

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

Judgment Book

CLAIM NO. 2008 HCV 01157

IN CHAMBERS

BETWEEN	JULIET CAMPBELL	1 ST CLAIMANT
AND	OREN BUCHANAN	2 ND CLAIMANT
AND	DONNETTE PRENDERGEST	1 ST DEFENDANT
AND	JUNIOR HALL	2 ND DEFENDANT

Mr. Sean Kinghorn instructed by Kinghorn and Kinghorn for the Claimants
Mr. Crafton S. Miller and Miss Clare Miller instructed by Crafton S. Miller
And Company for the Defendants

Tortious damage to property; credibility; assessment of damages; betterment.
When the incredulity of the defendants is juxtaposed with the credibility of
the claimants, the aphorism, "truth press down is like oil poured in water, it
rises to the top," comes into sharp focus. The court is constrained not to look
askance at the manifest truth of the claim. Accordingly, the claim is found
proved on a balance of probabilities.

Heard 15th and 30th April, 2010

CORAM : E.J. BROWN, J. (Ag)

- 1) Hellshire Beach, also known as the Half Moon Village Fishermen's Beach, is a popular haunt of many Jamaicans. There, mouth-watering seafood delights are not only prepared to order but according to the fastidious

selection of the customers. Then, to the sound of the waves breaking on the shoreline, in the background of the rhythmic decibels of the local sound system, anxious palates and grateful taste buds are titillated and hearty appetites satiated, be they epicurean or barbarian.

- 2) Both parties were providers of this service at Hellshire Beach from locations in uneasy proximity to each other. Miss Prendergast is the only person who said the claimants' stall was sited beside hers. Everyone else said it was located in front of the defendants' establishment. Although the claimants' presence at the beach antedated that of the defendants' the latter have a more well-known establishment trading as Prendy's on the Beach.
- 3) This contiguity, became a thorn in the defendants' flesh, and appears to have been the motivation behind their destruction of the stall and contents belonging to Miss Juliet Campbell and Mr. Oren Buchanan. At the end of the case, it was with consummate ease that the court found the case proved as neither of the two witnesses testifying to the destruction was challenged on the point. On the other hand, both defendants were discredited in material areas, even though they staunchly denied playing any part in the demise of the claimants' stall.

THE CASE FOR THE CLAIMANT

- 4) Miss Juliet Campbell, the 1st claimant, commenced the giving of evidence in support of the claim. Miss Campbell had been operating a stall-restaurant on the beach for some twenty-seven (27) years, having started at age fifteen (15). She declared herself to be illiterate. This structure which is made of

wooden uprights upon a stone foundation, is jointly owned with the second claimant, Mr. Oren Buchanan. The spot on which the building is located was given to her by the **Half Moon Bay Co-operative** (HMBC), which manages the beach. She is a member of the HMBC.

- 5) About the 17th July, 2007, her stall-restaurant was demolished by persons employed by the Portmore Municipality, apparently for being less than one hundred (100) feet from the shoreline. Defiantly, Miss Campbell saw to the rebuilding of the structure on the same spot. Towards the end of the same month the rebuilding was completed and preparations made for the expected Emancipation Day influx of patrons.
- 6) Patrons would not dine there on Emancipation Day however, as the proverbial wrecking ball was once again taken to it. Miss Campbell was not a witness to this destruction. In spite of the time and energy spent in cross examining her, her contribution to the claim has to be confined to the pecuniary losses claimed.
- 7) In examination in chief, Miss Campbell estimated the replacement value of the structure to be \$430,000.00. Notwithstanding the absence of formal recording keeping, Miss Campbell estimates that she made a monthly profit of \$80,000.00. Under cross examination Miss Campbell said that when business was fine she could make two million dollars (\$2m) over a two year period. The latter figure slightly exceeds the \$80,000.00 profit annualized. On the contrary, the replacement cost increased to three million dollars (\$3m).

- 8) When Miss Campbell last left her stall-restaurant, Mr. Patrick Burris, her brother-in-law, was left inside. Naturally, he was next to take the stand. Patrick Burris was a diffident Rastafarian who sometimes spoke in the idiom of the sect. He was an eye witness to the dastardly deeds of the day.
- 9) His siesta inside the stall was broken at about midday on the 30th July, 2007, by the sound of voices outside. He recognized the voices of Miss Prendergast and Mr. Hall. Upon getting up, Mr. Burris saw both defendants in the company of three policemen and three or four boys. Miss Prendergast, Mr. Hall and the boys proceeded to demolish the building.
- 10) The cross examination of Mr. Burris yielded two internal inconsistencies. First, in examination in chief, he said that he exited the building and watched them. In cross examination he asserted that he remained inside the building during the demolition. Secondly, in his witness statement, Mr. Burris certified that he tried to protect the liquor that was in the shop, gathering what he could. When asked about this he denied trying to protect the liquor and gathering what he could.
- 11) Questioned as to whether or not Miss Campbell had rebuilt the stall-restaurant after the destruction by the Municipality workers he gave a somewhat colourful response. Mr. Burris said, “yes, the princess rebuild her place properly still.” He maintained he saw who knocked down the building, describing the implements of destruction. In particular, Mr. Burris said Miss Prendergast or Prendy as she is also known, had a small claw hammer in her hand. Mr. Burris was never challenged on the veracity of what he saw.

- 12) Testifying as well as having witnessed the demolition team at work was Desmond Abrahams, a fisherman by trade and the common law brother-in-law of Miss Campbell. Mr. Abrahams came across as unschooled. In fact, he said he was unable to read but could do a little sketch in the writing. He never got any schooling. "The little I get is my father teach me and race paper help me a lot," he testified.
- 13) In examination in chief he said that at about midday, he was at his stall at the Hellshire Beach when he received information which led him post haste to Miss Campbell's stall. There he observed Miss Prendergast, Mr. Hall and two other men smashing the stall.
- 14) When cross examined, Mr. Abrahams was woefully confused as to the date of the incident. He first said it was the 17th July. Later he couldn't tell if it was on the 17th July. He said the building was knocked down on the day after the holiday. However, Mr. Abrahams couldn't say if that holiday was Christmas or August. That notwithstanding, as constant as the North Star was he in maintaining the defendants' involvement. Miss Prendergast had a hammer in her hand, Mr. Hall had a piece of wood, and another of the men had a crow bar while the next had a hammer.
- 15) Mr. Abrahams contradicted Miss Campbell and Mr. Burris that at the material time stall-restaurant was completely rebuilt after the 17th July incident. Mr. Abrahams said that the completed section measured about 10' x 10'. However, there was general agreement on the size of the building. Miss Campbell first said that the stall-restaurant was about 28' x 26' then that it was somewhat bigger than the courtroom. The courtroom was estimated to be about 25' x 25'. Mr. Graham estimated the size of the stall to

be about that of the courtroom. At the end of the cross examination, like Mr. Burris, Mr. Abrahams stood unchallenged on the central question of the defendants' culpability.

- 16) The last witness called in support of the claim was Mr. Raymond Jack. Mr. Jack graduated from the HEART TRUST (NTA) where he studied Building Technology. Similar studies were done at the St. Andrew Technical High School and what is now the University of Technology. He however did not graduate from the latter institution. Mr. Jack described himself as a builder of twenty-five (25) years experience.
- 17) Mr. Jack has been in business on his own account since 1994 when he formed his own company. Since then he has constructed homes for several well known artists, National Water Commission, the Port Authority of Jamaica, HEART and Nestlé. At the time of trial Mr. Jack was employed as a manager, in charge of structure and plumbing, on a housing venture being undertaken by Merritt's Construction. He provided the claimants with an estimate of the cost of rebuilding which was admitted into evidence as exhibit 1. According to Mr. Jack, 10' x 10' is 100 sq. ft.. He estimated the cost of the structure destroyed to be \$841,300.00.
- 18) Cross examined by learned counsel Mr. Crafton Miler, Mr. Jack's evidence was that he did not know the claimants prior to being consulted. Mr. Jack neither visited the site nor relied on architectural drawings. His estimate was based on information from Miss Campbell and Mr. Buchanan. That information concerned measurements, type of materials used and the method employed in erecting the structure. The estimate ultimately reflects how Mr. Jack would construct the structure as a professional.

THE CASE FOR THE DEFENCE

- 19) Mr. Ishmael Hall, otherwise called Junior, was the first to rise to oppose the claim. Mr. Hall presented himself as a man of undoubted intelligence and betrayed no challenges in articulating his responses. Ishmael Hall described Miss Campbell's business as not only smaller than his but also as a low income entity having a smaller customer base. During the week "they [the claimants] hardly had any customers but on the weekends they would have maybe a dozen or so."
- 20) Notwithstanding its size, Miss Campbell's presence was made conspicuous by conduct which fell outside the bounds of ordinary entrepreneurial pursuits. Mr. Hall said Miss Campbell interfered with his customers by shovelling sand towards them during meals. Miss Campbell went so far as to overturn a table at which his customers were dining.
- 21) Mr. Hall swore that after Miss Campbell's stall was demolished, the rebuilding only got as far as four posts covered with tarpaulin. Pieces of board from the demolished structure leaned onto the posts. Unlike the antecedent structure, the replacement had no foundation, walls or zinc covering.
- 22) Neither Mr. Hall nor Miss Prendergast took part in damaging this modest replacement. In fact, so he asserted in evidence, being the cosmopolitan, civic-minded citizen, all he sought to do at the material time was to clear away the debris which was scattered all over the beach. In that effort, he was ably assisted by Miss Prendergast and two men, Taffa and Willie. Mr. Hall's

clean-up crew removed the debris some 150 feet away from Miss Campbell's old spot and to a new area assigned by the HMBC.

- 23) Learned counsel Mr. Kinghorn wasted no time in getting Mr. Hall to disclose that he had been convicted for Malicious Destruction of Property in the St. Catherine Resident Magistrate's Court, as a result of the same incident. On the question of Miss Campbell's presence before Prendy's, Mr. Hall walked a zigzag path. First, he had no problem with Miss Campbell being in front of his shop. He affirmed his earlier evidence that she caused annoyance and disturbance to his business. That continued although he spoke to her about it. He then said the annoyance and disturbance was a problem to him. In the same breath Mr. Hall said he would not prefer that Miss Campbell was not there to annoy and disturb his business.
- 24) Mr. Hall accepted that on the day in question policemen were at his shop. The policemen did not take part in the clean up. Mr. Hall agreed that he was not the responsible body for cleaning the Hellshire Beach. He used no tools or implements in the clean up exercise. He agreed with learned counsel that he removed the debris from the area occupied by Miss Campbell to another section of the beach. Mr. Hall eventually agreed that having moved the debris 150 feet away, Miss Campbell's stall was no longer located in front of his shop. Mr. Hall denied that he and Miss Prendergast demolished the shop owned by the claimants.
- 25) Miss Donnette Prendergast next testified. It wouldn't be difficult to obtain a consensus, if not unanimity, that Miss Prendergast, facially, is a good representative of her gender. Additionally, Miss Prendergast is endowed

with the complexion which in this society fits her squarely within the stereotype of persons who would not condescend to the activities alleged. Miss Prendergast impressed the court as being educated, intelligent, self-confident, well-spoken and, pardon the colloquialism, feisty.

- 26) Like Mr. Hall, she too had occasioned to speak to Miss Campbell about her misbehavior. Miss Campbell would wash and make wet the area surrounding Prendy's. Further, Miss Campbell was always digging the sand at the beach front creating mounds that would sometimes contaminate the food being eaten by Miss Prendergast's customers. Miss Campbell, to the knowledge of Miss Prendergast, was given notice from 2005.
- 27) Miss Prendergast supported Mr. Hall in the assertion that what they did was to pick up the pieces of wood and zinc which remained scattered on the beach. However, according to Miss Prendergast, these items were neatly packed in "the spot where Miss Campbell's shop used to be". Sometime after, she was served with a summons "to answer charges of Malicious Destruction of Property". She was fined \$50,000.00.
- 28) Surprisingly, in answer to Mr. Kinghorn, Miss Prendergast said she didn't know what she was charged for. She elaborated, "I mean I don't know what offence I was made to pay a fine for." Miss Prendergast swore that it was after the fine was imposed that it was revealed to her what the charge was. Never mind that the indictment had been read to her in court.
- 29) Miss Prendergast also resiled from her evidence in chief on the question of where the debris was taken to. In cross examination Miss Prendergast said

the debris was taken to the area allocated to Miss Campbell. She too admitted the presence of three policemen at the time of the removal of the debris. Miss Prendergast flatly denied destroying the claimants shop.

RATIOCINATION

- 30) The defendants have advanced a defence that amounts to a bare denial of the claim. And if anything more than a bare denial, it is the delusion of Messrs Burris and Abrahams in somehow confusing the clean up activity with demolition of a practically non-existent structure. Either way, the substratum of the claim rests on the factitious not the factual.
- 31) But how could anyone, save the delusional, confuse the altogether innocuous and commendable activity of cleaning up a public beach with the pulling down of a structure sited thereon? The former activity involved picking up and carrying away debris from no specific area and without the use of tools or implements. The latter of necessity compelled the use of implements and work in one spot. It appears to be a case of apples and oranges, cheese and chalk.
- 32) While the court lacks the psychiatric expertise to pronounce on mental disorders and behavior, having seen Messrs Burris and Abrahams, the court can say it does not find their evidence to be the product of a false belief unaffected by reason. Both struck the court as the ordinary man one would expect to find on a Jamaica Urban Transit Corporation (JUTC) bus.

- 33) That aside, in all their simplicity and obvious lack of sophistication, these gentlemen impressed the court as truthful. Neither struck the court, and this is said respectfully, as being seized with the intellectual facility to construct such an elaborate scheme to frame Miss Prendergast and Mr. Hall. A scheme maintained seamlessly from 2007 to the present without once being broken under the crucible of cross examination on the central issue.
- 34) *Au contraire*, it is palpable that both Mr. Hall and Miss Prendergast were unprepared to speak the truth. First, since they did not destroy Miss Campbell's stall, why was it important to mention that she was being a nuisance to them? The court can see no other perceived benefit than that the defendants wished to advance this as motive for falsehood, although it was never suggested as such to Miss Campbell. That of course, is roundly rejected in the face of the evidence of Mr. Burris and Mr. Abrahams.
- 35) Secondly, Mr. Hall morphed into the physiology of the serpent as he tried to slither in his labyrinth of deceit concerning Miss Campbell's presence. If Miss Campbell's annoyance and disturbance amounted to no more than that of an insignificant insect, to be swatted away at will, then he might have been accepted as credible in declaring he would not have preferred her removal. Miss Campbell was interfering with his patrons to the point of warranting his personal intervention. Yet he was brazen enough to ask the court to accept, at the very least, indifference from him to her continued presence. It is transparently clear that Miss Campbell's presence in front of Prendy's was not welcomed and that the defendants wanted her removed by means fair or foul. This litigation reflects the choice they exercised.

- 36) To say that Miss Prendergast was a patently untruthful witness is to indulge in charitable euphemism, for the sake of her dignity. She knew that the materials (debris) from Miss Campbell's stall was carried some 150 feet away, yet in her evidence in chief she said it was neatly packed on the site of the demolished shop. Even more egregious was the assertion that she didn't know what she was charged for.
- 37) Miss Prendergast said in her witness statement that she received a summons to attend court for Malicious Destruction of Property. The educated, intelligent Miss Prendergast never read it. Maybe? But when and how did she know it was to answer charges of Malicious Destruction of Property? She said it was to answer such a charge. Further, in answer to the court, Miss Prendergast said the indictment was read to her. The indictment is little more than a statement of the offence. That document which would have been read to her before one scintilla of evidence was taken. Yet Miss Prendergast strove vainly to maintain that only upon the imposition of the fine was the charge made known to her.
- 38) When the incredulity of the defendants is juxtaposed with the credibility of the claimants, the aphorism attributed to the late Rev. Dr. Martin Luther King Jr. comes into sharp focus. That American civil rights leader said, "truth press down is like oil poured in water, it rises to the top." The court is constrained not to look askance at the manifest truth of the claim. Accordingly, the claim is found proved on a balance of probabilities.

ASSESSMENT OF DAMAGES

- 39) The claimants have suffered a pecuniary loss at the hands of the defendants. The question now becomes, what is the value of that loss? The starting point is Lord Blackburn's oft quoted dictum in **Livingston v Rawyards Coal Co. (1880) 5 App. Cas. 25,39; the award should be:**

that sum of money which will put the party who has been injured, or who has suffered, in the same position he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

That is the general rule. As explained by the learned authors of **McGregor on Damages** 18th edition, "the measure of damages in tort is ... to be assessed on the basis of restoring as far as possible the *status quo ante*." The claim is for \$841,300.00 to replace the demolished structure. Although Miss Campbell said the size of the stall was about 28' x 26', the estimate Mr. Jack returned was for a superstructure measuring 100 square feet or 10'x10', standing a foundation of a larger dimension and appurtenance. This is in harmony with the evidence of Mr. Abrahams that the completed section was about 10' x 10'.

- 40) Learned Counsel Ms. Clare Miller launched a surgical carpet bombing attack upon Mr. Jack and his evidence. First, doubt was cast upon his *bona fides* to give the evidence he gave. That submission was predicated on Mr. Jack's evidence that he was a builder, not a quantity surveyor. Secondly, the basis upon which the estimate was arrived at was criticized. Thirdly, there was disparity in the size of the structure deponed to by Miss Campbell and Mr. Barris and that for which Mr. Jack provided the estimate.

- 41) Fourthly, the estimate sought would provide the claimants with a structure superior to the one that was demolished. Upon these bases the court was urged to disregard Mr. Jack's evidence. Instead, the court should take judicial notice of the size and nature of structures characterized as stalls in Jamaica. In that event, counsel submitted, an appropriate award would be Fifty Thousand Dollars (\$50,000.00). Additionally, Miss Miller submitted that the claim was fanciful, with the object of unjustly enriching the claimants. The bases of this submission was the obvious chasm between the estimated loss in evidence in chief and evidence in cross examination.
- 42) So then, can the court place any reliance on the evidence of Raymond Jack? With all due deference to learned counsel, the court is compelled to give this submission short shrift. If a builder of twenty-five (25) years experience and some formal training cannot creditably speak to rebuilding costs, then no one outside of the designation, quantity surveyor can. The builder stands in a similar position to a motor vehicle repairman. Surely, no one could argue, save in jest, that the repairman is incompetent to provide an estimate of replacement cost for a damaged vehicle. The repair's estimate would only be subject to the adjustments of the adjustors. To further analogize, the only caveat attaching to the use of the builder's estimate is that it must abide verification by a quantity surveyor. There is no evidence that it was so verified. Therefore, an adjustment will have to be made to take that into account. The absence of the quantity surveyor's imprimatur does not make the estimate null and void.
- 43) Having accepted that Mr. Jack was competent to speak to the estimated replacement cost, was that estimate justifiably premised. Much was made of

the fact that Mr. Jack neither visited the *locus in quo* nor relied on architectural drawings during cross examination. The latter complaint must have been tongue in cheek because there was nothing formal attending this apparently modest enterprise. Secondly, it is difficult to see how a view would have been helpful in the context of this case. Miss Campbell testified, “when I went to view the spot where the restaurant was, nothing was there at all.” In the absence of the structure, its dimensions could only be arrived at from the recollection of those who knew it. Further, Mr. Jack also factored in his own experience as a builder to come by the estimate. In the circumstances of this case, Mr. Jack did the best that could be done.

- 44) The evidence shows that Mr. Jack’s estimate is the cost of rebuilding a 10’x10’ building. That is in harmony with the evidence of Mr. Abrahams. And that is what the court accepts. It is undeniable that Miss Campbell outdid herself in embellishing this aspect of her evidence. Miss Campbell’s evidence on the point is accordingly rejected.
- 45) There is no evidence that the stall-restaurant had been rebuilt at the time of trial. The presumption is that it had not been erected a fresh as Mr. Jack’s evidence was of an estimate, not actual expenditure. Therefore, it cannot truly be said either that a superior structure or unjust enrichment would be the result of an award in the terms of the claim.
- 46) However, even if the claimants were to receive an incidental, inseparable benefit upon being compensated, the defendants could not be heard to complain. In this regard the dictum of **Lord Hope of Craighead in O’Connor v Lagden [2004] Part 9 Case 1 [HL] p.9** is instructive:

It is for the defendant who seeks a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. It is not enough that an element of betterment can be identified. It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted.

- 47) In the instant case the court has been provided with a bare estimate. That is, one that is yet to pass the quantity surveyor's bar. Further, the claimants delayed some five (5) months to obtain the estimate. During that time building cost would not have been held in abeyance but expected to be spiralling upwards. Therefore, the claimants did nothing to mitigate their loss. Further, the court is unable to say whether the materials and methodologies to be employed are the most cost-effective of a number of options.

- 48) None of this translates however to a rejection of the estimate. It is not fair to relegate the claimant's structure to a common stall as understood in the vernacular. The structure was variously described as stall, restaurant and shop during the trial. Even so, it would be ill advised to take judicial notice of the size and character of the structure without the notoriety requisite of things judicially noticed.
- 49) Against the background of the foregoing, it is proposed to make a five percent (5%) deduction to account for the lack of verification by a quantity surveyor. A further deduction of ten percent (10%) is made for the absence of mitigation and uncertainty of cost-effectiveness. In respect of the damage to the structure, the award is Seven Hundred and Fifteen Thousand, One Hundred and Five Dollars (\$715,105.00). The claim for loss of profit must also be subject to the litmus test of a duty to mitigate. The court accepts learned counsel Mr. Kinghorn's submission on the point. Therefore, an award is made for four (4) weeks. That is a sum of Three Hundred and Twenty Thousand Dollars (\$320,000.00). Interest at the rate of three percent (3%) from the 18th December, 2007 to the date of judgment and, six percent (6%) from the date of judgment, is also awarded.

