

IN THE HIGH COURT OF FIJI
APPELLATE JURISDICTION

Civil Action HBE No: 15 of 2013

BETWEEN : DENARAU RESIDENTIAL ESTATES LIMITED

Appellant

A N D : BIPIN MAGANBHAI PATEL of Lot 22, 27 and 33 Sovereign Quays,
Denarau Island in the Republic of Fiji Islands.

Respondent

Counsel : Ms Bhavana Narayan for Appellant
Ms Ashneel Sudhakar for Respondent
Date of Hearing: 25/05/2015
Date of Ruling : 17/09/2019

R U L I N G

INTRODUCTION

1. This is an appeal from a decision of the Magistrates Court sitting in Nadi which was handed down on 30 April 2013. By that decision, the Learned Magistrate had dismissed Denarau Residential Estates Limited's ("DREL") claim of \$5,030.71 against Bipin Maganlal Patel ("Patel"). That sum constituted the penalty interest component which DREL had charged on Patel on account of arrears in contributions (rates and levies) on some properties which Patel owns on Denarau Island.

DENARAU ISLAND

2. Denarau Island is an integrated resort development located in the Western side of the island of Viti Levu which integrates five precincts

namely the hotel, residential, commercial, marina and the golf precincts. The residential precinct itself is made up of several other sub-precincts, one of which is called Sovereign Quays. Patel owns three lots within the Sovereign Quays. These are:

- (a) Lot 22 on Deposit Plan Number 9135 comprising 999 square meters contained in Certificate of Title Number 30593.
- (b) Lot 27 on Deposit Plan Number 9135 comprising 999 square meters contained in Certificate of Title Number 35934.
- (c) Lot 33 on Deposited Plan Number 9135 comprising 999 square meters contained in Certificate of Title Number 35937.

3. The integrated structure of Denarau Island is set up under a Charter. The Charter binds all persons and entities who are owners or occupiers of any property in any precinct. Amongst other things, the Charter makes provision for Denarau Corporation Limited ("DCL") to be the governing body on Denarau Island. I gather that to this end, DCL was then incorporated as an entity and registered under Fiji's Company Act. One of the key functions of DCL is to administer and manage contributions and to receive these from precinct owners. It is DCL which determines the levy amounts to be raised.

PROCEEDINGS BELOW

4. DREL had filed a claim at Nadi Magistrates Court on 26 January 2011 to recover the sum of \$21,404.64 from Patel. The sum of \$21,404.64 was made up as follows:

\$16,305.18	Being arrears in rates on properties owned by Patel
("principal")	
\$ 5,030.71	Interest

5. On 29 April 2011, three months after DREL filed the claim, Patel would settle the principal sum with DREL. This payment was pleaded in paragraph 9 of the statement of defence which was filed afterwards.

9. The Defendant says further that the Defendant paid the amount of \$16,305.18 to the Plaintiff as rates in arrears on or about the 29th day of April, 2011, and there are no unpaid rates owing.

6. Patel would refute any liability for interest on the following grounds at paragraphs 10 and 11 of his defence:

10. The Defendant says the Plaintiff's remaining claim is only for interest charged on the rates, which has not been pleaded as such, and the Defendant denies owing any interest to the Plaintiff in respect thereof.

11. The Defendant says further that the Plaintiff is not authorised by any agreement or contract with the lot owners to charge interest in unpaid rates and therefore the same is unlawful, unreasonable and unenforceable.

7. In its reply, DREL acknowledged the payment of \$16,305.18. However, it pleaded at paragraph 4 that the interest component of the sum claimed remained unpaid:

4. ...Interest of 5% is chargeable on overdue accounts every three months pursuant to Article 33.2(a) of the Articles of Association, which the Defendant in this case agreed to comply with when he signed the Commitment Deed.

MATTER BEFORE ME NOW

8. In the appeal before me now, DREL raises the following questions:

- i. whether or not the Learned Magistrate erred in his interpretation of the **Articles of Association** of DCL? DREL argues that the Articles establish the link between DRE and the DCL.
- ii. whether or not the Learned Magistrate erred in his interpretation of the **Charter of Denarau Island**? DREL argues that the Charter

outlines the linkage between land ownership on Denarau Island and share ownership in DCL.

- iii. whether or not the Learned Magistrate erred in law in his finding that the Respondent, as a member of DCL, is not bound to comply with the **Articles of Association** of DCL?
 - iv. whether or not the Learned Magistrate erred in his interpretation of **Article 33.2** of the **Articles of Association** of DCL? DREL argues that Article 33.2 confers a right to impose interest at the rate of 5% at each 90 day anniversary on outstanding levies/rates payable by the owners of land on Denarau Island; and therefore
 - v. whether or not the Learned Magistrate erred in his finding that DREL's claim being interest accrued in the sum of **\$5,030.71 (Five Thousand Thirty Dollars and Seventy One Cents)** is not recoverable by DREL?
9. All these questions point to the one single issue, whether or not DREL is entitled to the penalty interest in question?

IS DREL ENTITLED TO CLAIM INTEREST?

10. I start with the observation that, at paragraph 10 on page 3 of the learned Magistrate's Ruling, he found as a matter of fact that DREL is empowered under the By Laws and the Articles to also collect rates and levies from the residents on Denarau Island.
11. The basis of this finding is not clear to me. I have perused the court records but have not been able to locate the Articles of Association of DREL, which, I assume by its name, is a limited liability company registered under the local Companies Act.

12. Having said that, I assume that the Learned Magistrate was referring to the Articles of Association of DCL. I observe that only selected provisions of the Articles of DCL appear on pages 60, 138, 139,140, 141,142,143 and 144 of the Copy Records. In none of the articles which appear in the above pages, is DREL mentioned.
13. At page 146 of the Records, is a copy of the **Commitment Deed** which every purchaser of property on Denarau Island would execute. Clause 4 of the said Deed is a purchaser's covenant with DREL and DCL that, from the date the purchasers acquired the property, he or she or it, will pay to DCL each contribution payable under DCL's articles, comply with the Charter, and comply with DCL's Articles so far as they relate to ownership use, of development, by laws made under DCL's Articles and the payment of contributions.
14. The above covenants no doubt would bind a purchaser and owner to pay contributions and also to pay any penalty for outstanding contributions levied on his or her or its property. However, because DCL is the body corporate responsible, a purchaser is only bound to any assessment made by DCL which is the body corporate responsible for determining contributions payable on each property, and also to any penalty payable.
15. It is not clearly explained in the submissions how the covenant would bind a purchaser or owner to DREL.
16. As I have said, it is clear from the scheme that DCL is the body corporate upon which is imposed the duty at first instance to collect contributions

from members (property owners) and to levy a penalty on outstanding contributions.

17. The former is provided for under Article 33.1 of DCL's Articles of Association:

"...the liability to pay a Contribution arises when a Member receives a written notice from the Company signed by any Director or Secretary or another person authorised by the Board for that purpose ("Contribution Notice") which specifies: -

18. "Company" is defined in DCL's Articles to refer to DCL and not DREL.

19. The right to charge interest on outstanding levies/rates is provided under Article 33(2) of DCL's Articles of Association:

If a Member fails to make a payment within 10 days, the Company shall be entitled to:

(a) Add a penalty of 5% to the amount outstanding and further amounts of 5% at each 90 day anniversary of the original failure to pay on Payment Date while all or part of the amount remains outstanding;

(b)

(c) commence any legal action it deems necessary against the defaulting Member to recover Payments outstanding and to recover the costs of such action from the Defaulting Member.."

20. Given that, one would assume that the only way by which DREL would be entitled to levy and collect penalty interests is if it was "delegated" that duty to collect contributions by contract by DCL.

21. There was no clear evidence in the Court below of any such "delegation by contract". However, as I have said, the Learned Magistrate has found that DREL has power to collect contributions, although the source of that power

COMMENTS

22. I accept that any person or entity who acquires land on Denarau Island becomes liable to pay contributions, special levies and any penalty imposed on an outstanding contribution.
23. This is achieved by an interplay of various provisions in the Charter and DCL's Articles of Association.
24. I also accept that, by the interplay of the same provisions, a person or entity is liable to a penalty for any overdue contribution.
25. However, from the evidence in the Copy Records, these are assessed only by DCL and are payable to DCL.
26. There was no clear evidence in the records, and no clear submissions, to convince me, yet, that DREL is entitled to:
 - (i) assess and levy a penalty on any outstanding contribution, or
 - (ii) to sue to recover a penalty on any outstanding contribution assessed and levied by DCL
27. I would reconcile the above with the Learned Magistrates finding (see paragraph 10 above) by saying that whilst the duty to collect contributions, and penalties, may have been delegated to DREL by contract (although there was no clear evidence of such delegation by contract), the duty to determine these remain with DCL. This appears to be confirmed by a Notice which is at page 135 of the Copy Records that was sent to Patel by DCL dated 02 August 2010 saying that the "*total amount owing to DREL is as follows.....*"

28. Having said that, I must reiterate that the statement of claim in the court below did not specify that the
29. I agree with the view that the Articles of Association of DCL cannot be the basis of DREL's authority to levy a penalty on any outstanding contribution.
30. While I take note of the fact that Patel has settled the principal sum with DREL, I cannot accept that that is conclusive of DREL's entitlement to claim penalty, for reasons I have stated above.
31. Nor do I agree with the submission that it is unreasonable and nonsensical for Patel to, on the one hand, recognise DREL as the correct entity to communicate with and pay his principal outstanding levies payable by virtue of DCL's Articles and yet, on the other hand, not to recognise DREL's authority to levy penalty interest on those overdue contributions.

CONCLUSION

32. The material in the Copy Records do not explain whether the penalty in question was assessed by DREL or by DCL. Only DCL has clear authority to assess and determine penalty to be imposed. Since DCL was not a party, one can only assume that the penalty in question was assessed by DREL.
33. There is no clear evidence in the Copy Records to establish that DREL has such authority.

34. The common law has always taken a strict approach against the imposition of contractual penalties.

35. In Dunlop Pneumatic Tyre Company v New Garage & Motor co [1915] AC 79 House of Lords, Lord Dunedin set out the differences between a liquidated damages clause and a penalty clause:

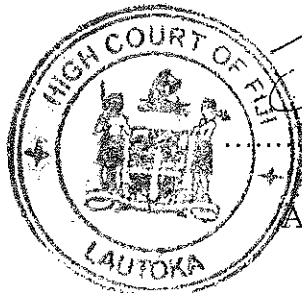
The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda)

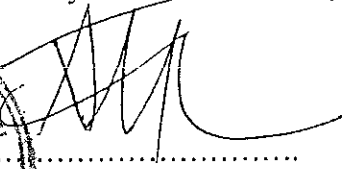
36. The UK Supreme Court recently clarified the law in the (joint) appeals in Cavendish Square Holding BV v Talal El Makdessi (Cavendish) and Parking Eye Ltd v Beavis [2015] UKSC 67 (Parking Eye).

37. Given that DREL does not have authority to determine or levy a penalty, the only conclusion I can draw is that any penalty it determines and imposes is stipulated *in terrorem* and is therefore unenforceable.

38. Finally, let me just say at this point that none of the above issues would have arisen had DCL sued Patel at first instance.

39. Costs to Patel which I summarily assess at ~~\$1,000~~ (one thousand dollars only).




Anare Tuilevuka
JUDGE
Lautoka