

**IN THE EASTERN CARIBBEAN SUPREME COURT
THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST CHRISTOPHER CIRCUIT
(CIVIL)
A.D.2009)**

Claim No. SKBHCV 2001/0191

BETWEEN:

SUSAN BARBARA DODGE, appointed Trustee of the Estate of RAYMOND And ARNOLD DODGE aka RAY DODGE And TONY ZAPPAROLI	Claimants
And	
MICHAEL SIMANIC	1st Defendant
And	
ROYAL ST.KITTS CASINO LIMITED	2nd Defendant
And	
	3rd Defendant
ALCEO ZULIANI	
And	
LEO TOFOLI	4th Defendant

Appearances: Mr Frank Walwyn for the Claimants
Mr Glenford Hamilton for the 2nd and 3rd Defendants

**2009: April 27,
October 11**

JUDGMENT

[1] **BELLE J.** The Claimants based their case partly on the outcome of the proceedings in an action conducted on 19th January 1996 in the Ontario Court (General Division),

being Court File No. 50420/90 in which the Court awarded Judgment in favour of Michael Simanic, Ray Dodge and Tony Zapparoli.

- [2] The Judgment of the Ontario Court ordered that certain lands subject to Co-tenancy Agreement dated 27th July 1989 be conveyed to Michael Simanic, Ray Dodge and Tony Zapparoli by Alceo Zuliani and Royal St Kitts Casino Limited. These lands comprised of among other things, 20 units of the Fairway Condominium Development situate in Frigate Bay, St. Kitts and the Judgment provided for distribution as follows: 6 units to Tony Zapparoli, 6 units to Ray Dodge, and 8 units to Michael Simanic.
- [3] However the lands were not conveyed as ordered in the Judgment and Michael Simanic improperly took control of the management and revenues of all the Fairway Condominiums. The Claimant therefore commenced this action on 3rd December 2002, and in the process an Order for Default Judgment was issued against Michael Simanic.
- [4] The Order in default declared that for the period from January 1996 up until 12th October 2001, Michael Simanic was a Trustee of the interests of the Claimants in respect of the Fairway Condominiums and was, therefore, accountable to the Claimants for any and all rents (prepaid, current or arrears) that were received or should have been received by him during this time period.
- [5] Both Claimants stated that the Order in default also required Michael Simanic to file with the Court a full and complete audited accounting of all rents and profits received by him, which he failed to do.
- [6] However in a letter dated 14th November 1997, a copy of which was attached to the Claimants' witness statements, Michael Simanic advised that he was renting the Fairway Condominium units at rates US\$1150.00 to US\$1350.00 per month. Specifically, Mr. Simanic's letter reads as follows:

"As per our discussions of this morning, I am sending you by fax few copies of my Fairways Condominium Leases. All units are rented at different rental level. University staff and students pay US\$1150.00 but must rent a minimum of 10 suites, which they do. Others pay from US\$1350.00 and up. Yours Truly Mike."

- [7] The Claimants said that the claims made are based on the figures provided by Michael Simanic in his letter quoted above. They concluded that they each suffered loss of gross rental income estimated at US\$567,000.00 up to the date of the witness statements based on a monthly rental rate of US\$1350.00, for which he is liable. This liability increases by the sum of US\$8100.00 per month.
- [8] The Claimants also both state in their witness statements that Royal St Kitts Casino Limited and Alceo Zuliani have unlawfully refused to convey to them the six (6) condominium units ordered pursuant to the Judgment. Gross rental income for the (6) units is estimated at US\$1,271,700.00 using the rate of US\$1350.00 per month from January 1996 (the date of the Judgment) to the current date of filing the witness statement (157 month) , for which they are jointly and severally liable.
- [9] Both Claimants conceded that since the date of the Judgment they received, Dodge, US\$4000.00 and Zapparoli US\$7,097.84 respectively in connection with the investment in the Fairway Condominiums. They stated that they have not received any other income or payment in connection with their investment in the Fairway Condominiums.
- [10] Both Claimants acknowledge that by the Order of the Court dated 12th October 2001 Joseph Pereira was appointed as the Receiver for a period of six (6) months. A copy of this Order is referred to at Tab 85 (D) of the List of Documents. Further Orders of the Court have extended the period of the Receiver and he is currently still in charge of the Fairway Condominiums.
- [11] With regard to the Claimants' claims for expenses they both claimed to have visited St. Kitts on a number of occasions for the purpose of attending court in these proceedings and otherwise trying to protect their interests. They both provided tables outlining the expenses being claimed. Mr. Zapparoli claimed CDN\$75,600.00 and Susan Dodge CDN\$52,000.00.
- [12] It is based on these facts that the Claimants claim the sums and Orders being claimed in this action.
- [13] The issues arising in this matter are as follows:

1. As co-owner subject to a co-tenancy agreement was Michael Simanic a trustee for the Claimants' interests?
2. As Co-tenants and the party required to convey or transfer the registered title of the relevant units was the second defendant a bare trustee of the Claimants' interests?
3. Was Alceo Zuliani the third defendant as the controlling mind (not disputed) behind the second defendant a bare trustee of the interests of the claimants required to affect the transfer of the units?
4. As trustees were the defendants individually and severally liable for any losses incurred as a result of the failure to effect the co-tenancy agreement?
5. How are damages to be assessed in the circumstances?
6. Are the Claimants entitled to a charge on the profits and property of the Defendants?

[14] It must be noted that the Defendants failed to comply with a Case Management Order of 5th December 2008 to file witness statements on or before 26th January 2009 and in accordance with Part 29.11 of the CPR 2000 they were not permitted to lead evidence at trial but could only cross examine the claimants.

[15] In this context Counsel for the Defendants argues that it is not clear from the evidence exactly when Mr. Simanic took control of the Condominiums but the suggestion seems to indicate some time in 1996 for it is after that time in January 1997 that Zapparoli claims to have attended to inspect the property for the first time. Counsel also refers to what he calls the suggestion that 20 units were completed in November of 1989 but there is no evidence to support this allegation.

[16] Counsel also relied on the presumption from the evidence that from the time the property was completed, Simanic assumed control of it to the exclusion of all other persons including the Defendants. Therefore he concludes that the Claimants must look to Simanic the first Defendant for all and any monies collected on their behalf during the relevant time commencing 1996 and ending when the Receiver was appointed by the court.

[17] The Defendants' counsel further argues that it is inconceivable that based on the evidence of the Claimants that Simanic was the trustee of their interests in respect of the Fairway Condominiums and was therefore accountable to both Dodge and Zapparoli and that an Order for default judgment was issued against Michael Simanic on 3rd December 2002, that they would come to the same court alleging that someone else is the trustee or are the trustees and are so liable for monies collected.

- [18] The Defendants counsel also submitted that the court appointed Mr Joseph Periera, Chartered Accountant to be the Receiver of the 20 units of Fairway Condominiums to manage and receive rents profits and monies receivable in respect of the interests of all the parties to these proceedings.
- [19] Based on the evidence counsel argues that the Receiver presents quarterly accounts to the court and pays all monies received after expenses into court. During the tenor of the receivership, he argued, neither the Claimants nor the Defendants were to have anything to do with the property and each was restrained from in any way interfering with the Receiver. Thus based on these major findings of the court that Semanic is the trustee for the Claimants interests and appointing the Receiver to receive any income of the properties there is no basis for any claims by the Claimants against the 2nd and 3rd Defendants and the claim for damages against them should consequently be dismissed.
- [20] With regard to expenses claimed the Defendants' counsel argues that these expenses were incurred either while Simanic was trustee or after the Receiver was put in place. These expenses therefore should not be allowed. The Claimants in his view came to the Federation uninvited according to them to see the state of their investment. These were frolics of their own, and these trips could accomplish nothing and they were unnecessary.
- [21] Finally he argued that any costs incurred in Canada should be determined by the Canadian Court and not this court.
- [22] Counsel for the Claimants however relied on a submission that not only Simanic was a trustee but that the second and third Defendants were also trustees based on the co-tenancy agreement. This submission was based on the decision of a Court in Ontario, which had considered a number of the issues contested by the parties arising from their agreement. This court (The High Court in St Kitts) had earlier held in a written decision on the issue of the application to register and enforce the Ontario judgment that the Defendants would be stopped from re-litigating issues, which had already been tried and determined by the Ontario Court.

[23] This matter relates to those issues, which I had previously ordered to be determined at trial out of the statement of claim claiming registration and enforcement. These issues were as follows:

- (a) The appointment of a Receiver to take possession of the lands and 20 units and to manage the same to the benefit of the parties to the Co-Tenancy Agreement as their interests are determined by the court, including taking any and all necessary steps, and executing and filing all necessary documentation to effect the transfer of land;
- (b) An order for restitutionary damages, in favour of the Claimants against the Defendants, for the lost economic opportunity suffered as a result of the Defendants' wrongful retention and corresponding failure to properly manage the lands and 20 condominium units while the Defendants were trustees of the Claimants' interests in such lands and units; and
- © A mandatory order directing the Receiver in place of the Defendants, Zuliani and Royal St Kitts to forthwith do all things necessary to convey the lands described in Schedule "A" to the Co-Tenancy Agreement of 27th July 1989 consisting of the parcel of land containing 14,455 sq. ft. and the parcel of land containing 44,603 sq. ft. more particularly described in Schedule "A" attached to the Ontario Judgment, to the Claimants as tenants in common, and directing the Registrar to register such transfer.

[24] Counsel for the Claimants argued based on the facts established from the Canadian decision and at this trial that his clients should be entitled to damages based on the outstanding claims and the proper approach to damages for a fiduciary breach was restitutionary. On this approach counsel argued, the Claimants are entitled to be put in as good a position as they would have been in had the breach not occurred. Based on the authority of **Hodgkinson v Simms**, [1994] 3 S.C.R. 388, the trustee in breach of trust must restore or pay to the beneficiaries of the trust either the assets which have been lost to the estate by reason of the breach of trust, or compensation for such loss.

[25] The evidence is that following the trial in Ontario, Michael Simanic the first Defendant took control of the management and revenues of all the Condominiums during the period from January 1996 (the date of the Ontario Judgment) to October 2001 (the date that the Court Appointed Receiver was put in place) and was therefore, accountable to the Claimants for any and all rents that were received or should have

been received by him during this period. This evidence was not shaken nor in any way contradicted by the Defendants under cross-examination.

[26] The Court had ordered judgment be entered in favour of the Claimants against Simanic for damages to be assessed and to be secured against Simanic's interest in the Condominium development. The Court also ordered that Simanic file with the Court, on or before 3 January 2003, a full and complete audited accounting of all rents and profits received by him with respect to the Condominiums. There is no evidence of compliance. However Simanic wrote a letter dated 14th November 1997, state that he was renting the Condominium units at rates from US\$1,150 to US\$1,350 per month.

[27] Counsel argued that in the circumstances the beneficiaries in the claims against a trustee are entitled to use the highest and best values for the fore gone opportunity in calculating the loss for which the trustee is responsible. This is particularly so in this case where the court has ordered the trustee to provide an audited account to assist the beneficiaries in quantifying their loss, and failed to do so. In making this submission counsel relied on the authority in **McNeil v Fultz** (1906), 38 S.C.R. 198

[28] In the latter case the defendant trustee held securities and shares for a group of investors, which included the plaintiff who held a one-sixth share in the property. The trustee exceeded his authority in wrongfully withholding the shares, which he was bound under trust to deliver to the beneficiaries. The Supreme Court of Canada held:

"The defendant was under an obligation to account to the plaintiffs at once for that which he received as trustee for them. Treated as a trustee wrongfully withholding property which he was bound under his trust to deliver to his cestuis que trustent, he is liable to make reparation for the loss suffered by the trust by reason of his breach of trust; and (every presumption being made against him as a wrongdoer), that loss must be calculated on the assumption that the securities would have been sold at the best price possible."

[29] Counsel submitted that although this decision dealt with securities the proposition that loss is to be calculated on the assumption that they would have been sold at the best price possible applies to the loss of rental income, where the beneficiary is entitled to use the highest rent the evidence supports.

- [30] Counsel then concluded that using the rental rate of US\$1,350 per month, the Claimants' rental income per month for the 6 units is US\$8,100 (\$1,350 x 6). The amount of rent that was or should have been collected on behalf each claimant (for their respective six units) for the period from January 1996 to October 2001 (70 months) was US\$567,000.00.
- [31] In the case of Zuliani and Royal St. Kitts counsel argued that their liability arose based on the fact that they created the situation that permitted Simanic to wrongfully take control of the Condominium property and breach his trust obligations to the Claimants by their failure to convey the property as Co-Tenants as ordered by the Ontario Court. This amounted to using the Royal St. Kitts in a "most improper" way and in a "virtually impardonable" manner.
- [32] Counsel also relied on the Recognition and Registration Order of this court to point to the accountability of the two Defendants, who had been found jointly and severally accountable to the Claimants for acts or omissions performed in respect of the Condominium units. Counsel concluded that any amount awarded by the court for losses suffered by the Claimants for the 70-month period prior to the appointment of the Receiver should be for the joint and several liabilities of Simanic, Zuliani and Royal St Kitts.
- [33] Counsel submitted that since Simanic had breached the Court Order to file an audited account which would have shown what deductions, if any, to make from gross revenue due to the Claimants and Zuliani and Royal St Kitts did not file any evidence in response to the Claimants' action, neither did they make any effectual challenge to the Claimants' evidence on lost income on cross-examination. Therefore the Claimants' evidence on this loss claim remains un-contradicted. I agree with this conclusion
- [34] The Claimants therefore seek the sum of US\$567,000 under this head on account of lost rental income for the period January 1996 to October 2001.
- [35] In response to the Defendants' argument that the Claimants should turn to the Receiver for the proceeds of the Condominium units the Claimants' counsel argued that Simanic, Royal St Kitts and Zuliani who is the brain behind Royal St Kitts failed to maintain the units. They fell into a terrible state of disrepair, which in their view was

due to the serious neglect by Simanic and his wrongful act in taking control of the Condominiums and their revenues derived from them to the exclusion of the Claimants and the failure of Royal St Kitts and Zuliani to comply with the Ontario Judgment.

- [36] According to counsel the court appointed the Receiver Joseph Pereira, Chartered Accountant as a mitigation measure. But the Defendants' failure to convey the Condominium units and the neglect of Simanic resulted in the collection of only US\$4000.00 to the Claimant Barbara Dodge from her US\$1.4 million investment when she should have collected US\$729,000 over the 90-month period which elapsed since the breach. Mr. Zapparoli only received one payment from the Receiver in the amount of US\$7,097.84 in connection with his US\$1.4 million investment during the period January 1996 to present when he should have received the same amount as Susan Barbara Dodge.
- [37] According to the Report of the Receiver dated 7th April 2009, the Receiver is holding a total of EC\$40,909.31 as at March 31st 2009 for the three beneficial owners of the Condominium units, Dodge, Zapparoli, and the Estate of Simanic. Prorated to each beneficial owner's proportionate share each Claimant's amount is calculated as follows:
- (a) EC\$40,909.31 in US \$ at the rate of 2.7 per US dollar is the equivalent of US\$15,151.60
 - (b) As the owners of 6 of the 20 Condominium units Dodge and Zapparoli should receive $US\$15,151.60 \div 20 = US\757.58 per unit $\times 6$ units = US \$4,545.48 per Claimant.
- [38] Counsel for the Claimants concedes that the amount due to the Claimants for the loss of rental income should be offset by the respective amounts they have received together with their proportionate share of the amount held by the Court Appointed Receiver.
- [39] In conclusion under this head counsel submits that Zuliani and Royal St. Kitts should be held jointly and severally liable for each Claimant's loss of rental income in the case of Susan Babara Dodge to the tune of US\$1,287,454.52 and in the case of Tony Zapparoli US\$1,284,350.68. According to counsel this represents the highest and best income the Claimants would have received had the Co-tenancy agreement and the order of the Ontario court been complied with.

- [40] Counsel relied on the authority of **McHugh v Union Bank of Canada** [1913] A.C. 299 which supports the proposition that courts must do the best they can on difficult loss assessments, based on the evidence before them.
- [41] The final head of loss relates to the Travel and Legal expense, which is basically, and argument, which supports the Claimants' claim for, costs on an indemnity basis. Counsel in this regard argued that the Claimants were obliged to incur expenses to ensure that their units were transferred to them largely for travel to the location of the property and the court and legal costs. For Dodge and Zapparoli these expenses are CDN\$53,960.00 and CDN\$75,600.00 respectively.
- [42] In addition to the above stated sums the Claimants provide evidence that they have jointly incurred costs of CDN \$1,171,835.23 relating to their attempt to enforce the Ontario Judgment in St Kitts and to get their Condominium units transferred to them. These expenses do not include the costs of the trial, which are also being sought on an indemnity basis. Their evidence as to quantum of damages in this regard is unchallenged and unshaken in cross-examination.
- [43] Counsel relied on the case **Hodgkinson v Simms** [1994] 3 S.C.R. 388 in which it was held that returning the Claimants to as good a position as they would have been in had the breach not occurred, meant "the return of capital ...plus all consequential losses including legal and accounting fees." Counsel submitted that this was fair in light of the arrogant approach to the Defendants have taken to their trustee obligations and the process of the court. I agree, and hold that the Claimants should be repaid the expenses of travel to and from St Kitts for various purposes connected with the case and also the legal fees incurred in Canada, which Order is being recognised and registered in St. Kitts.
- [44] Finally on the list of Claims and arguments counsel submitted that the pursuant to the Co-Tenancy agreement the trustee was to convey the lands as directed by the Co-Tenants upon the completion of the project. Based on the decision of justice Gotlib in the Ontario judgment and based on the view of this court based on the evidence adduced in this hearing the Claimants are entitled to an order that the Registrar of

Titles transfer title of the Condominium lands (described in Schedule "A" to the Co-Tenancy Agreement of 27th July 1989), currently registered in the name of Royal St. Kitts Casino Limited to Dodge, Zapparoli and the Estate of Michael Simanic as tenants in common in the following interests:

- (i) To Susan Barbara Dodge, a 30 percent individual interest;
- (ii) To Tony Zapparoli, a 30 percent undivided interest; and
- (iii) To the estate of Michael Simanic; a 40 percent undivided interest.

[45] I agree with counsel for the Claimants that the evidence disclosed and given under examination in chief (witness statements) and cross-examination support the Claims, which his clients have made. It is clear that even though Simanic was the trustee, he could only perform such acts as the other Co-Tenants permitted. By their acts Royal St. Kitts and its controlling mind Zuliani are both liable for the loss suffered as a result of their failures to comply with the Co-tenancy agreement in particular their failure to facilitate the transfers of the rental units.

[46] I also think that the imposition of a charge on the Estate of Michael Simanic is reasonable in the circumstances and in light of the fact that no representative of that estate has come forward and accepted responsibility in this action since the death of Mr Simanic.

[47] It is my view that I need not go beyond the conclusions of the Ontario Court unless evidence challenging these conclusions is adduced. Indeed the Claimants' assertions were not shaken under cross-examination.

[48] The Court therefore orders as follows:

The Estate of Michael Simanic, Royal St Kitts Casino Limited, and Alceo Zuliani , jointly and severally , pay to Susan Babara Dodge the following sums of money:

- (i) US\$ 1,287,454.52 + US\$64,000.00 up to the date of judgment and
- (ii) CDN\$ 53,960.00

(b) The Estate of Michael Simanic, Royal St. Kitts Casino Limited and Alceo Zuliani, jointly and severally, pay to Tony Zapparoli the following sums:

- (i) US\$1,284,350.68 + US\$ 64,000 up to the date of judgment and
- (ii) CDN\$75,600.00

- (c) The Estate of Michael Simanic, Royal St Kitts Casino Limited and Alceo Zuliani, jointly and severally, pay to Babara Dodge and Tony Zapparoli , jointly , the amount of CDN\$1,171,835.23 costs.
- (d) The Registrar of Titles shall transfer title of the lands described in Schedule "A" to the Co-Tenancy Agreement of July, 1989, consisting of the parcel of land containing 14,455 sq. ft. and the parcel of land containing 44,603 sq. ft., more particularly described as Schedule "A" attached hereto, currently registered in the name of Royal St. Kitts Casino Limited to Susan Babara Dodge, Tony Zapparoli, and the Estate of Michael Simanic as tenants in common in the following interests:
- a. to Susan Babara Dodge, a 30 percent undivided interest;
 - b. to Tony Zapparoli, a 30 percent undivided interest ; and
 - c. to the Estate of Michael Simanic, a 40 percent undivided interest;
- (e) Susan Babara Dodge and Tony Zapparoli shall have a first charge against the Estate of Michael Simanic's 40 percent undivided interest described in the paragraph above for all amounts ordered paid to them by the Estate of Michael Simanic herein , subject only to any prior liens and /or encumbrances, and the first charge shall be applied pro rata to them according to their respective amounts and,
- (f) The Estate of Michael Simanic, Royal St. Kitts Casino Limited and Alceo Zuliani jointly and severally pay Susan Dodge and Tony Zapporali, their costs of this trial to be assessed if not agreed.


Francis H. V. Belle
High Court Judge