

SUPREME COURT OF NOVA SCOTIA

Citation: Spring Garden Holdings Ltd. v. Ryan Duffy's Restaurants Ltd., 2010 NSSC 71

Date: 20100302

Docket: Hfx. No. 296170

Registry: Halifax

Between:

Spring Garden Holdings Limited, a body corporate

Plaintiff

v.

Ryan Duffy's Restaurants Limited, a body corporate and
Ryan Duffy's Management Limited, a body corporate

Defendants

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: July 9th and September 3rd, 2009 in Halifax, Nova Scotia

Written Decision: March 2nd, 2010

Counsel: Peter C. Rumscheidt, Esq. for the Plaintiff/Respondent
Christopher I. Robinson, Esq. for the Defendants/Applicant

By the Court:

[1] This matter involves a motion for summary judgment brought by Ryan Duffy's Management Limited (hereinafter referred to as "Management") pursuant to Civil Procedure Rules 13.03 and 13.04. The facts of the case have been agreed to, in part, by the parties and, in addition, are contained in the various affidavits that have been filed in relation to the motion. The salient facts are summarized below.

[2] On March 15th, 1984, Robert C. Risley entered into a ten year lease with The Bank of Nova Scotia and The Bank of Nova Scotia Properties Inc. for space in what is commonly known as "Spring Garden Place" which is located at 5640 Spring Garden Road in Halifax, Nova Scotia. At the leased premises, Mr. Risley operated a restaurant under the name of Ryan Duffy's Steak & Seafood.

[3] On October 23rd, 1992, Robert C. Risley incorporated Ryan Duffy's Restaurants Limited (hereinafter referred to as "Restaurants"). Soon thereafter his obligations under the 1984 lease referred to above were assigned to Restaurants. Thereafter, Restaurants held the lease for the premises and Restaurants and Robert C. Risley managed Ryan Duffy's Steak & Seafood.

[4] On January 1st, 1998, Restaurants entered into a new ten year lease (hereinafter referred to as the "Lease") with The Bank of Nova Scotia and The Bank of Nova Scotia Properties Inc. The original leased space was expanded and a new business was started under the name of Ryan Duffy's Speakeasy which was operated as a bar adjacent to Ryan Duffy's Steak & Seafood. On August 10th, 1999 the Lease was assigned from The Bank of Nova Scotia and The Bank of Nova Scotia Properties Inc. to the Plaintiff, Spring Garden Holdings Limited (hereinafter referred to as "Holdings".)

[5] Early in 2001, an agreement was reached between Robert C. Risley and his son Stephen Risley whereby Stephen acquired control of Ryan Duffy's Steak & Seafood

as well as the Speakeasy. On May 1st, 2001, Stephen Risley incorporated Management to manage the day to day operations of Ryan Duffy's Steak & Seafood as well as the Speakeasy. After May 1st of 2001, the businesses were structured such that Restaurants held the lease for the premises and Management managed the operations.

[6] On October 21st, 2003, Shamrock Restaurants Limited (hereinafter referred to as "Shamrock") acquired ownership of and became the sole shareholder of Restaurants. On October 23rd, 2003, Shamrock also acquired majority control of Management. Both companies were purchased from Stephen Risley.

[7] Clause 19.04 of the Lease required the landlord to give its consent to any change in control of the tenant (if the tenant is a corporation) except if the change occurred by bequest or inheritance. By letter dated December 4th, 2003 the landlord (Holdings) gave its consent for the sale of shares from Restaurants to Shamrock. Prior to this consent being given, Holdings was advised in writing of the existence of and the constitution of Management. In particular, it was given the names of the new officers and directors of both Restaurants and Management. At no time did Holdings seek to add either Shamrock or Management to the Lease nor did it seek to make either company guarantors under the Lease.

[8] There is evidence before the court that in December of 2004, Shamrock intended to sell its stock in Management and Restaurants to Landmark Roadhouses Incorporated (hereinafter referred to as "Landmark".) The sale appears to have been completed in relation to Management's shares but there is uncertainty about whether it was actually completed in relation to Restaurants' shares. Despite this situation, all parties have agreed that for the purpose of this motion, and at all material times, Management and Restaurants had the same controlling shareholder and that the court should consider the present shareholder to be Landmark.

[9] The parties have further agreed that neither Restaurants or Management has any ownership interest in the other, neither Restaurants or Management is the parent or the subsidiary of the other and there is no express contract of agency between Management and Restaurants.

[10] The undisputed evidence filed in relation to the motion also discloses that since the time that Shamrock had a controlling interest in Restaurants and Management:

- (a) Restaurants has had no assets other than the Lease;
- (b) Restaurants has had no employees;
- (c) Restaurants did not operate a bank account or have any credit facilities;
- (d) There were no financial accounting or income tax returns filed on behalf of Restaurants;
- (e) Restaurants' sole function was to hold the Lease;
- (f) Management ran the operations of Ryan Duffy's Steak & Seafood as well as the Speakeasy;
- (g) Management hired the staff for the operation and the employees who worked at the restaurant were employees of Management;
- (h) Any revenues that came into the restaurant were deposited into Management's bank account;
- (i) Service providers or equipment providers invoiced Management and they were paid out of Management's bank account;
- (j) The rent payments for the Lease were paid out of Management's bank account and Management listed the rent as an expense on their financial statements, even though the Lease was in Restaurants' name;
- (k) All of the equipment at the restaurant was either owned by or leased to Management; and
- (l) There were no written management or service agreements between Restaurants and Management.

[11] In addition, Restaurants and Management shared the same corporate address.

[12] On March 25th, 2008 the landlord distrained the leased premises and locked the doors of Ryan Duffy's Steak & Seafood as well as the Speakeasy.

[13] On May 16th, 2008 Holdings brought an action against Restaurants and Management in the Nova Scotia Supreme Court in relation to the Lease. At ¶ 6 and ¶ 7 of the Statement of Claim it is alleged:

- 6) The Plaintiff states that Duffy's Management was at all times material hereto the owner of all assets and inventory located at the leased premises and used in the restaurant business of Duffy's Restaurants. In the alternative, the Plaintiff states that for all intents and purposes, Duffy's Management was the Assignee in fact of all assets and inventory located at the leased premises.
- 7) The Plaintiff states that Duffy's Management is owned and operated by the same individuals as own and operate Duffy's Restaurants. The Plaintiff further states that Duffy's Management received all the benefit and privileges of the Lease as well as all of the benefits and sales from the operations conducted at the leased premises. For all intents and purposes, Duffy's Management was the alter ego of Duffy's Restaurants and is liable to the Plaintiff under the terms of the Lease in the same manner and to the same extent as Duffy's Restaurants.

[14] At the time of the hearing of this matter both counsel agreed that for the purpose of this motion the last sentence of ¶ 6 of the Statement of Claim shall be considered to be amended to read "In the alternative, the Plaintiff states that for all intents and purposes, Duffy's Management was the Assignee in fact of all assets and inventory located at the leased premises and was the Assignee of the Lease." Mr. Rumscheidt, on behalf of the Plaintiff, acknowledges that there was not a written assignment of the Lease and states that the Plaintiff's position is that there was an equitable assignment of the Lease.

[15] In the Statement of Claim the Plaintiff has claimed against both Restaurants and Management for special damages in the amount of \$113,326.96 plus pre-judgment interest and costs.

[16] In November of 2008, Management applied for summary judgment on the basis that there was no arguable issue to be tried with respect to the claim. The matter was heard before Pickup J. in January of 2009. At the time of that hearing counsel for the Plaintiff took the position that the application was premature and that additional documentation and discovery was required before the court could decide the summary judgment issue. Pickup J. concluded that there were genuine issues of material fact requiring a trial and dismissed the application.

[17] Additional disclosure and discovery has now taken place and Management is once again seeking summary judgment. Originally, Holdings took the position that this motion should be dismissed based on the doctrine of *res judicata*. At the time of the hearing that objection was withdrawn and it was agreed that the court should deal with the motion on its merits.

[18] All parties have now agreed that for the purpose of this motion there is no genuine issue of material fact that requires a trial. The facts recited herein are not in dispute. However, Management and Holdings dispute the legal conclusions that should be reached based on those facts. Management submits that Restaurants was incorporated for the proper purpose of holding a lease and being a tenant and that there was no improper or fraudulent conduct on behalf of itself or Restaurants that would warrant the lifting of the corporate veil. Management also submits that there is no evidence of an assignment of the Lease between Restaurants and Management.

[19] Holdings submits that for all intents and purposes Management was the alter ego of Restaurants and is therefore liable under the terms of the Lease in the same manner and to the same extent as Restaurants. It argues that Management and Restaurants are, in effect, a single economic entity and should be treated as such for the purpose of the Lease. Further, Holdings submits that there was an equitable assignment of the Lease.

TEST FOR SUMMARY JUDGMENT

[20] As indicated above, this motion has been brought pursuant to Civil Procedure Rules 13.03 and 13.04 which provide as follows:

Summary judgment on pleadings

13.03 (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

- (a) it discloses no cause of action or basis for a defence or contest;
- (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;
- (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

.....

Summary judgment on evidence

13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

(2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.

(4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

(6) The motion may be made after pleadings close.

[21] I am going to deal first with Civil Procedure Rule 13.04.

[22] Civil Procedure Rule 13.04(1) provides that a judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim fails to raise a genuine issue for trial must grant summary judgment. What then is the test for whether there is a genuine issue for trial?

[23] In this case, it is the Defendant, Management, that is seeking summary judgment. The appropriate test when a defendant brings a motion for summary judgment was set out in the Nova Scotia Court of Appeal decision in **United Gulf Developments Limited v. Iskandar**, 2004 NSCA 35, where the court stated at ¶ 9:

.....I concur with the Chambers judge that the appropriate test where a defendant brings an application for summary judgment in Nova Scotia is the test as set out in **Guarantee Co. of North America v. Gordon Capital Corp.** [1999] 3 S.C.R. 423:

27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

[Emphasis in the original]

[24] While this test was established under the 1972 Civil Procedure Rules – in my view the test remains the same under the present Rule 13.04.

[25] As indicated above, all parties have now agreed that there is no genuine issue of material fact requiring a trial. The burden is therefore on Holdings to satisfy me that its claim against Management has a real chance of success.

[26] Not surprisingly, counsel have very different views on what constitutes a “real” chance of success. Counsel for the Plaintiff has referred me to Pickup J.’s comments in **Turner v. Halifax (Regional Municipality)**, 2009 NSSC 28, where it is stated at ¶ 20:

20 In *Eikelenboom v. Holstein Assn. of Canada*, [2003] N.S.J. No. 479, 2004 NSCA 103; 2004 CarsellNS [sic] 340, the Court of Appeal reversed the chambers judge’s denial of summary judgment, but appeared to approve her statement of the test for summary judgment. Saunders J.A. did not appear to take issue with the following statement by the chambers judge as to what was meant by “a real chance of success”:

... A “real” chance of success is not to be expressed in percentages. It does not mean that the plaintiffs are *likely* to succeed at trial or have a better than 50/50 chance of success. At trial, plaintiffs have the onus of establishing their claim on the balance of probabilities. A real chance of success means the possibility of their success is not illusory or unrealistic. It is no more than saying they *could* succeed and the determination of whether they will or not should be left for the trial. The trial judge will have to examine all the surrounding circumstances. That is not the role of a chambers judge on a summary judgment application.

[Emphasis in the original]

[27] Counsel for Management submits that the Court of Appeal “specifically and quite forcefully rejected” Justice Hood’s approach in **Eikelenboom**, *supra*, and that summary judgment is a procedure “with teeth” which is meant to be “rigorous” so as to determine whether the Plaintiff has a real chance of success of winning their case on a balance of probabilities.

[28] The Court of Appeal in **Eikelenboom**, *supra*, confirmed that Hood J. had accurately referred to the test for summary judgement but felt that she had erred in its application (see ¶ 26.) The court did not, in my view, raise the bar that had to be reached by a plaintiff when faced with a summary judgment motion by a defendant.

[29] I agree with Justice Hood's suggestion in **Eikelenboom**, *supra*, that a "real" chance of success does not mean that the plaintiff is *likely* to succeed at trial i.e: that it has a better than 50/50 chance of success. I also agree with Hood J.'s suggestion that a "real" chance of success is one that is not illusory or unrealistic. As stated by Beveridge J. (as he then was) in **Bowden v. Withrow's Pharmacy Halifax (1999) Ltd.**, 2008 NSSC 252, "..... 'real' connotes a potential for establishing liability that is neither fanciful nor farfetched. It must be one that is reasonably grounded in legal principle....." (¶ 60).

[30] Our Court of Appeal has said on a number of occasions that the burden to show an arguable or genuine issue on a summary judgment motion is not a heavy one (see for example: **Lienaux et al. v. Toronto-Dominion Bank** (1995), 140 N.S.R. (2d) 156 (N.S.C.A.) at ¶ 9 and **Oceanus Marine Inc. v. Saunders** (1996), 153 N.S.R. (2d) 267 (N.S.C.A.) at ¶ 16.) Where, however, as in **Eikelenboom**, *supra*, there is no real chance of success – the court should allow the motion for summary judgment.

[31] In the case at bar, if the plaintiff does not have a realistic chance of succeeding with its claim then summary judgment should be granted. If, on the other hand, the plaintiff has a realistic chance of establishing its claim it is entitled to proceed to trial and to have its action heard regardless of whether it is likely to succeed at the end of the day.

THE APPLICANT'S POSITION

[32] Mr. Robinson, on behalf of Management, points out that Management and Restaurants are two distinct, separate legal entities that were incorporated by different individuals at different times (Robert C. Risley incorporated Restaurants on October 23rd, 1992. Stephen Risley incorporated Management almost nine years later on May 1st, 2001.) He notes that Management was not even incorporated when the Lease was signed and submits that there is nothing at all unusual about a company whose sole purpose is to hold a lease. He states that there is no obligation on a company to have employees or bank accounts in order to retain the corporate veil.

[33] Mr. Robinson notes that while Management and Restaurants have the same controlling shareholder (Landmark), Management has two minority shareholders (that own 40% of the shares of Management) who have nothing at all to do with Landmark or Restaurants (this later point was agreed to by the parties at the time of the hearing.) He points out that in the fall of 2003 (when Shamrock acquired ownership of Restaurants and majority control of Management) Holdings was given formal notice that there were now two companies (Restaurants and Management) and was also advised that the officers and directors of both companies were the same. Despite receiving this information, Holdings did not arrange for Management to be added to the Lease or to guarantee the Lease.

[34] Mr. Robinson submits that even acknowledging that the two companies were involved in the same bar and restaurant over the years and also acknowledging that Management and Restaurants have the same controlling shareholder – there is no basis, on the facts of this case, to pierce the corporate veil.

[35] Mr. Robinson has referred the Court to the Supreme Court of Canada decision in **Kosmopoulos v. Constitution Insurance Co.**, [1987] 1 S.C.R 2 where Wilson J. stated at pp. 10-11:

As a general rule a corporation is a legal entity distinct from its shareholders:
Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.) The law on when a court may

disregard this principle by “lifting the corporate veil” and regarding the company as a mere “agent” or “puppet” of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the “separate entities” principle is not enforced when it would yield a result “too flagrantly opposed to justice, convenience or the interests of the Revenue”: L. C. B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary College*, *supra*, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.

[36] Reference has also been made by Management to the Ontario Court of Appeal decision in **642947 Ontario Ltd. v. Fleischer et al.** (2001), 209 D.L.R. (4th) 182 where Laskin J.A. stated at ¶ 67 and ¶ 68:

[67].....To pierce the corporate veil is to disregard the separate legal personality of a corporation, a fundamental principle of corporate law recognized in *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.C.). Only exceptional cases – cases where applying the Salomon principle would be “flagrantly” unjust – warrant going behind the company and imposing personal liability. Thus, in *Clarkson Co. Ltd. v. Zhelka*, [1967] 2 O.R. 565 at 578, 64 D.L.R. (2d) 457 (H.C.J.), Thompson J. held that instances in which the corporate veil has been pierced “represent refusals to apply the logic of the *Salomon* case where it would be flagrantly opposed to justice”. Similarly, Wilson J. observed in *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 at 10, 34 D.L.R. (4th) 208, that the law on when the corporate veil can be pierced “follows no consistent principle. The best that can be said is that the ‘separate entities’ principle is not enforced when it would yield a result ‘too flagrantly opposed to justice, convenience or the interests of the Revenue’: L.C.B. Gower, *Modern Company Law* (4th ed. 1979) at p. 112.”

[68] Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated “those in control expressly direct a wrongful thing to be done”. *Clarkson v. Zhelka* at 578. Sharpe J. set out a useful statement of the guiding principle in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.) At 433-34, affirmed [1997] O.J. No. 3754 (C.A.) [summarized 74 A.C.W.S. (3d) 207]: “the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct”.

[37] Counsel for Management has also referred me to a number of other decisions including **Gregorio v. Intrans-Corp** (1994), 18 O.R. (3d) 527 and **Rietz v. Valhalla International Partners Inc.**, [2004] O.J. No. 4647 (Ont. S.C.J.)

THE RESPONDENT'S POSITION

[38] Mr. Runscheidt, on behalf of Holdings, submits that Restaurants and Management are so intertwined that they are, in reality, a single economic entity and that they should be treated as such for the purpose of the Lease. He refers to the fact that Restaurants has no employees, does not have a bank account or any credit facilities and has no financial accounting of its own. He notes that Management paid the rent owing under the Lease even though Restaurants was the named tenant. He further notes that Management claimed the rent payments as an expense on their financial statements. He submits that Management is the alter ego of Restaurants and is therefore liable to the Plaintiff under the terms of the Lease in the same manner and to the same extent as Restaurants.

[39] In support of its position, Holdings relies heavily on the Nova Scotia Court of Appeal decision in **White v. E.B.F. Manufacturing Ltd.**, 2005 NSCA 167, and also on the comments of Stratton J. in **Medjuck and Budovitch Ltd. et al. v. ADI Limited et al.** (1980), 33 N.B.R. (2d) 271 (N.B.Q.B.). It is important, in my view, to quote extensively from both of these decisions.

[40] The case of **White v. E.B.F. Manufacturing Ltd.**, *supra*, involved two defendant companies "E.B.F." and "Fence" both of which were wholly owned and run by the same sole shareholder, officer and director. E.B.F. had entered into a License Agreement with the plaintiff, White, whereby E.B.F. was granted an irrevocable and exclusive license to manufacture braided electrical fencing. Fence was incorporated simultaneously to market the fencing. At a trial to determine, *inter alia*, the royalty payments owed to White by E.B.F. – the judge ordered Fence to make its books and

records available for review by an accountant and also ordered that Fence's gross revenues be included when calculating the royalty payments owing to White. Fence was not a named party to the License Agreement.

[41] The court concluded that the "unique circumstances" of that case made it appropriate to lift the corporate veil (¶ 47). In the course of rendering the court's decision, Saunders J.A., took note of the "separate entities" principle set out in **Salomon v. Salomon & Co.**, *supra*, and commented upon in **Kosmopoulos v. Constitution Insurance Co. of Canada**, *supra*, and stated at ¶ 48:

[48] The concept that corporations are separate legal entities, despite the fact they may have the same shareholders, has been fundamental to the common law since the House of Lords decision in **Salomon v. Salomon & Co.**.....A more recent commentary on this principle can be found in the Supreme Court of Canada decision in **Kosmopoulos v. Constitution Insurance Co. of Canada**.....where Wilson, J. stated at ¶ 12:

As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979) at p. 112.....

[Emphasis by Saunders, J.A.]

[42] Saunders J.A. went on to note that "counsel for the appellant and intervenor urged that the corporate veil ought not to be lifted except in the most serious of cases where fraud, or deceit, or use of a corporation for an improper purpose is both pleaded and proved". He rejected this view, on the basis that it invited "a far too restrictive approach, implying that only the most egregious or criminally unlawful circumstance will entitle a court to lift the corporate veil." (¶ 49) He continued:

[50] In **Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners**, [1969] 1 W.L.R. 1241 (C.A.) Lord Denning declared at page 1255 [sic - 1254]:

. . . The doctrine laid down in *Salomon v. Salomon & Co.* [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. . . .

[51] In **Le Car GmbH v. Dusty Roads Holdings Ltd.**, 2004 CarswellNS 138 (S.C.), Murphy, J. accurately identified three situations where courts have lifted the corporate veil:

- (a) where failure to do so would be unfair and lead to a result “flagrantly opposed to justice”;
- (b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual to do personally; and
- (c) where the corporation is merely acting as the controlling shareholder’s agent.

[43] Saunders J.A. drew the following conclusion from this line of caselaw:

[52] Courts will often pierce the corporate veil where the company is an agent or the mere alter-ego of the controlling shareholder or parent company. There was certainly evidence before McDougall, J. to support a conclusion that FENCE was merely the alter-ego of Bryson and EBF. In **Aluminum Co. of Canada v. Toronto (City)**, 1944 CarswellOnt 71 (S.C.C.), at ¶ 15-16, Rand, J., referred to the Court’s earlier decision in the case of **Toronto v. Famous Players Canadian Corp.**, [1936] 2 D.L.R. 129 as having:

15 . . . settled that the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; when the directing mind and will of the former reaches into and through the corporate façade of the latter and becomes, itself, the manifesting agency.

...

16 The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can be said that the latter has, in the true sense of the expression, no independent functioning of its own.

[44] Applying this reasoning to the situation before the court, Saunders J.A. held that E.B.F. and Fence were “inextricably linked”, with E.B.F. as the manufacturing arm of the enterprise and Fence as the distributing arm. He noted that the sole shareholder of both companies had agreed that Fence was “a mere sales station” with “no employees, very little assets other than its inventory, and limited capitalization” (¶ 53). Furthermore, Saunders J.A. said:

[54] The evidence at trial established that Bryson is the sole shareholder, director and officer of both companies. When FENCE was created, it was decided that EBF would own all the business assets and FENCE would be used to sell the product and act as a buffer between EBF and its customers. FENCE has no independent functioning. The directing mind of EBF (Bryson) penetrates the corporate facade so that FENCE becomes the agent of EBF. Indeed in her covering letter referring to the License Agreement, Ms. Marcia Brennan, the parties’ corporate lawyer who drafted the documentation, states that FENCE is an agent of EBF and that she drafted the License Agreement on that basis.

[55] EBF manufactures ElectroBraid Fence. Its only customer is FENCE, a company controlled and operated by the same individual. Though FENCE does sell other products other than ElectroBraid, these products are all part of the ElectroBraid fencing system. Without ElectroBraid, FENCE would not be able to function. FENCE is a mere agent of EBF.

[56] In my opinion all of these unique circumstances confirm the soundness of the trial judge’s decision. I see no error in his treating EBF and FENCE - for the purpose of calculating the royalties to which White was entitled - as being, essentially, one and the same thing.....

[45] Mr. Rumscheidt has also referred me to **Medjuck and Budovitch Ltd. et al. v. ADI Limited et al.**, *supra*, where it was argued that failing to treat two companies as a single entity could “produce an unjust result” (¶ 34). Stratton J. said that despite **Salomon v Salomon & Co.**, *supra*, “the courts, in the case of some group companies, will pay regard to the commercial reality of the group of companies rather than to the niceties of the separate legal identities of each constituent company.” (¶ 35). He gave the example of **DHN Food Distributors Ltd. v. London Borough of Tower Hamlets**, [1976] 3 All E.R. 462 (C.A.), where the court pierced the corporate veil in a case involving a claim for compensation for land expropriated from a subsidiary of a parent company. Stratton J. noted:

[36] In that case, Lord Denning said at p. 467:

A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law, *Principles of Modern Company Law* (3rd Ed., 1969), p. 216, says: ‘there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group’. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co. (Wakefield) Ltd. v. Caddies*, [1955] 1 All E.R. 725; [1955] 1 All E.R. 352. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

[37] Shaw, L.J., added at p. 473:

Even if this were not right, there is the further argument advanced on behalf of the claimants that there was so complete an identity of the different companies comprised in the so-called group that they ought to be regarded for this purpose as a single entity. The completeness of that identity manifested itself in various ways. The directors of DHN were the same as the directors of Bronze; the shareholders of Bronze were the same as DHN, the parent company, and they had a common interest in maintaining on the property concerned the business of the group

.....

Why then should this relationship be ignored in a situation in which to do so does not prevent abuse but would on the contrary result in what appears to be a denial of justice?

[38] The principle enunciated in the *DHN Food Distributors* case was repeated in the *Littlewoods Organization Ltd. v. Harris*, [1978] 1 All E.R. 1026 (C.A.), in which Lord Denning stated at p. 1036:

The answer is, I think, the law today has regard to the realities of big business. It takes the group as being one concern under one supreme control. It does not regard each subsidiary as being a separate and independent entity. As Professor Gower says in his book on companies, *Principles of Modern Company Law* (3rd Ed., 1969), pp. 194, 195:

‘... it has become a habit to create a pyramid of interrelated companies, each of which is theoretically a separate entity but in reality part of one concern represented by the group as a whole. The separation of the group into distinct companies is not necessarily in any way improper; it may well be the most economical and convenient arrangement when the concern carries on a number of separate businesses ... (Then he goes on to say *Ibid*, p. 216 that) there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic unity of the whole group. The courts are here following the lead of the legislature.’

[39] There have been occasions in Canada when the courts have lifted the corporate veil. One such incidence is *Nedco Ltd. v. Clark and Communications Workers of Canada, Local Number 4*, [1973] 6 W.W.R. 425 (Sask. C.A.). In that case a lawful strike was in progress against a parent company. The union set up pickets outside the business premises of a subsidiary company. The subsidiary applied for and was granted an injunction prohibiting the picketing. On appeal, the court lifted the corporate veil. In doing so, Culliton, C.J.S., said, at pp. 430-431:

Notwithstanding that, since the judgment of the House of Lords in *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22, the autonomous and independent existence of the corporate entity has generally been accepted as a fundamental feature of both English and Canadian law, there have been occasions when the courts have found it both possible and necessary to pierce the corporate veil. The court has done so when one company [sic] being used as a cloak for the actions of the other; or, for the just and equitable enforcement of a tax law. The court has also done so when it has concluded that, while the corporations are separate in law, one may be under the control of the other to such an extent that together they constitute one common unit.

[40] Chief Justice Culliton continued, at p. 433:

After reviewing the foregoing, and many other cases, the only conclusion I can reach is this: while the principle laid down in *Salomon v. Salomon & Co. Ltd.*, supra, is and continues to be a fundamental feature of Canadian law, there are instances in which the court can and should lift the corporate veil, but whether it does so depends upon the facts in each particular case. Moreover, the fact that the court does lift the corporate veil for a specific purpose in no way destroys the recognition of the corporation as an independent and autonomous entity for all other purposes.

[41] In a subsequent decision *Kinookimaw Beach Association v. R. in Right of Saskatchewan*, [1979] 6 W.W.R. 84, Chief Justice Culliton clarified his statements in the *Nedco* case when he stated, at p. 88:

I think the principle to be drawn from the *Nedco* case is that the autonomous and independent existence of the corporate structure must be accepted and respected unless it can be shown that such

structure is being deliberately used to defeat the intent and purpose of a particular law or is intended to or does convey a false picture of independence between one or more corporate entities which, if recognized would result in the defeat of a just and equitable right.

[46] Mr. Rumscheidt, in the case at bar, relies on these authorities and says that he has a real chance of successfully arguing that Restaurants and Management are so intertwined that despite their separate legal status they should be treated as one and Management should be found liable under the terms of the Lease in the same manner and to the same extent as Restaurants.

ANALYSIS AND CONCLUSIONS

[47] As noted by Saunders J.A. in **White v. E.B.F. Manufacturing Ltd.**, *supra*, the principle that corporations are separate legal entities, despite the fact that they may have the same shareholders, has been fundamental to the common law since the House of Lords decision in **Salomon v. Salomon & Co.**, *supra*. This principle is rigidly applied, although in appropriate circumstances courts have seen fit to lift the corporate veil and disregard the separate legal status of a corporation.

[48] As further noted by Saunders J.A. in **White v. E.B.F. Manufacturing Ltd.**, *supra*, lifting the corporate veil is not limited solely to cases where fraud, deceit or the use of a corporation for an improper purpose is both pleaded and proved.

[49] The separate status of a corporation can be ignored when required by statute (such as a tax statute), when a contract entered into by a group of companies requires that the members of the group be treated as one and, as occurred in **White v. E.B.F. Manufacturing Ltd.**, *supra*, when a corporation is found to be acting as the agent of another (in **White**, *supra*, Fence was found to be the agent of E.B.F. – see ¶ 55.)

[50] In **White v. E.B.F. Manufacturing Ltd.**, *supra*, Saunders J.A. quoted with approval from **Le Car GmbH v. Dusty Roads Holdings Ltd. et al.**, *supra*, where Murphy J. identified three situations where the courts have lifted the corporate veil:

- (a) where failure to do so would be unfair and lead to a result “flagrantly opposed to justice”;
- (b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual shareholder to do personally; or
- (c) where the corporation is merely acting as the controlling shareholder’s agent.

[51] Courts have also referred to the corporate veil being lifted if a company is a “sham”, the “alter ego” of another or a “facade” although these situations could clearly be covered in the three circumstances listed by Murphy J. above.

[52] In the case at bar, we are not dealing with a statutory provision (such as a tax statute) that requires the corporations in question to be treated as one. Nor does this case involve a contract entered into by a group of companies which requires that the members of the group be treated as one. Further, in my view, we are not dealing with an agency situation such as existed in **White v. E.B.F. Manufacturing Ltd.**, *supra*. In this case, Restaurants was clearly not acting as agent for Management when the Lease was entered into as Management did not even exist at the time the Lease was executed and was only incorporated a number of years later.

[53] The issue, as I see it, is whether Holdings has a real chance of successfully arguing that, in the circumstances of this case, failing to pierce the corporate veil would lead to a result that is flagrantly opposed to justice or that the incorporation of Management was undertaken for a fraudulent or other objectionable, illegal or improper purpose.

[54] In the case at bar, Holdings does not allege fraud. It submits, however, that incorporating Management after the Lease was entered into and giving Management complete control of Restaurants and its finances without fully apprising the landlord of this fact was improper. It further submits that Restaurants and Management are, in reality, a single economic entity and should be treated as such despite the rule in **Salomon**, *supra*.

[55] I will deal first with what I will term the “single economic unit” argument.

[56] There is little doubt that Restaurants and Management are closely intertwined. They are controlled by the same majority shareholder, they share the same corporate address and they are both involved in the same business (Restaurants held the lease for the restaurant – Management managed the business.) Could the fact that these two companies are controlled by the same majority shareholder and are intimately involved in the same enterprise be enough to lift the corporate veil on the facts of this case?

[57] There is nothing wrong *per se* with two companies being controlled by the same majority shareholder or being involved in the same business enterprise. Many closely held corporations function in this manner and the law deems them to be separate legal entities.

[58] In addition, many narrowly held corporations will appear to be alter egos of each other. The benefits of incorporation, however, are not limited to widely held corporations.

[59] In any event, Restaurants and Management cannot, in my view, be considered to be true alter egos of the other. Restaurants has a sole shareholder (presently

Landmark) while Management has a majority shareholder (Landmark) as well as two minority shareholders who have nothing to do with Landmark or Restaurants.

[60] Despite the fact that these two companies are not true alter egos of each other, could they be so inextricably linked that the rule in **Salomon**, *supra*, should be ignored and they should be considered as one?

[61] In **Medjuck and Budovitch Ltd. et al. v. ADI Limited et al.**, *supra*, Stratton J. suggested that in the case of some group enterprises the courts will pay regard to the commercial reality of the group rather than to “the niceties of the separate legal identities of each constituent company” (¶ 35). Interestingly, despite these comments, Justice Stratton *did not* lift the corporate veil in that case.

[62] The comments of Stratton J. were used, however, by Grant J. in **Stewart v. Webster**, 2006 NBQB 321, to lift the corporate veil. That case went on to appeal (2007 NBCA 50). In a concise (two paragraph) decision the Court of Appeal stated:

1. The trial judge pierced the corporate veil and found the appellant personally liable for losses the respondents sustained in connection with a townhouse they purchased from a company controlled by the appellant (see 2006 NBQB 321 (N.B. Q.B.)). There is absolutely no evidence to support a piercing of the corporate veil and the correlative finding of personal liability on the part of the appellant. In short, there is not a scintilla of evidence supporting a finding that the company in question or any related corporation was “being used [by the appellant] as a shield for fraudulent or improper conduct” (see *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 28 O.R. (3d) 423, [1996] O.J. No. 1568 (Ont. Gen. Div.), at 433-34, *aff’d* [1997] O.J. No. 3754 (Ont. C.A.)).

[63] The Court of Appeal overturned the trial judge's decision to lift the corporate veil.

[64] In **Medjuck and Budovitch Ltd., et al. v. ADI Limited et al.**, *supra*, the Court referred to Lord Denning's comments in **Littlewoods Organization Ltd. v. Harris**, [1978] 1 All E.R. 1026 (C.A.) where he stated at p. 1036:

. . . The answer is, I think, the law today has regard to the realities of big business. It takes the group as being one concern under one supreme control. It does not regard each subsidiary as being a separate and independent entity. As Professor Gower says in his book on companies, *Principles of Modern Company Law* (3rd Ed., 1969), pp. 194, 195:

'.....it has become a habit to create a pyramid of inter-related companies, each of which is theoretically a separate entity but in reality part of one concern represented by the group as a whole. The separation of the group into distinct companies is not necessarily in any way improper; it may well be the most economical and convenient arrangement when the concern carries on a number of separate businesses...[Then he goes on to say *Ibid*, p. 216 that] there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic unity of the whole group. The courts are here following the lead of the legislature.'

[65] As is seen from the above, in **Littlewoods Organization Ltd. v. Harris**, *supra*, Lord Denning referred to and relied on the third edition of Gower, **Principles of Modern Company Law**, in support of his position. The present author of that text, however, appears to take a much different view of the matter in the more recent (7th edition) (Paul L. Davies, **Gower and Davies' Principles of Modern Company Law**, 7th ed. (London, Sweet & Maxwell, 2003.)) In reviewing the leading case of **Adams v. Cape Industries Plc.**, [1991] 1 All E.R. 929 (C.A.) and the "single economic unit" argument made in that case he states at pp. 184-185:

The first of these, described as the "single economic unit argument", proceeded as follows: Admittedly there is no general principle that all companies in a group of companies are to be regarded as one; on the contrary, the fundamental principle is unquestionably that "each company in a group of companies ... is a separate legal entity possessed of separate rights and liabilities". Nevertheless, it was argued, the court will, in appropriate circumstances, ignore the distinction between them, treating them as one. For this proposition a number of authorities were cited, but the

court distinguished them all as turning on the interpretation of particular statutory or contractual provisions. After reviewing these authorities the Court in Cape expressed some sympathy with the claimants' submissions and agreed that:

'To the layman at least the distinction between the case where a company trades itself in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has power to control, may seem a slender one.'

It also accepted that the wording of a particular statute or document may justify the court in interpreting it so that a parent and subsidiary are treated as one unit at any rate for some purposes. However, beyond that it was unwilling to go. **It seems, therefore, that in aid of interpretation (of statute or contract) the court may have regard to the economic realities in relation to the companies concerned. But that now seems to be the extent to which the "single economic unit" argument can succeed.**

[Citations omitted. Emphasis added]

[66] In K.P. McGuinness, **Canadian Business Corporations Law**, 2d ed. (Markham, Ont: LexisNexis, 2007) the author deals with the "Corporate Group Concept" and states at p. 72:

§2.70 Although a corporation and its shareholder may have an identity of economic interest, the legal distinction between corporation and shareholder is so fundamental that it cannot be ignored. Generally, the law is not concerned with the functional organization of the group. So long as the law remains as it is currently drafted, it appears that commercial reality in this context must give way to legal formality, for the very purpose of the law is to create a separate legal person in the corporation. In the field of corporate law, form is to a very large extent often the same as substance. **Cases in which the members of a corporate group can be regarded as a single entity are a very narrow exception rather than the rule.**

§2.71 Whether the exception should be so narrowly defined, is of course a separate question. A strong argument can be made for piercing the corporate veil where the parent corporation has misled the creditors of the subsidiary corporation into thinking that they are dealing with the parent rather than the subsidiary; indeed, it is possible to argue that the sham or alter ego cases can be explained in terms of whether such deceit has in practice been exercised. **Such cases are, however, rare.....**

[Emphasis added]

[67] In **801962 Ontario Inc. v. MacKenzie Trust Co.**, [1994] O.J. No. 2105 (Ont. Ct. J. Gen. Div.) the court, when considering a motion for summary judgment, dealt with the “single group enterprise” argument including the comments of Lord Denning in **Littlewoods Mail Order Stores Ltd. v. McGregor**, [1969] 3 All E.R. 855 (C.A.) and stated at ¶ 30 - ¶ 31:

30 More recently, in *Adams v. Cape Industries PLC* and another [1991] All E.R. 929 (C.A.) the English Court of Appeal cast doubt on the force of Lord Denning’s remarks. Slade L.J. stated at p. 1025:

In *Littlewoods Mail Order Store Ltd. v. McGregor* [1969] 3 All E.R. 855 t 861, [1969] 1 WLR 1241 at 1255 Sachs L.J. expressly dissociated himself from the suggestion that the subsidiary was not a separate legal entity and Karminski L.J. refrained from associating himself with it. We therefore think that the plaintiffs can derive little support from those dicta of Lord Denning MR.

At p. 1026 Slade L.J. stated the law this way:

We do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, thee [sic] right to use a corporate structure in this manner is inherent in our corporate law.

31 The issue was considered in this court in *W.C. Latimer Co. v. Dijon Investments Ltd.*, (1992), 12 O.R. (3d) 415 (Ont. G.D.). Mandel J. commented as follows at p. 423:

The plaintiff’s position, firstly, is that it is sufficient to impose liability upon the defendant by merely showing that he is the alter ego of the companies, namely, he had de facto control thereof: The plaintiff cites the dicta of Lord Denning in *Wallersteiner v. Moir*, [1974] 3 All E.R. 217 (C.A.) at p. 238, and *Littlewoods Mail Order Stores Ltd. v. McGregor*, [1969] 3 All E.R. 855 (C.A.) at p. 860, to the effect that if the corporation is a puppet in point of fact, it should be so regarded in point of law. This dicta was not concurred in by the other members of the court in *Wallersteiner*, who expressly declined to tear away the corporate veil, and by the other members of the court in *Littlewoods*, who respectively disassociated and refrained from associating with such proposition, and **such proposition was laid to rest in England by the Court of Appeal in *Adams v. Industries*, [1991] 1 All E.R. 929 p. 1025.**

[Emphasis added]

[68] From these various authorities I conclude that the fact that two or more corporations may be seen to be acting as a single economic unit is not, on its own, enough to override the long accepted principle that each corporation is a separate legal entity.

[69] Are there other facts in this case which would support the suggestion that failing to pierce the corporate veil would lead to a result that is flagrantly opposed to justice or that the incorporation of Management was undertaken for a fraudulent or other objectionable, illegal or improper purpose?

[70] The Lease in question was entered into by two corporate entities that would appear to be sophisticated business players. At the time that the Lease was executed only Restaurants was required to sign the Lease. No other individual or corporation was required to sign or guarantee the Lease.

[71] While Management was incorporated a number of years after the Lease was entered into there is no evidence to suggest that Restaurants ever owned any assets other than the Lease or that assets were transferred from Restaurants to Management to avoid obligations.

[72] While Holdings may not have originally been aware of the incorporation of Management in 2001 and while it may not have appreciated the corporate structure under which the restaurant was operating, it was clearly advised of the existence of the two companies in the fall of 2003. In addition, it must have known of Management's existence before that date as Management was paying the rent. Despite having this information, Holdings did not seek to add Management (or anyone else) to the Lease nor did it seek to make Management (or anyone else) guarantors under the Lease in 2003 when its consent was needed in relation to the sale of Restaurants' shares to Shamrock.

[73] There is no evidence, on the facts of this case, that Management or Restaurants attempted to mislead or deceive Holdings or that they did anything objectionable, illegal or improper. In my view, in the circumstances of this case, Holdings does not have a real chance of successfully arguing that failing to pierce the corporate veil in this case would lead to a result that is flagrantly opposed to justice or that the incorporation of Management was undertaken for a fraudulent or other objectionable, illegal or improper purpose.

[74] That takes me to the issue of whether there was an equitable assignment of the Lease. Holdings acknowledges that there was not a written assignment of the Lease but submits to the court that the facts support the suggestion that there was an equitable assignment of the Lease. Neither counsel has provided me with any authority in relation to this issue.

[75] In **Levine v. Davies** (1998), 37 O.R. (3d) 252 the Ontario Court of Appeal confirmed that part performance can support an equitable assignment of a lease and stated that “equity looks to what the parties intended”. In that case the parties clearly intended that the lease in question be assigned. The lease itself referred to the fact that it was going to be assigned and that the Lessee had the right to assign the lease to a certain non-profit corporation. However, the proper paperwork was not completed. The court concluded that it was appropriate to give effect to the parties’ intentions and held that the lease was validly assigned in equity.

[76] In the case before me, I am not satisfied that there is evidence of any intention to assign this Lease from Restaurants to Management.

[77] While Management paid the rent owing under the Lease, I am not persuaded that this is sufficient to show an intention to assign the Lease. During the course of the hearing counsel for Management posed a question which I found fitting. If a university student signs a lease but his parents pay the rent to the landlord – has there

been an equitable assignment of the lease to the parents? I think not. In my view, there must be an actual intention of the parties to assign the lease in order for an equitable assignment to occur. In the case before me, I am not satisfied that there is evidence to support the suggestion that there was an equitable assignment of this Lease.

[78] If I am in error in this regard, I am nevertheless of the view that the Lease itself prevents an equitable assignment. Clause 19.02 of the Lease provides:

The Tenant shall not assign or sub-let or part with the possession of all or part of the Demised Premises without the prior written consent of the Landlord, which consent may be arbitrarily withheld; provided, however, such consent to any assignment or sub-letting shall not relieve the Tenant from its obligations for the payment of Rent and for the full and faithful observance and performance of the covenants, terms and conditions herein contained.

[79] In the case at bar, there is no evidence that the written consent of the landlord (Holdings) was sought or obtained in relation to an assignment of the Lease.

[80] I conclude that Holdings does not have a real chance of success in its action against Management. I therefore grant summary judgment to Management. Holdings' action against Management will be dismissed.

[81] In light of my conclusions above, I need not deal with Management's motion under Civil Procedure Rule 13.03.

[82] I reserve the right to deal with the issue of costs. I will receive written submissions on the matter if counsel are unable to reach an agreement in this regard.

Deborah K. Smith
Associate Chief Justice