BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 1237 of 2006

BETWEEN:

DAVID BROOKS **Plaintiff**

and

HENRY NEWITT **Defendant**

Before the Hon. Madam Justice Margaret A Reifer, Judge of the High Court

2007: November 21, 22, 23, 27

2009: June 19

October 9

Mr. Brian Weekes and Mr. Satcha Kissoon of Weekes & Kissoon Attorneys-at-law for the Plaintiff

Mr. Kevin Boyce and Ms. Alana Gore of Clarke, Gittens & Farmer Attorneys-at-law for the Defendant

DECISION

The Nature of the Action

[1] This is an action alleging breach of the implied terms of a contract to rent a vacation home, and a claim for the specific sum of $23,500.00 and damages consequent on the alleged breach.

The Relevant Facts

[2] The Defendant is the owner of the said vacation home on the west coast (#78 Cherry Lane, Sunset Crest) of Barbados, which he

advertised for rental by way of a web page on the internet. In June of 2005, via the said web page, he contracted to rent the said property to the Plaintiff and his family from the 13th to 28th December 2005. As required by the terms of the Defendant's offer, the Plaintiff on the 24th June 2005 paid a deposit to the Defendant in the sum of US$2 987.00. It was expressly stated that this deposit was non-refundable. On or about 15th October 2005, the Plaintiff paid the balance of the contract price in the sum of US$8 813.00.

[3] The Plaintiff and his family arrived in Barbados on the 13th December 2005. They arrived at the premises and thereafter alleged that the premises were unclean and uninhabitable and that the defendant failed to rectify the situation when it was drawn to his attention. They left the premises and after a brief stay at a hotel, stayed at a more costly residence on the prestigious Sandy Lane Estate.

[4] He now seeks the return of all moneys paid together with damages for breach of contract.

The Issues to be determined

[5] From the brief facts outlined the following issues arise:

(1) Were the subject premises fit for habitation?

(2) Did the Defendant refuse to rectify the alleged problems thereby forcing the Plaintiff to seek alternative accommodation?

(3) What is the Plaintiff's entitlement in damages should the Court make a finding of breach of contract? Is he entitled to a full refund of the moneys paid together with the difference in cost between the new accommodation and the contracted one? Is he entitled to a return of all or some of the money advanced under the rental agreement? Is the Plaintiff entitled to damages for Emotional Distress?

Was there a breach of the implied term as to fitness for habitation?

[6] In making this determination this Court must look at the evidence of the parties. It is trite law that the Plaintiff must prove his case. A review of the evidence brings into stark relief the issue whether the Plaintiff either by his evidence, oral and/or documentary, or by his cross-examination of the Defendant and his witness has proven his case on the balance of probabilities.

[7] The Plaintiff was the only member of this family unit giving evidence before the Court and his complaints are best summarized in this extract from his evidence:

> *'Mr. Newitt brought us into the house and it appeared as though it was still occupied. There were medicines and a toothbrush and other personal belongings of someone in the bathroom, the kitchen was dirty, there was trash about and there was broken furniture and some mould or algae. The coverlet on the bed was stained. In general, the house just wasn't suitable to be moved into. It looked as if it had not been prepared to receive guests."*

[8] It appears that after some exchange between the parties (there was an undisputed allegation that the Plaintiff's wife stated that the house was filthy and the Defendant took exception to this) the Defendant challenged the Plaintiff's objections to the premises. Tempers may have been lost and after the Plaintiff had asked for a refund, the Defendant's final position was that he would not refund the money, but that he would try to rent the premises and that he would give the Plaintiff what money he got from this. Before he left Barbados the Plaintiff received a cheque in the sum of $5000 from the defendant together with a note saying that he had been able to rent the house for four days.

[9] He took the cheque with him but found on his return home that his bank in California refused to deposit it. He communicated this fact to the Defendant and asked that alternative arrangements be made, but he never heard from the Defendant. The Defendant in his evidence later stated that he put a stop on the cheque.

[10] It is his argument that there was an implied term of the rental agreement that the premises would be fit for occupation at the commencement of the term of rental, the premises were in fact unfit, and as a result thereof the Defendant would have breached that implied term. He stated that he drew this to the attention of the Defendant who refused to rectify the situation and further, refused to even allow the plaintiff and his family to stay at the premises.

[11] Not surprisingly, the Defendant and his wife both of whom gave evidence, had a different story to tell. The Defendant is a retired professional building contractor, who acquired the Sunset Crest property in 2002 and thereafter refurbished it and upgraded the fittings

and furnishings. He resides on the property in an adjoining cottage together with his wife, in order that they may be on hand for their guests. He described it as "luxury accommodation … kept in excellent condition." His evidence is that they have two full-time staff whether the property is rented or not.

[12] When asked if there is a cleaning schedule he responded:

> *"Yes, there is. We have systems where if guests leave, all the linen is stripped from the beds. There is a cleaning schedule daily where one maid strips and fixes beds and it is then inspected by me…*
>
> *When guests leave items, we look at it from a value point of view… We inform the guests and they inform us as to where we would send them... if the items are not valuable we would retain them and future guests would use them."*

[13] He was shown Exhibit DB5 in the agreed bundle of documents and he maintained that the description of the property on the web-site matches the reality. It was made clear that the offering on the web site makes no representations that there is a beach- view from the property. He maintained that the property is within three minutes walking distance from the sea… ***"I have walked it. I tested the three minutes on the website."***

[14] His evidence is that Mrs. Brooks' first words were a complaint that she could not see the sea from the property.

> *"I replied saying that we did not advertise saying that we could see the sea. She became very angry and informed her family to stay in the bus. I then requested her to accompany me to the villa, which she reluctantly did and Mr. Brooks with her…. Mrs. Brooks was very angry and basically had a cursory look around… It was a tirade . Mrs. Brooks stated that from her house in Santa Barbara she could see the ocean. It was a tirade of abuse. I was in shock… They departed the villa and went back to the vehicle…The vehicle was asked to stay before she went into the compound. The luggage or the children was not unloaded…"*

[15] As to the complaint about the pool being unclean, the defendant had this to say:

> *"On the way from the van to the villa we did not pass the pool. You cannot look at the pool on the way from the van to the villa. The pool is to the rear of the house…The lounge was in excellent condition. There were no items lying around. The parties did not leave the lounge and go to the bathroom. We did not look in any closets".*

[16] The Defendant's wife, a part owner of the subject property, also gave evidence of similar import. She spoke of the procedure followed by her two maids in preparing the premises for guests, followed by an inspection by her husband before the guests arrive. She stated that the furnishings are purposely white in order to enable them to more easily identify stains which are then bleached out. There are two sets of everything so that they can be quickly replaced. She arrived home from work on the evening of the 13th at about 6.00 p.m. and her findings

were as follows:

> "…*The condition of Desert Rose was perfect. I had even directed a Christmas tree with lights and decorations to be erected and it looked lovely. I didn't see any personal belongings strewn around Desert Rose. Trash is never allowed to be around… The kitchen was clean and tidy as always. Everything would be clean and tidy because the two maids would be working whole day… Mould and algae was not present. It wouldn't be allowed…"*

[17] This witness worked in the hospitality industry and she informed the court that her second husband was a hotelier who ran Royal Pavilion and Glitter Bay hotels, so that she was fully aware of the standards of a five-star hotel.

> *"I keep my standards the same way at Desert Rose. Desert Rose is advertised as a luxury villa which implies the highest standards. Food, bottles and any personal items belonging to guests are always removed either to be shared by maids or thrown away".*

Findings of Fact

[18] As judges we are called on not just to hear the words of the witness, but to assess their demeanor and determine their credibility. The

Plaintiff failed to produce any material evidence in addition to his testimony. I therefore had to match his credibility against that of the Defendant and his wife and I found it lacking.

[19] It was my very strong impression and conclusion that the Plaintiff is a pleasant and decent man who found himself so to speak, 'between a rock and a hard place'.

[20] His wife is the businesswoman and he the househusband pursuing a career as writer/publisher. He was delegated by his wife with the authority to make the holiday arrangements. My view is that on arrival in the island she was not satisfied with the arrangements made by him and sought to get out of these arrangements because she felt that she could do better. The plaintiff realized that his wife was not satisfied and he tried to make peace. I accept the truth and accuracy of the Defendant's version of events, in particular when he stated:

> *"…Approximately 15 minutes later Mr. Brooks came to see me. He firstly apologized for his wife's behaviour and requested a refund of rental moneys paid. My response was we have done nothing wrong. We will not refund the money."*

[21] This version of events was reluctantly agreed to by Mr. Brooks when he was pressed in cross-examination and stated as follows:

> *"I may have apologized to Mr. Newitt for my wife's behaviour. I had said if it was me and the boys we would work something out…"*

[22] I accept the Defendant's evidence as to the care with which he attended the preparation of this accommodation. He told the court that he only rents these premises during the winter season. He stated as follows:

> *"The income I receive is important because it provides us with a standard of living, it supplements my personal income, it is my bread and butter income. It is fair to say that I would seek to maintain my breadcrumb."*

[23] He vehemently maintained that on the 13th December 2005, he carried out an inspection of the premises at 3.30 p.m. and that inspection revealed a satisfactory state of cleanliness. There were no items of personal property in the closet or bathrooms.

[24] There is no evidence supportive of the Plaintiff's allegation that he asked the Defendant to remedy the defects and that he refused to do so. This court accepts the evidence of the Defendant as to the Plaintiff's wife's behaviour which showed unequivocably that she was revoking the contract, in that she had no intention of staying at these premises. The Defendant was given no opportunity or option to remedy any alleged defects. The Plaintiff's wife's allegation that there was no sea-view, that the property was not within walking distance of the sea and that there was a breach of the implied term as to fitness, were excuses to avoid the contract. There is no evidence to support the Plaintiff's assertion that he was forced to seek other accommodation and this claim is rejected. There is no evidence establishing that the Plaintiff and his family tried to occupy the property unsuccessfully or that they tried to occupy the premises and incurred expenses correcting the problems (**Goldstein v Walters [1960] 176 E.G. 989**), or that the Defendant refused to allow him and his family to stay in the property.

[25] In fact, it is proven to my satisfaction that the Plaintiff and his wife never went beyond the lounge. When this was put to the plaintiff he did not deny it, but instead rather inadequately rejoined that his son and his girlfriend would have observed these things when they examined the house. Besides the fact that the Defendant maintains that he did not observe this, these parties gave no evidence before this court.

What Measure of Damages

[26] I have rejected the Plaintiff's claim that there was a breach of the implied term as to the fitness of the premises.

[27] Some evidence introduced the issue of breach of an express

term as it related to a sea view and the distance to the beach.

However, it was neither pleaded or proven.

[28] It now has to be determined what, if any, refund is the Plaintiff entitled to.

[29] The Plaintiff firstly paid a non-refundable deposit, followed by the balance of the rental sum. The evidence of the Defendant is that some time around the 19th or 20th December, he was able to rent the house for a few days. The exact number of days and the exact sum received was not specified, but the defendant did agree that he would have been paid twice for part of the period paid for by the Plaintiff and his wife.

[30] Counsel for the Plaintiff argued that if the court found that there was no breach by the Defendant, at most the Defendant would only be entitled in law to retain the non-refundable deposit and to return the balance of the sum paid plus interest. He argued that the parties by virtue of the express provision in the contract for the non-refundable deposit in effect pre-calculated the damages which the Defendant

would suffer in the event that the Plaintiff chose not to fulfill his contractual obligation. He argued that the essence of liquidated damages is that it is a genuine pre-estimate of damage and that where the parties have agreed to a sum for liquidated damages the courts will not allow the party suffering damage in excess of that agreed sum from recovering any more than the agreed sum.

[31] In support of the above he cited **Howe v Smith [1884] 27 Ch. 89, 97-98; Workers Trust & Merchant Bank Ltd. V Dojap Investments Ltd. [1993] 573 at page 578; Dunlop Pneumatic Tyre Co Ltd. v New Garage and Motor Co. Ltd. [1915] AC 79, 86-88; Chitty on Contract 28th ed.; Diestal v Stevenson [1906] 2 KB 345; Cellulose Acetate Silk Co Ltd. v Widness Foundry [1925] Ltd. [1933] AC 20; elphistone v Monkland Iron and Coal Co. [1886] L.R 11; Elsey v JG Collins Insurance Agencies Ltd. [1978] 83 DLR (3rd edn.) 1.**

[32] Counsel for the Defendant argued that the refusal of the Plaintiff to occupy the premises was a breach of the rental agreement and amounted to a repudiation of the same. This repudiation, he argued, entitled the Defendant to retain the monies paid by the Plaintiff for the rental of the premises. In support of this submission, he advanced the authority of **Goldstein v Walters COA 176 EG 989; Dewar v Mintoft [1912] KB 373; Thompson v Corroon [1993] 42 WIR 157; and Chitty on Contracts Volume I , 28th Ed. para. 25-050 and 25-052.**

[33] Counsel for the Defendant also argues that the Plaintiff is precluded from arguing that it was implied in the rental agreement that the parties agreed that the deposit was liquidated damages for breach, as he did not plead this: **see Bullen & Leake & Jacobs Precedents of Pleading, 13th ed page 269; Order 18 of the Rules of the Supreme Court; Workers Trust & Merchant Bank Ltd v Dolap Investments Ltd [1993] AC 573 and Dunlop Pneumatic Tyre Co Ltd. v New Garage and Motor Co. Ltd [1915] AC 79 distinguished.**

The Claim for Emotional Distress

[34] In addition to the abovementioned claim for breach of contract, the Plaintiff alleged that he was entitled to further damages for the stress, emotional distress, disruption of holiday that the Defendant caused him. Counsel for the Plaintiff argues this head of claim on the authority of **Jarvis v Swan Tours Ltd. [1973] 1 QB 233.**

[35] Counsel for the Defendant argues that in determining the measure of damages under this head the court must consider evidence of the actual conditions the Plaintiff endured as a result of the breach of contract: **Adcock v Blue Sky Holidays Ltd (CA) (Transcript: Association) 13 May 1980; Jarvis v Swan Tours (supra); Jackson v Horizon Holidays Ltd [1975] 3AER92 (CA).** He also argued that where the Plaintiff finds alternative accommodation, the court should take into account the effect of such mitigation on the quality and enjoyment of the holiday: **Chesneau v Interhome Ltd [1983] CAT 238, 7 June 1983).**

[36] In the face of the finding that the Defendant did not breach the contract it is largely a moot point as to whether the Plaintiff suffered emotional distress. In the absence of such a finding, it would nonetheless have been impossible to make a finding favourable to the Plaintiff under this head.

[37] This court finds that there is no evidence establishing what conditions the plaintiff and his family had to endure as a result of the alleged breach. In fact what little evidence there is suggests otherwise. The Plaintiff states as follows:

> *"…I was concerned for my family's holiday. We had other relatives that were to join us, my brother and sister and their families. At the end of the holiday I enjoyed my holiday and we have come back again."*

Findings of law and fact

[38] In reaching a just solution in these circumstances, I find it necessary to revert to basic principles. The basic principle of compensation is that the aggrieved party ought to be compensated for loss of his **positive or expectation interest.** Stated otherwise, the innocent party must be put in the same financial position he or she would have been in had the contract been performed: **Robinson v Harman (1848) 1 Exch. 850 at 855; Farley v Skinner [2001] UKHL 49.**

[39] It is my finding that the Plaintiff herein is the party in breach. The Defendant did not sit back but instead sought to relet the premises for the period booked by the Defendant. This satisfied his legal obligation to mitigate: **see Payzu Ltd v Saunders [1919] 2 KB 581 and British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Co of London [1912] AC 673** where Viscount Haldane LC stated at page 689 of the same:

> *"…this…principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."*

[40] In other words, the aggrieved party can only recover his actual loss, the difference in value between what he would have received and what he actually received. The normal measure of damages is the claimant's profit, as account must be taken of any costs saved by the

non-performance. In this case the Defendant on his own admission received a double payment for an approximate five day period that he was able to rent the unit.

[41] The Plaintiff would have had the opportunity of obtaining details of the sum received during the discovery period. Also in giving his evidence before the court the Defendant was not challenged as to his accounting. He delivered to the Plaintiff a cheque in the sum of $5000 which he subsequently cancelled.

[42] A non-refundable deposit is not presumptively a pre-calculation of damages. This is subject to proof by the party asserting that there was such an agreement and/or by an interpretation of the wording of the contract to this effect. There was no evidence led to this effect, nor could this finding be made on an interpretation of the contract.

[43] **In Dunlop Pheumatic Tyre Co. Ltd. V New Garage and Motor Co. Ltd. [1915] A.C. 79, 86-88, Lord Dunedin stated:**

"…(3) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged at the time of the making of the contract, not as at the time of the breach."

See also Chitty on Contracts 28th ed. 27-103 page 1327-1328.

Disposal

[44] In the premises this court makes the following orders:

1. That the Defendant shall pay the Plaintiff the sum of $5 000 together with interest thereon at the rate of 6% from the date of this judgment until payment.

2. The Plaintiff shall pay one-half of the Defendant's costs to be agreed or taxed.

Margaret A. Reifer

Judge of the High Court.