

**IN THE COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW & EQUITY DIVISION  
2022/CLE/gen/01124**

**B E T W E E N:**

**(1) BENNET HOLDINGS LIMITED**

**(2) THOMAS INGERSOLL SCHEERER**

**(3) ARUNAS PLECKAITIS**

**(4) MARILYN PLECKAITIS**

**(5) TEOFILO VICTORIA**

**(6) MARIA MERCEDES DE LA GUARDIA**

**(7) JAMES ALLEN MALCOLM**

**Claimants**

**AND**

**(1) SCHOONER BAY VENTURES LIMITED**

**(2) SCHOONER BAY COMMUNITY CORPORATION**

**Defendants**

Before: The Honourable Justice Darron D. Ellis

Appearances: Mrs Gail Lockhart-Charles with Tracy Wells for the Claimants  
John Wilson, K.C., with Berchel Wilson for the Defendants

Hearing Date: Feb 27, 2025

**JUDGMENT**

**Community Declaration — Contractual construction — Exclusion clause / Negative covenant not to sue — Whether clause barring actions or suits created sanctioning**

**power — Enforcement provisions — Whether power to fine extended to alleged breach of no-suit clause — Attempt to levy fines equivalent to legal costs incurred in prior litigation — Prior order that each party bear own costs — Whether contractual machinery could be used to circumvent Court's costs order — Mandatory enforcement procedure — Failure to give notice and opportunity to be heard — Procedural invalidity — Equitable rule against penalties.**

1. Where a contractual instrument includes a provision purportedly authorising the imposition of monetary fines for breach, the court must decide whether the alleged breach falls within the scope of that provision and whether, when properly interpreted, the contract confers the power to impose such sanctions. A clause whereby parties agree not to initiate actions or suits arising from the enforcement or non-enforcement of an agreement functions as a defence to proceedings and, without clear and explicit language, does not establish a punitive regime or permit the imposition of fines. **Cavendish Square Holding BV v Makdessi** [2015] UKSC 67; **Photo Production Ltd v Securicor Transport Ltd** ([1980] AC 827) relied upon.
2. The enforcement provisions of the Declaration, under which the Defendants are empowered to impose sanctions, were directed to violations of covenants regulating conduct within the community and were intended to operate for remedial purposes, namely the resolution of compliance issues, rather than for punishment or compensation. A fine imposed to replicate or recover legal costs incurred in earlier litigation is, in substance, both a penalty and an impermissible attempt to reallocate costs where the court has ordered that each party shall bear their own costs. Such a fine is therefore unenforceable under the equitable rule against penalties as articulated in **Cavendish Square Holding BV v Makdessi** [2015] UKSC 67.
3. Where a contract prescribes mandatory procedural steps to be taken before a party may be sanctioned, those steps must be strictly observed. Any sanction imposed in breach of the stipulated procedure is liable to be set aside as invalid: **Lee v Showmen's Guild of Great Britain** [1952] 2 QB 329, relied upon.

Held: The Court determined that the article in question functions as a defensive exclusion clause and does not establish a regime of sanctions upon breach; that the enforcement provisions of the Declaration cannot be used to impose fines intended to replicate litigation costs; that any reliance on the article to bar the earlier proceedings should have been raised at the onset of that claim; and that, in any event, the fines were procedurally flawed for failing to adhere to the mandatory enforcement process. Further, even if such a power existed, the impugned fines were secondary obligations imposed by reason of a breach and were unenforceable as penalties.

**INTRODUCTION**

- [1.] This action concerns the scope and limits of enforcement powers conferred under an Amended and Restated Declaration of Covenants, Conditions, and Restrictions agreement (the Declaration) governing the Schooner Bay development in Abaco, and whether those powers entitle the Defendants to levy fines and individual lot assessments against the Claimants' properties in order to sanction an alleged breach of the Declaration by the Claimants.
- [2.] The Claimants challenge fines imposed by the Defendants under the Declaration, following earlier litigation between the parties in which the Court dismissed each party's claim and ordered that each party shall bear their own costs.
- [3.] The Defendants contend that the Claimants, by instituting earlier proceedings against the Defendants, were in breach of the Declaration barring the Claimants from bringing actions or suits arising from the enforcement or non-enforcement of the Declaration, and that the fines were a lawful exercise of the enforcement powers conferred by the Declaration.
- [4.] The Claimants argued that the article in question did not authorise punitive or compensatory sanctions, that the fines were in substance an attempt to recover legal costs contrary to the Court's prior order, and that the enforcement procedure to levy fines prescribed by the Declaration had not been followed.
- [5.] The Claimants seek declaratory and injunctive relief, contending that the Defendants' actions of levying fines and withholding certificates are ultra vires the Declaration, procedurally defective, and constitute an impermissible attempt to reverse a costs outcome already determined by this Court.
- [6.] The Defendants resist the claim, asserting that the impugned fines arise from a primary contractual enforcement power under the Declaration, that the Claimants were in breach of Article 7 thereof, and that the Claimants are estopped by findings in earlier proceedings from challenging the Defendants' entitlement to levy the fines.

**BACKGROUND**

- [7.] The Claimants are owners of residential lots within the Schooner Bay development.

- [8.] The 1<sup>st</sup> Defendant is the developer and vendor of the Schooner Bay development. The 2<sup>nd</sup> Defendant is the community corporation established to manage and administer the development in accordance with the Declaration.
- [9.] In 2016, disputes arose between the Claimants and the 1<sup>st</sup> Defendant concerning the marketing and management of properties within the development. Those disputes culminated in Supreme Court Action No. 2016/CLE/gen/00845 (“the Earlier Action”).
- [10.] In the Earlier Action, the Claimants sought declaratory relief and damages. The 1<sup>st</sup> Defendant counterclaimed, seeking injunctive relief and damages for alleged breaches of the Declaration.
- [11.] The Earlier Action was tried before Her Ladyship the Honourable Madam Justice Indra Charles (as she then was), who made a Ruling dated 20<sup>th</sup> July 2021 (“the 1<sup>st</sup> Ruling”).
- [12.] In the Earlier Action, *Charles J.* dismissed the claims and counterclaims of all the parties and ordered the parties to bear their own costs. As is noted in the 1<sup>st</sup> Ruling at paragraph 9, the properties in Schooner Bay are subject to the Declaration.
- [13.] Following the conclusion of the Earlier Action, the Defendants asserted that the Claimants had breached Article 7 of the Declaration by commencing the Earlier Action, and the Defendants have purported to levy fines and assessments against the Claimants’ properties in Schooner Bay as a result of the alleged breach in accordance with Article 2, Part II, of The Declaration. The Defendants relied on Article 7 of the Declaration, which states that:
- “Waiver. Neither the Founder (SBV)...nor their successors or assigns shall be liable for damages to any Owner...by reason of any mistake in judgment, negligence, nonfeasance, action or inaction in the administration of the provisions of this Community Declaration, the Design Code or the rules and regulations for the enforcement or failure to enforce this Community Declaration, the Design Code or the rules and regulations or any part thereof; and every Owner, by acquiring an interest in Schooner Bay, agrees that he, she or it will not bring any action or suit against the Founder...to recover damages or to seek equitable relief on account of their enforcement or non-enforcement of this Community Declaration.”
- [14.] The Defendants have alleged that pursuant to the “Corrective Action for Enforcements Rights” provisions of the Declaration under Article 2, the 2<sup>nd</sup> Defendant has rightfully assessed fines in the amount of Two-Hundred Sixty-One Thousand Four-Hundred Eighty-Two Dollars and Ninety-Four Cents (\$261, 482.94) which, if not paid by 14<sup>th</sup> February 2022, will be levied as an individual lot assessment against each of the Claimants’ individual lots and will constitute a charge upon the lot until the debt is satisfied or the lot is sold and the fine recovered.

[15.] Additionally, the Defendants have refused to issue certificates (unless and until the assessments were satisfied) to the Claimants in accordance with Article 5 Part II of the Declaration, which states:

“Notice to Purchasers – If there are any Assessments unpaid on the Parcel, you will automatically become liable for those Assessments when you accept a Conveyance. You should contact the SBCC before purchasing a Lot to make sure no Assessments are owed. You should also inquire about Special Assessments which may have been assessed but which are not yet owed.

The Treasurer of the SBCC, or managing agent if one has been employed by the Board, upon request of any Owner or contract purchaser, will furnish a certificate signed by a member of the Board or individual designated by the Board stating whether assessments are paid to date by that Owner and whether any Special Assessments have been levied. Such a certificate, when signed by the appropriate individual designated by the Board, may be relied upon by a good faith purchaser or mortgagee. The SBCC may charge a reasonable amount for such statements.”

[16.] The denial of the certificates prevents the Claimants from selling their lots, as they cannot sell their lots until the relevant authority has signed and issued the certificates.

[17.] The Claimants assert that the corrective action clause under Article 2 of the Declaration, on which the Defendants seek to base their right to fine, is inapplicable in the present circumstances and that the Defendants do not have the right to assess fines against the Claimants’ properties to recover legal costs from the earlier action.

[18.] It is these actions that give rise to the present proceedings.

### **The Pleadings**

[19.] On 4<sup>th</sup> August 2022, the Claimants filed a Writ of Summons. The Statement of Claim was filed on 29<sup>th</sup> July 2024. In paragraph 14 of the Claim, the Claimants averred that the Defendants purported to levy fines and assessments against the Claimants’ property for the recovery of costs incurred in the Earlier Action. Paragraph 15 states that the Defendants’ attorney articulated the claim for costs in an email, which provides that Article 7 of the Declaration was breached when the Claimants initiated the Earlier Action, and that the Defendants incurred legal fees of \$261,482.94. In paragraph 17, the Claimants averred that the Defendants have alleged that, pursuant to the Corrective Action For Enforcement Rights provisions of the Declaration, the 2<sup>nd</sup> Defendant has assessed fines for \$261,482.94, which, if not paid by 14<sup>th</sup> February 2022, will be levied as an individual lot assessment

against each Claimants' individual lot and will constitute a charge upon the lot until satisfied or the lot is sold and the fine recovered.

[20.] The Claimants objected to this position, averring that it was an attempt to recover costs from the Earlier Action, that the article under which they were seeking to recover costs was wholly inapplicable, and that, if it was, the correct procedure was not followed. Therefore, the fines are not valid. Fundamentally, the Claimants are seeking:

- a) A Declaration that the Defendants are not entitled to assess fines against the Claimants' lots in Schooner Bay for the purpose of recouping the legal costs incurred by the 1<sup>st</sup> Defendant in Supreme Court Action 2016 / CLE/gen/00845;
- b) An Order extinguishing and removing any fines assessed by the Defendants or either of them against the Claimants' lots in Schooner Bay in relation to costs incurred by the 1<sup>st</sup> Defendant in Supreme Court Action 2016/ CLE/gen/00845;
- c) An Order requiring the 2<sup>nd</sup> Defendant to promptly comply with its obligation under the Declaration to furnish a certificate signed by a member of the board of the 2<sup>nd</sup> Defendant or an individual designated by the board stating whether assessments are paid to date by that owner and whether any special assessments have been levied.
- d) An order prohibiting the 2<sup>nd</sup> Defendant its officers or agents from including any legal costs incurred by the 1<sup>st</sup> Defendant in Supreme Court action 2016/CLE/gen/ 00845 in the certificate required by the Declaration to be furnished by the Treasurer or managing agent of the 2<sup>nd</sup> Defendant upon the request of any owner or contractual purchaser of the lots owned by the Claimants in Schooner Bay.

[21.] On 19<sup>th</sup> August 2024, the Defendants filed a Defence. In paragraph 2 of the Defence, the Defendants deny that the Claimants are entitled to the orders and declarations set out in their claim. At paragraph 7, the Defendants aver that the right to levy fines and assessments against the Claimants is a primary right which arises under the Declaration for breach of the Declaration. At paragraph 10, the Defendants aver that by commencing the Earlier Action, the Claimants were in breach of Article 7 of the Declaration and pursuant to Article 2, the Defendants had the power to take corrective action to enforce their rights under the Declaration via individual lot assessments and to levy fines pursuant to their enforcement rights.

## The Evidence

### **The Affidavit of Mr Bennet Atkinson**

- [22.] The Claimants rely, inter alia, on an affidavit sworn by Mr Bennet Atkinson, who deposes that he is the President and beneficial owner of Bennet Holdings Limited, the 1<sup>st</sup> Claimant, and that he is authorised to swear the affidavit on its behalf. Mr Atkinson states that the affidavit is filed in support of the Claimants' application for interim declaratory and injunctive relief, including (i) orders prohibiting the Defendants from assessing fines and/or individual lot assessments to recover the 1<sup>st</sup> Defendant's legal costs incurred in Supreme Court Action No. 2016/CLE/gen/00845, (ii) an order extinguishing any such fines or assessments, (iii) orders requiring the 2<sup>nd</sup> Defendant to comply with its obligation to issue certificates under Article 5 of the Declaration, and (iv) ancillary relief.
- [23.] Mr Atkinson identifies the Claimants as property owners within the Schooner Bay development. He exhibits the conveyances by which the respective lots were acquired, including the conveyance for Lot U13 ("Carioca") in the name of the 1<sup>st</sup> Claimant, and similar conveyances for the remaining Claimants' lots. He then addresses the Earlier Action commenced in 2016 against the 1<sup>st</sup> Defendant. Mr Atkinson states that the action was tried before *Charles J* and resulted in a ruling delivered on 20<sup>th</sup> July 2021.
- [24.] Mr Atkinson deposes that, in the 1<sup>st</sup> Ruling, the Court dismissed both the Claimants' claim and the Defendant's counterclaim and ordered that each party shall bear their own costs. He refers in particular to paragraph 148 of the ruling, and he also refers to paragraph 150, which, as he understands it, contained a non-binding postscript addressing the parties' future course.
- [25.] Mr Atkinson states that, notwithstanding the dismissal of the counterclaim and the costs disposition in the 1<sup>st</sup> Ruling, the Defendants have purported to levy fines and/or assessments against the Claimants' properties in order to recover legal fees said to have been incurred by the 1<sup>st</sup> Defendant in the 2016 proceedings.
- [26.] In that regard, Mr Atkinson sets out and relies upon an email from the Defendants' attorneys dated 1<sup>st</sup> February 2022. In that correspondence, the Defendants' attorneys asserted that commencement of the Earlier Action was in breach of Article 7 of the Declaration and stated that the 1<sup>st</sup> Defendant had incurred legal fees said to total BSD \$261,482.94. The email asserted that the Board of the 2<sup>nd</sup> Defendant had assessed a fine in that amount and warned that, if unpaid by the stated date, it would be levied as an individual lot assessment and constitute a charge upon the relevant lots.
- [27.] Mr Atkinson further exhibits and relies on a letter dated 2<sup>nd</sup> February 2022 from the Claimants' attorneys to the Defendants' attorneys. In that letter, the Claimants' attorneys disputed that the Defendants were entitled to levy fines or assessments to recover litigation

costs, disputed the characterization of the 1<sup>st</sup> Ruling as a finding of breach against the Claimants, and asserted that the enforcement machinery in the Declaration required specified procedural steps including town manager involvement, notice, a board meeting, and an opportunity to be heard.

[28.] Mr Atkinson deposes in paragraph 19 that the Claimants have not been provided with any report from the town manager, nor have they been provided with notice of any board meeting, nor have they been afforded an opportunity to be heard at any enforcement meeting in relation to the alleged fines or assessments.

[29.] He further deposes that the purported fines and assessments have had practical consequences for the marketing and sale of the Claimants' properties. He states that purchasers and their attorneys require confirmation that no assessments, special assessments, or charges are outstanding as a condition of completion, and that the existence of the disputed sums has impeded sales.

[30.] In particular, Mr Atkinson states that Lot U13 is under contract for sale, and that the purchaser has indicated an unwillingness to proceed while there is a risk that substantial disputed fees may encumber the property. Mr Atkinson exhibits a letter dated 16<sup>th</sup> July 2023 from the purchaser giving notice that, unless confirmation is provided within 14 days that no such fines or assessments have been imposed in connection with the Earlier Action, the purchaser will terminate negotiations.

[31.] Mr Atkinson states that he has been unable to obtain the requested confirmation. He alleges that the Defendants have made clear that they will not issue confirmation or facilitate completion unless the 1<sup>st</sup> Defendant's legal costs are reimbursed.

### **The Affidavit of Tina Gascoigne**

[32.] The Defendants rely on an affidavit sworn by Ms Tina Gascoigne, who deposes that she is a director of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and that she also serves as General Counsel of the 1<sup>st</sup> Defendant. She states that she is authorised to swear the affidavit on behalf of both Defendants.

[33.] Ms Gascoigne states that the matters deposed to are within her personal knowledge and/or derived from her review of the Defendants' files and records in her capacity as director and general counsel. Ms Gascoigne explains that the present proceedings arise out of earlier litigation commenced by the Claimants in Supreme Court Action No. 2016/CLE/gen/00845 ("the Earlier Action"), which the 1<sup>st</sup> Defendant was required to

defend and in which, she states, the 1<sup>st</sup> Defendant incurred legal costs in the amount of BSD \$261,482.94.

[34.] She provides background to the earlier action, stating that it concerned a dispute about the 7<sup>th</sup> Claimant's role as a property manager within the Schooner Bay community and the listing of Claimants' properties with Coastal Living Magazine without the Defendants' knowledge or approval. Ms Gascoigne deposes that, prior to the Earlier Action, the Defendants advised the 7<sup>th</sup> Claimant and other homeowners that, pursuant to the Declaration, only the 1<sup>st</sup> Defendant was authorised to operate a property management rental company within the Schooner Bay development. She exhibits a copy of the Declaration.

[35.] She states that, notwithstanding this position, the Defendants became aware in early 2016 that the 7<sup>th</sup> Claimant had invited Coastal Living Magazine to Schooner Bay for the purpose of viewing properties belonging to the Claimants with a view to listing them for vacation rentals. She says the Defendants intervened to prevent this and advised Coastal Living Magazine that the 7<sup>th</sup> Claimant lacked authority to manage properties within the community.

[36.] Ms Gascoigne states that, following the Defendants' intervention, the Claimants commenced the Earlier Action seeking to challenge the Defendants' decision and to compel the 1<sup>st</sup> Defendant to permit the 7<sup>th</sup> Claimant to manage the properties. She refers to the 1<sup>st</sup> Ruling delivered by *Charles J* on 20 July 2021, and in particular to paragraph 139 of that ruling, where the Court stated that the homeowners were bound by the Declaration, including Article 7 thereof. She sets out the text of Article 7, which provides, inter alia, that owners agree not to bring actions or suits against specified entities in relation to enforcement or non-enforcement of the Declaration.

[37.] Ms Gascoigne states that the 1<sup>st</sup> Defendant incurred legal costs of BSD \$261,482.94 in defending the earlier action. She deposes that, in reliance on Article 2 and the Corrective Action for Enforcement Rights provisions of the Declaration, the Board of the 2<sup>nd</sup> Defendant notified the Claimants by email dated 1<sup>st</sup> February 2022 of their alleged breaches of Article 7 and assessed joint and several fines in the amount of those legal costs. She further states that the Claimants were advised that, if the fines were not paid by 14<sup>th</sup> February 2022, the amounts would be levied as individual lot assessments against each Claimant's lot, and that such assessments were subsequently made.

[38.] Ms Gascoigne deposes that, as she understands it, the Claimants now seek a determination that the Defendants have no right to assess fines or individual lot assessments to recoup the costs of defending the earlier action. She states that the Defendants' position is that they are not seeking to enforce any costs order made in the earlier action but are relying on what they characterize as their primary contractual rights under the Declaration.

[39.] She further states her belief that, in light of the ruling delivered by *Charles J*, the enforceability of Article 7 of the Declaration has already been determined and cannot now be challenged by the Claimants.

[40.] This affidavit does not address any procedural steps the Defendants must take before levying fines. It does not state that those steps were taken, nor does it submit that it can bypass those steps.

### **THE CLAIMANTS' SUBMISSIONS**

[41.] The Claimants submit that the Defendants have no power under the Declaration to assess fines or individual lot assessments to recover legal costs incurred in the Earlier Action, or to fine the Claimants for instituting the Earlier Action. They contend that the Corrective Action for Enforcement Rights provision in Article 2 of the Declaration concerns ongoing physical or managerial violations within the community, such as failures to maintain lots or to comply with the design code, rather than the retrospective recovery of litigation expenses or the imposition of a fine for a breach of Article 7.

[42.] The Claimants further submit that even if the enforcement provisions were capable in principle of applying to breaches of Article 7, the Declaration prescribes mandatory procedural safeguards — including attempted resolution by the town manager, notice to all parties, a Board meeting, and an opportunity to be heard — none of which were complied with by the Defendants.

[43.] The Claimants also deny that the earlier action resulted in any finding that they were in breach of Article 7 so as to give rise to issue estoppel. They emphasize that both the claim and counterclaim were dismissed and that the Court ordered each party to bear its own costs.

[44.] Finally, the Claimants submit that the 2<sup>nd</sup> Defendant's refusal to issue certificates under Article 5 of the Declaration has unlawfully impeded their ability to sell their properties and constitutes a breach of its contractual obligations.

### **THE DEFENDANTS' SUBMISSIONS**

[45.] The Defendants submit that the Corrective Action for Enforcement Rights under Article 2 is not confined to design code breaches but applies to any breach of any provision

of the Declaration, including Article 7. They argue that Article 7 prohibits owners from bringing actions against the Defendants in respect of the enforcement or non-enforcement of the Declaration, and that the Court in the Earlier Action found the Claimants to be bound by Article 7.

[46.] On that basis, the Defendants contend that the Claimants were in breach of Article 7 by commencing the Earlier Action and that the Defendants were entitled, pursuant to their contractual enforcement powers, to levy fines against the Claimants.

[47.] The Defendants further submit that the fines are not an attempt to recover costs awarded (or not awarded) in the Earlier Action but rather represent the exercise of a distinct contractual right to levy fines, the quantum of which was reasonably benchmarked against the legal costs incurred.

[48.] They argue that the Claimants are estopped from relitigating the applicability or meaning of Article 7 and that to accept the Claimants' construction would lead to commercial absurdity.

### **Issues**

[49.] The issues that the Court must consider are:

**(a) Whether the commencement of the Earlier Action fell within the scope of Article 7 of the Declaration;**

**(b) If so, whether Article 2, properly construed, conferred on the Defendants any power to impose fines or individual lot assessments and withhold certificates by reason of such breach;**

**(c) Whether, in any event, the Defendants complied with the mandatory procedural requirements prescribed by the Declaration before imposing the impugned fines and assessments; and**

**(d) Whether the impugned fines and assessments are unenforceable under the equitable rule against penalties.**

### **The Relevant Clauses**

#### **Article 7**

[50.] **Article 7 provides:**

“Waiver. Neither the Founder (SBV)...nor their successors or assigns shall be liable for damages to any Owner...by reason of any mistake in judgment, negligence, nonfeasance, action or inaction in the administration of the provisions of this Community Declaration, the Design Code or the rules and regulations for the enforcement or failure to enforce this Community Declaration, the Design Code or the rules and regulations or any part thereof; and every Owner, by acquiring an interest in Schooner Bay, agrees that he, she or it will not bring any action or suit against the Founder...to recover damages or to seek equitable relief on account of their enforcement or non-enforcement of this Community Declaration.”

[51.] A review of Article 7 shows that this clause serves mainly two purposes. Article 7 is an exclusion clause or a limitation of liability. It states:

“Neither the Founder, Town Architect, DRC, SBCC or its Board ... shall be liable for damages...”

[52.] Further, it's a procedural bar where it reads:

...every Owner ... agrees that he, she or it will not bring any action or suit... to recover damages or to seek equitable relief...”

[53.] This part is a negative covenant not to sue, which is usually enforceable procedurally (by a stay/strike-out application). It does not appear to be a covenant whose breach automatically gives rise to damages. Critically, nothing in the wording of Article 7 suggests that bringing a suit is a violation of the Declaration that triggers fines, sanctions, or enforcement powers, or that the Board may punish or discipline for breach.

## Article 2

[54.] The enforcement clause, Article 2, provides:

“Each Owner, Tenant, Occupant, and their family members and guests are required to abide by the covenants contain in this Community Declaration, which are covenants running with the land, all applicable Statute Laws of The Bahamas, and any rules and regulations adopted by the SBCC or the Founder. Each Owner is responsible for assuring such compliance, and any violation by Tenants, Occupants, family members, or guests may be considered to be a violation by the Owner. If the Town Manager cannot resolve a violation, the Board is empowered, on behalf of the SBCC, to take necessary legal steps to enforce the covenants contained in this Community Declaration.

If the Town Manager determines that the problem is not satisfactorily resolved, the Board will notify the owner of the date of the Board meeting at which the matter will be discussed. After hearing the report from the Town Manager and giving opportunity for the Occupant (and Owner, if Different) to be heard, the Board may take any of the following actions:

Fines. The Board has the right to assess fines in an amount appropriate for the issue at hand and may restrict the resident's use of the Community Common Areas for up to one (1) year or until the violation is remedied, whichever is longer. However, the primary goal of this Article is not to punish but to resolve problems. The SBCC may suggest or approve agreements and suspend payment of a fine if the agreement is honoured. Fines shall be charged against the Lot as an Individual Lot Assessment. Any fines collected shall be contributed to the general fund of the SBCC.

Corrective Action for Enforcement Rights. If the Board determines that any Owner, Tenant, or Occupant is in violation of this Community Declaration, The Design Code, or the rules and regulations, or has failed to maintain any part of a Lot (including the yard and any wall, fence, or building for which the Owner is responsible) in a clean, attractive and safe manner, in accordance with the provisions of this Community Declaration, the Design Code or applicable rules and regulations, the Board shall notify the owner of its findings and may assess fines. If the violation continues for ten (10) days after notice to the owner, the SBCC shall have the right without liability to enter the Lot to correct, repair, restore, paint and maintain any part of such Parcel, including but not limited to landscaping, and to have any objectionable items removed from the Parcel. The Board may reduce or eliminate the time for notice if it believed the condition creates a hazard. All costs related to such action are to be assessed to the Owner as an Individual Lot Assessment. The Board may also assess a management fee for activities that it must take to correct, repair, restore, paint or maintain any part of such Lot on behalf of an Owner. If, in accordance with this section, authorized agents of the SBCC enter upon any Lot to abate or remove a violation or breach of this Community Declaration, the Design Code, or the rules and regulations, neither the Person entering the Lot nor the Person directing the entry shall be deemed liable for any manner of trespass for such.”

[55.] A review of Article 2 shows that the enforcement regime is highly structured and thematic. It is aimed at:

- Land-use and conduct covenants (design, maintenance, pets, nuisances);
- Behaviour within the community (noise, safety, aesthetics);
- Physical compliance with the Declaration, Design Code, and Rules;
- Corrective action (repair, maintenance, abatement);
- Administrative sanctions (fines assessed to the Lot, loss of common-area privileges).

[56.] Every enforcement power is triggered by one thing only:

**a “violation” of the Community Declaration, rules and regulations governing conduct or use of property.**

[57.] There appears to be a distinction between Article 7 and the enforcement powers under Article 2. Article 2 appears to relate to covenants governing land use or conduct,

whereas Article 7 appears to be a procedural bar limiting the remedies a homeowner may seek.

[58.] Article 7 excludes liability for damages; bars owners from suing or seeking equitable relief; regulates remedies, not behaviour; and operates externally to the community (in court). Starting a lawsuit does not affect common areas; does not degrade property; does not breach a land-use covenant; and does not trigger corrective action.

## **THE LAW AND AUTHORITIES**

[59.] The Declaration is a contractual instrument and must be construed in accordance with orthodox principles of contractual interpretation. The Court must ascertain the objective meaning of the language used, having regard to the document as a whole and its commercial context.

[60.] The Court's task is not to rewrite the parties' bargain, but neither is it to extend contractual powers beyond their proper scope nor to permit penal consequences without clear authorization.

[61.] As to issue estoppel, it is well established that for the doctrine to apply, the issue said to be estopped must have been distinctly raised and distinctly decided in earlier proceedings. A review of the Earlier Action did not reveal the Court deciding that, *by a breach of Article 7, the Defendants could employ Article 2 to levy a fine on the Claimants*. The ruling simply says that the agreement, including Article 7, binds the parties.

[62.] No party challenges the validity or enforceability of Article 7 of the Declaration. The Court therefore proceeds on the basis that the provision is binding in accordance with its terms. The issue before the Court is one of construction and application, not validity.

[63.] The Defendants argue that the Claimants breached Article 7 by initiating the Earlier Action. The relevant provision includes a negative covenant in which each owner agrees not to bring any action or suit against the Founder to recover damages or seek equitable relief related to the enforcement or non-enforcement of the Declaration.

[64.] Article 7 is more than just descriptive or aspirational. It is stated in binding terms and can, in principle, be breached if claims within its scope are initiated.

- [65.] The Earlier Action was partially concerned with issues arising from the enforcement or non-enforcement of the Declaration. In those circumstances, and as a matter of ordinary contractual analysis, there is merit in the Defendants' argument that the commencement of those proceedings was inconsistent with the undertaking contained in Article 7.
- [66.] It is, however, unnecessary for the Court to finally decide, for the purposes of this case, whether the start of the Earlier Action amounted to a breach of Article 7. I am willing to assume, in favour of the Defendants, that the Earlier Action fell within the scope of Article 7 and that the Claimants acted against that provision by initiating the Earlier Action
- [67.] Even on that assumption, however, the critical question remains whether the Declaration conferred on the Defendants any power to impose the impugned fines and individual lot assessments by reason of such conduct.
- [68.] I accept the Defendants' submission that, read literally, the phrase "violation of this Community Declaration, the Design Code, or the rules and regulations" is capable of extending beyond design-related breaches. That, however, is not the end of the matter. The question is whether, reading Article 2 fairly, as a whole and in context, it authorises the specific sanction argued for here.
- [69.] In the Court's opinion, Article 2, in its natural and ordinary meaning, does not authorise the recovery of legal fees in defending a concluded Supreme Court litigation, and it does not authorise the Defendants to sanction owners for any breach of Article 7. Article 2 addresses remedial and managerial enforcement within the community. Its structure is significant: attempted resolution by the Town Manager, notice of a Board meeting, an opportunity to be heard, the imposition of appropriate fines, and, where necessary, corrective action regarding continuing violations affecting the use, condition, management, or enjoyment of property. It is not naturally or fairly read as authorising the recovery, by way of fine or assessment, of legal expenditure incurred in defending concluded court proceedings in breach of Article 7.
- [70.] That conclusion is strengthened by the structure and language of the provision. It begins with the Town Manager's attempt at resolution. It then, if necessary, proceeds to notice of a Board meeting and an opportunity to be heard. It subsequently considers fines, temporary restriction of common-area privileges, and, where a violation persists, entry onto the lot to carry out repairs, restoration, painting, maintenance, or removal of objectionable items. The "costs related to such action" are then made recoverable as an individual lot assessment.

- [71.] Read in that context, the enforcement powers under Article 2 are naturally directed at breaches related to the use, condition, management, or enjoyment of property within the community, and at other community-based violations that can be practically addressed or resolved.
- [72.] The disputed fines do not match that description. They were not imposed to address ongoing physical, managerial, or community violations. Nor were they said to reflect any costs of corrective measures undertaken by the Defendants within the community. Instead, they were calculated based on legal fees claimed to have been incurred by the 1<sup>st</sup> Defendant in defending the Earlier Action.
- [73.] That is a substantially different issue. Article 7 is not, in its wording, a type of enforcement clause. It primarily serves as a defensive or exclusionary provision. It limits or excludes liability and includes a negative covenant by which owners agree not to initiate certain actions or suits.
- [74.] The natural method of relying on such a provision is procedural: for example, by submitting an application to stay or strike out the proceedings that violated Article 7. What Article 7 does not do, without explicit language, is establish a separate punitive or compensatory regime under which the Defendants may impose fines based on legal costs incurred.
- [75.] Nothing in the language of Article 7 explicitly states that initiating proceedings constitutes a sanctionable offence involving fines under Article 2. Nor does the Declaration include any explicit language authorising the Board to recover, through a fine or assessment, legal costs incurred in defending proceedings which the Court has already adjudicated.
- [76.] In a case of this kind, clear words are required before the Court can conclude that the parties intended to confer such extraordinary power. I find no such language in the Declaration.
- [77.] This approach aligns with traditional principles. Exclusion and limitation clauses specify or restrict legal liability. Such provisions function negatively by limiting access to certain remedies through striking-out or summary-judgment applications; they do not, without clear and explicit language, establish an independent sanctions or punitive regime. As *Lord Diplock* explained in **Photo Production Ltd v Securicor Transport Ltd** [1980] AC 827, exclusion clauses delineate the scope of obligations and liability and must be accordingly strictly interpreted. At page 850, he noted:

My Lords, an exclusion clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law. Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a

contract; and must not offend against the equitable rule against penalties; that is to say, it must not impose upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation. Since the presumption is that the parties, by entering into the contract, intended to accept the implied obligations, exclusion clauses are to be construed strictly, and the degree of strictness appropriate to their construction may properly depend upon the extent to which they involve a departure from the implied obligations.”

[78.] In my judgment, on a strict interpretation of the Declaration, neither Article 7 nor Article 2 conferred on the Defendants any authority to impose fines in the sum of \$261,482.94 by reason of the commencement of the Earlier Action.

[79.] That conclusion is reinforced by the clear language of Article 2 itself. A provision in Article 2 states that “*the primary goal of this Article is not to punish but to resolve problems.*” That statement conflicts with the Defendants’ arguments and interpretation of Article 2. The fines in question did not address any ongoing issue within the community. The Earlier Action had already been concluded. Essentially, the fines aimed to impose a monetary penalty for initiating that litigation.

[80.] Moreover, the selected amount was not linked to any abatement, repair, restoration, management, or other corrective steps under the Declaration. It was linked instead to the Defendants’ legal fees in the Earlier Action. In substance, therefore, the fines represented an attempt to replicate or recoup litigation costs.

[81.] That is impermissible on the language of the Declaration. It is also inconsistent with the costs order made in the Earlier Action, by which the Court ordered that each party shall bear their own costs. Absent the clearest contractual language, the Court cannot accept a construction which would permit a private body, by labelling a charge a “fine,” to achieve substantively what the Court declined to award by way of costs.

[82.] I therefore reject the Defendants’ submission that Article 2 authorised the impugned fines or individual lot assessments. Properly construed, Article 7 is defensive in character, and Article 2 does not transform an alleged breach of Article 7 into a basis for ex post facto monetary sanctions of the kind imposed here.

## Procedural Impropriety

- [83.] There is, in any case, an additional and separate difficulty for the Defendants. Even if the Declaration could authorise sanctions for the alleged breach, the power to impose such sanctions was explicitly conditioned on compliance with the procedure outlined in Article 2.
- [84.] That procedure is structured and mandatory. It contemplates attempted resolution by the Town Manager, followed, if the matter is not satisfactorily resolved, by notice of a Board meeting, consideration of the Town Manager's report, and an opportunity for the Occupant and Owner to be heard before any relevant action is taken. Those steps are not merely formal. They are conditions governing the lawful exercise of the enforcement power.
- [85.] The Claimants' evidence is that none of those steps occurred. Mr Atkinson expressly deposed that no report from the Town Manager was provided, no notice of any Board meeting was issued, and no opportunity to be heard was afforded before the fines were imposed on the Claimants.
- [86.] The Defendants do not refute that evidence. Ms Gascoigne does not depose to the effect that the contractual procedure was followed. Nor does she suggest that compliance with it was unnecessary.
- [87.] Based on the evidence before the Court, I am satisfied that the Defendants did not adhere to the procedural requirements outlined in the Declaration prior to imposing the contested fines and assessments. The supposed exercise of authority was therefore procedurally flawed and invalid.
- [88.] That conclusion aligns with established principles. When a contractual or domestic tribunal derives its authority from the parties' agreement, it must operate within and in accordance with the procedures specified in that agreement. In **Lee v Showmen's Guild of Great Britain** [1952] 2 QB 329, the Court of Appeal recognized that when a body exercising contractual powers fails to comply with the relevant rules and basic procedural fairness, its decision can be set aside.
- [89.] In **Lee v Showmen's**, the Court of Appeal held that Frank Lee should not have been expelled because the committee had acted outside the union's rules. *Denning LJ* gave the following concurring judgment:

“The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorizes it or the parties agree to it. The jurisdiction of the

committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract.

It was once said by Sir George Jessel M.R. that the courts only intervened in these cases to protect rights of property: see *Rigby v Connol*; and other judges have often said the same thing: see, for instance, *Cookson v Harewood*. But Fletcher Moulton L.J. denied that there was any such limitation on the power of the courts: see *Osborne v Amalgamated Society of Railway Servants*; and it has now become clear that he was right: see the compositors' case, *Abbott v Sullivan*. That case shows that the power of this court to intervene is founded on its jurisdiction to protect rights of contract. If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is ultra vires. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his; or to protect him in his right to earn his livelihood.....Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. **There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid.** They cannot stipulate for a power to condemn a man unheard. .... In the case of social clubs, the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club; and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules; but they will not otherwise interfere.”

[90.] The principle applies fully here. The Declaration required notice, a multi-level hearing process including a report from a town manager, and an opportunity to be heard before sanctions could lawfully be imposed. The Defendants did not observe that process. Instead, the Claimants were simply informed by correspondence from the Defendants' attorneys that a fine had been assessed and would be levied against their lots if not paid.

[91.] Accordingly, apart from the substantive limits of Articles 7 and 2, the impugned fines and assessments made by the Defendants constitute a procedural impropriety, rendering the fines and assessments invalid due to non-compliance with the enforcement regime established by the Declaration.

## The Equitable Rule Against Penalties

[92.] If, contrary to my primary conclusion, the Declaration could be construed as conferring a power to impose fines of this kind and assuming there was no procedural impropriety, I would in any event regard the impugned sums as unenforceable penalties. The obligation to pay them arose only upon the alleged breach of Article 7 and was therefore secondary in nature.

[93.] Further, the sums were not shown to be linked to any cost of curing, abating, or remedying an ongoing violation within the community. Rather, they were benchmarked against legal expenditure allegedly incurred in earlier litigation. In circumstances where the Earlier Action had concluded, and the Court had directed that each party bear its own costs, a charge of that character bears the hallmarks of a deterrent or punitive exaction rather than a proportionate means of protecting any legitimate interest in community management or contractual performance.

[94.] Although the parties did not extensively explore the point by specifically invoking the penalties doctrine, the enforceability of the contract was clearly before the Court. It is therefore essential to apply the relevant legal principles.

[95.] The test is stated in **Cavendish Square Holding BV v Makdessi** [2015] UKSC 67 at paragraph 32, where the Court held:

**“The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter.**

[96.] The penalties doctrine reflects equity’s long-standing refusal to permit private contractual fines to displace judicial remedies, to enforce provisions operating in *terrorem*, or to allow parties to stipulate punishment under the guise of contract. In **Cavendish**, the Court further wrote at paragraph 131:

“The doctrine of penalties is commonly expressed as involving a dichotomy between compensatory and deterrent clauses. In *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1446H-1447A, Diplock LJ even expressed the doctrine in terms of a rule of public policy that did not “permit a party to a contract to recover in an action a sum greater than the measure of damages to which he would be entitled at common law”.

- [97.] On the Defendants' own case, the obligation to pay the disputed fine arose only because the Claimants were said to have acted in breach of Article 7 by commencing the Earlier Action. If such a liability exists at all, it arises only upon breach. It is therefore a secondary obligation and falls within the scope of the penalty doctrine.
- [98.] The next question is whether the detriment imposed is out of all proportion to any legitimate interest that would have been available at common law. In my judgment, it plainly is.
- [99.] The sum selected was not tied to any cost of curing, abating, or remedying a continuing violation within the community. It was instead benchmarked to legal fees said to have been incurred in earlier litigation. The Earlier Action, however, had concluded, and the Court in that action dismissed both the claims and counterclaims and ordered that each party shall bear its own costs.
- [100.] That order represents the final and conclusive exercise of the Court's jurisdiction. It was determined that no party suffered a recoverable litigation loss. That conclusion is reinforced by the character of the sums claimed. The amounts imposed were benchmarked to legal fees said to have been incurred by the 1<sup>st</sup> Defendant in the Earlier Action. Yet in that litigation, the Court dismissed both the claims and counterclaims and ordered that each party shall bear their own costs. In those circumstances, the Declaration should not readily be construed as permitting the Board, by private sanction, to achieve substantially the same result as an inter partes recovery of costs after the conclusion of the proceedings.
- [101.] Against that baseline, any monetary fine imposed by the Defendants by reason of the commencement of the Earlier Action cannot be compensatory or restorative. Where the recognised costs loss is zero, any monetary fine is necessarily out of all proportion. Any fine imposed by reason of the commencement of the earlier proceedings necessarily exceeds that measure and is punitive in substance.
- [102.] Allowing the Defendants to fine the Claimants would enable the Defendants to recover a sum exceeding the measure of costs they are entitled to at common law.
- [103.] The Court's decision to dismiss the claims and to have the parties bear their own costs in the 1<sup>st</sup> Ruling is significant. It reflects the Court's final ruling on the parties' right to recover damages and litigation costs against each other in that case. Under those circumstances, the Defendants could not have a legitimate contractual interest in imposing a monetary penalty that effectively aims to reproduce the very costs the Court had refused to award.

- [104.] The impugned fines were therefore not compensatory, restorative, or protective of any legitimate community-management interest. They were punitive in substance. They imposed a detriment by reason of breach and in an amount benchmarked to prior litigation expenditure.
- [105.] A sanction of that character falls squarely within the concern addressed by the penalties doctrine. It is out of all proportion to any legitimate interest in performance and operating, in substance, as punishment.
- [106.] This conclusion is supported by the context in which the fines were levied. The alleged breach involved resorting to the Court. The proceedings had concluded. There was no ongoing state of non-compliance to address. No property condition required correction. No community facility needed protection. Imposing a monetary penalty in those circumstances served no purpose other than deterrence and punishment.
- [107.] In my judgment, therefore, even if the Declaration could create a liability to pay a fine for breach of Article 7, the particular fines imposed here would be unenforceable as penalties. In short, they were secondary obligations triggered by an alleged breach; they imposed a substantial monetary detriment; and they were out of all proportion to any legitimate interest capable of protection under the Declaration.
- [108.] This determination is reinforced by the Court's exclusive jurisdiction over costs. Once the Court made no order as to damages and ordered that each party bear its own costs, it conclusively determined that neither party was entitled to recover damages or litigation costs from the other. That determination is not discretionary in hindsight; it is final.
- [109.] To permit a contractual fine to be imposed by reason of the commencement of those proceedings would amount, in substance, to an indirect re-allocation of costs already resolved by the Court. The penalties doctrine exists, in part, to prevent precisely that kind of private circumvention of judicial control.
- [110.] As explained in **Cavendish**, the doctrine prevents private parties from imposing punitive consequences that usurp the Court's remedial and supervisory role. A sanction imposed to replicate costs that the Court has expressly declined to award is punitive in substance and impermissible in principle. The Defendants cannot, by characterizing the charge as a "fine" or "assessment," avoid the application of the equitable rule against penalties.
- [111.] Accordingly, the penalties doctrine provides a further and independent basis for holding the impugned fines and assessments invalid.

## Conclusion

- [112.] For those reasons, I conclude that the Defendants were not entitled to levy the impugned fines or individual lot assessments against the Claimants' properties.
- [113.] On the assumption that the commencement of the Earlier Action falls within the scope of Article 7 of the Declaration, on the proper construction of the Declaration, neither Article 7 nor Article 2 conferred any power on the Defendants to levy the impugned fines or assessments, still less sums benchmarked to legal costs incurred in concluded litigation
- [114.] Article 7 is properly construed as a defensive or exclusionary provision. Its operation is procedural in character. It does not, without clear and express language, create a punitive or compensatory regime enabling the Defendants to impose ex post facto monetary sanctions benchmarked to litigation costs.
- [115.] Secondly, and in any event, the contractual procedure required before any such sanction could be imposed was not followed, with the result that the exercise of the asserted power was invalid.
- [116.] In any event, even if the Declaration is accepted as conferring such power to fine, the impugned fines would be unenforceable under the equitable rule against penalties. They were secondary obligations triggered by an alleged breach and imposed a detriment out of all proportion to any legitimate interest in enforcement.
- [117.] The fines were therefore unauthorized, unenforceable, and of no legal effect. It follows that the Defendants were not entitled to withhold the Article 5 certificates by reference to those impugned fines or assessments.

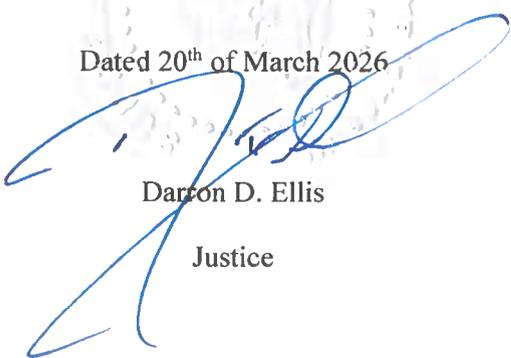
Accordingly, the Court makes the following orders:

- a) A declaration that the Defendants are not entitled to levy, assess, or impose fines or individual lot assessments against the Claimants at Schooner Bay arising out of any alleged breach of Article 7 by the Claimants, including for the purpose of recouping or mirroring legal costs incurred in Supreme Court Action No. 2016/CLE/gen/00845.
- b) A declaration that the fines and/or assessments amounting to a total of \$261,482.94 are invalid, unlawful, and unenforceable.
- c) An order that the 2<sup>nd</sup> Defendant shall, within seven (7) days of service of this Judgment, provide the Claimants with the certificates required pursuant to

Article 5, without reference to or inclusion of the impugned fines or assessments;  
and

d) The Court will hear the parties on the issue of costs.

Dated 20<sup>th</sup> of March 2026



Darfon D. Ellis

Justice