EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCM2018/ 0069

BETWEEN:

CYRIL DORNELLY CONSTRUCTION COMPANY LIMITED

Claimant/ Respondent

And

THE HARBOR CLUB LIMITED

Defendant/ Applicant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini High Court Judge

Appearances:
Mr. Horace Fraser for the Claimant/ Respondent
Mr. Mark Maragh, for the Defendant/Applicant

2019: February 12
March 18

DECISION

[1] ST ROSE-ALBERTINI, J. [Ag]: Before the Court is an application for summary judgment filed by the defendant The Harbor Club Ltd. ("THC") on the premise that it is not the proper party to be sued by the claimant Cyril Dornelly Construction Company Limited ("CDC") and

that the application ought not to proceed on the basis of an amended statement of claim filed by CDC, after the application was filed.

The Issues

[2] The matters which arise for the Court's consideration are:-

1. Whether the amended statement of claim filed subsequent to the application for summary judgment ought to be considered in determining the application?

2. Is THC entitled to summary judgment pursuant to CPR 15.2?

Background

[3] On 8th August, 2018 CDC filed a claim against THC for sums allegedly owed under a construction contract, which CDC says was executed by the parties in October 2015. The sum claimed is $503, 034.55, plus interest and costs.

[4] On 19th November 2018 THC filed an application for summary judgment against CDC pursuant to rule 15.2 of the Civil Procedure Rules 2000 ("CPR"). The grounds of the application are that it is not the proper party to the proceedings, as there is no contract between itself and CDC and that the claim is for damages under a contract, which by CDC's own admission, was executed with another entity. Accordingly, THC says the claim has no realistic prospect of success. This is also the essence of THC's defence filed on even date, in which it is averred that the contract is between CDC and Sunrod Property Inc ("Sunrod"), which is the proper party to be sued for payment of monies due under the contract.

[5] Subsequently on 5th December 2018, CDC filed an amended statement of claim which amended paragraph 3 to read: *"In October 2015, the claimant entered into a contract with the defendant, who acted by and through its agent Sunrod Property Incorporated in respect to the construction of a swimming pool, pizza parlour…"* The amended statement

of claim contained several further new averments to the effect that (1) Sunrod was at all material times the sole shareholder of THC and executed the contract as agent of THC; (2) that by certain letters THC confirmed the principal/agent relationship existing between itself and Sunrod and accepted the contractual responsibility for payment of the balance of the contract price to the claimant; (3) that although the contract was executed between CDC and Sunrod it was for the benefit of THC; (4) that THC is now refusing to pay the debt by hiding behind Sunrod as the contracting party and this is an appropriate case for lifting the corporate veil to ascertain the existence of a legal relationship between CDC and THC; (5) that the benefit from CDC services was obtained through a scheme put in place by THC, who is now refusing to pay for the benefit it derived from the services of CDC and (6) that THC has acted in bad faith.

The Law

[6] CPR15.2 governs such applications. It states:-

> *"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the –*
> *(a) claimant has no real prospect of succeeding on the claim or the issue; or*
> *(b) defendant has no real prospect of successfully defending the claim or the issue.*

[7] The procedure is outlined in CPR 15.5 and it states:-

> *15.5(1) The applicant must –*
> *(a) file affidavit evidence in support with the application; and*
> *(b) serve copies of the application and the affidavit evidence on each party against whom summary judgment is sought;*
> *not less than 14 days before the date fixed for hearing the application.*
> *(2) A respondent who wishes to rely on evidence must –*
> *(a) file affidavit evidence; and*
> *(b) serve copies on the applicant and any other respondent to the application;*
> *at least 7 days before the summary judgment hearing" (Emphasis added).*

[8] The purpose of the rule is best explained by Lord Wolfe MR in Swain v Hillman[1] where he said:-

> *"…….the Court now has a salutary power both to be exercised in a Claimant's favour or, where appropriate, in a Defendant's favour. It enables the Court to*

[1] [2001] 1 All ER 91

dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or,…….they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success[2].

……Useful though the power is, it is important that it be kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial…..…..the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."[3]

[9] Courts have been admonished to exercise caution in applying the rule, because summary judgment is considered a serious step. It provides finality without the opportunity for trial on the merits or the testing of evidence on cross examination. Nevertheless, to save unnecessary expense and to deal with cases expeditiously, a claimant or defendant is entitled to summary judgment where the respective party does not have a good or viable claim or defence.[4] It has been said that in so doing the court is not tasked with adopting a sterile approach but must consider the matter in the context of the pleadings and the evidence before it, to determine whether the claim has a realistic prospect of success.[5]

[10] In this jurisdiction the correct approach was helpfully distilled in Dr Martin Didier et al v Royal Caribbean Cruises Ltd[6]. Learned Chief Justice Pereira CJ writing for the Court of Appeal said the following:-

"[22] ……..A party who applies to have summary judgment entered on a claim must file affidavit evidence in support of the application and so too must a respondent who wishes to rely on evidence. This filing of affidavit evidence is a crucial part of the summary judgment procedure and forms the basis for the ***court's application of the legal test for entry of summary judgment****.*

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[2] At page 92, para e – f

[3] At page 95, para c

[4] Pentium (BVI) Limited v KPMG - BVIHCV2002/ 0122 per Rawlins J

[5] St. Lucia Motors Ltd & General Insurance Co. v Peterson Modeste SLUHCVAP2009/0008 (delivered 11th July,
2010) - per George-Creque JA

[6] SLUHCVAP2015/0004 delivered on 6th June, 2016 (unreported) at paragraphs 22-23 of the judgment

> *[23] While a claimant's pleaded case may be properly constituted, it may very well be completely hopeless in the face of a defendant's defence, and therefore, the claimant will have no real prospect of succeeding. Similarly, a defendant who puts forward a defence which clearly cannot stand up to a claimant's pleaded case will have no real prospect of successfully defending the claim. In either of these instances, it would be appropriate for the court to enter summary judgment on the claim pursuant to Part 15 of CPR provided that the issues in the claim are ones which are suitable to be dealt with using the summary procedure.5 In disposing of a claim summarily, the court would essentially consider the legal issues in the case, determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim and enter judgment accordingly. This* ***will be a judgment on the merits."*** [Emphasis added]

Should the amended statement of claim filed subsequent to the summary judgment application, be considered in determining the application?

[11] Counsel for THC Mr Mark Maragh contends that the amended statement of claim should not be considered, as it came after the application was filed. In support, he relies on the case of St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited[7]. In that case, the defendant filed an application to strike out the claimant's claim. It was filed during the period for filing a defence, consequent on which no defence was filed. After the filing of the strike out application and the expiry of the period for filing the defence, the claimant sought and obtained judgment in default of defence. An application was made by the defendant to set aside the default judgment, which was refused. The defendant appealed. The issue for the Court of Appeal was which application ought to have been determined first.

[12] The Court of Appeal held that the CPR placed responsibility for the active management of cases on the Court and referred to CPR 25.2 (f) and (j) which permits the court to decide the order in which issues are to be resolved and to set timetables and otherwise control the progress of cases.[8]

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[7] Civil Appeal No.: 6 of 2002 (Saint Christopher and Nevis; 31st March 2003)

[8] At paragraphs 17 and 28

[13] The Court said the following:

> *I am therefore fully satisfied that the application thus effectively stayed the proceedings until it was heard and determined and would have taken precedence over any other application or request since its determination in favour of the appellant/defendant could result in the matter being brought to an end.*[9]
>
> *"If the earlier application to strike out the Claim had been heard first and decided in the bank's favour then there would have been no claim for which to enter default judgment. The suit would have been put to an end. That possible outcome was sufficient in itself to have dictated that the striking out application should have been heard first. Because the later application/request was first entertained, the result was to conclusively deny the bank of its right to a hearing of what was a serious application and one that could have resulted in the dismissal of Caribbean's entire claim."*[10]
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> *"I am of the view that the court office would have been not only enabled and entitled… but obliged to refuse to enter the default judgment that had been requested after the defendant had earlier applied to strike out the claimant's entire case."*[11]

[14] Mr Horace Fraser countered on behalf of CDC, that it has the right to amend its statement of claim without permission at any time before case management, and the proceedings had not yet reached that stage. The amendment is not asking anything of the court and is merely a procedure to take the case forward. He argued that that application has not addressed the matters raised in the amended statement of claim and has now been rendered otiose. It should be withdrawn or dismissed. In the alternative, he says, the application ought to be considered on the amended statement of claim.

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[9] At paragraph 5, per Georges JA
[10] At paragraph 17, per Saunders JA
[11] At paragraph 29, per Barrow J.A.

[15] I have considered the contending arguments and take the view that the facts in St. Kitts Nevis Anguilla National Bank Limited case are not on all fours with the present case, as it concerned two applications for which the court was required to apply the "*first in time*" rule in disposing of these applications. In the instant case there are no contending applications but rather CDC has taken a legitimate step to strengthen its claim. There was nothing to preclude filing the amended statement of claim at least once without the court's permission, as no date had yet been fixed for the first case management conference.[12]

[16] The Court of Appeal decision in The Attorney General v Allen Chastanet et al,[13] is instructive on this issue. It concerned inter alia, the issue of whether the learned judge erred in striking out the appellant's amended statement of claim in view of the fact that a further amended statement of claim had been filed. There, the further amendments were made after an application to strike out had been filed and heard, and responded to issues raised with respect to the pleadings in the application to strike out. The proceedings had also not reached the stage of case management conference but the appellant had sought and obtained permission to make the further amendments. In his judgment, the learned judge did not refer to the further amended statement of claim. He made findings thereon and referred only to the amended statement of claim.

[17] The Court held:

> *"The mere fact that the further statement of claim was filed before the learned judge had rendered his decision, the learned judge would have been obliged to consider the further amended statement of claim had he been aware that it had been filed. The further amended statement of claim had overtaken the amended pleadings that were filed…"*[14]
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> *"In my view, once the latter pleadings had been filed and served in accordance with the leave that was granted by the learned judge, whether or not a cause of action arose on the amended claim and amended statement of claim was no*

[12] Comodo Holdings Limited v Renaissance Ventures Limited et al – BVIHCMAP2014/0032 (delivered 3rd May, 2016, unreported)
[13] SLUHCVAP2015/0016
[14] At paragraph 143

longer a live issue. Indeed, the filing of the further amended statement of claim would have effectively brought an end to the application to strike out the amended claim… In so far as the amended statement of claim was further amended, it is clear to me that the application to strike the amended claim as distinct from the further amended statement of claim became otiose…"[15]

"It was not open to the learned judge to pronounce on whether the amended claim and the amended statement of claim disclosed a cause of action in so far as they had been overtaken by the further amended statement of claim."[16]

[18] Applying this reasoning to the instant case, CDC's amended statement of claim cannot be ignored. By the time the application came on for hearing the amended statement of claim was properly filed and on record before the Court. It would have overtaken and replaced the original claim, with the effect that the Court would either have to consider the application on the amended claim or simply dismiss it as otiose.

[19] The application and the affidavits of the respective parties have been duly filed. The parties would have been under a duty to place before the Court all the relevant evidence to support their respective positions and upon which the Court could make a decision. CDC responded to the application by affidavit of Cyril Dornelly filed 28th November 2018. Even though this affidavit was filed before the amended statement of claim, it put before the Court the substance of the pleadings contained in the amended statement of claim, as well as evidence to support the new pleadings. The written submissions on behalf of CDC also suggest that the amended statement of claim and affidavit in response can be taken together.[17]

[20] THC filed two affidavits deposed by Michael Mathius on 19th December, 2018 and 23rd January, 2019 in reply to the affidavit of Cyril Dornelly which addressed its posture to the CDC's response. It can be taken that all the evidence upon which the application must be

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[15] At paragraph 146
[16] At paragraph 148
[17] See para 2.2 and 2.5 of the Claimant's Written Submissions filed on 17th January, 2019

considered is before the Court and there can be no prejudice to THC if the application is considered on the amended statement of claim.

[21] I therefore conclude that the interest of justice would best be served by proceeding with the application and that it should be considered on the amended statement of claim.

Is THC entitled to summary judgment pursuant to CPR 15.2?

[22] Adopting the approach given in Dr Martin Didier v Royal Caribbean Cruises Ltd the Court will now consider the legal issues raised by CDC in the amended statement of claim and the likelihood of a realistic prospect of success in relation to each of these issues.

Privity of Contract

[23] The contract was adduced in evidence by THC, as Exhibit MM1. It is not in dispute that on its face, it is by and between CDC and Sunrod. THC is not a party to the contract. The doctrine of privity of contract contemplates as a general rule, that a contract cannot confer rights or impose obligations on strangers or persons who are not parties to it.[18] In particular, a contract cannot impose a burden on a person who is not a party to it, if such contractual burden would be imposed without his consent.[19]

[24] CDC seeks to enforce a burden/ obligation of its contract with Sunrod against THC, namely payment of outstanding contract sums, in circumstances where THC is not a party to the contract and therefore did not consent or agree to such obligation. Additionally there is nothing in the contract to suggest that Sunrod did not undertake full responsibility for all its obligations under the contract. It is obvious from the contract that there is no contractual relationship or privity of contract between CDC and THC. Thus CDC is unable to enforce the terms of the contract against THC, unless an exception to the doctrine applies.

Contract for the Benefit of a Third-Party

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[18] Halsbury's Laws of England (Volume 22 (2012) at para 327 – The general rule

[19] Halsbury's Laws of England (Volume 22 (2012) at para 329 Attempts to impose burdens on third parties.

[25] Mr Fraser submits that THC it is the proper party to be sued for payment of the outstanding sums because it has benefited from the works undertaken by CDC under the contract and as such is responsible for payment. To this Mr Maragh responds that the allegations in the claim can only support a claim for breach of contract in circumstances where THC is not a party to the contract and rather than withdrawing the claim and filing a fresh claim against the correct party Sunrod, CDC has persisted in the same vein, by amending its claim, against the wrong party.

[26] As I understand the principle of 'contract for the benefit of a third party', it concerns the issue whether contracting parties can contract for one of them to confer a benefit on a third party in such a way that the third party may in its own right sue on the contract to enforce the benefit. The general common law rule is that a third party cannot enforce a benefit conferred on it, and only a party to the contract can acquire rights under it.[20]

[27] There is no issue of THC, seeking to enforce any benefit alleged to have been conferred upon it under the contract. Consequently there is no need to further consider the point.

Agency as an exception to the doctrine of privity of contract

[28] The original statement of claim alleged at paragraph 3 that: *"In October 2015, the claimant entered into a contract with the defendant in respect to the construction of a swimming pool, pizza parlour…";* and in paragraph 7: *"the claimant contends that the defendant's failure to pay its final invoice is a repudiatory breach of contract."*

[29] CDC subsequently amended paragraph 3 to read: *"In October 2015, the claimant entered into a contract with the defendant, who acted by and through its agent Sunrod Property Incorporated in respect to the construction of a swimming pool, pizza parlour…".*

[30] Agency, as an exception to the doctrine of privity of contract, arises where a principal authorizes his agent to act on his behalf in making a contract with a third party. The

[20] *Tweddle v Atkinson* (1861) 1 B & S 393; *Dunlop Pneumatic Tyre Co v Selfridge & Co Ltd* [1915] AC 847 at 853

consequence of such agency is that there is a direct contractual relationship between the principal and the third party, and the agent is neither liable under, nor entitled to enforce the contract he makes on behalf of the principal. However, the agent may be liable or entitled under that contract if he contracts personally, or as co-principal, or acts for a principal who is undisclosed, unnamed or non-existent.[21]

[31] The rule contemplates that where a person makes a contract in his own name without disclosing either the name or the existence of a principal, he is personally liable on the contract to the other contracting party, though he may be in fact acting on a principal's behalf.[22] That is so because the agent has contracted in such terms as to imply that he is the real and only principal. Evidence to contradict the terms of such contract is usually inadmissible. Whether an agent has contracted in such terms or not depends upon the construction of the particular contract. It is the law that a party is personally liable for the obligations which flow from a contract if he puts his unqualified signature to it. In order to be exonerated from liability, the contract must show, when construed as a whole, that he contracted as agent only and did not undertake any personal liability.[23]

[32] Article 1616 of the Civil Code[24] is of similar effect. It states:-

> *"1616. An agent who acts in his or her own name is liable to the third party with whom he or she contracts, without prejudice to the rights of the latter against the principal also."*

[33] Thus the Civil Code also imposes liability, where a relationship of agency exists and an agent enters a contract in his own name. Additionally, under this Article, the principal may also be held liable. Godfrey Aurelien v Johnny Chitolie[25] is a case in point from this

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[21] Halsbury's Laws of England/Contract (Volume 22 (2012))/4. Consideration and Privity/(2) Privity/(ii) Exceptions to the Doctrine of Privity/a. At Common Law/334. Agency.
[22] Hamid (t/a Hamid Properties) v Francis Bradshaw Partnership [2013] EWCA Civ 470; Halsbury's Laws of England/Agency (Volume 1 (2017))/7. Relations between Agent and Third Persons/(1) Liabilities of Agent/(i) On Contracts/157. Fact of agency not disclosed.
[23] Halsbury's Laws of England/Agency (Volume 1 (2017))/7. Relations between Agent and Third Persons/(1) Liabilities of Agent/(i) On Contracts/158. Identity of principal not disclosed.
[24] CAP4.01 of the Revised Edition of the Laws of Saint Lucia
[25] Claim No.: SLUHCV2008/0946

jurisdiction, where both the principal and the agent were held liable pursuant to article 1616 of the Civil Code.

[34] Based on the foregoing, if THC authorized Sunrod to enter the contract on its behalf, THC would be bound by the contract and CDC would be entitled to enforce it directly against THC. However CDC has adduced no evidence of THC authorizing Sunrod to enter the contract as its agent, and THC flatly denies this. Even if there was otherwise an agency relationship between THC and Sunrod as alleged by CDC, Sunrod would still be personally liable under the contract, having entered the contract in its own name without disclosing the existence or name of THC as its principal. Sunrod placed its unqualified signature on the contract, and when construed on the whole, the contract does not reveal that Sunrod contracted as agent only or that it did not undertake full liability for its obligations. As stated earlier a party who places his unqualified signature on a contract becomes the party liable for the legal obligations which flow from such contract.

[35] For the reasons stated above, Article 1616 is of no import, as CDC has not been able to show that a relationship of agency, whether express or implied, was in fact established between THC and Sunrod, to form the basis of liability under the contract.

Is there a relationship of agency between THC and Sunrod?

[36] Agency connotes a relationship where one person has the authority or capacity to create legal relations between a person occupying the position of principal and third parties. Whether that relationship exists in any given situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent.[26]

[37] The authority of the agent may be derived expressly from an instrument, either a deed or simply in writing, or may be conferred orally. Authority may also be implied from the

[26] Halsbury's Laws of England/Agency (Volume 1 (2017))/1. Nature and Formation/(1) The Relation of Agency/1. Nature of the relation of agency.

conduct of the parties or conferred by a valid ratification subsequent to actual performance. In addition, a person may appear to have given authority to another, and any acts within such apparent authority may effectively bind him to the third party.[27] The common law principles in relation to the formation and relationship of agency are in all material respects the same as the Civil Code.

[38] No evidence of a written or oral agency agreement has been adduced by CDC. THC denies that any such agreement exists and that no amount of investigation or disclosure could reveal such agency because it exists only in the directing mind of CDC. However, CDC alleges that at all material times THC held out Sunrod as its agent, and by certain letters confirmed the agency relationship and accepted contractual responsibility. These allegations raise the issues of ostensible authority and ratification, respectively.

Apparent/Ostensible Authority

[39] Apparent or ostensible authority, also known as the doctrine of 'holding out' is premised on estoppel. It arises where one person (P) has acted so as to lead another (C) to believe that he has authorized a third person (A) to act on his behalf, and that other (C) in such belief enters into transactions with the third person (A) within the scope of such ostensible authority. The first-mentioned person (P) is estopped from denying the fact of the third person's (A's) agency under the general law of estoppel, and it is immaterial whether the ostensible agent (A) had no authority in fact, or merely acted in excess of his actual authority.[28]

[40] Insofar as any other person is concerned, the ostensible authority is the sole test of the principal's liability. The onus lies upon the person dealing with the agent to prove either real or ostensible authority, and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it is sought to make the principal liable.

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[27] Halsbury's Laws of England/Agency (Volume 1 (2017))/2. Authority of the Agent/(1) Derivation and Extent/29. Derivation of agent's authority.

[28] Halsbury's Laws of England/Agency (Volume 1 (2017))/1. Nature and Formation/(4) Formation of Agency/(iv) Agency by Estoppel/25. Apparent authority.

Holding out is something more than estoppel by negligence and it is necessary to prove affirmatively, the conduct amounting to holding out. [29]

[41] CDC has neither in its amended statement of claim nor in its affidavit in response to the application pleaded or adduced evidence of affirmative conduct by THC which would constitute holding out Sunrod as its agent. The bare assertion that Sunrod is the sole shareholder of THC or that the contract may be for the benefit of THC, is not conduct which could be said to amount to holding out. The letters exhibited by CDC cannot be considered for the purpose of establishing ostensible authority as they came into existence subsequent to the execution on the contract. Therefore, these letters could not possibly have led CDC to conclude that Sunrod was authorized to act as agent of THC, upon which belief CDC entered into the contract.

Ratification

[42] Where an act, at the time it was entered into or done by an agent, lacked the express or implied authority or knowledge of a principal, such act may be ratified by the subsequent conduct of the principal. It is thereby made as effectively his own as if he had authorized the act prior to it being entered into or done. Where an act has been subsequently ratified, the relation of principal and agent is constituted retrospectively. The principal is then bound by the act whether it is to his advantage or detriment, to the same extent and with all the same consequences as if it had been done by his prior-given authority.[30]

[43] As the whole premise upon which ratification is based is that the person ratifying is already in appearance the one contracting, the agent must not be purporting to act for himself but must profess to be acting on behalf of a named or ascertainable principal. A contract made by one professing to act on his own behalf, though at that time he has the undeclared

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[29] Halsbury's Laws of England/Agency (Volume 1 (2017))/1. Nature and Formation/(4) Formation of Agency/(iv) Agency by Estoppel/25. Apparent authority.

[30] Halsbury's Laws of England/Agency (Volume 1 (2017))/4. Ratification/(1) General Principle of Ratification/58. Principal's retrospective ratification of agent's acts; Wilson v Tumman (2) (6 M & G at p 242)

intention of acting on behalf of another person, cannot be ratified by that other person so as to confer on himself the status of principal and the right to sue and the liability to be sued on the contract.[31]

[44] The House of Lords case of Keighley Maxsted & Co v Durant is authority for this proposition. In the words of The Earl of Halsbury LC:

> *"I confess that I do not see the relevancy of the argument that a contract might be made in the name of an unknown principal, and that such a principal may sue and be sued, though the name was not given at the time when the contract was made. The fact is that in such a case the contract is made by him, and the disclosure afterwards does not alter or affect the contract actually made. Here it would alter the contract afterwards and make it a different contract."*

[45] And Lord MacNaghten:

> *"It would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intentions locked up in his own breast; for it cannot be said that a person who so conducts himself does assume to act for anybody but himself. But ought the doctrine of ratification to be extended to such a case? On principle I should say certainly not. It is, I think, a well-established principle in English law that civil obligations are not to be created by or founded upon undisclosed intentions. That is a very old principle."*

[46] Sunrod having entered and signed the contract in its own name and not disclosed that it was acting as an agent, means that THC cannot ratify the contract. It is therefore not necessary to consider whether the letters amount to ratification, but for completeness, it is considered below.

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[31] Halsbury's Laws of England/Agency (Volume 1 (2017))/4. Ratification/(3) Conditions of Ratification/61. Act must be on behalf of principal.

[47] Ratification may be express, whether in writing or oral, or may be implied from conduct.[32] Ratification is a unilateral act of will. It must be evidenced either by clear adoptive acts or by acquiescence equivalent thereto.[33]

[48] The alleged acts, being the letters exhibited to CDC's affidavit in response are not clear adoptive acts that could amount to ratification. These letters are equivocal at best.

[49] The fact that the letters of 13th March 2017 and 21st March 2018 are on a letterhead styled as "Harbor Club" is not clear or conclusive of anything. It does not indicate that it is THC the defendant in the claim as distinct from "Harbor Club" the name of the project or hotel. It is not uncommon for a development project to have a name/brand which is used in correspondence and which is separate and distinct from the developer or operator of the project. The letter of 13th March 2017 is a notice in relation to the progress of the project / development and therefore is not extraordinary that it should have as its heading Harbor Club. No evidence has been adduced as to who Daniel Bulcher the person who signed the letter is. The capacity in which he signs the letter or the company he represents has not been stated.

[50] The letter of 21st March 2018 is signed by Mr. Sullivan in the capacity of Engineering Director of Aimbridge Hospitality. There is no explanation on the evidence of who he is and the connection between him and Aimbridge Hospitality on the one hand with THC and/or Sunrod on the other. On the face of this letter, there is no connection with THC save for the use of the words in the letterhead. Furthermore, the potentially incriminating aspect of the letter, being the expression of willingness to undertake the payment obligation under the contract, subject to proof of payment of the supplier, is explained by the letter of 3rd May 2018 from Amicus Legal on behalf of THC. The reason stated therein is the threatening manner in which CDC allegedly demanded payment from Ms. Sullivan and that it was an attempt to de-escalate that situation. In these circumstances, this letter is also equivocal and cannot be a clear adoptive act of the contract.

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[32] Halsbury's Laws of England/Agency (Volume 1 (2017))/4. Ratification/(4) Manner of Ratification/66. Form of ratification.

[33] Halsbury's Laws of England/Agency (Volume 1 (2017))/4. Ratification/(4) Manner of Ratification/67. Essentials of ratification.

[51] The letter of 19th April 2018 from Fraser & Co on behalf of CDC is unhelpful. In one breath it says CDC contracted with Sunrod and in another acknowledges that the employer i.e. the other contracting party is Sunrod. The letter of 3rd May 2018 is also at best equivocal. There are a few statements that conflate THC with Sunrod, but considering the letter on a whole, it very clearly recognizes that CDC's contract was with Sunrod and that the consequence of CDC's alleged failure to complete the work on time and at the standard expected resulted in losses to Sunrod, caused Sunrod to have to terminate the contract with it, enter a new contract with a new contractor, engage new suppliers, engage the engineer to draw up new plans for the project, amongst other things. It portrays Sunrod as principal, acting for itself.

[52] Even if THC could have ratified the contract, the letters before the Court could not by any measure constitute ratification by THC.

Piercing the Corporate Veil

[53] CDC has exhibited the annual returns for THC for the year 2017[34] which states that its sole shareholder is Sunrod Property Inc an International Business Company ("IBC") incorporated in St. Lucia. CDC says this entity has no physical existence or assets here and is a paper company only. CDC has also exhibited annual returns for Sunrod Property Inc. for the year 2017[35], which is a locally incorporated private company (Company No. 2012/C177. CDC has not indicated which company it contracted with, whether Sunrod, the IBC or Sunrod the local company and merely submits that the two are one and the same company. THC argues that CDC has not established that nexus. CDC further argues that by virtue of Sunrod being the sole shareholder of THC, it is the agent of THC.

[54] Firstly agency between a parent company and a subsidiary or between a company and its shareholders may not be inferred merely by control of the company or ownership of its shares. This will depend on an investigation of all aspects of the relationship between the

[34] See Exhibit CD2
[35] See Exhibit CD1

parties and there can be no presumption of such agency. [36] Therefore, it cannot be said that merely because Sunrod is the sole shareholder of THC necessitates that Sunrod has entered into the contract as agent of THC without more. CDC, for the reasons discussed above, has not satisfied the Court of an agency relationship in all the circumstances.

[55] Secondly, CDC's argument is inconsistent with the principle of separate legal personality, which is that a company is a legal entity that is separate and distinct from the individual members of the company and each company in a group is a separate legal entity possessed of separate legal rights and liabilities. The effect of CDC's argument is to ask the Court, as an exception to this principle, to pierce the corporate veil. The Court will only do so in exceptional circumstances where a person is under an existing legal obligation or liability or subject to an existing legal restriction for which he deliberately evades or frustrates enforcement by interposing a company under his control. Similarly, a corporate structure may be used as the vehicle to evade limitations imposed on conduct by law and rights of relief which third parties already possess against a defendant, so justifying the court's 'piercing' (or 'lifting') the veil. In doing so 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.[37] However, CDC has not presented the court with any evidence that this is the case here.

[56] A court will not pierce the corporate veil merely because an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny. Nor is a court entitled to lift the veil as against a company which is a member of a corporate group merely because the corporate structure has been used so as to ensure that the legal

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[36] Halsbury's Laws of England/Companies (Volume 14 (2016) Paras 1-645; Volume 15 (2016) Paras 646-1230; Volume 15A (2016) Paras 1231-2030)/2. Companies Registered under the Companies Acts/(4) Company Formation and Registration/(ii) Formation of Companies/d. Incorporation and Its Effects/116. Piercing the corporate veil.

[37] Halsbury's Laws of England/Companies (Volume 14 (2016) Paras 1-645; Volume 15 (2016) Paras 646-1230; Volume 15A (2016) Paras 1231-2030)/2. Companies Registered under the Companies Acts/(4) Company Formation and Registration/(ii) Formation of Companies/d. Incorporation and Its Effects/116. Piercing the corporate veil.

liability, if any, in respect of particular activities of the company will fall on another member of the group rather than the defendant company.[38]

[57] At most CDC has shown that that the two companies are connected but it has not pleaded, or adduced affidavit evidence to show that is has sought to enforce the contract against Sunrod and that Sunrod is attempting to evade its obligations thereunder. Neither has it shown that THC interposed Sunrod to obtain the benefit of the contract and evade liability. On these facts, there can be no justification for piercing the corporate veil.

Conclusion

[58] In light of the above this Court is of the considered view that summary judgment ought to be granted in favour of THC. On the pleadings and evidence CDC has not established that there is a realistic prospect of succeeding on the claim as presented.

[59] I therefore make the following orders:-

1. The application is granted and summary judgment is given for the defendant/ applicant.

2. The claimant/ respondent will pay the defendant/ applicant's costs to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar

[38] Adams v Cape Industries plc [1990] Ch 433