

IN THE SUPREME COURT OF BELIZE, A.D. 2021

CLAIM NO. 473 OF 2021

KAREN PIKE BAILEY

CLAIMANT

AND

TANYA HUSLE

DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Decision Date:

27th April 2022

Appearances:

Ms. Velda Flowers, Counsel for Claimant.

Ms. Kelly Bouloy, Counsel for Defendant.

KEYWORDS: Civil - Assessment of Damages - Lease - Termination of Lease - Late Charge - Payment of Rent - Penalty or Liquidated Damages - Section 12 Landlord and Tenant Act

JUDGMENT

The Background:

1. The Claimant and the Defendant entered into a lease (the Lease) with an option to purchase commencing December 1st, 2020 and ending on November 30th, 2021. It was agreed that the rent would be paid in advance (\$2,500.00 per month) and any rent paid later than the 5th of each month would attract a penalty of \$10.00 per day until payment was made in full.

2. The Defendant consistently defaulted on payment of the rent as agreed and by letter dated March 17th, 2021, the Claimant terminated the Lease and demanded possession within 30 days.
3. The Defendant failed to deliver up possession and these proceedings were initiated on the 21st July, 2021. The Claimant sought possession, rent in arrears, damages, interest and costs.
4. The Defendant admitted the default and agreed to pay outstanding rent of \$29,048.32. The Court made an Order accordingly. There remained for the Court's consideration the issue of the entitlement to and quantum (if necessary) of the late fee. The Court agreed to deal with this issue on the written submissions only of the parties.
5. Both parties have filed their submissions, and this is the Court's brief written decision.

The Pertinent Clause:

6. *"2. **RENT:** ... Tenant further agrees to pay a late charge of **\$10.00 BZD** for each day rent is not received after the **5th (fifth)** of the month to the Landlord, time being of the essence... Tenant agrees to make initial payments for First Month's Rent and a Security Deposit at signing of this agreement ("**Late Fees**")."*

The Issues:

1. Is the Claimant entitled to late fees pursuant to Clause 2 of the Lease?
2. If the Claimant is so entitled, then in what quantum?

Is the Claimant entitled to late fees pursuant to Clause 2 of the Lease?

7. The Claimant relied solely on the clause in the Lease and calculated late fees for 23 days in February 2021, every month thereafter up to November, 14 days in December 2021 and 12 days in January 2022 for a total of \$15,640.00.
8. She added that although the clause may seem oppressive it was not. She referred the Court to **section 12** of the **Landlord and Tenant Act, Cap. 189** which reads:

“12. In case any tenant for years or from year to year willfully holds over any land after the termination or determination of the tenancy, and after demand made and notice in writing given for delivering the possession thereof to the person entitled to possession of the land, the person so holding over shall, for and during the time he so holds over or keeps the person entitled out of possession, pay to the person so kept out of possession double the yearly rent which was payable under the tenancy, and the same shall be recoverable in a competent court.”
9. Counsel for the Claimant then calculated what the double rent would be for 10 months (being February to April, June to December 2021) and 17 days in January 2022 for a total of \$26,370.97.
10. The Defendant, on the other hand, was adamant that the late fee was penal, and in any event, its accrual would cease on termination of the agreement. Since the lease was terminated on the 17th March, 2021 entitlement to any late fees ceased and could not be enforced beyond that date. She concluded that the issue of whether the sum was a penalty or liquidated damages was of no importance and really required no determination.
11. Nonetheless, she went on to quote from *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd [1914] UKHL 1* for the distinction between liquidated damages and penalty:

“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 the 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...

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 the contract, not as at the time of the breach (Public Works Commissioner v. Hills and Webster v. Bosanquet)."

12. The Lease, she said, had a separate provision which dealt with termination and the late fee formed no part of it as it called for forfeiture of all security deposit and rental payments. Further, the Claimant had also made a claim for damages for breach of contract so to add a penalty would be *"out of all proportion.... or in other words, exorbitant: see Cavendish Square Holding BV v El Makdessi [2015] UKSC 67; [2015] 3 WLR 1373"* - ***Brown's Bay Resort Ltd v Pozzoni (Antigua and Barbuda) [2016] UKPC 10 at paragraph 9.***

13. Counsel also referred to ***Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29*** for the principle that after termination of a contract a party is only entitled to damages for breach. Liquidated damages is usually applicable to periods of delay prior to completion or termination.

Court's Consideration:

14. The Court finds **Triple Point** a convenient place to begin its discussion. The Supreme Court decision confirmed that if the agreed event for which liquidated damages are payable occurs before termination, then liquidated damages are payable up to termination.

15. Lord Legatt stated at paragraph 79:

“However, as Sir Rupert Jackson acknowledged in saying that ‘accrued rights must be protected’, the effect in law of termination of a contract on the parties’ rights and obligations is prospective only. In other words, subject to contrary agreement, the parties are discharged from their obligations under the contract which would otherwise arise after termination but not those which have arisen before: see eg Burrows, A Restatement of the English Law of Contract, 2nd ed (2020), section 19(4). In principle, therefore, where at the time of termination delay for which liquidated damages are payable has already occurred, there is no reason – in law or in justice – why termination of the contract should deprive the employer of its right to recover such damages, unless the contract clearly provides for this.”

16. He concluded at paragraph 86 *“that it is ordinarily to be expected that, unless the clause clearly provides otherwise, a liquidated damages clause will apply to any period of delay in completing the work up to, but not beyond, the date of termination of the contract.”*

17. Therefore, in the matter at bar, this Court finds it necessary to determine whether the late fee was oppressive as there is a period prior to termination for which the late fee may be enforceable notwithstanding that it may not continue to be enforceable after termination of the lease.

18. The late charge was written into the Lease and was agreed to by the parties. It is not described as a penalty or liquidated damages. It is a sum of \$10.00 per day payable only if rent had not been paid after the 5th of each month. According to the Lease, rent is due on the 1st of each month.

19. The on-time payment of rent is always an issue for landlords. The late fee is intended to mitigate his financial risk. There is no legislation in Belize which prescribes a maximum sum or percentage which could be charged as a late fee.

There is nothing which precludes its payment either. The Defendant says that the sum is exorbitant as the Claimant has asked for both damages for breach as well as the late charge.

20. The Claimant has already been awarded general damages including mesne profits which is compensation for both the non-payment of rent during the lease and while the Defendant held over. The late charge is not damages for the non-payment of rent which these damages cover, rather it relates to the late payment of rent. There is no overlap.
21. Just for completeness, the late fee can not be compared with the double rent payable for holding over under **section 12** of the **Landlord and Tenant Act** either. That Act has no applicability here whatsoever. The Claimant's claim to a sum for late fees is pursuant to a provision of the Lease, not for the holding over.
22. Moving on, the parties agreed to the time in which rent was to be paid and a grace period was given for payment beyond this date without incurring the late fee. This was all agreed between the parties and the Court will not interfere since it considers \$10.00 a day to be a reasonable sum which is in no way penal. It appropriately covers the Defendant's breach and the Claimant's inconvenience of waiting on the rental sum agreed to be paid by a specific time.
23. The late fee and entitlement to it had accrued prior to termination of the Lease and survives termination as described in *Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827*. The Court finds that up to the termination of the contract, the Claimant is entitled to the payment of that late fee.

24. Once the Contract was terminated by the Claimant's notice on the 17th March, 2021, the terms of the contract, unless they survived the contract, were no longer enforceable. The Lease itself dealt with termination and outlined the resulting effect - forfeiture of any deposit and all rental sums.
25. There is nothing in the Lease which indicates that the term of the Lease, which relates to late payment of rent, would survive. This Court agrees with the Defendant that they do not and so holds.
26. For these reasons, the Claim for late fees beyond the date of termination of the Lease fails.

Determination:

1. The Defendant is to pay to the Claimant the sum of \$570.00 being late fees for 23 days in February, and 17 days in March 2021.
2. This sum shall attract interest at the rate of 6% from the date of the filing of the Claim herein to the date of judgment and thereafter at the statutory rate of 6% until payment in full.
3. Costs are awarded on the prescribed basis, having not been agreed between the parties. The Court relies on Counsel on both sides to calculate and agree the sum.

**SONYA YOUNG
SUPREME COURT JUDGE**