**IN THE SUPREME COURT OF BELIZE, A.D. 2015**

**CLAIM NO: 298 of 2015**

**BETWEEN**

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| **BELIZE PICKWICK CLUB HOTEL LIMITED** | **1st CLAIMANT** |
| **BELIZE PICKWICK CLUB LIMITED** | **2nd CLAIMANT** |

**AND**

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|---|---|
| **PRINCESS ENTERTAINMENT LIMITED** | **1st DEFENDANT** |
| **GOLDEN PRINCESS ENTERTAINMENT LIMITED** | **2nd DEFENDANT** |
| **SUDI OZKAN** | **3rd DEFENDANT** |
| **MEHMET HAMDI KARAGOZOGLU** | **4th DEFENDANT** |

**Keywords:** Contract; Gaming Agreements; Memorandum of Understanding; Operating and Management Agreement; Lease Agreements of Gaming Premises; Breach of Contract; Measure of Damages;

Misrepresentation; Negotiations; False Representations; Fraudulent Misrepresentations; Misrepresentation alleging inducing Claimant into entering into Agreements;

Agency; Creation of agency between Companies;

Companies; whether company liable as principal for misrepresentation; Agency; Distinct legal personality; Exceptions;

**Before the Honourable** Mr. Justice Courtney A. Abel

**Hearing Dates:**
6th June 2016
7th June 2016
7th July 2016
26th July 2016
29th July 2016
29th November 2016
21st December 2016
17th January 2017.

**Appearances:**

Mr. Eamon H Courtenay, SC, and Ms. Iliana N. Swift for the Claimants

Mr. Rodwell Williams, SC, and Ms. Lissette V. Staine for the 1st, 3rd and 4th Defendants

**JUDGMENT**
**Delivered on the 17th day of January 2017**

## Introduction

[1] This largely contested claim concerns a disputed breach of contract principally about the operating, management and renting of a casino or gambling establishment located at Newtown Barracks, Belize City, Belize[1] ("the Premises").

[2] Central to the consideration of this claim are certain signed documents including a Memorandum of Understanding ("MOU"), an Option Agreement between 'Pickwick Club Hotel Limited' and the 1st Defendant dated 18th December 2008, an Operating & Management Agreement ("OMA") between 2nd Defendant and the 1st Claimant, and two leases between the 2nd Claimant and the 2nd Defendant. The OMA and Leases will be collectively called ("the Agreements")

[3] The ground floor of the Premises was initially conceived and developed by those representing the 1st and 2nd Claimants to be, euphemistically, gaming premises ("the Gaming Premises") and most of the upper part to be hotel premises.

[4] The Claimants brought this claim because they allege that the 3rd and 4th Defendants fraudulently induced them to enter into certain agreements to operate, manage and let the gaming premise for 15 years; and that the 1st and 2nd Defendants, both related companies, then breached such agreements by ceasing to occupy the Gaming Premises for which they must compensate the Claimants in damages.

[5] It is undisputed that the 2nd Defendants indeed took possession of the Premises in January 2012 under the agreements; paid rent of $20,000.00 from January 1, 2012 and monthly thereafter, and then since January 2015, in breach of the agreements, have ceased to operate and/or occupy the Gaming Premises, and has since then discontinued payments to the Claimants under the agreements.

[1] Parcels 959 and 1001, Block 45, Kings Park Registration Section on Newtown Barracks, Belize City, Belize.

[6] It appears that the 2nd Defendant, which has not contested the claim and has a default judgment entered against it because of the breach of the agreements, may well be a company with no assets for the Claimants to pursue against for compensation (so this judgment may well be worthless); and so the real contest in the present case has been between the Claimants and the 1st, 3rd and 4th Defendants being pursued for such compensation.

[7] The main issues, set out below, which is hotly disputed, concern the factual and legal circumstances under which the Agreements took place.

[8] The central question for determination is which, if any, of the 1st, 3rd and 4th Defendants are legally liable for such rent and to compensate the Claimants.

[9] The case which the Claimants have been advancing against the 1st,3rd and 4th Defendants is that in substance, fact and law that these Defendants are liable to the Claimants because:

(a) The 1st Defendant in actuality, even though not named a party to the agreements, is the principal of the 2nd Defendant (its agent) and is therefore in law liable to the Claimants for the damages for the breach of the agreements; and,

(b) The 3rd and 4th Defendants committed actionable and fraudulent misrepresentations by inducing the Claimants into entering into such agreements, and therefore are liable to pay damages to the Claimants.

[10] The burden of proof is clearly on the Claimants and the standard, largely requiring the proof of an original motive to substantiate a fraudulent plan, being quite high on the Claimants.

**The Issues**

[11] Did the 3rd and 4th Defendants make any actionable/fraudulent misrepresentations to the Claimants such that they should be held personally liable for any such misrepresentations made?

[12] Did the 2nd Defendant enter into the Agreements as an agent on behalf of the 1st Defendant?

[13] If it is found that the 1st Defendant was the true principal to the Agreements, did the 1st Defendant breach any of its contractual obligations with the Claimants?

## Background

The Parties and Personalities

[14] The witness Mr. Bhagwan "Bob"' Hotchandani ("BH") is a shareholder and director of the 1st Claimant and 2nd Claimant.

[15] The witness Samira Musa–Pott, Attorney-at-Law for Claimants, is a shareholder in and Secretary of the 2nd Claimant.

[16] The other witness for the Claimants, Sunjay Hotchandani ("SH"), the son of BH, is also a shareholder and director of the 2nd Claimant.

[17] Billy Musa, the father of Samira Musa–Pott, is also a director of the Claimants. BH, SH and Billy Musa were therefore all directors of the 2nd Claimant.

[18] The 1st Defendant is a privately owned company existing under the Laws of Belize. All the issued and outstanding shares of the 1st Defendant, comprising 10,000, are held by White Horse Falls Corporation of the British Virgin Islands as to 9,999 shares and by the 4th Defendant as to 1 share in trust for White Horse Falls Corporation.

[19] The 2nd Defendant is a privately owned company also formed and existing under the Laws of Belize with the issued and outstanding shares of which comprising 10,000 held by White Horse Falls Corporation of the British Virgin Islands as to 9,999 shares and by 4th Defendant as to 1 share in trust for White Horse Falls Corporation.

[20] The 2nd Defendant was incorporated by its owner, White Horse Falls Corporation, on 16th December, 2010, established at a time that the OMA and lease agreements were being negotiated, and inserted to hold the subject leases, and about which there has been much contention between the Claimants, the 1st, 3rd and 4th Defendants giving rise to the present claim.

[21] The 3rd Defendant is a director of both the 1st and 2nd Defendants and was appointed as such by White Horse Falls Corporation, the beneficial owner of which is almost entirely the 3rd Defendant. White Horse Falls Corporation is the underlying owner of a wider and related group of companies with 'Princess' in each of their names.

Each company, including the 1st and 2nd Defendants, operated a casino in Belize[2], and others elsewhere ("the Princess Group of Companies").

[22] The 3rd Defendant is also unarguably the directing mind and will of the Princess Group of Companies.

[23] The 4th Defendant is undoubtedly, and to a significant degree, a minority or nominee shareholder of the 1st and 2nd Defendant of which he is also a director.

[24] The 4th Defendant was the only witness for the 1st Defendant, having on its behalf and also engaged in negotiations with the Claimants regarding the subject transactions, during which, it is alleged by the Claimants, the 4th Defendant made certain fraudulent misrepresentations for which the Defendants are liable to the Claimants for loss and damage which they have suffered.

[25] Hande Mutlu ("Mutlu") was the private architect of the 1st Defendant and the personal assistant to The 3rd Defendant.

[26] BH knew the 3rd and particularly the 4th Defendants and for some time before 2008, had business dealings with the Defendants (had rented another property to the Defendants in the Corozal Free Zone of Belize in middle of 2005). BH was also a regular patron of the 1st Defendant's casino at the Princess Hotel, Belize City.

[27] It is not an overstatement to say that the relationship between BH and the 3rd Defendant started out as a relatively close one.

<u>The Beginnings</u>

[28] Sometime in late 2007 the Directors of Claimants decided to venture into a hotel and casino business since their main business, a membership club, was not doing well at the time.

[29] The Claimants had no prior experience in the gaming business and it may be that its directors had harbored a hope that by establishing a company which would compete with the 1st Defendant's casino business at their Princess Hotel, Belize City, they might interest them in taking it over and running it themselves from their proposed business. On the evidence this may be no mere idle speculation as Mr. BM was both a Consultant to the Defendants and also a director and representative

[2] 1 in the Town of San Ignacio, 1 in Belize City and 2 in Corazal within the 'Free Zone'.

for the Claimants (and therefore would have had some inside information in relation to both).

[30] The 1st Claimant was nevertheless incorporated on the 28th day of November, 2007 to carry on the hotel and casino business.

[31] In or about early 2008 the 1st Claimant applied to the Government of Belize (GOB) for, and duly obtained, on the 5th February 2008, a conditional gaming license for the Premises for a License Fee of US$50,000.00 annually – again how they obtained this licence may be a matter of speculation as there is no real evidence to suggest that this was obtained by other than a proper basis.

[32] The Licence obtained from GOB authorised specified games to be played with conditions attached including that it be limited to 7 gaming tables and up to 300 gaming machines and with the 1st Claimant being granted 24 months from the date of the licence in which to complete a 50 room hotel (upon failure of which the Gaming Board had the discretion of not renewing the licence).

[33] Shortly afterwards the 1st Claimant commenced the construction or improvement of a building on the Premises the upper levels of which were to be used for a hotel business and the ground floor to be used for gaming in compliance with the conditions of the gaming licence.

<u>The Initial Dialogue</u>

[34] In mid-2008, during discussions between BH, Mutlu and the 4th Defendant, BH casually, but possibly deliberately, mentioned that the 1st Claimant had obtained a casino license and was engaged in the construction of a building for a casino business.

[35] Interest was immediately ignited in the 4th Defendant in acquiring this license and business; and BH shortly thereafter called the 3rd Defendant, in St. Maarten, and had a telephone conversation, during which the 3rd Defendant, obviously seeking to protect its nearby casino business, requested that the Claimants not let the Premises to anyone else.

[36] The other directors of the Claimants then provisionally consented to rent the Premises if a suitable rent was agreed as this would have been less burdensome for

them to operate the casino themselves, and was possibly obviously the realization of their best hope.

[37] The 3rd Defendant offered to rent and operate the Premises on similar terms as that which the 1st Defendant had rented its property in the Corozal Free Zone.

The Negotiations

[38] In or about October 2008 a representative of the 1st Claimant and the 1st Defendant had a meeting to initially negotiate the terms of the agreement.

[39] Negotiations initially took place by way of teleconference during which the 4th Defendant translated for The 3rd Defendant. The 3rd Defendant, being essentially the owner of the Princess Group of Companies, had the final say for the 1st Defendant and apparently the parties decided on some of the essential terms and figures.

[40] The Claimants contacted their Attorney-at-Law, the witness Samira Musa –Pott, to act in the transaction with the initial intention being that the 1st Defendant would enter into an agreement with the Claimants.

The MOU & Option Agreement

[41] The terms negotiated in the meeting between BH and the 3rd Defendant were put into writing by the 1st Defendant's attorneys-at-law and on the 18th of December 2008 the Memorandum of Understanding & Option Agreement ("MOU") was entered into by the 1st Claimant and 1st Defendant with the former granting the latter the exclusive right and option to rent and operate the Premises upon the terms and conditions therein.

[42] It was always the intention of the parties that a formal agreement would later be entered into by the 1st Defendant and the 1st Claimant which intention is memorialised and evidenced by clause 6 of the MOU which stated: "*this Agreement is not intended to create binding legal relations between the parties but will form the basis for a further agreement to be entered into between the same parties in relation to the Project*".

[43] In the MOU the Project was described as being the development of the Premises into a hotel of not less than 50 rooms and to provide all forms of entertainment including gaming in all forms.

[44] This court accepts that the situation was as just stated and it was intended to be an MOU between the 1st Claimant and the 1st Defendant.

[45] The MOU sets out in a schedule to it a 'confidential' 15 year rent provision expressed by annual figures which was escalating for the first 6 years and which then plateaued for the remaining 9 years. Sketch (floor) Plans were also attached to the MOU in a Schedule.

[46] The representatives of the Claimants, so they claimed, relied on the representations contained in the MOU and at the request of the 3rd Defendant, allowed 1st Defendant's architect, Mutlu, to have some input in designing the entire interior of the Premises suitable for a gaming premises. There is some argument about the process of design and budgeting which this court consider will not significantly affect the outcome of this case.

[47] Clearly the representatives of the Claimants could reasonably have assumed that the 3rd Defendant and the 4th Defendant were negotiating on behalf of the 1st Defendant, as the 2nd Defendant did not exist throughout the first year and a half that the 1st Claimant had been conducting negotiations with the 1st Defendant.

<u>The Insertion of the 2nd Defendant into the Agreements</u>

[48] The Attorney-at-Law for the Claimants eventually was called upon to prepare the draft Agreement contemplated by the MOU, which she did, and on or about the 10th day of December, 2010 she forwarded the same to the Attorney-at-Law for the Defendants by way of a draft OMA as well as a lease agreement to be entered into by the 1st Defendant and the 1st Claimant.

[49] It appears that the Attorney-at-law for the Claimants received back the draft OMA on the 16th December 2010, the same day that the 2nd Defendant was incorporated, with the counterparty to the Agreements changed from the 1st Defendant to the 2nd Defendant. This witness testified, which I accept as evidence of truth (not necessarily determinative of the matters raised in this case), that at that time the change seemed to her to be unimportant for the reasons which she gave.

[50] I am prepared to accept that as a practical matter there may not have been the required due diligence at the time because the parties knew each other and to a

certain extent may have trusted each other due to the mutual friendship which existed at the time.

[51] Eventually, arising from the negotiations the following documents were signed:

(a) The OMA entered into as of 31st January 2011 between 2nd Defendant and the 1st Claimant.

(b) A Lease of part of the Premises[3] and a 'Memorandum Accompanying Lease' both entered into as of 31st January in 2011 but otherwise actually undated between the 2nd Claimant and the 2nd Defendant; and

(c) A Lease in respect of the other part of the Premises[4] and a 'Memorandum accompanying Lease' both dated 31st January 2011 between the 2nd Claimant and the 2nd Defendant.

[52] At the signing of these agreements the representatives of the Claimants noticed, but did not object, that the 2nd Defendant was substituted as party to such agreements in place of 1st Defendant.

The Terms of the OMA and the 1st Lease Agreements

[53] In the recitals to the said OMA, it is stated that the 2nd Defendant "*…is in the business of owning and operating licensed Gaming Premises and has the skills, background and experience in operating and managing the Gaming Premises*".

[54] In clause 14.4 of the OMA state as follows:

> *This Agreement contains the whole agreement between the Parties and supersedes and replaces any prior written or oral agreements, representations or understanding between them. The Parties confirm that they have not entered into this Agreement in the basis of any representation that is not expressly incorporated into this Agreement*[5].

[55] The effect of this latter provision in the OMA is to exclude any representations of the sort which the Claimants allege induced them to enter into the OMA[6].

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[3] Parcel 1001.
[4] Parcel 959
[5] See page 324 of the Trial Bundle.
[6] Foster and another v Action Aviation Ltd: [2013] 2439 (Comm), pgh 96.

[56] The OMA and Lease Agreements provided that the 2nd Defendant would operate, manage and occupy the Gaming Premises for a term of fifteen years.

[57] The OMA and Lease agreements granted the 2nd Defendant not only the exclusive right to occupy, operate and manage the Premises but also to retain all the income and profits derived therefrom in consideration of the payment to the Claimants of a monthly rental and operation fee as set out in the Agreements.

Possession, Operation and Management of the Premises

[58] Throughout 2011 the Defendants requested further amendments be made to the Agreements and that a second lease agreement be executed with the Claimants for the lease of another parcel of land to be used as parking space for the 1st Defendant's customers. Consequently, the leases were not registered at the Land Registry until February 2012.

[59] The Defendants took possession of the Premises in January 2012 and the 2nd Defendant, supported by the other Defendants, started paying rent for the same in the sum of $20,000.00 on January 1, 2012 and monthly thereafter.

[60] Eventually, with some delays, the ground floor of the Premises opened as a gaming premises but despite having a license to conduct live games at the Premises and as alleged by the Claimants, having caused them to incur substantial costs in fitting out the Premises for this purpose, they did not conduct live games or operate a full-service casino. They only offered machine games.

[61] At the time when the Defendants took possession of the Premises, the same was already designed and constructed by the Claimants and the Defendants working in concert.

[62] Thereafter the 2nd Defendant, supported by the 1st Defendant, furnished the Gaming Premises with gaming equipment and other fittings suitable to its business of operating the premises as a Casino, but the 1st Claimant did not and could not operate the Gaming Premises as its gaming permit had expired since February 4, 2011 and was not renewed.

[63] The reality on the ground with regard to the operations of the 2nd Defendant remained as the Claimants expected which was despite this new entity (the 2nd

Defendant) being the signatory to the Agreements, the operation or administration of the Premises was often handled by the staff of the 1st Defendant.

[64] Financial matters were handled by the Chief Financial Officer of the 1st Defendant and by its accountant both of whose offices were located at the business place of the 1st Defendant and not at the Premises.

[65] Collection of monthly rental payments was done at the premises of 1st Defendant and not at the Premises. In fact, operation fees and rental payments were sometimes even made with cheques from the banking account of the 1st Defendant.

[66] In about early 2012 the 1st Claimant experienced some difficulty renewing its casino license as it had not yet completed construction of 50 guest rooms which was a condition of the casino license. The 2nd Defendant then applied for the casino license itself using a block of 50 rooms located at the Premises of the 1st Defendant to satisfy this requirement. When applying for the license the 2nd Defendant, somewhat erroneously, represented, as the Claimants and their representatives well knew, that its casino was an extension of the Princess Entertainment gaming premises and they were thus able to obtain a license.

[67] A further gaming licence was granted for one year to the 2nd Defendant on the 9th June 2013 with a similar condition relating then to 25 rooms and an "*International Business Processing Service at the address of the gaming premises, and offering employment to at least 50 persons*".

[68] In or around July 1, 2013, the 2nd Defendant started operations of the casino and gaming business on the Premises and was therefore obliged to pay and did pay to the Claimants the operation fee of $80,000.00 per month in addition to the rent of $20,000.00 per month. The payment of the said operation fee to the Claimants commenced on July 1, 2013, and continued monthly thereafter until the 2nd Defendant vacated the Gaming Premises.

[69] In about October 2013 the 4th Defendant, in his capacity as Executive Vice President of the Princess Group of Companies, wrote to BH and requested that the 2nd Defendant reduce the rental fee and operations fee.

The Supplemental Agreement

[70] On or about the 18th of November 2013 and after negotiations, an amendment was made to the OMA and Lease Agreements between the 2nd Defendant and the 2nd Claimant and which was supplemental to the previous agreements ("the Supplemental Agreement") whereby it was agreed that the 2nd Defendant would procure its own gaming license going forward and it was confirmed the relationship between the 2nd Defendant and the Claimants to be that of landlord and tenant in relation to the Premises.

[71] The Claimants continued to collect their rental payments at the Premises of 1st Defendant from its staff.

Termination of Business Operations at the Premises

[72] In early January 2015 it was observed by BH that the Premises had been closed down so he immediately called the 4th Defendant to enquire what was happening and he informed that they were undergoing renovations.

[73] In a matter of days it was evident that all the gaming machines had been removed from the Premises and the staff had been relocated to the 1st Defendant's casino at 129 Newtown Barracks.

[74] On or about the 13th of January, 2015 BH and the Attorney-at-Law for the Claimants received an email from Martha Richards of Princess Entertainment to which she attached a letter addressed to the Chief Executive Officer of the Gaming Control Board advising them that the casino operated at the Gaming Premises would be closed temporarily.

[75] On or about the 16th of January, 2015 the Claimants received a letter from the attorney-at-law for the 1st Defendant advising that the 2nd Defendant would cease to operate the Gaming Premises and would only pay rental fees up to January 2015.

[76] All of the 2nd Defendant's assets were then removed from the Premises out of the Claimants' reach.

[77] It is accepted that strictly the 2nd Defendant at no time operated or purported to operate the casino and gaming business under any gaming permit held by the 1st Defendant. The 1st Defendant and the 2nd Defendant ostensibly conducted gaming

businesses at different premises and under different gaming permits and never under a permit obtained by any of the Claimants (as it was not assignable).

The Court's General Determinations of the Factual and Legal Situation

[78] The 3rd and 4th Defendants via the vehicle of the 1st Defendant may be considered the "head and brain" of the gaming operations at the Gaming Premises and did control and make all critical business or other significant decisions under the aforementioned Agreements.

[79] It is therefore true that any profits or losses of the 2nd Defendant were made by the skill and direction of the 1st, 3rd and 4th Defendants.

[80] The 1st Defendant certainly allowed its experienced employees to assist the 2nd Defendant with the management of the casino.

[81] The finances of the 1st and 2nd Defendants were comingled, and at all material times the 1st and 2nd Defendants though they may have operated separate bank accounts, were interconnected with the former supporting the latter.

[82] From time to time the 1st Defendant made loans to the 2nd Defendant to assist the 2nd Defendant in meeting its expenses but such loans were not arm's length commercial arrangements but was that of a sister company supporting a sister company.

**The Court Proceedings**

[83] The present claim was filed on 27th May 2015 principally against the 2nd Defendant for breach of the OMA, the Lease Agreements and the Supplemental Agreement.

[84] In the claim the Claimants alleged misrepresentations against the 3rd and 4th Defendants, and breach of Agreements against the 1st Defendant,

[85] Apart from revolving around the Premises, the claim touches and concerns the Agreements.

[86] The Claimants also alleges that the 2nd Defendant was at all times the agent of the 1st Defendant and as such the latter is liable to the Claimants for the 2nd Defendant's breach of the OMA, leases and Supplemental Agreement.

[87] The claim is also brought against the 3rd and 4th Defendants for alleged fraudulent misrepresentations which the Claimants also alleges induced them into entering into the OMA, leases and the Supplemental Agreement.

[88] But on the 2nd December 2015 the 2nd Defendant, having been served with the claim and failed to Acknowledge Service a default judgment was allowed to be entered against it in favour of the Claimants; thereby entitled to recover against the 2nd Defendant the following relief:

1. Damages to be assessed for breach of the OMA;
2. Interest pursuant to sections 166 and 167 of the Supreme Court of Judicature Act; and
3. Costs.

[89] In its amended statement of case, dated the 27th July 2015, the Claimants significantly pleaded and alleges:

> "…
>
> *(a) in negotiations/conversations held between September, 2008 and the early part of December 2008 with the directors and officers of the Claimants, namely Bob Hotchandani and Sunjay Hotchandani ("the Representees") that Princess Entertainment had the background and experience to successfully operate the Claimants' Gaming Premises and that Princess Entertainment, itself, would operate the premises;*
>
> *(b) in the MOU that a further operation and management agreement would be entered into by the 1st Defendant, itself;*
>
> *(c) orally, in meetings between January 2009 and November, 2010 that all negotiations between the 3rd and 4th Defendants and the Representees were being conducted on behalf of the 1st Defendant;*
>
> *(d) orally, in meetings held with the Representees in December 2010 that the 2nd Defendant would operate the Gaming Premises for and on behalf of the 1st Defendant and with the financial backing of 1st Defendant;*
>
> *(e) orally, in meetings held with the Representees between the latter part of December, 2010 and the 31st of December, 2010 and further evidenced in writing in the Agreements that the 2nd*

*Defendant was in the business of owning and operating gaming premises and that it had the skills, background and experience to successfully operate and manage the Gaming Premises of the Claimants."*

[90] Also in its amended statement of case the Claimants also pleads and alleges that the 3rd and 4th Defendants:

(a) Further represented by conduct that the 2nd Defendant was financially sound and had the ability to perform its obligations under the Agreements because the 1st Defendant would ensure it performed.

(b) Induced the Claimants, which acted on these representation, to enter into the Agreements and caused the Claimants to expend additional funds in fitting out the Premises in accordance with the specifications of the 1st Defendant.

(c) Knew each of these representations to be false, or that they ought to have known of such falsity, and were therefore fraudulent in that at the time of entering into the Agreements the 2nd Defendant was a newly incorporated company with no background or experience in the gaming business and did not have the capacity to perform its obligations under the Agreements; nor did it have the chance of gaining it.

[91] The Claimants in the Amended statement of case in addition alleges that the 2nd Defendant entered into the Agreements as the agent of the 1st Defendant which is the true principal of the transactions, by suggesting that:

(a) The 1st Defendant was the head and brain of the business venture and conducted all negotiations with the Claimants.

(b) The persons conducting the business of the 2nd Defendant, namely the 3rd and 4th Defendants, were appointed by the 1st Defendant.

(c) All profits were made by the skill and direction of the 1st Defendant which supplied and trained the staff of the 2nd Defendant.

(d) The 1st Defendant was in constant and effectual control of the business and made all decisions inclusive of authorizing payments under the Agreements to the Claimants.

(e) The finances of the 2nd Defendant and the 1st Defendant were often comingled and the financial obligations of the 2nd Defendant were met from the banking accounts of the 1st Defendant.

[92] The Claimants, in their statement of case, finally claimed that in breach of the Agreements, the 2nd Defendant has ceased to operate or occupy the Premises and has discontinued payments under the Agreements to the Claimants since January 2015 as a result of which the Claimants have suffered loss and damage for which all of the Defendants are liable.

[93] The Claimants therefore sought the following reliefs:

*1.* Against the 1st Defendant:

i. A Declaration that 2nd Defendant entered into the Agreements as agent of the First Defendant.

ii. Damages for breach of the Agreements;

Further or Alternatively:

2. Damages against the 2nd Defendant for breach of the Agreements.

Further or Alternatively:

3. Damages for misrepresentations against the 3rd and 4th Defendants:

4. Interest;

5. Costs; and

6. Any further consequential or other relief this Honourable Court deems just.

[94] As already noted a default judgment was, on the 2nd December 2015, allowed to be entered in favour of the Claimants against the 2nd Defendant for damages to be assessed. The assessment of damages remain outstanding against the 2nd Defendant.

[95] The 1st, 3rd and 4th Defendants deny and strenuously contested a great deal of the Claimants' allegations including (a) most of the allegations of false, reckless and/or fraudulent misrepresentations by the 3rd and 4th Defendants (b) that the 2nd

Defendant was an agent of the 1st Defendant, and (c) that the 1st Defendant acted in breach of any Agreement with the Claimants. Indeed there was a significant factual contest in relation to much of the evidence presented by the Claimants and the 1st, 3rd and 4th Defendants.

[96] The case was carefully managed and the court was assisted throughout by experienced Counsel for the represented parties. It was referred to mediation but it did not settle. The parties were ordered to agree costs by the 9th May 2016 and such costs have been agreed in the sum of BZ$75,000.00.

[97] The court had the benefit of substantial written submissions from Counsel for the parties as well as having heard oral arguments from them.

**Did the 3rd and 4th Defendants make any actionable/fraudulent misrepresentations to the Claimants such that they should be held personally liable for any such misrepresentations made?**

The Law

[98] Misrepresentation has been described and can properly be defined as:

> *"… a positive statement of fact, which is made or adopted by a party to a contract and is untrue. It may be made fraudulently, carelessly or innocently. Where one person ('the representor') makes a misrepresentation to another ('the representee') which has the object and result of inducing the representee to enter into a contract or other binding transaction with him, the representee may generally elect to regard the contract as rescinded. "*

[99] In the case of ***Matthews v Smith***[7] J Swift explained the law on fraudulent misrepresentation as follows:

> *"A false statement made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. If it was made in the honest belief that it was true, it would not be fraudulent. It is, however, important to consider in each case whether there were reasonable grounds for the maker of the statement to believe in its*

[7] *Matthews v Smith* [2008] EWHC 1128 (QB), pghs 137 – 139.

*truth, and also to examine the means of knowledge that were possessed by the maker of the statement at the material time. If that person shut his eyes to the fact, or deliberately abstained from enquiring into them, he would be guilty of fraud, in just the same way as if he had made the statement knowing it to be false.*

*The Claimant must also be able to establish that he acted in reliance on the defendant's misrepresentation(s). The misrepresentation(s) need not have been the sole cause of him acting as he did, provided that he was materially influenced by the misrepresentations(s).*

*The burden of proof is, of course, on the Claimant. Given the seriousness of the allegations he makes, he must establish his case by reference to the high civil standard."*

[100] If the statement is found to be untrue, a claim for fraudulent misrepresentation will fail if at the time the representor made the statement the person believed it to be true[8].

[101] The views expressed by the Singapore Court of Appeal in the case of ***Wee Chiaw Sek Annna*** [9] is also instructive:

*"It is, in our view, of the first importance to emphasise right at the outset the relatively high standard of proof which must be satisfied by the representee (here, the appellant) before a fraudulent misrepresentation can be established successfully against the representor (here, the deceased). As V K Rajah JA put it in the Singapore High Court decision of Vita Health Laboratories Pte Ltd v Pang Seng Meng [2004] SGHC 158, [2004] 4 SLR 162 at [30], the allegation of fraud is a serious one and that '[g]enerally speaking, the graver the allegation, the higher the standard of proof incumbent on the claimant'. If an allegation of fraud is successfully made, the representor would be justifiably found to have been guilty*

[8] ***Foster and another v Action Aviation Ltd*: [2013] 2439 (Comm), pgh 86**.
[9] [2013] SGCA 36 at paragraph 30.

*of dishonesty. Dishonesty is a grave allegation requiring a high standard of proof. In a similar vein, this court in Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict [2005] SGCA 27, [2006] 3 LRC 19 observed thus (at [14]):*

*'[W]e would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; but the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case.'"*

[102] Where a misrepresentation has been made by a director in his capacity as a director the Courts have found that the director is liable in his personal capacity for any loss suffered by the induced party. In ***Contex Drouzhba Ltd. v. Wiseman***[10] the Court held that a director, who entered into a contract with knowledge that the company did not have the capacity to fulfill its obligations under the contract, was personally liable for a written implied misrepresentation. Lord Justice Waller in delivering the unanimous judgment stated the Court's view as follows:

*"[12] There may be different factual situations but where the director is effectively the mind of the company, and where the document he signs makes a fraudulent representation to his knowledge, without for a moment any regard to Lord Tenterden's Act, then it seems to me the position is now clear, following the decision of the House of Lords in Standard Chartered Bank v. Pakistan National Shipping Corp [2003] AC 959. Even if the company would be liable for the deceit carried out by its director, the director has a personal liability for his own fraud."*

*…*

*"[24]In so far as Mr. Bartlett would seek to challenge the judge's finding that the implied representation was contained in the document. I am doubtful whether that was open to him on the appeal. But I would in any event reject the challenge. I should not*

[10] [2007] EWCA Civ 1201.

*be taken as saying that every contract signed by a director contains implied representations by the director. Each case will depend on its own facts. But that a director signing for a company may be making an implied representation about the ability of the company to pay is, in fact, support by the case on which Mr Bartlett placed so much emphasis, the Oaten Case. This was a framework agreement and it contained a promise of payment on certain terms on which the claimants would naturally rely before accepting further orders. By promising terms of payment there was, by implication, a representation that the company had the capacity to meet the payment terms, something Mr. Wiseman knew to be untrue."*

The Evidence

[103] The Claimants rely on the following evidence of misrepresentation:

i. The 3rd and 4th Defendants represented to the Claimants in negotiations and conversations and in the MOU that all negotiations were being conducted on behalf of the 1st Defendant, that the formal agreements would be entered into by the 1st Defendant, itself, which would operate the Premises ;

ii. The 3rd and 4th Defendants made the representations in the MOU knowingly and dishonestly in that they did not intend that the 1st Defendant would enter into any formal agreements or that 1st Defendant, itself, would operate the Premises or were reckless in that they did not care whether such statements made were true;

iii. If at the time that the statements were made, the 3rd and 4th Defendants did, in fact, hold such an intention, then their failure to communicate the change of intent to the Claimants, whom they knew were labouring under a misconception, is to be regarded as a repetition of the representation at a time that the 3rd and 4th Defendants knew it to be untrue;

iv. In December 2010, the 3rd and 4th Defendants procured the incorporation of the 2nd Defendant and deceitfully changed the counter-party in the draft copies of the Agreements from the 1st Defendant to this new shell company without informing the Claimants;

v. Even though the change of the counterparty occurred prior to signing the Agreements, the 3rd and 4th Defendants continued to represent that the Premises and the casino operated across the street from the 1st Defendant would be operated as a single business enterprise by the 1st Defendant ;

vi. In the recitals of the OMA the 3rd and 4th Defendants falsely represented that the 1st Defendant was in the business of owning and operating gaming premises and that the 2nd Defendant had the skills, background and experience to successfully operate and manage the Gaming Premises;

vii. By signing the Agreements the 3rd and 4th Defendants impliedly represented that the 2nd Defendant had the capacity to fulfill its obligations under the contract; and

viii. These representations were fraudulent in that the 3rd and 4th Defendants knew that the 2nd Defendant was a newly incorporated company with no background, experience or skills in operating gaming premises. Furthermore, they knew that the 2nd Defendant was undercapitalized and did not have the capacity to fulfill its contractual obligations nor the chance of gaining it because the directors would retain business for the casino being operated across the street.

[104] The Defendants rely on the following evidence that there was no misrepresentation:

i. Firstly, the 3rd Defendant is neither a party nor a signatory to the MOU. There is therefore nothing on the face of the MOU that points to any representation by him personally or otherwise.

ii. The evidence of the witnesses on both sides is consistent to the extent that the Claimants knew before the Agreements were executed that the 2nd Defendant was the contracting party and not the 1st Defendant; that neither they nor their attorney expressed any concern that the 2nd Defendant was the counterparty to the agreements; and they did not conduct any due diligence on it and proceeded to execute the OMA and Leases.

iii. Any such due diligence would have revealed that the 2nd Defendant was incorporated on 16th December 2010 and had no substantial asset.

iv. The OMA and Leases neither confirmed nor ratified the MOU nor were they made supplemental to it.

v. That in fact clause 14.4 of the Operations and Management Agreement clearly states that the parties may only rely on representations expressly made therein:

> *"This Agreement contains the whole agreement between the Parties and supersedes and replaces any prior written or oral agreements, representations or understanding between them. The parties confirm that they have not entered into this Agreement in the basis of any representation that is not expressly incorporated into this Agreement"*).

[105] It is noteworthy that BH testified under cross examination that the operation and management companies and Agreements were between two different parties which he considered were not the same but was the same people only with different names, essentially the 3rd Defendant, whom he knew and considered a reputable person, and to be at all times behind the 1st and 2nd Defendants; and as a consequence BH did not raise any question about any representations and indeed the insertion of the 2nd Defendant into Agreements in the place of the 1st Defendant.

Submissions

[106] The Claimants submit, opposed by the 1st, 3rd and 4th Defendants, that this Court ought to find the 3rd and 4th Defendants personally liable for the misrepresentations made to the Claimants which they claim induced them to enter into the Agreements and result in loss; and that they were the architects of the scheme hatched to ruin the casino project of their potential competitors, the Claimants.

Determination

[107] Having seen and heard the witnesses in the case I do not believe the 4th Defendant when he testified that during negotiations he informed BH of the intended incorporation of the 2nd Defendant and that the lease and the operation and management of the Premises would be taken by the 2nd Defendant when it was incorporated.

[108] I also do not believe the 4th Defendant when he testified that all subsequent negotiations were thus conducted on the understanding that the 2nd Defendant

would lease the Premises and manage and operate the gaming business on its own account.

[109] This court, based on clear evidence of the witnesses for the Claimants, has formed the view that the real actors in the negotiations were BH and the 3rd Defendant and that the 4th Defendant played a peripheral part in such negotiations and did not and was not so involved in the negotiations with BH to communicate any such intention to form and use the 2nd Defendant as a party to the intended agreement in the place of the 1st Defendant – I simply do not believe the 4th Defendant.

[110] I have found no basis to conclude that the 3rd and 4th Defendants made the representations in the MOU not intending (a) that the 1st Defendant would enter into any formal agreements or that (b) the 1st Defendant, itself, would not operate the Premises or that (c) the 3rd and 4th Defendants indeed were reckless in that they did not care whether such statements made were true. I therefore am not able to find that the 3rd or the 4th Defendants knowingly or even dishonestly intended not to use the 1st Defendant in the intended agreement contemplated in the MOU. Based on the evidence I have concluded that the 3rd and 4th Defendants may have intended to use the 1st Defendant in the intended agreement but that by the terms of the MOU they were not committed to being bound to using the 1st Defendant.

[111] After carefully considering all the facts and circumstances of the case, and particularly the evidence of all the witnesses in the case, I have concluded that a primary purpose for which the 2nd Defendant was incorporated, at or about the time that the 2nd Defendant was incorporated was formed, may have been as part of a genuine or deliberate business model or corporate strategy of the 3rd and 4th Defendants to protect themselves as they were proceeding with their decision to extend their gaming operations into the Premises – as the formation of the 2nd Defendant was entirely consistent with its other gaming arrangements and was openly inserted into the Agreements.

[112] I am therefore unable to find that in December 2010, the 3rd and 4th Defendants procured the incorporation of the 2nd Defendant and deceitfully changed the counter-party in the draft copies of the Agreements from the 1st Defendant to the 2nd Defendant without informing the Claimants.

[113] I also accept that by the statement in the recital of the OMA, by which the 2nd Defendant is representing that it is in the business of owning and operating licensed gaming premises and has the skills background and experience of doing so, but that the Claimants would have been well aware of the true factual situation which is that the 2nd Defendant was indeed established to be in the business of owning and operating the Premises, the Gaming Premises; and as part of the Princess Group of Companies and with its connections with the 3rd and 4th Defendants (as shareholders and directors) had the wherewithal, including access to the skills, background expertise in operating and managing the Gaming Premises. I have therefore concluded that this statement is not materially and factually false and certainly would not have mislead the Claimants or played any part in inducing either of them to enter into the Agreements.

[114] As the change of the counterparty occurred prior to signing the Agreements, I am unable to find that the 3rd and 4th Defendants did in fact continue to represent that the Premises and the casino operated across the street from the 1st Defendant would be operated as a single business enterprise by the 1st Defendant, as such a representation would have been at odds with and flying in the face of representations in the OMA.

[115] I have found, also, that at no time did the 4th Defendant explicitly and verbally represent to BH or anyone that the 2nd Defendant would operate the Premises for and on behalf of the 1st Defendant and/or with the financial backing of the 1st Defendant.

[116] I also accept that it was implicit, not necessarily that the 3rd and 4th Defendants represented by conduct to BH, that the 2nd Defendant was financially sound and able to perform its obligations - as the 1st and 4th Defendants would be standing financially behind the 2nd Defendant with their expertise and experience in gaming. I, however, consider that this representation was essentially, and in most if not all material respects, true and therefore was not a misrepresentation or would not have induced the Claimants to enter into the OMA.

[117] The evidence is clear that indeed there was no evidence that the 3rd Defendant in fact made any verbal representation to SH directly and was not a signatory to nor a

party to the Agreements – which only leaves the possibility of the 4th Defendant making any such representation.

[118] In relation to the Claimants' allegation that they entered into the Agreements based on certain representations made during the negotiations which included that the 1st Defendant would be operating the Gaming Premises which they clearly intended not to do, I have determined that the Claimants were in fact seduced by the presence of the 3rd (well known to BH and trusted by him) and the 4th Defendants, both having the means, wherewithal and experience to stand behind the 2nd Defendant and to underwrite its operations.

[119] This court has concluded that this is indeed the reason which caused the Claimants to overlook the placement of a different name on the Agreements which they therefore claimed, seemed not to be relevant at that time. That thought there may have been intended a commercial sleight of hand, which the Defendants may have engaged in by substituting into the Agreements the 2nd Defendant for the 1st Defendant, those representing the Claimants prior to entering the OMA and Leases were fully aware of the identity of the 2nd Defendant as a party to such agreements and were prepared to overlook it due to the presence of and their confidence in the 1st Defendant (especially) and also the 3rd Defendants, standing behind the proposed transactions.

[120] I have therefore carefully considered all of the evidence in the case, including all of the documents relied on by the Claimants, as well as the testimony of the witnesses, and the detailed written and oral submissions of Counsel for the Claimants and the 1st, 3rd and 4th Defendants, and I have come to the following conclusions in relation to the alleged representations made by the 3rd and/or 4th Defendants to the Claimants:

(a) In negotiations/conversations held between September, 2008 and the early part of December 2008 with the directors and officers of the Claimants, namely BH and SH that it would have been implied and not needed to be expressed, and therefore was not expressed that the 1st Defendant had the background and experience to successfully operate the Premises; and that the 1st Defendant, itself, would operate the Premises.

(b) In the MOU it was indeed represented that a further operation and management agreement would be entered into by the 1st Defendant.

(c) That orally, in meetings between January 2009 and November, 2010 all negotiations between BH and SH (on the one hand on behalf of the Claimants) and the 3rd and 4th Defendants (on the other hand on behalf of the 1st Defendant) may have been conducted on behalf of the 1st Defendant but more likely and significantly was being conducted on behalf of the 3rd Defendant and the Princess Group of Companies which he represented and which was beneficially owned by the him.

(d) That, during meetings held in December 2010 that all negotiations between BH and SH, on behalf of the Claimants, and the 3rd and 4th on behalf of the 1st, 3rd and 4th Defendants and any representations made, was to the effect that likely the 1st Defendant would operate the Premises but with the 3rd Defendant and the Princess Group of Companies which he represented and beneficially owned standing behind it.

(e) That, in meetings held between the latter part of December, 2010 and the 31st of December, 2010 between BH and SH on behalf of the Claimants and the 3rd and 4th Defendants that negotiations were being conducted possibly on behalf of the 1st but that the 2nd Defendant was inserted into the negotiations, backed by the 3rd Defendant and the Princess Group of Companies which was in the business of owning and operating gaming premises and the latter of which all had the skills, background and experience to successfully operate and manage the Premises.

(f) That the 3rd and 4th Defendants represented by conduct, and it may have in any event been assumed by the BH and SH, without conducting any due diligence (which the Claimants failed or neglected to conduct), that the 2nd Defendant was financially sound and had the ability to perform its obligations under the Agreements, because the 3rd Defendant standing behind the 2nd Defendant, together with the 1st Defendant and the other members of the Princess Group of Companies, would ensure such performence.

(g) The Claimants were indeed induced by and acted on these representations and/or assumptions, and as a consequence entered into the Agreements and may as a result have thereby expended funds in fitting out the Premises.

(h) Each of the above representations was generally true or were not materially false and/or were not made fraudulently as the true facts would have, or ought to have been known by the Claimants, at the time of entering into the Agreements.

(i) The 2nd Defendant was indeed a newly incorporated company and did not itself have any background or experience in the gaming business but had the backing of the 1st Defendant, the 3rd and 4th Defendants and the Princess Group of Companies of which it was a part; and as a result substantively did have the capacity to perform its obligations under the Agreements; and did have the chance of gaining it.

[121] This court has difficulty with the case for the Claimants in relation to fraudulent misrepresentation because such allegation is not based on facts which have recently come to the attention of the Claimants but must have been always known to the Claimants and its directors BH and SH; and despite such knowledge they were content to and did for some time perform their obligations under the Agreements despite such awareness.

[122] Generally this court was not persuaded by the theory being advanced by Counsel for the Claimants, because of lack of evidence in the case in support of such theory, that there was at the time that the 2nd Defendant was formed and/or inserted into the Agreements, indeed a fraudulent or any plan by the Defendants or any of them, motivated by their desire to stifle gaming competition, to form the 2nd Defendant as a company with little or no assets, to be used to operate, manage and let the Gaming Premises, and/or then to run it into the ground with the objective of killing any competition which the Claimants may have posed with its gaming Licence – that there was such a sophisticated anti-competitive scheme. This court has concluded that on balance based on all of the evidence that the notion of any such plan is somewhat far-fetched and in any event was not a viable business or commercial strategy. That is not to say that the Defendants were not

in some way motivated to prevent the establishment of a neighboring competing; but this court has concluded that such motivation did not fructify into an unlawful plan or strategy as claimed by the Claimants.

[123] In arriving at the present conclusion this court is not satisfied by the evidence facts and circumstances of the case upon which the Claimants have relied to prove this theory, and that it generally believed the witness called by the Defendants; and otherwise generally accepted the evidence of BH that in his dealing with the 3rd Defendant he trusted him and relied on his sense of fair play.

[124] Although the evidence in relation to this issue is somewhat inconsistent and not all one way or the other, generally, given the burden and standard of proof, in relation to this issue, I have preferred the evidence in support of the 1st, 3rd and 4th Defendants case and their version of events.

**Did the 2nd Defendant enter into the Agreements as an agent on behalf of the 2nd Defendant?**

The relevant law in relation to Agency

[125] It has correctly been stated that the relationship of agency arises in law:

> *"whenever one person called the 'agent', has authority to act on behalf of another called the 'principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen. Conversely, the relation of agency may arise despite a provision in the agreement that is shall not*[11]

[126] There does not appear to be any controversy between the parties, correctly in my view, as it appears to be trite law that an agency relationship can exist between two

[11] ***Halsbury's Laws of England*** **(Vol. 1 (2008))/1** (www.LexisNexis.com).

companies, each being a legal person, because of the principle of separate legal (including Corporate) personalities existing.

[127] The point of controversy in the present case seems to arise from the notion whether an agency situation may arise where it was contemplated that an existing company enter into an agreement with a related company (each for example having common subscribers, shareholders and/or directors) specifically established instead to enter the agreement, and which imposes onerous obligations; and the company established defaults in such obligations. The Defendants maintain that in such a case there is nothing wrong with this and is indeed one of the fundamental purposes of the whole system for which limited liability companies may be used and underlies much of the way in which commercial corporate dealings are organised[12].

[128] This court accepts that due care and weight ought to be given to any evidence that a company is deliberately used to enter a transaction to evade liability where there was an agreement not to use such a company as a party to the contract and such a company is used. That in such a case a court is required to consider whether a principal-agent relationship exists between related companies by looking to see if there is any consensual arrangements existing between such companies creating a relationship of principle and agent - such consensual arrangement would be established if, for example there is a written agreement between the companies amounting in law to such a principal and agent relationship (even if they do not recognize it themselves and even if they have professed to disclaim it).

[129] Where no written agreement exists the Court could also examine the relevant evidence and conduct of the companies, and depending on its findings, may determine whether such an agreement exists.[13]

[130] It is well established that there may be particular facts from which an agency could properly be identified and from which a sustainable case of agency, although rarely, could be inferred.

[131] Such a case may exist as that which has discussed in the 6 points raised in the case decided by Atkinson J in ***Smith, Stone and Knight Ltd v Lord Mayor, Aldermen***

[12] See The Government of Sierra Leone v Davenport and other, [2003] EWHC 2769 (Ch), pgh 59.
[13] Ibid paragraph 58

***and Citizens of the City of Birmingham*[14]. Here one of the issues was whether a subsidiary could be an agent of its parent company, and the Claimant ("the **Company**") had acquired a partnership concern and registered it as a company, Birmingham Waste Co. Ltd. In this case the Company had nevertheless continued to carry on the business as the subsidiary company, Birmingham Waste, with the parent company, the Company holding all the shares except five which its directors, holding such shares in their respective names in trust for the Company. The profits of Birmingham Waste were then treated as profits of the Company, with the persons who conducted the business having been appointed to be in effective and constant control. The defendant corporation then compulsorily acquired the Premises where Birmingham Waste carried on its business. The Company claimed compensation, but the defendant challenged whether the Company was the proper party to seek compensation.

[132] The six points which Atkinson J listed and which he considered relevant in determining whether a relationship of agency existed in law between the Company and Birmingham Waste, were stated to be[15]:

i. Were the profits treated as the profits of the parent company?

ii. Were the persons conducting the business appointed by the parent company?

iii. Was the parent company the head and the brain of the trading venture?

iv. Did the parent company govern the adventure, decide what should be done and what capital should be embarked on the venture?

v. Did the parent company make the profits by its skill and direction?

vi. Was the parent company in effectual and constant control?

[133] Atkinson J found all 6 elements in favor of the Company and opined[16]:

> *"… if ever one company can be said to be the agent or employee, or tool or simulacrum of another, I think the Waste company was in this case a legal entity, because that is all it was. There was nothing to prevent the claimants at any moment saying: 'We will carry on this business in our own name'. They had but to paint out the Waste company's*

[14] [1939] 4 All ER 116
[15] Ibid @ p. 121
[16] Ibid

*name on the premises, change their business paper and form, and the thing would have been done. I am satisfied that the business belonged to the claimants; they were, in my view, the real occupiers of the premises. If either physically or technically the Waste company was in occupation, it was for the purposes of the services it was rendering to the claimants, such occupation was necessary for that service, and I think that those facts would make that occupation in law the occupation of the claimants. An analogous position would be where servants occupy cottages or rooms for the purposes of their business, and it is well settled that if they have to occupy cottages or rooms for the purposes of their business, their occupation is the occupation of their principal. I have no doubt the business was the company's business and was being carried on under their direction…".*

[134] In the application of the principles (including the 6 points referred to) established in the case of ***Smith, Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham Smith Stone,*** the Claimants relied in the following commonwealth decisions arising therefrom: ***Spreag and another v Paeson Pty Ltd and others[17]; Canadian Imperial Bank of Commerce v. Hone[18];*** and ***Elbow River Marketing Limited Partnership v. Canada Clean Fuels Inc.[19]***.

The Evidence & Submissions

[135] The Claimants in the present case concedes that there is no written agreement between the 2nd Defendant and the 1st Defendant evidencing any agency relationship.

[136] However, the Claimants rely on the following facts from which it is asking this Court to infer that the 2nd Defendant and 1st Defendant did agree to an agency relationship:

i. By the terms of the MOU, it was the intention of 1st Claimant and 1st Defendant that the option to operate the casino be non-assignable and that formal agreements be entered into by the very same parties which executed the MOU: 1st Claimant and 1st Defendant;

[17] (1990) 94 ALD 679.
[18] [1987] BHS J. No. 136
[19] [2012] A.J. No. 460

ii. All negotiations were conducted by the 3rd and 4th Defendants for and on behalf of 1st Defendant from 2008 to 2010 as at this time the 2nd Defendant did not exist;

iii. The preliminary drafts of the Agreements were circulated for approval between the Claimants and 1st Defendant prior to 2nd Defendant even being incorporated;

iv. The 1st Defendant had Mutlu design the Premises to its preference;

v. The 2nd Defendant was not incorporated until December 16, 2010 after the terms of the Agreements were settled, and just two weeks before the Agreements were signed;

vi. Despite the change of name of the counter party in the Agreements, the characteristics described in the Agreements identify the 1st Defendant and not the 2nd Defendant as the party to the Agreements;

vii. The training for employees was provided by the 1st Defendant;

viii. All decisions, including but not limited to the payment of taxes and request for reduction of rent, were made by the employees and managers of the 1st Defendant and correspondence, license applications etc. were prepared by the employees of 1st Defendant;

ix. The 1st Defendant and its attorneys-at-law described the 2nd Defendant as an "extension" of the 1st Defendant;

x. The finances of the 1st Defendant and the 2nd Defendant were intermingled as the 1st Defendant's financial obligations directly impacted the ability of the 2nd Defendant to meet its obligations;

xi. The 2nd Defendant refused to conduct live games at the Gaming Premises even though this would increase its revenue which shows that the Premises and the casino of the 1st Defendant across the street were always operated as one business. Accordingly, the 2nd Defendant had no independent commercial interest in developing the capacity to perform its obligations under the Agreements;

xii. The 1st Defendant made several payments to the Claimants on behalf of the 2nd Defendant;

xiii. After the 2nd Defendant ceased operations, the 1st Defendant continued to make payments on behalf of the 2nd Defendant;

xiv. After the 2nd Defendant ceased operations, all the employees were relocated to the 1st Defendant;

xv. After 2nd Defendant ceased operations, all the gaming machines were relocated to the 1st Defendant; and

xvi. Both the 2nd Defendant and Princess the 1st Defendant have the same directors and shareholders.

[137] The Claimants submit that it would be in the interest of justice to find the 1st Defendant liable, because:

(a) The Claimants had at all times intended to operate a gaming premises with its newly granted gaming licence.

(b) The Claimants entered into negotiations and discussions with the 1st, 3rd and 4th Defendants.

(c) It was represented at all times that the Agreements would be entered into and the Premises would be operated by the 1st Defendant, a well-established and experienced casino operator.

(d) The Agreements were executed by the 2nd Defendant, which, undisclosed to the Claimants, was incorporated by the 3rd Defendants 2 weeks prior to execution of Agreement, yet they represented that the 2nd Defendant had the necessary skills to manage and operate the Gaming Premises.

(e) After executing the Agreements, the Defendants conducted themselves as if the Agreements were between the Claimants and the 1st Defendant.

(f) However, the Defendants expended little effort in the operation of Premises and unilaterally, without notice or cause ceased operations after 3 years.

[138] The Claimants consider that it is noteworthy that the directors of the sister companies, 1st Defendant and 2nd Defendants, are the 3rd and 4th Defendants, and yet they have not seen it fit to make representations on behalf of or defend the 2nd Defendant and have allowed a default judgment to be entered against it. They have always exercised complete dominance and control over the 2nd Defendant to such an extent that they are prepared to make it a sacrificial lamb in these proceedings.

The Claimants consider that this conduct is proof positive that they operated 2nd Defendant as an agent of the 1st Defendant and having achieved their objective, they allowed it to be sacrificed with the hope that they themselves and Princess Entertainment escape liability.

[139] The Claimants submit that on the evidence provided this was not a calculated move to contain liability; it was a calculated move to ensure that the 1st Defendant remained successful and the Claimant's business venture fail.

[140] The Claimants therefore submit that there is sufficient evidence for the Court to find that there was dishonesty and inappropriate use of a corporate structure on the part of the 1st, 3rd and 4th Defendants.

[141] The 1st Defendant is relying on the following facts from which it is asking this court to infer that the 2nd Defendant and 1st Defendant did not have any agreement with the Claimants for an agency relationship:

(a) It is wholly contested that the 2nd Defendant entered into and conducted the transactions as the agent of 1st Defendant.

(b) The evidence is clear that the Princess Group of Companies had been structured by the Defendants such that separate and distinct companies owns and manages each of the three casinos and gaming business in Belize: suggesting that the establishment of the 2nd Defendant was no mere façade, nominee of the 1st Defendant or sham arrangement, but part of the structured corporate arrangement designed to have a separate and independent identity. That such an arrangement BH conceded during cross-examination he was fully aware of prior to the execution of the Agreement in question; and that he was aware that a separate and distinct corporation would take on the new gaming project.

(c) On the evidence it was maintained by the witness for the Defendants that the 2nd Defendant made all decisions in respect of staffing the 2nd Defendant's casino and hiring and training of its employees with input from the 1st Defendant.

(d) That the 4th Defendant explained that any loans from the 1st Defendant to the 2nd Defendant was as a sister company due to the 2nd Defendant to meet

its expenses, not as a principal and or agent, but because of their sister relationship; and that that relationship was on a full commercial basis, at arm's length.

(e) The Audited Financial Statements for the 2nd Defendant and 1st Defendant for years 2013 and 2014 were put into evidence by the 4th Defendants which confirmed that the financial records of the two companies were separate; that their financial affairs were kept separate and that the loans to the 2nd Defendant were documented and treated as such by both companies.

(f) The 1st and 2nd Defendants held separate and distinct bank accounts and gaming permits. That it is therefore not true that their financial affairs were intermingled or that they operated their businesses as a single economic unit.

(g) The other evidence put forth by the Claimants in support of their claim of agency are consistent with the relationship of two sister companies having a common parent company; and as such provides an insufficient basis to find agency.

(h) None of the Agreements describe or allude to an agency between the 1st Defendant and 2nd Defendant; and even though a Court may find that agency exists where the contract is silent on the matter, in these circumstances (where the directors of the Corporate Claimants are all experienced and savvy businessmen conducting business with the assistance and under the guidance of their attorney-at-law) that no such principal and agency should be inferred.

(i) In the circumstances it is expected that such businessmen, at the very least, ought to have conducted due diligence on the 2nd Defendant and/or included a term in the Agreements which clearly identifies and clarifies the purported agency between the 1st Defendant and 2nd Defendant. That as no such agency is disclosed in the agreements; none should be found to have been contemplated.

Determination

[142] This court takes especial notice that:

(a) BH, under cross-examination accepts that the companies in the OMA were different parties to the MOU and that BH testified that though the companies were not the same "*it was the same people only with different names*"; he considered that he was dealing with the same persons, namely the 1st Defendant and 3rd Defendant both in relation to the OMA and the Leases. That he was dealing with the same people and then the names suddenly changed, but he considered that all the time he was really dealing with the 3rd Defendant who signed behind the company as a director. That even in the MOU he was dealing with the 3rd Defendant.

(b) BH clearly from his evidence later considered that he had been somewhat duped by the 3rd Defendant by the sudden insertion and substitution of the 2nd Defendant into the Agreements and he clearly considers that he has been shafted by the 3rd Defendant because, even though he had read the OMA and Leases and noticed it was a different company, he always considered that he was dealing with the 1st and 3rd Defendants both of which/whom he had considered would stand behind the 2nd Defendant as a reputable entity/person. It is clear that this was an overall and genuine impression which BH held based on trust and to a certain extent based on past dealings and their relationship.

[143] As noted this court has significantly found, contrary to the Claimant's case, that the 3rd and 4th Defendants, and not the 1st Defendant, was the head and brain of the whole proposed venture relating to the Premises. Thus the person conducting the business of the 1st and 2nd Defendants were the 3rd and 4th Defendants and not the 1st Defendant conduction the business of the 2nd Defendant.

[144] This court accepts that it was not explicitly stated by any of the Defendants that BH or any of the Claimants that the 2nd Defendant was an agent of the 1st Defendant.

[145] In all the circumstances of the case this court has therefore concluded that there is nothing to suggest that the Claimants or their directors would have at any relevant time come to the conclusion that the 2nd Defendant was the agent of the 1st Defendant.

[146] It seems to this court somewhat unlikely, given the information available to them at the time, that either BH or SH would have been thinking along such sophisticated legal lines, of principal and agent, even as experienced business persons; especially as the real mover and shaker of the whole transaction, and thereby the real Principal (in the language of agency) would have been considered by them to have been the 3rd Defendant.

[147] This court considers that if BH or SH had been thinking along the terms of any agency therefore it seem to this court more probable than not that they would have considered the 2nd Defendant the agent of the 3rd Defendant (who would have been considered the Principal) and not the 2nd Defendant the agent of the 1st Defendant.

[148] This court accepts that there may have been, however, some element of slight of hands on the part of the Defendants by inserting the word 'Golden' before 'Princess Entertainment Limited' which may have been intended to mislead and may have successfully mislead the Claimants - this court is prepared to consider this as possible and even to accept this much on the evidence.

[149] I have however carefully considered the facts and circumstances of the present case, particularly in relation to the suggestion by the Defendants that the Claimants their Attorney-at-Law and their directors, that the latter were fully aware that the 2nd Defendant would be the parties to the OMA and the Leases, and I have concluded that the evidence suggests that at the time of signing the Agreements all were fully aware of the situation and chose to ignore it.

[150] It is therefore clear to this court, and I so find, that any and all negotiations leading up to the signing of the Agreements took place on the one hand between (primarily) the 3rd Defendant and (secondarily) the 4th defendant for the 1st Defendant, and on the other hand those representing the Claimants (primarily BH), and that the 3rd Defendant was viewed and considered, and was indeed substantively, the controlling person and mind behind the whole negotiation and whose presence in the transaction provided comfort to the Claimants to enter into the Agreements.

[151] This court is also of the view that the 3rd Defendant was indeed representing at all times that the 1st Defendant had his full backing and weight and the substantial

Princess Group of Companies, with their expertise and knowledge, behind the transaction being negotiated.

[152] Unusually this was a situation where it was the personality and the backing of the 3rd Defendant, and not the identity of the 1st Defendant, which was critical to the Claimants and their representatives.

[153] This court has therefore concluded that the 2nd Defendant did not enter into the Agreements as the agent of the 1st Defendant but that in the language and law of agency it is more probable that the principal was the 3rd Defendant and not the 1st Defendant.

[154] Generally overall this court has concluded that the Claimants have not satisfied it that there is any credibility in the case which was advanced by the Claimants, although it has a superficial ring of cogency to it and of course it was very well presented and argued.

[155] This court considers that the case for the Claimants is indeed an after the fact rationally constructed and plausible theory, ably put together and advanced. But this court could find no evidence of a fraudulent plan by the 1st, 3rd and 4th Defendants, motivated by their desire to stifle gaming competition, by agreeing to operate, manage and let the Gaming Premises under a shell company (the 2nd Defendant), with the objective of running it into the ground to kill any competition - that it was a sophisticated anti-competitive scheme as claimed by the Claimants.

[156] This court has carefully considered all the evidence, the surrounding facts and circumstances of the case and considered the credibility of the witnesses in so far as such facts, circumstances and evidence may have supported such a theory, and after considering the burden of proof on the Claimants and the standard, largely requiring the proof of an original motive to substantiate a fraudulent plan, being quite high on the Claimants, has found that the Claimants have fallen short of meeting that burden.

[157] Having made this and the earlier determinations this court has found that not only there were no actionable or fraudulent misrepresentation made by the Defendants or any of them, as claimed by the Claimants, or indeed that there was a relationship of principal and agent as between the 1st Defendant and the 2nd Defendant; but has

found that the claims brought against the 1st, 2nd and 3rd Defendants should be dismissed with costs.

[158] However in the event that this court is found to be wrong for whatever reason then it will go on to consider the final issue before it.

**If it is found that the 1st Defendant was the true principal to the Agreements, did the 1st Defendant breach any of its contractual obligations with the Claimants?**

[159] Clause 1.1 of the OMA and the Leases provided that the 2nd Defendant would operate, manage and occupy the Gaming Premises for a term of fifteen years.

[160] The Agreements did not contain any termination clause in favour of the 2nd Defendant.

[161] The 2nd Defendant unilaterally ceased operation, management and occupation of the Agreements within 3 years. The reason provided was that the operation of the casino business was not profitable.

[162] The Claimants submit that impecuniosity is no legal basis to terminate the Agreements in light of the terms in Clause 10 of the Agreement. By ceasing to occupy and operate the Gaming Premises and by ceasing to make payments as per the terms of the Agreements, Princess Entertainment as the principal party has breached its obligations under the Agreements.

[163] The 1st, 3rd and 4th Defendants in effect have conceded that the 2nd Defendant has no defence to the claim against it; but submit that the 2nd Defendant's financial inability to continue paying the rent under the Agreements has nothing to do with them.

[164] If this court had found, which it has not, that the 1st Defendant is the true Principal of the 2nd Defendant then of course it follows that the 1st Defendant would be liable to the Claimants. The same could be said if this court is later found to be wrong about its finding that the 2nd Defendant is not the agent of the 1st Defedant.

**What, if any, is the appropriate quantum of damages?**

[165] The measure of damages for breach of contract has been described in the following terms:

> *"[i]f one party makes default in performing his side of the contract, then the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the claimant is entitled to compensation for the loss of his bargain. This is what may be best called the normal measure of damages in contract[20]….The object to keep constantly in mind in contract cases is that the claimant is to be put in the position he would have been in had the contract been performed[21]".*

[166] The Claimants submit that they are entitled to the entire sum claimed, which is the operation, management and rental fees from the date of the purported breach of contract (February 2015) to the end of the term of the contract March 2025.

[167] The 1st, 3rd and 4th Defendants submit that in determining the quantum of damages, it is doubtful that it will take the Claimants 10 years to find a replacement for the 2nd Defendant, if the Claimants are in fact taking reasonable steps to mitigate its loss.

[168] Again if this court had found, which it has not, that the 1st Defendant is the true Principal of the 2nd Defendant then of course it follows that the 1st Defendant would be liable to the Claimants, which, in the absence of any evidence about what would be a reasonable time to find a replacement tenant, this court would hold that the 1st Defendant is liable for the full amount of the contract period.

**Disposition**

[169] For the reasons given above, this court dismisses the Claim against the 1st, 3rd and 4th Defendants with Costs (fit for two Counsel) agreed in the sum of BZ$75,000.00., as agreed by Counsel for the Claimants and Counsel for the 1st, 3rd and 4th Defendants.

**Hon. Mr. Justice Courtney A. Abel**

[20] Ibid [2-002]

[21] **McGregor on Damages[21]** Ibid [2-007]