IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. ANUHCV 2014/0273

BETWEEN:

[1] FAIRLIGHT LIMITED

Claimant

and

[1] FLATPOINT DEVELOPMENT LIMITED
[2] EMERALD COVE CONSORTIUM LIMITED

Defendants

Appearances:
E. Ann Henry KC, Counsel for the Claimant
Leonora Walwyn, Counsel for the Defendants

2022: July 19th,
2023: January 26th

DECISION

[1] **GARDNER-HIPPOLYTE, M.:** This is an assessment of damages pursuant to judgment being entered for the Claimant for breach of contract by the Defendants.

Background

[2] The Claimant is the registered owner of a property that is within a gated community called Emerald Cove. The expert report and evidence received from the joint experts Mr. Trevor Gonsalves and Sheon Samuel indicates that the development of this gated community is located on the East Side of Antigua and "**lies in what is considered one of the most pristine areas of the island where unspoilt beauty and natural scenery and was intended to be a prime tourist attraction.**"[1] (My Emphasis)

[3] The Claimant purchased the property with the expectation that it would be a first class gated community with amenities. This expectation and reliance were based on an agreement entered

[1] Updated Joint Expert report of Trevor Gonsalves and Sheon Samuel, filed 3rd January, 2022 page 1

between the Claimant and the Defendants in 1989. It was a term of the agreement that Emerald Cove would consist of private residences, a high-density residential village, a hotel complex, sports infrastructure, and a golf course. Additionally, that it would be a gated community with amenities commensurate. It is also highlighted that all of this was part of the promotional brochures published about the development.[2] When a property was purchased it was part of the agreement that the new owner would have two years within which to build and if not the first Defendant could repurchase the property for 80% of the original purchase price.

[4] The first Defendant is the owner of the unsold parcels of land, the roads and other common areas that form part of the development. The second Defendant is the management company incorporated by the first defendant responsible for the maintenance and upkeep of the property. The agreement required that certain services were to be provided such as maintenance of roads, upkeep of common properties.

[5] Leading from this agreement the development did not materialise as expected. Lots were sold but few residential properties were built. The beneficial owner of the claimant company in his witness statements – details at great length the challenges and issues he has had with the Defendants and the development property throughout the years. The Claimant highlights that up until 2014 the first Defendant breached the agreement in every respect except for the provision of garbage collection and the electricity supply via a backup generator. Thereafter in 2019 both the water and electricity supply were disconnected as well as garbage collection was stopped.

[6] The Claimant states that little structural building has taken place, and there has been no sustainable resort development. The Claimant observed that of the 9 original villas that were built 6 were now unoccupied and in need of serious repair. The Claimant was not pleased that the direct supply of water and electricity from the public utility company was terminated without discussion with him and he has no visibility on the rate he is charged for the service of electricity. The Claimant states that his property has no value and is virtually unsaleable due to all the challenges associated with the development.

[7] The instant claim was subsequently filed on the 8th May, 2014 as the service charges for the maintenance of the property were increasing but no real services were being provided. Judgment in default was entered and the terms were determined by the Court on the 4th December, 2014. The terms that are relevant for the assessment are as follows:

i. It is hereby declared against the first Defendant that, by reason of its failure to provide the services for which the Claimant contracted under the Agreement made

[2] The brochure highlighted in brief the following – Professional tennis centre, 9-hole executive golf course, health club and spa, a water sports facility, a yacht club and marina, a waterfront arcade with restaurants and bars, and a hotel.

the 5th day of January, 1989 between the Claimant and the first named Defendant, and recorded in the Transfer of Land recorded in the Registry of Lands for Registration section: St. Phillips North Block: 25 3288A Parcel: 15, save for the removal of garbage from the premises of the Claimant and the supply of the electricity services of a stand-by generator as required, the first Defendant is in breach of the said contract dated 5th January, 1989.

ii. It is hereby declared that by reason of the breach of contract as aforesaid, the first Defendant and the second Defendant as the party responsible for the management and maintenance of the Emerald Cove Resort, Condominium and recreational properties or in such other capacity as designated by the first Defendant are precluded from requiring the Claimant to pay for any services save as are provided in accordance with the said agreements or otherwise for the benefit of the Claimant.

iii. The first Defendant shall pay to the Claimant damages for breach of the covenants contained in the Agreement of Purchase made between the claimant and the first named Defendant and recorded in the Transfer of Land recorded in the Registry of Lands for Registration section: St. Phillips North Block: 25 3288A Parcel: 15. Such damages, including damages for the diminution in value of the property by reason of the said breaches of covenant, to be assessed by this Honourable Court.

iv. The Defendants shall pay to the Claimant its costs according to the Civil Procedure Rules 2000.

v. The Defendants shall pay interest on all amounts which are found due and payable to the Claimant hereunder from the date of this Order.

[8] The Court received the evidence of Dr. Victor Cross who is the Beneficial owner of the Claimant company, along with the evidence and the joint expert report by a Civil & Structural Engineer & Valuator – Trevor Gonsalves and Civil Engineer & Project Manager – Sheon Samuel. Their updated report filed on the 3rd January, 2022 highlights the background of the initial plans, a description of the property and an update on the current status of the property.

[9] The Defendants called two witness G. Rivolta and Stefeno Cebrelli who are employed by the first Defendant.

[10] Having heard the evidence led by both Parties, the Court believes the evidence given for the Claimant and finds favour with it over the evidence provided by the Defendant. The witnesses for the Claimant gave forthright evidence and I found that their evidence assisted the Court in ascertaining the damages, including damages for the diminution in value of the property by reason of the said breaches of covenant.

[11] I will now go on to the assessment of damages.

Assessment of Damages

[12] Pursuant to the order of the Court on the 4th December, 2014 an assessment is to be made of the damages of the breach of the covenants contained in the agreement of purchase, including damages for diminution in value of the property by reason of the said breaches of covenant. Since the crux of the claim deals with the diminution in value, I will address this issue first.

Diminution in Value

[13] The evidence led in the witness statement of the beneficial owner of the Claimant highlights that from the time the property was purchased, the Emerald Cove development has not been kept in a manner and standard as ascribed to in the agreement as well as the expectation that was set out in with the brochure published. It is emphasised that the property was to be a first-class development but the reality on the ground is that it is not. The evidence led from the Claimant shows the following:

(a) The gated community is in a dilapidated state with unserviceable roads, overgrown common land, inaccessible and unusable beaches;
(b) Intermittent supply of utility services and power outages (Dr. Cross stated at paragraph 30 of witness statement of 19th March, 2020 – no piped water for over 12 months and no electricity for 7 months, he also refers to a visit where he had to open the manhole of the cistern to obtain water);
(c) There has been no sustainable development at the gated community and most buildings and structures are rundown and unkept;

[14] This evidence is supported by the Joint Expert Report of The Engineers referred to above. Their Joint report is very comprehensive, and their evidence very clear. In brief it was highlighted that this could have been a first-class development[3] but had now turned into dilapidated gated community. A thorough analysis was provided, and comparisons were made with similar developments. The Joint expert report also provided pictures with descriptions. The Joint Expert Report supports the conclusion that the development has several challenges that needs to be fixed and as a result, the value of the Claimant's property is diminished.

[15] The Joint experts list the following as the main contributors to the reduction in value of the Emerald Cove property[4]:

(a) The disconnection from APUA electricity for over two years and the development generator is not providing power to the any part of the private villa properties;

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[3] The report included the Emerald Cove Master Plan with details on original components of the development including the following:

- 125 residential lots, a 4-star hotel with just under 300 rooms, Residential village with 550 apartments and commercial space, 100 villas, 9-hole golf course, yacht club and marina and 4 miles of infrastructure and roads.

[4] Expert report at page 15.

(b) No APUA pipe bourn water, the laying of underground pipelines started but was not completed, resulting in an incomplete infrastructure system;
(c) There is no clearly defined reception area when entering the property;
(d) No visible structure to support a central waste management system;
(e) Many of the roads are not paved, no curbs or drains to channel surface water;
(f) Most of the roadsides are not maintained so shrubs and vegetation are growing unmanaged; there has been some attempt to clear shrubbery on the west side of the development;
(g) The commercial area of the development is vacant, continues to deteriorate. The reception and shopping areas are closed, the swimming pool is empty and fill of dirt, the restaurant is closed and not in use, in this area it looks unkept and needs repair, gardens need maintenance. The Multi- car parking garage is abandoned and overgrown with weeds;
(h) Two additional abandoned luxury villas in the development during the reporting period bringing the total to five;
(i) In the condominium area facing the marina, the timber frames for most of the buildings are rotting and falling off;
(j) The boardwalk to the condominium is weathered;
(k) There is no activity at the pool restaurant;
(l) The main restaurant at the windmill tower shows no activity of maintenance of grounds and flora as it did in the previous visit.

[16] The assessed diminution in value given by the Joint experts is $1,907,300.00.

[17] The evidence led from the first witness for the defendants, Stefano Cebrelli, indicates that he joined the first Defendant as early as 2004 when he was working for an architectural firm and later as a construction site assistant with a consulting company doing work at the development property. He later became a Director of the first Defendant in 2013 and a Director of second Defendant in 2014. By profession he is a construction engineer.

[18] The witness Cebrelli points out that the first defendant and its sister companies are owners of 110 parcels of residential use, common areas and technical services. That a condominium plan registered in 2009 does not include the Claimant's property. That the first part of the condominium plan has been built inclusive of garden, restaurant and swimming pool. The witness states that there is no agreement where the 1st Defendant must provide resort services.

[19] The witness agrees that Claimant bought the property prior to his involvement with the first Defendant. He also states in his witness statement that construction and maintenance of buildings, common areas, and infrastructure were being provided up to 2010 but due to the financial crisis there have been difficulties. That he disagrees primarily with the Joint Expert Report because there was no obligation to provide resort services.

[20] The second witness for the defendants, Pier Giorgio Rivolta, has been a consultant for the first Defendant since 2005, responsible for promotion of sales at the Emerald Cove Group of Companies. At paragraphs 7 and 8 of his witness statement he states that Emerald Cove was responsible for 60 parcels of residential use, common areas and technical services. That the original intent of the development at Emerald Cove was to be a residential resort with a golf course, restaurant, hotels, residential homes, and condominiums. This witness also confirms the impact of the financial crisis on the development.

[21] The submissions provided by the Counsel for the Claimant focuses on the evidence led by Dr. Cross and the Experts. The Claimant also relies on the Transfer of Land document at clauses 3 and 6 which stipulates the obligation of the claimant to build a villa in accordance with the aesthetic standards of Emerald Cove and to keep the property so constructed to the standard described in the agreement. Counsel argues that the measure of damages the claimant is entitled to is to put the claimant in the same position, so far as money can do so, as if his rights under the contract had been observed.[5]

[22] Counsel for the Defendants has argued that the Claimant only purchased land from them for the sum of $80,500.00 USD and thereafter the Claimant erected a dwelling on it. That there is no promise or undertaking that the value of a property would increase following the construction of a dwelling house or upon being provided with the services set out in the brochure being relied upon. Counsel also argues that in the absence of a quantity assessment it is difficult to accept the analysis provided by the Claimant and therefore the court should not rely on the assessment provided by the experts.

[23] I disagree with the submissions and the evidence provided by the Counsel for the Defendants, instead I agree and adopt the evidence and submissions provided by the Claimant.

[24] The Joint expert report was provided to the Defendants and an opportunity was given for written questions to be posed and challenges to their report to be made. This was not done. Cross examination was permitted but the evidence of the Experts was not shaken. Additionally, the Court conducted a site visit and toured the property belonging to the Claimant as well the Development property. The observations by the Court on the disrepair to the development property, lack of common services and infrastructure were in keeping with the overall observations of the Joint Expert Report.

[25] Accordingly, I adopt and agree with the assessment made by the Joint experts of what is the diminution in value of the property. Therefore, I find that the first Defendant is liable to pay the sum of ECD $1,907,300.00.

[5] Hadley v Baxendale (1984) 9 Exch 341, 354.

Damages for Breach of Covenants

[26] Counsel for the Claimant has argued that the Claimant is entitled to an additional amount for what has been coined as **visit anxiety. (My Emphasis)** Evidence has been led by the Claimant about how he continues to face challenges with the services at the development property. Reference is made to the lack of water and electricity and how he copes not having these necessities. It is argued that the Defendants should pay for the mental suffering directly related to the physical discomfort or inconvenience caused by the breach.

[27] Counsel for the Defendant has argued that the complaints of the Claimant are merely inconveniences which do not amount to breaches. This is premised on the fact that the beneficial owner Dr. Cross was not the original owner of the Claimant and only bought the Claimant company in 1999. Further that Dr. Cross has not provided names of the people who induced the Claimant to purchase the property, nor has he provided any evidence as it relates to the conditions of the road work and infrastructure which the Defendants company is bound to provide.

[28] Additionally, that if a breach were to be found then the Claimant is estopped from demanding damages due to statute of limitation, and the only relevant period is between 2008 to 2014.

[29] The Court does not have a report from a psychologist or psychiatrist as to the visit anxiety and I am of the opinion that this is not an appropriate award under damages for breach of contract. In the circumstances, I decline to award an amount under this head.

Conclusion

[30] For the abovementioned reasons the order of the Court is that the First Named Defendant[6] is to pay the Claimant as follows:

1. Damages in the sum of $1,907,300.00.
2. Prejudgment interest at 2.5%;
3. Post judgment interest at the rate of 5% from today's date until full payment;
4. Prescribed costs at 60% in accordance with CPR 65.5; and
5. The Claimant to draw, file and serve the order.

Charon Gardner-Hippolyte
High Court Master

By the Court

Registrar

[6] Order of the Court dated 4th December, 2014 at Paragraph (iii) – Master Glasgow