REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-00624

BETWEEN

FOSTER PAREJO

First Claimant

ALICIA PAREJO

Second Claimant

AND

MARIO BERMENT

First Defendant

REBECCA KEUNG FATT

Second Defendant

MARREB CONSTRUCTION SERVICES LIMITED

Third Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. Y. Ahmed instructed by Ms. C. Legall for the Claimants

Ms. T. Thompson and Mr. G. Mc Master for the First Defendant

Mr. T. Bharath instructed by Mr. R. Ramjohn for the Second Defendant

No appearance of the Third Defendant

DECISION ON APPLICATIONS

1. The second defendant applies by application of the 25th August, 2017 to have the claim struck out as an abuse of the court's process and/or on the basis that the statement of claim discloses no ground for bringing the claim pursuant to Part 26.2(1)(b) and (c) of the CPR respectively or alternatively that she be granted summary judgment against the claimant pursuant to Part 15.2(b) of the CPR. Further, in the event this application is unsuccessful the second defendant seeks an extension of time to serve her defence.

2. Additionally, by application dated the 20th November 2017, the first defendant seeks inter alia an order that the claimants' claim be struck out pursuant to Part 26.2(1)(c) of the CPR since it discloses no grounds for bringing the claim and/or no reasonable cause of action against the first defendant and/or is an abuse of process and is the subject of the doctrine of res judicata or issue estoppel.

The claim

3. The court makes no findings of facts but has narrated the facts as set out by the claimants to provide important background information for the purpose of understanding the claim and the competing arguments.

4. The claimants are the owners of a residential property situate at No. 12 Boland Gardens, Marshall Trace, Cunupia. On or about the 15th June 2014, the claimants negotiated an agreement with the defendants wherein the third defendant, a construction company agreed to do certain construction works on the claimants' property for an agreed labour cost of $145,000.00 ("the agreed sum"). The first and second defendants are directors of the third defendant. The agreed sum was to be paid in the following manner;
    i. a first payment of $43,500.00 representing 30% of the agreed sum before the commencement of the works;
    ii. a second payment of 30% of the agreed sum halfway into the construction works;

iii. a third payment of 30% of the agreed sum when three quarter of the construction works had been completed; and

iv. a final payment of 10% of the agreed sum upon completion of the construction works.

5. On the 17th June, 2014 an agreement dated the 15th June, 2014 was executed between the claimants and the third defendant. Pursuant to the agreement, the claimants were to supply all the material for the construction and the third defendant was required to conduct specific construction works to the ground and upper floor of the claimants' existing house as well as construct an outdoor swimming pool. These works were supposed to be completed within eight to twelve weeks from the date of commencement once the weather permitted.

6. In accordance with the agreement, the first claimant made the first payment in the sum of $43,500.00 on 4th August, 2014. This first payment was made out by cheque to the first defendant personally at his insistence. Consequently, construction of the swimming pool commenced on 4th August, 2014. As such, the claimants expected the entire project to be completed on or before 27th October, 2014 (weather permitting).

7. According to the claimants, during the course of preparing the pool area, the agents and/or servants of the third defendant destroyed a wire fence separating the claimants' property from a vacant lot. The claimants allege that they had to expend $8,000.00 to have the fence repaired. The claimants further allege that at the end of August, 2014 the pool was only 40% complete and not built in accordance with the specifications. Additionally, the other construction works were behind schedule.

8. The claimants allege that they made several inquiries from the first defendant about the progress of the construction and the manner in which the works were being conducted. They further allege that the first defendant made little or no effort to rectify the situation but instead instructed that the construction works be discontinued. Consequently, at the end of August 2014, the third defendant's servants and/ or agents ceased all construction work at the claimants' property in default of the terms of the agreement. As a result, the claimants instituted proceedings against the third defendant for breach of contract by

CV2015-00441 Foster Parejo and Anor v Marreb Construction Services Limited ("the first action").

9. The third defendant did not defend the first action resulting in judgment in default being granted against it on the 14th July, 2015 which was entered on the 23rd September, 2015. On the 2nd December, 2016 at the hearing of the Assessment of Damages before Master Sobion-Awai, the third defendant was ordered to pay the following;

    i. *Special Damages assessed in the sum of One Hundred and Ten Thousand dollars ($110,000.00) with interest at the rate of 3% per annum from 10th September, 2014 to 2nd December, 2016;*
    ii. *General Damages to be assessed in the sum of Fifteen Thousand dollars ($15,000.00) with interest at the rate of 6% per annum from 9th February, 2015 to 2nd December, 2016; and*
    iii. *The defendant do pay to the claimant 60% of the total prescribed costs.*

10. It is the case of the claimants that upon attempting to recover the judgment against the third defendant, they discovered that there were no operations at the registered office of the third defendant and that the third defendant had no assets and no business. In or about the 3rd February, 2017 the claimants through their search clerk found no properties in the name of the third defendant but found certain deeds in the name of the first and second defendants.

11. According to the claimants, the third defendant was incorporated on the 23rd September, 2008 with the filing of Articles of Association, Notice of Directors, Notice of Secretaries, Notice of Address at the Registrar's General Department but no further transactions have been recorded to date. The claimants allege that no annual returns have been filed with the Company Registry and no taxes have been filed with the Board of Inland Revenue for the third defendant. Consequently, the claimants claim that the third defendant is a sham company used by the first and second defendants for the purpose of avoiding personal liability for the tortious acts and other breaches committed by them. Further, that the third defendant is and was at all material times the alter personality and/or alter ego of the first and second defendants.

12. Further or alternatively, the claimants claim that defendants acted fraudulently and/ or in collusion with each other and/or in breach of their fiduciary duties as Directors of the third defendant by causing it to enter into a contract with the claimants with the full knowledge that the third defendant was not in a position to honour its commitments under the contract and/or would not have been in a position to repay any sums due and owing under the said contract.

13. Consequently, by amended Statement of Case filed on the 21st November, 2017 the claimants seek the following;

    i. A declaration that the first defendant and/or second defendant were the alter personality and/or controlling mind of the third defendant;
    ii. Alternatively that the first and second defendants acted fraudulently and/or in collusion and/or in breach of its fiduciary duty as Directors of the third defendant;
    iii. An order directing the piercing of the corporate veil of the third defendant and to hold the first and/or second defendant jointly and/or severally liable for the sums that are due to the claimants in the first court action;
    iv. Alternatively, a declaration that the first and second defendants are presently the alter personality of the third defendant and is one and the same with the third defendant;
    v. An order preventing the first and/or second defendant from disposing their assets pending the determination of this matter;
    vi. Damages for fraud and/or collusion against the defendants; and
    vii. An order for equitable tracings as against the first and/or second and/or third defendant.

Issues

14. The issues for determination are as follows;

    i. Whether the claimants ought to be prevented from litigating this claim on the ground of res judicata, issue estoppel or abuse of process;

ii. Whether the statement of claim discloses no grounds for bringing the claim; and

iii. In the alternative, whether the second defendant should be granted summary judgment against the claimants.

Issue 1 – *whether the claimants ought to be prevented from litigating this claim on the ground of res judicata, issue estoppel or abuse of process*

The submissions of the first defendant

15. According to the first defendant, the doctrine of res judicata prevents a party from litigating an issue or a defence which has already been determined (known as cause of action estoppel or issue estoppel) or which could have previously been litigated absent special circumstances. The first defendant submitted that the doctrine of res judicata is a cornerstone of justice, to avoid delays, waste of judicial time, duplicative litigation, potential inconsistent results and inconclusive proceedings.

16. The first defendant further submitted that ***Henderson v Henderson (1843) 3 Hare 100, 67 ER 313***, the landmark case on this issue confirmed the legal tenet that a party may not raise any claim in subsequent litigation which they ought to have properly raised in a previous action. According to the first defendant, the three-fold requirements that can be culled from Henderson supra which must be established in order to successfully invoke issue estoppel are as follows;

    i. That the same question has been decided and was fundamental as opposed to collateral or incidental to the decision;

    ii. That the decision in the first proceeding said to create the estoppel was final; and

    iii. That the parties to the first proceeding or their privies are the same persons as the parties or their privies to the subsequent proceeding.

17. In applying the aforementioned requirements to this case, the first defendant submitted as follows;

i. That in the first action, the court made a finding of judgment in default and therefore the matter was adjudicated and judgment was entered against the third defendant;

ii. That as a result of the adjudication and judgment in default, the decision was final. According to the first defendant, the claimants thereafter were permitted and entitled to proceed with the requisite enforcement proceedings against the third defendant pursuant to the Remedies of Creditors Act Chapter 8:09.

iii. That the claimants in the first action are the very same claimants to this action but have now also included the first and second defendants.

18. As such, the first defendant submitted that the claimants by this action are attempting to obliquely enforce judgment that has already been awarded to them by virtue of the first action. The first defendant further submitted that the claimants are now seeking to canvass the very same substantive issues of the first action.

19. The first defendant submitted that if the court peruses the first action, it would be pellucid that not only are the majority of the pleadings identical in nature to this action but the relief sought are also identical in nature. According to the first defendant, the claimants have essentially filed what is largely a duplicate of the first action, hoping to traverse the same events and litigate the same issues already determined and awarded. Consequently, the first defendant submitted that the requirements for invoking the doctrine of res judicata have been satisfied.

The submissions of the second defendant

20. According to the second defendant, the Supreme Court in ***Virgin Atlantic Airways v Zodian Seats UK Ltd. [2013] 4 All ER 715*** confirmed the current state of the law as it relates to the doctrine of res judicata and abuse of process. The second defendant relied upon the case of ***Persad & Ors. v Ramlakhan CV2012-01390***, paragraph 34, wherein Rampersad J relied upon the five principles set out by Lord Sumption in ***Virgin Atlantic Airways*** supra. Those five principles are as follows;

"34.1. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel' and precludes a party from challenging the same cause of action in subsequent proceedings.

34.2. Secondly, is the principle that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action in the same cause of action.

34.3. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment.

34.4. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties.

34.5. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

21. The second defendant submitted that if those five principles are dissected, it would be clear that the current claim is an incarnation of the first action. That the subject matter of this action is identical to the first action, judgment was obtained in the first action and therefore the doctrine of merger will confine the fruits of this action to the respective judgment obtained and no more. The second defendant further submitted that it is against the public interest and the interest of judicial efficiency to adjudicate on a matter which is brought as a means to make additional parties liable to a judgment which was obtained prior.

22. The second defendant also relied on the authority of ***Henderson*** supra, wherein in Wigram VC at 381 to 382 stated as follows;

"...I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole

case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special-case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

23. The second defendant submitted that even if this matter is deemed a special circumstance, it is still an abuse of process. In so submitting, the second defendant relied on the authority of ***Bradford and Bingley Building Society v Seddon [1999] 1 WLR 1582 at 1491*** wherein Auld LJ stated as follows;

"Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue."

24. As such, the second defendant submitted that the claimants should have brought forward the totality of their case in the first action. That the claimants are now seeking to sue new parties in an attempt to make them liable for a judgment which was not obtained against them. According to the second defendant, once the judgment in the first action had been granted, the remedies laid against the party which judgment had been granted against and not against other parties. The second defendant submitted that there is no right to enforce a judgment via another civil action. That the claimants claim is misconceived, wrong in law and a flagrant abuse of the court's process.

The submissions of the claimants

25. The claimants submitted that the defendants arguments that present action is barred against them, by virtue of res judicata or issue estoppel is fundamentally misguided and without merit. In so submitting, the claimant relied on ***Blackstone's Civil Practice 2005, page 346, paragraph 33.14*** which provides as follows;

"Where the issues raised in an earlier claim are identical to the issues raised in a later claim, there is an absolute bar on the later proceedings unless fraud or collusion is alleged (Arnold v National Westminster Bank plc [1991] 2 AC 93). Where an issue decided in a previous claim between the parties is central to a second claim between the same parties, the whole second claim will be struck out (Kennecott Utah Cooper Corporation v Minet Ltd [2002] EWHC 1633 (Comm.), [2003] PNLR 18. Issue estoppel applies where an order is made, and it does not matter whether the order was made by consent or after argument (Lennon v Birmingham City Council [2001] EWCA Civ 435, LTL 27/3/2001.

…Where the parties in the two claims are not the same, issue estoppel does not apply (Sweetman v Nathan [2003] EWCA Civ 1115, The Time 1 September 2003)…"

26. The claimants also relied on the case of the ***Trinidad and Tobago Society for the Prevention of Cruelty to Animals & Anor v Sakal Seemungal Civil Appeal No. 181 of 2007***, wherein Mendonça JA at paragraph 26 stated as follows;

"26. Where an issue has already been decided by a court of competent jurisdiction it cannot be litigated again. This is so whether the issue is sought to be re-litigated in the same action which it was decided or a different one. The parties are bound by the determination of the issue. This is referred to as issue estoppel."

27. Further, the claimants relied on the authority of ***Fidelitas Shipping Company Ltd. v V/O Exportchleb [1966] 1 QB 630 at page 642*** wherein Diplock LJ stated:

"...I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to show that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence; but such application will only be granted if the appellate court is satisfied that the fresh

evidence sought to be adduced could not have been available at the original hearing of the issue even if the parties seeking to adduce it had to exercise due diligence...The determination of the issue between the parties gives rise to what I venture to call in Thoday v Thoday an "issue estoppel". It operates in subsequent suits between the same parties in which the same issue arises. A fortiori it operates in any subsequent proceeding in the same suit in which has been determined."

28. Moreover, the claimants relied on the case of ***Yat Tung Investment Company Limited v Dao Heng Bank Limited and another [1975] A.C. 581.*** The facts of this case were the appellant purchased property from the bank and thereafter claimed that the sale of the property was a sham. The bank denied the sale was a sham and was successful on their counterclaim and the appellant's claim was dismissed. One month after the Court gave judgment the appellant brought another action against the bank claiming that the sale of the property to the second respondent was void or voidable as fraudulent. The bank and the Second Respondent applied for an order that the claim be struck out as an abuse of the process of the court. It was held that the allegation of fraud and the voidability of the sale by the bank were available in the first action, therefore the claim was struck out. Lord Kilbrandon at 590 stated as follows;

    "The shutting out of a "subject of litigation" - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in no. 969 came to be answered Mr. Lai (the plaintiff) was unaware, and could not reasonably have been expected to be aware, of the circumstances attending the sale to Choi Kee (the defendant), it may be that the present plea against him would not have been maintainable. But no such averment has been made."

29. Additionally, the claimants relied on ***Halsbury's Laws of England 5th Edition Volume 12A, paragraph 1603,*** wherein the doctrine of res judicata is described in the following manner;

"The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision save on appeal. It is most clearly associated with the legal principle of cause of action estoppel, which operates to prevent a cause of action being raised or challenged by either party in subsequent proceedings where a cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been the same parties (or their privies), and having involved the same subject matter. However, res judicata also embraces 'issue estoppel',...res judicata has been described as a portmanteau term which is used to describe a number of different legal principles with different juridical origins upon which the courts have endeavoured to impose some coherent scheme only in relatively recent times."

30. Applying the aforementioned to the present facts, the claimants submitted that the present action is not barred by virtue of res judicata or issue estoppel because firstly, the parties to the first action and the present action are not the same. According to the claimants; in the first action, the parties were restricted to the claimants and the third defendant. The claimants submitted that the third defendant is a party to these proceedings on the basis that the relief claimed in the present action touch and concern the validity of the third defendant as a purported genuine company (as opposed to a sham company). As such, the claimants submitted that the third defendant is a proper party to these proceedings for the purpose of it being afforded the opportunity to answer the allegations made against it in accordance with the well-established principles of natural justice.

31. The claimants submitted that it is undisputed that neither the first nor the second defendants were parties to the first action. That any issue which was determined by the court in the first action was therefore not as between the claimants and the first and second defendants. As such, the claimants submitted that there is no issue as adjudicated between the first and the second defendants by which the present parties are bound. Therefore, the claimants submitted that there is no issue estoppel binding on them as against the first and second defendants and consequently this ground of objection must fail.

32. Moreover, the claimants submitted that even if the parties to this action were the same as those in the first action, the present action will not be barred by virtue of the doctrine of res

judicata or issue estoppel as the issues which arise for adjudication in the present circumstances were not determined by the court in the first action. Consequently, the claimants submitted the first and second defendants' claim that the doctrines of res judicata and issue estoppel apply is unsustainable and ought to be rejected.

33. Further, the claimants submitted that this action does not constitute an abuse process in accordance with the principles enunciated in ***Henderson v Henderson 3 Hare 100***. In so submitting the claimants relied on the authority of ***Johnson v Gore Wood [2002] 2 AC 1*** wherein Lord Bingham at page 31 stated as follows;

"But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before… While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the

conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

34. According to the claimants, at all material times, they dealt with the first defendant as the servant and/or agent of the third defendant, a purported incorporated company. The claimants submitted that the written contract itself was done on the third defendant's letterhead and signed on behalf of the third defendant by the first defendant in his capacity as its General Manager. As such, the claimants submitted that in light of the facts available at that time, there was no justifiable reason to include either the first or the second defendant as defendants to the first action.

35. The claimants submitted that it was only after they began investigations to recover the fruits of their judgment that they discovered certain facts which led them to conclude that the third defendant was in fact a sham company and/or the alter ego of the first and second defendants.

36. Consequently, the claimants submitted that the issues for adjudication in these proceedings could not have been raised in the first action. The claimants further submitted that adopting the recommended broad merits-based approach, the court should weigh carefully the fact that should the present action be held to be an abuse of process, the resulting order would have consequences for them as they would be effectively barred from accessing the courts to litigate an issue that ought not to have been previously litigated before.

Findings

37. Upon the examination of all the circumstances of this case, the court finds that this claim ought not to be struck out on the ground of res judicata, issue estoppel or abuse of process. The court agrees with the pellucid and weighty submissions of the claimant. The parties to this claim are not the same as the parties to the first claim in that the first and second defendants were not a part of those proceedings. Therefore, any issues determined in the first action were not binding on the first and second defendants.

38. Secondly, the court also agrees that the third defendant is a proper party to these proceedings as the allegation made is now one of fraud and/or collusion in the obtaining of the contract and the performance thereof. On the face of it, this appears to be a different cause of action from that of the first claim, a breach of contract simpliciter. The issues that arise for determination in these proceedings are not the same as those determined in the first action. The crux of this action is whether the third defendant is a sham company and whether the corporate veil of the third defendant ought to be pierced so as to impose liability on the other defendants for fraud.

39. Thirdly, the court finds that this claim is not an abuse of process. To amount to an abuse of process, there must be demonstrable prejudice whether directly or by way of inference. Further, it must be shown that the actions of the claimants amount to such an intolerable misuse of the process of the court that it would be unfair to permit them to use the court's process in such a manner to the detriment of the defendants.

40. Although abuse of process is separate and distinct from cause of action estoppel and issue estoppel, it has much in common with those doctrines. As the court found that the issues in this matter were not adjudicated upon in the first action, no re-litigation of the issues is being attempted by the claimants. However, the rule in ***Henderson v Henderson*** supra, gives the court a wider jurisdiction. The rule provides that claimants are barred from litigating a claim that has already been adjudicated upon or that which could and should have been brought before the court in earlier proceedings arising out of the same facts.

41. Further, in ***Johnson v Gore*** supra, their Lordships of the House of Lords found that there was a public interest in the finality of litigation and in a defendant not being vexed twice in the same matter; but that whether an action was an abuse of process as offending against the public interest should be judged broadly on the merits taking in account all public and private interests involved and all the facts of the case, the crucial question being whether the claimant was, in all circumstances, misusing or abusing the process of the court.

42. The court is further guided by the authority of ***Yat Tung Investment Company Limited*** supra wherein Lord Kilbrandon at 590 stated that the plea of abuse of process may not have been maintainable against the plaintiff if he had averred that he was unaware and could not

have been reasonably expected to be aware of the circumstances of the sale at the time the counterclaim in the first matter came to be answered.

43. In this claim, the claimants have claimed that at all material times prior to the first action, they dealt with the first defendant as a servant and/or agent of the third defendant as the agreement was executed on the third defendant's letterhead and signed on its behalf by the first defendant. As such, the claimants claimed that in light of the facts available to them at the time of the first action, there was no justifiable reason to join the first and second defendants as parties to the first action as they were not parties to the contract.

44. It is pellucid that in the first action, the claimants were only concerned with third defendant's breach of the agreement. The court therefore accepts that in light of the facts available to the claimants at the time of the first action, it would not have been a reasonable expectation that the first and second defendants would be made to the first action.

45. According to the claimants, it was only after they obtained judgement against the third defendant and began to investigate the third defendant in order recover the fruits of their judgment that they discovered certain facts which led them to believe that the third defendant was a sham company and/or the alter ego of the first and second defendants. The court accepts that it was only after judgment was entered against the third defendant, the claimants began to investigate same.

46. Having considered all arguments, the court finds that the claimants were unaware and/or could not have been reasonably expected to be aware of the circumstances in which the third defendant was operating at the first action. Therefore, the issues which are to be determined in this case could not have been raised in the first action and the court so finds. As such, in conducting the balancing exercise of the competing public and private interests, the court is of the view that the claimants' claim is not an abuse of process.

Issue 2 - *whether the statement of claim discloses no grounds for bringing the claim*

The submissions of the first defendant

47. The first defendant submitted that the claimants have not advanced a single ground in their pleaded case which satisfies the common law requirements for the exercise of a court's discretion to pierce the corporate veil. That jurisprudence has set a high bar for the circumstances in which a court can justify such a piercing. In so submitting, the first defendant relied heavily on the case of ***Dave Persad v Anirudh Singh [2017] UKPC 32.***

48. In ***Dave Persad*** supra Singh (the respondent) owned two buildings ("the premises") in Trinidad. In 2002, Singh reached an agreement with Persad (the appellant) whereby Persad would take a five year lease of the premises, starting on the 1st April, 2002. Persad who was a qualified attorney, prepared the lease for the premises. The draft lease, which contained certain covenants by the tenant, stated that Singh was the lessor and that the lessee was a company called Chicken Hawaii (Trinidad) Ltd ("CHTL"), in respect of which Persad was a shareholder and director. Singh signed the lease without challenging the inclusion of CHTL as the lessee. CHTL's seal had been affixed to the lease by the company secretary. Following the grant of the lease, a restaurant was operated from the majority of the premises. Persad used part of the premises as an office and another party might have been used for residential purposes.

49. In 2004, Singh notified CHTL of items of disrepair observed at the premises, and required that they be remedied. Subsequently, he issued proceedings for possession, arrears of rent, damages for breach of covenant and mesne profits, naming both CHTL and Persad as defendants. Singh contended that Persad, as CHTL's director, had, at all material times, acted on his own or as its servant or agent. The judge considered that the facts of the case justified piercing CHTL's veil of incorporation, and that, for the purposes of the lease, Persad and CHTL *"were one and the same"*. Accordingly, Her ladyship held that Persad was personally liable for any defaults under the lease. Singh was awarded damages and costs. The Court of Appeal dismissed Persad's appeal. Consequently, Persad appealed to the Privy Council.

50. At paragraphs 13 and 14 Their Lordships considered the judge's reasoning for finding that the corporate veil should be pierced. Paragraphs 13 & 14 provided as follows;

"13. In these circumstances, the only part of the Judge's full and careful judgment to which reference needs to be made is in paras 63 to 66 where she considered the issue which she described as "Who were the 'real' parties to the lease and from whom can [Mr Singh] recover?" She concluded that Mr Persad and CHTL "were one and the same and his personal liability for any defaults of [CHTL] is founded" and so Mr Singh "can recover from both defendants".

14. She justified this conclusion primarily on the basis that CHTL was only formed after the discussions as to the level of rent, that Mr Persad did not draw the identity of the lessee or even the existence of CHTL to Mr Singh's attention when or before sending him the draft lease for execution, and that Mr Persad took possession personally from the start. She held that this entitled her to pierce the corporate veil and hold that CHTL's liabilities under the lease were also the liabilities of Mr Persad. She further justified this conclusion on the ground that Mr Persad "use[d] the company as an avoidance mechanism so as to displace the question of whether it is just to pierce the veil". She found that "there was a fluid exchange of persona between [Mr Persad] and [CHTL], which was not present at the negotiation and conclusion of the lease", and that Mr Persad "concluded the negotiations in his personal capacity [and] then formed the company". She also made the point that he "produced no corporate documents", and that "it [was] evident that this was a one man show, in the hope that if all was not well he would not be held personally liable".

51. The Privy Council in allowing the appeal confirmed that the piercing of the corporate veil is only justified in very rare circumstances. Lord Neuberger stated the following at paragraphs 20 and 21;

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 Herschell said at pp 43 to 44. If such a factor justified piercing the veil of incorporation, it would make something of a mockery of limited liability both in principle and in practice.

21. That passage in Lord Herschell'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 Herschell 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".

52. According to the first defendant, he at all material times negotiated and procured the contract in the name of the third defendant and not in his personal capacity which therefore places him on firmer ground than the appellant in ***Dave Persad*** supra. As such, in light of the learning in ***Dave Persad*** supra, the first defendant submitted that the claimants' claim appears to be stillborn and destined to fail.

The submissions of the second defendant

53. The second defendant submitted that it is clear from the claimants' claim that they had no dealings with her. In her affidavit sworn to and filed on the 9th August, 2017, the second defendant deposed that she has been legally divorced from the first defendant since 2012 and has had little or no interaction with him since then. The second defendant further submitted that the claimants' claim does not contain any grounds for lifting the corporate veil of the third defendant. The second defendant also relied upon the authority of ***Dave Persad*** supra.

54. The second defendant further relied on the authority of ***Prest v Petrodel Resources [2013] UKSC 34*** wherein Lord Sumption at paragraph 35 explained that piercing the veil can be justified only when *"a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control."* At paragraph 28, Lord

Sumption expounded the two circumstances where a court may look behind the dealings of the controllers of a company. Paragraph 28 provided as follows;

"The difficulty is to identify what is a relevant wrongdoing. References to a "facade" or "sham" beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil."

55. According to the second defendant, the claimants' attempt to pierce the corporate veil of the third defendant is not supported by any evidence. She submitted that the claimants have failed to prove any wrongdoing whatsoever on her part. She further submitted that the claimants have brought no evidence to rebut the fundamental assumption that in defining most legal relationships between persons (natural or artificial) it is presumed that their dealings were honest: *See **Prest** supra, para 18 per Lord Sumption.* The second defendant also submitted that aforementioned fundamental assumption is the first consideration to be made when deciding whether piercing the corporate veil is necessary.

56. The second defendant submitted that although the claimants have leveled the serious allegation of fraud, they have failed to specifically plead same. The second defendant relied

on the case of ***Three Rivers District Council v Bank of England (No 3) [2001] 2 All ER 513*** wherein Lord hope stated the following at paragraphs 51 and 55;

"…as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty…Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out…"

57. Further, the second defendant submitted that the claimants made reference to collusion and breach of fiduciary duty in their claim but that those advancements were not supported by any particulars and as such stood as bare allegations.

58. Moreover, the second defendant submitted that the claimants have not provided any evidence which would justify a court granting an order to freeze the defendants' assets. According to the second defendant, the requirements to satisfy the relief of a freezing order or injunction are as follows; 1) the party seeking such a remedy has a good arguable case, 2) the assets of the defendant are within the jurisdiction and 3) there is a real risk of removal or disposal of the asset: ***See Injunctions 11th Edition, pages 139 to 132, David Bean et al.*** The second defendant submitted that the claimants have advanced a case on poor merit which is nowhere close to a good arguable case. She further submitted that the claimants have failed to plead the existence of a current risk of dissipation of asset and therefore this relief sought by the claimants is devoid of merit.

59. According to the second defendant, equitable tracing is also not a suitable remedy in this action. The second defendant relied on ***Snells Equity 29th Edition, E.H.T. Snell, 302*** wherein the following is stated;

"The right to trace is founded upon the existence of a beneficial owner with an equitable proprietary interest in property in the hands of a trustee or other fiduciary agent…Yet apart from the usual relationships, e.g. trustee and beneficiary, it may arise from the

transaction itself as where money is paid under a mistake of fact: the payer retains the money a continuing equitable proprietary interest."

60. As such, the second defendant submitted that this case is not one of trustee, beneficiary or mistake and therefore does not fit into the circumstances warranting equitable tracing.

61. The second defendant submitted that apart from the fact that the claimants have failed to satisfy the requirements warranting the exceptional remedy of piercing the corporate veil, this remedy would not yield the desired end result sought by the claimants, that is, to hold the first and second defendants personally liable for the third defendant's liabilities.

62. In so submitting, the second defendant relied on the case of ***VTB Capital plc v Nutritek International Corp and others [2013] UKPC 5,*** wherein the appellant sought to pierce the corporate veil in order to hold the directors of the respondent jointly and severally liable for company activity. It was held that to pierce the corporate veil would not result in attribution and/or assignment of personal liability to the directors. Lord Mance at paragraph 138 stated as follows;

"[138] ...Even accepting that the court can pierce the corporate veil in some circumstances, the notion of such joint and several liability is inconsistent with the reasoning and decision in Salomon. A company should be treated as being a person by the law in the same way as a human being. The fact that a company can only act or think through humans does not call that point into question: it just means that the law of agency will always potentially be in play, but, it will, at least normally, be the company which is the principal, not an agent…"

63. According to the second defendant VTB Capital supra confirms that joint and several liability in not consistent with the principle of separate legal personality set out in ***Salomon v A Solomon 1987 AC 22.*** As such, the second defendant submitted that the claimants are seeking a remedy which cannot be obtained by piercing the corporate veil.

64. Further, the second defendant submitted that VTB Capital supra also considered the premise behind the imposition of liability to parties to contractual matters. That although

the facts of VTB Capital are in relation to fraudulent misrepresentation, the principles expounded are relevant to the instant case. At 139 and 140, Lord Mance stated as follows;

"[139] Subject to some other rule (such as that of undisclosed principal), where B and C are the contracting parties and A is not, there is simply no justification for holding A responsible for B's contractual liabilities to C simply because A controls B and has made misrepresentations about B to induce C to enter into the contract. This could not be said to result in unfairness to C: the law provides redress for C against A, in the form of a cause of action in negligent or fraudulent misrepresentation.
[140] In any event, it would be wrong to hold that Mr Malofeev should be treated as if he was a party to an agreement, in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him, and he did not intend to contract with them, and (ii) thereafter, Mr Malofeev never conducted himself as if, or led any other party to believe, he was liable under the agreement. That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based…"

65. According to the second defendant, the Remedies of Creditors Act, Chapter 8:09 provides the requisite framework for the enforcement of judgments obtained against litigants. The second defendant submitted that creditors also have the option of enforcing a judgment by way of a winding up petition under section 357 of the Companies Act, Chapter 81:01. The second defendant further submitted that by bringing this present action, the claimants are seeking to rewrite the Remedies of Creditors Act by attempting to enforce a judgment against parties other than which the judgment was obtained against. As such, the second defendant submitted that this action is unprecedented and absolutely wrong.

<u>The submissions of the claimants</u>

66. The claimants submitted that their claim contains sufficient facts to support the allegations of corporate fraud and directors breaches of duty so as to enable the defendants to understand the nature of the allegations and legal challenges being made against them. According to the claimants, their pleading contain the following details;

i. the contract entered into by the claimants and the defendants and the personal acts of the first defendant;
ii. the terms of the judgment entered against the third defendant for breaches;
iii. the particulars upon which the claimants argue that the third defendant is a sham company and/or the alter ego of the first and second defendants; and
iv. the allegation of impropriety on the path of both first and second defendants (joint and several) in misusing the Corporate structure to hide wrongdoing

67. The claimants submitted that the failure of the defendants to treat with the issue of fraud in their applications to strike in itself ought to allow this matter to continue. The claimants further submitted that the defendants cannot come on submissions to allege that they (the claimants) have failed to specifically plead the particulars of fraud when they (the defendants) did not address same in their applications.

68. The claimants submitted that their claim as pleaded discloses a legally recognised claim against the defendants, which is, whether by virtue of the actions of the defendants, it will be legally permissible for the corporate veil of the third defendant to be pierced so as to hold them jointly or severally personally liable for the Judgment Debt registered against the third defendant.

69. According to the claimants, the concept of setting aside corporate veil has been ever changing but well established over the years under English Law. The claimants submitted that it is a concept founded on fraud (per Lord Sumption in ***Prest*** supra). The claimants relied on the case of ***Ben Hashem v Al Shayif (2009) 1 FLR 115*** wherein Mumby J at paragraphs 159 to 164 stated the following principles applicable to setting aside corporate veil;
    i. Ownership and control of a company are not enough to justify piercing the corporate veil.
    ii. The court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice.

iii. The corporate veil can be pierced only if there is some impropriety.

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

v. Justify piercing the corporate veil, there must be both control of the company by the wrongdoer(s) and impropriety, that is misuse of the company by them as a device or facade to conceal their wrongdoing; and

vi. The company may be a facade even though it was not originally incorporated with any deceptive intent, the question is whether it is being used as a façade at the time of the relevant transaction(s).

70. The claimants further relied on the case of ***VTB Capital plc v Nutrtek [2012] All ER (D) 147*** wherein the English Court of Appeal agreed within Mumby J's propositions subject to two qualifications. Those two qualifications were; 1) that it was not necessary in order to pierce the corporate veil that there should be no other remedy available against the wrongdoer, and it was not enough to show that there had been wrongdoing and 2) it was not enough to show there had been a wrongdoing, the relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts: ***see paras 79 to 80 of VTB Capital*** supra.

71. The claimants submitted that their argument in the alternative is that the contract was entered into with the knowledge that it would not be fulfilled and/or in the event of breach, the third defendant would not be capable of paying damages for that breach. To prove the aforementioned, the claimants intend to rely on the undisputed facts established in the first action that this is what actually occurred.

72. The claimants submitted that first and second defendants have not exercised the care and diligence expected of them as directors and are therefore liable for failing to manage the affairs of the third defendant so that it can pay its debts owed. In so submitting, the claimants relied on **Section 99(1) of Companies Act 81:01** which provides as follows;

"Every director and officer of a company shall:-

a) *act honestly and in good faith with a view to the best interests of the company; and*
b) *exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."*

73. The claimants also relied on the authority of ***Winkworth v Edwards Baron [1986] 1 WLR 1512*** wherein Lord Templeman stated as follows at paragraph 1516:

"The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors."

74. The claimants further submitted that it is crystal clear that the central issues in this case are in dispute and therefore evidence is required to resolve those issues.

75. According to the claimants, ***Dave Persad*** supra is distinguishable from this case and is therefore irrelevant. The claimants submitted that in ***Dave Persad*** supra, there was no existing liability on the part of Persad at the commencement of the contract whereas in this case there was an existing liability on the part of the first defendant at the very least when he engaged the claimants, caused them to enter into the contract with the third defendant and subsequently took the initial deposit in his name.

76. The claimants submitted that the evasion principle would apply to both defendants in this case whereas the concealment principle would apply mostly to the first defendant.

Law and analysis

Striking out

77. ***Part 26.2(1) (c) of the CPR*** provides as follows;

"26.2 (1) The Court may strike out a statement of case or part of a statement of case if it appears to the Court –

…(c) that the statement of case or the part to be struck out disclose no grounds for bringing or defending a claim…"

78. In ***Terrence Charles v Chief of the Defence Staff and the Attorney General CV2014-02620,*** Justice Jones (now Justice of Appeal) stated as follows at paragraph 11;

"A decision made by the Court under Part 26.2 (1)(c), that the statement of case discloses no grounds for bringing the claim, amounts to a decision on the merits of the case. The burden of proof in this regard is on the applicant. At the end of the day the Defendants, as applicants, must satisfy me that no further investigation will assist me in my task of arriving at the correct outcome. That said the rule ought not to be used except in the most clear of cases. Where an arguable case is presented or the case raises complex issues of fact or law its use is inappropriate."

79. Further, in ***Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and others H.C.387/2007,*** Kokaram J at paragraph 4.7 and 4.8 stated as follows;

"4.7 Of course, the power to strike out is one to be used sparingly and is not to be used to dispense with a trial where there are live issues to be tried. A. Zuckerman observed: "The most straightforward case for striking out is a claim that on its face fails to establish a recognisable cause of action… (Eg. A claim for damages for breach of contract which does not allege a breach). A statement of case may be hopeless not only where it is lacking a necessary factual ingredient but also where it advances an unsustainable point of law" 4.8 Porter LJ in Partco Group Limited v Wagg [2002] EWCA Civ 594 surmised that appropriate cases that can be struck out for failing to disclose a reasonable ground for bring a claim include: "(a) where the statement of case raised an unwinnable case where continuing the proceedings is without any possible benefit to the Respondent and would waste resources on both sides Harris v Bolt Burden [2000] CPLR 9; (b) Where the statement of case does not raise a valid claim or defence as matter of law""

80. According to the first and second defendants, the claim should be struck out in its entirety as there is no material pleaded which would permit or require the piercing of the corporate veil. In ***Anil Maharaj (Trading as A. Maharaj Tyre Service) v Rudy Roopnarine, Paula Kim Roopnarine and Refinery Industrial Fabricators Limited CV2012-04524, paragraph 62,*** Rajkumar J in determining whether to pierce the corporate veil of the third defendant company therein stated that in order to impose personal liability on the directors of a company, a claimant is required to plead all the relevant material facts to establish that there is a reasonable cause of action against the directors, separate from any liability of the company.

81. In ***Anil Maharaj*** supra, the claimant applied to the court to lift the corporate veil of the third defendant company in order to ascribe personal liability to the first and second defendants in a claim for monies due and owing. Justice Rajkumar applied the principles enunciated in the cases of ***Kay Aviation b.v. v. Rofe (2001) PESCAD 7 (P.E.I. C.A.), paragraph 25*** and ***Montreal Trust Company of Canada v. ScotiaMcLeod Inc. (1995) 129 D.L.R. (4th) 711 at 720 (Ont. C.A.)*** and held that the claimant had not pleaded fraud, deceit, fraudulent misrepresentation, or dishonesty, nor had he pleaded any other material facts specific to ascribe personal liability to the defendants. As such, His Lordship found that the case as pleaded disclosed no grounds for lifting the corporate veil.

82. In ***Kay Aviation b.v. v. Rofe (2001) PESCAD 7 (P.E.I. C.A.),*** the court observed as follows at paragraph 25;

"The minimum level of material facts in a statement of claim founded on causes of action against an officer, director or employee of a corporation with whom the plaintiff has contracted is very high. The imposition of personal liability on an employee, officer or director of a company is the exception rather than the rule. To justify a departure from this rule a plaintiff must plead all the relevant material facts to establish there is a reasonable cause of action. In the absence of specifically pleaded material facts the action against the director, officer or employee of the corporation will be struck. See: Serel v. 371487 Ontario Ltd., [1996] O.J. No. 3988 (Gen. Div.). This is particularly so where the plaintiff is not a stranger to the defendant. In the case at bar, for example, the respondent has contracted

with the corporation in which the appellant is sole director and officer and with full knowledge of the inherent limits to liability.

83. In ***Montreal Trust Company of Canada v. ScotiaMcLeod Inc. (1995) 129 D.L.R. (4th) 711 at 720 (Ont. C.A.),*** the court summarized the circumstances under which the corporate veil can be pierced to render directors or officers of a company liable as follows;

"The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to the tort of inducing breach of contract between the company and the plaintiff: see Ontario Store Fixtures Inc. v. Mmmuffins Inc. (1989), 70 O.R. (2d) 42 (H.C.J.), and the cases referred to therein. Additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own."

84. In their statement of case, the claimants stated that they negotiated the agreement with the defendants. However, upon an evaluation of the claimants' claim and the second claimant's affidavits in opposition to the notices of application, it is clear that as pleaded, all dealings pertaining to the contract were allegedly conducted with the first defendant. There is no clear pleading likewise in respect of the second defendant. The claimants further aver that the first payment under the contract was made to the first defendant personally at his

insistence. Also, it is the claimants' case that when complications arose they directed their enquiries to the first defendant who made little or no effort to rectify the situation but instead instructed that the construction works be discontinued.

85. Although, the claimants are seeking to impose personal liability against both the second and first defendants, the basis of the alleged liability of the second defendant is not only unclear but in the court's view it is nonexistent. It is pellucid that the second defendant was joined as a party to these proceedings in the main because she is listed as one of the directors of the third defendant. In her affidavits in support of her application to strike, the second defendant deposed that she has been separated from the first defendant since 2010, and was officially divorced in 2012. She further deposed that she agreed by consent order at the end of her divorce proceedings to relinquish all claim and interest in the third defendant.

86. Therefore, taking into consideration all the circumstances of this case, it would appear that the pleaded claim against the second defendant discloses no basis for ascribing any personal liability to her. This is a fundamental requirement if any court is to set aside the liability of a company and impose same on a defendant. It follows in the court's view that the claims against the second defendant cannot exist without it. The court will therefore strike out all claims against the second defendant.

87. In relation to the first defendant however, the position is different. The claimants in their claim have made certain serious allegations against the first defendant which require further evidential investigation at trial. The claimants pleaded that not only did they negotiate the agreement with the first defendant, they also made out the first payment of the agreement to the first defendant personally allegedly at his insistence. Further, the claimants claimed that the possibility of the third defendant being a sham and/or alter ego of the first defendant emerged for the following reasons;

    i. The first defendant was the incorporator of the third defendant and is a director of same;

ii. Subsequent to incorporation, the third defendant acquired no assets or incurred any liabilities;

iii. No annual returns have ever been filed on behalf of the third defendant; and

iv. There is no evidence that the third defendant has ever paid taxes.

88. It is therefore clear to the court that the claimants have made out an arguable claim against the first defendant and so he has failed to demonstrate that the claim discloses no reasonable ground for bringing same. The first defendant has therefore failed to discharge his burden on the application. Further, matters such as whether the first defendant stands on firmer grounds than that of the appellant in ***Dave Persad*** supra are issues which need to be ventilated via evidence at trial and therefore cannot be determined at this preliminary stage.

89. In their claim, the claimants pleaded that in the alternative, they intend to argue that the defendants acted fraudulently and/or in collusion with each other and/or in breach of their fiduciary duties as directors by causing the third defendant to enter into the contract with the claimants knowing fully well that the third defendant was not able to complete same and/or would not have been able to repay any sums which may become due under the contract. To prove that the first defendant breached his fiduciary duties as director, the claimants intend to rely on the undisputed facts from the first action that the agreement was breached by the third defendant and that the third defendant is incapable of paying the damages awarded in the first action. The court agrees with the submissions of the claimant that the defendants did not treat with the issue of fraud in their applications. Even though, the claimants did fail to specifically plead any particulars of fraud, issues of fraud are raised on the pleadings in any event. Therefore, the allegation of fraud and any relief sought pertaining to fraud will not be struck out.

90. In relation to the relief for the prevention of the disposal of the assets of the defendants pending the determination of the claim, although set out in the claim, no interim application has been made for such relief and so to strike out the relief would be premature.

91. Finally, the r**e**lief for equitable tracing against the defendants will be struck as being not applicable in the circumstances of this case.

Issue 3 - *whether the second defendant should be granted summary judgment against the claimants*

The submissions of the second defendant

92. There is no counterclaim on the part of the second defendant upon which an order for summary judgment can be obtained. Further, the application for summary judgment was premised in the alternative so that it is now unnecessary to determine that application having regard to the decision of the court on the application to strike.

Disposition

93. The order of the court is therefore as follows;

a) The claim against the second defendant is struck out;
b) The claimants shall pay to the second defendant 45% of the prescribed costs of the claim;
c) The claimants shall pay to the second defendant the costs of the application to strike assessed in the sum of $21,600.00;
d) The first defendant shall pay to the claimants the costs of the application to strike to be assessed; and
e) The relief set out at paragraph 7 of the claim form and statement of case in relation to equitable tracing is struck out.

Dated the 20th March, 2018

Ricky Rahim

Judge