IN THE SUPREME COURT OF BELIZE, A.D. 1999

ACTION NO. 255

	(DISCOVERY EXPEDITIONS OF BELIZE	**Plaintiff**
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BETWEEN	**(AND**	
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	(BELIZE YACHT CLUB LTD.	**1st Defendant**
	(ISLAND MARKETERS LTD.	**2nd Defendant**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Dean Barrow S.C. for the Plaintiff.
Mr. Philip Zuniga for the Defendants.

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JUDGMENT

1. The dispute between the parties in this case flows from the operation of the tourism industry in this country and some of its associated activities.

2. The plaintiffs are what I believe is called in the industry, a “destination manager”. Indeed, Mr. David Gegg, their managing director explained in evidence that the plaintiffs as a destination management company, represent the interests of travel wholesalers and tour operators. They do this by marketing Belize as a desirable destination to tour operators and travel agents. Mr. Gegg further stated in evidence that the plaintiffs generated income in two ways: 1) by booking hotels throughout the country on behalf of travel wholesalers (this presumably means travel agents and others who sell travelling services and facilities) and for tour operators; 2) by operating tours and tour related services themselves. He further stated that they, that is the plaintiffs, make only a very small margin on the booking of hotels aspect of their business and that the lion-share

of, or as he put it, “the real income” of the plaintiffs derived from their tours and tour-related services they provided.

3. The defendants on the other hand, are in addition to yachting and other boat-related activities presumably on a club membership basis, also in the hotel business, and from the evidence, own one of the biggest hotels in Ambergris Caye, the Belize Yacht-Club Hotel.

4. This is the backdrop to the relationship between the plaintiffs and defendants in this case. Admittedly, the brush strokes may be a little sweeping, but against this backdrop, the parties are presented in a clearer relief for a proper appreciation of the contentions between them and their resolution. Against this backdrop, the plaintiffs and the defendants entered into a written contract on 1st December 1997. This is the matrix of the relationship between them out of which this suit has arisen.

5. This agreement was tendered and received in evidence as **Exhibit DG 1**. It reads like a standard Lessor/Lesser agreement (indeed the very terms used to describe the defendants and plaintiffs respectively in it); however given the backdrop outlined earlier, it contains some custom-made provisions reflecting the pursuits or interests of the parties. This agreement was expressed to last for a period of one year, from 1st December 1997 “to 31st (sic) November 1998”.

6. It provided, among other things, that the plaintiffs shall take as lessee the building known as the Belize Dive Shop situated on the pier in front of the Belize Yacht Club; all the space on the west end of the site of the present dive shop measuring 33 feet by 16 feet, to be used for two ‘skiffs’; and two slip spaces situated on the east end and in front of the dive shop (clause 1). In return for this the plaintiffs undertook to pay rent at the rate of $1,500.00 per month inclusive of Value Added Tax, payable in advance on the first day of the month and without deductions. In addition, the plaintiffs agreed to pay 12% commission on all gross sales made at or from the

Belize Dive Shop (clause 2). By clauses 3 and 4 of the agreement, the plaintiffs and defendants undertook mutual invoicing of each other for monies due under the agreement save and except the rent payable by the plaintiffs which was payable without any invoice.

7. Further, by clauses 13 and 14, the plaintiffs undertook to maintain and use the premises let to them as a dive and tour facility and to keep the dive shop open for business seven days a week and fifty two weeks per year closing only during the hours the defendants deemed it necessary to do so; and to maintain and operate a sales office and trained staff on the premises at the marina and or the lobby (the latter subject to the availability of the lobby desk from the then operator). The plaintiffs were required to do this seven days a week, closing only on the days the defendants (the agreement says the "resort", but this for practical purpose meant, of course, the defendants) deemed it necessary. The plaintiffs were also required to maintain a twenty four-hour emergency service number to ensure guests services and satisfaction. Clause 15 required the plaintiffs to provide certain minimum services for sale from the facility, such as Atoll Diving, Reef Diving, Snorkeling, Camera rentals etc.

8. Clause 16 provided that it was a fundamental condition of the agreement that the plaintiffs guaranteed to produce BZE $500,000.00 net income worth of room rental for the defendants during the period 1st December 1997 to 30th November 1998; and that if the plaintiffs did this they would be entitled to a further lease of the premises for another year from 1st December 1998 to 30th November 1999; with the further stipulation that if the plaintiffs produced BZE $700,000.00 of net room rental income for the defendants, they could renew the lease for a further period of one year at no rent but they shall pay in that case to the defendants a 12% commission on all gross sales.

9. Clause 18 of the agreement stipulated as follows:

> *"18. The Lessee (i.e. the Plaintiffs) shall operate a tour desk at the lobby of the Belize Yacht Club Hotel (i.e. of the first defendant) but all guests of the Belize Yacht Club, or the Belize Yacht Club Hotel shall pay for any tours bought at the desk through their hotel account with the Belize Yacht Club Hotel. The Lessee (i.e. the plaintiffs) shall pay to the Belize Yacht Club Hotel a 20% commission on all tours sold at the tour desk".*

10. Clause 19 stated as follows:

> *"Subject to all applicable laws the Lessee (i.e. the plaintiffs) shall have the exclusive right for the duration of this agreement to operate and sell water sports from the Belize Yacht Club Marina."*

11. From the evidence it would appear that the parties had had some business relationship, albeit informal, before they entered into the formal agreement of December 1997, some of whose terms I have mentioned above. This agreement was negotiated and concluded, according to the testimony of David Gegg, the managing director of the plaintiffs, in pursuance of a more in-depth business relationship between the parties.

12. Pursuant to the agreement, the plaintiffs, according to the evidence, after putting some infrastructure in place such as booths, started to operate the Dive Shop by the middle of December 1997. The plaintiffs also started to operate a Tour Desk from the lobby of the defendants' hotel. For the latter purpose, they were given access to furniture in the hotel lobby for which they provided a desk, brochures and personnel to man the desk. Before too long however, the relationship between the parties started to unravel: first, in relation to the operation of the tour desk in the hotel lobby and subsequently to their whole arrangement, including the operation of the Dive Shop and arrangement for tours by the plaintiff. Hence this action in which, in addition to the plaintiff's claim, there is also a counterclaim by the defendants.

13. From the pleadings, testimony, arguments and submissions in this case, I believe the following issues have been agitated between the parties that call for resolution:

First, was there a breach of the agreement by the defendants with regards to the operation by the plaintiffs of the tour desk in the lobby of the defendants' hotel?

Secondly, was there a diversion of hotel guests away from the plaintiffs' operated tours to other tour service providers by the employees of the defendants in breach of the agreement between the parties?

Thirdly, was there in fact an agreement, albeit it oral, for a further lease of the Dive Shop after 30 November 1998, the end of the written agreement between the parties?

Fourthly, intertwined with these issues are the counterclaims of the defendants regarding certain sums owed by the plaintiff.

14. I must mention here in relation to the counterclaim and the defence to it, that there is some disharmony in terms of rebuttal. This evidently stems from the fact that at the further hearing of this matter on 1st November 2001, the learned attorney for the defendants, Mr. Philip Zuniga, applied to amend the defence and counterclaim and Mr. Dean Barrow S.C. for the plaintiff had no objection, and this was duly granted. However, Mr. Barrow S.C. did not ask or seek to file an amended reply and defence to counterclaim. He had settled one dated 31st January 2000 and filed on 1st February 2000. Hence the evident disjuncture between some paragraphs in the pleadings between the parties. But I do not think anything of great moment turns on this.

15. Now to the issues between the parties. First, on the operation of the tour desk by the plaintiffs in the defendants' hotel lobby. This was provided for in clause 18 of the agreement between the parties and I have already recited it earlier. From the evidence, it seemed that this tour desk was made operational very soon after the conclusion of the agreement between the parties in early December 1997. Mr. Gegg said in evidence that within a very short period thereafter, the plaintiffs were told by the

manager of the defendants Mr. Eddie Halliday, to curtail the operating hours of the tour desk in the hotel lobby. Their operating hours were cut back from eight hours a day to four hours.

16. It is not exactly clear how the tour desk operations in the hotel lobby from which the plaintiffs sold tours and other related activities to tourists came to an end: the plaintiffs through their managing director Mr. Gegg, say they were ordered by the defendant to cease operation in breach of their agreement. The defendants for their part say that the plaintiffs agreed to stop operating the tour desk. From the evidence however, it appear that one Espejo who was employed by the plaintiffs to operate the tour desk might have fallen foul with the management of the hotel in whose lobby the tour desk was situated. Also it appears that the plaintiffs' operation of the tour desk was in some competition with some other business of the defendants. This related to the sale of time-shares for vacation homes and in order to captivate would-be customers some extras like tours were offered to guests. This conflict, I find, impacted on the operation of the tour desk in the lobby operated by the plaintiffs. **Exhibit DG 2**, the letter from the defendants dated 16 September 1998 to the plaintiffs tells a greater part of the story surrounding the cessation of operation of the tour desk in the lobby. This letter says among other things: *". . . It was also agreed that Discovery Expeditions would operate a tour desk at the Belize Yacht Club Lobby. When operation began, we found that factors aroused (sic) making the tour desk operation infringe on the sales of the Belize Vacation Club. After consideration, we met in Belize and we agreed that Discovery Expedition would not occupy the tour desk immediately.*

. . . We do not expect to receive commission from the desk at the Belize Yacht Club Lobby since it is no longer operational."

17. Both Ms. June Flowers and Mr. Eddie Halliday testified for the defendants concerning the operation of the tour desk from the lobby. It would appear that it was the competition between the plaintiffs and Belize Vacation Club

for the sale of tours to guests that brought an end to the plaintiffs' operations of the tour desk in the lobby. However, Mr. Gegg for the plaintiffs denied ever agreeing with Mr. Halliday to cease operating the tour desk in the lobby. Also, the defendants apart from denying in their amended defence and counterclaim that they told the plaintiffs not to operate the tour desk from the lobby of the defendants' hotel, expressly averred in paragraph 2 of their defence that it was the plaintiffs who, on or about 16 September 1998, offered to stop operating the tour desk, an offer which the defendants accepted. Yet in cross-examination by Mr. Barrow S.C. for the plaintiffs, Mr. Halliday for the defendants admitted that they needed the plaintiffs to stop the sale of tours from the lobby so that Belize Vacation Club could get sales for its time-shares. On the balance of probabilities, on the evidence, I find that the defendants in breach of clause 18 of their agreement with the plaintiffs forced them out of the lobby where they were entitled to operate a tour desk to sell tours to guests for which they had undertaken to pay 20% commission on all such tours sold therefrom.

18. The plaintiffs pleaded and particularized the loss and damages they suffered in respect of being required to cease operating the tour desk in the lobby. Mr. Gegg, in evidence stated how the sum of $250,560.00 in respect of this was arrived at. The defendants for their part, for whatever reason, apart from the general traverse in paragraph 11 of their amended Defence and counterclaim, signally ignored paragraph 13 of the plaintiffs' Statement of Claim wherein the loss and damages flowing from the breach relating to the tour desk are set out and particularized. In any event, there was no challenge from the defendants to the quantum of loss and damages claimed by the plaintiffs in respect of the tour desk.

19. In the result, I am compelled to find in favour of the plaintiffs in respect of this issue and the loss they claim. However, as the plaintiffs were obliged by the terms of the agreement to pay to the defendants 20% commission

on all tours sold at the tour desk, the sum of $50,112.00 representing this commission is set off against the sum of $250,560.00 to which the plaintiff would otherwise have been entitled as a result of the breach by the defendants of clause 18 of their agreement. On this score the plaintiffs are entitled to the sum of $200,448.00 in respect of the tour desk sales, from which I find, on the evidence, they were forced to abandon.

20. The second issue in this case relates to the alleged diversion of custom in the form of hotel guests away from the plaintiffs to other tour service providers by the employees of the defendants in breach of clause 19 of the agreement. In respect of this alleged breach, the plaintiffs are claiming the sum of $672,945.90 as estimated lost revenue in respect of sales from the Dive Shop. This claim is set out in paragraphs 6 and 7 of the plaintiff's Statement of Claim. For its proper appreciation and hopefully, its resolution, regard must be had to clause 19 of the agreement between the parties. I had earlier set out this clause in this judgment. But for a fuller picture in view of the plaintiffs' claim, it would, I believe, bear repetition. This clause 19 is in these terms:

> *"19 Subject to all applicable laws the Lessee shall have the exclusive right for the duration of this agreement to operate and sell water sports from the Belize Yacht Club Marina."*

21. From the evidence, it appears that from the middle of January 1998 when the plaintiffs had ceased operating the tour desk from the lobby of the defendants' hotel, they began to notice a significant movement of passengers from the Belize Yacht Club to other tour operators. Mr. Gegg testified that business was being diverted by employees of the defendants who were selling the services of other tour operators to the clients of the defendants and even to clients whom the plaintiffs had booked in to the hotel; and that he noticed that on a daily basis other dive vessels would show up at the dock of the defendants to pick up clients. These presumably would be clients to whom the plaintiffs had not made any

sales. This he further stated was brought to the attention of Mr. Halliday of the defendants.

22. At the heart of this complaint by the plaintiffs are the activities of one Rene Vasquez. The plaintiffs aver that this Mr. Vasquez was able from his socially strategic position at the Splash Bar in the defendants' hotel, to lure guests, hence custom, from them to other tour operators: See **Exhibits DG 10** and **11**, letters from the plaintiffs to the defendants. Mr. Halliday however stated in testimony that when the matter was reported to him he met with this Rene Vasquez and told him to cease immediately if what was reported against him was in fact happening.

23. I am however satisfied that on any reasonable construction of clause 19 of the agreement between the parties and on the evidence, the defendants could not be held responsible for the alleged diversion of custom from the plaintiffs. It was quite possible that given the socially strategic position, as I think it could be reasonably described, of this Mr. Vasquez at the Splash Bar, which afforded him ease of access to and possibly the opportunity to exchange views on the usual tourist attractions and activities with hotel guests, this might have caused some of those guests to take their custom elsewhere. But I do not think this could reasonably be put at the defendants' door. The evidence on this is too hazy to pin responsibility and any consequent loss by the plaintiffs on the defendants. This Rene Vasquez, I think, was on a frolic of his own and the defendants could not be held liable on this score for any loss of revenue by the supposed diversion of guests to other tour service operators.

24. In any event, the claim is not particularized and there is no amount claimed in respect of it by the plaintiffs. In fact, Mr. Gegg did say in evidence under cross-examination by Mr. Zuniga for the defendants, that he could not quantify how many tours were diverted.

25. On the evidence therefore, I do not find that the defendants knowingly or deliberately breached clause 19 of their agreement with the plaintiffs.

26. I now turn to the third issue: was there in fact an agreement, albeit an oral one, for a further lease between the parties after 30 November 1998, the date of the expiration of their formal agreement in **Exhibit DG 1**?

27. On the evidence, it is clear from the express provisions of **Exhibit DG 1** that the lease between the parties for the Dive Shop had a definite term, that is one year, running from 1st December 1997 and ending on 31st (sic) November, 1998.

28. However, perhaps because of the nature of the industry both parties were engaged in, namely, the tourism industry, which as I mentioned earlier, formed the backdrop of the arrangement between them, it may be understandable that notwithstanding the express provision as to the term of their agreement, both sides for some reason allowed the relationship to continue even after the stipulated date in their contract. Things seemed to have been put on a *laissez-faire* footing between them, at least for sometime: for it is undoubted that even after 31 (sic) November 1998 (the stipulated expiry date of the plaintiff's lease) the relationship between them continued.

29. Also, from the evidence, it would seem that even the elements contributed to this state of affairs. About the tail end of the plaintiffs' lease, Hurricane Mitch unleased its fury sometime in October 1998, and Ambergris Caye the locale of the principal operations of the parties and, of course, the situs of the Dive Shop, the subject-matter of the lease, became seriously affected. Both Mr. Halliday and Mr. Leo Wassner for the defendants testified that the Dive Shop let to the plaintiffs was destroyed. In fact Mr. Wassner said in evidence that as a result of Hurricane Mitch, the Dive Shop was blown away and landed on the pier of the defendants' marina. Mr. Gegg for the plaintiffs also testified that as a result of Mitch the entire

island of Ambergris Caye was shut down and the Dive Shop was destroyed and as a consequence up until February 1999 the Dive Shop was operated from one of the rooms of the defendants' hotel.

30. Moreover, from the evidence, some differences seemed to have arisen in the relationship between the parties concerning the payment of commission by the plaintiffs to the defendants, the allocation of rooms for guests (tourists) booked by the plaintiffs and the manner and timing of payment for these – see **Exhibits DG2, 3** and **4**; and the complaint by the plaintiffs of the undercutting of their business by one Rene Vasquez. (I have already dealt with this latter issue). Significantly, in **Exhibit DG 4** the plaintiffs themselves were making different proposals regarding the operation of the lease for the Dive Shop.

31. Matters between the parties however seemed to have reach a head when the plaintiffs were informed by letter from Mr. Leo Wassner, the third witness for the defendants that he had from 20th January 1999, taken over as managing director of the defendants. He went on to intimate the plaintiffs about changes being proposed on the allocation of rooms in the defendants' hotel. These do not concern us in this judgment and nothing turns on them – **Exhibit DG 5.**

32. Apparently in riposte, Mr. Gegg the managing director of the plaintiffs sent off a letter dated 22 January 1999 **(Exhibit DG 6)** in which, among other things, he drew Mr. Wassner's attention to "existing contracts with Belize Yacht Club for rates, allotments and other conditions for doing business".

33. There then followed a letter of the same date, 22 January 1999, from Mr. Wassner of the defendants to the plaintiffs stating that the defendants did not have any record of the contracts Mr. Gegg had mentioned in his letter and that: *"The only contract . . . is that between Discovery Divers and the Belize Yacht Club, but this contract expired on December 1, 1998"*. The letter then went on to state: *"Please be informed also, that if we cannot come to an agreement with the dive*

operation concession on our dock, I will run the dive operation under the name of the Belize Yacht Club" – **Exhibit DG 7**.

34. From all this, I am unable to find that there was a contract or an agreement, oral or otherwise, between the parties for a further lease after "31 (sic) November 1998" regarding the Dive Shop. That the plaintiffs continued to operate the services offered by the Dive Shop albeit, from a room in the defendants' hotel after Hurricane Mitch in late October 1998, was not in my view, on the evidence, on the basis of any contract, written or oral. At best, the plaintiffs became licensees or tenants at will of the defendants after 30 November 1998. (I might add here, in parenthesis, that I note that the date stated in the agreement for the expiry of the lease is "31st November". November I think it is safe to say has only 30 days, even in a leap year!)

35. Mr. Gegg for the plaintiffs stated in evidence that as a result of a letter dated 10 February 1999 from the defendants he did not anticipate a renewal of the contract between the parties. In this letter, tendered as **Exhibit DG 8,** Mr. Leo Wassner for the defendants stated:

> *"Belize Yacht Club is interest (sic) in continuing business with you, but only under a new contract. If you are interested in doing business with us and willing to discuss a new contract please call Mr. Wassner at your earliest convenience".*

This clearly evinces that after 30 November 1998 there was no more any contract between the parties regarding the lease for the Dive Shop.

36. From the evidence also, I do not find anything approximating to or representing an oral agreement between the parties for a renewal of the agreement to operate the Dive Shop, nor am persuaded, again on the evidence, that there was any agreement between the parties to reduce the said oral agreement into writing.

37. In particular, I do not find **Exhibit DG 4**, the letter of 11th December 1998 from the plaintiffs to the defendants, as confirmatory of the terms of the

supposed oral agreement for the lease of the Dive Shop. In fact as I have already mentioned above, the plaintiffs were by this letter among other things, making different proposals concerning the operation of the Dive Shop. This is a far cry from an oral agreement or the confirmation of the terms of an oral agreement concerning a lease for the Dive Shop.

38. Also, I do not think it is reasonable or logical to find that it was part of the terms of the alleged oral agreement to grant a further lease to the plaintiffs that the defendants agreed to contribute US $1,000.00 to help defray the expenses of the plaintiffs in attending a DEMA Dive Show in January 1999. Indeed, **Exhibit DG 13,** the letter of 19 February 1999, which the plaintiffs aver confirmed the defendants' commitment to contribute towards their expenditure in attending the said show, reads to my mind, more like a reminder of the plaintiffs' liability for outstanding payments to the defendants and a request for payment, albeit with an offer to pay $1,000.00 of the expenses towards attending the show. I find that it does not in any wise confirm any oral agreement between the parties to grant a further lease of the Dive Shop to the plaintiffs. The DEMA Show, I gather from the evidence, was a kind of trade fair at which the attractions of Belize as a destination would be displayed.

39. In the result therefore I am unable to accept as proved the claim of $672,945.90 by the plaintiffs representing estimate of loss of revenue in operating the Dive Shop because of the non fulfillment by the defendants of a supposed oral agreement to grant the plaintiffs a further lease of the Dive Shop.

40. I now turn to the issues of the defendants' counterclaim against the plaintiffs. These are more particularly stated in the counterclaim in the pleadings of the defendants. The defendants are counterclaiming various sums against the plaintiffs as follows:

1) $18,433.92 representing 12% commission on gross sales made by the plaintiffs from the Dive Shop;

2) $64,800.06 in respect of room rental to be generated by the plaintiffs;

3) $13,260.97 in respect of dishonoured cheques drawn by the plaintiff in favour of the defendants, and

4) $2,039.57 also in respect of dishonoured cheque drawn by the plaintiff in favour of the defendants.

41. In relation to the claim for $18,433.92 representing 12% commission of the gross sales made by the plaintiffs in the Dive Shop, the plaintiffs deny that they owe or failed to pay this sum. The payment of 12% commission on all gross sales made at or from the Dive Shop by the plaintiffs is an express provision of Clause 2 of the agreement between the parties. The defendants have pleaded and particularized in their counterclaim the sales and the equivalent commission exigible thereon during the relevant period of the agreement. On the evidence, and contrary to bare denial of the plaintiffs, I find that this commission is due and owing. For example in **Exhibit DG 2**, the defendants were asking the plaintiffs to forward to them the 12% commission from the Dive Shop sales as stipulated in the contract. Also in **Exhibit DG 3** which the defendants at the hearing demurred at being received in evidence, I find however that it does disclose, on a fair reading that the plaintiffs had not indeed paid the commission but were calling for a compromise.

42. I am therefore satisfied that this sum of $18,433.92 is owed the defendants by the plaintiffs in respect of 12% commission for sales from the Dive Shop. This sum will also be set off against the sum of $200,448.00 I had adjudged earlier as owed to the plaintiff in respect of the tour desk sales.

43. In respect of the counterclaim for $64,800.06 relating to the balance between the guaranteed room rental income for the defendants of $500,000.00 and that actually generated by the plaintiffs ($435,199.94), the plaintiffs have in their defence to the counterclaim equivocally admitted this shortfall but aver instead that the failure to generate $500,000.00 net worth of income was occasioned by the defendants' diversion of business, in breach of the agreement, away from the plaintiffs' Dive Shop. This I am however, unable to accept for the diversion of custom such as it was, I have already found, could not be laid at the door of the defendants. In any event, the diversion of business away from the plaintiffs Dive Shop and canceling their tour desk were materially different from, and could not have affected otherwise the obligation and ability of the plaintiffs to generate the necessary net worth of room rental as provided in the agreement.

44. Still in respect of this aspect of the counterclaim, the plaintiffs have in the alternative pleaded ***force majeure*** or ***act or God***, arising from the effect of Hurricane Mitch on Belize. They aver that as a result of this they deny owing or being liable for the balance of the $500,000.00 of the expected rental income they should have generated. That is to say, the sum of $64,800.06 representing the shortfall. On this score I am inclined to agree with the plaintiffs. Although I am not called upon to take judicial notice of the effect of Hurricane Mitch on Belize in 1998 and doubt if I could well do so, it is however common ground between the parties that its effects were devastating and disruptive of the tourist industry. I have earlier recounted the evidence given by both sides of the effects of this hurricane on Ambergris Caye and the Dive Shop in particular.

45. Although there was no ***force majeure*** clause in the agreement between the parties, I am prepared to hold on the evidence, and do so hold that the effects of Hurricane Mitch in October 1998 were such as to affect materially the ability of the plaintiffs to perform their undertaking

completely or to the level stated in the agreement. On the facts of this case, particularly as regards the effects of Hurricane Mitch, I think that even though the parties did not contemplate or provide for ***force majeure*** or act of God, it would be reasonable in the circumstances to exonerate the plaintiffs from liability for the non fulfillment of the balance of $64,800.06 to have been generated in room rental income for the defendants: Hurricane Mitch at least for some time closed Ambergris Caye thus no tourist could visit.

46. I might add here in conclusion on this point that although the plaintiffs seemed to have used ***force majeure*** and ***'act of God'*** as interchangeable with each other, they are not necessarily so. The former, that is, ***force majeure*** is regarded as going beyond the latter. For example, any legislative or administrative action that might interfere with the performance of contractual obligations by a party thereto might be ***force majeure*** but could not surely be described as an "act of God".

See generally ***Matsoukiv v Priestman & Co.*** *[1915] 1 KB 681*; and ***Lebeaupin v Richard Crispin & Co.*** *[1920] 2 KB 714*.

47. I am satisfied that, on the evidence, it is fair and reasonable to describe Hurricane Mitch as an "act of God", which because of its devastation, reason and common sense and indeed justice would, I think, rightly excuse the plaintiffs from liability for the balance of $64,800.06.

48. In this regard, I adopt the statement in ***Chitty on Contracts*** *Vol. 2 [1994] 27th Edition* at paragraph 35-013 on the expression "act of God":

> *"The archaic phrase "act of God" means an operation of natural forces (as opposed to an act of man), which it was not reasonably possible to foresee and guard against, like lightning,* ***extraordinary weather conditions*** *or totally unexpected heart attack) (emphasis add).*

Hurricane Mitch in October 1998 could justifiably and truly be described as an "act of God".

49. Finally on the defendants' counterclaim relating to the two cheques drawn by the plaintiffs in their favour but were not paid when presented for payment, I must commend the candour of Mr. Gegg for the plaintiffs. He testified that these cheques were payment for accommodation provided by the defendants for guests of the plaintiffs. He admitted that because of difficulties arising out of terms of payment instituted by the new management of the defendants (that is, presumably when Mr. Leo Wassner took over) the cheques were not paid when presented. He however, candidly admitted that the money was owed and would instead seek a set off with any money the defendants might owe them.

50. Accordingly, I award the sums of $13,260.97 and $2,039.57 as claimed in paragraphs 17, 18 and 19 and 20, 21 and 22 respectively of the defendants' counterclaim making a total of $15,300.54. This sum will also therefore be set off against the sum of $200,448.00, I had earlier found in favour of the plaintiffs.

51. In the result, I award the sum of **$166,713.54** to the plaintiffs in this action. This sum represents the net, after the deduction of the respective sums of $18,433.92 and $15,300.54 the defendants are entitled as set off on their counterclaim.

52. Finally, in view of my findings in the course of this judgment that each side succeeded in part in its claim against the other, I shall make no orders as to costs: each side will bear its own costs.

A. O. CONTEH
Chief Justice

DATED: 21st March, 2002.