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

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2003/0523

BETWEEN:

CLAIRE MCLEAN
JOAN MCLEAN
AMOS MORILL
MARIA ROSS
XABIER ROSS

Claimants

AND

GILBERT GOMES — 1st Defendant
DRB LIMITED — 2nd Defendant

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Mrs. Laurie Freeland-Roberts for the 1st and 2nd Claimants
Mr. Hugh Marshall with Miss Kema Benjamin for the Defendants

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2013: June 20, December 12
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RULING

[1] TABOR, M (Ag.): This is an application filed on 19th February, 2013 for damages to be assessed following a judgment in default of defence granted against the defendants on 30th October, 2009. The assessment hearing was held on 20th June, 2013 and cross examination of the witnesses conducted. The parties were ordered to file written submissions with authorities on the issue of quantum on or before 31st July, 2013. Submissions were filed by Counsel for the defendants on 9th August, 2013 and by Counsel for the claimants on 31st October, 2013.

[2] In support of the application are two affidavits filed on 19th February, 2013 by Mr. Claire McLean and a joint affidavit by Elizabeth Harrington and Jennifer Hadeed. In opposition the defendants filed the second affidavit of Mr. Gilbert Gomes on 23rd April, 2013.

Background Facts

[3] Mr. Gilbert Gomes in February, 2002 purchased the majority of shares in the Second Defendant, DRB, and was appointed a director of the Company. At the time of purchase the property of the Company consisted of a restaurant with administrative offices and an entertainment center together with 10 separate double condominium units. Prior to his purchase, the property was operated as a hotel, bar and restaurant managed by the Second Defendant. The condominium units were rented and the guests would pay the Company, who in turn would pay the unit owners. The individual unit owners would pay for the provision of such communal services as pool, parking, landscaping and security etc., on a monthly basis. Mr. Gomes noted that the Company records indicated that the payment for the communal services was USD $200.00 monthly.

[4] The genesis of the problems involved in the case at bar can be found in the peculiar land ownership patterns that existed with the properties in question. The Claimants are the owners of property with title "fee simple absolute in possession" that are supposed to be a part of a Condominium Complex. The Defendants purchased the shares of DRB which owned the property (the Mother Parcel) which surrounds the Condominium Complex.

[5] It is apparent that the operations of the Condominium Complex worked well under the previous owners of DRB, Mr. John DeShazo and Ms. Florence Suttie. However, when Mr. Gilbert Gomes took over the ownership of the property in 2002 it seems as if all the problems started then. Perhaps a contributing factor to this development for some of the unit owners was the adjustment to the new owners of DRB. In fact Mr. Gomes has noted that in an encounter with Mr. McLean he was referred to as the caretaker of the property, a statement which Mr. McLean has not denied. Also, in his affidavit of 23rd April, 2013 Mr. Gomes admitted that the relationship between himself and certain unit owners began to deteriorate, in particular with one Mrs. Sibel, whose charges of assault by her against him were dismissed and an injunction imposed against her.

[6] The deterioration in the relationship between the defendants and the claimants culminated in a claim filed by the claimants on 17 December, 2003 seeking the following remedies:

1. A declaration that the claimants, their servants, agents, guests, lawful visitors and other persons transacting or seeking business with them or any of them:

    (i) Are entitled to a right of way on foot and by vehicle over the Northern and Southern Gate on the Mother Parcel (Registration Section: McKinnons; Block: 45 1595B; Parcel: 65) and the access road leading therefrom.

    (ii) Are entitled to an easement by way of implied or presumed grant to park in the parking area of the Mother Parcel (Registration Section: McKinnons; Block: 45 1595B; Parcel: 65) closest to the Southern Gate.

2. A declaration that the acts of verbal abuse, threats of violence, actual violence and intimidation complained of by claimants and perpetrated against them, their servants, agents, guests, lawful visitors and other persons transacting or seeking to transact business with them along with the 1st Defendant's actions of dumping garbage/debris in large piles all over the Mother Parcel, the 1st Defendant's failure to cut the grass and to remove the stagnant water from the pool constitute a nuisance and infringes on the Claimants right to quiet enjoyment of their respective properties.

3. An Injunction to restrain the 1st defendant by himself, his servants or agents or otherwise from:

   (i) Molesting any of the Applicants/Claimants, their servants, agents, guests, lawful visitors or any other persons transacting or seeking to transact business with any of the Applicants/Claimants at their properties situated on the Runaway Bay Beach Club Compound.

   (ii) Physically or otherwise threatening any of the Applicants/Claimants, their servants, agents, guests, lawful visitors or any other person seeking to transact business with any or all of the Applicants/Claimants at their properties within the Runaway Bay Beach Club Compound.

   (iii) Using obscene and/or abusive language to, or threatening behavior towards any of the Applicants/Claimants their servants, guests, lawful visitors or any other person transacting or seeking to transact business with any of the Applicants/Claimants or in any other manner which is of such nature and degree as to cause annoyance, or result in ill-treatment of the Applicants/Claimants, their servants, agents, guests, lawful visitors or any other person transacting or seeking to transact business with any of the Applicants/Claimants.

4. An injunction restraining the defendants by themselves, their servants or agents or howsoever from:

   (i) Denying and/or impeding the Claimants or their servants, agents, lawful visitors or persons seeking to transact business with the Claimants in the exercise of an uninterrupted Right of Way on foot and by vehicle through the Northern Gate of the Mother Parcel (Registration Section: McKinnons; Block: 45 1595B; Parcel: 65).

   (ii) Denying and/or impeding the Claimants or their servants, agents, lawful visitors or persons seeking to transact business with the Claimants in the exercise of an easement by implied or presumed grant to park in the parking area closest to the Southern Gate of the Mother Parcel (Registration Section: McKinnons; Block: 45 1595B; Parcel: 65).

5. An injunction ordering and directing the defendants whether by themselves, their servants, agents or otherwise to:

   (i) Remove any and all fencing encroaching on the foreshore adjacent to Runaway Bay a public beach and the property of the Crown.

   (ii) Take all steps necessary to clean the Mother Parcel (Registration Section: McKinnons; Block: 45 1595B; Parcel: 65) including but not limited to the pool thereon, removing all garbage/debris from the vicinity of the Claimants properties, attend to the grass and maintain the Mother Parcel in a clean and sanitary manner.

[7] The Claimants have identified the following as the particulars of the nuisance:

(1) The 1st Defendant in or about the month of July, 2002 began a systematic campaign of verbally abusing, harassing, obstructing, intimidating and assaulting the Claimants, their servants, agents, guests, lawful visitors and other persons seeking to transact business with the Claimants at their villas on the Runaway Bay Beach Club compound, the incidences of which were fully ventilated in paragraph 7 of the said claim.

(2) In or about the month of June, 2003 the 1st Defendant erected a 12 foot chain link and barbwire fence around the entire perimeter of the Mother Parcel and constructed a larger gate than had previously existed at the Northern Gate, padlocked the said gate and retained the sole key, he however created a smaller gate therein with another padlock which would only give pedestrian access to the Northern access way to the villas, The villa owners/occupiers were at that time given keys to the smaller gate.

(3) In or about the month of February, 2003 the 1st Defendant padlocked the then gate at the southern entrance of the Mother Parcel denying total access to the parking lot therein as well as foot and vehicular access to the Southern access way.

(4) In or about the month of May, 2003 the 1st Defendant erected a wire fence and oil drum barricade across the southern access road effectively limiting the access of vehicular traffic through the southern access way and further denying access to the parking lot adjacent to the southern entrance.

(5) After the month of June, 2013 the 1st Defendant erected a large sliding wrought iron gate at the southern entrance to the Mother Parcel which is normally kept locked, and for which he distributed keys to the Claimants. He subsequently changed the locks to the smaller gate and neglected to re-distribute keys to the Claimants.

(6) The Defendants illegally caused the existing underground APUA electrical lines and the plumbing pipes leading to the Claimants' respective villas to be dug up, thereby suppressing the electricity and cutting off the water supply.

[8] The Claimants have identified the following as the particulars of loss and damage:

(1) Loss of rental income by the 1st and 2nd Claimants from September, 2003 through 15th December, 2003 – US$4,770.00. EC$12,959.61

(2) Rental of an alternative house for 2 weeks for children and Grandchildren's visit over the Christmas from 20th December, 2003 to 4th January, 2004 – US$1,200.00. EC$3,260.28

(3) Diminution in value of 1st and 2nd Claimants' property. EC$100,000.00

(4) Loss of rental income by the 3rd Claimant for 1 year – US$13,140.00. EC$35,700.00

(5) Diminution in value of 3rd Claimant's property. EC$100,000.00

(6) Loss of rental income by the 4th t and 5th Claimants from December, 2002 to December, 2003. EC$19,500.00

(7) Diminution in value of 4th and 5th Claimants' property. EC$100,000.00

(8) All the Claimants claim damages for mental distress, inconvenience, discomfort and disturbance.

[9] On 5th June, 2012 the Claimants obtained the following Order from the Court:

1. The Claimants are entitled to the following Orders pursuant to the Order of the Court dated the 30th day of October, 2009:

   (i) a right of way on foot and by vehicle over the Northern and Southern Gate on the Mother Parcel (Registration Section: McKinnons; Block: 45 1595B; Parcel: 65) and the access road leading therefrom.

2. An injunction to restrain the 1st Defendant by himself, his servants or agents or otherwise from:

   (i) Molesting or interfering, physically or otherwise threatening nay of the Claimants, their servants, guests, lawful visitors or any other person transacting or seeking to transact business with any of the Claimants or in any other manner which is of such nature and degree as to cause annoyance, or result in ill-treatment of the Claimants, their servants, agents, guests, lawful visitors or any person transacting or seeking to transact business with any of the Claimants; and

(ii) Denying and/or impeding the Claimants or their servants, agents, lawful visitors or persons seeking to transact business with the Claimants in the exercise of an uninterrupted Right of Way on foot and by vehicle through the Northern Gate of the Mother Parcel (Registration Section: McKinnons; Block: 45 1595B; Parcel: 65) or in the exercise of an easement to park in the parking area closest to the Southern Gate of the Mother Parcel.

3. An injunction ordering and directing the defendants whether by themselves, their servants, agents or otherwise to:

(i) Remove any and all fencing encroaching on the foreshore adjacent to Runaway Bay a public beach and the property of the Crown.

(ii) Remove all garbage/debris from the vicinity of the Claimants properties that are obstructing and prohibiting the Claimants from accessing their property from the public beach front.

[10] Subsequently, on the 27th June, 2012 the Claimants obtained the following Order from the court:

1. The Claimants are entitled to the following Order pursuant to the Order of the court dated the 30th October, 2009:

(i) The Claimants, their servants, agents, guests, lawful visitors and other persons transacting or seeking to transact business with them or any of them are entitled to an easement to park in the parking area of the Mother Parcel (Registration Section: McKinnons; Block: 45 1595B; Parcel: 65) closest to the Southern Gate.

The Law

[11] Nuisance is a common law tort. In the case of private nuisance, which is the subject of the claim at bar, this occurs where there is an interference with a person's enjoyment and use of his land. The law recognizes that owners of land or anyone who is in rightful possession of land has the right of quiet enjoyment of their land. The status of ownership or having rightful possession clearly means that a visitor or a person without an interest in the land would not be able to bring a private nuisance claim.

[12] In the determination of a private nuisance claim, the court will consider several factors. These include the fault of the defendant, whether the interference with the claimant's interest has been substantial and the reasonableness of the defendant's behavior.

Evidence of Mr. McLean

[13] Mr. McLean affidavit filed on 19th February, 2013 was accepted as his evidence in chief.

[14] Learned Counsel Mr. Hugh Marshall vigorously cross-examined Mr. McLean. During cross-examination Mr. McLean indicated that he acquired his villa in 1990 and used it as a source of income since he was not resident there. He could not remember when the villa was last rented but confirmed that it was rented while Mr. Gomes was the operator and that it was rented in 2002. He noted, however, that he was claiming for loss of rental although he has not placed before the court when the villa was last rented or any receipts.

[15] Mr. McLean indicated that he could not refurbish his villa since he was not allowed to walk on Defendants' property. He noted though that the last time he refurbished was probably in 2004 when he changed the furniture. He also indicated that he had access to the property in terms of cutting trees overhanging the roof but was not able to rent. When questioned by Counsel about his statement that Mr. Gomes prevented him from putting foot on the property, Mr. McLean admitted that he had access but carried out no refurbishing.

[16] Learned Counsel Mr. Marshall drew Mr. McLean's attention to parts 4 (i) and 4 (vi) of his affidavit where allegations are made that the Defendant started a systematic campaign of verbally abusing them, their servants, agents and guests etc., and illegally digging up the electrical and plumbing lines to the their villa respectively. However, during cross-examination Mr. McLean conceded that he did not provide any evidence of such abuse and that the digging up of the electrical and plumbing lines was an accident.

[17] Counsel reminded Mr. McLean of the series of hurricanes in 1995, 1996 and 1999 and inquired whether he rebuilt after 1995. Mr. McLean indicated that he rebuilt after 1995 and did not see anyone else rebuilding. In responding to a question from Counsel about the state of repair of the Defendant's property in 1999, Mr. McLean admitted that the property was not in good repair, there was significant beach erosion and the fence was in a derelict condition. Mr. McLean further admitted that around the year 2002 – 2003 the Defendant did some work on the premises and also erected a fence from which he said he also benefited.

[18] Counsel enquired from Mr. McLean how much he was paying DRB since his property valuation was done as part of a Condominium Complex and he said that he was paying nothing. He also indicated that he had not taken any steps to rent his property since 2004.

[19] On re-examination by learned Counsel Mrs. Freeland-Roberts about incidents he referred to between the Defendants and his tenants etc., Mr. McLean indicated that this information was captured in the letter of Stanford and Sullivan attached to his affidavit.

Evidence of Ms. Jennifer Hadeed

[20] Ms. Jennifer Hadeed affidavit filed on 19th February, 2013 was accepted as her evidence in chief.

[21] In the cross-examination of Ms. Hadeed, learned Counsel Mr. Marshall, asked her if she was legally responsible for Mr. Morill's affairs prior to the 10th February, 2010 and she said no.

[22] Learned Counsel took Ms. Hadeed through her affidavit and asked her if she could swear to the truth of the contents and she said no. Counsel then suggested that this was so because the contents of the affidavit were based on information given to her and she agreed with him. Ms. Hadeed also indicated that as Mr. Morill"s legal guardian she has never taken any steps to rent the property and that the Defendants never hindered her access to the property.

Evidence of Mr. Gilbert Gomes

[23] Mr. Gilbert Gomes affidavit filed on 23rd April, 2013 was accepted as his evidence in chief.

[24] Learned Counsel Mrs. Freeland-Roberts in her cross-examination of Mr. Gomes sought to clarify his ownership of DRB and when it occurred. Mr. Gomes indicated that he is the director and sole shareholder of the company and this came about when he paid for the shares 2002. He also indicated that there were 10 to 11 owners of units when he took over and he informed them that he was the new owner but Mr. McLean said he was the caretaker.

[25] Learned Counsel suggested that the Claimant was not told as indicated by Mr. Gomes but was only told during an incident. However, Mr. Gomes insisted that he went to the Claimant's villa and informed him.

[26] Learned Counsel inquired about the condition of the property when Mr. Gomes took over. Mr. Gomes indicated that the property was not fenced and there were a lot of "Kassie" trees all over. He indicated that he hired machines and started to clean the property as well as looking after the beach. He said he had no connection with the property prior to 2002.

[27] Mr. Gomes was taken to paragraph 7 of his affidavit by Counsel, where he indicated that upon taking over the company he met with the Claimants and other unit owners. Mr. Gomes said that he met with them collectively, McLean, Gobinet etc. At the meeting he said he was informed by some of the unit owners of the current arrangements including the discount at the restaurant and monthly fees for maintenance, fencing, security and swimming pool. He said that he indicated to the meeting that everyone would contribute to bring the beach back.

[28] Learned Counsel inquired if as a result of the meeting new arrangements were put in place. Mr. Gomes indicated that the old arrangements continued, except for a request by Mr. McLean for a new contract. The new contract was subsequently prepared and presented to Mr. McLean but he indicated that he will not pay. In responding to a question from Counsel, Mr. Gomes indicated that the contract was probably drafted in 2007.

[29] Learned Counsel put it to Mr. Gomes that several claims were filed against him in 2003, but he indicated that he could not recall. Counsel specifically asked if he could not recall actions by Mr. McLean and Mr. Ross against him and he insisted that he could not remember. He indicated, however, that he recalls an injunction brought against Mr.

McLean since he would have parties on his (the Defendant) property and left the garbage there.

[30] Mr. Gomes was asked by Counsel whether between 2002 and 2004 he was involved in any incidents with any of the Claimants. He indicated that the only incident he can recall involved a guest of Mr. McLean called Popeye, who said that he was attacked by thieves and requested a cutlass from him. Counsel again asked Mr. Gomes whether he recalled any incidents in 2004 with any guests or the Claimants and he replied no.

[31] Learned Counsel inquired from Mr. Gomes whether the fence he erected covered the Claimant's property. He indicated that the fence was erected around his property only and that 10 keys were cut for the unit owners for which they paid $10 each. He indicated further that some owners congratulated him on the fence for the increased security that it provided.

[32] Mr. Gomes' attention was drawn to Mr. McLean's affidavit and attachment CJM1 which presented information on the experiences of two guests who were staying at Mr. McLean's villa. When asked by Counsel if he recalled the incident highlighted by the guests he said no. Mr. Gomes indicated further, which was totally unrelated to the information in attachment CJM1, that the only altercation he had with Mr. McLean arose out of the fact that he had broken the walkway and built on the land of DRB without permission from the Development Control Authority.

[33] Mr. Gomes was asked by learned Counsel whether he has ever denied access to the parking lot to Mr. McLean. He answered in the affirmative and indicated that he informed Mr. McLean that it was his parking lot and the other unit owners pay to use it.

[34] Learned Counsel reminded Mr. Gomes that his evidence was that he never had any incidents with the Claimants and that he never told them that they were trespassing on his property. She also reminded him of the court Order in 2004 preventing him from interfering with the Claimants and their guests and the 2009 Order giving access to the Claimants. Counsel then asked Mr. Gomes if he can recall the incident of him not giving access to APUA to read the meters. This was denied by Mr. Gomes.

[35] Learned Counsel inquired from Mr. Gomes if when he took over the premises he issued a directive to the unit owners that a list of their guests should be provided to him and that if the list was not provided they would be denied access. Mr. Gomes indicated that he did request the list but that no one was ever denied access.

[36] Learned Counsel inquired from Mr. Gomes whether he sent communication to the unit owners about the use of the property after he took over and whether unit owners were given access to both the northern and southern gates. Mr. Gomes answered in the affirmative to both questions. Counsel also asked whether directions were given to unit owners in 2005 about parking and whether they were sent communication about the renovation of the parking area. Mr. Gomes indicated that they were informed about the renovation of the parking area and that they were also told that they could park after paying.

[37] With respect to the cleaning of the units and the surroundings, learned Counsel inquired from Mr. Gomes whether any of the unit owners made request for workers to access the property between 2004 and 2009. Mr. Gomes indicated that he was never informed but that there was never any objection to workers entering the property.

[38] Learned Counsel inquired from Mr. Gomes whether he interfered with the Claimants or their guests after the 2012 court Order, or whether he can recall stopping anyone from entering area around the units to do work. Mr. Gomes answered no to both questions. However, Counsel put it to Mr. Gomes that in 2012 a request by Mr. McLean to have a worker with a truck enter the property to clean was denied. Mr. Gomes indicated that there was no denial, but Counsel put it to him that access was only granted after the police was called.

[39] With respect to access to the beach, Mr. Gomes indicated that he has never interfered with the unit owners having access to the beach.

[40] In concluding her cross-examination, learned Counsel drew Mr. Gomes' attention to 15 (f) of his affidavit, which involved an investigation by APUA into electricity and water consumption on the property that were unauthorized. She inquired from Mr. Gomes whether the units were connected to the APUA for water and electricity in 2002. Mr. Gomes' answer to this question was that he did not know.

Visit to the Locus in Quo

[41] On the afternoon of 20th June, 2013 a visit was undertaken to the site at Runaway Bay. Included in the visit were the attorneys of both sides and Mr. Claire McLean and Ms. Jennifer Hadeed. During the visit it was quite noticeable that there has been much improvement in the property and the beach when compared to the pictures that were exhibited with the affidavits of both the Applicants and Respondents. However, all the villas were still in a state of disrepair.

Claimants' Submissions

[42] Learned counsel for the 1st and 2nd Claimants, Mrs. Freeland-Roberts, noted that the 3rd Claimant, who is also a party to this application via his legal guardians, has encountered similar experiences and issues like the 1st and 2nd Claimants with the Defendants. As a consequence, she has submitted that the 3rd Claimant is entitled upon application for the same award of damages resulting from the Defendants nuisance.

[43] Learned Counsel noted that the issues to be determined by the court are as follows:

1. What is the measure of damages in tort for private nuisance?

2. Whether the claimants are entitled to damages on the basis of their lack of access and consistent violation of their right to peaceful enjoyment of their properties?

3. What are the principles to be applied in awarding damages on the aforesaid basis?

[44] With respect to the issue of the measure of damages for private nuisance, learned Counsel has noted that once the injured party can show that there is material injury to his property or substantial interference with his use and enjoyment of it, then he is entitled to compensation. Counsel further noted that there are three classes of cases where the Claimant is not required to prove damages. These are (a) where on the facts damage can easily be readily presumed (Fay v Prentice (1845) 135 ER 789); (b) where the defendant interferes with an easement or right of access of the claimant (Nicholls v Ely Beet Sugar Factory Ltd. (1936) Ch 343); and (c) where harm to the claimant is reasonably feared to be imminent though none has actually occurred, an injunction may be granted in a *quia timet* action.

[45] Relying on the case of Osbourne Roberts v Romeo Roberts and Attorney General ANUHCV2003/0400 where the Court held that the claimant's property had been diminished in value as a result of a nuisance created by the 1st defendant which severely affected the claimant's right of way; learned Counsel has submitted that in the present case, the defendants consistent denial of access by the claimants to their property would give rise to the presumption that some kind of damage would result or more specifically that the value of the property would diminish. In fact Counsel has noted that the claimants were denied their right of access and the right to park on the defendants' property, an easement that was established long before the 2nd defendant took possession of the Mother Parcel.

[46] Learned Counsel noted that the Court in assessing the damages in Osbourne Roberts, adopted the principles stated in Snell and Prideaux v Dutton Mirrors (1995) 1 EG LR 259 where it was held that the claimant's entitlement to damages would be determined on the basis of the difference between the value of the property with full right of way (including the right of passage way for vehicles) and the value of the property with the more limited right of way. She further noted that in that case, even though the Claimant did not adduce the extent of the loss suffered, the court held that the value of his property was diminished and accordingly granted him an award.

[47] With respect to the second issue raised by Counsel i.e., whether the Claimants are entitled to damages on the basis of the lack of access and the interference with their right to the peaceful enjoyment of their property, she cited the English Court of Appeal case of Bone v Seale (1975) 1 All ER 787. In that case the defendants operated a pig farm which emitted intolerable stench against which the claimants sought an injunction and damages in respect of the stench. Even though the court held that the claimant suffered no pecuniary loss and there was no damage to his property nor interference to his health, the court awarded damages on a basis similar to that utilized in cases of loss of amenity in personal injury cases.

[48] In turning her attention to the defence raised by the Defendants, learned Counsel has noted that the 1st Defendant wants the court to believe that there was no nuisance on his part and that all the allegations of the Claimants are false. She noted further that by

implication the Defendants are suggesting that the injunction granted by the court in the matter on 7 January, 2004 were given on the basis of false accusations by the Claimants. Counsel has therefore urged the court to disregard this defence.

[49] Learned Counsel has also challenged the defence of necessity relied on by the Defendants, where they contend that everything that was done to the properties and the beach front that the Claimants consider a nuisance, was necessary to save the properties and increase their value. Learned Counsel noted, however, that although the courts have accepted necessity as a defence, for example in a case where the action of a defendant to avoid an imminent danger to himself has resulted in damage to the claimant; a defendant should not do more than is reasonably necessary to protect his property[1].

[50] In concluding her submissions, learned Counsel reiterated the fact that the Defendants actions not only restricted the Claimants access to their properties across the Mother Parcel or via the beach, but it also diminished the value of their properties. She noted that the debris, old iron, fish pots, cut trees and other unsightly objects dumped around the Mother Parcel and which restricted access; became the subject of an injunction which the Defendants are yet to fully comply with following the 27 June, 2012 court order. Counsel challenged the Defendants position that the Claimants could not have rented their units because they were in a state of disrepair. She noted that the Claimants usual tenants did not cite the disrepair as reasons for not returning, but rather the behavior of the 1st Defendant and his daughter.

Defendants' Submissions

[51] Learned Counsel Mr. Hugh Marshall at the outset of his defence made the following submissions:

(i) The Claimants claim special damages for losses they have not proved in any acceptable manner whatsoever.

(ii) The Claimants have presented substantial material contrary to the rules of evidence to include major sections of certain affidavits. As a consequence there is no evidence to substantiate the claims for damages.

(iii) The Claimants have taken no steps to mitigate their losses if any.

(iv) The Claimants have not proven in any acceptable manner any general and foreseeable loss that would result in an award of general damages.

[52] Counsel also highlighted the fact that the 1st, 2nd and 3rd Claimants claimed loss of rental income of their properties for the same period, rental of alternative accommodation for the same number of family members for the same period and a diminution in the value of the properties. He noted that all these claims are claims for special damages and that based

[1] Vaccianna v Bacchas (1964) 8 JLR 497 (Court of Appeal Jamaica) as referred to by Gilbert Kodilinye in the Commonwealth Caribbean Tort Law (3rd Ed.) page 185, footnote 122.

on the principles that govern an award for special damages they must be specifically pleaded and proved. He cited as authority for this the case of British Transport Commission v Gourley (1956) AC 185. He noted further that on examination of the affidavits in support of the claims, no evidence is submitted by the Claimants to support their contention that the properties were marketed for rentals during the period September, 2003 to December, 2004. There is also no evidence submitted to support the contention that relatives were accommodated at alternative premises.

[53] It is submitted by Counsel that in order for the Claimants to maintain a successful claim against the Defendants for the loss of rental revenue, they would have to present evidence of a single occasion where a prospective tenant was turned away because of the alleged actions of the Defendants. He noted that this was not done and therefore this aspect of the claim must fail.

[54] With respect to the general condition of the property, learned Counsel has submitted that it was in a derelict condition following hurricane Luis in 1995 and little had been done in terms of repairs and upkeep. Counsel noted that Mr. McLean in his cross-examination confirmed that the properties were damaged after hurricane Luis, that the property of the 2nd Defendant was not in a good state of repair and that there was significant beach erosion. Learned Counsel has submitted, therefore, that on a balance of probabilities the properties were not suitable for rental and the Defendants could not be held liable for any loss in rental. He noted further that rather than making the properties less marketable, the Defendants have improved their condition.

[55] In addressing the issue of the diminution of the value of the Claimants' property, learned Counsel again pointed to the lack of evidence to support this contention. He noted that in fact the evidence would show that from 2002 the Defendants began to make substantial injection of funds into the communal properties to restore the beach, erect a new perimeter fence, restore and renovate the main building and restore the grounds. Counsel further noted that these are all activities which the Claimant admitted enhanced his property. Counsel has submitted that the property value would also improve as a result.

[56] Learned Counsel gave some attention to the issue of general damages. He noted that the Claim Form contained a series of events which could give rise to a claim in general damages. Counsel made the point, however, that while the pleadings are repeated in the affidavits, they were not repeated as a recollection of what occurred but as a summary of the Claim Form. In that regard, Counsel is of the view that no evidence is presented to support the contentions raised by the Claimants, in that no witnesses came forward to substantiate the contentions made against the Defendants by the Claimants.

[57] With respect to the affidavit of Elizabeth Harrington and Jennifer Hadeed, Counsel noted that Ms. Harrington did not attend the hearing to be cross-examined and Ms. Hadeed in her cross-examination admitted that the contents of her affidavit were based solely on information she received. Counsel indicated, therefore, that pursuant to Rule 30.3 (1) of the CPR the evidence of Ms. Hadeed must be excluded.

[58] Learned Counsel concluded his submissions by indicating that the Claimants failed to prove any losses, either general or special, and therefore no award of damages can be given to them. He submitted that since costs must follow the event, an Order for costs should be made to the Defendants based upon the value of $50,000 pursuant to Rule 65.5 (2) (iii) of the CPR.

Analysis and Conclusion

[59] The DRB Company was incorporated in 1976. It purchased the Runaway Beach Hotel located at Runaway Bay and engaged in its operation for several years. Within the last two decades DRB ventured into a condominium complex type of operation. The shareholders of DRB then were Robert Deshazo, John Deshazo and Florence Suttie. The shares of Robert Deshazo and John Deshazo were subsequently transferred to Gilbert Gomes, who in 2002 became the majority shareholder of DRB.

[60] On assuming control of DRB Mr. Gomes continued the operation of the business. From the information presented to the court it is quite evident that there were problems from the very outset. In the case of the Claimant, Mr. Claire McLean, it appears that he had some difficulty accepting the new owner of the property as evidenced by his characterization of Mr. Gomes as the "caretaker". On the part of the Defendant, Mr. Gomes, I suspect that he was venturing into a new area of business and did not fully understand some of the peculiarities of a Condominium Complex type of operation and the legal obligations that would be involved. A case in point to underscore Mr. Gomes' misunderstanding of the operation of the Condominium Complex was his request to the unit owners for a list of their guests.

[61] I am of the view that it was a misunderstanding by all the parties involved that led to the ensuing problems at the Runaway Beach Club. In going forward all parties need to understand what their legal obligations are. The unit owners are obligated to pay for the communal services that are provided and the owners of DRB should realize that the fact that the units are surrounded by the Mother Parcel do not give them the right to hinder the access to the units.

[62] It is primarily the issue of access which precipitated the present claim. The Claimants are claiming special and general damages as a result of the activities of the Defendants commencing in 2002.

[63] With respect to special damages, these have to be pleaded and proved. In the case of Mr. McLean he has claimed special damages of $568,626.89, while Mr. Morill claimed $807,685. In neither case are these claims supported by any documentary evidence. While Mr. McLean has presented a letter from past tenants, Mrs. Rosemary Stanford and Mr. Paul Allan Sullivan, to indicate the rental they paid in 2002; this piece of information by itself cannot be used to compute the loss of rental income that he suffered. It should be noted as well that in the case of Mr. Morill, his witness Ms. Jennifer Hadeed conceded that she could not swear to the truth of the contents of her affidavit. In these circumstances, therefore, the court is not in a position to make an award for special damages to the Claimants.

[64] Learned Counsel for the Defendants has conceded that the Claim Form includes a series of events which could give rise to a claim in general damages. However, during his cross-examination Mr. McLean has admitted that no evidence has been provided to support the allegations that he has made against the Defendants. He has also admitted that he has had access to his property but carried out no refurbishing; that the issue of the disconnection of his electricity and water was an accident; and that he benefitted from the erection of the fence by the Defendants. In the case of Ms. Jennifer Hadeed, she also admitted that she has never taken any steps to rent the property and that the Defendants never hindered her access to the property. Even more telling was her admission that she could not swear to the contents of her affidavit, which is contrary to Rule 30.3 (1) of the CPR.

[65] It is unfortunate that this matter did not go to trial because there are a number of issues involved which could only be determined at trial. Learned Counsel for the Claimants has submitted, as authority and for the guidance of the court, the case of Osbourne Roberts v Romeo Roberts and the Attorney General, ANUHCV2003/0400. While there are some similarities between the case at bar and Osbourne Roberts with respect to the nuisance attributed to the Defendants, in the latter evidence was presented by witnesses to support the allegations of the Claimant. The Claimant was awarded $20,000 for general damages for the diminution of the value of his property as a result of the access to his house being blocked. In the instant case, no conclusive evidence has been provided to show that the Claimants were denied access to their properties, as a consequence the court cannot make an award for general damages.

[66] As I have indicated before, I believe this matter precipitated from a misunderstanding between the parties when Mr. Gomes assumed control over DRB. For the operation at Runaway Bay Beach Club to continue into the future smoothly, there must be some adjustment in the mindset of the operators of the DRB that the unit owners access to their properties must be unhindered at all times. More importantly, if the Condominium Complex type of operation is to continue, then all concerned will have to agree and adhere to the operative modalities that are put in place.

[67] In conclusion and for the reasons indicated above, I make the following order:

(i) I make no award of damages to the Claimants; and

(ii) I make no order as to costs.

[68] The court is grateful to Counsel on both sides for their helpful oral and written submissions.

Charlesworth Tabor
Master (Ag.)