



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

CAUSE NO. G 117 OF 2022

BETWEEN

- 1) MELKO DOBROSLAVIC
- 2) RONALEE MURRAY-DOBROSLAVIC

PLAINTIFFS

AND:

- 1) GRAND HARBOUR PROPERTIES
- 2) DALE CRIGHTON
- 3) TREVOR WATKINS

DEFENDANTS

Submissions: **The Plaintiffs in Person**
Mr. Ian Huskisson of Travers Thorp Alberga for the Defendants

Before: **The Hon. Justice Cheryl Richards KC**

Heard: **5th October 2022**

Judgment: **31st March 2023**

HEADNOTE

Civil litigation-Grand Court Rules Order 14 r.12-Application for Summary Judgment, Whether Company Proper Party to a Claim in Misrepresentation.

JUDGMENT

1. By Summons filed 23rd June 2022, the three Defendants sought orders for summary judgment against the Plaintiffs. The orders were sought pursuant to Grand Court Rules (GCR) O.14 r.12, on the ground that the claims brought have no prospects of success. The application in the alternative was that the claims be struck out pursuant to GCR O.18 r.19 on the ground that they disclose no reasonable cause of action. At the hearing the Defendants indicated that having seen the evidence of the Plaintiffs in response, the application is now limited to the personal claims against the Second and Third Defendants. The Defendants submit that there is no proper legal or factual basis to proceed against the two Defendants in their personal capacities.
2. The two Plaintiffs are the purchasers of Lot 43 Harbour Reach, (Block 22E Parcel 447REM4). This is a piece of land located in the Grand Harbour area of Grand Cayman (“the property”). The property was one of several parcels of land being sold as part of a land development project.
3. The First Defendant, Grand Harbour Properties Ltd., (“GHPL”) is the vendor of the property. The Third Defendant, Trevor Watkins is one of the Directors of GHPL and he and his wife are the beneficial owners of the First Defendant. The Second Defendant, Dale Crighton appears to be a real estate agent. His family’s company is said to be Crighton Properties Limited (“CPL”) which was involved in the development as listing agents. CPL produced a brochure with information about the lots for sale in the development.
4. There is no dispute that on the 15th December 2020 the First Plaintiff, Mr. Melko Dobroslavic entered into a written agreement to purchase (“offer to purchase”) the property from GHPL for the sum of C\$414,000.00. He paid a deposit of \$150,000.00. The listing or submitting agent was Era Real Estate Cayman Islands, (“Era Real Estate”). On the 18th December 2020, before the closing date of 30th December 2020, the First Plaintiff and GHPL by way of a deed of covenant completed the transaction. The First Plaintiff thereafter requested that the property be transferred into the names of himself and his wife, Ronalee Murray-Dobroslavic, the Second Plaintiff.

5. On the 26th May 2022 the Plaintiffs issued a Writ of Summons against the three Defendants. The Plaintiffs detail the cause of action as one in misrepresentation and deceit. They claim that certain representations were made by the sale signage and sale brochure for the property that were false. Exhibited to the Writ and to Mr. Dobroslavic's Affidavit dated 21st July 2022 is sale signage which described the lots as prime canal front lots which are, "demucked and filled to bed rock". The real estate agents to be contacted were named on the sign as CPL and IRG (Cayman Islands). Under the name CPL, the contact details for Mr. Crighton are listed. Also exhibited to the Affidavit is an excerpt from the sale brochure, which states:-

"With its raw land, fully demucked to bedrock and filled with compacted aggregate, safely retained by Grand Harbour's signature "Keystone" sea walls, lot owners have been able to build their homes without the need for expensive piling and benefit from other key features such as integral, cantilevered docks, well-elevated grades and some of the deepest and widest canals in the Cayman Islands".*

6. The Plaintiffs assert that relying on these representations they contacted a real estate broker of ERA Real Estate and made an offer to purchase the property. Having purchased the property, the soil was tested. Two engineers advised that piling was necessary to a depth of some 19-21 feet in order to find bedrock. Construction on the property was delayed for about seven months in order to construct 43 pilings, before a building permit could be obtained. An attempt by the Plaintiffs to negotiate with the Developer by way of the Second Defendant failed. The Plaintiffs seek damages to include additional construction costs, interest costs for certain delays and punitive damages.
7. In broad summary the Defence filed on the 23rd June 2022 is a denial of any false representations. It is admitted that the statements were made on signage and in the brochure, but it is said that there was a prominent footnote after the word piling in the brochure which stated, "*subject to engineering survey and depending upon property being developed.*" It is said that none of the Defendants represented or could be understood to have made representations that there could never be a need for piling.
8. In his Affidavit in response to the application dated 21st July 2022, the First Plaintiff states that this footnote was not disclosed to them prior to the offer to purchase, the form of brochure which they were provided does not include this footnote.

9. At the hearing the Defendants indicated that having seen the evidence of the Plaintiffs in response, it is accepted that there is an issue of fact as to which form of the brochure was seen by the Plaintiffs.
10. The second main aspect of the defence is that it is said that the Plaintiffs are estopped from relying on any such representations in any event because the 15th December agreement contained an “Entire Agreement” clause which is in the following terms: -

“19. *Entire Agreement*

This Offer to Purchase when executed by both parties is the complete agreement between the parties and the Purchaser hereby admits and declares that no statement, guarantee, promise, agreement, warranty or representation, whether oral or written, has been made with or to him on or prior to the date hereof by the Vendor, by anyone acting or purporting to act on the Vendor’s behalf, by the listing Broker/Co-Broker or any real estate agent concerning the Property or otherwise which he relied upon, apart from as specifically set out in this Offer to Purchase. This Offer to Purchase may be executed by each party in counterpart and exchanged and shall be allowed to be properly executed and binding if so executed and exchanged” (emphasis added).”

THE GRAND COURT RULES

11. By GCR O.14. r.12: -

- (1) *Where in an action to which this rule applies a defence has been served by any defendant, that defendant may, on the ground that the whole or part of the plaintiff’s claim has no prospect of success or, in respect of a claim for damages, that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff’s claim to be dismissed and judgment entered for the defendant on the whole or part of the claim.*
- (2) *This rule applies to every action begun by writ in the Court other than one of a kind mentioned in rule 1(2).”*

12. By GCR O.18, r.19: -

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.”

13. In ***Goodman v. DMS Governance Limited***¹, the Cayman Islands Court of Appeal identified the relevant principles to be applied on a claim for strike out. The Court considered an appeal against the summary dismissal of certain claims against a management company. The company was said to be vicariously liable for the acts of one of its employees who had provided director services. The appellate Court held that by GCR O.14, r.12 (1) a defendant may apply for summary judgment on the ground that the plaintiff’s claim has no prospect of success. The court may dismiss the claim unless there is a prospect of success on the whole or part of the claim. The Court said that the issue is whether there is a real as opposed to a fanciful prospect of success.

THE EVIDENCE ON THE APPLICATION

14. The application of the Defendants is supported by the Affidavits of Mr. Crighton dated 23rd June 2022, and Mr. Watkins dated 9th July 2022. As noted above, the First Plaintiff has filed an Affidavit in response dated 21st July 2022. The Second Plaintiff filed an affidavit dated 21st July 2022 attesting to her consent and agreement to the Affidavit of the First Plaintiff.

¹ [2020] 2 CILR 250

15. Counsel on behalf of the Defendants submits and I accept that the central focus must be on the entities or persons who were the contracting parties with respect to the property. There has to be a nexus between the contracting party and the alleged misrepresentation. Counsel said that it is important to recognise that GHPL is the developer, the legal entity that developed and sold the land. I also accept that any representation which is alleged would have had to have been made either by the contracting party itself, GHPL or on its behalf.
16. I have identified the first factual question for the Court in so far as it can be determined at this stage as being the connection if any between GHPL and the individual Defendants.
17. Both in the Defence filed and in the Affidavits, the Defendants point to inaccuracies in the statements made by the Plaintiffs as to the ownership of GHPL. The Writ refers to GHPL as the registered seller of the property². It describes Mr. Crighton as part owner of GHPL and Mr. Watkins as the second owner of GHPL. It is denied that Mr. Crighton owns shares in GHPL.
18. Mr. Watkins has produced the Register of Directors and Officers and the Register of Members of GHPL. The first page of this bears the seal of the Company Registry. GHPL has one shareholder, South Sound Limited. The Register of Members of South Sound Limited is also produced. The shareholders of this Company are Mr. Watkins and his wife.
19. In his Affidavit, the First Plaintiff indicates acceptance as to the statements of ownership made by Mr. Watkins.
20. I accept that there is no evidence that Mr. Crighton is an owner of GHPL. The assertion in the Writ appears to be incorrect and is now accepted by the First Plaintiff so to be.
21. The second factual question for the Court in so far as it can be determined at this stage is what role if any did the two individual defendants perform in relation to the transaction in particular as to the representations allegedly made.
22. By paragraph 8 of the Defence, it is denied that the Second and Third Defendants made the representation or any representation to the Plaintiffs. In respect of the personal claims against him, Mr. Watkins states that he has never made any representation of any kind to either of the Plaintiffs. He produces the Offer to Purchase signed between the First Plaintiff and GHPL

² Paragraphs 2-4

through real estate agents Era Cayman Islands. CPL is named thereon as the Listing Company. The deed of covenant made on the 16th December 2020 is signed between the First Plaintiff as Transferee and GHPL as Transferor and Management Company.

23. By his Affidavit Mr. Crighton attests that his family company, CPL has been involved as listing agents for the development. He states that the Plaintiffs made the offer to purchase through ERA Real Estate and that his family company did not represent them in any capacity. He states that he had no dealings with the Plaintiffs before their purchase of the property and he did not discuss any requirements for piling with them. He states that he first met the First Plaintiff at his request after the property was purchased. He did so as a courtesy to see whether he could assist with the Plaintiff's complaint. He was unable to assist.
24. In his Affidavit in response to the application, the First Plaintiff states that Mr. Crighton acted for the landowners in full capacity and was the only contact for the buyer's agent. He was the licensed sales broker.

"4. I further stated that Defendant 2 failed to disclose that he personally is listing broker instead [of] his company. He intentionally and purposely concealed fact that he and his company were active developers of Phase 2 containing 21 building lots and that he had personal knowledge that he did not go to bedrock which was found at depth of 19 feet and 21 feet below surface.

5. Mr. [Crighton] made statements many times in his Defense and his Affidavit that he has nothing to do with Plaintiffs in purchasing process. Facts are he had everything to do with it. He acted for landowners in full capacity. He was only contact that buyers' agent dealt with. In fact he was first contact on big sign reading from left to right, with his first and last name with telephone number belonging to him. Best to my knowledge 3rd Defendant assigned all responsibility of developing and selling to Mr. Creighton as licensed selling broker".³

³ Paragraphs 4 and 5 of Affidavit dated 21st July 2022.

THE SUBMISSIONS

25. The overall submission of the Defendants is that in the factual circumstances of this case, no successful claim can be brought against the Second and Third Defendants in their personal capacities. In support of this submission, the Defendants make four main points:-

- i) The First Defendant is the only proper party to a claim of misrepresentation.
- ii) There are no grounds to look behind the legal personality of the First Defendant. Even if there were such grounds, neither the Second Defendant nor the Third Defendant is an owner of the First Defendant.
- iii) There is no legal basis to pierce the corporate veil of the First Defendant.
- iv) There is no allegation that either of the two individual defendants made any representation to the Plaintiffs.

26. Counsel for the Defendants submits that the Claim was brought on a flawed basis both as to legal principles and as to ownership of GHPL. Paragraph 5 of the Statement of Claim states:-

“The cause of action for plaintiff’s claim is misrepresentation and deceit under common law tortious principles in civil action. Defendant (1) is an entity that cannot make representations, but its owners did, that is why they are included as Defendants personally.”

27. The Defendants say that it is not correct that GHPL is an entity that cannot make representations. Reliance is placed on the case of ***Springwell Navigation Corporation (a Body Corporate), v. JP Morgan Chase Bank (a Body Corporate) and others***⁴. In that case, the English Court of Appeal considered an appeal which in part was concerned with whether the trial judge was correct in concluding that certain representations made by a sales employee of Chase Investment Bank Ltd., (CIBL) did not amount to misrepresentations or negligent misstatements as alleged. The first issue arising from the judgment under appeal was summarised as being whether CIBL through its employee had made certain specific misrepresentations as to the nature of certain bonds. While not directly addressed by the

⁴ [2010] EWCA Civ. 1221

judgment in the case, I accept as Counsel for the Defendants submits that as a matter of general principles, a company acting through its employees and or agents can make representations.

28. Counsel also submits that no misrepresentation is pleaded which is made by either of the two individual defendants. They had no dealings whatsoever with the Plaintiffs. The only dealing with Mr. Crighton was a meeting after losses had already been incurred.
29. Counsel submits that an agent never assumes personal responsibility for the acts of the principal. As to the statements made in the brochure, Counsel said that Mr. Crighton did not personally produce the brochure. A firm with which he was associated with was one of the real estate agents, it was not him personally. As to the sign, Counsel argues that all that this says is that the property is for sale and if it is a representation at all it is one made by GHPL and not made by Mr. Crighton who has no personal knowledge of it. While his name is on the sign and on the brochure, this is simply for his contact details. Moreover, he was not a contracting party to the transaction.
30. As to ownership of GHPL, Counsel submits that neither of these individual Defendants is an owner of the First Defendant. Counsel states that this was purely a corporate transaction and there is no basis to look behind this. GHPL is not being used to evade an existing liability.
31. Counsel also submits that there is an element of vexatiousness about the Claim. In support of this Counsel referred to an email dated 28th September 2022 sent by the First Plaintiff to him. Counsel described this as a threatening email. In the email, the First Plaintiff commented on the case, referred to successful claims that he has brought in the past, urged that he be paid and said this: -

“The fact is you are uninformed about who the Plaintiffs are. Worst case scenario, if you force me to appeal, I will join you as Fourth Defendant for frivolous and untrue presentation for your clients that you know or should know is not the truth. Please be further advised that I have disbarred..... to practice law and that Bar reprimanded three other attorneys on my complaints and three letters in each case.”

32. Counsel argues that the individuals have been joined in order to put undue pressure on them which is inappropriate. In this case the contract was with the Company. Everything that was done was done on behalf of the Company. Individuals are entitled to conduct business through

corporations and those who act on behalf of the Company do not have personal responsibility. Counsel said that there is no need for individuals to be joined. If the claim is successful, then the Company will be in a position to pay any damages awarded.

SUBMISSIONS OF THE PLAINTIFFS

33. The Plaintiffs in response urged the Court to determine the entirety of the claim by granting summary judgment in their favour. The First Plaintiff asked the Court to decide the case and said that there is a lot more evidence which is available and additional evidence can be brought before the Court in the interim. Counsel for the Defendants opposed what is an oral application being brought without notice or filed summons. I indicated that the hearing would be limited to the Summons filed.
34. The Plaintiffs submit that the application for summary judgment or strike out has no merit. The First Plaintiff refers to the evidence of the professional engineers who analysed the land. This is said to evidence the intentional misleading by the Defendants which was effected by way of the sign and the brochure. He asks the Court to note that the sign did not say that ‘the land is sold as is where is, vendor does not guarantee quality of land, buyer to rely on his own expertise’ which would have been a proper exclusion.
35. The Plaintiffs submit that the claim is not excluded by the entire agreement clause which they say does not exclude liability for misrepresentation. They rely on the case of *AXA Sun life Services PIC v. Campbell Martin Ltd and others*.⁵ In that case, the English Court of Appeal was concerned with whether an entire agreement clause in five agreements was effective to exclude claims as to misrepresentations or liability for them. The case of *Springwell* was referred to as authority for confirming that a clause which acknowledges the making of no representation is an effective exclusion of liability in misrepresentation. Rix LJ stated that whether the exclusion was applicable in the particular case would depend on the wording of the clause, most importantly on whether a clear statement was made. The learned Judge stated:-

“In my judgment, this jurisprudence confirms my provisional conclusion on the wording of clause 24. No doubt all such cases are only authority for each clause's particular wording: nevertheless, it seems to me that there are certain themes which deserve recognition.

⁵ [2011] EWCA Civ. 133

Among them is that the exclusion of liability for misrepresentation has to be clearly stated. It can be done by clauses which state the parties' agreement that there have been no representations made; or that there has been no reliance on any representations; or by an express exclusion of liability for misrepresentation. However, save in such contexts, and particularly where the word "representations" takes its place alongside other words expressive of contractual obligation, talk of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation where its ingredients can be proved."

36. The Plaintiffs also produced materials on English Contract Law on the limitation and exclusion of liability. The Court's attention was drawn to a number of cases on exclusion clauses⁶ and the circumstances under which these have been held to be inapplicable. In deference to the Plaintiffs, I have reviewed all the material provided but as made plain during this hearing and again in this judgment, I am not deciding whether or not the entire agreement clause is or is not operable. That would be for a full hearing. The Defendants accept that the issue for a trial stage would be whether it is reasonable to exclude liability by creating an estoppel in the circumstances of this case.
37. In direct response to the Defendant's application, the Plaintiffs submit that the reason that the two defendants cannot be excluded from liability is because of misrepresentation, dishonesty, concealment and lying under oath. The Plaintiffs say that the two defendants have sworn affidavits and misrepresented facts which speak for themselves. The Company did not go to a notary and sign statements that were not true. They did this on a personal basis so that in his, the First Plaintiff's opinion, they are personally liable.
38. The Plaintiffs submit that it is not true that the two Defendants did not act personally. It is said that both Defendants acted on a personal basis prior to the agreement being signed. The First Plaintiff submits that Mr. Watkins is the landowner of phase 1 and phase 2 of the development. Mr. Crighton was given the responsibility to develop phase 2 and to sell lots and he was personally involved in all of this. Phase 2 of the development, which includes the property, has been personally developed and supervised by Mr. Crighton. He was the person who received the offer to purchase of the Plaintiffs because he was the listing broker and the real

⁶ Doyle v. Olby [1969] 2 QB 158, Edginton v. Fitzmaurice [1885] 29 CH. D. 459, Esso Petroleum Co. Ltd. v. Mardon [1976] QB 801, Hedley Byrne & Co, v. Heller & Partners Ltd. [1965] AC 465, Dimmock v. Hallett [1866-67] LR 2 Ch App 21, Thornton v. Shoe Lane Parking Ltd. [1971] 2 QB 163

estate agent communicated directly with him on their behalf. Before the closing, he paid CI \$9,000.00 as inducement for stamp duty in order to make a deal. He held \$150,000.00 of their deposit money before the closing and was the trustee.

39. The First Plaintiff said that once piling was completed, he made personal contact with Mr. Crighton. They met, Mr. Crighton looked very quickly at the costs claimed and he mentioned \$9,000.00. He was referring to inducement fees for stamp duty. They thought that he was going to offer to settle the matter. He said that he would prove to them that they do not need piling.
40. The First Plaintiff says that while the brochure was given to them by IRG real estate agency, the sign advertising the development said call Mr. Crighton. It is submitted that the Defendants failed to properly identify themselves as authorised agents of the Company. The reasonable man needs to know who he is dealing with. Is it an individual or some company. A person cannot use an entity to distance himself from liability without identifying himself as the company's authorised agent. The First Plaintiff said that there is absolutely no excuse to do business personally without identifying oneself.
41. It is further submitted by the First Plaintiff that the parties that put up the sign and created the brochures have an obligation to tell the truth. The Plaintiffs relied on the sign and brochure. In this case what was said was that they had gone down to bedrock and eliminated expensive piling. This was discovered not to be the case about five months later.
42. The First Plaintiff said that he had bought the land from GHPL and both defendants made misrepresentations to him. He was asked questions by the Court directly focused on the issues at hand and responded as follows: -

“Q: Before you purchased the land who do you say made misrepresentation to you before you signed the contract?

Ans: The defendants who created the sign and brochure. I say both involved, number 2 and 3, both defendants that he wants to exclude. Mr. Crighton is a real estate broker and sales agent and developer of phase 2 so he supervised the phase 2 development.

Q: What is the evidence that Mr. Crighton was the developer of Phase 2 and not GHPL?

Ans: He personally supervised that, without him, Company, could not do it.

Q: What is it that he did which you say that makes him developer of the land you purchased?

Ans: I know that he is a developer. I have the written letter from someone who was living in his home for two years and the letter was written that he is one of biggest developer on Island and that he has intimate knowledge about development and piling and that he knew that piling was required on that lot. The evidence is that he was a developer of the land and supervisor and selling agent for the property.”

43. With respect to Mr. Watkins, the First Plaintiff said that before he signed the contract, he never met Mr. Watkins. He said that he never dealt with Mr. Watkins, but he is the landowner and he passed that duty to Mr. Crighton to sell the land for him and to develop phase 2. The First Plaintiff said that the reason that Mr. Watkins cannot be excluded from the Claim is that he said in his Affidavit that he and his wife are beneficial owners of the property.
44. The Plaintiffs also say that Mr. Watkins has his entity that owns the land, and he has another entity which owns the shares. If the entity rather than the landowner is sued, they would also have to sue the second entity as well in order to out find where the money has gone. That is the reason that Mr. Watkins cannot be excluded.
45. The First Plaintiff also submits that there has been a breach of the rules for selling real estate. He referred to himself as the common man against persons who are seeking to continue to operate outside the law unless they are stopped.
46. As to disclosure to the reasonable man, Counsel for the Defendants in reply said that even if the Plaintiffs are partially correct, Mr. Crighton had clearly disclosed that he was acting on behalf of a Company, the correct party would therefore be CPL. It could never be Mr. Crighton.
47. Counsel also said that it is incorrect to suggest that Mr. Crighton made an inducement or payment. By the contract, the vendor agreed to a rebate of stamp duty. This was not an inducement by Mr. Crighton. The two real estate agents are CPL and ERA Real Estate. They have not been sued. They are simply agents acting with authority. CPL issued the brochure on behalf of GHPL and did so with authority to act as an agent for a disclosed principal which means that they cannot be liable personally. Even if that was wrong, the correct defendant

would be CPL if it was appropriate. As a matter of law, it is not. Counsel noted that nothing is alleged to that effect in the Writ, the pleaded case is that the two Defendants are here because the First Defendant cannot make representations.

DISCUSSION

48. The issue before the Court on this application is whether there is on the face of the papers a real prospect of success that the Second and Third Defendants will be held to be personally liable. I approach the issue by asking myself whether there is at this stage evidence to suggest that the two defendants would be either independently liable in their personal capacities for something done or said which may amount to a misrepresentation or that they would be liable as agents of the First Defendant such that a claim should be brought against them together with the First Defendant.
49. The general and well-known principle with respect to the separate legal personality of a company is stated in *Salomon v. Salomon*⁷. Lord Halsbury stated: -

“But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.”

50. In *Petrodel Resources Ltd. v. Prest*⁸ the English Supreme Court considered a wife’s appeal against the decision of the Court of Appeal. The question was in part whether property in the name of two companies owned by her husband could properly be the subject of dispositions under s.24 of the *Matrimonial Causes Act* 1973. By a majority the Court of Appeal had allowed the appeal of the companies against the order of the trial judge which had followed the practice in the Family division of treating assets of companies owned by one spouse as available for distribution on divorce.
51. In allowing the appeal, the Supreme Court reviewed what was said to be the limited circumstances in which the separate legal personality of a company could be disregarded, and the corporate veil pierced. While the decision in that case turned on the particular circumstances

⁷ [1897] AC 22

⁸ [2013] UKSC 34

which were that the properties in the names of the companies were beneficially owned by the husband, the Court reviewed the applicable general principles. Lord Sumption JSC stated that among the range of situations in which the law attributes the acts or property of a company to its controllers without disregarding the separate personality of the company is where a controller has done something as the agent of the company or as joint actor with it. The controller would be personally liable in addition to the company. The learned Judge stated: -

“Piercing the corporate veil” is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company. There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor. Property legally vested in a company may belong beneficially to the controller; if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose. For specific statutory purposes, a company's legal responsibility may be engaged by the acts or business of an associated company. Examples are the provisions of the Companies Acts governing group accounts or the rules governing infringements of competition law by “firms”, which may include groups of companies conducting the relevant business as an economic unit. Equitable remedies, such as an injunction or specific performance may be available to compel the controller whose personal legal responsibility is engaged to exercise his control in a particular way”.

52. The learned Judge explained that the phrase piercing the corporate veil, should be used to refer to those cases which are true exceptions to the rule in **Salomon v. Salomon**. One of the specific principles which provides for such an exception is where a company is used for deliberately dishonest purposes such as, a means of evading the law, for concealing the true facts or some relevant wrongdoing or impropriety. It was stated: -

“But when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in Salomon v A Salomon & Co Ltd [1897] AC 22, i.e. where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.”

53. Following a review of a number of cases, the learned Judge concluded: -

“In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are obiter, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.”

54. It was noted that the applicable broader principle seeks to prevent the abuse of a corporate legal personality. It is not an abuse to rely on a fact (if it is a fact) that the liability is that of the company and not the controller. It was said that: -

*“These considerations reflect the broader principle that 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 on 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 all about. Thus in a case like *VTB Capital v Nutritek* [2012] 2 Lloyd's Rep 313; [2013] 2 AC 337, where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company's contract, the fundamental objection to the argument was that the principle was being invoked so as to create a new liability that would not otherwise exist. The objection to that argument is obvious in the case of a consensual liability under a contract, where the ostensible contracting parties never intended that anyone else should be party to it. But the objection would have been just as strong if the liability in question had not been consensual. I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation*

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

55. Applying the legal principles from the cited case to the instant circumstances, firstly there is nothing pleaded or evidenced which suggests that the Third Defendant, Mr. Watkins did something personally either as the agent of GHPL or as joint actor with it. The First Plaintiff was clear that he had no personal dealings with Mr. Watkins. He asserts that Mr. Watkins is the developer or landowner but the contractual party, the vendor of the property is GHPL. That is clear from the agreements produced. These documents are not disputed by the Plaintiffs.
56. The real issue for the Plaintiffs appears to be a desire to ensure that if they are to be paid damages, that money will be available to do so. The issue is as to the liability of the Company. In the Court of Appeal judgment in *Petrodel Resources*, Rimer LJ referred to the basic principles applicable to limited liability companies. The learned Judge said this: -

"The judge noted in para 220 that "a lay person" might think that a husband "was entitled" to a house owned by a company that he owned. A lay person might so think but he would be wrong. If the same lay person carried on a business through a company of which he was the sole owner, and caused the company to incur liabilities that it could not meet, he would have no hesitation in asserting that the liabilities must be met exclusively by the company (by recourse exclusively to its assets) and (provided his shares were fully paid) had nothing to do with him personally. That is what limited liability is about."

57. It is not pleaded or asserted that GHPL was established in order to avoid liability or that it is being used to evade the law or prevent its enforcement. I accept the submissions of the Defendants in this regard. I conclude that on the facts of the instant case there is no reasonable prospect of success against Mr. Watkins in his personal capacity and that the Defendants should have summary judgment as to this part of their application.

58. The position with respect to the Second Defendant, Mr. Crighton, is less clear. Counsel for the Defendants is likely correct in each case that both the sign and the brochure do not identify him in any personal capacity. They appear to do no more than to identify him as the contact person for CPL. No company documents are provided for CPL. The real estate entity through which the Plaintiffs made the offer is ERA Real Estate not CPL. There is no direct evidence of personal contact with the Second Defendant until after the contract had been finalised.
59. Is there evidence that he may have been a party to or concurred in the making of the representation which is alleged to be false?
60. The First Plaintiff's evidence in his Affidavit is that the Second Defendant was personally responsible for the development and was the person on the ground. He also states that Mr. Crighton was personally the listing broker. This is denied.
61. The question I have is this, if the Plaintiffs are correct and an agent makes or concurs in the making of a statement on behalf of a principal which he, himself knows to be false, can the agent say that he is not at fault and the responsibility lies only with the principal?
62. The Plaintiffs drew the Court's attention to the case of *Nike Real Estate Limited v. De. Bruyne De Cuyper and International Relocation Group Limited*.⁹ In that case, the Grand Court ordered the rescission of a contract by which the plaintiffs had agreed to purchase a building in George Town from the vendors, the first and second defendants. The third defendant, a real estate company was the agent of the vendors. The Court held that there had been a material misrepresentation in that the defendants had failed to disclose that the lease of the building had been the subject of a rent reduction agreement. The defendants sought to rely on an entire agreement clause. The Court held that the misrepresentation had been fraudulently made and was material. It had induced the plaintiff to enter into the contract in the belief as to the level of rent which would be earned from the building. In the course of the judgment the Court considered the question of who would be liable for the misrepresentation and stated: -

“Accordingly, if the plaintiff has sustained damages as a result of the fraudulent misrepresentation and the other conditions precedent to liability are established, all of the

⁹ [2002] CILR 389

defendants are liable to the plaintiff. For that proposition, I refer to 31 Halsbury's Laws of England (*op. cit.*, para. 726, at 454):

'who is a representor', The following is a general statement of the rules for determining which persons are deemed to be representors. In the first place, only the person who actually made the representation is liable for its consequences, unless it was made on behalf of a principal or partner, in which case the principal or partner is deemed the representor, or one of the two representors, as the case may be. Secondly, an agent who has a co-agent, or who is a sub-agent, does not, merely as such, make the co-agent or the immediate agent, as the case may be, liable as a principal. Thirdly, where it is necessary to establish fraud, an innocent principal is liable for the fraud of his agent, and for this purpose it makes no difference if the principal is a corporation. Lastly, all who concur in making any false representation are jointly responsible, and, if it was fraudulent also, are jointly and severally responsible, to the representee for the consequences.'"

63. I remind myself of the general principles applicable on summary judgment applications. The Court is to determine whether there is a real prospect of success in defending the Claim. This is not a mini trial where the Court is to determine disputed issues of fact. The Court should be hesitant to make final decisions in the absence of a trial where a fuller investigation into the facts may add or alter the evidence available to a trial judge. These general principles are set out in the case of *Easy Air Ltd. v. Opal Telecom Ltd*¹⁰, in which Lewison J., stated: -

"As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

- *i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*
- *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];*

¹⁰ [2009] EWHC 339 (Ch.)

- iii) *In reaching its conclusion the court must not conduct a “mini-trial”*: *Swain v Hillman*;

- iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents*: *ED & F Man Liquid Products v Patel* at [10];

- v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial*: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

- vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

- vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which*

would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”

64. These principles have been referenced by the Court in this jurisdiction.¹¹
65. In this case the Plaintiffs have made certain assertions in evidence. They say that the Second Defendant is concealing his personal role, he was the listing broker, and personally involved in the role of developer of phase 2. While I accept that the Plaintiffs may well need to consider seeking leave in relation to amending the pleadings, I do not think that I should dismiss these assertions made in the Affidavit, out of hand without a full trial and a fuller investigation of the facts. Such an investigation of the facts is not permissible on a summary judgment application. The application of the Defendants to summarily dismiss the claim against the Second Defendant is refused.

Dated this the 31st day of March 2023



The Hon. Justice Cheryll Richards KC
Judge of the Grand Court

¹¹ 2021 (1) CILR128] Ritchie Capital Management LLC et al. v. Lancelot Investors Fund Limited and General Electric Company