EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2012/0261

BETWEEN:

LARKLAND RICHARDS

CLAIMANT

and

MAXINE HERBERT-DUGGINS
WILLIAM HERBERT III

DEFENDANTS

Appearances:

Mr. Jeffrey Nisbett, with Ms. Mickia Mills for the Claimant
Ms. Constance Mitchum Q.C with Ms. Rivi Warner-Lake for the 2nd Defendant

---

2017: November 17th

JUDGMENT

[1] **CARTER, J**.: In or about 24th May 2004 the parties entered into an agreement, (hereinafter referred to as "the management agreement"). The defendants were described as the administrators of the Herbert Estate and recited that they were desirous of developing two parcels of land being the property of the Herbert estate. The parcels of land were described as 100 Acres at Salt Pond estate ("the Pelican Resorts Development") and 30 Acres at Grape Tree Bottom ("Grape Tree Bottom Development") in St. Kitts.

[2] The Agreement purported to appoint the claimant and Omax Gardner as their "Agents" for the purpose of developing the lands. The Agreement set forth the objectives for the agents:

> "The agents are hereby granted by the Administrators the right to obtain development approval from the Planning Department, hold discussions with Surveyors, Architects, Bankers, Realtors and any other person (s) or institutions that may be necessary in advancing the development."

[3] The Agreement also set out the manner in which the agents would need to report and gain approvals from the Administrators on matters pertaining to the Development, the preparation of an annual budget, and the appointment of a Development Committee to review any plans or projects associated with the development.

[4] The mandate for the Administrators was to be for a term of five years and it was expressly stated that the mandate would only be revoked due to dishonesty or incompetence on the part of the Agents. The agreement very comprehensively set out the services for which the Administrators could be billed as well as provisions for the payment of commission and remuneration to the agents, bonus payment, government transfer tax, payments to the Estate and payout to the beneficiaries.

[5] The claimant states that in pursuance of the agreement that he proceeded with advising the defendants about the development of the two parcels and that he claimed reasonable remuneration for such work. It is the claimant's position that without any fault on his part in working towards the objectives of the management agreement, that prior to the expiration of five years and in breach of the agreement he was wrongfully removed by the defendants as manager of the project.

[6] With regard to the Pelican Development, the claimant stated that he incorporated Pelican Resort Development Company Limited (hereinafter "Pelican Resorts") in September 2004. Pelican Resorts was to be the vehicle through which the development of the 100 acres at Salt Pond Estate would be developed. The

claimant further states that he advised that a board comprising the defendants, their sister, Ronald Duggins and the claimant be set up. This board agreed to commence selling lots based on a subdivision plan for the Salt Pond Estate. It was decided to finance the infrastructure for the Estate out of sales.

[7] The claimant states that he engaged the services of a reputable realtor on the advice of the board and was able to collect deposits on lots in the Pelican Resorts development to the tune of $400000. The claimant contends that the defendants were well pleased with his progress and in aid of this drew the court's attention to a note from the 1st defendant from the 18th of April 2005. The letter is addressed to the claimant from the 1st defendant and the relevant parts of that letter states: *"I write to you as a follow up to our meeting of Thrusday,14th April 2005 with Nicholas Brisbane and my siblings. Let me first indicate to you that I am extremely please[d[(sic) with the progress made thus far and I am anxiously awaiting the birth of the project. While on St. Kitts for the few days I was approached by a number of influential persons who expressed their optimism with the project."*[1]

[8] The claimant goes on that the defendants made various requests for payment once monies were being received for deposits for sales and that when he was unable to make these payments because the monies were being spent on other matters relating to the development that the relationship between the parties began to break down. The claimant concludes that his services were ultimately terminated when another developer acquired land in the area of the Salt Pond estate a parcel close to the Pelican Resorts development and the value of lands in the area increased. He states that the defendants wanted him to renege on agreements for sales of lots already entered into with perspective purchasers. When he refused to do so he claims the defendants wrongfully terminated his services with immediate effect by letter on the 17th July 2007.

[1] Agreed Bundle #1 at page 32-33

[9] With regard to the Grape Tree Bottom Development, the claimant states that the 30-acre parcel of land was the subject of a restrictive covenant which restricted the usage of those lands to animal grazing and agricultural purposes only. In the event of the removal of the restrictive covenant it was provided *that "should any sale be in excess of a rate of $250 BWI per acre the vendors shall take 25% of the difference above such sum or fraction part thereof…"* The defendant claims that he sought to ensure that the Estate paid as small an amount as possible for the removal of the restrictive covenant and to this end that he negotiated with the former owners over a period of two years. He states that it was as a result of his efforts that the parties eventually agreed for the payment by the Estate of US$130,600 for the removal of the covenant, saving the defendants approx. US$1,556,205.55. It was eventually agreed that the Grape Tree Bottom lands would be sold for US$6,750,000.

[10] The claimant therefore claimed the following relief in respect of his services performed under the Management Agreement:

> 1. In relation to the Pelican Resorts project a declaration that in terminating the claimant's services before the expiration of the initial five-year term provided for in the management agreement the defendants acted wrongfully and without justification.
> 2. In relation to the Pelican Resorts project a declaration that the claimant is entitled to be paid remuneration as a management fee by the defendants based on 7% of gross sales of the Pelican Resorts project lands for five (5) years from 24th May 2004.
> 3. In relation to the Pelican Resorts project that an account be taken of all sales of Pelican Resorts project lands for the five-year period commencing on 24th May 2004 including lands vested in the beneficiaries of the Herbert Estate sold by them or any of them within the said period.
> 4. In relation to the Pelican Resorts project payment of the amount found due on The Taking of such account together with interest thereon at such rate on for such period as the court shall think fit under the provisions of section 27 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act 1975.
> 5. In relation to the Pelican Resorts project, in respect of the services carried out for the defendants and described in paragraph 28 of the claimant's witness statement the sum of US$75,000.
> 6. In further relation to the Pelican Resorts project damages for breach of the management agreement.

7. An accounting of all profits generated by the Salt Pond project over the two-year period prior to the claimant's wrongful termination and that the defendant's forthwith pay to the claimant the 10% bonus due to him.
8. In relation to the Grape Tree Bottom project a declaration that in terminating the claimant's Services before the expiration of the initial five-year term provided for in the management agreement the defendants acted wrongfully and without justification.
9. In relation to the Grape Tree Bottom project a declaration that it was an implied term of the management agreement that the claimant having expended his time and money for the benefit of the defendants he could not be terminated before he had a reasonable time to realize the fruits of his labour.
10. In further relation to the Grape Tree Bottom project the sum of US$389,051.39
11. In further relation to the Grape Tree Bottom project the sum of US$ 472.50
12. In further relation to the Grape Tree Bottom project lands damages for breach of the management agreement
13. Costs
14. Further or other relief
15. Default judgment in similar terms against the 1st defendant as prayed in the application filed herein on 23rd June 2014"[2]

[11] The second defendant does not deny the existence of the management agreement. In his defence he stated that as far as the management fee was concerned: "5. In relation to paragraph 14 the Second defendant states that the fee of 7% was intended mainly for the services of Mr. Gardner who was a qualified Accountant with real estate experience, and whose services were to be paramount for the Project. The claimant was obviously unable to provide the services expected from Mr. Gardner."[3]

[12] The 2nd defendant further claims that the claimant was dismissed "for good cause" including but not limited to:

(i) Unlawfully signing contracts of sale of the defendants lands without the authority of a Power of Attorney from the defendants;
(ii) Collecting and keeping monies for the estate in his personal bank account, instead of depositing same to the Estate Account.

[2] These are the items of claim sought at the end of the trial and reflected in the closing submissions of the claimant.
[3] Paragraph 5 of the Defence to the Amended Statement of Claim

(iii) Arranging the sale of the entire development waterfront to the site Engineer, and committing the Estate to providing the said site Engineer with additional paved roads through each lot to allow for further partition of the said lands. The said overdeveloped lands were being sold by the claimant to the said engineer at an uneconomical price of US$4.00 per square foot to the detriment of the Estate and its beneficiaries

(iv) Paying or committing payments for works and failing to monitor whether the said works were carried out.

(v) Failing to give any proper account of funds received on behalf of the Estate."[4]

[13] The defendant made no admissions and, in relation to the Grape Tree Bottom development and the claimant's negotiation of the removal of the restrictive covenant, stated that: *"The Vendors were personal friends of the defendants parents and were always willing to accept a reasonable price for the removal of the covenants as they did. The price therefore had nothing to do with the Claimant and he is therefore put to proof of his allegation therein."*

[14] The issues that arise for the court's determination are therefore as follows:

I. Whether the termination of the claimant's services under the management agreement amounts to breach of that agreement;

II. Whether, If the agreement was wrongfully terminated, the claimant is entitled to compensation for the early termination of the agreement in the form of remuneration for services and payments for sums which became due thereunder.

The evidence of the witnesses

[15] The claimant's witness statement was accepted as his evidence-in-chief. The witness gave his evidence in line with the matters set out in the statement of claim.

[4] Paragraph 11 of the Defence to the Amended Statement of Claim. These issues mirror those set out in the 'termination letter' of 17th July 2006, at pages 36 of the Agreed Bundle #1

[16] The claimant also related in further detail the various approaches and negotiations he had in furtherance of his work with the developments, for developing the Development and for the selling of lots once the land was subdivided. In his evidence-in-chief he described approaching the Bank, First Caribbean International Bank for financing; liaising with Elco Limited for the cutting of roads at the Pelican Cove Development; also with Ashton Leader, a land survey who surveyed the lots; various meetings with relevant persons about the development including adjacent land owners; attending meetings with the Board; also making payments to suppliers for services employed in the development of the lands.

[17] With reference to the specific allegations in the letter of termination the claimant states that he never misrepresented the prices for land on the peninsula. He stated that *"when the project began we used the going rate at the time."* He stated that he could not make and did not make a determination on the prices without the input of the administrators.

[18] The claimant was adamant that "the management of Pelican Cove was overseen by a Board, the chairperson was the 1st defendant. Next in line was the 2nd defendant, then their sister Michelle Herbert. I was the 4th person. Mr. Gardner was to be the 5th member but he never attended any meetings. …The meetings were regularly held and minutes were kept…" He insisted that the 2nd defendant attended "60% of the meetings" and that the defendant was well aware that monies had been lent to the 1st defendant from funds out of the project. The claimant stated that "On both occasions [that the 1st defendant was lent $20,000.00] he [the 2nd defendant] approved it in conversations between the both of them. He approved it."

[19] In relation to the issues raised in the letter of termination the defendant's evidence was instructive.

(i) Unlawfully signing contracts of sale of the Defendants lands without the authority of a Power of Attorney from the Defendants

The defendant agreed with the claimant's evidence that he had sought to get a power of attorney from the defendants. *"I think I remember that he asked and we refused a power of attorney. I think so. There was a little conflict. I remember saying it was because we had an unpleasant experience with giving someone else another power of attorney."*

He acknowledged that as the complainant had testified that when it came to the closing of the agreement for the sale of the lots that the claimant would sign and then he and the 1st defendant would sign. The defendant could not remember the agreements in particular. He admitted that *"I recall signing deeds for purchases during the time that Mr. Richards was agent. I am not sure I would have to see the paperwork."* Further that: "a number of sales occurred when Mr. Richards was agent. Monies were paid to the estate. I would not have signed if I was not sure the full purchase price was paid. I was satisfied that he had paid the full purchase price."

In relation to the meetings of the Board that that the claimant states that the defendant attended he was able to says that he attended a few at the claimant's offices. *"It was about 4-5 meetings*."

(ii) Collecting and keeping monies for the estate in his personal bank account, instead of depositing same to the Estate Account.

The defendant accepted that the account into which funds went was an escrow account for when Mr. Brisbane brought purchasers to the table. The claimant states that: *"Nicholas Brisbane and myself began as signatories and Mr. Ronald Duggins was added to the account."* When the defendant was questioned about allegations of irregularities with the account he could only say that: *"As far as I know it was an account with Mr. Richards and Mr. Brisbane."*

(iii) Arranging the sale of the entire development waterfront to the site Engineer, and committing the Estate to providing the said site Engineer with additional paved roads through each lot to allow for further partition of the said lands. The said overdeveloped lands were being sold by the claimant to the said engineer at an uneconomical price of US$4.00 per square foot to the detriment of the Estate and its beneficiaries

With reference to the sale of lots to at Grape Tree Bottom development. The defendant states *"I am not sure I attended a meeting where the sale to Brisbane was discussed. I recall having a discussion about the sale of the lots."* The defendant did not produce any evidence to support these claims.

The defendant made the bold statement that the Inland Revenue had valued the land at Pelican Resorts Development at $8 US per square foot. The defendant could not produce any document from the Inland Revenue to show that value for the land. He did not agree that lots at the adjacent development at White House Beach were being sold at $6.00 per square foot; rather the defendant states that his recollection was that "I know where it is in relation to the land at Pelican Resorts Development. It was in close proximity to it. I remember it was more than how much we were selling ours for. I am not sure how much more."

When the defendant was confronted by counsel for the claimant that in order to raise the proposed prices for the lots by this time that it may have necessitated the claimant having to renege on signed agreements, the defendant stated that *"I wanted proper market value but I did not necessarily want Mr. Richards to renege on the signed agreements."* When it was suggested directly that this was the reason that he terminated the claimant's services, "because he was not doing what you

wanted him to do" the defendant replied "it is not totally the truth. It is partially the truth."

He recalled that when the project started that "the loan or whatever did not get approved. The project would try to finance itself from sales. I think that was the case." He admitted that "the Project started out with zero cash in 2004. By the time we terminated Mr. Richards, he had commitments on purchases. During Mr. Richards' tenure, in two years he was able to get commitments for 3 million and collected 350,000.00 dollars approximately."

The defendant accepted that the sales amounted to some pounds US$3,173,147 or 8.5m EC with deposits of 353,000 or 951,000 EC. The defendant accepted that his apprehension that the lots in the Pelican Resorts Development were being sold undervalue was not borne out by the figures presented by the claimant.

The evidence presented with respect to the waterfront lots was that the 1st defendant was made aware of and corresponded with the claimant on these sales.[5] The 1st defendant clearly made an informed decision to sign the relevant contracts.

(iv) Paying or committing payments for works and failing to monitor whether the said works were carried out.

While the defendant admitted that the know that he knew that the claimant had procured the services of someone to subdivide the land and that the development had been laid out by 2006; that he had hired Calvin Esdaille to do survey work on the development; that he was in contact with realtors to get lots sold and that he made payments to the suppliers to the development, it was apparent that he was not intimately knowledgeable about the progress of the development.

[5] See Supplemental Bundle of Documents at pages 11,17 and 21 and Bundle #1 at pages 29 and 30.

He did not agree with counsel for the claimant that he refused to visit the site or never showed an interest in it. Further he disagreed that the claimant had got the development to the point where they were about to start paving the roads. Upon further questioning he could not agree that Contec [construction company] were on the verge of paving the road but he conceded: "I don't accept that because it was rough cut. The road was not finished yet. I guess that some could have been paved."

He accepted that had he allowed Mr. Richards to continue the roads in the development would have been in place.

(v) ***Failing to give any proper account of funds received on behalf of the Estate***.

The claimant admitted under cross examination that he did not prepare an annual budget. He stated: "I presented what monies I received. The expenses were presented to the Board as they came in." He details and the court has seen the statement of revenue and expenditure that the claimant states that he presented to the Board. "This is the extent of the accounting because there was nothing else to account for."[6] With regard to the claimant failing to give a proper account the defendant relied on what he had been told by the 1st defendant that she was not being kept abreast of everything that was going on. This appears to be the main reason that the defendant insisted that there was a lack of transparency.

(vi) The other issue relating to the accounting for funds relate to advances to the defendant's sister. The defendant described that when he found out that payments had been advanced to his sister, the 1st defendant, that he approached the claimant who related to him that he did not have enough in the account for the 4 other siblings to be paid in the same manner. The

[6] See pages 34-34 of Bundle 1

Claimant was unable to advance the equivalent to the 2nd defendant and his other siblings.

The 2nd defendant does not state that this inability to advance was because the claimant has misappropriated the funds in any way but instead seems to state the claimant should have ensured that the 1st defendant had informed him of these advances.

Court's conclusions:

[19] The evidence presented at trial set out narrative wherein the claimant was entrusted by the Defendants to act as their agent and to assist in the development of lands which formed parts of the Estate of their deceased parents. The defendant, as set out above, does not dispute that the claimant, acting under the authority of the management agreement, worked toward the fulfillment of his duties under that agreement. This court has had the benefit of hearing the evidence from both witnesses. The claimant gave very straightforward evidence and I believe his evidence of the efforts and successes that he had as he pursued the objects of the management agreement on behalf of the defendants. I am satisfied that was successful to a large extent up to the time that the agreement was terminated. The evidence of the defendant bears this out.

[20] The defendant, it was clear, was not intimately involved with the projects. He did not reside in the jurisdiction. He did sit through board meetings but it appears to this court that he was satisfied with the progress of the developments to the extent that he did not feel the need to know the minute details. Both parties agree that difficulties stemmed from the sales of the lots and the prices that were being obtained for such sales. It appears that the defendant was satisfied with the progress up and until the defendant realized the 1st defendant has been advanced monies from the deposits on sales from the Pelican Development.

[21] Much was made in the cross-examination of the claimant of the role of the Mr. Omax Gardner and the eventual fact that Mr. Gardner did not sign the management agreement and that the agreement was premised on the expertise that Mr. Gardner could offer which the claimant did not possess. However, I accept that this did not have any significant impact on the relationship between the claimant and the defendants and that they were prepared to and did utilize the services of the claimant without any revision of the terms of the management agreement to reflect Mr. Gardner's input was to be absent from the agreement.

[22] I believe the claimant that he had moved the project forward in a significant way. The defendant does not counter this assertion in his evidence. Although the claimant admitted under cross examination that the roads were not paved or the water and electricity connected to the lots at the time that he was terminated, he says clearly that this was because *"the project was being funded by sales and the money ran out."* As set out above the defendant could not refute this assertion. The fact that the project could not be completed by early 2006 and the resultant request for returns of deposits by purchasers and the extent to which this was the claimant's failure to complete the project must be viewed within this context.

[23] I do not accept the Submission by counsel for the defendant that the Transfer of Land Agreement of 4th January 2006 reduced the fee based rate for the claimant from 7% to 5%. The 7% was a management fee on gross sales. The Transfer of Land Agreement is entirely separate and does not reference the management agreement at all in this regard. The former agreement was to facilitate the sale of lots between Larkland M. Richards and Associates and the defendants only and did not deal with matters pertaining to the management of the two developments at Pelican Cove or at Grape Tree Bottom in any particular.

[24] The matters set out in the letter of 17th July 2006 as the reasons for the defendant's termination of the management agreement have not been borne out on the evidence. The claimant stated in his evidence in chief that he was not to be removed from his position under the management agreement except for

dishonesty or incompetence. He argued that he was not terminated within the terms of the agreement and that the defendants were, *"…trying to infer incompetency in order to justify the termination."* From the evidence presented by the claimant this court agrees with him.

The absence of the 1st defendant

[25] This matter has proceeded without the presence of the 1st defendant. The 2nd defendant had prior to the trial raised this issue. The court considers that the claimant should not be precluded from having his claim adjudicated upon due to issues surrounding the service of the 1st defendant. The claimant has brought the case against them personally based on the management agreement, between the two defendants of the One Part and the claimant of the other part. It is clear the defendants held themselves out as having the capacity to make decisions on behalf of and administrators of the Estate. The 2nd defendant has acknowledged in his defence that he and the 1st defendant are the executors of the Estate of William V. Herbert and Cheryl Herbert, deceased.

What is the claimant entitled to recover?

[26] The 2nd defendant has admitted, ***in his capacity as Administrator of the Herbert estates*** that the claimant is entitled to the following:

(i) 5% on 6 closings which together totaled US$749,603.50 in the amount of US$37,480.18 (ii) US$1,034.00 as payment for incorporation of the company Pelican Resort Development Co. Ltd(iii) US$5000.00 for expenses.

[27] The defendants claimed that the claimant had in effect breached the management agreement for the reasons set out in the termination letter. Those reasons having been shown to be untenable on the evidence, the effect of the purported termination is that the defendants find themselves in a position where they have terminated a valid agreement without cause. This is a material breach of the agreement. The damages due upon an unlawful termination is that to which the

claimant would have been entitled if he had been allowed to continue for the full course of what would have been the balance of the five-year term of the management agreement.

[28] During the course of the cross-examination of the claimant by the defendant's attorney the claimant was asked about a letter[7] sent to his then attorney seeking to recover monies owed to the claimant in which his attorney seemed to indicate that the management agreement was to be for a 5% and not a 7% fee to the claimant based on sales. The claimant answered that he never gave his attorney those instructions. The claimant stated that the reference to 5% on sales was at a time when the Board was trying to get him to sell lots. It had nothing to do with his management fee of 7%. The court has considered this point carefully and takes accepts the claimant's evidence that the fee agreed under the management agreement was for 7% while a 5% fee had only been proposed for upon sales by commission.

[29] The claimant submitted that the court should find that there was **"**an implied term of the management agreement that the claimant having expended his time and money for the benefit of the defendants he could not be terminated before he had a reasonable time to realize the fruits of his labour and therefore that he should be awarded the sum of US$389,051.39 to compensate therefor. The claimant however admitted that he was involved only with negotiations for the removal of the restrictive covenant on the parcel of land encompassing the Grape Tree Bottom project. I am not persuaded that this term can be implied into the agreement or that the claimant should be compensated based on the eventual sale.

[30] In relation to the relief claimed the court considers that the management agreement encompassed both developments at Pelican Resorts and Grape Tree Bottom. The termination was with regard to both projects and they should

[7] See page 103 of the agreed Bundle #1

not be treated as they severable in the context of the management agreement. The court will award the following:

1. A Declaration that in terminating the claimant's services under the management agreement before the initial five-year term that the defendants acted wrongfully and without justification.
2. A declaration that the claimant is entitled to a management fee of 7% of gross sales under the management agreement in relation to the Pelican Resorts project.
3. That an account be taken of all sales of the Pelican Resorts project for the 5-year period commencing on 24th May 2004 including lands vested in the beneficiaries of the Herbert estate sold by them or any of them within the period in order to assess the fee due at (2) above. The claimant is to be awarded interest at the rate of 6% on the amount due from the date of filing of the claim.
4. An account of any and all profits generated by the Pelican Resorts project and the Grape Tree Bottom Project over the two-year period prior to the claimant's wrongful termination and that the defendant forthwith pay to the claimant the 10% bonus due to him pursuant to clause 3 of the management agreement from those profits.
5. In relation to the Pelican Resorts project, in respect of the services carried out for the defendants and described in paragraph 28 of the claimant's witness statement the sum of US$75,000.
6. Payments for incorporation of the company Pelican Resort Development Co. Ltd and for expenses relating thereto to be assessed.
7. Costs
8. Damages for breach of the Management agreement to be assessed.
9. Default judgment is entered in similar terms against the 1st defendant as prayed in the application filed herein on 23rd June 2014.

Justice Marlene I Carter

High Court Judge

By the Court

Registrar