing the said properties.

18. The defendants say that the plaintiff receives every service that all other owners at Princess Isle receives; that there is no distinction between an owner who has improved his lot and one who has not; and all owners are called "homeowners" regardless of whether they have a home on their lot or not.

19. The defendants contend that the plaintiff having failed to pay the service charges for more than seven years, the second defendant was entitled to enter and repossess the said properties and that the first defendant did not commit a trespass when posting the notice of repossession thereon.

20. The second defendant bases its right to enter and repossess the properties as aforesaid on the provisions of the conveyance, the declaration and the deed of assignment and contends that the service charge provided for in the conveyance is a rentcharge and therefore recoverable by repossession and re-entry.

21. The issues for determination as expressed by the plaintiff are as follows:

    (1) Whether the first defendant acted lawfully or did he trespass?

    (2) Whether the second defendant has any right or interest in the said properties which would have entitled the defendants to service charges? And if so,

(3) Whether there was any right to dispossess the plaintiff and determine its title?

22. The defendants see the issues as follows:

(1) Did the vendor, Bahamia Realty Limited, have a right to re-enter the properties and take possession thereof for non-payment of the service charges?

(2) If so, has that right been successfully assigned to the Association such that it had the right to re-enter?

23. Although framed differently, it seems to me that the parties agree that the main issue to be determined is whether the second defendant had a right to enter and re-possess the said properties for non-payment of service charges.

24. In my opinion, in order for the purported re-entry and repossession of the said properties by the second defendant to be valid, in addition to the arrears provisions in the conveyance, several conditions must be satisfied.

25. Firstly, the service charges must at least have the characteristics of a rentcharge; secondly, as such, they must be capable of being reserved to the vendor in a conveyance to uses; thirdly, the rights thereto must be assignable; fourthly such rights must have been validly assigned by Princess Realty Limited to the second defendant; and, fifthly, the plaintiff must have been in arrears with the payment of service charges for more than 120 days.

26. Of course, the exercise of the entry and repossession must have been done lawfully.

27. Over the years there have been a number of developments of subdivisions in Freeport in which the conveyances of lots have reserved to the developer out of the property a service charge and which have made provision for distress and re-entry in the event of non-payment.

28. Although Mr Maynard pointed out that for the most part those cases dealt with the procedure for taking possession of properties as a result of the non-payment of the service charge, whose enforceability was presumed, it is common ground that Campbell JA in the case of Juanita Knowles v Bahama Reef Development Co. [1995] BHS J. No. 33, expressed the view, albeit obiter, that the service charge in the conveyance in that case was "akin to a rentcharge in that it issues out of the hereditaments conveyed and is charged thereon for payment".

29. Nevertheless, counsel on both sides take issue with Campbell JA's characterization of the service charge as being "akin to a rentcharge".

30. Mr Maynard on behalf of the plaintiff contends that although the service charge may resemble a rentcharge, it lacks the material elements of a rentcharge; while Mr Smith QC for the defendants contends that the service charge is not merely "akin to a rentcharge" but is "plainly a rentcharge".

31. "Service Charge" means "an amount payable by a tenant of a dwelling as part of, or in addition to the rent:

> (1) Which is payable, directly or indirectly, for services, repairs, maintenance or insurance or the landlord's costs of management; and
>
> (2) The whole or part of which varies or may vary according to the relevant costs
>
> The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable." [English Landlord and Tenant Act 1985 s. 19 (as amended)]. See also Halsbury's Laws of England 4th Edition, volume 27(1) at pages 294-295).

32. "Rentcharge" is defined in Section 2 of the Limitation Act, chapter 83 Statute Laws of The Bahamas, as:

> "Any annuity or periodical sum of money charged upon or payable out of land except a rentservice or interest on a mortgage or any other charge on land"

33. Megarry and Wade on *The Law of Real Property* (7th edition 2008) say at paragraph 31-014 that:

> "Periodical payments in respect of land fall under the two main heads of rentcharges and rent services. Where the relationship of lord and tenant exists between the parties, any rent payable by virtue of that relationship by the tenant to the lord is a rent service. If there is no relationship of lord and tenant, the rent is a rentcharge..." [emphasis added].

34. The learned authors also opined at paragraph 31-019 that:

> "Rentcharges are more suitably employed in connection with schemes of development, particularly where plots or flats are sold freehold and the purchasers contribute to the cost of maintaining the common parts of the buildings or grounds. In this context they have proved useful as a device for circumventing the rule that the burden of positive covenants cannot run with freehold land.

Consequently such rentcharges have not been abolished by the Rentcharges Act 1977.

35. Section 2(3) of the English Rentcharges Act 1977 ("the 1977 Act") provides:

> "This section does not prohibit the creation of a rentcharge.... which is an estate rentcharge"

36. Section 2(4) of the 1977 Act provides as follows:

> For the purposes of this section "estate rentcharge" means [...] a rentcharge created for the purpose—
>
> (a) of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or
>
> (b) of meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land.

37. Clearly the service charges in this case were not reserved by a lease or tenancy. Equally as clear from the above is that although certain rentcharges were abolished by the 1977 Act, "estate rentcharges" were among the list of rentcharges that have not been abolished: See ss. 2(3) and 2(4) of the 1977 Act.

38. Consequently, I reject Mr Maynard's submission that no rentcharges may be created at law or in equity after 22 August 1977.

39. Rentcharges may be created by statute, an instrument *inter vivos* or by will. If created *inter vivos*, it must be by deed (Hewlins v Shippan (1826) 5 B & C, 221 at 229), although it has always been possible for a person disposing of land to reserve a rentcharge to himself without the grantee of the land executing the deed. [Megarry and Wade *supra* at paragraphs 31-020 to 31-022].

40. The remedies available to an owner of a rentcharge, if it is not paid, and provided no contrary intention is shown in the instrument creating the rentcharge, include (1) the common law action for the money; (2) distress; (3) possession; and (4) demise to a trustee for a term of years to raise the money due. Also, see Megarry and Wade at paragraphs 31-027 to 31-031, where the learned authors also say that:

> "These last three remedies are expressly excepted from the law relating to perpetuities, together with like powers conferred by any instrument for enforcing payment of a rentcharge. This provision is perhaps not wide enough to cover a clause which is sometimes inserted entitling the rentcharge owner to effect a permanent forfeiture of the land if the rent is unpaid for a specified period, properly called a right of re-entry as opposed to a right of entry. The general rule that such a power is void unless confined to the perpetuity period probably applies in such a case." [emphasis added].

41. In the light of the foregoing, I agree with Mr Smith QC that the service charges in this case appear to have all of the characteristics of a rentcharge. They certainly, in my view, resemble a rentcharge more than the service charge as defined in the English Landlord and Tenant Act 1985 *supra*.

42. Firstly, in this case, the service charge is an annual payment expressed to be *"*out of the said hereditaments*"*. The conveyance provides at clause 1(1) that the properties were conveyed to the plaintiff to the use, inter alia, "that the vendor may henceforward receive during the service charge period out of the hereditaments the following service charges..." The Limitation Act defines a rentcharge as "any...periodical payment charged upon or payable out of land".

43. Secondly, there is no relationship of lord and tenant. Megarry and Wade *supra* make it clear that "if there is no relationship of lord and tenant, the rent reserved is a rentcharge" and in this regard I take counsel for the defendants' point that "rent" is not used as it is colloquially used but refers to any money or "periodical payment" reserved on a conveyance of land.

44. Thirdly, the properties were conveyed in fee simple to the plaintiff, the vendor (Princess Realty Limited) retaining no reversion in the land but reserving to itself a certain sum – the annual service charge – with a provision that if payment of that sum fell into arrear for 120 days it would be lawful for the vendor to distrain for it and to re-enter and re-possess the said properties. According to Woodfall on Landlord and Tenant at paragraph 7.009: "A rentcharge is where land is charged with a rent by deed with power to distrain for it, but the owner of the rent has no reversion in the land."

45. The learned authors say that:

> "A rentcharge is created where a person conveys to another land in fee simple reserving a certain rent payable, with a clause that if the rent is in arrear for a specified number of days it shall be lawful to distrain for it."

46. They say further that: "In such case the rent owner is entitled to distrain, not of common right, but by virtue of the clause in the deed; and therefore it is called a rentcharge, because in this way the land is charged with a distress for the payment of rent: Bradbury v Wright (1781) 2 Doug 624."

47. And Lord Herschell, L.C. in the case of In re Lord Gerard and Beecham's Contract [1894] 3 Ch. 295, page 311 opined that:

> "On the conveyance of land reserving a rent, it was the right of distress which made the rent a "rent-charge." In the case, therefore, of a sale of land under sect. 10 reserving rent, it appears to me that there is no difficulty in saying that it is a rent-charge."

48. Fourthly, as Mr Smith QC points out, the power in the conveyance to re-enter and re-possess does not offend the rule against perpetuity as the conveyance sets out the perpetuity period defined therein as the "service charge period".

49. Further, I accept counsel for the defendants' submission that the description of "estate rentcharges" in the 1977 Act is a "perfect description" of the service charges reserved by the conveyance in this case in that plots in the Princess Isle subdivision were sold freehold and the purchasers are required to contribute to the cost of maintaining the common parts of the subdivision.

50. Additionally, in the case of Robert Griffin and Diane Griffin v Sheila A. Martin 1997/CL/FP/234 ("Griffin v Martin"), Ganpatsingh J (as he then was), in considering whether it was necessary for the service charge owner to join in the declaration of condominium opined that that question involved a consideration of "the law as it relates to rentcharges, notwithstanding that these charges are described as service charges in the Bahamas".

51. In that case, Ganpatsingh J (as he then was) concluded, as do I, that it matters little what it is called, whether service charge or ground rent or rentcharge, once it is charged to issue out of the land of the grantor, with a right of entry by way of distress, it is a rentcharge.

52. I, therefore, find that the service charge in this case is a rentchage, as contended by the defendants.

53. A rentcharge created *inter vivos* must be by deed.

54. In this case, the instrument creating the service charge, which I have found is a rentcharge, is the conveyance to uses dated 1 April 1999 from Princess Realty Limited to the plaintiff.

55. Nevertheless, Mr Maynard argues that there is no deed as required by the Statute of Frauds charging the plaintiff's land with the payment of service charges or a rentcharge.

56. As I understand Mr Maynard's argument, the only way a rentcharge may be legally created *inter vivos* is by the fee simple owner by separate deed charging the land with the payment of rent, similar to the case of a fee simple owner executing a mortgage deed charging his land to secure payment of a loan.

57. However, as I understand the authorities, the usual or common way for a rentcharge to be created *inter vivos,* is by a conveyance to uses; that is, a conveyance whereby "a person conveys to another land in fee simple reserving a certain rent payable, with a clause that if the rent is in arrear for a specified number of days it shall be lawful to distrain for it." See Woodfall on Landlord and Tenant *supra*.

58. The nature of such a conveyance was described by Williams on The Law of Real Property (24th edition) at page 523 as "a conveyance from the vendor to the purchaser and his heirs to the use that the vendor and his heirs might thereout receive the rentcharge agreed on and subject to the rentcharge to the use of the purchaser..." In other words, a conveyance to uses.

59. Similarly, in this case, by the conveyance the said properties were conveyed by the vendor/Princess Realty Limited, to the purchaser/plaintiff to the use, *inter alia:* that the vendor may henceforward receive during the service charge period out of the hereditaments the service charges...and to the use of the purchaser in fee simple.

60. It seems to me that the conveyance in this case fits Williams' description of a conveyance to uses.

61. However, in Mr Maynard's submission, the conveyance is not a legitimate conveyance to uses and to the extent that it purports to be one, he says, it breaches the Statute of Uses. As he puts it: "it is a fraudulent conveyance in violation of the Statute of Uses including a counterfeit rentcharge and attempting to pass off service charges as an interest in land."

62. In his submission, the conveyance has one of three possible effects, namely that Princess Realty Limited as vendor:

(1) Conveyed the fee simple estate absolute to the plaintiff to the use of the vendor i.e. to hold in trust for the benefit of the vendor to the extent only of the value of the service charges: In which case the conveyance of the fee simple estate would be lawful only if it created a rentcharge (known to law) but what it created is clearly not a rentcharge - it is not so described and it does not have the characteristic of a rentcharge. It is a service charge (unknown to law). A review of the conveyance, the declaration and the deed of assignment, the service charge is, as described, a charge for services rendered or to be rendered and there is no evidence that the proceeds are to be used exclusively for the benefit of the land and not as a perk for the developer. (emphasis added).

(2) Conveyed the fee simple estate absolute to the plaintiff to the use of the vendor, that is, in trust for the benefit of the vendor: In which case the purchaser would have paid a very substantial sum for the land and would not have received what he bargained for. He would have got nothing for his money, an obvious fraud contrary to the Statute of Uses which was enacted to prohibit the fraudulent use of conveyances to uses.

(3) Conveyed to the plaintiff the fee simple absolute subject to a covenant to pay service charges to the vendor: In this case, the conveyance being contrary to the Statute of Uses does not reserve or create any interest in the land nor a rentcharge. If it is not to fail totally the interpretation which can be given to it is that it conveys to the purchaser the fee simple estate absolutely subject to a positive covenant to pay for services performed or to be performed (service charges). See Milnes v Branch 5 M & S 411.

63. Counsel for the defendants disagrees with Mr Maynard's contention that the effect of the conveyance was such that the purchaser/plaintiff got nothing for his money. Indeed, he pointed out that the way in which a rentcharge operates is that the vendor retains no reversionary or beneficial interest in the land charged by the rentcharge. In his submission, the plaintiff obtained a fee simple estate in the said properties, which fee simple estate was subject to a condition that gave the vendor (Princess Realty Limited) a right to re-enter and determine the estate when and if the event of default occurred; that unless and until entry is made, the fee simple continues. (See Megarry & Wade *supra* at paragraph 3-058).

64. Therefore, Mr Smith QC submits, the basis of the re-entry on the said properties was not that the vendor retained beneficial ownership thereof, but rather that the vendor (and subsequently, the second defendant to whom such right of re-entry was assigned) had a legal interest in land in the form of a rentcharge with a right of re-entry. Consequently, he submits, the conveyance does not breach of the Statute of Uses.

65. Moreover, Mr Smith QC points out, the conveyance in this case is in all material respects similar to the conveyance in the case of Juanita Knowles v. Bahama Reef Development Company Limited (32 of 1993 C.A) ("Juanita Knowles"). He points out further that the right to enter on land based on the service charge was also upheld in Commercial Centre Complex Limited v Freeport Commercial and Industrial Limited (C.L. 760/1986) ("Commercial Centre") and Bahama Reef Development Company Limited v Wellington Smith and Mercantile Land Resources Limited (C.L. 336/1992) ("Wellington Smith").

66. However, Mr Maynard says that those cases are not a general authority for rights to, and enforcement of, service charges and, therefore, each must be determined on its own facts. In any event, he says, those cases are distinguishable from this case as the conveyances in those cases were constructed differently from the conveyance herein, in that payment of the service charge was made, not as rent, but as part of the consideration for the grant so that, in his submission, failure to pay the service charges amounted to a failure of the consideration. Hence, he posits, Strachan J could hold that the conveyance in the Wellington Smith case was "an estate in fee defeasible by condition subsequent" and Campbell JA could hold in the Juanita Knowles case that "it is a 'fee simple on condition' simpliciter, that is to say, subject to the reservation in favour of the vendor of an annual sum akin to a rentcharge in that it issues out of the hereditaments conveyed and is charged thereon for payment." However, in this case, he submits, there is no condition subsequent or fee simple on condition; no reservation and no charge over or interest in the land.

67. Counsel for the defendants disagrees that the service charge formed part of the consideration in the Juanita Knowles case, but submits that whether it did or not had no bearing on the finding in that case that the property was charged with a yearly service charge, non-payment of which would entitle the vendor to enter

upon the said properties and to repossess the same as if the conveyance had never been executed, as is the case in the conveyance herein.

68. The clause in the conveyance in the Juanita Knowles case, which Mr Maynard contends makes that case distinguishable from this case, is clause F, re-produced below:

> "It has been agreed that the Vendor shall sell and the Purchaser shall purchase the said hereditaments hereby assured to the Purchaser at the price of Five Thousand Nine Hundred Fifteen and no/100 Dollars and a yearly service charge of One Hundred Forty and no/100 Dollars for each Lot hereinafter described to issue out of the said hereditaments for the term of Ninety-nine years from the date hereof and to be secured in the manner hereinafter appearing".

69. I note here that the properties in the Juanita Knowles and Wellington Smith cases were both in the Bahama Reef Subdivision, where, as noted by Strachan J in the Wellington Smith case: "Bahama Reef uses a common form conveyance having a covenant which runs with the land, to pay a service charge."

70. The relevant clause in the conveyance in this case is recital D, which provides as follows:

> "The vendor has agreed to sell and the purchaser has agreed to purchase the hereditaments described in the First Schedule hereto ... being a portion of Princess Isle for an estate in fee simple in possession subject as aforesaid, subject to the Restrictions and subject to the uses and exceptions and reservations as hereinafter provided but otherwise free from encumbrances at the price of $510,000.00."

71. As I understand Mr Maynard's submission, the distinguishing feature between the conveyance of properties in the Bahama Reef Subdivision and the conveyance in this case is that the consideration for the sale by the developer was the price of the lot together with the annual service charge, which was secured by a charge on the land and was payable over a 99-year period.

72. However, it seems to me that the argument advanced by Mr Maynard may place the Bahama Reef Subdivision form of conveyance into the category of those which were abolished by the English Rentcharges Act 1977.

73. According to Megarry and Wade in The Law of Real Property (7th edition) at paragraph 31-017: conveyances in which a vendor took the purchase price in the form partly of a capital sum and partly of a rentcharge, known as chief rents or fee farm rents, were said to complicate conveyancing and were unpopular with

land owners because they were "repugnant to the concept of freehold ownership". (See also (1975) Law Com. No. 68, para. 26). Consequently they were abolished by the English Rentcharges Act 1977.

74. In any event, I agree with Mr Smith QC that failure of consideration in a real property transaction does not found a right to enter upon and re-possess real property after it has been conveyed, although failure to pay a rentcharge does.

75. Further, notwithstanding Mr Maynard's argument that the aforesaid local authorities are not a general authority for rights to, and enforcement of, service charges, the fact is that in each of those cases the court considered the nature of the estate in the land conveyed to the purchaser where service charges were reserved to the vendor by a conveyances to uses.

76. For example in the Commercial Centre case, Malone Snr J found that payment of the service charge with the remedy of re-entry was "a condition subsequent to the fee simple" and that the right of re-entry accrued to the defendant because of a breach of the condition. On page 19 of the judgment, the learned Senior Judge said: "The estate here created is not a fee simple absolute, but a fee simple on condition. It is presently voidable, but has not been avoided."

77. Then, in the Wellington Smith case, Strachan J described the estate vested in the purchaser, where the vendor retained a right to re-enter for failure to pay service charges, as "a fee defeasible by condition subsequent"; while the Court of Appeal (Campbell JA) in the Juanita Knowles case termed the purchaser's estate as "a fee simple on condition' simpliciter" and Ganpatsingh J in Griffin v Martin described the fee simple conveyed under the conveyance to uses as "a modified fee as it is subject to a condition subsequent determinable in the event stipulated."

78. A fee simple may be absolute or modified - a fee simple absolute being the highest ownership interest possible that can be had in real property whereas a modified fee simple, also referred to as a modified fee, is any fee simple except a fee simple absolute. Modified fees may be determinable or conditional. A determinable fee is said to be a fee simple which will automatically determine on the occurrence of some specified event which may never occur, while a fee simple upon condition, which is said to be akin to but distinct from a determinable fee, has some condition attached to it by which the estate given to the grantee may be cut short. This is sometimes called a condition subsequent in order to

distinguish it from a condition precedent relating to the beginning of the estate. (See Megarry and Wade in the Law of Real Property (7th edition) page 73 *et seq*).

79. The learned authors opined that the difference between a "determinable fee" and a "fee simple defeasible by condition subsequent" is not always easy to discern although they say that the essential distinction between the two is that the determining event in a determinable fee itself sets the limit for the estate first granted, whereas a condition subsequent is an independent clause added to a limitation of a complete fee simple absolute which operates so as to defeat it. Words such as "while" "during" "as long as" "until" are said to be apt for the creation of a determinable fee, and words which form a separate clause of defeasance such as "provided that" or "on condition that", "but if" or "if it happen that" are said to operate as a condition subsequent.

80. The learned authors expressed the view that "a fee simple upon condition" merely gives the grantor (or whoever is entitled to his interest in the land, if the grantor is dead), a right to enter and determine the estate when the event occurs; that the right of entry arising on a breach of the condition is exercisable at the option of the grantor or his successor and unless and until entry is made, the fee simple continues.

81. Therefore, in my view, it does not matters whether the estate granted to the plaintiff is described as a "fee simple upon condition" or a "fee defeasible by condition subsequent", which appear to be used interchangeably by Megarry and Wade. What is relevant, however, is that the conveyance in this case conferred on the vendor (Princess Realty Limited) the right to re-enter the said properties in the event the purchaser/plaintiff failed to pay the service charges for a specified period during the service charge period.

82. As submitted by counsel for the defendants, an estate in fee simple "on condition" demonstrates how a vendor's interest in land, for example, an incorporeal hereditament such as a rentcharge, can coexist with the purchaser obtaining a fee simple estate in such land without the need for the vendor to retain a reversionary interest or for the property to be held on trust for the vendor, as contended by counsel for the plaintiff.

83. Consequently, I accept the defendants' submission that by the said conveyance the plaintiff obtained a fee simple estate in the said properties subject to a condition subsequent (the purchaser/plaintiff paying the service charges), that

gave the vendor (Princess Realty Limited) the right to re-enter and determine the estate when and if the event of default occurred; that until entry was made, the fee simple estate vested in the purchaser/plaintiff continued.

84. In my judgment clause 1(4) of the conveyance makes it very clear that the vendor had the right to re-enter and to repossess the land conveyed to the plaintiff in the circumstances which the sub-clause clearly defines and since the right of re-entry is confined to the perpetuity period, defined in the conveyance at clause 1(5) as the "service charge period", it does not offend the rule against perpetuities. See Megarry and Wade (7th edition) paragraph 31-031.

85. Also, in my judgment, upon the plaintiff's default in paying the service charges for 120 days, Princess Realty Limited, had the right to re-enter and thereby defeat the purchaser's fee simple estate without having to refund the purchase price, as intimated by counsel for the plaintiff.

86. It was, of course, the second defendant and not Princess/Bahamia Realty Limited who purportedly entered and repossessed the said properties. Mr Maynard contends, on behalf of the plaintiff, that as the second defendant was not a party to the conveyance, and as Princess Realty Limited had, by the conveyance, conveyed the entire estate it held in the said properties to the plaintiff, there was no interest or estate left in Princess Realty Limited which could have been assigned or conveyed to the second defendant. Consequently, Mr Maynard submits there was no privity of estate privity of contract between the second defendant the plaintiff which would have entitled to second defendant to enter and repossess the said properties. (Milmo v Carreras [1946] 1 K.B. 306).

87. As indicated, with the exception of the right to the service charge in clause 1(1)(a) of the conveyance, that is the Annual Bahamia Service Charge, Princess Realty Limited/Bahamia Realty Limited by the deed of assignment, assigned unto the second defendant, all its rights and entitlements to the said service charges.

88. That assignment had been foreshadowed in the declaration at Article V section 14 which provides as follows:

> "For the avoidance of doubt it is hereby declared that after the Turn Over Date the Association shall own the right to charge and collect Service Charges other than that set forth in clause 1(1)(a) of the Conveyance. Consequently, the Association shall be entitled to enforce collection of Service Charges by all remedies available to the Declarant and specifically may repossess any Lot for non-payment subject as foresaid, the Declarant shall assign all

> of its right, title, interest and estate in and to the Service Charges contemporaneously with Turn Over.

89. I have found that the estate conveyed to the plaintiff by the conveyance was not an estate in fee simple absolute but an estate in fee simple on condition subsequent. I have also found that the service charge is a rentcharge.

90. A rentcharge is an incorporeal hereditament and as such it is an interest in land and subject to the law of real property.

91. Megarry and Wade on The Law of Real Property (7th edition 2008) at page 756 say that: "a rent reserved by a lease is annexed to the reversion in land, while a rentcharge stands on its own as an incorporeal hereditament." At page 751, the learned authors say that one of the distinguishing features of incorporeal hereditaments is that the law of real property applies to them, just as it applies to corporeal land. The authors note that rentcharges are included amongst the list of incorporeal hereditaments that "are important interests in land".

92. As an interest in land, it is capable of being conveyed or assigned or devised.

93. By the aforesaid deed of assignment, Bahamia Realty Limited as beneficial owner granted and conveyed:

> "all its estate and interest in the parcels or lots of land in the Princess Isle Subdivision arising out of Indenture of Conveyances made between the grantor and the respective purchasers for the payment of service charges excepting as provided in paragraph 1(a) of the Conveyances unto the grantee [second defendant] to hold absolutely and hereby assigns all its rights benefits and entitlements to the said service charges unto the grantee."

94. By that clause, Bahamia Realty Limited assigned its right to the service charges as well as the benefits of the remedy for non-payment thereof to the second defendant. Article 5 section 14 of the declaration clearly states that this assignment would take place.

95. It appears that no particular form of assignment is required. Counsel for the defendants submits that the language of the deed of assignment is sufficient to transfer the benefit of the stated service charges and the remedies therefor from the Vendor to the Association. For that submission counsel relied on the case of Burton v. Camden London Borough Council (2000) [2000] UKHL 8; [2000] 2 AC 399; [2000] 1 All ER 943; [2000] 2 WLR 427 (17th February, 2000)

96. In that case one of two joint secure tenants of a flat executed a deed of release in favour of the other, the operative part of which consisted of the following single clause:

> "Jan Theresa Hannawin hereby releases her legal and beneficial interest under this joint secure tenancy to Susan Patricia Burton who accepts the same to hold pursuant to this deed of release as the sole secure tenant of the dwelling with effect from the date hereof."

97. On appeal to the House of Lords of the Court of Appeal's decision declaring Miss Burton as the sole tenant, the Court identified the issue before it as whether the deed of release was effectual to vest the tenancy in Miss Burton alone? The majority of the court decided that the deed of release was ineffectual to achieve its object of vesting the tenancy in Miss Burton alone because by reason of section 91(1) of English Housing Act 1985, that object was incapable of achievement and that was so regardless of the form of words that were used. However, Lord Millett expressed the following view: "the word 'assignment' is not a term of art. It denotes any conveyance, transfer, assurance or other disposition of property from one party to another. The essence of an assignment is that it operates to transfer its subject-matter from the ownership of the assignor to that of the assignee."

98. There is no prohibition in the conveyance to the vendor assigning his interest in the service charges. Indeed, as I said, the conveyance, which the plaintiff executed, not only foreshadowed the assignment to the Association but also provided at clause 1(5) that that upon default by the purchaser/plaintiff in paying the service charges for 120 days, "it shall be lawful for the vendor or the Association or its assigns into and upon the said hereditaments or any part of the same in the name of the whole to enter and the same to have again repossess and enjoy as if these presents had never been executed.."

99. I therefore find that the rights and benefits to the service charge/rentcharge were effectively assigned to the second defendant.

100. It is not disputed that the service charges are in arrears. Although counsel for the plaintiff says that the plaintiff has paid the Annual Bahamia Service Charge portion of the charges, he admits that the plaintiff has not paid the other portions of the service charges.

101. However, Mr Maynard argues that notwithstanding the assignment and the non-payment of the service charges, the second defendant was not entitled to enter and repossess the said properties as there was no privity of estate or privity of contract between the plaintiff and the second defendant that would entitle the second defendant to do so. In his submission, Princess Realty Limited/Bahamia Realty Limited having conveyed the fee simple estate in the said properties to the plaintiff, there was nothing left in Princess Realty Limited/Bahamia Realty Limited to convey or assign to the second defendant.

102. For that argument he relies on the case of Milmo v Carreras *supra*.

103. In that case, the plaintiff was the tenant of a flat under a lease for a term of seven years, expiring on 28 November 1944. On 25 October 1943 the plaintiff/tenant agreed to sublet the flat to the defendant for one year from 1 November 1943 and thereafter quarterly until either party gave three months' notice. The agreement had the usual undertaking to deliver up at the end of the term. The sub-term by reason of the quarterly extension would necessarily extend beyond 28 November 1944 when the head lease expired. On 27 April 1945 the plaintiff served on the defendant a notice to quit on 1 August 1945. The defendant refused to give up possession. The plaintiff sought an order for possession. It was held that where the lessee (plaintiff/tenant) divested himself of everything he had, the relationship of landlord and tenant could not exist between them and the so-called sub-lessee.

104. In that case, it was clear that the reversion in the leasehold premises remained with the head landlord. The plaintiff/tenant/sub-landlord had sub-letted all of his term so Greene M.R. opined he had divested himself of the entirety of his interest in the flat and he was thenceforward a stranger to it.

105. In this case, although Princess Realty Limited conveyed all of its estate in the said properties to the plaintiff, it retained/obtained an interest therein by virtue of the rentcharge, a portion of which it assigned, as it could, to the second defendant.

106. In the English case of Rivis v Watson (1839) 5 Meeson and Welsby 255, relied on by the defendants, it was held that the assignee of a portion of a rentcharge may distrain for it notwithstanding that the party chargeable with the rentcharge did not consent to the assignment.

107. The plaintiff was well aware at the time he purchased the said properties, from the declaration as well as the conveyance, that Princess Realty Limited intended to assign the rentcharge to the second defendant.

108. Clause 1(5) of the conveyance sets out the remedies for non-payment of the service charges, including the right of re-entry and repossession. Those rights having been assigned to the second defendant, the second defendant was, in my judgment, entitled to enforce payments and/or exercise all of its remedies in connection therewith.

109. Further, the plaintiff had not, at the date of entry and repossession, assigned its estate in the said properties so it was still bound to pay the service charges, or, in default of which, to deliver up possession to the service charge holder, in this case the second defendant, to whom the benefit of the covenant to pay the service charge was expressly assigned.

110. Woodfall on Landlord and Tenant at paragraph 9.035 says that:

> "The assignee of a rentcharge may distrain for arrears thereof which became due after the assignment, (Maund's Case (1601) 7 Co. Rep. 28b), but not for previous arrears (Brown v Metropolitan Counties Life Insurance Society (1859) 1 E & E 832).

111. I, therefore, accept the submission of counsel for the defendants that the clear implication of the authorities cited is that the assignee of a rentcharge, in this case, the second defendant, may enforce the remedy attached to the rentcharge. Further, the authorities cited in Rivis v Watson establish that the rentchargee's consent is not required for the remedy to pass to the assignee of part of a rentcharge, although in this case, the plaintiff, in my view, consented to the assignment when he took the conveyance of the said properties.

112. The plaintiff also contends that it is not obliged to pay the service charges because it is neither a homeowner nor the beneficiary of homeowner's services

113. At the date of the conveyance of the said properties to the plaintiff, they were already part of a building scheme in accordance with the declaration. By the conveyance, the service charges included at clause 1(b):

> "An Annual Homeowner's Maintenance Fee for Common Expenses for Princess Isle payable to the Vendor but which may subsequently be assigned to the Association of ...$10,096.20...being the amount based on the Purchaser's relevant Homeowners' Unit Entitlement Percentage, of the annual cost of the Common Expenses of Princess Isle, as defined in the Declaration...which...shall be paid upon the execution of this deed

> for the ensuing 12 month period and subsequent payment shall be paid in accordance with the provisions of Article V Section 8 of the declaration free from all deductions whatsoever and which...may be increased or decreased by the Vendor, or as the case may be the Association, at any time or times after the expiration of the aforesaid 12 month period. The Purchaser's proportionate share, referred to in the Declaration as the Homeowners' Unit Entitlement, of the Common Expenses of Princess Isle is 3.91%."

114. The Declaration provides at Article V section 3(a) that:

> "Each Lot shall be subject to an annual assessment for, and each Owner further agrees to pay, a proportionate share of the expenses of maintaining the Common Property and such expenses as are necessary and required for the performance of the duties of the Association. This shall be known as the Annual Homeowners' Maintenance Fee for Common Expenses."

115. And at section 3(c):

> "The proportionate share of the Common Expenses payable by each Owner with respect to each Lot shall be weighted and computed on the basis of the percentage of the total area that the Purchaser's Lot bears in relation to the total saleable area of Princess Isle. This is the Homeowners' Unit Entitlement."

116. It seems clear to me from the above provisions that the obligation to pay the service charges is in no way contingent upon whether the purchaser has constructed a 'home' on the Lot.

117. I therefore find that the plaintiff was obliged to pay the service charges reserved at clause 1(1)(b)-(g) of the conveyance, notwithstanding he may not have yet constructed a house thereon.

118. Mr Maynard for the plaintiff also submitted that because service charges are not an interest in the land, the right to enforce them would be barred by the Limitations Act after six years of default: (see Halsbury's Laws of England 4th ed. volume 28, paras. 932 and 972). Therefore, he argues, if recovery of rent is barred, so must be any forfeiture.

119. Counsel for the plaintiff appears, by that submission, to accept that as an interest in land, the Limitation Act would not apply. I have held that the service charge is a rentcharge, an incorporeal hereditament and, therefore, an interest in land.

120. On the plaintiff's own admissions, it has not paid the service charges, except for the Annual Bahamia Service charges, for a period in excess of 120 days. I,

therefore, find that the second defendant by virtue of the conveyance, the declaration and the assignment was entitled to enter upon the said properties and repossess the same as a result of such non-payment.

121. The evidence, according to the affidavit of repossession, is that the first defendant, on behalf of the second defendant on 14 November 2007 made a demand of the plaintiff for payment of arrears of service charges in the sum of $98,130.94, being service charges payments for a period in excess of seven years, by serving the notice thereof on the plaintiff's registered office as well as on the said properties; that no payment having been made within 120 days after service of the said notice, the first defendant, on behalf of the second defendant on 4 April 2008, entered upon the said properties and repossessed the same.

122. The plaintiff accuses the first defendant of trespassing on the said properties.

123. In Black's Law Dictionary (6th Edition), 1990, page 1504, the term 'trespasser' is explained as follows :

> "One who has committed trespass. One who intentionally and without consent or privilege enters another's property. One who enters upon property of another without any right, lawful authority, or express or implied invitation, permission, or license, not in performance of any duties to owner, but merely for his own purpose, pleasure or convenience".

124. Clearly, the purpose of the first defendant's entry onto the said properties was to affix the affidavit of repossession at the behest of the second defendant who was entitled to do so.

125. Consequently, I find that the second defendant in affixing the notice of repossession to the said properties in the manner set out in the affidavit of repossession, did not commit a trespass thereupon.

126. In summary, my findings are as follows:

(1) The service charge reserved by the conveyance is a rentcharge.

(2) The conveyance to the plaintiff satisfies the Statute of Frauds.

(3) The conveyance does not offend the Statute of Uses.

(4) The vendor's right to the service charge along with the remedies for enforcement were effectively assigned to the second defendant by the indenture dated 13 December 2005.

(5) Notwithstanding the plaintiff may not have constructed a dwelling house on the said properties, the plaintiff was still obliged to pay the service charges.

(6) The plaintiff not having paid the service charges due under the conveyance to the second defendant for a period in excess of 120 days, legal demand having been made therefor, the second defendant was entitled to enter upon the said properties and repossess the same.

(7) The first defendant as the second defendant's servant or agent did not commit a trespass when affixing the notice of repossession to the said properties in the manner averred in the affidavit of repossession.

127. In the result, I answer the questions posed in the originating summons as follows:

(1) The second defendant by virtue of the declaration, the conveyance and the assignment, had an interest in Lots 19 and 19A Block 41 Princess Isle Subdivision, Freeport, Grand Bahama, which entitled it to enter upon and repossess the said properties upon the service charges being in arrears and unpaid for more than 120 days.

(2) The second defendant had a right to charge the plaintiff fees and levy assessments for services rendered or to be rendered to Homeowners in the Princess Isle Subdivision, notwithstanding the plaintiff is not a "homeowner" in the sense that he has not yet constructed a dwelling house on the said properties.

128. The plaintiff's claim for damages, trespass and mesne profits is, therefore, dismissed with costs to the defendants, to be taxed if not agreed.

129. My apologies to counsel and the parties for my delay in delivering this judgment, which is deeply regretted.

Delivered this 11th day of May A.D. 2012

Estelle G. Gray Evans
Justice