



[2025] JMCC Comm 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO.SU2020CD00431

BETWEEN	LOUIS CAMPBELL	CLAIMANT
AND	HOTELES DECAMERON JAMAICA LIMITED	1st DEFENDANT
AND	CLUB CARIBBEAN LIMITED	2nd DEFENDANT
AND	HOTELES DECAMERON COLUMBIA SAS	3rd DEFENDANT
AND	TERRANUM GROUP	4th DEFENDANT
AND	EQUITY INTERNATIONAL	5th DEFENDANT
AND	HESCOV INVESTMENTS LIMITED	6th DEFENDANT
AND	DECAMERON GLOBAL SERVICES S. DE.R.L.	7th DEFENDANT
AND	AMH S. A.	8th DEFENDANT

Mr. Jovell Barrett, instructed by Barrett Legal Services for the claimant

Mr Gavin Goffe and Mr Matthew Royal instructed by Myers Fletcher and Gordon for the
1st and 6th defendants

Mr Vincent Chen and Ms Tashakaye Perue instructed by Chen Green & Co for the 2nd
defendant

Heard: April 15 - 18, April 22, 2024 and September 26,2025

Contract - Breach of employment contract – Secondment of employees - Whether contract of employment repudiated by employee - Whether notice required before termination of a Fixed term employment contract – Whether termination before expiry amount to wrongful termination of a fixed term contract – Whether the measure of damages is based on the unexpired term

IN OPEN COURT

CORAM: JARRETT, J

Introduction

- [1]** The foremost question to be determined in this wrongful dismissal and breach of employment contract claim, brought by Louis Campbell (the claimant), is to whom was he employed? He claims, among other things, for unpaid salary, vacation leave pay, redundancy pay, pension contributions and 1% of the gross operating profits of Decameron Club Caribbean (the hotel), owned by Club Caribbean Limited (the 2nd defendant) and operated by Hoteles Decameron Jamaica Limited (the 1st defendant). The 3rd, 4th, 5th, 7th and 8th defendants were not served with the claim and therefore did not take part in these proceedings. Hescov Investments Limited (the 6th defendant) is wholly owned by the 1st defendant.
- [2]** The 2nd defendant denies the claim and says that the claimant was one of its many employees who was seconded to the 1st defendant in November 2001, by virtue of a Loan Agreement (the Loan Agreement) between the 1st defendant and the 2nd defendant. In April 2008, he was engaged directly to the 1st defendant, and since then, he was no longer its employee. The 1st defendant, however, emphatically denies that it had any contractual relationship with the claimant and contends that it ended the claimant's secondment on April 5, 2019, and advised the 2nd defendant accordingly. The 6th defendant says the claimant was never employed to it.

- [3] It is helpful to start by setting out the pleadings. The evidence in this case is plentiful. I have spent some time recounting much of it because it sets the very important backcloth to my ultimate findings.

The claim

- [4] In his claim form filed on October 7, 2020, the claimant claims damages for breach of contract in the sum of US\$847,194.36, and interest at a commercial rate of 1% per annum above the weighted average on commercial loan rates from July 2018 to the date of judgment or at such rate and for such period as the court deems just. He also claims damages for wrongful dismissal in the sum of US\$2,332,445.03, at a commercial rate of 1% per annum above the weighted average on commercial loan rates, from the 5th of April 2019, until the date of judgment or at such rate and for such period as the court deems just. Exemplary damages and costs are also sought.
- [5] It is pleaded in the particulars of claim, that the 1st defendant is a company incorporated under the laws of Jamaica with its principal place of business being Salem District, Runaway Bay in the parish of St Ann. It is owned by the 3rd defendant, and at all material times was engaged in the tourism and hospitality industry. It is alleged that from 2001, the claimant has been wholly and exclusively employed to the 1st defendant under “the tutelage” of the 3rd defendant (a Colombian company and the sole owner of the 1st defendant), until April 5, 2019, when his employment was terminated. It is further alleged, that from August 1993 until November 2001, the claimant was employed to the 2nd defendant in the capacity of Financial Controller, until November 2001 when his employment was “transitioned” to the 1st defendant. Since November 21, 2001, the 1st defendant operated the 2nd defendant’s hotel as a going concern under “a lease type arrangement” between them, referred to as a Loan Agreement. The 2nd defendant is a company incorporated under the laws of Jamaica, engaged in the tourism and hospitality industry with its registered place of business being Runaway Bay in the

parish of St. Ann. It is pleaded in the alternative, that during the period August 1993 to April 5, 2019, the claimant was the lawful employee of the 2nd defendant.

- [6] In relation to the 6th defendant, the claimant pleads that it is a company incorporated under the laws of Jamaica and is solely owed by the 1st defendant. It is engaged in the tourism and hospitality industry, and the claimant was employed by the 1st defendant to work there, during his employment with the 1st defendant.
- [7] It is alleged that it was an express term of the Loan Agreement that the 1st defendant was given exclusive authority to possess and operate the 2nd defendant's hotel for an initial 5-year period, liable to be extended for a further 5 years at the 1st defendant's sole option. Under the Loan Agreement, it was the responsibility of the 1st defendant to pay all the employees on behalf of the 2nd defendant. At the time of the transition of the operations of the 2nd defendant's hotel to the 1st defendant, the claimant had no written contract with the 1st defendant in relation to his remuneration and benefits, however, the 1st defendant continued to pay the claimant in "the same custom and practice as he was paid", by the 2nd defendant. The Loan Agreement was renewed by the 1st defendant which extended its operation and control of the 2nd defendant's hotel for 10 years. In April 2008, the 1st defendant promoted the claimant to the position of its Managing Director, a post he held until April 5, 2019, when his employment was terminated by the 1st defendant.
- [8] A Supplemental Agreement dated October 10, 2011, was made between the 1st and 2nd defendants which extended the term of the Loan Agreement for a further 15 years. It is alleged that it was an express term of the Supplemental Agreement that at the expiration of the extended term or any renewal, the 1st defendant would settle all redundancy payments due to the 2nd defendant's staff during the period the 1st defendant operated the 2nd defendant's hotel. On July 24, 2014, a fixed term employment contract between the claimant and the 1st defendant through its president, Mr Lucio Garcia Mansilla, was revised and formally reduced in writing.

Mr Lucio Garcia Mansilla was at that time, president of the 1st, 3rd and 6th defendants.

- [9] It is contended that if the claimant's status between November 21, 2001, and March 2008 is disputable, then when he was promoted to Managing Director in April 2008, this was confirmation that he became a full-time employee of the 1st defendant until April 5, 2019, when his services were terminated. It is pleaded in the alternative that the wrongful termination was done by the 1st defendant as the agent of the 2nd defendant. Until June 2018, all the claimant's remunerations and entitlements were fully paid by the 1st defendant, thereafter, he noticed short payments to his salary until certain portions of his remuneration ceased. Up to the termination of his contract on April 5, 2019, short payments of the claimant's salary amounted to USD \$ 133,972.20. This sum of money was never paid, despite requests made on his behalf to the 1st defendant by his attorneys-at-law.
- [10] By email on April 5, 2019, from its Vice President and company lawyer, the 1st defendant terminated the claimant's services with immediate effect, without any valid reason or due process, and in breach of the claimant's employment contract. Notwithstanding this email, the claimant reported to work on April 8, 2019, but was refused entry to the 2nd defendant's hotel.

The defences

The 1st & 6th defendants

- [11] In their defence filed on December 3, 2020, the 1st and 6th defendants deny that the claimant was ever employed to them and say that at all material times he was an employee of the 2nd defendant and was seconded to the 1st defendant until that secondment ended in April 2019. It is denied that the claimant's employment transitioned to either the 1st or 6th defendant, or that the claimant's employment to the 2nd defendant terminated in April 2019. It is alleged that by virtue of the Loan Agreement, the 2nd defendant accepted a loan from the 1st defendant to refurbish and renovate the 2nd defendant's hotel and to discharge certain third-party

obligations. It was a part of the Loan Agreement, that the 1st defendant would take over the operations of the 2nd defendant's hotel for an initial 5 years, with the right to renew the agreement for a further 5 years.

[12] It is further alleged that it was an express term of the Loan Agreement that the 2nd defendant's staff, including the claimant, was to be seconded to the 1st defendant, and the 1st defendant was authorised to pay salaries and allowances to them on behalf of the 2nd defendant. Many of these persons were members of the Bustamante Industrial Trade Union (BITU) and had received non transferrable recognition by the 2nd defendant under the Labour Relations and Industrial Disputes Act (LRIDA). If the 2nd defendant's employees had been terminated and rehired by the 1st defendant it would have required an amendment to the Pension Fund, which might then require a reamendment, upon the repayment of the loan. It was because of this and other reasons why it was impractical or not cost effective to terminate the employment of the 2nd defendant's employees, and then for the 1st defendant to rehire them for an indefinite period, which could be for a limited period of 5 years.

[13] The 1st and 6th defendants also plead, that at all material times, the claimant was a member of the 2nd defendant's pension fund and would not have been entitled to contribute to it or benefit from it, had he not been an employee of the 2nd defendant. The amounts the claimant claims he was earning at the time operational control of the 2nd defendant's hotel was assumed by the 1st defendant is denied.

[14] The existence of a July 24, 2014, fixed term contract is denied. On that document, the signature, purported to be that of Mr. Lucio Garcia Mansilla was not witnessed by anyone; there is no record of the Board of either the 1st or 6th defendant approving or ratifying its execution; and the constitutional documents of the 1st defendant require the company seal to be affixed in the presence of 2 directors and not one. This fixed term contract was presented to the 1st and 6th defendants for the first time, after Mr. Lucio Garcia Mansilla died. The claimant represented that he prepared the document to protect himself during the acquisition of the 1st

and 6th defendants by their current owners. The clause in the contract requiring the 1st defendant to pay for the unexpired term as well as redundancy payment is illogical and contrary to law. It is alleged that for these reasons, the purported contract is unauthorised, void, illegal and/or unenforceable.

- [15] The defence further pleads that the claimant did not receive the remuneration he claims to be entitled to, from the 1st and 6th defendants. Copies of his payslips for August to October 2018 show that he was on the payroll for the 2nd defendant as Managing Director earning JMD\$132,000.00 each month and that he was contributing to the 2nd defendant's pension fund. The 1st defendant discovered that the claimant was wrongly claiming reimbursements which were suspected not to be genuine, to be exorbitant, or to which he was not entitled. This led to his reimbursements being suspended, pending an investigative audit.
- [16] In response to the claimant's allegation that the 1st defendant offered him a service contract to replace the fixed term employment contract, it is pleaded that the 1st and 6th defendants discussed changing the claimant's status from that of an employee of the 2nd defendant to being a consultant to the 1st defendant. This proposed contract better defined the role in which they saw the claimant, which was an advisory one, assisting the 1st and 6th defendants with matters involving government authorities and local stakeholders. At the time of the proposed service agreement, there were 3 hotels in Jamaica being operated by the 1st and 6th defendants, including 2 in Montego Bay. Each one of these hotels had a general manager who did not report to the claimant, and to whom the claimant did not report.
- [17] To resolve the dispute over the claimant's claim for reimbursement and the validity and enforceability of the fixed term contract, the 1st defendant proposed an independent contractor agreement (proposed service agreement), to replace and supersede the existing arrangements concerning the claimant. The claimant refused to sign it unless the reimbursements he claimed were outstanding, were paid in full. The claimant's reimbursement claims were paid in good faith, despite

the concerns of the 1st defendant, and it was hoped that this would clear the way for the parties to resolve their differences amicably. The claimant refused the proposed service agreement and his employment with the 2nd defendant continued. At no time, did the 1st or 6th defendant represent that the claimant was an employee of any entity other than the 2nd defendant.

[18] It is denied that the 1st defendant paid the claimant remuneration based on the July 2014 contract up to June 2018. There is no record of the claimant being paid a percentage of gross operating profits, and there is no record of the claimant complaining of the non-payment of these amounts before 2018.

[19] It is alleged that the claimant regularly took paid vacation, and any vacation which he did not take, he would have forfeited as a matter of law. If, which is not admitted, the claimant was the employee of the 1st defendant, the claimant would be entitled to 12 weeks' basic pay in lieu of notice, he was not terminated by reason of redundancy and in any event, the claim for redundancy payment would be statute barred.

The 2nd defendant

[20] The 2nd defendant denies that after the claimant's 18-year prolonged secondment to the 1st defendant, he was still its employee up to 2019. It alleges that the secondment came to an end and because of the lapse of time and the course of conduct over many years, the claimant became an employee of the 1st defendant. It alleges further that due to the prolonged secondment of the claimant and the transition of his employment to the 1st defendant, the 1st defendant no longer acted as its agent but instead became the principal employer of the claimant. It is also pleaded that the 1st defendant entered into a separate agreement with the claimant on July 24, 2014, and that the 2nd defendant did not take part in any decisions made by the 1st defendant to terminate the claimant's employment.

[21] It is alleged that if the claimant was still employed to the 2nd defendant, he would have had a right to enter the hotel's premises and could not have been barred from doing so by the 1st defendant, who was managing the hotel premises at the time.

The claimant's reply

[22] In his reply, the claimant essentially repeats the allegations he makes in the particulars of claim and includes much of his direct evidence. It is therefore unnecessary to summarise those pleadings.

The evidence

The claimant

[23] The claimant's redacted witness statement stood as his evidence in chief after a successful application by the 1st and 6th defendants, for several paragraphs to be struck out for a multiplicity of reasons, including offending the rule against hearsay. His witness statement was also amplified with the permission of the court.

[24] The claimant says he was offered the job of Financial Controller for the 2nd defendant and reported to work on or around August 28, 1993. He received an appointment letter outlining his salary package, which included an amount to be placed on the payroll register; amounts paid monthly in United States Dollars, classified as housing and overseas payments; an allowance for the use of his personal car, the cost of utilities, the payment of his helper and gardener, the cost of house repairs, medical expenses for himself and his family and steward sales (which are food items taken from the hotel inventory or from other stores or supermarkets for his personal use and that of his family). Additionally, he would also be paid annually, 1% of the 2nd defendant's gross operating profits. He says he worked in this job until November 21, 2001. He insisted that proper statutory declarations be done for him, including all amounts paid outside the normal payroll register. All yearly amounts paid to him were therefore grossed up, statutory

declarations made, and the relevant taxes paid. His wages were revised from year to year. This approach to his wages was continued by the 1st defendant up to 2019.

[25] Around April 2001, individuals from Hoteles Decameron Group, including Mr Lucio Garcia Mansilla, the President of “Decameron”, visited the 2nd defendant’s hotel. They left within two days and then returned and interacted with and asked questions of the 2nd defendant’s management team. He later understood that these individuals were conducting a due diligence exercise with a view to take over the operations of the 2nd defendant’s hotel. Around November and December 2001, the 2nd defendant underwent a massive redundancy exercise, during which most of the other senior managers and executives of the “old operation” of the 2nd defendant’s hotel were made redundant and paid what was due to them. He, however, remained working and anticipated receiving his redundancy payment as well. The staff complement was reduced to about 175 employees as requested by “Decameron’s due diligence team.”

[26] According to the claimant he understood that the reduced staff complement, including himself were being transferred to the new Decameron operation and Decameron would undertake the 2nd defendant’s responsibilities and obligations to the staff. The term “secondment” or any specific term or condition was not mentioned to him. But, after the 1st defendant began operating the 2nd defendant’s hotel, the terms, “secondment”, “take over”, “transitioned”, “pass on”, “assumed”, “undertake”, “transferred” and “assigned”, were used by both the 1st and 2nd defendants to describe the process by which the remaining staff complement of the 2nd defendant’s hotel was transferred to the 1st defendant’s new operation.

[27] On November 21, 2001, there was a meeting, on the 2nd defendant’s premises, at which lawyers and executives from both the 1st and 2nd defendants were present, including Mr Lucio Garcia Mansilla. Mr Lucio Garcia Mansilla gave him a Citibank cheque in the sum of USD\$ 15,000.00, which he took from his shirt pocket, and which was drawn on the account of the 8th defendant. After the meeting ended, he packed away the files for the 2nd defendant on which he was working, and as far

as he knows, since that day, he has never worked on behalf of the 2nd defendant. From then on, he had no doubt that he was employed, paid by and reported directly to the 1st defendant and he immediately started working as Financial Controller for the Decameron Group.

- [28]** On March 18, 2003, on behalf of the 1st defendant, he and Mr Lucio Garcia Mansilla, signed the Supplemental Agreement to the Loan Agreement. The 1st defendant collected all the revenue from operating the 2nd defendant's hotel, and paid its operational expenses, including rent to the 2nd defendant as required by the Loan Agreement. Some of the rent due to the 2nd defendant was, however, paid to third parties. His own wages were paid by the 1st defendant and were recorded in the 1st defendant's books as part of its expenses.
- [29]** The policy of the Decameron Group was not to allow its executives to take vacation leave, and so it was agreed that vacation leave would accumulate and payment made in lieu thereof. Several times he requested vacation leave and was not permitted to take it. On September 25, 2018, Mr Alvaro Duenas, who at the time, was still employed to the 1st defendant, was paid \$10,198,784.00 as pay in lieu of him taking vacation leave. It was Mr Lucio Garcia Mansilla's style to carry around the 8th defendant's Citibank cheque book. The 8th defendant is a company registered in New York in the United States of America which collected receivables and paid certain bills on behalf of the 2nd defendant's hotel, including some of his own wages.
- [30]** He was instrumental in the negotiations on behalf of the 1st defendant, for its acquisition of the former Jack Tar hotel now Royal Decameron Montego Beach. He was promoted to Group Financial Controller representing both Decameron hotels and, in that capacity, he interacted with banks, trade unions, staff, suppliers, governmental organizations and other entities. He also prepared and provided accounting, administrative and other services for the 1st defendant and the 6th defendant. "Decameron" through Mr Lucio Garcia Mansilla, had no issues with his performance. On September 2, 2006, Mr Lucio Garcia Mansilla paid him

USD\$15,000.00 drawn on the 8th defendant's Citibank account representing 1% of the gross operating profits for both the 1st defendant's operations of the 2nd defendant's hotel and the 6th defendant's operation of Royal Decameron Montego Beach as at year ended December 31, 2005.

- [31]** In April 2008, he was promoted to Managing Director for the Hoteles Decameron Group in Jamaica. He negotiated the wages for this post with Mr Lucio Garcia Mansilla and wanted the same gross monthly salary of USD\$30,000.00 as the previous Managing Director. Eventually, a minimum take home salary of USD\$18,000.00 per month was agreed, which would be paid in the "usual practice and customs since August 1993". When he was promoted to the post and the wages agreed, Mr Lucio Garcia Mansilla who operated in a "highly unorthodox" manner, wrote on a piece of napkin what his new salary package was to be and handed it to the then Financial Controller. Payments were made to him and Mr Lucio Garcia Mansilla retroactively approved them on his visits to Jamaica. Whenever the amounts payable to him fell below the minimum of USD \$18,000.00, Mr Lucio Garcia Mansilla would tally and round off the amounts paid to him and write him a cheque drawn on the 8th defendant's Citibank account, for the balance of the minimum salary shortfall. On August 5, 2013, for example, he received cheque number 10511 from Mr Lucio Garcia Mansilla in the sum of USD\$60,800.00, representing an accumulated shortfall over several months.
- [32]** During 2011, acting on behalf of the Decameron Group, he made several representations to the 2nd defendant, which led to the successful negotiation of the extension of the Loan Agreement. Consequently, on October 10, 2011, the Supplemental Agreement between the 1st defendant and the 2nd defendant was executed, and he and Mr Lucio Garcia Mansilla signed on behalf of the 1st defendant in their capacities as its directors.
- [33]** On or around July 23, 2014, he learnt that Mr Lucio Garcia Mansilla had sold his shares in "Decameron", but he remained president. He also learnt that "Decameron" was putting in place certain corporate structures and, while his salary

would remain the same, the payments were now to be made monthly, both locally and from the overseas' head office, but this had to be substantiated by a written contract. He asked Mr Lucio Garcia Mansilla about his redundancy payment dating back to 1993 and had mixed feelings, since he had not received any such payment. He was, however, comforted by his belief that he would receive workplace security of tenure.

[34] The claimant says he received a draft agreement from Mr Lucio Garcia Mansilla, which he reviewed, made corrections to, and returned to him. On July 24, 2014, Mr Lucio Garcia Mansilla determined the amount owing to him and gave him cheque number 10792 drawn on the 8th defendant's Citibank account in the sum of USD\$33,600.00, representing the difference between his expenses, and his minimum monthly salary. That same day, July 24, 2014, he received from Mr Lucio Garcia Mansilla, the final draft of the agreement for signing, which encompassed the arrangement and remuneration package that existed between him and the Decameron Group since he was promoted to Managing Director. The agreement was signed on July 24, 2014. Mr Lucio Garcia Mansilla signed three sets in his capacity as president of the "Decameron Hotel", and he signed as employee. The expert report of Ms Beverly East dated November 15, 2021, confirms that the signature on the agreement is that of Mr. Lucio Garcia Mansilla. Based on advice from his lawyers, a supplemental agreement was executed on July 16, 2015, so as to "properly explain [their] "intent". ¹

[35] The 1st defendant continued to pay him his usual wages, however, he first had to present an expense report. This was in accordance with the "contract that existed between [him] and the company" for many years and which was reduced in writing on July 24, 2014. Mr Lucio Garcia Mansilla resigned from the Decameron Group around August 2015 and died around October 2015.

¹ This document was not put in evidence and was not part of the agreed bundle of documents.

- [36] In January 2017, he was advised to attend a meeting at the Decameron Head Office in Bogota Columbia on February 6, 2017. He was given a proposed Professional Services Agreement, which had some similar or identical terms to that of his existing agreement with the 1st defendant. This proposed agreement, among other things, a) acknowledged the existing July 24, 2014, agreement; b) provided that he would receive compensation of USD\$18,000.00 net monthly upon the presentation of invoices, and that he would be entitled to 1% of the 1st defendant's gross operating profits; c) was for a fixed term with an expiration date of July 23, 2024 ; d) wrote off the amounts owed to him; e) represented the entire agreement between them; f) superseded all prior agreements specifically the agreement dated July 24, 2014 and g) could be terminated without notice. He insisted that he should have his own lawyers review the document and informed the meeting that he was still owed salary of USD\$179,264.61. Later he met with the Compensation Officer, Mr Miguel Prieto, in his office where he saw both the original of the July 24, 2014, agreement and the July 16, 2015, agreement. Shortly afterwards, the 1st defendant paid into his Bank of America account, the reconciled balance of his salary which was owed to him. After that, he continued to receive his monthly salary regularly.
- [37] He continued to submit salary requests along with supporting documents, and these were vetted and either approved or disapproved by the Financial Controller who then forwarded them to the corporate office. The corporate office made payments to him from the Bank of America account of Decameron Global Services. This was a newly formed company that collected receivables on behalf of the 1st and 6th defendants, and paid some of his wages on behalf of the 1st defendant. Since March 2017 to May 2018, all his monthly salary, averaging USD\$26, 470.47 has been paid by "Decameron". At the end of each year, or whenever a financial institution required it, he received from the Financial Controller, pay advice in the name of "Royal Decameron/Club Caribbean Limited". He never received the purported pay advice dated August 24, 2018, September 25, 2018, and October 25, 2018, respectively, referred to by the 1st and 6th defendants in their defence.

He has requested proof that he received these documents but has yet to be provided with same.

- [38]** Around June 2018, he noticed that his request for salary disbursement was short paid, and this remained the case until the 1st defendant terminated his services in March 2019. The total amount short paid is USD \$133,972.20 as at March 2019. He has made several requests for payment.
- [39]** On April 2, 2019, he and his attorney-at-law, attended a meeting with the 1st defendant's attorneys-at-law, Mr Juan Pablo Barrera, Mrs Maria Olano and Mr Gavin Goffe. At that meeting, Mr Barrera agreed to pay to him the arrears of salary amounting to US\$ 133, 972, 20 and he was asked to accept the additional sum of USD\$400,000.00, making a total sum of \$530,000.00, as a full and final payment for him to sever ties with the 1st defendant. Included in this sum, was said to be amounts due to him from his tenure with the 2nd defendant. He asked for the basis on which this figure was determined and in response, Mr Barrera asked whether he had an expectation of what he ought to receive. He handed Mr Barrera a printout with his calculations but was told to do whatever he wished, and the meeting ended abruptly.
- [40]** On April 5, 2019, he received an email from Mr Barrera informing him that his secondment was terminated with immediate effect. The email suggested that he discuss his employment status with the 2nd defendant. The email further said that the termination was based on a review of the operational needs of the 2nd defendant's hotel and his "non-objection" at the meeting. He did not receive from the 1st defendant or anyone else, any notice of compensation, including the outstanding arrears. On April 8, 2019, he reported to work at the 2nd defendant's office located on the 2nd defendant's premises which is wholly controlled by the 1st defendant. He attempted to enter the premises but the barrier at the gate was closed. He was not permitted to return to work at the 2nd defendant and therefore, he left the gate of the property.

[41] By letter dated March 29, 2019 (later corrected to May 29, 2019) his then attorneys-at-law wrote to the 1st defendant making a claim, among other things, for redundancy. He says he is entitled to the following from the defendants: -

Outstanding Reimbursements	US\$133,972.20
Unpaid vacation	US\$503,222.16
Share of Profits up to April 5, 2019	US\$210,000.00
Payment in lieu of notice	US\$ 70,217.05
Redundancy payment	US\$ 380,342.33
Payment for unexpired portion of contract	US\$ 1,620,843.48
Company's portion of pension on unexpired contract	US\$ 81,042.17
Unexpired portion of share of profits	US\$ 180,000.00
TOTAL:	US\$ 3,179,639.39

[42] On cross examination the claimant said he was not dismissed by the 2nd defendant in 2001. He admitted that he remains a member of the 2nd defendant's pension fund and was a trustee until 2019. He denied that to be a member of the 2nd defendant's pension fund he had to be an employee of the 2nd defendant. According to him, he is still a member of the fund but is not an employee of the 2nd defendant. He said his claim for breach of contract is in relation to the contract dated July 24, 2014, with the 1st defendant. He admitted that he had no contract with the 6th defendant and that he is not claiming that the 6th defendant breached any contract it had with him. Neither is he contending that the 2nd defendant, or any of the other defendants breached his employment contract. He said there is only one contract that he is claiming has been breached, and it is the July 2014 contract. When that document (which is part of the agreed bundle of documents) was shown to him and he was asked whether it affirms the existence of a secondment, he agreed that it did.

- [43]** When asked whether he could identify where on his payslips there is a deduction for tax in relation to the United States currency component of his pay, the claimant said those deductions were not reflected on the pay slips. He said that every year he received a certificate indicating that income tax was deducted from the United States currency portion of his pay. When asked if he had those certificates with him in court, he said he left them at the offices of the 1st defendant. He said that most of his communication with the 1st defendant was oral, there was no written agreement reflecting his compensation package when he was promoted in 2008, but there was “something written on a napkin”.
- [44]** In July 2014, he saw no indication that Mr. Lucio Garcia Mansilla was ill. It was in August 2015 that Mr Lucio Garcia Mansilla became ill and announced his resignation. He knew in July 2014 that there was a change in ownership of the “ultimate parent” of the 1st defendant and he was informed that Mr Lucio Garcia Mansilla had “sold his shares”. He said that it was the “company’s idea through its president”, to prepare the July 2014 agreement. He denied the suggestions that he was aware that “the former president had resigned months before the July 2014 document was “purportedly signed” and that it was not ratified by the 1st defendant’s board.
- [45]** Since the death of Mr Lucio Garcia Mansilla, the claimant said he took vacation leave “here and there”, and that such proof is in the 1st defendant’s office. He disagreed with the suggestion that he did not apply to anyone for vacation leave. He said he did not have proof in court of the denial of his requests for vacation, but said such proof is with the 1st defendant. When asked when his claim for vacation leave began, he answered:

“86 weeks, balance brought forward from Club Caribbean days”.

He said he would not be able to say how much of the USD \$ 503,222.16 which he claims for outstanding vacation earned, is against the 1st or the 2nd defendants.

[46] The claimant agreed with counsel for the 2nd defendant that when he was Managing Director for the 1st defendant, the 2nd defendant had its own Managing Director in the person of Mr Richard Salm. He also agreed that on his promotion to Managing Director his salary package increased significantly.

The 1st and 6th defendants

[47] Mr Juan Pablo Barrera (Mr Barrera) was the sole witness for the 1st and 6th defendants. His witness statement filed on March 19, 2024, stood as his evidence in chief. He says that the 1st and 6th defendants are wholly owned subsidiaries of Hoteles Decameron Colombia S.A.S., the 3rd defendant, and he is its Vice President, Legal, and General Counsel. His role and responsibilities extend to the 3rd defendant's subsidiaries, including the 1st and 6th defendants. His employment with the 3rd defendant began in 2014.

[48] The 1st defendant assumed operation of the 2nd defendant's hotel pursuant to the Loan Agreement, by which a loan was granted to the 2nd defendant to refurbish and renovate the hotel and to discharge certain third-party obligations of the 2nd defendant. The Loan Agreement provided that the 1st defendant would operate the 2nd defendant's hotel under the brand name "Royal Decameron Club Caribbean" for an initial 5-year period, with the 1st defendant having the option to renew for a further 5-year term. This option was exercised by way of two Supplemental Agreements dated March 18, 2003, and October 10, 2011, respectively, with the latter extending the term for a further 15 years effective December 15, 2011. The Loan Agreement as amended remains currently in force between the 1st defendant and the 2nd defendant.

[49] The secondment of the employees of the 2nd defendant was part of the arrangements under the Loan Agreement and is expressly referred to in clause 3(iii). This clause requires the 2nd defendant to reduce its staff complement and the apportionment of redundancy payments between the 1st and 2nd defendants, with the former being responsible for the portion of redundancy payments payable,

for the periods staff members were seconded to it. Seconding staff was consistent with the fact that the 1st defendant would be operating the 2nd defendant's hotel for a specified period, and once the 2nd defendant's obligations under the Loan Agreement were discharged, the 2nd defendant would be entitled to resume operating its hotel under its own name and brand.

[50] Secondment was the most effective means by which the 1st defendant could instruct the 2nd defendant's staff without changing the employer/employee relationship between the 2nd defendant and its staff, who remained members of the Club Caribbean Limited Pension Fund. The 2nd defendant's staff is unionized, and all Heads of Agreements are negotiated by the 1st defendant, pursuant to the authority assigned to it under the Loan Agreement. The 2nd defendant through its Managing Director, Mr Richard Salm, recognised in a letter dated March 27, 2020, that seconded staff remained its employees.

[51] The claimant was one of the 2nd defendant's staff seconded to the 1st defendant. He was never an employee of the 1st or 6th defendants or of any entity in which they have an interest. The 2nd defendant retained its employer/employee relationship with the claimant and while performing his duties at the hotel, the claimant was the most senior officer in Jamaica. He was not required to request vacation leave from anyone; there was no officer more senior to him with the authority to refuse his request for vacation leave. He knows of no instance where the claimant was not permitted to take vacation leave. While there are no detailed records of all the vacation leave taken by the claimant, his requests for reimbursements included reimbursement for vacation expenses, including plane tickets. Furthermore, demand letters from his attorneys-at-law state that the claimant had been reimbursed for vacation expenses, particularly airline tickets for the 25 years of his employment with the 2nd defendant.

[52] The 1st defendant paid salary to the claimant on behalf of the 2nd defendant in the manner that had been agreed to between the claimant and the 2nd defendant prior to the secondment. He was, therefore, paid in two tranches, a Jamaican dollar

portion and a United States Dollar portion, the latter being understood by the 1st defendant to be a non-taxable allowance. These payments were made as agents for the 2nd defendant, and the 1st defendant did not independently enquire into their legality. Up to the point where the claimant's secondment was terminated, each month he was paid the Jamaican equivalent of USD\$1,000.00 as basic salary, and USD\$7,000.00 as allowances. Pay advice slips dated August 24, 2018; September 25, 2018, and October 25, 2018, show these payments, which, converted at the time to JMD\$132, 000.00 and JMD\$136,000.00 respectively.

[53] The document dated July 24, 2014, is not an agreement by the 1st defendant and does not bind it. Mr Lucio Mansilla Garcia resigned as a director of the 1st defendant effective May 8, 2014. His resignation was part of a transaction by which ownership of the 3rd defendant and all its global assets, including the 1st defendant, were acquired from him. As the company secretary for the 1st defendant, the claimant was aware of this. The 1st defendant's Articles of Association require the company seal to be used only on the approval of the board of directors, or a committee of directors authorised by it. Any document to which the seal is attached must be signed by a director and the secretary or by another director or some other person so appointed by the directors. The 1st defendant did not instruct or give its approval to Mr Lucio Garcia Mansilla or any other director or officer of the 1st defendant to negotiate terms of employment with the claimant or to conclude and execute any contract with him.

[54] The signature of Mr Lucio Garcia Mansilla was not witnessed by anyone, and the 1st defendant was never informed by him of the existence of this document. There are no records of any board meeting approving or ratifying the execution of this document. The approval of the board of directors would be required to assign a share of the gross operating profits of the 1st defendant to an employee, especially to one on secondment. The document remained unknown to the 1st defendant until it was presented by the claimant in 2016, after Mr Lucio Garcia Mansilla died in October 2015.

- [55]** It is not the 1st defendant's practice to pay an employee a percentage of gross operating profits, to enter into fixed term contracts of 10 years' duration where the employee is guaranteed to be paid the full value of the contract after its termination, or to undertake to pay an employee's statutory deductions.
- [56]** In or about 2018, the reimbursements claimed by the claimant were suspected to be not genuine. The amounts claimed were exorbitant, or in relation to 'expenses' which could not have been legitimately incurred while undertaking his duties. He also failed to submit all supporting documents to substantiate the expenses he says he incurred. The 1st defendant therefore suspended payments to the claimant pending an investigation.
- [57]** Hostilities developed between the claimant and the 1st defendant concerning the moneys the claimant claimed were due to him. Consequently, in 2017 he was invited to a meeting to discuss changes in his status from being an employee of the 2nd defendant to being a consultant to the 1st defendant in its operation of the hotel. The proposed agreement sought to "more particularly define" the role that the claimant would play in the 1st and 6th defendants' operations in Jamaica, since the three hotels operated by them, each had general managers who did not report to the claimant and over whom he had no supervisory authority. It would also resolve the disputed reimbursements. The claimant insisted that he would not sign the proposed agreement before the disputed payments were made. In a show of good faith, the 1st defendant made the payment, however the claimant ultimately refused to accept any of the terms of the proposed agreement.
- [58]** In April and May 2019, the 1st defendant reviewed its operations and decided that the claimant's role was no longer necessary, and his job functions could be distributed among other employees. He met with the claimant on April 2, 2019, and advised him of the removal of his role from the 1st defendant's organizational chart. The claimant told him that he expected to be paid redundancy payments due to him under the law. He said he had no objections to the termination of the secondment. By letter dated April 2, 2019, the 2nd defendant was advised of the

decision to terminate the secondment of the claimant. There has been no response to this letter, and the 1st defendant does not know whether the 2nd defendant formally terminated the claimant's employment. The claimant was advised that his secondment was terminated by email and letter dated April 4, 2019.

[59] On cross examination, Mr Barrera said it is unheard of, in the Decameron companies, for an employee in a position such as the claimant's, in a country like Jamaica, to be earning a minimum of USD \$18,000.00 per month. When asked whether he agreed that up to August 2015, Mr Lucio Garcia Mansilla still held the position of president of the 1st defendant, he said his understanding is that there was no formal position of president for the 1st defendant. As part of the acquisition agreement with the new owners of the 3rd defendant, Mr Lucio Garcia Mansilla would continue to hold the formal position as president within the organization, but without any authority to bind the company. He admitted that he did not disclose the acquisition agreement.

[60] He disagreed that as president of the 3rd defendant, Mr Lucio Garcia Mansilla remained in charge of the 1st defendant from May 2014 until at least August 2015. He, however, later agreed, that up to October 2015, Mr Lucio Garcia Mansilla was a director of the 1st defendant. When asked who the directors of the 1st defendant were, between May 2014 to August 2015, he said that his understanding is that the registered directors were Mr Lucio Garcia Mansilla and Mr Javier Pimienta. Mr Javier Pimienta was appointed by the new owners as a director in several jurisdictions including Jamaica, for the purpose of controlling all matters that needed to be approved at the board of director's level and particularly the board of the 1st defendant.

[61] When asked if he agreed that the effective date of the resignation of Mr Lucio Garcia Mansilla was October 9, 2015, Mr Barrera said he could not recall the exact date. He thinks Mr Lucio Garcia Mansilla died in October 2015, and this was two to three months after he resigned. On being further pressed, he denied that Mr Lucio Garcia Mansilla resigned on October 9, 2015. When he was shown pages

369 to 372 of exhibit 1(A), which included: a) a copy of a Notice of Appointment /Change of Directors for the 1st defendant indicating that on October 9, 2015, Mr Lucio Garcia Mansilla ceased to hold office as a director; b) an email thread indicating that Mr Lucio Garcia Mansilla had resigned; c) a response dated October 12, 2015, from Ms Tracey-Ann Long (one of the 1st defendant's attorneys-at-law in Jamaica), stating that she was unaware of his resignation and ; d) a subsequent email to her dated October 12, 2015, indicating that Mr Lucio Garcia Mansilla died on October 11, 2015 ; Mr Barrera maintained that October 9, 2015, was not the date of Mr Lucio Garcia Mansilla's resignation. He said that date was placed on the document by Ms Tracey-Ann Long, because under Colombian law, a company cannot be without a director, and that date was inserted into the document so that there would not be a vacuum.

[62] Mr Barrera "partially" agreed that the work of the claimant went beyond the work of managing the 2nd defendant's hotel. He agreed that between May 2014 and August 2015, Mr Lucio Garcia Mansilla, with the proper authorization, could enter into and sign contracts on behalf of the 1st defendant, but he disagreed that in that period, Mr Lucio Garcia Mansilla was authorised and had the ability to enter into contracts binding on the 1st defendant.

[63] In relation to the signing of the purchase and sale agreement for the purchase of Waterfront Investment Limited, Mr Barrera agreed that that agreement was signed by Mr Lucio Garcia Mansilla, on behalf of the 1st defendant, that the company's seal was affixed to the document and that that agreement was binding on the 1st defendant. He, however, disagreed that between May 2014 and August 2015, Mr Lucio Garcia Mansilla had the authority to use the 1st defendant's seal and denied that there was a position of president for the 1st defendant. He later agreed that the 1st defendant has not provided any evidence that the claimant was aware that Mr Lucio Garcia Mansilla had resigned as president of the 1st defendant in May 2014.

[64] According to Mr Barrera, a report arising from the investigation into the reimbursements claimed by the claimant was produced but is not before the court. He does not know how much vacation leave the claimant was entitled to up to April 2019 and he could not remember if in April 2019, the claimant claimed additional reimbursements amounting to USD \$133, 972.20.

[65] In answer to questions on cross examination from counsel for the 2nd defendant, Mr Barrera did not agree that payments, made to the claimant after he became Managing Director of the 1st defendant, were not made on behalf of the 2nd defendant. He also disagreed that since April 2008 when the claimant became the Managing Director of the 1st defendant, he was directly employed by the 1st defendant.

[66] In respect of the hostilities which Mr Barrera spoke of in his direct examination, the following exchange took place between him and counsel for the 2nd defendant: -

Q: You would agree with me that what Hoteles Decameron Jamaica Ltd did in an effort to resolve these hostilities was to invite Mr. Louis Campbell all the way to Colombia?

A: I agree that in order to manage and solve the hostilities we wanted to have discussions with Mr. Campbell which included discussions in Colombia so yes.

Q: In Colombia it is your evidence that Mr. Louis Campbell was invited to sign a new agreement as between himself and Hoteles Decameron Jamaica Limited?

A: No. He was invited to discuss the possibility of modifying his agreement and have a discussion with us, to modify, in agreed terms, the one that he had with his employer.

Q: Was it not your evidence earlier, that Mr. Louis Campbell was invited to consider becoming a consultant to Hoteles Decameron Jamaica Ltd?

A: Correct

Q: And this consultancy agreement would have nothing to do with Club Caribbean?

A: Correct.

[67] On further cross examination, he said that the claimant's functions included taking care of the 1st defendant's wholly owned subsidiaries which operated Hoteles Decameron Cornwall Beach and Hoteles Decameron Montego. He agreed that these two hotels have no relations with the 2nd defendant. On re-examination, he said that after the acquisition, it was agreed that Mr Lucio Garcia Mansilla would maintain an honorary position as president, but without the ability to bind any of the Decameron entities with third parties. As such, he was not in charge of any operations, at least not alone and without consultation.

The 2nd defendant

[68] Mr Seymour Smith is a director and shareholder of the 2nd defendant. His witness statement filed on December 15, 2023 (as redacted at trial), stood as his evidence in chief. He said that under the Loan Agreement, the 1st defendant had full authority over seconded staff and was responsible for their remuneration, including any redundancy payable to seconded staff during the period of the agreement.

[69] The claimant occupied the position of Managing Director for the 1st defendant until he was terminated in April 2019. The 1st defendant's course of dealings over the years culminated in it hiring the claimant, thereby terminating the secondment and placing the claimant in its direct employment in 2008. When the claimant was appointed as the 1st defendant's Managing Director, Mr. Richard Salm was the Managing Director for the 2nd defendant, a position he held until his death in 2021. Shortly after his appointment as Managing Director, the claimant attended the 2nd defendant's shareholders' meetings as the representative of the 1st defendant. When the interest of the 1st defendant and the 2nd defendant collided, the claimant always sought to protect the interest of the 1st defendant, and his dealings showed his loyalty to the 1st defendant. The 2nd defendant was not consulted prior to the 1st defendant's termination of the claimant's employment.

- [70]** On cross examination by counsel for the claimant, Mr Smith said that his understanding of the Loan Agreement was that it would be for a duration of 5 years, and employees of the 2nd defendant, who were seconded to the 1st defendant would return to the 2nd defendant at the end of the 5 years. He said that other than the claimant, he is aware of employees who were seconded, and whose secondment was terminated by the 1st defendant. Their status would be that they would no longer be employed to the 2nd defendant; they would be made redundant and paid redundancy payments by the 1st defendant which was charged to the account of the 2nd defendant. However, only the portion of the redundancy for the period they worked with the 2nd defendant would be charged to the 2nd defendant's account.
- [71]** According to Mr Smith, it was the practice and custom of the 2nd defendant to pay statutory deductions due to the government and pay the net earnings to the employees. When shown Exhibit 1A-1, which is the claimant's job letter from the 2nd defendant dated January 4, 1999, he agreed that it reflected the claimant's pay package from the 2nd defendant and that the usual practice of paying statutory deductions applied to the claimant. He also agreed that this practice continued after the 1st defendant took over the operations of the 2nd defendant. When asked if the claimant was treated the same, as all employees working for the 2nd defendant and seconded to the 1st defendant, Mr Smith said the claimant was treated "exceptionally" by Mr Lucio Garcia Mansilla. He said "exceptionally", meant that the claimant was taken on as a full-time employee of the 1st defendant.
- [72]** All salaries paid to the claimant from 2008 to 2019. were paid on behalf of the 1st defendant. Mr Smith also said that the salary for all the other employees was paid by the 1st defendant since it took over the 2nd defendant's operations. As far as he is aware, all payments to staff from 2001 to the present, are not recorded in the books of the 2nd defendant, and these payments were made on behalf of the 1st defendant. Asked whether in April 2019 the claimant was still under secondment from the 2nd defendant, he said: "No, my understanding is that his connection with Club Caribbean ended in 2008." He agreed that upon the claimant's termination

from the 1st defendant, there was no work for the claimant to do at the 2nd defendant.

[73] On cross examination by the 1st defendant's counsel, Mr Smith said he agreed with a letter dated March 27, 2000, part of Exhibit 1(b), written by Mr Richard Salm to the president of the 3rd defendant, and agreed that any member of staff who was seconded in 2001 and who is still employed to the hotel, is an employee of the 2nd defendant. He did not agree that Mr Richard Salm was himself seconded and maintained that he was the Managing Director of the 2nd defendant.

Analysis and discussion

[74] As earlier observed, given the parties varied contentions, the primary question to be answered, before determining whether the claimant is entitled to the relief he seeks, is to whom he was employed as of April 5, 2019. In making this determination, I have identified the following issues and sub issues which must also be resolved: -

- a) Whether the claimant was seconded to the 1st defendant in November 2001.
 - i) If so, when did his secondment come to an end.
- b) Whether in April 2008, the claimant was directly employed to the 1st defendant under a contract of service.
 - i) If so, did this bring his employment with the 2nd defendant to an end.
- c) Whether the agreement between the claimant and the 1st defendant dated July 24, 2014, is legal, valid and enforceable against the 1st defendant.

Whether the claimant was seconded to the 1st defendant in November 2001

[75] A good starting point in the analysis of this issue, is the Loan Agreement. It provides that the 1st defendant will advance to the 2nd defendant, USD \$900,000.00 (the loan), for the proposed renovation, refurbishing and improvement of the 2nd defendant's hotel in Runaway Bay in St Ann (the hotel), and to cover certain soft costs. The loan is secured by the 1st defendant being given the exclusive authority to possess and operate the 2nd defendant's hotel for an initial period of 5 years, with the right of renewal for a further 5 years. It is repayable annually by way of deductions from the amounts payable to the 2nd defendant for the exclusive use of the hotel. The 1st defendant is authorised to make certain regular payments payable to third parties by the 2nd defendant, and such payments are also to be deducted from the amounts payable to the 2nd defendant. The 1st defendant was to pay to the 2nd defendant, USD \$4000.00 per annum for the first five-year term and USD \$4,800 each year for the second five - year term for each available unit of the hotel's inventory. Of the loan amount of USD \$900,000.00 (which is to be disbursed in stages), the 1st defendant is to pay a maximum of USD\$ 250,000.00 for soft costs.

[76] In relation to the secondment of staff, there is very little information available. There was no disclosure of a separate agreement dealing with secondment, and in fact, on the claimant's pre-trial, interlocutory application for specific disclosure of any secondment agreement, the 1st defendant's response was that there is no such agreement. There are only three provisions in the Loan Agreement which speak, in any appreciable detail, to secondment. The first of the three, is clause 3(iii) (**page 7 Exhibit 1A**). Clause 3 deals with the purpose of the loan, and it is important to reproduce here the entire clause, as it contextualises subclause (iii):

“Purpose of Loan

The Term Loan shall be used for the purpose of paying the costs and expenses of the refurbishing, renovation and improvement of the Hotel and to reduce certain outstanding indebtedness of Club Caribbean. Hoteles Decameron as a condition of any disbursement will have to agree to the

proposed payments up to \$250,000.00. All funds to be advanced for soft costs are to be disbursed by Hoteles Decameron in agreement with Club Caribbean directly to the creditors involved. It is understood and agreed that soft costs include:

(i) Payment of accrued sums due to shareholders;

(ii) Trade payables;

(iii) Redundancy costs to Club Caribbean. Existing staff levels are to be reduced to approximately 175 inclusive of security and any redundancy due to staff members from Club Caribbean who are not to be seconded to Hoteles Decameron, by agreement will be due and payable by Club Caribbean. Any redundancy during the term of the agreement due to Club Caribbean staff who are seconded are to be pro-rated with Hoteles Decameron being responsible only with respect to the period the employee was seconded to them. Club Caribbean Limited will immediately take steps to reduce the numbers of such employees to a maximum of 175.

(iv) Any other liabilities to third parties as disclosed

[77] Falling under the rubric of the warranties and obligations of the 2nd defendant, are the other two provisions which form part of clause 8 (**page 10 Exhibit 1A**):

“During the term of this agreement, all payments to employees or on behalf of employees of Club Caribbean, including Education Tax, National Housing Trust, Heart, NIS and Income Tax (P.A.Y.E), shall be the responsibility of Hoteles Decameron and will be paid by Hoteles Decameron in respect of the current obligations which accrue during the term of the agreement. Hoteles Decameron shall not be responsible to pay any accrued arrears of payments due or arising prior to the agreement herein”.

“HOTELES DECAMERON shall have full authority with respect to workers seconded. Club Caribbean will make available to Hoteles Decameron during the term of five years and any renewal or extension thereof, all such employees as Hoteles Decameron determines are necessary which employees Hoteles Decameron will pay during the term of the agreement and Club Caribbean will within an agreed period, take such steps to reduce the numbers of such employees to a maximum in the order of 175 persons including security guards, in order for Hoteles Decameron to achieve certain desired levels of efficiency, such determination regarding the number and section of employees to be made by December 15, 2001.”

[78] As is evident from his pleadings and his evidence, the claimant contends that since the 1st defendant took over the operations of the 2nd defendant’s hotel in November 2001, he was directly employed to the 1st defendant. His case is that he was not one of the seconded employees. He contends that since the take-over, he reported directly to the 1st defendant and performed duties as the Financial Controller for the Decameron Group. The 2nd defendant is aligned with the 1st defendant on this issue. Its position is that the claimant was indeed seconded. Where the 2nd defendant parts company with the 1st defendant, is where it asserts that over time, the claimant became a direct employee of the 1st defendant.

[79] Other than the claimant’s oral evidence on this issue, he has provided no documentary proof that he was not a seconded employee. He pleads that his position as Financial Controller for the 2nd defendant was “transitioned” to the 1st defendant in November 2001. Mr Goffe in his submissions, argued, and I agree with him, that as section 7 of the Employment Termination and Redundancy Payments Act (**ETRPA**), which deals with the change of ownership of a business and the procedure to take over contracts of employment, was not engaged, it cannot be said that the claimant’s employment with the 2nd defendant “transitioned” or was “transferred” to the 1st defendant.

[80] The claimant relies, to support his claim, on the contract which he says he entered into with the 1st defendant on July 24, 2014, and which, the 1st defendant breached. This document, which was signed by the claimant, states in its recitals, that the claimant was seconded to the 1st defendant from the 2nd defendant. I agree with Mr Goffe, that the claimant cannot approbate and reprobate at the same time in relation to this document. It seems to me that the 2nd defendant ought to at least know whom among its employees was seconded. Its witness, Mr Seymour Smith's evidence is that the claimant's secondment was terminated when he was directly employed by the 1st defendant in 2008. In the result, I find on a balance of probabilities, that the claimant was seconded to the 1st defendant in November 2001.

When did the claimant's secondment end?

Whether in April 2008, the claimant was directly employed to the 1st defendant under a contract of service. If so, did this bring his employment with the 2nd defendant to an end?

[81] It is convenient to deal with these issues together.

[82] The 1st defendant's case is that it terminated the claimant's secondment on April 5, 2019, by letter of that same date, the claimant was always on secondment from the 2nd defendant, and at no point was he employed by the 1st defendant. It is not in dispute that at the time of the Loan Agreement in November 2001, the claimant was the 2nd defendant's Financial Controller. The claimant says he was promoted to Managing Director by the 1st defendant in April 2008. The 2nd defendant corroborates this evidence. The claimant's further evidence that his salary increased significantly after he was promoted to Managing Director was not disputed.

[83] Although the 1st defendant denies that it promoted the claimant to Managing Director in April 2008, there are several correspondences which are agreed documents and part of **Exhibit 1A**, which refer to the claimant as the Managing Director of the 1st defendant. There is, for example, a letter dated April 20, 2009,

from Mr Richard Salm (who signed as Managing Director of the 2nd defendant), to the claimant, whom he addresses as the Managing Director of the 1st defendant. There is also a letter dated July 14, 2010, addressed to the branch manager of the National Commercial Bank, Jamaica Limited in St Ann's Bay, seeking to open bank accounts in the name of the 1st defendant, in which the claimant was referred to as Managing Director and Mr Lucio Garcia Mansilla as President. The Supplemental Agreement dated October 10, 2011, between the 1st and 2nd defendants, extending the life of the Loan Agreement for an additional 15 years, was signed by the claimant as Director. Additionally, there is a letter dated October 31, 2014, to the Manager of the Bank of Nova Scotia Jamaica Limited, St, Ann's Bay, signed by the claimant as Managing Director and Mr. Andrew Reeves as Financial Controller, informing that bank that the new signing officers for the 6th defendant and the 1st defendant, were among others, the claimant who is described as Managing Director. Furthermore, the claimant's evidence that he was promoted by the 1st defendant to Financial Controller for the Decameron Group and that he performed duties on behalf of other entities in the Group other than the 1st defendant, has not been challenged.

[84] Mr Barrera in his witness statement said that the claimant was the most senior officer in Jamaica while he performed services at the hotel. He even goes on to say that as Managing Director, the claimant was responsible for ensuring that the hotel kept proper records of vacation leave. He admitted in cross examination that he was employed to the 3rd defendant in 2014 and really cannot speak of his own personal knowledge, to what took place prior to that time, and he does not dispute the claimant's evidence, that his remuneration as Managing Director was negotiated directly with Mr. Lucio Garcia Mansilla. In evidence are copies of cheques made payable to the claimant, drawn on accounts of the 8th defendant, as well as wire transfers to an account he held at Bank of America, from the 7th defendant, Decameron Global Services S. DE. R.L.

[85] In arguing that the claimant was never the Managing Director of the 1st defendant, counsel Mr Goffe, said there was no such service contract between the claimant,

and the 1st defendant, although he performed the role of Managing Director. Besides, he argued, the claimant could not be Managing Director, as the Articles of Incorporation for the 1st defendant requires a Managing Director to be a director. It seems to me however, that the Supplemental Agreement (which the 1st defendant has not said is invalid), clearly does not support these submissions, because that document was signed by the claimant as director of the 1st defendant. Furthermore, another agreed document, part of **Exhibit 1A**, is an email dated October 9, 2015, to Ms. Tracey-Ann Long (one of the 1st defendant's Jamaican lawyers), from Ms. Ana Lucia Giraldo of the 3rd defendant, which instructed Ms. Tracey-Ann Long to assist with certain appointments to the Board of the 1st defendant following the resignation of Mr. Lucio Garcia Mansilla. That email identified the claimant as one of its current directors and was copied to Mr Barrera. In cross examination, Mr Barrera said Ms. Ana Lucia Giraldo worked for him.

[86] Even though there was no written agreement in evidence between the claimant and the 1st defendant reflecting his engagement as Managing Director, I find, on a balance of probabilities, looking at the evidence in its entirety, that as of April 2008, the claimant was indeed the Managing Director of the 1st defendant and was employed as such by the 1st defendant since April 2008 under a contract of service. In the exchange recounted earlier, between Mr Barrera and Ms Perue on cross examination, it is a reasonable inference to draw, from Mr Barrera's evidence, that when the claimant was invited to Colombia to have discussions with a view to manage and resolve hostilities, he was indeed the 1st defendant's employee. There is no evidence that the 2nd defendant was informed about this meeting, or about the hostilities referred to by Mr Barrera. If the claimant had remained the employee of the 2nd defendant, I would have expected the 2nd defendant to be a part of this meeting and the discussions. Furthermore, since, as Mr Barrera said, the discussions in Colombia were with a view to modifying the claimant's agreement with his "employer"; if by "employer", he meant the 2nd defendant, why then wasn't the 2nd defendant at that meeting and why was there no evidence that they were advised of the meeting and of the 1st defendant's intentions? One need not look

beyond Mr Barrera's further answer in cross examination, for the answers to these questions, as he agreed with the suggestion put to him, that the proposed Consultancy Agreement had nothing to do with the 2nd defendant.

[87] In relation therefore, to the period after April 2008, having found that the claimant was directly employed to the 1st defendant, I reject Mr Barrera's evidence that all payments made to the claimant were made on behalf of the 2nd defendant.

[88] It has been seen from the 2nd defendant's defence, that it denies that the claimant remained its employee up to April 2019, when his services were terminated by the 1st defendant. The 2nd defendant's position is that the claimant became an employee of the 1st defendant due to the lapse of time and the course of conduct of the parties. The 2nd defendant's evidence is that since April 2008 when the claimant was employed directly by the 1st defendant as its Managing Director, his secondment ended.

[89] In her submissions on behalf of the 2nd defendant, Ms Perue argued that the actions of the claimant demonstrate that since April 2008, the claimant's fidelity as an employee was to the 1st defendant and not to the 2nd defendant. Learned counsel said the claimant was under the direct supervision and management of the 1st defendant. According to her, applying to the evidence in this case, the principles in **Ready Mixed Concrete (South East) Ltd v Minister of Pension and National Insurance [1968] 2 QB 497**, relied on by Palmer - Hamilton J in **Atlantic Hardware Plumbing Co. Ltd v Guardsman Limited [2018] JMSC Civ 194**, it is clear, that the claimant became the employee of the 1st defendant in April 2008 and this was the case until his services were terminated in April 2019. Ms Perue pointed to the evidence of the 2nd defendant's witness, who said that since April 2008, when the claimant entered into direct contractual arrangements with the 1st defendant, the claimant's secondment came to an end and thereafter he was in the 1st defendant's direct employment. Mr Goffe submitted, however, that an employment contract can be terminated only by resignation, termination, death or retirement, and there is no evidence that any of these events occurred in this

case, in relation to the claimant's contract of employment with the 2nd defendant. I disagree with Mr Goffe. I will explain why.

[90] There is a long line of English decided cases in which the principle has been established that there is no real distinction between contracts of service and ordinary contracts, and therefore, if there is a repudiation by one party, there must be an acceptance of that repudiation to bring the contract to an end. (See **Gunton v Richmond-upon-Thames LBC [1980] 3 WLR 714**; **London Transport Executive v Clarke [1981] IRLR 166** and **Rigby v Ferodo Ltd [1988] ICR 29**).

[91] I have found that the claimant was employed to the 1st defendant as its Managing Director and that this contract of service, began in April 2008. The 2nd defendant's case is that upon the claimant's direct engagement with the 1st defendant evidenced in part by his demonstrated fidelity to the 1st defendant, his secondment terminated and so too his employment with the 2nd defendant. Mr Seymour Smith's evidence that where the interest of the 2nd defendant and the 1st defendant collided, the claimant always sought to protect the interest of the 1st defendant, is borne out by letter dated December 7, 2012, from the claimant to Mr. Richard Salm, the then Managing Director of the 2nd defendant. In that letter, the claimant, signing as Managing Director for the 1st defendant, chides the 2nd defendant for its approach to its club membership programme, and the involvement in it, of one Steve Forbes. He also stated, in emphatic terms, the things the 1st defendant will not support in relation to that programme. The first two paragraphs of that letter read:

“Dear Richard

Re: Steve Forbes

We acknowledge receipt of your letter dated December 4, 2012, and we are somewhat surprised that having requested and waiting for a meeting with you to have dialog on the matter, you then show up with a letter arbitrary stating your position, moreso (sic) you are the one who always request dialog or unity among us especially when any decision is made that isn't in your favour.

We are happy to work with you in your club membership business, however, notwithstanding your long-time personal friendship with Mr Forbes, or your obligations or indebtedness (if any) to him, or his ability to manipulate others, we **WILL NOT** support the following: -

- (a) Anyone other than the management of Decameron to have 100% control over our guest including those in Club membership programme.
- (b) Conflicting information being past (sic) on to any of our guests.
- (c) Anyone to operate their personal business which may cause chaos, conflict of interest, mayhem or revolt that will jeopardize the smooth operation of the hotel.
- (d) The operation of more than one taxi/tour desk on property that may compete with each other or anyone taking advantage ...
- (e) Crowding or solicitation in the lobby area."

[92] There is no evidence that the 2nd defendant expressed any opposition to the claimant being directly employed to the 1st defendant. I am of the view and accordingly find, that in April 2008, by accepting the job as the 1st defendant's Managing Director, the claimant repudiated his employment contract with the 2nd defendant. I also find, that given the 2nd defendant's lack of opposition to that repudiation, it is reasonable to infer, that the repudiation was implicitly accepted by the 2nd defendant, resulting in the termination of the claimant's contract of service with them.

[93] The fact that the claimant remained a member of the 2nd defendant's pension fund does not change my findings. The claimant's evidence that a member of that fund need not be an employee of the 2nd defendant was not challenged. Besides, in the Amended and Restated Trust Deed, an agreed document which is in evidence, a member of the Plan is defined to include a former employee who has a current or future entitlement from the Plan.

Whether the Agreement between the claimant and the 1st defendant dated July 24, 2014, is legal, valid and enforceable against the 1st defendant.

- [94]** I find it difficult to accept, Mr Barrera's evidence that the July 24, 2014, agreement does not bind the 1st defendant, as Mr Lucio Garcia Mansilla resigned as a director of the 1st defendant effective May 8, 2014. A letter of resignation of that date is in evidence, but that letter is contradicted by the email correspondences with Ms Tracey-Ann Long, referred to earlier, which indicate that Mr Lucio Garcia Mansilla ceased holding office as director on October 9, 2015, and died on October 11, 2015. Furthermore, Mr Barrera agreed on cross examination that up to October 2015, Mr Lucio Garcia Mansilla remained a director of the 1st defendant.
- [95]** I do not find reliable, Mr Barrera's evidence that in 2014, as part of the acquisition agreement with the new owners of the 3rd defendant, Mr Lucio Garcia Mansilla continued to hold the position of president of the 1st defendant (although no such formal position existed) but had no authority to bind the company. Not only was this acquisition agreement not in evidence, but Mr Barrera agreed in cross examination, that Mr Lucio Garcia Mansilla remained a director of the 1st defendant up to October 2015. According to him, it was Mr Javier Pimienta, a director appointed by the new owners in several jurisdictions, who between May 2014 and August 2015, controlled all matters needing board approval, particularly that of the 1st defendant's board. I find it peculiar, that Mr Lucio Garcia Mansilla remained a director for the 1st defendant, yet he had no authority to bind the company, and it was another newly appointed director who oversaw all matters needing board approval. It is perplexing, that the only other director (Mr Javier Pimento), was the person controlling matters needing the board's approval; a board made up of himself and Mr Lucio Garcia Mansilla. This, in circumstances where, in the email correspondences with Ms Tracey-Ann Long, referred to earlier, Mr Lucio Garcia Mansilla was referred to as the "heart and soul" of the 1st defendant.
- [96]** In those email correspondences, Ms Tracey-Ann, Long stated on October 12, 2015, that she did not know that Mr Lucio Garcia Mansilla resigned as director of the 1st defendant. This was in response to an email dated October 9, 2015, to her from Ms. Ana Lucia Giraldo that said: "As you may know, Lucio resigned from his position as President of Decameron. Yesterday our Board decided to appoint

Leonardo in all the positions held by Lucio in our companies, as well as replace Javier Pimienta who no longer works with us.” It is in Mr. Barrera’s email of October 12, 2015, that he informs Ms Tracey – Ann Long that: “Lucio passed away on Sunday in NY.”

[97] Mr Barrera’s evidence that October 9, 2015, was not the date of Mr Lucio Garcia Mansilla’s resignation, and that that date was used in the company’s filings by Ms Tracey - Ann Long so that there would be no vacuum, as under Colombian Law, a company cannot be without a director, is remarkable and difficult to accept as credible. The 1st defendant is a company registered under the Companies Act of Jamaica and so it is Jamaican law that is applicable. It is clear that Ms Tracey - Ann Long was one of the 1st defendant’s attorneys-at-law in Jamaica, responsible for ensuring its compliance with the requisite filings at the Registrar of Companies. If Mr Lucio Garcia Mansilla had resigned as director in May 2014, it is passing strange, that this information would not have been communicated to Ms Tracey-Ann Long until one year and five months later. No evidence was given by the 1st defendant to explain this. I would have expected the company’s attorneys-at-law in Jamaica, to be informed of the resignation of the company’s “heart and soul”, who at the time, was one of only two directors. It is telling, that under cross examination, Mr Barrera agreed that the 1st defendant did not provide the claimant with any evidence that Mr Lucio Garcia Mansilla had resigned as ‘President’ of the 1st defendant in May 2014. It is also telling, as observed earlier, that he said on further cross examination that he could not recall the exact date of Mr Lucio Garcia Mansilla’s resignation, but he thinks he died in October 2015, and this was two to three months after he resigned.

[98] It is important to note that in its defence, the 1st defendant does not plead that Mr Lucio Garcia Mansilla could not have signed the July 2014 agreement as President of the 1st defendant, because at that time, he had resigned his position as director. Strictly speaking therefore, the 1st defendant cannot now rely on evidence that Mr Lucio Garcia Mansilla resigned in May 2014 and therefore could not have signed the July 2014 agreement, as President of the 1st defendant, it having not

foreshadowed this evidence in its pleadings. (See **CPR 10.7**). It is recalled that it's pleading on this issue, questions whether Mr Lucio Garcia Mansilla signed the agreement, and refers to the signature said to be his, as his "purported" signature. But, the expert report of Ms Beverly East, Certified Forensic Document Examiner, in which she opines that the signature of Mr Lucio Garcia Mansilla on the July 2014 agreement is authentic, has not been challenged.

- [99] As has been seen, the 1st defendant also contends that the "purported" signature of Mr Lucio Garcia Mansilla was not witnessed. In his submissions, Mr Goffe argued that the agreement offends the provisions of the 1st defendant's Articles of Association, in that the seal of the company needed to be affixed in the presence of two directors. He argued further that a meeting of the board of directors of the 1st defendant needed to be convened to resolve to appoint a Managing Director and decide his/her salary, and there is no evidence that this was done. He submitted that without any evidence of board approval of the agreement, and with only one director signing, the document does not bind the 1st defendant.
- [100] What is inexplicable about the 1st defendant's evidence on this issue of the July 2014 agreement, is that while it seeks to distance itself from the agreement, it expressly refers to and acknowledges its existence in the proposed 2017 Consultancy Agreement. Not only is a copy of the July 2014 agreement attached to the proposed 2017 Consultancy Agreement, but in its clause 11, it refers to that agreement, as a prior agreement between the 1st defendant and the claimant, which was to be superseded by it. How can the 1st defendant now say, in response to the claimant's present claim, that it is not bound by the 2014 agreement, when it expressly recognised and acknowledged its existence in 2017? I frankly do not find the 1st defendant's evidence on this issue to be credible.
- [101] It is true that the Articles of Association require that every instrument to which the seal is attached must be signed by a director and countersigned by a secretary or another director, and this was not done in this case. But I agree with counsel Mr Barrett, that there is nothing in those Articles of Association which states that any

document on which the seal is affixed which is only signed by one director is unenforceable. Besides, in 2017, when it offered the proposed 2017 Consultancy Agreement to the claimant, the 1st defendant clearly accepted that the 2014 agreement was a binding prior agreement between itself and the claimant.

[102] It also cannot be ignored that the Purchase and Sale Agreement dated December 12, 2014, for the purchase by the 1st defendant of the shares in Waterfront Investments Limited, was signed by only one director of the 1st defendant, Mr Lucio Garcia Mansilla, and the company's seal was affixed to the document. Mr Barrera in cross examination did not seek to impugn that agreement and in fact admitted that it was a valid agreement.

[103] Having carefully considered all the evidence and the submissions of counsel, I find, on a balance of probabilities, that the July 2014 agreement was signed by Mr Lucio Garcia Mansilla, who at the time was still a director and the person carrying the title of President; the 1st defendant considered itself bound by the agreement as is reflected in the proposed 2017 Consultancy Agreement; and the July 2014, agreement is therefore enforceable against it. I find further, that any non-compliance with the terms of the Articles of Association, was clearly not seen by the 1st defendant as invalidating the agreement, and in any event, its acknowledgment of the agreement, is indicative of its ratification of it.

The ex turpi causa non oritur actio point

[104] In its arguments before the court, the 1st defendant raised for the first time, the question whether the July 2014 agreement is illegal and therefore unenforceable. The contention is that under that agreement, only the Jamaican equivalent of USD\$1,000.00 has been described in the payslips as being taxable, and Mr Goffe argued that there has been no explanation why USD \$7,000.00 was being paid to the claimant overseas and off the payroll. According to learned counsel, the 1st defendant inherited this arrangement from the 2nd defendant, and they "now know" that this is tax fraud. Relying on the decisions in **Holman v Johnson (1775) 1**

Cowp 341, and **Hall v Woolston Hall Leisure Ltd [2000] EWCA Civ 170**, Mr Goffe argued that if the court is satisfied that there was a practice of not paying taxes from 2017, the claim should be dismissed and a finding made that the 2014, agreement was one to defraud the revenue.

[105] The claimant's evidence that all amounts paid to him were grossed up annually and all relevant taxes paid, and statutory declarations made, was not challenged on cross examination. His evidence that certificates exist at the offices of the 1st defendant, reflecting the income tax deductions from the United States Dollar component of his salary, was also not refuted. Furthermore, the 1st defendant's sole witness, Mr Barrera did not give any evidence contradicting the claimant's evidence that annually the amount paid to him was "grossed up", statutory declarations made, and the relevant taxes paid. I agree with Mr Barrett's submission that on this issue, the 1st defendant did not put to the claimant a contrary position, reflective of the 1st defendant's case. This, however, is not surprising, as the 1st and 6th defendants did not plead in their defence that the July 2014 agreement was illegal, and unenforceable by reason that it was one to defraud the revenue. By virtue of CPR 10.7, the 1st defendant was obliged to plead that the agreement was illegal and therefore unenforceable in order to be able to rely on any factual argument or allegation which could have been set out in the defence, unless permission was given by the court. No such permission was sought. It was a provision of the July 2014 agreement, that the 1st defendant would pay all the statutory deductions. I place little weight on Mr Barrera's evidence that it was not the practice of the 1st defendant, or of companies in the Decameron Group, to pay the statutory obligations of employees. The inference he clearly wishes to be drawn is that the payment of the claimant's statutory deductions was never made by the 1st defendant. Not only did he not explicitly say so, but he also said it was not the practice of the Decameron Group to enter into 10-year fixed term contracts; and I have found that the July 2014 agreement, which was a 10-year fixed term contract, was entered into between the 1st defendant and the claimant. Furthermore, the proposed 2017 consultancy agreement expressly

referred to and recognised its existence. It is plain on a reading of that July 2014 contract, that it made provision for the 1st defendant to pay all statutory deductions.

[106] For all these reasons I will not treat the July 2014 agreement as being a fraud on the revenue.

The consequential issues of liability that arise

[107] Having found that the claimant was employed to the 1st defendant since 2008 and that the July 2014 agreement is valid and enforceable against the 1st defendant, issues of liability now arise for determination. Having also found that the claimant was seconded to the 1st defendant in November 2001, and that he repudiated his employment contract with the 2nd defendant, which repudiation was accepted by the 2nd defendant, there can be no liability visited upon the 2nd defendant. The claimant was not made redundant by the 2nd defendant, he repudiated his employment contract and so, there can be no entitlement to redundancy payments from the 2nd defendant, pursuant to the Loan Agreement, for the period prior to his secondment. As to the 6th defendant, there can also be no liability visited upon it. There is no evidence that the claimant was employed to the 6th defendant under any contract of employment. In fact, this was conceded by the claimant in cross examination.

[108] Issues of liability therefore only arise in relation to the 1st defendant and in my view, they are as follows: -

- a) Whether the 1st defendant wrongfully dismissed the claimant.
- b) If the claimant was wrongfully dismissed by the 1st defendant what is the 1st defendant liable to pay to the claimant as a result of the wrongful dismissal.
- c) Whether the 1st defendant is liable to the claimant for 1% of gross operating profits, up to April 2019, and for the unexpired term of the contract.

- d) Whether the 1st defendant is liable to the claimant for outstanding reimbursements.
- e) Whether the 1st defendant is liable to the claimant for unpaid vacation.

Whether the 1st defendant wrongfully dismissed the claimant.

[109] The July 2014 agreement is a 10-year fixed term contract. It is dated July 24, 2014, and is said to expire on July 22, 2024. As indicated earlier, the email the claimant says he received from Mr Barrera, indicating that his secondment was terminated is dated April 5, 2019. It is helpful to reproduce it in full:

“Dear Louis,

Further to our meeting last Tuesday April 2, 2019, we now confirm that the decision has been taken to terminate your secondment to Hoteles Decameron Jamaica Limited effective Friday April 5, 2019, at 5:00pm.

We confirm that the decision was made based on a review of the operational needs of the hotels and your non-objection as expressed in the meeting. We regret that we were unable to reach an agreement on the amount of the redundancy that is payable to you by the owners of the hotel. We will write to you separately concerning your claim for reimbursement of expenses.

On or before Friday, kindly return all property belonging to Decameron or the hotels and take control of any personal belongings that might be in your office.

Based on our conversation with Richard Salm, we expect that you will receive communication from Club Caribbean Limited in regards to the redundancy. Please find herein a letter we sent to Club Caribbean Limited, as well as a signed letter confirming this email.

We thank you for your service and wish you all the best.

Juan Pablo Barrera”

[110] There is no provision in the July 2014, agreement, for its early termination prior to July 22, 2024, and there is no evidence that the claimant breached any of its terms. Therefore, the fixed term contract having been terminated 5 years prior to its expiry, I find that the claimant was wrongfully dismissed. He was, however, not entitled to notice. One of the issues the Privy Council, had to contend with on an appeal from Bermuda in **Reda & Another v Flag (2002) 61 WIR 118**, was whether the fixed term employment contracts of certain executives had an implied term that they were terminable on reasonable notice. Lord Millett writing for the Board, disagreed with the argument of counsel for the appellants that as a matter of law, all contracts of employment are subject to an implied term that they are terminable on reasonable notice and that only clear words can displace such an implied term. He , however, said that such a rule does not apply to fixed term contracts, and save for any express provision otherwise, an employee under such a contract could not be dismissed during the term of the contract.

What is the 1st defendant liable to pay to the claimant as a result of the wrongful dismissal?

Whether the 1st defendant is liable to the claimant for 1% of gross profits up to April 2019, and for the unexpired term of the July 2014 contract.

[111] The vexed question that now arises is to what the claimant is entitled, as a result of the wrongful termination of his contract of employment. Linked to this, is also the question of his entitlement to 1% of the 1st defendant’s gross profits. I will immediately say, that because the contract was a fixed term contract, the claimant is entitled to be paid for the unexpired term of the contract as his damages for wrongful dismissal. (See **Lisamae Gordon v Fair Trading Commission, Claim No 2005 HCV 2699, unreported Supreme Court decision delivered March 28, 2008**).

[112] It is recalled that Mr Barrera’s evidence is that at the time of termination, the claimant’s basic salary was equivalent to USD \$ 1,000.00, and allowances of USD

\$7,000.00. His evidence that the three pay slips which he exhibits, represents the claimant's pay for August, September and October 2018, is denied by the claimant who says he never received any of those slips. The July 2014, agreement, provides for the claimant to receive a minimum monthly salary of USD\$18,000.00, comprised of a basic salary of USD\$ 8,000.00 per month, travelling or motor vehicle allowance of USD\$ 2,800.00 per month, plus motor vehicle running cost, accommodation arrangements not exceeding USD \$2,500.00 per month, supermarket or steward sales not exceeding USD \$1,500.00 per month; local medical reimbursements, and overseas medical insurance coverage, for the claimant and his family .

Payment for the unexpired term of contract

[113] The payslips in evidence are agreed documents. Those relied on by the claimant, indicate that his basic monthly salary was USD \$8,000.00, comprised of a United States Dollar portion of \$7,000.00 and Jamaica Dollar portion equivalent to USD \$1,000.00. Although Mr Barrera disputed the claimant's reimbursement and allowances, these are clearly reflected in the July 24, 2014, agreement as part of the claimant's wages. The evidence of deposits made to the claimant's bank accounts from the 1st defendant show on average that USD \$ 21,516.95 was deposited monthly in his accounts for the 12-month period July 2017 to July 2018.

[114] I believe that taking an average of the total wages (basic pay and allowances), paid to the claimant by the 1st defendant for the 12-month period leading up to his termination, is a good basis on which to determine his average monthly wages, so as to calculate the amount payable to him for the 64 months unexpired term of the agreement. Applying this methodology, I find that the amount the 1st defendant is liable to pay for wrongful dismissal is USD \$ 1,377,084.80.

Redundancy payments

[115] Much emphasis was placed by the claimant on his entitlement to redundancy payment. In his submissions, Mr Barrett argued that the reference to redundancy

payments in the July 2014 agreement is a reference to redundancy payments the claimant would be entitled to for the period of his employment to the 2nd defendant which, pursuant to the Loan Agreement, was payable to him by the 1st defendant.² However, having found that the claimant repudiated his contract of employment with the 2nd defendant, in 2008 when he took on direct employment with the 1st defendant, there is no basis on which he can argue that upon being terminated by the 1st defendant in April 2019, he is entitled to redundancy for the period of his employment with the 2nd defendant. Prior to 2008, he was never made redundant by the 2nd defendant. Having also found that the claimant is entitled to the unexpired term of the July 2014 agreement, he cannot at the same time be entitled to redundancy under the provisions of the **ETRPA**.

Pension

[116] The claimant claims the 1st defendant's portion of his pension, on the unexpired term of the July 2014 agreement. No submissions were however made to explain and support this aspect of his claim. There is no provision in the July 2014 agreement in relation to pension, besides, the evidence is that the claimant remains a member of the 2nd defendant's Pension Plan. It seems to me therefore, that his claim for pension, ought to be directed to the Trustees under that Plan.

Unpaid vacation leave

[117] On the claimant's pre-trial application for specific disclosure filed on January 24, 2024, I made an order for the 1st defendant to disclose copies of any documents which contradict the claimant's claim to be entitled to 86 weeks of vacation leave up to the date of his termination. No disclosure was made by the 1st defendant of any such document; however, the 1st defendant maintains that the claimant is not

² These were submissions argued in support of the claimant's application for a freezing order in **Louis Campbell v Hoteles Decameron & Ors [2025] JMCC Comm 25**.

entitled to the amount claimed as he regularly took vacation leave and, in any event, that which he did not take, he would have forfeited by operation of law.

[118] Frankly, the claimant's evidence leaves me in doubt as to whether he is entitled to his claim for 86 weeks of unpaid vacation leave. The July 2014 agreement on which he relies, provided for him to have 5 weeks' vacation leave every year. On cross examination the claimant said that some of what he claims is from: "Club Caribbean days" but could not say how much. With his contract of employment with the 2nd defendant having been terminated in 2008, due to his repudiation of it, I cannot see how the claimant would be entitled to claim from the 2nd defendant for unpaid vacation leave from "Club Caribbean days". The July 2014 agreement made no provision for the 1st defendant to pay unpaid vacation leave for the period the claimant was employed to the 2nd defendant.

[119] The claimant admitted to taking vacation leave: "here and there" after the death of Mr Lucio Garcia Mansilla, but gave no details as to when he took vacation. This is information I would expect him to have recalled or researched prior to trial and be prepared to give evidence on. After all, this is a part of his claim. In his requests for reimbursements, he claimed several times for airline tickets and overseas expenses, and in April 2018, his request for reimbursements included expenses for airline ticket, overseas and "vacation expenses". No explanation was given as to whether the reimbursement requests for "airline tickets and overseas expenses", included vacation expenses. Given the state of his evidence, I am certainly not satisfied that the claimant is owed by the 1st defendant, USD\$ 503,222.16, for 86 weeks of unpaid vacation. He has failed to prove his entitlement to unpaid vacation leave, and on a balance of probabilities therefore, I find that he is not entitled to it.

Unpaid reimbursements

[120] The claimant claims that since around June 2018, his reimbursements have been short paid and he claims that as of March 2019, the sum of USD\$ 133,972.20, is owed to him. There has been no serious challenge to this aspect of the claim. Mr

Barrera in the April 5, 2019, letter terminating the claimant's employment said further correspondence would come regarding unpaid reimbursements. There is, however, no evidence of any such correspondence. There is also no evidence from the 1st defendant that the investigation into these reimbursements, led to a finding that these sums were not owed to the claimant. Moreover, the claimant's evidence that Mr Barrera agreed in the April 2, 2019, meeting to pay the sum claimed, was not challenged. In the circumstances, and on a balance of probabilities I find that the claimant is entitled to unpaid reimbursements of USD \$133,972.20

Gross operating profits

[121] The July 2014 agreement provides for the claimant to receive 1% of the 1st defendant's gross operating profits. Based on his contract with the 2nd defendant, this was an entitlement he also received while under their employ, as is corroborated by the 2nd defendant's answer to the Notice to Admit Facts. The claimant's evidence is that he received 1% of the gross operating profits for the 1st defendant for the year ended December 31, 2005. He gives no other evidence of receiving this benefit. I observe that in 2005, he was still under secondment from the 2nd defendant. As Managing Director for the 1st defendant since April 2008, and as its company secretary, I would expect that the claimant would have known whether profits were made by the 1st defendant in any given year since 2008, and would have sought to receive the portion of it to which he was entitled. But he gives no evidence of whether profits were made, or of his claim to 1% of it.

[122] Although Mr Barrera says it is not the practice of the 1st defendant to make this type of payment, I do not find his evidence on this issue credible. I have found for the reasons earlier expressed, that the July 2014 agreement is enforceable against the 1st defendant. The 1st defendant is therefore to disclose its audited financial statements for the period 2008 to 2024, and I will so order. The year 2008 being the first year of the claimant's direct employment with the 1st defendant, and the year 2024 is when the July 2014 contract was to have expired. If any profits were

made by the 1st defendant during that period, the claimant is to be paid 1% of any such gross operating profits.

Interest

[123] The claimant claims interest at 1% above the weighted average on commercial loan rates but has neither made submissions as to why that type of interest rate ought to apply nor provided any evidence as to what the applicable commercial bank rate is. I can see no basis on which commercial interest ought to apply in this case, and without any justification for it being urged on me, I shall apply 3% interest on the amounts awarded.

Exemplary damages

[124] Exemplary damages have been pleaded, but no submissions were made in relation to this aspect of the claim and so I treat it as being abandoned by the claimant. In any event, I see no basis on which exemplary damages ought to be awarded. None of the well-known circumstances outlined by the House of Lords in the landmark decision of **Rookes v Barnard [1964] AC 1129** are present in this case.

Conclusion and summary of findings

[125] I find that the claimant was seconded to the 1st defendant in November 2001 but was directly employed to the 1st defendant from at least April 2008, when he became its Managing Director. I find that when the claimant took direct employment with the 1st defendant, he repudiated his employment contract with the 2nd defendant and that repudiation was implicitly accepted by the 2nd defendant thereby terminating the contract of service. There is therefore no viable claim against the 2nd defendant.

[126] There is no evidence of breach of contract by the 6th defendant.

[127] I find that the 1st defendant is bound by the July 2014 agreement with the claimant. The expert opinion of Ms Beverly East, that the signature on that document is that of Mr Lucio Garcia Mansilla, was not challenged by the 1st defendant. Furthermore, this agreement was expressly acknowledged and referred to by the 1st defendant in its proposed 2017 Consultancy Agreement. I find that at the time the 2014 agreement was signed; Mr Lucio Garcia Mansilla was a director of the 1st defendant and carried the title of “President”. I further find that the 1st defendant considered itself bound by the agreement and this was not the first time that Mr Lucio Garcia Mansilla signed, post May 2014, as the sole director to a contract which bound the 1st defendant. He did so in the purchase and sale agreement for Waterfront Investments Limited.

[128] I find that having terminated the July 2014 agreement prior to its expiry, the claimant is entitled to be paid the salary and emoluments he would have earned during the unexpired term of the contract. I also find that he is entitled to unpaid reimbursements and 1% of any gross operating profits earned during the unexpired term.

[129] I see no basis on which interest on the amounts awarded to the claimant should be at the commercial rate and I see no basis on which exemplary damages ought to be awarded.

Orders

[130] In the result, I make the following orders: -

- a) The claim against the 2nd defendant is dismissed, with costs to the 2nd defendant to be agreed or taxed.
- b) The claim against the 6th defendant is dismissed, with costs to the 6th defendant to be agreed or taxed.
- c) Judgment for the claimant against the 1st defendant in the following terms:

- i. USD\$ 1,377,084.80 for wrongful dismissal with interest at 3% from April 5, 2019, to September 26, 2025.
- ii. USD\$ 133, 972.20, for breach of contract, representing unpaid reimbursements, with interest of 3% from April 5, 2019, to September 26, 2025.
- iii. Within 21 days of this order, the 1st defendant is to disclose copies of audited financial statements for the 1st defendant for the period 2008 to 2024 and pay to the claimant 1% of any gross operating profits made by it between 2008 and 2024.
- iv. Costs to the claimant to be agreed or taxed.
- v. Liberty to apply in relation to (iii) above.

A Jarrett

Puisne Judge