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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ONE VIRGINIA AVENUE CONDOMINIUM ASSOCIATION OF OWNERS, Plaintiff/ Counterdefendant, v. JOSEPH P. REED and MICHELE L. REED, Defendants/, Counterplaintiffs,	)	Civil Action No. 18726-NC
JOSEPH P. REED and MICHELE L. REED, Third-Party Plaintiffs, v. ONE VIRGINIA AVENUE CONDOMINIUM COUNCIL, Third-Party Defendant.	)	

MEMORANDUM OPINION

Submitted: April 25, 2005
Decided: August 8, 2005

Gary A. Bryde, Esquire, GARY A. BRYDE, P.A., Hockessin, Delaware, *Attorney for Plaintiff, Counterdefendant and Third-Party Defendant*

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PARSONS, Vice Chancellor.

The subject of this action is a dispute regarding condominium fee assessments between a condominium association and the owners of the commercial area of the development. Plaintiff and counterclaim defendant, One Virginia Avenue Condominium Association of Owners (the "Association"), seeks payment of unpaid fees along with penalties assessed for nonpayment. Defendants and third party plaintiffs, Joseph and Michele Reed (the "Reeds"), deny all liability. In addition, as owners of the commercial area, the Reeds filed a Counterclaim and Third Party Complaint against the Association and third party defendant One Virginia Avenue Condominium Council (the "Council"), seeking a declaration that the Association and Council's assessments charged against the commercial area are improper and that the commercial area must receive all services that are charged to it as common expenses on par with the residential units.

This matter was filed on March 12, 2001. It was tried on September 10, 2004, and argued on April 25, 2005. This Memorandum Opinion reflects the Court's post-trial findings of fact and conclusions of law.

I. FACTS

One Virginia Avenue (the "Condominium") is located on the boardwalk in Rehoboth Beach, Delaware. It was originally developed by Commonwealth Trust Company ("Commonwealth"). The condominium was established under the Delaware Unit Properties Act (the "Act")[1] by a Declaration dated January 8, 1973. The affairs of

[1] 25 *Del. C.* § 2201 *et seq.*

the Association are governed by the Council, an elected body, under the Declaration and the related Code of Regulations ("COR").

The Condominium includes 105 residential units, one manager's unit, three commercial spaces (collectively, the "Commercial Area"), and common areas. The Declaration describes the Condominium's common elements and apportions their ownership among the residential units and the Commercial Area. The percentages were set in relation to the value of each unit's improvements relative to the Condominium as a whole. The Association uses these percentages when assessing condominium fees for common expenses. The components of the common expenses charged to the Commercial Area are at the center of this litigation. The Commercial Area was apportioned 3.813% of the common elements—more than double the share of any other unit.

The Condominium utilizes a centralized heating and cooling system (the "Central System") to service the common areas, the manager's unit and the residential units. To control the temperature of individual residential units, each unit has a fan or blower to control the flow of hot or cold air from the Central System. Each unit's fan or blower motor is operated by electricity that is individually metered, and that expense is included in each residential unit owner's own utility bill. All expenses related to the operation of the Central System, however, have been treated as a common expense. In other words, nearly the entire cost of heating and cooling the residential units is treated as a common expense and borne by all owners, including the owner of the Commercial Area, according to their share of the common elements. The Commercial Area does not receive heating

and cooling from the Central System. Instead, the Commercial Area is serviced by a separate system that the Reeds own and maintain. Thus, notwithstanding the fact that the Reeds provide their own heating and cooling for the Commercial Area, they are charged 3.813% of the cost to heat and cool the residential areas.

The Commercial Area has been treated differently than the residential units in other ways, as well. The Reeds and their tenants are not allowed to use the pool, a declared common element. The Reeds also cannot park in the Condominium. The Commercial Area's heating and cooling units, however, are located in the garage and obstruct a number of parking spaces.[2]

A. The Commonwealth Action

After developing the Condominium, Commonwealth retained ownership of the Commercial Area as Trustee for the Rehoboth and One Virginia Avenue Trust. While it owned the Commercial Area, Commonwealth had a number of disputes with the Association regarding charges for common expenses and services received. On October 13, 1983, Commonwealth filed a Complaint against the Council alleging that it had failed to provide insurance for the Commercial Area's heating and cooling equipment

[2] The parties dispute how many *usable* parking spaces the heating and cooling units obstruct. They seem to agree that between two and five spaces are blocked by the low hanging equipment. After evaluating the testimony at trial and reviewing the photographs of the parking garage (*see* the Pl.'s Trial Ex. ("PX") S and the Defs.' Trial Ex. ("DX") SSSS), I find that the Reeds' equipment does in fact occupy and obstruct a number of parking spaces that otherwise could be used to park cars or for other storage. Although the precise number of spaces is disputed and difficult to determine precisely from the evidence, I find that at least three usable spaces are obstructed.

and had improperly charged Commonwealth for the heating and cooling of the residential units while not providing heating and cooling to the Commercial Area (the "Commonwealth Action").[3] Commonwealth sought (i) $8,169.64 for the cost to repair the damaged air conditioning elements; (ii) a judgment equal to the past, present and future assessments related to providing heating and cooling to the residential units; and (iii) a declaratory judgment that the Council not assess Commonwealth for any services that benefit the residential units to the exclusion of the Commercial Area.[4]

On May 14, 1992, the parties reached a settlement agreement (the "Settlement Agreement").[5] Under the agreement, Commonwealth received a payment of $4,000 and the Council agreed to insure the air conditioning units. In addition, the parties signed mutual releases agreeing to release all claims they had or might have asserted arising out of the alleged acts or omissions involved in the action[6] and entered into a Stipulation of Dismissal.[7] The releases between Commonwealth and the Council were, by their terms, made binding upon the parties and their successors. The Settlement Agreement, however, was never recorded in the Commercial Area's chain of title. After the

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3 PX A.

4 *Id.* at OVA 01861.

5 PX B.

6 PX C.

7 PX D.

settlement, Commonwealth continued to pay a full 3.813% of the common expenses in addition to paying separately for the Commercial Area's heating and cooling.[8]

B. The Reeds' Purchase of the Commercial Area

On January 14, 1999, Commonwealth and the Reeds entered into a contract for purchase of the Commercial Area. On March 31, 1999, Commonwealth and the Reeds entered into a deed to transfer ownership, and on June 2, filed a corrective deed (the "Deed"). The Deed refers to the Commercial Area as "that certain unit known as Unit No. A in the Condominium Project known as One Virginia Avenue . . . ." In connection with the "proportionate undivided interest totaling 3.813% in all common elements" that the Deed transferred, the Reeds agreed "to pay such charges for the maintenance of, repairs to, replacement of and expenses in connection with the common elements as may be assessed from time to time by the Council in accordance with the Unit Property Act . . . ."[9]

Before purchasing the Commercial Area, the Reeds received the recorded condominium documents, the leases for the Commercial Area and the Condominium's

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[8] The Reeds have objected to all documents relating to and discussion of Commonwealth's payment of condominium fees as not relevant under D.R.E. 401. For their part, the Association has objected to scores of the Reeds' exhibits on relevancy and timeliness grounds. Unless otherwise noted, the Court finds all documents relied upon in this opinion relevant and timely produced. Regarding evidence of Commonwealth's payment of common expenses after the settlement of the Commonwealth Action, I overrule the Reeds' relevance objection. Because the Reeds presented no contrary evidence, I find that Commonwealth did make those payments, as alleged by the Association.

[9] Deed (JX 1) at 1–2.

budget. Even before purchase, the Reeds considered the condominium fees high and cited that fact in a negotiation letter sent to Commonwealth's real estate agents.[10] Mr. Reed also had a conversation with the Condominium's manager, Prouse, in which she informed him that "other than the general Condominium maintenance that we do, there were no specific services provided for him."[11] The parties disagree about who initiated this conversation and whether it took place just before or just after closing of the purchase on March 31. I find Prouse's recollection on this point more reliable and find that the conversation occurred just before the closing. I further find that Prouse did inform Mr. Reed that the Commercial Area was not provided parking in the garage, but never specifically discussed utilities, or heating and cooling with him. Therefore, although the Reeds believed the condominium fees were high, they had no actual notice before closing of exactly what services were covered and how they related to the Commercial Area's access to the Condominium's common elements.[12]

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10 PX G.

11 Tr. at 28 (Prouse).

12 Mr. Reed explained that "[a] high condo fee . . . among real estate investors is viewed as a negative just because someone else is spending the money for you and they typically don't do as good a job." Tr. at 155–56 (Reed). Reed didn't inquire further, however, explaining at trial: "You don't really have any control over it. If there's 105 units in there and it's run properly, you know, I assume that it must be, you know, a reasonable exchange for services received versus payments made." Tr. at 154–55 (Reed).

Soon after closing, Mr. Reed sent a letter dated June 21, 1999, to the Association.[13] The letter enclosed payment of the second and third quarter assessments for 1999 in full, but stated that he had concerns regarding the equity of the assessed charges. He explained that he wanted an opportunity to discuss the situation with the Council, but had been informed that his next opportunity would not come until the September meeting. The Reeds were never contacted by the Council and never received notice of the September meeting. On or about February 5, 2000, the Reeds sent another letter complaining about being assessed for common expenses that they did not consider common.[14] The Association again failed to respond to the Reeds' requests to discuss the assessments. On July 28, 2000, the Reeds made a payment in connection with their assessments for the fourth quarter of 1999 and the first three quarters of 2000.[15] In computing the amount of that payment, the Reeds included the full assessments for each of those quarters and then deducted an amount representing the Commercial Area's heating and cooling expenses from the date of their purchase in April 1999 through June 2000. Their reasoning was that if they were to be charged for the residential units' heating and cooling, the Commercial Area's heating and cooling should also be treated as a common expense. For each quarter from the fourth quarter of 2000 on, the Reeds paid

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13 DX D.

14 DX E.

15 DX UUUU.

the amount of the assessment for that quarter less $2,200.00 for heating and cooling expenses of the Commercial Area.[16]

On March 12, 2001, the Association filed this suit. On March 22, 2001, the Association's counsel, Thomas D. Whittington Jr., sent a letter to Mr. Reed, proposing that he continue to make similar partial payments subject to "the understanding of counsel that it is a payment of an amount acknowledged by your clients and that the payment by your clients and receipt by my client will not affect the outcome of the legal issue."[17] Whittington also explained that continuation of the prorated payments would "make it easier for my client to continue providing access and services as it has in the past." Thereafter, the Reeds continued to prorate their payments, and included a note along with the payments that they were "[p]er our agreement."[18] The Association,

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16 For example, an October 15, 2001 letter (DX 13) enclosing the Reeds' prorated payment of the fourth quarter assessment, explained the amount paid as follows:

4th Quarter 2001 assessment	$3,440.66
Water & sewer assessment	$ 128.70
Less: heating and cooling expenses	-$2,220.00
NET DUE	$1,349.36

17 DX BBBBBBB. The Association objects to this letter on hearsay grounds. I deny the objection because Whittington was the Association's attorney and his statements are admissions by a party-opponent under D.R.E. 801(d)(2)(D).

18 *See, e.g.*, DX HHHHH. I overrule the Association's relevance and hearsay objections to this document. It has not been admitted for the truth of the matter asserted.

however, continued to assess penalties on the prorated payments, even after Whittington's letter.

At some point in 2002 the Association's accountants were told not to cash the Reeds' partial payments.[19] Thereafter, the Association refrained from cashing at least six checks from the Reeds and purported to charge the Reeds penalties on the full amount due without giving them any credit for the checks that had been tendered but not cashed.

C. The Delaware Unit Properties Act

The Act applies to real property, owners and lessees where the parties have submitted a development to the Act by duly recording a declaration.[20] The Act defines a "Condominium" as "any multi-unit Condominium or Condominiums or complex . . . intended for use for residential, commercial or industrial purposes or for any other lawful purpose or for any combination of such uses."[21] A "unit" is defined as:

> a part of the property designed or intended for any type of independent use which has a direct exit to a public street or way, or to a common element or common elements leading to a public street or way, or to an easement or right-of-way leading to a public street or way, and includes the proportionate undivided interest in the common elements which is assigned thereto in the declaration or any amounts thereof.[22]

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19 Tr. at 85–89 (Smith).

20 25 *Del. C.* § 2203.

21 25 *Del. C.* § 2202(1).

22 25 *Del. C.* § 2202(14).

Under the Act, "'Common elements' means and includes . . . [t]he land on which the Condominium is located and portions of the Condominium which are not included in a unit . . . ."[23] In other words, everything other than a "unit" is a "common element" and condominiums under the Act are comprised of only those two components.

The Act also defines three circumstances under which expenses can be treated as "common expenses." Section 2202(4) states:

> (4) "Common expenses" means and includes:
>
> a. Expenses of administration, maintenance, repair and replacement of the common elements;
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> b. Expenses agreed upon as common by all the unit owners; and
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> c. Expenses declared common by provisions of this chapter or by the declaration or the code of regulations.

Thus, under the Act, there are two types of common expenses: expenses attendant to the common elements and any other expense that can be treated as a common expense based on either (i) agreement by all unit owners or (ii) declaration by the Act or the condominium's declaration or code of regulations.

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[23] 25 *Del. C.* § 2202(3)(a). This type of regulatory approach is common, as "[t]he condominium statutes have always contemplated only two types of property that are subject to condominium ownership: units and common elements." Mark F. Grant and Brooke D. Davis, *RIS Investment Group, Inc. v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes: Condominium Associations Cheated: The Fourth District Denies Assessments Imposed Upon Developer-Owned Unconstructed Condominium Units*, 22 Nova L. Rev. 437, 455–56 (1997).

D. The Declaration and COR

The Declaration for the One Virginia Avenue Condominium was recorded on or about January 8, 1973. It defines the Condominium as consisting of "the units, the common elements and the commercial areas."[24] The Declaration describes the Condominium's common elements and assigns ownership percentages of them among the units and the Commercial Area. The Declaration states that the Commercial Area owns 3.813% of the common elements, more than double the ownership interest of any of the residential units. The Declaration further states that the "[h]eating and/or cooling systems for any of the common elements and cooling towers, shall be general common elements."[25] Neither the Declaration nor the COR, however, specifically describes any common expenses.

The COR outlines the structure of the Condominium's governing body, which is to consist of a Council of between three and five members. Among the Council's duties is "[c]ollection of monthly assessment from the unit owners for proper common expenses."[26] Assessments are to "be made pro-rata, according to the value of the unit owned, as stipulated in the Declaration" and the Treasurer is empowered to "employ any lawful means provided by the laws of this State for the collection of a debt to collect such monthly assessment from any owner."[27]

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[24] Decl. (JX 2) at 597.

[25] Decl. § 4(s).

[26] COR (JX 3) Art. IV, § 3(c).

[27] COR Art. VI, § 1.

The Declaration and COR are drafted somewhat loosely and reveal a number of inconsistencies, both internally and with respect to the Act. Central to this case is the fact that at times the Declaration appears to differentiate between the Commercial Area and the "units," while at others it does not.[28] The Reeds rely on that distinction to argue that the Commercial Area was not intended to be a "unit" and therefore was not intended to be subject to assessments to be collected "from the unit owners."[29] The Association admits that the Condominium's documents were inartfully drawn, but insists that the Commercial Area must be considered a "unit" because condominiums only consist of units and common elements.

Interpreting the Declaration as a whole, and in the context of the COR, the Act and the Deed, I find that the Commercial Area was intended to be treated as a unit, and more to the point, to be subject to assessments. The Reeds have not suggested what, if not a unit, the Commercial Area was intended to be. Under the Act, condominiums only consist of units and common elements. Thus, although the Declaration sometimes refers to the Commercial Area and the "units" separately, I conclude that the drafters of the Condominium's documents intended the Commercial Area to be a unit within the meaning of the Act.

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[28] *See, e.g.*, Decl. at 597 ("The project consists of the units, the common elements and the Commercial Area.") & § 3 (Description of Units: The condominium shall consist of One Hundred Six (106) units in a Condominium of five stories, in part, and of eight stories in the remaining part. . . .").

[29] COR Art. IV, § 3(c).

The most persuasive evidence in support of that conclusion is language directly evidencing an intent to subject the Commercial Area to assessments. The Declaration establishes the original relative values of the units "in order to determine a percentage share of each unit in the expense of and rights in the elements held in common . . . ."[30] Therefore, the Declaration's apportionment of 3.813% of the common elements to the Commercial Area strongly evidences an intent to subject the owners of that area to assessments. It would be unusual, to say the least, to grant rights to common elements without a duty to pay a proportionate share of expenses, and vice versa. The COR further supports this view, stating that "assessments shall be made pro-rata, according to the value of the unit owned, as stipulated in the Declaration."[31] The Reeds' Deed also supports this interpretation, because it conveys a 3.813% interest in the Common Elements and contains a covenant to pay a corresponding share of assessments.

In sum, the Declaration, COR and Deed all manifest an intent to subject the Commercial Area to assessments. For that reason and the fact that the Commercial Area must be considered a unit under the Act, I find that the Commercial Area is a unit and subject to assessments.

E. The Dispute

The Association contends the Reeds have an absolute obligation to pay all condominium fees assessed by the Council, including a 3.813% share of the heating and

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30 Decl. § 5.

31 COR Art. IV, § 1.

cooling expenses of the residential units. The Association seeks payment from the Reeds of the unpaid condominium fees and penalties, a permanent injunction forcing the Reeds to pay condominium fees as they are assessed, and an award of the Association's attorneys' fees.

The Association advances a number of arguments to support its requested relief. First, it contends that the Reeds are barred by either res judicata or collateral estoppel from asserting that the costs associated with heating and cooling are not common expenses. Second, the Association argues that the Reeds are equitably estopped from contesting the assessments because initially they paid the condominium fees in full, thereby conceding their responsibility for the full amount of the assessment. Third, according to the Association, the Reeds' acceptance of the Deed wherein the Reeds covenanted to pay their proportionate share of all assessments levied by the Council created a binding contract that this Court is not empowered to reform.

The Association contends the fees assessed the Commercial Area are proper in light of its interpretation of the Declaration and COR. Moreover, the Association argues that the Reeds failed to investigate adequately what services were included in the condominium fees and should have known that they would be charged a portion of the heating and cooling expenses of the residential units.

In addition to denying certain allegations of the Complaint and raising various defenses, the Reeds filed counterclaims against the Association. As stated in the Pretrial Stipulation and Order (p. 26), they seek, among other things, a "[d]eclaration that the assessment of heating and cooling expenses are not an authorized common expense."

The Reeds also seek a declaration that the Commercial Area is entitled to use common elements, such as the parking lot and the pool, in a manner commensurate with the proportional share of the common expenses that they bear.

The Reeds challenge the validity of the assessments charged the Commercial Area on the ground that the heating and cooling of the residential units may not properly be charged as a common expense. They also dispute the make-up of the assessments on equitable grounds. The Reeds deny that the Settlement Agreement applies to them for a number of reasons, including among others, untimely production, lack of notice and lack of a final judgment for purposes of res judicata and claim preclusion. Finally, the Reeds dispute the Association's power to levy penalties on late assessment payments, or in the alternative, argue that the penalties charged by the Association exceeded the statutory limit.

II. ANALYSIS

A condominium declaration and its accompanying code of regulations together form a contract between the unit owners under the statutory framework of the Delaware Unit Properties Act.[32] Where the language of the contract is clear and unambiguous, this Court will accord that language its ordinary meaning.[33] The Court's interpretation should

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32 *Council of Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 5 (Del. 2002).

33 *Id.*

give effect to every term of the instrument, and if possible, reconcile all of the provisions of the instrument when read as a whole.[34]

There are two primary issues in this case. One is whether the common expenses charged to the Reeds by the Association are proper under the Unit Properties Act and the One Virginia Avenue Condominium Declaration and COR. The other is whether the Reeds are barred from challenging the assessments for common expenses on any of the various theories advanced by the Association. Before examining the propriety of the assessments themselves, I will address the Association's arguments for precluding the Reeds from even raising those issues.

A. The Association's Preclusion and Estoppel Arguments

The Association contends that the Commonwealth Settlement precludes the Reeds from disputing the assessments under the doctrines of res judicata and collateral estoppel.[35] It argues that the Reeds are bound by the Settlement, notwithstanding their lack of notice, because notice is not a factor in res judicata or collateral estoppel

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34 *Id.* at 7.

35 The Reeds urge the Court to disallow these defenses in their entirety as untimely, because the Association did not disclose the existence of the Commonwealth Action until one week before the Association filed its summary judgment motion (over three years after this action was filed). The Reeds, however, have not presented any evidence that they suffered any prejudice as a result of the delay in the Association's development of these defenses. Based on that fact, the absence of any evidence of bad faith on the part of the Association and the general preference for resolving matters on the merits, as opposed to procedural grounds, I deny the Reeds' request to strike the defenses of claim and issue preclusion on timeliness grounds.

analysis.[36] The Association also argues that the Reeds are barred by equitable estoppel from withholding payment of any portion of the condominium fees. The Reeds disagree and argue, among other things, that: (i) being successors in interest to Commonwealth does not mean they are privies of Commonwealth under either res judicata or collateral estoppel; (ii) as a bona fide purchaser without notice they are not estopped by any act, conduct or declaration that would have supported an estoppel against their grantor; and (iii) the Settlement does not constitute a final judgment for the purposes of either res judicata or collateral estoppel.

1. Res judicata or claim preclusion

Under the doctrine of res judicata or claim preclusion, a party is foreclosed from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties.[37] The doctrine of res judicata holds that a final judgment on the merits by a court of competent jurisdiction may be raised as a bar to a second suit on the same matter by the same party, or her privies.[38] The preclusive effect of the judgment extends to all claims which were or could have been litigated in the earlier proceeding.[39] The elements of the defense of res judicata are: (1) the claim in the second action must be the same as in the first action; (2) the prior judgment must be a

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36 *See* Pl.'s Opening Post-trial Br. at 18.

37 *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).

38 *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 184 (Del. 1959).

39 *See Trans World Airlines, Inc. v. Hughes*, 317 A.2d 114, 118 (Del. 1974).

final personal judgment in favor of one of the parties; and (3) the parties to the second action must be parties or privies of parties to the first action.[40]

Although there are some differences, the claims asserted by the Reeds in this case include at least some of the claims advanced in the Commonwealth Action. The key issue in determining whether that action should have any claim preclusive effect on the Reeds, however, depends upon whether a final judgment was ever entered in the Commonwealth Action. The rules of res judicata are applicable only when a final judgment is rendered.[41] The Association contends that the Commonwealth Settlement, Releases and Stipulation of Dismissal constitute such a final judgment. The Reeds deny that those documents, individually or collectively, suffice to bar them from pursuing their claims.

The Commonwealth Action sought, *inter alia*, a declaratory judgment in Superior Court invalidating the manner in which the Association was levying assessments on the Commercial Area and handling certain insurance issues. The Association, in response, denied Commonwealth's allegations, thereby implicitly claiming that their assessments were valid and authorized. The Court never decided the controversy because the parties entered into the Settlement.

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40 *See id*. at 119. The predecessor and successor relationship between successive owners of an interest in property is one of the pre-existing legal relationships that may involve "privity." *See* Restatement (Second) of Judgments § 62, cmt. a & § 43 (1982).

41 Restatement (Second) of Judgments § 13 (1982).

According to the Association, the Stipulation of Dismissal of the Commonwealth Action with prejudice acts as a final adjudication on the merits[42] and, together with the Settlement Agreement and Releases, qualifies as a final judgment.[43] The only one of those documents filed with the Court and made of public record in the Commonwealth Action was the Stipulation of Dismissal.[44] It simply states that: "all claims of plaintiffs and defendants which were asserted or could have been asserted in this action are hereby dismissed in all respects with prejudice." The claims and potential claims of both parties to the Commonwealth Action included questions concerning the assessment for condominium fees covering heating and cooling expenses for residential units and the practice of not providing heating and cooling services to the Commercial Area. For example, Commonwealth's complaint sought, among other things:

> [A] declaratory judgment against the Council prohibiting it from making any further assessments against Commonwealth for the cost of heating, cooling and insuring the residential units, or otherwise providing benefit only to the residential units, unless heating, cooling, insurance and all other benefits for the cost of which Commonwealth is assessed, are likewise extended for the use and benefit of Commonwealth.[45]

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42 Pl.'s Opening Summ. J. Br. at 12. Before trial, the parties filed cross-motions for summary judgment and briefed those motions extensively. Both sides incorporated by reference in their post-trial briefs the legal arguments in their respective summary judgment briefs.

43 *Id*.

44 As the Association acknowledges, the Stipulation of Dismissal did not require the signature of the Court.

45 Commonwealth Compl. at ¶ C.

The defendant Council, of course, could have asserted a counterclaim for a declaratory judgment to the opposite effect. Thus, in my opinion, the public record in the Commonwealth Action, and particularly the Stipulation of Dismissal, fails to indicate what, if any, issues could be said to have been finally adjudicated on the merits by the Settlement.

Similarly, the Settlement Agreement provides no clear indication of the parties' intent in terms of preclusive effect as it relates to the issues now being raised by the Reeds. Paragraph 1 of the Agreement states: "It is expressly understood that this settlement is made in compromise of disputed claims and is not an admission against interest by either party." After reflecting the parties' agreement to execute the Releases and the Stipulation of Dismissal, the Settlement Agreement provides that the Council would pay Commonwealth $4,000 (¶ 4) and provide insurance coverage for the air conditioning units for the Commercial Area and that Commonwealth would not claim in the future that such units are "common elements or facilities under the condominium documents" (¶ 5). The Agreement further provides that: "Commonwealth shall have continuing repair, operating, maintenance and replacement responsibility of the [air conditioning] units to the extent there is no coverage under the flood insurance policy." Under paragraph 6 of the Settlement Agreement, the Council undertook additional obligations for two other air conditioning units and any units installed to replace those units. Thus, the Settlement Agreement specifically addresses certain insurance-related concerns, but makes no mention of the parties' dispute regarding the assessment of fees in connection with heating and cooling expenses for the residential units.

The only other Commonwealth Settlement documents that the Association relies on are the two Releases, which are identical in form. Under them, the parties mutually released "any and all manner of claims, actions, or proceedings of any nature which [each] . . . has, or could have claimed against any and all Releasees arising out of the alleged acts and/or omissions which are the subject of claims asserted in the [Commonwealth] Action."[46] The Releases further provided that each party "further agrees not to sue or institute any action of any kind in any court … on any of the claims released in this Release."[47] At a minimum, these Releases precluded the parties from seeking any relief with respect to conduct that occurred before the Action was settled. As in the case of the Settlement Agreement, however, the Releases are ambiguous, at best, in terms of the parties' intentions as to future suits to determine their respective rights regarding the treatment of expenses for heating and cooling of the residential units.

In sum, based on a careful review of the Commonwealth Settlement documents, I conclude that they are not entitled to the same force and effect as a final judgment on the merits. For this reason alone, I conclude that the Reeds' claims are not barred by the doctrine of claim preclusion.

The only case cited by the Association in support of its contention that the Settlement Agreement documents constitute a final judgment was *IBP, Inc. v. Tyson*

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46 PX C & D.

47 *Id.*

Foods, Inc.[48] But the *IBP* case is readily distinguishable. *IBP* involved an attempt by Tyson to rescind or terminate a merger agreement and cross-claims by IBP for specific performance and other relief. After a nine-day trial, the court issued a lengthy opinion addressing a multitude of arguments. The opinion rejected, for example, a claim by Tyson that IBP fraudulently induced the merger agreement. The court ordered specific performance of the merger, but left open for further consideration whether Tyson also was responsible in money damages for any injury caused by the delay resulting from its actions. Thereafter, the parties reached a settlement and submitted an "Order and Final Judgment" which the court entered.[49] Tyson later moved to vacate the post-trial opinion based on fears that plaintiffs in certain federal actions would seek to use the fact findings in the opinion to support their claims. The court denied that request, noting that through the settlement Tyson voluntarily forfeited its right to appeal the opinion. In holding that there was a final judgment, the court relied heavily on the intent of the parties as evidenced by the title of the document and the surrounding circumstances.

In this case, the parties to the Commonwealth Action entered into the Settlement Agreement, but never filed it with the Court or asked the Court to enter any form of consent order or judgment reflecting specific findings or conclusions on the merits. Furthermore, the settlement documents did not reflect an intent by the parties to

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[48] 793 A.2d 396, 400–01 (Del. Ch. 2002).

[49] *Id.* at 400.

effectuate a final judgment with the broad preclusive effect the Association now seeks. Thus, the *IBP* case is inapposite.

The doctrine of res judicata or claim preclusion only applies to final judgments because its application can levy a harsh result. The Commonwealth Action related to an interest in property. The parties to that action probably could have settled their dispute in a way that would have included a final judgment and offered preclusive effect. To do so, however, they would have had to make that intent and the scope of the desired preclusion clear.[50] The Commonwealth Settlement did not satisfy those requirements.

2. Collateral estoppel or issue preclusion

The related doctrine of collateral estoppel or issue preclusion precludes a party to a second suit involving a different claim or cause of action from the first from relitigating an issue necessarily decided in a first action involving a party to the first case.[51] Collateral estoppel provides that, "where a question of fact essential to the judgment is litigated and determined by a valid and final judgment, the determination is conclusive between the same parties in a subsequent case on a different cause of action."[52] To

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[50] Although the Reeds were not parties to the Commonwealth Action, the Association contends they are "the successors in interest of the Commonwealth Trust Company by virtue of their acceptance of the Deed to the commercial area from Commonwealth." Pl.'s Opening Summ. J. Br. at 12. The Reeds dispute this argument and deny that being successors in interest makes them privies of Commonwealth. Having concluded that there was no final judgment in the Commonwealth Action, I need not resolve this issue.

[51] *Betts*, 765 A.2d at 534.

[52] *Columbia Cas. Co. v. Playtex F.P., Inc.*, 584 A.2d 1214, 1216 (Del. 1991) (quoting *Tyndall v. Tyndall*, 238 A.2d 343, 346 (Del. 1968)).

establish its defense of issue preclusion, the Association must prove the existence of the following four elements: (1) the issue previously decided is identical to the issue presented in this case; (2) the prior action was fully adjudicated on the merits; (3) the party against whom the doctrine is invoked (*i.e.,* the Reeds) was a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[53]

For the reasons discussed in connection with the Association's res judicata argument, I find that it has failed to demonstrate the existence of at least the first two of these four elements. The Commonwealth Action was not fully adjudicated on the merits. In addition, the Settlement Agreement documents provide no indication that any issue regarding the propriety of certain assessments for heating and cooling of residential units was decided in the Commonwealth Action. Therefore, the Reeds are not foreclosed by the doctrine of collateral estoppel or issue preclusion from challenging the assessments in question in this action.

3. Equitable estoppel

The Association also contends that the Reeds should be equitably estopped from contesting the assessments. It argues that equitable estoppel should apply because initially the Reeds tendered full payment for the assessments. The Association's arguments fail, however, because it has not proven any of the components of an equitable estoppel claim.

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[53] *Betts*, 765 A.2d at 535.

For an equitable estoppel to apply, it must be shown "that the party claiming estoppel lacked knowledge or the means of obtaining knowledge of the truth of the facts in question, relied on the party against whom estoppel is claimed, and suffered a prejudicial change in position as a result of that reliance."[54] The Association does not allege that it lacked knowledge of the Reeds' disagreement with the assessments, and in fact, the full payments were accompanied by a letter explicitly reserving the Reeds' right to contest the fees.[55] Moreover, the Association does not allege that it relied on or suffered any prejudice as a result of the Reeds' alleged assent. Therefore, the Association has failed to present any basis for application of equitable estoppel in this case.

Thus, I find that the Reeds are not barred from asserting that the costs associated with heating and cooling the residential units are not common expenses. I now turn to that issue.

B. The Assessments

Under the Act, "common expenses" fall into two categories: (i) "expenses of administration, maintenance, repair and replacement of the common elements,"[56] and (ii) any other expense that has been agreed to by all unit owners or is named specifically by

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54 *Burge v. Fidelity Bond & Mortg. Co.*, 648 A.2d 414, 420 (Del. 1994) (citing *Wilson v. Am. Ins. Co.*, 209 A.2d 902, 903–04 (Del. 1965)).

55 *See* July 21, 1999 Letter from Mr. Reed to the Association, DX 10 ("This payment shall in no way be construed as my acceptance of the assessments nor as a waiver of my rights to contest the assessments.").

56 25 *Del. C.* § 2202(4)(a)

the Act, declaration or code of regulations.[57] The Reeds contend that the heating and cooling of the residential units cannot properly be treated as a common expense. The Association contends that the assessments are proper because the Central System is a designated common element[58] and because all of the unit owners have agreed to treat heating and cooling as a common expense.[59]

In terms of the heating and cooling system, section 4(s) of the Declaration specifically identifies the following as a common element: "Heating and/or cooling systems for any of the common elements and cooling towers."[60] The Association contends that this designation allows it to treat the use of the Central System as a common expense, presumably as a declared common expense under § 2202(4)(c).[61]

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57 25 *Del. C.* § 2202(4)(b) & (c).

58 Pl.'s Summ. J. Reply Br. at 12.

59 Pl.'s Post-trial Answering Br. at 11.

60 The Declaration's definition of "common elements" contains no other reference to the heating and cooling system.

61 The Association has not argued that heating and cooling of the residential units may be treated as a common expense under § 2202(4)(a). I agree that section is not controlling, but it does highlight the distinction between common elements and common expenses. Section 2202(4)(a) defines "[e]xpenses of administration, maintenance, repair and replacement of the common elements" as "common expenses." By definition, the residential units are not common elements. In this case, however, it is the *operation* of an arguably common element (the Central System) to the benefit of private elements (the residential units) that is at issue. To find that the operation of the Central System to heat and cool the residential units constitutes a common expense under § 2202(4)(a), this Court would have to conclude that the General Assembly intended "administration" to encompass "operation." I reject that interpretation for several reasons.

Section 4(s), however, specifically refers to heating and cooling systems for the *common elements*, without referencing the units. In fact, there is no mention of heating and cooling of the units anywhere in the Declaration or the COR. Thus, although the Central System for heating and cooling the Condominium includes certain common elements as designated in section 4(s), that section does not state that the entire Central System is a common element. Furthermore, section 4 merely identifies common elements, not common expenses. I therefore conclude that nothing in the Act, the Declaration or the

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First, "[t]here is a presumption that the legislature intends a distinction between terms when different terms are used in the same statute." *Rockford Park Condo. Council v. Biancuzzo*, 1984 WL 19481, at *3 (Del. Ch. Sept. 20, 1984). The Act uses "administration" and "operation" as distinct terms. For example, under the Act rules govern the details of the use and operation of the property (§ 2208(9)), while regulations govern the method of administration of the property (§§ 2206, 2208). The separate usage of these two terms implies that the legislature intended "administration" and "operation" to have distinct meanings. Therefore, "administration" cannot be interpreted to subsume "operation" within the meaning of § 2202(4)(a). Second, § 2202(4)(a) itself is rather precise in its wording. For example, maintenance, repair and replacement are all related terms, and maintenance loosely construed could include both repair and replacement. Thus, it would be incongruous to interpret "administration" broadly when the other terms in the section seem to be used narrowly. In addition, there is at least some evidence that practitioners in the field have recognized the Act's distinction between "administration" and "operation" and have responded to it by adding the term "operation" to the standard statutory language when drafting condominium declarations. *See, e.g.*, *Council of Dorset Condo. Apts. v. Gordon*, 787 A.2d 723, 727 (Del. Ch. 2001) (condominium's declaration describes the common expenses as: "The expenses which have been incurred or shall be incurred for the maintenance, repair, replacement, management, operation and use of the Common Elements . . ."); *Council of Wilmington Condo. v. Wilmington Ave. Assocs., L.P.*, 1997 WL 817843, at *9 (Del. Super. Oct. 24, 1997) (declaration defines common expenses as "(2) The expenses of administration, operation, maintenance, repair and replacement of the Common Elements").

COR, designates heating and cooling of the residential units as a common expense, and that the Association's reliance on § 2202(4)(c) is misplaced.

In the alternative, the Association argues that all of the unit owners agreed to treat heating and cooling of the residential units as a common expense under 25 *Del. C.* § 2202(4)(b). Specifically, the Association contends that the Settlement ratified Commonwealth's assent to pay a portion of the residential units' heating and cooling expenses. I also find this argument unpersuasive for several reasons.[62]

First, the Settlement Agreement fails to manifest Commonwealth's agreement to be charged for services only benefiting the residential units. As discussed above, the Settlement Agreement does not declare what expenses are to be charged to Commonwealth as common expenses, or reflect an agreement by Commonwealth and all other unit owners to treat heating and cooling of the residential units as a common expense. In fact, the Settlement Agreement is silent regarding the assessments.

The Association argues that Commonwealth's continued payment of full assessments after the settlement evidences the existence of an agreement between the Association and Commonwealth. I consider this argument weak because merely continuing to pay does not foreclose the possibility that Commonwealth continued to

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[62] I need not determine, and express no opinion on, whether the residential unit owners have agreed to treat their heating and cooling as a common expense within the meaning of § 2202(4)(b). The lack of agreement by the Reeds, or by Commonwealth in a manner that would bind successors in interest such as the Reeds, to treat those expenses as common expenses to be paid pro rata by the owners of the Commercial Area is sufficient to defeat the application of § 2202(4)(b) in the context of this case.

object to the payments but found it financially imprudent to contest the matter further. I therefore find that the Association has failed to prove that Commonwealth ever agreed to pay a portion of the residential units' heating and cooling expense as a common expense.

Even assuming *arguendo* that Commonwealth agreed to the current make-up of the assessments within the meaning of § 2202(4)(b), the Reeds would not be bound by Commonwealth's assent. In appropriate circumstances, an agreement to pay condominium fees may run with the land and be enforced by a court of equity as an equitable servitude.[63] To establish that a covenant runs with land in equity, it must be demonstrated that "(1) the claimed restrictive covenant 'touches and concerns' the land, (2) the original covenanting parties 'intended' to create a binding covenant, and (3) the successor to the burden had 'notice' of the covenant when he acquired his interest in the subject property."[64]

The Reeds had no actual notice of the purported agreement between the Association and Commonwealth. Moreover, the Reeds cannot be charged with constructive notice because the Association failed to amend the Condominium's documents or record the Settlement Agreement in the Commercial Area's chain of title.[65]

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63 *See Atkinson v. B.E.T., Inc.*, 1984 WL 159375, at *3 (Del. Ch. Dec. 4, 1984); 9 *Powell on Real Property* § 60.01[5] (Michael Allan Wolf ed., 2002).

64 *Van Amberg v. Bd. of Governors of Sea Strand Assoc.*, 1988 WL 36127, at *6 (Del. Ch. Apr. 13, 1988).

65 The Association seems to contend that the Reeds should be charged with inquiry notice based on their knowledge, for example, that the budgeted electrical expense was high. The Association argues that the Reeds' primary motivation for the purchase was emotional and that they failed to do adequate due diligence. The

Thus, as bona fide purchasers without notice, the Reeds are not bound by any agreement between Commonwealth and the Association that otherwise could be construed as an equitable servitude upon the Commercial Area. In sum, the Association has failed to prove that it has any basis to assess the Commercial Area for heating and cooling of the residential units.

C. Use of the Common Elements

The Reeds complain that they have been denied use of common elements such as the parking garage and pool. The Association argues that the Reeds' heating and cooling system occupies a number of parking spaces, satisfying any right they have to use the parking garage, but admits that the Reeds have not been given use of the pool.

> Reeds, however, did conduct substantial due diligence before entering into the purchase agreement, and performed the requisite title search. Because the Condominium's documents were not available to them before entering into the contract, the Reeds made review of the documents a condition of the purchase agreement. Ultimately, they procured and reviewed the Commercial Area's leases, Declaration, COR, and the Condominium's budget. In addition, according to Prouse, Mr. Reed contacted her to inquire about the condominium fees and the services provided before closing on the purchase. Notably, Prouse testified that as the Condominium's property manager she normally is not contacted by prospective purchasers doing due diligence. Prouse also explained that in her other capacity as a realtor, selling three or four of the Condominium's units per year, nobody has ever inquired into the cost of electricity charged the units.
>
> The Reeds' investigation, however, never uncovered either the disputed billing practices or the Settlement Agreement. I find that the information available to the Reeds before the purchase of the Commercial Area did not reasonably require any further inquiry as to the treatment of heating and cooling expenses for the residential units.

Under the Declaration and Deed, the Commercial Area owns a 3.813% share of the common elements.[66] The Association has not pointed to anything in the Condominium documents that justifies denying the Commercial Area access to common elements, such as the parking garage and the pool, or indicates that its owners would be denied such access. There is no requirement that all units be treated the same, because the establishment of a condominium is a matter of private contract.[67] Any significant differences in treatment, however, should be reflected in the Condominium's documents or related records accessible to owners or prospective owners.

Based on the absence of any evidence of an agreement to the contrary, I find that the Reeds have a right to use of the parking garage and pool, as common elements, on par with all other unit owners. With respect to the parking garage, the Reeds' heating and cooling equipment currently occupies a number of parking spaces. The Reeds have not presented any persuasive evidence establishing that they are entitled to more spaces than they currently use. For that reason, I conclude that they have not been denied their right to use the parking garage.

As to the pool, the parameters of the Reeds' rights to use the pool may be difficult to prescribe in view of the differences between a residential unit and the Commercial Area. Those rights presumably would not exceed the usage rights enjoyed by the owners

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66 Decl. § 5.

67 *Cf. Henlopen Acres v. Potter*, 127 A.2d 476, 481 (Del. Ch. 1956) (unequal maintenance assessments need not have a reasonable basis because they arise from a private contract).

of a typical residential unit. The details of that question will need to be addressed in the first instance through negotiations. Alternatively, the parties might agree to continue the practice of denying the Commercial Area access to the pool in exchange for some other concession.

D. Amount Currently Owed and Penalties

Having established that the Association may not charge the Commercial Area for expenses related to heating and cooling the residential units as a common expense, this Court is presented with the unenviable task of determining the parties respective rights in light of the Reeds' withholding of payments, the Association's improper assessments, and the penalties or interest applicable to any owed amounts.

1. The Reeds' withholding of payments

The Association has argued throughout this litigation that the Reeds have the absolute and unconditional obligation to pay condominium assessments. The Reeds respond that their prorated payments were proper because the unconditional duty to pay only extends to *lawful* assessments. Moreover, the Reeds argue, the cases cited by the Association address a different situation from the case at bar: they involved owners that had taken set-offs against their lawful assessments in connection with grievances related to maintenance instead of the validity of the assessments themselves.

The Association cites *Park Centre Condominium Council v. Epps* for the proposition that condominium owners have "an unconditional obligation to pay the assessment fees, irrespective of any liability which a condominium association may bear

to the homeowner."[68] The court went on to explain that: "Whatever grievance Epps may have against the Council, it does not entitle him to withhold payment of lawful assessments."[69] Thus, *Epps* stands for the principle that condominium owners have no right to withhold assessments due to unperformed maintenance, unlike the situation that may exist in other contexts, such as landlord-tenant law.[70] In reaching that conclusion, the court explained that the dangers posed by allowing owners unilaterally to withhold assessments "would threaten the financial integrity of the entire condominium operation."[71]

The holding in *Epps* is not directly applicable to this case, because the Reeds withheld payments in a dispute about the payments themselves, not, for example, based on a failure to maintain their unit. Until this opinion, the propriety of the assessments charged to the Reeds had not been determined. The Reeds had every right to challenge the assessments and seek reimbursement of any overcharges. Moreover, I found that the issues in this case were sufficiently close as to warrant denial of the parties' cross motions for summary judgment and trial. Nevertheless, allowing withholding of all or part of a condominium assessment in this type of circumstance poses the same dangers to all of the Condominium owners as discussed in *Epps*. Therefore, I find that although the Association's assessments were improper, the Reeds withholding of payment deserves

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68 1997 WL 817875, at *3–4 (Del. Super. May 16, 1997).

69 *Id.* at *4.

70 *See, e.g.*, 25 *Del. C.* § 5307.

71 *Epps*, 1997 WL 817875, at *4.

careful scrutiny and should be strictly limited to the allegedly unlawful aspect of the assessment.

2. The Commercial Area's assessments

I have determined that the Association may not charge the Commercial Area for the heating and cooling of the residential units. Unfortunately, the trial record does not include sufficient evidence to permit a reasonable estimation of the cost of heating and cooling those units. Electricity represents the primary expense generated by operation of the Central System. The record does not include specific figures for the Condominium's yearly electricity expenses, although the Annual Budget estimates $110,000 for electricity for the fiscal years ending June 1999 and 2000.[72] Even those *estimates*, however, include costs for electricity and heating and cooling for the common elements or areas, as well as the residential units. The Reeds properly may be charged for the former costs.

In order to determine the amount of an appropriate assessment that excludes the cost of heating and cooling residential units, I am ordering a further proceeding in the form of an accounting. That proceeding may occur before me, the Court of Chancery Master or a private special master agreed to by the parties. A key issue to be addressed in that accounting is what portion of the electricity expenses should be considered "expenses of administration, maintenance, repair and replacement" of truly common elements associated with the Central System.

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[72] DX 2.

Based on the budgeted electricity figures, however, my preliminary conclusion is that by subtracting $2,200 from each quarterly assessment the Reeds likely deducted more than the true cost of heating and cooling the residential units.[73] Even assuming the entire $110,000 was spent on the residential units, the Reeds' 3.813% share would have amounted to only $1,048.57 per quarter. Therefore, even without being able to determine the exact amount of the proper assessments, it appears likely that the Reeds will be liable for unpaid assessments.

3. Penalties

In general, the Association began assessing penalties on late condominium fees in the 1980s.[74] The Reeds have been assessed penalties of 10% per quarter[75] or a 40% annual rate.[76] The penalties were charged after a 30 day grace period. The Association contends that it has the power to assess penalties under its power to collect funds for common expenses (25 *Del. C.* § 2211) and to manage the business affairs of the

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73 I do not mean to prejudge this issue and recognize that the accounting conceivably could demonstrate that the Reeds' reduced payment still might have exceeded the amount ultimately determined to be due from them as an assessment. If that were to occur, the Reeds would be entitled to reimbursement of any overpayment.

74 Tr. at 59–60.

75 The Condominium fee statements actually purport to apply a 10% per month penalty to late assessments, but in practice a 10% quarterly penalty has been applied.

76 The penalties were not added to the accumulated total of unpaid assessments, so in effect, they were not compounded.

Condominium (25 *Del. C.* § 2212).[77] The Reeds deny that the Association had a "formal legal basis" to assess penalties, because they were imposed "without regard to any formal decision-making by the Association or the Council, or any legally binding agreement or resolution."[78] Alternately, the Reeds argue that if penalties are proper, they are limited by 25 *Del. C.* § 2233 to 18% per annum.

Section 2233 states that "all sums properly assessed against a unit shall constitute a charge against that unit and that the unit owner is personally liable for any assessment due 'together with interest thereon not to exceed 18% per annum.'"[79] Article IV, § 1 of the COR states that "[t]he treasurer may employ any lawful means provided by the laws of this State for the collection of a debt to collect such monthly assessment from any owner." I interpret the COR to give the Council the power to assess interest on unpaid assessments as lawful means to collect unpaid assessments. The Council, however, exceeded that authorization. Instead, it charged a penalty in the range of 40%, more than double the maximum allowable rate of 18%. In this circumstance, merely lowering the unlawful interest rate charged by the Council to the maximum allowable rate would have the effect of encouraging such heavy handed behavior.

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77 Pl.'s Summ. J. Reply Br. at 12. The Association also contends that it is entitled to interest, in addition to the penalties, under 25 *Del. C.* § 2233. *Id.*

78 Defs.' Post-trial Opening Br. at 16–17.

79 *Council of Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 8 (Del. 2002) (quoting 25 *Del. C.* § 2233).

Moreover, on March 22, 2001, the Association's counsel, Whittington, suggested that the Reeds continue to make prorated payments until the issue could be resolved among the parties. The Reeds continued to do so, at least partially in reliance on Whittington's encouragement. Notwithstanding Whittington's letter, at some point during 2002 the Association's accountants were told not to cash the Reeds' partial payments and at least six of the Reeds' checks were not cashed. The Association also purported to levy penalties on the Reeds' prorated payments after Whittington's letter and later on the entire amount of the remitted but uncashed payments. In light of this history, I find an interest award of 18% too high.

On the other hand, I conclude that interest should be awarded for several reasons. First, the Reeds improperly withheld payments from the Association in an amount that appears to be well in excess of the adjustment to which they are likely to be entitled. Second, notwithstanding the dispute, the Reeds had an obligation to pay their assessments in full or, at least, to avoid withholding an excessive amount in light of the alleged impropriety in the assessment. In addition, having withheld payments since late 1999, the Reeds have had the use and benefit of those monies, to the detriment of the Association, ever since.

With these facts in mind, I find that the Reeds should be charged interest at the legal rate specified in 6 *Del. C.* § 2301(a) on the difference between the proper assessment and the amount tendered by the Reeds for each affected period. Beginning with the fourth quarter 1999 assessment, interest should apply to all underpaid assessments after expiration of the 30 day grace period. In order to approximate the

benefit lost to the Association and disgorge the benefit that accrued to the Reeds, a floating legal rate should be used. In addition, the interest award should be compounded quarterly because "the legal rate of interest most nearly resembles a return on a bond, which typically compounds quarterly."[80] Thus, the legal rate in effect at the end of each grace period should be applied to the outstanding balance of unpaid assessments and interest until the expiration of the following assessment's grace period. The total amount due from the Reeds to the Association as a result of these rulings shall be determined initially in the accounting proceeding.

4. Attorneys fees

The Association also seeks its attorneys fees and costs in pursuing this action. I do not believe attorneys fees or costs should be awarded to either side in this dispute. The action raised a number of close questions of fact and law. Both sides proceeded in good faith to resolve those issues through this proceeding. Because I have held that the Association's assessments of the Commercial Area were unlawful in part, it was not the prevailing party on certain issues. Likewise, the Reeds did not prevail on other issues. In these circumstances, I consider it most equitable for each side to bear its own attorneys fees and expenses.

III. CONCLUSION

For the reasons stated, I conclude that the Reeds are entitled to a declaratory judgment that (1) the Association's assessment of heating and cooling expenses for the

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[80] *Taylor v. American Specialty Retailing Group, Inc.*, 2003 WL 21753752, at *13 (Del. Ch. July 25, 2003).

residential units as common expenses chargeable against the owner of the Commercial Area was not authorized and (2) the Reeds are entitled to use of the Condominium parking garage and pool, as common elements, on par with the other unit owners, provided, however, that the Reeds' current usage of approximately three parking spaces in the garage in connection with the heating and cooling units of the Commercial Area satisfies their rights to use of the garage. I further conclude that an accounting is required to determine the amount of the heating and cooling expenses attributable to residential units as opposed to common elements. In addition, I conclude that the Reeds are liable for the amount, if any, by which their prorated assessment payments for the periods from the fourth quarter of 1999 to the date judgment is entered were less than the amounts due each quarter based on the adjusted assessment determined in the accounting and for interest at the legal rate of interest compounded quarterly, as specified in this opinion. The penalties purported to be charged by the Association were not authorized and are of no effect. Each side shall bear its own attorneys fees and costs.

The Court will conduct a telephone conference with counsel on September 1, 2005 at 3:30 p.m. to discuss the logistics of the accounting.

IT IS SO ORDERED.