IN THE COURT OF APPEAL OF BELIZE AD 2018

CIVIL APPEAL NO 5 OF 2017

BELIZE PICKWICK CLUB HOTEL LIMITED
BELIZE PICKWICK CLUB LIMITED Appellants

v

PRINCESS ENTERTAINMENT LIMITED
GOLDEN PRINCESS ENTERTAINMENT LIMITED
SUDI OZKAN
MEHMET HAMDI KARAGOZOGLU Respondents

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

E Courtenay SC along with I Swift for the appellants.
R Williams SC along with L Staine for the respondents.

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26 October 2017 and 16 March 2018.

SIR MANUEL SOSA P

[1] I have read, in draft, the judgment of my learned Sister Hafiz Bertram JA and concur in the reasons for judgment given, and the orders proposed, in it.

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SIR MANUEL SOSA P

HAFIZ BERTRAM JA

Introduction

[2] This is an appeal against the decision of Abel J contained in a judgment dated 17 January 2017. The learned trial judge dismissed the claim for breach of contract in relation to the operation, management and renting of a casino, against the first, third and fourth respondents. This Court heard the appeal on 26 October 2017 and reserved its decision.

[3] A default judgment was entered against the second respondent as shown by an order dated 2 December 2015 for having failed to acknowledge service of the claim. It was ordered that the appellants recover damages for breach of an operation and management agreement entered into on 31 December 2010, between the appellants and Golden Princess such damages to be assessed;

[4] Belize Pickwick Club Hotel Limited (hereinafter referred to as the "Pickwick Hotel") is a domestic company registered in Belize under the Companies Act, Chapter 250, of the laws of Belize. It carries on business as a hotel among other matters at parcels 959 and 1001, Block 45 of the King's Park, Newtown Barracks, Belize City. Belize Pickwick Club Limited (hereinafter referred to as the "Pickwick Club") is also a domestic company registered in Belize under the Companies Act, Chapter 250. It is also located at the same King's Park address.

[5] Princess Entertainment Limited (hereinafter referred to as "Princess Entertainment") is a domestic company registered in Belize under the Companies Act, Chapter 250, of the laws of Belize. It carries on business as a casino, among other matters at King's Park. Golden Princess Entertainment Limited (hereinafter referred to as the "Golden Princess") is a domestic company registered in Belize under the Companies Act, Chapter 250 and it conducts business as a casino also. The third respondent, Suzi Ozkan (hereinafter referred to as "Ozkan") and the fourth respondent, Mehmet Hamdi Karagozoglu (hereinafter referred to as "Karagozoglu") are two of the directors of both Princess Entertainment and Golden Princess.

[6] The main issues argued in the court below were fraudulent misrepresentations and agency. The appellants claimed that Ozkan and Karagozoglu fraudulently induced them to enter into leases and agreements to operate and manage their gaming premises for 15 years. The agency issue was in relation to Golden Princess being the agent of Princess Entertainment. The appellants claimed that the agreements were breached when the respondents ceased to occupy the gaming premises and as such they sought damages for breach of the agreements.

Chronology of events

[7] On 5 February 2008, Pickwick Hotel obtained a gaming permit for the period 5 February 2008 to 4 February 2009. At this time, its gaming premises located at King's Park, Belize City was under construction. It is located almost opposite to Princess Entertainment.

[8] In or about October 2008, Karagozoglu, in his capacity of director of Princess Entertainment expressed an interest to Mr. Bhagwan 'Bob' Hotchandani ("Bob"), a director of Pickwick Hotel and Pickwick Club to lease the gaming premises of the appellants which was under construction and to manage and operate its casino.

[9] On 18 December 2008, a memorandum of understanding and option agreement ("the MOU") was entered into between Pickwick Hotel and Princess Entertainment granting Princess Entertainment *"the exclusive right and option to take and rent all gaming premises and own and* control *its gaming licence in relation to the project."* The project being a hotel of not less than fifty rooms and provide all forms of entertainment including gaming in all forms. The MOU was signed by Karagozoglu on behalf of Princess Entertainment.

[10] On 10 December 2010, the appellants attorney-at-law, Samira Musa-Pott, forwarded by electronic mail, a draft copy of an operations and management agreement between Princess Entertainment and Pickwick Hotel to the attorneys-at-law, Barrow and Williams LLP for Princess Entertainment.

[11] On 16 December 2010, Golden Princess was incorporated by its owner, White Horse Falls Corporation, the overseas based company.

[12] On 16 December 2010, Barrow and Williams forwarded by email a copy of a lease agreement and an amended copy of the Operations and management agreement to Sunjay Hotchandani, ("Sunjay") a director of the appellants. The counterparty to the agreements had been changed from Princess Entertainment to Golden Princess.

[13] In January 2011, the Operations and Management Agreements ("OMA") were executed by the parties.

[14] On 4 February 2011, Pickwick Hotel's gaming permit expired and was not renewed**.** It experienced difficulty obtaining a gaming license as it had not yet completed construction of the number of rooms required to obtain a license.

[15] On 27 April 2011, Barrow and Williams emailed Mrs. Pott advising her that they had amended the agreements to include the lease of another parcel of land and the agreements would have to be re-executed.

[16] On 28 November 2011, copies of the re-executed agreements were sent to Mrs. Pott.

[17] On 20 January 2012, Barrow and Williams by an email, recommended to Mrs. Pott that Golden Princess would apply for a gaming license in its own name using its hotel rooms across the street.

[18] In January 2012, Golden Princess took possession of the gaming premises and started paying rent of $20,000.00 monthly. They offered only machine games despite having a licence to conduct live games. No payment was made under the operations or management agreement as Pickwick Hotel gaming permit expired and was not renewed.

[19] On 9 February 2012, Land Registry issued Certificates of Lease from Pickwick Club to Golden Princess over parcels 959, and 1001, Block 45 of the King's Park Registration Section.

[20] In July of 2012, Bob informed Karagozoglu that Pickwick Hotel was having difficulties renewing its gaming permit.

[21] On 4 June 2013, a letter was sent by Barrow and Williams to Mrs Pott stating that the payment by Golden Princess to obtain the gaming licence would be used to offset rent due to the appellants.

[22] On 9 June 2013, a gaming permit was issued to Golden Princess covering period 10 June 2013 to 9 June 2014.

[23] In July 2013, Golden Princess continued operations of the casino and gaming business on the gaming premises and paid to the appellant the operation fee of $80,000.00 per month in addition to the rent of $20,000.00 per month.

[24] In October 2013, Bob informed Karagozoglu that his bank required a supplementary agreement to the OMA to clarify the relationship between Golden Princess and the appellants since Golden Princess had its own gaming permit and was not operating under Pickwick's expired gaming permit.

[25] On 17 October 2013, a letter was sent from Karagozoglu to Bob requesting a reduction in the rental and operation fee due to the slow business activity being experienced.

[26] On 8 November 2013, an agreement was entered into by Golden Princess and the appellants relieving Golden Princess of its obligation to pay arrears in rental fees and relieving Pickwick Hotel of its obligation to obtain a gaming license.

[27] On 18 November 2013, the appellants and Golden Princess entered into an agreement ("the Amending Agreement") to clarify and confirm their relationship of

landlord and tenant and to amend the leases, their accompanying memorandum and the OMA to reflect that Golden Princess was operating the premises and business under its own gaming permit and that the appellants had waived rent for the period April 2013 to June 2013.

[28] On 9 June 2014, Golden Princess first gaming permit expired.

[29] On 24 October 2014, the second gaming permit was issued to Golden Princess for the period 10 June 2014 to 9 June 2015.

[30] In January 2015, Karagozuglu informed Bob that Golden Princess intended to vacate the premises and a month was given to them to hand over the gaming premises to the appellants in good order.

[31] On 13 January 2015, Golden Princess made minor repairs to the premises and handed over the premises in good condition. Golden Princess removed all gaming machines and equipment from the gaming premises and relocated the staff to the casino operated by Princess Entertainment**.**

[32] On 13 January 2015, an email was sent by Martha Richards, an officer of Princess Entertainment, to the appellants and Mrs. Pott, to which a copy of a letter was attached which informed the CEO of the Gaming Control Board of the temporary closure of Golden Princess. A claim was issued before the court for breach of the agreements.

The Claim before the trial court

[33] The appellants claimed that Ozkan and Karagozoglu misrepresented to them that Golden Princess had the capacity, expertise and backing of Princess Entertainment to assume the management of a casino which had initially been anticipated to be managed by Princess Entertainment itself.

[34] They claimed that having been induced by the representations, they entered into an operation and management agreement and two lease agreements (collectively “the

Agreements") with Golden Princess for the rental and operation of gaming premises belonging to the appellants which was located at parcels 959 and 1001, Block 45, King's Park Registration Section, Belize City (the "gaming premises").

[35] The appellants claimed that Golden Princess, in breach of the agreements, has ceased to operate the gaming premises. As a result of the actions by the respondents, the appellants claimed that they suffered loss and damage.

[36] In the amended statement of claim, the appellants claimed that in reliance of the MOU and at the request of Ozkan and Karagozoglu on behalf of Princess Entertainment, they allowed the architect of Princess Entertainment to design the interior of the gaming premises. The appellants built the said premises to meet the design and this caused the appellants to substantially exceed their construction budget in order to accommodate the needs of Princess Entertainment.

[37] They claimed that on 31 December 2010, Golden Princess by virtue of the agreements agreed to take the exclusive right to operate and manage the gaming premises and retain all the income and profits derived therefrom in consideration of the payment to the respondents of a monthly operation fee as shown in the operation and management agreement. The appellants also agreed to grant and Golden Princess agreed to take a lease of property at King's Park for a monthly rent of USD10,000.00. The duration of the agreement was for 15 years.

[38] The appellants claimed that on 18 November 2013, at the request of Ozkan and Karagozoglu and after negotiations, an amendment was made to the agreements, whereby it was agreed that Golden Princess would procure its own gaming licence and the relationship between the parties would be one of landlord and tenant **– See Annex 5.**

[39] They claimed that in order to induce them to enter into the agreements with Golden Princess, Ozkan and Karagozoglu expressly made the following representations to them:

"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 Princess Entertainment itself;

c) orally, in meetings between January 2009 and November 2010, that all negotiations between Ozkan and Karagozoglu and the representees were being conducted on behalf of Princess Entertainment;

d) orally, in meetings held with the representees in December 2010 that Golden Princess would operate the Gaming Premises for and on behalf of Princess Entertainment and with the financial backing of Princess Entertainment;

e) orally, in meetings held with the representees between the latter part of December, 2010 and the 31 of December, 2010 and further evidenced in writing in the Agreements that Golden Princess was in the business of owning and operating gaming premises and that Golden Princess had the skills, background and experience to successfully operate and manage the Gaming Premises of the Claimants."

[40] The appellants claimed that Ozkan and Karagozoglu further represented by conduct that Golden Princess was financially sound and had the ability to perform its

obligations under the agreements because Princess Entertainment would ensure it is performed.

[41] They further claimed that they were induced and acted upon each of the representations and as such entered into the agreements and expended additional funds in fitting the gaming premises in accordance with the specifications of Princess Entertainment.

[42] They claimed that each of the representations was false in that at the time of entering into the agreements Golden Princess was newly incorporated, had no background or experience in the gaming business and did not have the capacity to perform its obligations. That Ozkan and Karagozoglu made the representations fraudulently in that they knew they were false or were reckless, not caring whether they were true or false.

[43] The appellants further claimed that Golden Princess entered into the agreements as the agent of Princess Entertainment which is the true principal of the transactions. The particulars being:

a) Princess Entertainment was the brain of the business venture and conducted all negotiations with the appellants;

b) The persons conducting the business of Golden Princess, Ozkan and Karagozoglu were appointed by Princess Entertainment;

c) The profits were made by the skill and direction of Princess Entertainment and it supplied and trained the staff of Golden Princess;

d) Princess Entertainment was in constant and effectual control of the business and made all decisions inclusive of authorizing payments under the agreements;

e) The finances of Golden Princess and Princess Entertainment were intermingled and financial obligations of Golden Princess were met from the banking accounts of Princess Entertainment;

[44] The appellants claimed that Golden Princess has ceased to operate or occupy the gaming premises and has discontinued payments under the agreements since January 2015. As a result, they suffered loss and damage by reason of Golden Princess and Princess Entertainment's breach of the agreements and the misrepresentations made by Ozkan and Karagozoglu.

[45] The relief sought by the appellants in the court below were:

1. Against Princess Entertainment:

   a) A declaration that Golden Princess entered into agreements as agent of Princess Entertainment.

   b) Damages for breach of the agreements.

Further or alternatively:

2. Against Golden Princess damages for breach of the agreements.

Further or alternatively:

3. Against Ozkan and Karagozoglu damages for misrepresentations.

The defence

[46] The respondents denied that Golden Princess was incorporated for the sole purpose of conducting the business of Princess Entertainment and say that it was incorporated primarily to operate the gaming premises on its own account as specified in its Memorandum of Association.

[47] They stated that Ozkan and Karagozoglu entered into the agreements in their capacity as directors and officers of White Horse Falls Corporation of the British Virgin Islands, the holding company of Princess Entertainment and Golden Princess, as distinct from their own personal capacity.

[48] The respondents also denied that they requested the appellants to allow an architect to design the gaming premises which was designed and built by the appellants**.**

[49] The respondents stated that Golden Princess was incorporated by White Horse Falls Corporation of the British Virgin Islands and not by Ozkan and Karagozoglu, for the purpose of owning and operating a new and additional gaming premises in Belize. They further stated that Golden Princess was incorporated on or about the 16 December 2010, and the formal contracts were executed on the 31 December 2011, which is one year before the formal contracts were executed and not immediately as alleged by the appellants. They said that the operation and management agreement and the two lease agreements were all executed on 31 December 2011 and not 2010 as alleged. (The documents were actually executed on 24 January 2011. A secretary had erroneously changed the date to 31 December 2011 as shown by submissions made by senior counsel, Mr. Courtenay).

[50] The respondents stated that the agreements were entered into on the basis that Pickwick Hotel was the holder of a gaming permit which it was to renew and keep valid throughout the duration of the agreement and to contract out the operations to Golden Princess in accordance with the Operations and Management agreement. There was a failure of the appellants to renew their gaming licences and Golden Princess eventually obtained its own gaming permit for the premises and was not obliged to pay any operations fees to the appellants. It paid only rent for leasing the premises. Clause 7 of the amended agreement reflected and confirmed the landlord and tenant relationship.

[51] The respondents denied they made representations whether orally, in writing or by conduct as alleged by the appellants to induce them to enter into the agreements with Golden Princess. However, if such was made, they were done by Golden Princess and not by Ozkan and Karagozoglu. They denied that any representations were made by Ozkan and Karagozoglu at all.

[52] The respondents said that the appellants knew that Golden Princess was a newly incorporated company and knowingly entered into all agreements with them. Further,

Golden Princess does not do business for Princess Entertainment and neither are they principal and agent in any way or at any time at all. Golden Princess and Princess Entertainment were separate and distinct corporate entities.

[53] They denied that the appellants were entitled to any of the reliefs claimed. But, alternatively if the appellants suffered loss or damage, that was caused by their failure to mitigate their loss by failing or refusing to obtain a gaming license or seeking alternative business arrangements within a reasonable time.

The reply

[54] The appellants said that Ozkan and Karagozoglu never represented that they acted on behalf of White Horse Falls Corporation of the British Virgin Islands. Further, Golden Princess did not exist at the time of the parties commenced negotiations and only became aware in 2010 when the agreements were signed.

[55] The appellants denied the agreements were executed on 31 December 2011 and maintained that Golden Princess was incorporated two weeks prior to execution of the agreements.

[56] The appellants said that pursuant to the amendment made to the agreements on 18 November 2013, they were no longer under an obligation to obtain a gaming license. That they were only informed that Golden Princess had vacated the gaming premises after the staff and equipment had been relocated. Further, they have taken steps to mitigate losses within a reasonable time and secured the interest of a potential tenant with whom they have been negotiating since early 2015.

The witnesses for the parties

[57] The witnesses for the appellants (claimants) were Samira Musa Pott (Mrs. Pott), Sunjay Hotchandani ("Sunjay") and Bob Hotchandani ("Bob"). The respondents

witnesses were Sudi Ozkan, the third respondent and Mehmet Hamdi Karagozoglu, the fourth respondent.

The order of the trial judge

[58] The trial judge dismissed the claim against Princess Entertainment, Ozkan and Karagozoglu with costs agreed in the sum of BZ$75,000.00.

The Appeal

[59] The appellants appealed the order of the trial judge made on 17 January 2017 (perfected on 8 February 2017), dismissing the appellants claim against Princess Entertainment, Ozkan and Karagozoglu, on the following grounds:

(1) The trial judge erred in law in finding that Golden Princess did not enter into the operation and management agreement and a lease agreement (collectively "the agreements") as agent of Princess Entertainment.

(2) The trial judge erred in finding that Princess Entertainment did not breach any of its contractual obligations with the appellants.

(3) The trial judge erred in law in finding that Ozkan and Karagozoglu did not make fraudulent representations to the appellants such that they should be held personally liable for any such misrepresentations.

(4) The decision of the trial judge was against the weight of the evidence.

(5) The trial judge erred in law in failing to find that Ozkan was the principal of Golden Princess in respect of the execution, implementation and breach of the agreements entered into by Golden Princess.

The relief sought by the appellants on appeal

[60] The appellants sought the following orders and declarations in an amended notice of appeal dated 25 October 2017:

(1) An order setting aside the Order of the Supreme Court dated 8 February 2017 in claim no. 298 of 2015;

(2) A declaration that Golden Princess entered into the Agreements as agent of Princess Entertainment;

(3) An order awarding damages against Princess Entertainment for breach of the Agreements;

(4) Alternatively, a declaration that Golden Princess entered into the agreements as agent of Ozkan; (amendment)

(5) An order awarding damages against Ozkan for breach of the agreements; (amendment)

(6) Further or alternatively, an order awarding damages against Ozkan and Karagozoglu for misrepresentation;

(7) Respondents pay the appellant's costs of the appeal and in the court below.

The trial judge erred in law in finding that Ozkan and Karagozoglu did not make fraudulent representations to the appellants

[61] In the court below, the appellants made an alternative claim for damages for fraudulent misrepresentations by Ozkan and Karagozoglu. The trial judge stated that given the burden and standard of proof in relation to this issue, he preferred the evidence of Princess Entertainment, Ozkan and Karagozoglu. He had a difficulty with the case for

the appellants in relation to fraudulent misrepresentation because the allegations were not based on facts which recently came to their attention. He said the facts relied upon by the appellants were always known to the Directors, Bob and Sunjay, but despite such knowledge they were content to and did for some time perform their obligations under the Agreements.

[62] Generally, the trial judge was not persuaded by the theory being advanced by counsel for the appellants because of the lack of evidence that Golden Princess was incorporated and inserted into the agreements as a fraudulent plan motivated by their desire to stifle gaming competition and to use the company with little or no assets, to operate, manage and let the gaming premises and "*run it into the ground with the objective of killing any competition which the Claimants (appellants) may have posed with its gaming Licence – that there was such a sophisticated anti-competitive scheme."*

[63] Abel J concluded that on a 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."* However, he made it clear that it "*is not to say that the Defendants (respondents) were not in some way motivated to prevent the establishment of a neighbor competing; but this court has concluded that such motivation did not fructify into an unlawful plan or strategy as claimed by the Claimants (appellants)."* The judge said that in arriving at this conclusion, he was not satisfied by the evidence, facts and circumstances of the case upon which the appellants have relied to prove their theory. Generally, the judge believed the witness called by the respondents and accepted the evidence of Bob whose evidence is that he trusted Ozkan and relied on his sense of fair play. Bob had testified that he had knowledge of the different parties in the agreements but he did not question it because he considered Ozkan to be a reputable person. He thought it was the same persons (Golden Princess and Ozkan) but with different names.

[64] The evidence in relation to fraudulent misrepresentation, as stated by the trial judge, was somewhat inconsistent and not all one way or the other. However, given the burden and standard of proof of fraudulent misrepresentation, the judge preferred the

evidence and version of events in support of Princess Entertainment, Ozkan and Karagozoglu. This Court ought not to interfere with the findings of the trial judge except where there is clear grounds for so doing. (See section 38 of the Supreme Court of Judicature Act of Belize as discussed in **Francisco Arceo v Nora Waye**, Civil Appeal No. 17 of 2004)

[65] The appellants contended that the judge erred in finding that Ozkan and Karagozoglu did not make fraudulent representations to the appellants so as to be held personally liable for any such misrepresentations. The misrepresentations alleged are as stated in the amended statement of case dated 27 July 2015, which will be discussed below.

The law

[66] The law in relation to misrepresentation and fraudulent misrepresentation was not in dispute in the court below. In **Halsbury's Laws of England, Misrepresentation (Volume 76 (2013)) at para 701**, the learned authors said:

> "**701. Misrepresentation as a ground for the rescission of a contract or the award of damages.**
> A misrepresentation is 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."

[67] The trial judge relied on the case of **Matthews v Smith [2008] EWHC 1128**, where Swift J explained the law on fraudulent misrepresentations. At paragraphs 136 – 139, he said:

> **"[136] …** In order for the Claimant to succeed in his claim for fraudulent misrepresentation, he must establish that the representations made by the Defendant were false and that the Defendant made the representations knowing them to be untrue, or recklessly, not caring whether they were true or false, or without honest belief in their truth: ***Derry v Peak (****1889) 14 App Cas 337,* 54 JP 148, 58 LJ Ch 864.
>
> **[137]** 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 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 facts, 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.
>
> **[138]** 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 misrepresentation(s).
>
> **[139]** 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."

[68] If a statement made by a representor is found to be untrue, a claim for fraudulent misrepresentation will fail if at the time he made the statement he believed it to be true. See **Foster and another v Action Aviation Ltd** [2013] 2439 (Comm), page 86.

[69] In relation to a misrepresentation made by a director in his capacity as a director, he will be liable in his personal capacity for any loss suffered by an induced party. See **Contex Drouzhba Ltd. v Wiseman [2007] EWCA Civ 1201**.

The representations

Representation in MOU that Princess Entertainment would enter into formal agreements

[70] The appellants claimed that the respondents fraudulently represented to them in the MOU that a further operation and management agreement would be entered into by Princess Entertainment itself. Their evidence is that Ozkan and Karagozoglu represented to them in negotiations and conversations and in the MOU that all negotiations were being conducted on behalf of Princess Entertainment. Further, that the formal agreements would be entered into by Princess Entertainment and it would operate the premises itself. Furthermore, that the representations were made in the MOU knowingly and dishonestly in that they did not intend to have Princess Entertainment enter into any formal agreements or operate the premises or were reckless in that they did not care whether the statements were true. The respondents evidence is that Ozkan was neither a party or a signatory to the MOU. The finding of the trial judge was that it was indeed represented that a further operation and management agreement would be entered into by Princess Entertainment but found no basis to conclude that Ozkan and Karagozoglu *made the representations in the MOU not intending that* Princess Entertainment would enter into any formal agreements or it would not operate the premises itself. He also found no basis to conclude that Ozkan and Karagozoglu *were reckless in that they did not care whether the statements made were true.* As such the trial judge concluded that he was not able to find that Ozkan and Karagozoglu knowingly or even dishonestly intended not to use Princess Entertainment in the intended agreement contemplated in the MOU.

[71] It was indeed represented to the appellants that the formal agreements would be entered into by Princess Entertainment itself. This was in fact the intention at the time of the early negotiations as shown by the evidence. In my opinion, there was no evidence to support the claim that the representation was made recklessly. The change of intention came about with the incorporation of Golden Princess and changing the counterparty in

the agreements. This change however, could not be regarded as evidence of misrepresentation. The appellants have not shown Golden Princess was inserted into the agreements with the intention to commit fraud.

[72] The judge did not find the evidence of Karagozoglu believable that he informed Bob during negotiations of the intended incorporation of Golden Princess and that all subsequent negotiations were conducted on the understanding that the said company would lease the premises and manage and operate the gaming premises. This however, does not prove misrepresentation by the respondents. In my opinion, there is no basis to interfere with the findings of the trial judge that there was no misrepresentations in relation to the intention of Ozkan and Karagozoglu. Bob was aware of the change of the counterparty but he was not concerned because he had a personal relationship with Ozkan. Mrs. Pott, the attorney for the appellants, was also aware of the change. The evidence of Mrs. Pott is that she prepared the agreements and when it was returned she saw that it had a counterparty, Golden Princess.

[73] Abel J also found that though Ozkan and Karagozoglu may have intended to use Princess Entertainment in the agreement, they were not committed to being so bound by the terms of the MOU. Clause 6 of the MOU shows that it was not intended to create binding legal relations between the appellants and Princess Entertainment. Clause 6 states:

> "… 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."

[74] The further agreement was the OMA and Lease agreements. The OMA contained an exclusion clause which excluded other representations that is not expressly stated therein and it replaced prior agreements. Clause 14.4 of the OMA states:

> "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."

[75] The trial judge rightly, in my opinion, treated the MOU as non-binding based on the terms of Clause 6 of the MOU itself and additionally Clause 14.4 of the OMA which excluded other agreements and representations not expressly stated in that clause. Further, it is a fact which is undisputed that Ozkan was not a signatory to the MOU.

[76] Furthermore, it was reasonable for the trial judge to conclude at paragraph 114 of his judgment that since the change of the counterparty occurred prior to signing the agreements, he was unable to find that Ozkan and Karagozoglu did in fact continue to represent that the premises and the casino operated across the street from Princess Entertainment would be operated as a single business enterprise by Princess Entertainment. The reason being that "such representation would have been at odds with and flying in the face of representations in the OMA".

Was there a deceitful change of the counterparty?

[77] The appellants contended that Ozkan and Karagozoglu procured the incorporation of Golden Princess in December 2010 and deceitfully changed the counterparty in the draft copies of the agreements from Princess Entertainment to the new shell company without informing them. The judge considered the evidence, facts and circumstances of the case and concluded that the incorporation of Golden Princess may have been part of a "*genuine or deliberate business model or corporate strategy*" of Ozkan and Karagozoglu to protect themselves as they were proceeding with their decision to extend their gaming operations on the premises. Further, this decision was consistent with its other gaming business openly inserted into the Agreements. As such, he was unable to

find that Ozkan and Karagozoglu procured the incorporation Golden Princess in December 2010, and deceitfully changed the counterparty in the draft Agreements as argued by the appellants. The change was there in black and white in the agreements and not hidden in the fine prints. In fact, the attorney- at- law for the appellants, read the agreement carefully and was aware that the counterparty in the OMA was Golden Princess but gave an explanation as to why she did not see it as a problem. In my opinion, the knowledge of the appellants defeats the issue of deceit.

[78] The motive for the change from Princess Entertainment to Golden Princess is not unbelievable. The evidence of Karagozoglu was that the Princess Group operate several casinos in Belize, namely, Princess Entertainment in Belize City, one in San Ignacio and another at the Corozal Freezone Limited. All of these casinos have its own operating company and general managers. It was therefore, not unreasonable for the trial judge to infer from the evidence that the incorporation of Golden Princess was done as a business strategy and consistent with other gaming arrangements. As such, the trial judge was correct in finding that Ozkan and Karagozoglu had not incorporated Golden Princess for the purpose of deceitfully changing the counterparty in the draft Agreements. There is no evidence to suggest such deception. Each gaming premises in Belize is owned by independent companies.

<u>Representation during early negotiations that Princess Entertainment had the background and experience to operate gaming premises</u>

[79] The appellants stated it was represented by Ozkan and Karagozoglu during negotiations/conversations held between September 2008, and the early part of December 2008 with the directors and officers of the appellants, Bob and Sunjay that Princess Entertainment had the background and experience to successfully operate the gaming premises and that Princess Entertainment would have operated it. The trial judge did not believe that Ozkan and Karagozoglu made such expressed statements since that would have been unnecessary. He found that it would have been implied that Princess Entertainment would have operated the premises and had the background and

experience to successfully operate the premises. The judge in my opinion, made a proper assessment of the evidence since Golden Princess did not exist during the first eighteen months of the negotiations. Further, Princess Entertainment had experience in the gaming business and so there would have been no need to discuss experience in the gaming business. Bob, according to his evidence, was also aware of other gaming premises belonging to the Princess Group of Companies.

Oral representations that negotiations conducted on behalf of Princess Entertainment

[80] The appellants say that it was orally represented in meetings between January 2009 and November 2010, between Ozkan and Karagozoglu and the representees of the appellants, (in particular Bob) that the negotiations were being conducted on behalf of Princess Entertainment. The trial judge concluded that the negotiations may have been conducted on behalf of Princess Entertainment but more likely and significantly was conducted on behalf of Ozkan and the Princess Group of Companies which he represented and which was beneficially owned by him. In my view, it was reasonable for the judge to arrive at such conclusion based on the fact that the respondents own other gaming premises in Belize and Princess Entertainment is part of the Princess Group of Companies. The judge obviously did not find it believable that any oral representations were made that the negotiations were conducted on behalf of Princess Entertainment because Golden Princess was not incorporated at the time and there would not have been a need to mention Princess Entertainment.

Representations that Golden Princess would operate for Princess Entertainment

[81] The appellants say that Ozkan and Karagozoglu orally represented in meetings held with the representees in December 2010, that Golden Princess would operate the Gaming Premises for and on behalf of Princess Entertainment and with the financial backing of Princess Entertainment. The trial judge concluded based on the evidence that the representations made was to the effect that it is likely that Princess Entertainment

would operate the premises with Ozkan and the Princess Group of Companies. In my opinion, the judge was entitled to arrive at that conclusion since Golden Princess was newly incorporated by White Horse Corporation and needed the support from the other Princess Group of Companies, its directors, owners and shareholders.

Representations that Golden Princess had skills and experience

[82] The appellants evidence was that in meetings held with the representees of the appellants between the latter part of December 2010 and 31 December 2010, it was falsely represented, orally by Ozkan and Karagozoglu, and in writing in the Agreements, that Golden Princess was in the business of owning and operating gaming premises and that Golden Princess had the skills, background and experience to successfully operate and manage the gaming premises. The trial judge concluded after considering the evidence that the negotiations were being conducted possibly on behalf of Princess Entertainment but that Golden Princess was inserted into the negotiations, backed by Ozkan and the Princess Group of Companies which was in the business of owning and operating gaming premises and the latter had the skills, background and experience to successfully operate and manage the gaming premises.

[83] The trial judge approached this issue by considering the fact that the appellants had knowledge of the fact that Golden Princess was established to be in the business of operating the gaming premises as part of the Princess Group of Companies. It therefore had connection with Ozkan and Karagozoglu who were directors and shareholders and had access to such skills and expertise. In my opinion, the judge had properly assessed the facts and found that the statement is not materially and factually false and would not have misled the appellant or induced them into entering into the agreements. Golden Princess was part of the Princess Group and had access to the skills. The appellants had not established that the statements were false and that Ozkan and Karagozoglu made those representations recklessly without honest belief in their truth. See **Derry v Peak**.

Implied representation as to capacity of Golden Princess

[84] The appellants evidence is that Ozkan and Karagozoglu impliedly **r**epresented that Golden Princess had the capacity to fulfill its obligations under the contract by the signing of the agreements. Ozkan and Karagozoglu were signing as Directors of Golden Princess and not in their personal capacities. Further, there is no evidence that at the time of the signing of the agreements they had knowledge that Golden Princess would be unable to fulfill its obligations under the agreement. What has to be proven is the untruth at the time of the signing of the agreements.

[85] This signing of the agreement was not such as in the case of **Wiseman** where the director was untruthful as to the capacity of the company to pay its bill. The Director in that case knew the company was insolvent but signed an agreement on behalf of the company to make certain payments within thirty days after shipment of goods. The trial court found that the agreement and its promise of payment carried an implied representation of the capacity of the company to pay. On appeal the court agreed with the trial court. The Director, by promising terms of payment, made an implied representation that the company had the capacity to meet its terms of payment, when he knew that it was an untruth. As such, the judge was entitled to find that the director made a fraudulent misrepresentation in writing as to the ability of the company and was entitled to hold that the document was signed by the director as the person to be charged.

[86] In that case, it is made clear that not every contract signed by a director contains implied representations by the director, as each case would depend on its own facts. In the instant case, while there may have been an implied representation by Ozkan and Karagozoglu that Golden Princess would be able to fulfil its obligation for the entire duration of the contract, there is no evidence to show that this was an untruth. Golden Princess was not insolvent at the time of the signing of the agreements as in **Wiseman.** Further, Golden Princess was in operation of the premises for many months before its closing. As such, it is my opinion, that there could not have been a finding by Abel J that

Ozkan and Karagozoglu made an implied fraudulent misrepresentation when they signed the agreement.

Representations by conduct that Golden Princess was financially sound

[87] The appellants stated that Ozkan and Karagozoglu represented by conduct that Golden Princess was financially sound and had the ability to perform its obligations under the agreements because Princess Entertainment would ensure it is performed. The trial judge concluded that Ozkan and Karagozoglu **"**represented by conduct and it may have in any event been assumed" by Bob and Sunjay, "without conducting any due diligence (which the Claimants failed or neglected to conduct), that Golden Princess was financially sound and had the ability to perform its obligations under the agreements. The reason being that Ozkan was standing behind Golden Princess together with Princess Entertainment and the other members of Princess Group of Companies and they would ensure such performance.

[88] The trial judge stated that it was implicit, "*not necessarily that the 3rd (Ozkan) and 4th Defendants (Karagozoglu) represented by conduct to BH, that the 2nd defendant (Golden Princess) 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.*" I see no reason to interfere with the conclusion arrived by the trial judge. Golden Princess was indeed being assisted by its sister companies as proven by the appellants. It could not have functioned without experienced and skilled persons in the gaming business.

Induced by representations that were true or not materially false

[89] The appellants claimed that they were induced and acted upon each of the representations and as such entered into the agreements and expended additional funds in fitting the gaming premises in accordance with the specifications of Princess

Entertainment. The trial judge concluded that the appellants were indeed induced and acted on the representations and as a consequence entered into the agreements and may as a result expended funds in fitting the gaming premises. He found that they were seduced by Ozkan and Karagozoglu who had the wherewithal and experience to stand behind Golden Princess and to underwrite its operations. Further, this is the reason why they overlooked the name of Golden Princess being placed as a counterparty. The appellants had the knowledge of the substitution and overlooked it because of the presence of Princess Entertainment and Ozkan. The reason being that Bob trusted Ozkan. This inducement or seduction referred to by the trial judge is in relation to the experience and skills in the operation of casinos and does not prove fraudulent misrepresentations.

[90] *A misrepresentation is a positive statement of fact, which is made or adopted by a party to a contract and is untrue.* See *Halsbury's* **Laws of England, Misrepresentation (Volume 76 (2013))** at **para 701.** The appellants failed to establish that the representations made by Ozkan and Karagozoglu were false and that they made them *"knowing them to be untrue, or recklessly, not caring whether they were true or false, or without honest belief in their truth*" ***Derry v Peak.***

Representations false as Golden Princess newly incorporated

[91] The appellants also claimed that the representations were fraudulent in that at the time of entering into the agreements Golden Princess was newly incorporated, had no background or experience in the gaming business and did not have the capacity to perform its obligations. Further, Ozkan and Karagozoglu made the representations fraudulently in that they knew they were false or were reckless, not caring whether they were true or false. The trial judge concluded that the representations were generally true or were not materially false and were not made fraudulently since the true facts would have, or ought to have been known by the appellants at the time of entering into the agreements. The judge said that Golden Princess was indeed newly incorporated and did not have the experience in the gaming business but had the backing of Princess

Entertainment, Ozkan, Karagozoglu and the Princess Group of Companies of which it was a part. As such, it had the capacity to perform its obligations under the agreements. In my opinion, the trial judge was entitled to make such finding. The knowledge of the appellants that Golden Princess was newly incorporated cannot support their argument of fraudulent misrepresentation. They knew that Golden Princess had the support of Princess Entertainment, Ozkan, Karagozoglu and the Princess Group of Companies. Further, the gaming premises was operated for over a year and did not fail from its inception. As such, the evidence by the appellants that Golden Princess did not have the capacity to fulfill its obligations or the chance of gaining it because the directors would retained business for the casino being operated across the street, was not found to be believable by the trial judge.

Live games

[92] The appellants contention is that when Golden Princess was operating there were no live games, only machine games. The reason being to ensure that the venture failed so as to eliminate competition. Mr. Karagozoglu under cross-examination said they did not have live games since they were trying a different model. The appellants argued that more money is made in live games and Princess Entertainment should have brought over tables to Golden Princess and try the live games. Further, since this was not done, the inference to be drawn is that they had no intention of Golden Princess succeeding and they did not want competition.

[93] In my opinion, it is unreasonable for this Court to draw such an inference especially since the appellants have not proven that the live games would have resulted in greater profits or that more customers would have gone to the gaming premises to play. Further, there is nothing preventing the appellants from competing with Princess Entertainment. All they had to do was to invest and fulfil the conditions for the gaming licence, that is, completing the 50 hotel rooms upstairs of their gaming premises. It is also difficult to draw the inference as requested by the appellants since Golden Princess was operating for one year and six months before deciding to close because of losses. The appellants

knew of the losses suffered by Golden Princess and reduced the rent for a period of time. But the fact that Golden Princess suffered losses does not close the door for the appellants. They can apply for a licence and operate the gaming business on their own strength.

[94] Senior counsel referred the Court to the evidence of Mr. Karagozoglu when he was being cross-examined about not using live games. He was told, "*I am suggesting to you, Mr. Hamdi (Karagozoglu), that you all laugh and say, mission accomplish. No competition for Princess Entertainment in Belize City."* Mr. Karagozoglu replied and said, "*No one wants that close competition.*" This answer in my opinion, does not show fraudulent intention. He would have been untruthful to give a different answer.

Conclusion

[95] The appellants failed to establish that the trial judge erred when he found that Ozkan and Karagozoglu did not make fraudulent representations to them and that they should be held personally liable for any such misrepresentations. The judge properly assessed the evidence which was before him and drew reasonable inferences from those facts. The evidence shows that that there was slow business activity and as such the business was unsuccessful and as a result the rent had to be reduced for a period of time. The proof of fraudulent misrepresentations is lacking. I propose that the order sought awarding damages against Ozkan and Karagozoglu for misrepresentation should therefore be refused.

Whether Golden Princess entered into the agreements as agent for Princess Entertainment?

[96] The appellants in their claim sought a declaration that Golden Princess entered into agreements as agent of Princess Entertainment. They also claimed damages for breach of the agreements. The trial judge after considering the evidence and the law found that Golden Princess did not enter into the Agreements as the agent of Princess Entertainment. The judge examined the conduct of both companies since there was no

written agreement of an agency relationship. The judge correctly stated the law as to when a relationship of agency arises, as shown below. He considered several authorities, including **Smith, Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham** [1939] 4 All ER 116 and **The Government of Sierra Leone v Davenport and another** [2003] EWHC 2769 (Ch).

The law

Nature of the relation of agency

[97] In **Halsbury's Laws of England (Vol. 1 (2017))**, at paragraph 1, the nature of the relation of agency is explained as follows:

> **"1. Nature of the relation of agency**
>
> The terms 'agency' and 'agent' have in popular use a number of different meanings, but in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties.
>
> The relation of agency typically arises 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 it shall not."

Sole ownership and control of company by shareholder not sufficient to prove agency

[98] The authority **Davenport** shows that sole ownership and control of a company by a shareholder are not sufficient to prove agency. Further, the fact that a shareholder causes a contract to be made by his company and not by him personally shows that he had no intention to being a party. At page 59, Richards J said:

> **"[59]** If there is no express agreement between the company and the shareholder, and none is alleged in this case, the difficulty for the Claimant lies in identifying facts from which a sustainable case of agency may be inferred. As already noted, the facts of sole ownership and control of the company by the shareholder are not sufficient. Moreover, … the fact that the shareholder causes the contract to be made by his company, not by him personally, is itself evidence that he did not himself intend to be a party, particularly if the contract imposes onerous obligations. This is indeed one of the fundamental purposes of the whole system for limited liability companies and underlies much of the way in which commercial dealings are organised. The point was made by Toulson J in *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (No 2)* [1998] 4 All ER 82, [1998] 1 WLR 294. Having referred to *Salomon v A Salomon and Co Ltd* he continued:
>
> > "The relationship of principal and agent can only be established by the consent of the principal and agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in *ex parte Delhasse* (1878) 7 Ch D 511. But the consent must have been given by each of them, either expressly or by implication from their words and conduct."
>
> …

[60] Nonetheless, there may be particular facts from which an agency could properly be inferred, despite the importance of the considerations just discussed. This has been recognised in a number of authorities: for example, ***Gramophone and Typewriter Ltd v Stanley*** [1908] 2 KB 89, [1908-10] All ER Rep 833, ***Smith, Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the Citizens of the City of Birmingham*** [1939] 4 All ER 116, 104 JP 31, ***Adams v Cape Industries plc*** [1990] Ch 433, [1991] 1 All ER 929, [1990] BCLC 479, 545-549, ***Yukong Line Ltd v Rendsburg*** (supra). Although regularly recognised in principle, it seems rarely to have been held that the facts of any particular case justify the inference of agency between a company and its controlling shareholder. An exception is the ***Smith, Stone and Knight*** case. … the particulars of claim contains in effect the list of six general points set out at p 121 of the report which Atkinson J considered were relevant to determining the issue of agency. In my judgment, with the exception of the first of those points (the profits of the subsidiary company were treated as the profits of its parent company), none of the points individually or collectively is a sufficient basis from which to infer an agency relationship. They are entirely consistent with the relationship which frequently exists between a holding company and a wholly-owned subsidiary or between a "one-man company" and its owner. In *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 at 189-190, Kerr LJ, in commenting on that decision, said that ". . . the facts were so unusual that they cannot form any basis of principle" and that "no conclusion of principle can be derived from that case".

Relationship of agency between parent and subsidiary company a question of fact

[99] In **Smith's** case, one of the issues that were determined was whether a subsidiary could be an agent of its parent company. Atkinson J stated six points which he considered

were relevant in determining whether a relationship of agency existed in law by looking at the facts from which agency can be inferred. At page 121 he said:

> "It seems therefore to be a question of fact in each case, and those cases indicate that the question is whether the subsidiary was carrying on the business as the company's business or as its own. I have looked at a number of cases—they are all revenue cases—to see what the courts regarded as of importance for determining that question. There *is San Paulo Brazilian Ry Co v Carter*, *Apthorpe v Peter Schoenhofen Brewery Co Ltd*, p 41; *Frank Jones Brewing Co v Apthorpe*, *St Louis Breweries v Apthorpe*, and I find six points which were deemed relevant for the determination of the question: Who was really carrying on the business? In all the cases, the question was whether the company, an English company here, could be taxed in respect of all the profits made by some other company, a subsidiary company, being carried on elsewhere. …"

[100] The six points listed by Atkinson J are*:*

(1) Were the profits treated as the profits of the parent company?

(2) Were the persons conducting the business appointed by the parent company?

(3) Was the company the head and the brain of the trading venture?

(4) Did the company govern the adventure, decide what should be done and what capital should be embarked on the venture?

(5) Did the company make the profits by its skill and direction?

(6) Was the Company in effectual and constant control?

Arguments by the parties

[101] The appellants submitted that the trial judge erred in his assessments of the facts in concluding that Princess Entertainment was not the principal to the Agreements. In the

court below they claimed that: (a) Princess Entertainment was the brain of the business venture and conducted all negotiations with the appellants. The trial judge found that Ozkan and Karagozoglu via the vehicle of Princess Entertainment may be considered the "head and brain" of the gaming operations and did control and make all critical decisions under the agreements; (b) They further claimed that the profits were made by the skill and direction of Princess Entertainment. The trial judge found that the profits and losses of Golden Princess were made by the skill and direction of Ozkan and Karagozoglu and Princess Entertainment; (c) The appellants also claimed that Princess Entertainment supplied and trained the staff of Golden Princess. The trial judge found that Princess Entertainment indeed allowed its experience employees to assist Golden Princess with the management of the casino; (d) The appellants claimed that the finances of Golden Princess and Princess Entertainment were intermingled and financial obligations of Golden Princess were met from the banking accounts of Princess Entertainment. The judge found that the finances of Princess Entertainment and Golden Princess were commingled and although the two companies may have operated separate bank accounts, were interconnected with Princess Entertainment supporting Golden Princess.

[102] The appellants, in making their claim seem to follow the six points listed by Atkinson J in the **Smith's case,** namely (1) the profits treated as the profits of the parent company; (2) the persons conducting the business was appointed by the parent company; (3) the company was the head and the brain of the trading venture; (4) the company governed the adventure and decided what should be done and what capital should be embarked on the venture; (5) the company made the profits by its skill and direction and (6) the company was in effectual and constant control.

[103] **Smith's** case relied upon by the appellants can be distinguished from the instant case. There is no evidence that the income of Golden Princess was utilized for Princess Entertainment; Golden Princess was not conducting business for Princess Entertainment; Princess Entertainment was not the head and brain of the gaming venture as it was the directors Ozkan and Karagozoglu through Princess Entertainment that may be considered the "head and brain" as found by the trial judge; there was no evidence that

Princess Entertainment made decisions on capital to be used on the venture; there is no evidence that Princess Entertainment made profits through Golden Princess. The judge found that the profit and losses of Golden Princess were made by the skill and direction of Princess Entertainment, Ozkan and Karagozoglu; and Princess Entertainment was not in effectual and constant control of Golden Princess.

[104] The fact that the trial judge made some positive findings in relation to the six points, such as the training of staff and comingling of finances, these findings cannot be conclusive evidence of an agency relationship. The Princess Group of Companies has several sister companies in Belize which assist each other as shown by the evidence. When Golden Princess was incorporated, skilled staff from other sister companies trained its staff and then left. The comingling of finances as stated by the trial judge is unclear as the evidence shows that the financial records of Princess Entertainment and Golden Princess were separate. The audited statements from these two companies showed that Golden Princess borrowed from Princess Entertainment.

[105] The six points in **Smith's case** was criticized in the case of **The Government of Sierra Leone.** Richards J was not persuaded by those points. With the exception of the profits of the subsidiary company that were treated as the profits of its parent company, he said that that "none of the points individually or collectively is a sufficient basis from which to infer an agency relationship. They are entirely consistent with the relationship which frequently exists between a holding company and a wholly-owned subsidiary or between a "one-man company" and its owner." He cited the case of *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 at 189-190, where Kerr LJ, in commenting on Smith's case, said that ". . . the facts were so unusual that they cannot form any basis of principle" and that "no conclusion of principle can be derived from that case".

[106] The appellants in the instant appeal argued that based on the representations of Princess Entertainment, Ozkan and Karagozoglu, it can be reasonably inferred that there

was an agency relationship between Golden Princess and Princess Entertainment. The appellants submitted that the facts of the case strongly support and justify an inference being drawn that Golden Princess acted as an agent of Princess Entertainment when it entered into the Agreements. They submitted that an agency relationship can be inferred from the following sixteen points:

(i) It was the intention of Pickwick Hotel and Princess Entertainment as shown by the terms of the MOU that the option to operate the casino be non-assignable;

(ii) The negotiations were conducted by Ozkan and Karagozoglu for and on behalf of Princess Entertainment from 2008 to 2010 and at that time Golden Princess did not exist;

(iii) The preliminary drafts of the Agreements were circulated for approval between the appellants and Princess Entertainment prior to the incorporation of Golden Princess;

(iv) Princess Entertainment had its architect design the gaming premises to its preference;

(v) Golden Princess was incorporated on 16 December 2010, after the terms of the agreements were settled and two weeks before the agreements were signed;

(vi) The characteristics described in the agreements identified Princess Entertainment and not Golden Princess as the party to the agreements;

(vii) Princess Entertainment trained the employees of Golden Princess;

(viii) Decisions which include payment of taxes, request for reduction of rent were made by the managers and employees of Princess Entertainment and licence applications were prepared by the employees of Princess Entertainment;

(ix) Princess Entertainment and its attorney-at-laws described Golden Princess as an “extension” of Princess Entertainment;

(x) The finances of Princess Entertainment and Golden Princess were intermingled;

(xi) All gaming machines and staff were relocated to Princess Entertainment's casino after the closure of Golden princess;

(xii) Princess made several payments to the appellants on behalf of Golden Princess;

(xiii) Princess Entertainment continued to make payments on behalf of Golden Princess after it ceased operations;

(xiv) Princess Entertainment and Golden Princess have the same directors and shareholders.

[107] The appellants submitted that based on the evidence and what the trial judge accepted and determined, it can be inferred that Golden Princess was an agent of and was controlled by Princess Entertainment with respect to the agreements. They relied on **Smith's case** and several authorities which applied its principles, namely, **Spreag and another v Paeson Pty Ltd and others** [1990] 94 ALR 679, **Canadian Imperial Bank of Commerce v Hone** [1987] BHS J No 136, **Elbow River Marketing Limited Partnership v Canada Clean Fuels Inc** [2012] A.J. No. 460.

[108] The test as laid down in **Smith's** case as shown above is a question of fact in each case as to whether "*the subsidiary was carrying on the business as the company's business or its own."* The test can be satisfied by the six questions identified in that case as shown above. However, the authorities of (1) **Elbow River Marketing** *and* (2) **Hone** show that the positive answers to the six questions may not be sufficient as there needs to be some additional element of impropriety or improper purpose which must be proven. **Elbow River Marketing** shows that an agency relationship could exist between sister companies and not only between parent and subsidiary.

[109] The following was submitted for Princess Entertainment in response to the arguments made by the appellants:

(i) The MOU was expressed to be non-binding. Further, the OMA contained a clause which excluded any representation that is not expressed therein;

(ii) Golden Princess was incorporated two weeks prior to the execution of the MOU and a year prior to the execution of the final leases;

(iii) The evidence shows that Hande, the architect provided her services to the Princess Group of Companies in Belize and abroad. She was not an employee or agent of Princess Entertainment or was instructed specifically by Princess Entertainment to design the Gaming Premises;

(iv) The evidence showed that Princess Entertainment made loans to Golden Princess. The audited financial statements for Golden Princess and Princess Entertainment for 2013 and 2014 confirmed that the financial records of the two companies were separate and the loans were documented. They also had separate bank accounts and gaming permits.

[110] The respondents distinguished **Smith's** case as follows:

(i) The facts upon which the judge relied upon were undisputed but in the instant matter there are a number of material facts which were disputed;

(ii) The parent company bought the premises and the business as a going concern from a third party which became the property of the parent and it then carried on the business for a few months before it caused the registration of its subsidiary company. In the instant matter, Golden Princess was incorporated a couple weeks prior to the execution of the agreements and a couple of years prior to the operation of the gaming premises. Princess never took or operated the gaming premises in its own name;

(iii) The judge noted that the fact that the business and the premises were never assigned to the subsidiary was of great importance. This is significant because the parent company was the legal owner of major assets which they said formed part of the subsidiary business. In the instant matter, the Agreements were in the name of Golden Princess and not Princess Entertainment;

(iv) The profits of the subsidiary were allocated to different businesses of the parent company. In the instant matter there was no allegation that the profits or income of Golden Princess was used for the business of Princess Entertainment.

[111] The respondents submitted that **Spreag's** case relied upon by the appellant can also be distinguished from the instant matter. The judge relied on the fact that the subsidiary company had no bank account or other assets, no premises of its own, did not keep books of accounts and did not prepare balance sheet or profit and loss account. However, in the case at bar, Golden Princess and Princess Entertainment held different bank accounts and there was no allegation that the profits or income of Golden Princess were used for the business of Princess Entertainment. Further, all loans given to Golden Princess were noted in the audited accounts of both Golden and Princess Entertainment.

[112] The respondents further submitted that while the court in the case of **Hone** ruled that the subsidiary was an agent of its parent company, Luckhoo P also indicated at paragraph 12 of his judgment that *"something more must be shown than the ownership of all the shares of the subsidiary or complete domination of its business in order to constitute the subsidiary company the agent of the parent company controlling it." (*In that case Hone, who was the defendant had used the corporate defendants as vehicles for his ventures and the movement of monies within and without which was under his exclusive control. Hone as the sole beneficial owner of Far East was found liable to repay monies paid by mistake into Far East account which business was treated as that of Spectrum).

[113] The respondents also submitted that the **Elbow River Marketing** case can be distinguished on the basis that the appellant made it clear to the corporation with whom it contracted that it wanted to be assured that it was financially solid and capable of fulfilling its obligations under the contracts. The corporation in response supplied the financial and credit records of its sister company which met the requirements set out by the appellant. But, in the case at bar, the trial judge found as a matter of fact that there was no such expressed oral assurances by the respondents as to the capabilities of Golden Princess. Also there was no evidence that the appellants were given the financial records of Princess Entertainment

Whether the points listed by the appellants can infer agency

Initial negotiations

[114] The first three points can be dealt with together since they concern the terms of the MOU and negotiations prior to execution of the agreements. Firstly, it was indeed the intention of Pickwick Hotel and Princess Entertainment as shown by the terms of the MOU that the option to operate the casino be non-assignable. Secondly, the negotiations were conducted by Ozkan and Karagozoglu on behalf of Princess Entertainment from 2008 to 2010 and at that time Golden Princess was not incorporated. Thirdly, the preliminary drafts of the Agreements were circulated for approval between the appellants and Princess Entertainment prior to the incorporation of Golden Princess. These prior negotiations however, did not assist the trial judge in relation to Golden Princess being the agent of Princess Entertainment. This is because the evidence from Bob for the appellants was that he considered that he was dealing with Ozkan in the early negotiations and after Golden Princess became the counterparty. The reason being that Ozkan signed as Director of the company. The evidence indeed proved that Bob trusted Ozkan and it was not about Princess Entertainment. The judge found that Ozkan and Karagozoglu via the vehicle of Princess Entertainment were the head and brain of the whole proposed venture relation to the premises, contrary to the case for the

appellants. As such, it was the two Directors who were conducting the business for both Princess Entertainment and Golden Princess.

[115] In my opinion, the evidence supports the above conclusion of the trial judge. Princess Entertainment is privately owned and all its issued and outstanding shares are held by White Horse Falls Corporation. Golden Princess was incorporated by White Horse Falls Corporation. Ozkan is a director of both Princess Entertainment and Golden Princess. White Horse Falls also incorporated Princess Casino in San Ignacio Belize, Princess Entertainment in Belize City and in Corozal which is within the Free Zone. Karagozoglu is a minority shareholder of Princess Entertainment and Golden Princess and is a Director of those companies. Both Ozkan and Karagozoglu engaged in negotiations with the appellants and made significant decisions under the Agreements. Both of them have expertise in the gaming business.

Was Hande, the architect instructed by Princess to design the gaming premises

[116] The appellant contended that Princess Entertainment had its architect design the gaming premises to its preference. The respondents submitted that Hande provided her services to the Princess Group of Companies in Belize and abroad. There was no evidence before the trial judge which proved that Hande was instructed by Princess Entertainment itself to design the premises. In any event, this is not sufficient to infer an agency relationship.

Incorporation of Golden Princess

[117] Golden Princess was incorporated on 16 December 2010, after the terms of the agreements were settled and two weeks before the agreements were signed and a year prior to the execution of the leases. This however, was no secret and as discussed under the issue of misrepresentation, the appellants had knowledge that Golden Princess was the counterparty. The trial judge considered the fact that the appellants and their attorney-

at-law had knowledge that Golden Princess would be the parties to the OMA and the leases and he concluded based on the evidence that they chose to ignore it although they were aware of the situation. As a result of such conclusion, the judge found that all negotiations leading up to the signing of the Agreements took place on the one hand between Ozkan and Karagozoglu for Princess Entertainment. On the other hand, those representing the appellants, primarily Bob, viewed Ozkan as the controlling person and mind behind the negotiation and his presence provided comfort to the appellants to enter into the Agreements. It was reasonable for the trial judge to arrive at that finding because of the evidence of the appellants that they were really dealing with Ozkan and not Princess Entertainment.

[118] The judge was of the view that Ozkan was representing at all times that Princess Entertainment had his "*full backing and weight and the substantial Princess Group of Companies, with their expertise and knowledge, behind the transaction being negotiated."* He stated that this was an unusual situation where it was the personality and backing of Ozkan which was critical to the appellants and not the identity of Princess Entertainment. As a result, he concluded that Golden Princess did not enter into the agreements as the agent of Princess Entertainment.

[119] The judge was entitled to hold that Golden Princess did not enter into the agreements as agent of Princess Entertainment. Ozkan was trusted by the appellants and he was seen as the person behind the negotiations. Further, there is evidence to support the finding by the trial judge that Ozkan and Karagozoglu through Princess Entertainment was the head and brain of the whole proposed venture relating to the premises.

[120] In my opinion, there is no evidence to suggest that Golden Princess was the agent of Princess Entertainment. The evidence proves that each of the Princess Group of companies is owned and operated by different companies. As such the characteristics in the agreement was in relation to Golden Princess itself contrary to what was contended

by the appellants. In my opinion, the judge was entitled to make that finding based on the evidence before him.

Princess Entertainment trained the employees of Golden Princess

[121] The appellants say that the employees of Golden Princess was trained by Princess Entertainment and that they had interlocking employees. The respondents submitted that the evidence of Karagozoglu was that Princess Entertainment allowed a few of its experienced employees to assist with the management of the Gaming premises but that Golden Princess made all decisions in respect of staffing the casino and hiring and training employees. The trial judge found as a fact that Princess Entertainment allowed its experienced employees to assist Golden Princess with the management of the casino. This finding of assistance only was borne out by the undisputed evidence of Karagozoglu who under cross-examination stated that experts from Princess Entertainment and San Ignacio Casino went to Golden Princess to train their employees and left. He also gave evidence that each of the casinos are owned by different companies and have different managers. However, they have common Directors and shareholders. This evidence in my view, shows nothing more than a sister company assisting a sister company.

[122] It was further submitted that decisions which include payment of taxes, request for reduction of rent were made by the managers and employees of Princess Entertainment. Also, licence applications were prepared by the employees of Princess Entertainment. This evidence in my view, also shows that Princess Entertainment was assisting its sister company, Golden Princess.

Intermingling of finances of Princess Entertainment and Golden Princess

[123] The appellants argued that the finances of Princess Entertainment and Golden Princess were intermingled. Princess Entertainment made several payments to the appellants on behalf of Golden Princess and it continued to do so after Golden Princess ceased operations. The respondents contended that the evidence showed that Princess

Entertainment made loans to Golden Princess and this was confirmed by the audited financial statements for Golden Princess and Princess Entertainment for 2013 and 2014. Also they had separate bank accounts and gaming permits. The trial judge found that the finances of Princess Entertainment and Golden Princess were commingled, and at all material times though they may have operated separate bank accounts, were interconnected with the former supporting the latter. He further found that from time to time, Princess Entertainment made loans to Golden Princess to assist the company 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. Karagazoglu's evidence indeed proved that loans were made to Golden Princess. He exhibited the audited statements which confirmed the loans were made and that the financial records of the said companies were separate. Since the financial records were separate the use of the word 'comingled' by the trial judge was misleading. The financial records were clearly separate.

Relocation of staff and gaming machines after closure of Golden Princess

[124] In relation to the staff there is no evidence that they were working at Golden Princess and had contracts with Princess Entertainment. As such the relocation of staff cannot be evidence of agency. Likewise, the relocation of the gaming machines does not prove agency.

Princess Entertainment and Golden Princess have the same directors and shareholders

[125] The fact that Princess Entertainment and Golden Princess had the same directors and shareholders do not prove agency. There is evidence that each of the Princess Group of Companies had different management and control.

Application of the law

[126] It is a question of fact as to whether a relationship of agency can be inferred. The appellants relied heavily on the **Smith's case** to make their argument of agency in the court below and the six points listed by Atkinson J in that authority. In that case the subsidiary company was an agent of the parent company. **Smiths' case** can be distinguished from the instant matter as Princess Entertainment was not a parent company and Golden Princess was not a subsidiary company. They are both independent companies. The evidence proves that Princess Entertainment was at no point operating the business in its own name as in the **Smith's case.** The counterparty in the agreement was Golden Princess and the appellants had knowledge of this fact. The OMA and the leases were in the names of Golden Princess.

[127] In the instant matter, the trial judge described Princess Entertainment and Golden Princess as sister companies. This is a reasonable statement since it can be seen from the evidence that all of the Princess Group of Companies assisted each other in Belize. Princess Entertainment was in fact assisting Golden Princess with training of staff and lending money. There is no evidence however, of control and misrepresentations or other improper conduct by Princess Entertainment as described in the **Smith's** case.

[128] In the case of **Elbow River**, which was relied upon by the appellants**,** Tilleman J at paragraph 150 said that in the **Smith** case, the authorities considered were mostly parent-subsidiary relationships or relationships between a corporation and a controlling shareholder. He stated that although in **Elbow River**, CCF and Canada Clean were sister corporations, "the factors in **Smith** go to control of one entity over another, and it is conceivable that one of the two sister corporations might exert at least *de facto* control over the other". As such, he considered the six factors. At paragraph 167 he found that while Canada Clean may very well have controlled CCF as described in **Smith** "*it is not enough to establish liability as principal in the absence of other very clear evidence of agency, or fraud or dishonesty, or some other inappropriate reason for the corporate*

structure that was employed." In my opinion, the appellants have not proven agency or fraud or dishonesty or any inappropriate reason for the incorporation of Golden Princess as shown in Elbow River. The evidence shows that Golden Princess was a business that failed after operation for one year and six months.

[129] It is to be noted, though not of importance to the issues raised in the instant matter, that in the appeal of **Elbow River Marketing Limited Partnership v Canada Clean Fuels Inc** [2012] A.J. No. 1155, (the appeal) the court held that whilst the chambers judge identified the correct test for finding agency by control relationship when he reviewed the factors in **Smith,** he erred by misapplying that test with respect to agency and evaluating the evidence on an incorrect standard for summary judgment application. The court said that, "*The test was not whether **Elbow River** has proven all of the requirements for a finding of agency, but whether it has raised enough evidence to warrant the issue of agency going forward to trial*."

[130] I am in agreement with the respondents that **Elbow River Marketing** case can be distinguished on the basis that the appellant wanted to be assured by the corporation that was contracted that it was financially solid and capable of fulfilling its obligations under the contracts. The corporation supplied financial and credit records of its sister company which met the requirements set out by the appellant. In the instant matter, Abel J found as a matter of fact that there was no such expressed oral assurances by the respondents as to the capabilities of Golden Princess. Further, there was no evidence that the appellants were given the financial records of Golden Princess.

[131] The **Spreag's** case relied upon by the appellant can also be distinguished from the instant matter as submitted by the respondents. In that case, the subsidiary company had no bank account or other assets, no premises of its own, did not keep books of accounts and did not prepare balance sheet or profit and loss account. In the instant matter, Golden Princess and Princess Entertainment held different bank accounts and there was no allegation that the profits or income of Golden Princess were used for the

business of Princess Entertainment. Further, the loans given to Golden Princess were recorded in the audited statements of both Golden Princess and Princess Entertainment.

[132] In **Hone's** case, where it was ruled that the subsidiary was an agent of its parent company, Luckhoo P indicated at paragraph 12 of his judgment that *"something more must be shown than the ownership of all the shares of the subsidiary or complete domination of its business in order to constitute the subsidiary company the agent of the parent company controlling it."* In that case Hone, who was the defendant had used the corporate defendants as vehicles for his ventures and the movement of monies within and without which was under his exclusive control. Hone as the sole beneficial owner of Far East was found liable to repay monies paid by mistake into Far East account which business was treated as that of Spectrum.

[133] Based on the foregoing discussion, I am of the opinion that the trial judge was entitled to find that Golden Princess did not enter into the operation and management agreement and a lease agreement, as agent of Princess Entertainment. As such, there could not be a finding that Princess Entertainment breached any of its contractual obligations with the appellants. As a result of his previous finding (under the issue of fraudulent misrepresentation) that Ozkan and Karagozoglu through Princess Entertainment was the head and brain of the proposed venture relating to the gaming premises, the judge made a reasonable conclusion that the persons conducting the business of Princess Entertainment and Golden Princess were Ozkan and Karagozoglu of the Princess Group of Companies and not Princess Entertainment conducting the business of Golden Princess.

Conclusion

[134] I propose that the declaration sought by the appellants that Golden Princess entered into the agreements as agent of Princess Entertainment should be refused. It

follows that the order sought awarding damages against Princess Entertainment for breach of the agreements should also be refused.

Whether Golden Princess was the agent of Ozkan

[135] In the amended notice of appeal, the appellants sought an alternative declaration that Golden Princess entered into the agreements as agent of Ozkan. The appellants contended that the trial judge erred in law in failing to find that Ozkan was the principal of Golden Princess in respect of the execution, implementation and breach of the agreements entered into by Golden Princess. This was not a relief sought in the court below. Based on a statement made by the trial judge, as shown below, the appellants invited this Court on the basis of *section 38 of the Supreme Court of Judicature Act* and *section 19 of the Court of Appeal Act*, to grant the reliefs sought at paragraphs 4 and 5 of the amended notice of appeal. The appellants argued that since the trial judge found that it was probable that Ozkan was the principal to the Agreements, the judge erred in not making an order that Ozkan was personally liable for breach of contract and damages. The judge stated that Golden Princess did not enter into the agreements as the agent of Princess Entertainment "*but that in the language and law of agency it is more probable that the principal was the 3rd Defendant (Ozkan) and not the 1st Defendant (Princess Entertainment)".*

[136] The respondents argued that the judgment order approved by counsel on both sides and the trial judge does not refer to any finding that Ozkan was the true principal of Golden Princess. Further, the matter of agency between Ozkan and Golden Princess was neither pleaded nor argued and it was not a live issue put before the court for full ventilation and determination. As such the judge's comment was therefore, *obiter dicta.*

[137] In my opinion, the trial judge did not make a finding that Ozkan was the principal of Golden Princess. As rightly stated by a member of the panel of the Court, the judge went off on an escapade of his own. He was not staying within what was pleaded by the

appellants (claimants). This Court cannot make an order based on the observation by the trial judge on the comparison between Ozkan and Princess Entertainment. The judge said that Princess Entertainment could not be principal because Ozkan and Karagozoglu through Princess Entertainment may be considered the "**head and brain**" of the gaming operations at the gaming premises and controlled and made all critical business or other significant decisions under the agreements. This however, was not a finding of Ozkan being the agent of Golden Princess. Further, the law of agency does not support a finding of agency merely because of the controlling director and shareholder. See the case of **The Government of Sierra Leone**, where Richards J said that the six points listed in the **Smith's case** with the exception of the profits of the subsidiary company treated as the profits of its parent company, cannot infer an agency relationship. "They are entirely consistent with the relationship which frequently exists between a holding company and a wholly-owned subsidiary or between a "one-man company" and its owner." In the instant appeal, there is no basis to infer agency. The Princess Group of Companies were doing business independently of each other.

[138] Further, Ozkan is one of the two Directors of Princess Entertainment and Golden Princess. He is not a shareholder of any of the companies. The principal shareholder of Princess Entertainment and Golden Princess is White Horse Corporation, an overseas entity. The evidence shows that Ozkan and Karagozoglu entered into the agreements in their capacity as directors and officers of White Horse Falls Corporation of the British Virgin Islands, the holding company of Princess Entertainment and Golden Princess, as distinct from their own personal capacity.

Conclusion

[139] I propose that the declaration sought by the appellants that Golden Princess entered into the agreements as agent of Ozkan, should not be granted. It follows, that the order sought awarding damages against Ozkan for breach of the agreements should not be granted.

Disposition

[140] The order I propose to make would be the following:

(i) The appeal is dismissed.

(ii) The appellants shall pay the costs of the appeal to be taxed if not agreed. This order for cost is provisional in the first instance, to be made final in 15 days from today unless the appellants were to file for a contrary order within such period, in which event the matter of costs would be decided on written submissions to be filed and exchanged by the parties in 10 days from the making of such application.

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HAFIZ-BERTRAM JA

DUCILLE JA

[141] Having read the judgment of Hafiz-Bertram JA. I am in full concurrence with her reasons and cannot add anything further.

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DUCILLE JA