



[2016] JMCC COMM 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2012CD00087

BETWEEN	LOUIS CAMPBELL	CLAIMANT/FIRST ANCILLARY DEFENDANT
AND	AMBIANCE RESORT PROPERTIES INC	FIRST DEFENDANT/ ANCILLARY CLAIMANT
AND	JEMARA RESORT NV	SECOND DEFENDANT
AND	JEMARA RESORT PROPERTIES COMPANIES LIMITED	THIRD DEFENDANT
AND	ALEX OSTENBRINK	FOURTH DEFENDANT/ SECOND ANCILLARY DEFENDANT

IN OPEN COURT

Michael Howell and Aon Stewart instructed by Knight Junor & Samuels for the claimant/first ancillary defendant

Walter Scott QC, Elizabeth Salmon instructed by Anna Gracie of Rattray Patterson Rattray for first defendant/ancillary claimant

Michael Thomas for the fourth defendant/second ancillary defendant

September 29, October 1, November 13, 14, 2014, June 1, 17 and December 2, 2016

CONTRACT – BREACH OF CONTRACT – AGENCY - APPARENT AUTHORITY – OSTENSIBLE AUTHORITY

SYKES J

The claim, defence, counterclaim and ancillary claim

[1] Mr Louis Campbell has brought this claim against Ambiance Resort Properties Inc ('ARPI') seeking to recover money he alleges is owed to him by ARPI. He alleges that it is for services rendered to ARPI in respect of financial, accounting and administrative services he alleges that he provided. Mr Campbell was described variously as the financial director and employee. It can safely be said that that Mr Campbell was never ever an employee of ARPI in the commonly understood sense of that word. At best he was an independent contractor engaged to provide services to ARPI. ARPI's primary defence is that Mr Campbell was employed by Jemara Resorts NV, ('Jemara'), a company registered in Aruba, and of which the principal was at all material times Mr Alex Oostenbrink. ARPI goes further to say that it hired Jemara to manage the hotel it owned and all matters relating to Mr Campbell were within the exclusive preserve of Jemara.

[2] ARPI also says that if Mr Louis Campbell was engaged directly by Jemara as a financial director of ARPI, that is to say that Jemara was purporting to be the agent of ARPI with authority to create direct contractual relationship between ARPI and Mr Campbell, then Jemara exceeded the management agreement it had with ARPI.

[3] ARPI counterclaims against Mr Louis Campbell for negligence. ARPI also brought an ancillary claim against Mr Louis Campbell and Mr Alex Oostenbrink. It is in his capacity as an ancillary defendant that Mr Oostenbrink is participating in this trial. He was never served by Mr Louis Campbell and so is not a defendant in the claim brought by Mr Campbell. Neither were Jemara and Jemara Properties Company Ltd ('JPCL') served in Mr Campbell's claim.

[4] In the ancillary claim, ARPI claims damages for negligence against Mr Campbell and as against Mr Oostenbrink, there is a claim for an indemnity in respect of any sums found to be due to Mr Campbell if he succeed in his claim.

The background

[5] Mr George Gardner is a businessman from Pennsylvania in the United States of America. He states that ARPI was incorporated in the state of Delaware and was registered in Jamaica in 1986 as an overseas company. It operated a hotel known as Club Ambiance ('the hotel' or 'the property') located at Runaway Bay, St Ann, Jamaica.

[6] He stated that when other hotels began offering all-inclusive vacation plans the hotel's revenue declined and this decline led to the decision to offer its own version of an all-inclusive plan. His then manager, a Mr Gotting, was not able to market the new plan effectively and this led to a new manager, a Mr Seegar, being hired. Like Mr Gotting before him, Mr Seegar was unable to market the hotel as an all-inclusive property. It appears that Mr Seegar departed shortly after his engagement. The stark problem for solution was how to market the hotel so that it could compete effectively in the market in which it was now operating – one in which all-inclusive plans appeared to be attractive to the consuming vacationers.

[7] It was in this context, according to Mr Gardner, that he met Mr Alex Oostenbrink who offered to talk about marketing the hotel. The discussion led to a written agreement between Mr Oostenbrink's company, known as Jemara. Jemara, says Mr Gardner, was contracted to manage the hotel.

[8] It is Mr Gardner's evidence that these discussions with Mr Oostenbrink and Jemara were conducted through another of Mr Gardner's companies known as Waymaker. That company had a Mr Lee Sandifer as its chief financial officer. The result was that two documents were brought into existence. First, a document called a letter of agreement dated July 4, 1995 and a second document called a management agreement dated February 16, 1996.

[9] Mr Gardner has also stated that an addendum to the letter of agreement indicated that Mr Alex Oostenbrink was to provide marketing services while accounting support and direction would be provided by Mr Louis Campbell.

[10] Mr Gardner insists that the management agreement specified that ARPI had appointed Jemara as manager of the hotel. Under that contract Jemara was to prepare a budget for each year of the contract. Jemara was given power to appoint the manager of the hotel. The agreement provided that Jemara's remuneration was based on a particular formula that need not be stated.

[11] It was Mr Gardner's understanding that Mr Campbell was always an employee of Jemara or at the very least, not an employee of ARPI and neither was he contracted directly by ARPI to provide services to it.

[12] From the stand point of Mr Campbell, there is additional background information. Mr Campbell says that he met Mr Oostenbrink in 1993 when Mr Oostenbrink was general manager of another hotel known as Club Caribbean. Mr Campbell describes himself as the financial controller of Club Caribbean. He describes himself and Mr Oostenbrink as 'hired by Club Caribbean Limited and we began working as a team since then and we managed to turn around the fortunes of Club Caribbean Hotel.' He states that he 'was able to bring some improvement to the financial condition of the hotel while Alex was concentrating on the general management and marketing of the hotel which resulted in an increased number of guests staying over.' Mr Campbell by this testimony is advancing the idea that he and Mr Oostenbrink worked as team since 1993 at Club Caribbean.

[13] So good was their work that, according to Mr Campbell, '[b]ased on our performance at Club Caribbean it became well known in the hotel industry in the north coast region of Jamaica that working as a team, myself and Alex Oostenbrink were able to lead Club Caribbean out of the red and into profitability.'

[14] Mr Campbell also states that in July 1995, Mr Oostenbrink approached him and told him that ARPI was having similar problems to that which he had remedied at Club

Caribbean. He also stated that Mr Oostenbrink 'explained to me that the chairman/president of Ambiance Resort Properties Inc., George Gardner, had discussions for him to manage Club Ambiance and that they wanted me to assist him as the finance director.'

[15] As will be shown shortly, Mr Campbell's account was incomplete. He was not present when the initial dialogue took place between Mr Gardner and Mr Oostenbrink. The testimony of Mr Oostenbrink is that it was he (Oostenbrink) who suggested to Mr Gardner that Mr Campbell was the man to assist in what Mr Gardner wanted to accomplish at Club Ambiance. Thus when Mr Campbell was introduced to Mr Gardner it was not so much that Mr Gardner specifically requested Mr Campbell but rather he acquiesced to the suggestion coming from Mr Oostenbrink that Mr Campbell should be part of the effort to turn around the property. The premise of this recommendation by Mr Oostenbrink, as the extract from the evidence will shortly show, was that Mr Oostenbrink and Mr Campbell were a team and they worked together.

[16] Mr Oostenbrink gives further evidence on the background to this dispute. He agrees that he signed a letter of agreement on behalf of Jemara to manage the hotel. He states that Jemara 'was specifically hired to turn around the financial health of Club Ambiance which was hitherto in a very poor condition and on the brink of closing down.' He proposed a plan to Mr Gardner to 'save the hotel and turn it into a successful and profitable operation.' He also proposed that Mr Campbell's services be engaged in order 'to implement new systems and train the accounting staff.' According to Mr Oostenbrink, Mr Gardner accepted the plan which included Mr Campbell. From this is beyond question that it was Mr Oostenbrink who made suggestions to Mr Gardner, including the hiring of Mr Campbell, and Mr Gardner accepted. It is equally obvious that Mr Gardner was anxious to find a company to provide the necessary services and skills to ARPI to enable it to compete in the all-inclusive market. There is no evidence to suggest that ARPI ever departed from this mode of operation, namely, contracting a third party to manage the property and that that third party would bring its own team in to provide the requisite skill sets the job needed.

[17] Mr Oostenbrink states that ARPI through Mr Gardner and Mr Lee Sandifer knew of Mr Campbell's employment and they 'expressly agreed to his employment.' This bit of evidence from Mr Oostenbrink was carefully placed to seek to take advantage of Diplock LJ's dictum in **Freeman & Lockyer (A firm) v Buckhurst Part Properties (Mangal) Ltd and another** [1964] 2 QB 480. The analysis of the evidence will show that this carefully placed wording is not a complete picture and does not achieve the possible desired result of transforming Jemara or Mr Oostenbrink into an agent of ARPI thereby permitting the conclusion that Jemara and/or Mr Oostenbrink had ostensible authority (since there is no evidence of actual authority) to create direct contractual relations between ARPI and Mr Campbell.

The issues, the evidence and the analysis

[18] The first two important issues to be decided are (a) whether in July 1995 or at any time in 1995 ARPI contracted directly with Mr Campbell in such a manner as to make it directly responsible for Mr Campbell's fees when he was contracted to provide financial and accounting services to ARPI; and (b) whether Jemara or Mr Oostenbrink had any ostensible or apparent authority to act as agent for ARPI in relation to the services to be provided by Mr Campbell.

[19] It is common ground between Mr Gardner and Mr Oostenbrink that after both men spoke there was a letter of agreement. This document is dated July 4, 1995. The preamble states that it was made between ARPI which was called the owner on the one part and Jemara, thereafter called the manager, on the other part.

[20] The recital gives the background and reasons for the agreement. It reads:

Whereas, the owner is in need of competent and qualified management which can assume and actively manage the responsibilities of day to day operations of the hotel, the promotion and advertising of its business, the negotiations with suppliers and other businesses concerning their products, the employment and supervision of the personnel of the hotel, and the general management and supervision of the all details (sic) pertaining to the hotel thereby relieving the owner of these obligations, and

Whereas, the manager is experienced in this field of endeavour has a qualified and experienced staff trained in all phases of hotel management, including the areas of promotion, marketing, advertising, personnel and public relations, accounting procedures and costs controls, food and beverage, entertainment, guest relations, reservations, maintenance, and property management, and

Whereas, the owner desires to engage the services of the manager at the hotel, and the manager desires to act on the owner's behalf

Now, therefore, this agreement witnesseth the following matters agreed to by the parties:

- 1. [intent to enter a definitive management agreement regarding the hotel]*
- 2. [initial term – extends to October 31, 1996]*
- 3. [renewal – contract may continue after initial term of two years]*
- 4. [compensation – in terms of addendum 1 of agreement]*
- 5. Immediate Plans of Action (sic) – The manager will immediately undertake the operational and marketing plans outlines in addendum 2 of this agreement.*
- 6. Management Committee – the owner and manager agree to form a management committee to direct the general business planning for the hotel. It is anticipated that the management committee shall initially consist of George Gardner, Alex Oostenbrink and Lee Sandifer. Additional support to the committee may be provided by other personnel.*

The management committee will be provided periodic management reports, monthly financial reports, and audited financial statements. All significant capital expenditure and operating budgets will be reviewed and approved by the management committee. It is anticipated that the management committee will have at least quarterly meeting for the initial term of the contract.

7. *Termination – This agreement shall be terminated within 90 days by written notice of either party to the other or by signing of the definitive management agreement.*

[21] The recital is background information indicating why ARPI and Jemara were entering into the contract. The second paragraph of the recital while not part of the operative terms of the contract states the reasons for the parties entering into the contract. The owner was seeking someone to take over the day to day operations of the hotel. The owner was looking for someone who had the requisite experience. Significantly, the second paragraph of the recital noted that Jemara ‘has a qualified and experienced staff trained in all phases of hotel management including ... accounting procedures and cost controls.’ Clearly, the mutual expectation of both parties was that Jemara had its own staff which would undertake the day to day running of the hotel. This strongly suggests that Jemara was to bring its own personnel to manage the hotel and a necessary conclusion is that Jemara would be responsible for paying its own staff, presumably from the fees paid by ARPI. As will be shown shortly, the compensation package offered to Jemara by ARPI was very generous and clearly a package of that magnitude would only be offered on the premise that Jemara brought in its own staff to do the job required.

[22] It is equally clear from this document that Mr Oostenbrink could not possibly have been under the impression (which he claimed that he had) that Jemara was at all material times ARPI’s agent. If that were so it would make nonsense for the recital to be speaking of Jemara having ‘qualified and experienced staff trained in all phases of hotel management, including ... accounting procedures and costs controls.’

[23] The letter of agreement did not contain the compensation package for Jemara. That was remedied by an addendum to the July 4, 1995 letter of agreement. The addendum reads in full:

Management services provided by manager for hotel shall include no less than the following:

A resident manager for the hotel

Marketing services and support – by Alex Oostenbrink

Accounting support and direction of hotel by accounting staff by Louis Campbell

.....

The manager shall be entitled to the following remuneration for its services.

- A. The manager shall receive a monthly base fee of US\$4,000 for July 1995 through October, (sic) 1995*
- B. Effective November 1, 1995, the manager shall receive 3.5% of the gross revenue of the hotel, calculated and payable monthly.*
- C. Effective November 1, 1995, the manager shall also receive 12% of the Gross Operating Profit (G.O.P) of the hotel. This amount shall be payable upon submission of annual audited accounts at the end of the financial year. The definition of G.O.P shall be defined and agreed upon in the contract.*

[24] If Mr Oostenbrink, somehow, failed to grasp that neither Jemara nor himself was being given authority to bind ARPI to any contract between ARPI and Mr Campbell this addendum should have removed all doubt. It states that the manager (as in Jemara) was to provide ‘accounting support and direction of hotel by accounting staff by Louis Campbell.’

[25] It is not clear when this addendum to the July 4, 1995 letter of agreement was executed but it seems to have been in 1995 and quite likely it was executed shortly after the July 4 letter was signed by Jemara and ARPI.

[26] The letter of agreement between Jemara and ARPI was executed on July 4, 1995. This must be borne in mind when looking at Mr Campbell’s evidence on this aspect of the case. Mr Campbell states that in July 1995, Mr Oostenbrink approached him and had discussions with him regarding the hotel. Mr Campbell added that ‘Alex explained to me that ... George Gardner had discussions with him to manage Club Ambiance and that they wanted me to assist him as the finance director’ (the last

sentence of paragraph 5 of Mr Campbell's witness statement). Mr Campbell does not give a date in July 1995 when Mr Oostenbrink approached him but the common sense and internal logic of Mr Campbell's account of the matter would suggest that it was after the letter of agreement was concluded since it would not have been prudent for Mr Oostenbrink to be putting the idea to Mr Campbell that Mr Gardner and Mr Oostenbrink wanted him (Campbell) to be assisting Mr Oostenbrink as finance director of Club Ambiance. The egg (contract signing) need to be hatched before the counting of the chickens could begin.

[27] Even without the extract from Mr Gardner's evidence that is cited further on in these reasons for judgment the probabilities of the evidence in the round including the date of the letter of agreement it is more probable than not that Mr Oostenbrink spoke to Mr Campbell after July 4. This would suggest that from the initial dialogue between Mr Oostenbrink and Mr Campbell regarding the situation at the hotel, it is more probable that Mr Campbell was being 'kept' on the team by Mr Oostenbrink. Mr Campbell testified that he and Mr Oostenbrink were a team and they had done a Lazarus in respect of Club Caribbean. Mr Campbell stated that the work of Mr Oostenbrink and himself 'became well known to the hotel industry in the north coast region of Jamaica' and this knowledge came about because of 'our performance at Club Caribbean.' The knowledge that persons in hotel circles had was 'that working as a team, myself and Alex Oostenbrink were able to lead Club Caribbean out of the red and into profitability.'

[28] In furtherance of his case theory that ARPI was directly responsible for his fees Mr Campbell, in his examination in chief embarked upon what he called clarification of some matters. In paragraph 5 of his witness statement Mr Campbell sought to say that the pronoun 'they' in the last line of last sentence was referring to Mr Gardner, Mr Oostenbrink and Mr Lee Sandifer. Grammatically, that does not make sense since the antecedent to which the pronoun 'they' referred could not include Mr Sandifer since Mr Sandifer was never mentioned in the entire paragraph. In fact Mr Sandifer was not mentioned in the first 5 paragraphs of the witness statement. Mr Sandifer was first mentioned in paragraph 6 and it was in the context of Mr Campbell alleging that he was

introduced to Mr Sandifer, Mr Gardner and Ms Adams. The court therefore does not accept that Mr Campbell intended to include Mr Sandifer in paragraph 5.

[29] The court cannot help but note Mr Oostenbrink's remarkable silence, in his witness statement, on this aspect of the engagement of Mr Campbell. The first four paragraphs of Mr Oostenbrink's witness statement does not mention Mr Campbell at all. Mr Oostenbrink stated that while employed to Club Caribbean he was approached by Mr Gardner to manage Club Ambiance. He states that he accepted the offer and on July 4, 1995 signed the letter of agreement. Paragraph 4 states that a formal management agreement was subsequently entered into by Jemara and ARPI effective November 1, 1995. The first time Mr Oostenbrink mentions Mr Campbell is in paragraph 5 where he says that he proposed to Mr Gardner that Mr Campbell be engaged to implement new systems and train the accounting staff. Mr Oostenbrink omitted to mention in his witness statement the terms of the letter of agreement of July 4 as well as the addendum the terms of which have been set out above.

[30] Reading Mr Oostenbrink's witness statement which was his examination in chief no one would get the impression that Mr Campbell and Mr Oostenbrink worked as a team. The account is rather dry and does not convey the impression of the team work spoken of by Mr Campbell. The contrast between Mr Oostenbrink's lack of speaking to the team relationship with Mr Campbell and Mr Campbell's effusive description could hardly be more glaring. Not even the amplification given in further examination spoke the team relationship between himself and Mr Campbell. Mr Oostenbrink, in paragraph 5 of his witness statement, gives a rather sterile account of the engagement of Mr Campbell. He states:

...Since the hotel's accounting system was in a deplorable condition and outdated, I proposed to the owner to engage the services of the 1st Ancillary Defendant (sic) to implement new systems and train the accounting staff. Before coming to work at Club Ambiance the 1st Ancillary Defendant was employed at Club Caribbean as Financial Controller. He was similarly engaged at Club Ambiance as Financial Controller. This engagement was made the subject of an agreement dated 7th April 2006. The plan

was accepted and the 1st Ancillary Defendant implemented a workable accounting system and was most helpful in solving tax issues as well as accounting and banking issues. Under his stewardship the profitability of the hotel was quickly guaranteed and it was saved from certain bankruptcy.

[31] It was the cross examination by Mr Scott of Mr Oostenbrink that extracted further information. This is the relevant portion of the evidence:

Q Mr. Oostenbrink, for how long were you the General Manager for Club Caribbean?

A Nineteen ninety-three, I came to Jamaica nineteen ninety-three coming from Antigua, joined Club Caribbean nineteen ninety-three for a period of about four to five years, yes.

Q Was it you who recruited Mr. Louis Campbell to Club Caribbean?

A To Club Caribbean, he was recruited by the Chairman of Club Caribbean, Mr. Richard Sam.

Q He reported directly to you, Mr. Louis Campbell that is?

A He reported to me as well as to Mr. Sam.

Q His job at Club Caribbean was a full-time job?

A Yes, it was a full-time job.

Q Both Mr. Campbell and yourself worked together as a team?

A Oh, yes.

Q In relation to Club Ambience, was it your suggestion that Mr. Louis Campbell was to provide financial direction to the hotel?

A Mr. Sandy Lee Fer (sic) mentioned to me that there was a need for a person to oversee the accounts.

Q And was it your suggestion that Mr. Louis Campbell?

A And I suggested that I know a person who is very well known in the concept of both the hotels and it was Louis Campbell and I introduced Mr. Louis Campbell to both gentlemen.

Q Mr. Louis Campbell never worked as a full-time employee at Club Ambience, did he?

A No.

Q At all times when JEMARA had the management contract there was an accountant at the hotel, a full-time accountant?

A There was a full-time accountant.

HIS LORDSHIP: Is that Ambience?

MR. SCOTT: At Club Ambience, m'Lord.

(emphasis in bold added)

[32] The court was left with the impression that but for cross examination Mr Oostenbrink was not very willing to disclose more information about the relationship between himself and Mr Campbell. Mr Oostenbrink was not eager to embrace the idea that he and Mr Campbell were this dynamic team capable of bringing back hotels from near extinction. Why? Is that he was assisting Mr Campbell by trying to create the impression in his witness statement that ARPI and Mr Campbell were in a direct contractual relationship?

[33] The significance of the questions and answers in bold asked by Mr Scott could not have been lost on counsel for Mr Campbell and counsel for Mr Oostenbrink. The question flowed out of the examination in chief of Mr Campbell, the defence filed by ARPI and the sterile account given by Mr Oostenbrink in his examination in chief. ARPI's defence was and is that Mr Campbell was at material times an employee of Jemara. Mr Oostenbrink was not asked any questions by Mr Howell, counsel for Mr Campbell and neither was he re-examined by Mr Thomas in respect of the answers given to Mr Scott in cross examination.

[34] In addition there is this cross examination of Mr Gardner by Mr Thomas who represented Mr Oostenbrink. The cross examination on the point of how Mr Gardner and Mr Campbell met and whether they were a team proceeded on the premise that it was Mr Oostenbrink who first contacted Mr Gardner and offered his services and not Mr Gardner seeking out Mr Oostenbrink. This is the extract from the transcript of Mr Thomas' cross examination:

Q. *Mr. Gardener, good afternoon, sir?*

A. *Good afternoon.*

Q. *In July 1995, or there about, you met Alex Oostenbrink. You heard my question, sir?*

A. *Yes, I did.*

Q. *What is your answer?*

A. *Did I meet Alex Oostenbrink, yes.*

Q. *And at the time Mr. Oostenbrink was the general manager of Club Caribbean Hotel?*

A. *I believe that was his title.*

Q. ***And he gave you a phone call, you were in St. Ann and he called you up on the telephone, correct?***

A. ***Yes.***

Q. ***To discuss with you -- he said to you he had heard that Ambiance was in severe financial problems and he wanted to discuss that with you?***

A. ***Ambiance was struggling, yes.***

Q. ***And he had certain proposals to make to you?***

A. ***That's correct.***

Q. And arising from those discussions, a letter of agreement was arrived at Ambiance appointing Jemara manager of Ambiance Hotel?

A. That is correct.

Q. Now, the primary problem that Club Ambiance suffered from at that time was that the system of her accounting needed overhauling it was in shambles. You heard the question, sir?

A. Is that a question, I thought you were making a statement.

Q. No, it's a question to you, I am asking you whether the primary problem at Club Ambiance was at that time have to do with a system of accounting it was in shambles, would you agree with that?

A. No, I do not. The main problem that I was aware of was that we had a lack of occupancy and we needed someone that could fill the rooms.

Q. And in that regard you entered into the contract with Jemara?

A. Exactly.

Q. And with reference to the accounting performance of the accounting department it left much to be desired, would you all agree?

A. Is that a question.

Q. Oh, yes it is?

A. The accounting problems were not the main reason why Mr. Oostenbrink called me.

Q. No, no, we have passed that?

A. He wanted to...

Q. We have passed that. I am asking you whether -- let me put it to you this way, were you satisfied at that time with the performance of the accounting department at Club Ambiance, were you satisfied with it?

A. *That was not the main problem.*

Q. *I did not ask you that, sir. I did not ask you that. Kindly listen to my question, were you satisfied with the accounting performance of accounting department of Ambiance in mid 1995, that's my question?*

A. *I do not recall anything about that.*

Q. *You do not recall what was the performance of the accounting department in July 1995, is that what you are saying?*

A. *No, I do not.*

Q. ***Mr. Oostenbrink introduced Mr. Campbell to yourself and Mr. Sandifur in 1995?***

A. ***It was probable in 1995. I remember meeting Mr. Campbell after I had signed an agreement with Mr. Oostenbrink.***

Q. ***Mr. Oostenbrink after your discussions with him, one of his proposals was to engage – that Ambiance was to engage the services of Mr. Campbell to implement new system and train the accounting staff, isn't that correct?***

A. ***The letter of agreement that I signed was Jemara specified that Mr. Oostenbrink would take charge of the marketing and Mr. Campbell as an employee of Jemara would take charge of the accounting, yes.***

Q. *Who was in charge of accounting before Mr. Campbell?*

A. *The hotel accountant, I do not know who that was.*

Q. *Yes, I assume so and you don't remember his name, okay. I am suggesting to you, Mr. Gardener that at the time when Mr. Oostenbrink had discussions with you mid 1995, the accounting department system was in a deplorable condition at Club Ambiance, what you say to that?*

A. *As I say, that was not something that was my focus, my focus was the marketing end and Mr. Lee Sandifur was responsible for the accounting.*

Q. *In fact, you are so correct, and all through the 15 years that Mr. Oostenbrink was there, your focus was never on the accounting, isn't that correct. Your focus was never on the accounting system wouldn't you agree?*

A. *The accounting was not my responsibility, no I had other people in charge of that.*

Q. *And you knew very little if anything at all, about what was happening in the accounting department, wouldn't you agree?*

(emphasis added)

[35] This passage of cross examination was based on the premises that (a) Mr Oostebriink first made contact with Mr Gardner to discuss the situation at Club Ambiance and (b) both men in their capacities as representatives of their companies had come to terms and executed the July 4, 1995 agreement. Mr Gardner is here saying that it was after he executed the agreement that he met Mr Campbell.

[36] Mr Oostenbrink, in his witness statement, makes the rather broad assertion that '*[i]t was always my belief that I through Jemara resorts NV (sic) had authority to act on behalf of the ancillary claimant if not on all matters, certainly to contract the employment of the 1st ancillary defendant. I therefore at the time of executing the contract of employment of the 1st ancillary defendant on behalf of the ancillary claimant had the latter in contemplation as the principal of Jemara Resorts NV and I as the agent for Jemara.*' This assertion of Mr Oostenbrink has not factual foundation having regard to the letter of agreement and the addendum. Mr Oostenbrink had no rational basis for this view because (a) the letter of agreement never mentioned Mr Campbell; (b) the recital made it clear that ARPI was contracting with Jemara on the basis that it had '*a qualified and experienced staff trained in all phases of hotel management, including the areas of promotion, marketing, advertising, personnel and public relations, accounting procedures and costs controls, food and beverage, entertainment, guest relations, reservations, maintenance, and property management*'; (c) the addendum unambiguously stated that Jemara would provide (i) a resident manager, (ii) marketing services and support and (iii) accounting support and direction. The addendum simply

identified who in Jemara would provide (ii) and (iii). In light of this Mr Oostenbrink had no reasonable grounds to have held the view he claimed to have had. In light of what has been said Mr Oostenbrink would have known that what he was asserting was simply very inaccurate. There is no rational basis for Mr Oostenbrink in the period July 1995 to February 1996 to have the belief of which he spoke.

[37] This court finds that it was Mr Oostenbrink who presented Mr Campbell to Mr Gardner as part of Jemara's team. This is the best explanation for the phraseology of the letter of agreement and the addendum. Also this court finds that between July 1995 and December 31, 1995 Jemara was never ever the agent of ARPI. The court expressly finds that Mr Oostenbrink was never ever the agent of ARPI for the same period. The court expressly finds that at no time in 1995 did either Jemara or Mr Oostenbrink have any authority, actual or ostensible, to create any direct contractual relations between ARPI and Mr Campbell.

[38] Mr Campbell gives details of a meeting he says he had in July with Mr Gardner and Mr Sandifer. Mr Campbell states that it was Mr Oostenbrink who invited him to meet Mr Gardner. Mr Campbell said that he met Mr Gardner at the hotel. He also met Mr Lee Sandifer.

[39] Mr Campbell states that Mr Gardner and Mr Sandifer asked him questions about himself. At some point Mr Gardner and Mr Oostenbrink left the room and the rest of the afternoon was spent in discussions with Mr Sandifer. Mr Campbell testified that during the discussions Mr Sandifer told him that he wanted him (Campbell) to bring the hotel accounting upto date, train accounting staff and provide financial, accounting and administrative services to the hotel on behalf of ARPI.

[40] He says that he told Mr Sandifer that he had to get clearance from Club Caribbean before he undertook the assignment. He said that he and Mr Sandifer agreed to a remuneration of US\$2,000/month starting in July 1995. He also said that Mr Sandifer authorised him to 'hire and train the members of the accounting and administrative staff' and that 'Alex also gave his verbal agreement to this arrangement.'

[41] The court does not accept this aspect of Mr Campbell's evidence. Since the letter of agreement was executed on July 4, 1995, the probabilities suggest that the discussions between Mr Oostenbrink and Mr Gardner began before that date, possibly in late June or the first three days of July. Mr Gardner gave evidence that he met Mr Campbell after July 4, 1995. Mr Howell for Mr Campbell and Mr Thomas for Mr Oostenbrink never challenged him on this and both witnesses did not give a contrary date in their evidence. This court therefore concludes that Mr Gardner in fact met Mr Campbell after the July 4 letter of agreement. The basic terms of the engagement of Jemara were already worked out by the time Mr Gardner and Mr Campbell met. If Mr Sandifer was as involved as Mr Campbell suggests he was how could he not know of the July 4, 1995 letter of agreement? If Mr Sandifer, working for Mr Gardner's company Waymaker, knew of the letter of agreement why would he be speaking to Mr Campbell about the monthly fee when the letter agreement was in place? Would Mr Gardner be in a meeting with Mr Sandifer and Mr Campbell after the letter of agreement was signed and Mr Sandifer not know of that letter? Is it consistent with logic of the evidence that Mr Sandifer would not know of Mr Gardner's desire to engage Jemara which was to have an experienced and qualified staff to manage the hotel? The court does not accept that Mr Sandifer would be in the supreme state of ignorance that would cause him to be negotiating a contract of service directly with Mr Campbell at fees of US\$2,000.00/month because this is what Mr Campbell's case theory requires.

[42] It will be recalled that the letter of agreement referred to two addenda. That it was the addendum disclosed that was the relevant one was confirmed by Mr Oostenbrink in cross examination by Mr Scott. The relevant parts of the transcript states:

Q. Would you have a look please, at page eleven of Exhibit 1. Have you had a look at it, Mr. Oostenbrink?

A Yes, sir.

Q Is this the Letter of Agreement, which you signed on behalf of JEMARA Resort NV with Ambience Resort Properties Incorporated in July of 1995?

A Yes, sir.

Q *And would you please turn to page 23 of that bundle. Is that the Addendum to the Letter of Agreement?*

A Yes.

Q ***That is -- this is the Letter of Agreement made between JEMARA Resort MV and Ambience Properties Incorporated in July 1995; is that so?***

A Yes.

Q ***You agree with me, sir, that the Addendum states, quite clearly, "That management services provided by the manager to the hotel shall include no less than the following," before I go any further, just for clarity, the manager was JEMARA MV -- JEMARA Resorts MV; wasn't it?***

A Yes.

Q ***The hotel was Club Ambience?***

A **Correct.**

Q *Good. A Resident Manager for the hotel, JEMARA was to provide a Resident Manager for the hotel?*

A *Where is that?*

Q *On the same page you are looking there, page 23?*

A Okay.

Q *In the addendum, shall we start again?*

A Yes, please.

Q *"Management services provided by manager to hotel shall include no less than the following: A Resident Manager for the hotel," is that correct? Did JEMARA provide a Resident Manager?*

A Yes, sir but...

Q *It's simple. Mr. Oostenbrink, just answer my question very simply, we will get along quickly. Marketing services provided by Alex Oostenbrink, is that correct?*

A *That is correct.*

Q ***Accounting support and direction of hotel accounting staff by Louis Campbell; is that correct?***

A ***That's correct.***

Q ***These were services to provide by JEMARA Resorts NV, is that correct?***

A ***That's correct.***

Q *Thank you. Now look at the bottom.*

A *Yes.*

Q ***When we deal with the compensation, "The manager shall receive a monthly base fee of US Four Thousand Dollars for July 1995 to October 1995," is that correct?***

A ***That's correct.***

Q ***The manager being JEMARA Resorts NV; is that correct, Mr.Oostenbrink?***

A ***That's correct, sir.***

Q *So again to get it very clear, Ambience Resort Properties Incorporated would pay JEMARA Resorts NV a base fee of US Four Thousand Dollars for this period?*

A *Only for that period.*

Q *Only for that period?*

A *Correct.*

Q *Correct. And then B, effective November 1, 1995, the manager shall receive 3.5 percent of the gross revenue of the hotel calculated and payable monthly?*

A Correct.

Q *Pause. Mr. Oostenbrink, Mr. Oostenbrink, Ambience Resort Properties Incorporated was required to pay 3.5 percent of the gross revenue of the hotel, calculated and payable monthly to JEMARA Resorts NV, is that correct?*

A *That's correct.*

Q *C, the manager shall effective November 1, 1995, the manager shall also receive 12 percent of the gross operating profit of the hotel. Pause there, is that correct?*

A *That's correct.*

Q *Pause again, Mr. Oostenbrink, this meant that Ambience Resort Properties Incorporated was to pay 12 percent of the gross operating profit to JEMARA Resorts NV?*

A Correct.

Q *So for the first phase, July to October, it was a flat base fee of US Four Thousand Dollars, effective November 1, it was 3.5 percent of the gross revenue?*

A Yes.

Q *And in addition 12 percent of the gross operating profit?*

A Yes.

Q *And these payments were all to be made by Ambience Resort Properties to JEMARA; is that correct?*

A *That's correct.*

Q ***Under the Letter of Agreement and the Addendum, Ambience Resort Properties was obligated to make payments to JEMARA Resorts NV, is that correct?***

A ***Repeat that please.***

Q Under the Letter of Agreement that we looked at on this Addendum, Ambience Resort Properties Incorporated was obligated to make payments to JEMARA Resorts NV?

A Yes.

Q For the work carried out by it; is that correct?

A Correct.

(emphasis added)

[43] The page references in this extract are incorrect but there is no doubt that counsel and the witness were referring to the letter of agreement of July 1995. The cross examination of Mr Oostenbrink on this point confirmed that this addendum was the addendum attached to the July 1995 document. Based on all the evidence this was the only document between Jemara and ARPI that governed the fees payable to Jemara. All this was before the February 1996 management agreement.

[44] These answers from Mr Oostenbrink provide good reason to have serious doubts about Mr Campbell's evidence that it was in 1996 he first knew of the agreement between ARPI and Jemara. Before analysing the answers the court will set out further evidence from Mr Campbell on whether he knew of the terms of agreement between Jemara and ARPI. This is what Mr Campbell had to say on the point in cross examination.

Q. Thank you. Were you aware, sir, that, this is in 1995 that Jemara Resort N V was contracted by Ambiance Resorts Properties Incorporated as the manager for Club Ambiance?

A No, sir.

Q Have you at any time become so aware?

A I was aware in 1996 when I was asked to do the budget.

Q In 1996?

A That's correct.

Q *So would it be correct, then, Mr. Campbell, that since 1996 you are aware that Jemara Resort N V was the manager of Club Ambiance?*

A *Yes, sir.*

[45] Mr Campbell confirmed in cross examination that he knew of some of the details of the arrangements between Jemara and ARPI. This is the evidence on that point:

Q *Would you continue looking at Addendum 1, please, on page 27?*

A *Addendum 1, yes.*

Q *And would you -- you see the second paragraph, sir?*

A *That's correct.*

Q *That second paragraph sets out the remuneration due to the manager?*

A *That's correct.*

Q *Item A?*

A *Item what?*

Q *A, 2(a).*

A *Okay. "The Manager shall receive a monthly base fee of U.S. \$4000 for July, 1995, through to October, 1995."*

Q *And then (b)?*

A *"Effective November 1, 1995, the Manager shall receive 3.5% of the gross revenue of the hotel calculated and payable monthly."*

Q *Pause there. During your tenure as Finance Director, were you aware of these sums of 3.5% of gross revenue being payable to Jemara?*

A *That's correct.*

Q *As manager?*

A *That's correct.*

Q *Would you read paragraph C, 2(c)?*

A *Effective November 1, 1995, the Manager shall also receive 12 % of Gross Operating Profit of the Hotel. This amount shall be payable upon submission of annual audited accounts at the end of the financial year." To be define --sorry. "The definition of G.O.P shall be defined and agreed upon in the contract."*

Q *Thank you. During your tenure as Finance Director, were you aware, sir, of Jemara Resorts N V being entitled to -- in addition to the 3.5% of gross revenue, 12 % of Gross Operating Profit?*

A *Yes, sir.*

Q *And you agree with me that those two sums, the 3.5% of Gross Revenue and the 12 % of G. O. P represents the compensation to Jemara?*

A *That's correct.*

Q *As manager?*

A *That's correct.*

Q *Thank you.*

HIS LORDSHIP: You saw documents, and so on, to that effect?

THE WITNESS: I only see these documents after I file the suit in 2012. I have never seen these before.

HIS LORDSHIP: The question that was asked is in 1995, how do you compare --

THE WITNESS: Lee Sandifer was the one who asked me to provide the budget for Jemara in these amounts. He has never showed me a copy of the contract neither does Alex Oostenbrink.

HIS LORDSHIP: But when he asked you to do this, he told you what these amounts were for?

THE WITNESS: Yes, sir.

[46] This response by the witness as well as further cross examination led Mr Scott to submit that it is against the probabilities that Mr Campbell had not seen these documents before. The reason for this submission was that Mr Campbell while not an accountant by training understands financial information and the importance of having source documents and authorisations before moneys are paid out of business's accounts.

[47] The evidence does not suggest that Jemara was not paid in accordance with the terms of the agreement. If that is so then for the months of July, August, September and October 1995, Jemara would be paid US\$4,000/month by ARPI. Since Mr Campbell was assisting with the accounts he would have become aware of these monthly payments. If he was doing his job properly as he claims and Mr Oostenbrink alleges, then he would have wanted to know why ARPI was making payments to Jemara. It is hornbook accounting that any proper accounting system of a company requires that all payments out of an account need to have authorisation and justification. There would need to be some documentation demonstrating or showing the basis of the payment. This is no small thing. We are dealing with a hotel with an accounting system which was said to be 'deplorable' and Mr Campbell's job was to improve what was there. It must be that part of that improvement would be to establish proper systems for accounts payable and receivable. A proper system must include proper documentation of payments and the reasons for them. If Mr Campbell implemented 'a workable accounting system' as alleged by Mr Oostenbrink then it is virtually impossible for Mr Campbell not to have known about these payments which in turn would have led him to query them which in turn would have led him to the agreement between Jemara and ARPI. He would query them because, on his case theory, he did not know of the letter of agreement and the addendum in 1995 the very year when these payments became part of ARPI's liabilities. Even if were said that the sums were not actually paid then they would be recorded as a payable since ARPI was under a specific contractual obligation to meet those payments.

[48] But the improbability of Mr Campbell not knowing about the contents of the agreement in 1995 becomes even more apparent if one bears in mind the

compensation structure for Jemara that would come into effect on November 1, 1995. According to the addendum, as of November 1, Jemara would be entitled to receive 12% of Gross Operating Profit. This was in addition to Jemara being entitled to 3.5% of gross revenue. By any measure these sums would have exceeded a mere US\$4,000.00 per month. Jemara was entitled to receive 3.5% of gross revenue. Revenue means just that – what comes in from customers and other revenue earning activity. Thus without any deduction for costs or even provision for profit Jemara was entitled to 3.5% of the revenue. Assuming there was an operating profit, Jemara would get 12.5% of that. How would Mr Campbell determine, in 1995, that these payments were lawfully incurred had he not known about them before 1996? The rhetorical question is how could Mr Campbell not know, in 1995, about the agreement between Jemara and ARPI document from 1995 if were the financial director of Club Ambiance? Did he not see financial records?

[49] A further in road into Mr Campbell's case occurred in this manner. He said that his fees were provided for in the budget but was unable to indicate what line item covered the fees that he says were paid or due to him. This was quite a remarkable answer coming from Mr Campbell in light of what he was engaged to do. He told the court that he was to provide financial and accounting services. Surely this must include accurately recording items of expenditure and including such expenditure as either a line item in the balance sheets or identifying the line item that included his fees of US\$2,000.00. This is important because he is claiming that he is owed money by ARPI and this is on the premise that ARPI contracted his services and not Jemara or Mr Oostenbrink. This is the cross examination in that regard:

Q Was your compensation recorded in the budget as a budgeted item?

A Yes, sir.

Q Under what head, sir?

A I know, I mean --

Q Under what head?

A I just want to say I remember vaguely, five hundred -- up to 19 -- up to 2008 five hundred dollars out of accounting and auditing was for me, and there was another one thousand dollars in the budget as professional fee that was for me. In 2000 --

Q That's 1500?

A 1500, yes.

Q But your compensation was 2000?

A Was subsequently changed in 2007, that's why I am saying up to 2008 or 2006 -- sorry, I don't remember the figure totally how it was broken down, but I know it was in the budget.

HIS LORDSHIP: You said up to 2006 it was 1500?

THE WITNESS: It was reduced to 1500 in 2006.

HIS LORDSHIP: So what from 1995?

THE WITNESS: From 1995 to 2006 it was 2000.

HIS LORDSHIP: It was 2000, and then it was reduce to?

THE WITNESS: 1500 in 2006.

HIS LORDSHIP: So in respect of the \$2,000.00, do you know how those accounted for in the budget of the entity, the 2000?

THE WITNESS: I know it was between audit and accountant and professional fee, I don't remember the exact split, but I know in 2008, for example, five hundred out of audit and accountant was for me and one thousand professional fee.

BY MR. SCOTT:

Q So are you familiar with a balance sheet?

A Oh, yes.

Q Profit and loss account?

A Oh, yes.

Q *Expenditure worksheet?*

A Yes.

Q *With the various subheads?*

A Yes.

Q *Would you agree with me that items under professional services, for example, are not part of employee payroll numbers?*

A *It depends on the company, because it is an internal document, as to when you do your audit then the auditor will reclassify accordingly.*

Q *Under income and expenditure of companies when you have professional fees being paid out, those are not determined payroll, PAYE payments?*

A No, no.

Q Yes.

A Okay.

[50] These responses by Mr Campbell were a matter of concern given what he says was required of him in respect of ARPI. For a man who was responsible for getting ARPI's accounts in order – accounts that were part of an accounting system which Mr Oostenbrink described quite graphically as 'in a deplorable condition and outdated' – these answers were quite astonishing.

[51] Mr Howell urged the court to say that Mr Campbell was engaged directly by ARPI. One of the bits of evidence he pointed to in support of this proposition was the placing of Mr Campbell as a signatory on the account of ARPI. Mr Oostenbrink's evidence does not address this question of the addition of the names to the account of ARPI. The two witnesses who spoke to this were Mr Gardner and Mr Campbell. The summary of Mr Gardner's evidence on this point was that the designation of Mr Campbell as financial director and the designation of Mr Oostenbrink as managing

director came about because the bank required the men to have some kind of designation if they were going to be authorised to operate ARPI's accounts.

[52] That fact, regrettably, in the context of this case, does not support that proposition since Mr Oostenbrink's name was also on the account and no one has suggested that Mr Oostenbrink in his personal capacity could look to ARPI for his remuneration. In other words, the fact that Mr Campbell's name was on the account is not as significant as Mr Howell submits. Mr Howell pointed to the fact that the bank document showed that Mr Campbell was described as the financial director of ARPI and that, the inference suggested to be drawn, was an acknowledgement by ARPI that Mr Campbell was engaged directly by it.

[53] Mr Howell was seeking to tie the bank document to a June 25, 1998 letter signed by Mr Oostenbrink which referred to Mr Campbell as the financial director. The court does not accept this reasoning. Let us look more closely at the bank document. The document in question indicates that Mr Campbell and Mr Oostenbrink were styled as director of finance and managing director, respectively. In the document Mr Campbell was referred to as director of ARPI. No one, not even Mr Campbell has contended that he ever functioned as a director of ARPI. The document actually states that these appointments took place 'at a meeting of the directors.' This document is dated July 5, 1995. It was this document that enabled Mr Campbell and Mr Oostenbrink to draw cheques on ARPI's account at National Commercial Bank. The document shows that Mr Gardner and Mr Sandifer signed the document in their capacities as president and consultant respectively. The printed text immediately preceding the signatures read: *We hereby certify that above to be a true copy of the minutes.* Under the signature of both men are specimen signatures of Mr Sandifer, Mr Oostenbrink, Ms Adams and Mr Louis Campbell.

[54] This court accepts Mr Gardner's explanation that that was done because the local bankers insisted that if both men were to be signatories on the company's accounts they had to have some kind of title which prima facie would authorise them so to do. The court finds that the placing of the names of both men was simply a

mechanism to give them access to ARPI's accounts and to constitute Mr Oostenbrink or Jemara as agents of ARPI or to bring ARPI into a direct contractual relationship with Mr Campbell. Incidentally, the court cannot help but note that Mr Howell had no questions of any kind for Mr Oostenbrink. One would have thought that having regard to the dispute between Mr Campbell and Mr Gardner on why Mr Campbell's name was placed on the account Mr Oostenbrink may have some knowledge of this.

[55] In support of his case theory Mr Howell secured Mr Gardner's concession that he was aware that Mr Campbell was paid by ARPI but in this court's view this is not sufficient to change the court's conclusion in light of the rest of the evidence.

[56] Mr Howell's submission that Mr Campbell was directly engaged in 1995 by ARPI rested on (a) the banking documents where Mr Campbell was described as the financial director or director of finance; (b) Mr Campbell was paid from ARPI's accounts; (c) the allegation that Mr Sandifer approved the payment of US\$2,000.00 per month; (d) Mr Sandifer authorised him to commence the services he was to provide and (e) payments made to third parties on behalf of Mr Campbell by ARPI. In respect of points (a) and (c) the court has already expressed its views and need not repeat them here. What was said earlier in relation to (c) about Mr Sandifer applies to (d). The court decided earlier that Mr Gardner met Mr Campbell after the July 4, 1995 letter of agreement. It is extremely unlikely that Mr Sandifer would be unaware of the agreement although there is no clear evidence on the specific point. The balance of probabilities favours Mr Sandifer having this knowledge. The allegation that Mr Sandifer gave permission to Mr Campbell to commence his services makes no sense because such permission would not be necessary because of the already concluded contract between Jemara and ARPI. So far as (e) is concerned by itself it does not have significant explanatory power and taken along with the other factors highlighted by Mr Howell does not have the effect of producing the desired inference. It may have been simply an accounting arrangement between Jemara, ARPI and Mr Campbell. That seems the more likely explanation rather than it being evidence of ARPI being in direct contractual relationship with Mr Campbell.

[57] The court has looked at (a) the meeting between Mr Campbell, Mr Sandifer, Mr Gardner and Mr Oostenbrink, (b) the other evidence given by Mr Campbell regarding the relationship between himself and Mr Oostenbrink; (c) Mr Oostenbrink's evidence and (d) Mr Gardner's. The court concludes, on a balance of probability, that the evidence does not support the conclusion that Mr Campbell was engaged directly by ARPI in July 1995. The court finds that ARPI contracted Jemara in July 1995 to manage the resort. The terms of the letter of agreement and the addendum show that Jemara was responsible for bringing its own staff and contracting its own people to execute the job. The court also concludes that Mr Campbell knew of the arrangement between Jemara and ARPI and that he had this knowledge from 1995. All this means that Mr Campbell knew full well that he was not contracted by ARPI directly.

[58] In addition the evidence of Mrs Carolyn Lloyd and the work that she did makes it too plain that in 1995 Mr Campbell was not an employee of ARPI. Mrs Lloyd testified for ARPI. She too, like Mr Campbell, is not an accountant but was very familiar with financial information. She was engaged in early 2012 to prepare the hotel for sale. She said that as part of her job she was to collate all existing valid contracts and pass them on to the lawyers so that when the property was sold the question of potential liability or obligations on existing contract would be known. She said she was not aware of Mr Campbell or his contract during that process. She only became aware of him after the property was sold.

[59] Miss Lloyd stated that she viewed an enormous amount of documents during the entire period she prepared the hotel for sale. She was able to state quite categorically that Mr Campbell as not registered on the hotel payroll as an employee. She said there were no payroll records for Mr Campbell. She stated that the payroll records comprised weekly payroll, fortnightly payroll, payments for salaries, health payments and the like. In this particular case she said that there only two payrolls: fortnightly and monthly. She said that she was tasked with preparing the redundancy payments of all the staff. She had to go through every file, every record of every single employee.

[60] When pressed in cross examination by Mr Howell, Miss Lloyd responded by saying that the payroll clerk first compiled the list of all employees, when they started to work at the hotel, how much they earned and the payroll clerk also did a provisional calculation of the redundancy entitlements. Miss Lloyd then took the list and went 'through every personnel file that was in the office to verify all these people were employed which they were.' She went through approximately 200 files. She said these files did not include persons who supplied or provided services to the hotel.

[61] She also said that she found some records in the name Louis Campbell. Some records showed just LC which she concluded was Louis Campbell. Miss Lloyd indicated that she could not verify some of the payments to Mr Campbell meaning there were no supporting documents.

[62] The court concludes that in 1995 there was no legally enforceable contract in existence between Mr Campbell and ARPI. The court also finds that in 1995 Jemara was not acting as agent for ARPI. Mr Sandifer did not conclude any contract between ARPI and Mr Campbell in 1995. It follows from this that in 1995 ARPI did not and does owe Mr Campbell any money and was not obliged to pay him for any services he provided in 1995.

[63] The concludes that Jemara had no authority in 1995 to engage the services of Mr Campbell for ARPI directly because it had no authority to act as agent for ARPI in relation to the services of Mr Campbell. All this was known to Mr Campbell.

[64] Mr Howell stressed that Mr Gardner knew that Mr Campbell was engaged to provide services for ARPI and raised no objection and therefore, the argument goes, ARPI cannot now say, in the face of that knowledge, that it is bound by contract to pay Mr Campbell. When this submission is taken along with Mr Oostenbrink's assertion that ARPI knew of and 'expressly agreed to his employment' the ultimate conclusion desired by Mr Howell was that Mr Campbell was directly engaged by ARPI.

[65] The foundation of this argument is **Freeman & Lockyer**. In that case a company was formed to develop a lot of land that had been purchased by two persons. The land

was eventually transferred to the company. One of the directors of the company went overseas and was not involved in the day-to-day operations of the company. While he was away, the other director engaged the services of the claimants who in fact did the work for which they were contracted. The claimants were not paid and they sued the company as well as the director who had engaged their services. By the time of the trial the director who had engaged the services had disappeared and he never participated in the proceedings. The action therefore proceeded against the company alone. The question was whether the company was liable for the fees payable to the claimants and if so on what basis.

[66] The Court of Appeal of England and Wales held that there was a distinction between (a) an agent being held out by his principal as having authority to conduct business on behalf of the company and (b) an agent who professes to act on behalf of the principal 'and he thereby impliedly represents and warrants that he has authority from the company to do so' (Pearson LJ at page 498). Pearson LJ was of the view that the court, in that case, was concerned with (a) and not with (b). His Lordship held at page 498 that:

In this case the company has known of and acquiesced in the agent professing to act on its behalf, and thereby impliedly representing that he has the company's authority to do so. The company is considered to have made the representation, or caused it to be made, or at any rate to be responsible for it. Accordingly, as against the other contracting party, who has altered his position in reliance on the representation, the company is estopped from denying the truth of the representation.

[67] It is this reasoning that Mr Howell is seeking to pray in aid when it is being said that ARPI knew of the employment of Mr Campbell. Counsel did not cite Pearson LJ but there is no doubt that Pearson LJ has captured the essence of Mr Howell's submissions.

[68] Specific reliance was placed on Diplock LJ. Mr Howell did not rely on actual authority being given to Jemara or Mr Oostenbrink to bind ARPI. Mr Howell relied on

ostensible authority. What did his Lordship have to say on this? At page 502 Diplock LJ referring to actual authority held the following:

An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor. It may be that this rule relating to "undisclosed principals," which is peculiar to English law, can be rationalised as avoiding circuitry of action, for the principal could in equity compel the agent to lend his name in an action to enforce the contract against the contractor, and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract.

[69] Based on this dictum there is no evidential basis to find that the July 4, 1995 letter of agreement and its addendum conferred actual authority on Jemara or Mr Oostenbrink to contract with Mr Campbell as if either one of them had actual authority from ARPI to bind ARPI to any contract with Mr Campbell. Even if the court were to say that Mr Campbell did not know about the letter of agreement or the addendum as Diplock LJ has explained, that would be irrelevant since actual authority is the product of an agreement between principal and agent to that effect. The third party is not privy to or would necessarily know of that agreement.

[70] Unsurprisingly, Mr Howell's safe-harbour was ostensible authority. Diplock LJ said this about ostensible authority at page 503:

An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind

within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

[71] His Lordship explained that because the third party usually does not know of the contractual relationship between principal and agent, the third party hardly relies on actual authority; the third party almost inevitably relies on ostensible authority, that is to say, in the words of Pearson LJ, the principal made representation to the third party that caused that third party to believe and act upon the representation to his detriment. The detriment here is that Mr Campbell acted upon what Mr Gardner and Mr Sandifer said to him which resulted in him providing the services for which he was not paid.

[72] Diplock LJ explained at page 503:

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.

The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an

agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.

[73] Diplock LJ expanded on this to deal with the case of companies. When a company is involved there are additional matters to consider. One is whether the constitution of the company permits it to enter into the contract it is alleged to have made. A company cannot exceed its constitution. This was stated by Diplock LJ at page 504:

Under the doctrine of ultra vires the limitation of the capacity of a corporation by its constitution to do any acts is absolute. This affects the rules as to the "apparent" authority of an agent of a corporation in two ways. First, no representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself. Secondly, since the conferring of actual authority upon an agent is itself an act of the corporation, the capacity to do which is regulated by its constitution, the corporation cannot be estopped from denying that it has conferred upon a particular agent authority to do acts which by its constitution, it is incapable of delegating to that particular agent.

[74] Mr Howell has not presented any evidence regarding the constitution of ARPI. The court does not know whether ARPI had the authority to enter into a contract of the kind alleged with third parties such as Mr Campbell. There is no evidence of whether any special procedure needed to have been followed even if ARPI could lawfully enter such an agreement of the kind alleged in this case. However the court has and will proceed on the basis that ARPI has the authority to what it is alleged to have done.

[75] In this important judgment Diplock LJ was shifting the doctrinal foundation of the lack of authority on the party of company to enter into the kind of contract that may be in issue from constructive notice to the third party (by way of the memorandum and articles of association being public documents and thus the third party would have 'constructive notice' of them, that is to say, the law imputes the knowledge to him even if he in fact had no such knowledge) to one of the company being under a legal disability

to do what it is alleged to have done, that is, the company acted ultra vires or beyond the terms of its constitution.

[76] His Lordship explained further that a company can only act through natural persons and when one is relying on a representation made by the company then that representation must be made by someone who has the authority from the company to make such a representation. This was stated at paged 504 – 505:

The second characteristic of a corporation, namely, that unlike a natural person it can only make a representation through an agent, has the consequence that in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his "apparent" authority must be made by some person or persons who have "actual" authority from the corporation to make the representation. Such "actual" authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, upon the board of directors, or it may be conferred by those who under its constitution have the powers of management upon some other person to whom the constitution permits them to delegate authority to make representations of this kind. It follows that where the agent upon whose "apparent" authority the contractor relies has no "actual" authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.

[77] This means that as a practical matter when it comes to proof that the principal gave the impression that the agent had authority to do what he did, there is usually some evidence of the principal behaving in a manner that caused the third party to believe that the agent had the authority to do what he did. Evidentially, this often means that the principal knows that the agent was upto and with that knowledge sits back, does nothing about it thereby causing the third party to believe that the agent in fact had the authority he did not have. Diplock LJ expounded on this at page 505:

The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the "actual" authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such "apparent" authority that the agent had authority to contract on behalf of the company.

[78] Here is Diplock LJ elucidating an important point. His Lordship is saying that in the ordinary course of things the board of a company are there to manage the affairs of the company. If they permit the agent to act in the management or conduct of the company's affairs then that conduct by the board would amount to a representation to any person dealing with the agent that the agent has the authority to engage with third parties. In such a case the company is precluded from denying that the agent had the authority to do what he did. The reason is that the very act of permitting the agent to do what he did is itself an act of management within the competence of the board unless it is ultra vires the constitution of the company.

[79] Of times what constitutes representation by the board is knowledge of what the agent was doing and doing nothing to stop it or correct the mistaken view of the third party. This is why Mr Howell is speaking of knowledge on the part of Mr Gardner that Mr Campbell was hired. The logic is that Mr Gardner's knowledge is the knowledge of ARPI and therefore ARPI is bound contractually to pay Mr Campbell.

[80] Diplock LJ developed a four-part test to be applied in the context of ostensible authority when the third party is seeking to enforce a contract against a company. His Lordship said at pages 505 – 506:

If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown:

(1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;

(2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;

(3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and

(4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

[81] In this case (1) has not been satisfied. The court has already concluded that neither Jemara nor Mr Oostenbrink had any authority to enter into a contract of the kind Mr Campbell is seeking to enforce. It follows that (2) does not arise for consideration. Mr Campbell was not induced by ARPI to enter into the contract he is seeking to enforce. Mr Campbell knew in 1995 that Jemara and Mr Oostenbrink did not have the authority to enter into any contract of the kind he is seeking to enforce directly with him on behalf of ARPI

[82] Mr Howell and Mr Campbell cannot have it both ways. If Mr Campbell was competent at his engagement and carried out it properly and thoroughly then he would have known the terms of the July 1995 letter of agreement and the addendum between

Jemara and ARPI. It is a bit difficult to maintain that he was competent and also maintain he had no knowledge of the letter of agreement and addendum. The detailed reasons for this conclusion have been given already.

Did anything happen after the July 1995 agreement to change any of the conclusions arrived at so far?

[83] Mr Campbell states that '[i]n breach of the terms of my oral agreement of employment to be paid on the 25th day of every month the contract was unilaterally breached by the management of Club Ambiance by their failure to make the promised payments.' This state of affairs continued until 1998. Mr Campbell states that 'by 1998 I became very uncomfortable with the situation in which I was wrong' and that further to his concerns 'regarding the irregular payments [he] asked Alex to put the terms we had already agreed to orally in written form.' Then he says that he and Mr Oostenbrink 'agreed to have our contract in writing to secure [him] because [he] was training staff whose skill level was improving.' This culminated in agreement dated June 25, 1998. This is the first written agreement between Mr Campbell and anyone concerning his engagement.

[84] The written agreement dated June 25, 1998 was exhibited. It was signed by Mr Campbell and Mr Oostenbrink. It is on a document headed 'Club Ambiance.' Mr Oostenbrink purports to sign as managing director of ARPI. The letter states that Mr Campbell was confirmed as financial director for ARPI in Jamaica effective July 1998. The document states that the monthly fee would be US\$2,000.00 'payable to any third party of [his] choice.' This extended to but was not restricted 'to [his] credit card and or direct payment to you.' The letter stated that:

You are mandated to keep a running balance of your account as the unpaid amounts, if any, will be accrued and payable based on cash available to the hotel.

You will be required to provide financial, accounting and administrative services to the hotel as the case may be.

You will report directly to me [Mr Oostenbrink], and is (sic) required to update me on financial, accounting, taxation and business issues.

I hope we will continue to work together as a team and this relationship will be mutual (sic) beneficial.

[85] Mr Campbell goes on in his witness statement to complain that he was paid irregularly 'based on cash availability.' He says that his payments were in arrears. The June 25, 1998 document does not say that he was to be paid on the 25th day of each month. All it says is that there is to be a monthly payment. The agreement also required Mr Campbell to keep a running balance of unpaid amounts.

[86] Before this June 28, 1998 document was executed between Mr Oostenbrink and Mr Louis Campbell there was the February 16, 1996 management agreement between Jemara and ARPI. By this time Mr Campbell had been carrying out his functions for some time. The management agreement of February 16, 1998 agreement stated that it was effective as of November 1, 1995. ARPI is identified as the owner and Jemara as the manager. Clause 1 appointed Jemara 'subject to the terms hereto, to be the manager of the hotel for one year commencing from the effective date hereof.' Clause 2 states that Jemara accepts the appointment and agrees to manage the hotel on behalf of the owner.

[87] The recital states that ARPI owns and operates the hotel. It also states that ARPI agreed to appoint Jemara and Jemara agreed to serve as manager.

[88] The operative parts of the management agreement states that the owner appoints Jemara to be manager for a period of one year commencing from the effective date and a further appointment for two years to commence at the end of the first period. This additional appointment was subject to certain revenue targets. Cause 2 states that 'Jemara accepts such appointment and agrees to manage the hotel on behalf of the owner in a faithful, diligent, honest and business-like manner.' Under clause 4 Jemara was to provide on or before July 1 of each year an estimated in budget for approval by the owner.

[89] That agreement has a clause 5 which Mr Howell says permitted Jemara to employ persons directly for ARPI thereby making ARPI directly responsible for paying them. Clause 5 states in relevant parts:

Jemara, in the performance of its duties hereunder, shall supervise, direct, and control the management and operation of the hotel and will render or supervise and control the performance of all services and do or cause to be done all things reasonably necessary for the efficient and proper operation of the hotel as a first-class holiday resort. Without limiting the generality of the foregoing, Jemara services shall include the following:

- (a) the selection, employment and termination of employment, supervision, direction, training and assignment of the duties of a resort manager and of all employees engaged in the operation of the hotel including the managerial and working staff, the department heads, the executive and accounting staff and all other such employees.*
- (b) ...*
- (c) ...*
- (d) the selection, terms or employment and termination thereof including rate of compensation and the supervision, direction, training and assignments of duties of all employees shall be the duty and responsibility of and shall be determined or controlled by Jemara without interference by the owner or any of its shareholders, directors, officers or employees, and shall conform to the industry norms.*
- (e) ...*
- (j) generally the negotiation and execution of contracts reasonably necessary or desirable in connection with the operation of the hotel in the usual course of business except that execution of the following kinds of contracts shall be subject to the approval of the owner.*

[90] The management agreement speaks to other matters but it is this clause that is relied on by Mr Howell to say that Mr Campbell was properly contracted directly to ARPI.

[91] In cross examination by Mr Thomas, Mr Gardner agreed that the terms of the management agreement and clause 5 in particular did not preclude Mr Oostenbrink from contracting Mr Campbell directly to ARPI thereby making ARPI directly responsible for paying Mr Campbell for his services. This provided material for Mr Howell to make his submissions.

[92] The court notes that the management agreement expressly provides that it shall be construed according to the laws of Pennsylvania and the parties irrevocably submit to the jurisdiction of Pennsylvania in relation to all matter arising from or in connection with the contract. Thus the court cannot arrive at any binding interpretation of the agreement as between the contracting parties. However, what the court can do is look at the contract as part of the circumstances of the case.

[93] It will be recalled that this document was to replace the letter of agreement. The background also included the fact that Mr Gardner was looking for someone with the requisite skill and competence and who had the staff to market and manage the property. With this background it can safely be said that it was never contemplated that Jemara would not have its own people to deliver the services needed to ARPI. Stated another way, there is nothing so show that ARPI have moved away from its desire to have a company or person with his or her own staff to take up the challenge of managing the hotel in a very competitive all-inclusive environment.

[94] The compensation structure for Jemara under the management agreement was even more generous than under the 1995 agreement. Under the agreement Jemara was to receive 12% of the 'annual gross operating profit before fixed charges from hotel operations as an incentive management fee' The compensation package went even further to say that if the net profit before income tax exceed US\$350,000 annually during the duration of the agreement, Jemara shall earn 20% of such excess amount as an extra incentive management fee payable annually. It would be a remarkable thing if it

were to be accepted that Jemara was no longer to bring its staff to do the job but yet they would be getting more money for less responsibility, that is to say, the services were to be directly engaged by ARPI as distinct from paying Jemara for the service and Jemara paying its staff.

[95] The clause 5 relied on as the possible foundation for ARPI to contract directly with Mr Campbell does not have that effect having regard to all the circumstances. There is no evidence that Mr Gardner changed his requirement that the manager should have the staff with the requisite skills to run the hotel.

[96] What then of the letter of June 25, 1998 signed by Mr Campbell and Mr Oostenbrink? The court finds that Mr Oostenbrink had no authority to make it appear that Club Ambiance was contracting directly with Mr Campbell. Since the court has found that Mr Campbell knew of the terms of the 1995 agreement between Jemara and ARPI the court also finds that unless there was some change Mr Campbell would have known that in 1998 neither Mr Oostenbrink nor Jemara had the authority to contract with him on behalf of ARPI in the terms stated in the 1998 document.

[97] The 1996 agreement between ARPI and Jemara was known to Mr Campbell. The same reasoning applied to the 1995 agreement applies here. The 1996 document had even greater financial obligations imposed on ARPI. A competent financial director would know of the terms of the agreement if he was going to function properly. In the context of a loss-making hotel one of the primary things a financial director would want to know is the hotel's legal financial obligations. He would want to reduce unnecessary expenditure. In 1996 Mr Campbell and Mr Oostenbrink were still operating as a team.

[98] In the February 1996 management agreement, there is nothing there that would have empowered Jemara to bind Mr Campbell directly to ARPI. There is no acceptable evidence that ARPI ever represented to Mr Campbell that Jemara or Mr Oostenbrink had any authority to bind ARPI in any contract with Mr Campbell. There is no evidence that ARPI changed its requirement for Jemara to have its own staff to do the job required.

[99] If Mr Campbell's evidence is accepted then it appears that the sole document that governed his contractual relationship with ARPI from 1995 to 1998 was the June 25, 1998 document. This was until a document dated April 7, 2006 was executed. This document was exhibited. This agreement came about, he said, because after 12 years of work Mr Oostenbrink indicated that the hotel could not afford the arrears owed to Mr Campbell. The twelve years were 1995 – 2007. According to Mr Campbell the sum of US\$140,000.00 was owed to him. This figure was arrived at on the basis of US\$2,000.00/month less all payments that were already made during the period. He then says that the figure was agreed between himself, Mr Oostenbrink and Mr Oakley Stephenson, the accountant.

[100] The April 7, 2006 document says that it is made 'between [ARPI] hereinafter called the owner and Alex Oostenbrink, along with Jemara Resort nv and Jemara Property Ltd hereinafter called the operator all trading as Club Ambiance of Runaway Bay St Ann, Jamaica (hereinafter called the employer) of one part and Louis Campbell ... the employee on the other part.' The document goes on to say that the owner is 'in possession of the land and hotel building, and the operator is currently employed by the owner and represents the owner in all matter as it relates to the employer.' The operative part then sets out obligations on the part of the employer and employee. In respect of what has been described as fees the document states that 'fees will be of [US\$1,500.00] monthly, payable at the end of each month. The fees may be payable to any third party of the employee's choice, this includes but not restricted to credit card companies, bank transfer to any bank as directed by the employee.' The exhibited copy is very poor but it seems to have been signed by Mr Oostenbrink and two witnesses. Mr Campbell may have signed but since he is putting it forward as part of his case the court will treat it as if he accepted the terms stated in the document.

[101] There is a third document dated July 22, 2007. This document in the preamble cites ARPI as the owner, Jemara as the operator 'all trading as Club Ambiance' 'of one part' and Verona and Louis Campbell, styled the lessee and employee 'of the other part.' Later in the preamble Mrs Verona Campbell (Mr Campbell's wife) is referred to as

the lessee and Mr Louis Campbell referred to as the employee. The operative part states explicitly the following

THE SUM OWED BY THE HOTEL TO THE EMPLOYEE

Resulting from the unpaid amounts on the employment contract dated June 25, 1998, the hotel acknowledge and agrees that the sum of [US\$140,800.00] is owing to the employee as at June 1, 2006.

THE RELATIONSHIP

The hotel acknowledge that the employee Louis Campbell and the lessee Verona Campbell are husband and wife respectively and whereas the hotel will endeavour to settle the sum owing to the employee, the hotel authorise the lessess/employee to offset the rent set out in clause 2 of the lease agreement the sum owed to the hotel. Such off set or rent retained by the lessee/employee will not constitute any breach of the lease agreement whatsoever, providing the amounts offset or retained by the lessee/employee does not exceed the sum owed by the hotel to the employee.

THE TERM

This agreement commence (sic) on the 1st day of September 2007 and expires when all the sum owed by the hotel to the employee are paid or offsets whichever comes first.

[102] The agreement is signed by Mr Louis Campbell and Mr Oostenbrink. The date at the end of the document is July 22, 2007.

[103] Mr Campbell explained that his wife Mrs Verona Campbell had leased a shop from Club Ambiance and instead of there being an actual physical or electronic payment of rent moving from Mrs Campbell to the hotel it was agreed that the rent would be deducted from the sums owing to Mr Campbell. He said that the monthly rental was US\$500.00.

[104] There is a work sheet in the agreed bundle showing sums of US\$2,000.00, various payments and gift shop rental of US\$500.00. The sheet ends with a closing balance of US\$115,032.56.

[105] Mr Campbell states that he agreed to set off the sum of US\$25,500.00 for rental against the sum owed to him. He also says that as at July 11, 2013 when he filed the further amended claim form the amount owed to him from the July 7, 2007 agreement is US\$115,294.56. He also says that since the April 7, 2006 agreement he is owed a further US\$108,000.00. The total amount owed to him is US\$223,294.56.

[106] In cross examination Mr Campbell said that from 1995 to 2006 his emolument was US\$2,000/month and then it was reduced to US\$1,500.00/month.

[107] What of these last two documents? Mr Oostenbrink had no authority from ARPI to be concluding any contract with Mr Campbell in ARPI's name or on ARPI's behalf. Mr Howell in his written submissions fully appreciated that in the February 1996 document there was no mention of ARPI being responsible for paying Mr Campbell or Mr Campbell having any direct contractual relationship with ARPI. From all the evidence in the case Mr Oostenbrink would have known that it was never the intention of ARPI that Mr Oostenbrink or Jemara could contract with Mr Campbell on behalf of ARPI. When Mr Oostenbrink purported to sign these documents on behalf of ARPI he was in no doubt that he did not have that authority.

[108] Nothing happened in 1996 and beyond to cause Mr Campbell to think that ARPI gave authority to Jemara or Mr Oostenbrink to contract directly with him on behalf of ARPI. Mr Campbell would have known this because he would have access to the financial records of ARPI which in turn could have recorded ARPI's liability to Jemara. He had this information from 1995. In short, Mr Campbell had specific knowledge that ordinary third parties rarely have and his therefore outside of the **Freeman & Lockyer** principle.

[109] Mr Oostenbrink had no authority to execute any document naming himself, his company and ARPI as employer and in that capacity contract with Mr Campbell. This would have been known to Mr Campbell.

[110] Two other witnesses were called by Mr Campbell. There were Mr George Nicholas a union officer and Mrs Elaine Gardner, a retired tax official. Their evidence was to prove that Mr Campbell was an employee of the hotel. They were not able to speak to the contractual arrangements between Mr Campbell and any other person regarding his employment. These two witnesses told us that they interacted with him in their professional capacities but respectfully, their evidence did not advance Mr Campbell's case. No more will be said about them.

The counter claim and ancillary claim

[111] On the counter claim, there is no evidence from Mr Gardner or any witness on behalf of ARPI that the three-fold requirements of the tort of negligence, namely, duty owed, breach of the duty owed and consequential damage flowing from the breach of the duty owed existed. It is fair to say that ARPI did not pursue the counter claim with any vigour. The counterclaim is dismissed with costs to Mr Campbell.

[112] The ancillary claim brought by ARPI against Mr Campbell was in substance the same as the defence and counterclaim against Mr Campbell. The ancillary claim against Mr Campbell fails for the same reason the counterclaim failed.

[113] ARPI's ancillary claim against Mr Oostenbrink fails since that was contingent upon Mr Campbell succeeding in his claim. The claim against Mr Oostenbrink was seeking a contribution from him in the event that ARPI was found liable to Mr Campbell.

[114] The ancillary claim is dismissed with costs to the ancillary defendants.

Conclusions

[115] Mr Campbell has failed to prove that ARPI had the direct contractual responsibility for paying him. Mr Oostenbrink had no authority to enter into a contract on behalf of ARPI with Mr Campbell. Mr Campbell was presented to Mr Gardner as part of

a team who had worked wonders at Club Caribbean. Mr Oostebrink knew that ARPI at all material times was engaging with him in his capacity as the principal of Jemara which was to bring its own staff to execute the agreement with ARPI. This arrangement was known to Mr Campbell.

[116] Having regard to the context, all the circumstances and evidence this court does not accept that Mr Campbell did not know, in 1995, that ARPI had contracted with Jemara to operate the hotel. The court does not accept that Mr Campbell first heard about Jemara in 1996. ARPI is not responsible for paying Mr Campbell any of the money Mr Campbell claims that he is owed. Mr Campbell's claim against ARPI is therefore dismissed with costs to ARPI.

Delay

[117] The evidence in this matter was completed in November 2014. Oral submissions were heard in June 2016. The delay in completing this matter was occasioned by the court being on leave and scheduling an appropriate time to complete the hearing. The delay is regretted.

Disposition and orders

[118] The claim against the first defendant is dismissed and judgment entered for ARPI. Costs for two counsel to the first defendant to be agreed or taxed. The counterclaim against the claimant is dismissed and judgment entered for Mr Campbell. Costs on the counter claim to Mr Campbell to be agreed or taxed. The ancillary claim against both ancillary defendants is dismissed. Cost on the ancillary claim to the ancillary defendants to be agreed or taxed.

[119] Injunction granted restraining first defendant and or its agents, servants, employees from removing from Jamaica the sum of US\$270,000.00 from the island of Jamaica, wherever that sum is being held and regardless of whom holds the sum, for a period 28 days pending a determination by the Court of Appeal on whether the injunction should be granted for longer than 28 days.