[2022] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

SUPREME COURT CIVIL APPEAL NO 2/2017

AND

APPLICATION NO COA2020APP00104

BETWEEN	**LOUIS CAMPBELL**	**APPELLANT**
AND	**AMBIANCE RESORT PROPERTIES INC**	**RESPONDENT**

CONSOLIDATED WITH

SUPREME COURT CIVIL APPEAL NO 3/2017

BETWEEN	**AMBIANCE RESORT PROPERTIES INC**	**APPELLANT**
AND	**ALEX OOSTENBRINK**	**1ST RESPONDENT**
AND	**LOUIS CAMPBELL**	**2ND RESPONDENT**

Patrick Foster QC and Francois McKnight instructed by Nunes, Scholefield, DeLeon & Co for Louis Campbell

Miss Carlene Larmond instructed by Chancellor & Co for Ambiance Resort Properties Inc

Michael Thomas for Alex Oostenbrink

22, 23, 24 October 2019 and 31 January 2022

MCDONALD-BISHOP JA

Introduction

[1] Before the court for determination in these proceedings are two separate but interrelated appeals from the decision of Sykes J (as he then was) made in the Commercial Division of the Supreme Court on 2 December 2016. In the first appeal (SCCA No 2/2017), Mr Louis Campbell ('Mr Campbell') is the appellant. He is challenging the decision of the learned judge made in favour of Ambiance Resort Properties Inc ('ARPI'), the respondent in that appeal. In the second appeal (SCCA No 3/2017), ARPI is the appellant and has appealed the learned judge's decision made in favour of the 1st respondent, Alex Oostenbrink ('Mr Oostenbrink'), and the 2nd respondent, Mr Campbell. By order of a single judge of this court, made on 17 January 2017, the two appeals were consolidated and two separate interim injunctions were granted, restraining ARPI and Mr Oostenbrink from taking specified sums from the jurisdiction until the determination of the appeal.

[2] Since the hearing of the appeal, there had also been an application for fresh evidence brought by Mr Campbell, which is also disposed of in these proceedings (Application No COA2020APP00104).

[3] The appeals arose from the same set of facts and are, therefore, treated together in keeping with the order for consolidation. Although each will be dealt with in turn by my sister Simmons JA (Ag) (as she then was) and me in separate judgments, it is necessary to provide the common background to the appeals and fresh evidence application to ensure a better understanding of the issues that have arisen for determination by this court.

[4] However, before providing a synopsis of the relevant factual background, I must first, on behalf of the court, extend my profound apologies for the delay in handing down the court's decisions. Regrettably, the delay was not avoided, despite strenuous effort to expedite the disposal of the matter. I am mindful that no apology will be sufficient to

remedy the inconvenience and anxiety caused by the delay, but I still consider it right to proffer one.

The genesis of the claim

[5] ARPI is a company duly incorporated under the laws of Delaware in the United States of America ('USA') and registered in Jamaica as an overseas company. Up to 2012, it owned and operated a hotel in Runaway Bay in the parish of Saint Ann, which traded under the name, Club Ambiance (and will be referred to interchangeably as 'the hotel' or 'Club Ambiance'). The hotel was eventually sold in 2012.

[6] Mr George Gardner was a businessman from Pennsylvania, USA, and chairman of ARPI. He was also the director of the hotel. According to him, in or around 1995, while the hotel was owned and operated by ARPI, it was not doing well. It encountered stiff competition from other hotels that started offering all-inclusive vacation plans. This led to a decline in revenue. Despite changing managers, the hotel continued downhill in a financially precarious position and almost ceased to be viable. Mr Gardner desired to engage a person or an entity in the management of the hotel to restore its viability. The decision was taken that the hotel would offer its version of an all-inclusive plan.

[7] As a consequence, Mr Gardner met and entered into discussions with Mr Oostenbrink regarding marketing the hotel so that it could compete effectively in the all-inclusive market. At the time, Mr Oostenbrink was the general manager of another property, Club Caribbean. He was also the principal of Jemara Resorts NV ('Jemara'), a company registered in Aruba. This discussion between ARPI and Mr Oostenbrink led to a written agreement in July 1995, between Jemara and ARPI, for Jemara to manage the hotel. These discussions with Mr Oostenbrink, acting for and on behalf of Jemara, were conducted through another company, Waymaker, which Mr Gardner owned. Waymaker was a management company that provided management services for companies owned by Mr Gardner. Mr Lee Sandifer was its chief financial officer. Two agreements emerged from these discussions. The first was what had been styled a Letter of Agreement dated

4 July 1995 ('the 4 July 1995 agreement'), and the second was a Management Agreement dated 16 February 1996 ('the February 1996 management agreement').

[8] Mr Campbell was working with Club Caribbean at the time of the discussions between Mr Gardner and Mr Oostenbrink in or around July 1995. Messrs Campbell and Oostenbrink had worked together at Club Caribbean before 1995 with what seemed to have been a resounding success. They reportedly restored the viability of that hotel, and Mr Oostenbrink was of the view that he and Mr Campbell could replicate that success at Club Ambiance. Mr Oostenbrink recommended to Mr Gardner that Mr Campbell should be a part of the restoration process. Mr Campbell was not a part of those discussions between Mr Oostenbrink/Jemara and ARPI.

[9] In July 1995, Mr Oostenbrink approached Mr Campbell about teaming up with him to manage and restore Club Ambiance as they had done at Club Caribbean. Mr Campbell did not object. Mr Gardner also accepted the involvement of Mr Campbell. According to Mr Oostenbrink, Mr Campbell was engaged "to implement new systems and train the accounting staff".

[10] Mr Campbell subsequently met with Messrs Gardner, Sandifer and Oostenbrink in July 1995 when Messrs Gardner and Sandifer asked him about himself. Mr Sandifer then held discussions with him regarding the services he was required to provide.

[11] Mr Campbell started working part-time at Club Ambiance in July 1995, while he retained his job at Club Caribbean. However, it was not until 25 June 1998 that he entered into a written contract for 10 years regarding his engagement with Club Ambiance. Mr Oostenbrink signed the agreement on behalf of Jemara and ARPI.

[12] A further contract, dated 7 April 2006, was purportedly entered into between ARPI, Mr Oostenbrink, Jemara Resort and Jemara Property (as "the operator") all trading as Club Ambiance (called the "employer"), on the one hand, and Mr Campbell (called "the employee"), on the other hand. Mr Oostenbrink signed for and on behalf of the "employer" for Mr Campbell to provide services at Club Ambiance for 15 years at

US$1500.00 per month. On 22 July 2007, a supplemental agreement was entered into purportedly between ARPI (as "owner") and Jemara ("the operator"), both trading as Club Ambiance ("the employer"), on the one hand, and Verona Campbell and Mr Campbell (called the lessee and employee, respectively), on the other hand. This agreement was supplemental to a lease agreement entered into on 22 July 2007 between Club Ambiance and Verona Campbell and the 25 June 1998 agreement between Club Ambiance and Mr Campbell. This agreement provided, among other things, for rent owed to the hotel by Mr Campbell's wife for two shops she had rented to be set off against fees owed to Mr Campbell by ARPI. Mr Campbell alleged that the total sum owed to him by the date of the filing of his further amended claim form was US$223,294.56 after the sums set-off for his wife's rental were deducted.

[13] According to Mr Campbell, his engagement with Club Ambiance ended in 2012 when the hotel was sold. He was not paid monies he claimed are due and owing to him for his services at Club Ambiance under the contracts. His contention is that he was entitled to be paid outstanding sums under what he alleged to have been a contract of employment with ARPI. ARPI rejected his assertions that he was directly employed to it, leading to the initiation of the claim in the Supreme Court.

The procedural history in the Supreme Court

[14] For the determination of the issues on the appeal, it is vital to have a proper appreciation of not only the evidence provided in the Supreme Court but also the pleadings on which the parties' respective cases were based. Accordingly, a brief insight into the relevant parties' statements of case is provided.

Mr Campbell's statement of case

[15] On 16 July 2013, by way of a further amended claim form, Mr Campbell pursued his claim against four defendants jointly and severally. The defendants were ARPI (1st defendant), Jemara (2nd defendant), Jemara Properties Companies Limited ('Jemara Properties') (3rd defendant), and Alex Oostenbrink (4th defendant).

[16] By that further amended claim form, Mr Campbell advanced his claim against the four defendants in these terms as summarised for convenience:

(i) Damages for breach of contract in the aggregate sum of US$108,000.00, being monies due and owed under a contract between Mr Campbell and all four defendants dated 7 April 2006 with interest at 1% above the commercial rate, compounded monthly on the amounts due from the date the payment had become due to the date of judgment.

(ii) The sum of US$115,294.56, being the balance of the sum of US$140,800.00, that ARPI had acknowledged in an agreement dated 22 July 2007, with interest at 1% above the commercial rate, compounded monthly on the amount due from the date such payment had become due to the date of judgment.

(iii) Specific performance of the agreement dated 7 April 2006 for the sum of US$162,000.00, being the balance of the contract price payable under that agreement, with interest at 1% per annum, from 31 May 2006 until payment.

(iv) Alternatively, interest at the usual commercial rate or at such rate and on such terms as the court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act.

(v) Costs.

[17] In his further amended particulars of claim, bearing the same date as his further amended claim, Mr Campbell sought to prosecute his claim based on the two agreements dated 7 April 2006 and 22 July 2007. He averred that by the agreement of 7 April 2006, the defendants retained his services as the financial director for Club Ambiance for 15

years commencing 1 May 2006. By what he called "a tripartite agreement" dated 22 July 2007, ARPI, through Jemara, acting as its duly authorised agent, acknowledged the debt of US$140,800.00 owed by ARPI to him for services he provided to ARPI under the contract dated 25 June 1998.

[18] He contended that it was an express term of the agreement of 7 April 2006 that he would perform the services detailed in the contract of 25 June 1998 and be paid US$1500.00 at the end of each month. He performed the services in accordance with the agreement of 7 April 2006, and pursuant to the agreement of 22 July 2007, his wife had set off rental due to ARPI from the debt of US$140,800.00, leaving a balance of US$115,294.56.

[19] The four defendants, he averred, had failed or neglected to pay him the sums of US$108,000.00 and US$115,294.56, despite his repeated demands for payment. In addition, the four defendants have breached the contract of 7 April 2006 by prematurely terminating his contract before the expiration of 15 years, and he is entitled to be paid the balance of the contract price totalling US$162,000.00. He, therefore, claimed payments in three distinct sums: US$140,800.00, US$115,294.56, and US$162,000.00, plus interest.

[20] Jemara, Jemara Properties and Mr Oostenbrink were never served with Mr Campbell's claim and were, therefore, not parties to the proceedings in the court below relating to the claim. ARPI was the only defendant which was served.

ARPI's statement of case

[21] ARPI defended the claim by an amended defence filed on 13 August 2013. It contended that, at all material times, Club Ambiance was managed by Jemara, in accordance with the 4 July 1995 agreement and the subsequent 16 February 1996 management agreement, which was to be effective as of 1 November 1995. According to these agreements, Jemara was to provide management services, including marketing services by Mr Oostenbrink and accounting support services by Mr Campbell. ARPI

contended that at the time of contracting with Jemara, it was never the parties' intention that Mr Campbell was to be engaged as an employee of ARPI. It averred that at no time did it have a contract of employment with Mr Campbell but that it was always intended that Mr Campbell was to be engaged to provide services as a part of Jemara's management team. Therefore, any sums owed to Mr Campbell for services rendered would not be owed to him by ARPI but by Jemara under the agreement ARPI had with Jemara and the compensation package to be paid.

[22] ARPI further contended that at no time did the February 1996 management agreement authorise Jemara or Mr Oostenbrink to act on its behalf to engage Mr Campbell as its financial director. Furthermore, ARPI had made no representations to Mr Campbell that it wished to hire him as its employee, nor did it represent to Mr Campbell that either Jemara or Mr Oostenbrink was its agent to employ him in the capacity of finance director or at all.

[23] ARPI also averred that its staff listing and payroll records did not reflect that Mr Campbell has ever been a member of its staff, nor was he paid a salary.

[24] ARPI filed a counterclaim and an ancillary claim against Mr Campbell and an ancillary claim against Mr Oostenbrink. It counterclaimed for, among other things, damages for negligence against Mr Campbell and entitlement to a set-off against Mr Campbell's claim. The basis of the negligence claim was that if Mr Campbell was, as he alleged, the financial director of Club Ambiance, then he had breached the duty of care he owed to ARPI by his failure, refusal and/or neglect to handle the financial affairs of the hotel in a reasonable and prudent manner which directly resulted in losses to ARPI.

[25] Alternatively, it claimed an indemnity or contribution from Mr Oostenbrink in respect of any sums found to be due to Mr Campbell if he succeeded on the claim. There were several bases for this claim. The first was that Jemara, through Mr Oostenbrink, acted without authority and in breach of contract in entering into an employment agreement with Mr Campbell purportedly on behalf of ARPI. The second was that Jemara,

through Mr Oostenbrink, also acted without authority, in breach of contract and/or negligently, in entering into the supplemental agreement of 22 July 2007. Finally, Mr Oostenbrink's breach of contract and/or negligence caused or contributed to Mr Campbell's claim for breach of contract.

Mr Oostenbrink's statement of case

[26] The court did not determine Mr Campbell's claim against Mr Oostenbrink as Mr Oostenbrink was never served with Mr Campbell's claim. However, he was served with the ancillary claim and filed a defence in response to it on 15 November 2013. The learned judge took the view that Mr Oostenbrink was, therefore, not a defendant in the claim brought by Mr Campbell and was only there as an ancillary defendant on ARPI's ancillary claim.

[27] Mr Oostenbrink's response to the ancillary claim was, basically, that by virtue of the February 1996 management agreement, he acted as the principal and/or agent for ARPI and so had the right to enter into an employment contract with Mr Campbell on its behalf. He also averred that ARPI knew of the employment of Mr Campbell through Messrs Gardner and Sandifer. There was no objection by ARPI to the employment, he stated, and as a consequence, ARPI, by its conduct of acquiescence and/or inactivity, had ratified the employment of Mr Campbell as finance director. Therefore, ARPI would be estopped from bringing a claim for an indemnity or contribution against him in response to Mr Campbell's claim. He also denied the allegations of negligence and breach of contract particularised against him and that ARPI was entitled to the relief claimed. Finally, he set out the facts on which he relied in resisting the ancillary claim.

ARPI's reply to Mr Oostenbrink's statement of case

[28] In its reply, ARPI relied on facts pleaded in its particulars of claim and insisted that Mr Campbell was never employed by it as a member of staff. It averred that it had never seen an employment contract between itself and Mr Campbell. It has never had any payroll material or documents evidencing the employment of Mr Campbell by it. ARPI relied on the 4 July 1995 agreement and its addendum for their full terms and effects.

ARPI also relied on clause 5(d)(1) of the 16 February 1996 management agreement and contended that on no construction of this agreement was there any authority on the part of Mr Oostenbrink to act on its behalf in employing Mr Campbell.

Mr Campbell's response to the counterclaim and ancillary claim

[29] Mr Campbell, in his defence to the counterclaim and ancillary claim, averred that he was never a party to any contract between ARPI and Mr Oostenbrink, Jemara or Jemara Properties and so could not admit or deny any allegations as to the substance of their contractual arrangement. He denied that he was negligent, as alleged and that ARPI was entitled to set off any payments due to him.

The learned judge's decision

[30] The matter came on for hearing before the learned judge on divers days between 29 September 2014 and 17 June 2016. The relevant parties gave evidence by way of witness statements and viva voce evidence. Mr Campbell gave evidence on his behalf and relied on the evidence of Mr George Samuel Nicholas, trade unionist, and Mrs Elaine Thompson, a retired compliance officer with the Tax Administration of Jamaica. ARPI relied on the evidence of Mr Gardner and Mrs Carolyn Lloyd, a hospitality consultant. Mr Oostenbrink was his own historian. The witnesses were all cross-examined.

[31] On 2 December 2016, the learned judge, after considering the evidence and the submissions of counsel on the parties' behalf, delivered his written judgment in which he made orders as follows:

> "1. The claim against [ARPI] is dismissed and judgment entered for ARPI.
>
> 2. Costs for two counsel to [ARPI] to be agreed or taxed.
>
> 3. The counterclaim against [Mr Campbell] is dismissed and judgment entered for Mr Campbell.
>
> 4. Costs on the counterclaim to Mr Campbell to be agreed or taxed.

5. The ancillary claim against both [Mr Campbell and Mr Oostenbrink] is dismissed.

6. Cost [sic] on the ancillary claim to [Mr Campbell and Mr Oostenbrink] to be agreed or taxed.

7. Injunction granted restraining [ARPI] and or its agents, servants, [and] 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 of 28 days pending a determination by the Court of Appeal on whether the injunction should be granted for longer than 28 days."

[32] The findings on Mr Campbell's claim and ARPI's counterclaim and ancillary claim will be outlined, respectively.

(a) Findings of the learned judge on Mr Campbell's claim

[33] In coming to his decision, the learned judge identified what he regarded as the first two crucial issues to be decided in these terms:

> "(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."

[34] The learned judge, after a comprehensive and close review of the evidence, concluded on these issues on the claim that:

(i) In 1995, there was no legally enforceable contract between Mr Campbell and ARPI. Mr Sandifer did not conclude any contract between ARPI and Mr Campbell in 1995, and so, in 1995, ARPI did not owe Mr Campbell any money and was not obliged to pay him for any services he provided in 1995 (para. [62]).

(ii) 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 service of Mr Campbell. This was known to Mr Campbell (para. [63]).

(iii) There is no evidential basis to find that the Letter of Agreement of 4 July 1995 and its addendum conferred actual authority on Jemara or Mr Oostenbrink to contract with Mr Campbell and bind ARPI to any contract with Mr Campbell (para. [69]).

(iv) Jemara and Mr Oostenbrink did not have the ostensible authority to contract with Mr Campbell on behalf of ARPI on the basis that Mr Gardner knew that Mr Campbell was hired (para. [37]).

(v) 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 (paras. [81]

(vi) In 1998, neither Mr Oostenbrink nor Jemara had the authority to contract with Mr Campbell when they signed the agreement of 25 June 1998. Mr Campbell knew of the 1995 contract, and unless there were some changes, he would have also known that neither Mr Oostenbrink nor Jemara had the authority to contract with him on behalf of ARPI (para. [96]).

(vii) Nothing in the 16 February 1996 management agreement would have empowered Jemara to bind Mr Campbell directly to ARPI (para. [98]).

(viii) Mr Oostenbrink had no authority from ARPI to conclude any contract with Mr Campbell in ARPI's name or on its

behalf as contained in the two documents of 7 April 2006 and 22 July 2007. Nothing happened in 1996 and beyond to cause Mr Campbell to think that ARPI gave Jemara or Mr Oostenbrink the authority to contract directly with him on behalf of ARPI (paras. [100]-[108]).

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

(x) Mr Campbell had failed to prove that ARPI had direct contractual responsibility for paying him (para. [115]).

(xi) Mr Oostenbrink had no authority to enter into a contract on behalf of ARPI with Mr Campbell. Mr Oostenbrink knew that ARPI, at all material times, was engaging him in his capacity as the principal of Jemara, which was to bring its own staff to execute the agreement with ARPI. This agreement was known to Mr Campbell (para. [115]).

(xii) Having regard to the context, all the circumstances and evidence, the court does not accept that Mr Campbell did not know in 1995 that ARPI had contracted Jemara to operate the hotel. The court does not accept that Mr Campbell first heard about Jemara in 1996 (para. [116]).

(xiii) ARPI is not responsible for paying Mr Campbell any money Mr Campbell claims he is owed (para. [116]).

(xiv) Mr Campbell's claim against ARPI is therefore dismissed (para. [116]).

(b) Findings of the learned judge on ARPI's counterclaim and ancillary claim

[35] In dismissing ARPI's counterclaim and ancillary claim, the learned judge opined as follows:

> (i) There is no evidence adduced by ARPI to establish the three-fold requirements of the tort of negligence, namely, duty of care, breach of the duty owed and consequential damage flowing from the breach of duty owed (para. [111]).
>
> (ii) The ancillary claim was, in substance, the same as the defence and counterclaim, and it fails for the same reason as the counterclaim (para. [112]).
>
> (iii) ARPI's ancillary claim fails against Mr Oostenbrink because it was contingent upon Mr Campbell succeeding in his claim (para. [113]).

The consolidated appeals

[36] Both Mr Campbell and ARPI are aggrieved by the learned judge's decision, not surprisingly, for different reasons. Mr Campbell complains that the learned judge erred in numerous respects in dismissing his claim with costs. ARPI's dissatisfaction is that the learned judge erred in dismissing the ancillary claim and awarding costs to Messrs Campbell and Oostenbrink. It has taken no issue with the dismissal of the counterclaim.

[37] Each appeal has been examined in turn. Mr Campbell's appeal is the first to be determined. However, in seeking to convince the court that the learned judge erred in law, Mr Campbell sought to adduce fresh evidence on appeal, which must first be disposed of before the substantive appeal can properly be determined.

Mr Campbell's appeal (SCCA No 2/2017)

Application to adduce fresh evidence (Application No COA2020APP00104)

The fresh evidence

[38] After this court heard the appeal and reserved its decision, Mr Campbell, by an amended notice of application filed 7 July 2020, sought permission to adduce, as fresh evidence in the appeal, a copy of the Certificate of Incorporation for Jemara Resort dated 25 July 2017 and a Liquidation Report from the Chamber of Commerce and Industry of Aruba dated 25 July 2017.

[39] The primary grounds on which the order is sought are as follows:

> "a) The evidence regarding the incorporation of [Jemara] will have an important influence on the result of this case.
>
> b) The evidence shows clearly that [Jemara] was incorporated on August 31, 1995, whereas the Letter of Agreement relied on by the learned judge at trial, was dated July 4, 1995.
>
> c) It demonstrates that [Mr Campbell] could not have been an employee/staff member of [Jemara] as it was not a legal entity at the material time.
>
> d) The evidence is credible.
>
> e) The interest of [Mr Campbell] will be prejudiced if the evidence is not allowed in.
>
> f) The Orders requested are necessary to dispose fairly of the appeal herein and [to] save costs.
>
> g) [Mr Campbell] has complied with all other rules, orders and directions of this Honourable Court."

[40] ARPI objects to the application with accompanying submissions that it should be dismissed. In any event, the question of whether the fresh evidence should be received on appeal is one entirely in the discretion of the court.

The Law

[41] Of necessity, the application is determined by reference to the law relating to the reception of fresh evidence on appeal in civil proceedings. Just recently, in **Harold Brady v General Legal Council** [2021] JMCA Civ App 27, this court had to examine the circumstances in which it is permitted by law to receive fresh evidence on appeal. The principles of law that have been applied over the years by this court were, once again, rehearsed and examined. For expediency's sake, I will adopt, with slight modification, what I stated in **Harold Brady v GLC**, at paras. [38] to [46], to be the guiding principles that govern consideration of this application.

[42] The general principle embodied in rule 52.21(2)(b) (formerly rule 52.11(1)(b) of the United Kingdom Civil Procedure Rules) ('the UK CPR') is that, unless it orders otherwise, the appeal court will not receive evidence that was not before the lower court. There is no similar provision in our Civil Procedure Rules 2002 ('CPR') and the Court of Appeal Rules ('CAR'). Nevertheless, by way of an established practice, which can be said to have crystallised into law, this court has operated on the same principle in civil proceedings as the UK Court of Appeal. It does so by applying common law principles, most notably, the principles laid down in the well-known case of **Ladd v Marshall** [1954] 1 WLR 1489 ('the **Ladd v Marshall** principles'). This court has endorsed and applied those principles, as the applicable test, in numerous decisions from the court. See, for instance, **Rose Hall Development Limited v Minkah Mudada Hananot** [2010] JMCA App 26, and as cited on behalf of Mr Campbell, **Merlene Thomas v Michael Spencer and Others** [2010] JMCA App 9.

[43] The **Ladd v Marshall** principles have established that the court will only exercise its discretion to receive fresh evidence in civil proceedings where:

1. the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;

2. the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and
3. although the evidence itself need not be incontrovertible, it is such as is presumably to be believed or apparently credible.

[44] **Ladd v Marshall**, therefore, laid down the rule that where there has been a trial or a hearing on the merits, the decision arrived at the end of that process should only be reversed by reference to new evidence, if it can be shown that the foregoing conditions are satisfied. This requirement regarding the reception of fresh evidence, following a hearing on the merits, reflects the long-settled policy established by strong authority that there must be finality to litigation.

[45] **Ladd v Marshall** remains good law in Jamaica and is usually the starting point in considering fresh evidence applications in civil proceedings, even though there is authority to suggest that the court is not bound in a straightjacket to apply these principles. The primary consideration, it is held, is that justice is done (see **Rose Hall Development Limited**). It should be noted, however, that although the CPR does not make express provision for fresh evidence applications like its UK counterpart, it is accepted that the **Ladd v Marshall** principles are not in conflict with the overriding objective of the CPR (see **Darrion Brown v The Attorney General of Jamaica and Others** [2013] JMCA App 17). Therefore, the **Ladd v Marshall** principles are consonant with the interests of justice and the overriding objective in considering fresh evidence applications in civil cases.

[46] This court has also adopted the instructive pronouncements of Rose LJ in **R v Sales** [2000] 2 Cr App R 431 in considering the approach to an application for the court to admit fresh evidence where the issue of credibility arises. His Lordship stated, in part, at page 438:

> "... Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for [the] Court to hear the witness de bene esse in order to determine whether the evidence is capable of belief."

[47] ARPI has raised questions regarding, among other things, the reliability and credibility of the documents Mr Campbell wishes to adduce. It is settled law that for Mr Campbell to succeed on his application, he must satisfy all the requirements of **Ladd v Marshall** as they are cumulative. So, even if the evidence is credible, which is the final requirement, he must fulfil the first two requirements as to the unavailability of the evidence at the time of trial and that the evidence was likely to have had an important influence on the outcome of the trial, even if not decisive. These first two requirements of **Ladd v Marshall** will be considered in turn.

Discussion and findings

(i) Was the evidence regarding the incorporation of Jemara not available and could not have been obtained with reasonable due diligence at the trial?

[48] Mr Campbell, in his affidavit in support of the application, deposed that sometime in July 2017, he was advised that Jemara was not an entity incorporated in Aruba prior to the letter of agreement dated 4 July 1995. After that, upon discovering that fact, he made enquiries in or around 17 July 2017 with officials from the Chamber of Commerce and Industry, Aruba, and requested an original copy of the Certificate of Incorporation and Liquidation Status Report for Jemara. The document was received by him on 25 July 2017 and showed that Jemara was not incorporated on 4 July 1995. This fact is important to show that Jemara could not have hired him because it did not exist when he was engaged to work with Club Ambiance in 1995.

[49] In my view, the court should not accept Mr Campbell's argument that the evidence he now seeks to adduce regarding Jemara's status as an incorporated entity should be

received because it was not available at the time of the trial. I say so for these reasons. Mr Campbell spoke with Mr Oostenbrink concerning their engagement with Club Ambiance from as far back as July 1995. On Mr Campbell's own evidence, he became aware of Jemara's agreement with ARPI in 1996. Subsequently, he signed several agreements with Mr Oostenbrink in which Jemara was represented as a party to the contract on whose behalf Mr Oostenbrink was acting and relied on those written agreements in pursuing his claim.

[50] Information regarding Jemara's standing and date of incorporation would have been available from as far back as August 1995 and, therefore, certainly by the time Mr Campbell entered into his first written contract with Mr Oostenbrink purportedly as representative of Jemara in 1998. He would have entered into an agreement with Jemara named as agent for ARPI without checking the legal standing of Jemara; that was his sole responsibility to do. He would have been put on notice that this was a corporate entity, and so from as far back as 1998, at least, he ought to have done his due diligence checks regarding the capacity of the entities with which he was contracting.

[51] Furthermore, and even more importantly, after executing the agreements with Jemara as a party, Mr Campbell's further amended claim was filed in July 2013, naming Jemara as a defendant. Up to July 2013, he represented in his statement that Jemara was a corporate entity and, therefore, liable to be sued in its name. He declared the corporate status of Jemara and that its place of incorporation was Aruba. This averment must be taken to mean that Mr Campbell (or his attorneys-at-law on his behalf) had done his independent investigation and was satisfied that Jemara was endowed with the requisite legal personality to be sued in the proceedings he was initiating. That investigation would have unearthed the Certificate of Incorporation now being relied on and shown that Jemara was incorporated after July 1995.

[52] If Mr Campbell had carried out that prudent inquiry that he was obliged to do as a claimant bringing action against a corporate entity, he would have obtained the evidence he is now seeking to elicit concerning the incorporation date of Jemara. Even if

he did not have the information in his possession during the trial, it is undeniable that Mr Campbell could have obtained this information with reasonable diligence before the trial ended in 2016.

[53] I conclude that any information regarding Jemara's incorporation and standing as a legal entity would have been available when Mr Campbell amended his statement of case in 2013, and, indeed, at the time of the trial and could have been obtained with reasonable diligence for use at the trial.

[54] The report showing the liquidation status of Jemara is not relevant in these proceedings as the evidence of it being in liquidation did not arise in the proceedings in the court below and had no bearing on the issues that arose for resolution. Relevance remains the primary test for admissibility, and this evidence is irrelevant to the appeal. On this basis alone, that document is not admissible as fresh evidence in the appeal.

[55] Furthermore, and even of graver concern is that Mr Campbell claimed to have heard of the unincorporated status of Jemara in July 1995, as far back as 2017, and had also obtained the documents he wished to adduce from as far back as 2017. Although he had the evidence he now wishes to elicit, he did not make his application to adduce fresh evidence in the appeal until 2020. This application was after the hearing of arguments in the appeal ended. There is no reasonable explanation or, indeed, any reason proffered for the inordinate delay between 2017 and 2020 in bringing this application. The absence of any explanation for this late application is unacceptable.

[56] In any event, even if the lateness of the application would not have militated against a favourable consideration of the application, Mr Campbell has failed to satisfy the first pre-requisite of **Ladd v Marshall**. Accordingly, the application should be refused on that basis alone.

[57] I must state, however, that even if the court were to ignore this failing and proceed to consider the application in the interests of justice, Mr Campbell is still faced with insurmountable difficulty in persuading the court to receive what he regards as fresh

evidence when the second **Ladd v Marshall** principle is considered. Accordingly, my finding regarding that requirement will now be briefly stated.

(ii) Whether the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive

[58] Mr Campbell's primary contention is that the fresh evidence demonstrates that Jemara was not an entity at the time of entering into the 4 July 1995 agreement with ARPI. This, he said, will possibly affect the outcome of this appeal.

[59] In my view, the question regarding whether Jemara was incorporated on 4 July 1995, when the agreement was signed between ARPI and Mr Oostenbrink, purportedly, as representative for Jemara, is of no relevance to the issues the court below had to resolve at trial. It also has no bearing on the issue this court has to decide on the consolidated appeal. The issue at trial was not whether Jemara employed Mr Campbell but whether he was employed to ARPI when he claimed that he had a contract for services with ARPI for which it should be held liable in damages for breach of contract.

[60] The case he deployed at trial, which was slightly different from his pleaded case, was that ARPI employed him on two bases. Firstly, by virtue of discussions he had with Mr Sandifer in 1995, who negotiated an oral contract with him on behalf of ARPI "to bring the accounting of the hotel up to date, to train the accounting staff and to provide financial, accounting and administrative services to the hotel" at a salary of US$2000.00 per month as of July 1995. This basis was never pleaded and did not specifically form the basis of a claim for damages. He, however, raised it in his witness statement filed on 21 February 2014. It was presented as part of the history of his alleged employment with ARPI. The second basis, which he pleaded, is by virtue of written contracts he purportedly entered into with ARPI in 1998, 2006 and 2007 with Mr Oostenbrink acting as the authorised agent of ARPI.

[61] In keeping with the pleaded statement of case, the pertinent question for the court would have been whether Mr Campbell was employed to ARPI based on the written contracts he relied on since 1998 and should be paid by ARPI, the sums claimed by him

as arising from breach of those contracts. The question of whether Jemara was incorporated or not, in or around 4 July 1995, did not figure and could not have figured in the resolution of that issue.

[62] The learned judge concluded that Mr Campbell became affiliated with ARPI as a member of Jemara's team, brought in by Mr Oostenbrink. He opined that Mr Campbell knew or must have known of Jemara's agreement with ARPI in 1995, as he purportedly served as financial director at Club Ambiance. The learned judge's view was that Mr Campbell's engagement was through Jemara and not through any direct engagement with ARPI through Mr Sandifer. He also rejected the case that Mr Oostenbrink and/or Jemara were authorised to bind ARPI to a contract with Mr Campbell. It is not at all likely, given the case the learned judge had to decide and his reasoning in considering it, that if he had received evidence that Jemara was not incorporated on or around 4 July 1995, his decision would have been different. He would, nevertheless, have concluded that Mr Campbell was not directly employed by or to ARPI and entitled to be remunerated by ARPI.

[63] Therefore, even if it could be said that the evidence that Jemara was not yet incorporated in July 1995 is reliable and credible (although ARPI contends it is not), that could not help Mr Campbell in this application. This conclusion is informed by the issues before the learned judge for determination and the decision he arrived at. The corporate status of Jemara was never an issue and would not have factored into any material question that the learned judge had to determine on the claim brought by Mr Campbell. Whether Jemara was incorporated or not, the questions for resolution would still have been, in short: (1) whether by an oral contract in 1995, ARPI had directly employed Mr Campbell; and (2) whether Mr Oostenbrink, who signed the three contracts Mr Campbell was relying on, had brought Mr Campbell into direct relationship with ARPI for ARPI to be directly responsible for his remuneration. The contracts on which Mr Campbell based his claim would have been those existing when Jemara was incorporated. The learned judge was unequivocal in his rejection of Mr Campbell's case for reasons that would have had nothing to do with the legal standing of Jemara in July 1995.

[64] In all the circumstances of the case before the learned judge, evidence of Jemara's date of incorporation would have had no bearing whatsoever on the question for determination at trial so as to have had an important influence on the outcome of the case. For these reasons, the application has failed the second limb of **Ladd v Marshall**. It follows, therefore, that a determination of the issue regarding the credibility of the proposed evidence is not necessary; because even if the evidence were found to be credible, that could not, on its own, avail Mr Campbell. Accordingly, Mr Campbell's application has failed the **Ladd v Marshall** test for the admissibility of fresh evidence.

(iii) The application of the overriding objective

[65] Counsel for Mr Campbell has advanced arguments that seem to suggest that even if the **Ladd v Marshall** prescriptions are not satisfied, the application should be granted pursuant to rule 2.14(b)(h) of the CAR and the overriding objective of the CPR, which is embodied in the CAR. Rule 2.14(b)(h) states that the court may "make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal".

[66] As already established, the CAR does not expressly provide for the reception of fresh evidence in civil appeals. There is also no statutory power conferred on the court to admit fresh evidence in civil proceedings similar to the provision of section 28 of the Judicature (Appellate) Jurisdiction Act, which confers power on the court to receive fresh evidence in criminal proceedings. As such, the CAR has not conferred that power on the court; and so, the overriding objective of the rules would not expressly apply to the exercise of the court's discretion in treating with a fresh evidence application. This has been made clear in the judgment of this court in **Darrion Brown** in which Phillips JA, speaking for the court, noted that:

> "[37] The approach with regard to the exercise of the discretion of the court utilizing the overriding objective has arisen subsequent to the amendment of the [UK] Civil Procedure Rules (introduced by the Civil Procedure (Amendment) Rules 2000) …"

[67] Given that our rules have not been amended along the lines of the UK CPR to permit the Court of Appeal to receive fresh evidence on appeal, our court is still governed by the **Ladd v Marshall** test. It follows logically then that the approach regarding the use of the overriding objective in determining fresh evidence applications would not be applicable as it does not involve interpreting or applying any rule of the CAR. As we all know, the overriding objective of the CPR (and, by extension, the CAR) is only operable when the court is interpreting or exercising powers under the rules (see rule 1.2 of the CPR).

[68] Phillips JA in **Darrion Brown** also helpfully made reference to the case of **Mostyn Neil Hamilton v Mohamed Al Fayed** [2000] EWCA Civ 3012, where, in delivering the judgment of the court, Lord Phillips MR made this statement concerning the amended rule in the UK CPR:

> "... We consider that under the new, as under the old procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. **In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straightjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective.** In adopting this approach we are following the guidance to be found in the judgment of May L.J in Hickey v Marks (6 July 2000), of Morritt V-C in Banks v Cox (17 July 2000) and of Hale L.J. in Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318." (Emphasis added)

[69] Phillips JA then highlighted at para. [38] the learned Master of the Roll's treatment of the **Ladd v Marshall** principles within the context of the new rule. At para. 13 of his judgment in **Meston Neil Hamilton**, Lord Phillips MR opined:

> "**These principles have been followed by the Court of Appeal for nearly half a century and are in no way in conflict with the overriding objective. In particular it will not normally be in the interests of justice to reopen a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result**." (Emphasis added)

[70] As established by Brooks JA (as he then was) in **Merlene Thomas v Spencer** and recently restated in **Harold Brady v GLC**, the **Ladd v Marshall** test is in no way in conflict with the CAR. It follows that admitting fresh evidence when there is a failure to satisfy the requirements of **Ladd v Marshall** would not be in keeping with the overriding objective to deal with the case justly. Therefore, the application cannot be granted merely on the strength of the overriding objective when the requirements of **Ladd v Marshall** are not met, especially in the circumstances of this case, where the fresh evidence, in all probability, will not influence the result of this appeal.

Disposal of the fresh evidence application

[71] In my view, there is no legitimate basis for the court to grant permission for Mr Campbell to adduce the certificate of incorporation and the liquidation report for Jemara as fresh evidence in the appeal. He has failed to satisfy the court that the evidence relating to the incorporation of Jemara was not available at the time of the trial or could not have been obtained with reasonable diligence. He has also failed to satisfy the court that the evidence was likely to have had an important influence on the outcome of the trial and is likely to influence the outcome of the appeal. Furthermore, Mr Campbell has failed to establish the relevance of the liquidation report to the trial or the appeal.

[72] Accordingly, I would refuse the application to adduce fresh evidence and make no order as to the costs of the application.

The merits of Mr Campbell's appeal will now be considered without regard to the evidence he sought to adduce as fresh evidence.

The issues

[73] Mr Campbell has challenged the learned judge's decision on 13 grounds of appeal on mixed law and fact, which substantially overlap. However, when stripped of the overwhelming details, the core of the appeal may be reduced to one fundamental question: whether there was an enforceable contractual relationship between Mr Campbell and ARPI to render ARPI liable in damages for breach of contract.

[74] This principal question can be dissected into two subsidiary questions, which are (1) whether ARPI was brought into a direct contractual relationship with Mr Campbell through the actions, representations and acquiescence of its principals in 1995 and its own acquiescence thereafter; and (2) whether Mr Oostenbrink and/or Jemara had the authority to bind ARPI in a direct contractual relationship with Mr Campbell.

[75] The learned judge had answered these questions in the negative in favour of ARPI. The task of this court is to determine whether he erred in so doing as contended by Mr Campbell.

The standard of review

[76] In considering whether this court may justifiably disturb the learned judge's decision on the grounds of appeal, which substantially challenge his findings of fact and mixed questions of law and fact, due consideration is given to the standard of review that this court must engage based on the dictates of the relevant authorities.

[77] Relatively recently, in **Bahamasair Holdings Ltd v Messier Dowty Inc (Bahamas)** [2018] UKPC 25, the Judicial Committee of the Privy Council revisited the question of the approach an appellate court should take in reviewing findings of fact of a trial court. After a restatement of the legal principles garnered from older authorities, their Lordships between paras. 32 and 36 of their judgment reiterated the settled

principles governing the approach that an appellate court should take to review the factual findings of a trial court. The guidance of their Lordships is encapsulated as follows:

(i) The appellate court should intervene only if it is satisfied that the trial judge was plainly wrong: **Watt (or Thomas) v Thomas** [1947] AC 484; **Clarke v Edinburgh & District Tramways Co Ltd** (1919) SC (HL) 35, 36-37.

(ii) It can only be on the rarest of occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion: **Thomson v Kvaerner Govan Ltd** [2003] UKHL 45.

(iii) The appellate court must defer to the trial judge's opinion because the trial judge is in a privileged position to assess the credibility of the witnesses' evidence, but it is not limited to that. Other relevant considerations include the fact that the trial judge's principal role is determining fact. With experience in fulfilling that role comes expertise: **Anderson v City of Bessemer** (1985) 470 US 564, 574-575.

(iv) An appellate court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the trial judge's findings and position, particularly the extent to which he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere: **Central Bank of Ecuador v Conticorp SA** [2015] UKPC 11; [2016] 1 BCLC 26, para. 5.

(v) Duplication of the trial judge's efforts in the appellate court is likely to contribute only negligibly to the accuracy of fact determination: **Anderson v City of Bessemer**, cited by Lord Reed in para. 3 of **McGraddie v McGraddie and Another** [2013] UKSC 58.

(vi) The principles of restraint "do not mean that the appellate court is

never justified, indeed required, to intervene". The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities". Where one or more of these features is not present, the argument favouring restraint is reduced: para. 8 of **Central Bank of Ecuador**.

[78] In the earlier case of **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21, after extracting the applicable principles from some earlier cases, their Lordships also stated, in part, at para. 12 of their judgment:

> "… It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'… This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts… **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…**" (Emphasis supplied)

[79] Against this background of the standard of review, the burden is on Mr Campbell to persuade this court to the view that the findings of fact of the learned judge have rendered his decision plainly wrong to justifiably warrant the interference of this court.

[80] In examining the merits of the appeal, I have used as a convenient guide, in so far as is reasonably practicable, the grouping of the grounds of appeal utilised by counsel

in their helpful submissions. The grounds of appeal that have given rise to the first sub-issue will now be discussed.

Sub-issue (1) – Whether ARPI was brought into a direct contractual relationship with Mr Campbell through the actions, representations and acquiescence of its principals in 1995 and its own acquiescence thereafter (grounds i, ii, iv, vi, ix and xii)

[81] The complaint of Mr Campbell in ground i, which is in actuality the principal and all-encompassing ground of appeal, is that the learned judge erred in finding that there was no legally enforceable contract between ARPI and him. In support of this ground, Mr Campbell relies on other grounds of appeal, which, essentially, are subsidiary. In those grounds of appeal, the specific complaints relating to his engagement with Club Ambiance in 1995 are that:

(a) the learned judge failed to give sufficient weight to the evidence of Mr Gardner that he was aware that Mr Campbell was paid by ARPI (ground ii);

(b) the learned judge erred in finding that on a balance of probability, the evidence does not support the conclusion that Mr Campbell was engaged directly by ARPI (ground iv);

(c) the learned judge erred in failing to give any weight or consideration, whatsoever, to Mr Campbell's evidence that he had a direct contractual relationship with ARPI and that ARPI had the responsibility for paying him (ground ix); and

(d) the learned judge erred in failing to accept the uncontroverted evidence that Mr Sandifer had negotiated directly with Mr Campbell a contract of service of fees of US$2000.00 per month (ground xii).

[82] The first question that I have seen fit to consider is whether an oral contract was formed in 1995 between ARPI and Mr Campbell that would render ARPI directly responsible for paying him compensation in damages for breach of contract. In

considering this issue, I have found it helpful to examine that aspect of the learned judge's decision and the grounds of appeal challenging it by reference to the main pillars of Mr Campbell's case presented at trial.

[83] It can safely be said that Mr Campbell's case against ARPI at trial was advanced on five main pillars as reflected in the submissions of his counsel, namely: (a) an alleged oral agreement between ARPI's principals and him made in or around July 1995 employing him to Club Ambiance; (b) the conduct of ARPI appointing him a signing officer on Club Ambiance's bank account in 1995; (c) payments to him or on his behalf from ARPI's bank accounts; (d) written contracts executed by Mr Oostenbrink as the representative for Jemara and purportedly acting as the duly authorised agent of ARPI; and (e) the knowledge and acquiescence of ARPI in his employment to Club Ambiance.

(a) Employment to ARPI by oral agreement in 1995

[84] Mr Campbell gave evidence that Mr Oostenbrink introduced him to Messrs Gardner and Sandifer in July 1995 after Mr Oostenbrink had told him that Mr Gardner was desirous for both of them to assist Club Ambiance. During that meeting, he was asked questions about himself by Messrs Gardner and Sandifer. However, during the course of the same meeting, but in the absence of Mr Gardner and Mr Oostenbrink, he and Mr Sandifer had accounting-related discussions concerning the hotel. During those discussions, Mr Sandifer, on behalf of ARPI, "confirmed that he wanted him on board to bring the accounting of Club Ambiance up to date and to train accounting staff and provide financial accounting and administrative services". He and Mr Sandifer agreed orally to remuneration of US$2000.00 per month for services starting July 1995. Mr Sandifer also authorised him to hire and train accounting and administrative staff members. Mr Oostenbrink gave his verbal agreement to that arrangement. After he sought and obtained permission from his then-employer, Club Caribbean, to work part-time at Club Ambiance, he started working immediately at Club Ambiance in reliance on the oral agreement between him and Mr Sandifer.

[85] In treating with this evidence regarding ARPI's engagement of Mr Campbell in 1995, by way of an oral contract, the learned judge relied heavily on the terms of the written agreements of 4 July 1995 and 16 February 1996 and the circumstances that led up to them. Having done so, he rejected Mr Campbell's evidence regarding the existence of an oral contract between him and ARPI.

[86] In rejecting Mr Campbell's contention, the learned judge found that it was common ground between Messrs Gardner and Oostenbrink that after discussions between them, the 4 July 1995 agreement would have been executed. After that, the agreement was executed. After considering the terms of that agreement, the learned judge found that it was made between ARPI and Jemara as explicitly stated in the preamble.

[87] He considered the recital to the agreement, which, according to him, was background information indicating why ARPI and Jemara were entering into the contract. He then opined that based on the recital to the 4 July 1995 agreement, 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 fact strongly suggests, he said, that Jemara was to bring its own personnel to manage the hotel. He concluded that Jemara would be responsible for paying its staff, presumably from fees paid by ARPI. He inferred this from what he regarded as a generous compensation package offered to Jemara by ARPI. According to him, a package of that magnitude would only have been provided on the premise that Jemara brought its own staff to do the job required.

[88] The learned judge also had regard to the addendum to the 4 July 1995 agreement, which he found quite instructive. The addendum provided, in so far as is materially relevant at this juncture:

> "1. Management Services provided by Manager to 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 accounts staff- by Louis Campbell

…

2. 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."

[89] Having further examined Mr Campbell's evidence regarding the commencement of his employment in 1995, the learned judge opined it was more probable than not that Mr Campbell was being 'kept' on the team by Mr Oostenbrink. He drew this conclusion partly from the evidence of Mr Oostenbrink's initial dialogue with Mr Campbell after 4 July 1995 regarding the situation at Club Ambiance and partly from the evidence of Mr Campbell that they had worked closely together as a team at Club Caribbean in similar circumstances. The learned judge did not overlook Mr Campbell's evidence that, given their performance at Club Caribbean, persons in "the hotel circles" knew that the two of them "working as a team were able to lead Club Caribbean out of the red to profitability".

[90] The learned judge also considered paras. 5 and 6 of Mr Campbell's witness statement, which formed part of his examination-in-chief. At para. 5, Mr Campbell stated that Mr Oostenbrink approached him in July 1995. Mr Oostenbrink told him that Mr Gardner had discussions with him to manage Club Ambiance and that "they wanted [him] to assist him as the finance director". Then, in para. 6, Mr Campbell stated that Mr Oostenbrink invited him to meet with Mr Gardner at Club Ambiance. While there, Mr

Oostenbrink introduced him to Messrs Gardner and Sandifer. He was subsequently introduced to Mr Gardner's daughter, who managed the group's accounting and finance.

[91] After examining those paragraphs, the learned judge noted that Mr Campbell had not mentioned Mr Sandifer in his witness statement at any point before para. 6. Therefore, when Mr Campbell referred to "they", in para. 5, in referring to the persons he said wanted him to assist Mr Oostenbrink as finance director, he did not intend to include Mr Sandifer.

[92] The learned judge also had regard to the evidence of Mr Oostenbrink regarding the engagement of Mr Campbell. He was not impressed by Mr Oostenbrink's posture in this regard. He noted that reading Mr Oostenbrink's witness statement (which was allowed to stand as his examination-in-chief) and considering his evidence in amplification of his witness statement, no one would get the impression that he and Mr Campbell had worked as a team as conveyed by Mr Campbell. Mr Oostenbrink also did not mention the 4 July 1995 agreement or the addendum in his witness statement. Rather Mr Oostenbrink, he said, gave "a sterile account" of the engagement of Mr Campbell, and it was the cross-examination of counsel for ARPI that managed to extract further information in this regard. The learned judge formed the view that, but for the cross-examination of Mr Oostenbrink, Mr Oostenbrink was not "very willing" to disclose much information about his relationship with Mr Campbell.

[93] The learned judge further considered the evidence of Mr Gardner in coming to his decision concerning Mr Sandifer's alleged offer to Mr Campbell. He particularly noted Mr Gardner's evidence on cross-examination that Mr Oostenbrink first called him to discuss the problems at Club Ambiance. In that conversation, Mr Oostenbrink made certain proposals to Mr Gardner, which subsequently led to the execution of the 4 July 1995 agreement, appointing Jemara the manager of Club Ambiance. Mr Oostenbrink then introduced Mr Gardner to Mr Campbell in July 1995. Mr Gardner said he met Mr Campbell after signing the agreement with Mr Oostenbrink. He also testified that the 4 July 1995 agreement he signed with Mr Oostenbrink specified that Mr Oostenbrink would take

charge of the marketing of the hotel and Mr Campbell would take charge of the accounting as part of the management services to be provided by Jemara.

[94] After revisiting Mr Campbell's evidence regarding his meeting with Mr Sandifer and the alleged oral contract, against the background of the preceding matters, the learned judge concluded at para. [41] of his judgment, "[t]he court does not accept this aspect of Mr Campbell's evidence". As part of this conclusion, he found that Mr Gardner met Mr Campbell after the 4 July 1995 agreement. By then, he continued, the basic terms of the engagement of Jemara were already worked out. In rejecting Mr Campbell's claim of an oral contract, the learned judge found as the pivotal evidence the provision in the addendum of the 4 July 1995 agreement that Jemara, as manager, would provide management services to the hotel which "shall include no less than…**accounting support and direction of Hotel accounting staff - by Louis Campbell**" (emphasis added). Therefore, the learned judge noted Mr Campbell's involvement as part of the provision of management services by Jemara.

[95] Furthermore, the learned judge observed that the addendum to the 4 July 1995 agreement provided the remuneration to be paid to Jemara for the management services to be provided, and it specified that ARPI would make all payments to Jemara for the work carried out by it. There was nothing to say that any individual connected to Jemara was to be paid directly by ARPI. He found the addendum to the 4 July 1995 agreement to be the only document between ARPI and Jemara that governed the fees payable to Jemara.

[96] Against the background of the 4 July 1995 agreement, the learned judge refused to accept that Mr Sandifer would not have known of Mr Gardner's desire to engage Jemara and of the contract entered into between ARPI and Jemara when they met with Mr Campbell. Although there was no direct evidence of Mr Sandifer's knowledge, he refused to accept that Mr Sandifer could have been "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$2000.00/ month" in the light of the pre-existing arrangement with Jemara in which

Mr Campbell's services were presented as part of Jemara's management services. He further refused to accept that Mr Campbell did not know the terms of the written agreement between Jemara and ARPI before 1996, given his function at Club Ambiance purportedly as finance director who ought to have known of ARPI's liability to pay Jemara.

[97] As far as the learned judge was concerned, there was also what he termed "a further inroad" in Mr Campbell's case. That inroad was Mr Campbell's inability to indicate what line item in ARPI's budget covered the fees of US$2000.00 that he said was payable to him due to the agreement with Mr Sandifer. He found Mr Campbell's answers to questions on this matter "quite astonishing" and his response "a matter of concern given what was required of him in respect of ARPI" (para. [50] of the judgment). The learned judge did not find any item referable to the alleged compensation due to Mr Campbell as an employee of ARPI.

[98] This finding of the learned judge as to the non-persuasiveness of Mr Campbell's evidence regarding the 1995 oral contract was further bolstered by the evidence of Mrs Lloyd, witness for ARPI. Mrs Lloyd performed management consultancy services at ARPI between November 2010 and May 2012, when Club Ambiance was being prepared for sale. She was to oversee the sale and audit process of the hotel. Mrs Lloyd testified that part of her duties was to collate all existing valid contracts for the lawyers to be advised about potential liabilities and obligations of ARPI upon the sale of the hotel. Within that context, she would be made aware of existing employment contracts. She saw no contract for Mr Campbell, and his name was not reflected on the payroll as an employee. However, she noted some transactions related to Mr Campbell in the accounting records. Although some records were seen that indicated some payments to Mr Campbell from the payroll account, those payments could not be verified as there was no supporting documentation. There were also some credit card payments made on his behalf. She also stated that the files she saw and examined did not include persons who supplied or provided services to Club Ambiance. The last payment entry made in respect of Mr Campbell was in 2010.

[99] After considering Mrs Lloyd's evidence, the learned judge concluded at para. [58] of his judgment that her evidence "and the work that she did makes it too plain that in 1995 Mr Campbell was not an employee of ARPI".

[100] Based on all the foregoing matters the learned judge considered, he concluded that Mr Campbell was not brought in a direct contractual relationship with ARPI in 1995 through any verbal discussions or negotiations with Messrs Sandifer and Gardner.

The submissions

(i) for Mr Campbell

[101] In oral arguments before the court, Mr Patrick Foster QC argued that the learned judge did not consider the viable commercial agreement between ARPI and Mr Campbell. He submitted that Mr Campbell was not a party to the meeting between Messrs Gardner and Oostenbrink that led to the 4 July 1995 agreement. He was not aware of the addendum which implicates him in the Jemara management structure. Queen's Counsel maintained that Mr Campbell was under the impression that ARPI had engaged his services directly.

[102] He submitted further that the learned judge did not sufficiently consider all the evidence before him as he had formed the view that Mr Campbell was a member of the Jemara team. Additionally, since it was documented in writing in the addendum to the 4 July 1995 agreement, he did not sufficiently analyse other evidence outside the scope of the document. Finally, according to Mr Foster, the learned judge also failed to properly assess the February 1996 management agreement before concluding that Mr Campbell could not have been employed directly in the light of the compensation package for Jemara.

[103] Queen's Counsel maintained that Mr Campbell's case was not that Mr Oostenbrink, on behalf of ARPI, had engaged him to work with the hotel at the initial stages. However, the learned judge focused extensively on that question which did not arise on the evidence. The evidence was that the contract was formed in 1995, in discussions with Mr

Sandifer and that he dealt with ARPI through its agents. Queen's Counsel contended that the learned judge did not fully appreciate the evidence of Mr Campbell and so his extensive analysis of Mr Oostenbrink's engagement of Mr Campbell in the initial stages indicates a lack of careful consideration of Mr Campbell's case.

[104] Mr Foster also argued that the addendum to the 4 July 1995 agreement clouded the learned judge's judgment to the extent that he failed to appreciate the import of other evidence, which showed a separate contract between Mr Campbell and ARPI commencing in 1995. The learned judge, he said, did not consider the evidence because he was satisfied with the decisiveness and cogency of the addendum. Consequently, because he formed that view regarding the addendum, nothing else after the 4 July 1995 agreement was considered.

[105] In their written submissions on this issue, counsel for Mr Campbell further submitted, among other things, that the learned judge failed to consider whether, at the time of the discussions between Mr Campbell and the principals of ARPI in 1995, there was an intention to create legal relations. Furthermore, according to them, he disregarded Mr Campbell's evidence of the oral agreement, by which ARPI's authorised officers engaged him. Therefore, his findings that ARPI did not directly engage Mr Campbell are inconsistent with the weight of the "credible unchallenged evidence" before him.

(ii) for ARPI

[106] On behalf of ARPI, Miss Carlene Larmond strongly countered those submissions. She noted that Mr Campbell had not pleaded in his statement of case to an oral agreement with ARPI as the basis for his claim. She pointed out that he brought his claim based on the 7 April 2006 and 27 July 2007 agreements. She noted that it was in his witness statement and, later, in amplifying his evidence at trial, that he alleged the oral agreement with ARPI through discussions with Mr Sandifer in July 1995. Counsel submitted that an interesting feature of the evidence before the learned judge was that Messrs Campbell and Oostenbrink were saying two different things. So, being faced with two separate scenarios regarding the allegation of direct employment by Mr Sandifer, the

learned judge had to, of necessity, examine the 4 July 1995 agreement and the addendum.

[107] Miss Larmond further argued that based on the evidence of Mr Gardner, it was Waymaker, through Mr Sandifer, that was involved in the negotiations with Mr Oostenbrink, acting for Jemara, that resulted in the 4 July 1995 agreement. The learned judge's finding was not that Mr Sandifer was not authorised to deal with Mr Campbell but rather that at that time, Mr Sandifer would not have been negotiating a separate contract with Mr Campbell because an agreement with Mr Campbell on Jemara's team would already have been concluded.

[108] It was the learned judge, she said, who had extracted from Mr Campbell what he was contending had transpired at the meeting with Messrs Gardner, Sandifer and Oostenbrink in July 1995. She argued that an examination of that evidence shows that there was nothing on Mr Campbell's evidence that "was intelligible" or "made sense". The learned judge applied the appropriate standard of proof and rejected Mr Campbell's case that he had a direct contractual relationship with ARPI, which arose in 1995 after his alleged agreement with Mr Sandifer. The learned judge cannot be faulted for doing so. He was correct in his approach in determining the issue and arrived at the correct conclusion that Mr Campbell's evidence of the meeting and the results of the meeting should be rejected.

Analysis and findings

[109] In my view, the issue of whether ARPI was to be bound by any alleged discussions Mr Campbell had with Mr Sandifer had to be considered against the background of the agreement between ARPI and Jemara. That consideration was necessary in the light of the statements of case of Mr Campbell and ARPI and the evidence led at trial. Mr Campbell, at trial, was relying on an alleged oral contract, the terms and circumstances of which he did not plead. The issue regarding the discussion with Mr Sandifer arose in his witness statement.

[110] Even more importantly, his evidence of an oral contract would have contradicted the terms of the written agreement in which his name was mentioned explicitly with ARPI, Jemara and Mr Oostenbrink; that was the 4 July 1995 agreement. Therefore, it was incumbent on the learned judge to consider the evidence against the background of the parties' statements of case and the pleaded written agreements.

[111] The fact that Mr Sandifer was not called as a witness to speak directly to his knowledge and discussions with Mr Campbell would not have rendered Mr Campbell's evidence of the alleged oral contract incontrovertible. The learned judge was correct to have regard to the 4 July 1995 agreement and its addendum. The documentary evidence would have shed light on the contracting parties' intention and arrangement to provide management services to the hotel through Jemara.

[112] There was additional evidence that was capable of shedding light on Mr Campbell's assertions to which the learned judge correctly had regard. At para. [56] of his judgment, the learned judge opined that it was "extremely unlikely" that Mr Sandifer would have been unaware of the agreement. He concluded that the balance of probabilities favoured that Mr Sandifer had knowledge of it. The learned judge cannot be faulted for this finding, especially in the light of Mr Gardner's evidence that Mr Sandifer, for Waymaker, was a party to the negotiations of the 4 July 1995 contract with Jemara on behalf of ARPI. Also, Mr Sandifer was responsible for accounting-related matters at the hotel, and Mr Campbell was engaged in providing accounting support. It is, therefore, expected that Mr Campbell would have had to have discussions with Mr Sandifer regarding his role as finance director.

[113] In essence, then, the learned judge's ultimate finding was that on a balance of the probabilities, he did not find Mr Campbell's evidence relating to this oral agreement with Mr Sandifer reliable and/or credible for the reasons he gave. It was entirely a question for the learned judge, as the tribunal of fact, having heard and seen the witnesses, to say what he would accept or reject and what weight he would place on each item of

evidence. It was also open to him to draw such reasonable inferences from proved facts as he deemed fit.

[114] It was properly within the province of the learned judge, as fact finder, to find on a balance of probabilities that there was no enforceable oral contract between Mr Campbell and Mr Sandifer that could have bound ARPI. Moreover, he had other evidence that affected the probability of Mr Campbell's evidence being true. Therefore, this court cannot conclude that the learned judge erred by giving insufficient weight to Mr Campbell's evidence regarding his alleged discussions with Mr Sandifer that he said had given rise to a direct contractual relationship with ARPI. Mr Campbell's evidence regarding that matter was thoroughly examined. The learned judge did not accept it on a preponderance of the probabilities, and that was his purview. This court must exercise restraint in treating with this finding of fact having regard to the standard of review by which it must be guided.

[115] I am moved to accept Miss Larmond's submissions that the learned judge cannot be faulted in his approach, analysis and conclusion regarding the existence of a binding oral contract. Accordingly, it cannot be said that he was plainly wrong in his decision regarding the creation of an oral contract of employment between ARPI and Mr Campbell commencing in July 1995 by virtue of discussions with Mr Sandifer. Once the learned judge rejected Mr Campbell's evidence regarding the alleged existence of an agreement between Messrs Sandifer and Campbell, he did not need to consider whether there was an intention to create legal relations. His rejection of the evidence that there was no oral agreement would logically mean that he would have found no intention to create legal relations between Mr Sandifer and Mr Campbell or ARPI and Mr Campbell in 1995 as alleged.

[116] Therefore, the court has no reason to disturb the learned judge's decision on the basis of his finding that no binding oral contract was formed between ARPI and Mr Campbell in 1995 during discussions with Mr Sandifer or any other principal of ARPI. Consequently, Mr Campbell's appeal fails on this issue.

(b) Mr Campbell's authority to sign on ARPI's bank account

[117] To establish his claim that he was directly employed to ARPI, Mr Campbell also relied on the fact that on 5 July 1995, he was appointed a signatory to ARPI's bank account. Messrs Gardner (as principal of ARPI) and Sandifer (as consultant) authorised his appointment as a signing officer. By way of explanation, Mr Gardner's evidence was that Mr Campbell's designation as finance director and Mr Oostenbrink as managing director was due to the bank's requirement that there had to be some form of designation if they were to be authorised to operate ARPI's account.

[118] The learned judge accepted Mr Gardner's explanation and concluded that the fact that Mr Campbell was a signatory to the account did not support the proposition that he was directly employed to ARPI. He considered that Mr Oostenbrink's name was also placed on the account and that no one had suggested that he could have looked to ARPI for his remuneration in his personal capacity. After considering relevant documentary evidence, regarding banking information and Mr Gardner's evidence, he found that placing the names of Messrs Campbell and Oostenbrink on ARPI's account was simply a mechanism to give them access to ARPI's accounts. It did not bring Mr Campbell into a direct contractual relationship with ARPI to render ARPI liable to compensate him. In the learned judge's view, nothing of significance turned on the fact that Mr Campbell was a signatory to ARPI's bank account.

[119] There is no ground of appeal specifically challenging the learned judge's finding regarding Mr Campbell's appointment as a signatory on ARPI's bank account. However, it seems to form part of Mr Campbell's complaints that the learned judge erred in finding that there was no legally enforceable contract between ARPI and him (ground i) and that the evidence did not support the conclusion that he was engaged directly by ARPI in 1995 (ground iv). Counsel for Mr Campbell, in their submissions, also raised it as an indicator of a direct contractual relationship between ARPI and Mr Campbell. Therefore, I have considered it part of Mr Campbell's case on appeal that this fact evidenced a contractual relationship between ARPI and him which the learned judge wrongly rejected.

[120] In my view, there is nothing objectionable regarding the learned judge's findings on this issue. There was sufficient evidence before him to reject Mr Campbell's contention that his authority to access ARPI's account in 1995 evidenced his employment contract with ARPI. Instead, he accepted the explanation of Mr Gardner, as he was entitled to do, and there is no proper basis for this court to usurp his role as judge of the fact. Accordingly, Mr Campbell cannot succeed on this complaint.

(c) Payments made by ARPI to Mr Campbell

[121] Mr Campbell has also used as evidence of his alleged contractual relationship with ARPI, payments made to him or on his behalf from ARPI's bank account, and Mr Gardner's evidence that he was aware of such payments. The learned judge addressed this issue at para. [56] of his judgment and concluded that the evidence of payments to Mr Campbell or third parties on his behalf did not have "significant explanatory power" when other factors highlighted on behalf of Mr Campbell were considered. He surmised that the payments could have been "simply an accounting arrangement between Jemara, ARPI and Mr Campbell". That, he said, "seemed the more likely explanation" rather than it being evidence of ARPI being in a direct contractual relationship with Mr Campbell.

[122] Mr Campbell has explicitly challenged this finding, contending in grounds of appeal ii and ix that (a) the learned judge erred in failing to give sufficient weight to Mr Gardner's evidence that he was aware that ARPI paid him; and (b) that he failed to give any weight or consideration to his (Mr Campbell's) evidence that ARPI had direct responsibility for paying him.

The submissions

(i) for Mr Campbell

[123] Mr Foster expressed strong objection to the learned judge's finding regarding the payments to Mr Campbell by ARPI. He argued that the undisputed evidence of Mrs Lloyd was that she found indications of some payments to Mr Campbell or on his behalf. According to Queen's Counsel, the only inference is that those payments were for

management services rendered. Mr Foster further contended that it seems that the learned judge had not properly treated with that issue because he was more preoccupied with what he regarded as sloppy accounting. Queen's Counsel argued that this view of sloppy accounting was not a basis for attaching less credibility to the evidence that clearly shows payments by ARPI to Mr Campbell. Therefore, the learned judge did not give sufficient weight or consideration to this evidence of payments made to Mr Campbell while assessing the issue of direct employment to ARPI. Consequently, he was plainly wrong in concluding that Mr Campbell was not directly contracted to ARPI.

(ii) for ARPI

[124] Miss Larmond, in her response on behalf of ARPI, submitted that the learned judge was not obliged to draw an inference regarding payments to Mr Campbell. She argued that one would have expected that the best evidence would have come directly from Mr Campbell, who claimed that ARPI paid him for services rendered as part of a contract of employment. She noted that, as the learned judge found, Mr Campbell was unable to indicate in the budget where provision was made for payment of the fees, he alleged were to be paid to him. According to Miss Larmond, Mr Campbell's evidence took the court no further regarding the recorded payments to him being remuneration arising from a direct contractual relationship with ARPI. Therefore, the learned judge was correct in rejecting the evidence of the recorded payments as indicative of a direct contractual relationship between ARPI and Mr Campbell.

Analysis and findings

[125] The learned judge opined that the record of payments made directly to Mr Campbell from ARPI's account could have come about due to some accounting arrangements among Jemara, ARPI and Mr Campbell. However, while the learned judge was entitled to draw reasonable inferences from proved facts, there was no documentation establishing what those payments were for and nothing to establish a clear and unmistakable nexus between the payments and a contract of employment between ARPI and Mr Campbell. Mrs Lloyd's evidence was that, among other things, she

saw several payments recorded as having been made to Mr Campbell from the payroll account. Those cheques were prepared and signed by the hotel's accountant. There was, however, no documentation in support of these payments. Mrs Lloyd stated that there were shortcomings in the accounting records. There was, therefore, no payment that definitively pointed to the existence of a contract of employment for Mr Campbell, and there was nothing from Mr Campbell that substantiated his assertions that the payments that were seen arose from a contract of employment with ARPI.

[126] Therefore, the learned judge was not entitled to speculate about matters with no or no sufficient underlying factual basis to support them. He had Mr Campbell's evidence that the payments were for work done, pursuant to a direct contract with ARPI, and Mrs Lloyd's evidence that there was no record of Mr Campbell being an employee on ARPI's payroll or any evidence of an employment contract, or any other contract, pertaining to him. So, in the end, there was the absence of supporting documentation for the payments seen, and Mr Campbell provided none, which would have been indicative of a direct contractual relationship between ARPI and him.

[127] In those circumstances, the critical question for the learned judge was to determine what was reliable and credible. He had to consider whether, on the totality of all the evidence and a preponderance of the probabilities, the payments evidenced a direct contractual relationship between ARPI and Mr Campbell as alleged. In rejecting, as improbable, Mr Campbell's evidence that the payments to him constituted evidence of a direct contractual relationship between him and ARPI, the learned judge, in para. [57] of his judgment, stated:

> "… 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..."

[128] The learned judge examined the payments being relied on by Mr Campbell within the context of other evidence in the case and found that it was not of sufficient weight, standing alone or with the other evidence, to substantiate Mr Campbell's assertion that

he was directly employed to ARPI in 1995. In that regard, he considered: (a) the meeting between Messrs Campbell, Sandifer, Gardner and Oostenbrink in 1995; (b) the evidence given by Mr Campbell regarding the working relationship between him and Mr Oostenbrink at Club Caribbean; (c) Mr Oostenbrink's evidence; and (d) Mr Gardner's evidence.

[129] The learned judge would have also had before him Mrs Lloyd's evidence on cross-examination about the state of the accounting records at the hotel when she did her audit. She testified that the records were disorganised and that a search through them disclosed "unusual transactions". Payments to Mr Campbell that were traced back to the payroll cheque book were viewed as unusual because Mr Campbell's name did not appear on the payroll as an employee. Also, suppliers of services were not paid from the payroll account. She could not verify what those payments to Mr Campbell were for. She noted that efforts to obtain information from the hotel's accountant to verify the questionable accounting records proved futile.

[130] In the light of all this evidence from Mrs Lloyd, the learned judge's observation that the accounting procedure at the hotel was sloppy was supported by evidence that he clearly accepted. Therefore, his ultimate finding against that background that the record of payments to Mr Campbell did not possess "significant explanatory power" cannot be faulted. Accordingly, there is no justifiable basis for this court to conclude that the learned judge was plainly wrong in finding that the evidence from Mr Gardner that he was aware that payments were made to Mr Campbell was insufficient to support Mr Campbell's case that a direct contract of employment existed between him and ARPI.

[131] In my view, the grounds of appeal challenging the learned judge's finding concerning the evidence of payments to Mr Campbell by ARPI are not sustainable. They, too, fail.

(d) Whether ARPI is liable to Mr Campbell due to the knowledge and acquiescence of ARPI's principal and ARPI in 1995 and after

[132] In ground of appeal vi, Mr Campbell has made a broad and non-specific complaint that seems to relate to the principals of ARPI - Messrs Gardner and Sandifer - in meeting and having discussions with him and not raising any objection to his engagement at Club Ambiance. Given the case deployed at trial by Mr Campbell, it seems safe to first consider ground vi by reference to his dealings with Messrs Gardner and Sandifer in 1995 when he was introduced to them by Mr Oostenbrink. Ground vi reads:

> "The learned judge erred as a matter of law by failing to consider the legal principle that where a principal has known and acquiesced in the agent professing to act on its behalf, and thereby impliedly representing that he has the principal's authority to do so. [sic] The principal is considered to have made the representation, or caused it to be made, or at any rate to be responsible for it and in so far as the other contracting party has altered his position in reliance on the representation, the principal is estopped from denying the truth of the representation."

[133] Mr Foster submitted to this court that the issue of agency arose at different points in the evidence. The first point, according to him, was when Mr Campbell met with Mr Gardner and Sandifer in 1995. Queen's Counsel stated that the contract was formed when Mr Campbell dealt with ARPI through those agents. He argued that the learned judge did not appreciate Mr Campbell's evidence as to when the contract was formed. As a result, he expended a lot of time on the issue of whether Mr Oostenbrink, on behalf of ARPI, engaged Mr Campbell to work with the hotel at the initial stages. This, Queen's Counsel maintained, was not the evidence and so the learned judge did not consider or carefully consider Mr Campbell's evidence.

[134] In my view, this complaint of Mr Campbell and the submissions of his counsel reinforcing it are without merit. In the first place, Mr Campbell's evidence regarding the formation of an oral contract in 1995 was not in keeping with his pleadings, and so he advanced a case at trial that departed from his pleaded statement of case. As much as that approach is to be deprecated, the learned judge, nevertheless, had regard to the evidence. As already indicated above, he gave exhaustive consideration to Mr Campbell's

evidence that he was engaged to ARPI through oral discussions he had with Messrs Gardner and Sandifer when he met them for the first time in July 1995. He rejected Mr Campbell's case that he was engaged to ARPI through Mr Sandifer and found that Mr Campbell knew he was not so engaged. Therefore, after that finding, the question of agency would have been rendered redundant. So, he need not have considered the issue of ostensible authority in the context of the alleged oral contract between ARPI and Mr Campbell.

[135] In any event, after the learned judge concluded his consideration of Mr Campbell's evidence regarding the alleged oral contract entered into in 1995, he also considered whether Mr Gardner's knowledge of and acquiescence in the engagement of Mr Campbell binds ARPI. This issue emanated from the contention of counsel for Mr Campbell at trial (Mr Michael Howell) that ARPI is contractually bound to pay Mr Campbell because Mr Gardner knew that Mr Campbell was engaged to provide services for ARPI and had raised no objection. Mr Howell had argued that ARPI, in the face of Mr Gardner's knowledge, cannot deny that it is bound in a direct contract with Mr Campbell.

[136] The learned judge recognised, at para. [65] of his judgment, that the foundation of that argument that Mr Gardner's knowledge and acquiescence bind ARPI was the case of **Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd and Another** [1964] 2 QB 480. He specifically noted that counsel, Mr Howell, was praying in aid the concept of and law relating to ostensible authority. The learned judge at para. [66] of his judgment noted the following principle of law as expounded by Pearson LJ in **Freeman & Lockyer** at page 498, which he said captured the essence of counsel's submissions:

> "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."

[137] The learned judge later posited at para. [71] of his judgment that according to the argument of counsel, the detriment was that Mr Campbell acted upon what Messrs Gardner and Sandifer said to him, which resulted in him providing the services for which he was not paid. The learned judge had clearly considered Mr Campbell's contention that persons he regarded as ARPI's principals entered into negotiations with him to engage his services directly on behalf of ARPI. He, however, rejected it, which he was entitled to do.

[138] It is, indeed, fair to say that although the learned judge had embarked on a detailed review of the law of agency, especially as enunciated in **Freeman & Lockyer**, he did not expressly state that based on the law as he had discussed it, Messrs Gardner and Sandifer did not have the authority to bind ARPI. However, he did not need to go that far because he had already rejected Mr Campbell's evidence regarding the representations he said were made to him by Mr Sandifer, which would have been the alleged basis for the contract in 1995. The learned judge had already concluded at para. [62] of his judgment that Mr Sandifer did not conclude any contract with Mr Campbell. This means, in effect, that there were no representations that could have given rise to the question of apparent or ostensible authority.

[139] Therefore, having considered the argument regarding the knowledge and representations of Messrs Gardner and Sandifer, the learned judge found that ARPI could not be held liable based on either actual, apparent or ostensible authority on the part of its principals in 1995 or thereafter. In my view, the learned judge made no mistake in evaluating the evidence, which was such as to undermine his conclusion regarding Mr Campbell's claim. Consequently, there is nothing in his findings that would warrant interference from this court with this decision.

[140] The fact that he had regard to the position of Mr Oostenbrink vis-à-vis ARPI does not detract from his proper consideration of the evidence regarding Messrs Gardner and

Sandifer. The consideration of whether Mr Oostenbrink was an agent for ARPI also arose on the case advanced by both ARPI (in its defence and ancillary claim) and Mr Oostenbrink (in the ancillary claim). ARPI denied that Mr Oostenbrink was authorised to enter into a contract with Mr Campbell in its name. Mr Oostenbrink averred that ARPI knew of and expressly agreed to Mr Campbell's employment or acquiesced in it. Therefore, the learned judge's extensive consideration of Mr Oostenbrink's involvement in his dealings with ARPI and the engagement of Mr Campbell in 1995 was not all misplaced as Mr Foster would want to believe.

[141] Also, the learned judge's focus on the issue of agency relative to Mr Oostenbrink is not indicative of any failure on his part to consider the primary contention of Mr Campbell that he was employed in July 1995 through his direct engagement by Mr Sandifer and not as a member of Jemara's management team. The learned judge had already found that no contractual relationship arose from those discussions among Messrs Sandifer, Gardner and Campbell. He found that to be so because a written agreement was already in existence before those discussions, and in that agreement, Mr Campbell was presented as part of Jemara's team. That finding was open to the learned judge on the evidence, and so his conclusion on that matter cannot be faulted.

[142] In concluding, the learned judge considered the principles relative to the issue of agency as detailed by Mr Campbell in ground vi in assessing the case deployed by Mr Campbell at trial. It is, therefore, not fair or accurate to say that the learned judge erred as a matter of law by failing to consider the legal principles regarding ostensible authority relative to ARPI's principals and by focusing, instead, on the authority of Mr Oostenbrink.

Conclusion on sub-issue (1)

[143] Mr Foster maintained that the learned judge was plainly wrong in his "selective analysis", rather than a comprehensive one, in coming to his finding that no enforceable contractual relationship existed between ARPI and Mr Campbell. According to Queen's Counsel, the learned judge did not properly assess the evidence in its entirety, which, if done, would have demonstrated a direct contractual relationship between Mr Campbell

and ARPI that commenced in 1995. The evidence of the dealings between ARPI and Mr Campbell, he said, shows that Mr Campbell was treated differently from being a member of the Jemara team. However, these matters were not fully appreciated by the learned judge, and on that basis, his decision was plainly wrong.

[144] Miss Larmond, on the other hand, submitted that in considering the 1995-1996 period, the learned judge took into account other evidence apart from that presented by Mr Campbell and rejected his claim to there being a direct contract with ARPI. She maintained that his finding on the issue is correct and should not be disturbed.

[145] I agree with Miss Larmond. The learned judge microscopically examined all the evidence, including documentary evidence, and was clearly not impressed with or persuaded by the evidence of Mr Campbell regarding the circumstances surrounding his engagement with the hotel in 1995. Accordingly, it was quite permissible for the learned judge to conclude that the written agreements of 1995 and 1996 that evidenced the contractual relationship between Jemara and ARPI for management services to be provided by Jemara, which included the services provided by Mr Campbell, was strong evidence against the finding of a direct contractual relationship between ARPI and Mr Campbell.

[146] The question of whether there was an enforceable contract of employment between ARPI and Mr Campbell was one to be determined on the evidence on a balance of probabilities. Having considered the case by an application of the requisite standard of proof, the learned judge concluded that Mr Campbell's account of what transpired in 1995, regarding his alleged direct engagement with ARPI, was not only improbable but implausible and, even at times, incredible. He concluded that the fact that Mr Gardner knew that Mr Campbell was engaged to provide services for ARPI and had raised no objection or had expressly agreed does not render ARPI contractually bound to Mr Campbell. I find there was sufficient evidence before the learned judge, on which he could have arrived at the finding he did. There is no mistake in the learned judge's evaluation of the evidence that is sufficiently material to undermine his conclusion that

there was no legally enforceable contract between Mr Campbell and ARPI that came into existence in 1995.

[147] Grounds of appeal i, ii, iv, vi, ix and xii do not avail Mr Campbell in his appeal.

[148] I will now proceed to consider sub-issue (2) regarding the authority of Mr Oostenbrink and/or Jemara in their dealings with Mr Campbell.

Sub-issue (2) – Whether Mr Oostenbrink and/or Jemara had the authority to bind ARPI in a direct contractual relationship with Mr Campbell (grounds iii, v, vi, vii, viii, x, xi, and xiii)

[149] In determining whether the learned judge was plainly wrong to find that neither Mr Oostenbrink nor Jemara had the authority to bind ARPI to a direct contractual relationship with Mr Campbell, a brief overview of the written contracts signed by Messrs Oostenbrink and Campbell is warranted.

(a) The written contracts (1998 -2007)

[150] Mr Campbell contended that ARPI breached the oral agreement of 1995 by failing to consistently pay him the agreed sum of US$2000.00 on the 25th of every month. As a consequence, the payments fell into arrears. By 1998, he became uncomfortable that he was not being paid in accordance with the oral agreement, and so he asked Mr Oostenbrink to put the terms agreed orally into writing. Consequently, on 25 June 1998, he and Mr Oostenbrink, as the representative of Jemara and acting on behalf of ARPI, signed an agreement. This agreement confirmed his position as finance director for the hotel for a term of 10 years at a fee of US$2000.00 to be paid according to cash availability and to any third party of his choice. This included but was not restricted to credit card payments. The contract also required him to keep a running balance of unpaid amounts. It provided that he would report directly to Mr Oostenbrink. Mr Campbell asserted that despite this arrangement, he was still not paid consistently and, consequently, payments were in arrears. Subsequently, it was mutually agreed between him and Mr Oostenbrink that the arrears would be paid. There were also discussions regarding reducing his fee to US$1500.00.

[151] Consequently, on 7 April 2006, a second agreement was signed by him and Mr Oostenbrink. Again, Mr Oostenbrink signed as the agent for ARPI. This agreement was a re-negotiation of the monthly payment that was reduced from US$2000.00 to US$1500.00 for a term of 15 years starting 1 May 2006.

[152] On 22 July 2007, the supplemental agreement detailed at para. [12] above was purportedly signed between Mr Campbell and his wife with ARPI and Jemara, trading as Club Ambiance. Mr Oostenbrink signed on behalf of Club Ambiance. This agreement provided, among other things, for rent owed to the hotel by Mr Campbell's wife to be set off against fees owed to Mr Campbell by ARPI.

[153] Mr Campbell stated that he was not aware of the terms of the management agreements between ARPI and Jemara until he filed his claim in 2012. However, upon seeing the terms of the February 1996 management agreement, he realised that he was employed directly to ARPI by virtue of clause 5(a) of that agreement.

[154] The learned judge did not accept Mr Campbell's case that either the February 1996 management agreement or any of the later written contracts he relied on rendered ARPI liable to compensate him as claimed. Instead, the learned judge concluded that between July and December 1995, neither Jemara nor Mr Oostenbrink was ever the agent of ARPI. He found they had no authority, actual or ostensible, to engage the services of Mr Campbell for ARPI directly or to create any direct contractual relations between ARPI and Mr Campbell in 1995.

[155] In relation to the written contracts of 1998, 2006 and 2007, he found that Mr Oostenbrink had no authority to make it appear that ARPI was contracting directly with Mr Campbell. He opined that Mr Oostenbrink had no authority from ARPI to conclude any contract with Mr Campbell in ARPI's name or on its behalf, and Mr Oostenbrink knew it. Also, Mr Oostenbrink had no authority to execute any document naming himself, his company and ARPI as the employer and, in that capacity, contracted with Mr Campbell.

This, the learned judge said, would also have been known to Mr Oostenbrink and Mr Campbell.

[156] The learned judge arrived at these conclusions on several bases, some of which have already been discussed within the context of his consideration of Mr Campbell's allegation of the existence of the oral contract in 1995. As already indicated above, the learned judge had found that in 1995, ARPI did not owe Mr Campbell any money. Consequently, it was not obliged to pay him for services rendered. This finding, therefore, impacts the resolution of the question regarding Mr Oostenbrink's authority to bind ARPI in a contractual relationship with Mr Campbell.

[157] Mr Campbell, in grounds of appeal iii, v, vi, vii, viii, x, xi, and xiii, has taken issue with the learned judge's reasoning on this issue of the agency of Mr Oostenbrink and/or Jemara. Essentially, these grounds of appeal challenged the learned judge's findings that:

a. the compensation package payable to Jemara was indicative of Jemara bringing its own staff and not acting as an agent in the engagement of Mr Campbell;
b. neither Mr Oostenbrink, Jemara nor Jemara Properties had actual or ostensible authority to create direct contractual relationship between Mr Campbell and ARPI;
c. between July 1995 and 31 December 1995, neither Jemara nor Mr Oostenbrink was an agent of ARPI;
d. Jemara and Mr Oostenbrink did not have the ostensible authority to contract with Mr Campbell on behalf of ARPI on the basis that Mr Gardner knew that Mr Campbell was hired;
e. Mr Oostenbrink 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;
f. Mr Campbell knew or ought to have known of the management agreement between ARPI and Jemara; and

g. Mr Campbell knew that Mr Oostenbrink knew the arrangement that Jemara was not an agent of ARPI in engaging him and did not have the authority to contract with him on behalf of ARPI.

The submissions

(i) for Mr Campbell

[158] Mr Campbell contends that the learned judge erred by failing to assess all the evidence correctly and accorded insufficient weight to the evidence in favour of his case. It was submitted on his behalf that due to the learned judge's narrow analysis of the evidence, which was driven by the belief that the addendum to the 4 July 1995 agreement was the document on which to rely, he failed to properly assess the evidence. Accordingly, this rendered his decision plainly wrong.

[159] Mr Foster submitted that the written contract of 25 June 1998 was merely formalising the status that existed from 1995 between Mr Campbell and ARPI and was not "transformative in nature". He pointed out that Mr Campbell's evidence was that he was concerned about his job security and wanted a formal contract to provide greater stability in the post. The formalisation of the contract was not properly considered by the learned judge, because in his mind, the contract with Mr Campbell was a component part of the contract between Jemara and ARPI. The learned judge, Queen's Counsel contended, did not have regard or sufficient regard to the evidence of Mr Oostenbrink that he was an agent for ARPI and that the contract he signed on behalf of ARPI in 1998 showed a direct relationship between ARPI and Mr Campbell.

[160] Queen's Counsel submitted that it arose from the evidence that Mr Campbell would reasonably have believed from 1998 that Mr Oostenbrink had a right to enter into a contract on behalf of ARPI. Mr Oostenbrink was the hotel's managing director and had the right to engage staff. If he did not have actual authority, he would have had ostensible authority to enter into the form of contract he did with Mr Campbell.

(ii) for ARPI

[161] In response, Miss Larmond submitted that the learned judge got it right. She stated that his task was to make a finding on the totality of the evidence, and he came to the correct conclusion after using the correct approach on this issue. Counsel submitted that Mr Campbell's reliance on clause 5(a) of the February 1996 management agreement does not assist him as he was not employed as a member of staff of ARPI. His role was to provide accounting support and direct the accounting staff in accordance with the provisions of the addendum to the 4 July 1995 agreement. Furthermore, she said, clause 5(d)(1)(d) of the February 1996 management agreement makes it plain that Jemara would pay for the services of the support for the financial controller. That clause, she stated, makes a specific provision for Jemara to pay a person with oversight of financial matters whether or not that person is called a financial controller. So, even if Mr Campbell's evidence that Mr Oostenbrink had the authority to sign a contract with him under clause 5(a) was accepted, the February 1996 management agreement states that Jemara was responsible for paying for those services.

[162] Counsel maintained that when one goes back to when that agreement was concluded, it is clear that the agreement, primarily, was because ARPI wanted a company that would come with "an outfit of persons to provide certain management services". It is plain to see, she said, that in 1995, Jemara presented as having a qualified staff trained in all areas of hotel management, including accounting support and costs control.

[163] According to Miss Larmond, the learned judge was correct in his approach in assessing the written contracts being relied on by Mr Campbell by going back to the 1995 agreement and making comparisons with the February 1996 management agreement. It is clear from that background that Jemara would have brought its own staff, including Mr Campbell, to carry out management functions. She also noted that it was also not unreasonable for the learned judge to have considered the compensation package payable to Jemara under the said agreement in concluding that Jemara would have been expected to carry and pay its own team, which included Mr Campbell. The approach of

the learned judge to take the management agreements into account in arriving at his findings cannot be faulted. Therefore, the learned judge was entitled to conclude that neither Mr Oostenbrink nor Jemara had any actual or ostensible authority to contract on behalf of ARPI with Mr Campbell. She urged that this court should not disturb the learned judge's decision for all these reasons.

Analysis and findings

[164] Once again, I have found the submissions of ARPI to be more persuasive than Mr Campbell's, and I accept them. As the learned judge found, the documentary evidence reveals that Mr Campbell's services in accounting support and directing of accounting staff formed part of the management package to be provided by Jemara as expressed in the 4 July agreement of 1995. Whether Mr Campbell's designation was financial director, financial controller or anything else, the agreement was explicit that his services form part of the minimum management services to be provided by Jemara.

[165] Despite that provision, Mr Campbell's contention before the learned judge was that he was employed pursuant to clause 5(a) of the February 1996 management agreement. He was apparently strengthened in this proposition by the evidence of Mr Gardner, under cross-examination, that the February 1996 management agreement and clause 5(a), in particular, did not preclude Mr Oostenbrink from contracting Mr Campbell directly to ARPI. Clause 5(a) reads in so far as is relevant:

> "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**." (Emphasis added)

[166] The learned judge did not accept Mr Campbell's position that clause 5(a) applied to him. In arriving at that position, the learned judge looked at the reason for and background to the February 1996 management agreement and the compensation structure for Jemara, as part of the circumstances that militated against a finding in favour of Mr Campbell. He noted that:

> "[94] …It would be a remarkable thing if it were to be accepted that Jemara was no longer to bring its own 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."

[167] The learned judge also considered that the February 1996 management agreement had no provision for ARPI to be responsible for paying Mr Campbell directly.

[168] A crucial aspect of the evidence, however, that would have gravely undermined Mr Campbell's reliance on clause 5(a) of the February 1996 management agreement is clause 5(d)(1)(d). Miss Larmond's argument that whatever Mr Campbell's designation was, his services were to be paid for by Jemara is very attractive in the light of this latter provision in the February 1996 management agreement. According to clause 5(d)(1), Jemara services also included-

> "(d) The selection, terms of employment and termination thereof including rates of compensation and the supervision, direction, training and assignment 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.
>
> (1) **Persons directly paid by Jemara Resorts N.V. include:**

(a) …

(b) …

(c) …

(d) **Support of Financial Controller**

(e) …" (Emphasis added)

[169] Mr Campbell's contention, backed by the submissions of his counsel, was that he was not the financial controller but, instead, the financial director, and so clause 5(d)(1)(d) would not apply to him. He relied on the evidence that Club Ambiance had a financial controller to bolster this argument. The flaw in Mr Campbell's position is, however, palpable. On an accurate reading of the sub-clause, the person to be paid by Jemara was the person providing support services to the financial controller, not the financial controller. Furthermore, the addendum to the 4 July 1995 agreement clearly stated that Mr Campbell was engaged to provide "accounting support" and "direction of hotel accounting staff" as part of Jemara's management team. This must be taken to mean, as ARPI contends, that he falls under clause 5(d)(1)(d) to be paid by Jemara in keeping with his role. Therefore, Miss Larmond's argument is quite persuasive that even if Mr Oostenbrink had employed Mr Campbell under clause 5(a), Jemara was, nevertheless, responsible for paying him based on clause 5(d)(1)(d).

[170] It is starkly evident that even though Mr Gardner had agreed that Mr Oostenbrink could have employed Mr Campbell under clause 5(a) and had asserted that the financial controller and financial director were the same, ARPI would not have been responsible for paying him directly for his services by virtue of clause 5(d)(1)(d). It was the person providing support to the financial controller through the management services offered by Jemara and not the financial controller, who was to be paid directly by Jemara. Mr Campbell was explicitly identified by name in the 4 July 1995 agreement as the only person providing such support services. Pursuant to that arrangement, he undertook engagement as finance director for the hotel. There is no evidence that anyone else was so designated to provide accounting support as part of the services offered by Jemara.

Therefore, it would not have been against the weight of the evidence for the learned judge to conclude that Mr Campbell was to be paid directly by Jemara and not ARPI for his services. That finding was open to the learned judge on the strength of the undisputed documentary evidence.

[171] I conclude that the learned judge's analysis and finding regarding the applicability of clause 5 to Mr Campbell's case are unassailable. It was open to him to find as he did, on the totality of the evidence before him, that the documentary evidence of the written agreements of 1995 and 1996 did not support Mr Campbell's case that ARPI was directly responsible for his remuneration. Therefore, he was not plainly wrong in concluding that ARPI owed Mr Campbell no money. This finding is dispositive of the appeal, and so there is no need to further investigate, in any detail, the learned judge's findings that Mr Oostenbrink and/or Jemara had no authority to bind ARPI to a direct contract with Mr Campbell so as to render ARPI liable.

(b) Mr Campbell's knowledge of arrangement between Jemara and ARPI

[172] However, for completeness, I have considered one last issue that played an integral part in the learned judge's conclusion that Mr Oostenbrink and/or Jemara did not have the apparent or ostensible authority to bind ARPI in a direct contractual relationship with Mr Campbell. This issue concerns the learned judge's finding regarding Mr Campbell's knowledge of the arrangement between ARPI and Jemara. Therefore, the final question to be settled now is: did the learned judge err in finding that Mr Campbell knew or ought to have known of the arrangement between Jemara and ARPI?

The submissions

[173] Mr Foster argued that the learned judge's imputation of knowledge to Mr Campbell of the agreement between ARPI and Jemara and that he knew Mr Oostenbrink was not Jemara's agent was plainly wrong. Queen's Counsel contended that Mr Campbell knew of the payments to Jemara in 1996 but did not know the nature of the agreement between

ARPI and Jemara. He was no part of that transaction between ARPI and Jemara and was, therefore, on its periphery.

[174] Queen's Counsel referenced the case of **Royal British Bank v Turquand** [1843-60] All ER Rep 435 in support of the argument that Mr Campbell was not required to investigate into the internal arrangements between Mr Oostenbrink/Jemara and ARPI. He maintained, on the principle of that case, that a person dealing with a company is assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent with them. However, he is not required to do more; he is not required to launch investigations into the regularity of the internal proceedings of the company.

[175] In response, Miss Larmond submitted that the learned judge was correct in his findings that Mr Campbell knew of the agreement between ARPI and Jemara because Mr Campbell's evidence on the point was riddled with inconsistencies. He "flipped and flopped as to when he knew what", she argued.

Analysis and findings

[176] The learned judge critically evaluated Mr Campbell's evidence regarding his knowledge, or lack thereof, of the arrangement between Jemara and ARPI. Having done so, he evidently found it (at best) improbable that Mr Campbell did not know of the agreements that the parties entered into in the light of the payment structure and his role as finance director. He found on a balance of probabilities that Mr Campbell knew or must have known of the arrangement. He, therefore, rejected Mr Campbell's evidence that he had no knowledge of the arrangement between ARPI and Jemara until 1996 and had not seen the management agreement until 2012. The learned judge extensively revealed his thought-process regarding Mr Campbell's knowledge at paras. [47] and [48] of his judgment, which would be best expressed verbatim:

> "[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 entitle [sic] 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 [sic] the financial director of Club Ambiance? Did he not see financial records?"

[177] The learned judge then later reasoned at para. [97] of his judgment:

> "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."

[178] Therefore, the learned judge took into account several critical aspects of the evidence in arriving at his conclusion regarding Mr Campbell's knowledge. It cannot be said that he was wrong in so doing.

[179] The learned judge was equally dismissive of Mr Campbell's case regarding the written contracts he sought to rely on in proof of his case. In the learned judge's view, as expressed fully at para. [108] of his judgment:

> "[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 [sic] therefore outside of the **Freeman & Lockyer** principle."

[180] It was on the basis of these findings, regarding Mr Campbell's knowledge or imputed knowledge, that the learned judge partly found that **Freeman & Lockyer** could

not avail him in establishing that Mr Oostenbrink and Jemara had the apparent or ostensible authority to bind ARPI, when Mr Oostenbrink entered into the written contracts with him. The submissions of counsel for Mr Campbell, that the learned judge applied the wrong law and failed to properly assess the evidence in arriving at this finding, cannot be accepted.

Conclusion on sub-issue (2)

[181] The learned judge's view that neither Mr Oostenbrink nor Jemara had the authority to contract with Mr Campbell on behalf of ARPI in terms of the 1998, 2006 and 2007 contracts and that Mr Campbell knew cannot be justifiably rejected by this court. He applied the relevant law to the evidence and arrived at his conclusion, which is a mixed finding of law and fact. There is no error of law identified in his reasoning on this point, and it cannot be said he was plainly wrong in his findings of fact.

Accordingly, the learned judge's findings that neither Mr Oostenbrink nor Jemara had the ostensible authority to bind ARPI to a direct contractual relationship with Mr Campbell is unimpeachable. Therefore, the grounds of appeal, alleging that he erred in his findings regarding the apparent or ostensible authority of Mr Oostenbrink and Jemara to bind ARPI into a direct contractual relationship with Mr Campbell, are without merit. They, too, fail.

Ultimate issue: whether the learned judge erred in finding that there was no enforceable contract between ARPI and Mr Campbell

[182] The task of the learned judge was to ascertain from the evidence whether, on a balance of probabilities, Mr Campbell had established his claim that ARPI was liable to him in damages in the sums claimed due to the existence of an enforceable contract of employment between them. Having seen and heard Messrs Campbell, Oostenbrink, Gardner and the other witnesses, against the backdrop of undisputed documentary evidence, the learned judge found that the balance of probabilities was more in favour of ARPI's case that no enforceable contract existed. He rejected the critical aspects of Mr Campbell's case, on which the success of the claim depended, as improbable, implausible

and incredulous. His findings that there was no oral contract created in 1995 between ARPI's principals and Mr Campbell and that neither Mr Oostenbrink nor Jemara had the actual, apparent or ostensible authority to bind ARPI in a contractual relationship with Mr Campbell are unassailable. Those are matters that fell within his province as the finder of fact, and there is nothing on which this court could safely say that the conclusions he arrived at were not open to him on the evidence led before him.

[183] Therefore, it cannot be said that the learned judge erred in finding, on the ultimate and pivotal issue, that there was no enforceable contract between Mr Campbell and ARPI, whether directly or by virtue of the law of agency.

[184] Accordingly, this court has no legitimate basis to interfere with the learned judge's decision on Mr Campbell's claim. The appeal (SCCA No 2/2017) fails.

Disposal of Mr Campbell's appeal

[185] I would dismiss the appeal and affirm the learned judge's decision. Also, in keeping with the general rule that costs follow the event, ARPI, being the successful party, should be awarded the costs of the appeal.

[186] Therefore, on Mr Campbell's appeal, the proposed orders are:

1. The appeal is dismissed.
2. The decision and orders of Sykes J (as he then was), made on 2 December 2016 in the Commercial Division of the Supreme Court, are affirmed.
3. Costs of the appeal to ARPI to be agreed or taxed.

ARPI's appeal (SCCA No 3/2017)

[187] In respect of ARPI's appeal, I have read the draft judgment of Simmons JA (Ag). I agree with her reasoning and conclusion that the appeal should be allowed with the proposed consequential orders made as to costs. I have nothing further that I could usefully add.

F WILLIAMS JA

[188] I have read, in draft, the judgments of McDonald-Bishop JA and Simmons JA (Ag). I agree with their reasoning, conclusion and proposed orders, and there is nothing I could usefully add.

SIMMONS JA (AG)

[189] I, too, have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning, conclusion and the orders she proposed, and there is nothing that I can usefully add.

[190] I will now consider ARPI's appeal that relates to the ancillary claim.

ARPI's appeal

Background

[191] The background and the procedural history of this appeal have been set out by my sister, McDonald-Bishop JA, at paras. [5]-[35] of this judgment. However, it suffices for the purpose of this appeal to repeat some salient facts concerning ARPI's ancillary claim against Mr Oostenbrink.

[192] ARPI, in its ancillary claim, sought against Mr Campbell, damages for negligence, interest and costs and against Mr Oostenbrink, an indemnity or contribution in respect of any sum adjudged to be due to Mr Campbell by ARPI. It was averred in the particulars of the ancillary claim, that Mr Oostenbrink, as principal and agent of Jemara, negligently and/or in breach of the February 1996 management agreement, entered into an employment contract with Mr Campbell as Finance Director of Club Ambiance which was owned by ARPI.

[193] The particulars of breach of contract and negligence of Mr Oostenbrink as agent of Jemara are:

"i. Acting outside of his authority in entering into a contract of employment on [ARPI's] behalf.

ii. Exposing [ARPI] to a law suit for breach of contract of employment which it knew or ought to have known.

iii. Failing to provide proper supervision of the Finance Director [Mr Campbell] or at all.

iv. In the circumstances, failing to dutifully and diligently manage the hotel."

[194] Mr Oostenbrink, in his defence to the ancillary claim, stated that Jemara was the manager of the hotel and was authorised by virtue of clause 5(a) of the February 1996 management agreement to enter into an employment contract with Mr Campbell. Mr Oostenbrink stated that he signed the said agreement as agent of Jemara. The particulars of breach of contract and negligence were denied. It was averred that when the February 1996 management agreement is analysed as a whole, it may be interpreted that Mr Oostenbrink was impliedly authorised to do so as agent of ARPI and, as such, acted in accordance with the usual customs in the hotel business and/or clause 5(a) of the said agreement in entering into a contract of employment with Mr Campbell.

[195] Alternatively, it was averred that it could be inferred from the words used in the February 1996 management agreement that Jemara had the authority to act on behalf of ARPI in the employment of Mr Campbell. In the circumstances, Mr Oostenbrink having had apparent or ostensible authority to do so, Ambiance was estopped from denying that he acted in accordance with that authority.

[196] In the alternative, it was stated that at the time when Mr Oostenbrink executed the contract of employment on behalf of ARPI (although he was not its agent), he had ARPI in his contemplation. It was also stated that ARPI, through its owner, Mr George Gardner, and/or its chief accountant, Mr Sandifer, was aware of Mr Campbell's employment and there was no objection. As a result of its acquiescence, ARPI ratified Mr Campbell's employment as financial director and is estopped from bringing a claim for an indemnity or contribution against Mr Oostenbrink.

[197] It was also averred that during the 15 years that Mr Oostenbrink was managing the hotel, ARPI never lodged any complaints that he was mismanaging the said hotel.

[198] In respect of ARPI's ancillary claim against Mr Oostenbrink for an indemnity or contribution, the learned judge held that it failed since that was contingent upon Mr Campbell's claim being successful. Accordingly, the learned judge dismissed the ancillary claim and awarded costs to Mr Campbell and Mr Oostenbrink.

Grounds of appeal

[199] ARPI, which was dissatisfied with the ruling of the learned judge filed a notice of appeal by which the following decisions were appealed:

> "a) The Ancillary Claim against [Mr Oostenbrink] is dismissed.
>
> b) Costs on the Ancillary Claim to [Mr Oostenbrink] to be agreed or taxed."

The following findings of fact and law were challenged:

> "a) '**ARPI's ancillary claim against Mr Oostenbrink fails since that was contingent upon Mr Campbell succeeding in his claim.**' [Paragraph 113, Reasons for Judgment]
>
> b) '**The ancillary claim is dismissed with costs to the ancillary defendants.**' [Paragraph 114, Reasons for Judgment] (Emphasis as in original)

The grounds of appeal are as follows:

> "a) The learned judge fell into error when he dismissed the ancillary claim for indemnity or contribution in circumstances where a consideration of the ancillary claim on the merits did not arise and was unnecessary in the light of the learned judge's dismissal of the main claim.
>
> b) The learned judge fell into error when he failed to appreciate or failed to adequately appreciate that the dismissal of the ancillary claim would have the effect

of depriving [ARPI] of any remedy to which [ARPI] would be entitled under the Law Reform (Tortfeasors) Act should [Mr Campbell] successfully appeal against the decision in the main claim; or would act as a bar to any such remedy.

c) The learned trial judge failed to consider or to sufficiently consider that the general rule that the unsuccessful party must pay the costs of the successful party pursuant to Civil Procedure Rule 64.6 would not have been applicable in circumstances of the ancillary claim for indemnity or contribution.

d) In awarding costs to [Mr Oostenbrink], the learned trial judge failed to consider or failed to sufficiently consider that the dismissal of the main claim was in effect a rejection of [Mr Oostenbrink's] defence to the ancillary claim alleging an agency relationship; and an award of costs to [Mr Oostenbrink] is inconsistent with the learned judge's finding that [Mr Oostenbrink] knew or ought properly to have known that no such relationship existed.

e) The learned trial judge erred in making the [costs] order when he failed to take into account or failed to adequately take into account that the actions of [Mr Oostenbrink] exposed [ARPI] to the claim in respect of which [ARPI] succeeded and that it was therefore reasonable for ARPI to have claimed an indemnity or contribution against [Mr Oostenbrink].

f) The learned Judge failed to consider the appropriateness of a Bullock or a Sanderson order as to costs in all the circumstances."

[200] The orders sought are:

"a) The order dismissing the ancillary claim as against [Mr Oostenbrink] be set aside and substituted with an order that the main claim having been decided in favour of [ARPI], there are no issues of liability remaining for determination as between [ARPI] and [Mr Oostenbrink].

b) Costs in the Appeal to [ARPI] to be taxed if not agreed.

c) No order as to costs in the Court below.

d) Or in the alternative, costs in the Court below to [Mr Oostenbrink] to be borne by [Mr Campbell]."

Ground a): The learned judge fell into error when he dismissed the ancillary claim for indemnity or contribution in circumstances where a consideration of the ancillary claim on the merits did not arise and was unnecessary in the light of the learned judge's dismissal of the main claim.

Ground b): The learned judge fell into error when he failed to appreciate or failed to adequately appreciate that the dismissal of the ancillary claim would have the effect of depriving [ARPI] of any remedy to which [ARPI] would be entitled under the Law Reform (Tortfeasors) Act should [Mr Campbell] successfully appeal against the decision in the main claim; or would act as a bar to any such remedy.

ARPI's submissions

[201] Miss Larmond submitted that in light of the fact that the ancillary claim, being one for an indemnity or contribution, was contingent on the outcome of the main claim, the learned judge erred when he dismissed it after the main claim failed. It was argued that based on **Desmond Clarence Bennett v Jamaica Public Service Co Ltd and Others** (unreported), Supreme Court, Jamaica, Suit No CCL 1999/B-325, judgment delivered 24 April 2009 ('**Desmond Bennett SC**'), the ancillary claim did not arise and as such there was "nothing to dismiss". In that case, the court made no finding in respect of the ancillary claim. In this regard, it was pointed out that in **Desmond Bennett v Jamaica Public Service Company Limited and Clarence Bailey** [2013] JMCA Civ 28 ('**Desmond Bennett CA**'), this court did not disturb the findings of the trial judge on the substantive issues and his judgment on the claim and ancillary claim was affirmed in respect of liability.

Mr Oostenbrink's submissions

[202] Mr Michael Thomas, on behalf of Mr Oostenbrink, stated that it was "conceded" that the learned judge "may" have dismissed the claim in error and indicated that if the court agrees with that position, the only remaining issue to be litigated between the parties to the ancillary claim was that pertaining to costs.

Analysis

[203] Rule 18.2(1) of the Civil Procedure Rules, 2002 ('CPR'), states that "[a]n ancillary claim is to be treated as if it were a claim for the purposes of these Rules except as provided by this Part". Rule 18.10(2) provides that "[w]hen an ancillary claim form is served on an existing party for the purpose of requiring the court to decide a question against that party in a further capacity, that party also becomes a party in the further capacity specified in the claim form". Mr Oostenbrink was the 4th defendant in the claim and the 2nd ancillary defendant in the ancillary claim. The only remedy sought against him by ARPI was for an indemnity or contribution in the event that it was found to be liable in the main claim.

[204] In **Desmond Bennett SC**, a claim was brought against the defendants for negligence and/or breach of statutory duty against the Jamaica Public Service Company Limited ('JPS'), arising out of injuries suffered by the claimant due to electric shock. Donald Card, the second defendant, was the contractor and mason who had been engaged by Clarence Bailey, the ancillary defendant at whose premises the work was being done. JPS brought a claim against Mr Bailey for negligence and/or contributory negligence, which was essentially for an indemnity or contribution in relation to any damages which may have been awarded. The defence was that the claimant was the author of his own demise. The claim was, however, withdrawn against Mr Card. R Anderson J found that as a result of the withdrawal of the claim against Mr Card, JPS was not liable to Mr Bennett either in negligence or breach of statutory duty. In dealing with the ancillary claim against Mr Bailey, he stated at page 38 of his judgment:

> "In light of my holding in relation to [JPS] on liability, I make no finding of liability against [Mr Bailey] …".

[205] In **Desmond Bennett CA**, the judgment of R Anderson J on the claim and the ancillary claim was affirmed in respect of liability. This approach is in keeping with that of the court in the Australian case of **Burke and Anor v Gillett and Anor** [1996] VicRp 11; [1996] 1 VR 196 (7 November 1994) ('**Burke**'), where Tadgell J referred to the

judgment of the court in **Allman v Daly (2); Allman v Country Roads Board** [1959] VicRp 81; [1959] VR 614 (16 October 1957), in which Page J stated:

> "In the Action Allman v Country Roads Board; Daly, Ferguson, Gallagher and Monson, third parties, (1956 No. 1665), I will, in accordance with the jury's verdict, enter judgment for the defendant with costs, including the costs of pleadings, interrogatories and shorthand notes, and any reserved costs. **So far as the third party proceedings are concerned, I think it would be incorrect to enter judgment for the third parties against the defendant, because, as I have already shown, these proceedings are contingent on the defendant's liability being established.** Since it has not been established, the third party proceedings were never litigated, and were I to enter judgment for the third parties, and were the defendant Daly to appeal from this judgment, it would be necessary for the Country Roads Board to appeal also against the judgment for the third parties in order to preserve its rights should the appeal be successful. In Re Salmon (1889) 42 Ch D 351, where the defendant succeeded and recovered judgment, judgment was not entered for the third party against the defendant, and the question as to whether the third parties were directly affected by the appeal was considered.
>
> **I think in all the circumstances justice will be done if I make no order on the third party proceedings except to order that the third parties, Ferguson, Gallagher and Monson are to have such costs against the defendant Country Roads Board as they have incurred by reason of the service upon them of the third party notices, but excluding any costs of the trial**. I accordingly make such an order against the Country Roads Board." (Emphasis added)

[206] In **Burke**, Tadgell J stated:

> "Counsel for the defendants relied particularly on the unreported decision of Kaye J in Devon Downs Administrators Pty Ltd v Theodoropoulos given on 7 April 1982. In that case his Honour found in favour of the defendants against the plaintiff and awarded costs against the plaintiff in favour of the defendants. The question then arose as to the costs of

> the third party proceedings and the fourth party proceedings. Kaye J took the view that, **since he had found that the defendants were not liable to the plaintiffs, and that it had been unnecessary for him to determine the third party proceedings, no substantive order or judgment upon the third party proceedings ought to be pronounced**. His Honour followed the decision of Pape J in Allman v Country Roads Board [1959] Vic Rp 81; [1959] VR 614, in which, at 624, Pape J had taken the view that, because the third party proceedings before him had been contingent upon the defendant's liability being established, it was inappropriate to deal substantively by way of order with the third party proceedings." (Emphasis supplied)

[207] In **Kheirs Financial Services Pty Ltd & Anor v Aussie Home Loans Pty Ltd & Anor** [2010] VSCA 355 (20 December 2010) ('**Kheirs**'), the court referred to **Devon Downs Administrators Pty Ltd v Theodoropoulos**, unreported, Supreme Court of Victoria, Kaye J, 7 April 1982, in which a similar view was expressed. Para. 22 states:

> "Similarly, in Devon Downs, Kaye J held that there should be no substantive order in the third party proceeding. Applying Allman, Kaye J said:
>
> > **The defendants, not having been found liable to the plaintiff, the third party proceedings were not determined. Therefore, in my view, no order or judgment ought to be made or pronounced. No issue has been determined between the defendants and the third party, and in particular, the issue of whether there is a right to an indemnity or contribution in the defendants against the third party**. …
> >
> > In the result, I do not intend to make any order for judgment in respect of either the third or fourth party proceedings." (Emphasis added)

[208] The claim having failed in the instant case, it is beyond debate that the ancillary claim did not arise and, as such, needed to be brought to an end. The learned judge chose to conclude the matter by dismissing the ancillary claim. In A Practical Approach

to Civil Procedure by Stuart Sime, 11th Edition, the learned author states at paragraph 18.38:

> "Although it is procedurally connected with the main claim, an additional claim is in many respects a separate claim. Settlement, dismissal, or striking out of the main claim will not usually terminate third party proceedings (*Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651, CA)… **If the defendant claims an indemnity or contribution from the third party and the main claim is dismissed or struck out, the additional claim will end as its basis is gone**…". (Emphasis supplied)

[209] This passage seems to suggest, as was stated in **Desmond Bennett SC**, **Burke**, **Allman v Daly (2)** and **Kheirs**, that no order as to liability would have been necessary to bring the proceedings against Mr Oostenbrink to an end. On this, Miss Larmond and Mr Thomas agreed. I am of the view that the learned judge erred when he dismissed the ancillary claim. In the circumstances, the judgment ought to be set aside in respect of the issue of liability.

Ground c) The learned trial judge failed to consider or sufficiently consider that the general rule that the unsuccessful party must pay the costs of the successful party pursuant to Civil Procedure Rule 64.6 would not have been applicable in circumstances of the ancillary claim for indemnity or contribution.

Ground d) In awarding costs to [Mr Oostenbrink], the learned trial judge failed to consider or failed to sufficiently consider that the dismissal of the main claim was in effect a rejection of [Mr Oostenbrink's] defence to the ancillary claim alleging an agency relationship; and an award of costs to [Mr Oostenbrink] is inconsistent with the learned judge's finding that [Mr Oostenbrink] knew or ought properly to have known that no such relationship existed.

Ground e) The learned judge erred in making the [costs] order when he failed to take into account or failed to adequately take into account that the actions of [Mr Oostenbrink] exposed [ARPI] to the claim in respect of which ARPI succeeded and that it was therefore reasonable for [ARPI] to have claimed an indemnity or contribution against [Mr Oostenbrink].

Ground f) The learned Judge failed to consider the appropriateness of a Bullock or a Sanderson order as to costs in all the circumstances.

ARPI's submissions

[210] Miss Larmond, in her written submissions, indicated that ARPI is seeking for the costs order of the learned judge to be set aside and substituted with either of the following: (a) no order as to costs or (b) that Mr Campbell be ordered to pay the costs of Mr Oostenbrink.

[211] She submitted that the learned judge, in making the costs order, did not disclose whether he considered the principles that ought to guide a court when making an order for costs in multi-party litigation. In the circumstances, it was submitted that this court ought to consider the matter afresh.

[212] The court's attention was directed to rule 64.6 of the CPR, which deals with principles relating to the consideration and award of costs. Counsel submitted that while the costs of ancillary proceedings are generally considered separately from the main proceedings, there is sufficient basis, in this case, to depart from this rule. In this regard, the court was reminded that Mr Oostenbrink, a defendant in the ancillary claim, was also the 4th defendant in the main claim. His defence to the ancillary claim was closely intertwined with the case advanced by the claimant (Mr Campbell) in the main claim. The learned judge's rejection of his evidence, it was submitted, is relevant to the question of whether he should be awarded costs and who should bear those costs.

[213] Reference was made to paras. [30]-[33] of the judgment in which the relationship between Mr Campbell and Mr Oostenbrink was discussed. Counsel submitted that based on the learned judge's observations in relation to Mr Oostenbrink's evidence, an order for "no order as to costs" would have been appropriate.

[214] Alternatively, Miss Larmond argued that if the court finds that Mr Oostenbrink was entitled to costs, they ought to be paid by Mr Campbell. This is because Mr Campbell's claim was based on the premise that Mr Oostenbrink had the authority to employ him on

ARPI's behalf. However, the learned judge found that Mr Campbell and Mr Oostenbrink knew that was not the case. In the circumstances, it was submitted that it was not unreasonable for ARPI to have sought a contribution or indemnity against Mr Oostenbrink.

[215] Reference was made to **Desmond Clarence Bennett v Jamaica Public Service Co Ltd and Others** (unreported), Supreme Court, Jamaica, Suit No 1999/B-325, judgment delivered 1 May 2009 ('**Desmond Bennet (SC-costs)**'), in support of the argument that a Bullock Order (see **Bullock v The London General Omnibus Company and Others** [1907] 1 KB 264) or Sanderson Order (see **Sanderson v Blythe Theatre Company** [1903] 2 KB 533) could have been considered by the learned judge as being appropriate in the circumstances of this case.

[216] It was further submitted that this court should take note of the fact that Mr Campbell did not serve Mr Oostenbrink and that he participated fully in the trial as an ancillary defendant. Counsel argued that having been made aware of the claim, through service on the ancillary claim form, Mr Oostenbrink would have submitted to the jurisdiction of the court, and there is no basis for any demarcation as to the capacity in which he participated in the trial (see **Claudia Henlon v Sharon Martin Pink and Others** [2015] JMCA Civ 4 ('**Henlon v Pink**').

[217] In conclusion, the court was asked to find that it was reasonable for ARPI to have commenced an ancillary claim against Mr Oostenbrink. It was submitted that if the court finds that notwithstanding Mr Oostenbrink's conduct, he is entitled to costs, those costs ought to be paid by Mr Campbell.

Mr Oostenbrink's submissions

Ground c)

[218] Mr Thomas submitted that, based on the decision of the Court of Appeal of the Eastern Caribbean States in **Dufour and Others v Helenair Corporation Ltd and Others** (1998) 52 WIR 188, an appellate court will not interfere with a decision based on

the exercise of a judge's discretion, unless the judge erred in principle and that, as a result, the decision was "clearly or blatantly wrong".

[219] It was acknowledged that the general rule is that the unsuccessful party must be ordered to pay the costs of the successful party unless there are special circumstances that require a deviation from that rule.

[220] Counsel submitted that in **Desmond Bennett SC** and **Desmond Bennett CA** the courts, notwithstanding the egregious conduct of the ancillary defendant, did not make an order that there be "no order as to costs" but granted costs to the defendant in the ancillary claim. It was also noted that the appellate court, in that case, found that there were good reasons for the bringing of the ancillary claim, and even in those circumstances, costs were ordered in favour of the ancillary defendant.

[221] It was further submitted that Mr Oostenbrink, by his participation in the matter as an ancillary defendant, did not submit to the court's jurisdiction as could be said of the fourth respondent in **Henlon v Pink**, which was referred to by counsel for ARPI. He stated that the case could be distinguished on the basis that in that case, the 4th defendant filed the ancillary claim and, as such, became an ancillary claimant. Mr Oostenbrink did not file the ancillary claim.

Ground d)

[222] It was submitted that if the court finds that the learned judge, in awarding costs, failed to consider that the failure of the main claim was, in effect, a rejection of the ancillary defence, an order that the costs paid by the ARPI to Mr Oostenbrink be recoverable from Mr Campbell would be appropriate.

Ground e)

[223] Mr Thomas submitted that the situation in **Desmond Bennett SC** differs from the instant case as, in that case, it was an identifiable action of the ancillary defendant (Bailey) that exposed the ancillary claimant (JPS) to the claim. It was pointed out that

even in those circumstances, the court did not make an order of "no order as to costs". Reference was also made to **Desmond Bennett CA**, where Brooks JA (as he then was) spoke of the conduct of the ancillary defendant.

Ground f)

[224] Mr Thomas submitted that Bullock or Sanderson Orders are not normally made in respect of ancillary proceedings; as such, it is unlikely that the learned judge would have made either of those orders. Reference was made to page 38 of **Desmond Bennet SC**, where R Anderson J invited the parties to make submissions in respect of costs. It was submitted that had the learned judge extended a similar invitation to the parties, the issue of whether either of those orders was appropriate would have been considered. It was, however, submitted that in light of the learned judge's finding that Mr Oostenbrink participated as an ancillary defendant, it is unlikely that he would have found it appropriate to make either a Bullock or Sanderson Order as such orders are made against other named defendants and not in respect of ancillary proceedings.

[225] In conclusion, Mr Thomas submitted that based on the principle that costs follow the event, this court should not make an order of "no order as to costs" and that the following alternative orders could be made:

> "(i) Costs of the Ancillary Claim to [Mr Oostenbrink] to be taxed if not agreed.
>
> (ii) These costs are to be paid by [ARPI] and are recoverable from [Mr Campbell]."

[226] Reliance was placed on paras. 68.42-68.46 of Blackstone's Civil Practice (2017) in support of the appropriateness of the alternative orders.

Analysis

[227] The court's discretion in awarding costs is governed by the Judicature (Supreme Court) Act and rule 64.6 of the CPR. Section 47(1) of the Judicature (Supreme Court) Act states that "[i]n the absence of express provision to the contrary the costs of and incident

to every proceeding in the Supreme Court shall be in the discretion of the Court…". Rule 64.6(1) of the CPR provides that "[i]f the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party…". In other words, costs follow the event. The court's discretion must, however, be exercised judicially. In **Jones v McKie and Mersey Docks and Harbour Board** [1964] 2 All ER 842 at 844, Wilmer LJ cited with approval, the following passage from **Donald Campbell & Co Ltd v Pollak** [1927] All ER Rep 1 at page 41, where Viscount Cave LC stated:

> "A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must of course be exercised judicially…".

[228] In the event that the court is minded to depart from this rule, regard must be had to a number of factors, including whether it was reasonable for a party to pursue a particular allegation or raise a particular issue (see rule 64.6(4) of the CPR).

[229] In this matter, the learned judge awarded costs to Mr Oostenbrink in the ancillary proceedings. Paras. [113], [114] and [118] are relevant. They state:

> "[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.
>
> …
>
> [118] … The ancillary claim against both ancillary defendants is dismissed. Cost [sic] on the ancillary claim to the ancillary defendants to be agreed or taxed."

[230] This appeal arose from the exercise of the learned judge's discretion. In such circumstances, this court will not lightly interfere with that decision as it is not the function of this court to substitute its views for that of the learned judge. The basis on which this court will disturb such a decision is well settled. In order to succeed, ARPI must demonstrate that the learned judge, in the exercise of his discretion, erred on a point of law or made a decision that no judge "regardful of his duty to act judicially could have reached" (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 (**'Mackay'**), in which Morrison JA (as he then was) summarized the principles in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, at 1046).

[231] The general rule is that where the assessment of costs is concerned, "[a]n ancillary claim is to be treated as if it were a claim…". This principle was confirmed by this court in **Desmond Bennett CA**, where Brooks JA stated at para. [81]:

> "[81] The introduction of the CPR has not disturbed that application. In **Arken v Borchard Lines Ltd and Others** [2005] EWCA Civ 655, the English Court of Appeal discussed the issue in the context of the rules of the Civil Procedure Rules of that country that deal, respectively, with the overriding objective, ancillary proceedings and costs. The court made it clear, however, that a court assessing the issue of costs, is entitled to consider the ancillary proceedings separately from the main proceedings. An excerpt from that court's deliberations on the point may assist:
>
> > '[75] **In the usual course of things the court will consider the incidence of costs in the main proceedings quite separately from the incidence of costs in the [ancillary] proceedings, but nobody submitted that this was an inviolable rule**…
> >
> > [77] In the ordinary run of cases under the CPR the same principle will be applied. **A successful [ancillary] defendant should not be deprived of his prima facie right to an order for costs against [an ancillary] claimant merely on the ground of the [main] claimant's impecuniosity**…The issue that has to be

> determined on the peculiar facts of the present litigation is whether the interests of justice deemed that some different order should be made…as between the various [parties]...'" (Emphasis as in original)

[232] Whilst this is not a case of impecuniosity, it is evident that, in circumstances such as these, where the ancillary claim is for an indemnity or contribution, and the main claim failed, the learned judge had the discretion to make the costs order that he considered appropriate. There is, however, no indication that he considered whether, in keeping with the overriding objective to deal with the case justly, a different order may have been more appropriate, given the particular circumstances of this case. This raises the issue of whether the learned judge exercised his discretion judicially and, as such, this court may consider the matter afresh.

[233] Mr Campbell's claim was based on the premise that Mr Oostenbrink had the authority to employ him on ARPI's behalf. Mr Oostenbrink, who was named as a defendant, was sued in the capacity of servant and/or agent of ARPI, Jemara and Jemara Properties Company Limited. The allegations made against those parties also applied to him. ARPI's in its defence denied that Mr Oostenbrink was its agent and asserted that Mr Campbell was at all material times employed to Jemara. Mr Oostenbrink was never served with the claim form and particulars of claim but participated in the trial as an ancillary defendant and gave evidence. The main issue for the court's determination was whether he had either ostensible or apparent authority to act as agent for ARPI in relation to the engagement of Mr Campbell.

[234] The learned judge, having examined the terms of the 4 July 1995 agreement, stated at paras. [22]-[24]:

> "[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:

> '1. Management Services provided by [the] Manager to 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 accounts staff by Louis Campbell
>
> ...
>
> 2. 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 [accounts] staff by Louis Campbell'."

[235] The findings of the learned judge in relation to Mr Campbell's engagement and the role played by Mr Oostenbrink are at para. [37] of the judgment, which states:

> "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**." (Emphasis supplied)

[236] The learned judge concluded at para. [62] that in 1995 there was no legally enforceable contract between Mr Campbell and ARPI. The learned judge also found that, in 1995, Jemara was not acting as agent for ARPI and, as such, did not owe Mr Campbell any money and was not obliged to pay him for any services rendered in that year.

[237] In light of the findings of the learned judge, ARPI has asserted that he erred by not considering whether there was any reason to deviate from the general rule, which resulted in ARPI being liable to pay Mr Oostenbrink's costs. The issue of whether a Bullock Order or a Sanderson Order would be appropriate was raised by counsel for ARPI. Counsel for ARPI has argued that neither order could be made in ancillary proceedings. A Bullock Order is one where the successful defendant's costs should be included in the costs recoverable by the plaintiff from an unsuccessful defendant. A Sanderson Order is one where the plaintiff is ordered to pay the costs of the successful defendant and then add those costs to the costs which are to be paid by the unsuccessful defendant to the plaintiff or for an unsuccessful defendant to pay the costs of the successful defendant.

[238] In **Desmond Bennet CA**, at para. [80], Brooks JA stated that the above orders can be made in ancillary proceedings. He relied on the cases of **Edginton v Clark and**

Another [1963] 3 All ER 468 ('**Edginton**') and **Aiden Shipping Co Ltd v Interbulk Ltd; The Vimeira** [1986] 2 All ER 409 ('**Aiden Shipping**').

[239] In **Edginton**, the appeal was concerned with the county court judge's refusal to allow the defendants to add to the costs recoverable from the plaintiff, those costs which they had been ordered to pay to the third party. Upjohn LJ, who delivered the judgment of the court, stated that the court, in the exercise of its discretion, had the power to order "the plaintiff or the defendant or the third or any subsequent party to pay the costs of any other party or parties to the litigation, as the justice of the case may require…".

[240] In **Aiden Shipping**, the issue was whether there could be implied into section 51(1) of the United Kingdom's Supreme Court Act, 1981 ('the UK Act') a limitation that restricted costs orders to the parties in the proceedings. That section is similar to section 47(1) of the Jamaican legislation. Lord Goff of Chieveley, who delivered the decision of the court, stated at page 413:

> "It is, I consider, important to remember that s 51(1) of the 1981 Act is concerned with the *jurisdiction* of the court to make orders as to costs. Furthermore, it is not to be forgotten that the jurisdiction conferred by the subsection is expressed to be subject to rules of [the] court, as was the power conferred by s 5 of the 1890 Act. It is therefore open to the rule-making authority (now the Supreme Court Rule Committee) to make rules which control the exercise of the court's jurisdiction under s 51(1). In these circumstances, it is not surprising to find the jurisdiction conferred under s 51(1), like its predecessors, to be expressed in wide terms. The subsection simply provides that 'the court shall have full power to determine *by whom* … the costs are to be paid'. Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to establish principles on which the discretionary power may, within the framework of the statute

> and the applicable rules of court, be exercised. Such a policy appears to me, I must confess, to be entirely sensible."

[241] Whilst section 47(1) of the Judicature (Supreme Court) Act, unlike section 51(1) of the UK Act, does not contain an explicit statement that the court has the power to determine "by whom …the costs are to be paid", it is buttressed by rule 64.3 of the CPR which states:

> "The court's powers to make orders about costs include power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings".

When those two provisions are read together, it is clear that the court has a very wide discretion in the award of costs.

[242] In Blackstone's Civil Practice (2017) at paragraph 68.45, the learned authors stated that where the claim and the additional claim have failed, the successful third party should recover its costs from the defendant in the main proceedings. It is also stated that in some cases, it may be appropriate to order the claimant to pay the defendant's costs on the claim and to reimburse the defendant in relation to the costs on the additional claim. The circumstances that may warrant such an order are "where the nature of the claim made the additional claim both inevitable and reasonable (*Arkin v Borchard Lines Ltd (Nos. 2 and* 3) [[2005] EWCA Civ 655], or where the main and additional claims are based on interconnected facts with the additional claim being contingent on the result in the main proceedings (*Green v Sunset and Vine Productions Ltd* [2009] EWHC 1610 …)".

[243] Rule 64.6(4) of the CPR states that the court, in its consideration of whether it should deviate from the general rule that costs follow the event (see rule 64.6(1) of the CPR), must have regard to factors such as the conduct of the parties before and during the proceedings and whether it was reasonable for a party to pursue a particular allegation or raise a particular issue.

[244] Mr Oostenbrink's role in the engagement of Mr Campbell was the central issue in the dispute between the parties. The evidence in relation to both the claim and the ancillary claim was clearly interconnected, if not largely the same. From all indications, Mr Oostenbrink's evidence as contained in his witness statement was supportive of Mr Campbell's position that he was employed by ARPI. ARPI's defence was that Mr Oostenbrink had no authority to engage the services of Mr Campbell on its behalf. It was therefore critical for him to have been brought into the proceedings. Mr Campbell, with whom, based on the evidence, Mr Oostenbrink had a prior relationship, did not serve him with the claim. There is no indication as to the reason why he did not do so. In those circumstances, it was perfectly reasonable for ARPI to have sought an indemnity or contribution from Mr Oostenbrink in the event that Mr Campbell's claim was successful. Those circumstances, in my view, warrant a departure from the general rule that costs follow the event.

[245] In order to deal with this case justly, the findings of the learned judge are relevant to the issue of whether the award of costs in the ancillary proceedings ought to be considered separately from that in the main claim. Having conducted an in-depth analysis of the evidence of Mr Campbell and Mr Oostenbrink, the learned judge rejected Mr Oostenbrink's assertion that he had the authority to engage Mr Campbell's services. He also found that Mr Campbell knew that Mr Oostenbrink had no such authority.

[246] The orders suggested by ARPI pertaining to costs in the court below are that there be no order as to costs or that Mr Oostenbrink's costs be paid by Mr Campbell. Miss Larmond submitted that the former was appropriate, as it was reasonable for ARPI to have commenced the ancillary claim. She, however, argued that in the event that the court agrees with Mr Thomas' submission that Mr Oostenbrink is entitled to costs, such costs ought to be paid by Mr Campbell. In this regard, I have noted that Mr Oostenbrink filed a defence to the ancillary claim. He also filed a witness statement and therefore fully participated in the trial. As a consequence, he would have incurred costs in this matter. It is noted that Mr Oostenbrink's conduct has been severely criticized by the learned judge and pointed out by ARPI as a basis for not awarding costs in his favour. However, in light

of the circumstances of this case and the authorities, in particular, **Desmond Bennett (SC- costs)** and **Desmond Bennett CA**, I am of the view that he should be awarded the costs of defending the ancillary claim. In **Desmond Bennett SC**, although the conduct of the ancillary defendant was the subject of criticism, costs were, nevertheless, ordered in his favour, and this was not disturbed by this court. However, I am of the view that the alternative order suggested by ARPI would be appropriate in the circumstances; that is to say, Mr Campbell should bear Mr Oostenbrink's costs in the court below.

Costs of the appeal

[247] ARPI has, no doubt, incurred costs associated with the filing of the ancillary claim. So too has Mr Oostenbrink. Having considered the circumstances of the case and the helpful oral submissions of counsel for the parties, it seems that the appropriate order as to costs on the appeal should be that Mr Campbell pays the costs of the appeal of ARPI and Mr Oostenbrink.

[248] In light of the foregoing, I propose the following orders:

1. The appeal is allowed.
2. The judgment of Sykes J made on 2 December 2016 on the ancillary claim relative to Mr Oostenbrink is set aside and substituted therefor is an order that:

   "The main claim having been decided in favour of ARPI, there are no issues of liability remaining for determination as between ARPI and Mr Oostenbrink."
3. Costs of the ancillary claim in the court below to Mr Oostenbrink to be agreed or taxed and are to be paid by Mr Campbell.
4. Costs of the appeal to ARPI and Mr Oostenbrink to be agreed or taxed, such costs to be paid by Mr Campbell.

MCDONALD-BISHOP JA

ORDER

Re: Application No COA2020APP00104 (Fresh evidence application)

1. The application to adduce fresh evidence is refused.
2. No order as to the costs of the application.

Re: SCCA No 2/2017 (Mr Louis Campbell's appeal)

1. The appeal is dismissed.
2. The decision and orders of Sykes J (as he then was), made on 2 December 2016 in the Commercial Division of the Supreme Court, are affirmed.
3. Costs of the appeal to Ambiance Resort Properties Limited (ARPI) to be agreed or taxed.
4. The injunction granted by Edwards JA on 17 January 2017, restraining ARPI and its servants and/or agents from removing the sum of US$270,000.00 from the Island of Jamaica, until the determination of the appeal, is discharged.

Re: SCCA No 3/2017 (ARPI's appeal)

1. The appeal is allowed.
2. The judgment of Sykes J made on 2 December 2016 on the ancillary claim relative to Mr Alex Oostenbrink is set aside and substituted therefor is an order that:

   "The main claim having been decided in favour of ARPI, there are no issues of liability remaining for determination as between ARPI and Mr Oostenbrink."

3. Costs of the ancillary claim in the court below to Mr Oostenbrink to be agreed or taxed and are to be paid by Mr Louis Campbell.
4. Costs of the appeal to ARPI and Mr Oostenbrink to be agreed or taxed, such costs to be paid by Mr Campbell.
5. The injunction granted by Edwards JA on 17 January 2017, restraining Mr Oostenbrink and his servants and/or agents from removing the sum of US$270,000.00 from the Island of Jamaica, until the determination of the appeal, is discharged.