[2017] JMCC Comm 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2014 CD 00145

BETWEEN	**DIV. DEEP LIMITED**	**1ST CLAIMANT**
AND	**MAHESH MAHTANI**	**2ND CLAIMANT**
AND	**HARESH MAHTANI**	**3RD CLAIMANT**
AND	**TOPAZ JEWELLERS LTD.**	**1ST DEFENDANT**
AND	**RAJU KHEMLANI**	**2ND DEFENDANT**

Walter Scott Q.C and Nastasia Robinson instructed by P.L Jennings for the Claimants

Stacy Knight instructed by Knight Junior & Samuels for the Defendants

HEARD: 10 and 6 October 2017

CIVIL PROCEDURE – APPLICATION TO STRIKE OUT CLAIM – NO REASONABLE GROUNDS FOR BRINGING CLAIM – CLAIM ESSENTIALLY FOR BREACH OF CONTRACT AND FRAUD-WHETHER CLAIM STATUTE BARRED – FACTUAL DISPUTE AS TO DATE CAUSE OF ACTION AROSE – CIVIL PROCEDURE RULES 2002 RULE 26.3 (1) (B) AND (C)

COMPANY LAW – CLAIM AGAINST A LIMITED LIABILITY COMPANY – MANAGING DIRECTOR AND MAJORITY SHAREHOLDER ALSO SUED IN HIS PERSONAL CAPACITY – WHETHER CRITERIA EXISTS FOR PIERCING THE CORPORATE VEIL – WHETHER IT IS NECESSARY TO LIFT THE CORPORATE VEIL TO HOLD THE MAJORITY SHAREHOLDER LIABLE

EDWARDS, J

Background

[1] This is a claim which has its origin in a failed arrangement between the parties which begun as far back as in the year 1993. The fallout from that failed arrangement resulted in multiple litigation before this court. The present claimants were formerly defendants to a claim brought against them by Tewani Limited in 2007 for possession of property in claim 2007 HCV 01056 (the 2007 claim). The claimants, in turn, filed a defence and an ancillary claim in May 2010 against Topaz Jewellers, Raju khemlani and Suresh Khemlani and others. Judgement in the 2007 claim was handed down in favour of Tewani Limited by Beswick J in October 2010 where she also ordered that the ancillary claim proceed separately to trial. That ancillary claim meandered through the courts with several applications and adjournments resulting in the ancillary claim against several of the other parties being discontinued. On 8 May 2015 Batts J, in the exercise of his case management powers, ordered the case to be re-titled a claim by Div Deep Limited – 1st claimant, Mahesh Mahtani – 2nd claimant, Haresh Mahtani – 3rd claimant, Topaz Jewellers Limited – 1st defendant/ancillary defendant, Raju Khemlani – 2nd defendant/ancillary defendant and Suresh Khemlani – 3rd defendant/ancillary claimant.

[2] The claim against Suresh Khemlani was discontinued on or about 16 February 2016. His ancillary claim against Topaz Jewellers and RajuKhemlani would therefore, naturally fall away. Now remaining before the court are the three claimants – Div Deep Limited, Mahesh Mahtani and Haresh Mahtani and the two defendants Topaz Jewellers and Raju Khemlani. On the 31 August 2015 the claimants filed a Further Amended Claim Form and Further Amended Particulars of Claim pursuant to the orders of Batts J made on the 8 May 2015.

[3] I should perhaps also mention that all the parties are related. Raju Khemlani is the majority shareholder in Topaz Jewellers and its managing director. Suresh Khemlani is his brother and was the company secretary for Topaz Jewellers. The 2nd and 3rd claimants are also related and are the directors of the 1st

claimant. The 2nd and 3rd claimants are also the first cousins of the 2nd defendant.

The Facts

[4] As I have already indicated the genesis of this case is from a failed arrangement made sometime in 1993 where monies were paid by the claimants pursuant to an investment deal. That investment deal failed to materialize and sometime in 1995 the parties entered into a different arrangement where there 2nd and 3rd claimants paid additional monies on behalf of the 1st claimant to the 2nd defendant on behalf of the 1st defendant, for the purchase of property owned by the 1st defendant. It was agreed that no refund was to be made on the failed investment deal and the funds already paid were to be used by the 1st defendant as part of the purchase price for the property. The claimants claimed that the monies were with respect to the purchase of a 1/3 share in the property owned by the 1st defendant known as 81B King Street. As a result of this arrangement they were put in possession of the property. They remained in possession of the said property until 2007.

[5] In the meantime, unknown to the claimants, the 1st defendant entered into a mortgage agreement with National Commercial Bank (NCB) using the said land at 81B King Street as collateral. This mortgage was not disclosed to the claimants until the 1st defendant went into default in and around the year 2000. After the 1st defendant defaulted on the loan NCB exercised its power of sale under the mortgage. After learning of the mortgage and the threat of the banks exercise of its power of sale under the mortgage, the claimants lodged a caveat against the property. They also reported the 2nd defendant to the fraud squad and he was subsequently charged, tried and acquitted. The caveat however, did not prevent the property being subsequently sold by NCB to Tewani Limited under the power of sale. The claimants, despite their knowledge of the sale, refused to remove from the premises, claiming a right to be there as purchasers in possession. The ultimately lost to Tewani Limited in the 2007 claim brought by it for recovery of possession against them.

[6] The 1st and 2nd defendants also brought a claim against the claimants in claim 2005 HCV 03196 for, *inter alia*, damages and mesne profits, in which the claimants filed a defence and counterclaim in 2005. That claim has not been prosecuted and is in abeyance.

The Application

[7] The 1st and 2nd defendants filed Notice of Application for Court Orders on 21 October, 2015 seeking an order to strike out the claim brought by the 1st, 2nd and 3rd claimants against them. The grounds of the application rest on two limbs, which were that:

i. There were no reasonable grounds for bringing the claim against the 2nd defendant in his personal capacity.

ii. The claim against the 1st and 2nd defendant was statute barred in any event and should be struck out as an abuse of process.

[8] At the hearing of the application and before it could be heard there were some preliminary housekeeping matters that required "clearing up". As mentioned at paragraph 2 about, the application, as originally filed, was also against a third defendant/ancillary claimant, Suresh Khemlani, however, the claimant's claim was subsequently discontinued against him, as a result of which his ancillary claim against the 1st and 2nd defendants was also discontinued. Therefore, at the beginning of this hearing permission was granted to the applicants to amend the notice of application by removing paragraph 2 and 4 which referred to Suresh Khemlani as 3rd defendant/ancillary claimant. Permission was also granted to amend paragraph 3 to insert the "1st defendant and" so that it read "That the Claim by the 1st, 2nd and 3rd Claimant against the 1st and 2nd defendant"…be struck out as an abuse of process…"

The Issues

[9] Queen's Counsel Mr Scott indicated from the outset that he, on behalf of the claimants, took no issue with the form or substance of the application and that the sole issue in contention was whether, at this stage, the facts were sufficiently clear so that the court could find that the claim was statute barred and whether Raju Khemlaniwas properly sued in his personal capacity. This application therefore, raises two (2) simple issues:

(a) Is the claim statute barred (limitation of action point)?

(b) Was the claim properly brought against Raju Khemlani in his personal capacity (piercing the corporate veil point)?

I intend to deal with the limitation of action point first.

Submissions on the limitation of action point

[10] Counsel for the defendants in her written and oral submissions argued that the application was properly made pursuant to rule 26.3 (1) (b) & (c) of the Civil Procedure Rules 2002 (CPR). Counsel argued that the defendants were entitled to apply to strike out the claim on the basis that it was an abuse of the process of the court where the limitation period had expired.

[11] Counsel submitted that the claim was an action for breach of contract, fraud and damages and in such a case the question for determination was, when did the cause of action arise? Counsel pointed out that the cause of action for contract arose when the breach occurred. Therefore, according to counsel, time began to run from the time the contract was broken. Counsel submitted that, in this case, the cause of action arose in October 2000 when the claimants learnt that the property had been mortgaged and they reported the matter to the fraud squad. Counsel argued that the 18 October, 2000 is the date given by the claimants as the date they were informed that the property had been mortgaged and that the 1st defendant was in danger of losing it. Counsel pointed out that they had also

lodged a caveat against the property on 27 October 2000. Counsel pointed out that the claim was filed 26 February 2010, ten (10) years after finding out about the mortgage and filing a criminal case and was therefore, clearly statute barred.

[12] Counsel also asked the court to take note that the claimants had filed a further amended claim in August 2015 in which they raised entirely new causes of action and amended some of the existing ones. Counsel pointed out that there were three (3) new remedies sought in restitution, fraud and indemnification which were being sought without the court's permission having been made outside the limitation period. Counsel pointed out that of the ten (10) remedies sought three (3) were for entirely new causes of action; that is:

a) Damages for unjust enrichment.

b) Damages for fraud.

c) Restitution in integrum.

Counsel noted that there were also amendments to three (3) existing causes of action and the remedies sought there-from. Counsel argued that all the purported amendments were void and of no effect having been made without permission after case management conference and after the limitation period had expired.

[13] Counsel noted that the claim for fraud was based on the act of mortgaging the property which was way outside of the limitation period, the mortgage having been executed in 1997. Counsel argued that all the facts came to the knowledge of the claimants in 2000 and that there were no factual allegations in the initial Ancillary Claim nor in the Further Amended Claim and Particulars which were not known to the claimants from 2000 and prior to October 2006, when the limitation period of 6 years expired. Counsel noted that the burden was on the claimants to show that their cause of action was brought within the limitation period and that they are unable to do so. The claim she asserted, should therefore be struck out.

[14] Counsel relied on the following cases:

(1) **Joy Douglas et al v Barclays Bank plc et al** [2013] JMSC] Civ 85;

(2) **Bertram Carr v Von's Motor &Company Ltd** [2015] JMCA App 4;

(3) **Medical and Immunodiagnostic Laboratory Limited v DorettO' Meally Johnson** [2010] JMCA Civ 42.

[15] Queen's Counsel, on behalf of the claimants, also relied on his written and oral submissions. Queens Counsel argued that:

a) The issue was narrowed down to what was the applicable limitation period. In the case of land the limitation period was 12 years and in the case of fraud and breach of contract it was 6 years. In both cases (fraud and contract) time starts to run when the fraud was discovered or when the breach of contract occurred.

b) That the causes of action in this case fall into one (1) or two (2) categories, breach of contract and fraud, stemming from a breach of agreement for sale of land, fraudulent misrepresentations and fraudulent actions of the defendants.

c) The date of the breach of contract is a question of fact. It is either after 14 February 2001, the date on which the parties agreed that the sale would proceed as originally agreed and intended or 30 April 2005 when the defendants wrote to terminate the agreement for sale by treating the claimants as tenants and the monies paid by them as 'advanced rental.'

d) On either dates the case would have been filed in time as the claim was filed in 2007 that is, within six (6) and two (2) years respectively.

e) On no view of the facts could a case of fraud arise before 2005.

f) Up to 2005 there was an agreement to splinter the title to allow the claimants to receive a splinter title for their portion. It was only later that it became clear that the defendants had reneged on the deal.

g) The action is not one for recovery of possession as the land was sold by NCB exercising its power of sale under the mortgage. It is therefore, a claim for recovery of monies paid and damages.

h) The claimants had made a report to fraud squad which resulted in the 2nd defendant being arrested and charged in 2006.

i) In any event the claimants as defendants in suit 2005 HCV 03196 had filed defence and counterclaim alleging the said fraud and breach of contract against Topaz Jewellers Limited and Raju Khemlani, the present defendants/applicants. Therefore, even if the period when the cause of action arose was 2000 as alleged by the applicants, the claim was still alive in 2005 when the counterclaim was filed. That counterclaim is still extant.

j) The court may appropriately exercise its case management powers and order both claims to be tried together pursuant to rule 26.1(h).

[16] Queen's Counsel also relied on the case of **Medical and Immunodiagnostic Laboratory Limited v DorettO' Meally Johnson** (2010) JMCA Civ 42.

Discussion and disposal of the limitation of action point

[17] The question of whether a claim is statute barred is a procedural defence which must be specifically pleaded. If pleaded, it is a complete defence where the period limited within which the claim should have been brought has expired. If it is raised as a defence, it is normally resolved at trial. However, if the defence is pleaded, it is open to the defendant to have it tried as a preliminary issue or to apply to have the claim struck out on the basis of the limitation point.

[18] Faced with such a plea, the burden is on the claimant to prove that the claim was brought within the time limited to do so. If the defence is pleaded and the claimant does not discontinue the claim, a defendant may apply to have the claim struck out as an abuse of the process of the court. The principles were correctly traversed by Simmons J in **Joy Douglas et al v Barclays Bank plc et al** at paragraphs 56-59 and paragraphs 93. Simmons J, in addition, also considered the court's inherently discretionary jurisdiction to strike out a statement of case where it is shown to be an abuse of the process of the court.

[19] Whilst I have seen the specific plea of this defence by Suresh Khemlani (against whom the claim has been discontinued), both in his defence filed and in his own application to strike out the claimants' claim, there is no such plea filed on behalf of the 1st defendant or Raju Khemlani, the 2nd defendant, in this case. Neither have they filed any affidavit in support of their application. An affidavit was filed by counsel appearing on their behalf in which no such plea was raised either.

[20] I pause here to take the opportunity to remind counsel that it is undesirable for counsel to file an affidavit in a matter in which counsel appears and worse yet one in which counsel intends to personally argue.

[21] A defence was filed by 1st and 2nd defendants on 8 July 2010 to the Ancillary Claim of the 3rd ancillary defendant (Suresh Khemlani) and defence to the Ancillary Claim of the 1st, 2nd and 3rd claimants was filed 25 June 2010. In neither defence was the issue of the limitation period raised by the 1st and 2nd defendants.

[22] Although the claimants filed a Further Amended Claim and Particulars of Claim on the 31 August 2015, the 1st and 2nd defendants have not filed a Further Amended Defence. Suresh Khemlani, did file a Further Amended Defence on 2 October 2015 and an affidavit in which he raised the defence that the claim was statute barred. I have seen no such plea from the 1st or 2nd defendant in their defence, nor is there any affidavit filed by either in support of the application which raised such a plea. However, counsel for the claimants took no issue with this fact. The defendants relied on the affidavits and defence of Suresh Khemlani which was before me and which raised the limitation defence.

[23] I decided to hear and determine the application nonetheless for the following reasons; (a) Mr Scott QC, did not take this point and made it clear it was not an issue he wished to advance; (b) the defence had been raised by Suresh Khemlani whilst he was still a party to the claim; and (c) Suresh Khemlani did file an affidavit in support of his own application to strike out for abuse of process on

the basis that the claim was statute barred whilst he was still a party to the claim and which formed part of the bundle filed by counsel.

[24] The general rule is that the cause of action in a claim in contract arises when the breach occurs, so that time begins to run from the contract is breached and not when damage is suffered. The cause of action in contract and debt is six (6) years. There is a general dispute between the parties as to the causes of action in this case, and when they arose. The result is that the question of when the limitation period would expire is also hotly contested. On the defendants' case time began to run from 2000 for all the possible causes of action and therefore, the claim is statute barred. On the claimants' case time did not begin to run until either sometime after 2001 or in 2005 and therefore, the claim is still alive, having been filed in 2007.

[25] The Further Amended Claim and Further Amended Particulars of Claim filed 31 August 2015 per the orders of Batts J made 8 May 2015, is for damages for breach of contract for sale of land; damages for fraud and or negligence in the execution of a mortgage with the NCB over property known as 81B King Street, owned by the claimants and for defaulting on the said mortgage causing it to be sold under power of sale contained in the mortgage. There is also a claim in restitution.

[26] The Further Amended Claim is particularized, *inter alia*, as follows:

1) The claimants Div Deep Limited, Mahesh Mahtani and Haresh Mahtani all of 56A King Street in the city and parish of Kingston, Jamaica claims against the defendant/ancillary defendant Topaz Jewellers Limited, Raju Khemlani and the defendant Suresh Khemlani all of 16 Belmont Road, Kingston 5 in the parish of St. Andrew, Jamaica damages for breach of an Agreement for sale of land between the claimants the defendants whereby the said 1st defendant/ancillary defendant acting through the 2nd defendant/ancillary defendant and the 3rd defendant failed to deliver up

the registered title to all that parcel of land part of NUMBER EIGHTY-ONE KING STREET known as NUMBER EIGHTY-ONE B KING STREET in the parish of Kingston.

2) The claimants further claim against the 1st and 2nd defendant/ancillary defendants and 3rd defendant, damages for fraudulently and/or negligently executing a mortgage with the National Commercial Bank over all the parcel of land part of Number EIGHTY-ONE KING STREET known as NUMBER EIGHTY-ONE B KING STREET in the parish of Kingston, Jamaica owned by the claimant without the latter's prior consent and/or knowledge and further for defaulting on the said mortgage, thus causing same to be sold to Tewani Limited at auction under powers of sale contained in the mortgage.

[27] In the Further Amended Particulars of Claim also filed 31 August 2015 the claimants aver that the 1st defendant (Topaz Jewellers Limited) was a limited liability company, duly incorporated under the laws of Jamaica and was the registered proprietor of all that parcel of land known are 81 (B) King Street.

[28] The dates which I find of relevance in the Further Amended Particulars of Claim, I have placed in chronological order, as follows:

i. **1993 –** 2nd and 3rd claimants invested monies in a project being developed by Topaz Jewellers which never materialized. The money was not refunded.

ii. **1995 –** the 1st defendant offered to sell to Div Deep a 1/3 portion of 81 (B) King Street. The 1st claimant agreed to the purchase in lieu of the refund of the investment funds. Other additional payments toward the purchase were also made in 1995.

iii. **1996 –** the land was registered to the 1st defendant 16 January 1996 at Volume 1281 Folio 227 of the Register Book of Titles.

iv. **1996–**29 January 1996 2nd defendant issued a receipt acknowledging payment of $5,151,040.00 as "payment towards the

purchase of part of the premises known as part of 81 (B) King Street."

v. **1996 –** 3 April 1996 part payment of purchase price was paid to Hamilton Bank on instructions of 2nd defendant, Raju Khemlani and delivered to him.

vi. **1996 –** 4 March 1996, 2nd defendant issued further receipts for monies paid by the claimants toward the purchase of 81 (B) King Street.

vii. **1996 –** December 1996 the 1st claimant was put in possession.

viii. **1997 – June 1997** 2nd defendant acting on behalf of the 1st defendant executed a mortgage over the entire property in favour of NCB.

ix. **1997 –** August 1997 commenced operation of a jewellery and appliance store.

x. **1998 –** 6 January 1998 the claimants insured the 1/3 portion of the land.

xi. **2000 –** 18 October 2000 the claimants were informed of the mortgage by Suresh Khemlani, who was the company secretary of the 1st defendant and a co-signature to the mortgage along with the 2nd defendant.

xii. **2000 –** 1 December 2000 the 2nd and 3rd claimants made a report to fraud squad regarding the "fraudulent actions of the 2nddefendant's resulting in a charge and trial of the 2nd defendant".

xiii. **2001 –**14 February 2001 – defendants agreed to settle by giving effect to original agreement.

xiv. **2001 –** 8 March 2001 all the parties met along with their respective attorneys-at-law and arrived at an agreement whereby the 1st defendant would take steps to splinter the title 1281 Folio 227 in two (2) lots and obtain separate titles and transfer the portion sold to the 1st claimant.

xv. **2001 –** July 2001 the property was splintered and a splinter title registered at Folio 1319 Volume 496. The remaining 2/3 was registered at Folio 1391 Volume 495.

xvi. **2001 –** splintered title for 1/3 portion at Folio 1319 Volume 496 not transferred after July 2001 when it was generated.

xvii. **2006 –** 7December 2006 the said land was transferred to Tewani Limited (third party particulars with notice) under the powers of sale contained in the mortgage.

xviii. **2007 –** 8 February 2007 Notice to Quit was served on the jewellery store, Grand Jewellers which the claimants operated on the property by the claimants.

[29] The question which arises is what cause of action did the claimants raise in their claim and when did that cause of action arise? Counsel for the defendants argued that six (6) years from the cause of action upon which the claimants rely had expired several years before the filing of the claim. Queen's Counsel argued on behalf of the claimants, that the period of limitation has not yet expired.

[30] However, the facts, as gleaned from the affidavits filed in this matter and the documentary evidence supplied at this stage, does not appear to be as straightforward as that. The claim filed by the claimants against the 1st and 2nd defendants was brought by way of an ancillary claim to the claim brought against them by Tewani Limited in the 2007. The Defence and Ancillary Claim to that claim were filed 26 February 2010 and amended 27 May 2010. There is no claim by the 1st and 2nd defendants filed in 2007 as asserted by Queens Counsel. In that regard he is mistaken. The claimants cannot rely on the claim filed by Tewani Limited in 2007 to stop time running against them. Time would only stop when they filed their Ancillary Claim, which in law is a separate and discrete claim, in 2010.

[31] Part 26.3 (1) of CPR deals with the striking out of claims. Counsel argues that based on part 26.3 (1) (b) the defendant is entitled to plead the defence of limitation or apply to strike out the claim on the basis that it is frivolous vexatious and an abuse of the process of the court. See **Joy Douglas et al v Barclays Bank Plc. et al** at paragraph 56.

[32] A look at the Further Amended Claim Form and Further Amended Particulars of Claim shows that the claimants' claim is for damages for breach of contract,

fraud, restitution and negligence. The statutory limitation on all of the above is six (6) years by virtue of section 46 of the Limitation of Action Act which is to be read in tandem with the UK statute 21 James Cap 16 1623, which is received law. Where the procedural defence is raised by a defendant the onus is on the claimant to prove that the action was brought within the limitation period.

Is the claim or any part statute barred?

[33] I have already listed the possible dates which are applicable to this case. It is clear that the claimants knew from 2000 that the 1st defendant had mortgaged the property which it allegedly had already sold to the 1st claimant. The result of their knowledge is that they called in the fraud squad. It is therefore, arguable as stated by the 1st and 2nd defendants, that the contract for sale of land was breached in that year and that by their actions in initiating an investigation and prosecution of the 2nd defendant, they accepted the contract as being at an end and that there was fraud involved. In such a case, time would begin to run from 2000 and having filed the defence and ancillary claim in 2010, the claim for fraud, negligence and breach of contract resulting from the mortgage of the property to NCB would be statute barred, having been brought outside of the six (6) year period. To the extent that the claimants rely on the Mortgage agreement as the factual basis for the claim for fraud, negligence and breach of contract, any such claim would be statute barred, the mortgage having been executed in June 1997 and it having come to the attention of the claimants in October 2000.

[34] However, that is not the end of the matter, because the evidence on affidavit of Mahesh Mahtani and documents so attached including letters from attorneys for both sides, is, that even after 2000, there were negotiations to complete the transfer of 81 (B) King Street to the claimants. A court could view this in one (1) of two (2) ways; firstly:

i. That the parties did not consider the contract at an end in 2000, or secondly;

ii. that the agreements resulting from the negotiations were either a collateral agreement to the contract for sale or that it was a separate new agreement to transfer the land to the claimants under the terms negotiated in the agreement. This new agreement also now contemplated actions by a third party, NCB and could be argued to have been a new contract. In which case, time would begin to run at a date when that arrangement also fell through, which, on the evidence could be anywhere between 2002 and 2005 or 2006. If 2002 when the splinter titles were ready but not transferred, it would be outside the limitation period. If 2005 when the defendants wrote to say the payments would be treated as rental, it is definitely not statute barred. Similarly if it was in 2006 when the land was finally sold to Tewani Limited it equally not be statute barred.

[35] To my mind the question of how the conduct of the parties affected their contract in light of the documentary evidence can only be resolved at trial. There is rank dispute regarding the effect of what took place in 2000 and the effect the further negotiations which resulted in the survey and splintering of the title between 2001 and 2002, had on the parties' agreement.

[36] In such a case it is difficult to say at this stage that the claim is statute barred. This has to be resolved at trial.

[37] In **Ronex Properties Limited v John Laing Construction Limited and others (Clarke, Nicholle and Marcel (a firm) third parties)** [1982] 3 ALL ER 961 Donaldson LJ at page 966 stated that a defendant who was relying on a limitation defence could apply to strike out the claim as being an abuse of the process of the court, but could only do so in the clearest of cases. This is how Donaldson LJ puts it:

> "Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexations and an abuse of the process of the court and support his application with evidence, but in no circumstances can he seek to strike out on the ground that no cause of action is disclosed."

[38] Striking out a claim on the basis of a limitation defence should, therefore, only be done where it is "crystal clear". See Brooks JA in **Bertram Car v Von's Motor and Company Limited** paragraphs 11-15.

[39] As I have said previously, this claim began life in 2010 as an ancillary claim to the 2007 claim brought by Tewani Limited. The claimants were then the defendants/ ancillary claimants against Tewani Limited, Topaz Jewellers Limited, Raju Khemlani and others. The ancillary claim against Tewani was struck out and the ancillary claim against the others was ordered to proceed to trial. It meant that much of the remedies sought in the original ancillary claim were against the other defendants all of whom have fallen away and are no longer relevant to the claim against these two defendants. Permission to amend the ancillary claim had been granted by Batts Jin orders 2 and 3 as follows:

> "2. Permission is granted to the 1st, 2nd and 3rd Claimants to further amend the Ancillary Claim which will now be entitled a Claim and Particulars of Claim within 45 days of the date hereof.
>
> 3. Permission granted to the Defendants to Amend Defence to Ancillary Claim which will now be entitled a Defence within 90 days of the date of service of Amended Claim."

[40] The first order (order 1) lists the names in which the claim was to continue. The Further Amended Claim was, therefore, not only permitted by the orders made by Batts J but is the only one validly before the court. To the extent, therefore, that the Further Amended Claim is a claim for fraud and negligence for the fraudulent and or negligent execution of the mortgage, that aspect of it has to be struck out as being statute barred. All actions involving the dealings with the mortgage having came to the claimant's attention from 2000. It follows therefore, that the claim for a remedy for declaration that the 1st and 2nd defendants acted fraudulently, deceitfully and dishonestly and for damages for fraud/and or negligence resulting from the execution of the mortgage must also be struck out from this Further Amended Claim and Further Amended Particulars of Claim.

[41] There is however, the fact that the 2005 claim brought by the 1st and 2nd defendants against the claimants is still extant. That claim is for mesne profits and libel and slander. The defence and counterclaim of the three (3) claimants filed in 2005 in that case, raises, by and large, the same issues as in this case, so that even if this claim for fraud was statute barred the claimants could proceed to have their counterclaim heard in that 2005 claim.

[42] Queen's Counsel has submitted that the court should order both matters be heard together. In keeping with the overriding objective to deal justly with cases, I do not view that as an unreasonable request. Counsel for the defendants also made no objections to this course being taken. The defence and counterclaim was attached to the affidavit of Mahesh Mahtani filed on and was before me in this application.

Submissions on the piercing the corporate veil point

[43] With respect to piercing the corporate veil, counsel for the applicants argued that the application was properly brought under rule 26.3 (1) (c) as there was no basis on which the 2nd defendant should be sued for the actions of the 1st defendant and therefore there was no reasonable grounds for bringing the claim against him. Counsel submitted that even though the 2nd defendant was the majority shareholder and managing director of the 1st defendant, the 1st defendant was a separate legal entity and there were no circumstances shown to justify piercing the corporate veil.

[44] Counsel argued on behalf of the 2nd defendant that he is not a proper party to the claim because the commercial relationship was with the 1st defendant, which is a limited liability company with separate legal personality. Counsel contended that none of the actions complained of were done by him in his personal capacity. Counsel further contended that the property in question was at all material times owned by the 1st defendant.

[45] Counsel argued that based on the principles in **Salomon v Salomon and Company** [1997] AC 22 the 1st defendant was a separate legal entity distinct from its officers and shareholders, and was solely responsible for its debts and obligations, even though its actions were carried out by officers and directors of the company acting as its agent.

[46] Counsel pointed to the fact that the pleadings and the evidence showed that the intention at all times was for the 2nd defendant to conduct business on behalf of and in the name of the 1st defendant and that all documentation, inclusive of receipts and correspondence were made in respect of the 1st defendant.

[47] Counsel also noted that the claimant in their pleadings conceded that (a) the 2nd defendant was a director of the 1st defendant; (b) the 1st defendant acted through the 2nd defendant; and (c) the 2nd defendant acted on behalf of the 1st defendant. Counsel further pointed to the fact that there was no allegation of any tortuous conduct on the part of the 2nd defendant or anything done by him which induced the claimants to act.

[48] Counsel argued further that there is no basis on which the court should pierce the corporate veil to allow the claimants to proceed against the 2nd defendant in his personal capacity. Counsel relied on the case of **Prest v Prest and others** [2013] UKSC 34.

[49] Queen's Counsel submitted on behalf of the claimants that the question was whether the court will lift the corporate veil to find that Raju Khemlani and Topaz Jewellers were one and the same. In making his submissions, Queen's Counsel cited the case of **International Hotels (Jamaica) Limited v Proprietors Strata Plan No. 461** (2013) JMCA Civ 45.

[50] Relying on this case and the authorities cited therein, Queen's Counsel argued that, although there is no unifying principle in the approach of the courts in piercing the corporate veil, there is jurisdiction to do so in cases where the

company's separate legal status is being used for wrongdoing. Counsel argued that the instant case was one in which there was a blatant abuse of the company's (1st defendant's) separate legal status. Counsel submitted that the 2nd defendant used his position as managing director of the 1st defendant to take advantage of the familial relationship with the 2nd and 3rd claimants and to defraud them. He further submitted that this was a proper case in which the court should lift the veil of incorporation. Queen's Counsel submitted that the 2nd defendant used his position to further his own initiatives which were to "embezzle funds" from his cousins under the false pretences of a sale of land agreement.

[51] Queen's Counsel asked the court to note that in the 2005 claim the 2nd defendant Raju Khemlani, filed a claim against the claimants as the 2nd claimant in that suit in his personal capacity, with Topaz Jewellers as the 1st claimant. Queen's Counsel stated that he found it surprising that the 2nd defendant should now be arguing that he should not be sued in his personal capacity in this suit.

Discussion and disposition of the piercing the corporate veil point

[52] It is a well-established principle of law that a company is a separate legal entity from its shareholders and controllers. A company's separate legal personality means it has rights and liabilities of its own and can sue and be sued in its own name. It may own, buy and sell property in its own name. The company does not belong to its shareholders even if all the shares belong to one individual. That is the foundation principle as expounded by the House of Lords' in its decision in **Salomon v Salomon**. Even where a company is a one-man company with that one-man controlling all its activities, it is still a separate legal entity from that one-man. In incorporating a company the one-man who controls it is entitled to expect that every person doing business with the company and the courts of the land will treat with and apply the principles of separate legal personality.

[53] By virtue of section 4 (1) of the Companies Act 2004 (the Act) a company has the capacity, and subject to any other provisions in the Act, the rights, powers and

privileges of an individual. By virtue of section 12 (2) from the date of its incorporation, the subscribers and members of the company from time to time becomes a "body corporate". Under the Act also the company has all the powers of an individual and can hold lands. In this way, the 1st defendant validity owned the lands known as 81 (B) King Street. In **Macaura v Northern Assurance Company Limited and others** [1925] AC 619, the House of Lords held that creditors and shareholders have no legal or equitable interest in the assets of a company and, as a result, had no insurable interest in the assets of the company.

[54] Because persons doing business with a company is dealing with a separate legal persona from the directors and shareholders of that company, problems sometimes arise where it is necessary or desirable to go after the controller of the company to hold that person liable in a case where the company alone would be liable. To hold someone else liable for the acts of the company would require the court to disregard the company's separate legal personality and to do that, a court must pierce the corporate veil. Undoubtedly, since **Salomon v Salomon** the court has in many cases seen it fit to pierce the corporate veil. A court, however, is always reluctant to do so and the principles which are applied to the question of whether to pierce the veil of incorporation, are not cohesive and are very often unclear.

[55] In many cases where the veil is pierced it involved dishonest attempts to conceal assets or to evade judgment or legal obligations. Courts have sometimes looked at the "realities of the situation" and pierced the veil where it involved groups of companies or subsidiaries and their parent companies. For the purpose of piercing the corporate veil it makes no difference if a single director controls all or a majority of the shares as in **Salomon v Salomon**. There is no general principle for piercing the corporate veil in the interest of justice. See **Adams v Cape Industries PLC** [1990] Ch. 433.

[56] It is however, possible by examining the cases to see a thread of principle running through them which would give some indication of the basis upon which

a court will depart from the **Salomon v Salomon** principle of separate corporate personality.

[57] The first starting point for me is the case of **Gilford Motor Company Limited v Horne** [1933] Ch 935. In that case Mr Horne formed a company, JM Horne and Company Limited, for the sole purpose of avoiding a restraint of trade clause in his previous contract of employment to the plaintiff. The Court of Appeal in granting an injunction against Horne, stated that it was:

> *"...quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr E.B Horne. The purpose of it was to try to enable him under what is a cloak or a sham, to engage in business."*

[58] One identifiable principle, therefore, is that the veil of incorporation may be pierced where the incorporation was a cloak or a sham to avoid an existing legal obligation. The legal obligation in the case of Mr Horne was to abide by the restraint of trade clause in his previous contract. He used the company therefore, to act as his agent in conducting business that he himself should not have been conducting. The company was a cloak behind which he hid to do what he could not legally do.

[59] In **Jones v Lipman** [1962] 1 WLR 832, Mr Jones entered into a contract to sell property to another and reneged on the deal. In order to avoid an order for specific performance to transfer the property to the buyer he incorporated a company and transferred the property to that company. In deciding to pierce the corporate veil, the court found that the company was a creature of the controller, 'a device and a sham, a mask' used by Mr Jones in order to avoid his equitable obligations.

[60] In both **Gilford Motor Company Limited v Horne and Jones v Lipman** the controller of the company had a pre-existing legal obligation which he was attempting to evade by incorporating and interposing a company. There is

therefore, the principle that the veil of incorporation will be pierced where the company was incorporated to conceal or evade legal or equitable obligations or to evade a law relating to the distribution of assets or to frustrate the enforcement of law.

[61] Another broader principle is that the veil may be pierced to prevent an abuse of the corporate legal personality. It may also be expressed as a narrower principle that it may be pierced to undo a relevant impropriety or wrongdoing where no other remedy is available to the victim of that wrongdoing. To be relevant that wrongdoing must be linked to the use of the corporate structure to evade an existing legal obligation. See **Prest v Prest and others**.

[62] In **Prest v Prest and others** the Supreme Court in the UK declined to pierce the corporate veil because there was no evidence that the corporate structure had been created for any "improper purpose". In that case an appeal was brought by a wife in matrimonial proceedings against her husband, a Nigerian oil trader, who had no substantial assets in the UK. He, however, owned and controlled several companies worldwide which were holding companies for several valuable assets in the UK. The trial judge held he was entitled to pierce the corporate veil under some wider distinct jurisdiction under the Matrimonial Causes Act (UK) and ordered the companies to transfer assets to the wife.

[63] The English Court of Appeal set aside that order in a majority decision. It held that there was no reason to pierce the corporate veil in this case as the corporate structure and asset ownership had not been created for any improper purpose. The Court of Appeal denied any notion of any wider distinct jurisdiction under the Matrimonial Causes Act for a court to ignore the separate legal personality created by incorporation.

[64] On appeal to the UK Supreme Court, that court agreed that this case was not an appropriate case to pierce the corporate veil. The court found that the corporate structure had been created for wealth protection and tax avoidance and that

there was no evidence that the companies were set up to avoid any existing legal obligations. Interestingly, however, the Supreme Court upheld the wife's appeal on the entirely different basis that the companies held the properties on resulting trust for the wife.

[65] The gravamen of the Supreme Court's decision regarding the issue of when it would be necessary to lift the corporate veil was that whilst there may be circumstances in which the court would disregard the veil of incorporation, those cases were indeed rare. In the judgment of Lord Sumption SCJ, in which he refers to several authorities, he took the view that those authorities which refer to 'facade' and to 'sham' are in fact referring to two separate principles, that is, the 'concealment principle' and the 'evasion principle'. The concealment principle, he declared, did not involve piercing the corporate veil at all. Lord Sumption said at paragraph 34-35:

> *"...the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary that is what incorporation is about. 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."*

[66] Lord Sumption was also of the view that there must be some relevant impropriety or wrongdoing which must be linked to the use of the company structure to avoid or conceal liability. Of this, what he termed, the evasion principle, he said:

> *"…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."*

The court will then pierce the corporate veil for the sole purpose of depriving the company and its controller of any advantage it otherwise wrongfully obtained by the reliance on the company's separate legal personality.

[67] Lord Neuberger in his judgment agreed with Lord Sumption that the authorities deal either with cases involving concealment of the nature of the arrangements with a company or the interposing of a company to evade a legal obligation. He also agreed that those cases which involved concealment were not cases which properly involved piercing the corporate veil at all. He said that where a company was used to disguise the nature of the arrangement, the court need only look behind the company to see the true party to the arrangement. This, he said did not involve piercing the corporate veil at all. He also agreed, at paragraph 81, that the doctrine 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."*

[68] Lord Neuberger also agreed with Munby J at first instance in **Ben Hashem v Ali Shayif** [2008] EWHC 2380, that where the power exists to pierce the corporate veil it should only be done where there is in fact no other remedy available.

[69] Lady Hale was not prepared to accept unreservedly the differentiation by designation of a principle of concealment or evasion but was content to ground the principle in the fact that persons who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business.

[70] Lord Mance agreed that the veil should only be pierced on the evasion principle suggested by Lord Sumption. He also agreed that concealment cases only involved the use of the corporate structure to conceal the real actor(s) or were based on some analysis of some other relationship which may be found to exist, such as principal–agent, nominee or trustee-beneficiary. Lord Mance also made reference to his decision in the Privy Council case of **La Generals des Carrieres et des Minesv Hemisphere Associates LLC** [2012] UKPC 27. In giving the judgment of the Board in that case, Lord Mance said the Board was prepared to accept as correct, without further consideration, those principles expounded by Munby J at 1st instance in **Ben Hashem v Ali Shayif**. In that case Munby J in discussing the basis on which a court may pierce the corporate veil formulated six principles as follows:

> *"In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the corporate veil. This is, of course, the very essence of Salomon v A Salomon & Co Ltd [1897] AC 22...*
>
> *Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought necessary in the interest of justice.*
>
> *Thirdly, the corporate veil can be pierced only if there is some impropriety.*
>
> *Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability…*
>
> *Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis(use) of the company by them as a device or facade to conceal the wrongdoing…*
>
> *Finally, and flowing from all this, a company can be a facade even though it was not originally incorporated with any deceptive intent.*

The question is whether it is being used as a facade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes."

[71] These principles were also referred to and approved by Lord Sumption at paragraph 25 of his judgment.

[72] Lord Clarke in his judgment agreed that the principle existed but felt that the power to pierce the corporate veil should only be applied when no other conventional remedy is available. He, like Lady Hale, was reluctant to agree to a categorization into 'concealment' and 'evasion' principle, without further argument.

[73] Lord Walker was prepared to see it as part of the disparate occasions on which some rule of law produces apparent exceptions to the principles of separate juristic personality. It may, he said, result from statutory provisions or from joint liability in tort, or from the law of unjust enrichment or principles in equity and the law of trust.

[74] Since **Prest v Prest and others,** the Supreme Court again reiterated in **Antonio Gramsci Shipping v Lemberge** [2013] ECWA Civ 730 that the corporate veil should only be pierced in a case of evasion of legal obligations. Closer home in **International Hotels (Jamaica) Limited v Proprietors Strata Plan** No 461 [2013] JMCA Civ 45, Panton P referred to the foundation principle in **Salomon v Salomon.** In considering when it might be appropriate to disregard the general principle of separate legal personality, Panton P referred to the decision in **Prest v Prest and others** which he said located the jurisdiction to disregard the principle in a limited category of cases where there was an abuse of the corporate structure for the purpose of some wrongdoing. He applied that principle

in the case before the appellate court and found that there was no relevant wrongdoing requiring the veil to be pierced.

[75] Guided by these principles and applying them to the instant case, the question whether the 2nd defendant is properly before the court depends on (a) whether the 1st defendant is a company in name only (the concealment principle); (b) whether the 1st defendant was created by the 2nd defendant to evade his then existing liability (the evasion principle); or (c) whether at the time of the transaction the corporate structure was being used as a facade by the 2nd defendant to conceal a relevant wrongdoing (the evasion principle).

[76] With regard to (a), the question of whether the 1st defendant is a company in name only is a question of fact and does not involve any notion of piercing the corporate veil. The court would only have to determine, after hearing evidence, whether the facts "disclose a legal relationship between the company and its controller which will make it unnecessary to lift the corporate veil" – Per Lord Sumption in **Prest v Prest and others**. As stated by Lord Sumption, if it is unnecessary to do so then it is also not appropriate to do so.

[77] The relationship between the defendants may be found to be of such a nature that the actions of the 1st defendant were the actions of the 2nd defendant. This is a question of fact for a trial court to determine. I am also prepared to say, at this stage in any event, that it may be possible for a court to conclude, on the facts of this case, that there was a principal/agent relationship between the 1st and 2nd defendants and therefore the 1st defendant was not transacting in its undoubted capacity as a separate legal personality but merely as an agent of the 2nd defendant in the same way a wife or brother could have. It may also be possible to find on the evidence that the 1st defendant was a mere nominee of the 2nd defendant and that there was a relationship of trustee-beneficiary between the two. Those would be relationships which would make it unnecessary and therefore inappropriate to pierce the corporate veil as the court could look behind the transaction and give to the claimants a remedy against the 2nd

defendant principally in his personal capacity. I do not think that it would be appropriate to determine such a fact specific issue in a striking out application.

[78] With regards to (b) and (c), the issue is whether the claimants have identified any abuse of the company's separate legal personality for the purpose of some relevant wrong doing, or that the company was being used as a facade at the time of the transaction to conceal any relevant wrongdoing.

[79] The claimants have based part of their claim in fraud. Fraud unravels everything. See Denning LJ in **Lazarus Estates Ltd v Beasley** [1956] 1 ALL ER 341 at 345. But although Lord Sumption paid lip service to the principle that fraud unravels everything, he did not locate the jurisdiction to pierce the corporate veil in any allegation of fraud. To my mind it was not necessary to do so. As Lord Sumption said, that principle that fraud unravels everything reflects a broader principle governing cases of dishonest benefit. Lord Neuberger took the view that it was an independent principle which existed independently of any doctrine of piercing the corporate veil.

[80] To my mind, fraud may very well be a relevant wrongdoing so as to permit the court to pierce the veil. The Supreme Court in **Prest v Prest and others** and reiterated in **Antonio Gramsci** have made it clear that under English law the veil will be pierced, even in cases of where fraud is alleged, only in the limited circumstances of a relevant wrongdoing as the cases have defined it. But if a company is alleged to have committed fraud, it can only do so through its directing mind and will. If the directing mind and will is a sole shareholder the company will be held liable for the fraud of the controller. The controller may also be held liable jointly or severally with the company for that fraud.

[81] In **Komercni Banka AS** v **Stone & Rolls Ltd** [2002] EWHC 2263 (Comm), [2003] 1 Lloyds's Rep 383 a fraudster used the company of which he was the sole directing mind and will and beneficial owner to defraud several banks and both he and the company were successfully sued for deceit.

[82] In the instant case there was no allegation of fraud at the time of incorporation and no allegation of fraud at the time of the transaction. That is not to say however, that if there was fraud committed by the 2nd defendant against the claimants there would be any need to pierce the corporate veil in order to hold him liable for that fraud. He would be equally liable for his own fraud along with the company, as the only human embodiment of the activities of the company.

[83] The law presupposes that on incorporation a company has the capacity to enter into contracts and sue and be sued in its own name. A company is also capable of committing the tort of negligence. It is not possible to state as a fact that the company was incorporated for the sole purpose of being interposed by the 2nd defendant to evade a legal obligation he had towards the claimants. The remaining issue therefore, is whether there is any prima facie evidence that at the time of the transaction there was an abuse of the corporate personality by the 2nd defendant by interposing the company to deliberately frustrate the claimants' from enforcing his existing obligation to them. Again, this is fact specific as the parties interactions resulting in the contract go way back in time. It seems to me however, that there would be some difficulty in invoking the doctrine because the original investment plan was with the 1st defendant and it was the 1st defendant who owed a return of investment funds to the claimant after 1993. It was also the 1st defendant who offered to sell the land to the claimant in lieu of the return of the investment funds. It is, therefore, quite difficult to see how it may be possible to find that the 1st defendant was interposed by the 2nd defendant to conceal an existing liability or a relevant wrongdoing. It is a question of fact, however, for a trial judge to determine after all the evidence has been considered.

[84] Even if the doctrine could not be invoked in this case, however, the claimants might still not be without remedy. Although there is no evidence exactly when the 1st defendant was incorporated it would have been at or before 1992 when it first entered into the failed investment opportunity with the claimants and others. The property in question was transferred to the 1st defendant in 1996. The

claimant's entered into the agreement to purchase a third of the property in 1995 at a time when the 1st defendant had already purchased the property but was awaiting title. It is for a trial judge to determine on evidence after cross-examination whether, when the 1st defendant became the registered owner of the property, it did so as a mere nominee of the 2nd defendant, used as a vehicle for the purposes of the transaction. In such a case there would be no need to pierce the corporate veil as it would be possible to look behind the transaction to unmask true arrangement and the true parties. See **Trustor AB v Smallbone** [2001] 3 ALL ER 987 and **Gencor ACP Ltd v Dally** [2000] 2 BCLC 734 cited in **Prest v Prest and others**. In both cases it was found that the true facts were that the company received money as agent or nominee and the controller was held liable to account.

Conclusion

[85] I conclude therefore, that the claimants' claim in so far as it alleges fraud and negligence with respect to the execution of the mortgage on 81B King Street is struck out as being statute barred. There being a dispute as to which agreement governs the relationship between the parties and when it was breached, the claim with regard to damages for breach of contract and restitution is to be determined at trial.

[86] The 2nd defendant is properly before the court in his personal capacity without any necessity to pierce the corporate veil and there is no basis to strike out the claim against him at this stage.

[87] The 2005 claim being between the same parties, should be heard together with this claim.

Orders

[88] I therefore order that:

(1) The claim for fraud and negligence resulting from the execution of the mortgage with NCB is struck from the claimants' Further Amended Claim and Further Amended Particulars of Claim.

(2) Consequently, the claimants are permitted to amend the Further Amended Claim and Further Amended Particulars of Claim as necessary to give effect to Order (1).

(3) The defendants' application to strike out the claim against the 2nd defendant is refused.

(4) The claim 2005 HCV 03196 is ordered to be tried at the same time as this present claim.

(5) The defendants having only partially succeeded in this application are awarded only one third of their cost to be agreed or taxed. The claimants are awarded two thirds of their costs to be agreed or taxed.