Claim No. SCT 010/2018

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum,

Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL OF DIFC COURTS

BEFORE SCT JUDGE NATASHA BAKIRCI

BETWEEN

IDRA RESIDENTIAL BODY CORPORATE

Claimant

and

MR ISLA & MRS INEZ

Defendants

Hearing: **11 March 2018**

Judgment: **21 March 2018**

JUDGMENT OF SCT JUDGE NATASHA BAKIRCI

UPON the Claim Form being filed on 9 January 2018;

AND UPON a Second Consultation having been held on 24 January 2018 before SCT Judge Nassir Al Nasser and the parties having failed to reach settlement;

AND UPON a Hearing having been held before me, SCT Judge Natasha Bakirci on 11 March 2018, with the Claimant's representative and the First Defendant attending;

AND UPON the parties being given until 15 March 2018 to discuss potential settlement;

AND UPON reviewing the documents and evidence submitted in the Court file;

IT IS HEREBY ORDERED THAT the Defendants shall pay the Claimant the sum of **AED 213,103.11.**

Issued by:

Natasha Bakirci

SCT Judge

Date of issue: 21 March 2018

At: 9 am

THE REASONS

The Parties

1. The Claimant, Idra Residential Body Corporate, is an entity established pursuant to the Strata Title Law (DIFC Law No 5 of 2007) and the registered body corporate for the residential lot 3 of the Idra Building, registered with the DIFC Registrar of Real Property.

2. The Defendants are Mr Isla and Mrs Inez, owners of Unit 234 in the Idra Residential Tower in the DIFC.

The Claim

3. Following the Defendants' purchase of the unit in Idra, the Claimant claimed AED 439,173.36 from the Defendants as a debt, pursuant to the DIFC Law of Contract and the DIFC Law of Damages and Remedies, relating to the recovery of unpaid levy contributions due from the Defendants to the Claimant, together with associated penalties, interest and costs.

The Defence

4. The Defendants accepted that they owed service charge and levies in respect of the said unit in Idra but requested that the Claimant exercise discretion and compassion when calculating interest and late payment penalties, which they found to be excessive and unfair.

DIFC Courts Jurisdiction

5. Rule 53.2 of the Rules of the DIFC Courts ("RDC") requires that the Small Claims Tribunal ("SCT") hears only cases that fall "within the jurisdiction of the DIFC Courts." The jurisdiction of the DIFC Courts is determined by Article 5(A) of the judicial authority law, Dubai Law No. 12 of 2004, as amended ("Judicial Authority Law"), which provides a number of limited gateways through which the DIFC Courts have jurisdiction over a claim, which are, as relevant:

> "(a) Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
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> (b) Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;
>
> (c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities; .
>
> (e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.
>
> (2) .civil or commercial claims or actions where the parties agree in writing to file such claim or action with [the DIFC Courts] whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions."

6. 6. It has not been disputed that the Claimant is a DIFC entity and that the property which is at the heart of the dispute is located in the DIFC.

7. Based on the above and given the value of the claim which falls below AED 500,000, I am satisfied that the DIFC Courts SCT has the jurisdiction to hear this case.

The Hearing

8. During the Hearing, the Claimant confirmed that on 6 February 2018 the Defendants had made a partial payment of AED 226,070.25, leaving an outstanding balance of AED 213,103.11 which was due and payable.

9. The First Defendant stressed that the Defendants had from the outset acknowledged that they owed the service charge and the debt but had encountered financial difficulties since buying the property. They had purchased the property for just over AED 10 million in 2008 but it was now worth AED 7 million. The First Defendant explained that he had taken out a mortgage for which he was paying AED 65,000 a month, while his salary is AED 99,000.

10. The First Defendant stated that his relationship with the Second Defendant (his ex-wife) had suffered significantly as a result of this strain. They had been unable to pay any earlier. He asserted that he had paid the levies in full and requested some compassion for the Defendants' financial situation. They were trying to sell the property and had paid as much as they could. Moreover, he emphasised that the interest and penalties together resulted in a punitive amount. Although this was in the Claimant's rules and within their rights, they still reserved discretion to waive some of these late payment penalties.

11. The Claimant replied that it would be unfair to expect the Claimant to waive any late payment penalties which were in accordance with the DIFC Strata Law, as well as the Body Corporate's registered Strata Management statement.

12. The First Defendant highlighted that based on his calculations, over a third of what he had paid the Claimant to date had been applied to interest and penalties. The First Defendant requested that the Court take into consideration what would be an equitable amount to charge in respect of late interest and penalties, given the Defendants' difficult financial circumstances.

13. The Claimant clarified that the late payment penalties in what was being sought from the Defendants at the date of the Hearing amounted to AED 27,189.97. The Claimant was also claiming its court filing fee in the sum of AED 21,906.51.

14. The Claimant explained their position that they had consulted with their Committee of Management who found it unfair to waive late payment fees for some unit owners and not others. At the Hearing I gave the parties until 15 March 2018 to explore potential payment plans.

Post-Hearing Submissions

15. In subsequent submissions filed with the SCT, the First Defendant stressed that the Defendants fully accepted that they owed the annual service charge to the Claimant. They had made total payments amounting to AED 637,932.11 including the most recent payment on 6 February 2018 of AED 226,070.25, which reflected all outstanding levies notified to them. The Defendants owed AED 7.5 million on the mortgage to the Ivana of Dubai (IBD), while the apartment was currently worth AED 7 million. CBD was refusing to allow them to sell for less than the outstanding mortgage.

16. In its reply, the Claimant reiterated that its current claim was for AED 439,173.36, of which AED 27,189.97 were late payment penalties levied in accordance with Item 68 of the DIFC Strata Title Law and Item 23.3 of the body corporate's registered strata management statement. As the Defendants had initiated a partial payment of AED 226,070.25 on 6 February 2018, a balance of AED 213,103.11 related to this claim remained unpaid. They proposed a payment plan spanning over a period of "9.68 months".

17. The First Defendant replied that the Defendants had made full payments of all service levies notified to them. Based on the Claimant's internal accounting policies these payments were not wholly applied towards the levies, and a substantial portion had been applied towards interest and penalties.

18. The First Defendant complained that he had specifically emailed and stated that the payment he was making in February 2018 was towards outstanding levies and not towards the Claimant's Claim, nor towards any interest and penalties. The Claimant had imposed interest and penalties due to payments being made annually and not regularly in the year.

19. The First Defendant lastly requested that the SCT differentiate between the actual levies charged which had all been paid, and the interest and penalties charged due to the fact that financial difficulties had rendered the Defendants unable to make regular payments during the year.

The Law

20. Article 68 of the DIFC Strata Law, DIFC Law No. 5 of 2007 provides as follows:

> "68. Contributions (1) The body corporate may from time to time levy on the owners contributions in respect of the lots to raise amounts that the body corporate decides are necessary to meet anticipated expenditure. (2) The contributions are to be proportionate to the unit entitlements of the lots. (3) A contribution falls due for payment on a date fixed by the body corporate. The body corporate must give the owners at least 30 days' notice of the amount and when it is due. (4) The owner of the lot as at the due date for payment is liable for the contribution, and any person who later becomes an owner before the contribution is paid becomes jointly and severally liable for payment.
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> (5) If a contribution for which an owner or other person is liable under paragraph (4) is not paid, the owner or other person is taken to have failed to comply with a requirement of this Law for as long as the contribution remains unpaid. (6) Interest accrues on overdue contributions at a rate fixed by ordinary resolution of the body corporate. (7) The rate of interest must be fixed on a fair and reasonable basis"
>
> (emphasis added).
>
> Clause 23.3 of the Claimant's registered strata management statement states as follows, as relevant:
>
> "(g) The Unit Owners agree to pay in a timely manner all sums due to the Ider.The Unit Owners agree and acknowledge that it is important that stringent penalties apply to Unit Owners who default on payments.
>
> .The Ider may (by Ordinary Resolution) authorize the use of such penalties for non-payment and incentives for payment as are permitted under Applicable Law..
>
> The maximum interest that may be applied by the Ider in the event of such non-payment is 12% per annum, calculated on a daily basis. The maximum penalty that can be applied by the Ider in the event of a Unit Owner failing to comply with a notice identifying a breach by the Unit Owner of its obligations is AED 2,000 per notice.
>
> .
>
> (i) If a Unit Owner fails to adhere to any of the terms and conditions of this Strata Management Statement, including the By-Laws, the Ider shall be entitled to levy a penalty which shall be considered a debt payable on demand, and otherwise take any action it deems necessary for the purposes of enforcing this Strata Management Statement.."

21. 21. In the case of *Filib v Fifi* [2014] DIFC SCT 092, H.E. Justice Shamlan Al Sawalehi, considered the application of Article 68 of the DIFC Strata Law against an interest rate of 12% per annum on the Defendant's overdue contributions, finding that it was fixed on a "*fair and reasonable basis*".

22. In the more recent case of *Hande House Residential Body Corporate v Haluk* [2017] DIFC SCT 009, SCT Judge Nassir Al Nasser held that the Defendant was obliged to pay the charges, penalties and interest in relation to the base Levy Contribution, although he found that there was insufficient evidence supporting legal fees that were being charged by the body corporate in that case.

Conclusion

23. Having read all the submissions and listened carefully to the parties' arguments at the Hearing, I have great sympathy for the Defendants' financial situation. However, as was conceded by the First Defendant himself at the Hearing, the Claimant is within its legal rights, based on both the DIFC Strata Law as well as its registered strata management statement by which the Defendants as unit owners were bound, to charge interest and late payment penalties in cases such as the Defendants.'

24. During the Hearing and throughout the Defendants' written submissions to the SCT, I have heard and seen references to "compassion," "understanding," and "discretion" in the light of their financial difficulties. However, in my position as judge over the matter I can only determine what the Defendants are legally obliged to pay based on the relevant law and governing documents.

25. On the basis of the evidence before me, I find that the Defendants still owe AED 213,103.11 to the Claimant, this sum includes the AED 21,906.51 court fee.

Issued by:

Natasha Bakirci

SCT Judge

Date of Issue: 21 March 2018

At: 9 am