In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2023: No. 02

BETWEEN:

STEVEN HOLLIS

First Appellant

SUZANNE HOLLIS

Second Appellant

HOSPITALITY MANAGEMENT SERVICES LTD.

Third Appellant

and

THE MINISTER OF FINANCE

Respondent

JUDGMENT

Date of Hearing: **22 April 2026**
Date of Judgment: **10 July 2026**

Appearances: **Richard Horseman, Wakefield Quin Limited for the Appellants**
Wendy Greenidge, Attorney General's Chambers for the Respondent

<u>JUDGMENT of Robinson AJ</u>

Introduction

1. The Appellants, Steven Hollis ("**Mr Hollis**"), Suzanne Hollis ("**Mrs Hollis**") and Hospitality Management Services Ltd ("**HMS**") appeal against the judgment of the Learned Senior Magistrate, Wor. Maxanne Anderson dated 5 August 2022 in which the Learned Senior Magistrate found in favour of the Minister of Finance. By the Learned Senior Magistrates' judgment, the Appellants were ordered to pay the Minister of Finance the sum of $145,332.78 plus court costs of $110.

2. The sum found due and owing by the Learned Senior Magistrate was the full amount claimed by the Minister of Finance in respect of unpaid social insurance contributions. This sum was claimed by way of Ordinary Summons issued on 30 July 2019 and the Particulars of Claim served with the Ordinary Summons made clear that the claim was in respect of unpaid social insurance contribution for the period June 2015 to January 2018 for which Mr and Mrs Hollis were claimed to be jointly and severally liable with HMS as employer.

3. The Learned Senior Magistrate heard the matter on 24 January 2022 and 28 April 2022 and rendered a detailed judgment on 5 August 2022. Mr Horseman has represented the Appellants throughout whereas Ms Greenidge did not appear before the Learned Magistrate.

4. The Learned Magistrate had before her witness statements on behalf of the Minister of Finance from Maria Boodram, an employee of the Registrar of Companies dated 9 August 2021 and Tonya Hatherley ("**Ms Hatherley**"), Inspector of the Department of Social Insurance dated 10 June 2021. Maria Boodram was not called to give oral evidence and her witness statement was not challenged. The substance of this witness statement was that at all material times, Mr and Mrs Hollis had been directors of HMS. Ms Hatherley gave oral evidence to the Learned Senior Magistrate and was cross examined by Mr Horseman.

5. On behalf of the Mr and Mrs Hollis and HMS, Mr Hollis was the only witness having provided a witness statement dated 8 October 2021 (which was subsequently corrected as to paragraph 19 only). Mr Hollis was cross examined by Ms Janae Nisbett then appearing for the Attorney General's Chambers. The Learned Senior Magistrate set out in her judgment at some length the key points arising from each cross examination and also received detailed written closing submissions.

6. The Appellants gave notice of intention to appeal on 8 August 2022 and the Notice of Appeal was filed on 20 June 2023.

7. The key issue at trial before the Learned Senior Magistrate was whether HMS was legally and factually the employer of those persons in respect of whom social insurance payments had not been paid rather than St. George's Club which had been a trading name for a company called Seasons Limited. The employees in question had been operating restaurants physically located at St George's Club. The Learned Magistrate found that HMS was the employer and therefore Mr and Mrs Hollis were jointly and severally liable.

8. The Notice of Appeal set out five separate grounds of appeal which can be summarized as follows:

   (a) The Learned Senior Magistrate erred in law and erred in making a finding of fact that HMS was the "employer". The evidence at trial did not support a finding that HMS was the employer.

   (b) The Learned Senior Magistrate failed to take into account or consider that St. George's Club (Seasons Limited) ("**SGC**") exercised all "employer" related duties, that all funds derived from the restaurants' operations were paid into SGC's accounts and that all outgoing funds were paid from SGC's accounts. The Learned Senior Magistrate found that all funds from the operations were paid into HMS's account and it was asserted that this was contrary to the evidence at trial.

   (c) The Learned Senior Magistrate erred by failing to give a reasoned judgment or adequate reasons to support the material finding that HMS was the employer.

   (d) The Learned Senior Magistrate erred in law by finding that the sum of $145,332.78 had been proven in evidence. It was said in the Grounds of Appeal that there was no credible evidence adduced at trial proving that the judgment sum was in fact owed.

   (e) The Learned Senior Magistrate erred in law by failing to accede to the Appellant's strike out application after the close of the case for the Minister of Finance on the basis that quantum had not been proved.

   (f) The Learned Senior Magistrate erred in law in failing to explain on what basis she accepted that the sum of $145,332.78 was proved in evidence.

9. There is clearly a degree of overlap in these Grounds of Appeal and as Mr Horseman noted in his written submission the two key issues are whether HMS was the employer and whether quantum of unpaid social insurance had been proved. Mr Horseman submits that HMS was not the employer and quantum was not proved whereas Ms Greenidge

contends the opposite. Before looking at the evidence and arguments in more detail, I will set out the law on the procedure for civil appeals of this sort and then the statutory background to the issues before the Court.

10. It is also relevant to note that following the lodging of the appeal, the Minister of Finance made an application by Amended Summons dated 29 December 2023 for permission to file and rely on two additional affidavits each sworn by Gershon Gibbons, Director for the Department of Social Insurance. That application was pursuant to 14(5) of the Civil Appeals Act 1971 and was heard by Wheatly AJ on 12 June 2024 and refused. The written submissions for the Respondent on the hearing of the appeal before me on 22 April 2026 unfortunately referred to this excluded evidence. I therefore invited Ms Greenidge to file amended written submissions following that hearing and these were filed on 24 April 2025. I am grateful to Ms Greenidge for these amended submissions. I have not had regard to the excluded affidavits.

<u>Law on the Procedure of Civil Appeals</u>

11. The Civil Appeals Act 1971 section 14 provides as follows:

> (1) Subject to any other provision of law, upon the hearing of an appeal the Court may allow the appeal in whole or in part of may remit the case the court of summary jurisdiction to be retried in whole or in part and may make such other order as the Court may consider just.
>
> (2) All appeals to the Court shall be by way of re-hearing on the record, and shall be by notice of appeal, and no writ of error or other formal proceedings other than such notice of appeal shall be necessary.
>
> (3) The Court shall have power to draw all inferences of fact which might have been drawn in the court of summary jurisdiction and to give any judgment and make any order which ought to have been made.
>
> (4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.
>
> (5) The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit of deposition.

12. Therefore, under the Civil Appeals Act 1971 the Court has broad powers in the conduct of an appeal. The appeal is a re-hearing on the record, the Court can draw all inferences of fact which might have been drawn in the court of summary jurisdiction, and the Court has full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition. However, section 14(4) mandates that misdirection or improper reception or rejection of evidence shall not be a successful ground of appeal unless the same has resulted in a "substantial wrong or miscarriage of justice". In deciding this appeal I have had careful regard to section 14.

13. I have had the benefit of the Appeal Record which included very detailed notes taken at trial by the Learned Senior Magistrate. I have also had the benefit of professionally transcribed audio of the hearings that took place on 24 January 2022 and 29 April 2022 (included at Tabs 5 and 6 of the Appellant's Submissions binder).

<u>Contributory Pensions Act 1970</u>

14. The Contributory Pensions Act 1970 ("**1970 Act**") contains the applicable statutory obligations which were found by the Learned Senior Magistrate to give rise to civil liability on the part of the Appellants.

15. Liability to contribution the Pension Fund is dealt with in section 4 of the 1970 Act. Section 4(1)(a) and (b) provides definitions of "an employed person's contribution" and "an employer's contribution".

16. Section 4(2) of the 1970 Act places an obligation on the employer to pay not just the "employer contribution" but also the "employed person's contribution".

17. This provides as follows:

> An employer liable to pay an employer's contribution is respect of a person employed by him shall in the first instance by liable to pay also, on behalf of and to the exclusion of that person, the employed person's contribution payable by that person for the same contribution week, and for the purposes of this Act contributions paid by an employer on behalf of an employed person shall be deemed to be contributions paid by the employed person.

18. Section 7 of the 1970 Act then permits an employer to deduct the "employed person's contribution" which has been paid by the employer from the employee's salary, wages or other remuneration. Section 7 is subject to the important proviso:

Provided that no deduction may be made from any salary, wages or remuneration other than such as are paid wholly or partly in respect of the contribution week for which the contribution is payable.

19. The obligation on the employer to make the relevant payments falls due on the last working day of the following month (see section 4(7)).

20. Section 8 then sets out certain further obligations and for this Judgment it is relevant to note that section 8(4)(a) provides that it is the obligation of the employee to provide the employer his or her social insurance number and section 8(5)(c) provides that when employment comes to an end, it is the obligation on the employer to report this to the Director of Social Insurance.

21. The scheme of the 1970 Act is clear. The obligation is on the employer to deduct and pay both the employer's and employee's portion of social insurance and the employer is not permitted to deduct from an employee's remuneration that which it does not pay to the Government.

22. Section 32 then deals with civil proceedings for recovery of unpaid contributions. It provides in material part:

(a) All sums due to the Fund shall be recoverable as debts due to the Crown, and without prejudice to any other remedy, may be recovered summarily as a civil debt by the Director.

(b) Without prejudice to any other remedy for recovery of sums due to the Fund, the directors and officers of a company or other body corporate that owes sums to the Fund are liable jointly and severally for sums that become due while they were directors or officers, and proceedings may be taken under this section against all or any of them for recovery of those sums.

23. It is thus clear from the statutory scheme that there is joint and several liability of directors and officers of corporate employers. Clearly the legislative objective is to ensure that social insurance contributions that ought to have been paid by employers and which have been deducted from employee remuneration are in fact paid.

24. However, what the 1970 Act does not do is impose any statutory implication of employment or any alteration of the ordinary rules on proving the quantum of any debt due – only a debt which is in fact due from an employer is recoverable under the 1970 Act. On a civil recovery action (such as the proceedings before the Learned Senior Magistrate) liability of the employer upon which joint and several liability extends to

directors and officers, and the quantum thereof must be proved to the ordinary civil standard of proof – i.e. on the balance of probabilities.

<u>Evidence before the Learned Senior Magistrate</u>

25. As noted above the evidence on behalf of the Minister of Finance was given by Ms Hatherley. Ms Hatherley supplemented her witness statement with fairly extensive additional questioning in chief and was cross examined at some length by Mr Horseman. The Learned Senior Magistrate summarized Ms Hatherley's evidence in chief at paragraphs 4-10 of her judgment and the cross examination at paragraph 11.

26. The essential and relevant aspects of Ms Hatherley's evidence is as follows.

27. HMS was registered with the Department of Social Insurance on 13 June 2012 and account number 1368842 was assigned to HMS. The application for registration was made by an "Employer Registration Form" signed on 18 May 2012 signed by a Theresa Hall (Record of Appeal page 71). This was received by the Department of Social Insurance on 21 May 2012 and provided the address of 60 Water Street, St Georges, GE 05 as the Company's Registered Office, street address and mailing address. The "type of business" was "Restaurant Management & Operations". Only one employee was registered at this time and that was Piero Casalicchio whose start date was given as 1 May 2012 (Record of Appeal page 72).

28. By letter dated 12 January 2016 Mr Hollis wrote an employee (referred to only as "Luca") in the following terms (Record of Appeal page 52):

> It is with regret that I have to advise you that due to circumstances beyond our control, the partnership between Hospitality Management Services Ltd (HMS) and the St. George's Club that has existed since we commenced operating the restaurants in 2013 has come to an end. As you know, HMS has always operated with substantial support from the St. George's Club and without it we are unable to continue. Accordingly, we will not be resuming operations when your vacation concludes at the end of January. Indeed, without the financial support of the St George's Club, HMS will need to be put into liquidation. Therefore, unfortunately, we are giving you two weeks' notice that your employment with HMS is terminated.
>
> We appreciate all your hard work and support and wish you all the best in your future endeavours.'

29. The letter dated 12 January 206 was on HMS letterhead which set out the address at 60 Water Street, St George's, GE 05.

30. HMS came onto Ms Hatherley's radar on 16 August 2016 when an employee called into the Department of Social Insurance to check on their contributions since their employment with HMS was terminating. On the same date, Ms Hatherley wrote to HMS for the attention of Mr Casalicchio stating, inter alia, that the HMS account had been selected for inspection because of an overdue balance of $114,067.20.

31. Ms Hatherley wrote to HMS to the attention of Mr Hollis on 14 February 2017 and enclosed a letter informing him that the Department of Social Insurance records indicated an outstanding balance on HMS' account of $142,834.80. Ms Hatherley followed up on this letter by email on 17 March 2017 and in this email, Ms Hatherley asked Mr Hollis to make contact. Ms Hatherley against wrote on 19 April 2017 and 17 October 2017 and also had a telephone conversation with Mr Hollis.

32. Ms Hatherley's witness statement records at paragraph 15 (Record of Appeal page 49) that "after numerous unanswered phone calls and emails to Mr Hollis in regards to HMS to have their account settled the outstanding social insurance account was referred to the Debt Enforcement Unit…" and at paragraph 16 that "at no time during correspondence with Mr Hollis prior to court proceedings did he inform DOSI [Department of Social Insurance] that HMSL [HMS] was not responsible for the outstand debt…".

33. Ms Hatherley also gave evidence of more than one employee calling into the Department of Social Insurance to query their contributions. Ms Hatherley's evidence in this regard was that on 20 November 2017 an employee called into the Department of Social Insurance to query contributions and on 24 November 2017 provided a copy of his work permit and pay stubs to verify employment by HMS. The Department of Immigration later confirmed that the employee's work permit was issued to HMS for the period 13 May 2016 – 13 May 2017.

34. Ms Hatherley provided evidence of a third employee who on 22 March 2018 attended the office of the Department of Social Insurance to enquire about missing contribution payments and this employee stated that they worked at the SGC. The records held by the Department of Social Insurance, however, recorded that this individual was employed by HMS. In this case the employee commenced proceedings in the Magistrates Court against Seasons Ltd – The St. Georges Club as 1st Defendant, HMS as Second Defendant and Mr and Mrs Hollis as 3rd Defendant (case reference 19CV00803). In that case, the Wor. Maxanne Anderson (not at that time Senior Magistrate) gave judgment for the plaintiff for sums due in respect of unpaid social insurance contributions as against Seasons Ltd – The St Georges Club in the sum of $4,568.75 and against HMS and Mr and Mrs Hollis in the sum of $19,322.62.

35. Ms Hatherly also recorded in her evidence several communications with SGC. Ms Hatherley wrote to SGC on 14 February 2017 and was informed that Mr Hollis was the point of contact for HMS. On 6 December 2017 Ms Hatherley was informed by the hotel manager at SGC that HMS was responsible for employment for the period May 2016 - January 2017.

36. The Learned Senior Magistrate set out in her judgment at paragraph 11 a summary of the cross examination of Ms Hatherley by Mr Horseman.

37. Ms Hatherley confirmed in cross examination that she had not conducted an inspection of HMS or attended 60 Water Street, St George's given that there had been no reply from HMS to inquiries from the Department of Social Insurance. Ms Hatherley also confirmed that she confirmed the connection between employer and employee on the basis of pay stubs and had some pay stubs on her file although they were not in evidence. Ms Hatherley also placed emphasis on the letter from HMS dated 12 January 2016 referred to above. Ms Hatherley concede that had an inspection been carried out this would have confirmed the number of employees and the relevant period for contributions. It was put to Ms Hatherley that Seasons Ltd had made the last payment to the Department of Social Insurance and Ms Hatherley conceded that she did not know who had made payments and did not know that Seasons Ltd had made the last payment.

38. Evidence on behalf of HMS and Mr and Mrs Hollis was given by Mr Hollis whose witness statement was received into evidence. The Learned Senior Magistrate set out in detail the nature of Mr Hollis' evidence at paragraphs 13(a)-(s) of the Judgment.

39. Mr Hollis gave evidence of meeting Mr Casalicchio and introducing him to Sally and John Kyle who owned and operated the SGC. After discussion it was agreed that Mr and Mrs Hollis would assist Mr Casalicchio to manage the restaurants and the Kyles suggested that a management company be formed for the purposes of managing the restaurants on behalf of the SGC. Mr and Mrs Hollis had no experience in restaurant management, and their role was limited to taking care of decoration and so on in the premises. While Mr and Mrs Hollis had no experience in the restaurant business they allowed themselves to become directors of HMS.

40. A management agreement was entered into dated 20 March 2012 (Record of Appeal pages 85-87). Mr Hollis's evidence was that HMS was not the employer and that this was clear from the name of the company HMS. Mr Hollis referred in particular to Recital B (Record of Appeal page 86) which provided that:

> SCG wishes to retain the services of HMS to manage the operations of the Restaurants and to grant HMS an option to lease the Restaurants' premises and to operate the Restaurants more particularly described herein.

41. Mr Hollis also referred in his witness statement to clause 4.2 (Record of Appeal page 82) which dealt with staffing and recorded that all staff were to remain employees of SGC.

42. A further agreement was then entered into in late 2012 (Record of Appeal, page 88-101) to supplement the more formal agreement of 12 March 2012. Mr Hollis referred in particular to headings and points in this document which referred to "Staff Management" and "Social Insurance, Payroll Tax, Health Insurance & Company Pension Contributions: Requirement". The latter heading was followed by the following four categories:

    (1) Balance each employees' contributions for period worked to respective department
    (2) Put forth contribution forms
    (3) Add and delete employees as needed
    (4) Make payment to vendors as directed.

43. The Learned Senior Magistrate drew attention to the above point 4 and highlighted the words "as directed". During the appeal hearing, I referred counsel to the concluding paragraph of this document which reads (my emphasis):

> The above functions will be carried out by The St. Georges Club <u>for HMS Limited</u> with the caveats that the additional rent, the monthly fees and the shareholding changes are executed as discussed and agreed with Piero Casalicchio, Managing Director, HMS Limited.

44. Mr Hollis candidly admitted in his witness statement that HMS accepted that it had work permits issued to it in its name but that this was at the urging of those running SGC. A lease was entered into in respect of the restaurants but this was silent on staffing issues. On the issue of payment of salaries, Mr Hollis' evidence was that all employees were paid by SGC and "deductions from salary were to be made by SGC".

45. Mr Hollis admitted that he wrote the letter to Luca (see above at paragraph 28) in the context of learning that SGC was in financial difficulty. Mr Hollis stated that "I was advised that HMS should cease operations and therefore I wrote this letter on instruction as I was concerned about the facts that were now out in the public domain that SGC was in financial difficulty" (Record of Appeal page 83).

46. Mr Hollis's evidence was that he had no access to the accounts of SGC as they were controlled by Mr Kyle and that all funds derived from the restaurants were paid into SGC's bank accounts and all outgoings such as staff salaries were paid from the account of SGC.

47. The Learned Senior Magistrate sets out at paragraph 15 of her judgment the cross examination of Mr Hollis and as noted above, I have had the benefit of the complete transcripts. It is fair to say that for the most part, Mr Hollis repeated many of the matters set out in his witness statement that I have briefly summarized above. Mr Hollis was clear in his evidence that he did not consider that HMS was the employer of the restaurant staff and that all relevant bank accounts and bills were dealt with by SGC. As far as he was concerned, SGC had taken responsibility to pay all staff and this included pension and insurance. Mr Hollis contended that HMS was a "third party".

48. All paper correspondence was passed over to SGC but he accepted that they would receive Department of Social Insurance notices once per month and that in 2016 they realised that demand notices were not being paid. On Mr Hollis' evidence it was the Kyles of SGC who insisted that HMS as manager of the restaurants should apply for work permits.

<u>The Lower Court Decision</u>

49. The Learned Senior Magistrate posed the question: Was HMS an Employer? The Learned Senior Magistrate answered this key question in the affirmative. While the Appellants criticise the Learned Senior Magistrate in explaining her reasoning, I consider that this criticism is unfair. It is in my view clear from paragraph 16 of the Judgment that the Learned Senior Magistrate considered that the following factors were important in answering this question in the affirmative as she had:

    (a) HMS managed the restaurants for SGC;
    (b) The letter of 12 January 2016 addressed to "Luca" clearly stated that HMS was the employer of Luca and that Luca was an employee of HMS;
    (c) More than one employee of HMS called into the Department of Social Insurance to check on contributions made by HMS;
    (d) HMS applied for work permits.

50. While the Learned Senior Magistrate also referred to the annual company returns from HMS as an indication of an employer status, in my view this was an aspect of corporate governance of HMS rather than an indication of whether HMS was an employer of the relevant staff. While the Learned Senior Magistrate did not refer to any of the authorities relied on by the Appellants she did state that she had reviewed these and concluded that she had made a finding of fact that the Appellants were liable for the weekly contributions to the pension fund and that this was regardless of the agreements made between the Appellants and SGC.

51. The Learned Senior Magistrate appears to have placed considerable emphasis on the clause of the agreement of 18 December 2012 referred to above at paragraph 42 which

referred to SGC making payments "as directed". The Learned Senior Magistrate interpreted this to indicate that payments to vendors would be made by SGC as directed by HMS and that this would have included contributions under the Contributory Pensions Act 1970.

52. The Learned Senior Magistrate did not deal in any detail with regard to arguments about quantum and held that since the claim was a claim for a sum of money rather than for damages, the arguments of the Appellants on this point were wrong.

Arguments on Appeal

(a) Appellants

53. The core submission of Mr Horseman was that the Learned Senior Magistrate fell into error in finding that HMS was the employer. On behalf of the Appellants it was argued that the correct finding would have been that HMS was not the employer but rather that SGC was.

54. As in the Court below, the Appellants rely on *Halsbury's Laws of England, Volume 39* in setting out the test at common law as to whether the person is an employee.

55. This provides in part that:

> *"There is no single test for determining whether a person is an employee. The test that used to be considered sufficient, that is to say the control test, can longer be considered sufficient… and is now only one of the particular factors which may assist a court or tribunal in deciding the point. More recently, the 'integration' or 'organisation' test has been suggested, proposing that the important question was whether the person was integrated into the enterprise or remained apart from, and independent, of it. However, while both of these factors are still pertinent, the modern starting point for deciding whether a contract of service (now generally referred to as a 'contract of employment') exists is to ascertain if:*
>
> *(1) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in performance of some service for his master ('mutuality of obligation');*
> *(2) He agrees, expressly or impliedly, that in performance of that service he will be subject to the other's control in a sufficient degree to make that other master ('control');*
> *(3) The other provisions of the contract are consistent with it being a contract of service.*

The final classification of an individual now depends upon a balance of all relevant factors, fine though that balance sometimes might be, with 'mutuality of obligation' and 'control' being seen as the 'irreducible minimum' legal requirements for the existence of a contract of employment…
The way in which the parties themselves treat the contract and the way in which they describe and operate it are not decisive; and a court or tribunal must consider the categorisation of the person in question objectively…

56. The Appellants also referred to *Harvey on Industrial Relations and Employment Law "Who is the Employer"* (at paragraph 132-02 and following) which in turn referred to the UK Employment Appeal Tribunal case of Clark v. Harvey Westwood et all UKEAST/0018/20. The Appellants placed particular emphasis on this case for the proposition (in a non-Bermudian context) that the existence of a work permit is not necessarily determinative of whether a person is employed or not while accepting that it is a factor to be taken into account. On the facts of Clark, the Claimant had not seen the work permit documentation and the Employment Appeal Tribunal found that it did not provide any evidence of the intention of the Claimant (see paragrapg54(e)). I accept the Appellants' submission that the existence of a work permit is not necessarily determinative of whether a person is an employee or not.

57. The Appellants also rely on the following statement of principle in Clark at paragraph 52 from which I have omitted the cross references to other authorities:

"In my judgment, the following principles, relevant to the issue of identifying whether a person, A, is an employee of B or C, emerge from those authorities:

a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law…
b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the relevant evidence…
c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties…
d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how… Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer? In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed…"

58. The extract from *Harvey* and the Employment Appeals Tribunal in Clark referred to the United Kingdom Supreme Court case of Autoclenz Ltd v. Belcher [2011] UKSC 41 which emphasised the need for a court determining whether an employee/employer relationship existed to ask itself what the true agreement was between the parties and ought to look at the reality of the obligations and how the parties conducted themselves in practice.

59. The Appellant argued that in the case of HMS, SGC performed all of the "employer functions" and particular criticism is made of the Department of Social Insurance for not conducting an inspection pursuant to section 29(2) of the 1970 Act. While Mr Horseman noted that Ms Hatherley accepted that inspections were used to "… confirm the employee/employer relationship", no inspection was even attempted in this case. He submitted that the lack of inspection ought to have been taken into account when considering whether the Respondent had proved that HMS was the employer.

60. Mr Horseman also drew attention to the fact that the last payment on account to the Department of Social Insurance was made by Seasons Limited (i.e. SGC).

61. The Appellants criticise the Learned Senior Magistrate's reasoning and explanation of that reasoning in the Judgment. They say that it was wrong for the Learned Senior Magistrate to rely on a single provision in the agreement of 18 December 2012 and that it was not clear from the Judgment as to what weight was given to the totality of the written agreements between HMS and SGC.

62. Mr Horseman refers to the judgment of Subair Williams J. in Fernandez v. Burgess [2018] SC (Bda) 73 App in which the necessity for and importance of reasons being given in the Magistrates' Court is emphasised.

63. With regard to the appeal on quantum, while the Appellants accept that there was evidence before the Learned Senior Magistrate that the total of $145,332.78 was the outstanding debt it is contended that there was no or no satisfactory evidence to how this sum was calculated. The Appellants' case is that the Respondent failed to prove the amount due and again that the Learned Senior Magistrate failed to explain adequately this part of her decision.

64. A further point taken by the Appellants in the lower court was that if the Respondent was intending to produce computer records, then compliance with Sections 27D and 27E of the Evidence Act 1905 was required. In summary, the Appellants appeal on this point boils down to the submissions that there was no appropriate evidence before the lower court of the quantum so that the Court could be assured that the sum claimed was due and owing.

(b) Respondent

65. The Respondent submits that the Learned Senior Magistrate was correct to hold that HMS was the employer responsible for social insurance contributions pursuant to section 4 of the 1970 Act and that Mr and Mrs Hollis are jointly and severally liable.

66. Ms Greenidge submitted that the evidence does indicate that HMS was at all times the employer responsible for applying for work permits irrespective of who actually signed the application form as representing the employer. The Respondent points to section 61 of the Bermuda Immigration and Protection Act 1956 ("**1956 Act**") and in particular subsection (2) which provides that "Any such application [for grant of permission to engage in gainful employment] shall be made on behalf of the applicant by the prospective employer who shall be responsible for ensuring that the application is complete and accurate in accordance with the Guidelines issued by the Minister for the purposes of this section".

67. The Respondent also relies on the initial registration application to the Department of Social Insurance which was made on behalf of HMS.

68. The Respondent makes reference to section 18(1) of the Employment Act 2000 which makes provision with regard to termination of contracts of employment. Ms Greenidge places emphasis on the letter of 12 January 2016 by which Mr Hollis on behalf of HMS wrote to Luca terminating his employment with HMS.

69. With regard to the argument of the Appellants that SCG exercised all "employer" related duties, the Respondent contends that the agreement dated 18 December 2012 (referred to above at paragraph 40) provided that SGC was to make payments to vendors "as directed". Ms Greenidge argues that it was not possible for HMS to delegate its duties with respect to the payment of social insurance contributions.

70. On the issue of quantum, the Respondent points to the Replies to Further and Better Particular ordered by Magistrate Chin on 4 October 2019. It is submitted that these particulars detailed all billing dates, all payments made on account, all employees listed on HMS' account with the Department of Social Insurance for the period 1 June 2015 to 23 October 2019. It is argued that this showed the amount due of $145,332.78 (pages 13-14 of the Record of Appeal).

<u>Discussion</u>

71. Notwithstanding Mr Horseman's skilled arguments to the contrary on behalf of the Appellants, in my view the Learned Senior Magistrate was correct to hold that HMS was

the employer and thus that Mr and Mrs Hollis as directors were jointly and severally liable for unpaid social insurance contributions which have to date not been paid in respect of the relevant employees.

72. It is quite clear from the Judgment of the Learned Senior Magistrate that having heard the witness testimony and reviewed the documentary evidence that she was satisfied that there were several important factors which were relevant in determination of the identity of the employer.

73. As noted above, those factors were: (a) HMS was the manager of the restaurants for SGC; (b) Mr Hollis clearly stated in the letter of 12 January 2016 that HMS was the employer of Luca; (c) more than one employee of HMS came into the Department of Social Insurance to check whether contributions had been made by HMS; (d) work permits for employees were in the name of HMS.

74. From these factors the Learned Senior Magistrate held that at all material times HMS held itself out as the employer. The Learned Senior Magistrate also pointed to the terms of the agreement of 18 December 2012 and I will return to the terms of this and the earlier agreement below.

75. I accept that the Learned Senior Magistrates' reference to the commentaries and case law to which she was referred was very brief and her Judgment did not set out any analysis of the legal test. However, it does not appear to me that the propositions for which they stand were or are in dispute.

76. I have set out above certain extracts from the commentary to which I was referred together with some of the decided cases that were drawn to my attention. It seems to me that as a matter of statutory interpretation of the 1970 Act there is nothing to indicate that a meaning is to be given to the terms "employer" and "employee" that differs from the common law meaning of these terms. As *Halsbury's* notes "the final classification of an individual now depends upon a balance of all relevant factors".

77. Thus what is clear from the extract from Halsbury's to which I was referred (and referred to above) is that the factual context of the inquiry into whether or not a person is or is not an employee is all important. The parties own view of their relationship is relevant but not decisive. The Court must look at the reality of the obligations and the reality of the situation (see <u>Autoclenz</u> at [30]).

78. It seems to me that in this case, a highly relevant factor that the Learned Senior Magistrate was correct to consider was that HMS was the holder of the work permits under the 1956 Act for restaurant employees for whom work permits were necessary.

79. The argument put forward by the Appellants appears to be that even though they were aware that pursuant to the 1956 Act, HMS had applied to the Department of Immigration for work permits for expatriate staff, that at one and the same time, with regard to the Department of Social Insurance, HMS was not to be considered the employer at all. This seems to me to be artificial. A company and its directors cannot in my view make a positive application to the Government of Bermuda for permission under the 1956 Act to employ staff and then turn round to the Department of Social Insurance (or the Court) and expect this status as employer to be treated as a mistake or some sort of unfortunate accident.

80. While I accept as held in Clark that the name of an employer on a work permit is only a factor, it does seem to me on the facts of this case and in the statutory context of the 1956 Act imposing strict restrictions on employment rights to be an important one.

81. The explanation for the letter written by Mr Hollis to Luca dated 12 January 2016 seems to be that Mr Hollis wrote this letter in something of a panic because SGC was in serious financial difficulty.

82. While this may have been Mr Hollis' motivation for writing this letter, the letter clearly refers to HMS as Luca's employer. There was nothing in the factual situation of which I am aware that explains why Mr Hollis would refer to Luca as an employee of HMS if Hr Hollis did not in fact think that this was the case. Again, I consider this correspondence which was generated in a context entirely unrelated to the claim by the Respondent for unpaid social insurance contributions to be a strong indicator of the actual factual situation.

83. Related to the factor that work permits were in the name of HMS is the fact that one or more employees made contact with the Department of Social Insurance to inquire about contributions. There was clearly factual evidence before the Learned Senior Magistrate that one or more employees other than Luca believed that they were employed by HMS. This is, of course, on its face a subjective understanding of who the employer was and while not decisive is another relevant factor.

84. The reliance by the Learned Senior Magistrate on the factor that HMS was the manager of the restaurants for SGC is less clear cut but on balance also in my view supports the finding that HMS was the employer.

85. With regard to the "Restaurant Management Services & Option Agreement" dated 20 March 2012, Mr Hollis in his evidence drew attention to clause 4.2 of this agreement which provided that:

> Staffing – All staff shall remain employees of SGC; however, as manager of the Restaurants, HMS shall be responsible for supervising and directing all of the Restaurants' employees. HMS shall be responsible for identifying prospective new hires [sic] will make appropriate recommendations to SGC in this regard. In disciplinary matters, HMS shall liaise with SGC which shall remain responsible in enforcing appropriate measures.

86. Even if the contractual documentation were to stop there, there is a strong indication that "control" in the practical sense of the restaurant employees rested with HMS who were entitled to supervise and <u>direct</u> all the restaurant employees.

87. What was not referred by Mr Hollis, however, is the fact that the Restaurant Management Services & Option Agreement is on its face stated to be intended to be a short-term agreement. As its name suggests, it incorporated an option agreement to lease the two restaurants and it provides in clause 9.2.4 that upon the commencement of the leases, the reference to SGC in, *inter alia*, clause 4.2 was to be read as a reference to HMS. As a result, the Appellants reliance on this agreement seems to me to be somewhat misplaced.

88. While a formal lease of the restaurant known as Blackbeard's Hideout was entered into in December 2013 (Record of Appeal pages 102-129), the Restaurant Management Services & Option Agreement must be read together with the further agreement between SGC and HMS dated 18 December 2012 (Record of Appeal pages 99-101). The Learned Senior Magistrate placed emphasis on the fact that in this agreement, under a heading that included social insurance, it was provided that SGC would make payment to vendors "as directed". In my view, a more important provision in this agreement is the language immediately above the signature block that provides that the listed functions (including those relating to social insurance) were to be carried out by SGC <u>for</u> HMS. I do not accept, therefore, that the long list of functions set out in the agreement dated 18 December 2012 were functions that SGC was agreeing to carry out for its own account.

89. I accept that there are a number of other factors which must be taken into the balance and which point the other way. One is that the banking arrangements for the restaurants appear (at least on the whole) to have been managed by SGC. I accept that the Learned Senior Magistrate was incorrect in finding that it had been established the proceeds of the restaurant operations had been paid into HMS accounts. Another is that the liquor licences for the restaurants were in the name of SGC.

90. As is made clear by the commentary to which I have referred above, when applying the common law test as to whether a party is an employer or employee the Court must stand back and look at all of the circumstances. Having done so, and having looked at the factors that were canvasses before me and which I have reviewed above, I agree with the Learned Senior Magistrate that HMS was the employer for the purposes of the 1970 Act.

91. On the issue of quantum, I agree with Mr Horseman's criticism of the Learned Senior Magistrate that there is no real reasoning in the Judgment as to why she considered quantum in the sum of $145,332.78 to have been proved. There does appear to have been an unhelpful focus on the question of whether damages were being claimed when clearly this is a claim for a debt.

92. I have no doubt, however, that there was sufficient evidence before the Learned Senior Magistrate to find that on the balance of probabilities there was a debt for unpaid social insurance contributions proved against the Appellants. There was clear witness evidence from Ms Hatherly that $145,332.78 was the sum due while she could not stand over the actual calculation of the sum.

93. The criticism levelled by Mr Horseman on the Department of Social Insurance and Ms Hattersley for not conducting an inspection as is permitted by the 1970 Act only goes so far. It supports the proposition that the Respondent could perhaps have produced before the Magistrates' Court better evidence had such an inspection been carried out but the court below and this court on appeal must consider the evidence that was in fact produced and consider the civil standard of proof. I do not accept that there was anything wrong in the Learned Senior Magistrate refusing Mr Horseman's application for a dismissal at the end of the Minister of Finance's case in the Magistrates' Court.

94. I am, however, concerned that the quantum figure allowed by the Learned Senior Magistrate was overstated. I say this for the following reasons.

95. The Respondent relied heavily on the Replies to Further and Better Particulars and the document attached thereto. One of the documents attached as an "Employer Financial History Report" (Record of Appeal pages 13-14) which appears to be a running account for HMS from 2 June 2015 to 26 January 2018. What concerns me is that this account starts in June 2015 with an opening balance of $72,221.64 which does not cover the period of June 2015 – January 2018 as claimed in the Ordinary Summons but relates to a prior period. Thus, it appears likely to me (without deciding this) that the amount of social insurance contributions for the period covered by the Ordinary Summons (i.e. June 2015 – January 2018) has been overstated. I am also concerned that the sum ordered to be paid by HMS by the decision of the Magistrates Court dated 12 February 2021 in the case of Carlit v. Seasons Ltd – The St. Georges Club et al (Case no. 19CV00803) (referred to above at paragraph 34) in the sum of $19,322.62 (assuming this was in fact paid to the employee) may also have been included at least in part in this running total.

96. With regard to the Appellants appeal as to quantum my decision is to allow this and subject to the point I make immediately below, to remit the assessment of quantum to the

Magistrates Court. I am concerned, however, that this is likely to cause further delay in what has been a protracted appeal.

97. Therefore, what I proposed to do is to allow the parties 28 days from the date of this judgment to agree the appropriate quantum for unpaid social insurance contributions for HMS from June 2015 - January 2018. If that can be agreed, then the order that I will make is to substitute this sum for the sum ordered to be paid by the Learned Senior Magistrate. Unless such agreement can be reached as to the sum due by the expiration of 28 days, then the issue of quantum is remitted to the Magistrates' Court.

Summary

98. In summary, I find that the Learned Senior Magistrate was correct to find that the Minister of Finance had established on the balance of probabilities that HMS was the employer so that Mr and Mrs Hollis were jointly and severally liable with HMS for unpaid social insurance contributions. I am also satisfied on the balance of probabilities that for the period June 2015 to January 2018 unpaid social insurance contributions were due from HMS. However, I am not satisfied for the reasons given that the sum of $145,332.78 was proved as the debt due and owing and I will dispose of the appeal on quantum in the way outlined at paragraph 97 above.

99. I will hear Counsel in respect of costs and the precise form of order.

Dated this 10th day of July 2026

THE SEAL OF THE SUPREME COURT OF BERMUDA

SIGNED

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MR. KEITH ROBINSON

ASSISTANT JUDGE, SUPREME COURT OF BERMUDA