

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

MARREB CONSTRUCTION SERVICES LIMITED

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: 20th November, 2019

Appearances:

Claimants: Mr. Y. Ahmed instructed by Ms. C. Legall

Defendants: Mr. F. Scoon instructed by Ms. L. Lowman

JUDGMENT

THE CLAIM

1. According to the claimants, they entered into an agreement with the defendants wherein the second defendant agreed to undertake certain construction works at their home. By way of a previous claim, CV2015-00441 *Foster Parejo and Anor. v Marreb Construction Services Limited* (“the first claim”), the claimants instituted proceedings against the second defendant for breach of contract. That claim was undefended resulting in default judgment being granted on July 14, 2015 and entered on September 23, 2015. On December 2, 2016 at the hearing of the Assessment of Damages before the Master, the following ordered was made;
 - i. Special Damages assessed in the sum of \$110,000.00 with interest at the rate of 3% per annum from September 10, 2014 to December 2, 2016;
 - ii. General Damages assessed in the sum of \$15,000.00 with interest at the rate of 6% per annum from February 9, 2015 to December 2, 2016; and
 - iii. The defendant do pay to the claimant 60% of the total prescribed costs.
2. The claimants by their Amended Statement of Case filed on November 21, 2017 allege at paragraphs 17 to 19 that upon attempting to recover the judgment against the second defendant, they discovered that there were no operations at the registered office of the second defendant and that the second defendant had no assets and no business. The claimants further

allege that no annual returns have been filed with the Company Registry and no tax returns have been filed with the Board of Inland Revenue.

3. As such, the claimants claim that the second defendant is a sham company used by the first defendant for the purpose of avoiding personal liability for the tortious acts and other breaches committed by him. Further, that the second defendant is and was at all material times the alter personality and/or alter ego of the first defendant. Consequently, the claimants seek an order that the corporate veil of the second defendant be pierced and the first defendant be held liable for the sums that are due to them in the first claim.
4. In the alternative, the claimants argue that the first defendant acted fraudulently and/or in breach of his fiduciary duty as a director by causing the second defendant to enter into a contract with them knowing fully well that the second defendant will be unable to complete same and/or will be unable to repay any sums due under the said contract,
5. It is to be noted that the second defendant was initially named as the third defendant in this claim but this court struck out the claim against the then second defendant.

THE DEFENCE OF THE FIRST DEFENDANT

6. In response to the claimants' allegations as put forward in paragraphs 17 to 19, the first defendant by his defence filed on July 25, 2017 avers at paragraph 8 as follows;

“Save and except that the third defendant has not been fully compliant with certain filing obligations, the first defendant vehemently denies paragraphs 17 to 19 of the statement of case and the particulars therein, and will hold the claimants to strict proof of same at the trial of this action. In response thereto, the first defendant avers that at all material times, the third defendant was a limited liability company and therefore a legal entity and personality, which was separate, distinct and apart from the first defendant.”

7. The first defendant did not file any witness statements.

THE SECOND DEFENDANT

8. The second defendant failed to file a Defence. By notice of application dated March 20, 2018 the claimants sought a judgment in default of defence against the second defendant. That application was adjourned to be dealt with upon determination of the claim.

ISSUES

9. The main issue to be determined by this court is whether the corporate veil of the second defendant ought to be pierced or lifted to find the first defendant liable for the judgment debt. In the event the court finds that the corporate veil ought not to be pierced or lifted then it has to consider the claimants’ alternative claim which is whether the first defendant acted fraudulently and/or in breach of his fiduciary duty.

THE CASE FOR THE CLAIMANTS

10. The claimants called one witness; the second claimant, Alicia Parejo (“Alicia”). The first claimant, Foster Parejo (“Foster”) is Alicia’s husband. The claimants are the owners of a residential property situate at No. 12 Boland Gardens, Marshall Trace, Cunupia (“the subject property”). The claimants purchased the subject property sometime in early 2010. At that time, the subject property comprised of a three-bedroom concrete flat building with two toilets and baths. It is fenced to the front with concrete blocks and a metal gate at the driveway. There is wire fencing to the sides and to the back of the property.
11. Prior to June, 2014 the claimants discussed renovating the subject property by converting it into a split level house. The ground floor would comprise three bedrooms, two toilets and bath, a bigger kitchen, an office space, a gallery and an enclosed garage. The upper floor would comprise of a master bedroom with a toilet and bath and a storage room. The claimants also wanted to build a pool to the back of the subject property which would adjoin the enclosed garage. Further, they planned on replacing the existing roof of the house as well as constructing a new roof for the additional split level.
12. Consequently, the claimants hired Linden Drafting Services from Rio Claro to prepare the plans for their proposed split level house. They subsequently received those plans.
13. On or about the afternoon of June 8, 2014 the claimants met with the first defendant in the kitchen of their home. Foster had previously made contact with the first defendant. The purpose of that meeting was to allow

the first defendant to conduct an on-site inspection of the subject property and to collect a copy of the house plans. The first defendant was to review the plans and submit a quotation to the claimants for the labour and materials required. The claimants went through the plans in detail with the first defendant to lay out exactly what works they needed to be done on the subject property.

14. With respect to the swimming pool, they discussed the construction of a complete pool measuring 10 feet by 22 feet. They also discussed that the maximum depth of the swimming pool had to be five feet and that there would be six jets for the pool.

15. During that meeting, the first defendant indicated that he was capable of doing all the work the claimants required, specifically the construction of the swimming pool and the renovations/additions to the ground and upper floors. The only areas of work the first defendant stated that he could not carry out were the roofing and electrical works. However, the first defendant informed the claimants that he could recommend another contractor to do the roofing and electrical works.

16. Further, during the meeting the first defendant showed the claimants pictures of pools on his phone. The first defendant stated that *"This is the work we do, these are some of the pools we have done before. We do work all over the country"*. The first defendant also took measurements of different areas on the subject property and the existing dwelling house.

17. At some point the first defendant stated that he owned a company called Marreb Construction Services Limited (the second defendant) and informed the claimants that he could supply them with a quotation for the

works within a week. The first defendant then gave the claimants another mobile number and stated that they should use that number when contacting him. No office number for the second defendant was provided.

18. On or about June 15, 2014 the claimants met with the first defendant for a second time at the subject property. At this meeting, the first defendant presented them with a quotation for the cost of the construction/renovation works. The quotation which was prepared on the second defendant's letterhead provided as follows;

"...Marreb Construction Ltd is pleased to present a proposal for the construction of the addition to the existing house at the above captioned site.

Ground floor... \$58,000.00

Upper floor... \$65,000.00

Swimming pool...\$22,000.00

This job will be completed within 8 to 12 weeks from commencement.

Weather Permitting.

Our terms of payment are 30% down, 30% at the halfway point, 30% at three quarter way point and 10% on completion..."

19. At this meeting, a completion date of on or about October 27, 2014 (weather permitting) was set. Alicia testified that she kept inquiring from the first defendant whether he was capable of doing the type of work required and if he had the manpower. The first defendant answered in the affirmative. Alicia was particularly anxious for the construction/renovation works to be completed before Christmas 2014 since she wanted to have a pool party during the Christmas.

20. Further, at the meeting the first defendant told the claimants that he would provide them with a listing of the materials required for the construction/renovation works. After discussing the quotation over a two day period, the claimants accepted same.
21. Consequently, on June 17, 2014 the claimants met with the first defendant at the subject property and Foster in Alicia's presence signed and dated the quotation. As Foster was going to be out of the country for all of July, 2014 and wanted to be home when the construction works started, a start date of August 4, 2014 was agreed upon. It was further agreed that the first payment of \$43,500.00 would be made on August 4, 2014. Alicia wrote out the amounts of each of the four payments totaling \$145,000.00 on her copy of the quotation/agreement and returned a copy to Berment.¹
22. In or about the last week of July, 2014 Alicia contacted the first defendant via telephone and confirmed the start date of August 4, 2014. On August 4, 2014 the claimants met the first defendant at the subject property. During this meeting, the first defendant gave the claimants two letters which were dated July 24, 2014. Each letter contained a list of the materials the claimants would have to purchase in order for the construction/renovation works to be carried out. The letters were again done on the second defendant's letterhead but were not signed by the first defendant on behalf of the company. As Alicia was speaking directly with the first defendant, she did not raise an issue about the letters being unsigned.²

¹ A copy of the quotation/agreement was annexed to Alicia's witness statement at "A.P.1".

² Copies of those letters were annexed to Alicia's witness statement at "A.P.2".

23. As per the agreement, the claimant was to purchase all the materials required for the project. The first defendant informed the claimants that throughout the course of the works, he would let them know what materials were required on site so that same could be purchased.
24. As previously agreed, the claimants made the first payment in the sum of \$43,500.00 by cheque. Before writing the cheque, Alicia asked the first defendant to confirm that the spelling of the second defendant's name was the same as per its letterhead. However, the first defendant indicated that the cheque should be made out to him personally and stated "*Well I am the owner, I am Marreb so make it out to me*".
25. Consequently, Alicia proceeded to make the cheque payable to the first defendant personally. Foster then signed the cheque as the bank account is held in his name.³ After handing over the cheque to the first defendant, Alicia asked for a receipt. However, the first defendant did not have a receipt book on him. As Alicia needed to have some record of the payment, she used one of her personal receipt books. When she was writing out the receipt, she asked the first defendant to confirm that the receipt was to be made out on behalf of the second defendant. However, the first defendant again indicated that the receipt should be made out personally to his name and not on behalf of the second defendant. As such, Alicia made out the receipt as instructed and the first defendant signed same. She kept the original and gave the first defendant the copy.⁴
26. After the first payment was made, the claimants and the first defendant agreed that the construction works would start with the pool. The first

³ A copy of the cheque was annexed to Alicia's witness statement at "A.P.3"

⁴ A copy of the receipt dated August 4, 2014 was annexed to Alicia's witness statement at "A.P.4"

defendant informed the claimants that they did not need to purchase any materials immediately as he planned to bring a backhoe to begin digging the area for the pool which he estimated would take two to three days. No actual work was done on August 4, 2014.

27. At that meeting, the first defendant also informed the claimants that if they had any issues at all with the progress of the construction works, they should not speak to his workers. They should address all issues with him directly via his personal mobile phone. Further, the first defendant told the claimants that they should not speak to the supervisor who would be in charge of the works. Alicia testified that as she found the aforementioned to be odd, she asked the first defendant why she should not speak to any of his workers or the supervisor. In response, the first defendant informed Alicia that his employees would not understand the scope of works that he was being hired to do.

28. At approximately 7:30am on August 5, 2014 a backhoe arrived at the subject property to commence the excavation works for the pool. The first defendant was not present in the morning. The backhoe started working and whilst removing excess dirt, the driver attempted to deposit the excess dirt over the fence and onto a parcel of land to the back of the subject property. Whilst attempting to do the aforementioned, the backhoe driver pulled down the entire wire fencing to the back of the subject property. The backhoe continued working until it broke down sometime around midday. No work was done for the rest of the day whilst the backhoe was being repaired.

29. The first defendant visited the subject property sometime in the afternoon of August 5, 2014 and Alicia showed him the damage that was done to the

fence. The first defendant assured Alicia that once the auger pilling for the house was completed, the fence would be repaired.

30. Works continued on August 6, 2014 up to August 28, 2014. During that time, the claimants purchased various materials as requested by the first defendant. Those materials included cement, sharp sand, plastering sand, concrete blocks, BRC wire nails and construction ply. The claimants also paid the cost to transport those materials to the subject property. The total cost for those materials and the transport was approximately \$28,690.00.
31. By August 28, 2014 the hole for the pool had been dug, the block work had been done and the concrete reinforcement and pipes were installed. The plastering and tiling had not been started and the jets, pump and skimmer had not yet been installed.
32. Alicia was not at home on August 28, 2014 but after receiving a call from her housekeeper, she telephoned the first defendant to get an explanation as to why only a skeleton staff was present at the subject property as there was a lot of work to be completed and the works were behind schedule.
33. The first defendant informed Alicia that he had labour problems and as a result he had to shut down all work temporarily until the labour problem was sorted out. The first defendant further informed Alicia that he was travelling abroad in the near future and that he would return in two weeks to resolve the situation. Alicia was totally surprised by that turn of events and by the casual and abrupt manner in which the first defendant spoke to her.

34. Approximately two weeks thereafter, two workers visited the subject property and removed the debris and materials left in the pool.
35. When the first defendant returned on September 10, 2014 Alicia held a meeting at subject property with him. At that meeting, the first defendant stated that he was discontinuing the project and refused to have any further dealings with Alicia. The first defendant indicated that he was only prepared to deal with Foster and would speak directly to him concerning refunding the monies that were paid.
36. Sometime in or about September, 2014 Alicia approached Anthony Meijas of Meijas Swimming Pool Services (“Meijas”) to discuss the completion of the pool. Alicia received an estimate from Meijas dated September 22, 2014 placing the cost of the materials and equipment required to complete the pool at \$31,226.00 and a labour cost of \$18,000.00.
37. In relation to the construction/renovation works to the house which were never started by the first defendant, Alicia approached a builder, Uric Miller (“Miller”) to obtain an estimate for the labour cost associated with the construction/renovation works which were originally to be done by the second defendant. Alicia obtained a quotation dated November 18, 2014 from Miller which placed the labour cost at \$180,000.00.
38. Foster was out of the country from mid-August, 2014 to late September, 2014. Upon his return, Alicia told him about the problems that she had with the first defendant and the ceasing of the works. During the months of October, November and December, 2014 Alicia attempted to contact the first defendant by telephone but she was unsuccessful. She also looked in the telephone directory in the business listing for a physical address,

email address and/or telephone number for the second defendant but was unable to find any listing at all for the company.

39. Due to the claimants' inability to contact the defendants, they sought legal advice. Based on the legal advice they received, a pre-action protocol letter dated January 16, 2015 was sent to the company to its purported registered address at No. 36 Boissiere Village, Maraval. That letter was however returned to the claimants then lawyers' office as unclaimed.⁵

40. After receiving no response to their pre-action protocol letter, the claimants sought further legal advice. Based on the legal advice received, Alicia gave instructions to her then lawyers to carry out a company search on the second defendant to confirm that its registered address was in fact still No. 36 Boissiere Village, Maraval. The search report dated January 23, 2014 confirmed that according to the documents filed with the Companies Registry, the second defendant's purported address was still No. 36 Boissiere Village, Maraval.⁶

41. Subsequently, the claimants initiated legal proceedings against the second defendant for, amongst other things, damages for breach of contract ("the first claim").⁷ Through registered post, the claim form and statement of case in the first claim were served on the second defendant on February 12, 2015 at its purported registered address, No. 36 Boissiere Village, Maraval. However, as with the pre-action protocol letter, the claim form

⁵ A copy of this letter and the envelop showing that it was stamped as unclaimed were annexed to Alicia's witness statement at "A.P.5"

⁶ A copy of the search report was annexed to Alicia's witness statement at "A.P.6".

⁷ Copies of the Claim Form and Statement of Case for the first claim were annexed to Alicia's witness statement at "A.P.7".

and statement of case in the first claim were returned to the claimants then lawyers' office as unclaimed.⁸

42. Due to the problems the claimants were having with serving the claim form and statement of case in the first claim, the claimants drove to Boissiere Village, Maraval during late February or early March, 2015 in an attempt to locate the second defendant's purported registered address. The claimants are not from the Maraval area and so they used the global positioning system ("GPS") in Foster's car as well as the GPS navigation software 'waze' on Alicia's phone in order to try to locate No. 36 Boissiere Village, Maraval. Neither the vehicle's GPS nor the mobile application waze was able to locate that address.

43. The claimants also visited Dindial's Hardware located at No. 19 Saddle Road Maraval which is situate after Ellerslie Plaza in the Maraval area. The claimants drove around the Boissiere Village that day but were unable to locate the second defendant's purported address.

44. Foster together with his brother-in-law returned to the Boissiere Village for a second time in or about mid-March 2015 in an attempt to locate either the second defendant's purported registered address or the first defendant. Their efforts in finding a location to match No. 36 Bossiere Village, Maraval were again unsuccessful.

45. As a result of the claimants' failure to locate the second defendant's purported registered address and upon receiving legal advice from their then lawyers, Alicia gave instructions to file an application for substituted

⁸ A copy of the returned envelope stamped as unclaimed was annexed to Alicia's witness statement at "A.P.8".

service (by way of newspaper advertisement) of the claim form and statement of case in the first claim.⁹ The claimants' application for substituted service was granted by Order dated April 13, 2018. They subsequently paid to have the first claim advertised in the Trinidad Express newspapers on April 23, 2015 and April 30, 2015.¹⁰

46. Despite the advertisement of the first claim in the newspapers, the second defendant did not enter an appearance. Consequently, the claimants applied for and were granted judgment in default of appearance against the second defendant by Order dated July 14, 2015. The hearing of the assessment of damages was fixed for December 9, 2015 before the Master.

47. By letter dated December 1, 2015 the claimants then lawyer wrote to the first defendant personally, informing him of the default judgment against the second defendant and of the date of hearing for the assessment of damages.¹¹ By letter dated January 26, 2016 the second defendant's then lawyer acknowledged receipt of the claimants' letter dated December 1, 2015 and informed the claimants that they have been instructed to engage in discussions with them with a view of an early settlement of the matter. As such, the claimants' lawyers were asked to provide a copy of the claim form and statement of case along with their opinion on quantum. Alicia testified that this was the first time since September, 2014 that she had any contact with the first defendant.¹²

⁹ Copies of the application and the affidavit in support were annexed to Alicia's witness statement at "A.P.9".

¹⁰ A copy of the Order dated April 13, 2015 was annexed to Alicia's witness statement at "A.P.10".

¹¹ A copy of this letter was annexed to Alicia's witness statement at "A.P.11".

¹² A copy of this letter was annexed to Alicia's witness statement at "A.P.12".

48. By letter dated January 29, 2016 the claimants then lawyers responded to letter dated January 26, 2016, enclosed copies of the claim form and statement of case and advised that they were claiming the sum of \$159,226.00 in damages with 6% interest from October 27, 2014.¹³ There was no response to this letter. As such, the assessment of damages continued before the Master.

49. Four witness statements and a hearsay notice were filed on behalf of the claimants in the first claim. By letter dated April 5, 2016 the claimants' then lawyers wrote to the second defendant's then lawyer enclosing copies of the aforementioned documents. Mr. Joel Roper, Counsel purportedly acting on behalf of the second defendant signed a copy of that letter acknowledging receipt of same on April 5, 2016.¹⁴

50. The second defendant did not participate at the hearing of the assessment of damages before the Master and as such, the order mentioned at paragraph one was made.¹⁵ There has been no appeal of that order.

51. The second defendant made no attempts whatsoever to satisfy the judgment of December 2, 2016. Consequently, in or about January, 2017 the claimant gave instructions to their attorneys to carry out a search to obtain all records of the second defendant contained at the Companies Registry. The search revealed the following documents of the company;

- i. Certificate of Incorporation dated September 23, 2008 with registration number M 3279(95);

¹³ A copy of this letter was annexed to Alicia's witness statement at "A.P.13".

¹⁴ A copy of this letter was annexed to Alicia's witness statement at "A.P.14".

¹⁵ A copy of the order of Master Sobion-Awai was annexed to Alicia's witness statement at "A.P.15".

- ii. Articles of Incorporation dated September 22, 2008 signed by the first defendant personally as the incorporator of the company;
- iii. Notice of Directors or Notice of Change of Directors dated September 22, 2008 showing that as at September 22, 2008 the first defendant and Rebecca Berment (“Rebeca”) were the sole Directors of the company;
- iv. Declaration of Compliance dated September 22, 2008 signed by the first defendant;
- v. Notice of Address or Notice of Change of Address of Registered Office dated September 22, 2008 showing that as at September 22, 2008 the company’s registered address and mailing address was No. 36 Bossiere Village, Maraval; and
- vi. Notice of Secretary/Assistant Secretary or Notice of Change of Secretary/Assistant Secretary September 22, 2008 showing that at that date, Rebecca was the sole Company Secretary of the company.¹⁶
- vii. No annual returns were ever filed.

52. Based on the results of the company’s search and after receiving further advice from their lawyers, the claimants gave instructions for an asset search to be carried out on the defendants to find out whether the second defendant owned any property or if it had taken out any mortgages or other charges.

53. The asset search which was received in or about early February, 2017 showed that the second defendant did not own any property. However, the search revealed that the first defendant and Rebecca were the owners of the following properties;

¹⁶ Copies of those documents were annexed to Alicia’s witness statement at “A.P.16”.

- i. Deed of Conveyance dated April 28, 2000 and registered as DE2000096900BF between Kenneth Winsley Norton, Stuart Raymond, the first defendant and Rebeca;
- ii. Deed of Assignment dated September 18, 2001 and registered as DE200102216084D001 between Horace Krishna Naidoo, Molly Naidoo, the first defendant and Rebecca;
- iii. Deed of Conveyance dated December 13, 2003 and registered as DE200301565901D001 between Anbrat Limited, the first defendant and Rebecca;
- iv. Deed of Conveyance dated December 14, 2004 between Richard Harold Bryden, Joanne Attin Bryden, the first defendant and Rebecca;
- v. Deed of Conveyance dated February 21, 2005 and registered as DE200500565164D001 between Ulric McNeil, the first defendant and Rebecca; and
- vi. Deed of Conveyance dated December 24, 2009 and registered as DE201200613964D011 between Zina Hosein, the first defendant and Rebecca.¹⁷

54. Further, in response to a request for further particulars by way of answers dated June 28, 2018 the first defendant supplied the following information;

- i. Names of local financial institutions at which the second defendant owns a bank account, namely RBC;
- ii. Whether the second defendant is VAT registered-no;

¹⁷ Copies of those deed were annexed to Alicia's witness statement at "A.P.17".

- iii. Whether the second defendant ever paid NIS contributions pursuant to the National Insurance Act – no;
- iv. The location of the second defendant’s office over the past few years – No. 36 Boissiere Village, Maraval (from incorporation to February, 2014) and No. 5 Poinsetta Avenue, Petit Valley (from February, 2014 to present);
- v. Whether income tax statements/returns were ever prepared and filed with the Board of Inland Revenue on behalf of the second defendant – no;
- vi. Whether the second defendant has ever entered into any mortgages and/or loan agreements since incorporation with any financial institutions and general details thereof – no; and
- vii. Whether the second defendant has ever acquired or rented any assets, real or personal in its name and the particulars thereof – yes, construction equipment (including but not limited to pressure washers, demolitions hammers, compactors, pneumatic tools, air compressors) rented at various times from Rent-A-Tool and BT Rentals.¹⁸

55. To date there has been no offer or attempt by the second defendant to pay the judgment debt obtained in the first claim. The second defendant has also not defended this action to date. By letter dated November 22, 2017 the defendants were informed that the claimants were prepared to accept payment of the full judgment debt obtained in the first claim of \$151,545.60 together with interest at 5% per annum from December 2, 2016 by way of four equal monthly instalments and the costs of the

¹⁸ A copy of this response was annexed to Alicia’s witness statement at “A.P.18”.

proceedings in the sum of \$7,500.00. By letter dated November 30, 2017 the aforementioned offer to settle was rejected by the defendants.¹⁹

56. On November 20, 2017 the first defendant filed an application to strike out the action against him. By Order dated April 25, 2018, that application was dismissed and the first defendant was ordered to pay costs to the claimants in the sum of \$21,600.00. To date, the first defendant has not paid those costs.

57. In or about early January, 2019 Alicia attempted again to locate No. 36 Boissiere Village, Maraval. This time she was successful. Upon locating No. 36 Boissiere Village, Maraval she observed that it was a two storey residential building. There were no signs to indicate that there was any business operating therein.

The cross-examination of Alicia

58. According to Alicia, after she and Foster met with the first defendant on June 8, 2014 they entered into an agreement with both defendants. She testified that her understanding of the quotation/agreement was that she entered into an agreement with both defendants since the first defendant only mentioned as a by the way that he had a company (the second defendant). She further testified that in her mind the first and second defendants were one and the same.

59. Alicia testified that when she received the return from the cheque made out to the first defendant, the bank endorsement showed that the funds had been debited to the personal account of the first defendant.

¹⁹ Copies of those letters were annexed to Alicia's witness statement at "A.P.19".

60. The first claim was initiated against the second defendant because Alicia's attorneys at that time advised her to so do.

ISSUE 1 - *whether the corporate veil of the second defendant should be pierced*

Law

61. A company is a legal entity that is separate and distinct from the individual members of the company.²⁰ However, there are circumstances where the court will pierce (or lift) the corporate veil.

62. According to ***Halsbury's Laws of England***,²¹ the doctrine of piercing the corporate veil should only be invoked where a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.

63. In ***Prest v Petrodel Resources Ltd.***²² Lord Sumption had the following to say;

"[28] 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

²⁰ See *Salomon v Solomon & Co. Ltd* [1897] AC 22 page 51

²¹ Volume 14 (2016) para 116

²² [2013] 2 AC 415

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.

[35] I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.”

64. In the Privy Council case of ***Dave Persad v Anirudh Singh***,²³ Their Lordships confirmed that the piercing of the corporate veil is only justified in very

²³ [2017] UKPC 32

rare circumstances. 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 April 1, 2002. Persad who was a qualified attorney, prepared the lease for the premises. The draft lease, which contained certain covenants by the tenant, stated Singh to be the lessor and the lessee, a company named 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.

65. 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, the court 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.

66. At paragraphs 13 and 14 Their Lordships considered the Trial 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".

67. Lord Neuberger stated the following at paragraphs 17, 20 and 21 of the decision of the Privy Council;

“17. As the Court of Appeal rightly acknowledged, piercing the veil is only justified in very rare circumstances, a point which was implied in the UK Supreme Court’s decision in VTB Capital Plc v Nutritek International Corpn [2013] 2 AC 337, paras 127, 128 and 147, and was expressed in terms in its subsequent decision in Prest v Petrodel Resources Ltd [2013] 2 AC 415, paras 35, 81-82, 99-100 and 106. As Lord Sumption explained in Prest at para 35, piercing the veil can be justified only where “a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control”. In this case, Mr Singh cannot get near establishing any evasive or frustrating action on the part of Mr Persad. Mr Persad was under no relevant “legal obligation or liability” to Mr Singh at the time that he proffered to Mr Singh the draft lease executed by CHTL or at the time that the lease became binding. He had been negotiating for the grant of a formal lease and therefore there could have been no question of his having been bound as lessee prior to the formal completion of the Lease. In any event, the parties always envisaged a term of five years, and such a lease can only be granted by deed - see section 3 of the Landlord and Tenant Ordinance (Chapter 27, No 16)...

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".

Analysis and findings

68. The court agrees with the claimants' submissions that the requirements of the evasion principle as outlined above were met. Upon an evaluation of the evidence, the court finds that there was an existing legal obligation held by the first defendant in relation to the claimants independent of the second defendant's involvement. The first defendant met and engaged with the claimants, considered the job, accepted same and according to Alicia's evidence only mentioned the second defendant in passing. As the first defendant failed to lead any evidence to the contrary, the court accepts the aforementioned evidence of Alicia.

69. Further, and of utmost importance, the court finds that the evidence suggests that it was the first defendant who was carrying on the business rather than the second defendant. According to the evidence of Alicia, it

was the first defendant who met with them at their home to do an on-site inspection, he started the works, supervised same and when he thought it necessary stopped the works, although incomplete. As such, the court the court agrees with the submissions of the claimants that the second defendant was involved in a very limited way in that letters were signed using the company's letterhead and no more.

70. The court also finds that the quotation dated June 15, 2014 and executed on June 17, 2014 eventually evidenced the contract between the claimants and defendants. The court disagrees however, with the submissions of the defendants that the agreement and the quotation for the materials clearly evinced that the contract was from the very start, entered into between the claimants and the second defendant through the company's agent, the first defendant in his capacity as General Manager and that there was no personal contractual liability established between the claimants and the first defendant on the evidence. As a matter of pure common sense when taken in the context of the unchallenged evidence, such a finding can only be based on the fact that those quotations were made on the company's letterhead and no more. The mere fact that the letterhead of the second defendant was used does not satisfy this court when all of the facts and circumstances surrounding the making of the agreement is considered.

71. In particular and of pivotal importance to the finding of the court is the fact that the first defendant specifically caused the cheque for payment for the works to be made out to him personally. Further, there is evidence that he deposited the funds into his personal bank account and not that of the second defendant company. There is no evidence that there was any resolution or decision of the company to authorize payment which was

due to the company to be made directly to the first defendant's personal account as General Manager.

72. The importance of this evidence becomes even more apparent when one considers the answer given in response to the request for information set out above, in that the second defendant appears to have been the holder of an account in RBC. The evidence raises a clear inference that the first defendant was himself using the second defendant to avoid any liability that may have arisen.

73. In so doing the first defendant treated the funds received as belonging to him and not the second defendant company. It was equally clear from the evidence that he was the controlling mind of the company and exercised sole control over the company's funds. As such, the court finds that it is more probable than not that the effect of the actions of the first defendant was that the second defendant (with whom the contract was entered) was the one who acted for and behalf of and was the agent of the first defendant and not the other way around as submitted by the first defendant.

74. In relation to the claimants' submission that the evasion principle should apply as the company is a literal sham due to the following;

- i. It has no business location;
- ii. It pays no taxes;
- iii. It has not paid national insurance pursuant to National Insurance Act;
- iv. No changes of address of registered office filed with the Company's Registry, so that it still remains at 36 Boisierre Village Maraval.
- v. No Annual Returns have ever been filed.

vi. Since Incorporation no other documents have been filed with Company Registry, the court finds that while the aforementioned factors would not, if considered separately, warrant the piercing of the corporate veil, those factors when taken cumulatively (in conjunction with the fact that the first defendant received the contractual payment in his personal name) clearly supports the application of the evasion principle. The evidence demonstrates clearly that the company is a mere shell used by the first defendant to evade the legal obligation he would have entered into.

75. Additionally, the defendant submitted that despite the fact that the claimants knew that the second defendant had an RBC Bank account, no attempt was made to bring that information before the court. That one would think that bank statements would be a clear indication of whether the company was a mere shell or sham than the failure to file certain documents with the company's registry. The court finds this argument to be disingenuous for several reasons. Firstly, the duty lay with the first defendant who is obviously in control of the second defendant and who is the General manager thereof to disclose same but he failed so to do. Secondly that disclosure only came about upon he application of the claimants for further information. Thirdly, even at that stage the information provided was bare at the highest.

76. Consequently, the court finds that the evidence suggests that the first defendant would have entered into the contract with the claimant and interposed the second defendant so that the separate legal personality of the company would shield him in the event that all did not go well. The court finds that such a finding is further supported by the fact that the first defendant did not lead any evidence of either the solvency of the second

defendant and/or any other contracts the second defendant would have engaged in.

77. The court is therefore satisfied that this case falls into the category of rare and exceptional cases in which the court ought to pierce the corporate veil to reveal the unlawful actions of the first defendant and to hold him personally liable for the judgment debt.

78. Additionally, the defendant has made heavy weather of the fact that the first claim was brought against the second defendant only. The court agrees with the submission of the claimant that the main objective of this claim was to determine whether the claimants in entered into a contract with the first defendant as the principal or whether the contract was with the second defendant as the principal as ***a matter of law***.

79. Finally, before closing, the court is of the view that the facts of *Dave Persad* supra are distinguishable from the facts of this case in the following manner;

- i. At the outset of this case and at the formation of the contract when consideration was being passed, the first defendant took the payment personally. In *Persad*, the contract was in fact entered into with C.H.T.L and rents were payable by C.H.T.L. The existing liability was therefore that of the first defendant when he superimposed the second defendant on the entire transaction, unlike in *Persad*.
- ii. Further, in *Persad*, Their Lordships of the Privy Council commented that Singh, being the holder of an MBA, fully well understood the meaning of a lease being entered into with a company. Therefore, *Persad* was under no initial liability.

- iii. In the present case (on the claimants' evidence), the first defendant acknowledged that he and the company were 'one and the same', quite a different material position from the facts of Persad, as the C.H.T.L. appears to have not yet been incorporated at the time the contract was entered into.
- iv. The pleadings herein unlike in Persad set up a case of challenging corporate personality and sought an order to set aside the veil of incorporation. In Persad, the pleadings were entirely silent on the issue of lifting the corporate veil.
- v. Evidence was led by Persad to challenge the case against him even though he provided no documentary evidence. In this case, the first defendant has led no evidence whatsoever and consequently there was no evidence to the contrary of that of the claimants for consideration.

The alternative claim

80. Finally, the court having found that the corporate veil of the second defendant ought to be pierced, there is no need to determine the claimants' alternative claim.

DISPOSITION

81. The court will therefore make the following order;

- i. It is declared that the first defendant was and is the alter personality and/or the controlling mind of the second defendant and the first defendant is therefore liable to satisfy the judgment

obtained by the claimants in High Court claim number CV2015-00441.

- ii. The first defendant shall pay to the claimants the prescribed costs of the claim.
- iii. The parties shall be heard on the application for default judgment against the second defendant.

Ricky Rahim

Judge