

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
(CIVIL)

SAINT LUCIA

CLAIM NO. SLUHCV 007 OF 1994

BETWEEN:

BARBARA KIDDELL

Claimant

vs

WINDJAMMER LANDING COMPANY LIMITED

Defendant

CONSOLIDATED WITH

CLAIM NO. SLUHCV 0778 OF 1997

BETWEEN:

1. HUGH BRIAN MACNICOL  
ROBERT KNOWLES MACNICOL  
DAVID ALEXANDER MACNICOL  
WILLIAM SCOTT MACNICOL  
(EXECUTORS OF ESTATE BARBARA I. KIDDELL)
2. GEORGE B. KIDDELL
3. DAVID MACNICOL
4. JAMES E. DELANEY
5. PATSY DELANEY
6. KAINO HAMU

Claimants

vs

1. WINDJAMMER LANDING COMPANY LIMITED
2. WINDJAMMER LANDING COMPANY ST. LUCIA (1992)  
LIMITED
3. ELGIN HOLDINGS LIMITED

Defendants

**Appearances:**

Mr. Andy George for Mr. George Kiddell, Mr. James Delaney and Mrs. Patsy Delaney  
Ms. Brenda Floissac Flemming for Defendants

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2006: March 10  
2007: February 14  
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**JUDGMENT ON ASSESSMENT OF DAMAGES**

- [1] **EDWARDS J:** The Claimants were found to have proven their individual claims against Windjammer for breaches of their Maintenance and Rental Pool Agreements in the Judgment delivered on 15<sup>th</sup> July 2005. Before embarking on the assessment of damages it is prudent to summarize my findings in that Judgment.
- [2] Mrs. Barbara Kiddell's Maintenance Agreement existed from 1<sup>st</sup> January 1989 to 25<sup>th</sup> June 1994. Her Rental Pool Master Agreement existed from 30<sup>th</sup> June 1990 to October 1993. She proved that Windjammer failed to provide her or provided her in an untimely manner with the following documents mandated under the Agreements -
- (a) Quarterly statements in an untimely manner for 4 quarters in the years 1991 and 1992, pursuant to her Maintenance Agreement.
  - (b) Quarterly Service Account Statements for the quarters ending 30/6/91,30/9/91, 31/3/92, 30/6/92, 31/12/92 pursuant to her Rental Pool Master Agreement.
  - (c) Unaudited quarterly Rental Pool Statements in an untimely manner for the quarters 30/6/91,30/9/91,31/12/91.
  - (d) Audited Statements of the Rental Pool Operations for 1991.

- (e) Audited Statements for 1992 in an untimely manner.
- (f) A notice in writing 3 months prior to the end of the operating year, giving details of the reason for the increase in maintenance fees for the ensuing operating year ending 31/12/93.

[3] Mr. George Kiddell's Maintenance Agreement existed from 1<sup>st</sup> January 1989 to 5<sup>th</sup> March 1995. His Rental Pool Master Agreement existed from 30<sup>th</sup> June 1990 to 14<sup>th</sup> April 1994. He proved that Windjammer failed to provide him with or provided him in an untimely manner with the following documents mandated under the Agreements –

- (a) Quarterly Statements in an untimely manner for the 4 quarters in the years 1991 and 1992, and the quarter ending March 31, 1994 pursuant to the Maintenance Agreement.
- (b) A notice in writing 3 months prior to the end of the operating year, giving details of the reason for the increase in maintenance fees for the ensuing operating years ending 31<sup>st</sup> December 1993, 1994 and 1995.
- (c) Quarterly Maintenance Statements for the quarters ending 30/6/94, 30/9/94, 31/12/94 in an untimely manner.
- (d) Unaudited quarterly Rental Pool Statements in an untimely for the quarters 30/6/91, 30/9/91, 31/12/91.
- (e) Unaudited quarterly Rental Pool Statements for the quarters ending 30<sup>th</sup> June, 30<sup>th</sup> September and 31<sup>st</sup> December for the years 1994 to 2002, in an untimely manner.

- (g) Quarterly Service Account Statements for the quarters ending 30/6/91,30/9/91, 31/3/92, 30/6/92, 31/12/92 pursuant to the Rental Pool Master Agreement.
- (h) An Audited Statement of the Rental Pool Operations for 1991.
- (i) Audited Statements in an untimely manner for 1992.

[4] Mr. David MacNicol's Maintenance Agreement Services commenced on 1<sup>st</sup> January 1989 and there has been no interruption in services. His Rental Pool Agreement existed in 1991 up until 2002. He proved that Windjammer failed to provide him with or provided him in an untimely manner with the following documents mandated under his Agreements –

- (a) Quarterly Statements in an untimely manner for the 4 quarters in the years 1991 and 1992, and the quarter ending March 31, 1994 pursuant to the Maintenance Agreement.
- (b) A notice in writing 3 months prior to the end of the operating year, giving details of the reason for the increase in maintenance fees for the ensuing operating years ending 31<sup>st</sup> December 1993, 1994 and 1995, 1996
- (c) Quarterly Maintenance Statements in an untimely manner for the quarters ending 30/6/94, 30/9/94, 31/12/94
- (d) Quarterly Maintenance Statements for the quarters ending 31/12/99, and 31<sup>st</sup> March, 30<sup>th</sup> June, 30<sup>th</sup> September and 31<sup>st</sup> December for the years 2000 to 2002.

- (e) Unaudited quarterly Rental Pool Statements in an untimely manner for the quarters 30/6/91, 30/9/91, 31/12/91.
- (f) Unaudited quarterly Rental Pool Statements in an untimely manner for the quarters ending 30<sup>th</sup> June, 30<sup>th</sup> September, 31<sup>st</sup> December for the years 1994 to 2002.
- (g) Quarterly Service Account Statements for the quarters ending 30/6/91, 30/9/91, 31/12/91 and the 4 quarters for 1992, 1994, 1996 to 2002.
- (h) An Audited Statement of the Rental Pool Operations for 1991.
- (i) Audited Statements for 1992 and 1998 in an untimely manner.

[5] Mr and Mrs. Delaney's Maintenance Agreement commenced on the 1<sup>st</sup> June 1989 and the Maintenance services have been uninterrupted up to 2002. The Rental Pool Maintenance Agreement appeared to have been in existence from 1991 up to 2002. The Delaney's proved that Windjammer failed to provide or provided them in an untimely manner with the following documents under the Agreement -

- (a) Quarterly Statements in an untimely manner for the 4 quarters in the years 1991 and 1992 and the quarter ending 31/3/94 under the Maintenance Agreement.
- (b) A notice in writing 3 months prior to the end of the operating year, giving details of the reason for the increase in maintenance fees for the ensuing operating years ending 31<sup>st</sup> December 1993, 1994, 1995 and 1996.

- (c) Quarterly Maintenance Statements in an untimely manner for the quarters ending 30/6/94, 30/9/94, 31/12/94.
- (d) Quarterly Maintenance Statements for the quarters ending 31/12/99 and 31<sup>st</sup> March, 30<sup>th</sup> June, 30<sup>th</sup> September and 31<sup>st</sup> December for the years 2000 to 2002.
- (e) Unaudited quarterly Rental Pool Statements in an untimely manner for the quarters 30/6/91, 30/9/91, 31/12/91.
- (f) Unaudited quarterly Rental Pool Statements in an untimely manner for the quarters ending 30<sup>th</sup> June, 30<sup>th</sup> September, and 31<sup>st</sup> December for the years 1994 to 2002.
- (g) Quarterly Service Account Statements for the quarters ending 30/6/91, 30/9/91, 31/12/91 and the 4 quarters for 1992, 1994, and 1996 to 2002.
- (h) An Audited Statement for the Rental Pool Operations for 1991.
- (i) Audited Statements for 1992 and 1998 in an untimely manner.

[6] Mr. Kaino Hamu's Maintenance Agreement existed prior to 1991, and it was terminated in October 1997. His Rental Pool Master Agreement commenced in 1990 and it came to end on 7<sup>th</sup> June 1994. Mr. Hamu proved that Windjammer failed to provide him with, or provided him in an untimely manner with the following documents under his 2 Agreements –

- (a) Unaudited quarterly Rental Pool Statements in an untimely manner for the quarters 30/6/91, 30/9/91, 31/12/91.

- (b) Unaudited quarterly Rental Pool Statements in an untimely manner for the quarters 30<sup>th</sup> June, 30<sup>th</sup> September, and 31<sup>st</sup> December for the years 1994 to 2002.
- (c) Quarterly Rental Pool Statements in an untimely manner for the quarters ending 31/3/94 (upon termination of his Agreement) the period 1<sup>st</sup> April to 7<sup>th</sup> June 1994 (after reinstatement of his Agreement), the period 1<sup>st</sup> December to 31<sup>st</sup> December 1995 and subsequent quarters ending 31<sup>st</sup> March, 30<sup>th</sup> June, 30<sup>th</sup> September, 31<sup>st</sup> December 1995, the quarters ending 31<sup>st</sup> March, 30<sup>th</sup> September and 30<sup>th</sup> June 1996, (and upon termination of the reinstated agreement at the end of August) the period 1<sup>st</sup> July to 31<sup>st</sup> August 1996.
- (d) Quarterly Service Account Statements for the quarters ending 30/6/91, 30/9/91, 31/12/91 and the 4 quarters in 1992.
- (e) Quarterly Service Account Statements for the quarters ending 31/3/94 (upon termination of the Agreement) for the period 1<sup>st</sup> April to 7<sup>th</sup> June 1994, (upon re-instatement of the Agreement) for the period 1<sup>st</sup> to 31<sup>st</sup> December 1994, the 4 quarters in 1995, the quarters 31/3/96, 30/6/96, (an upon termination of the agreement) the period 1<sup>st</sup> July to 31<sup>st</sup> August 1996.
- (f) An Audited Statement of the Rental Pool Operations for 1991
- (g) Audited Statements for 1992 in an untimely manner

[7] I also found that Windjammer's calculations and allocations of Maintenance fees to the Claimants were unreasonable and too high. I concluded that the Front Office Costs to the Villa Owners contemplated by the Maintenance Agreement would be

more probable in the region of 25% for the years 1993 to 2002, and that a reasonable percentage allocation for Security Costs is more probable 60% to the 116 Villa Owners for the years 1993 to 2002. I directed further that all the other percentage allocations should be reduced by 5% for the years 1993 to 2002.

- [8] I found in addition, that Windjammer had failed to pay the Claimants the income they were entitled to for the duration of their respective Rental Pool Agreements by wrongfully deducting Travel Agents Commission, Kimonos, Taxi Shuttle Golf and Managers Cocktail Party Expenses from the Gross Rental Revenue earned for Rental Pool Operations prior to reporting it in the Rental Pool Profit Distribution Statements for the Claimants for the years 1991 to 2002.
- [9] Regarding the Counter claim of Windjammer, I found that Mrs. Kiddell and Mr. Hamu were owing Maintenance Fees which sums would have to be recalculated and adjusted downwards based on my findings at paragraphs 7 and 8 above.
- [10] Mr. Kiddell was found to be successful in his claim against Windjammer for Wrongful termination of his Maintenance Agreement, having regard to my findings at paragraph 7 and 8 above. I inadvertently did not make any finding concerning the alleged Maintenance fees owed by Mr. Kiddell after the termination of the Maintenance Agreement on 5<sup>th</sup> March 1995. From July 2001 Mr. Kiddell, Mr. Hamu and Executors of Mrs. Kiddell's estate ought to have been paying \$1000.00 for Maintenance fee pursuant to a Court Order.
- [11] I therefore requested that The Expert Chartered Accountant for Windjammer Mr. David Smith, file a Report, after complying with my recalculations of the Maintenance fees and the Rental Pool Income of the Claimants.
- [12] Mr. Smith's Report dated 15<sup>th</sup> July 2005 was filed in the Registry on the 12<sup>th</sup> October 2005.



- [13] However it was not brought to my attention until 6<sup>th</sup> January 2006 after I made certain enquiries about it.
- [14] On 10<sup>th</sup> March 2006, having provided the opportunity for the Claimants and Windjammer to question Mr. Smith concerning his Report through their Counsel, I note that evidence was adduced from Mr. Smith, by Counsel for Windjammer, concerning the accuracy of my findings.
- [15] I shall not revisit those matters, since in my view the proper forum for challenging such matters is the Court of Appeal.
- [16] I shall now consider Mr. Smith's Report in order to assess the damages that should be awarded.

#### **MR. SMITH'S RECALCULATIONS**

- [17] At paragraph 282 of the Judgment Windjammer was required to adjust the Rental Pool Distribution Profits upwards and recalculate the income earned by all the Claimants for the duration of their Rental Pool Agreements from 1991 to 2002.
- [18] Based on the Claimant's Expert Mr. Robert Mc Donald's Report Schedule No. 4, the 1991 allocations were arrived at by taking the 1991 allocations as an approximation of the 1992 allocations, in the absence of Windjammer's Financial Records for 1991.
- [19] Though Mr. Smith's Rental Pool Adjustments pursuant to the Judgment do not include recalculations for 1991, I will therefore assume that the 1991 adjustments would be an approximation of the 1992 adjustments. I therefore have found, that according to Schedule B of the new Report, the total sum for Rental Pool Income wrongly withheld according to the Judgment, from 1991 to 2002 for each Claimant is as follows:

(1) Mrs. Kiddell = \$ 3,722.00 – 1991  
\$ 3,722.00 - 1992  
421.00 – 1993  

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TOTAL = U.S.\$7,865.00

(2) Mr. Kiddell = \$3954.00 – 1991  
\$3,954.00– 1992  
\$2,998.00 – 1993  
715.00 - 1994  

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TOTAL = U.S.\$11,621.00

(3) Mr. MacNicol = \$3,676.00 – 1991  
3,676.00 - 1992  
2,528.00 – 1993  
3,014.00 - 1994  
2,509.00 – 1995  
3,443.00 – 1996  
2,932.00 – 1997  
2,387.00 - 1998  
2,893.00 – 1999  
2,730.00 – 2000  
1,398.00 – 2001  
1,611.00 - 2002  

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TOTAL = U.S.\$32,796.00

(4) Mr & Mrs. DeLaney - \$3,988.00 - 1991  
3,988.00 - 1992  
2,883.00 – 1993  
2,919.00 - 1994  
2,639.00 – 1995  
3,318.00 – 1996  
2,867.00 – 1997  
2,475.00 - 1998  
2,901.00 – 1999  
2,559.00 – 2000  
1,302.00 – 2001  
1,485.00 - 2002  

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TOTAL = U.S.\$33,325.00

(5) Mr. Hamu = \$3,401.00 – 1991  
 3,401.00 – 1992  
 2,493.00 – 1993  
1,055.00 – 1994

**TOTAL = U.S.\$10,350.00**

[20] According to Schedule C of the Second Report of Mr. Smith, the Maintenance Fees Overcharges for the years 1993 to 2002 in respect of each Defendant would have been as follows:-

(1) Mrs. Kiddell = \$3,773.00 – 1993  
 1,709.00 – 1994  
 2,603.00 – 2001  
4,663.00 - 2002

**TOTAL = U.S.\$12,748.00**

(2) Mr. Kiddell = \$3,773.00 – 1993  
 3,947.00 – 1994  
 797.0 - 1995  
 2,604.00 – 2001  
4,663.00 - 2002

**TOTAL = U.S.\$15,784.00**

(3) Mr. MacNicol = \$3,773.00 – 1993  
 3,947.00 - 1994  
 4,550.00 – 1995  
 4,634.00 - 1996  
 4,423.00 – 1997  
 5,257.00 – 1998  
 4,624.00 – 1999  
 5,123.00 - 2000  
 5,207.00 – 2001  
4,663.00 – 2002

**TOTAL = U.S.\$46,201.00**

(4) Mr & Mrs. Delaney

Similar to Mr. MacNicol

**TOTAL = U.S.\$46,201.00**

[21] I also found at paragraph 169 (v) of my Judgment that between 13<sup>th</sup> July 1992 and 6<sup>th</sup> February 2002 on some occasions, Windjammer failed to provide and make available to the Claimants the financial information requested, concerning the Rental Pool Operations for their individual units, within a reasonable time or at all, as paragraph 5.4 of the Rental Pool Agreements called for.

[22] I refer to Mr. Smith's Schedule A, pages 1 and 2 in his Second Report. Taking into account the 1991 Rental Pool Credit of \$3,722.00, for Mrs. Kiddell, \$3,954.00 for Mr. Kiddell, \$3,676.00 for Mr. MacNicol, \$3,988.00 for Mr & Mr Delaney, and \$3,401.00 for Mr. Hamu, the Adjusted Outstanding Balances payable must change.

[23] It follows therefore that Mrs. Kiddell's Estate is owing Windjammer the sum of \$16,720.00 - \$3,722 = \$12,998.00.

[24] Mr. Smith testified that even after the adjustments done pursuant to my Judgment, Mr. Kiddell would still be owing Windjammer a sum of \$615 as of March 1995. I cannot agree with Mr. Smith, having regard to the following facts:

- (1) In 1991 the approximate Rental Pool Credit would be \$3,954, similar to 1992.
- (2) As at March 1995, the additional Rental Pool income would therefore total \$11,621.00.
- (3) Mr. Kiddell at the time Windjammer terminated his Maintenance Services would therefore not have owed Windjammer, since Windjammer owed him \$11,621.00 for additional Rental Pool income and he owed Windjammer \$8,282.00 for Revised Maintenance Charges.
- (4) It is Windjammer who would be owing him \$3,339.00, resulting in Windjammer's unlawful termination of his Maintenance Services.

[25] It follows therefore that by 2002 Mr. Kiddell would have owed Windjammer not \$8,711.00 but \$8,711.00 - \$3,954.00. Taking into account the 1991 Rental pool credit Mr. Kiddell would presently owe Windjammer \$4,757.00 in these circumstances.

[26] Mr. MacNicol would be owed \$77,845 + \$3,676 by Windjammer which is \$81,521.00.

[27] Mr and Mrs Delaney would be owed \$78,060 + \$3988 by Windjammer which is \$82,048.00.

[28] Mr. Hamu would be owing Windjammer \$25,676 - \$3,401 = \$22,275.00.

#### **DAMAGES FOR MR KIDDELL**

[29] I must take into account the fact that Windjammer wrongfully refused Mr. Kiddell the services he was entitled to under the Maintenance Agreement. At paragraph 353 of my Judgment, I noted that Mr. Kiddell testified that his villa was unused and essentially vacant for 6 years, and that he paid a housekeeper E.C.\$67,640.28 during this period to attend to the villa. This is special damage which was never pleaded.

[30] Mr. Kiddell also deposed in his Witness Statement that: **"As a direct result of Windjammer's aforementioned wrongful conduct in breach of its Maintenance Agreements and Rental Pool Agreements with the Plaintiff's, the Plaintiffs have not only been required to incur substantial legal fees but substantial forensic accounting costs to try and gather up, identify and review the financial records which were produced by Windjammer pursuant to the Order of Mr. Justice Saunders. The Plaintiffs would not have had to incur those forensic accounting costs had Windjammer not breached the said Agreements but produced all of the financial records that it was required to produce pursuant to the said Agreements in a timely fashion. Accordingly, in addition to the aforementioned claims by the Plaintiffs and regardless of the outcome of those claims, I believe the Plaintiffs are or should be entitled to an Order requiring Windjammer to pay them (i) the sum of**

\$104,575.39 Cdn on account of fees and disbursements invoiced by and paid to Kroll Lindquist Avey, the forensic Accounting firm retained by the Plaintiffs, for the aforesaid accounting services in 2002, and (ii) the additional sum of US\$2,375.00 paid to Evan Hermiston CA for fees on account of the performance of related services including, more particularly, in association with and assistance to the Kroll firm.”

- [31] These fees paid to their Accountants are also Special damage in my view. Besides this, Mr. Kiddell and the other Claimants have provided no documentary evidence to substantiate their claims that such sums were expended. By their further Amended Statement of Claim filed on 2<sup>nd</sup> October 2003 the Claimants were provided with a final opportunity to include all of the items of Special Damages in their pleadings. They did not seize that opportunity.

#### PLEADING SPECIAL DAMAGES

- [32] PART 8.7 (1) of CPR 2000 requires that Claimants must include in the Claim form or in their Statement of Claim, a statement of all the facts on which the Claimants rely. PART 8.7 (3) requires the Claimants to identify in the Statement of Claim any document which the Claimants consider is necessary to their case, or annex a copy of such document to the Statement of Claim.
- [33] Though the particularity required for special damages claimed under PART 8.9 (5) relates to claims for special injuries only, guidance is provided by the common law as to what particulars must be pleaded in relation to a claim for damages.
- [34] The common law rule for pleading damage was stated in The Susquehenna [1926] A.C. 655 at 661 by Lord Dunedin in the following manner:

“If there be any special damage which is attributed to the wrongful act that special damage must be averred and proved, and if proved, will be awarded.

If the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question.”

- [35] The common law relating to awards for general and special damages was pronounced by Lord Mac Naughten in Stroms Bruks Aktie Bolag v Hutchinson [1905] A.C. 515 at pages 525 – 526. “General Damages . . . are such as the law will presume to be a direct natural or probable consequence of the action complained of. ‘Special damages’, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and therefore, they must be claimed specially and proved strictly.”
- [36] “The basic test of whether damage is general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial”: Mc Gregor on Damages 16<sup>th</sup> ed. (2003) para 43-006.
- [37] “Where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so become crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage: [at paragraph 43-011] . . . On a strict view, the Claimant will be debarred from proving special damage not only where he fails to plead it at all but where he fails to plead it with sufficient particularity . . . [paragraph 43-016] . . . Where, in Perestrello v United Paint Co, [1969] 1 W.L.R. 570, C.A.] the claimants claimed not for loss of profits arising out of the defendant’s repudiation of a contract, but for their expenditure which had been rendered futile by the defendant’s breach, it was held that the claimants were not entitled to give evidence of this unpleaded loss, the Court pointing particularly to the fact that, as was admitted, the claim as pleaded was inconsistent with the claim now sought to be advanced:” (Mc Gregor on Damages supra at paragraph 43-013).

- [38] I am of the view therefore that the Claimants are only entitled to nominal changes for Windjammer's breaches of the Book-Keeping and Disclosure terms of the Contracts since they have not pleaded special damages. Mr. Kiddell also is in the same position regarding the monies he spent to employ a housekeeper, repair his villa, and as vacation cost elsewhere for 6 years.
- [39] I refer to paragraph 354, and paragraphs 359 to 362 of my Judgment. Mr. Kiddell refused to mitigate his loss when he rejected Windjammer's offer to repair his Villa at a cost of ½ of the US\$25,000.00 offered to repair his Villa and Mrs. Kiddell's Villa between May and November 1998.
- [40] The estimated cost of Mr. Wayne Brown, to repair Mr. Kiddell's Villa was EC\$36,505.00 in 2001. Had Mr. Kiddell accepted Windjammer's offer then to repair the Villas in 1998, the dilapidation and deterioration of the Villa would not have reached the level that it was in 2001.
- [41] Mr. Kiddell was under a duty to act reasonably to reduce the damage to his property. He should have taken reasonable precautions for minimizing the extent of the damage to his Villa. Consequently the higher repair costs would not be considered, even if I had decided to award this expenditure as general damages. Mr. Kiddell said he paid \$42,520.19 to Mr. Brown to repair his Villa in 2001, plus \$25,000.00 Canadian dollars to make it habitable. These expended sums were clear before trial and could have been determined with accuracy. They should have been pleaded as Special Damages.
- [42] It was reasonably foreseeable that the termination of Mr. Kiddell's Maintenance Agreement would deprive him of the pleasure of the use and enjoyment of his Villa in my opinion. Mr. Kiddell deposed that he had to vacation elsewhere at a cost of US\$75,000.00 during the 6 years that the maintenance services were non-existent. However he has not provided documentary evidence to establish this expenditure. Though it should have been pleaded as special damages and was not, in my opinion, I could consider this US\$75,000.00 when I am determining what sum to award for mental distress in these circumstances.



[43] He also deposed that during this period he had to pay realty taxes for his Villa in the amount of at least US\$15,549.80 and insurance in the amount of \$17,958.00 Canadian. Again he has provided no documents to substantiate this. In my view he cannot recover these items of expenditure as damages as he would have been paying realty taxes and insurance contributions to Windjammer, even where the Maintenance Agreement subsisted.

[44] Mr. Kiddell is also seeking punitive and exemplary damages. The principle in Addis v Gramophone Co. Ltd [1909] A.C. 488 apparently prevents the recovery of exemplary/punitive damages for any breach of contract. However in special circumstances damages may be awarded for mental distress where the parties contemplated it as a not unlikely consequence of breach: (Mc Gregor on Damages supra at para 26-019.

[45] I regard the instant case as comparable to an enjoyment or holiday case which ought to be regarded as an exception to the principle laid down in Malik v Bank of Credit and Commerce Int'l S.A. [1998] A.C. 20. It is pointed out in Mc Gregor on Damages (supra) at para. 26-074 that in the case of a failure, in breach of contract, to provide a holiday of an advertised standard or some other form of entertainment or enjoyment, damages may be awarded for the disappointment and mental distress caused by the breach of contract.

[46] Having considered the pleadings, and the absence of any Special damages pleaded, I have concluded that apart from the specific sums credited and or to be awarded to all of the Claimants or Windjammer as Revised Rental Pool Income or as Outstanding Maintenance Fees owing, Nominal damages should be awarded to all of the Claimants. Mr. Kiddell is entitled, in my view, to general damages for the inconvenience and mental distress, from being deprived of using his Villa during his annual vacation periods for the 6 years.

#### THE AWARDS IN U.S. DOLLARS

[47] I therefore award Mr. Kiddell the following sums for Damages –

(i)	Nominal Damages	=	US\$10,000.00
(ii)	General Damages	=	US\$36,000.00
	TOTAL	=	EC\$123,740.00
(iii)	Prescribed Costs	=	\$27,561.00 E.C.

[48] Mrs. Kiddell is awarded Nominal Damages of US\$6,000.00 = EC\$16,140.00. Prescribed Costs will therefore be \$4,842.00 E.C.

[49] Mr. MacNicol is awarded Nominal damages of US\$6,000.00 and the sum of US \$81,521.00 = EC\$235,431.49  
Prescribed Costs = EC\$23,543.49

[50] Mr and Mrs DeLaney are awarded US\$6,000 Nominal Damages and the sum of US\$82,048.00 = EC\$236,949.12. Prescribed Costs will be E.C.\$22,714.65.

[51] I must note that in converting the currency into E.C. dollars I applied the rate of \$2.69 E.C. for one U.S. dollar. Prescribed Costs have been calculated pursuant to PART 65.5 (2) (a) and APPENDIX B of CPR 2000.

[52] Mr. Hamu is awarded the sum of US\$6,000.00 = E.C.\$16,140.00. Prescribed Costs will be EC\$4,842.

[53] On the Counterclaim, Windjammer is awarded the sum of US\$12,998.00 = E.C.\$34,964.62 for Maintenance fees owing by Mrs. Kiddell's Estate. Prescribed Costs is therefore E.C.\$10,241.16.

[54] On the Counterclaim Windjammer is awarded the sum of US\$4,757.00 for Maintenance fees owing by Mr. Kiddell after his Maintenance contract was terminated on 5/3/95 E.C.\$12,796.33. Prescribed Costs is therefore E.C.\$3,838.90.

[55] On the Counterclaim Windjammer is awarded the sum of US\$22,275.00 for Maintenance fees owing by Mr. Hamu = E.C.\$59,919.75. Prescribed Costs is E.C.\$15,983.95.

### CONCLUSIONS

[56] On the Claims I enter judgment against Windjammer for the Claimants as follows –

- (a) Judgment for Mrs. Kiddell in the sum E.C.\$16,140.00 with prescribed costs E.C.\$4,842.00 and interest thereon at the rate of 6% per annum on the Judgment debt until final payment.
- (b) Judgment for Mr. Kiddell in the sum of E.C.\$123,740.00 and prescribed costs E.C.\$27,561.00 and interest thereon at the rate of 6% per annum on the Judgment debt until final payment.
- (c) Judgment for Mr. MacNicol in the sum of EC\$235,431.49 with prescribed costs EC\$23,543.49 and interest thereon at the rate of 6% per annum on the Judgment debt until final payment.
- (d) Judgment for Mr and Mrs DeLaney in the sum of EC\$236,849.12 with Prescribed Costs EC\$22,174.65 and interest thereon at the rate of 6% per annum on the Judgment debt until final payment.
- (e) Judgment for Mr. Hamu in the sum of EC\$16,140.009 with prescribed costs E.C.\$4,842.00 and interest on the Judgment debt at the rate of 6% per annum until final payment.

[57] On the Counterclaim I enter judgment against the Claimants for Windjammer as follows –

- (a) Judgment for Windjammer against Mrs. Kiddell's estate in the sum of EC\$34,964.62 with prescribed costs EC\$12,411.55 and interest thereon at the rate of 6% per annum on the Judgment debt until final payment.
- (b) Judgment for Windjammer against Mr. Kiddell in the sum of EC\$12,796.33 with prescribed costs \$3,838.90 and interest on the Judgment debt at the rate of 6% per annum until final payment.
- (c) Judgment for Windjammer against Mr. Hamu in the sum of EC\$59,919 with prescribed costs EC\$15,983.95 and interest on the Judgment debt at the rate of 6% per annum until final payment.

Dated this 9<sup>th</sup> day of February 2007

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**OLA MAE EDWARDS**  
**HIGH COURT JUDGE**