Michaelmas Term
[2017] UKPC 32
Privy Council Appeal No 0021 of 2016

JUDGMENT

Dave Persad (Appellant) *v* Anirudh Singh (Respondent) (Trinidad and Tobago)

From the Court of Appeal of Trinidad and Tobago

before

Lord Neuberger
Lord Kerr
Lord Reed
Lord Hughes
Lord Hodge

JUDGMENT GIVEN ON

30 October 2017

Heard on 21 June 2017

Appellant
Hari N Ramkarran SC

(Instructed by Sheridans)

Respondent
Anand Beharrylal
Kwaku Awuku-Asabre
(Instructed by Yaseen Ahmed)

LORD NEUBERGER:

1. The primary issue on this appeal is whether, as the Court of Appeal held, Pemberton J was entitled to conclude that the appellant, Dave Persad, was liable to the claimant, Anirudh Singh, for sums due under a lease which Mr Singh had granted to a company called Chicken Hawaii (Trinidad) Ltd ("CHTL").

2. The background facts are as follows. Mr Singh is the owner of premises consisting of two buildings at ¼ MM Manzanilla Road, Mayaro, Trinidad. In late autumn 2001, when he was about to leave for the United States, he told his brother that he was looking for a tenant for the premises. In early 2002, having been told of the premises by Mr Singh's brother, Mr Persad contacted Mr Singh by telephone to discuss the possibility of taking a lease of the premises. Discussions then took place between the two men and they reached an agreement whereby Mr Persad would take a five-year lease of the premises starting on 1 April 2002, and that Mr Persad, who is a qualified attorney, would draft the lease.

3. Sometime in March 2002, Mr Singh allowed Mr Persad to occupy the premises in advance of the anticipated grant of the lease. Mr Persad then proceeded to carry out some works of decoration and improvement.

4. Meanwhile, Mr Persad had prepared a form of lease of the premises, which it appears he negotiated with Mr Singh's brother. The draft lease reserved a rent of TT$4,000 per month for the first two years and TT$5,000 per month for the last three years, payable monthly in advance. It also contained covenants by the tenant, including a covenant to pay the rent, to keep the premises in repair, to deliver up the premises at the end of the term, and not to commit nuisance. In addition, the draft lease contained a proviso for forfeiture in the event of the lessee failing to pay the rent or breaching any covenant.

5. In its opening passage, the draft lease stated that the lessor was Mr Singh, and, importantly for present purpose, that the lessee was CHTL, not Mr Persad. In about January 2002, a copy of the draft lease executed on behalf of the lessee was sent to Mr Singh in the USA for execution. In the normal way, at the end of the lease it was recorded as executed on behalf of the lessor and the lessee. The lessor was to be Mr Singh with a space left for him to sign. The lessee was recorded as CHTL, and it was stated that the seal of CHTL had been "affixed by Sandra Dass, Company Secretary". In the space left for execution by the lessee was Ms Dass's signature under which CHTL's company seal had been affixed. Mr Singh took some time to sign the lease

himself, but he did so on 1 May 2002, which is the date on which the lease is recorded as having been executed.

6. There appears to have been no mention of CHTL during the negotiations, which had proceeded on the assumption that Mr Persad would be the lessee. It would seem that the first time that Mr Singh heard that CHTL was to be the lessee, indeed the first time he had heard of CHTL was when he received the draft lease executed on behalf of CHTL. However, although he took some time to sign the lease and to send it back, Mr Singh did not challenge or even question the inclusion of the company as the lessee. In his evidence, Mr Singh said that he noticed that CHTL had been identified as the lessee and that he appreciated that its status as a limited company meant that it was a separate legal entity from Mr Persad - unsurprisingly as Mr Singh is a qualified MBA.

7. Following the grant of the lease, a restaurant was run from the majority of the premises, but a part was used by Mr Persad personally as an office, and another part may have been used for residential purposes. The rent was initially paid, albeit not always on time. The evidence established that, on at least two occasions, namely in July and August 2004, the rent was paid by cheques signed by Mr Persad drawn on CHTL's bank account. Meanwhile, after having received complaints of nuisance, Mr Singh visited the premises in early September 2003 when he observed some disrepair. In April 2004, a notice identifying the items of disrepair and requiring their remedy was served on CHTL by Mr Singh's attorney. (Such a notice is required by section 70(1) of the Conveyancing and Law of Property Act (Chapter 56, No 1) as a preliminary step before a forfeiture can be initiated.)

8. On 28 September 2004, Mr Singh issued proceedings for possession, arrears of rent amounting to TT$16,000, damages for breach of covenant, and mesne profits. Both CHTL and Mr Persad were named as defendants. The statement of claim identified the lease as having been made between Mr Singh and CHTL, and referred to Mr Persad as a director of CHTL and "at all material times acting on his own or as the servant and/or agent of [CHTL]". It referred to "the defendants" as having been in breach of the repairing and nuisance covenants, and stated that CHTL was in arrear with the rent. The prayer for relief sought against both defendants possession, arrears of rent, mesne profits, and damages for breach of covenant, The statement of claim was later amended to record the fact that the premises were vacated during August 2005.

9. CHTL and Mr Persad served a defence and counterclaim. In the defence, the grant of the lease to CHTL and the covenants pleaded in the claim were admitted. It was also admitted that Mr Persad is and was "a director and agent" of CHTL, but it was denied that he "at all material times acted on his own". The breaches of covenant alleged by Mr Singh were denied. In its counterclaim, CHTL sought damages from Mr Singh for allegedly disrupting its restaurant business carried on at the premises, repayment of a loan, and reimbursement for the cost of some improvements to the premises.

10. The claim and counterclaim came on for trial before Pemberton J, and after hearing witnesses (including Mr Singh and Mr Persad) and legal argument, she gave judgment on 15 July 2011. The effect of her decision was that judgment was given against both CHTL and Mr Persad for TT$21,569.69 damages for breach of covenant, for TT$17,833.33 in respect of arrears of rent, and for mesne profits at TT$5,000 per month for the period between 11 August 2004 and 18 August 2005, together with interest in each case at the rate of 10% per annum from 18 August 2005 to the date of judgment; and the defendants were ordered to pay TT$11,673 costs. On the counterclaim, she gave CHTL judgment for compensation for improvements, but dismissed the other claims.

11. Mr Persad appealed to the Court of Appeal (Smith, Moosai and Mohammed JJA) against the finding that he was liable to Mr Singh for any of the sums awarded against him, but his appeal was dismissed in a short ex tempore judgment given on 21 May 2014.

12. Mr Persad now appeals to the Board against the finding that he was liable to Mr Singh for any of the sums awarded against him and upheld by the Court of Appeal. There is no challenge as to the Judge's conclusions in relation to the liability of CHTL (or the amounts awarded against that company) or any of her findings of primary fact.

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".

15. In upholding this decision, the Court of Appeal explained that "[a] court may pierce the corporate veil when there is an abuse of the corporate personality to evade or frustrate the legal consequences of one's actions". They summarised the reasons for the Judge's conclusion that she could pierce the veil in this case as being "[Mr] Persad, concluded the negotiations in his personal capacity", "he then formed the company", "he produced no corporate documents and he could not recall when last annual returns had been filed", and "from his testimony, it is evident that was a one man show". As the Court of Appeal then said, "[b]ased on these facts, the trial judge inferred and concluded that this company was formed in the hope that if all was not well, [Mr Persad] would not be held personally liable". The Court of Appeal then concluded that there was "no reason" to interfere with Pemberton J's decision, based as it was on the evidence, and she had had the advantage of seeing the witnesses. They also added that Mr Singh, whose credibility was not challenged, had described CHTL as a "front" for Mr Persad.

16. The issue therefore is whether, as the Court of Appeal found, the Judge had been entitled to hold that, notwithstanding that the lease had been granted to CHTL, Mr Persad could be liable for CHTL's failure to pay rent and breaches of covenant. The Judge considered that she was entitled to take this course because the facts justified piercing the veil of incorporation. The Board intends no disrespect, particularly in the context of what was otherwise a careful and painstaking judgment, in stating that the facts of this case do not begin to justify piercing the veil of incorporation.

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).

18. The fact that Mr Persad proffered a draft lease with CHTL as the lessee, after he and Mr Singh had been negotiating on the assumption that Mr Persad would be lessee, does not assist Mr Singh's case. Mr Persad did not give any sort of assurance that he

personally would take the lease or that he would not put forward a limited company as the lessee, when the proposed lease came to be drawn up. Further, it is not as if Mr Persad misled Mr Singh in any way: Mr Singh appreciated that the lease which he was being asked to execute involved the grant to a lessee which was not Mr Persad but was CHTL. It is not even as if Mr Singh failed to appreciate that a limited company was a different legal person from its shareholder or director.

19. The fact that Mr Persad had gone into occupation of the premises adds nothing. Given that he was a director and shareholder of CHTL (or, assuming CHTL was not formed until 2 April 2002 (see para 25 below), an intended director and shareholder), it was entirely consistent with CHTL taking the lease. But even ignoring that point, it is difficult to see how Mr Persad's early occupation of the premises could assist Mr Singh's argument that the corporate veil should be pierced: the occupation is consistent with the fact that the parties negotiated on the assumption that Mr Persad would be the lessee, but given that that common assumption does not assist Mr Singh's case, Mr Persad's occupation of the premises cannot do so either.

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".

22. In the course of his able and spirited submissions, Mr Beharrylal suggested that the facts of this case were comparable with those in *Gilford Motor Co Ltd v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832, whose facts are respectively set out by Lord Sumption in *Prest* at paras 29 and 30. The Board considers that those cases are readily distinguishable from the present case. Not only did the person who set up the company in those cases have an existing relevant legal obligation which he was

trying to avoid by entering into a transaction involving the company, but also the involvement of the company was unilaterally effected by the person concerned, without the knowledge, let alone the consent, of the other party. In this case, as already mentioned, Mr Persad had no relevant obligation to Mr Singh at the time of the transaction involving the company, namely the grant of the lease, and furthermore Mr Singh, the person seeking to pierce the corporate veil, was directly involved in, indeed was a necessary party to, that transaction.

23. Mr Beharrylal also suggested that Mr Singh might be able to rely on other causes of action, including misrepresentation, mistake and rectification. Apart from the fact that they were not pleaded, none of these causes of action could arise on the facts of this case. However, there are two outstanding points which must be dealt with.

24. The first is the possibility that Mr Persad could be liable for mesne profits (or, more accurately, damages for trespass) between the time that the lease came to an end and the time that the premises were vacated. This would be on the basis that, although he could not be liable for any breaches of the lessee's covenants, Mr Persad could be liable for trespass while he occupied the premises once the lease had expired. However, there is no evidence to suggest that he was there during the period in respect of which mesne profits were ordered. The most that can be said is that it does appear that for some period during the currency of the lease he was occupying an office in the premises, but that is as far as the evidence goes. Furthermore, there is no evidence as to the extent, let alone the value, of the office space, other than the indication that it is a pretty small room. Given the absence of any satisfactory factual or valuation evidence on the point, and fact that the possibility of Mr Persad being liable as a trespasser was not raised below, it is inappropriate to consider this issue further.

25. The second issue arises from Mr Singh having discovered after the hearing that CHTL had not been incorporated until the day after the lease was formally granted. That is a point which was not raised at trial or in the Court of Appeal. However, Mr Singh wishes to raise the point before the Board, by way of an application to rely on new evidence, namely the certificate of incorporation of CHTL, which of course records the date of its formation. In pursuing this application, the Board considers that Mr Singh may well have faced real problems in justifying not having raised this point at the hearing. After all, the certificate was publicly available before the hearing. It is arguable that the certificate should have been produced on disclosure in the proceedings by CHTL, but it can be said with some force that it would not have gone to any issue on the pleadings, and anyway that any failure to disclose would have been that of CHTL not of Mr Persad. However, it is unnecessary to reach a conclusion on those issues, because Mr Singh faces an insurmountable problem in connection with his application.

26. The problem for Mr Singh is that, even if the Board was to admit this new evidence, it would get him nowhere. Section 20 of the Companies Act (Chapter 81:01

of the Laws of Trinidad and Tobago) deals with "pre-incorporation agreements" by companies. Section 20(1) provides that where an agreement is entered into by a person on behalf of a company which does not exist, that person is bound in place of the company. Section 20(2) states that, in such a case, the company concerned may nonetheless "adopt" a written agreement "by any action or conduct signifying the intention to be bound" within a reasonable time. Section 20(3) provides that, in such a case, the company can enforce and is bound by the agreement from its inception, and, subject to an irrelevant exception, the person otherwise bound by virtue of subsection (1) ceases to be so bound. The effect of this section therefore is that Mr Singh's argument based on the late incorporation of CHTL must fail because (i) the payment of rent by CHTL in 2004 (and possibly earlier) served to ratify its status as lessee under the lease by virtue of section 20(2), and (ii) even if that were not right, the effect of section 20(1) is that Ms Dass is liable as lessee under the lease, and the issue on this appeal is whether Mr Persad is liable.

27. For these reasons, the Board allows Mr Persad's appeal, and refuses Mr Singh's application. The parties should try and agree costs and a form of order. As at present advised, and subject to argument to the contrary from Mr Singh, the Board would be inclined to order Mr Singh to pay Mr Persad his costs of the entire proceedings, but the first instance costs should be limited to the extra costs attributable to Mr Persad's involvement over and above the costs which were or would have been incurred in connection with the claim against CHTL.

28. In fairness to Pemberton J it should be recorded that the decisions of the UK Supreme Court in *VTB* and *Prest* were given after she had given her judgment in this case. Both *VTB* and *Prest* had been decided by the time of the Court of Appeal hearing, but they were not referred to *Prest*, although they were referred to *VTB*.