SAINT KITTS AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.15 OF 2003

BETWEEN:

SUSAN BARBARA DODGE, appointed Trustee of the
Estate of RAYMOND ARNOLD DODGE aka RAY DODGE

and
TONY ZAPPAROLI

Appellants

and
MICHAEL SIMANIC

and
ROYAL ST. KITTS CASINO LTD

and
ALCEO ZULIANI

and
LEO TOFOLI

Respondents

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Albert Redhead	Justice of Appeal
The Hon. Brian Alleyne, SC	Justice of Appeal

Appearances:
Mr. Anthony Ross and Mr. Fitzgerald Eddy for Susan Barbara Dodge and Tony Zapparoli
Dr. Henry Brown with Mr. Sylvester Anthony and Mr. Patrice Nisbett for Michael Simanic
Mr. Anthony Gonsalves and Mr. Clayton Perkins watching brief for The Royal St.Kitts Casino Ltd and Alceo Zuliani
No appearance for Leo Tofoli

2003: November 4;
2004: January 12.

JUDGMENT

[1] BYRON, C.J.: This is an appeal against an order of Baptiste J. issued on 23rd May 2003 varying the terms of a receivership order with respect to certain property located at Frigate Bay.

[2] The parties have been engaged in a long standing dispute over 20 condominium style units at Frigate Bay which had been the subject of a Co-Tenancy Agreement between Dodge, Zapparoli, Simanic and Tofoli made in 1989. Before the designated units could be registered relationships broke down and Simanic issued a claim in Ontario against the other co-tenants. There were cross-claims and counterclaims. The Royal St. Kitts Casino was a defendant in the Ontario proceedings. It had and still has legal title to the units. The Appellants allege that the litigation came to an end with formal judgment dated July 15th 1997, and as no further appeals are available it is final and binding. I do not think that details of that order are relevant in these proceedings. It is sufficient to report that the order has not been enforced and that litigation concerning its effect and enforceability in St. Kitts-Nevis is in progress.

[3] In these proceedings the Appellants applied to the Court to recover possession of the units allocated to them and for relevant accounting from Simanic. During the litigation they applied for an order for the appointment of a receiver over the property during the continuation of the litigation. That application was supported by evidence alleging that Simanic, wrongly, exercised unilateral control over all the units and collected rents on them; ignored all requests for and orders of the Court to account; Simanic denied the appellants' access to their units, and failed to maintain the units, leading to the requirement for major repairs. On the 12th October 2001 Master Rawlins made a receivership order appointing Mr. Joseph Pereira Chartered Accountant as receiver for a period of 6 months subject to terms and conditions spelt out in the order. The dispute was not resolved, the litigation

remained pending and on the application of the Appellants, Baptiste J. on the 12th April 2002 issued an order continuing the receivership for a period of 12 months.

[4] I think that it is instructive to note that the terms of the receivership order required the tenants to pay rent to the receiver, who was directed to maintain the property in a tenantable state. He was required to pay money received into Court, submit accounts to the Court and his fees were to be approved by the Court.

[5] The affidavit evidence shows that the receiver complied with these orders of the Court. The proceedings did not however reach completion. A default judgment was entered against Simanic, his application to set it aside was refused and he appealed against that decision to the Court of Appeal. During this current sitting of the Court we dismissed his appeal on the 4th November 2003.

[6] On 2nd April 2003 the Appellants issued an application to renew and extend the Order of 12th April 2002 for an additional 12 months repeating the grounds in the previous application and alleging that Simanic had not complied with orders requiring him to account and provided no explanation for his default. The application was supported by affidavits and exhibits. The reports and affidavits from the Receiver were filed. The Respondent did not file any application or affidavits in opposition.

[7] At the hearing the learned trial Judge noted "Receivership order extended to exclude Mr. Simanic's Units C1, B3, D1, A1 and C3. The units of Ray Dodge and Tony Zapparoli are also excluded from the receivership order. Mr. Leo Tofoli's Units to remain covered under the Receivership Order with liberty to apply within 30 days." The order of the learned Judge was not explained by reasons given by him.

[8] The Appellant has urged that the appeal should be allowed for the failure of the learned Judge to give reasons. In the case of Flannery v Halifax Estate Agencies[1] Henry LJ explained the rationale for the judicial duty to give reasons:

> "The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties – especially the losing party – should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex p Dave*) whether the Court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
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> The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the Judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself."

[9] It is clear that Henry LJ was not expressing the view that wherever there were no reasons the order should be set aside on that ground alone. In fact there have been cases where the Court of Appeal was able to consider and adjudicate on the substance of appeals where the judge did not give any reasons for his judgment. A recent example in our court is the case of Capital Bank International limited v Eastern Caribbean Central Bank and Sir Dwight Venner [2].

[10] In this case there was access to the Court process and the evidence that was before the Judge. The notes of the learned Judge did not reveal what if any arguments were adduced orally. It was possible therefore to review the material before the judge with the exception of the oral arguments. Neither Counsel arguing before the Court of Appeal were involved at the hearing but Counsel for the Respondent suggested that the order had been made by consent. The Judge had

[1] (2000) 1 All ER 373 at 377
[2] (GRENADA) CIVIL APPEAL NOS.13 & 14 of 2002

made no note of any such consent and the order was not entered as a consent judgment. This suggestion could not be taken seriously.

[11] Looking at the entire proceeding and the material before the learned Judge I confess that I come inevitably to the conclusion that there was no rational basis for the decision of the learned Judge. The order made did not conform to the application before the Court. This was heightened by the fact that the only evidence adduced was in support of the application before the Court. In effect there was an uncontested application for the continuation of the receivership order. There was no evidence before the court which could indicate any reason for variance.

[12] In my view the order ought to be set aside for lack of rationality. There was no application leading to it, there was no evidence supporting it, and the history of the matter did not provide any basis for it. No reason was advanced to show why the receivership orders that had been in force over the previous months should have been varied in the way the learned Judge did or at all.

[13] With regard to costs there is a consent order as Counsel had agreed that the unsuccessful party should pay the successful party $7500.00. Both Appellants have the same interest in the proceedings and were represented by the same Counsel. One set of costs is to be paid. See CPR part 64.7.

[14] I would order that

a. the appeal be allowed
b. the order of the learned trial Judge be set aside
c. the Appellants be at liberty to enter the draft order lodged with the application as the judgment of the Court.
d. Simanic do pay the Appellants costs in the sum of $7,500.00.

Sir Dennis Byron
Chief Justice

I concur

Albert Redhead
Justice of Appeal

I concur

Brian Alleyne
Justice of Appeal