TORTOLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1988

BETWEEN:

MORRIS TURNBULL - Defendant/Appellant

and

ELOISE HODGE as Administratrix of the Estate of Rudolph Hodge, deceased - Plaintiff/Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Gerard St. C. Farara for Defendant/Appellant
J.S. Archibald, Q.C. for Plaintiff/Respondent

1989: Jan. 9.
June 26.

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JUDGMENT

BISHOP, J.A.

When this appeal was dismissed on 9th January 1989 it was indicated that written reasons would be given at a subsequent date. I now give my judgment in the matter.

On the 15th October 1962 an indenture was made between William Turnbull and Amelia Turnbull (husband and wife), herein also called the Lessors, and Rudolph Hodge, also called the Lessee. By that deed, numbered 215 of 1962, the Lessors demised unto the Lessee, from the 12th October 1962, for the term of 25 years, "all that piece or parcel of land situate at Cane Garden Bay........containing by estimation three-quarters of an acre, and butted and bounded .... on the east by the public road, on the west by the sea, on the north by the public road and on the south by lands of Davis". Covenants affecting the parties were set out thus:-

> "AND the Lessee doth hereby for himself and his heirs successors and assigns covenant with the Lessors their personal representatives and assigns in manner following, that is to say:-
>
> (then followed three covenants and a proviso)
>
> AND the Lessors do hereby for themselves, their heirs personal representatives and assigns covenant with the Lessee in manner following:-
>
> (1)..................

/(2) That at......

> (2) That at the expiration of the term hereby granted if these presents shall not have been determined under the power of re-entry..........at the request and cost of the Lessee by deed grant a lease of the said premises for a further term of twenty-five years subject to an increase in the rent herein reserved by not more than 50% and subject to the same covenants and conditions as are hereby and herein contained.
>
> (3) ...."

William Turnbull predeceased his wife, who, on the 9th January 1982 executed a transfer of the above mentioned land (registered as Parcel 69, Block 2538B in the West Central Registration Section) to her children and grandchildren, among whom was Maurice Turnbull, the appellant. The instrument of transfer - No. 253/1982 - was registered in the land Registry on 6th April 1982.

On the 31st March 1986 Rudolph Hodge died in Tortola, and on the 25th August 1987 Letters of Administration of all his Estate were granted, to his wife Eloise Hodge.

On the 4th September 1987, the solicitors for Eloise Hodge wrote a letter to Maurice Turnbull and the other heirs of William and Amelia Turnbull concerning the land mentioned in deed 215 of 1962. A request was made on her behalf for the granting of a further lease, for a further term of 25 years, in accordance with the terms of the said lease. Eloise Hodge was described in the letter as "the person now entitled to the leasehold interest in the said property".

A reply dated 18th September 1987 was written by the solicitor for the children and grandchildren to whom the land was transferred. The letter stated in part:-

> "Your client's purported exercise of the option to renew Lease No. 215 of 1962 is categorically rejected. Neither Mrs. Eloise Hodge or any person now living is entitled under the terms of Lease No. 215 of 1962, to exercise the option to renew provided in the said Lease; the only person who was so entitled, that is to say the Lessee, Rudolph Hodge, being deceased."

The sequel was that the solicitors for Eloise Hodge, in her capacity as Administratrix of the Estate of Rudolph Hodge deceased, filed an Originating Summons naming Maurice Turnbull as defendant, and seeking determination of the following question: "Whether the covenants and conditions in a recorded indenture of lease dated October 15, 1962 ("the lease") made between William Turnbull and Amelia Turnbull as the lessors (both now deceased) and Rudolph Hodge

as the lessee (now deceased) relating to land in Tortola, for a term of 25 years from October 12, 1962, are binding on the heirs, personal representatives, successors and assigns of all the said parties to the lease to the extent that the plaintiff is entitled to the benefit of the said Lessors covenant to renew the lease for a further term of 25 years, as the plaintiff contends, or whether the said covenant to renew was personal to the said lessee and ceased upon his death, as the defendant contends".

The summons was supported by an affidavit from Janice M. George-Creque, solicitor, in which she stated that the plaintiff would rely upon certain exhibited documents. There was an affidavit in reply, sworn to by Gerard St. C. Farara, solicitor. He referred to the documents on which Maurice Turnbull would reply.

At the hearing on the 3rd June 1988, Counsel for the parties agreed that the affidavits would constitute the evidence from which the question would be answered.

In passing, I wish to emphasise the undesireability of Counsel who appeared to argue at the trial, also swearing to the affidavit as solicitor in the matter. He put himself in the position of a witness making statements on oath; and when his affidavit was the essential evidence relied upon, then a position was created in which he was the solicitor, the sole witness and the Counsel for the defendant. Perhaps I should point out that the need did not arise for cross-examination of the deponent,and this "saved the day".

In her decision read on 10th June 1988 Bertrand J. stated:-

> "........... I find therefore, on a proper construction, the lease could not be personal to Rudolph Hodge and was intended to bind the heirs, personal representatives, successors or assigns of all parties. There was no obligation on Rudolph Hodge to request the renewal of the lease at any specified time, except before the expiration of the said lease. Rudolph Hodge died.........more than a year before the expiration of the lease.... It is my view that the burden of the covenant to renew passes to the Lessor's heirs and the benefit passed to the personal representative of Rudolph Hodge, deceased; that is the plaintiff."

The learned Judge did not agree with the contention of learned Counsel for the defendant/appellant that there was a contrary intention shown in the lease that the benefit of renewal passed to the plaintiff.

Thus the question was answered as contended for by the plaintiff.

On the 26th June 1988, Maurice Turnbull appealed against the

/decision on....

decision on the following grounds: (1) that the learned trial Judge erred in law in holding that the covenant for renewal contained in the Indenture made 15th October 1962 between William Turnbull and Amelia Turnbull as Lessors and Rudolph Hodge as Lessee, was not personal to the said Lessee Rudolph Hodge (2) that the **learned trial Judge** erred in law in holding that the said covenant to renew the said lease could be exercised by the plaintiff/respondent as administratrix of the Estate of the Lessee Rudolph Hodge (3) that the learned trial Judge erred in holding that on a true construction of the terms of the said lease the said covenant to renew ran with the land and touched and concerned the said land, and could be exercised by the plaintiff/respondent; and (4) that the learned trial Judge erred in law in holding that it would not be fair and equitable for the plaintiff/respondent, as the personal representative of the deceased Lessee, to pay rent under the lease and not to have the benefit of the covenant to renew, the said ruling being based on a wrong premise, that is, that the plaintiff/respondent had paid rent under the said lease whereas the only rents which the Lessee was liable to pay thereunder, being a sum of $100.00, had been due and paid since 1964, well before the death of the Lessee.

Counsel argued the first three grounds of appeal together. He commenced his arguments by stating the general principle of law relevant to a covenant to renew a lease; that is to say, that such a covenant falls within the category of covenants which are held to run with the land. He also submitted that a general principle was to be found in section 12 of the Conveyancing and Law of Property Ordinance, Cap. 199 which indicated "A person may take an immediate or other interest in land or other property or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument". He stated the general principle to be, that persons who are not original parties may take the benefit of a covenant; and he emphasised the use of the word "may" in the section. Then Counsel contended that the general principle may be displaced by the intention of the parties, as determined on a true construction of the lease; and he submitted that if the wording of the lease made a distinction between covenants that would bind heirs, successors and assigns and covenants which did not bind those persons, then the covenants that did not bind such persons were NOT covenants that ran with the land.

Mr. Farara also referred to section 29(1) of Cap. 199, the relevant part of which states: "A covenant........ made after the 1st January 1885 binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant........."

/Before......

Before analysing the lease No. 215 of 1962, Counsel cited paragraph 388 of Halsbury's Laws of England, 4th edition, Volume 27, and the cases MULLER v. TRAFFORD (1901) 1 Ch. 54 (at pages 59 and 60) and In re ROBERT STEPHENSON & CO. LTD. POOL v. THE COMPANY (1915) 1 Ch. 802 (at pages 806 to 809); and he urged that a covenant to renew was to be treated in the same way as a covenant not to assign without the landlord's consent (see the Modern Law of Real Property by Cheshire, 8th edition at page 427).

In his analysis of the lease Counsel referred to the parties named as the Lessors and the Lessee, and he pointed out that unlike the case of In re Robert Stephenson there was no definition clause providing a meaning for the expressions "the lessors" and the "the lessee". He contended that this showed that the draftsman of the lease did not intend the term "lessee", when used alone, to include his heirs, or successors or assigns. Consequently, there were covenants in the lease which were not intended to inure to the benefit of Rudolph Hodge's successors in title. Counsel referred to that part of the lease in which the Lessee's covenants were specified. He drew to our attention that the opening paragraphs (as he called it) showed that the Lessee, "for himself and his heirs successors and assigns" covenated with "the Lessors, their personal representatives and assigns". He then referred to the part of the lease setting out the Lessors' covenants and pointed out that the opening paragraph showed that"the Lessors" for themselves, their heirs, personal representatives and assigns covenanted with "the Lessee". There was no mention when setting out these later covenants (which included the covenant to renew the lease of the premises for a further term of 25 years) of the expression "for himself, his heirs, successors and assigns". Mr. Farara submitted that this meant that the covenant to renew was personal, limited to the Lessee (Rudolph Hodge) alone, and when he died it could not pass to the benefit of the administratrix of his Estate (Eloise Hodge). In Counsel's view, the lease, read as a whole, expressly stated that the covenant to renew did not run with the land beyond the Lessee.

Learned Counsel for the appellant did not pursue ground 4 with much vigour. The passage in the decision to which objection was taken did not show that there was a finding that the personal representative of Rudolph Hodge paid any rent under the lease; and in any event, the question posed in the Originating Summons could have been adequately answered without reference to the equitable position of any sort of payment whatever by Eloise Hodge. It is not necessary to say more on this ground. It is without merit in this appeal.

In his address, learned Counsel for the respondent considered the cases cited. He stressed that they dealt with sub-leases and that they were both decided prior to the coming into force of the Law of

/Property.....

Property Act 1925 and before there was the statutory need to state expressly that the covenant was not intended to bind successors in title of the original parties to the lease. Counsel referred us to paragraphs 113 and 396 in the 4th edition of Volume 27 of Halsbury's Laws of England. He urged that the covenant to renew was binding on the heirs and assigns of the parties to the lease - whether they were mentioned in the lease or not.

Mr. Archibald read a passage from the judgment of Denning L.J. (at page 514) in SMITH & SNIPES HALL FARM LATD. v. RIVER DOUGLAS CATCHMENT BOARD (1949) K.B.D. 500 and submitted that the legal principle affecting a covenant to renew a lease made in England after the year 1925, was clearly postulated or followed then. Counsel further submitted that when, like the Law of Property Act 1925, the statute law of Tortola required that if the covenant was not intended to bind successors in title of the original parties to the lease, then that fact should be "expressly stated", it meant recorded "in black and white". In Counsel's view it was not necessary to have to determine the meanings of the terms "lessors" and "lessee" either from an interpretation clause in the lease or from a study of the lease, since the heirs and assigns of the lessors and lessees, whether mentioned or not, were bound by a covenant to renew the lease.

This brings me to the question that this Court was invited to answer. It was stated by learned Counsel for the appellant thus: "Whether the covenant to renew the lease, on a true construction of the lease, was personal to the Lessee Rudolph Hodge and therefore only exercisable by him or whether the covenant to renew touched and concerned the said land and therefore runs with the land and may be exercised by the administratrix to the Estate of the Lessee Rudolph Hodge?"

The function of the deed 215 of 1962 was, among other things, to create covenants, and the parties thereto were expected to effect those covenants. Now the general rule that only the persons who are the contracting parties are bound by the covenants is subject to exceptions. Mediaeval land law recognised that covenants in a lease might operate more widely than those in an ordinary contract. In the 1909 edition of Holdsworth History of English Law, Volume III at page 131, the author observed that covenants in a lease "were regarded in a sense as being annexed to an estate in the land, so that they could be enforced by anyone who took that estate in the land". Thus certain covenants in a deed concerned with land did not bind only the contracting parties but also all those persons who succeeded to the title. Or, put another way, the covenants - burdens and benefits - run with the land. "From the present point of view all covenants fall into one or

/other of.....

other of two classes, being either (i) personal to the contracting parties or (ii) such as touch and concern land" (8th edition of The Modern Law of Real Property by G.C. Cheshire at page 426). The test for ascertaining into which class a particular covenant falls was stated: "unless it is reasonably incidental to the relation of landlord and tenant it cannot be said to touch and concern the land so as to be capable of running therewith or with the reversion"; and, if there was any doubt, it was stated at page 427 of the same edition that a covenant by the lessor to renew a lease was held in Muller v. Trafford (supra) to touch and concern the land. As such it was capable of running with the land. As I stated earlier, learned Counsel for the appellant accepted that a covenant to renew a lease fell within the category of covenants that are said to run with the land.

Paragraph 388 of Volume 27 of Halsbury's Laws of England (4th edition) which was relied upon by Mr. Farara, dealt with the general principles governing the passing of benefit and burden of covenants. The relevant part stated: "It is a general principle of the law of contract that a contract cannot confer rights or impose obligations on persons who are not parties to the contract. However, a lease of land may last for many years and the reversion and the term are normally freely transferable. Consequently it is necessary that the covenants in leases should be enforceable between the successors in title of the original lessor and lessee. As a general rule covenants in leases are so enforceable either under the doctrine of privity of estate or by virtue of statute. This rule may be regarded as one of the exceptions to the general principle of privity of contract........... It is always open to the original parties to the lease to provide that the benefit or burden of any particular covenant is not to run with the land or the reversion in which case the covenant will bind those parties only". Reference was made in the foot-note to the In Re Robert Stephenson case, and to the Law of Property Act 1925.

In the case before us the covenant to renew the lease for a further term of 25 years was not, in my view, personal to and so only exercisable by Rudolph Hodge, the Lessee. I would so answer the first part of the question as framed on behalf of the appellant. By the test stated earlier, and as decided in Muller's case, the covenant to renew the lease touched and concerned the land demised by the Lessors William and Amelia Turnbull to the Lessee Rudolph Hodge. As such it ran with the land unless the contrary intention could be shown to be expressly stated in the lease. I have already stated the statutory provisions of Cap. 199 that apply to this matter.

Paragraph 396 of Volume 27 of Halsbury's Laws of England (relied upon by Counsel for the respondent) indicated that a covenant against assignment without the landlord's consent is a covenant which runs with

/the land....

the land and binds assigns whether mentioned or not unless the parties indicate a contrary intention.

I have pointed out that Mr. Farara urged that a covenant not to assign without the landlord's consent and a covenant to renew a lease ought to be treated alike. Therefore whether or not the successors in title of the Lessee, in lease 215 of 1962, were mentioned in the lease, they would be bound unless a contrary intention was stated. After a careful study of the lease in question, I am unable to say that a contrary intention was expressly stated in it. What Counsel for the appellant argued was, in my opinion, tantamount to asking the Court to infer a fact from other facts expressed in the lease. This was quite a different thing from expressly stating that fact. In the absence of such an express statement the covenant to renew the lease ran with the land. I would therefore answer the second part of the question in the affirmative.

For the reasons explained, the grounds of appeal failed and the appeal was dismissed with costs here and in the Court below.

E.H.A. BISHOP,
Justice of Appeal

L.L. ROBOTHAM,
Chief Justice

G.C.R. MOE,
Justice of Appeal.