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A Partnership Established Since 1984

Our reference: KPR
Your reference:

26th July, 2023

Caribbean Developments (Antigua) Limited
Jolly Harbour
St. Mary's
Antigua
Attn: Joseph Krohn

By email: joseph.krohn@portopalma.com

Privileged and Confidential

Dear Sir,

Re: Caribbean Developments (Antigua) Limited ("CDAL") – Restrictive Covenants – Application of Community Charges

Our instructions are that CDAL is tasked with the responsibility of managing the development known as "Jolly Harbour" in the parish of Saint Mary's in Antigua (**"Jolly Harbour"**). Most homeowners in Jolly Harbour are subject to restrictive covenants which govern the relationship between the homeowners and CDAL (the **"Restrictive Covenants"**). One of the common Restrictive Covenants states as follows:

"*The Transferee shall pay the monthly maintenance charge also known as community charge, which is now levied by the Transferor and which charge is now set at xxx hundred dollars United States currency (US$ 372), plus 15% ABST, per month per villa and which is charged for and expended upon services provided to and for the benefit of the abovementioned parcel, which services are included but not limited to security, grounds maintenance, infrastructural maintenance, sewage, lighting, and liability and risk insurance for common areas in the administration thereof.*"

Homeowners have recently raised concerns about the types of services to which community charges are applied by CDAL. Homeowners submit that community charges are to be used exclusively for maintenance of common areas and not for extra insurance, replacement of generators and so on.

Therefore, you have asked us for advice on the types of services that CDAL can provide using community charges.

Our advice is set out below.

1. INTERPRETING RESTRICITVE COVENANTS

The requirement under the Restrictive Covenants to pay community charges is a positive covenant[1]. As a general rule, a positive covenant is a matter of contract between the parties to the contract. However, a person who takes the benefit of a positive covenant must also subscribe for the burden attached to the covenant if the benefit is related to and conditional upon the burden[2].

When interpreting a written contract, the court is focused on identifying the intention of the parties by reference to *'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'*. That meaning has to be assessed in the light of: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the agreement; (iii) the overall purpose of the clause and the agreement; (iv) the facts and circumstances known or assumed by the parties at the time that the document had been executed; and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions[3].

In **Curo Places Ltd v Pimlett**[4], a tenancy agreement was made between the appellant landlord and the respondent tenant for a bungalow in a sheltered housing scheme. The bungalow was set in communal grounds that were maintained by the landlord. Initially, the landlord had not charged the tenant for grounds maintenance. However, the landlord subsequently gave written notice to the tenant, seeking to add grounds maintenance as a service under the tenancy agreement for which it could charge. The tenant objected, contending that the landlord had no power to do so under the terms of the tenancy agreement. The English Court of Appeal found that the landlord had been entitled under the tenancy agreement to add extra services, subject to prior consultation with tenants as the tenancy agreement stated that the landlord might provide 'extra services' if it had believed that such services would have been 'useful'.

The obligations of the Homeowners in relation to the community charge are set out in the Restrictive Covenants. The Restrictive Covenants expressly states the purpose of community charges as "***for and expended upon services provided to and for the benefit of the abovementioned parcel, which services are included but not limited to***." The natural and ordinary meaning is arguably that community charges can be used for any service that benefits the relevant Villa. The Restrictive Covenant does not expressly state that community charges are restricted to maintenance. The Restrictive Covenants do not include a pre-condition that only items owned by the homeowners can be replaced using community charges. In other words, items used for the benefit of the homeowners irrespective of legal ownership can be replaced using community charges.

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[1] Halsbury's Laws of England, Conveyancing (Volume 23 (2016)) 77
[2] Westerhall Point Residents Association Limited v Anthony Batihk [2016] ECSCJ No. 79
[3] Ryan v Villarosa [2018] All ER (D) 07 (Jan)
[4] [2020] All ER (D) 07 (Dec)

In **Fluor Daniel Properties Ltd v Shortlands Investments Ltd**[5] the tenant occupied part of a modern office building which was equipped with an extensive air conditioning system. The lease under clause 7.2 obliged the landlord to *'uphold maintain repair amend renew cleanse and decorate and otherwise keep in good and substantial condition ...the building ... including.. the air conditioning system'*. The lease required the tenant to pay a service charge.

The landlord proposed to replace large elements of the air conditioning system using the service charge.

The Court was satisfied that the landlord was entitled to carry out, and the tenant was obliged to pay for works that went beyond repair based on the terms of the lease. However, the Court also found that the rights and obligations to repair were only triggered by the existence of some defect or malfunction.

Clause 7.2(e), although widely drawn, did not entitle the landlord to incur expense on equipment where it was in proper working order and capable of rendering the relevant service to the standard required by the landlord's obligations, and where the proposed works were not reasonably required to maintain the service and would not improve it.

The fact that the air conditioning plant had operated over the expected 'industry-recognised lifespan' could only serve as a starting point. In this case, the maintenance records did not show any increase in the frequency of breakdowns or a rise in the cost of maintenance. Accordingly, the judge ruled that much of the work was not justified and could not be carried out at the expense of the tenant. The judge went on to conclude *that for the service charge to be recoverable, the item in question had to be no longer reasonably acceptable, having regard to the age, character and locality of the premises, to a reasonably minded tenant of the kind likely to take a lease of that building*.

Although *the Flour case* above relates to a lease, the factors used by the Court to interpret the use of the service charge would be useful guidance in determining what services for the benefit of homeowners justify use of community charges. If equipment used by CDAL for the benefit of homeowners is no longer operating at a reasonable level in the circumstances, CDAL should be able to use community charges to replace those items.

2. OBLIGATION TO PAY

In the Antigua case, **The Proprietors, Condominium Plan No. 2/1989 v Trinity Investment Company Limited; Trinity Investment Company Limited and others v The Proprietors, Condominium Plan No. 2/1989 and others**[6], Trinity Investment Company Limited, the unit holder of a condominium damaged by hurricane claimed that its obligation to pay maintenance fees, utility charges and late penalties was suspended because the management company of the

[5] [2001] All ER (D) 36 (Jan)
[6] [2016] ECSCJ No. 152

condominium failed to use insurance proceeds it was paid to rebuild its unit. The management company accepted that the insurance proceeds were partly used to pay off urgent debts of the condominium which if left unpaid could have led to closure of all the properties. The management company felt that paying the debts was in the best interest of the overall condominium.

The Court of Appeal found that the management company breached its duty by not applying of the insurance proceeds to repair of the relevant unit, but Trinity Investment cannot lawfully refuse to pay fees that are levied against their property on the basis of any perceived grievance they may have with the management company. Trinity Investments was awarded damages for breach of duty by the management company but Trinity Investments was also ordered to repay outstanding common charges.

In [redacted] **v Caribbean Development (Antigua) Limited**[7], a homeowner within Jolly Harbour sought a declaration that he was not required to pay community charges but the Court found as follows at para 39:
"*As previously noted, the Claimant seeks a declaration that the Defendant is not entitled to be paid any monies for monthly community charges whatsoever. In the light of the terms of Clause 5 of the Sales Agreement, and in the light of the Claimant's acceptance during cross-examination that he is bound by the Agreement and is obliged to pay community charges, and that he has in fact benefitted from community services provided by the Defendant, I can see no reason to grant this declaration.*"

In light of the above cases, even if CDAL is in breach of its obligations under the Restrictive Covenants, this would not itself legally entitle the homeowners to refuse to pay community charges whilst benefitting from services provided using community charges.

3. EXCLUSION OF RESTRICTIVE COVENANTS

In **Westerhall Point Residents Association Limited v Anthony Batihk**[8], the appellant is the residents' association of a residential development and the respondent is the current owner of Lot 101 of the development. The developers had imposed covenants on all lots by Deed of Indenture which included a covenant that the purchasers share proportionately in the maintenance and upkeep of the road to access the development. The respondent was a subsequent purchase of one of the lots.

The Estate Road, the only means of access to the properties in the development, is maintained by the Association and is used by the respondent. The Association carries out the maintenance of the Estate Road and the cost of the maintenance is passed on to the owners of properties in the development. The respondent refused to pay his share of the maintenance costs because he argued that the Deed did not state that it is binding on successors in title and he was not a member of the association. The respondent's refusal led to the Association filing a claim against him for recovery of his share of the maintenance costs.

[7] [2017] ECSCJ No. 355
[8] [2016] ECSCJ No. 79

The respondent admitted that he used the Estate Road but denied that he is obliged to contribute to the costs of maintenance of the Estate Road. The Court of Appeal found that a person who takes the benefit of a positive covenant must also subscribe for the burden attached to the covenant.

Although there was nothing in the Deed that said that the use of the Estate Road is conditional on the payment of maintenance costs, it is clear that the parties to the Deed intended that purchaser's use of the Estate Road was not gratuitous but that it was conditional on the payment of a proportionate share of the maintenance costs.

In light of the *Westerhall* case, even if there are some homeowners with Restrictive Covenants that have more restrictive wording in relation to community charges or no mention of community charges, if the homeowner is benefiting from the services, CDAL can still seek to levy community charges on the relevant homeowner.

4. CONCLUSIONS

Community charges are not expressly limited to maintaining certain common areas of the properties. Community charges are to be used for services that benefit the properties. If equipment used by CDAL for the benefit of homeowners is no longer operating at a reasonable level in the circumstances, CDAL should be able to use community charges to replace those items irrespective of legal ownership of the relevant equipment.

Even if CDAL is in breach of its duty, there is no automatic right for homeowners to withhold community charges. Moreover, even if the restrictive covenant wording does not expressly apply to an existing homeowner, if the homeowner is benefiting from the services, CDAL has grounds to seek to recover community charges.

Sincerely,
HILL & HILL
Per:

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Kari-Anne P. Reynolds