



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2013: 3

BETWEEN:

ACORN SERVICES LTD.
Appellant

-v-

KENNETH F. DILL
Respondent

JUDGMENT
(in Court)¹

Date of hearing: March 18, 2013

Date of Judgment: April 23, 2013

Ms Lovette Tannock, Christopher Swan & Co, for the Appellant

The Respondent appeared in person

¹ The Judgment was circulated without a further hearing in order to save costs.

Introductory

1. By an Ordinary Summons issued in the Magistrates' Court on February 14, 2012, the Appellant claimed \$5,886 consisting of \$4,412 in rental arrears and \$1,474 in respect of collection fees pursuant to clause 4(f) of the relevant Lease. In addition \$125 was claimed in respect of legal costs and \$50 in respect of the costs of service. At the trial on December 4, 2012, the Plaintiff increased its arrears of rent claim but the Magistrates' Court (Worshipful Arthur Hodgson (Acting)) only allowed \$500 for "Legal and Charges". Judgment was awarded in favour of the Plaintiff in the amount of \$8,708.86.
2. The Appellant, while seeking this Court's affirmation of the Judgment of the Magistrates' Court in part, appeals in part on the following ground:

"1. The Learned Magistrate erred in Law by not advising of his reasons for not granting the Plaintiff's collection costs, thereby denying the Plaintiff their right to due process."

3. However, the central complaint was substantive as well as procedural. Namely, that (a) the Summons had claimed a collection fee of 33% based on common market practice in the debt collection world, and (b) that the Magistrates' Court ought to have awarded \$2708.92 or 33% of the total amount of the arrears of rent found to be due. Ms. Tannock conceded that the Lease did not specify on what basis the collection charges would be computed.
4. The Appellant's counsel submitted that this aspect of the Appellant's claim had not been challenged by the Respondent at trial. The Respondent contended with great conviction that the Appellant's counsel had conceded before the Learned Acting Magistrate that the collection costs should not be awarded. Because the Appeal Record and the Magistrate's notes were silent on this issue, I reserved judgment so that a transcript of the audio recording could be prepared. I also indicated, after hearing counsel, that if the appeal was successful I would summarily assess costs.

Findings: were sufficient reasons given for refusing the claim for a 33% collection fee?

5. According to an unofficial transcript of the hearing completed by the Court on or about April 15, 2013, the following discourse took place between the parties and the Learned Acting Magistrate in relation to the collection costs head of claim in the course of a two hour long hearing²:

² Minor cosmetic changes have been made to the Transcript placed on the Court file.

“...COURT: Anyway, what have you done with this bill?”

MS TANNOCK: Your Worship I relieve the amended amount which has deducted the cost of the locks. Which includes rent, water and late fees up until June 2012 comes to \$8,208.86. Our collection fee is which we claim we are entitled to claim under Section 4(f).

COURT: That collection fee, how do you determine that? When somebody signs an agreement that says you're entitled to recover expenses of collection, how do you determine what that is?

MS TANNOCK: You mean what the percentage is?

COURT: Yeah, how do you, you know...

MS TANNOCK: The percentage is determined by the collection agency, what it's based on the debt.

COURT: Suppose they want 100% can they take 100%?

MS TANNOCK: They can try but I don't know how much will fly in front of a Magistrate.

COURT: Right so how does a Magistrate make a decision about what it should be?

(3:34:08)

MS TANNOCK: Your Worship the standard amongst debt collection agencies on this island is around 33% that is what we charge.

COURT: And I don't think they are usually able to collect that amount. If this were done on a, on a umm time spent basis, that had to be assessed by the Court what would it be? How much time have you put in this case?

MS TANNOCK: If you give me a moment to confirm how many times we've appeared in Court Your Worship. This matter was set for trial on the 8th of June, so we appeared in Court once before and we've appeared today. Your Worship I'm prepared to say at least 500.

COURT: One of the disadvantages of being in business is that you never collect all that you would like to.

MS TANNOCK: I understand that Your Worship and I appreciate that but under the lease he's entitled, our clients are entitled to the cost of the their legal fees and collection fees.

COURT: Well it can't be both, legal and collection. That is part of the collection fees, the legal fees.

MS TANNOCK: Actually collecting the debt, I submit Your Worship is actually separate than the representation in Court.

COURT: What have other Magistrate's done with respect to that fee?

MS TANNOCK: Pardon I'm sorry.

COURT: What have other Magistrates, I'm sure this is not the first time you've been to Court on this item.

MS TANNOCK: Magistrate Wolffe, I'm being honest, Magistrate Wolffe is usually, usually understands that our offices try not to claim anything excessive. I'm being honest....but...

COURT: You're expected to be honest, you're an officer of the Court.

MS TANNOCK: But I mean, my, I believe my offices are willing to negotiate on the collection fees if we are willing to have, if there's a judgment in place. It's not a hard and fast rule that our offices work by because we understand that circumstances are tight on both sides, sometimes on the landlord side and sometimes on the tenant's side.

COURT: I'm just going to make a note here of how I dealt with this matter. You can have a seat, you can have a set Mr Dill.

MR DILL: Your Honour, you hear that he said that I moved in on the September, and it's August. This is (unclear) lies that this man's telling you.....

COURT: One of the things.....I'll tell you what's on my mind with respect. I'm having some trouble, she's charging you \$1400 for legal and collection fees. I'm having a little difficulty with that but I'm also aware of the fact that even if I give judgment, it doesn't mean to say that he's going to get his money. In other words, they may be spending more time trying to get the money from you. How do you propose to pay this?

MR DILL: Well Your Honour....

COURT: Think about it while I write this note...

...COURT: Now, what am I going to give you for collection fees? You've been to Court twice?

MS TANNOCK: Yes we have Your Worship.

COURT: That's \$100 an hour, 4 hours, \$400. You had to prepare, that's \$100 an hour, \$500.

MS TANNOCK: We'd accept that Your Worship.

MR DILL: Excuse me Your Honour?

COURT: Yes.

MR DILL: Can I speak?

COURT: Yes.

MR DILL: We didn't spend no 4 hours in Court when we came here last time. We just came in here, couple minutes that's all it was. What's she talking about? 'Cause when I had these pieces of paper to give to the Judge that was here, I don't know which one it was, she just said that 'how do I plea' this is why, he's here right now I mean, what hours are you talking, we was in Court...

COURT: She asked you fairly to come to Court, she has to come down here.....

MR DILL: Yes.

COURT: Alright. She has to wait in line for example today we're been down here for an hour today. The time she comes down here, gets back up there..

MR DILL: Your Honour can I say something?

COURT: See let me tell you what you're doing Mr Dill. See you've got to watch this. You've got to watch this in life. You've signed a contract here that say you're going to pay for any legal action it says here in (f) 'Legal and Collection Fees – the tenant agrees to be responsible for all legal Court and collection fees if the landlord or agent has to force the payment of any overdue rent. Late penalty or related expenses incurred by the tenant or their guests or invitees within the provisions of this lease' Now, you've heard her say that the standard procedure in Bermuda for collection agencies is 30% of the bill. In other words, if a bill is \$3,000 it's \$1,000 for collection. Now, she's claiming here on this bill \$1,400. Now I'm sitting here and I'm trying to help you out.

MR DILL: Yes Your Honour.

COURT: I'm saying to her, look I know what the standard is, I'm an attorney too and I know all of these charges but, I asked her because I wanted you to hear it. And I'm sitting here and I'm telling her 'I'm not going to give you all of that' so I'm trying to find a way to compromise it to benefit you and you don't recognize that I'm trying to help you here. You're jumping up, you're getting angry with her and this....I'm trying to help you here. Alright? Now, if you want to negotiate to get a little bit lower, that's not the way to negotiate to get it lower. Alright? So you have to recognize what the state of play is. Anyway, what I think I'm going to do Ms Tannock, what did I say? Umm \$500?

MS TANNOCK: Yes Your Worship. You suggest \$500 in legal fees so far.

COURT: I've taken \$1,000 off of what I could very easily have left on. So what did you say just now? \$8,000 take of the other \$1,000 here so that's 7 what..that comes out to...

MS TANNOCK: I'm sorry Your Worship.

COURT: What was the figure you gave me just now?

MS TANNOCK: \$8,208.86. That's the total debt outstanding.

*COURT: And I've taken off the \$1,474. Which is \$6,843....(Judge calculates total amongst himself). (3:49:00)
So I've given judgment for the amount of \$7,334.86.*

MS TANNOCK: Your Worship can you repeat that figure again please?

COURT: I've taken the figure of \$8,208.86, I've deducted the legal fees that you have here, the collection fees and then I've added to it \$500 to replace that. So I have \$7,334.86....

... COURT: Yes Ms Tannock, what else can I do for you today?

MS TANNOCK: Your Worship I was actually going to ask because I, it's my position that in your judgment you are giving us less than what we've actually claimed. And so I was looking for you to clarify that for me.

COURT: You gave me the figure I didn't even add it up myself.

MS TANNOCK: \$8,208.

COURT: \$8,208. That's a total inclusive?

MS TANNOCK: No that's not the total inclusive of our collection fees that is the debt alone.

COURT: Oh, I'm sorry. So you've got to add \$500 to that.

MS TANNOCK: Right, exactly.

COURT: Alright let me go through the exercise of making it clear for me. I just took your figure for \$8,000, your claim was for \$5,886 which included your collection fee. You looking at the Summons?

MS TANNOCK: Yes, I'm looking at the Summons.

COURT: Now, you've amended that \$5,886 to \$8,208.

MS TANNOCK: Right, my apologies Your Worship because I thought that you understood that the collection fee was also going to change because the debt has changed. So, if the debt itself, if you're looking at the Summons in our Details of Claim....

COURT: Well a part from the collection fee, the debt itself is \$4,412.

MS TANNOCK: Right. Plus our collection fee is on top... as mentioned there were some payments made in between that period of time which we've deducted from what we're requesting. So, the total debt if we were to write it on these details of claim would be the \$8,208.86 and then our collection fees on top.

COURT: Hold on...let's follow my sums.

MS TANNOCK: Okay...

COURT: Just a minute let me get this, what are you saying Ms Tannock?

MS TANNOCK: That the debt alone I was trying to indicate to you how I got to the \$8,208.86, that is the debt alone.

COURT: Right.

MS TANNOCK: On top of that, you've advised that you're prepared to give us \$500 in legal fees.

COURT: Right.

MS TANNOCK: So it should be the \$8,206 plus the \$500.

COURT: Okay.

MS TANNOCK: And then plus what you're prepared to give us in collection fees which I presume is, I think you said less \$1,000 for the collection fees, so that's \$8,206.86....

COURT: I'm going to give you the \$8,208 plus \$500.

MS TANNOCK: So our collection fees are not being given Your Worship?

COURT: No. I'm giving you \$500 for legal and collection fees. \$8,508.86. I've taken the \$8,208 and I've added \$500 to that.

MS TANNICK: Your Worship I get that is \$8,708.

COURT: \$8,708.86. Okay. Alright Mr Dill I've given judgment for Acorn Services for \$8,708.86. Okay?..."

6. The Appellant's counsel clearly did not waive her client's right to a contractual collection fee based on 33% of the arrears of rent found to be due, an entitlement which was not challenged by the Respondent and was (to some extent at least) affirmed by the Court. Ms. Tannock did imply that if a judgment was awarded she might negotiate about payment of the full collection fee if it was awarded; but this was far from a concession that this aspect of the Appellant's claim, which was not positively disputed, was being waived. The Learned Acting Magistrate written note of his decision on the issue was:

"Legal and Charges \$500 allowed."

7. The Transcript suggests that the discretionary claim for legal costs and the contractual claim for collection charges were treated by the Court as one composite discretionary item based on a summary assessment of how much time counsel had spent preparing for and attending Court. In effect, the Appellant's contractual claim to recover the collection fee its client would incur from the collection agency (which is the obvious rationale for the relevant clause in the Lease) was refused altogether.
8. It is clear from the Transcript why the Court, having heard the parties, rejected the Appellant's disputed claim for locks and keys. The Learned Acting Magistrate was not satisfied that this aspect of the claim had been proved. However, as regards the undisputed collection fee claim, there was no challenge either to the existence of the contractual obligation or to the fact that the applicable rate was 33%. The Court had no obvious legal or factual or basis on which to refuse this head of claim, based on what appeared (in the absence of evidence to the contrary) to be both a standard clause in the Lease and a standard percentage charge.
9. In these circumstances I am bound to find that there was a failure to give sufficient reasons to justify the impugned decision. Although I am unaware of any civil equivalent of section 21 of the Summary Jurisdiction Act 1930, at common law the duty furnish appropriate reasons to explain the legality of a decision is an aspect of the common law rules of natural justice: see e.g. *Pitcher-v-Commissioner of Corrections* [2011] Bda LR 68.

Findings: disposition of appeal

10. I find that the Appellant's claim for the collection fees as a contractual entitlement linked to the amount of rent found to be due was made out in the Magistrates' Court and no valid basis for refusing this aspect of its claim was advanced at trial or on appeal. The claim was one for common law damages, not for discretionary equitable relief. The Appellant was entitled to be compensated in damages for any loss proved to flow from the Respondent's breach of contract. The trial judge had no general discretion to refuse to award damages for a proven head of loss with a view to doing justice in any broader sense.
11. Since the Respondent is a litigant in person, I have out of an abundance of caution considered carefully whether it might be arguable that the claim for the collection charge could be struck down by the Court on the grounds that it is an unlawful penalty clause forming part of an unconscionable bargain. I find that the clause is not, sensibly read, a penalty at all. It is intended to compensate the landlord for the actual collection fees that he may incur from seeking to collect arrears of rent should the tenant breach his fundamental payment obligations. Like the Learned Acting Magistrate, I was initially somewhat puzzled by the clause, failing to appreciate that it is not a direct charge on the tenant but an indirect one, obliging the tenant to indemnify the landlord for any collection fees the landlord may incur by reason of the tenant's breach of contract. The clause provides as follows:

“4...(f) Legal court and collection fees-The Tenant agrees to be responsible for all legal court and collection fees if the Landlord or Agent has to enforce payment of any overdue rent, late penalty or related expenses incurred by the tenant or their guests or invitees within the provisions of this Lease.”

12. In *Philips Hong Kong Ltd-v-The Attorney-General of Hong Kong* [1993] UKPC 29, the Judicial Committee of the Privy Council approved the following statement of principles as guidance for when a liquidated damages claim is recoverable as damages or not recoverable because it is a penalty. Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd-v-New Garage and Motor Co* [1915] AC 79 at 86 opined as follows:

“1. Though the parties to a contract who use the words ‘penalty’ or ‘liquidated damages’ may prima facie be supposed to mean what they say, yet he

expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

2. 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 [1905] A. C. 6.

3. The question whether a sum stipulated is 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 (Public Works Commissioner v Hills [1906] A. C. 368 and Webster v Bosanquet [1912] A. C. 394.

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(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. (Illustration given by Lord Halsbury in Clydesbank Case [1905] A.C. 6.

(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 (Kemble v Farren 6 Bing. 141.)...

(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' (Lord Watson in Lord Elphinstone v Monkland Iron and Coal Co. 11 App. Cas. 332.

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 precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties

(Clydebank Case, Lord Halsbury [1905] A. C. at page 11; Webster v Bosanquet, Lord Mersey [1912] A. C. at page 398).’’

13. Applying those principles to the collection fees claimed in the present case, it is clear that the item is recoverable as liquidated damages and cannot fairly be construed as a penalty clause. Accordingly the appeal is allowed and the Appellant is awarded the additional sum claimed in respect of the collection charge of \$2708.92 which represents 33% of the arrears of rent awarded as damages to the Appellant in the Court below. The Appellant is also awarded the costs of the appeal which I summarily assess at \$500.00.

Dated this 23rd day of April, 2013 _____

IAN R.C. KAWALEY CJ