EASTERN CARIBBEAN SUPREME COURT

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2013/0065

BETWEEN:

JASDIP LTD

Claimant

and

[1] CAP ESTATE (ST.LUCIA) LIMITED

[2] SEA BREEZE HILLS DEVELOPMENT COMPANY LIMITED

Defendants

CLAIM NO. SLUHCV2013/0066

BETWEEN:

[1] ALEXANDER GEDDES

[2] WINIFRED GEDDES

Claimants

and

[1] CAP ESTATE (ST.LUCIA) LIMITED

[2] SEA BREEZE HILLS DEVELOPMENT COMPANY LIMITED

Defendants

Appearances:

Mr. Ramon Raveneau, for the Claimants

Mr. Dexter Theodore, QC for the Defendants

2017: August 8

JUDGMENT

[1] **ACTIE, M**.: The claimants obtained judgment in default of defence against the defendants and the matters are now before this court for the assessment of damages. The two claims are not consolidated but arose from similar land sales transactions with the defendant companies.

Background

[2] By Deed of Sale dated 3rd June 2008, JASDIP Ltd. obtained title to two parcels of land from Cap Estate (St Lucia) Ltd. By Deed of Sale and Deed of Lease Assignment dated 17th June 2009, Alexander and Winnifred Geddes, obtained the freehold and leasehold title for two parcels of land from Cap Estate (St. Lucia) Ltd. The parcels of land formed part of an upscale development at Cap Estate known as "Sea Breeze Hills Development". A Development Company, "Sea Breeze Hills Development Company Ltd" was incorporated for the purpose of maintaining the high standards and future viability of the development.

[3] Both title deeds contained a clause that the "Development Company" would have the responsibility for the repair and maintenance of the common areas, garbage collection, pest control and all incidents incurred in the normal course of property maintenance and management of the development. The Deeds of Sale expressly stated that the common areas had been vested in the "Development Company". Each purchaser of a lot within the development was ipso facto a member of the "Development Company" and was entitled to the issue of one common share in the company for each lot purchased with a view to having some control in the Development Company.

[4] Prior to the execution of the Deed of Sale, the parties had entered into an agreement for sale with the defendant companies. It was a term of the agreement for sale that the common property would have been transferred to the "Development Company" prior to the execution of the deed of sale. The agreement provided that the "Development Company" would have the responsibility for road maintenance and repairs within the development, garbage collection and disposal, pest control and security. The Development Company was to levy charges on all property owners within the development to defray the expenses incurred in fulfilling its obligations.

[5] The claimants aver that Cap Estate (St Lucia) Ltd had up to the date of filing of the claims failed to vest the common areas in the "Development Company" and had also failed to transfer the shares in the Development Company to the claimants in accordance with the expressed terms of the Agreement for Sale and Deed of Sale.

[6] The claimants aver that they along with other land owners, have had to personally finance the management and maintenance of the development which was intended to be the responsibility of the "Development Company". The claimants, having obtained judgment in default of defence are now seeking the assessment of damages.

[7] Counsel for the defendants vehemently challenges the assessment of damages on several grounds. Counsel is of the view that the claimants are not entitled to any compensation as the Deeds of Sale are silent on provision of security services. Counsel contends that the provision of security services was only a term in the Agreement for Sale but did not form part of the Deeds of sale. Counsel contends that the terms of the Agreements for Sale are inadmissible in this assessment of damages having been neither pleaded nor exhibited to the affidavits in support of the applications for default judgment. However, Counsel contends that should the defendants be held liable then liability is limited to USD $5000.00 in accordance with the Agreement for Sale which he alleges to be inadmissible.

[8] Counsel for the claimants in response states that the terms of the agreement are incorporated in the Deed of Sale mutatis mutandis.

Law and analysis

[9] The starting point is that once a judgment in default of acknowledgement or defence has been granted, unless the defendant obtains an order of the court setting aside the judgment in default, it is taken to mean that the defendant has accepted liability.

[10] The court notes that the defendants raised several objections which go the quality of the claimants' pleadings and also to issues of liability. The defendant cannot after judgment in default of acknowledgement or defence raise any challenge as to the deficiency of the claimant's pleadings or liability. The defendant's participation in the assessment of damages is limited to the issue of quantum of damages.

[11] The Privy Council in **Strachan v. The Gleaner Company Ltd & Anor**[1] at paragraph 16 states:-

> "The first is that, once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307 citing *Lunnon v Singh* (unreported) 1 July 1999, EWCA. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata.* The second is that, whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at

[1] [2005] UKPC 33

a further hearing at which the plaintiff could prove his loss. The third is that the claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount of such damages which remains to be determined".

[12] Our Court of Appeal in **Michael Laudat & The Attorney General of The Commonwealth of Dominica v Danny Ambo**[2] Edwards J.A stated:-

> "Ordinarily, at an assessment of damages hearing the court would not enquire into matters of liability because the defendant, having failed to file an acknowledgment of service and/or a defence is taken to admit liability as pleaded. At the assessment of damages hearing, the court is not required to re-open the application or request for default judgment; and it would not be appropriate to go behind the default judgment order or assess the merits of the pleadings in relation to the cause of action while the default judgment stands. The issue of the defendant's liability having been settled by the default judgment, the only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of any special damages claimed and general damages. Where damages for any pleaded causes of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim."

[13] **CPR 2000 Rule 12.13** and **Rule 16.2** give the defendant an option to participate in the assessment of damages. The defendant/judgment debtor can only challenge quantum and nothing more. The claimant on the other hand is under an obligation to provide palpable evidence to prove the amounts claimed. The evidence relied on should not merely be exhibited but should fairly summarize their effect to prove the amounts claimed under the various heads.

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[2] DOM HCVAP 2010/016

[14] Guided by above referenced principles, I now look at the awards claimed by the respective claimants along with the supporting evidence.

(1) CLAIM NO. SLUHCV2013/0065 - JASDIP LTD.

[15] **Special Damages**

(a) **Personal annual share of providing security for development: -** JASDIP pleaded that it has had to and continues to pay the portion of the costs of providing security which were better suited to be provided by the "Sea Breeze Hills Development Company" up to the filing of the claim and to date of assessment. The sums were all substantiated and are accordingly allowed as claimed in the following sums:-

I. Security for the period from April 2012 to December 2012- $74,587.82.
II. Security paid for the month of January 2013 - $7,452.00
III. Security services for 2013 - $75,348.00
IV. Security services for the year 2014 - $100,533.40
V. Security services for the year 2015 - $108,656.77

Total award for providing security services = $366,577.99

[16] JASDIP in its claim particularized, pleaded and substantiated a claim for annual share of providing maintenance of the guard house in the sum of $1620.82 and is accordingly allowed.

[17] **Miscellaneous-** JASDIP claims for miscellaneous costs consisting of travel expenses and car rental expenses to attend mediation and the assessment of damages.

[18] Parties are under an obligation to attend court to pursue their matters. The fact that the parties are resident outside the jurisdiction is not by itself an issue to be taken into consideration in an assessment of damages. The court has over the years engaged the use of technology to accommodate overseas litigants. The parties could have made arrangements to join the mediation proceedings and

assessment of damages by using skype or video conference technology. Parties are under an obligation to take all possible steps to mitigate their losses. JASDIP has not convinced the court of the necessity to have incurred the costs claimed under this head and accordingly are not allowed.

[19] **Personal share of cost of installing proper drainage: -** JASDIP claimed the sum of $34, 748.06 under this head. Counsel conceded that the amount claimed is premature and should be deleted.

[20] **Prospective loss –** JASDIP claims prospective damage reasonably anticipated until the common property is vested in the "Development Company". The text Mc **Gregor on Damages at Para 11-024**[3] in relation to prospective loss states :-

> "The rule is that damages for loss resulting from a single cause of action will include compensation not only for the damage accruing between the time the cause of action arose and the time the cause of action commenced, but also for the future or prospective damage reasonably anticipated as the result of the defendant's wrong, whether such future damage is certain or contingent".

[21] It is the evidence that the defendants up to the date of judgment had not transferred the common areas to the "Development Company" in accordance with the terms of the Agreement for Sale and Deed of Sale which were executed between 2008/2009. JASDIP seeks compensation for prospective continuing loss for a period of at least 6 months as a reasonable time for the common areas to be vested in the "Development Company".

[22] The court notes that the matters have been in the system since 2013 for the ongoing breach since 2008/2009. It was brought to the attention of the court that efforts were being made to finalize the transfer of the common property to the

[3] 18th ed. Page 435

Development Company along with the transfer of the shares to the purchasers in keeping with the terms of the Agreement for Sale and Deed of Sale. In the circumstances, I am of the view that a period of six months should give the parties sufficient time to finalize all outstanding issues under the terms of the contracts. Accordingly, I award compensation for prospective loss using the monthly sum of $8556.00 x 6 = $51,336.00.

[23] **Misrepresentation:-** JASDIP claims general damages for fraudulent misrepresentation. JASDIP avers that both defendant companies were represented by the same directors, Trevor Cozier and Lawrence Samuel. It was an express term in the Deed of Sale that the common property had been vested in the Development Company. The claimants aver that Cap Estate (St. Lucia) Limited having been represented by the same directors as the Development Company, had full knowledge of the fact that the common property had not been transferred but made the representation knowing it was false or not believing it to be true or was reckless and not caring whether it was true or false.

[24] It was held in **Derry v Peek** that a false statement made carelessly, without reasonable belief in its truth did not amount to fraud but may furnish evidence of it. Four principal elements of the Tort of Deceit must be established: (1) There must be a false representation of fact by word or conduct;(2) The representation must be made with knowledge that it is false or made in the absence of belief or truth ;(3) The false statement must be made with the intention that the claimant should act upon it causing him damages (4) It must be shown that the claimant acted upon the false statement and sustained damage in so doing. If fraud is proved, there is no necessity to establish that there was no intention on the part of the defendant to injure or defraud the claimant.

[25] In **Smith v Chadwick** Lord Bramwell said “an untrue statement as to the truth or falsity of which the man who makes, has no belief is fraudulent; for, in making it, he affirms, he believes, which is false.”

[26] It is evident that the assertion that the common property had been vested in the Development Company was false. It is a reasonable inference that the same directors of the two companies ought to have known that the common property had not been transferred to the Development Company. What then is the measure of damages to be awarded to the claimants? The Court in **Clarke and others v Urquhart**[4] held that where a claimant had been induced to purchase property by reason of fraudulent representation, the claimant may opt for the recovery of the purchase price and the actual value of the property at the time of the sale and also consequential loss he may have sustained, provided such loss is not too remote. The object of the award of damages is to put the claimant in as good a position, as far as money can do it, as if the promise had been performed[5].

[27] JASDIP presented an estimate from LJA Construction Ltd for the rehabilitation of the guard hut. The estimate gave two options for rehabilitation for the "Sea Breeze Hills Development' security entrance hut. Option 1 gives an estimate cost of $24,325.00 for the rehabilitation of the existing guard house. Option 2 gives a more detailed and extensive estimate for the construction and replacement of the guard house in the sum of $140,130.00. JASDIP is not seeking the recovery of the purchase price but urges the court to make an award in the sum $140,130.00 for option 2 in the LJA construction estimate.

[28] The usual measure of damages is the value transferred generally represented by the contract price less the value received. A valuation survey report would have best represented the value of the property without the agreed security as claimed compared with the costs paid by the claimants. JASDIP has not advanced any cogent reason for not providing the evidence to prove the difference of actual face value of the property neither has it presented any reason for the selection of option 2 of the LJA construction estimate.

[4] [1930] A.C. 28
[5] Per Lord Denning in Doyle v Olby (Ironmongers) Ltd [1969] 2 Q.B 158

[29] The court in considering an award for damages should give consideration to relevant matters and to award damages that are not too remote. JASDIP has not convinced the court that cost of rehabilitation of the existing hut is the appropriate quantum of damages to be awarded for the misrepresentation. The court is not to speculate in an assessment of damages. The claimant is under an obligation to prove damages in accordance with established principles. The claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the claimant could prove its loss. Parties are under an obligation to assist the court in making an appropriate award. In the circumstances, I am constrained to refuse an award under this head.

ORDER

[30] In summary, JASDIP is awarded the following

Special Damages

(1) Security services = $366,577.99

(2) Maintenance of the guard house - $1,620.82

Total Special Damages in the sum of $ 368,198.81 with interest at the rate of 3% from the 3rd June 2008 to the date of filing the claim and at the rate of 6 % from the judgment till payment of debt in full.

(3) Prospective Loss - $51,336.00 with interest at 6 % from the date of judgment until payment in full.

(4) Prescribed Costs on the global sum in accordance with CPR 65.5.

(2) CLAIM NO. SLUHCV2013/0066-Alexander Geddes and Winnifred Geddes

Special Damages

[31] **Alexander Geddes and Winnifred Geddes** (The Geddes) - pleaded and particularized for damages for security for development from the time of purchase to present in the sum of $26,288.00. However, they were only able to substantiate evidence to prove the sum of $$20,333.58 up to the date of filing of the claim. The Geddes also proved continuing loss since the filing of the claim in the sum of $16,711.16 making a total sum of $37,044.74 and is accordingly awarded.

[32] **Damages for Misrepresentation –** The Geddes' claim general damages for fraudulent/negligent misrepresentation damages in the sum of $140,130.00. The Geddes like JASDIP relies on an estimate from LJA Construction Ltd for the rehabilitation of the guard hut. For the reasons given at paragraph 26 above, I will refuse an award under this head.

[33] **Prospective loss – The** Geddes also claimed for prospective loss in the sum of $3900.00 taking an average monthly payment of $650.00 for approximately 6 months. Using the same principles as in the award to JASDIP at paragraph 20 above I will allow the award as claimed under this head

Mental Distress

[34] The Geddes' claim an award of damages for mental distress. The Geddes aver that the development was advertised as a secured gated community. The Geddes submitted evidence of brochures advertising the development as a gated community with full security services.

[35] The general rule at common law as laid down in **Addis v Gramophone Co Ltd**[6] is that damages for injured feelings cannot be recovered in an action for breach of contract. The rule has been relaxed with certain exceptions called the "holiday cases". Under this exception, damages have been awarded where the object of the contract was to provide pleasure, peace of mind or sentimental benefit.

[6] [1909] AC 488 (HL)

[36] In **Farley v Skinner**[7]**,** Mr. Farley bought a large estate, not far from Gatwick. Airport. It had a croquet lawn, a tennis court, an orchard, a paddock and a swimming pool. It cost £420,000 and after the purchase was complete on 28 February 1991, he spent £125,000 improving it. He hired Mr. Skinner to survey the house, particularly to determine levels of aircraft noise. Skinner reported that the noise was of acceptable level, whereas in reality, at 6 am the noise was intolerable. This distressed Mr. Farley often spent early mornings in his garden. The trial judge held that Mr. Farley had paid no more than someone who knew of the noise, so there was no financial loss, but awarded £10,000 for distress. The Court of Appeal overturned this judgement and rescinded the £10,000 award. The House of Lords restored the trial judge's award, because not being put at such inconvenience was an important term. Lord Scott held that if Mr. Farley had known about the aircraft noise he would not have bought the property. He could either claim for being deprived of the contractual benefit (*Ruxley Electronics Ltd v Forsyth*), or he could claim as having consequential loss on breach of contract (*Watts v Morrow*). He added that if there had been an appreciable reduction in the house's market value, he could not recover both, which would have been double recovery. The House of Lords restored the trial judge's award, because not being put at such inconvenience was an important term.

[37] The Geddes' state that the development was advertised as gated to portray that this was a community separated from the outside world with strictly controlled access as opposed to one which offered unimpeded access to bandits. They aver that they purchased the property on the expressed representation and absolute belief that they were purchasing gated community equipped with security services. They aver that living at the development has been mentally distressing and emotionally daunting as there were always intruders on the property.

[7] {2002} 2 AC 732

[38] As stated in the authorities, it is a general rule that damages are not available for mental distress when a contract is breached. However, where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. Taking all the circumstances in the round, I am of the view that damages are recoverable for the obvious inconvenience and mental stress caused by this continuing breach since 2009. Accordingly, I make an award in the sum of $3000.00 for mental distress.

Order

[39] In summary, Alexander and Winnifred Geddes are awarded the following:

(1) Special Damages in the sum of $37,044.74 with interest at the rate of 3% from 17th June 2009 to the date of judgment and at the rate of 6% from the date of judgment until payment in full.

(2) General damages for mental stress in the sum of $3000.00 with interest at the rate of 6% from the date of judgment until payment in full.

(3) Prospective Loss in the sum of $3900.00 with interest at the rate of 6 % from the date of judgment until payment in full.

(4) Prescribed Costs on the global sum in accordance with CPR 65.5.

Agnes Actie

High Court Master

By the Court

Registrar