

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2018/0109

BETWEEN:

KARENA DOROTHY MATTHEW

CLAIMANT

And

CHALLENGER'S ENTERPRISES LTD.

VERNON CHALLENGER

DEFENDANT

APPEARANCES:

Mr. Justin L Simon K.C of counsel for the Claimant

Ms. Gail Christian of counsel for the Defendant

2024: December 10;

2025: March 27

DECISION

- [1] **DRYSDALE, J.:** This case concerns a claim to pierce the corporate veil due to allegations of fraud, in order to satisfy a judgment debt obtained by the Claimant against a separate company.

BACKGROUND

- [2] The Claimant commenced these proceedings on 28th February 2018, seeking to recover a judgment debt in the amount of \$129,986.00, together with interest and costs, from November 2011 in respect of High Court Claim ANUHCV2006/0313 between the Claimant and Modern Image Construction Co. Limited.
- [3] The Defendants deny any liability to the Claimant, arguing that there is no justification for piercing the corporate veil. They contend that the First Defendant and Modern Image Construction Co. Limited are separate and distinct entities with different types of business and different personnel.

THE PLEADINGS

The Claim

- [4] The Claimant's claim avers she is authorised to commence these proceedings by virtue of a power of attorney filed in the land registry on 18th February 2005 which authorized her to do all things necessary in respect of Block 41 2195B Parcels 325 and 326 (hereinafter "the Property").
- [5] The Claimant's case is that the Second Defendant incorporated Modern Image Construction Company (hereinafter "Modern Image") on August 30, 2004, to engage in the building and construction business, with the Second Defendant as its sole director and shareholder.
- [6] On June 8, 2006, the Claimant sued Modern Image for breach of contract and negligence regarding construction work on the Property. A default judgment was obtained on May 3, 2007 with damages being assessed on November 8, 2011. Damages in the sum of \$129,986.00 with legal costs of \$14,000 were awarded by the Master. However Modern Image failed to comply with the judgment and thereafter ceased doing business but remains on the register of companies.
- [7] The First Defendant was incorporated on October 12, 2012, by the Second Defendant and his wife, Mikel Challenger, for the purpose of engaging in construction, woodworking, and agriculture. The Second Defendant possesses a controlling interest in the company, holding 995 shares, while his wife owns 5 shares. They both serve as joint directors.

- [8] The Claimant further asserts that the Second Defendant, by virtue of being the sole director and shareholder of Modern Image Construction Company, and the majority shareholder and a director of the First Defendant, effectively acts as the directing mind and controlling force behind both companies. Additionally, the Claimant alleges that the Second Defendant, who is a builder and construction worker by profession, manages the First Defendant's operations in the same way he managed those of Modern Image.
- [9] The Claimant alleges that the Second Defendant intentionally incorporated the First Defendant to conduct construction work which it actively does and discontinued Modern Image construction business to avoid paying its debts, including the judgment debt.
- [10] Modern Image lacks assets and is no longer operating, precluding it from satisfying the judgment debt. Furthermore, its assets and potential construction projects have been transferred to and are being handled by the First Defendant, under the Second Defendant's direction. The Claimant contends that the Second Defendant's actions are fraudulent and that the First Defendant was deliberately established as a means of preventing the Claimant from recovering the judgment debt owed by Modern Image.

The Defence

The First Defendant

- [11] The First Defendant denies the Claimant's case in its entirety, specifically contesting the Claimant's authority to commence these proceedings. Furthermore, the First Defendant asserts that it had no business dealings whatsoever with Modern Image and exists as a wholly separate and distinct legal entity.
- [12] The First Defendant denies having received any contractual work or other business dealings from Modern Image and further denies ever possessing any assets belonging to Modern Image. Therefore, the First Defendant maintains that it bears no responsibility or liability whatsoever for Modern Image's debts.

The Second Defendant

- [13] The Second Defendant also denies any liability for the debts of Modern Image. In his defence, the Second Defendant acknowledges that, while Modern Image remains technically registered with the Companies Registry, it has not conducted any business operations for a period exceeding eight years.
- [14] With respect to the legal proceedings between Modern Image and the Claimant, the Second Defendant maintains that legal counsel was retained to represent Modern Image in the matter, and that he relinquished all responsibility to said counsel. It was only upon service of the judgment in default that Modern Image became aware of the fact that its instructions had not been implemented. The judgment in default was subsequently presented to him, in his capacity as a director of Modern Image, as a fait accompli.
- [15] The Second Defendant asserts that, by the year 2009, Modern Image had experienced a significant decline in its client base and possessed no assets. He notes that, in 2007, a Delta Truck and certain small tools had been provided to Modern Image on a loan basis. The Second Defendant further contends that the subsequent economic downturn severely impacted the company, rendering it unsustainable and non-viable. Consequently, Modern Image ceased business operations at the end of 2009.
- [16] The Second Defendant made reference to another company under his sole directorship, Modern Wood Creations. He explained that this company was able to obtain subcontracts for millwork within a more upscale market segment, thereby differentiating it from Modern Image, which catered to a clientele in the low to lower-middle income bracket.
- [17] The Second Defendant states that, in 2012, three years after the cessation of Modern Image's operations, the First Defendant was incorporated. The stated objects of the First Defendant include the provision of millwork services, construction services, and the operation of a plant nursery. The Second Defendant denies that Modern Image transferred any assets to the First Defendant and

further denies any personal liability for the outstanding debts of Modern Image. The Second Defendant contends that the Claimant has no reasonable cause of action to institute these proceedings

The Reply

[18] The Claimant in its reply filed on 6th June 2018 counters that the failure of the Second Defendant to wind up Modern Image given the admitted unsustainability of that company but instead incorporated the First Defendant with similar objects provides grounds for the claim particularly in light of section 17 of the Companies Act.

[19] The Claimant contends that the incorporation of the First Defendant by the Second Defendant was a deliberate act intended to frustrate the Claimant's efforts to enforce the judgment debt owed by Modern Image. The Claimant asserts that the claim is grounded in the well-established principle of piercing the corporate veil.

THE EVIDENCE

[20] Both parties filed witness statements in support of their respective cases. The Claimant presented the testimony of two witnesses, while the Defendants submitted statements from three witnesses. Since the evidence largely mirrored the pleadings, only relevant evidence will be summarized below.

The Claimant

Karen Dorothy Matthew - Donawa

[21] The Claimant provided a detailed account of the circumstances surrounding the signing of a contract with Modern Image and the subsequent events that culminated in a damages award of \$129,986.00. The Claimant further testified that, as of the present date, the aforementioned order has not been satisfied, resulting in the accumulation of interest. This accrued interest, when combined with the original judgment amount and associated legal costs, brings the total outstanding sum to \$190,780.96.

- [22] The Claimant further deposed that the Second Defendant in his capacity as sole director of Modern Image was aware of the judgment debt that the failure to satisfy the debt appeared to be deliberate.
- [23] The Claimant reiterated the similar objectives of Modern Image and the First Defendant, stating that the First Defendant performs construction work under the Second Defendant's direction, just as Modern Image did. The Claimant further stated that the Second Defendant incorporated the First Defendant to avoid the Modern Image judgment debt, noting that the First Defendant was incorporated after 2011, around the time Modern Image ceased operations.
- [24] The Claimant expressed the opinion that it was peculiar for the Second Defendant to incorporate the First Defendant for the purpose of executing construction projects, while Modern Image, despite remaining registered as a construction business, is not currently engaged in any such activity. The Claimant also expressed that it was unlikely that Modern Image a company that had been in operation for at least 6 years did not have any assets as claimed by the Defendants.
- [25] Finally, the Claimant expressed that despite the Second Defendant being the alter ego of both companies that all recent construction works are being executed by the First Defendant to the exclusion of Modern Image.
- [26] Under cross-examination, the Claimant's legal authority to institute these proceedings was challenged. The Claimant acknowledged that the original power of attorney, granted in 2005, was revoked in 2018, although she was unable to specify whether the revocation occurred in February or April. She confirmed that a new power of attorney was executed in 2024 and conceded that, at the time she signed her witness statement in 2019, she did not possess a valid power of attorney. She stated, however, that she was unaware of the revocation by her mother until later.
- [27] The Claimant admitted that after the default judgment against Modern Image, nothing was done for a year, following her attorney's advice. Subsequently, due to a disagreement, she retained alternate legal counsel to assist her in recovering the monies owed pursuant to the judgment.
- [28] The Claimant further admitted that she possessed no direct proof or evidence regarding the business dealings of Modern Image. She confirmed that her interactions were exclusively with Modern Image and that she was unaware of any assets or contracts having been transferred from

Modern Image to the First Defendant. The Claimant also acknowledged that her new legal counsel had corresponded with the Transport Authority, inquiring as to whether Modern Image had any registered vehicles, and that the response indicated no vehicles were recorded as being, or having been, under the ownership of Modern Image. The Claimant did not accept this as conclusive evidence that Modern Image had no vehicles. She stated that such a finding was highly unlikely.

[29] The Claimant stated that she was unaware when Modern Image ceased trading but accepted that the last annual return filed concerned 2009.

[30] During re-examination, the Claimant explained she later learned from her mother about the document revoking her initial power of attorney. She identified this as the recent power of attorney and confirmed it revoked the 2005 power of attorney on April 28, 2018.

Dwight Donawa

[31] The witness, who is the husband of the Claimant and a carpenter by trade, provided testimony primarily focused on his previous interactions with the Second Defendant, Modern Image, and the Claimant concerning the construction of the house on the Property. His testimony also covered the subsequent events that ultimately resulted in a judgment being obtained against Modern Image. However, he offered no direct evidence pertaining to the present case and the claim that the companies in question were a sham and that the corporate veil should be pierced.

[32] Nonetheless the witness was cross examined on his knowledge of Modern Image. Particularly the witness was asked about his knowledge of any assets or contracts of Modern Image which were transferred to the First Defendant. The witness conceded that he had no knowledge of Modern Image's business operations. When questioned about Modern Image's current status, he stated that while it remained registered, it was not actively conducting any business.

[33] The witness was ultimately questioned as to the factual basis of any connection between Modern Image and the First Defendant. In response, he stated that the Second Defendant served as a director in both companies and that both companies engaged in building and construction activities.

The Defendants

Jacquie Browne

- [34] The witness testified that she is the Operations Manager of the First Defendant and has been employed by the company since 2016. She described her role as involving the management and monitoring of the company's three departments: construction, woodworking, and plant nursery and provided further details concerning her work activities.
- [35] The witness acknowledged that the First Defendant was incorporated in October of 2012. She further stated that, from the time of its inception, the woodwork shop, which produces windows, doors, cabinetry, and other related items, has consistently secured contracts across a range of price points. The witness also testified that the First Defendant secured one substantial construction contract in 2016. However, she explained that the company's business primarily consists of smaller-scale projects, largely centred around the renovation of residential and commercial properties, and that these projects typically include a significant millwork component.
- [36] The witness further stated that the plant nursery represents a relatively small percentage of the First Defendant's overall revenue. She explained that the nursery, which employs two individuals, is currently focused on expanding its stock and establishing a presence within the landscaping industry. Finally, the witness noted that the First Defendant also engages in the provision of heavy-duty equipment services and public management services, citing the Public Works Department as one of its clients.
- [37] Under cross-examination, the witness, who serves as the operations manager of the First Defendant and has been employed since 2016, confirmed that the First Defendant engages in building construction. She reiterated that, since 2016, the First Defendant has secured only one major construction contract, a high-end residential property located in Pearn's Point. The witness also confirmed that the First Defendant commenced providing heavy equipment services sometime after her employment and currently rents of such equipment to the Ministry of Public Works.

Mickel Brann

- [38] The witness a Director of the First Defendant, stated that the company's 2012 incorporation was a strategic move to leverage opportunities created by Modern Wood Creations, another company established by the Second Defendant in 2007. He explained that Modern Wood Creations, specialized in the trading of furniture manufacturing and supply and doors and windows and successfully targeted a niche market in upscale and gated communities.
- [39] The witness testified that the First Defendant was established not only to capitalize on this existing niche market but also to broaden the range of services offered. These expanded services include the operation of a plant nursery, the provision of heavy-duty equipment services, project management services, and building construction. He clarified that woodworking constitutes the staple business activity of the First Defendant, and as such, the woodworking crew represents the company's only consistently employed staff complement.
- [40] The witness testified that the plant nursery operates on a very limited scale. He further advised that, since its incorporation, the First Defendant has secured only one major contract, with its general contracting work consisting of smaller-scale renovations and build-outs, all of which are underpinned by millwork.
- [41] He asserted that the First Defendant has absolutely no association with the defunct Modern image as the objects of both are entirely different with different clientele and employee focus.
- [42] On cross examination the witness testified that she had no involvement in the operations of Modern Image. However, she affirmed her active participation in the First Defendant as a director and shareholder, and further stated that she plays an active role in the company's business operations.
- [43] The witness confirmed that she became aware of the default judgment against Modern Image through her husband, the Second Defendant, prior to the incorporation of the First Defendant. However, she stated that the judgment was not brought to the attention of the First Defendant.
- [44] The witness acknowledged that the sole director of Modern Image also holds a directorship in the First Defendant. Initially, she asserted that the objectives of the two companies were entirely

dissimilar. However, she subsequently conceded that building and construction are among the stated objectives of both companies.

The Second Defendant

- [45] The Second Defendant, a director of the First Defendant and the incorporator/director of Modern Image, stated that Modern Image served the lower to lower-middle class market. He explained that the company failed after 2007 due to the economic downturn.
- [46] The Second Defendant testified that, upon receiving the claim filed by the Claimant against Modern Image, he promptly retained legal counsel to represent the company and furnished all necessary information for the purpose of filing a defence. However, this action was not taken, and he subsequently became aware that a judgment had been entered against Modern Image. He stated that, by the time he learned of the judgment, Modern Image had ceased operations, possessing neither ongoing work nor any assets.
- [47] The Second Defendant testified that, by 2009, he was entirely reliant on Modern Wood Creations, a company incorporated in 2007, for the provision of millwork. He explained that Modern Wood Creations cultivated a base of repeat customers who, in turn, referred the business to others within their social network. He further stated that the access afforded by Modern Wood Creations facilitated the incorporation of the First Defendant, which provides a broader range of services, including woodworking, heavy-duty equipment services, project management, building construction, renovations, architectural drawings, and the operation of a plant nursery. He further deposed that The First Defendant operates as a 'one-stop shop' by partnering with construction industry specialists, allowing them to offer a wide array of services.
- [48] The Second Defendant testified that the First Defendant is a demonstrably different entity than Modern Image, possessing a distinct focus, clientele, and product offerings. He stated that the majority of the First Defendant's contracts pertain to woodworking projects, given that construction activities are not a daily occurrence, whereas the demand for cabinets and other wood products remains consistently present.

- [49] During cross examination the Second Defendant acknowledged that Modern Image still existed as a valid company at the companies' registry but insisted that it has not traded. The Second Defendant suggested that the main type of business for Modern Image was low-income housing and renovations. He accepted that he personally signed the annual returns concerning Modern Image and that the last annual return filed for the year 2009 listed construction as the main type of business.
- [50] The Second Defendant acknowledged the contract between the Claimant and Modern Image for home renovations. He initially denied the Claimant took legal action for incomplete work, claiming he was unaware of any proceedings until the default judgment. However, when confronted with his own witness statement, where he admitted instructing counsel to represent Modern Image, he conceded that he had known about the proceedings from the beginning but stated that the firm retained did not act in accordance with his instructions to defend the case.
- [51] The Second Defendant admitted receiving notice for the damages assessment hearing and that Modern Image's counsel was present. Despite the \$129,986.00 damages award¹, he claimed Modern Image was already defunct, blaming the economic downturn and rising costs. While initially stating records would prove this, he admitted there were no official records of Modern Image's decline. He then reverted to blaming rising costs and again shifted responsibility to his attorney, claiming he was poorly represented.
- [52] The Second Defendant was questioned about the First Defendant's business. He denied that construction was the main type of business. Later he admitted filing a 2009 annual return indicating construction as the primary business. He claimed the First Defendant focused on woodworking and the plant nursery but then asserted that 'construction' was a broad term including woodwork. However, he simultaneously denied that Modern Image could have engaged in similar work despite his definition of construction.
- [53] The Second Defendant maintained that the woodworking and other services provided by the First Defendant were outside the scope of what Modern Image could have done. He justified this by

¹ Judgment debt included damages in the sum of \$129,986.00 plus interest and costs

stating that he operated other companies, specifically Modern Wood Creations, which were already dedicated to woodworking activities.

[54] When asked why the First Defendant was incorporated, he stated he needed to provide for his family and saw a significant financial opportunity in the high-end renovation sector.

[55] Finally, he outlined the process of winding up a company, emphasizing that it requires the settlement of outstanding debts. He then explicitly denied that his failure to wind up Modern Image was motivated by an intention to avoid paying its debts.

The Issues

[56] The issues before the court are as follows:

- i. Whether the Claimant has successfully demonstrated that the corporate veil should be pierced.
- ii. If yes who is responsible for the debt owed by Modern Image.

However, before delving into the substantive issue a preliminary matter concerning the Claimant's ability maintain these proceedings will be first addressed.

DISCUSSION AND DISPOSITION

Discussion

Preliminary Matter – Admissibility of the Claimant's evidence

[57] As a preliminary matter before addressing the core issue, I will determine whether the Claimant's evidence given by witness statement is admissible in circumstances where the Claimant signed the witness statement under a power of attorney that had been revoked. A new power of attorney was obtained and disclosed shortly before the trial to the Defendants. The Defendants did not object to the Claimant's evidence in chief although the Defendants questioned the Claimant on the power of attorney during cross examination.

[58] It is a well-established legal principle, that an individual acting on behalf of another must possess the requisite authority to do so. A power of attorney serves as the formal instrument granting such

authority. Therefore, any objection to the admissibility of the Claimant's evidence was required to be raised by the Defendants prior to the Court's acceptance of her evidence-in-chief. The Defendants failure to raise a timely objection to the admission of the Claimant's witness statement effectively functioned as an implied acceptance of its admissibility. In essence, by remaining silent, the Defendants signalled their acquiescence to the introduction of this evidence into the record. This conclusion is reinforced by their cross-examination of the Claimant regarding the power of attorney, which demonstrated awareness and capacity to challenge admissibility. As no application to strike the evidence was made, and considering that no demonstrable prejudice resulted from the irregularity of the witness statement's execution under a revoked power of attorney, the Court will not retroactively (and on its own initiative) exclude evidence already forming part of the record.

Issue – Whether the Corporate Veil should be pierced

[59] The present matter, as has been indicated, concerns the Claimant's endeavour to set aside the corporate veil and thereby impose liability upon the Defendants for the judgment debt owed by Modern Image. The Claimant specifically alleges that the Second Defendant, with a deliberate and improper intent, incorporated the First Defendant. This incorporation, the Claimant argues, was not a legitimate business undertaking, but rather a calculated manoeuvre designed to perpetuate the construction business previously operated by Modern Image while simultaneously evading the financial obligations arising from the judgment debt owed to the Claimant. The Claimant further alleges that the First Defendant is a sham and that the Second Defendant as the controlling mind transferred assets and construction works to the First Defendant to frustrate enforcement of the judgment debt.

[60] The Defendants refute these claims, emphasizing that Modern Image ceased operations in 2009, while the First Defendant was incorporated three years later in 2012. Moreover, they highlight a fundamental difference in company structure with Modern Image being operated by a single director and shareholder, while the First Defendant is governed by two directors, including the Second Defendant, who are also shareholders. They further assert a clear market divergence, with Modern Image catering to low-income housing and the First Defendant targeting an upscale clientele. They also argue that the Claimant has failed to properly plead and or establish fraud which is necessary

to determine that a company is a sham company. Finally, they reiterate the separate legal identities of the two companies

[61] It is a fundamental and well-established principle emanating from the case of **Salmond v A Salmond & CO Ltd**² that a company possesses a distinct legal personality, entirely separate from its directors and shareholders. This principle establishes the company as an independent entity with its own rights and responsibilities, protecting directors and shareholders from personal liability for company debts and actions.

[62] Consequently, for one company to be held liable for the debts or obligations of another, it is necessary to pierce the corporate veil. The case of **Prest v Petrodel Resources Limited and others**³ clarified that this process “is for the purpose of depriving the company or its controller of the advantage they would have obtained by the company’s separate legal personality.” This doctrine, which operates as an exception to the established principle of separate legal personality, allows the court to disregard the corporate entity and hold its directors or shareholders personally liable. Lord Sumption, in **Prest v Petrodel Resources Limited and others**⁴ expressed that this limited power is crucial to prevent abuse and maintain the law’s effectiveness and also underscored the need for clear boundaries for its application. He stated that:

“I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognized and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law”

[63] The doctrine of piercing the corporate veil is applied in limited instances, such as fraud, improper purpose, and, most relevantly, the evasion of legal liability. **Prest v Petrodel**⁵ reinforces the principle that courts are empowered to pierce the corporate veil when an individual deliberately

² [1897] AC 22

³ [2013] UKSC 34

⁴ [2013] UKSC 34

⁵ [2013] UKSC 34

seeks to frustrate an existing legal liability, which is precisely the allegation made by the Claimant. Sumpton J who delivered the leading judgment espoused that:

"I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have derived from the company's separate legal personality."

- [64] The Claimant bears the burden of proving, on a balance of probabilities, that the First Defendant was incorporated or used as an abuse of the corporate form to evade the judgment debt owed by Modern Image. The test for demonstrating evasion is fact-specific, requiring a flexible approach rather than strict adherence to inflexible rules. Nonetheless, as established in **Prest v Petrodel**, which is the governing legal authority, proving that the First Defendant was incorporated for an improper purpose and that both companies operate under a common controlling mind are essential components of this test. These factors, alongside the issue of the non-existence of transferable assets, though not the sole determinants, are essential considerations in this case.

Assets and Contracts

- [65] The Claimant has not provided direct documentary evidence substantiating a formal transfer of assets or contracts from Modern Image to the First Defendant. While this absence is significant, it is not necessarily determinative, particularly given the unique circumstances of both companies. Modern Image was essentially a sole proprietorship, operated by a single individual, and the First Defendant is a closely held entity directed by the Second Defendant and his wife. In such situations, the formalities of asset transfers may not always be meticulously documented. Therefore, the court acknowledges that the lack of explicit documentary proof, while a factor to be weighed, does not automatically preclude the possibility of a transfer. However, the court also recognizes that the likelihood of a transfer is diminished by several factors: Modern Image ceased operations three years prior to the First Defendant's incorporation; a search revealed no vehicles ever registered in Modern Image's name; and it is improbable that a contract would remain dormant for such an extended

period. These factors, while not conclusive, weigh against the probability of a direct transfer and against the Claimant's case.

Improper Purpose

- [66] In order for the Claimant to succeed the Claimant must establish on a balance of probabilities that, that the First Defendant was incorporated or utilized as a mechanism to circumvent the enforcement of an existing or anticipated judgment debt against another company. The Claimant cites the timing of the First Defendant's incorporation and the similarity of its objects as supporting evidence. The Defendants refute this assertion by positing that the new company was formed to cater to a distinct clientele and further suggest that Modern Image had ceased business operations two years prior to the judgment and three years prior to the First Defendant's incorporation. The Defendants also emphasize the dissimilarity of objects between Modern Image and the First Defendant.
- [67] The parties are in dispute regarding the similarity of the objects of Modern Image and the First Defendant. Despite initially acknowledging that both companies listed building and construction as their objectives, the Second Defendant subsequently stated and maintained that the companies were essentially dissimilar. The Second Defendant's assertions that the companies' objects differed, and that the First Defendant's primary focus was not construction are directly refuted by the evidence. Both companies' stated objects include construction. The Second Defendant's subsequent attempt to create a distinction by claiming the First Defendant's focus was millwork, only to admit it falls under construction, highlights an attempt to create a false distinction.
- [68] Another primary point of contention is the distinction in clientele, with Modern Image focusing on low-income housing and the First Defendant being incorporated to serve a more upscale and affluent clientele. However, a difference in clientele does not alter a company's stated objectives and cannot be considered a material distinction between two companies regarding their permitted scope of work. While a company may choose to target a specific market segment, its fundamental corporate objectives, as defined in its memorandum or articles of association, remain unchanged. Therefore, focusing on clientele differences as a means to argue for distinct corporate identities is unmeritorious.

- [69] The Defendants argue that the First Defendant's inclusion of agriculture, as opposed to Modern Image's objects, demonstrates a distinct difference. However, the Second Defendant's evidence clarifies that this 'agriculture' translates to a plant nursery, which is part of a broader business strategy. The First Defendant operates as a 'one-stop shop' for construction clients, offering services like heavy-duty equipment, architectural drawings, and project management, alongside the plant nursery. This integrated approach demonstrates that agriculture is not a separate business, but a service tailored to complement their construction offerings. Therefore, despite the differing wording of their objects, Modern Image and the First Defendant operate with essentially the same core business focus.
- [70] The Defendants' evidence that the First Defendant offered services beyond its stated objects, including heavy-duty equipment and architectural drawings, demonstrates that the First Defendant operated with a degree of flexibility. This flexibility, which could also have been exercised by Modern Image whose objects like the First defendant are not limited, undermines the Defendants' stated reasons for incorporating the First Defendant.
- [71] The incorporation of the First Defendant, occurring ten months after the assessment of damages against Modern Image, raises a substantial question concerning its potential intent to evade that judgment debt. However, this timeline cannot be considered in isolation. The First Defendant, while incorporated post-judgment, shares similar business objectives with both Modern Image and Modern Wood Creations. The court has observed a distinct pattern in the Second Defendant's business practices, specifically his incorporation of at least six companies. Notably, many of these entities exhibit overlapping objectives, seemingly designed to perform marginally differentiated functions. This approach contrasts with the practicality of consolidating these activities within a single, established corporate structure. This pattern suggests a deliberate strategy of incorporating new companies to address perceived variations or nuances in intended purpose, rather than utilizing existing corporate entities. This strategy offers a plausible explanation for the incorporation of the First Defendant. It appears the Second Defendant may have opted to create a new company, despite the fact that Modern Wood Creations, which was already operational and profitable, could have efficiently performed the same type of work. Thus, the timing of the First Defendant's incorporation, while suspicious, fits within a broader pattern of the Second Defendant's business practices.

[72] Following the precedent set in **Prest v Petrodel**, the court recognizes that the corporate veil should only be pierced when incorporation is a facade to avoid liability. While the Claimant has presented evidence of Modern Image's closure with an unpaid judgment debt, and the Second Defendant's incorporation of the First Defendant with overlapping business objects shortly after damages were assessed, these facts, on their own, do not warrant piercing the corporate veil. Especially when considering the existence of Modern Wood Creations, an active company that could have carried out all the First Defendant's functions, rendering the new incorporation seemingly redundant. Importantly, there is no proof of asset, contract, or goodwill transfer from Modern Image to the First Defendant as it appears Modern Image was already defunct and without assets at the time judgment was entered. Therefore, it does not automatically follow that the First Defendant was incorporated for the purpose of evading the judgment debt. There is no evidence that the First Defendant is a continuation of Modern Image or that it has been used as a vehicle to conceal assets or frustrate enforcement efforts.

Controlling Mind

[73] The controlling mind is simply the person who effectively dictates its decision making, business operations and financial dealings. Establishing the 'controlling mind' is crucial because it helps to ascertain whether the corporate form is being used legitimately for business purposes or whether it is being abused to shield individuals from liability or to perpetrate fraud. It is also a crucial consideration on whether to pierce the corporate veil.

[74] The Claimant asserts that the Second Defendant is the controlling mind of the First Defendant, arguing that his construction skills, vital to both companies' operations, combined with his control, supports this claim. This assertion is based on the First Defendant's primary business activity being construction. The fundamental principle of legal evidence places this burden squarely on the Claimant, not on the Defendants to disprove it. To discharge this burden, the Claimant must furnish concrete and persuasive evidence substantiating the Second Defendant's controlling influence over the First Defendant's operations.

[75] In this case, the evidence presented by the Claimant is insufficient. While the Second Defendant readily admitted to complete control over Modern Image, describing it as a one-man company there

is a significant lack of detailed evidence regarding his specific roles and functions within the First Defendant, beyond his acknowledged construction skills. Conversely, the First Defendant provided evidence of a corporate structure with Jacquie Browne playing a key operational role. Furthermore, there is no evidence of commingling of funds between the Defendants and or the Defendants and Modern Image nor any evidence that the Second Defendant exercises absolute control over the First Defendant.

- [76] Therefore, based on the totality of the evidence presented, the Claimant has failed to establish that the Second Defendant is the controlling mind of the First Defendant

Disposition

- [77] In the present case, the Claimant has failed to adduce sufficient evidence to establish that any assets or contracts rightfully belonging to Modern Image were transferred to the First Defendant. Furthermore, the Claimant has not demonstrated that the First Defendant has been utilized to actively obstruct or defeat legitimate enforcement efforts pertaining to the outstanding judgment against Modern Image.
- [78] While the court acknowledges its concern regarding the timing and specific circumstances surrounding the First Defendant's incorporation, as well as the notable similarity between the stated business objects of both companies, these factors, standing alone, are insufficient to warrant the extraordinary remedy of piercing the corporate veil. The doctrine of piercing the corporate veil is a drastic measure, reserved for instances where the corporate form is demonstrably being used as a facade to perpetrate fraud or evade legal obligations.
- [79] In this instance, the absence of clear and compelling evidence of asset diversion or direct frustration of enforcement efforts is particularly significant. The stringent legal threshold required for piercing the corporate veil necessitates a high degree of certainty that the corporate entity is being abused. Mere suspicion or circumstantial evidence, while potentially indicative of questionable conduct, does not meet this rigorous standard. Consequently, the court finds that the Claimant has failed to satisfy the requisite burden of proof to justify disregarding the separate legal personality of the First Defendant.

Order

[80]

In light of the above it is hereby ordered that:

- a. The Claimant's Claim Form and Statement of Claim is hereby dismissed
- b. The Claimant shall pay the Defendants prescribed costs pursuant to CPR 65.12

Jan Drysdale

High Court Judge

By The Court



Registrar