IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2004 HCV 2189

BETWEEN	WATERSPORTS ENTERPRISES LTD.	CLAIMANT
AND	JAMAICA GRANDE LIMITED	FIRST DEFENDANT
AND	GRANDE RESORT LIMITED (Added pursuant to Rule 19.2 of the Civil Procedure Rules)	SECOND DEFENDANT
AND	URBAN DEVELOPMENT CORP. (Added pursuant to Rule 19.2 of the Civil Procedure Rules)	THIRD DEFENDANT

CONSOLIDATED WITH:

CLAIM NO. 2004 HCV 2364

BETWEEN	JAMAICA GRANDE LIMITED	CLAIMANT
AND	WATERSPORTS ENTERPRISES LTD.	DEFENDANT

HEARD WITH:

CLAIM NO. 2004 HCV 2805

BETWEEN	URBAN DEVELOPMENT CORPORATION	CLAIMANT
AND	WATERSPORTS ENTERPRISES LTD.	DEFENDANT

Dr. Lloyd Barnett, Mr. Keith Bishop and Ms. Kerry-Ann Ebanks instructed by Bishop and Fullerton for Watersports Enterprises Limited.

Mr. Stephen Shelton, Mr. Gavin Goffe and Ms. Maliaca Wong instructed by Myers, Fletcher and Gordon for Jamaica Grande Limited.

Mr. John Vassell and Miss Teneisha Watkins instructed by Vaccianna and Whittingham for the Urban Development Corporation.

Mr. Christopher Samuda and Mrs. Stacy-Ann Soltau-Robinson instructed by Samuda and Johnson for Grande Resorts Limited.

Land – Nature of occupying party's interest in land – Whether interest created by occupation or by agreement – Whether interest terminated by acquisition by UDC – Section 24 of the UDC Act

Contract – Termination of – Whether termination constituted breach – Whether conspiracy to commit breach

15th, 16th, 17th April, & 25th September 2008

BROOKS J.

Watersports Enterprises Limited provides water sports services to its customers. These services include boat cruises, fishing, scuba diving, water skiing and wind surfing. Watersports has been in operation since the nineteen sixties, and has conducted that operation in, among other places, the Ocho Rios harbour in the parish of Saint Ann.

In December 2002, Watersports entered into an agreement with Jamaica Grande Limited, whereby Watersports would be the exclusive provider of water sports services to Jamaica Grande's guests. Jamaica Grande owned and operated a hotel adjacent to the beach, at the northern section of the Ocho Rios harbour. This was not the first of such agreements between the parties. This latest agreement should have remained in force until 31st December 2005, but in August 2004, Jamaica Grande sold the hotel and its operation to Grande Resort Limited, and pursuant to that sale,

sought to terminate the agreement with Watersports. Jamaica Grande also sought to have Watersports remove its operation from the hotel property as well as from beach land adjacent to the hotel property. The beach land was not part of the hotel property but in fact was leased by Jamaica Grande from the Urban Development Corporation (UDC).

Faced with these efforts by Jamaica Grande, Watersports lodged caveats against the titles for the hotel property as well as for the beach land. It also brought this claim in which it seeks damages for breach of contract as against Jamaica Grande and for conspiracy to breach the contract as against Jamaica Grande and Grande Resort. Watersports also seeks declarations as to its interests in the parcels of land in question.

Jamaica Grande and the UDC each countered with Fixed Date Claim Forms in which they respectively seek orders that the caveats be discharged and declarations that Watersports has no estate or interest in any of the lands in question.

There are a number of issues to be discussed in arriving at a decision in these claims but they may be conveniently considered within the ambit of three questions:

1. what interest, if any, does Watersports have in UDC's land;
2. what interest, if any, does Watersports have in the hotel property;

3. is Jamaica Grand in breach of its agreement with Watersports and if so, to what remedy, if any, is Watersports entitled?

What interest, if any, does Watersports have in UDC's land?

UDC's witness, Mr. Glenton Rose did not have a detailed knowledge of the land in issue. His main input was to bring to the attention of the court the various certificates of title for the lands in issue as well as the lease agreement between UDC and Jamaica Grande.

A review of the relevant certificates of title shows that the bulk of the lands in dispute were originally reclaimed lands and were first registered in 1969, in UDC's name. This was pursuant to a certificate of title registered at Volume 1059 Folio 240 of the Register Book of Titles. UDC subdivided this land and sold various parcels of it (including two of the lots forming part of the hotel property) to others.

Eventually, in May 1991, UDC repurchased two portions of the hotel property from two of the original purchasers. These two portions were coupled in a single certificate of title, namely Volume 1236 Folio 249. One of the portions included the peninsular mentioned above and the other portion comprised a portion of the beach between the Ocho Rios harbour and the hotel property. The lands comprised in Volume 1236 Folio 249 were

designated to be held with the land comprised in Volume 1059 Folio 240 and all dealt with as one holding.

Later in May 1991, Jamaica Grande became the registered proprietor of the hotel property.

A simplistic outline of the situation described above would be that there were two relevant properties; the "UDC land" and the "hotel property". The two were adjacent holdings. The UDC land comprised a peninsular and the beach land which separated the hotel property from the sea and sand. Jamaica Grande, which held the hotel property, in seeking access to the sea and sand as attractions for its guests, leased the UDC land from UDC.

The lease was for a period of twenty-five years and was endorsed on the certificates of title for the UDC land. For completeness, it should be pointed out that the title that UDC held comprised other lands which were not included in the lease.

It is the evidence of Mr. Ernest Smatt, the managing director of Watersports, that while all these changes regarding the land titles took place, Watersports was openly operating on the beach and on the peninsular, providing its services to its customers, some of whom were guests of the hotel and some of whom it had otherwise attracted.

As a part of its operation and to facilitate providing services to its customers, Watersports had constructed a pier along a portion of the peninsular jutting into the Ocho Rios harbour. It also constructed jetties which were used to dock its boats and the other seagoing equipment that it used to provide some of its services. The pier was attached to the UDC land.

Watersports insists that it was encouraged by Jamaica Grande and its predecessors in title for the hotel property, to carry out its operation in that way, by virtue of successive exclusive agreements to provide the services to hotel guests and by acquiescence to Watersports' other customers traversing hotel property.

In determining what interest, if any, this operation created for Watersports in the UDC land, two factors have significant effect. The first of these is the effect of Section 24(4) of the Urban Development Corporation Act. This section provides, among other things, that where the UDC acquires land, all rights or easements of others in respect of that land shall vest in the UDC, unless otherwise agreed. Section 24(4) is set out hereunder in full:

> "Upon the acquisition by the Corporation of any land for the purposes of this Act all private rights of way over, and all rights of laying down, erecting, continuing or maintaining any pipes, wires or cables on, under or over such land, together with the property in such pipes, wires or cables, **and all other rights or easements in or relating to such land shall, except so far as may be otherwise agreed by the Corporation and the person entitled to the rights in question, vest in the Corporation**, and any person who suffers loss by the vesting of any

> such right or property a aforesaid shall be entitled to be paid reasonable compensation by the Corporation. Any question arising as to the amount of such compensation shall be determined by arbitration in the manner provided by the Arbitration Act." (Emphasis supplied)

In applying this provision to the instant case, it means that any right or interest which Watersports may have acquired in respect of the UDC land between 1969, when the land was first registered, and 1991 when UDC repurchased it from the hotel owners, became vested in the UDC upon the repurchase. There was no question, at the time, of any compensation being due to Watersports, as there is no evidence that any was then, or has since, been demanded or paid. That was seventeen years ago. Compensation could hardly be raised as an issue now, but even if it could be so raised, that issue, according to section 24(4), is a matter to be determined, at least initially, by arbitration.

Counsel for Watersports submitted that section 24(4) was "unconstitutional and incapable of providing a valid defence" to UDC. This strident statement was made in the context that Section 18 of the Constitution protects the subject from having his property compulsorily acquired by the State, unless certain requirements were fulfilled.

It is my view that the submission is not well founded because the Urban Development Corporation Act has fulfilled the requirements of Section 18. Section 24(4) of the Act provides the principles and manner in

which compensation for the property is to be determined. This satisfies the first requirement of Section 18. The other requirement, of access to the court by persons affected, is satisfied by section 16 of the Act. That section provides that acquisition of land by the UDC shall have the effect of incorporating the provisions of the Land Acquisition Act. The latter Act preserves, in section 17, the right of any person dissatisfied by the acquisition, to have the matter referred to the Court for resolution.

The second factor affecting Watersports' interest in the UDC land is that of permission. This factor, to a large extent, also affects Watersports' interest in the hotel property.

The evidence is that Watersports and the various hotels which operated on the hotel property had several successive agreements over the years. Mr. Smatt, in cross examination testified to agreements with Jamaica Grande's predecessors. He also testified that an agreement was made with Jamaica Grande from as far back as 1993 when it started operation. There was another in 1996, and still another, as he recalled, in 2000. According to Mr. Smatt, in cross-examination, those agreements were "along the same lines as the one in 2002"....There might have been some changes but the basis of the contract would remain unchanged". It is therefore necessary to look at this last agreement in some detail.

The document, after introducing the parties, indicates that Jamaica Grande appointed Watersports, "the exclusive provider of such watersports activities as may be required for said guests". Watersports also agreed to pay Jamaica Grande a monthly user fee of US$3,000.00 for the use of certain areas of the hotel property. These were, an office located by the pool side, "the use of a desk at the Tour Area, a Beach Kiosk and Sanitary and other facilities".

The agreement made it clear that Watersports did not have an exclusive right to occupy the UDC land or any portion of the hotel property. Paragraph 5 of the agreement specifically reserved rights to Jamaica Grande's "Agents, Employees, Workmen, Guests and all persons authorised by Jamaica Grande such swimming, wading, sailing, fishing and **beach rights in respect of the beach, jetty and waters adjacent to or forming part of the property owned by Jamaica Grande** and all such rights to enter as may be reasonable in connection therewith". (Emphasis supplied)

Paragraph 6 of the agreement went on to impose a number of obligations on Watersports, including:

a. a restriction on encumbering "the property of Jamaica Grande or any part thereof to which Watersports may have access (6 (b));

b. permitting Jamaica Grande's servants, agents and others to "pass and repass over and along any **jetty, pier, beach and other property occupied" by Watersports** (6 (e));

c. to keep Jamaica Grande indemnified against any claim for loss or damage arising out of its operations (6 (g)), and significantly,

d. on the termination of the agreement "to deliver up the property occupied by Watersports to Jamaica Grande in such good order, state and condition as the same ought to be...fair wear and tear excepted(6(o))". (Emphasis supplied)

These provisions make it clear that Watersports' presence, on the UDC land as well as on the hotel property, was by way of the agreement. Its obligation to deliver up the property which it occupied, upon the termination of that agreement is definitive of its status with regard to that property. Having regard to the UDC re-purchase, Watersports had no other rights of occupation. There could therefore be no interest, in the UDC land, to which any licence, created by the agreement, could be coupled. This also applied to the pier constructed by Watersports on the UDC land.

In addition to the above, counsel for UDC also submitted that time, for the purposes of the Limitation Act, could not run as against UDC while the

UDC land was the subject of a lease. The reasoning, though not expressed in these terms, (and I hope I do no injustice by my synopsis) is as follows:

a. an essential ingredient of a claim for title by occupation, is exclusive and unequivocal possession;

b. being exclusive, only one person can be in such possession at any one time;

c. in a lease, the holder of the paper title, (assuming that person to be the lessor) grants exclusive possession to the lessee;

d. a trespasser or other person taking possession of land while it is the subject of a lease is not excluding the holder of the paper title, but rather the person then entitled to exclusive possession by the lease;

e. therefore, it is only upon the termination of the lease that the trespasser commences exclusion of the holder of the paper title

Although the authorities cited were not completely on point, I find the argument compelling and I accept the conclusion as being a correct statement of the law.

The principle that time does not run as against the person entitled to the reversion, is also given some recognition by section 8 of the Prescription

Act. The section stipulates that the time during which land was held by virtue of any term of years, shall be excluded from the computation of the time for the acquisition of prescriptive rights. The exclusion is subject to the provision that the person being entitled to the reversion must have resisted the claim for prescriptive rights within three years of the termination of the term.

The principle is also, in my view, applicable to the Watersports' claim for a right to remain on the UDC land pursuant to a licence coupled with an interest. Watersports cannot encumber UDC's interests in the land while it is the subject of the lease. By agreement, that lease came to an end on the sale of the operation by Jamaica Grande to Grande Resort. Watersports has no claim against UDC pursuant to any interest it may have acquired in the UDC land during the lease to Jamaica Grande.

In so far as the store-room and pier which Watersports constructed on the UDC land is concerned, all the above conclusions apply. I would also pray in aid the principle that in carrying out the construction, Watersports clearly, by that fact alone, acquired no legal interest in the real property. To quote from the judgment of Williams, J. in *Greaves v Barnett* (1978) 31 WIR 88 at page 91j, "[t]he general rule is that what is affixed to the land is part of the land so that the ownership of a building constructed on the land

would follow the ownership of the land on which the building is constructed."

What interest, if any, does Watersports have in the hotel property?

The question of Watersports' interest, if any, in the hotel property may be conveniently discussed under four heads; the issue of a claim by virtue of a possessory title and/or prescriptive rights, secondly, the issue of whether proprietary estoppel applies, thirdly, whether there is a licence coupled with an interest and fourthly, whether Watersports has acquired an easement over the hotel property.

Possessory Title / Prescriptive Rights

The provisions of the agreement mentioned above also define Watersports' status in respect of the hotel property. Pursuant to those provisions, its status on the hotel property was by virtue of the various agreements which it entered into from time to time.

Counsel for Watersports submitted that the registered proprietors of the hotel property were barred, by virtue of the Limitation of Actions Act, from bringing any action to recover from Watersports, the areas which Watersports occupied. I find the submission flawed on two bases;

a. Mr. Smatt's evidence concerning Watersports' occupation of the subject areas was not convincing as being credible. This is despite

the fact that he was the main, if not the only witness as to fact, in respect of the history of Watersports' relationship with the hotel property. It is also despite the fact that the standard of proof in this case is on a balance of probabilities. Mr. Smatt was obviously an intelligent witness, well attuned to the implication of the various issues involved in the claim, and patently an astute businessman. I found however, that he was lacking in credibility when he was tackled on certain crucial issues concerning documentary evidence and the matter of exclusive possession of the UDC lands. For example, when he was asked about a contract between Ernie Smatt Enterprises Ltd. and one of Jamaica Grande's predecessors, concerning the provision of water sports services, his answer was that that was "not necessarily for the same period". Again, when he was asked, based on the contents of a letter, about agreements prior to 1978, Mr. Smatt's less than frank, in my view, response was that, "there might have been another contract before but I am not 100% sure".

Other answers demonstrated to me Mr. Smatt's unreliability as a witness. When he was questioned about other persons sharing the jetty on the UDC lands, and in particular a Mr. Drakulich, Mr. Smatt's response was that he "was not paying attention" to that situation. The

court was referred to a lawsuit between Mr. Drakulich and Watersports which had an extended life in these courts and in the Court of Appeal. I reject Mr. Smatt's answer as being untrue. He similarly, initially, didn't recall another competitor who had operated on the beach, but after a few searching questions in cross-examination, he demonstrated a familiarity with the relevant facts of that case which belied his initial claim of ignorance.

Finally on the matter of Mr. Smatt's credibility, I also reject, as being untrue his testimony in cross-examination, that he constructed the office building which was on the hotel property. When faced with documentary evidence that he had said in the past, that he **assisted** in the construction, Mr. Smatt's response was that there were two parts to the building and that he had built one part of the structure. It is demonstrative of Watersports' position on the hotel property, that he testified in answer to a question by Mr. Vassell Q.C., that "I built that office. With the **permission and consent** of the hotel". (Emphasis supplied)

As a result of Mr. Smatt's failures, as described above, I have preferred the documentary evidence and the reasonable inferences to be drawn from them, to his testimony.

b. The areas which Watersports occupied on the hotel property were by virtue of the successive agreements signed with Jamaica Grande and its predecessors in title. Although only the 2002 agreement was placed in evidence, its contents show that Watersports did not regard itself as being the owner of any of the property which it occupied. It did not have that *animus possidendi* or intention to hold in "denial of the title of the true owner", which is essential to the acquisition of a possessory title. (See paragraphs 17-18 of the judgment of the Judicial Committee of the Privy Council in *Wills v Wills* P.C.A. 50 of 2002 (delivered 1/12/03). The agreement, especially the aspect of delivering up the occupied areas upon termination of the agreement, demonstrates not only Watersports' attitude toward the areas of the hotel property which it occupied, but indicates that it occupied them by virtue of the agreement. On that finding, the law as outlined by their Lordships in *Brian Clarke v Alton Swaby* PCA 13 of 2005 (delivered 17/1/07), is of assistance. At paragraph 11 of the judgment Lord Walker of Gestingthorpe said:

> "However it is perfectly clear that under the law of Jamaica, as under the law of England, a person who is in occupation of land as a licensee cannot begin to obtain a title by adverse possession so long as his licence has not been revoked. Unless and until it is revoked, his occupation of the land is to be ascribed to his licence, and not to an adverse claim..."

Counsel for Watersports submitted that the absence of the previous agreements was detrimental to the Jamaica Grande's case. I find, however, based on Mr. Smatt's answers of the similarity of the provisions and Watersports' attitude demonstrated by the 2002 agreement, which attitude I have detailed above, that I am able to draw inferences concerning those previous agreements. Primarily, I find that those agreements made it clear that Watersports' presence on the hotel property was by way of a licence. In evidence of that, the 2002 agreement even mentioned a deposit which had been paid, by virtue of a previous agreement, by Watersports to Jamaica Grande.

Even if I am wrong in drawing inferences as to the contents of the previous agreements, I still find that the 2002 agreement is sufficient to define Watersports' status in relation to the hotel property, and equally important, what was its mindset, *animus* or attitude toward the hotel property at the time of entering into that agreement.

For all the reasons stated above, related to the fact and implications of the agreement, I find that Watersports has secured no possessory title in respect of any part of the hotel property. Neither does section 2 of the Prescription Act operate to vest any right in or over, the hotel property to

Watersports. The rights which it enjoyed were by virtue of agreements in writing entered into by Jamaica Grande and its predecessors in title.

Proprietary Estoppel

Counsel for Watersports submitted that Watersports is entitled to protection of its place on the hotel property, by the equitable jurisdiction of this court. The main thrust of the submission was that Watersports had spent money in building structures on the hotel property which structures improved the property. This expenditure was, the submission runs, encouraged by Jamaica Grande and its predecessors in title.

There was also evidence that Jamaica Grande and its predecessors, despite the terms of the written agreements, allowed Watersports to have customers, other than hotel guests, come on to the hotel property in order to gain access to Watersports' facilities. Watersports pointed to three routes which its customers used to so traverse the hotel property. Although there was a letter, very late in the day, by Jamaica Grande seeking to protest this practice, I find that it was a well established one. I find that Jamaica Grande acquiesced to the situation and implicitly encouraged it to the extent that it charged Watersports for each such customer using the facilities on the hotel property. Accounts prepared by Jamaica Grande showed Jamaica Grande

charging Watersports for "chaise lounges". This was the nomenclature used to describe the charge made in respect of Watersports' guests.

Counsel for Watersports cited powerful, well established authority for the applicable principles of law in this area. The evidence, counsel say, shows "clearly in the instant case [that] Mr. Smatt expected that Watersports would be allowed to carry on its watersports business indefinitely...". Counsel concluded that "the Court should reject UDC and Jamaica Grande/Grande Resort claim for possession and award to Watersports a perpetual licence and easement or long term lease" (paragraph 9.5).

It is however, in the application of the established legal principles to the instant case, where I respectfully differ from counsel in conclusion. The evidence, in my view, does not justify Mr. Smatt, if in fact he did, expecting that Watersports would be allowed to carry on business on the hotel property indefinitely. Each agreement, and specifically the 2002 agreement, provided that Watersports would vacate the occupied area upon termination thereof. Watersports could only reasonably expect that it would be allowed to carry on its business, so long as it had an agreement in place with Jamaica Grande.

I find that in acquiescing to Watersports' practice of bringing its customers unto the hotel property, Jamaica Grande was doing no more than

allowing that practice so long as Watersports had a legitimate reason to be present on the hotel property.

In so far as the construction by Watersports is concerned, I have already expressed my reservation about Mr. Smatt's evidence as to what was built by Watersports. To the extent that any expenditure was incurred by Watersports for the construction of the office, I find that the expenditure was in the context of the agreement between Watersports and Jamaica Grande and that Watersports had no entitlement, beyond the boundaries of that context. For completeness, I repeat that Watersports agreed to vacate the hotel property unequivocally; there was no reference to or reservation concerning, structures built or occupied by it. In any event its extended stay on the hotel property, since the construction and by virtue of the injunction, has resulted in compensation for any expense which it would have incurred.

Licence coupled with an interest

It would have been clear from what has preceded, that I have placed a great deal of emphasis on the 2002 agreement and its implications. I have already opined that Watersports harboured no intention to acquire any interest in Jamaica Grande's property. However, its contractual licence has value and equity will come to Watersports' aid, as indeed it has, to allow it to remain on the land for the specified purpose. Professor Gilbert Kodilinye

at page 109 of the 2nd edition of *Commonwealth Caribbean Property Law*, correctly states that:

> "...a court of equity may grant an injunction to restrain the licensor from revoking the licence in breach of the contractual term and, where appropriate, may compel the licensor to carry out the bargain by means of a decree of specific performance."

The learned author goes on to quote as authority for his statement of the law, an extract from the judgment of Lord Denning MR in *Verrall v Great Yarmouth BC* [1980] 1 All ER 839 at page 844:

> "Since *Winter Garden Theatre (London) Ltd. v Millennium Productions Ltd,* [[1947] 2 All ER 331] it is clear that once a man has entered under his contract of licence, he cannot be turned out. An injunction can be obtained against the licensor to prevent his being turned out."

The learned author, at page 110 also makes it clear that despite "the enhanced status of the contractual licence as against the licensor brought about by the use of equitable remedies, it seems that a contractual licence remains incapable of binding third parties, even with notice." The cases of *King v David Allen & Sons (Billposting) Ltd.* [1916] 2 AC 54 and *Provincial Bank Ltd. v Ainsworth* [1965] 2 All ER 472 were cited in support of the principle.

The learned author, in my view, correctly demonstrated why the cases of *Errington v Errington and Woods* [1952] 1 All ER 149 and *Binions v Evans* [1972] 2 All ER 70 (which bears a striking material resemblance to the instant case) do not detract from the principle. It is important to note that

in *Binions v Evans* the purchaser Binions received title "expressly subject to the agreement between the vendors and Evans, and Binions paid a reduced price because of this".

Applying these principles to the instant case, I find that Watersports has nothing other than a contractual licence and that licence came to an end upon the sale of the hotel property to Grande Resort and the notice by Jamaica Grande that Watersports should vacate the property. Watersports has already had equitable relief and it is to be determined whether it would be entitled to any further remedy by way of damages for breach of contract.

Easement

Very little need be said in respect of Watersports' claim for an entitlement to an easement of passage over the hotel property. The common law prerequisites for an easement; that there be a dominant and a servient tenement do not exist. Watersports does not own any land in or around the hotel property which could be deemed a dominant tenement. The UDC land, although now owned by a different person than the owner of the hotel property, was at all material times either owned by or leased to, the owner of the hotel property. The essential qualities of an easement, according to Dankwerts J. (as he then was) in *Re Ellenborough Park* [1955] 3 WLR 91 at page 96, are:

> "...(1) there must be a dominant and a servient tenement; (2) an easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit; (3) **the dominant and servient owners must be different persons**; and (4) the right claimed must be capable of forming the subject-matter of a grant..." (Emphasis supplied)

The Court of Appeal confirmed the decision of Dankwerts, J. and at pages 900-901 of the report at [1955] 3 WLR 892, Sir R. Evershed, MR accepted the principles cited above, as being correct.

Watersports is not entitled to an easement across the hotel property.

Is Jamaica Grand in breach of its agreement with Watersports and if so, to what remedy, if any, is Watersports entitled?

The first relevant portion of the agreement, for discussing the question of whether there was a breach of contract, is clause 1. By that clause Jamaica Grande appointed "Watersports the exclusive provider of such watersports activities as may be required for said guests for a period of THREE (3) YEARS beginning on the 1st day of January 2003 ...and ending on the 31st day of December 2005...unless earlier terminated in accordance with [the] Agreement".

There is no contest that Jamaica Grande, by a letter dated August 31, 2004, sought to terminate the agreement effective on 6th September 2004. The letter also informed Watersports that as of the effective date, Watersports would "have no right to conduct [its] watersports activities or to be on the property". By letter dated September 3, 2004, Jamaica Grande

sought to extend the notice period to 11th September 2004, but termination of the contract was a consistent feature of both letters. The reason given for the termination of the contract was that the hotel had been sold and would be closed. A further reason was given that, by virtue of the sale, Jamaica Grande's right to use the beach area, including the areas used by Watersports, would be terminated.

These reasons are outside of the scope of the 2002 Agreement. Clause 7 provided for the method by which termination could take place. The clause speaks to termination in the event of default on the part of Watersports, either by way of non-performance or non-observance of the terms. No attempt was made to make use of the provisions of the clause. This is so, despite a letter of complaint by Jamaica Grande, concerning the use of the hotel property for access to Watersports' area. I have already referred to this letter (in the section dealing with proprietary estoppel) and find that it does not play a material part in the termination. It is fair to conclude therefore, that in terminating the agreement, Jamaica Grande acted in breach of the 2002 Agreement.

I accept the submission of Watersports' counsel, that the fact that it was the sale of the hotel property which precipitated the termination, does not assist Jamaica Grande. Learned counsel appropriately cited the case of

Maritime National Fish, Ltd v Ocean Travellers, Ltd [1935] AC 524 as authority for the proposition that a "self-induced frustration cannot excuse a person who breaks the terms of a contract".

I would not however extend the application of that principle to a period beyond December 31, 2005. Although there were provisions for renewal of the agreement, it would be improper and unreasonable to require Jamaica Grande to retain ownership of the hotel property in order to be able to renew its agreement with Watersports. The sale of the hotel property would effectively release Jamaica Grande from any obligation to renew the agreement with Watersports upon its expiry.

What therefore, is the remedy to which Watersports is entitled? The onus is on Watersports to show that it has suffered loss arising from the breach. The standard of proof, though on a balance of probabilities requires a certain degree of precision to give the court real assistance in assessing the loss and the appropriate damages. Learned counsel for Watersports in their closing submissions conceded that "Watersports has not adduced any specific evidence as to the quantum of its loss". They went on to say that "it is clear that the termination of the agreement occasioned loss of business".

It would be fair to say that the effect of the injunction granted to Watersports would have prevented it being able to claim damages for any

loss of income from sources other than the 2002 Agreement. The injunction is still in place despite the fact that the contract period has long expired.

In so far as income from the exclusive franchise is concerned, providing the proof of the loss of the income as a result of the termination should have been fairly straight-forward. One would have expected that a limited liability company, such as Watersports is, would have been able to produce its records to show what in fact was the net monthly figure paid to it by Jamaica Grande over a suitable representational period. This would have assisted the court in determining, with some confidence, what Watersports would have lost for the period September 2004 to December 2005. But that was not to be.

Instead, the evidence of Mr. Smatt in paragraph 16 of his affidavit sworn to on September 8 2004 was that he was "advised by [his] accountant...that [Watersports] is likely to lose net profit of approximately US$ 500,000.00 for the remainder of the contract". His accountant Mr. Irvin Wade swore to an affidavit on October 7, 2004 in which he explained a portion of the billing procedure between Jamaica Grande and Watersports. He exhibited a cheque stub for a net amount of US $9,281.08 representing a sum paid to Watersports by Jamaica Grande in September 2002. Transactions for only the 16th and 18th September 2002 were referred to in

that document but no explanation was given as to whether this was a weekly reconciliation or otherwise. No explanation was given as to the reason for using a 2002 example rather than one more current, at the time. No estimate was given, either, as to the cost of earning that income.

It is true, that long after the time permitted for filing witness statements had passed, a witness statement by Mr. Wade was filed, which sought to provide information concerning annual losses as a result of the termination of the contract. The statement was not admitted into evidence. Dr. Barnett for Watersports made the bold statement that the question of damages had to be dealt with separately and that it was "impossible to deal with damages" in this trial.

I differ from learned counsel on this issue. There must be an end to litigation. The issue of damages was a live one in the case, being one of the reliefs claimed by Watersports in its Further Amended Particulars of Claim. Watersports, as said before, had an obligation to provide the evidence, in this trial, in proof of its claim. Submissions have been made in respect of this aspect of the claim. It is not appropriate to set another hearing for the determination of the matter of the quantum of damages.

Watersports has not met the requirements for proof of its loss arising from the termination of its exclusive contract. It can recover nothing in this

regard. Indeed, its continued occupation of the hotel property and the UDC land, by virtue of the injunction, for a period approaching three years since the date of expiry of the agreement may well have provided it with all the compensation to which it would have been entitled. It would not be inappropriate to cite Lord Walker of Gestingthorpe's words in the *Bryan Clarke* case mentioned above, where he said at paragraph 18:

> "Often the equity can best be satisfied by a monetary award. Sometimes even a monetary award is inappropriate where (as here) the claimant's expenditure on improvements to a dwelling has been accompanied and followed by years of rent-free accommodation in the dwelling in such a way as to satisfy the equity and leave it exhausted..."

The claim against Grande Resorts Limited

Very little has been said in this judgment, thus far, about Grande Resort. Indeed, nothing, was mentioned in Watersports' counsels' closing submissions concerning Watersports' claim against Grande Resort; perhaps rightly so. There was no evidence to support a claim of Grande Resort's knowledge of the terms of the agreement between Watersports and Jamaica Grande.

I accept the submission of counsel for Grande Resort, that Watersports, in order to succeed on this limb, "would have to establish sufficient knowledge by" Grande Resort of the said agreement. Mr. Smatt in cross-examination accepted that he had no correspondence or dialogue with Grande Resort's representatives prior to 31st August 2004. Mr. Ian Kerr, for

Grande Resort testified that Grande Resort did not have actual knowledge of the course of dealings between Jamaica Grande and Watersports.

Watersports must fail on this ground as well.

The claims by Jamaica Grande and UDC

It would have been clear, based on the preceding opinion, that I am of the view that Watersports, having no interest in either the UDC land or the hotel property, was not entitled to lodge caveats against the titles for each. Those caveats must therefore be removed.

Jamaica Grande has also claimed that an order be made for an enquiry into the loss it has incurred as a result of the caveat having been lodged. The evidence of Mr. Patrick Hylton, on behalf of Jamaica Grande, was to the effect that the presence of the caveat resulted in delay in the completion of the sale. This enquiry was part of the relief forming part of Jamaica Grande's fixed date claim form. It will therefore be granted.

Conclusion

The evidence demonstrates that Watersports, during the time it was in occupation of the various portions of the UDC land and the hotel property, did so on the basis of its successive agreements with the owners of the hotel property. Watersports had no intention to dispossess the owners of the paper titles for these properties. As against the UDC land, the acquisition by UDC

effectively terminated any interest which Watersports may have had prior to that acquisition. The fact that the UDC land was, while owned by UDC, at all times the subject of a lease, meant that Watersports could not acquire a possessory title as against the UDC.

Watersports acquired no interest whatsoever, in the hotel property. It is implicit in its 2002 agreement that it accepted that it had no such interest. In that document, Watersports agreed, upon the termination of the agreement, to vacate the property which it occupied.

Watersports must therefore fail in its claims. It must vacate the property and its caveats must be removed.

It is therefore declared that:

1. Watersports Enterprises Limited does not have any estate or interest in any of the lands comprised in Certificates of Title registered at Volume 1211 Folio 653, Volume 1094 Folio 240 and Volume 1094 Folio 241 of the Register Book of Titles;

2. Watersports Enterprises Limited does not have any estate or interest in either of the lands comprised in Certificates of Title registered at Volume 1236 Folio 249 or Volume 1059 Folio 240 of the Register Book of Titles;

It is further ordered that:

1. Judgement for the Defendants against the Claimant in Claim No. 2004 HCV 02189;

2. The injunctions granted in Claim No. 2004 HCV 02189 are hereby discharged;

3. The Registrar of Titles shall forthwith remove Caveat No. 1317519 from affecting Certificates of Title registered at Volume 1211 Folio 653, Volume 1094 Folio 240, Volume 1094 Folio 241, Volume 1236 Folio 249 and Volume 1059 Folio 240 of the Register Book of Titles;

4. A case management conference be held on the 7th of October 2008 at 9:00 a.m. for 45 minutes in respect of Fixed Date Claim Form No. 2004 HCV 2364 to provide directions concerning an enquiry as to damages allegedly suffered by Jamaica Grande Limited as a result of Watersports Enterprises Limited having lodged Caveat No. 1317519;

5. Watersports Enterprises Limited shall quit and deliver up on or before the 31st day of October 2008, to Grande Resorts Limited and/or The Urban Development Corporation, all those parcels of land forming parts of the lands comprised in Certificates of Title registered at Volume 1236 Folio 249,

Volume 1059 Folio 240, Volume 1211 Folio 653, Volume 1094 Folio 240 and Volume 1094 Folio 241 of the Register Book of Titles;

6. Costs of all other parties to be paid by Watersports Enterprises Limited, such costs to be taxed if not agreed;

7. Certificate for two counsel granted in respect of each claim.