



ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 13 OF 2008

BETWEEN

SUNDRY WORKERS

Employees

And

GEORGE DEXTER TAVERNIER
(Trading as Tavernier Construction)

First Employer

And

KIER CONSTRUCTION LIMITED

Second Employer

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

Mr. Cosbert Cumberbatch of Cumberbatch & Associates, Attorneys-at-Law for the Employees

Mr. John E. Fuller and Siobhan Quinn-Leandro of John E. Fuller & Co, Attorneys-at-Law for the First Employer

Ms. Safiya L. Roberts of Roberts & Co, Attorneys-at-Law for the Second Employer

2017: November 17

2019: September 13

**DECISION ON APPLICATION TO DETERMINE LIABILITY AS BETWEEN FIRST
AND SECOND EMPLOYERS**

Brown, P;

Introduction

1. By its application filed on 19th August, 2016 the Second Employer applied for an Order directing that: "A preliminary hearing be held to determine the issue of liability of the First Employer and the Second Employer in respect of the

Employees claim of unfair dismissal". The application was supported by an affidavit sworn by Ms. Carol-Ann Skepple, a legal clerk in the Chambers of Counsel for the Second Employer, in which she set out the grounds for the application.

2. Pursuant to the Order of Court dated 28th September 2016, the desired preliminary hearing was held on 17th November 2017 after which the Court reserved its decision and directed that the parties file closing submissions.

The Dispute

3. By their Reference of Complaint filed on November 4, 2008 the Employees commenced these proceedings and identified the issue in dispute between the parties to be unfair dismissal. At paragraphs 6, 7, 18 and 19 of their Amended Memorandum of Claim filed on 21st May 2015, the Employees pleaded that:

"6. Pursuant to the two Contracts mentioned George Dexter Tavernier trading as Tavernier Construction Limited recruited a large body of skilled workmen to work on the Sandals expansion project. The 1st Employer determined the workers rates of pay and their hours of work and was also totally in charge of the recruitment and termination process and it was the understanding of the workers that George Dexter Tavernier trading as Tavernier Construction was the workers Employer.

7. The Employees interacted on a daily basis personally with George Dexter Tavernier. Kier Construction Limited did not give the workers commands or instructions on a daily basis.

18. The Court is asked to determine the liability of the First and Second Employers to pay the termination benefits to which the workers are entitled.

19. The Employees seek the following relief against the First Employer and or alternatively against the Second Employer.

(1) Severance, notice pay, compensation and/or damages for unfair and/or unlawful dismissal.

(2) Such further or other relief as the Court may deem fit."

4. In response, at paragraphs 2, 3, 5 and 13 his Memorandum of Defence filed on 24th November 2009 the First Employer pleaded:

"(2) Paragraph 3 of the Employee's Memorandum is admitted save that its terms were orally altered within days of the agreement being executed

by the employer and over the period of the construction of the Sandals construction the employer sourced labour only for Kier Construction Limited and performed no other services for Kier Construction Limited.

(3) In fact all of the workers sourced by the employer for Kier Construction Limited were in fact and in law employed by Kier Construction Limited and not by the Employer.

(5) Paragraph 4 of the Employee's Memorandum is denied, it was Kier Construction Limited that did the laying off.

(13) Paragraphs 12 and 13 of the Employee's Memorandum are denied. Tavernier Construction was not the employee's employer."

5. At paragraphs 4 and 15 of its Memorandum of Defence filed on 13th May 2016 the Second Employer pleaded:

"4. There was no employer/employee relationship created between Kier Construct and the Employees. The Employees were under the direct control of Tavernier Construction and were told at all material times that they were employed by Tavernier Construction. At all material times, the Employees understood that Tavernier Construction was their employer, as supported by paragraphs 6 and 7 of the Amended Employee's Memorandum.

15. Paragraphs 18 and 19 are denied. Kier Construction did not have an employer/employee relationship with the Employees and therefore are not liable for paying any termination benefits that may be due to the Employees. Kier Construction denies any claims made by the Employees for the relief from the termination, lawful or not, by the employer, Tavernier Construction."

Documentary Evidence

6. The 4 relevant documents to which the First and Second Employers were signatories, and which were all prepared by the Second Employer, are as follows:

- (1) AIA Document – 1997 :
Standard Form of Agreement Between Contractor and Subcontractor dated 31st August 2005 (**the August 2005 Agreement**).
- (2) AIA Document – 1997:
Standard Form of Agreement Between Contractor and Subcontractor Dated 20th December 2005 (**the December 2005 Agreement**).

- (3) KIER CONSTRUCTION Subcontract Agreement dated 13th September 2006 (the September 2006 Agreement).
- (4) Sandals Antigua Expansion – Employer Obligations letter dated July 6, 2007 (the 2007 Employer Obligations Agreement)

7. Selected Articles of the August 2005 Agreement are as follows:

“ARTICLE 4 SUBCONTRACTOR

§4.1 EXECUTION AND PROGRESS OF THE WORK

§4.1.1 The Subcontractor shall supervise and direct the Subcontractor’s work, and shall cooperate and coordinate with the Contractor in scheduling and performing the Subcontractor’s work to avoid conflict, delay in or interference with the work of the contractor, other contractors or the Owner’s forces.

...

ARTICLE 8 THE WORK OF THIS SUBCONTRACT

§8.1 The Subcontractor shall execute the following portion of the Work described in the Subcontract Documents, including all labor, materials, equipment, services and other items required to complete such portion of the Work, except to the extent specifically indicated in the Subcontract Documents to be the responsibility of others.

(Insert a precise description of the Work of this Subcontract, referring where appropriate to numbers of Drawings, sections of Specifications and pages of Addenda, Modifications and accept Alternates.)

SUPPLY OF SKILLED TRADESMEN FOR THE CONSTRUCTION OF THE SUPERSTRUCTURE TO THE CENTRAL FACILITIES AT THE SANDALS ANTIGUA EXPANSION PROJECT.

ARTICLE 10 SUBCONTRACT SUM

§10.1 The Contractor shall pay the Subcontractor in current funds for performance of the Subcontract the Subcontract sum of Eastern Caribbean Six hundred and twenty five thousand, eight hundred and six dollars and 2c (\$625,806.02). subject to additions and deductions as provided in the Subcontract Documents.

ARTICLE 13 INSURANCE AND BONDS

§ 13.1 The Subcontractor shall purchase and maintain insurance of the following types of coverage and limits of liability:

Type of Insurance	Limits of liability
Workmen's Compensation Insurance	\$1,000,000.00

ARTICLE 16 ENUMERATION OF SUBCONTRACT DOCUMENTS

§16.1.3 The following Modifications to the Prime Contract, if any, issued subsequent to the execution of the Owner-Contractor Agreement but prior to the execution of this Agreement:

Modification	Date
Implementation Letter	8/8/2005

8. As to the corresponding Articles in the **December 2005 Agreement** - save that the Contract sum was increased to \$762,656.54 under Article 10.1 and there is no requirement for the Subcontractor to furnish Workmen's Compensation Insurance to the tune of \$1,000,000.00 under Article 13.1 - they are substantially the same as those in the **August 2005 Agreement**.
9. As to the **September 2006 Agreement** the description on the cover page reads:

**"KIER CONSTRUCTION
Subcontract Agreement**

Sub-Contract Works:

Installation of the structure, including internal walls and plaster works, chasing etc. of the Barefoot Restaurant, Dive Pool, Dive Shop Facility, Outside Class, Pool Equipment Room, and Storm Water Holding Tank."

10. The **2007 Employer Obligations Agreement** is substantially reproduced as follows:

"[Kier Construction Limited]

July 6, 2007

Tavernier Construction

Attention: Mr. George Tavernier

Dear Sir,

Re: Sandals Antigua Expansion - Employer Obligations

Following numerous site meetings between the Contractor and Sub-contractor in respect of Tavernier Construction's Contractual and Statutory Obligations, we write to confirm that as the Employer of Labour resources on the Sandals Antigua Expansion, Tavernier Construction is responsible for all severance, notice and holiday payments due to its employees under the Antigua and Barbuda Labour Code and all other Statutory law.

It is agreed, that throughout the currency of the Project, Kier Construction Limited had paid monies to Tavernier Construction through measured works. The Contractor has also paid the Subcontractor gross wages due to labour resources calculated using agreed rates per hour multiplied by the total amount of time worked by the operatives on site. In addition to paying the gross amount due to the workforce, Tavernier Construction has been paid an agreed percentage for profit, on costs and overheads as demonstrated by Tavernier Construction payment certificates.

It is understood and agreed by Tavernier Construction and Kier Construction Limited, sufficient monies have been paid to the Sub-contractor to meet his contractual and statutory obligations. However, through discussions with Tavernier Construction, it has been established that previously paid monies have been utilized elsewhere within the Subcontractor's business resulting in the inability of the Subcontractor to meet all his financial commitments for labour he has employed.

So as not to cause any un-necessary disruption to the construction site or interference with Sandals guests, without prejudice Kier Construction Limited agrees to assist Tavernier Construction in meeting his contractual and statutory obligations by making a payment in the sum of EC\$242,964.33. EC\$100,000.00 shall be paid to Tavernier Construction during week commencing 9th July, 2007.

In consideration of the above, the Sub-contractor agrees:

- a) To the content of this agreement in its entirety.
- b) George Tavernier is empowered to sign for and on behalf of Tavernier Construction.
- c) To pay all his operatives monies due to them in accordance with the laws of Antigua and Barbuda, provide authenticated evidence that these monies have been paid to his workforce who have worked on Sandals Antigua Expansion.

- d) Indemnify the Contractor (Kier Construction Limited) against any claims due or that may become due for unpaid wages, severance pay, holiday pay or any other labour charges in respect of his labour or any other lower tier sub-contractors labour that is due or may become due under the labour ordinance of Antigua and Barbuda.
- e) To ensure that there is no unruly or disruptive behaviour by Tavernier Construction workforce during the process of termination of employment associated with the completion of the project.
- f) Any dispute by the workforce will be dealt with solely by Tavernier Construction with no reference be drawn to Kier Construction Limited whatsoever.
- g) The above agreement does not relieve the Sub-contractor of his obligations under the terms and conditions of Sub-contract.

Agreed for and on behalf of
Kier Construction Limited

Agreed for and behalf of
Tavernier Construction

....

Written and Oral Evidence

Second Employer:

11. Mr. Paul O'Neill, Commercial Manager of the Second Employer filed a witness statement on October 21, 2016 and gave evidence via Skype video call at the hearing. He testified that the Second Employer did not have an employee/employer relationship with the Employees and is not liable to them. Further, he contended that the Second Employer had no agency relationship with the first Employer by virtue of which it could be liable.
12. According to Mr. O'Neill, **the August 2005 Agreement, the December 2005 Agreement and the September 2006 Agreement** were all binding on the First Employer. In particular, Mr. O'Neill testified that:
 - (a) The First Employer was solely responsible for hiring his workforce, paying their wages, terminating or ending their work contracts and managing and supervising them.
 - (b) The First Employer was not engaged as an employee or agent of the Second Employer. He was acting solely as an independent contractor.
 - (c) The First Employer's business was not integrated into that of the Second Employer.
 - (d) The First Employer was responsible for his workforce and was required to meet all the statutory contributions on their behalf.

- (e) All the Employees understood and accepted that they were being hired by the First Employer and that he was their employer.
- (f) By the **2007 Employer Obligations Agreement**, the First Employer confirmed the position that he was liable to meet severance, notice and holiday payments due to the Employees.
- (g) By the **2007 Employer Obligations Agreement** the Second Employer agreed to make a full and final settlement of all monies due under the terms and conditions of the sub-contract to the First Employer in the sum of \$242,964.33 which sum was based on information provided by the First Employer which he was satisfied would cover all of his statutory obligations as the employer of his workforce.
- (h) The works contained in the sub-contracts were completed on or about 31st August 2007 on which date the contract between the First and Second Employers ended.
- (i) In relation to any departures from the agreements, Mr. O'Neill testified that: "From the onset Kier Construction paid Tavernier Construction monies calculated by applying all-inclusive unit rates against the quantity of work executed... to arrive at an amount certified and paid in accordance with the sub-contract agreements. After a period of time this arrangement changed and was based on costs calculated and provided by Tavernier Construction."(my emphasis)

13. Under cross-examination Mr. O'Neill denied that the First Employer's obligation under the sub-contracts was limited to the "supply of skilled and unskilled tradesmen" as stipulated under Article 8:1 of the **August 2005 and December 2005 Agreements**.
14. When pressed by Counsel for the First Employer and the Employees, respectively, Mr. O'Neill pointed to Article 4 and stood his ground. In answer to a suggestion put to him by Mr. Cumberbatch, Mr. O'Neill denied that the Second Employer was jointly responsible for the management and supervision of the works under the contracts.
15. In answer to a question put to him by the Court, Mr. O'Neill testified that there was no breakdown of the total contract sum which was agreed based on the quantity of work as submitted by the First Employer. He testified that as time went on the Employees got paid significantly more than the stated original contract sums.

Employees

16. The witness statement of Mr. Glenmore Nathan, a Carpenter, was filed on April 16, 2015. When called as a witness for the Employees, he testified that he was employed by the First Employer who was subcontracted by the Second Employer to provide construction services.
17. Mr. Nathan further testified that he worked for one year and six months. He stated that "Blinds", who was recruited by the First Employer, lined out the work but after a while a "white man", who was employed by the Second Employer, whose name he does not know, came and said that he, the "white man", is the Supervisor.
18. According to Mr. Nathan, the First Employer effected a series of lay-offs between October 2006 and July 2007. In that regard, he testified that in the last week of July 2007 when he reported for work as usual he was informed by the Second Employer that the workers of the First Employer were not to perform any further duties on site and that they should not return to the site. Further, Mr. Nathan stated that as soon as he reported for work on that day, a "white man", who was employed by the Second Employer, came and said that all the First Employer's men should get off the job site. In addition, he testified that despite being told not to do so, he returned to work the following day and was again told by the Second Employer to leave the job site.
19. Mr. Nathan also testified that when they were told by the Second Employer to leave the job site they went to the Second Employer's office and asked why they had to leave. According to him, they were told by the Second Employer that the First Employer's workers were not to be on the job site anymore.
20. Under cross examination by Mr. Fuller, Mr. Nathan admitted that he never saw the First Employer on the job site. He said that there was no regular Foreman but "Blinds" would tell his gang members what to do and the "white man" would look over things.

First Employer

21. The First Employer's witness statement was filed on November 24, 2009. He testified that in or about December 2005 he was employed by the Second Employer to provide labour only for the project. He referred to Article 8:1 of the **August 2005 Agreement** and maintained that his only obligation was to supply labour. According to him, his job was to find the workers and deliver them to the gate of the job site daily. He also maintained that he did no supervision on the job site.

22. Under cross examination Mr. Tavernier testified that he had nothing to do with the contracts. He said that it was difficult to explain, but he signed them because Mr. O'Neill said it was just for the paperwork. He testified there is no way the amounts stated in the Agreements could pay for what was done by the "nearly 200" workers he supplied.
23. Mr. Tavernier testified that when he signed the first agreement, the rates were provided by Mr. O'Neill. He further testified that when he protested that the stated contract sums could not do the job, Mr. O'Neill responded by telling him that it would not matter because the Second Employer would pay more than the amount stipulated. In addition, he testified that Mr. O'Neill told him that the contracts were just for paperwork and they would not be bound by them.
24. The First Employer also emphasized that he was not paid in accordance with the contract. He insisted that his payments varied according to the number of men he supplied to work on the site. He repeatedly emphasized that the contracts were not binding on him. He repeated that all he had to do was supply the workers and no more. He testified that he transported the workers to the entrance of the job site and the Second Employer exclusively placed them to work at different locations on the job site.
25. As to statutory deductions, Mr. Tavernier testified that he made deductions for the Employee's contributions but made no contributions as an employer of the men he supplied because that was not his responsibility.
26. As to the **2007 Employer Obligation Agreement**,g the First Employer testified that it was made on the morning when the Second Employer terminated the services of about 50 workers and they went to the Second Employer's office to demand their severance pay. He stated that Mr. O'Neill offered to pay-off the men to help them to "cool down" as that was what mattered most at the time. As to signing that document, the First Employer testified that he signed it "under duress".
27. As to payments under the Agreements, the First Employer maintained that he never received any lump sum payments from the Second Employer. All his payments were based on "man-head". Contrary to what was suggested to him by Counsel, he also emphasized that he could not have one supervisor supervising over 200 men on the job site.

The First Employer's Submissions

28. Learned Counsel for the First Employer, Mr. John Fuller, asserted that: "the main question to be determined by the court... is which of the two Employers ... is liable to pay severance pay and other statutory benefits to the Employee's upon the termination of their employment contract".
29. Mr. Fuller accurately and concisely summarized the evidence of three witnesses who testified at the hearing. In his statement of the law, learned Counsel quoted Section C40 of the Labour Code as well as the definitions of Employer and Employee under Section A5.

"A5. "employee" means any person who enters into or works under or stands ready to enter into or work under, a contract with an employer, personally to perform any services or labour, whether the contract be oral or written, expressed or implied; and the term includes a person whose services or labour have been interrupted by a suspension of work during a period of leave, temporary layoff, strike, or lockout, as well as an apprentice whose services or labour may be designed primarily to train such apprentice; but the term does not include established employees of the Government; "

"employer" means any person, including any of his representatives, who contracts for or stands ready to contract for the services or labour of an employee and the term includes anybody of persons corporate or incorporate;"

"C 40. Every employee whose term of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy."

30. In his statement of the law, Mr. Fuller referred to the case of **Johnson v Coventry Churchill** [1992] 3 All E R 14 and quoted the dictum of J.W. Kay QC, at paragraph 19 as follows:

"It is for the Court to examine the realities of the relationship between the parties and, whilst the label put on the relationship by the parties is a factor of importance to be considered, it cannot override the reality of the situation"

31. Based on that case precedent, we endorse Mr. Fuller's submission that this Court is at "full liberty" to make a determination as to who is the employer and may

reach a conclusion which is not in line with what any of the parties has put forward as true.

32. As to the tests to be applied to determine whether an employer/ employee relationship existed between the Employees and the First Employer or the Second Employer, learned Counsel relied on Halsbury's Laws of England (5th Edition Volume 39.) and asserted that there is no single test. He quoted paragraph 15 at page 37 and emphasized that: *"In general, a contract of employment need not be in any particular form. A contract of employment may thus be inferred from conduct which shows that such a contract was intended although never expressed...."*
33. After consideration of the "control test", the "integrated approach", and the "mixed / multiple test" and corresponding authorities, Mr. Fuller submitted that the First Employer was not the employer of the Employees. As a result, he requested that the First employer's name be struck out from the Reference.

Second Employer's Submissions

34. In her Submissions on behalf of the Second Employer, Ms. Safiya Roberts submitted that the Second Employer is not liable as the employer to the Employees because of (a) the contractual relationship between the two Employers, and (b) the course of conduct disclosed by the evidence.
35. According to Ms. Roberts, the three subcontract agreements made in August 2005, December 2005 and September 2006 all clearly show that the First Employer was responsible as the employer of his workforce for the completion of certain works on the project. As such, he is liable for any claim of unfair dismissal.
36. Ms. Roberts submitted that the First Employer's contention that he was only obliged to supply skilled and unskilled tradesmen is not sustainable in light of the provisions in the contracts including those in Article 4 of the two **2005 Agreements and the September 2006 Agreement**.
37. Counsel acknowledged that a change in the payment mechanism as agreed between the parties, and admitted by Mr. O'Neill, effected an amendment to the written contracts but the same did not affect the binding nature of the terms of the other Articles.
38. Further, Counsel submitted that there was no basis or room for reading an implied term into the contracts that the Second Employer would be the employer of the workforce hired by the First Employer.

39. In support of her position regarding the absence of an employment relationship between the Second Employer and the Employees, Ms. Roberts also submitted that the course of conduct between the Employers “prove” that there was no such relationship.
40. Moreover, Counsel submitted that upon the application of the “mutuality of obligation test” and the “control test” the Second Employer is clearly not the employer of the Employees. In particular, Ms. Roberts emphasized that on the totality of the evidence, none of the necessary ingredients under those two tests are present in this case. She maintained that it was the First Employer who hired the workers and paid them. And, unlike the First Employer, the Second Employer had no power to control them. In her view, the First Employer was contracted to and did supervise his workforce and was responsible for terminating their employment.
41. Finally, before making her concluding submission, Ms. Roberts submitted that the **2007 Employer Obligations Agreement** expressly confirms that the First Employer is responsible for all severance, notice and holiday payments due to the Employees. As a result, Counsel concluded, the Second Employer is not liable to the Employees on their claim in these proceedings.

Employees Submissions

42. In his submissions on behalf of the Employees, learned Counsel, Mr Cumberbatch reminded the Court that these proceedings were initially commenced in November 2008 against the First Employer only and that the Second Employer was added pursuant to the order of the Court in November 2009. In his view, given that chronology, it would be “pointless” to determine the preliminary issue now before the Court. Instead, he submitted that the Reference should proceed to trial at the end of which, the court should then determine whether either the First or the Second or both Employers are liable.

Resolution

43. I will resolve the main issue as to which of the two Employers is liable and determine the application before me by considering the most instructive parts of the pleadings, salient parts of the evidence, Counsel’s submissions and the supporting authorities.

44. As to the documentary evidence, I have noted the more instructive terms of the three contracts between the First and Second Employers. In my opinion the most striking terms appear in Article 8.1 of each of the **August 2005 and December 2005 Agreements** which are quoted at paragraph 7 above.
45. In that regard, I note that both contracts derive from the "AIA Document A401™ – 1997 Standard Form of Agreement Between Contractor and Subcontractor". It is common ground that the contracts were both created by the Second Employer from a preexisting template. It is my further understanding that, in particular, the terms of the articles with a line parallel to the left line margin of each page were not part of the "standard form" but were all formulated and inserted by the Second Employer.
46. Article 8.1 of both the **August 2005 Agreement** and **December 2005 Agreement** in the Standard Form required the party completing the form to: *"Insert a precise description of the work of this subcontract..."* The clauses inserted in that Article in both Agreements are all in capitals and further highlighted with the said parallel line. Those clauses in the **August and December 2005 Agreements**, respectively, are as follows:

"SUPPLY OF SKILLED AND UNSKILLED TRADESMEN FOR THE CONSTRUCTION OF THE SUBSTRUCTURE TO THE MAIN ROOM BLOCK AND CENTRAL FACILITIES"

"SUPPLY OF SKILLED TRADESMEN FOR THE CONSTRUCTION OF THE SUPERSTRUCTURE TO THE CENTRAL FACILITIES AT THE SANDALS ANTIGUA EXPANSION PROJECT."

47. The express requirement for the insertion of a "precise description", the use of capital letters, and the use of the parallel line leave no doubt in my mind that Employer deliberately and carefully chose its words in describing "the work" to be carried out under those two subcontracts. In my view, it is instructive that, save for the names of the parties on the cover pages, no other Article of the August and December 2005 Agreements contain insertions made in capital letters.
48. In the circumstances, subject to my findings regarding the course of conduct of the parties, I am inclined to conclude that those clauses, being part of Article 8 in both Agreements should be given their literal meaning according to the words used and the emphasis applied. As a result, I am inclined to find that the "precise description" was paramount and overarching.

49. As a result, all other written contractual obligations in **the August and December 2005 Agreements** and **the September 2006 Agreement** which required the First Employer to “supervise and direct” his work, purchase workmen’s compensation and so on are contrary to or inconsistent with Article 8.1. In any event, there is no evidence before me that those obligations were willingly discharged by the First Employer or were enforced by the Second Employer.
50. It is also noteworthy that the “**Implementation Letter**” dated August 8, 2005, referred to at paragraph 7 above, which modified at least **the August 2005 Agreement**, was not produced by the Second Employer. As a result, without the benefit of the written modifications to the **August 2005 Agreement**, I am left to do the best I can with the available evidence.
51. Based on my assessment of the written and oral evidence of the witnesses and my observations of their demeanours, I find that the First Employer is a more believable witness than Mr. O’Neill. To the extent that their testimonies conflict, I prefer the written and oral evidence of the First Employer. As to Mr. Nathan, although his evidence was partly contradictory and partly supportive of each of the two Employers, I find him to be an honest witness.
52. In the final analysis, on the balance of probabilities, I find that the course of conduct of the parties established the following facts:
- (1) In accordance with Article 8.1 of **the August 2005 Agreement** and **the December 2005 Agreement**, the First Employer was engaged for the limited purpose of supplying the Employees as tradesmen to the Second Employer for the execution of the construction works by the Second Employer.
 - (2) The First Employer discharged his obligation by transporting the Employees from time to time to the job site whereupon they were deployed, directed and supervised by the Second Employer.
 - (3) Apart from recruiting them and paying their wages, the First Employer had no control over the Employees in the daily performance of their work.
 - (4) The sums paid by Second Employer to the First Employer under **the August and the December 2005 Agreements** exceeded the “Contract Sum” respectively stipulated under Article 10 of those Agreements.
 - (5) The First Employer provided the Employees with no tools, materials or equipment for the performance of their work on the job site.
 - (6) The First Employer’s actions in paying their wages and meeting the Employees’ share of the compulsory statutory payments did not relieve the Second Employer of its statutory obligations.
 - (7) The services of the Employees were terminated exclusively by the Second Employer.

- (8) The Second Employer's payment of the sum of \$242,964.33 under the **July 2007 Agreement** was tantamount to a partial discharge of its statutory obligations arising upon the termination of the services of the Employees by reason of redundancy.
- (9) As a result of their conduct at all material times, save for the "precise description" of the work as stipulated in Article 8. 1 of the **2005 Agreements**, neither those agreements nor the **2006 Agreement** governed the contractual relationship between the First and Second Employers.
53. The question as to who was the true employer of the Employees does not turn solely on the matters of fact determined above. That question is a mixed question of fact and law. In the circumstances, I am obliged to consider and apply the judicially formulated tests to fully determine whether an employer /employee relationship existed between the Employees and the First Employer or the Second Employer.
54. In his Submissions learned Counsel Mr. Fuller cited the **Johnson case** which was referred to at paragraph 30 above and submitted that this Court must consider the "realities of the relationship" between the First Employer, the Second Employer and the Employees. The reality of the situation is paramount notwithstanding the "label" which was put on the written terms of the Agreements. Those labels and detailed provisions cannot override the reality of the actual situation which subsisted at the material times.
55. Further, Mr. Fuller also relied on the excerpt from Halsbury's referred to at paragraph 32 above, to the effect that the Court should "examine all the relevant evidence" before coming to a conclusion as to whether a contract of employment existed between the Employees, on the one hand, and First Employer or the Second Employer, on the other hand.
56. I am mindful of the several useful submissions and supporting authorities cited by both Counsel regarding the several tests. The question as to who is the employer was determined by this Court on the application of those tests in Reference 49 of 2014: **D. Gisele Isaac v Board of Education** (the Isaac case). I find it convenient to apply the same approach for present purposes.
57. In the **Isaac case** the Court considered the 2001 judgment of the UK Court of Appeal in **Montgomery v Johnson U Ltd and another** [2001] ICR 819 (the Montgomery case) and the 2007 judgment in the West Indian (Barbados) case of **Sagikor Insurance Co. v Carter and others** 71 WIR 74.

58. In the **Montgomery case**, “the employee entered into a contract with an employment agency for her to do work for a company. In the contract between them, the agency reserved the right to terminate the employee’s services. After the company became dissatisfied with the employee’s performance, she was dismissed by the agency at the request of the company”. At the hearing of a complaint of unfair dismissal, the industrial tribunal held that the agency was the employer.
59. “The appeal of the agency against the decision of the tribunal was allowed by the Court of Appeal which reasoned that “mutuality of obligation and the requirement of control” constituted the “irreducible minimum” requirement for the existence of a contract of employment. And since the agency had little or no control over the employee, a part of the “irreducible minimum”, in the form of sufficient control, was absent. As a result, the employee was not an employee of the agency”.
60. The outcome of that appeal clearly illustrates the learning in Halsbury’s that “...a person may be the employee of another even if a third party has the power of appointing or dismissing him, or of requiring his dismissal, ...”
61. “In the **Sagicor case**, Sir David Simmons CJ delivered the judgment of the High Court of Barbados in which it considered the principal issue of whether the Defendants were engaged under contracts of service or contracts for services. The Plaintiff insurance company argued that the Defendants were employed under contracts for services and the Defendants argued that they were employed under contracts of service. The Learned Chief Justice applied the several tests judicially formulated over time and determined that issue in favour of the workers.
62. The learned Chief Justice first considered the “control test”. Under that test the pertinent question in the instant case is: whether the First or Second Employer could control or had the right to control not only the work which the Employees did but also the manner in which they did it? The answer to this question, as informed by the evidence, points to the existence of an employer/ employee relationship between the Second Employer and the Employees.
63. “According to Simmons CJ at para. 9 of his judgment, the limitations of the control test led to the development of the “organization / integration test”. Under that test, the Employees were the employees of either the First Employer

or the Second Employer depending on whose business it was and whether they were engaged as a part of it. On the application of this test, I am further inclined to conclude that the Employees were employees of the Second Employer.

64. Having noted that the "organization/integration test" ...like the control test, may still be of relevance in some cases". Simmons CJ also considered the "economic reality test" and noted at para 13 that the question of as to the existence of an employer/ employee relationship "can only be settled by examining the whole of the various elements which constitute the relationship between the parties". The various elements gleaned from the course of conduct between the parties also strongly suggest the existence of an employer / employee relationship between the Second Employer and the Employees.
65. In terms of the "economic reality test", the question is: whether the Employees were in business on the account of the First Employer or on the account of the Second Employer? In my view, the Employees were engaged on account of the Second Employer.
66. The Learned Chief Justice also referred to the "mutuality of obligations test", which considers whether it was the First Employer or the Second Employer which had a continuing obligation to provide work for the Employees on a day to day basis and whether there was a corresponding continuing obligation on the part of the Employees to do the work provided by either of the two Employers. In my estimation, the mutual obligations subsisting over the contract periods were clearly between the Employees and the Second Employer.
67. In the instant case, as it was in **the Sagikor case**, the proper comprehensive approach to the main issue requires a thorough consideration of all aspects of the Employees' employment. Was there a nexus or stronger nexus between the Employees and the First Employer or between the Employees and Second Employer during the course of performance of their daily duties? In the final analysis, the nexus between the Employees and the Second Employer was much stronger than that between the Employees and the First Employer.
68. In the premises - taking all the Agreements into account, the manner in which the Employees commenced their employment, the factual circumstances under which they discharged their duties, the general course of conduct of the parties and the principles established by the judicially formulated tests - I find Mr. Fuller's submissions to be more persuasive than those of Ms. Roberts. Having carried out a crucial balancing exercise, I have arrived at the following conclusion.

Conclusion

69. In my opinion, notwithstanding the several terms of the written Agreements and the method by which the Employees were hired, the answers to the foregoing questions favour the existence of an employer / employee relationship between the Employees and the Second Employer. My conclusion is that the Employees were, in fact and in law, employees of the Second Employer. Accordingly, the Second Employer is liable to meet all payments to which the Employees became entitled upon the termination of their services by reason of redundancy.
70. Finally, having regard to the protraction of the proceedings to date, I encourage the Employees and the Second Employer, in collaboration with the First Employer, to endeavour to agree a "sensible and realistic" settlement of all claims by the Employees for severance pay, notice pay and other outstanding benefits to which the Employees are entitled.

Dated this 13th day of September 2019


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Charlesworth O.D. Brown
President

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 13 OF 2008

BETWEEN

SUNDRY WORKERS

Employees

And

**GEORGE DEXTER TAVERNIER
(Trading as Tavernier Construction)**

First Employer

And

KIER CONSTRUCTION LIMITED

Second Employer

JUDGMENT

Hon. Charlesworth O.D. Brown, President