IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G 253 OF 2014

BETWEEN

SCOTIABANK & TRUST (CAYMAN) LTD.

PLAINTIFF

AND

PROPRIETORS OF STRATA PLAN NOS. 547 AND 627

DEFENDANTS

Appearances:

Plaintiff represented by Kirsten Houghton instructed by Campbells

Defendants represented by Vanessa Allard instructed by Brooks & Brooks

JUDGMENT

By Originating Summons filed on November 18, 2014, the Plaintiff sought the following order:

"1. Declaring that, on its true construction, the proviso to By-law "61.3 of the By-Laws of the Defendant, which reads:

61.3 Pay to the Corporation in advance by the fifth day of every month or within five (5) days of demand as applicable:

61.3.1. all contributions necessary to establish and maintain the fund for the Operating Budget, Reserve Fund Budget and

GRAND COURT CAYMAN ISLANDS

Capital Budget levied by the Corporation pursuant to clause 6(2) of the Law;

61.3.2. his contribution to all other costs and expenses incurred by the Corporation in connection with the performance of its duties under the Law and under these By-laws calculated by reference to his Unit Entitlement;

61.3.3. his contribution to the Deductible calculated by reference to his Unit Entitlement;

PROVIDED ALWAYS *that in the event of any such payments not being made within five (5) days of the beginning of each month or within five days of demand as applicable he shall pay late fees thereon of CI$50.00 if same remains unpaid seven (7) days thereafter, of CI$100.00 if same remains unpaid after fourteen (14) days thereafter, and CI$150.00 if same remains unpaid 21 days thereafter such sums to be cumulative and compounded on a monthly basis until payment; and in the event of any such payments (together with late fees accrued) not been made within sixty (60) days of such demand or in the event of his becoming bankrupt or making composition with his creditors or being a corporation entering into liquidation then and in any of these events he shall and does hereby irrevocably and exclusively authorise and permit the Corporation without recourse or liability to enter into possession of his Strata Lot and further does hereby irrevocably and exclusively appoint the Corporation without recourse or reliability to be the receiver of the rents and profits of his Strata Lot in each case until such time as the said payments (together with*

interest accrued) have been made by him to the Corporation or received by the Corporation pursuant to the appointment aforesaid..."

is too vague and uncertain to be enforceable; alternatively

2. Declaring that, on its true construction, the proviso to By-law 61.3 of the By-Laws of the Defendant is an irrecoverable penalty and not enforceable.
3. Such further or other relief as this Honourable Court may deem appropriate.
4. Costs."

Background

The Defendant, a Strata Corporation, is the registered owner of the strata plan known as "Lantern Point". The Plaintiff is the mortgagee in possession of units within that strata being: Unit 20; Unit 27; Unit 39 and Unit 43. The registered owners of these units are in default of their mortgage payments. They are also in default of their strata fees which are payable to the Strata Corporation under its by-laws.

The Plaintiff sought to exercise its power of sale with respect to the Units in question, however pursuant to the provisions of the aforesaid By-laws, the Defendant had imposed late fees on the four Units which the Plaintiff was attempting to sell. It was the Plaintiff's

contention that these fees were exorbitant. Negotiations between the parties were attempted but the matter was not resolved.

The Plaintiff's Case

At the outset of proceedings, Counsel for the Plaintiff clarified that despite the action filed, a claim was only being pursued against the Proprietors of Strata Plan No. 547.

The Plaintiff did not dispute the fact that each of the owners of Units 20, 27, 39 and 43 have failed to pay strata fees for quite some time. The Plaintiff however challenged the manner in which late fees are calculated by the Defendant and brought this action challenging the aforementioned section of the relevant By-laws. It is the contention of the Plaintiff that as mortgagee in possession and successor in title to the registered owners, it is still subject to an overriding duty to act reasonably so as to preserve the interests of the registered owners.

There is no dispute that the monthly strata fees for each Unit is CI$410.00. Mr. Raymond Tynski, Branch Manager of Scotia Centre, in his affidavit filed December 5, 2014; made reference to an offer to purchase Unit 27 in July 2014 on CIREBA standard terms. There was a standard condition included in the offer that the Vendor, in this

case the Plaintiff, would fall to pay any adjustments going on the property prior to closing. The condition was as follows:

> 8. <u>Adjustments</u>
>
> *"all adjustments for the Property, including but not limited to maintenance fees, utility charges, rents, insurance, damage and security deposits shall be made as at completion and apportioned on a daily basis between the Vendor and the Purchaser. In the event this transaction involves a Strata Lot... any special assessment owed to the Strata Corporation which has been invoiced before Completion is the responsibility of the Vendor unless otherwise stipulated by this Offer..."*

The Plaintiff (as Vendor) would be liable to settle all outstanding liabilities attached to the property as at the date of Closing, including any fees owed to the Defendant. When added to the amount owed by the borrower, there was an increase in the amount which would need to be recovered either from the equity recoverable from the sale or by other means of enforcement.

In his affidavit; Mr. Tynski explained that based on the relevant By-laws; CI$200 was added in respect of each overdue monthly instalment of strata fees. Thus for example, if there were 12

outstanding instalments of strata fees, in the next month's statement, CI$2400 in late fees would be added, as well as an additional CI$410 charged for current strata fees. Using the date of the last payment made by the Unit owner, his affidavit showed the strata fees owed as at December 1, 2014 as opposed to outstanding fees charged as at June 2014 on behalf of the Strata Corporation.

Unit	Last Payment	Fees owed at 1/12/14	Fees charged - June 2014
20	August 2012	$11,890.00	$69,840.00
27	November 2012	$10,660.00	$57,660.00
39	July 2013	$7,380.00	No request made
43	December 2012	$10,250.00	$49,800.00

Counsel for the Plaintiff explained the calculations in further detail. According to the spread sheet for Unit 27, the sum of $410 was claimed for each month as the regular strata fee. If this was not paid in December 2012, the sum of $200 in late fees was claimed. Thereafter, $200 per month was claimed for every month that the original sum of $410 was not paid. Then in January 2013, a new fee of $410 was charged. When this was not paid, the sum of $200 in late fees was claimed and thereafter $200 per month was claimed for every month that the January 2013 strata fee of $410 was not paid. This process continued for each and every month that the fee of $410 was not paid. Over time, it resulted in significantly large claims.

The Plaintiff argued that it had a duty to exercise reasonable care to ensure that the liability of the borrower was minimised. Accordingly, negotiations took place between Plaintiff and Defendant in an attempt to reach an agreement concerning the level of fees to be paid. Legal and Administrative fees were included in the Defendant's claim.

In his affidavit, Mr. Raymond Tynski stated that the level of fees claimed by the Defendant would be an issue in relation to any of the said properties which have strata fees in arrears and for which the Plaintiff is acting as mortgagee in possession. The Plaintiff also expressed the view that in the absence of a finding by the Court that the fees claimed were properly payable; it did not consider itself liable to pay them. Additionally, the Plaintiff was of the view that it could not incur such liability in good faith on behalf of the borrowers. It was argued that the "late fees" were not "a genuine attempt to pre-estimate the loss which may be suffered by Lantern Point as a result of late payment".

The sale of Unit 27 subsequently fell through.

The proviso to By-law 61.3 is too vague and uncertain to be enforceable.

Counsel for the Plaintiff argued that the by-laws form a contract between the Strata Corporation and the proprietors and that the provisions of the by-laws are registered as encumbrances and appurtenances against the title to the Units. Consequently, it was submitted, the by-laws are binding on the proprietors; and they "attach" to each Unit by way of registration. It was argued that the Plaintiff as mortgagee in possession was entitled, in the interests of the borrowers to challenge the by-laws.

Counsel referred to the English Court of Appeal case of **Durham Tees Valley Airport v bmibaby Ltd [2010] EWCA Civ 485** which considered the test to be applied in cases of alleged uncertainty of contractual terms in the context of "performance level" requirements in a contract, against which, in cases of breach, damages would be assessed. Patten, LJ referencing **G. Scammell and Nephew Limited v H C and J G Ouston [1941] AC 251**, stated therein:

> *"for a contract to be binding its terms must be "sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and*

performances to be rendered by each party are reasonably certain".

Counsel for the Plaintiff submitted that the clause in question left it unclear to the reader what it is that is to be "compounded on a monthly basis". It was argued that the clause was also unclear to the Defendant and that this was exemplified by the fact that it charged a figure of CI $200 per month on each overdue instalment, when this figure had not been mentioned in the proviso. Counsel submitted that this was a further illustration of the uncertainty of the proviso.

Counsel for the Plaintiff also challenged the addition of legal fees and administration fees to the outcomes of each Unit despite the absence of express provision in the by-laws for doing this.

The proviso is an irrecoverable penalty and is not enforceable.

It was submitted in the alternative by the Plaintiff, that the proviso to By-law 61.3 presented the case of an unenforceable penalty. It was argued that despite the term used, what was truly intended was the imposition of a sanction for a breach of the contractual obligation to pay strata fees on time. It was submitted that while the by-law appears to provide for the payment of liquidated damages; it was not a genuine pre-estimate of the damage which may be caused to the

strata by late payment. It was further submitted that the reference to compounding further emphasised that fact.

Counsel referred to the well-known case of **Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Ltd. [1915] AC 79** which has been cited in many other cases. Lord Dunedin commented variously therein as follows.

> *"The court must find out whether the payment stipulated is in truth a penalty or a liquidated damages...*
>
> *The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage."* .

His Lordship went on to articulate that the determination of whether a sum of money which is stipulated is either a penalty or liquidated damages is *"a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach"*. At pages 87-88 of the judgment, he made reference to various tests which would assist in the "task of construction". If applicable to a case, they "may prove helpful, or even conclusive".

His Lordship stated the tests as follows:

> *"(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach....*
>
> *(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.... This though one of the most ancient instances is truly a corollary to the last test....*
>
> *(c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage"....*

On the other hand:

> *(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make a precise pre-estimation almost an impossibility. On the contrary, that is just a situation when*

GRAND COURT
CAYMAN ISLANDS

it is probable that pre-estimated damage was the true bargain between the parties...."

Counsel for the Plaintiff argued that while the non-payment of the strata fees gave rise to a debt, based on the calculations presented by the Defendant, the sums which were claimed in addition to the principal sum were vastly disproportionate to the said principal sum. Additionally it was submitted there was no evidence presented concerning the reason for the inclusion of the proviso.

It was submitted that there were no objective grounds on which it could be shown that the sums claimed in the proviso were genuine pre-estimates of loss. Counsel for the Plaintiff submitted that if an action for damages for breach of contract under the common law had been brought against the borrowers, the remedy would have been an award of the principal plus statutory interest calculated on a simple basis, at the court rate. Consequently, it was argued there could be no justification for the difference between the amounts claimed and the sums recoverable at common law.

With reference to the Defendant's assertion about the past actions of the Plaintiff in relation to claims for the payment of late fees; Counsel for the Plaintiff asserted that the past behaviour of a party is irrelevant on a question of construction. It was submitted that there

could be many explanations for past behaviour including ignorance or a relatively low resulting fee.

The Defendant's Case

Through Counsel, the Defendant asserted:

1. That By-Law 61.3 was neither vague nor uncertain;

2. The charges listed in the said By-Law were not in the nature of a penalty but were in the nature of liquidated damages;

3. The charges were reasonable and enforceable;

4. In the past, the Plaintiff had paid fees and costs which were due under the same By-law, without objection. Therefore at a minimum the Plaintiff had acquiesced and agreed that the By-law charges were reasonable fees and costs and were enforceable and neither vague nor uncertain;

5. The Plaintiff and the Defendant have conducted discussions about the fees, charges and costs with no prior objection.

   Additionally the Plaintiff had indicated its consent to them and had agreed to make payments on these fees, charges and as calculated by the Defendant.

Not surprisingly, it was the Defendant's position that the fees charged were neither extravagant nor unreasonable. Additionally, the Defendant expressed surprise that the Plaintiff sought to challenge these fees.

In his affidavit, Mr. Paul Pearson, Chairman of the Executive Committee of Lantern Point (the Defendant) stated that pursuant to the By-laws the Strata Corporation was obligated to, among other things, "control, manage and administer the common property for the benefit of all the proprietors". As such, the duties of the Strata Corporation included ensuring that the property at Lantern Point was in good repair, adequately insured and properly maintained.

Both Mr. Stanford Lindo, an Accountant and member of the Executive Committee at Lantern Point and Mr. Pearson asserted in their affidavits that the Strata Corporation had the responsibility to pay and keep up-to-date all rates, fees, costs and overheads in respect of the common property. The funds to deal with this came from fees from each proprietor. Further, each owner had the duty to pay fees monthly; which were calculated on the basis of his unit entitlement.

According to Mr. Pearson, since 2012 the owners of four units: 20; 27; 39 and 43 stopped paying their monthly strata fees and despite demand, no fees were forthcoming. The Defendant learned that the

Plaintiff; which held the mortgages on each unit intended to exercise its power of sale and as such communication took place to recover the fees which were due.

It was central to Defendant's case that the Plaintiff had been aware, as far back as 2012 of the late fees which were charged on delinquent units and which were expected to be paid in accordance with the By-Laws. Mr. Pearson asserted that the Plaintiff held approximately 49 mortgages on units at Lantern Point. As part of the ordinary process of sale/purchase; the Plaintiff was provided with a copy of the Strata By-Laws. Accordingly, the Plaintiff had always been aware of and had not previously objected to the provision in the By-Laws which was at issue between the parties.

It was further asserted that apart from the registration of charges on the units in the development, the Plaintiff had also engaged in correspondence with the Defendant on a regular basis concerning various units. The Defendant concluded that the Plaintiff had been well aware that the "Executive Committee was entitled to and expected to be paid late fees and costs in respect of overdue strata fees on units in the development."

Mr. Pearson also asserted that in or around 2011, the Plaintiff dealt with arrears of strata fees in respect of Unit 57; which fees were

calculated at the same rate provided for in the By-laws. There was no objection to the settlement of these fees.

It was the Defendant's case that based on past dealings, the Plaintiff had not only been aware of the manner in which late fees were calculated, it had previously been accepted. The Defendant asserted that it was disingenuous for the Plaintiff to claim at this juncture that the fees were too vague or unreasonable to be enforced.

It was also argued that the sum of $200 per month which was claimed each month as late fees was entirely reasonable and represented a reasonable estimate of the loss that the strata suffered when fees were not paid. It was pointed out that when fees were not paid it fell as the responsibility of the remaining owners to meet all expenses.

Counsel submitted that the Strata Corporation interpreted By-Law 61.3 to mean that it is entitled to charge the late fee of $200 for payments which exceed 28 days. This amounted to a calculation of $50 for every seven days that the strata fee is not paid. It was argued that the Plaintiff is taken to have acknowledged, acquiesced and agreed to this interpretation and the reasonableness of the late fee calculation as far back as 2011 when it settled charges, late fees and costs in respect of Unit 57. At that time the Plaintiff has been

provided with a detailed breakdown of fees, costs and expenses for the Unit. It was submitted that the Plaintiff raised no objection until late August 2014.

Loss & Damage to the Strata Corporation

Counsel for the Defendant submitted that the sole source of income for the Strata Corporation was the strata fees collected from the owners. Further, the damage or loss occasioned by delinquent owners could not be measured solely in terms of an exact amount of the unpaid strata fees. When fees were not paid, as pointed out in the second affidavit of Mr. Stanford Lindo, the Strata Corporation faced the following:

(i) Risk of default;

(ii) Administrative burden;

(iii) Compounded on insurance coverage;

(iv) Projects delayed/postponed;

(v) Additional/delayed maintenance problems.

In his affidavit, Mr. Lindo suggested that if the Strata Corporation went into overdraft in order to cover expenses, the interest which it would face from the Plaintiff bank would be quite significant. He stated that the cost of borrowing such funds would be by way of an

unsecured overdraft which would be charged at 18% compounded. He suggested that in contrast, the fees which were charged could not be viewed as exorbitant.

Counsel for the Defendant submitted that in placing an estimate of its losses by reference to an increasing scale of late fees over time, the Strata Corporation had at the forefront of its contemplation the potential cost to it of having to borrow the funds in order to cover the shortfall. It was appropriate therefore for the Strata Corporation to have estimated its potential losses in the manner that it had rather than seeking to prove its actual losses in the event of a breach. It was argued that the potential cost of doing this was likely to significantly outweigh the amount of the loss itself (**Dunlop Pneumatic Tyre**).

Counsel for the Defendant made reference to **Alfred McAlpine Capital Projects Limited v Tilebox Limited [2005] EWHC 281 (TCC)**. At paragraph 48 "2" Mr. Justice Jackson stated:

> *"Although many authorities use or echo the phrase "genuine pre-estimate", the test does not turn upon the genuineness or honesty of the party or the parties who made the pre-estimate. The test is primarily an objective one, even though the court has*

some regard to the thought processes of the parties at the time of contracting."

Counsel also referred to **Murray v Leisure Play TLC [2005] EWCA Civ 963**. At paragraph 55 it was stated:

"In my judgment, good faith belief of the parties is not the deciding factor here. The court would look at the result and (bearing in mind that the onus is on the party challenging the clause to establish that it is a penalty) ask whether it is satisfied that the parties could not, if they had had the proper information or considerations in front of them, genuinely have considered that the damages payable under the contractual provision were a realistic pre-estimate of the damages payable on breach at common law. In other words, in the context of Lord Dunedin's speech, the test of genuineness is objective. A pre-estimate is genuine if it is not unreasonable in all the circumstances of the case."

It was submitted that the fact that "the losses, late fees and expenses now due and owing continue to increase in what appears to be a dramatic fashion, is no reason to now say, that the fees are exorbitant and therefore unenforceable. Any idea that the question for consideration is the difference in value between the actual loss

and the estimated loss had been rejected" in cases such as **The Imperial Tobacco Company (of Great Britain and Ireland) Limited v Parslay [1936] 2 All ER 515**.

Counsel for the Defendant also argued that the Strata Corporation had been negotiating with the Plaintiff, seeking payment of these costs, late fees and expenses for two years and the current figures claimed are at least in part caused by the behaviour of the Plaintiff.

Counsel for the Defendant submitted that it is not the correct approach to dispute the sums claimed because of the present calculation and values that they have accumulated to. Further, the correct date of consideration is not when there is breach but at the date of contract.

Another case to take note of is **Lordsvale Finance Plc v Bank of Zambia [1996] Q.B. 752**. On the issue of whether a contractual clause was a penalty, it was held therein:

> *"there was no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could in the circumstances be explained as commercially justifiable, provided its dominant purpose was not to deter the other party from*

breach; that if an increased rate of interest applied only from the date of default or thereafter, provision for a modest increase in the rates would not be struck down as a penalty; that the rate of 1 per cent, could not be said to be in terrorem but was consistent only with an increase in the consideration for the loan by reason of the increased credit risk represented by a borrower in default; and that, accordingly, the default interest provision would be fully enforced."

Conclusion

It is clear that based on the negotiations which took place between the parties over the years and prior to litigation, the Defendant had formed the opinion that the Plaintiff was willing to settle outstanding fees, costs and charges and the sole issue was quantum.

However, the matter before the Court concerns the construction of a clause. The past behaviour of the parties is not relevant. Certainly, it has not been suggested that the Plaintiff is barred from raising the issue.

It is useful to revisit the relevant section of By-Law 61.3:

> *"in the event of any such payments not being made within five (5) days of the beginning of each month or within five days of demand as applicable he shall pay late fees thereon of CI$50.00 if same remains unpaid seven (7) days thereafter, of CI$100.00 if same remains unpaid after fourteen (14) days thereafter, and CI$150.00 if same remains unpaid 21 days thereafter such sums to be cumulative and compounded on a monthly basis until payment;"*

The submission that the foregoing wording is vague or unclear must fail.

That which must also fail however is the suggestion that the wording is the equivalent of a demand for $50 every 7 days until a maximum of $200 is achieved for the month. The wording does not admit of that conclusion despite the Defendant's long interpretation of the wording in that manner and the previous acquiescence by the Plaintiff to such an interpretation.

The clear meaning of the words is that after non-payment of the strata fee for 21 days, the sum of $150 accrues and this sum is cumulative and compounded on a monthly basis until payment.

The interpretation and application of the words of the by-law notwithstanding; the Plaintiff's claim that the words are too vague

and uncertain to be enforceable must fail. This leads to the claim in the alternative.

The Courts are always hesitant to deem a contractual clause to be a penalty. As Colman, J in **Lordsvale Finance Plc v Bank of Zambia** commented at pages 763-764:

> *"It is perfectly true that for upwards of a century the courts have been at pains to define penalties by means of distinguishing them for liquidated damages clauses. The question that has always had to be addressed is therefore whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss. That is because the payment of liquidated damages is the most prevalent purpose for which an additional payment on breach might be required under a contract. However, the jurisdiction in relation to penalty clauses is concerned not primarily with the enforcement of inoffensive liquidated damages clauses but rather with protection against the effect of penalty clauses. There would therefore seem to be no reason in principle why a contractual provision the effect of which was to increase the consideration payable under an executory contract upon the happening of a default should be struck down as a penalty if the increase could in the circumstances be explained as*

commercially justifiable, provided always that its dominant purpose was not to deter the other party from breach."

There can be no dispute that the Strata Corporation needs the funds provided by strata fees to meet the annual and recurring expenses of the property. There can also be no dispute that the funds are needed in a timely manner to allow the Strata Corporation to discharge its duties to all of the owners. Real risks are faced by the Strata Corporation when fees are not paid. It is entirely appropriate for a genuine pre-estimate of loss to be made.

As was stated in **Dunlop Pneumatic Tyre**:

"It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that ***the consequences of the breach are such as to make a precise pre-estimation almost an impossibility****. On the contrary, that is just a situation when it is probable that pre-estimated damage was the true bargain between the parties....'* (Emphasis mine).

However can the pre-estimated damage here be viewed as a true bargain between the parties?

Turning to the spread sheet for Unit 27 as an example, it is seen that the Unit owner has made no payments towards the monthly strata fees of $410 per month from November 2012 to July 2014. She is charged the sum of $410 for each of those months. She is also charged a late fee of $200 for each of the months from November 2012 to July 2014. Thereafter she is charged a late fee for each of the months from December 2012 to July 2014. This pattern then continues until she is finally charged a late fee of $200 for July 2014.

Substituting the sum of $150 which is deemed to be the correct monthly late fee under the By-Law makes little difference. This figure represents a little more than 36% of the original sum which is owed. The resulting figure when compounded is unconscionable.

It cannot be said that the fault of a final large figure lies with the defaulting party. A person who owes $1640 in strata fees which covers four months of non-payment; would also owe late fees of $1500, using the sum of $150 as the monthly late fee. While it is true that the Strata Corporation would have been left without the requisite funds, it is difficult to view the late fee as calculated as a genuine pre-estimate of damage. No loss could ever amount to the stipulated sum.

There has been no evidence adduced, other than the interest which would be payable on an unsecured overdraft to meet expenses; which accounts for these calculations. In truth, the figures adduced do not represent a genuine covenanted pre-estimate of the damage which may be occasioned to the strata by late or non-payment.

I find that what is solely intended by the by-law is the imposition of a sanction for the breach of the owner's contractual obligation to pay strata fees on time.

I find that the terms of Bye-Law 61.3 amounts in law to a penalty and as such are not enforceable. Accordingly, judgment is granted to the Plaintiff. The Plaintiff is also awarded costs to be agreed or taxed.

Nova Hall
Judge of the Grand Court (Acting)
23rd July 2015.