

IN THE SUPREME COURT OF BELIZE, A. D. 2014

CLAIM NO. 283 OF 2012

(THE PROPRIETORS, STRATA PLAN NO. 56 CLAIMANT

BETWEEN (AND

(SANDHILL LTD.

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mr. Aldo Reyes of Reyes Retreage LLP for the Claimant

**Mr. Mikhail Arguelles of Mikhail Arguelles and Associates and Mr. Ryan Wrobel
of Wrobel and Company for the Defendant**

J U D G M E N T

The Facts

1. These are the facts as set out in the Agreed Statement of Facts and Issues filed on behalf of the Claimant and the Defendant jointly on January 29th, 2013:

1. The Claimant is a statutory corporation in respect of Strata Plan 56, also known as Los Porticos Villas in Placencia Village, Stann Creek District, Belize.
2. The Defendant is a company formed pursuant to the Companies Act, Chapter 250 of the Laws of Belize and engaged in the business of resort management, tourist accommodation, and resort administrative services.
3. The Defendant was responsible for payments of hotel tax to the Belize Tourism Board.
4. The Claimant and Defendant were parties to a Rental Property Management Agreement dated 1st April, 2010 (hereinafter “the Rental Agreement”) whereunder the Defendant was engaged by both the Claimant and the owner of each respective strata lot to, inter alia, manage and rent out the respective strata lot within the resort for tourist accommodation.
5. The Claimant and Defendant were parties to a Management Agreement dated 1st April, 2010 (hereinafter “the Management Agreement”) whereunder the Defendant was engaged to, inter

alia, manage and maintain the common property within the Resort.

6. The remuneration under both the Management Agreement and the Rental Agreement was 40% of the base rental income earned from tourist accommodation under the Rental Agreement.
7. The Defendant, as manager, also collected and maintained the homeowner's fees paid by the owners of strata lots within the resort. This sum was held by the Defendant on trust for the Claimant.
8. The Defendant elected to terminate the Rental Agreement and Management Agreement and pursuant to such served the Claimant with a contractual notice of termination on the 12 August, 2011.
9. It was subsequently agreed that the termination would take effect at the end of 30 November, 2011.

10. There were twenty (29) instances of bookings and prepayments for occupancy in units at Los Porticos Villas for dates beyond the termination date of both the Agreements. Such bookings and reservations were effected prior to the date of termination of the Agreements.
11. The Defendant collected and retained the sum of \$28,070.78 for advanced bookings in the month of December 2011.
12. The Defendant collected and retained the sum of \$10,199.98 for advanced bookings in months after December 2011.
13. Janelle Collins was involved in setting up the QuickBooks accounting system for the Defendant as it pertained to the rentals, operation and management of Los Porticos Villas.
14. Shortly after the Defendant served the Claimant with the notice of termination of the Agreements on the 12th August, 2011, Jan Collins worked with the Defendant on its QuickBooks accounting system to ascertain the total amount which was payable to the Defendant on the termination of the Agreements.

15. It is agreed that there was some work carried out to repair leaks in the main pool and the plunge pool.

16. It is agreed that some work was carried out to repair some defect with the fountain in the main pool.

17. It is agreed that the groundskeepers, housekeepers and office employees wore uniform shirts which were provided by the Defendant.

18. It is agreed that some infrastructural renovations of building 9 within Los Porticos Villas took place.

The Issues

2. The issues as agreed between the Claimant and the Defendant are as follows:

- i. Whether the Defendant was entitled to retain the sum of \$43,937.34, or any sum at all, pursuant to the Agreements.**
- ii. Whether the Claimant is liable for the cost of repairs to the main pool, the plunge pool and the fountain on the main pool.**

- iii. **Whether the Claimant is liable for the cost of uniforms shirts provided by the Defendant to the groundskeepers, housekeepers and office employees.**
- iv. **Whether the Defendant effected a reconfiguration of the electrical system and if so whether the Claimant is liable for the associated costs thereof.**
- v. **Whether the Claimant is liable for the costs of the infrastructural renovations of building 9.**

Issue Number One

- 3. **1. Whether the Defendant was entitled to retain the sum of \$43,937.34, or any sum at all, pursuant to the Agreements.**

The Claimant relies on the evidence of Terry Brooker, the Chairman of the Claimant's Executive Committee and Janell Collins, the Claimant's Treasurer, to establish this aspect of its claim. Both Mr. Brooker and Ms. Collins testified that the sums of \$15,866.56 (from sums which the Defendant held on trust for the Claimant) and \$28,070.78 (from prepayments for rental accommodation) respectively were retained by the Defendant for a total of \$43,937.34. Learned Counsel for the

Claimant Mr. Reyes submits that Sandhill Ltd. is not entitled to keep that sum or any sum. He argues that under the Property Management Agreement, Sandhill Ltd. was engaged to carry out 11 items of administrative services and 7 items of property management services as listed at pages 4, 5 and 7 of the agreement. Under the Rental Management Agreement Sandhill Ltd. was engaged to conduct a number of duties, including those set out at Article 6.1 which states:

“For services rendered in marketing and obtaining tenants, managing the OWNER’S property, front desk, collecting rent, accounting clerk, servicing accounts, advertising, providing financial reports, service staff and housekeeping MANAGER shall be paid for rentals a management fee of forty percent (40%) of the base rental income.”

Mr. Reyes further contends that compensation to Sandhill under both agreements was Sandhill’s share to 40% commission in rental revenues.

Under the Property Management Agreement paragraph 16 as follows:

“Compensation to MANAGER for the combined services of property management and hotel operations will be derived from its share of the rental revenues from the hotel operations...”

He argues that once the agreements terminated on November 30th, 2011 Sandhill's duties under both Agreements ceased, as well as its rights and entitlements thereunder. Sandhill Ltd. was therefore not entitled to keep the sum retained as it is trite contract law that a party cannot enjoy the benefits of a contract after the contract has been terminated, since termination of a contract discharges all rights and obligations contained therein unless stipulated otherwise. Mr. Reyes points out that nowhere in these agreements is there any stipulation that entitles the Defendant to retain any commission for bookings beyond the date of the termination of the agreements. He also makes the point that securing future bookings does not entitle Sandhill Ltd. to any commission because any rental income derived from such accommodation is not actually earned until after the guests have stayed and checked out of the resort. He refers to the evidence of Defence witness Kramer, Director of the Defendant Company Sandhill Ltd., who admitted under cross-examination that when prepayments are made for future reservations they are booked by Sandhill Ltd. as "deposits". In addition, Mr. Reyes points out the fact (as per Kramer's evidence) that hotel tax payable to the Belize Tourism Board is paid after guests have checked out. Hotel tax,

like general sales tax, is a tax borne by end users, in this case, hotel guests. Once the sum is paid and earned, the hotelier remits this 9% tax to the Belize Tourism Board. It is therefore clear, Mr. Reyes submits, that the rental income from accommodations is not earned until after the guests have stayed at the Resort. Therefore, Sandhill Ltd. cannot earn any commission from earnings generated beyond the date of their tenure as manager.

4. Mr. Ryan Wrobel on behalf of Sandhill Ltd. submits that the sum of \$28,070.78 represented compensation for services provided by the Defendant to the Claimant under the Management Agreement and the Rental Property Management Agreement. He refers to paragraph 6.1 of the Rental Property Agreement cited above by Mr. Reyes in his arguments. Mr. Wrobel contends that this sum represented the Manager's commission under the Agreement and was earned at the time that the reservations were booked. He refers to the testimony of Mr. Kramer who was asked about the industry standard as to when the commissions are earned by hotel managers/booking agents. Mr. Kramer responded that *"the booking agent takes the commission as soon as the monies are received from guests."*

5. In relation to the sum of \$15,866.56 which the Claimant says were homeowners fees unlawfully kept by Sandhill Ltd. which were held in trust for the Claimant, Mr. Wrobel argues that at the date of the termination of the agreements, Sandhill Ltd. had already turned over all sums equating to homeowners fees to the Claimant which it had previously held in trust. Mr. Wrobel contends that based on Mr. Kramer's evidence no owner has ever stated to Sandhill Ltd. that their account and monies due to them were not satisfied. Mr. Wrobel also seeks to impugn Mr. Brooker's credibility on the basis that Mr. Brooker testified that he was accused of fraud and/or perjury in Calgary, Alberta, Canada during his tenure as an officer in the Calgary Soccer Federation. He submits that Mr. Brooker therefore lacks credibility.

Findings of the Court

6. I have reviewed all the evidence and authorities in this matter and I find in favor of the Claimant on this first issue. I refer first to Clause 6.1 in the Property Management Agreement which spells out how the Defendant is to earn its commission:

6.1 RENTAL MANAGEMENT FEES *“For services rendered in marketing and obtaining tenants, managing the OWNER’S property, front desk, collecting rent, accounting clerk, servicing accounts, advertising, providing financial reports, service staff and housekeeping MANAGER shall be paid for rentals a management fee of forty percent (40%) of the base rental income **(defined as total gross rental income minus sales taxes, food costs if inclusive, amenity fees, surcharges, tour trips, credit card charges and any tour and wholesaler package fees)**” (Emphasis mine)*

To my mind, the definition of base rental income as set out in this contract as I emphasized above clearly prescribes the parameters of the commission to which the Defendant is entitled. It is only after these various taxes and charges have been deducted from the gross rental income that the Defendant becomes entitled to 40% of what is left after those taxes and charges have been paid. In other words, the contract spells out that the Sandhill Ltd. is only entitled to the net income remaining after payment of taxes and charges to various third parties such as the Belize Tourist Board, Sales Tax Department etc.

7. While I appreciate the point made by Mr. Wrobel for the Defendant as to what the industry standard is, I respectfully disagree with his contention that this should be applied in this case as I find that industry standards would only apply in cases where there is no contract governing how the commission is to be earned. In this particular case, the parties have agreed between themselves and have spelt out in precise terms that this is how the commission is to be earned and calculated.

8. In addition, it is obvious that, as rightly pointed out by Mr. Reyes for the Claimant, that the duties and responsibilities of the Defendant went far beyond merely securing bookings. The Defendant was engaged to carry out a wide array of services, including securing bookings, none of which were carried out after the termination of the agreements. As helpfully set out by Mr. Reyes in his submissions, these services to be provided by the Defendant were numerous and cumulative, and included the following:
 - a) Assure insurance coverage;
 - b) Collect and deposit monthly strata fees;
 - c) Pay insurance costs, land taxes and other GOB or other local council charges;

- d) Pay and distribute utility bills;
- e) Settle other maintenance and security costs;
- f) Give and render notices to owners, the executive committee and the corporation;
- g) Taking steps to ensure restrictions and obligations are adhered to;
- h) Provide accounting, bookkeeping and clerical services;
- i) Develop an annual operating budget for approval by the Corporation;
- j) Collect and deposit corporation assessments;
- k) Render annual financial records;
- l) Provide monthly reports of rental occupancy;
- m) Provide monthly reports of actual income and expenses;
- n) Provide security coverage;
- o) Maintain common areas, equipment and landscaping;
- p) Acquire replacement or additional equipment for the common areas;
- q) Provide day to day maintenance and upkeep of building exteriors and common areas;
- r) Arrange minor or major maintenance contracts;
- s) Identify and remedy repairs;
- t) Provide day to day cleaning of common areas;
- u) Maintain and repair individual units;
- v) Inspect units for damages, loss or theft;
- w) Arranging for a semi-annual deep cleaning of each unit;

- x) Cleaning and linen services;
- y) Purchase, store, consume and account for materials and services required for operation of unit;
- z) Marketing;
- aa) Front desk operation;
- bb) Collecting rent;
- cc) Providing accounting clerk;
- dd) Servicing accounts, advertising;
- ee) Providing service staff and housekeeping.

Mr. Reyes makes the salient point that Mr. Kramer admitted under cross examination that these services were not provided to the Claimant by Sandhill Ltd. after the termination of these agreements. I therefore agree with Mr. Reyes' submission that once the contract came to an end, so did the Defendant's entitlement to a commission.

10. On the issue of the \$15,866.56 retained by the Defendant, I accept the evidence of Mr. Brooker and Ms. Collins on a balance of probabilities as being true. They claim this amount was the sum retained as homeowners fees by the Defendant on trust for the Claimant. I also accept as true the evidence that the Defendant kept the sum of \$28,070.78 for advanced bookings in the month of December 2011. This was one of the agreed

facts as set out in the Agreed Statement of Facts and Issues signed by both counsel on behalf of the parties, and having reviewed the evidence I find there was no serious challenge on this issue. I find that the Defendant was not entitled to keep the total sum of \$43,937.78 or any part thereof, once the contract was terminated. I therefore order the Defendant to pay the Claimant the sum of \$43,937.78 forthwith.

Second, Third, Fourth and Fifth Issues

11. ***Whether the Claimant is liable for the cost of repairs to the main pool, the plunge pool and the fountain on the main pool;***

Whether the Claimant is liable for the costs of the uniform shirts provided by the Defendant to the groundskeepers, housekeepers and office employees;

Whether the Defendant effected a reconfiguration of the electrical system and if so whether the Claimant is liable for the associated costs thereof;

Whether the Claimant is liable for the cost of the infrastructural renovations of building 9.

Mr. Wrobel on behalf of the Defendant submits that Sandhill Ltd. should be compensated for the costs and repairs which went above and beyond those services which were to be performed under the terms of the Agreements. The Defence produced several witnesses including Michael Kramer, Manager of Sandhill Ltd., Klaas Loewen, Director of AL Construction Ltd., Francene August, Director of Go Graphics Ltd. and Martin Galvez, Electrician, to substantiate Sandhill Ltd.'s counterclaim for expenses incurred in running the resort with respect to construction materials, uniforms for staff, and electrical redistribution at the resort, respectively. The total sum sought by Sandhill Ltd. as per its counter claim is \$113,561.47 plus interest and costs.

12. Mr. Reyes on behalf of the Claimant contends that Sandhill Ltd. is not entitled to any of these costs because maintenance and upkeep of the pools, and of the distribution of electrical systems fell within the duties of Sandhill Ltd. under the Property Management Agreement. As such, Sandhill Ltd. cannot claim additional payment for those repairs as it has already been compensated in accordance with the terms of that agreement. In support of this contention Mr. Reyes cites Article III (iv) of the Property Management Agreement which reads as follows:

*“As the selected property management services vendor
MANAGER will be responsible to:*

*4. Provide day to day maintenance and upkeep of
the building exteriors and common areas to
include: landscaping, **pools**, roofs, exterior walls of
building, decks, stairs, water, sewer, water heaters
and outside air conditioning units and the
**distribution systems for electrical power, TV and
internet connections.”***

With regard to the expenses incurred on staff shirts and uniforms, Mr. Reyes submits that there is no clause in either agreement which compels The Proprietors of Strata Plan No. 56 to pay for uniforms for the staff of Sandhill Ltd. In addition, when the contracts were terminated Sandhill Ltd took all the t-shirts with them.

13. In relation to the \$75,000.00 expended by the Defendant for the repairs to building 9, Mr. Reyes makes the point that building 9 was not the Claimant’s property but that of the developer, Los Porticos Ltd. Michael Kramer conceded that he knew this under cross examination and that he knew that the Claimant was under no obligation to renovate building 9. In addition, Mr. Kramer indicated that Sandhill Ltd. had approached the Claimant about renovating building 9 but the Claimant had refused to

offer any financial assistance to renovate building 9. In spite of that refusal, the Defendant still went ahead and renovated the building 9. Mr. Reyes argues that the Defendant should not now be allowed to recover this or any sum from the Claimant for those repairs, as it was never agreed between the parties.

Findings of the Court on Second, Third, Fourth and Fifth Issues

14. Having reviewed the evidence and the submissions in this matter, I am in full agreement with learned Counsel for the Claimant on the second third fourth and fifth issues. I find that clause 4 of Article 3 in the Property Management Agreement cited above clearly sets out that maintenance of the pool and of the distribution of electricity system in the resort fell squarely within the responsibilities of Sandhill Ltd. The Defendant is therefore already compensated and cannot recover additional sums for those services.
15. I also agree that as there is no provision in either contract which places the responsibility for providing uniforms for the Defendant's employees, Sandhill Ltd. cannot recover that expense.

16. I find that the Defendant acted outside the terms of the contract by incurring expenditure in renovating building 9, especially since it did so without first obtaining approval of the Claimant. This is even more so since Sandhill Ltd. sought the approval of the Claimant, the Claimant expressly refused and the Defendant still went ahead with that massive expense. As Mr. Reyes rightly pointed out Article II (9)(b) of the Property Management Agreement specifically governs this situation:

“Subject to the terms hereof MANAGER shall not make any expenditure in excess of the amount authorized for such expenditure by the Budget, unless it is required to make the expenditure in an Emergency Situation or to keep any part of the Property in good standing or to comply with any law, rule, order or regulation, or unless it is reasonably necessary to continue the Operations in accordance with good management practice, and in such event, MANAGER may make such expenditure and shall forthwith advise the Executive Committee in writing thereof.”

17. Learned Counsel Mr. Reyes correctly refers to Article II 9(a) to make the point that this clause does not grant the Manager an unfettered power to incur expenditure which has not been budgeted because Article II 9(b) is subject to Article II 9(a) which reads as follows:

Article II 9

“At least 90 days prior to the beginning of each fiscal year, develop a recommended annual operating budget for approval by the Corporation. The annual operating budget will include projected income, detailed expenses from operations, and the proposed monthly strata fee to be charged to all units for the following budget year.”

Article II (9)(a)

*“If the Executive Committee disapproves the proposed Budget, MANAGER **shall** submit a revised Budget within 15 days of such disapproval. If the revised Budget is not approved by the Executive Committee, the parties shall continue to be governed by the Budget for the previous fiscal year until a new Budget is approved. MANAGER will at all times hold itself available for consultation with the Executive Committee for the purpose of establishing or revising the Budget.”*

18. I agree with the Claimant’s submissions that the Defendant must adhere to the provisions that call for the preparation of a Budget and the detailed expenses from operations. The evidence shows that Sandhill Ltd. did not conform to the requirements laid out in these provisions at

all. In fact the court questioned the Defence witness Jean Marc Tasse, Director and Co-Owner of Sandhill Ltd. on this as follows:

THE COURT: *“So Mr. Tasse, you are saying that you proceeded to spend \$15,000.00 to repair the pools and the fountain because you wanted to see Los Porticos succeed. But weren’t you aware that under your contract you had to seek approval from Strata before expending any money which was not budgeted for? Weren’t you aware of that before you went ahead and made these repairs?”*

THE WITNESS: *“Yes, I was aware of that but under a good manager, and we had guests, we had to fulfill the expectations and the promises we made to our guests.”*

19. While the court fully understands the difficulty faced by Sandhill Ltd. in trying to make the resort habitable to accommodate their guests, the fact remains that Sandhill Ltd. failed to comply with the procedure set out by the contract which governs how to incur expenditure which has not been budgeted. Sandhill Ltd. therefore cannot recover any of these expenses. The counterclaim of the Defendants is dismissed.

20. I therefore order the following:

- 1) That the Defendant Sandhill Ltd. pays to the Claimant Proprietors of Strata Plan No. 56 the sum of Forty three thousand nine hundred and thirty seven dollars and thirty four cents (\$43,937.34) being the value of sums unlawfully retained by the Defendant pursuant to a Rental Property Management Agreement and a Management Agreement which have since been terminated;
- 2) Interest pursuant to section 166 of the Supreme Court of Judicature Act;
- 3) Costs of \$5,000.00 to be paid by the Defendant to the Claimant.

Dated this Friday, 14th day of February, 2014

**Michelle Arana
Supreme Court Judge**