

IN THE EASTERN CARIBBEAN SUPREME COURT
HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)
A.D.2008

Claim No. SKBHCV 1996/0072

Between:

NH INTERNATIONAL (CARIBBEAN) LIMITED

Applicant

And

FRANCHETTE POWELL

Respondents

ALICIA POWELL

Appearances: Mr Sylvester Anthony for the Applicant

Mrs Marguerite Foreman for the Respondent

2009: February 27th
August 11th

DECISION

[1] **BELLE. J:** This is a matter of some antiquity, which was commenced by Writ, and Statement of Claim filed on July 19th 1996. The substance of that Claim was that the Claimants, then Plaintiffs claimed that works being carried out by the Defendant on the Island Main Road in the vicinity of Mattingley caused damage to their dwelling house as a result of vibrations emanating from the use of certain equipment. The Claimants claimed damages and costs.

[2] After the commencement of the CPR 2000 the matter proceeded under the said rules. On 11th June 2004 after a trial, judgment was entered for the Claimants against the

First Defendant. After an assessment of Damages the Claimants were awarded damages in the sum of \$247,257.03 and costs in the sum of \$47,088.55.

[3] The Defendant never paid this money. On the 10th December 2007 the Claimants filed an application in which they prayed for the respondent in this matter NH International (Caribbean) Limited to be deemed the same company as the Defendant in the suit NH International. The Claimants also asked for NH International (Caribbean) Limited to provide security sufficient to cover the judgment sum in the action in 7 days in addition to interest and the Claimants' costs in such manner and amount as the Court deems just.

[4] The Claimants also prayed in the alternative as follows:

"That the First Defendant NH International (Caribbean) Limited do within 7 days disclose to the Claimants' solicitors full details of all its assets (including Bank accounts) with the jurisdiction their location and their values.

That the First Defendant /NH International (Caribbean) Limited be restrained from moving any of the said assets from the jurisdiction.

That the First Defendant NH International (Caribbean) Limited be restrained from disposing of or otherwise dealing with any of the said assets in the jurisdiction.

That in the event that the First Defendant's/ NH International (Caribbean) Limited's assets within the jurisdiction amount to less than the judgment sum plus interests and costs the First Defendant /NH International (Caribbean) Limited do within 7 days provide security sufficient to cover the difference in such manner and amount as the court deems just."

[5] The grounds of the Application were listed as follows:

"1. On 11th June 2004 the Court gave judgement for the Claimants against the First Defendant in a claim for damages for negligence.

2.. On 15th December 2004, by Order on Assessment of Damages, the Court awarded the Claimants Damages in the amount of \$247,257.03 and Costs in the total amount of \$47,088.55.

3. *The First Defendant left the Federation and has failed and /or refused to meet the judgement debt.*
4. *The First Defendant has now re-appeared in the Federation in the form of NH International (Caribbean) Limited, and the Claimants are seeking to enforce the judgment."*

[6] The Claimant Alicia Powell filed an affidavit in support of the Application in which she outlined the attempts made to recover the debt due to the Claimants by the Defendant company pursuant to the order of the Court. The Claimants went on to state that after frustrating their attempts to recover the debt the Defendant reappeared in St Kitts under the name NH International (Caribbean) Limited which is one of the companies involved in Ocean's Edge at Frigate Bay St. Kitts. The affiant exhibited a photograph of a billboard at the project site in St. Kitts clearly carrying the name NH International (Caribbean) Limited.

[7] The Claimants further stated that on checking the website: [www. nhinternational.com](http://www.nhinternational.com) she found that it carried the following statement under the heading "Projects : NH International (Caribbean) Limited" , several Civil Works Projects carried out by the Company. Among these is the following statement:-

"Other Road Projects

Rehabilitation and improvement of the island Main Road, St Kitts

Client : Government of St. Kitts

Rehabilitation of Road sections of approximately 24 km and included general earthworks, realignment of three sections of road, construction of culverts, widening of four bridges, installation of drainage culverts, regarding of the road shoulder, construction of 10,004m of slipper... kerbs, using asphaltic concrete for the total length of the roads."

[8] The relevant page from the website was exhibited with the affidavit. The affiant stated that the description of the project is exactly the same as that carried out by NH International and shows that NH International (Caribbean) Limited regards itself as one and the same as NH International Limited.

- [9] The Affiant continued to state that on the same internet site under the heading "About US. About NHC" is the following statement:

" Formed in 1995, NH International (Caribbean) Limited was the fruit of the union of two independently successful companies, NH International Limited and Emile Elias and Company Limited (founded in 1965), that had strategically aligned and operated as a joint venture between 1992 and 1995, as a result of a management buyout of Norwest Holst International Limited...."

- [10] Alicia Powell then went on to point out that despite the 1996 letter referred to in paragraph 7 above, which purports to come from NH International, it really came from the already formed NH International (Caribbean) Limited. The Claimant then adds that on the same web page the address of NH International (Caribbean) Limited is shown to be 39 Long Circular Road, St James Trinidad" which is exactly the same address as that of the First Defendant in the substantive Claim. The Claimant also noted however that the FAX numbers and telephone numbers on the web page were different from those on the past correspondence from the First Defendant.

- [11] The Applicants argued that the gamishee proceedings are wholly misconceived because they proceed from the basis that NH International and NH International (Caribbean) Limited are one and the same which is a finding of fact for which a judicial hearing is required which has never taken place.

- [12] Counsel also contend that a finding that NH International and NH International (Caribbean) Limited are one and the same requires a piercing of the veil and this requires a trial in which the interested persons must be given an opportunity to be heard.

- [13] The major submission of the Applicant is that before the Court can entertain the gamishee proceedings:

- I. The Applicants have to first establish that NH International is indeed a company in being;

- II. The Applicants have to establish that NH International (Caribbean) Limited has an account signified as NH International/NH International (Caribbean) Limited;
- III. The Applicants have to establish that NH International (Caribbean) Limited was incorporated to avoid NH International from paying the debt; and
- IV. The Applicants are obliged to show proof of the preconditions, which have first to be established to justify the piercing of the veil.

[14] The Applicants argue that the Court has become functus because the Order of 11th December 2007 has been discharged and the said discharge of that Order has not been appealed. The Applicants consider the garnishee proceedings an abuse of process. Counsel therefore concludes that the orders of 11th December 2007 and 18th April 2008 should not have been made.

[15] In an affidavit in support of the Application to discharge the order of 18th April 2008 Omardath Jugmohan states that he is advised by Mr. John Connon, Managing Director, and verily believes that N.H International (Caribbean) Limited was registered in the Cayman Islands in 1995. He also states that he is advised that NH International is a separate and distinct corporate entity from the First Defendant, NH International, and that NH International (Caribbean) Limited never had any contact with the Government of St. Kitts and Nevis for the rehabilitation and improvement of the Island Main Road in St. Kitts.

[16] Mr. Jugmohan concludes that he is advised and believes that the current contract with Cable Bay Hotel Development is the first contract to be executed by NH International (Caribbean) Limited in St. Kitts and that N.H International (Caribbean) Limited was never served with any legal documents relating to any lawsuits in St. Kitts in which N.H. International (Caribbean) Limited was a party.

[17] However based on the evidence adduced from the affidavit in support of the application for a provisional ex-parte garnishee order it is evident that the Respondents to this application to discharge the garnishee order anticipated the line of defence mounted by the Applicants. Mrs. Alicia Powell in an affidavit in support of the garnishee application sought to provide both historical background and proof of deep

connections between the companies N.H International Limited and N.H. International (Caribbean) Limited.

[18] The affidavit in summary alleges that the beneficial ownership of both companies and even the executive managerial staff appear to be one and the same. A striking illustration of this is that one John Connon was Managing Director of NH International and the time of the road project which was the subject of the damages suit. Emile Peter Elias was Chairman of NH International at the time of the Road Project a statutory Declaration of Emile Peter Elias pursuant to Section 319 of the Companies Act 1995 of the Republic of Trinidad and Tobago filed in the Registrar General's Office Trinidad and Tobago reveals this information. The Affidavit also reveals that Annual Returns for NH International show Emile Peter Elias, Director of Emile Elias & Company Limited and John Arthur Connon as directors.

[19] The Affidavit also reiterates an earlier charge that the website of NH International (Caribbean) Limited boasts of the earlier contact with St Kitts in relation to the road rehabilitation project.

[20] Based on this information I make a few observations. Firstly it was not a fanciful presumption which prompted the earlier injunction against NH International (Caribbean) Limited. Nevertheless it is possible for a company to have the same executives and basically the same ownership and still be a separate company. What is in issue is not just the technical issue of whether the companies are one and the same but also whether they are so intertwined that it would be unconscionable to permit the allied company NH International (Caribbean) Limited and its directors to operate with total impunity in relation to an Order of the court. It is of some concern to me that the affidavit of Omardath Jugmohan never attempts to refute the allegation that the website of NH International (Caribbean) Limited has promoted itself as an entity which has done previous road rehabilitation work in St. Kitts.

[21] Counsel for the Claimants/Respondents argues that this is not a case where there is any need to pierce the corporate veil because the applications filed do not go after the directors of NH International (Caribbean) Limited personally. While this is true it is evident that the connection between the two companies apart from their names and

addresses in Trinidad and Tobago over time revolves around the overlapping personnel who must be aware of the linkages with the Road Rehabilitation project. Counsel also contend that earlier statements of fact regarding the connections between the two companies were never contested other than by affidavit filed, but no one appeared in court on December 20th 2007 to argue any position in relation to facts determined by the court on the ex-parte hearing. In response the Applicants contend that the Order of 11th December 2007 was discharged on 11th January 2008.

[22] In the absence of a definitive final order declaring that NH International Limited and NH International Caribbean Limited are one and the same I do accept that NH International (Caribbean) Limited is entitled to a hearing to determine this issue and the extent of, if any, collaboration between the two companies in avoiding payment of the debt owed to the Judgment Creditor, before any form of execution proceeds. I would therefore order that such a hearing be scheduled early in the new Law Term by the Registrar of the High Court for a date to be set in the November 2009 trial window.

[23] I impose a stay of proceedings in the garnishee application and make no order as to costs at this time. Such an order will be made on the outcome of the application to determine the issues stated above.


Francis H V Belle
High Court Judge