

THE EASTERN CARIBBEAN SUPREME COURT
MONTSERRAT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. MNIHCV2014/0028

Between:

BERTRAND BURKE

Claimant

and

MILDRED KIRWAN

First Defendant

HIGHLANDER PROPERTIES LTD.

Second Defendant

Before:

Master Fidela Corbin Lincoln

On Written Submissions:

Chivone Gerald of Counsel for the claimant

Sylvester Carrott of Counsel for the defendant

2014: December 11th

Pleadings - Lifting or piercing the corporate veil - Whether the statement of claim discloses facts capable of establishing a basis for lifting the corporate veil- Whether a company struck off the Register of Companies can sue and be sued –Sections 483, 511 and 512 of The Companies Act Cap 11:12

HELD: granting the claimant leave to amend the statement of claim, staying the claim against the 2nd defendant until its restoration to the Register of Companies and awarding costs of \$1000.00 to the defendant:

1. The circumstances in which a court may be prepared to lift or pierce the corporate veil include:



- (1) where the company was being used for a deliberately dishonest purpose;
- (2) to recognise the receipt of the company as that of the individuals in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individuals;
- (3) in family matters where assets are vested in a one man company and the company is considered an alter ego of a party;
- (4) in cases of impropriety linked to the use of the company structure to avoid or conceal liability; and
- (5) when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control

Prest v Petrodel Resources Ltd and others [2013] 4 All ER 673.

2. The statement of case must clearly set out the facts upon which a party relies and include facts which are essential to establishing the claim. If there is an allegation of fraud or dishonesty or a need to rely on such allegations the particulars of same must be pleaded. While it is not necessary to use the word "fraud" or "dishonesty" the facts which make the conduct fraudulent or dishonest must be pleaded and be unequivocal. It is not sufficient to say that these particulars will be made clearer at disclosure or when witness statements are filed.

Saint Lucia Motor and General Insurance Company v Peterson Modeste HCVAP 2009/00. **Armitage v Nurse** (1997) 2 AER 705.

3. The striking off of a company off the Register of Companies pursuant to Section 511 of the **Companies Act** Cap 11:12 of the Laws of Montserrat is evidence that the company is no longer registered under the Act and consequently its legal status or corporate personality acquired upon its registration is extinguished or suspended.

JUDGMENT

- [1] **Corbin Lincoln M [Ag]**: On 3rd July 2014 the claimant commenced a claim against the defendants for the sum of \$15,900.00 being the amount allegedly due to the claimant for survey and subdivision fees in relation to a parcel of land which was registered in the name of the 2nd defendant.

[2] Pursuant to the powers conferred by the Civil Procedure Rules 2000 ("CPR") Part 26.2 the parties were directed by the court to file affidavits and submissions on the following issues:

- (1) Whether the claimant's statement of case discloses any reasonable grounds for bringing a claim against the 1st defendant, a director of the 2nd defendant in her personal capacity.
- (2) Whether the 2nd defendant is and was at the time the claim was commenced on 3rd July 2014 an existing legal entity capable of being sued

Does the claimant's statement of case disclose any reasonable grounds for bringing a claim against the 1st defendant, a director of the 2nd defendant, in her personal capacity?

The Statement of Claim

- [3] The statement of claim consists of 7 paragraphs.
- [4] Paragraph 1 of the statement of claim avers that the claimant is a licensed surveyor practicing in Montserrat and Antigua.
- [5] Paragraph 2 of the statement of case avers that the 1st defendant is a director of the 2nd defendant and that the 2nd defendant is registered as company number 14 of 2008 under the Laws of Montserrat.
- [6] Paragraph 3 of the statement of claim avers that the 2nd defendant was the registered proprietor of a parcel of land ("the land") from 28th November 2008 to 10th October 2013.
- [7] Paragraphs 4 and 5 of the statement of claim aver that in October 2008 the 1st defendant instructed the claimant to survey and subdivide the land and the claimant completed the work on or about 12th November 2014.
- [8] Paragraphs 6 and 7 of the statement of claim aver that:

"The claimant submitted an Invoice to the First Defendant in or about the month of February 2009, and the said invoice illustrated the amount of

\$10,000.00 paid up to that date, and the balance of \$15,900.00 due, and the First Defendant acknowledged the sums due and promised to pay the outstanding balance during the month of March 2009.

Notwithstanding numerous requested made by the claimant to the Defendant for payment of the outstanding balance, the Defendant has failed or refused to do so."

The Defence

- [9] The defence avers, among other things, that the 1st defendant was at all material times acting as a director of the 2nd defendant and that the 2nd defendant was struck off the Register of Companies with effect from 26th June 2014.

The Claimant's Submissions

- [10] Counsel for the claimant submits that the claimant dealt with the 1st defendant throughout the transaction. The claimant completed the work and submitted his invoice to the 1st defendant who acknowledged receipt and undertook to make payment.
- [11] Counsel also submits that "The facts of this particular case have now crystallized into the question posed. If indeed the legal issue continues to be relevant the Claimant will seek the Court's leave to amend the Statement of case. The level of misrepresentation, negligence and deceit by the First Defendant is apparent and the Claimant seeks justice and fairness. The Court will be invited following the Amendment to the Statement of case, to pierce the corporate veil...In this case there now seems to be uncertainty as to which Defendant the Claimant dealt with...In instituting the Claim against both Defendants the Claimant is avoiding the need to ask the Court to add or substitute a party at a later stage. The First Defendant is not prejudiced in any way since an application may be made to remove her as a party after standard disclosure and the pleadings closed."
- [12] Counsel submits further that a party may plead to facts on which he intends to rely but there is no duty to provide in the pleadings the means by which he intends to prove such facts. This is a matter of evidence. The evidence may come in different forms such as from documents or oral evidence and the court must be slow to make a determination at this stage as this would deprive the claimant of his right to have his case disposed of on its merits.

- [13] The cases of **Rainham and Chemical Works Ltd (in liquidation) and others v Belvedere Fish Guano Co. Ltd.**¹, **MCA Records Inc & Another v Charly Records Ltd and ors**² and **Contex Drouzhba Ltd. v Wiseman & Anor**³ were cited by counsel as authority for the proposition that a director can be made liable in tort for deceitful misrepresentation.

The Defendant's Submissions

- [14] Counsel for the defendant submits, in summary, that:
- (1) A company, although a separate legal entity, can only act through the instrumentality of individuals. The fact that a contract was entered into by the 2nd defendant through the instrumentality of the 1st defendant does not make the 1st defendant liable.
 - (2) A company director acting within his or her powers and within the powers of the company and without fraud, negligence or breach of fiduciary duty incurs no personal liability. The case of **Standard Chartered Bank v Pakistan National Shipping Corporation and others**⁴ was cited by counsel.
 - (3) The claimant's statement of case is silent as to the basis upon which it is suggested that the 1st defendant is liable.
 - (4) The cases cited by the claimant concern liability of a company director in tort but this claim concerns a breach of contract. There are no allegations of deceit, fraud or misrepresentation made in the statement of claim.

Analysis

- [15] Counsel for the claimant submits that the claim was instituted against both defendants because it is unclear which of the defendant's the claimant contracted with.
- [16] A party may institute proceedings against as many parties as considered necessary and sue in alternative capacities. The statement of case must however be coherent and establish a cause of action against the parties named in the suit in the capacity in which that party is being sued. While it should be as concise as

¹ [1921] 2 AC 465

² [2001] EWCA Civ 1441

³ [2006] EWHC 2708

⁴ (No. 2 & 4) (2003) 1 AC 959.

possible, the statement of case must clearly set out all the facts upon which the party relies ⁵.

- [17] The principle that pleadings should state those facts which will put defendants on their guard and tell them what case they have to meet⁶ has not been altered by the introduction of the Civil Procedure Rules. Lord Woolfe MR in **McPhilemy v Times Newspapers Ltd**⁷ stated:

*"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. **This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.**"* (my emphasis).

- [18] The statement of claim avers that the 1st defendant is a director of the 2nd defendant. This infers that the 1st defendant is being sued in that capacity since no other facts to the contrary are pleaded. Having instituted the claim against the 1st defendant in her capacity as a director of the 2nd defendant, the issue which arises for consideration is whether the statement of claim discloses any facts capable of establishing a basis for lifting the corporate veil so as to make the 1st defendant personally liable for the alleged debts of the 2nd defendant.

- [19] In **Prest v Petrodel Resources Ltd and others**⁸, Lord Sumption SCJ, after noting that the term 'piercing the corporate veil' is rather indiscriminately used, stated:

⁵CPR Part 8.7 (1) and (3).

⁶*Phillips v Phillips* (1878) 4 QBD 127 per Cotton LJ.

⁷[1993] 3 All ER 775, 792J-793A, cited with approval in *East Caribbean Flour Mills Limited v Ormiston Ken Boyea*; *East Caribbean Flour Mills Limited v Hudson Williams* -[2007] ECSCJ No. 110.

⁸[2013] 4 All ER 673.

"Most advanced legal systems recognise corporate legal personality while acknowledging some limits to its logical implications. In civil law jurisdictions, the juridical basis of the exceptions is generally the concept of abuse of rights, to which the International Court of Justice was referring in In re Barcelona Traction, Light and Power Co Ltd [1970] ICJ 3 when it derived from municipal law a limited principle permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations. These examples illustrate the breadth, at least as a matter of legal theory, of the concept of abuse of rights, which extends not just to the illegal and improper invocation of a right but to its use for some purpose collateral to that for which it exists.

English law has no general doctrine of this kind. But it has a variety of specific principles which achieve the same result in some cases. One of these principles is that the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not. The principle was stated in its most absolute form by Denning LJ in a famous dictum in Lazarus Estates Ltd v Beasley[1956] 1 QB 702, 712, [1956] 1 All ER 341, [1956] 2 WLR 502"

[20] After observing that this area of law is 'heavily burdened by authority, much of it characterised by incautious dicta and inadequate reasoning'⁹ Lord Sumption traced the authorities to find situations where the court found it necessary to pierce the corporate veil. The cases identified show that some of the circumstances in which the court has indicated that it may be prepared to, and in some cases did, lift or pierce the corporate veil include:

- (1) where the company was being used for a deliberately dishonest purpose;¹⁰
- (2) to recognise the receipt of the company as that of the individuals in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individuals¹¹;

⁹ Para 19

¹⁰ Adams v Cape Industries plc [1991] 1 All ER 929, [1990] Ch 433

- (3) in family matters where assets are vested in a one man company and the company is considered an alter ego of a party¹²;
- (4) in cases of impropriety linked to the use of the company structure to avoid or conceal liability¹³; and
- (5) when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may pierce the corporate veil for the purpose of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.¹⁴

- [21] The facts set out in the claimant's statement of claim do not provide a factual basis to support a claim that the corporate veil should be lifted for any of the reasons identified above or at all.
- [22] The claimant submits that *"the level of misrepresentation, negligence and deceit by the First Defendant is apparent"*. It is not apparent to me from the facts set out in the statement of claim. If there is an allegation of fraud or dishonesty or a need to rely on such allegations the particulars of same must be pleaded.¹⁵ While it is not necessary to use the word "fraud" or "dishonesty" the facts which make the conduct fraudulent or dishonest must be pleaded and be unequivocal.¹⁶ It is not, as suggested by counsel for the claimant, sufficient to say that these particulars will be made clearer at disclosure or when witness statements are filed.
- [23] The statement of claim does not contain the essential facts to establish a basis for lifting the corporate veil. In the circumstance I find that the statement of claim fails to disclose any facts to support a claim for the lifting of the corporate veil to make the 1st defendant, a director of the 2nd defendant, personally liable for the alleged debts of the 2nd defendant.

¹¹Trustor AB v Smallbone [2001] 3 All ER 987, [2001] 1 WLR 1177

¹²Green v Green [1993] 1 FLR 326, Mubarak v Mubarak [2001] 1 FLR 673

¹³Ben Hashem v Al Shayif [2008] EWHC 2380 (Fam), [2009] 1 FLR 115

¹⁴Prest v Petrodel Resources Ltd and others per Lord Sumption SCJ at paragraph 35

¹⁵Saint Lucia Motor and General Insurance Company v Peterson Modeste HCVAP 2009/008

¹⁶Miller LJ in *Armitage v Nurse* (1997) 2 AER 705 at 715 cited by Lord Hope in *Three Rivers District Council and others v Bank of England* (No. 3) [2001] 2 All ER 513 at para 55.

- [24] Notwithstanding, having regard to the overriding objective of dealing with cases justly and taking into consideration time and costs, rather than striking out the claim I will give the claimant leave to amend the statement of case. This would not in my view result in any injustice to the defendant as any prejudice can be compensated in costs.

Is the 2nd Defendant an Existing Legal Entity capable of Being Sued?

- [25] The statement of claim avers that the 2nd defendant is a company registered under **The Companies Act** Cap 11:12 of the Laws of Montserrat ("**the Act**"). The 2nd defendant was however struck off the Register of Companies ("**the Register**") by the Registrar of Companies ("**the Registrar**") pursuant to Section 511 (1) of the Act around 26th June 2014.¹⁷
- [26] The claim was commenced on 3rd July 2014 and therefore at the time the claim was commenced the 2nd defendant's name was no longer on the Register.
- [27] The issue arising for consideration is whether a company which is struck off the Register pursuant to Section 511 (1) of the Act ceases to be a legal entity capable of being sued.

Submissions

- [28] Counsel for the defendants submits that once a company is struck off it ceases to exist as a legal entity. Counsel submits that liability is preserved subject to a creditor or person aggrieved making an application under Section 483 (6) of the Act for the company to be restored. Counsel submits that the court is not permitted to restore a company to the Register of its own motion.
- [29] Counsel for the claimant submits that pursuant to Section 512 of the Act the liability of a company struck off the Register continues notwithstanding that it was struck off the Register and consequently a company that is struck off the register can still be sued.

Analysis

¹⁷Exhibit MK1 to affidavit of Mildred Kirwan sworn and filed on 11th November 2014.

- [30] While in some jurisdictions there are statutory provisions which expressly state that upon being struck off the register neither the company nor its directors may commence or defend legal proceedings, carry on any business or in any way deal with the assets of the company¹⁸ there are no similar provisions in the Act.
- [31] Section 512 of the Act provides that upon being struck off the register the liabilities of the company, its directors and members continues. Does this mean that a company can be sued notwithstanding that it is struck off the Register?
- [32] Both Sections 483 and 511 of the Act give the Registrar the power to strike a company off the Register. Section 483 provides for striking a 'defunct company' off the register i.e. a company that is not carrying on business or in operation. Section 511 provides for a company to be struck off the Register by the Registrar for, among other things, failure to file annual returns or documents or paying annual fees.
- [33] One of the most significant differences between these two sections is the process and effect of striking off.
- [34] A company struck off under Section 483 is not only deemed struck off upon the publication of the relevant notice by the Registrar in the gazette but is also **dissolved** upon the publication of the said notice. A company that is dissolved ceases to exist and a court has no jurisdiction over it as there is nothing over which to exercise jurisdiction¹⁹. It therefore loses its legal personality although it can be restored to the Register upon an application to court in the circumstances provided under Section 483.
- [35] On the other hand, a company struck off under Section 511 is not deemed to be dissolved upon publication of the relevant notice in the Gazette by the Registrar. It may therefore be argued that the company still exists. However, in my view, while the company may still exist in the sense that it has not been dissolved or wound up under the Act, its legal status or corporate personality is extinguished or at least suspended upon being struck off pursuant to Section 511 for the following reasons:

- (1) A company comes into existence upon the issue of its certificate of incorporation and from the date shown on its certificate of incorporation.²⁰ Its

¹⁸ Section 215, Business Companies Act 2004 (BVI); Section 167 International Business Companies Act 200 (Bahamas)

¹⁹ *Re Workvale Ltd. (In Dissolution)* (1992) 1 WLR 416, *Re Westbourne Grove Drapery Co.* (1879) 39 LT 30.

²⁰ Sections 8 and 9 of the Companies Act Cap 11.12 of the Laws of Montserrat.

corporate capacity and powers conferred upon its incorporation include the capacity and powers of an individual and the power to carry on its business and conduct its affairs.²¹

- (2) The Registrar must maintain a Register which reflects, among other things, every body corporate incorporated or registered under the Act and every body corporate which has subsequently been struck off.
- (3) A company's legal status or personality is therefore acquired upon its registration under the Act and the Register reflects the name of companies duly registered under the Act.
- (4) The striking of a company off the Register pursuant to Section 511 is evidence that the company is no longer registered under the Act and consequently its legal status or personality acquired upon its registration is extinguished or at least suspended. The company's ability to assert its rights, deal with assets and sue or be sued – all attributes of its separate legal personality are therefore affected by the striking off. This remains the case notwithstanding that the Act provides that a company may be restored to the Register some time in the future upon an application and deemed at that point to have always remained on the register.

[36] The fact that Section 512 preserves the liability of the company, its directors and officers does not in my view alter the fact that the legal status or personality of the company has been extinguished or suspended by virtue of the company being struck off the Register. Section 512 prevents a company, its directors and members from avoiding or denying liability whether arising under the Act or otherwise and whether incurred before or after the striking off. Thus, for example, a director has a duty to protect the assets of a company. This duty and the liability arising there from continues even after the company is struck off and consequently a director who authorises or acquiesces in the disposition of the assets of a company after it has been struck off the register may be liable to the company in respect of the moneys misapplied.²²

[37] In the circumstance I find that the effect of the 2nd defendant being struck off the Register pursuant to Section 511 is that the 2nd defendant has lost its legal status or corporate personality. Since an action can only be maintained against an

²¹Section 17 of the Companies Act Cap 11.12 of the Laws of Montserrat.

²²Re Transocean Equipment Manufacturing and Trading Ltd [2005] All ER 320.

existing legal entity²³ an action cannot in my view be maintained against the 2nd defendant until such time as the company is restored to the Register.

Restoration to the Register

- [38] Counsel for the defendants submits that an application must be made to the court pursuant to 483 (6) for a company to be restored to the Register and the court is not permitted to restore a company to the Register of its own motion.
- [39] Counsel for the claimant submits that should the court find that the 2nd defendant must be on the Register to be sued, it is empowered to make such an order following an application by the claimant or on its volition.
- [40] Section 511 (5) of the Act states that upon receipt of **an application** in the prescribed form and upon payment of the prescribed fee the Registrar may restore a company struck off the Register. Section 511 (5) does not specify **by whom** an application could be made and I note that it does not expressly prohibit an application being made to the Registrar by **a creditor**.
- [41] Section 483 (6) states that the court may, **upon an application** by the company, a member or creditor restore a company to the Register if satisfied, among other things, that it is just to do so.
- [42] The express words used in both sections make it clear that the restoration process is to be initiated by way of **an application** and I so find.

Conclusion

- [43] In conclusion, I find that: **(a)** the statement of claim fails to disclose any facts to support a claim for lifting the corporate veil to make the 1st defendant, a director of the 2nd defendant, personally liable for the alleged debts of the 2nd defendant; and **(b)** the 2nd defendant is, and was not at the time the claim was commenced, a company registered under the **Companies Act** Cap 11.12 having been struck off the Register of Companies by the Registrar pursuant to section 511 of the said Act and consequently is not an existing legal entity capable of being sued.

²³Caribbean Development Consultants v Lloyd Gibson Suit No.CL 323 of 1996 (Jamaica).

[44] However, taking into consideration all the circumstances including the overriding objective of dealing with cases justly and saving time and costs, rather than striking out the statement of claim it is hereby ordered as follows :

1. The claimant is granted leave to amend the statement of case. The claimant shall file and serve an amended statement of claim within 14 days.
2. The claimant shall pay costs of \$1000.00 to the defendant within 21 days.
3. The claim against the 2nd defendant is stayed pending the restoration of the 2nd defendant to the Register.

A handwritten signature in blue ink, appearing to read 'Fidela Corbin Lincoln', with a stylized, circular flourish at the end.

Fidela Corbin Lincoln
Master (Ag.)