

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.ANUHCV2018/0504

BETWEEN:

[1] CARLISLE BAY LIMITED

CLAIMANT

AND

[1] AKKEL CARIBBEAN PROPERTIES LIMITED

[2] DAVID BOND

[3] ENA BOND

DEFENDANTS

Appearances:

Ms. Rika Bird led by Mr. David Joseph KC for the Claimant.

Ms. Joanne Massiah for the Defendant

2022: December 8th

2023: February 24th

JUDGMENT

- [1] **ROBERTSON, J.:** The Defendants are fee simple owners of Unit 22 located at the Claimant's resort. The Second Defendant is the beneficial owner of Unit 22. The Claimant and the Second Defendant negotiated an agreement with a view to the management and the rental of Unit 22. The Claimant contends that the Defendants are generally, and the second Defendant specifically, in breach of the said rental and management agreement, and the Claimant has issued these proceedings.

- [2] The Defendants have defended the claim and issued a counter claim. The Defendants contend that the Claimant failed to rent the Unit during the period 2013 to March 2021 and seek, among other things, damages for breach of contract or a declaration that the Defendants are entitled to a fair compensation for the Claimant's failure to rent unit for the period 2004 to March 2021.
- [3] This Court has determined that the Defendants have breached the rental and management agreement and that the Defendants are liable for the sum stated herein. The counterclaim is dismissed.

Relevant Background.

- [4] The Claimant owns and operates a five-star resort in Antigua and Barbuda. The Second Defendant, Mr. David Bond, is a beneficial owner of Unit 22, and is the personal representative of the estate of the third Defendant, Ena Bond, his deceased wife. The First Defendant has not adhered to the governing laws and therefore the second Defendant has been acting for and on behalf of the First Defendant. The Second Defendant maintains that he is the beneficial owner of Unit 22.
- [5] The Unit, Registration Section: South East; Block: 56 1880A; Parcel: 24, Unit: 22 was acquired by purchase agreement dated January 21, 1994 and it was agreed that upon payment of the purchase fee, the First Defendant would become a member of the Carlisle Bay Club which was owned by the Claimant. It was also agreed that the owner together with family and guests of the owner shall be entitled together with their family and guest to use and enjoy the facilities of the Club in accordance with the rules and by-laws from time to time in force.
- [6] Additionally, pursuant to that agreement it was agreed that the Claimant would manage all units making up the resort and that the Claimant would be the agent for the purpose of sale of the Unit and the owner of the Unit would enter into a rental and management agreement with the Claimant. In accordance with the rental and management agreement the owner would pay to the Claimant a contribution in respect of the operation, maintenance and upkeep of the Club and its facilities as required from time to time and also pay contributions assessed by the Claimant for the management and maintenance of the common areas of the resort in which the Unit was located.
- [7] The Claimant reserved the right to install and maintain utility lines, pipes, sewers. and other necessary facilities required for the development of the property. But the exercise of that right was not to permanently interfere with the peaceful enjoyment of the unit purchased.
- [8] The agreement also indicated that the Claimant had the right to approve reasonable modifications.
- [9] The Claimant and the owner of Unit 22 encountered challenges with the rental and the management of the Unit, and the parties agreed to enter into an agreement in 2016. The Claimant and First Defendant represented by the Second Defendant executed a Rental and Property Management Agreement in 2016 ("the 2016 Agreement") which governed, among other

things, the Claimant's management of Unit: 22 and common areas of the condominium property. The common areas include the recreational areas as well as the general areas where guests or owners would be required to traverse to get to their respective units. The relevant terms of the agreement are indicated hereunder.

- [10] The 2016 Agreement made provisions that the owner of the unit would agree and authorise the Claimant to undertake necessary management and maintenance of the property to ensure that the minimum standard as required by the Claimant is maintained and that the Unit is kept in a similar layout, specification, and finish to the Claimant's Units provided that the minimum standard is maintained.
- [11] The process for the upgrades is collaborative between the Claimant and the unit owner and the costs for such upgrades are recovered through adherence to the property management agreement. Thus, the unit holder is not required to make up-front contributions for the upgrades.
- [12] It was expressly agreed that as the sole and exclusive agent, the Claimant was responsible for managing and renting the Unit and that all costs for refurbishment, service charges and maintenance were payable from the rental income to be accrued by the Claimant on behalf of the Second Defendant.
- [13] The Claimant and Second Defendant also agreed that the net rental income would be shared on a 60/40 percentage basis after the Claimant deducted costs and fees as outlined in the Agreement. The Claimant would receive 60 percent and the Defendant would get 40 percent. The payment of the Claimant's service charges, is to be taken from the rental income derived from the rental agreement.
- [14] It is the Claimant's case that the Second Defendant is in breach of the 2016 Agreement and that the Second Defendant independently rented Unit 22 and retained all rental income to the financial detriment of the Claimant. Specifically, the Second Defendant marketed the Unit for rent on various websites including, AirBnB.com, Booking.com, TripAdvisor and Expedia.com, and rented the Unit and that the financial income for such rental arrangements was being retained solely by the Second Defendant.
- [15] The Claimant also indicated that the Second Defendant has been renting the Unit, hence if the Unit is demanded it could not be available to the Claimant to rent in accordance with the 2016 Agreement; that the Second Defendant is renting the Unit at a cost lower than a similar unit on the Claimant's property which has resulted in cost ambiguity and in the Claimant losing customers which would have ordinarily booked with the Claimant.
- [16] The Claimant further contends that the Defendant authorised the refurbishment of the Claimant's Unit and that the cost of the said refurbishment was US\$215,611.66. This sum was accrued in December 2007. The Claimant contends that this sum is due.
- [17] It is the case for the Defendants that the Claimant failed to rent the Unit for a substantial period of time namely between 2013-2019 or to accrue or account for the rental income which it received when the Unit was rented. As a result of the Claimant's refusal or inability to fulfil its obligations

under the agreements the Second Defendant was, in an effort to mitigate his losses arising from the Claimant's failure to rent the Unit, forced to rent the Unit.

[18] The Second Defendant also notes that the Claimant is required under the Agreement to prepare a Statement of Account twice a year for the benefit of Second Defendant. Specifically, the Statements of Account were required to be prepared at the end of the first and third quarters. The Statements required certain information namely, Name of Guests, Duration of Stay, Total Rent Received, Commission Deduction, Rental Income distribution (60:40) percentage, Agreed Service Charge, Capital Costs, Net Statement Balance per Unit. The Second Defendant contends that the Claimant failed to provide the Statement of Account as expressly required under the Agreement and as a result was in breach. The Claimant states that there has been general compliance providing the Second Defendant with the particulars of the Statement of Account and any areas of non-compliance are of no consequence.

[19] Regarding the debt owed the Second Defendant contends that it was an express term of the 2016 Agreement that prior to the Defendants being entitled to their 40 percent share of net rental income the Claimant, was entitled to deduct all costs due to the Claimant solely from the rental income to be accrued to the Defendants. The Second Defendant also contends that based on the terms of the Agreement, there was no liability to the Second Defendant as the Claimant was responsible for the rental of the Unit, managed the rental income and was responsible for making all deductions due to the Claimant prior to making any distribution of the 40 percent net balance due to the Defendants.

[20] The Second Defendant further states that the Claimant failed to rent Unit 22 or to accrue income and that the Claimant, having not rented the Defendant's property pursuant to the Agreement, is not entitled to claim the sums sought. Finally, the second Defendant contends that a portion of the claim as being a debt owed is time barred by statute.

THE TERMS OF THE AGREEMENT

[21] The Rental and Property Management Agreement was made between the Parties on January 1, 2016. The relevant terms of the Agreement are as follows:

"1 The Owners appoint the Company to be their sole and exclusive Agent to rent and manage the Owners property described as Registration Section: South East; Block: 56 1880A; Parcel: 24, Unit: 22 registered in the name of Akkel Caribbean Propertied Limited and (hereinafter referred to as "the property") as part of the Company's general Hotel operations from the date of this Agreement and to perform the duties set out herein.

2. PROPERTY RENTAL

2.1 The Owners agree with and authorise the Company pursuant to this exclusive agency to enter into such contracts and agreements on behalf of the Owners as may be necessary to demand, receive rent and give receipts for the rent of the Property.

2.2 The Owners agree with and authorise the Company to collect all rents, charges, fees or other sums from time to time payable to the Owners in respect of the use and rental of the Property or any part of it and further agree that rents, charges, fees or other sums payable from time to time to the Owners in respect of the use and rental of the Property will be payable directly to the Company and not to the Owners.

3. PROPERTY MANAGEMENT

3.1 The Owners agree with and authorise the Company to undertake the necessary management and maintenance of the Property to ensure that the minimum standard of the Company is being maintained and the Property at all times is kept similar in layout, specification and finish to the Company's hotel units, provided always that the minimum standard of the Company is determined by the said Company and includes, but is not limited to the design, architecture, layout, furniture, finish and specification of the property or any part thereof or of machinery, plant, equipment, fittings. The Company at all times retains the right to refuse to rent the Owners' property if the said property or any part of the property falls below the minimum standard of the Company as the said minimum standard is described herein.

...

4. SERVICE CHARGE

The Owners agree to pay the Company all service charge payments in an agreed amount including all service charge arrears and full incidental account arrears as per the statement attached hereto in Appendix A and all such amounts are payable solely from income to be accrued under this agreement and are to be fully liquidated prior to the Owners receiving any profit share from net income accrued and payable by the Company under this agreement.

5. OTHER CHARGES

...

5.2 Should Owners or Owners' guests elect to use hotel services which include but is (sic.) not limited to the restaurants, bar, spa, non-complimentary water sports equipment and excursions, the Owners and Owners' guests will pay the applicable rate for such service. The charges for hotel services will be paid in full on or before check out and departure from the Hotel.

...

7. STATEMENT OF ACCOUNT

The Company agrees to prepare statements of account and such statements to be compiled and furnished to the Owners twice yearly, that is, at the end of the first quarter and third quarter in each calendar year. The Statement of Account herein shall detail the following:

7.1 Name of each rental guest;

7.2 Start date, duration and end date of each guest rental;

- 7.3 Total rent received from guest;*
- 7.4 Deduction of Third Party Agent's commission where applicable;*
- 7.5 Rental Income distribution specified to be a 60/40 percentage division;*
- 7.6 Annual Service Charge as agreed;*
- 7.7 Essential capital replacement costs charged to Unit Owner and*
- 7.8 Net Statement Balance per Unit.*

8. RENTAL INCOME AND RENTAL TERMS

8.1 The Owners agree that the Company shall retain sixty percent (60%) of the gross rent receivable in respect of the Owners' property as quantified in clause 7 above. The Company agrees to pay the Owners forty percent (40%) of the rent receivable as per the Statement of Account in clause 7 above, less service charge payments referred to in clause 4 above, and capital improvements costs (if any) referred to in clause 3.2 above.

8.2 The Owners agree that the Company will have absolute discretion in setting the rental charge for the property and the rent chargeable by the Company will vary in accordance with the expected level of reservation enquiries to the Company's Hotel and will also vary up or down depending on the time of year.

8.3 The Owners agree that the subject property will be available to rent at all times. The unit will be let on a first come first served basis, that is if the Owners unit has been rented to a hotel guest then the Owners will not then be able to occupy the unit for the duration that it has been so rented and vice versa. In the event that the Owners wish to occupy the property then the Owners must notify the Companies Hotel Reservations of such intention. The Companies Hotel Reservations shall thereafter confirm whether or not the Property has been rented to a guest. If the Property is available then Hotel Reservations will reserve the Property for the Owners and issue an email confirmation stating the same.

8.4 Notwithstanding the foregoing, there shall be no limit on the Owners' occupation of the property provided that it is hereby accepted and understood by the Parties that the rental allocated to the Owners' account has a direct relationship with the number of weeks the property is available for rent and taking into account further that the rental charged will be significantly higher during periods considered as peak season, being:

8.4.1 Christmas and New Year's weeks

8.4.2 Presidents Week / February Mid-Term weeks

8.4.3 Easter weeks

8.4.4 October Mid-Term week

...

10. AMENDMENT

No amendment, change, assignment or modification to or of this Agreement shall be effective or enforceable unless it is in writing and executed by each party to this Agreement.

11. BINDING UPON SUCCESSORS AND ASSIGNS

This Agreement shall ensure to the benefit of, and be binding upon the parties and their respective heirs and assigns. For the avoidance of doubt, should the Owners sell the subject property, the Owners agree to bind the Purchaser to honour the terms of this Agreement.”

THE EVIDENCE

[22] Three witnesses were heard in this matter. The Claimant called two witnesses, Mr. Gerry Comaskey and Mr. Thomas Eivers and the Defendant called Mr. David Bond.

The Evidence of Gerry Comaskey

[23] Mr. Comaskey is a Director of Carlisle Bay Resort. His evidence is that the Second Defendant breached the terms of the 2016 Agreement in that the Defendant:

- (1) Booked Unit 22 outside the rental pool agreement and thereby the Defendant operated the rental as a commercial business;
- (2) Independently advertised and rented Unit 22;
- (3) Unlawfully uses the logo of Carlisle Bay Resort;
- (4) Rented the Unit for rates lower rate than that of an equivalent unit offered by the Resort;
- (5) Retained all monies obtained from the private rental.
- (6) Retained the monies gained from rental at a significant loss to the Claimant.

[24] The witness indicates that by an agreement in writing dated March 16, 1990¹ between the Claimant and the Second and Third Defendants, the Claimant was appointed the sole and exclusive agent of the Condominium Corporation to control, manage and administer the common properties of the condominium development located at the Carlisle Bay Club Condominium Plan No. 23 of 1989 registered at Registration Section: South East; Block: 56 1880A; Parcel: 24 for the benefit of all the condominium proprietors. Around that time, the Second and Third Defendants entered into a management agreement for the property with the Condominium Corporation pertaining to the management and ownership of Unit 22.

[25] Subsequently, on December 20, 2015, the Claimant and the Defendants entered into a verbal agreement that was later encapsulated in a written agreement of January 1, 2016, the 2016 Agreement

¹ This agreement is not before the Court.

[26] The Claimant's contractual obligation to manage and administer the common property included determining the financial amounts needed and raising the said amounts by levying contributions to the properties in proportion to the unit entitlement of their respective lots.

[27] Consequently, the Claimant has been providing services including security, maintenance, landscaping, utilities, incidentals, use of hotel facilities and property insurance to the Defendants.

[28] Mr. Comaskey also states that in 2007, the Defendants authorized the Claimant to refurbish Unit 22 for the benefit of the Defendants and to bring the Unit to the required resort standards. Unit 22 was refurbished by the Claimant at a cost of US\$215,611.66. This witness indicates that the Defendants continue to benefit from the improvements done to Unit 22 while refusing to settle its service charges, incidentals and refurbishment costs which are due to the Claimant.

[29] By the 2016 Agreement, the Second Defendant agreed to pay all service charge payments, incidentals and refurbishment costs in an agreed amount which included all service charges in arrears. The sum in arrears was at that time in the amount of US\$301,935.33. A statement detailing the sums owed issued to the Second Defendant was appended to the 2016 Agreement².

[30] By Clause 4 of the 2016 Agreement, the sum owed to the Claimant as provided in the appended statement of account, accrued an interest of 5% per annum, amounting to US\$17,610.53.

[31] As of July 2020, the outstanding amount due to the Claimant is US\$443,726.02 being the outstanding sum due to the Claimant in a running account under the 2016 Agreement.

[32] The Claimant estimates a loss of US\$491,972.00 being 60% (less commission) of the gross rent receivable being US\$913,088.00 in respect of the value of direct bookings rented by the Second Defendant at Unit 22.

[33] Mr. Comaskey noted that since the Second Defendant has been renting the property at a lower rate than that of an equivalent unit offered by the Claimant, there has been price confusion for the customers, the loss of repeat guests who opted to rent from the Second Defendant, and damage to the reputation of the resort since the marketing of the Unit is not done by the Claimant.

The Evidence of Thomas Eivers

[34] Mr. Eivers is the Asset Manager of Carlisle Bay Resort. The evidence of Eivers was largely consistent with the evidence of Mr. Comaskey as it relates to the execution and terms of the 2016 Agreement and the Defendant's breach of the said Agreement.

[35] This witness indicates that the Claimant provided incidentals to the Defendants at the Carlisle Bay Resort by use of the hotel facilities, services offered by the hotel, and meals. He also indicates that the resort has a strong record of renting Unit 22 when it has been made available for rental and that the Defendant's Unit is one of four units at the resort of that size and location which is extremely popular for booking. This witness indicates that during the high season, "the Defendants' Unit can command occupancy rates up to 80%".

² See Clause 4 of the 2016 Agreement and Appendix A.

[36] Mr. Eivers in a correspondence to the Second Defendant Mr. Bond dated March 8, 2018 raised the matter of what Mr. Eivers considered to be the Second Defendant's continuous breaches of the 2016 Agreement. A portion of the correspondence is indicated hereunder.

"As I have pointed out in my previous correspondence, your continued use of booking channels to market & sell your suite independently through various Online Travel Agents (such as Expedia etc) and Air B&B is damaging to the online reputation of Carlisle Bay. It is impacting on the resort's online pricing strategy and has the potential to cause confusion in the marketplace for any potential guests wishing to book with us.

There is a clear breach of the rental agreement that exists between Carlisle Bay & yourself as you continue to advertise and sell your unit independent of the Carlisle Bay and outside of the rental agreement that we have in place.

...
...

I would appreciate if you could please confirm to us in writing that you will discontinue marketing your unit independently and that all booking for your suite will perform within the parameters of the rental agreement that has been set out to you and that you have signed."

[37] In the view of Mr. Eivers, the Claimant has properly accounted to the Defendants for any income generated in accordance with the terms of the rental agreement. This witness further notes that the Statements of Account were presented to the Defendants between 2016-2021, Mr. Eivers indicated that the Claimant is unaware of any requests being made from the Defendants for further financial information relating to Unit 22 other than the information which was already provided in the Statements of Account.

[38] This witness noted that the Defendant has not made any attempt to discharge the debt owed to the Claimant and that the sum due and owing to the Claimant increases yearly.

[39] This witness supported the position of the Claimant that the Second Defendant frequently restricted the availability of his Unit when the Second Defendant made private arrangements to book the Unit. This was done by the Second Defendant blocking the Unit or communicating that the Unit was unavailable several months in advance of a season thereby severely restricting the resort's ability to rent the Defendant's suite for bookings. The units at the resort particularly the units similar to that held by the Defendants were generally in high demand during peak seasons. The reason offered by this witness for such high demand is the layout of the Unit is attractive to persons generally and particularly to multi-generational users.

[40] As it relates to the availability of the Unit Mr. Eivers indicated that it was not uncommon for the management of the Claimant to contact the Second Defendant with details of bookings during periods which the Second Defendant blocked the Unit and that generally the request of the Claimant to use the Unit would be refused by the Second Defendant in preference to his personal bookings.

[41] This witness further contends that the image the Second Defendant utilises to market and rent the Unit was commissioned by Carlisle Bay Resort and that it was an express term and condition for the procurement of the ?commission that the image was not to be used by third parties without permission being so granted. The Claimant had not granted the Second Defendant permission to use the images belonging and associated with the Claimant and the Claimant's brand.

[42] This witness explained that the sum of US\$491,972.00 which is being claimed by the Claimant represents 60% (less commission) of the gross rent receivable in respect of the value of direct bookings rented by the Defendants of Unit 22 for the period 2012-2019³. Additional revenue foregone was admitted into evidence at the trial of these proceedings which was intended to make the data current.

[43] Regarding closure during the period of the COVID -19 pandemic this witness indicated that a decision was taken to close the resort effective March 28, 2020, as a safety measure and in light of there being a significant number of cancellations received by the resort. Additionally, the management of the Claimant determined that the closure of the resort was an appropriate response since it appeared that there were deepening national and international concerns on COVID-19 pandemic as evidenced by the subsequent closure of all non-essential businesses in Antigua and Barbuda by the Government.

[44] On June 4, 2020, hotels and resorts on the island were advised that they were permitted to reopen and to operate once the Claimant conformed with the guidelines established by the Ministry of Health. Operators of hotels were required to obtain a certificate of approval before being permitted to open. To obtain the certificate of approval resorts had to satisfy the health authorities that safety provisions were undertaken. The resort reopened on October 8, 2020. It was determined by the management of the Claimant that the Claimant required time to ensure that it complied with the relevant guidelines and to obtain the certificate of approval and to address any further matters or recommendations raised by the Ministry of Health. The Claimant contends that it would have been unrealistic to reopen the resort to specifically cater for the Second Defendant's bookings. The witness also contends that during the period of the closure the Claimant had to maintain a skeleton staff and there were ongoing maintenance fees for the resort which continued to be incurred.

The Evidence of David Bond

[45] Mr. Bond is the Second Defendant in these proceedings and is the beneficial owner of Unit 22. The Second Defendant purchased the Unit from the Claimant on January 21, 1994, for the sum of US\$150,000.00. The sale of the property was governed by a Purchase Agreement dated January 21, 1994

[46] There was also a Management Agreement and a Rental Agreement, both entered into with Carlisle Bay on January 21, 1994. The Second Defendant contends that the Claimant failed to fulfil its obligations under the Management Agreement and from around 1996 until 2003, the

³ Updated revenue projections were entered into evidence and are discussed later in this judgment.

Management services deteriorated to the point where the arrangement appeared to have become almost non-existent. The Second Defendant evidenced the breakdown in the management and rental agreement by noting that he had to purchase fuel for a generator which he was required to operate to service his Unit. The Second Defendant also indicated that the Claimant failed to rent his property and as a consequence the Agreement became void through non-performance.

[47] In 2003 Carlisle Bay Club was purchased by Harcourt Developments Ltd of Dublin.

[48] In the opinion of the Second Defendant the rental of the property under the new owners went moderately well when the resort was reopened in 2005. The Second Defendant also indicated that around this time the Second Defendant formed the clear view that the new owners were prioritising the rental of their own properties before his Unit and further that when his Unit was rented Carlisle Bay Club failed to report the income received. The Second Defendant indicated that this was observed on several occasions when he arrived on island believing that the Unit was unoccupied and upon arrival finding that guests were either in occupation or found evidence that guests had recently departed.

[49] The Second Defendant also observed from information received from Carlisle Bay Club that no income had been reported in some years and that as a result the Claimant was in breach of its obligations to rent the unit and further that the Claimant was in breach of paragraph 7 of the Rental Agreement, as it failed *"to prepare statements of accounts... and [furnish] to the Owners twice yearly... at the end of the first. and third quarter in each calendar year. "*

[50] Additionally, the Second Defendant indicated that the Claimant failed, despite repeated requests, to provide audited financial statements to him and that this also constituted a fundamental breach of the agreement which rendered the agreement void and of no legal effect.

[51] Further, the Second Defendant commented that despite assurances by Mr. Comaskey and the management of the Claimant that Unit 22 would be rented on the same frequency such frequent rental did not materialize. The Second Defendant noted that it was apparent to him that his Unit was generally only rented as 'a last resort' that is when the resort was otherwise fully booked or when a unit specifically with the amenities which Unit 22 contained was requested. The witness provided specific examples that on two occasions in 2018 accommodations were required for a high profile guests and the Unit was utilised.

[52] Mr. Bond says that the claim for the alleged accumulated balance outstanding is for a period in which the majority of the debt is time barred by the Statute of Limitations and therefore, not recoverable. Alternatively, the agreement upon which the Claimant is?? it was both implied and expressly intended to be a non-recourse loan only recoverable against income earned from the rental of Unit 22 by the management which the Claimant failed to rent.

[53] The Second Defendant asserts that prior to the filing of the lawsuit he never experienced problems having his guests stay in Unit 22 or with them using the common facilities and services available to guests at the resort. That the Claimant has always been aware and has, for approximately 21 years, accepted that bookings for Unit 22 are made directly with the Second

Defendant and having been notified of the dates of occupancy, have facilitated the guests on their arrival.

[54] However, since the present claim has been filed, the Claimant has repeatedly sought to deny the Second Defendant and his guests access to Unit 22. Mr. Bond refers to the Claimant evicting a guest from the Unit and insisting that the guests stay in rooms owned by the Claimant if they wanted to stay at the resort.

[55] The Second Defendant refers to disruptions in the enjoyment of his Unit and refers to an occasion in November 2019, when the Second Defendant arrived at the property for a vacation but was unable to occupy same as all utility services were cut by the Claimant and the Claimant had removed certain kitchen equipment and utensils which made the Unit uninhabitable. This forced him to occupy rental accommodations at a neighbouring hotel at the Second Defendant's expense. Also, guests of the Second Defendant were denied access to Unit 22 on October 22, 2020 as the Unit was occupied by the Claimant's guests without the Second Defendant's knowledge or approval. The Second Defendant and his representative was denied access to the Unit during the 2020 temporary closure.

[56] The Second Defendant in his evidence expressed concern about the actions of the Claimant and the marketability for sale of Unit 22.

[57] The Second Defendant also challenges the maintenance charge of US\$32,000.00 for the year 2020 when the resort was closed for six months as a result of the COVID – 19 pandemic and a skeleton staff was maintained. The Second Defendant indicated that he was of the view that the sum was unjustifiable and does not form part of audited statements.

[58] During cross-examination the Second Defendant admitted that he has marketed the Unit on various electronic platforms and that persons book through these platforms. The Second Defendant also noted that some of the guests to his Unit are not necessarily paying guests.

ISSUES

[59] The issues for Determination are:

- (1) Whether the Defendant or the Claimant is in breach of the agreement.
- (2) Whether the Claimant's claim or any part thereof is statute barred.
- (3) Whether damages are payable, if so, to whom are damages payable and how should such damages be quantified.

The Law, the Analysis and the Findings of the Court.

[60] A contract, an agreement which gives rise to legal obligations, exists between the parties.

[61] Agreements are to be construed as a reasonable person with all the knowledge of the background and context enter contractual arrangements of the agreement? In ***Investors Compensation Scheme Ltd v West Bromwich Building Society***⁴, Lord Hoffmann noted that⁵ :

“(1) Interpretation is the ascertainment of the meaning, which the document would convey to a reasonable person having all the background knowledge, which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the ‘matrix of fact’, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything, which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent...

(4) The meaning, which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention, which they plainly could not have had...”

[62] In the circumstances of this case the relevant agreements are the purchase agreement and the 2016 agreement. The purchase agreement, among other things, provided that:

- (a) The Defendants shall become members of the Carlisle Bay Club.
- (b) The Defendants shall be entitled with their family and guests (whether paying or non-paying) to use and enjoy the facilities of the Club in accordance with the rules.
- (c) The Defendants shall appoint the Claimant as agent and agree to enter into a rental and management agreement with the Claimant.
- (d) In accordance with the rental and management agreement the purchaser shall (i) pay to the Claimant a contribution in respect of the operation, maintenance and upkeep of the Club and its facilities as shall be assessed by the Claimant from time to time and (ii) pay such contribution as shall be assessed by the Corporation for the management and

⁴ [1998] 1 All ER 98.

⁵ [1998] 1 All ER 98, pp 114-115.

maintenance of the common area from the date of possession of the unit by the Defendants.

- (e) The Claimant reserves the right to, among other things, install and maintain utility lines etc and any other necessary facilities required for the development of any property within the resort.

[63] The 2016 agreement provides, among other things, that the Claimant was:

- (1) to be the sole and exclusive agent for the Unit 22⁶;
- (2) to enter into contracts for the use of the Unit⁷;
- (3) to be the only entity to collect rents, charges or fees payable in respect of the use and rental of Unit 22⁸; and that the rents, charges, fees or other sums payable from time to time in respect of the use and rental of the Unit will be payable directly to the Claimant and not the owners⁹;
- (4) to retain 60% of the gross rent receivable and pay to the Defendants 40% of the rent receivable less service payments referred and capital improvement(s) costs¹⁰;
- (5) to have absolute discretion in setting the rental charge of the property and the rent chargeable may vary¹¹.
- (6) to permit the Defendants and the guests of the Defendants to use the facilities and where applicable a charge would be levied for such use¹².
- (7) to provide statement of accounts in the first and third quarter¹³.

[64] In the 2016 Agreement the Defendants agreed to pay to the Claimant all service charge payments in an agreed amount including service charge arrears and full incidental account arrears as per the statement attached to the agreement¹⁴. The Defendants were to notify the Claimant when the Defendants intended to occupy the Unit¹⁵.

[65] It is clear that although the Defendants owned the Unit the Defendants agreed that the Claimant would be responsible for the management and the rental of the unit. The Defendants, as owners, were permitted to occupy the Unit and to host guests (paying and non-paying) at the Unit however, it is noted that in the 2016 Agreement the Defendants agreed that they would make the Unit "available at all times"¹⁶ and that the responsibility to determine the rate of rental and to rent the Unit lay with the Defendant. Surely, this was intended to ensure that while the Defendants, as owners enjoyed the benefit of ownership, the Unit was also available for rental

⁶ See Clause 1 of 2016 Agreement.

⁷ See Clause 2.1 of the 2016 Agreement.

⁸ See Clause 2.2 of 2016 Agreement.

⁹ See Clause 2.2 of the 2016 Agreement.

¹⁰ See Clause 8.1 of the 2016 Agreement.

¹¹ See Clause 8.1 of the 2016 Agreement.

¹² See Clause 5 of the 2016 Agreement.

¹³ See Clause 7 of the 2016 Agreement.

¹⁴ See Clause 4 of the 2016 Agreement.

¹⁵ See Clause 8.3 of the 2016 Agreement.

¹⁶ See Clause 8.3 of the 2016 Agreement.

so that both parties would derive benefits as contemplated in the management and rental agreement.

Marketing and Rental by the Defendants.

[66] The 2016 Agreement made arrangements for the Claimant to be appointed an agent for the Defendant for the purposes of the rental and management of the Unit. The 2016 agreement specifically indicates that the Claimant was appointed the “sole and exclusive agent” to rent and manage the Unit. The Claimant is authorised to collect all rents, charges, fees or other sums payable to the owner in respect of the use and rental of the Unit or part of the Unit. The Purchase Agreement permits the Defendants and their guests (paying and non-paying) use of the Unit. On its face it may appear that the Purchase Agreement and the 2016 Agreement are in conflict, but this is not necessarily the case. The 2016 Agreement seeks to ensure that the Unit is readily available for the benefit of the rental agreement, that the benefits to the parties of the agreement are maximised while allowing the Defendants to benefit from ownership of the Unit. While the Defendants are permitted to host guests at the unit such hosting ought not to conflict with the Defendants’ commitment that the Claimant was appointed the sole and exclusive agent for the rental and management of the Unit.

[67] The second Defendant has admitted that he has, to the exclusion of the Claimant, marketed, rented, and derived an income from the rental of the Unit. The evidence before this Court is that the Second Defendant markets the Unit on various platforms including Expedia, Airbnb, bookings.com and TripAdvisor. In so doing the second Defendant is operating as an agent and is in breach of the 2016 Agreement. It is noted that even if the Claimant in the ordinary course of its dealings as an agent or in furtherance of the rental and management agreement utilises these platforms the Second Defendant in marketing the Unit on the platforms is in breach of the exclusivity provisions of the 2016 Agreement.

Rental Charges.

[68] The evidence before the Court is that the second Defendant sets the rates to be used by his guests. In so doing the second Defendant is in violation of clause which indicates that the Claimant shall have the sole discretion in setting the rental charge for the property. The Claimant contends that there are practical implications from this breach including the fact that the second Defendant becomes a direct competitor of the Claimant, there is price confusion by potential guests since Unit 22 is in the Claimant’s resort and Unit 22 is being rented for a lower rate than the comparable. The Claimant has produced evidence of the Claimant having lost customers as a result of the actions of the Second Defendant.

The Interpretation of Clause 4.

[69] Clause 4 provides that the owners of the Unit agree to pay all service charge payments including all service charge arrears and full incidental account arrears as per the Appendix A and that all such amounts are payable solely from income to be accrued under the agreement and are to be fully liquidated prior to the Owners receiving any profit share from net income accrued and payable by the Claimant under the agreement. In a normal operation of the agreement these

matters would be liquidated under the terms of the rental agreement however with the intervention of the Second Defendant fewer rental opportunities are available to liquidate the service charges incurred and to go towards the liquidation of charges on the accrued account.

[70] It is noted that the Defendants have benefitted from the sums which stand in arrears and the implication of the Second Defendant extensively occupying the unit to host guests from the Second Defendant's marketing of the Unit is that while the Defendants have obtained the benefit there is an unnecessary delay in the liquidation of the sums in arrears.

Statement of Account.

[71] The 2016 Agreement provides at Clause 7 that the Claimant agreed to prepare the statements of account and such statements to be compiled and furnished to the Defendants at the end of the first quarter and third quarter in each calendar year. The statements of account were to include the name of each rental guest; the start date, duration and end date of each guest rental, total rent received from guest, deduction of third-party agent's commission where applicable, rental income distribution specified to be a 60/40 percentage division, annual service charge as agreed, essential capital replacement costs charged to the Unit Owner and net statement balance per unit.

[72] The evidence before the Court is that statements were sent via electronic mail to the second Defendant. The statements were quarterly statements and there is evidence of statements accounting for particular guests. The statements provide elements identified in Clause 7 of the 2016 Agreement. The evidence before the Court is that statements were regularly emailed to Second Defendant. There is no evidence of the Second Defendant requesting additional information or a more detailed statement and the Claimant refusing to provide same. There is no agreement that the Claimant would provide to the Defendants with audited financial statements.

The Rental of the Unit

[73] The Second Defendants contend that the Claimant failed to fulfil its obligations under the Agreement and that the Second Defendant was forced to mitigate its losses by renting the Unit on its own. This submission is not accepted by the Court since the evidence before the Court is that while the 2016 Agreement was signed in January 2016, the second Defendant rented the Unit to guests outside of the Agreement during the months of January, February, July, October and December of that year. Thereby the Defendant has not permitted the Claimant a fair opportunity at operations under the 2016 Agreement.

[74] Additionally, this Court notes that the Agreement itself does not speak to a specific number of rentals to be expected on an annual basis. However, the evidence of the Thomas Eivers provides, on the projected income of similar units, useful information. Taking the evidence of Mr. Eivers the projected gross annual return on the Unit was expected to be US\$96, 519.83. The evidence of this witness of the combined rentals, that is revenue from the Claimant and the Second Defendant rental of the Unit, between the period 2016 to 2020 ranges from US\$123,003 to US\$214,930.00. The figures of the combined gross income suggest that the Claimant is not under performing in its obligation to rent the Unit.

[75] Further, during cross-examination the witness for the Claimant was asked to explain the periods when it may appear that the Unit was being underutilised in the rental and management agreement. The evidence of Mr. Thomas Eivers is that although Unit 22 was a unit that was likely to be in demand as a multi-generational unit, other global factors may affect the actual demand at a given time. The witness referred to the prevalence of the Zika virus in 2017 which adversely affected bookings and referred to fluctuations in the exchange rate which adversely affected the disposable income of persons arriving from the destinations which often frequent the resort. The witness also noted that there are instances when the Unit is blocked by the Claimant for the Claimant's private usage.

[76] Finally, this Court notes that the Claimant has commercial interest in ensuring that the Claimant honours the obligations under the terms of the 2016 Agreement and in this context, it is difficult to accept that the Claimant would deliberately not market the Defendants' unit and forego the commercial benefits to both parties.

[77] Additionally, in this Court's view the Defendants have not supported its case that the Claimant failed to rent the Unit prior to the 2016 Agreement. There is no evidence, for example of comparable units being rented to the exclusion of the Defendants' Unit.

The Limitation Question

[78] The Defendants contend that certain sums which the Claimant alleges as falling due are time barred by the operation of the Limitation Act 1997¹⁷.

Section 11 of the Limitation Act provides:

"11. (1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.

(2) Subsection (1) shall not affect any action to which section 12 applies."

[79] Sections 29(5) - (7) of the **Limitation Act No.8 of 1997** of the Laws of Antigua and Barbuda state:

"(5) Subject to subsection (6), where any right of action has accrued to recover -

(a) any debt or other liquidated or pecuniary claim; or

(b) any claim to the personal estate of a deceased person or to any share or interest in any such estate;

and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it, the right shall be deemed to have accrued on and not before the date of the acknowledgement or payment.

¹⁷ Section 11(1) of the Limitation Act No.8 of 1997 states that *"an action to recover any sum...shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

(6) A payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of principal debt.

*(7) Subject to subsection (6), a **current period of limitation may be repeatedly extended under this section by further acknowledgment or payments but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgement or part payment***". [Emphasis Added].

[80] The provisions of section 29(5)-(7) when read together indicate that once a cause of action has been barred by the provisions of the Limitation Act it shall not be revived¹⁸. The limitation period for the sums owed is six years.

[81] In the circumstances of this case the Claimant seeks to recover the sum of US\$386,283.00 which the Claimant contends includes monies owed to the Claimant for services rendered to the Defendant from December 31, 2005. This sum includes the debt due for maintenance, refurbishment and other services rendered to the Defendants. The appendix to the 2016 Agreement acknowledged the debt owed and made arrangements for the liquidation of same.

[82] However, this Court is of the view that the acknowledgment of debt may only refer to those items for which the cause of action accrued within six years of the acknowledgment.

Damages for Breach of Contract.

[83] "It is noted that the normal function of damages for breach of contract is compensatory. Damages are awarded not to punish the party in breach or confer a windfall on the innocent party, but to compensate the innocent party and to repair his actual loss. Compensation is normally achieved by placing the innocent party in the same position, so far as money can do, as if the contract has been performed." ¹⁹

[84] In the circumstance of this case the Claimant contends as a result of the Defendant's conduct in marketing the Unit outside of the rental agreement the Claimant has suffered loss. The claimant has quantified the damages to be the average cost which the Claimant would have earned had the same dates been available to the Claimant to rent the Unit.

[85] This Court accepts this measure used by the Claimant and further notes that the Claimant is unable to determine its opportunity loss during the peak and off-peak seasons when the Second Defendant marketed the Unit separately. There is also evidence that customers who were regular

¹⁸ "A **current period of limitation** may be repeatedly extended under those provisions by further acknowledgments and part payments; but a right of action, once barred by the 1980 Act, cannot be revived by any subsequent acknowledgment or payment." (Emphasis Added.) Halsbury's Laws of England/Limitation Periods (Volume 68 (2021))/3.

¹⁹ Romeo Skepple v Oliver Potter ANHUHCV2013/0330.

to the Claimant began booking through the platforms outside of the rental agreement which were made available by the Second Defendant.

[86] The evidence before the Court is that the booking dates to which reference has been made do not include dates in which the second Defendant and the family of the Second Defendant occupied the Unit. While the Second Defendant is, as the owner of the Unit entitled to occupy his Unit for himself and his guests the marketing and rental of the Unit is not in the spirit of the 2016 Agreement and does not permit the Unit to be openly available in accordance with the 2016 Agreement.

[87] The evidence of the Claimant is that this sum is US\$1,134,788.00 for the period 2012? to January 2021 and a further sum of US\$440,000.00 to the time of the trial. The total sum being US\$1,574,788.00. To this sum there is to be a deduction of 10.20% commission which would have been payable by the Claimant to travel agent= US\$1,414,168.60. Pursuant to the rental agreement the Claimant is entitled to a 60% share = **US\$848,501.16**.

[88] This trial was held during what the Claimant in their evidence described as the peak season. The evidence before the Court is that the Second Defendant had other private bookings after the trial and during the peak season. The Court having ruled that the private bookings of the Second Defendant would have been in contravention of the 2016 Agreement the Claimant is entitled to its rental share on the same basis for the period from the date of trial to the delivery of this decision. The assessment for that period is referred to a Master in Chambers if the sum is not agreed.

[89] The Claimant seeks interest on service charges and full incidentals at 8%. It is however noted that the 2016 Agreement makes no provision for the imposition of interest on sums in arrears perhaps because the drafter had not considered the present eventuality. Nevertheless, there is no provision for the imposition of a payable interest. In such circumstances this Court declines to make an order for interest in the manner sought by the Claimant. The Defendants are however liable for interest payable at 5% from the service of the claim to today's date. Statutory interest thereafter.

[90] The Claimant has sought an injunction to restrain the Defendant whether by himself, his servants or agents through online platforms or otherwise howsoever from marketing, renting out or offering the rental use of Unit 22 to third parties. For the avoidance of doubt this injunction does not restrain the Second Defendant and the guest of the Defendant from occupying Unit 22 in accordance with the terms of the 2016 Agreement and complying with requirements of Clause 8.3 thereof in particular.

[91] The Defendants have not on a balance of probabilities proven the Claimant has breached the terms of the 2016 Agreement and therefore counterclaim is dismissed

[92] It is ordered that the Defendants are liable to the Claimant for:

- (a) The sums arising for breach of agreement in the sum of **US\$848,501.16**.
- (b) The sum for service charges and incidentals from 2010 to August 2022 in the sum of **US\$232,273.50**.
- (c) The sums claimed prior to 2010 are statute barred.

- (d) Interest payable at 5% from the service of the claim to date of judgment and statutory interests thereafter.
- (e) The Defendant's counterclaim is dismissed.
- (f) Prescribed costs are payable to the Claimant by the Defendant.

Marissa Robertson
High Court Judge

By the Court

Registrar