



Neutral Citation Number: [2025] CIGC (Civ) 26

**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
CIVIL DIVISION**

**Cause No: G 2024-0098**

**BETWEEN: EMBANKMENT INVESTMENTS LTD**

**Plaintiff**

**AND: ABBI-GAYLE PHURAN**

**Defendant**

**Before: The Honourable Justice Marlene Carter**

**Appearances: Mr. Nicholas Dixey of Nelsons Legal for the Plaintiff  
Mr Clayton Phuran of CP Attorneys for the Defendant**

**Heard: 16 July 2025**

**Draft Circulated: 21 August 2025**

**Judgment Delivered: 28 August 2025**

*Civil Division – Validity of Lease – whether lease agreement legally binding if signed copy not received  
by one party – reasonableness of late fees – liability for costs on indemnity basis*

### **JUDGMENT**

#### **Background**

1. The Plaintiff, Embankment Investments Limited, a company engaged in, amongst other things, property holding, was at the material time the registered proprietor of property located at #6 Elizabeth Villas, 81 Old Crewe Rd. George Town, Grand Cayman (hereinafter “the property”). The Defendant is a former tenant of the property.

*[2025] CIGC (Civ) 26 - Embankment Investments Ltd v Abbi-Gayle Phuran*

2. The Plaintiff's claim arises from the terms of a lease agreement dated the 5 June 2023 for the period 01 July – 30 June 2024, ("the 2023 lease") under which the Plaintiff claims it agreed to lease the property to the Defendant. The Defendant contends that the 2023 lease was never formally agreed.
3. The term of the 2023 lease was for a period of 12 months. The rent due thereunder per month was CI\$2,500 to be paid on the last day of each month. The 2023 lease required the Defendant to pay a security deposit of CI\$2,500 prior to the commencement of the lease. Given that the Defendant had been in possession of the property under a previous lease agreement, the Plaintiff held the sum of CI\$2,150.00 as a security deposit in June 2023. Therefore, the balance which was due at the commencement of the 2023 lease to be applied towards the security deposit was CI\$350.00. Apart from these charges, the Defendant would be responsible for the payment of electricity, water, TV/ Internet and telephone bills during the currency of the lease.
4. It was a clause of the 2023 lease that in the event rent was not paid by 5:00 PM on the fifth business day of each month, a late fee of CI\$30.00 per day would be charged to the tenant. The 2023 lease also included a provision that in any legal action the prevailing party was entitled to all costs incurred, including a reasonable attorneys fee.
5. A further term of the 2023 lease specified that if rent or charges remained unpaid for up to 14 days, the Plaintiff could give the tenant 14 days' notice to vacate the property. Failure to pay the outstanding rents or charges where notice had been given, would then lead to the Plaintiff being entitled to serve a notice in accordance with section 56 of the Registered Land Act [2018 Revision] ("the RLA") for the tenant to immediately vacate the premises.
6. It is the Plaintiff's position that the Defendant confirmed her agreement to the terms of the lease by endorsing her signature on the final page and initialing each page of the lease on the 21 June 2023. It is further contended that the lease was countersigned by REM Services Limited, agents for the Plaintiff ("REM") on 29 June 2023.
7. Prior to the 2023 lease the parties entered into two previous lease agreements. An initial agreement commenced on 1 July 2021. Under the terms of that 2021 lease the monthly rent was in the amount of CI\$2,100.00. A second lease commenced on the 1 July 2022 whereby the monthly rent increased to CI\$2,150 dollars. By the terms of the 2023 lease agreement the monthly rent would have increased to \$2,500.

*[2025] CIGC (Civ) 26 - Embankment Investments Ltd v Abbi-Gayle Phuran*

8. The Statement of Claim filed on 15 March 2024 states the manner in which the Plaintiff asserts that the Defendant breached the terms of the lease.

*“6. The Defendant has breached the terms of the Lease in that she: -*

- (a). Made only a partial rent payment of CI\$1,200 on 7 July 2023 and failed to pay the remaining CI\$1,300 due for that month;*
- (b) Failed to pay the additional security deposit of CI\$350 pursuant to Clause 4 as it fell due on 01 July 2023, or at all;*
- (c) Further, she failed to make any payments to the rent due on 01 August 2023, 01 September 2023 and 01 October 2023, incurring further arrears of CI\$7,500;*
- (d) Failed to pay the late charges that have accrued pursuant to Clause 6 as a result of her failure to make rental payments further to paragraphs 5(a) and (c) above, totalling CI\$7,380 to the date of the Writ;*
- (e) Left the premises in an unclean state of disrepair that required a professional cleaning company to deep clean the premises at an additional cost of CI\$561;*
- (f) Failed to pay the water utility bill as it fell due, leaving a sum outstanding of CI\$1,975.61 at 31 October 2023.”*

9. As a result of the alleged breaches, the Plaintiff served a notice to vacate on the Defendant on the 8 September 2023 thereby terminating the 2023 lease in accordance with section 56 of the RLA. The Defendant vacated the property on or about the 15 September 2023. A new tenant moved into the property on the 1 November 2023.
10. The particulars of loss and damage arising from the Defendant’s alleged breaches of the 2023 lease are set out at paragraphs 10 to 15 of the Statement of Claim. These particulars relate to outstanding rental arrears, unpaid utility and cleaning bills, late fees and legal expenses. The full extent of the Plaintiff’s claim is as follows: the amount of \$26,746.11; late charges of \$30 per day from the date of the claim to the date of judgment, interest from the date of the claim to the date of judgment and costs on an indemnity basis pursuant to clause 21 of the lease.
11. The Defendant’s position is that she owes only CI\$4,025 to the Plaintiff representing rental arrears from June 2023 to September 2023 when she vacated the premises. These the Defendant submits should be calculated as follows:

- “14. The Defendant admits to owing CI\$4,025 for rent from June 2023 to September 2023 at the rate of \$2,150 per month, as per the terms of the 28<sup>th</sup> June 2022 lease considering deductions for payments made by the Defendant of:
- a. CI\$1,200 paid in July 2023;
  - b. CI\$1,075 paid in September 2023;
  - c. The Defendant further asserts that the security deposit of CI\$2,300 as per Clause 4 of the Lease, should be applied towards reducing the outstanding amount.”

12. By Order dated, 08 October 2024, judgment on liability with damages to be assessed was entered on admissions made by the defendant and in accordance with GCR O.27, r.3.

### The issues

13. The issues as identified by the parties for the court’s determination are as follows:
- (i) whether the lease agreement dated the 1 July 2023 is valid and enforceable.
  - (ii) whether the Defendant is liable under the lease for unpaid rent, utilities, cleaning and legal fees.
  - (iii) whether the Plaintiff is entitled to recover late fees under clause six of the lease
  - (iv) the quantum of damages and interest due to the Plaintiff.
  - (v) whether the Plaintiff is entitled to costs on an indemnity basis pursuant to Clause 21 of the lease agreement.

### The Parties Submissions

#### Issue 1 – the validity of the lease agreement

14. The Plaintiff’s contention is that the 2023 lease was duly executed by the parties and as a result is legally binding. The Plaintiff points to the Defendant’s execution of the lease on 21 June 2023 as well as her subsequent conduct as being clear evidence that the Defendant intended to be bound by the terms of the lease. The Defendant signed and initialed each page of the 2023 lease and made a partial rental payment in July 2023. By these actions the Plaintiff states the Defendant unequivocally accepted the new agreement and cannot now deny its validity.
15. The Plaintiff referred the court to the case of *Reville Independent LLC v Anotech International (UK) Ltd*<sup>1</sup> (“*Reville*”) regarding the issue of a party’s conduct and whether such conduct can

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<sup>1</sup> [2016] EWCA Civ 443

[2025] CIGC (Civ) 26 - *Embankment Investments Ltd v Abbi-Gayle Phuran*

amount to an unequivocal acceptance. In the instant case, the Plaintiff contends that the Defendant's conduct goes beyond the threshold of acceptance by performance and affirms the binding nature of the lease agreement.

16. Regarding rental arrears and the security deposit, the Plaintiff's position is that the Defendant failed to pay the full amount of the rent which was due for July 2023 and further failed to make any other payments for the months of August, September and October 2023. A new tenant for the property was not contracted until 1 November 2023. As a result, the Plaintiff contends that the total loss for rental arrears is CI\$10,300. Having applied the amount of the security deposit towards those outstanding arrears, the balance claimed for rental arrears is in the amount of CI\$8,150.
17. The Defendant denies liability for the full extent of the relief sought by the Plaintiff. The Defendant's position is that she at all times acted in good faith. The Defendant does not dispute that she signed the 2023 lease document dated 5 June 2023 sent to her by R.E.M on the 21 June 2023. She also signed the assigned tenant change addendum to remove her former roommate's name from the tenancy document so that she became the sole tenant of the property on 29 June. However, the Defendant submits that despite her clear attempt to renew the lease the Plaintiff, via R.E.M, refused to execute the renewal of the 2023 lease, unless full payment of all arrears was made upfront.
18. The Defendant submits that she sought a copy of the signed lease from the Plaintiff but never received the same. As such, the Defendant asserts, the 2023 lease document signed on her part but not countersigned by the Plaintiff is an indication that there was no new lease agreement. For this reason, the Defendant submits that the relevant lease is the 2022 lease agreement. Further, she submits that when she remained in the property in July 2023 at the end of the 2022 lease agreement period, there being no completed new lease agreement, she remained holding over under the 2022 lease, holding over on the rental amount which was charged under that 2022 lease being CI\$2,150 and not CI\$2,500 the amount of rent under the 2023 lease.
19. Counsel for the Defendant invited the court to consider two authorities - *Unilever PLC v ABC International et al*<sup>2</sup> and *Equilibrio Solutions (Jamaica) Limited v Peter Jervis & Associates Limited*<sup>3</sup>, cases in which a party sought to enforce agreements that were not fully executed. The

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<sup>2</sup> [2008] CILR 78

<sup>3</sup> [2021] JMCC COMM. 26

[2025] CIGC (Civ) 26 - *Embankment Investments Ltd v Abbi-Gayle Phuran*

Defendant also referred to the cases of *Toomer v Hamilton and Sullivan*<sup>4</sup> and *Banks v Arch*<sup>5</sup> in support of that aspect of the submission regarding the attribution of payments or values received during a tenancy and how this should be applied to any rental arrears.

20. The Defendant's position was further amplified at paragraph 16 of the Skeleton Submission:

*"The Defendant submits that any shortfall in rent resulted from temporary hardship and was communicated transparently. The refusal to renew the lease and subsequent notice to vacate terminated the tenancy, and the Defendant complied fully with that termination; The Plaintiff [or its agent] failed in its obligations to communicate consistently and manage the tenancy with reasonable care, contributing to the current dispute."*

21. In light of the foregoing the Defendant denies that the Plaintiff is entitled to the amounts claimed for rental arrears.

## **Issue 2 - Outstanding utility payments**

22. Regarding the issue of the utility bills and the cost of cleaning, the Plaintiff contends that the Defendant failed to pay an outstanding water bill in the amount of CI\$1,975.61 and left the premises in a condition that necessitated professional cleaning which incurred additional costs of CI \$561.00.
23. The Defendant states that she was unaware of the amount of CI\$1,975.61 claimed by the Plaintiff for the water bill. The Defendant states that she paid all outstanding water bills for the property and that these charges were incurred for water usage after she had departed the property.
24. The Defendant confirmed that she was required to vacate the property by the 15 September 2023 and that she did so. Before she vacated the property, she had the apartment professionally cleaned the keys to the property were left on the kitchen counter and the unit secured. All of these facts were promptly communicated to REM. The Defendant denies that there was ever any need for further cleaning services as employed by the Plaintiff.

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<sup>4</sup> [2006] HCV 00955

<sup>5</sup> [2004-05 CILR 441]

[2025] CIGC (Civ) 26 - Embankment Investments Ltd v Abbi-Gayle Phuran

**Issue 3 – Late fees**

25. On the issue of late fees, the Plaintiff argues that pursuant to Clause 6 of the lease agreement, a late payment fee of CI\$30.00 per day to the date of filing of the claim was incurred by the Defendant. The Plaintiff contends that the terms of Clause 6 are clear and unambiguous and imposed a continuing obligation on the Defendant to pay the daily fee until the breach is remedied. The Plaintiff also submits that there is no language which limits the duration of that fee and that it accrues until payment is made or judgment is entered. Counsel for the Plaintiff in written submissions argued as follows:

“5.11 *D has not disputed the existence or validity of the Lease, nor has she provided any evidence to challenge the enforceability of the late fee clause. The Lease was voluntarily entered into, and the late fee provision was clearly stated and accepted.*

5.12 *In the Cayman Islands, landlords may impose late fees for overdue rent where such fees are expressly included in the lease. While the Landlord and Tenants Law (1998 Revision) does not specifically regulate late fees, it does not prohibit them. These matters are governed by general principles of contract law, which permit such fees provided they are reasonable and not punitive.*

5.13 *In the absence of statutory prohibition, the contractual terms will apply, unless they are unconscionable or penal. The later fee clause in this case is compensatory, not punitive, and reflects a reasonable consequence of delayed payment.”*

26. Counsel for the Plaintiff referred the court to the case of *Cavendish Square Holding BV v Makdessi*<sup>6</sup> (“*Cavendish*”) and *Dunlop Pneumatic Tire Company Ltd v New Garage and Motor Co Ltd*<sup>7</sup> (“*Dunlop*”) in support of this argument.

27. Counsel submits that the late fee charged by the Plaintiff is modest, directly linked to the inconvenience and administrative expense caused by a late payment and that it is neither extravagant nor unconscionable. As such there is nothing to prohibit the continuation of late daily fees up to the date of judgment. Additionally, counsel pointed to at least two instances during the previous year’s tenancy where the Defendant had taken issue with the Plaintiff after being charged a late fee and argues that the Defendant was well aware of the clause’s existence, well aware of how it was regulated as part of the lease, and had never argued that such late payment was unreasonable in any circumstances.

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<sup>6</sup> [2015] UKSC 67

<sup>7</sup> [1915] AC 79

[2025] CIGC (Civ) 26 - *Embankment Investments Ltd v Abbi-Gayle Phuran*

28. On this issue the Defendant disputes the Plaintiff's entitlement to claim late fees, submitting that the CI\$30.00 a day late fee is not a genuine pre-estimate of loss, and it should therefore be regarded as an unenforceable penalty which the Defendant is not obligated to pay. It is also argued on behalf of the Defendant that this fee is disproportionate to any loss suffered by the Plaintiff. The Defendant submitted that the CI\$30 late fee is punitive and disproportionate in the circumstances.

#### **Issue 4 – Legal Costs**

29. The Plaintiff's contention is that Clause 21 of the lease agreement entitles the Plaintiff to recover all costs incurred in connection with the instant action including a reasonable attorney's fee. He submits that this clause is a binding contractual term between the parties which was never challenged by the Defendant.
30. Counsel relies on the decision of the Grand Court in *Zhongzhi Capital (HK) Co Ltd v Geoswift Holdings Ltd*<sup>8</sup> and *Chaplain Ltd v Kumari*<sup>9</sup>. The latter is a decision of the Court of Appeal of England and Wales which upheld a landlord's right to recover legal costs on an indemnity basis under a lease clause. Counsel submitted that this decision reinforced the principle that clearly drafted contractual cost recovery provisions are enforceable.
31. The Defendant asserts with regard to legal costs that Clause 21 of the lease agreement states that the Plaintiff is only entitled to legal fees "*if it prevails*" in this action. The Defendant further asserts that the Plaintiff's claim was exaggerated, and that the Plaintiff is not entitled to the costs it seeks which include "reasonable attorney's fees".

#### **The evidence at trial**

##### *The evidence for the plaintiff*

32. For the Plaintiff, two affidavits of Colin Palmer, a senior property manager at REM, were filed and stood as evidence-in-chief. Mr. Palmer oversees the real estate Management team of REM which handles residential, commercial and industrial leasing and property management services for landlords and tenants. Mr. Palmer related that the facts detailed within his statements were based on various documents within REM.'s files and systems as he was not the person who was engaged in the negotiation for the 2023 lease between the Plaintiff and the Defendant.

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<sup>8</sup> [2021] CIGC (FSD) 132

<sup>9</sup> [2015] EWCA Civ 798

[2025] CIGC (Civ) 26 - *Embankment Investments Ltd v Abbi-Gayle Phuran*

33. Mr. Palmer related that according to REM.'s account statements the Defendant made a partial payment of rent of CI\$1,200 on the 7 July 2023. He confirmed that rental payments for August, September and October were not made. Mr. Palmer explained the application of late charges as per Clause six of the 2023 lease.
34. In relation to the other issues before the court, Mr. Palmer stated that when the Defendant vacated the premises it was in a state of disrepair, necessitating a professional cleaning company to carry out what he described as a deep cleaning of the property. He produced photographs which he stated confirmed this condition and accounted for the cost of deep cleaning in the amount of CI\$561.00. He related, as referenced above, the application of the security deposit towards the outstanding rental arrears.
35. Mr. Palmer confirmed that the water utility bill for the property was found to be outstanding in October 2023 in the amount of CI\$1,975.61 and confirmed as well that a new tenant moved into the property on 1 November 2023.
36. Mr. Palmer stated that the period of the water bill appeared to be from the 19 September to 26 October 2023. He stated that when the Defendant left the property, she did not give proper notice that she had vacated. However, he could say that by 18 September 2023 she was no longer on the property as this was the date upon which the deep cleaning of the property took place. The outstanding bill came to light when the water was disconnected at the property. Mr Palmer could not confirm that the sum was paid by the Defendant at the end of October 2023 in the amount of CI\$426.00 was in fact the total left outstanding when the Defendant departed the property.
37. When he was questioned by counsel for the Defendant, Mr. Palmer agreed that, up to 29 June 2023 there was no signed agreement between the Plaintiff and the Defendant. He confirmed that the renewal was to take effect from 1 July 2023 and stated that as far as he was aware the lease was signed by the landlord on 29 June 2023 and in place by 30 June 2023.
38. Mr. Palmer could not say when the Plaintiff was provided with a copy of the 2023 lease. Mr. Palmer was questioned about the photographs which were tendered as evidence of the need for a deep cleaning of the property. He related that those photographs were not photographs which were taken by him. He agreed that while there might be other relevant photographs, none of these had been

exhibited by him. He also agreed that the photographs that were exhibited to his affidavit did not show the state of the entire unit.

*The evidence of the defendant:*

39. The Defendant gave evidence at trial. Her witness statement dated 16 December 2024 stood as her evidence in chief. She explained that prior to July 2023 she rented the property with a friend. She had always paid the rent by the due date except in cases of unforeseen circumstances. One such unforeseen circumstance occurred in 2023, when she experienced a period of unemployment at the beginning of June that year.
40. The Defendant stated that the 2022 lease was due to expire at the end of June and she initially intended to renew the lease. She sent a signed copy of the lease renewal for the owner's signature in anticipation of her commencing new employment in July 2023. She stated that REM informed her that the lease would not be renewed until all outstanding rent arrears were paid. At this point there were outstanding rental arrears under the 2022 lease. She contacted the agency to explain her employment status and she was again told that the outstanding balance must be settled before the lease could be renewed. She stated that having no alternative accommodation she remained at the property until she was given notice to vacate in September 2023. She vacated the property within the seven days prescribed by the notice.
41. The Defendant also stated that she would usually go to the Water Authority to pay the water bill. She never received a physical water bill at the property. After leaving the apartment on 15 September 2023, she went to the Water Authority and paid the outstanding amount. She was unsure of the date that she made the payment, but she was adamant that she did so. She was not aware of the amount claimed for the outstanding water bill until she was served the statement of claim. She related that the water bill was usually approximately C\$55.00 per month and that she and her housemate would not pay it each month but would go periodically every few months to make the payments.
42. She related that when she left the property, she did a walkthrough, and she was satisfied that *"it was cleaned to the same level it was given to me."* She stated that, to her knowledge, none of the upholsteries was dirty, necessitating the cleaning evidenced by the Proclean invoice tendered by Mr. Palmer.

43. The Defendant stated that she never understood that there was a new lease agreement. This was because, *“In my mind I thought that the lease was not entered into, and it was continuing under the previous lease until a lease was confirmed.”*

### **Court’s findings and conclusions**

#### *Issue 1- The validity of the 2023 lease*

44. I find the following salient facts relevant to this issue.
- (i) The Plaintiff and the defendant had previously contracted for the Defendant to rent the property.
  - (ii) Previous lease agreements with substantially the same terms as the 2023 lease had been negotiated and agreed between the parties and had formed the basis of the tenancies for 2021-2023.
  - (iii) Between May – June 2023, the parties engaged in negotiations regarding the renewal of the lease of the property.
  - (iv) In May 2023, REM communicated to the Defendant that the Plaintiff was prepared to renew the lease at the increased rent of CI\$2,500 per month and increased security deposit by CI\$350.00.
  - (v) The Defendant was at this point in arrears of rent from the previous 2022 lease. The agent for the Plaintiff indicated that the rental arrears would need to be satisfied.
  - (vi) The Defendant considered the invitation to renew the lease on those terms.
  - (vii) The Defendant informed the Plaintiff that she would undertake any renewal of the lease as a sole tenant.
  - (viii) The Defendant considered the document sent to her by REM and signed it on 21 June 2023 as an offer made in the terms set out by the Plaintiff.
  - (ix) On 29 June 2023, in furtherance of the offer the Defendant submitted to REM a tenant change addendum document which the parties agree was necessary to show that the Defendant’s former roommate would not be a party to the 2023 lease.
  - (x) The 2023 lease at Clause 3 states as follows:  
*“RENEWAL: Any renewal or extension of this Lease must be in writing and signed by all parties hereto, their successors or assigns. Tenants MUST notify the Landlord in writing not less than thirty (30) days prior to the expiration of the Lease of their intention to vacate or renew for a further term. Should the tenant continue on possession of the Premises after the expiration of this Lease, without written extension or renewal hereof, such possession shall be on a month-to-month basis only and then under the same terms and conditions as*

*herein found except the Landlord has the exclusive right to give the Tenant a twenty-one (21) day notice to vacate without reason.”*

- (xi) The Plaintiff, through its agent REM, signed the lease on 29 June 2023.
- (xii) The Plaintiff did not provide the Defendant with a copy of the 2023 lease signed by all parties subsequent to 29 June 2023.

45. In *Reveille*, the main issue before the court was the circumstances in which a contract will result when a written offer states that it is not binding until it was signed by the offeree and the offeree does not sign but performs in a manner contemplated by the contract’s terms. The court considered the relevant rules of English contract law. At paragraph 40 of that judgment the court noted the following relevant principles:

- (i) *“...the parties’ consent to a contract in the acceptance of an offer, and it is well accepted that acceptance can be by the conduct of the offeree so long as that conduct, as a matter of objective analysis is intended to constitute acceptance: **Brogden v Metropolitan Railway Co***
- (ii) *Acceptance can be of an offer on the terms set out in a draft agreement drawn up between the parties but never signed.*
- (iii) *If a party has a right to sign a contract before being bound it is open to it by clear and unequivocal words or conduct to waive the requirement and to conclude the contract without insisting on its signature.*
- (iv) *If a signature is the prescribed mode of acceptance an offeror will be bound by the contract if it waives that requirement and acquiesces in a different mode of acceptance; Where signature as the prescribed mode of acceptance is intended for the benefit of the offeree and the offeree accepts in some other way, that should be treated as effective unless it can be shown that the failure to sign has prejudiced the offeror.*
- (v) *A draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly.*
- (vi) *The subsequent conduct of the parties is admissible to prove the existence of a contract, and its terms, although not as an aid to its interpretation.”*

46. The Court stated that these principles must be set against the need for certainty in commercial contracts and the protection of the reasonable expectations of honest, sensible businessperson.
47. When the plaintiff through its agent REM conducted negotiations for the previous 2022 lease [1 July 2022 – 30 June 2023], the parties had completed discussions and arrangements for that lease similar to those conducted between May and June 2023. At that stage the Defendant was changing the person with whom she shared the property so that a tenant change addendum was required. As well, the draft 2022 lease was forwarded to the Defendant, and she signed it with the new tenant and sent it on to the landlord for signature. At time the Defendant quite obviously considered that once she had completed that process, this was sufficient to complete the agreement for the 2022 lease between the parties. She communicated to REM then: *“Please provide us with a copy of both of the fully signed agreements for our records.”* [emphasis mine] This was not an inquiry as to whether the documents would be signed to complete the agreement.
48. When the 2023 lease was negotiated between the parties, a tenant change agreement was again necessitated as the Defendant was to be the sole tenant. The terms upon which the landlord was willing to let the property were communicated to her and by her signing the draft agreement which incorporated those terms it is evident that this was her offer to be bound by those terms. REM sent an email to the Defendant regarding a new lease on the 23 May 2023. This email clearly sets out the terms upon which the tenancy could continue under a new lease, the increased rent and the topping up of the security deposit by C\$350.00. In reply, on 25 May the defendant indicated: *“...I will continue the lease for another year.”*
49. By 5 June the Defendant had the draft agreement. By 21 June the Defendant had signed the renewed lease agreement and returned it to REM. However, the Tenant Change Document from the previous roommate had not been returned to REM. REM advised on 27 June in response to the Defendant seeking the signed renewed lease, *“I am awaiting the signed tenant change document from Tiffany, so that the lease issue in your name only can be issued.”* This was reiterated by email on 29 June in which REM stated: *“We require the fully signed tenant change document back to obtain landlord signature on the renewal lease agreement...”*. During this email exchange REM also stated: *“...also the outstanding balance needs to be settled...”*

50. The duly signed Tenant Change Document was sent to the Plaintiff on 29 June 2023. The 2023 lease document submitted by the Plaintiff during these proceedings shows that the Plaintiff's agent attached a signature on its behalf on the same date.
51. The Plaintiff's contention that she relies on the provision of clause 3 of the lease is unsustainable in the circumstances outlined above. As the authorities make plain, a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly. The Defendant did not have back a signed copy of the lease; however, the lease appears to have been signed by both parties by 29 June 2023. The Defendant had done all that she needed to do to complete the process.
52. While there was an indication that outstanding rental amounts needed to be paid, apart from stating this factual position, the Plaintiff did not thereby make it a condition that needed to be satisfied before the contract was formally concluded. The email in which the outstanding rent is discussed does not make it so. These two matters are distinct. All the terms of the lease had been agreed. The Plaintiff had set out the proposed changes that they would seek for the lease to go forward. The Defendant had taken those changes into account when she signed the draft. This was the offer made to the landlord. The landlord accepted that offer. It was only the signature that needed to be appended to the document, and this was dependent not on the payment of the arrears but on the fully signed tenant change document to confirm that the Defendant would be the sole tenant at the property.
53. It is disingenuous of the Defendant having gone through a similar process before and with full knowledge of the changed terms for the renewal of the tenancy to now seek to say that because she never had back a signed copy of the lease she was therefore holding over under the 2022 lease. There was no indication from the Plaintiff that it did not accept the Defendant's offer. There was nothing in the conduct of either party from which it could be implied that there was no agreement. In the circumstances of this case the fact that there was no further communication, the 2023 lease having been signed by both parties upon terms of which they were both aware and in agreement, there is no basis to say that the failure to forward a signed copy to the Defendant thereby vitiated the 2023 lease. While it is the case that the acceptance was not communicated to the Defendant, the reason for such a communication, in the usual course, is to ensure certainty on the part of the parties

- as to what was being contracted. In this case there was no uncertainty as to the new terms. The terms of the invitation were the very same terms offered and accepted.
54. *In Toomer v Hamilton and Sullivan*<sup>10</sup> the issues concerned the determination of a tenancy agreement. The claimant in that case alleged that he had leased land from the first defendant and that he paid rent for that land on a yearly basis. The first defendant sought to rebut the presumption that there was a concluded agreement between himself and the claimant. The first defendant, when he acquired the land, sought upon purchase to increase the rent from 700.00 to 30000 per year. At issue was whether the first defendant's offer to continue the tenancy at 1000,00 per acre was refused or accepted by the claimant. The court concluded that the conduct of the claimant showed that there was no consensus ad idem. There was no agreement regarding the amount of the rent to be paid. The court found that "*Rent must be certain or capable of being calculated with certainty at the date when payment becomes due. An uncertain agreement cannot be enforced.*"
55. In the instant case although the plaintiff states that there is no written agreement, the invitation to treat from the landlord was plainly set out, an increase in rent and an increase in the security deposit. The plaintiff signed the lease and thereby made an offer to the landlord on the same said terms. There is no uncertainty. There was consensus ad idem in this case. For this reason, *Toomer* is distinguishable from the instant facts.
56. In *Equilibrio Solutions (Jamaica) Limited v Peter Jervis and Associated Limited*<sup>11</sup>, the main issue related to the court's determination of whether the parties had reached agreement to constitute a valid contract. In that case there was an oral component to the case. There was not the "well written" contract like the 2003 lease agreement. The parties did not execute a written document at all. The court noted: "*the court is not required to practice alchemy and conjure a contract from thin air. What is necessary is of the Court to examine the evidence as to the terms which the parties have asserted for a part of the contract based on oral agreement and/or conduct.*" The court then determined "*to assess the interaction between the parties and deconstruct the agreement between them...in order to determine what constitutes the legal agreement.*"
57. In this case there is a written agreement. The question to be determined is whether the Defendant was unaware of the contents of that agreement by reason of the fact that she did not have returned

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<sup>10</sup> 2006 HCV 00955

<sup>11</sup> [2021] JMCC COMM. 26

[2025] CIGC (Civ) 26 - Embankment Investments Ltd v Abbi-Gayle Phuran

to her a copy of the agreement countersigned by the Plaintiff. The contract became binding once it was accepted by the Plaintiff, the Defendant having signed. There was nothing in the 2023 lease agreement that was changed or unfamiliar to the Defendant. This is not a case of revised terms or variation of terms. The 2023 lease agreement was in the terms which formed the Defendant's offer.

58. It is noteworthy that when the Defendant did not receive a copy of the 2023 lease, she did not then seek to withdraw her offer. This was because she knew that the 2023 lease was the basis upon which she now remained at the property. As counsel for the Plaintiff stated, the Defendant was concerned that she would have to leave the property and sought to ensure that she did all that was required for the 2023 lease to have legal validity. She did all that the Plaintiff had deemed necessary for the Plaintiff to sign the lease and this is in fact what happened. Once the Defendant returned the signed draft lease and the Tenant Change Addendum the Plaintiff completed the transaction.

59. There was never any communication from the Plaintiff, subsequent to those email communications demanding payment of outstanding rents, before the lease was signed. I find that the email reminding the Defendant of outstanding rent arrears under the 2022 lease was just that, a simple reminder of an outstanding liability. The Defendant, on her own evidence, had up to this time been a model tenant. She had communicated her financial difficulties to REM in June 2023, yet the Plaintiff signed the 2023 lease on 29 June 2023. There was a clear intention to maintain the relationship despite the outstanding rent arrears. The Defendant remained at the property unchallenged. She remained there under the terms of the signed 2023 lease.

60. The 2023 lease is a validly enforceable document. The Defendant is liable under the lease for unpaid rents from July to October minus the part payment made in July 2023 of CI\$1,200.00. The security deposit which remained in the Plaintiff's possession for the 2022 lease is also to be applied to those payments.

*The outstanding water bill*

61. The Defendant bears no responsibility for outstanding water charges in the amount of CI\$1,975.61. The Defendant departed the property on 15 September 2023. There is no evidence, indication or submission that she remained there or indeed returned to the premises after that date. The water bill tendered into evidence shows that an outstanding bill for CI\$426.00 was paid on 26 October 2023. The Defendant stated that she was unclear that this is the amount that was paid after she departed the property. What is clear is that the Plaintiff did not pay this amount.

[2025] CIGC (Civ) 26 - Embankment Investments Ltd v Abbi-Gayle Phuran

62. The water bill confirms and corroborates the Defendant's evidence that the monthly bills were consistent in terms of the level of consumption over the years that the Defendant rented the property. This level of consumption was, according to the Defendant's evidence, approximately CI\$50- \$55.00 per month. The bill represents an exceptionally large increase in consumption. This increase has not been explained by the Plaintiff. The salient point, however, is that it occurred after the Defendant had vacated the property. This aspect of the claim for CI\$1,975.61 fails.

*The cleaning bill*

63. The Defendant produced invoices for payments for cleaning the property on the date of her departure. The evidence of Mr. Palmer that the property was left in a state of disrepair is not borne out by the photographs produced to support this assessment. I accept the Defendant's evidence that she left the property as she had found it. If the only evidence that could be provided was of minute scraps left behind a couch in the property or of a minor water stain on the cooktop, this is not sufficient to satisfy this court on a balance of probabilities that the property was left in a state of disrepair to the extent that necessitated the deep clean that the Plaintiff undertook. The Plaintiff could offer nothing to disprove or go behind the invoices submitted by the Defendant for cleaning services on the property on the date of departure, further undermining this aspect of the claim. For these reasons this aspect of the claim in the amount of CI\$561.00 also fails.

*Late fees*

64. The Plaintiff claims late charges of CI\$30.00 per day from the date of the writ to the date judgment is entered. Clause 6 of the 2023 lease states as follows:

*"LATE CHARGES: In the event that the rent and /or any expenses incurred by the Tenant are not received prior to 5.00 pm on the 5<sup>th</sup> business day of the month, regardless of cause, a late fee of CI\$30.00 per day will be charged. In the event that the Tenants' check is returned or dishonoured, the Landlord will charge the tenant a penalty equal to 5% of the overdue amount. Should the rent or charges remain unpaid for 14 days regardless of cause, a 14-day notice of vacate will be issued."*

65. The Defendant had been charged late fees during the term of the 2022 lease. As accepted by the Plaintiff at trial, many of those late charges were issued incorrectly. The exhibited emails between the Defendant and various representatives of REM from that period show the Defendant having to make inquiries and request corrections to REM's ledger in respect of outstanding charges due from

her. Mr. Palmer accepted that the system appeared to post a late fee on the fifth day of the month if the rent was not paid, whereas the lease provided that the late charge would only be imposed if the rent and/or any other expenses required to be paid by the Defendant was not received prior to 5:00 pm on the 5<sup>th</sup> business day of the month.

66. The Plaintiff submitted that this was overwhelming support for its contention that the Defendant was aware of the operation of that provision, and she had never complained about it being unreasonable or onerous. Counsel for the Plaintiff submitted that there was never an agreement for forbearance concerning the late fees and that the obligations of the Defendant continue until payment is made or judgment is entered. As of the date of the writ, the late fees were CI\$3,480.00.
67. Counsel for the Plaintiff submitted that the landlord was entitled to impose a late fee for overdue rents where such fees were expressly included in the lease. Counsel's comments refer to the fact that the *Landlord and Tenant Law (1998 Revision)* does not specifically regulate late fees, nor does it prohibit them. He argued that the imposition of the late fee was governed by the general principles of contract law which permit such fees to be charged, which are reasonable and not punitive. He went further to state that in the absence of statutory prohibition, the contractual terms under the lease would apply unless they were unconscionable or penal. Further, while the late fee in this case was not compensatory, it was not punitive as it reflects what is in effect a reasonable consequence for delayed payment of rent. Counsel referred to the case of *Cavendish*. It was submitted that the key test that the courts must look at is whether the clause protects a legitimate business interest and whether it is proportionate to that interest. In this case, the Plaintiff argues that it has a legitimate interest in ensuring the timely payment of rent; that the fee is modest, commercially justified and proportionate in the circumstances.
68. The Defendant submits that the late fee is a penalty. Counsel also relies on *Cavendish* in this regard. In *Cavendish* the court stated that the question whether a damages clause is a penalty "*falls to be decided as a matter of construction.*" In reviewing the penalty clause, the court noted that it was first felt that a provision could not be a penalty unless it provided an exorbitant alternative to common law damages. The court accepted the pronouncement of Lord Roskill in *Export Credits Guarantee Department v Universal Oil Products*:

*"[P]erhaps the main purpose, of the law in relation to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by*

*[2025] CIGC (Civ) 26 - Embankment Investments Ltd v Abbi-Gayle Phuran*

*the plaintiff as a result of the breach by the defendant. But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain.”*

69. The court recognized that *“the classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it.”* In determining what makes a contractual provision penal, the court referred to **Dunlop** and to the speech of Lord Dunedin and the four tests formulated by him in that case:

*“Lord Dunedin formulated four tests ‘which, if applicable to the case under consideration, may prove helpful, or even conclusive’ they were*

- (a) That the provision would be penal if “the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach”*
- (b) That provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum;*
- (c) That there was “a presumption (but no more)” that it would be penal if it was payable in a number of events of varying gravity;*
- (d) That it would not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss.”*

70. The court recognized that while this speech has *“achieved the status of a quasi-statutory code in the subsequent case-law”* these tests were not meant to be entirely determinative and did not take away from the essential question to be considered, whether the clause impugned was unconscionable or extravagant. The court also clarified that the four tests are *“a useful tool for deciding whether these expressions can properly be applied to simple damages clauses in standard contracts, but they are not easily applied to more complex cases.”*

71. Later in that judgment, the court stated at paragraph 31:

*“In our opinion, the law relating to penalties has become the prisoner of artificial categorization, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and deterrent. These distinctions originate in an overliteral reading of Lord Dunedin’s*

[2025] CIGC (Civ) 26 - Embankment Investments Ltd v Abbi-Gayle Phuran

*four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field.”*

72. It also pronounced:

*“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.”*

73. Counsel for the Defendant’s submission that there was no liability for late fees because the Defendant did not remain on the premises under the 2023 lease but was holding over at the end of the 2022 lease are not accepted given the court’s determination of Issue 1. The late fee is not extravagant or unconscionable. It is proportionate to the interest of the Plaintiff. In this case proportionate to the payment of rent which at the relevant time was in the amount of CI\$2500.00. The late fee for a full month would amount to CI\$30 x 30 or CI\$900.00. This represents a proportional or alternative remedy to performance of the Defendant’s primary obligation which is to pay the rent in the sum contracted at the time that it was due for payment each month under the 2023 lease. I find that the late fee is not a penalty. The Defendant is liable for late fees. These late fees are payable from the time that they first became due, the fifth business day after 1<sup>st</sup> July 2023 to the date of judgment.

#### *The indemnity clause*

74. Clause 21 of the 2023 lease states:

*“ATTORNEY FEES: In any legal action brought by either party to enforce the terms hereof or relating to the Premises, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney’s fee.”*

75. In ***Zhongzhi Capital*** Ramsey Hale J, as she then was, held that where a contractual entitlement to an indemnity clause is clear and unambiguous, the court should ordinarily exercise its discretion to give effect to that right.

*“59. The cases establish that where there is a contractual provision covering all costs, charges and expenses in enforcing an agreement, the discretion should ordinarily be exercised so as to reflect that contractual right. In my view,*

*[2025] CIGC (Civ) 26 - Embankment Investments Ltd v Abbi-Gayle Phuran*

*there is no tension between the provisions in O.62 r.4(11), that litigation costs in the conventional case should not be awarded on an indemnity basis unless there is some conduct justifying it, and the exercise of the Court's statutory "power to determine by whom and to what extent the costs are to be paid" to give effect to an agreement made between the parties that costs of enforcing that agreement should rest with a particular party. It is consistent with the overriding objective of the Rules to deal with matters justly.*

60. *In the present case, unlike the cases of **Weaving** and **John**, ZZHK's right to be indemnified in costs is clear. Indeed, Geoswift has not suggested that it would have any defence to such a claim. I consider the appropriate order to be one that reflects ZZHK's contractual entitlement, and I order that Geoswift pay ZZHK's costs on an indemnity basis, including the costs of the costs application."*

76. The question of whether the Plaintiff is only entitled to legal fees if it prevails in the action was another issue considered in **Zhongzhi**. The court found that it could award such fees if the prevailing party has acted reasonably throughout the litigation. *"If the claim or defense is found to be unreasonable, the court may award costs on a more generous indemnity basis."*

77. The Defendant submitted that the Plaintiff's claim was inflated, particularly with respect to late fees, legal costs and utility charges, all to bring the claim within the jurisdiction of the Grand Court. This was the basis of the Defendant's argument regarding the unreasonableness of the Plaintiff's actions. The Defendant did not seek to argue that Clause 21 does not equate to an award of costs on an indemnity basis.

78. As alluded to in **Zhongzhi**, the court seeks to smooth the tension between clear contractual terms and the discretion of the court on application for an award of indemnity costs by looking to what was agreed between the parties. The 2023 lease was entered into freely by the parties. There is no ambiguity as to the terms of Clause 21. That the Defendant may not have placed too much emphasis on its effect as she sought to ensure that she remained on the property does not take away from its clear intent and meaning.

79. The Plaintiff's claim has been shown to have merit. It was necessary to bring the action to enforce the terms of the 2023 lease, the existence and validity of which the Defendant denied. The fact that the Plaintiff's claims for utility payment for water and for cleaning of the property have been

rejected does not equate to the claim being deemed unreasonable. Even without these parts of the claim, the action would have been one that could have been brought in the Grand Court.

80. The legal action brought by the Plaintiff having succeeded in part, the extent to which the Plaintiff is entitled to all costs incurred in connection with the action arises now to be determined. On the basis that the Plaintiff succeeds regarding rental arrears, late fees and costs, even as it fails on its claim for utility payments and the cleaning bill, the court will give effect to the clear contractual terms of the 2023 lease. The plaintiff will be awarded the costs of the action on an indemnity basis to include reasonable attorney's fees.



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**Hon. Mrs. Justice Marlene Carter**  
**Judge of the Grand Court**