IN THE SUPREME COURT OF SEYCHELLES

Franco Cultreri
of St. Louis, Mahe

Plaintiff

Vs

1. **Michael Eible of**

Seychelles Savings Bank, Victoria

2. **Enrico Famulari of**

Glacis, Mahe
Defendants

Civil Side No: 361 of 1999

Mr. A. Juliette for the plaintiff

Mr. C. Lucas for the 1st defendants

D. Karunakaran, J

JUDGMENT

The plaintiff commenced this action by issuing a writ of summons to the defendant under the Summary Procedure on Bills of Exchange, in terms of Section 295 of the Seychelles Code of Civil Procedure. The defendant having received the writ of summons obtained leave of this Court to appear and contest the claim of the plaintiff in this matter. Hence, the Court heard the case on the merits and now proceeds to deliver its judgment.

The plaintiff in this action claims the sum of SR201, 200/- allegedly due and payable to the plaintiff as the payee of two bills of exchange to wit: Two cheques Nos. 002928 and 002917 dated respectively the 10th September 1999 and the 2nd September 1999; both were drawn on Bank of Baroda, Victoria, Mahe for the sum of Rs200,000/- and Rs 1,200/- respectively. The defendants deny liability; challenge the genuineness of the plaintiff's claim and dispute the passing of consideration in respect of these two cheques by deponing in their affidavit thus:-

1. *We are the directors of Kibi (Pty) Ltd the company whose registered office is at Oliaji Building, Francis Rachel Street, Victoria.*

2. *The Company did owe the Plaintiff Rs.1, 200/- which sum was already paid on the 30th September 1999 to cover the cheque dated 2nd September 1999.*

3. *We deny owing or having owed the Plaintiff any sums or at all. Cheque 002928 of Baroda Bank was a cash cheque and not intended to benefit or pay the Plaintiff but was part-payment due on a land transaction by the Company.*

4. *The cheque was in the office of the Company and could not be located after the 10th September. The bank was ordered to stop payment and police was informed.*

5. *The cheque was a "cash" cheque. Had it been intended for the Plaintiff it would have cited the Plaintiffs name like cheque 2917.*

6. *All parties to this suit have been interviewed by the police as a result of the defendants' complaint made on behalf of the Company. No action was taken the cheque having been retrieved.*

7. *We aver that the cheque is the property of Kibi (Pty) Ltd and not that of the plaintiff and that we are not indebted to the Plaintiff.*

8. *We are the Directors of Kibi (Pty) Ltd, which has corporate liability. As a point of Law in Limine we aver that should the Plaintiff have any claim as a result of nonpayment of a company's cheque, the same ought to be brought against the Company in its own capacity and not against the Directors in their personal capacity.*

The plaintiff Mr. Franco Cultreri testified that at all material times, he was the manager of a company registered in Seychelles as "Footwear Company (Seychelles) Limited", which was engaged in the business of manufacturers, importers and retailers of shoes, boots and other related items made of leather, rubber and man made fabrics.

4According to the plaintiff in 1999, his company (vide exhibitP6) imported building materials from Italy and supplied them to both defendants, who gave him two cheques first above mentioned towards the costs of those supplies. In support of his claim the plaintiff produced a letter dated 17th March, 1999 from the company Ki. Bi. Pty Ltd placing an order to the plaintiff for some Aluminum roofing material. When the plaintiff presented the cheques for payment the banker namely, Bank of Baroda honored only one cheque 002917 for the sum of Rs 1200/- and declined to pay for the other cheques No. 002928 for the sum of Rs200, 000/-

DW1 and DW2, two officials from Bank of Baroda testified in essence, that the two cheques in question were issued from a current account held with their bank by a company known as “KIBI” Pty Ltd. This account was closed on the 8th of August 2002. Both defendants herein were authorized signatories for signing all debit transactions in the said company’s account. The cheque 002917 issued for the sum of Rs 1200/- was honored by the bank and as regards the other cheque No. 002928 for the sum of Rs200, 000/- they were unable to trace the records to find out the stop payment instruction given by the company “KIBI” Pty Ltd.

In the circumstances, the bone of defendant’s contention is that the cheques have been issued by the company “KIBI Pty Ltd” from its current account held with Bank of Baroda. The defendants in this action are two individuals. Under Section 33 of the Companies Act 1972 and on the Strength of Salomon vs. Salomon, the company is a separate legal entity and the members of the company are not personally liable for the debts or any other acts of the company. Hence, Mr. Lucas, learned counsel for the defendants submitted that this action against the defendants is not maintainable in law and therefore sought dismissal of this action. On the other hand, Mr. Juliette, learned counsel for the plaintiff submitted that (i) this aspect defence as to “corporate liability” was not pleaded in the

defence and (ii) individuals cannot hide behind a company and do wrong and attempt to get away by claiming protection over company. They are responsible for their individual action. They wrote the cheque on behalf of the company and signed the cheques and hence they should be held responsible for the debt. Thus, Mr. Juliette urged the Court in effect, to lift the corporate veil and hold the individuals responsible for the debts of the company in which both were directors at the time of signing the cheques in question.

First of all, contrary to what Mr. Juliette submitted to Court I note, the defendants have obviously, pleaded the defence of "corporate liability" under paragraph 8 of their affidavit. Hence, I find that the first limb of Mr. Juliette's submission does not hold water.

As I move on to the second limb, obviously, the fundamental question that arises for determination is this:

> "*Are the defendants personally liable to pay for the company cheques, which they signed in their capacity as directors cum authorized signatories of the Company?"*

I believe it is pertinent to restate here what I have stated in *State Assurance Corporation of Seychelles vs. First International Financial Company Ltd Civil Side No: 409 of 1998.*

Lifting or Piercing the Corporate Veil

The corporate law concept of **piercing (lifting) the corporate veil** describes a legal decision where a shareholder of a corporation is held personally liable for the debts of the corporation despite the general principle that those persons are immune from suits in contract or tort, that otherwise would only hold the corporation liable. This doctrine is also known as **"*disregarding the corporate entity*"**.

Undoubtedly, as rightly submitted by the learned counsel for the defendant, Mr. C. Lucas, it is an axiomatic principle of company law, that a company is a legal entity separate and distinct from its members, who are only liable to the extent that they have contributed to the company's capital. The landmark decision in *Salomon v A. Salomon & Co Ltd [1897]* created two basic legal concepts, namely, (i) ***"corporate entity"*** and (ii) ***"limited liability",*** *the 'Adam' and 'Eve' of the corporate genesis, if I may say so.* It is truism that on principle, the Courts will generally hold the company liable for all actions or debts that are legally the responsibility of the corporation, not its shareholders. The Courts have thus, preserved the dual presumptions of "Corporate entity" and "Limited liability" as laid down by the House of Lords. The Salomon principle certainly will continue to govern the corporate world, from precedent to precedent, as it has done since the 19th century. However, if shareholders' actions were clearly designed to pass personal liability off to the corporation, the Courts have disregarded the rigid application of the Salomon principle, when such rigidity resulted in corporate calamity and legal absurdity. Historically, the Courts have lifted the corporate veil for good reasons and have silenced Salomon. In a number of circumstances, the Courts have pierced or ignored the corporate veil, to reach the person behind the veil or to reveal the true form and character of the concerned company. The rationale behind this is that the law will not allow the corporate veil to be misused as a masquerade by unscrupulous individuals to swindle and defraud others, and escape from the clutches of law by hiding behind the corporate veil. "Limited liability" is a "mode of swindling," declared Jeffersonian scholar Thomas Cooper in the 1820s. The "Enron" episode of 2001, the largest corporate fraud in U. S history, is a glaring example. The Salomon principle laid down by the law lords in the 19th century - however suited to economic and social

conditions of that time - are not suited to that of the 21st century. It should be fine-tuned to meet the changing needs of time and the emerging corporate culture. If *Salomon* allows business owners to escape responsibility for what their businesses do, then the "legal fiction" of corporate personality is a farce and will never serve the purpose for which it was created by the statute. In the circumstances, when the court feels that the corporate form is being misused, it will rip through the corporate veil and expose its true colour, character and nature, disregarding the Salomon principle. On the other hand, if the Courts are too rigid in applying this principle and decline to lift the veil, at times it causes injustice, not only to third parties but also to company owners. The often cited case of *Macaura v Northern Assurance Co Ltd [1925] AC 619* is an example of such a situation. Mr. Macaura was the sole owner of a company he had set up to grow timber. The trees were destroyed by fire but the insurer refused to pay since the policy was with Mr. Macaura (not the company) and he, personally, was not the owner of the trees. The House of Lords upheld that refusal based on the rigid application of the Salomon principle. Thus, injustice was done to Mr. Macaura. Do we need such a rigid application that causes injustice?

When is the veil lifted?

The courts have been more prepared to pierce the corporate veil when it feels that fraud is or could be perpetrated behind the veil. The courts will not allow the Salomon principal to be used as an engine of fraud. The two classic cases where the courts lifted the corporate veil for reasons of fraud are *Gilford Motor Company Ltd Vs. Horne (1933) Ch 935;* and *Jones Vs. Lipman (1962) 1 WLR 832;*

In *Lipman,* Justice Russell specifically referred to the judgments in *Gilford v. Horne* and held that Mr. Lipman's company was " a mask which (Mr. Lipman) holds before his face, in an attempt to avoid recognition by the eye of equity". Under no circumstances will the court allow any form of abuse of the corporate form and when such abuse occurs, the court will step in, as it ought to. In our jurisdiction too, the Courts under certain circumstances have lifted the corporate veil, when justice and necessity demanded us to do so *vide SACOS Vs. First International Financial Company- Civil Side 409 of 1998.*

However, in the case on hand, it seems to me, that both defendants had signed the cheques in their capacity as directors cum authorized signatories of the company KIBI Pty Ltd for signing all debit transactions in its account with Bank of Baroda. Indeed, there is no pleading or any allegation made by the plaintiff that fraud or breach of trust or deceit has been perpetrated behind the corporate veil of KIBI Pty Ltd. Therefore, this Court cannot pierce the veil in order to hold these two defendants unduly liable for the debts, which the company KIBI Pty Ltd might or might not have incurred by virtue of issuing the cheques in dispute to third parties. Accordingly, I find both defendants are neither jointly nor severally responsible for the cheques they signed for and on behalf of the company.

It is also interesting to note that other recent cases suggest that if the tort is deceit rather than negligence, the courts will more readily allow personal liability to flow to a Director or employee. *(See, Daido Asia Japan Co Ltd Vs Rothen (2002) BCC 589* and *Standard Chartered Bank v Pakistan National Shipping Corp (No. 2) (2003) 1 AC 959.*

In most jurisdictions, no hard and fast rule exists calibrating the standard

required to be applied by the Court on the question of judicial “veil lifting”. The rule is rather based on case-by-case decisions. In the US, different theories exist but the most important one is the "alter ego" or "*instrumentality*” rule, which attempted to create a piercing standard. Mostly, they rest upon three basic prongs - namely "*unity of interest and ownership*", "*wrongful conduct*" and "*proximate cause*". However, the theories failed to articulate a real-world approach which the courts could directly apply to their cases. Thus, as the Courts struggle with the proof of each prong, they eventually take a global approach and analyze all given factors in order to decide the question of lifting the corporate veil. This is known as "*totality of circumstances*", which in my view, is the most appropriate and suitable approach this Court should also take in the case on hand. In examining the “*Totality of Circumstances*” peculiar to the case on hand, I take into account the following facts and circumstances as they transpire from evidence on record:

(a) It is evident from exhibit P5 that it was the Company KIBI Pty Ltd that had placed the order with the plaintiff for the supply of the building materials. The plaintiff claims that these two cheques were issued in consideration of or towards the cost of those materials supplied to the company. Hence, needless to say, the company is responsible for the debt, not the defendants personally.

(b) *Upon evidence, I am satisfied on a preponderance of probabilities that the Company KIBI Pty Ltd did owe the Plaintiff Rs.1200/- which sum was paid on the 30th September 1999 to cover the cheque dated 2” September 1999. This fact is also corroborated by the evidence given by the Bank officials, DW2 and DW2 whom I believe to be truthful witnesses. I do not believe the plaintiff’s version to*

the contrary.

Furthermore, on evidence I believe the defendants in that, cheque 002928 of Baroda Bank, which disappeared from the office of KIBI Pty Ltd, was a cash cheque and not intended to benefit or pay the Plaintiff but was part-payment due on a land transaction by the Company.

(c) *As rightly pointed out by the defendants, the cheque 002928 was a "cash" cheque for a higher sum that is, Rs200, 000/-. Had it been intended for the Plaintiff it would have cited the Plaintiffs name like cheque 2917.*

(d) *The cheque 002928 was in the office of the Company and could not be located after the 10th September 1999. Consequently, the bank was ordered to stop payment and police was informed.*

Having given a careful thought to the "*totality of circumstances",* the Court finds and concludes that the corporate veil of the "KIBI Pty Ltd" has not been misused by the defendants as its shareholders/directors. The Court therefore, applies the Salomon principle, and declines to pierce or lift the corporate veil of the said company.

In the final analysis, I find the answer to the fundamental question (supra) thus:-

> "No. The defendants herein are not personally liable to pay for the company's cheques, which they signed in their capacity as directors cum authorized signatories of the Company"

In view of all the above, the case is dismissed with costs.

D. Karunakaran

Judge

Dated this 4th day of December 2007