EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2015/0006

BETWEEN:

[1] JOAN MARQUIS
[2] BRANDS INC

Appellants

and

THE HONOURABLE ATTORNEY GENERAL OF SAINT LUCIA

Respondent

Before:

The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer, QC	Justice of Appeal [Ag.]
The Hon. Mr. Gerard Farara, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Dexter Theodore QC with him Ms. Shahida Charlemagne
for the Appellants
Mrs. Brender Portland-Reynolds, Solicitor General, for the Respondent

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2018: May 16;
September 21.

Civil appeal – Compulsory acquisition of land – Land Acquisition Act – Compensation to be awarded – Lifting corporate veil – Whether court should award compensation to appellant for disturbance relating to loss of business – Causation – Whether acquisition caused loss of the business – Method of valuation – Whether cost method as opposed to investment approach more appropriate

The Government of St. Lucia compulsorily acquired a parcel of land situate at Vide Bouteille, Castries (the "property") belonging to the first appellant, Ms. Joan Marquis ("Ms. Marquis"). The property was acquired for the purpose of widening the Castries/Gros Islet highway. On the property stood a two-storey building from which various businesses operated. Around 1987, Universal Brands, a business in which Ms. Marquis was the

majority shareholder, commenced operations on the property and in 2000, the second appellant, Brands Inc commenced operations thereon. Ms. Marquis held 25% of the shareholding in Brands Inc while her daughter, Ms. Joanna Salton ("Ms. Salton"), held the remaining 75%.

Plans to widen the Castries/Gros Islet Highway were first commissioned in 1997; however, it was not until August 2005 that two notices of likely acquisition were published in the Saint Lucia Gazette (the "Gazette"). Between April and May 2006, four notices of acquisition were published in the Gazette thereby giving effect to the compulsory acquisition.

By letter dated 20th November 2007, Ms. Marquis was offered compensation for the acquisition in the sum of $483,000.00 plus statutory interest of approximately $48,000.00. That offer was rejected, and by letter dated 5th June 2008 a subsequent offer of $500,000.00 with interest of $65,000.00 was made. The appellants were still not satisfied with the offer and as a result, the Board of Assessment ("the Board") was established to determine the compensation to be awarded.

The Board concluded by a majority that Ms. Marquis was entitled to: value of land and building of $610,470.00 together with interest at the rate of 6% per annum from 10th April 2006 to the date of payment; compensation for disturbance: loan interest accrued on the sum of $425,000.00 from 11th October 2002 to the date of payment; and legal costs to be assessed if not otherwise agreed. While the Board also found that Ms. Marquis would be entitled to 25% of the loss suffered by Brands Inc, if proven, it concluded that Ms. Marquis was not able to show a causal connection between the losses of Brands Inc and the acquisition of the property. No award was made to Brands Inc on the basis that Brands Inc was not a "person interested" within the meaning of the Land Acquisition Act to whom an award could be made separate and apart from Ms. Marquis.

The appellants, being dissatisfied with the decision of the Board, appealed on several grounds. The issues to be determined are: 1. Whether the appellants have established the right for the court to pierce the corporate veil and award compensation to Ms. Marquis for disturbance relating to loss of business of Brands Inc; 2. Whether there is a causal connection between the acquisition and the loss of the business of Brands Inc; and 3. Whether the Board erred in applying the cost method of valuation in awarding compensation for the land and building.

Held: dismissing the appeal and ordering that the appellants pay the costs of the appeal being 2/3 of the costs before the Board, that:

1. It is an elementary principle that the shareholders and the company are separate and distinct legal entities and that the court will lift the corporate veil in circumstances where the company is a mere facade concealing the true facts. Mere ownership and control of a company is not sufficient to lift the corporate veil. In the case at bar, the onus was on Ms. Marquis to show that the structure of Brands Inc was a mere facade. Evidence that Brands Inc conducted the same type of business as Universal Brands, from the same

location and had the same client base and same directors, is not evidence that Brands Inc was a mere facade.

Woolfson v Strathclyde Regional Council 1978 SC(HL) 90, La Generale de Carrieres et des Mines v FG Hemisphere Associates LLC [2012] UKPC 27, Ord v Bellhaven Pubs Ltd & Ors v Prest and others [1998] 2 BCLC 447, Adam v Cape Industries [1991] 1 All ER 929 applied.

2. The onus is on the person claiming compensation to show on a balance of probabilities that the loss suffered was as a result of the acquisition and/or news of the acquisition. Before the Board was evidence that Universal Brands ceased operations in 1999 and it was unable to pay its debts. Brands Inc ceased operation in 2000-2001. There was no documentary evidence that Ms. Marquis or Brands Inc were denied financing prior to Brands Inc ceasing operation because of the acquisition. Therefore, it was open to the Board to find that neither the impending acquisition nor the acquisition caused or materially contributed to the demise of Brands Inc and there is no basis to interfere with that finding.

   Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 1 All ER 846, Aberdeen City District Council v Sim and another [1982] 2 EGLR 22 applied.

3. The Land Acquisition Act provides for fair compensation to be paid to the land owner for losses suffered by the land owner. Where he/she is conducting business on the property, the most appropriate method of valuation is the income/investment approach which anticipates a proper analysis of the business as a going concern. The value of the land is determined on the basis of the amount of rent that an occupier would pay for the right to occupy and the level of return an investor would require on their capital. In the case at bar, it is not disputed that the property was used as a business premises. Ms. Marquis, however, was not conducting any business on the property during the shadow period or at the time of acquisition. Critically, there were no records of any rental history of the premises. In the circumstances, the income/investment approach would be inappropriate.

   Mon Tressor Desert Limited v Ministry of Housing [2008] UKPC 31 applied; Mark Pennington and another v Burnley Borough Council [2004] EWLands ACQ/102/2002(14 March 2003) distinguished.

4. The finding of the Board that the trading figures were unreliable was a finding of fact. It is well settled that an appellate court would not interfere with the finding of facts of a lower court unless it was plainly wrong. In this case, it was open to the Board to conclude that the trading figures and financial forecasts of a company which was not a party to the proceedings and which had defaulted on its loans and ceased operation since 1999, and another company which was in operation for less than a year and which also could not service

its debts was an unreliable basis to apply the income/investment approach. Accordingly, the the Board's decision is unimpeachable.

JUDGMENT

[1] THOM JA: This is an appeal against an award of compensation made by a Board of Assessment ("the Board") for the compulsory acquisition of real property belonging to the first appellant, Ms. Joan Marquis ("Ms. Marquis"), pursuant to the Land Acquisition Act.[1] The property was acquired by the Government of Saint Lucia for the public purpose of widening the Castries/Gros Islet Highway.

[2] The background to this appeal is that Ms. Marquis was the registered owner of a parcel of land situate at Vide Bouteille, Castries and registered in the Registry of Lands as parcel 0850 B 3 (the "Property"). The property measured 6,204 square feet and on which stood a two-storey building measuring some 2,160 square feet of floor space. The property is located adjacent to the Castries/Gros Islet Highway with road frontage in a commercially zoned area surrounded by sales depots, offices and warehouses. Around 1987, Universal Brands, a business in which Ms. Marquis was the majority shareholder, commenced operations on the property. Subsequently, a company which also carried on business on the property, Brands Inc was incorporated on 22nd March 2000 with 100 issued shares, 25 of which were issued to Ms. Marquis and the remaining 75 were issued to her daughter, Ms. Joanna Salton ("Ms. Salton").

[3] Around 1997, the Government of Saint Lucia commissioned plans to widen the Castries/Gros Islet Highway to ease traffic congestion. Based on the plans prepared for the widening of the road in 2001 and revised in 2006, the property was identified as one which needed to be acquired to facilitate the widening of the road. As early as 11th October 2002, the Permanent Secretary in the Ministry of

[1] Cap. 5.04, Revised Laws of Saint Lucia 2013.

Physical Development, in response to a query from CIBC (Caribbean) Ltd,[2] advised CIBC, in writing, of the intended acquisition of the Property. However, it was not until August 2005 that two notices of likely acquisition were published in the Saint Lucia Gazette (the "Gazette") and on 10th April, 17th April, 1st May and 8th May 2006 four notices of acquisition were published in the Gazette thereby giving effect to the compulsory acquisition.

[4] By letter dated 20th November 2007, the authorised officer made an overture of settlement to Ms. Marquis for the acquisition of the property in the sum of $483,000.00 plus statutory interest of 6% per annum, calculated from 29th March 2006 of approximately $48,000.00. A subsequent offer was made by letter dated 5th June 2008 in which the authorised officer advised that Cabinet had approved compensation in the sum of $500,000.00 with interest at 6% per annum from April 2006 to June 2008 of $65,000.00.

[5] The appellants were still not satisfied with that offer and as a result of their dissatisfaction the Board was established to determine the compensation to be awarded to them.

[6] Before the Board, both appellants contended that the intended acquisition was public knowledge from 2000 when the Prime Minister announced in a budget speech the plans to upgrade the Castries/Gros Islet Highway. The appellants argued that because of the announcement, they were restrained from obtaining further and alternative financing to enable them to continue developing their business since the property was the most significant asset of their business.

[7] Ms. Marquis claimed compensation in the sum of $2,646,007.00. The particulars of her claim being: (a) value of land and building - $2,129,907.00; (b) loss of Popovic joint venture - $386, 100.00 and (c) professional fees (legal and

[2] In 1996, CIBC loaned to Universal Brands $690,000.00 on the security of the property. In 1999, Ms. Marquis defaulted on the loan which resulted in judgment being registered by the bank against her and the company.

accounting) - $130,000.00.

[8] Brands Inc claimed the total sum of $4,281,407.00. The particulars of the claim being: (a) loss of leasehold interest ($4,407.00 x 12months x 10 years) - $528, 000.00; (b) digicel billboards ($2,000.00 x 12months x 10years) - $240,000.00; (c) business losses prior to entry (from the year 2000 to 2005 plus 3 months in 2006) - $1,604,265.00; (d) goodwill extinguished upon entry on 17th April 2006 - $769,142.00; (e) loan interest and penalties (from the year 2002 to 2007) $1,100,000.00 and (f) time of Directors (Ms. Marquis and Ms. Joanna Salton) - $40,000.00.

[9] First Caribbean International Bank (Barbados) Limited ("FCIB") also claimed to be entitled to be paid $1,144,864.67 from the proceeds of compensation payable by virtue of a hypothecary obligation, mortgage debenture and floating charge executed by Ms. Marquis and Brands Inc and a judicial hypothec.

[10] The Royal Bank of Canada ("RBC") also claimed to be entitled to be paid from the proceeds of compensation payable by virtue of a judicial hypothec. RBC acknowledged that its entitlement ranked after FCIB.

[11] Before the Board, the Government in response contended that the acquisition was not certain until the publication of the respective notices in 2006. Therefore, any losses should be computed with effect from the date of the notices in 2006. The Government further contended that pursuant to the Land Acquisition Act, Brands Inc was not entitled to any compensation since it was not a "person interested" within the meaning of the Land Acquisition Act.

Findings of the Board of Assessment

[12] The Board, having heard the evidence of several witnesses, concluded by a majority that Ms. Marquis was entitled to the following compensation:

(a) Value of land and building of $610,470.00 together with interest at the rate of 6% per annum from 10th April 2006 to the date of payment.

(b) Compensation for disturbance: loan interest accrued on the sum of $425,000.00 from 11th October 2002 to the date of payment.

(c) Legal costs to be assessed by the Registrar of the High Court if not otherwise agreed.

[13] The Board declined Ms. Marquis compensation for loss related to the joint venture with Dr. Alexander Popovic ("Dr. Popovic") as in the opinion of the Board there was no agreement in place for the joint venture and the possible acquisition was not the only reason why Dr. Popovic did not agree to the joint venture. While the Board also found that Ms. Marquis would be entitled to 25% of the loss suffered by Brands Inc, if proven, it found that Ms. Marquis was not able to show a causal connection between the losses of Brands Inc and the acquisition of the property.

[14] The Board refused Brands Inc's claim and made no award to it on the basis that Brands Inc was not a "person interested" within the meaning of the Land Acquisition Act to whom an award could be made separate and apart from Ms. Marquis because compensation for the value of the land is inseparable from the claim for disturbance. The Board was also of the view that no award should be made in relation to the Digicel lease since the lease was for a period of two years with no provision for renewal.

[15] The Board also ordered that FCIB was entitled to be paid from the price of the property, the balance of the debt due to it under the hypothecary obligation at the date of the acquisition.

Grounds of appeal

[16] The appellants, being dissatisfied with the decision of the Board, appealed on several grounds. The grounds outlined in the notice of appeal raise the following

issues:

(a) Whether the appellants have established the right for the court to pierce the corporate veil and award compensation to Ms. Marquis for disturbance relating to loss of business of Brands Inc.

(b) Whether there is a causal connection between the acquisition and the loss of the business of Brands Inc.

(c) Whether the Board erred in applying the cost method of valuation in awarding compensation for the land and building.

[17] At the hearing of the appeal, learned Queen's Counsel Mr. Theodore, did not pursue the submission in relation to depreciation of the building where he had contended that the Board erred in applying a depreciation factor and that it was excessive. In my view, this was the correct approach since there was no merit in the submission. Mr. Theodore, QC also did not pursue the appeal in relation to Brands Inc. This also was the correct approach since Brands Inc was clearly not a "person interested" within the meaning of the Land Acquisition Act. Brands Inc was simply a company which operated business on the property but had no interest in the property and therefore was not entitled to any compensation pursuant to the Land Acquisition Act.

Lifting of the corporate veil

[18] The issue of lifting the corporate veil arose in the context that Ms. Marquis is not satisfied with the 25% award made by the Board in relation to losses suffered by Brands Inc. Ms. Marquis contends that the corporate veil of Brands Inc should be lifted and she should be awarded compensation of 100% of losses suffered by Brands Inc since Brands Inc was simply the vehicle through which she conducted her business.

[19] Section 19 of the Land Acquisition Act sets out the compensation to be awarded

when land has been compulsorily acquired. It reads in part as follows:

> "19. Rules for assessment of compensation
> Subject to the provisions of this Act the following rules shall apply to the assessment and award of compensation by a Board for the compulsory acquisition of land—
>
> a) the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, in its condition at the time of acquisition, if sold in the open market by a willing seller, might have been expected to have realized at a date 12 months prior to the date of the second publication in the Gazette of the declaration under section 3.
> However, this rule shall not affect the assessment of compensation for any damage sustained by the person interested by reason of severance, or by reason of the acquisition injuriously affecting his or her other property or his or her earnings, or for disturbance, or any other matter not directly based on the value of the land;
>
> b) the special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which the land could be applied only in pursuance of statutory powers not already granted, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government department;
>
> c) where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to public health, the amount of that increase shall not be taken into account;
>
> d) where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Board is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement"

[20] The courts have interpreted these provisions to mean the value of the land to the owner including personal losses. Lord Nicholls in Director of Buildings and

Lands v Shun Fung Ironworks Ltd[3] explains the rationale for the award of compensation for disturbance as follows:

> "Land may, of course, have a special value to a claimant over and above the price it would fetch if sold in the open market. Fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority…If he is using the land to carry on a business, the value of the land to him will include the value of his being able to conduct his business there without disturbance. Compensation should cover this disturbance loss as well as the market value of the land itself. The authority which takes the land on resumption or compulsory acquisition does not acquire the business, but the resumption or acquisition prevents the claimant from continuing his business on the land. So the claimant loses the land and, with it, the special value it had for him as the site of his business. The expenses and any losses he incurs in moving his business to a new site will ordinarily be the measure of the special loss he sustains by being deprived of the land and disturbed in his enjoyment of it. If, exceptionally, the business cannot be moved elsewhere, so it simply has to close down, prima facie his loss will be measured by the value of the business as a going concern. In practice it is customary and convenient to assess the value of the land and the disturbance loss separately, but strictly in law these are no more than two inseparable elements of a single whole in that together they make up the value of the land to the owner." [4]

[21] The business on the property was operated by Universal Brands and subsequently Brands Inc. Therefore, for Ms. Marquis to be awarded disturbance compensation, it was necessary for her to prove that it was an appropriate case for the corporate veil of Brands Inc to be lifted.

[22] In determining this issue, the Board considered the cases of John Edward Roberts and John Roberts (Bexley) Ltd v Ashford Borough Council[5] and DHN Food Distribution Ltd v Tower Hamlets London Borough Council[6] on which Mr. Theodore, QC relied but found them to be distinguishable from the instant case. The Board identified as a distinguishing feature the fact that Brands Inc was not an entity owned solely or primarily by Ms. Marquis. Ms. Marquis was

[3] [1995] 1 All ER 846.
[4] At p. 852.
[5] [2005] UKLANDS ACQ/100/2004.
[6] [1976] 3 All ER 462.

only a 25% shareholder of Brands Inc, while in DHN Food the entity which carried on the business was solely owned by the subsidiary of the land owner. Similarly, in John Edward Roberts the owner of the land was the major shareholder of the entity which operated the business. Therefore, in DHN Food and John Edward Roberts the loss suffered by the company as a consequence of the acquisition was tantamount to being the loss of the land owner who would be entitled to compensation for the loss if the business was in his name. However, in the instant case, the Board found that the loss of Brands Inc was not solely Ms. Marquis' loss as she was a minority shareholder of Brands Inc. The Board determined that this was not an appropriate case for the application of the principle of lifting of the corporate veil.

[23] The Board however noted that Brands Inc operated from the property rent-free and Ms. Marquis relied on the business for her livelihood. The Board considered that fairness in compensation mandated that Ms. Marquis, being a 25% shareholder of Brands Inc, was entitled to compensation for 25% of any loss of business of Brands Inc, if proven.

[24] Learned Queen's Counsel Mr. Theodore submitted that the Board misdirected itself as to the test which ought to have been applied in determining whether to pierce the corporate veil. He submitted that the test ought not to have been whether Brands Inc was wholly owned by Ms. Marquis but rather whether Brands Inc was the vehicle through which Ms. Marquis, the one with the legal title, carried on business.

[25] Mr. Theodore, QC further submitted that there was no distinction between Ms. Marquis and Brands Inc. He maintained that notwithstanding Ms. Salton's 75% shareholding in the company, Brands Inc was being operated as though it was the business of Ms. Marquis and it mattered not how Ms. Marquis and her daughter chose to structure the company.

[26] Mr. Theodore, QC contended further that Ms. Marquis had been conducting

business since 1987 under the business name Universal Brands and her daughter, Ms. Salton had only joined the business in 1997. Albeit the change in business name in 1999 from Universal Brands to Brands Inc, there was continuity of operations as the companies engaged in the same type of trading activity, shared the same directors, operated from the same location, had the same client base and the same asset base. He reiterated that there was no separation of personality between the business, Ms. Salton and Ms. Marquis and that though there was no evidence to suggest that the profits were solely that of Ms. Marquis', there was certainly no evidence to suggest that the profits were divided between Ms. Marquis and Ms. Salton.

[27] Mr. Theodore, QC also submitted that the instant case was no different from the cases of DHN food and particularly John Edward Roberts where the President of the Land Tribunal found that the company's losses were that of the owner and there was no reason why the owner should be deprived of compensation for loss suffered by the company in consequence of the acquisition in circumstances where, if the business had been in his name, he could have obtained compensation. On these authorities, Mr. Theodore, QC urged the Court to lift the veil and award to Ms. Marquis full compensation for disturbance to reflect the reality of the situation that Brands Inc was simply the vehicle through which Ms. Marquis carried out business. Mr. Theodore, QC contended that the Board's finding that Ms. Marquis should be entitled to 25% compensation, if proven was wrong and should be disturbed as there was no reason why the corporate veil should not be lifted and Ms. Marquis awarded full compensation for disturbance.

[28] In response, Mrs. Portland–Reynolds averted the Court's attention to the decision of the House of Lords in Woolfson v Statclyde Regional Council[7] where Keith LJ in discussing the decision in DHN Food expressed doubts as to the correctness of the English Court of Appeal application of the principle of piercing the corporate veil. Mrs. Portland-Reynolds also sought to distinguish John

[7] 1978 SC(HL) 90.

Edward Roberts on the basis that Mr. Roberts owned the majority of shares in the entity, whereas in the instant case Ms. Marquis is the minority owner.

[29] Mrs. Portland-Reynolds also submitted that there was no legal basis in the instant case for lifting the corporate veil since the appellants had failed to demonstrate that they fell within the limited exceptions to the principle that a company is distinct from its shareholders. The fact that persons held shares in a company is not a viable basis for lifting the corporate veil.

Discussion

[30] It is an elementary principle of company law that the shareholders and the company are treated as separate and distinct legal entities. In some exceptional circumstances, the courts have departed from this principle. This is often referred to as the lifting of the corporate veil.

[31] The circumstances in which the corporate veil is to be lifted has been considered in a number of cases including **DHN Food Distribution Ltd v Tower Hamlet's** London Borough Council, Woolfson v Strathclyde Regional Council, Roberts v Ashford Borough Council and Adams and others v Cape Industries plc and another.[8] In DHN Foods, DHN, the parent company, carried on the business of food distributors on land owned by one of its subsidiaries using trucks owned by another subsidiary. The subsidiaries were wholly owned by DHN. On the land being compulsorily acquired, they claimed compensation based on the value of the land and disturbance. The English Court of Appeal in holding that they were entitled to compensation for the disturbance based its decision inter-alia on the fact that the reality of the situation was that DHN was in a position to control its subsidiaries in every respect. They were therefore in reality a single economic entity. In my view, even on the principle in DHN Ms. Marquis has not shown that the principle should be applied, since the evidence does not show that in reality Brands Inc and Ms. Marquis were a single entity. Ms. Marquis was not the sole

[8] [1991] 1 All ER 929.

owner and there was no evidence that she was in sole control of Brands Inc.

[32] In Wolfson, the House expressed doubt on the decision in DHN Foods. Lord Keith in delivering the judgment of the House stated:

> "I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts".[9]

Thus, in Wolfson in applying the principle, the House refused to lift the corporate veil where Wolfson had all but a single share in the company."

[33] In John Roberts, Mr. Roberts was the owner of the land on which the company John Roberts (Bexley) Ltd in which he owned 74,950 of the 75,000 issued shares carried on business. The land was compulsorily acquired by the Council. On a claim for compensation of the value of the land and disturbance, the President of the Land Tribunal, applying the reasoning in DHN Foods, found that the reality of the situation was that the company's losses were Mr. Roberts' losses and therefore there was no reason why he should be deprived of compensation for loss suffered by the company where if the business had been in his name he could have obtained compensation. It seems that the decision of the House of Lords in Wolfson was not drawn to the President's attention. In the instant case where Ms. Marquis holds a mere 25% of the shares in Brands Inc, it cannot be said that in reality the losses of Brand Inc are the losses of Ms. Marquis.

[34] Based on the authorities such as Woolfson v Strathclyde, La Generale de Carrieres et des Mines v FG Hemisphere Associates LLC,[10] Ord v Bellhaven Pubs Ltd & Ors v Prest and others[11] and Adam v Cape Industries plc the following principles emerge:

(a) Mere ownership and control of a company were not sufficient

[9] At p. 96.
[10] [2012] UKPC 27.
[11] [1998] 2 BCLC 447.

to lift the corporate veil.

(b) Even where there was no unconnected third party interest the veil could not be pierced only because it is necessary in the interest of justice to do so.

(c) The veil can only be pieced where special circumstances exist indicating that the company is a mere facade concealing the true facts.

(d) The impropriety must be linked to the use of the company structure to avoid or conceal liability.

(e) In order to pierce the veil, both control by the wrongdoer and impropriety must be demonstrated.

(f) A company may be a facade even though originally incorporated without deceptive intent.

[35] Applying these principles, I can find no reason for treating the structure of Brands Inc as a mere facade. It is not disputed that Ms. Marquis was always one of the shareholders of the various entities. In Universal Brand she held 97.9% of the shares, but in Brands Inc she held 25% of the shares. Ms. Marquis was not a 100% shareholder of any of the entities. Indeed, Ms. Marquis was a minority shareholder of Brands Inc. The onus was on Ms. Marquis to lead evidence to show that the structure of Brands Inc was a mere facade. This, in my view, she failed to do. Evidence that Brands Inc conducted the same type of business as Universal Brands, from the same location and had the same client base and same directors, is not evidence that Brands Inc was a mere facade. The fact that there was no evidence that Ms. Marquis was not in full control of Brands and received all of the profits as emphasised by Mr. Theodore, QC does not assist Ms. Marquis. Indeed, the evidence shows that in earlier years Ms. Marquis was the majority shareholder in the entity Universal Brands which carried on business until 1999

and Ms Salton was only a 2.1% shareholder, but in 2000 when Brands Inc was incorporated there was a shift in shareholding with Ms. Marquis' daughter Ms. Salton becoming the major shareholder and Ms. Marquis the minority shareholder. These circumstances do not support the contention of Mr. Theodore, QC that Ms. Marquis and Brands Inc were one and the same and the business of Brands Inc was in reality Ms. Marquis' business and therefore any loss suffered by Brands Inc was Ms. Marquis' loss.

[36] In spite of the finding by the Board that it was not appropriate to lift the corporate veil, the Board by awarding Ms. Marquis 25% of the loss of business of Brands Inc if she could prove a causal connection between the loss and the acquisition, in effect did lift the corporate veil since there is no other legal basis on which the Board could have made such an award. However, there is no cross appeal by the Government.

Causation

[37] The Board found that Ms. Marquis would be entitled to 25% of the loss of business of Brands Inc if she could prove that Brands Inc suffered loss of business as a result of the acquisition (including the period before the notice of acquisition i.e the "shadow period"). While there is no dispute with the Board's finding that disturbance compensation is payable for the shadow period, there is disagreement on the commencement of the shadow period. The Board did not make a finding when the shadow period commenced. Mr. Theodore, QC argued that the shadow period commenced from 2000 when the Prime Minister made the announcement. Whereas Mrs. Portland-Reynolds submitted that the shadow period commenced in October 2002 when the Permanent Secretary wrote to CIBC confirming that the Government intended to compulsorily acquire the property. I am of the opinion that based on the decision of the Privy Council in Shun Fung, the shadow period commences when the intention of the acquisition is made known. In this case, the intention to acquire the property was made very public in the budget speech on 28th March 2000 by no less a person than the Prime Minister. In those

circumstances, in my view the shadow period commenced when the announcement was made. From that time the public at large was made aware of the Government's intention to acquire the property.

[38] Having examined the evidence, the Board was of the view that Ms. Marquis had not proved a causal connection between the acquisition of the property and loss of business by Brands Inc. The Board concluded that:

> "It is difficult for the Board to understand or accept that there is a causal link to the demise of Brands Inc. or Universal Brands (1992) Limited by this acquisition. The Board also finds it difficult to accept that the requirement for repairs would have affected the business of Brands Inc.… Whilst the Board found that Miss Marquis would have been entitled to 25% of the losses claimed on behalf of Brands Inc., we find that Ms. Marquis has not established the causal connection between the loss of her business and the acquisition and will make no award under this head of compensation."[12]

[39] Although the Board found that Ms. Marquis was entitled to 25% of the loss suffered by Brands Inc, it concluded that she had failed to prove a causal link between the losses and the acquisition. It is necessary to determine whether the Board erred, as contended by Ms. Marquis, in finding that she had failed to prove a causal link between the losses of Brands Inc and the acquisition.

[40] The reasons for the Board's conclusion are: (a) Brands Inc's business ceased operations in 2000-2001; (b) while Ms. Marquis testified that her attempt to get a loan in 2003 for the business failed because of the pending acquisition, the Board noted that there were no documents evidencing efforts for refinancing and confirming that the inability to use the property for refinancing caused the loss to the business in 2000-2001; (c) the Board noted that the evidence which was not contradicted and which Ms. Marquis accepted as correct was that from early as 1999 Universal Brands was in default of its loans which led to a default judgment being entered against it and Ms. Marquis; (d) the inability to effect the repairs to the building did not have any adverse effect on the business of Brands Inc as the

[12] At paras. 60-61 of decision of the Board.

business of Mi Casa which was also operating on the property continued to do so until it was evacuated by the Government after the property was acquired; and (e) Brands Inc's business was not viable.

[41] Mr. Theodore, QC contended that the Board erred in several respects, being: (a) the Board applied the wrong test in determining causation; (b) the Board did not place sufficient emphasis on the effect of the announcement by the Prime Minister on the business; (c) the Board did not give sufficient weight to the circumstantial evidence that was before the Board.

Ground (a) – Test to determine causation

[42] Mr. Theodore, QC submitted that based on the decision of the Privy Council in Shun Fung, Ms. Marquis' burden was not to prove the likelihood of loss during the shadow period beyond a reasonable doubt. Instead, the court had to determine whether on a balance of probabilities the looming threat of the acquisition during the shadow period caused the loss of the appellants' business. I agree. However, having perused the judgment of the Board, nowhere is it stated, or can it be inferred that the test applied by the Board in determining causation was the test of beyond reasonable doubt as contended by Mr. Theodore, QC.

Grounds (b) and (c) – Effect of announcement and circumstantial evidence

[43] I will deal with (b) and (c) together since they are interrelated.

[44] Mr Theodore, QC submitted that there was sufficient circumstantial evidence before the Board from which the inexorable inference of causality could have been drawn that the announcement of the Prime Minister of the intention of the Government to acquire the property resulted in the demise of the business of Brands Inc.

[45] Mr Theodore, QC accepted that the evidence showed that in 1999 Universal Brands having experienced difficulties paying its debts for some time, judgment was entered against it and Ms. Marquis in 2001. Indeed, Mr. Evan Hermiston ("Mr. Hermiston") who testified on behalf of Ms. Marquis explained that the default occurred because the profit levels of Universal Brands were inadequate to allow for the business debts to be serviced. Mr. Theodore, QC also accepted that by 2001, Brands Inc's business had failed. However, he emphasised that during 2000 Brands Inc made a profit of $77,000. This he argued showed that what the business needed was a restructuring of its loans to ease the cash flow problems and not necessarily a cash injection as the Board found. He submitted further that Brands Inc's business failed because efforts to obtain loan financing bore no fruit because of the Prime Minister announcement of the impending acquisition made the Banks uneasy. He relied also on the evidence of Ms. Salton that, "we couldn't get financing, because every bank asked us what asset you are going to use".

[46] Mr. Theodore, QC further submitted that the Board placed undue emphasis on the absence of documentation evidencing the inability of Brands Inc to use the property for refinancing caused the loss of Brands Inc business in 2000-2001, while not attaching sufficient weight to the evidence of Ms Salton referred to above.

[47] Mr. Theodore, QC argued alternatively that even if the acquisition was not the sole cause of loss to the business, it was an intervening event that contributed to the loss of the business. Therefore, Ms Marquis is entitled to full compensation for the loss of the business. He relied on the cases of Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)[13] and Williams v Bermuda Hospital Board.[14]

[48] Mrs. Portland-Reynolds in response submitted that Ms. Marquis accepted during her testimony that Brands Inc was incorporated in 2000 and operated up until

[13] [2002] 2 WLR 1353.
[14] [2016] UKPC 4.

2001 for a period of less than one year. She argued that when the Prime Minister made the announcement during his budget speech, at that time, neither Ms. Marquis nor Brands Inc operated viable businesses since at that time the loans were not being serviced and the property was heavily indebted. Ms. Marquis had defaulted on her several loans prior to 2000 including a loan from Royal Bank of Canada of $600,000. and St Lucia Cooperative Bank $77,000. The default judgment in relation to the CIBC debt was registered on 1st May 2001. During the shadow period, the level of operation of the business of Brands Inc simply could not service the debt. Thus, even if there was no acquisition the business would have failed.

[49] Mrs. Portland-Reynolds also referred to the evidence of Dr. Popovic which was accepted by the Board and which finding was not challenged by the appellants, where he testified that the joint venture between Ms. Marquis and himself in 1999 did not materialize as Ms. Marquis' business itself was not viable. The property was heavily mortgaged. Mrs. Portland-Reynolds also referred to the evidence of Ms. Salton where she accepted that the business operated by Universal Brands had ceased to be viable by 2000-2001.

[50] Based on the authorities such as Shun Fung, Prasad and another v Wolverhampton Borough Council[15] and Aberdeen City District Council v Sim and another,[16] the onus is on the person claiming compensation to show that the loss suffered was as a result of the acquisition and/or news of the acquisition. Before the Board was evidence which was not disputed that the business of Universal Brands ceased in 1999 and at that time it was in no position to pay its debts and judgment was entered against it in 2001. The property was the security for the debt. Brands Inc ceased operation in 2000-2001. Brands Inc's business was very short lived. Ms. Salton testified that she could not recall if Brands Inc conducted any business in 2001, she however later stated if there was any

[15] [1983] 2 All ER 140.
[16] [1982] 2 EGLR 22.

business it was very little. Ms. Salton also accepted that Brands Inc had a cash flow problem. Although it made an operating profit in 2000, it could not pay its debt. There was no documentary evidence that Ms. Marquis or Brands Inc were denied financing prior to Brands Inc ceasing operation because of the acquisition or it was one of the reasons. Indeed Ms. Marquis' evidence is that it was not until 2003 she sought financing from financial institutions. At this time the property was heavily mortgaged. Both FCIB and RBC made claims before the Board in relation to the sums owed to them. In addition, it was not disputed that there were several other debts including sums owed to the St Lucia Cooperative Bank. The property being heavily mortgaged in excess of one million dollars which sum was not being repaid, it was therefore not surprising that in Ms. Salton's testimony, she stated that, '…the banks would ask which property are you going to use to secure the loan?'

[51] The case of Williams v Bermuda Hospital Board,[17] on which Mr. Theodore, QC placed much reliance does not in my view advance the case of Ms. Marquis. Williams was a case about medical negligence where the Privy Council stated that the test for causation was whether on a balance of probabilities the act or omission caused the injury or materially contributed to the injury. In this case, based on the evidence that was before the Board it was open to the Board to find that neither the impending acquisition nor the acquisition caused or materially contributed to the demise of Brands Inc. There is therefore no basis to interfere with the Board's finding that there was no causal connection between the acquisition and any loss suffered by Brands Inc.

Method of Valuation

[52] Section 19 of the Land Acquisition Act provides the basis for assessing the compensation to be paid being the fair market value of the property. Various methods of valuation have been used to determine the fair market value of land. These methods include the residual method, the cost approach method and the

[17] [2016] UKPC 4.

income/investment method.

[53] The Privy Council in Mon Tressor Desert Limited v Ministry of Housing,[18] having reviewed a number of authorities outlined the following propositions to be applied when determining the value of land that has been compulsorily acquired:

> "(a) The value of an interest in land compulsorily acquired is the amount which that interest, if sold on the open market by a willing seller, might be expected to realise at the date of first publication of the statutory notice. This familiar principle is given statutory form in Mauritius by s 19(3) of the Land Acquisition Act.
>
> (b) In assessing this value the best evidence is comparison with figures from other sales of comparable property.
>
> (c) The land acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future: *Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302, [1939] 2 All ER 317, 108 LJPC 51.
>
> (d) The use for which the land is being acquired must be disregarded in making this assessment: *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565, 63 TLR 486; *Waters v Welsh Development Agency* [2004] UKHL 19, [2004] 2 All ER 915, [2004] 1 WLR 1304.
>
> (e) Where there are no comparable sales resort may be had to the residual value method. This should be reserved for exceptional cases and will not be applied where the open market value is otherwise ascertainable by such assessments as a spot valuation: *Cripps on Compulsory Acquisition of Land*, 11th ed (1962), para 4-200. As the Lands Tribunal stated in *Perkins v Middlesex CC* (1951) 2 P & CR 42 ". . . a spot valuation based upon experiences of the market is more likely to be right than calculations which depend upon many assumptions and forecasts."
>
> (f) A spot valuation can take into account the existence and amount of hope value. Its assessment depends upon an amalgam of factors, the likelihood (ranging from complete certainty to a very slight possibility) of the requisite planning permission being granted, the

[18] [2008] UKPC 31.

> demand for the suggested development, the time which such development would take and the projected costs. The resulting figure represents the premium over existing use value which a developer may be thought willing to pay in order to acquire the land in the hope of turning it to profitable account."

[54] The Board found that Ms. Marquis had not adduced evidence of reliable trading figures and in the absence of reliable trading figures or the rental history of the property which might have assisted in arriving at a value based on the income/investment approach, the only reliable method of valuation was the cost approach. The Board took into consideration several land transactions around the time of acquisition and determined that the value of land in the area was about $50 per square foot. However, the Board noted that the property was in a better location due to its' close proximity to the highway and therefore the Board determined the value of the land to be $70 per square foot.

[55] Mr. Theodore, QC contended that the Board erred in adopting the cost approach and in so doing arrived at a valuation which was manifestly wrong. Mr. Theodore, QC relied on the cases of Mon Tressor v Ministry of Housing and Mark Pennington and another v Burnley Borough Council[19] where the Land Tribunal held that in valuing shop premises, the most appropriate valuation approach to be taken was the investment method. Based on that authority, Mr. Theodore, QC submitted that in valuing premises which house a business, like Ms. Marquis' property, the most appropriate method of valuation would be the income or investment approach. Mr. Theodore, QC also averted the Court's attention to the abovementioned principles emanating from Mon Tresor v Ministry of Housing. Mr. Theodore, QC submitted that, had it simply been a property which did not have a business operating on it, the cost approach would have been the appropriate method. The distinction in the use of the property is what created the need for the investment approach to be used rather than the cost approach. He relied on the case of Pennington v Burnley Borough Council where at paragraph 55 of the judgment the President of the Land Tribunal stated that the investment method

[19] [2004] EWLands ACQ/102/2002 (14 March 2003).

was the appropriate valuation approach where the premises were business premises.

[56] I agree with Mr. Theodore, QC that where the owner of the land is carrying on business on the property the appropriate method of valuation would be the income/investment method. This was accepted by the Board and it is not disputed by the Government.

[57] In the income/investment approach the value of the land is determined on the basis of the amount of rent that an occupier would pay for the right to occupy and the level of return an investor would require on their capital.[20] This approach is said to provide an indication of value by converting future cash flows to a single capital value. The investment approach anticipates a proper analysis of the business or investment as a going concern.

[58] In Pennington v Burnley Borough Council, Mr. and Mrs. Pennington operated a sandwich shop on their property which was subsequently compulsorily acquired by the Council. Expert evidence was led on behalf of Mr. and Mrs. Pennington by a chartered surveyor who had over 20 years' experience in the sale and transfer of retail business. He testified not only of the size of the various floors, but also the rental value, and provided detailed trading figures of the business. Also, while the Council opposed the use of the investment approach, they too provided a valuation on the investment basis. The Tribunal therefore had before it evidence from both sides on which the investment method could have been applied.

[59] In the cost approach method, emphasis is placed on the building costs plus the value of the land less depreciation. The best evidence for this approach is a comparison of figures from sales of comparable property.

[20] Modern Methods of Valuation, Eric Shapiro, David Mackmin and Gary Sams, 11th edn at p.12.

[60] Mr. Theodore, QC also submitted that the premise on which the Board adopted the cost approach being that there were no reliable trading figures or rental history was flawed. He contended that there was evidence to conduct the analysis on the investment approach before the Board. Mr. Theodore, QC referred to the evidence of Mr. Hermiston which showed that he was engaged by Ms. Marquis and Ms. Salton in 2002 to prepare a financial proposal and business plan that could be utilised to obtain new financing to revitalize the business. Mr. Hermiston's evidence was incontrovertible. His source documents included, bank statements, cheque books, receipts and invoices. This he used to trace both the trading and financial performance of Universal Brands and Brands Inc for the period 1996-2000. He was therefore able to forecast the future trading and financial course of Brands Inc. His evidence was supported by business consultant Mr. Afzal Khan who had reviewed Mr. Hermiston's projections and his opinion was that Mr. Hermiston's projections were conservative because based on information from prospective clients of the appellants the level of demand was much higher than Mr. Hermiston had anticipated.

[61] Mr. Theodore, QC further contended that the Board ought to have placed much weight on Mr. Hermiston's testimony. His testimony showed that the same line of business and same customers applied over the years to Universal Brands and to Brands Inc. It was the same business carried on by Ms. Marquis over the years although under different names and at times the shareholder-ship varied. The Board was therefore wrong to reject the evidence of Mr. Hermiston and Mr. Khan as unreliable.

[62] In support of his contention that the business of Universal Brands and Brands Inc was the same, Mr. Theodore, QC referred to the following passage in the judgment of Lord Nicholls in Shun Fung where he stated:

> "A business has several attributes. These include the goods or services it supplies, its management and staff, its suppliers, its customers, its location, its reputation, its name. When a business closes down at one site and reopens elsewhere, there is usually no difficult in knowing whether, in practical terms, it is the same business or not… In each case it

> is a question of fact and degree whether the new business has retained sufficient attributes of the old business for the new business sensibly to be regarded as the old business at a new site or which comes to the same as a continuation of the old business at a new site".[21]

Based on this learning Mr. Theodore, QC contended that since Brands Inc traded in the same line of goods, had the same management and staff, supplies, collateral and customers as Universal Brands, the historical records of Universal Brands would be a reliable source of data for the development of performance projections.

[63] Mrs. Portland-Reynolds in response submitted that the documents on which the appellants' expert relied did not emanate from either of the appellants but rather from Universal Brands which was never a party to the proceedings. Mrs. Portland-Reynolds adopted the Board's reasoning and contended that the cost approach is the only and most suitable method of valuation in this case. She submitted that Ms. Marquis, in seeking to induce the Board to rely on the proposed investment method, relied heavily on documents which emanated from neither Brands Inc nor herself, but a third entity which is not part of these proceedings. She further submitted that the economic analysis undertaken on the appellants' behalf did not take into account the period of time in which Universal Brand had materially and significantly started to show a decline and or was not profitable. Mrs. Portland-Reynolds stated that of note is the fact that the analysis done by Mr. Khan and Mr. Hermiston were both done largely on the basis of discussions with the Ms. Marquis as Brands Inc and Universal Brands were not a going concern at the time.

[64] It is not disputed that the property was used as a business premises at the time of the announcement. The property is located in a commercially zoned area and has been used as a business premises since 1987. The difficulty that Ms. Marquis faces is that she did not carry on business on the premises. The business was owned by Universal Brands and from 2000 by Brands Inc. Ms Marquis was only a

[21] At p. 855.

shareholder in these companies. The trading figures related to these companies. Critically, there were no records of any rental history of the premises. In fact, the evidence was that Brands Inc occupied the property rent-free. The entities were not viable entities before the shadow period commenced or during the shadow period. They were unable to pay their debts. This is quite unlike the case of Pennington v Burnley Borough Council where the investment approach was used in assessing the value of the property after it was compulsorily acquired. There the owners of the property were carrying on business on the property at the time of the acquisition and they were able to provide detailed trading figures of the business and financial forecasts. In the instant case, Ms. Marquis was not conducting any business on the property either during the shadow period or at the time of acquisition, nor was Ms. Marquis renting the premises.

[65] The finding of the Board that the trading figures were unreliable was a finding of fact. It is well settled that an appellate court would not interfere with the finding of facts of a lower court unless it was plainly wrong. The reasons for the Board's finding can be summarised as follows: (a) the report considered Universal Brands which had ceased business since 1999 and Brands Inc as the same entity; (b) the report took no account of loan servicing; and (c) No consideration was given to the fact that Brands Inc was only incorporated in March 2000 and by 2001 it had ceased to do business.

[66] Indeed, there was no evidence that Brands Inc ever operated at a profit. While there were figures of $77,000.00 profits in 2000, as indicated earlier, it was accepted by Ms. Marquis that loan servicing was not taken into account. In my view, it was open to the Board to conclude that the trading figures and financial forecasts of a company which was not a party to the proceedings and which had defaulted on its loans and had ceased operation since 1999, and another company which was in operation for less than one year and which also could not service its debts was an unreliable basis to apply the income/investment approach. In the circumstances, the more appropriate approach was the cost

approach. In my opinion, the process of reasoning of the Board is unimpeachable.

[67] Mr Theodore, QC argued alternatively that if the court was of the view that the cost approach was the correct approach then Ms. Marquis should be awarded full compensation for disturbance in computing the value of the property using the cost approach. However, in view of the earlier finding that this was not an appropriate case for the application of the principle of lifting the corporate veil and that Ms. Marquis had failed to prove a causal connection between any loss of Brands Inc and the acquisition of the property from the onset of the shadow period, Ms. Marquis was not entitled to compensation for disturbance loss, this submission is otiose.

[68] For the reasons given above, I would dismiss the appeal. The appellants shall pay the costs of the appeal being 2/3 of the costs before the Board.

I concur.
Humphrey Stollmeyer, QC
Justice of Appeal [Ag.]

I concur.
Gerard Farara, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar