EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2000/0330

BETWEEN:

RONA HENRY
ERIC HENRY

Claimants

and

TROPIC BUILDERS LIMITED

Defendant

Appearances:
Ms. Kalisia Marks for the Claimants/Judgment Creditors
Mr. John Fuller for the Defendant/Judgment Debtor.

2018: December 11th

ORAL JUDGMENT

[1] WILKINSON J.: On 11th November 2004, Thomas J found Tropic Builders Limited (the Company) was liable for negligence and breach of contract and ordered that damages be assessed. Some 5 years 3 months later, on 24th February 2010, damages were assessed and Mrs. Rona Henry and Mr. Eric Henry (the Henrys) were awarded: (a) general damages of $1,141,705.00 for reinstatement less $34,255.00 (b) $50,000.00 for alternative accommodation during reinstatement period, (c) $70,000.00 for loss of use or interference with enjoyment for 14 years, $5,000.00 in nominal damages with respect to personal effects, (d) interest at the rate of 10 percent of the total amount of $1.232,480.00 in general damages from 24th October 2000 to 25th September 2003, and (e) prescribed costs.

[2] The claim arose out of an agreement for the construction of a home for the Henrys on Friars Hill in the parish of Saint John. The Henrys being dissatisfied with the building and which was fraught with problems brought suit. It is against this background that Thomas J found the Company liable.

[3] On a judgment summons filed 18th March 2011, and heard on 24th September 2013, and which hearing which included cross-examination of 1 of its 2 directors, Mr. Bengt Berntsson, Cottle J made an order that the Company pay the judgment sum and interest accrued on or before 30th September 2013. There was a penal notice attached to the order and it warned Mr. Berntsson that he was liable to be imprisoned should the Company fail to pay the judgment debt.

[4] Approximately 2 years and 10 months later, on 4th August 2016, the Henrys filed pursuant to Rule 53 a committal application seeking the following: (a) an order that Mr. Bengt Berntsson be committed to prison, (b) an order that in the alternative suspending the order for committal for a period of 21 days to allow full payment on the judgment debt, (c) an order for costs of the application, and (d) such further and other relief as the Court deemed fit. At the date of the application, the total judgment debt, interest and costs owing was now $2,090,423.39.

[5] Pursuant to rule 53.2 (1) Cottle J's order fixed a date, "on or before 30th September 2013" by which the Company was to pay the judgment sum.

[6] In compliance with rule 53.3, the said order contained on it the requisite penal notice and it specifically addressed the specific officer of the Company identified as being liable to imprisonment as being Mr. Bengt Berntsson.

[7] Pursuant to rule 53.4(a) according the affidavit of Mr. Rowan Knight, head bailiff of the High Court at Antigua, he personally served Mr. Berntsson on 17th October 2013, with a copy of Cottle J's order.

[8] The application pursuant to rule 53.7 (a) stated the Company's breach, and which was the failure to comply with Cottle J's order.

[9] Pursuant to rule 53.7(2), the application was supported by the affidavit of Mr. Henry.

[10] Rule 53.7(3) which requires penal notice be endorsed on the order, and Mr. Berntsson having had notice of the terms of the order were complied with.

[11] Rule 53.8 which requires service of the notice of hearing was complied with.

[12] According to Mr. Henry, Mr. Berntsson has since the date of judgment built several homes throughout Antigua and Barbuda under both the Company and his newer company, Benito Construction Limited.

[13] There was disclosed the annual report and financial statement for the Company for the year ending December 2009; it was prepared by CH & P Consulting. A review of the statement indicates that Mr. Berntsson is 1 of 2 directors, the other being his deceased wife, Mrs. L Berntsson. The Company made a profit of $13,308.00 in 2009 and $27,755.00 in 2008 – a decrease year over year. It had no assets for either 2008 or 2009. It had long term liabilities of $1,062,703 at 2009. No cash in 2009, and $10,517.00 in 2008. There was a capital reserve noted for both 2008 and 2009 of $2 million. And retained earnings were recorded in the minus position of ($3,243,845.00).

[14] The Court observes at this juncture that there was no record in the financial statement of the judgment delivered on 11th November 2004 and the potential exposed liability of the Company. It is

common for financial statements to record an estimated sum in these circumstances with explanation.

[15] At 5th October 2010, there was incorporated a new company, Benito Construction Ltd. offering the identical type of business – building contraction. The directors were Mr. Berntsson, Mr. Nigel Martin and Mr. Thor Berntsson. Mr. Berntsson is the majority shareholder with 51 percent with the other 2 directors hold 24 and 25 percent of the shares.

[16] According to Mr. Berntsson, after the decision was made to wind up the Company, he joined forces with Mr. Nigel Martin and Mr. Thor Berntsson to incorporate the new company in order for him to survive and to be able to continue to provide care for his wife who took ill in 2015 and passed away in 2017. With a small cash investment Benito Construction Ltd was able to trade and carry out construction work, pay its debts and provide employment for many of the former employees of the Company.

[17] Mr. Berntsson was cross-examined extensively at the committal hearing. It is a fact that although there was disclosed an unsigned resolution to wind-up the Company, it was not filed in the Companies Registry although it was filed with the tax authorities. Mr. Berntsson said that he did not know if the resolution was prepared only for the purposes of the Henrys' case.

[18] On the question of whether there was cash in the bank account of the Company at the time when the decision was taken to wind-up the Company, Mr. Berntsson responded that he 'would say that there probably (would) be some" but he would have to look at the statement. He said that the Company owed very little as it paid all of its bills monthly. It paid its creditors each and every month.

[19] On the question of whether the small cash investment in Benito Construction Limited was from the Company, Mr. Berntsson, said "No". He also said that the employees of the Company who moved over to Benito Construction Ltd, were paid severance pay. The others, he personally guaranteed their severance pay when it became due.

[20] As to the assets of the Company and in particular the vehicles, Mr. Berntsson said that some were used by Benito Construction Ltd and some were scrapped. At time of cross-examination none of the Company's vehicles were in use. He admitted that no attempt was made to liquidate the vehicles and apply the sum against the judgment debt.

[21] Mr. Berntsson was asked what became of the $2 million capital reserve which was shown in the financial statement, he responded that he could not say as he had no understanding of accounting.

[22] It was put to Mr. Berntsson that the Company had no intention of paying the judgment debt. To this he responded that he had no way of paying the judgment debt.

[23] Mr. Berntsson was asked if he understood that he was responsible for paying the debt if the Company could not. He said "No."

[24] Mr. Berntsson agreed that he was "the main person" behind Benito Construction Ltd. and that Benito Construction Ltd. made a small profit. He admitted to earning enough from Benito Construction Ltd to make a reasonable living and said that he made enough to provide care for his wife when she was

alive. He owns his own home, a boat, and a personal motor vehicle, Toyota SUV aged 16 years and with an approximate value of $10,000.00. He said that he owned a nice home which was mortgage free but he was unaware of its value. He owned a smart phone which was a gift from his daughter. He did not have a savings account. For his work with Benito Construction Ltd. he was paid a salary of $5000.00 per month as a pensioner. His utilities average about $700.00 per month.

[25] At the close of Counsel's cross-examination, Mr. Berntsson said that he could probably afford to pay something on the debt each month.

[26] On a question from the Court, Mr. Berntsson said that his home was probably valued about a little over $1 million aside from the value of the land. His home is established on approximately 30,000 square feet of land in the Blue Waters area in the parish of Saint John.

The Law

[27] The Civil Procedure Rules 2000 Part 53 provides for committal and sequestration proceedings:-

> "Committal order or sequestration order against officer of body corporate
>
> 53.4 Subject to rule 53.5, the court may not make a committal order or a sequestration order against an officer of a body corporate unless —
>
> (a) a copy of the order requiring the judgment debtor to do an act within a specified time or not to do an act has been served personally on the officer against whom the order is sought;
>
> (b) at the time the order was served it was endorsed with a notice in the following terms:
>
> > "NOTICE: If [name of body corporate] fails to comply with the terms of this order proceedings may be commenced for contempt of court and you [name of officer] may be liable to be imprisoned or to have an order of sequestration made in respect of your property."; and
>
> (c) if the order required the judgment debtor to do an act within a specified time or by a specified date, it was served in sufficient time to give the judgment debtor a reasonable opportunity to do the act before the expiration of that time or before that date.
>
> Application for committal order or sequestration order
>
> 53.7 (1) The application must specify the
>
> > (a) exact nature of the alleged breach or breaches of the order or undertaking by the judgment debtor; and
> >
> > (b) precise term of the order or undertaking which it is alleged that the judgment debtor has disobeyed or broken.

(2) The application must be verified by affidavit.

(3) The applicant must prove –

(a) service of the order endorsed with the appropriate notice under rule 53.3(b) or rule 54.3 (b); and

(b) that the person against whom it is sought to enforce the order had notice of the terms of the order under rule 53.5 if the order required the judgment debtor not to do an act; or

(c) that it would be just for the court to dispense with service.

Powers of the court

53.9 If satisfied that the notice of application has been duly served, the court may –

(a) accept an undertaking from the judgment debtor or an officer of a body corporate who is present in court and adjourn the application generally;

(b) adjourn the hearing of the application to a fixed date;

(c) dismiss the application and make such order as to assessed costs under rule 65.11 as it considers to be just;

(d) make a committal order against a judgment debtor who is an individual;

(e) make a committal order against an officer of a judgment debtor which is a body corporate;

(f) make a sequestration order against a judgment debtor who is an individual or a body corporate;

(g) make a sequestration order against an officer of a judgment debtor which is a body corporate; or

(h) make a suspended committal order or sequestration order on such terms as the court considers just."

[28] The Court has already noted the other procedural rules which have been complied with as to filing serving and so forth.

[30] While the CPR 2000 Part 53 provides the procedure for an application for committal, the application must be considered pursuant to The Debtors Act Cap 131. This Act provides:

"3. With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money.

There shall be excepted from the operation of the above enactment:

(a) …

(f) Default in payment of sums in respect of payment of which orders are in this Act authorized to be made:

….

4. (1) Subject to the provisions hereinafter mentioned, and to the prescribed rules, the Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any persons who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court:

Provided –

(a) That the jurisdiction by this section given of committing a person to prison shall, subject to any rules, be exercised only by a Judge or his deputy, and by an order made in open Court, and showing on its face the ground on which it is issued;

(b) That such jurisdiction shall only be exercised where it is proved to the Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and refused or neglected, or refuses or neglects, to pay the same. (My emphasis)

(2) Proof of means of the person making default may be given in such manner as the Court thinks just: and, for the purposes of such proof, the debtor and any witnesses may be summoned and examined on oath according to the prescribed rules."

[31] In **Blackstone's Civil Practice 2012** at p. 1293 it is stated:

"The court will not commit a person for civil contempt unless the allegations of contempt are proved beyond a reasonable doubt … Where more than one breach is alleged, the court must consider whether each of them has been proved beyond a reasonable doubt, but in deciding whether the breaches justify committal, the court must consider the whole picture to see whether it portrays a respondent seeking to comply with orders of the court or one bent on flouting them Gulf Azov Shipping Co. Ltd. v. Idisi [2002] EWCA Civ.21,LTL 16/1/2001at [18]."

[32] There was much cross-examination on Mr. Berntsson's personal circumstances and that of his relationship and employment with the new company, Benito Construction Ltd. While the issue of piercing the corporate veil was not raised, it was perhaps attempted indirectly by the questions of the personal nature to Mr. Berntsson.

[33] In this regard, the Court recalls the first principles of company law as set out in the locus classicus Salomon v. Salomon and Co. Ltd. [1897] AC 22 and which firmly established that from the date of incorporation, its subscribers of the memorandum, persons who may become members and hold offices are separate and distinct from a company.

[34] Although the facts are not on all fours, the Court also finds helpful the principles in Dave Persad v. Anirudh Singh [2017] UKPC 32. Here Lord Neuberger said:

"20. In the light of the issues before the Judge, the fact that Mr. Persad did not produce any documents relating to the creation or constitution of CHTL takes matters no further. The fact that CHTL was a "one man company" is also irrelevant: see Salomon v. A Salomon and Co. Ltd [1897] AC 22, which famously established the difference between a company and its shareholders. That case also exposes the fallacy of the notion that the court can pierce the veil where the purpose of an individual interposing a company into a transaction was to enable the individual who owned or controlled the company to avoid personal liability. One of the reasons that an individual, either on their own or together with others, will take advantage of limited liability is to avoid personal liability if things go wrong, as Lord Hershell said at pp.43 to 44. If such a factor justified piercing of the corporate veil of incorporation, it would make something of a mockery of limited liability both in principle and in practice.

21. That passage in Lord Hershell's speech also disposes of the suggestion that CHTL was a "front" for Mr. Persad. Such (mildly) pejorative terms can only too easily be invoked to justify a decision which is both unreasoned and wrong. Lord Hershell said, at p.42, that he was "at a loss to understand what is meant by saying that" the company was an "alias" for its shareholder and director, as the company "is not another name for the same person: the company is ex hypothesi a distinct legal persona."

Findings and Analysis

[35] On 24th September 2013, Cottle J having made an order for payment the legal principle that all orders of the Court must be obeyed unless and until discharged or set aside by the court of appeal applies - see Isaacs v. Robertson (1984) 43 WIR 126.

[36] By the time the Henrys filed their application for committal on 4th August 2016, it was some 2 years and 10 months post Cottle J's order. The general principle is that applications for committal ought to be brought quickly. No explanation was given by the Henrys for the delay in filing their application for committal given that Cottle J's order fixed payment to be on or before the expiration of 6 days from his order.

[37] The unchallenged evidence is that the Company was in existence for some time before it contracted with the Henrys. There was no evidence that the Company was a sham, device or façade at the time of its contract with the Henrys.

[38] The Court relying on the principles in Salomon v. A Salomon and Co. Ltd and Dave Persad v. Anirudh Singh [2017] UKPC 32 finds that the questions of a personal nature to Mr. Berntsson such being about his personal home, smart phone and salary from Benito Construction Ltd. were irrelevant.

[39] What's left? It appears there was only left the 2009 annual report and financial statement for assessment on the ability of the Company to pay the judgment debt. This report as the Court noted prior shows a net profit of $13,308.00 at 2009. It is a fact that by 5th October 2010, Mr. Berntsson

together with Mr. Martin and Mr. Thor Berntsson incorporated a new company, Benito Construction Ltd. and he was working for the new company. It appears that the operation of the Company had ceased from about October 2010.

[40] The Court was left with a puzzling question since Mr. Berntsson did not appear to know, and it was what happened to the capital reserve of $2 million? Was some of it absorbed by the long term borrowing? And as also observed, the retained earnings were also in the minus position of ($3,243,845.00).Perhaps these were better questions for the persons preparing the financial statement.

[41] As the Court understands, a capital reserve on a balance sheet is never used to pay dividends but is to secure the payment of contingencies and or to offset capital losses. This reserve is usually permanently invested.

[42] The Court therefore questions whether the $2 million stated as capital reserve ever really existed or was a mere recording on the financial statement. The Court comes to this conclusion as the Court finds it hard to believe that Mr. Berntsson would not be aware of if the Company had the sum of $2 million. This is not a small sum of money by any means.

[43] Pursuant to the Debtors Act section 4(1)(b) the Court must be satisfied that the Company had the means to pay and refused or neglected to do so. Further, Mr. Berntsson contempt must be proved beyond a reasonable doubt.

[44] When it comes to financial matters of a company, in general, reliance is usually placed on its financial statements, such instances would be on application for a loan from a bank or other lending agency, for certain licences and so forth. The Court believes that its examination is no different as it seeks to ascertain whether the Company had the ability to pay the judgment debt at date of Cottle J's order, that is 24th September 2013, or subsequent.

[45] On review of the financial statement, the Court finds that the Company did not have the ability to pay the judgment debt either at 24th September 2013, or subsequent.

[46] The Henrys' application is therefore dismissed. There will be no order for costs since the Court was told that the Company was being wound-up and so ceased to exist.

[47] Court's order:

1. The Henrys' application is dismissed.
2. No order for costs

Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar