SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2011/0821

BETWEEN: DOUBLOON INTERNATIONAL LIMITED

Claimant

AND

BANK OF SAINT LUCIA LIMITED

Defendant

Appearances:

Mr. Leslie Prospere of Counsel for the Claimant
Mr. Thaddeus Antoine of Counsel for the Defendant

2014: April 11th, May 15th,

DECISION

[1] TAYLOR-ALEXANDER, M: This is an interlocutory decision on the determination of the following preliminary issues:—

(i) Whether as regards its dealings with the defendant company there existed one to the other a relationship of principal and agent between the claimant and Doubloon Hotel Limited; and

(ii) Whether such relationship extended to the management and access to the account number 9299302401 held at the Bank of St. Lucia Limited.

The Pleadings

[2] The pleadings as filed assist in a brief chronology of the events:—

Doubloon International Limited is the parent of several wholly owned subsidiary companies including Doubloon Hotel Limited. By letter dated March 2011 the claimant demanded payment from the defendant of the sum of $79,000.00 or such other sum that stood to the credit of the claimant in its account, and the claimant instructed the transfer of these funds to the claimant's account in Guernsey. In a letter in reply to the claimant, the defendant communicated its intention not to do so. On the 9th May 2011, by letter from its attorneys the claimant demanded the return of these monies which the defendant continued to withhold. The claim filed is for the pay out of the monies held, pursuant to the demand made and for interest, loss and damage.

[3] The defendant pleads justification in withholding the demanded funds on the basis that that the claimant was the principal and parent company holding 100% shares in the company Doubloon Hotel Limited (DHL) which the defendant avers was an agent company among many agent companies set up by the claimant in the Doubloon Group and a conduit through which all investment in the agency companies were carried through.

[4] The claimant requested and negotiated a loan with the defendant by way of overdraft and bridging finance in anticipation of funds from Europe, necessary for its agent DHL to further the hotel project. The bridging finance was approved by the defendant, and the overdraft facility was signed by the defendant and the managing director of the claimant. Upon the request of the claimant the funds were placed in the name of the agent DHL for the immediate use by the agent for the payment of salaries. Any

negotiations for the extension of the overdraft were always done by the claimant and not the agent DHL. There are sums owed by DHL to the defendant and the defendant submits that they are entitled to withhold the sums standing in the account of the claimant. The defendant denies in the circumstances that the claimant is entitled to the relief claimed.

Defendant's Submissions

[5] The defendant avers that although the claimant and its counterpart DHL are in fact separate companies, the courts' have been prepared to infer exceptions to the well-established principle in Salomon v Salomon & Co [1897] AC 22 and a willingness to lift the corporate veil and set aside the legal personality of the company, although there is no single guiding principle which the court's have applied as a basis for their decision. What is clear the defendant's states is that the courts have been prepared to infer as between companies who share common elements a relationship of principal and agent. The defendant relies on a number of cases where those principles have been espoused. In the Canadian authority of Le Car Gmbh v Dusty Roads Holdings Ltd, 2004 Carswell NS 138 (N.S SC) the courts were prepared to infer a relationship between companies where the failure to do so would be unfair and lead to a result flagrantly opposed to justice; where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose; where a corporation is merely acting as the controlling shareholder's agent, Toronto (City) v Famous Players Canadian Corp [1936] 2 DLR 129, the court held that a determination of the nature of the respondent's business is prima facie a question of fact and that it depends on whether various subsidiary corporations are independent personalities or are mere agents controlled as such by the respondent company for the carrying on of its own business. Both of these cases although not binding, are persuasive authorities. The defendant also relies on Smith Stone and

Knight Limited v Birmingham Corporation [1939] 4 All ER 116KB, where the determination of a relationship between two related companies was considered to be a question of fact, to be answered by what the court considered were six points directed at reasoning not just a specific transaction but by consideration of the head and the brain of the companies; the effective control of the companies; the treatment of the profits; the location of the company for tax purposes, who governed the adventure etc. all of these were found to be relevant to a simulacrum of the companies.

[6] It is in reliance on those common law cases and the exceptions that the defendant relies on to support its contention that that there is no distinction in the operations of the claimant and DHL and the claimant was at all times a principal in an agency relationship. The sums advanced were furtherance of that relationship and the defendant is entitled to withhold these monies in settlement of an overdraft of DHL company.

Claimant's Submissions

[7] The claimant discounts the defendant's submissions, denying that the letters exhibited by the defendant are capable of drawing the conclusions reached. The claimant submits that a consideration of the emails exchanges between the parties is relevant and important to a determination of with who negotiated and the manner in which these transaction were negotiated with the bank.

[8] The claimant states that account number 929302401 at the centre of the dispute was opened in June 2005 for a specific purpose to act as a cash collateral for three credit cards issued to Judith, Sam and John Verity. The overdraft facility of DHL was established in October 2008 over three years

after the cash collateral account was established and the term letter establishing the facility made no reference to the cash collateral account neither was a link between the facility and the account ever made.

[9] The Companies Act Cap 13.01 recognises a relationship of a holding company to its subsidiary in section 548 and in reliance on Halsbury's Laws of England 4th ed 2004 reissue at Vol 7(1) and on Adams v Cape Industries plc and another [1991]1 All ER 929, the court is not free to abandon the principle of Salomon v Salomon & Co Ltd [1897] AC 22 merely because it considers that justice so requires. The claimant submits that unless subterfuge or fraud is established the courts generally will not pierce the corporate veil.

Discussion

[10] It is trite law that on incorporation, a company adopts its own legal personality is such that it is not normally the agent of those shareholders. This is the case even in instances of one man shareholder companies. This is of course the principle under which the case of Salomon v Salomon [1897] AC 22, achieved infinite notoriety. It continues to be the relevant authority explaining the relationship of the shareholders or subscribers to a company and the company itself. Slade LJ, in the Court of Appeal case of Adams v Cape Industries plc [1990] Ch 433 said this of the current approach:-

> "…the court is not free to disregard the principle of Salomon v Salomon & Co Ltd [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."

[11] That is not to say that the courts will not consider the practical realities of every case and will not pierce the corporate veil and treat all parts of a fraudulent operation as one, where the circumstances dictate. Halsbury's 4th Ed 2004 reissue at Vol 7 (1) provides for the circumstances where a court will be moved to do so. The authors' state:—

> "a company is a legal entity separate and distinct from its members. That is also the position within a group of companies where the fundamental principle is that each company in a group (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities. There may, however, be cases where the wording of a particular statute or contract justifies the treatment of parent and subsidiary as one company at least for some purposes or where the court "will pierce the corporate veil', not because it considers it just to do so but because special circumstances exist indicating that it is a mere façade concealing the true facts. In identifying what is a mere façade the motive of those behind the company will be relevant. The court will go behind the status of the company as a separate legal entity distinct from its shareholders and will consider who are the persons as shareholders or even as agents directing and in identifying what is a mere façade the motive of those behind the company will be relevant. The court will go behind the status of the company as a separate legal entity distinct from its shareholders and will consider who are the persons as shareholders or even as agents directing and controlling the activities of the company."

[12] In the recent decision of Prest v Petrodel Resources Limited and others [2013] 4 All ER 673, UKSC 34, the Supreme Court revisited the basis for piercing the corporate veil, narrowing the wide discretion previously assumed by the courts to decide which act of impropriety enabled the piercing of the corporate veil. Lord Sumption who delivered the leading judgment of the Supreme Court said this:—

> "...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 evades or whose enforcement 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 obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in Ben Hashem, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in VTB Capital who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy."

[13] According to the Court's reasoning the Court's ability to pierce the corporate veil should be triggered where 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 and that if there are other situations in which piercing the veil may be relevant as a final fall-back, they are likely to be novel and very rare.

[14] It would seem therefore that an allegation of a relationship of agency, while accepted in some pre Prest v Petrodel Resources Limited and others is no longer sufficient to move the court to pierce the corporate veil, unless the defendant can establish an existing legal obligation or liability which the claimant deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. I am satisfied of a further limitation placed on the Court's discretion and evident from the dicta of Lord Sumption, that a Court may only pierce the

corporation veil if only there is no other legal method of achieving an equivalent result. The effect of Prest is to substantially challenge the submissions of the claimant as to the justified basis for treating the claimant and DHL as one entity.

[15] More so on the issue of agency, the author of Gower's Principles of Modern Company Law 5th ed, Sweet and Maxwell, 1992, at page 132, have stated that although a company may act as agent for its parent company and other companies in the group there is no presumption of agency and in the absence of an express agreement between the parties, it will be very difficult to establish one.

[16] The defendant, as I have stated, faces some challenges in its defence of the proceedings given the restricted application of the principles of agency to facilitate the piercing the corporate veil and with the recent decision of Prest which has now telescoped the incidents when the corporate veil may be pierced.

[17] Despite my expressed concerns, i agree with the submissions of the defendant that this Court is incapable at this stage and without the benefit of the evidence, documentary or otherwise of forming any analysis of the nature of the relationship between the claimant and DHL sufficient to form any concrete analysis of a relationship of agency, and where, or if, agency continues to be a relevant factor, evidence of a deliberate frustration of a liability or legal obligation of the claimant by interposing a company. TO do so would be to engage in premature conjecture on the companies and the parties' course of dealings.

[18] In consequence, I decline to exercise summary judgment of the defence, the Court incapable at this stage of the proceedings and without the benefit of evidence of forming a conclusive assessment as to the likely success of the defence advanced. I am of the view that despite the excessive delay, this matter is to proceed to discovery and for trial directions, which the Court will issue on the 10th day of June, 2014.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER