SUPREME COURT OF NOVA SCOTIA
Citation: 4187440 Canada Inc. v. The Physio Clinic Ltd., 2014 NSSC 214

Date: 2014-07-10
Docket: Hfx. No. 363344
Registry: Halifax

Between:

4187440 Canada Inc.

Plaintiff

v.

The Physio Clinic Limited, carrying on business as The Physio Clinic and Woodlawn Physio Clinic; Michael D. Sutton; and M.D. Sutton Holdings Limited

Defendants

Revised Decision:	This decision has been corrected according to the attached erratum dated July 11, 2014.
Judge:	The Honourable Justice Peter P. Rosinski
Heard:	Tuesday, May 20, 2014, in Halifax, Nova Scotia
Counsel:	Harry Thurlow and Andrea Isabelle, for the Plaintiff Michael D. Sutton, for the Defendant

Introduction

[1] This is a motion for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04, made by the Defendants Michael D. Sutton and M.D. Sutton Holdings Limited, in an effort to have these two defendants removed from the action. The motion was filed February 4, 2014.

Evidence

[2] The evidence for the Defendants is contained in the affidavits of Michael D. Sutton, sworn and filed February 4 and May 16, 2014. Mr. Sutton was also cross-examined. The evidence for the Plaintiff is contained in the affidavits of Andrea L. Isabelle, sworn and filed February 10 and May 12, 2014; and Edith Dalton, sworn and filed May 12, 2014.

[3] Counsel for the Plaintiff objected to paragraphs 8, 9, 10, and 18, as well as associated exhibits 1 and 9 of Mr. Sutton's May 16, 2014, affidavit. At the hearing I ruled that paragraphs 8 and 9 are admissible. I concluded that paragraph 10 and Exhibit 1, and paragraph 18, and Exhibit 9 are not admissible.

[4] Similarly, I noted that I would disregard as inadmissible the following:

- Exhibit "C" and paragraph 5 of the February 10, 2014, affidavit of Andrea Isabelle, being references to a "without prejudice" settlement letter from then counsel for one or more of the defendants to present counsel for the plaintiff, as Mr. Sutton was self-represented, and there was no evidence that he had waived privilege, nor did he suggest that he did so at the hearing,

- Any references to "Google maps", and associated exhibits, in the affidavits of Andrea Isabelle or Mr. Sutton.

[5] In Mr. Sutton's cross-examination, consistent with the Registry of Joint Stock materials filed in the affidavit of Andrea Isabelle, he confirmed that he is a director, officer and recognized agent for M.D. Sutton Holdings Limited ("Sutton Holdings" – a property holding company) and The Physio Clinic Limited ("TPL"). He acknowledged that in the 1990s he restructured his personal and business interests, and that in 2006 a number of individual physiotherapy operating companies including the Woodlawn Physio Clinic Limited ("Woodlawn") , were amalgamated under the umbrella corporation, TPL.

[6] While previously there had been up to 19 locations of physiotherapy clinics under the umbrella corporation, at present there are 12. The ownership structure of TPL and Sutton Holdings is similar, in that each of those company's shares are held by a numbered company, the shares of which are held by the Sutton Family Trust, Sutton Trust Holdings Company, and members of Mr. Sutton's family,

including himself. Therefore, Mr. Sutton, as an individual has no shares in TPL or Sutton Holdings.

[7] Mr. Sutton conceded that, after the initial 1995 Woodlawn lease, but for some lease term and payment specific changes, the boilerplate terms of each successive lease remained the same.

Position of the Parties

[8] The Plaintiff states in its pleadings that on July 18, 1995, Woodlawn entered into a 10-year lease for premises at the Woodlawn Staples Shopping Center in Dartmouth, Nova Scotia. That lease was signed by the Defendant Michael D. Sutton on behalf of Woodlawn, and on behalf of the then-owner of the premises, Annapolis Basin Group Incorporated. Variations to the lease were made on October 11, 1995; May 28, 2002; and October 10, 2007. The last agreement extended the lease and set a termination date of August 31, 2012. Woodlawn vacated the premises in June 2011, citing the landlord's failure to fulfill its obligations under the lease.

[9] Those basic facts are not disputed by the parties.

[10] The Plaintiff landlord argues that by vacating the premises and no longer paying rent, Woodlawn breached the lease. The Defendant TPL says it had cause to vacate the premises and that it gave notice to the landlord.

[11] The Defendants argue that this is a dispute between the parties to the original lease or their successors, and that Michael D. Sutton and Sutton Holdings should not be parties to the Action.

[12] The Plaintiff has pleaded that the tenant did not have cause to vacate the premises, and that, to the contrary, the tenant made a calculated business decision to terminate its business at that location. The Plaintiff further pleads that the tenant TPL was in essence only a "shell company" which was rendered insolvent by the actions of Michael D. Sutton and/or Sutton Holdings, and that this was done intentionally, to frustrate the Plaintiff's ability to realize upon damages arising from the tenant's breach of the lease.

[13] The Plaintiff has pleaded that Michael D. Sutton is the "controlling mind" of Sutton Holdings , TPL, and Woodlawn. At the hearing, the Plaintiff appeared to argue this on the basis of agency or the doctrine of piercing the corporate veil (the "controlling mind"/"alter ego" theory).

[14] The Plaintiff specifically pleaded that Sutton Holdings and Michael D. Sutton therefore committed:

1. The Tort of Conspiracy, by transferring the business of TPL/Woodlawn from the Woodlawn premises to a new location owned by Sutton Holdings in such a way as to leave TPL insolvent and unable to meet its obligation to pay rent or accelerated rent to the Plaintiff, or to meet its other contractual obligations under the lease; the Plaintiff notes that the new location, at 120 Main Street, Dartmouth (the Westphal Clinic) also violated a noncompeting business clause, being within a one mile radius of the Plaintiff's premises that were rented to Woodlawn/TPL in 1995;
2. Breach of the *Assignments and Preferences Act* R.S.N.S. 1989, c. 25 and the *Statute of Elizabeth* 1571 (Eng.) 13 Eliz. 1 c.5, by transferring the business of Woodlawn to the Westphal Clinic and rendering TPL insolvent;
3. Intentional interference with economic relations between the landlord and tenant Woodlawn/TPL by causing Woodlawn/TPL to renege on its lease obligations with the Plaintiff, and relocate its Woodlawn clinic to Westphal.

[15] The Plaintiff pleads that the Court should find Michael D. Sutton personally liable for the wrongs of TPL and Sutton Holdings because there is a relationship of agency between the principal Michael D. Sutton and those companies, or, alternatively, they are merely the "alter ego" of Michael D. Sutton, the "controlling mind."

[16] At the hearing the Plaintiff argued that there are two key facts that tie Mr. Sutton and Sutton Holdings to the breach of the lease herein:

1. The fact that 14 months before the termination date of the lease, the Woodlawn clinic was effectively moved to the 120 Main Street Westphal location, which premises were owned by Sutton Holdings;
2. That Michael D. Sutton is the "controlling mind" of all the relevant companies involved in the breach of the lease alleged.

[17] As to its position regarding agency or "piercing the corporate veil", the Plaintiff argues the material facts in dispute include:

1. The extent of control of the various corporations by Michael D. Sutton;
2. Whether Michael D. Sutton or Sutton Holdings directed a wrongful or unlawful thing to be done, going to the alleged conspiracy, violation of the *Assignments and Preferences Act* and the *Statute of Elizabeth*, and the intentional interference with economic relations.

[18] Further, in relation to the pleaded causes of action against Michael D. Sutton and Sutton Holdings, Plaintiff's counsel argues that the material facts in dispute include:

1. Whether Woodlawn/TPL were in violation of article 16.3 of the lease regarding the one mile "radius restriction" by opening the Westphal clinic;
2. The terms of the rental arrangement between Woodlawn/TPL and Sutton Holdings regarding the Westphal location in the immediate aftermath of Woodlawn/TPL vacating the Woodlawn location, specifically, whether it was a "sweetheart" deal?

[19] The Defendants argue in response that before TPL left the Woodlawn clinic premises, its corporate business plan entailed opening further clinics in different neighborhoods in the area around the Woodlawn Staples Shopping Center in order to create a market saturation and prevent competition with that group of companies. The Westphal clinic was one such location, and was contemplated to open independent of what happened at the Woodlawn location. Thus, there was no plan to close the Woodlawn location, but only to add additional locations to protect it from competition. Moreover, the new facility at 120 Main Street, Dartmouth (the Westphal clinic) was to be "collaborative" to all other TPL locations and would not be "competing" *per se* with the Woodlawn clinic. Furthermore, the Defendants say, the new location is not within the one-mile radius contemplated by the original lease agreement.

[20] In the alternative, the Defendants say that Michael D. Sutton was told in 1989, and again in 1990, by representatives of the landlord that clause 16.3 the one-mile radius noncompetition clause) was unintended boilerplate language inserted into the lease that did not apply to the tenant, Woodlawn/TPL, since its lease payments were not predicated upon a percentage of sales, which is typically when such noncompetition clauses are relied upon by landlords.

[21] The Defendants also argue that TPL was not insolvent at the time notice was given to terminate the lease, nor is it insolvent at this point in time.

[22] The Defendants also say there is no evidence to support the claim that individually or together, Sutton Holdings or Michael D. Sutton supported or assisted TPL to breach its obligations; nor is there any evidence of an attempt to "defeat, hinder, delay or prejudice" any creditors.

Is this Motion "premature"

[23] There is an order on file dated April 8, 2014 in which Justice Hood ordered that "the defendant shall produce their affidavit disclosing documents, including the documents listed in schedule "A" to this order by April 30, 2014."

[24] Under the *Civil Procedure Rules* 1972, Rule 13.02 contained "an over-arching inherent jurisdiction to refuse summary judgment", which could be relied upon to avoid premature summary judgment orders. That jurisdiction has not been expressly retained in the new *Civil Procedure Rules*, as noted in *Coady v. Burton Canada Company*, 2013 NSCA 95, at paragraphs 68 – 86. Justice Saunders said for the majority, however that, "[i]f the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to 'put its best foot forward', then the motions judge should

adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end." (Paragraph 87 item 7).

[25] Although the Plaintiff claimed that the Defendants are in violation of the order of Justice Hood regarding disclosure, the Defendants submit that they have provided everything the order required. They say the Plaintiff has requested documents that do not exist, and have never existed.

[26] At the commencement of the hearing, Plaintiff's counsel indicated that, with the excision from Mr. Sutton's May 16th affidavit of Exhibits 1 and 9, and the associated paragraphs, they were prepared to proceed with the hearing

Applicable Law

[27] This motion is governed by *Rule* 13.04. *Rule* 13.04(1) reads, in part:

> 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.

[28] That *Rule* has been authoritatively commented upon by the Court of Appeal in *Coady, supra, per* Saunders J.A. for the majority and more recently in *Symington v. Halifax (Regional Municipality),* 2013 NSCA 152, *per* Saunders J.A.

As is the case here, both of these cases involved defendants seeking summary judgment on evidence. It is therefore instructive to recall Justice Saunders words in *Coady*:

> **87** Before turning to the final issue raised on appeal, I wish to provide a quick summary of the law as it presently stands in Nova Scotia concerning summary judgment litigation. From the jurisprudence to which I have referred as well as the case law cited therein, a series of well-established legal principles have emerged. I will list these principles in the hope that their enumeration will serve as a helpful checklist or template to guide counsel and judges in their application. In Nova Scotia:
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> 1. Summary judgment engages a two-stage analysis.
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> 2. The first stage is only concerned with the facts. The judge decides whether the moving party has satisfied its evidentiary burden of proving that there are no material facts in dispute. If there are, the moving party fails, and the motion for summary judgment is dismissed.
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> 3. If the moving party satisfies the first stage of the inquiry, then the responding party has the evidentiary burden of proving that its claim (or defence) has a real chance of success. This second stage of the inquiry engages a somewhat limited assessment of the merits of the each party's respective positions.
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> 4. The judge's assessment is based on all of the evidence whatever the source. There is no proprietary interest or ownership in "evidence".
>
> 5. If the responding party satisfies its burden by proving that its claim (or defence) has a real chance of success, the motion for summary judgment is dismissed. If, however, the responding party fails to meet its evidentiary burden and cannot manage to prove that its claim (or defence) has a real chance of success, the judge must grant summary judgment.
>
> 6. Proof at either stage one or stage two of the inquiry requires evidence. The parties cannot rely on mere allegations or the pleadings. Each side must "put its best foot forward" by offering evidence with respect to the existence or non-existence of material facts in dispute, or whether the claim (or defence) has a real chance of success.

> 7. If the responding party reasonably requires disclosure, production or discovery, or the opportunity to present expert or other evidence in order to "put his best foot forward", then the motions judge should adjourn the motion for summary judgment, either without day, or to a fixed day, or with conditions or a schedule of events to be completed, as the judge considers appropriate, to achieve that end.
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> 8. In the context of motions for summary judgment the words "genuine", "material", and "real chance of success" take on their plain, ordinary meanings. A "material" fact is a fact that is essential to the claim or defence. A "genuine issue" is an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded. A "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation.
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> 9. In Nova Scotia, CPR 13.04, as presently worded, does not create or retain any kind of residual inherent jurisdiction which might enable a judge to refuse to grant summary judgment on the basis that the motion is premature or that some other juridical reason ought to defeat its being granted. The Justices of the Nova Scotia Supreme Court have seen fit to relinquish such an inherent jurisdiction by adopting the Rule as written. If those Justices were to conclude that they ought to re-acquire such a broad discretion, their Rule should be rewritten to provide for it explicitly.
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> 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
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> 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
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> 12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

[29] In a nutshell then, *Rule* 13.04 (Summary Judgment on Evidence) requires the following analysis:

Step 1

[30] The issue at Step 1 is simply whether there are material facts in dispute.

A – On a Plaintiff's Motion

[31] The Plaintiff has to put forward an evidentiary basis from the plaintiff's or defendant's evidence tendered: *2420188 Nova Scotia Ltd. v. Hiltz,* 2011 NSCA 74, at paras. 15 and 25, per Fichaud J.A. the Majority. The Plaintiff must establish that there are no material facts (including mixed fact and law matters) in dispute in relation to its claim, which if considered alone, would prove each element of the cause of action specifically in issue; see also *MacNeil v. Bethune* 2006 NSCA 21, at paras. 31-33.

B – On a Defendant's Motion

[32] The Defendant has to put forward an evidentiary basis, from the plaintiff's or defendant's evidence tendered, showing there are no material facts in dispute in relation to its defence to the claim as defined by the pleadings: *Hiltz, supra*; **or** in other words, that the Defendant has shown on the undisputed material facts, on a *prima facie* basis, the absence of a valid claim - *MacNeil v. Bethune, supra, at para. 31*.

Step 2

[33] If there are no disputed material facts after Step 1, the analysis moves to Step 2. At this step , one assesses the "relative merits of the parties positions" in a limited way in order to determine whether there is an evidentiary basis on undisputed material facts, that the claim or defence, as the case may be, has a "real chance of success": *Coady, supra,* at para. 42. The responding party has the evidentiary burden on this issue.

[34] As Saunders J.A. put it in *Coady* at paras. 42 and 44:

> The judge is required to take a careful look at the whole of the evidence and answer the question: has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success… Is there a reasonable prospect for success on the undisputed facts?

[35] Under *Rule* (2009) 13.04(2) a court may allow "partial" summary judgment.

[36] Until the *Civil Procedure Rules* (1972) were amended in 2002, defendants could not avail themselves of summary judgment: *United Gulf Developments Ltd. v. Iskander* , 2004 NSCA 35, per Roscoe, J.A., at para. 6. Once defendants became so eligible in 2002 under the amended Rule, that reality caused Justice Roscoe to state her view that "it is not possible to mirror the usual test for a plaintiff on a

summary judgment application where a defendant brings the motion.": *Iskander* at para. 9.

[37] The comments of the Court in *Iskander* provide a useful background to understanding Defendants' motions for summary judgment on evidence under *Rule* 13.04.

[38] Justice Roscoe went on to comment on Rule 13 (1972), stating as follows:

> **5** Civil Procedure Rule 13 was amended in 2002 to permit a defendant to apply for summary judgment. Previously, a summary judgment application was only available to plaintiffs. The amended Rule states:
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> > 13.01. After the close of pleadings, any party may apply to the court for judgment on the ground that:
> >
> > > (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
> > >
> > > (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
> > >
> > > (c) the only arguable issue to be tried is as to the amount of any damages claimed.
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> **6** Jurisprudence under the former Rule established that summary judgment may be granted where the plaintiff can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried. (*Bank of Nova Scotia v. Dombrowski* (1977), 23 N.S.R. (2d) 532 (S.C.A.D.) at 537; *Oceanus Marine Inc. v. Saunders*, (1996), 153 N.S.R. (2d) 267 (C.A.) at para. 15.) The "no arguable issue" standard has been incorporated into the new Rule.
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> **7** Since the new Rule has been in effect, two applications by defendants for summary judgment in the Supreme Court of Nova Scotia, have concluded with reported decisions which discuss the appropriate test: *Binder v. The Royal Bank* [2003] N.S.J. No. 304 (Q.L.) 2003 NSSC 174 (under appeal) and *Eikelenboom v.*

Holstein Assn. of Canada [2003] N.S.J. No. 479 (Q.L.); 2003 NSSC 241. It appears that the same test was applied in those two cases as that used in the decision under appeal. In the *Binder* case Justice Moir traced the history of the Rule, compared the new Rule to that in other jurisdictions and at para 7 set out the appropriate test on an application for summary judgment:

> 7 Now any party may apply for summary judgment. And, the express standard picks up something of the approach adopted by the courts under the old rule. Now, the application is made on the ground that "there is no arguable issue to be tried with respect to the claim": 13.01(a) or "there is no arguable issue to be tried with respect to the defence": 13.01(b). In my opinion, no substantive distinction can be made between "no genuine issue for trial" and "no arguable issue to be tried". Thus, the approach adopted by the Supreme Court of Canada in *Hercules* and in *Guarantee Company of North America* applies to summary judgment applications before this Court. The applicant must meet a threshold. Generally, that threshold is met when the case is such that the Court should properly inquire into the presence or absence of a genuine issue (*Hercules*, para. 5 and 15), which I would equate with a reasonably arguable issue. Specifically, the threshold is met in cases where "there is no genuine issue of material fact requiring trial" (*Guarantee Company of North America*, para. 27, emphasis added). Once the threshold is met, the respondent is required to show a real chance of success in its claim or defence. This is not much different from the approach we are used to and, like it, this approach places incentive on both parties to produce evidence justifying their positions.

8 In the case under appeal, Justice Moir employed the same test stating it in the following terms:

> Starting with *Carl B. Potter Limited*, Nova Scotia developed an approach to plaintiff's summary judgment applications by which the plaintiff was required to clearly prove the claim. Then the defendant was called upon to demonstrate a point reasonably to be presented in defence.
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> In my opinion, it is not possible to appropriately mirror this approach in situations where the defendant applies for summary judgment. Rather, the approach suggested by the Supreme Court of Canada in the decisions of *Guarantee Company of North America* at para. 27, and *Hercules Management* at para. 15 are of guidance at least in defendants' applications in this province.
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> The Court will consider summary judgment only where the moving party establishes that, "there is no genuine issue of material fact

> requiring trial," and that that threshold having been met by the applicant, the respondent fails to, "establish his claim as being one with a real chance of success."
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> **9 I agree with Justice Moir that it is not possible to mirror the usual test for a plaintiff on a summary judgment application where a defendant brings the motion. I agree as well, that there is no appreciable difference between the standard of no genuine issue, and no arguable issue. 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:**:
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> > 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).
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> **10** The Rule now allows a defendant to bring the application. This rectifies those cases in which the courts were prevented from interfering where a plaintiff's claim disclosed a reasonable cause of action, but a defendant had what appeared to be a defence to which the plaintiff had no arguable response. For example, in *Sherman v. Giles* [1994] N.S.J. No. 572 there was probably a compelling defence of Crown immunity.
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> [my emphasis]

[39] Two further aspects of this case are of significance to the analysis: the fact that the primary defence is one of denial, with the Defendants claiming to have no involvement with the pleaded causes of action; and that the Plaintiff seeks to hold an individual personally liable for the wrongful actions of corporate persons.

[40] In that respect an earlier decision of our Court of Appeal is particularly helpful: *Globex Foreign Exchange Corporation v. Launt,* 2011 NSCA 67. Pursuant to three contracts, a numbered company (the company) entered into three contracts with Globex for the purchase of approximately £1.2 million at pre-agreed exchange rates. Launt was the sole director and shareholder in the company. The company had not carried on any business in the preceding four years, nor did it have any assets except approximately $125,000 that Launt advanced to it for the currency trades. In furtherance of the contracts, Globex purchased the pounds sterling. The company refused to complete the contracts. Globex sold the currency back to the market at a loss of approximately $90,000. Globex commenced an action against the company and Launt . Globex alleged in its pleadings that "… At all relevant times [the company] was Launt's duly authorized agent, servant or employee".

[41] In defence of the summary judgment motion brought by Globex, Mr. Launt filed his own affidavit. In it he stated that he had read the statement of claim and:

> a) At no time did I ever indicate or state to any employee or agent of the plaintiff that the defendant [company] was entering into any agreement with the plaintiff as my agent;

> b) The defendant [company] was not my agent for that or any other purpose;
>
> c) I have not received any money from the plaintiff, and to the best of my knowledge and belief neither has the defendant [company].

[42] The chambers judge granted summary judgment effectively removing Mr Launt as a defendant. The majority of the Court of Appeal reversed that result. They held that the defendant Launt had not satisfied the first part of the summary judgment on evidence test. They concluded that the chambers judge "erred in approaching her task as if she were to determine on the evidence before her whether an agency relationship existed between Launt and [the company], rather than determining whether there was a material fact in issue requiring a trial." (para.17).

[43] Justice Bryson in dissent, conceded that:

> Notwithstanding some infelicitous language… Her focus on determining a lack of agency was misplaced – but that determination really assumes that there was no evidence raising a material issue of agency. Mr. Launt discharged the initial evidentiary onus on him of showing that Globex's claim had no merit. Globex failed to lead evidence that would show it had a real chance of success." (para. 89)

[44] Thus the Majority and Justice Bryson differed in their reading of the chambers judge's decision in relation to the first stage of the summary judgment on

evidence test. At that stage the onus is on the moving party to establish that there are no material facts in dispute. The Majority said:

> Although Launt was unsuccessful on this summary judgment motion, I am not deciding or suggesting that a party can never be successful on a summary judgment motion where agency is alleged and pleaded. I'm deciding that the facts, as set out in the affidavit evidence submitted in this case, are insufficient for satisfying the first part of the summary judgment test.

[45] Both the Majority (para. 19) and Justice Bryson (paras. 49 and 50) agreed that whether an agency relationship exists is a question of fact. Agency was the only legal basis that Globex asserted in its effort to implicate Launt. In the case at Bar the Plaintiff appears to advance both agency and a "piercing the corporate veil" argument.

[46] In Justice Bryson's opinion, it is important to maintain this distinction:

> Nevertheless, in exceptional circumstances the court may infer an agency where it might also "lift the corporate veil". Globex does not primarily rely on this latter argument. But some of Globex's authorities mention it, because lifting the corporate veil is associated in those cases with an inference of agency. They consider agency and piercing the corporate veil together, although they are legally distinct. In *Dumbrell v. Regional Group of Companies Inc.* 2007 ONCA 59 at para. 80, the Ontario Court of Appeal explained:
>
> > The concepts of piercing the corporate veil and holding that a corporation acts as an agent for the individual who controls that corporation achieve the same result in that they both impose personal liability for what appear to be corporate actions. They achieve that result, however in different ways. The agency relationship assumes that the corporation and the controlling mind are distinct, but that on the relevant facts the former

> acted as agent for the latter. Piercing the corporate veil it ignores the legal persona of the corporation… [para. 54]

[47] Regarding the law, I will quote Justice Bryson at length because his reasoning permits a contrast to that of the Majority:

> **55** In *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2 (Q.L.) at para. 12, Justice Wilson discussed piercing the corporate veil:
>
> > **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. ...
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> **56** Kosmopoulos claimed an insurable interest in the goods of his company which had been lost in a fire. He was the sole shareholder and directing mind of his company. Although he succeeded on other grounds, the Supreme Court of Canada declined to lift the corporate veil in order to "do justice" to Mr. Kosmopoulos. Justice Wilson discussed the perils of doing so:
>
> > **14**. ... <u>If the corporate veil were to be lifted in this case, then a very arbitrary and, in my view, indefensible distinction might emerge between companies with more than one shareholder and companies with only one shareholder</u>: for a recent comment on the arbitrary and technical distinctions that would be created by lifting the corporate veil in this case, see Jacob S. Ziegel, "Shareholder's Insurable Interest -- Another attempt to scuttle the *Macaura v. Northern Assurance Co.* Doctrine: *Kosmopoulos v. Constitution Insurance Co.* (1984), 62 *Can. Bar Rev*. 95, pp. 102-03. In addition, it is my view that if the application of a rule leads to a harsh justice, the proper course to follow is to examine the rule itself rather than to affirm it and attempt to ameliorate its ill effects on a case-by-case basis. [Emphasis added.]
>
> **57** Two points about *Kosmopoulos* warrant special attention. First, the Supreme Court was not prepared to lift the corporate veil in that case and was not prepared to entertain a distinction between single shareholder and multi shareholder corporations. Second, Canadian jurisprudence since then has not embraced the

rather loose language quoted by Justice Wilson from the 4th ed. of Gower, at para. 12 of *Kosmopoulos*. For example, in *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.*, [1989] B.C.J. No. 1032 (B.C.C.A.), after referring to para. 14 of *Kosmopoulos* and the Gower quotation, said this:

> Professor Welling in *Corporate Law in Canada* (Toronto: Butterworths, 1984) put it more firmly. He referred to the American cases that apply the fair play rationale and said (at p. 129):
>
> > Little need be said about this rationale, other than that it simply will not do. There are, so far as we know, no such broadly enforceable standards of "fair play and good conscience," at least in Canadian corporate law.

58 Mere evidence of control of a company by an individual shareholder or small group of shareholders does not give rise to an inference of an agency relationship. In *Edgington v. Mulek Estate*, 2008 BCCA 505 (Q.L.), at para. 20 the British Columbia Court of Appeal said:

> **20** ... Shareholders, despite being in a position of control, do not, as a rule, incur liability for the breach of their corporation's contractual obligations. It is not a matter of control; the shareholders of a closely held company like Westpark invariably have control of the company.

59 In *642947 Ontario Ltd. v. Fleischer*, [2001] O.J. No. 4771 (Q.L.), the Ontario Court of Appeal considered potential personal liability of two shareholders. At para. 68, Laskin J.A. said:

> **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.* (1986), 28 O.R. (3d) 423 at 433-34 (Ont. Ct. (Gen. Div.)), aff'd [1997] O.J. No. 3754 (C.A.): "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." [Emphasis added.]

60 The law is clear that the use by a sole shareholder of his corporation to shield himself from personal liability is not wrongful. In most cases that is business as usual. Nor is it wrongful to do business with third parties when the corporation has limited assets or means to pay. There must be more. At the very least, there must be some kind of improper conduct, or "unique circumstances", (per Saunders J.A., in *White*, para. 47: para. 65 below).

61 In *Sutherland (Robert D.) Architects Ltd. v. Montykola Investments Inc. et al.* (1995), 142 N.S.R. (2d) 137 (rev'd on other grounds, [1996] N.S.J. No. 169), Justice Gruchy also considered Justice Wilson's *dicta* in *Kosmopoulos* and Davison J.'s analysis of the law in *Lockharts Ltd. v. Excalibur Holdings Ltd. et al.* (1987), 83 N.S.R. (2d) 181, when lifting the corporate veil for the benefit of an innocent third party. Justice Gruchy noted para. 36 of *Lockharts*, where Justice Davison said this:

> **[36]** What can be drawn from the foregoing authorities? In my assessment, the fundamental principle enunciated in the **Salomon** case remains good law in Canada and "one man corporations" should be considered as separate entities from their major shareholder save for certain exceptional cases. A judge should not "lift the veil" simply because he believes it would be in the interest of "fairness" or of "justice". If that was the test the veil in the **Salomon** case would have been lifted. On the other hand the courts have the power, indeed the duty, to look behind the corporate structure and to ignore it if it is being used for fraudulent or improper purposes or as a "puppet" to the detriment of a third party.
>
> **[37]** One of the fundamental purposes of establishing a corporate existence is to limit the liability of the shareholders. In doing so, growth of commerce is encouraged by providing a vehicle by which monies can be invested with the knowledge that losses would be restricted to an amount usually equivalent to the extent of the investment.
>
> **[38]** The purpose of the corporate entity was not to defraud or mislead others including creditors and shareholders and in my opinion where a company is being used for this purpose the "veil" should be lifted and a remedy made available to the victims of such conduct. [Emphasis added.]

62 Justice Gruchy went on to lift the corporate veil in *Sutherland* because individual shareholders of Montykola stripped its assets and diverted those assets to themselves after entering into business with the plaintiff. Justice Gruchy was satisfied that they did so in order to frustrate recovery by the plaintiff.

63 In support of its position, Globex relies on a number of cases which can be readily distinguished. First, Globex refers to *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167 for the proposition that courts will lift the corporate veil even where there is no fraud, deceit or improper purpose. In *White*, Justice Saunders said this about the instances when the corporate veil can be lifted:

> [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.

64 In *GmbH*, Justice Murphy was quoting from J. Anthony VanDuzer, *The Law of Partnerships and Corporations* (Concord: Irwin Law, 1997), p. 100, where Professor VanDuzer said:

> **4) Agency**
>
> The third basis on which courts have purported to disregard separate corporate personality is by finding that the corporation is merely acting as the agent of someone else. Conceptually, the corporate form is not disregarded by a holding that it is an agent. Rather, the business of the corporation or whatever activity gives rise to the claim by a third party is determined to be carried on not by the corporation directly, but only as an agent of the controlling shareholder. The courts often use evocative but ultimately unhelpful language to describe the corporation -- for example, "sham," "cloak," "conduit," or "alter ego."
>
> The main test for the existence of this peculiar form of agency is whether there is extensive control by the shareholder over corporation. The factors referred to in *Smith, Stone and Knight Ltd. v. Birmingham Corp.* are almost universally cited as those relevant to a determination whether agency exists:
>
> * Were the profits treated as profits of the shareholder?
>
> * Was the person conducting the business appointed by the parent company
>
> * Was the shareholder the head and brain of the trading venture?
>
> * Did the shareholder govern the adventure and decide what should be done and what capital should be committed to the venture?
>
> * Did the shareholder make the profits by its skill and direction?

* Was the shareholder in effectual and constant control?

65 As will be readily apparent from the discussion which follows, the first proposition of *Smith, Stone & Knight* does not apply in this case. And in *White*, the court was prepared to lift the corporate veil and find an agency relationship existed in "unique circumstances". Those circumstances were: Mr. White had a licensing agreement with a manufacturing company for the payment of patent royalties on product sales. Subsequently a sales company was incorporated to effect sales to the public. The manufacturing company sold to the sales company which in turn sold to third party customers. The question was whether royalties should be paid on the wholesale price from the manufacturing company to the sales company or on the third party sale price to the public by the sales company. Both the manufacturing and sales companies were controlled by the same shareholder. The companies' own lawyer described the sales company as an "agent" of the manufacturer. In these special circumstances the court was prepared to treat both companies as one and to base royalty payments on the prices charged by the sales company to third parties. Nothing like these "unique" circumstances is alleged in this case.

66 Then Globex refers to the case of *Provincial Electric (1969) Ltd. v. Registered Holdings Ltd.*, [1977] N.S.J. No. 731, where the county court said that a corporation can be an agent for an undisclosed principal where that corporation is used "solely as a front for what are essentially the acts and operations of the principal shareholder" (para. 14). In the absence of analysis and relevant authorities, that quotation is unhelpful and unpersuasive. The real question is in what *circumstances* the court will come to that conclusion. We do not know how the result in *Provincial Electric* was "flagrantly opposed to justice, convenience or the interests of the Revenue" (*Kosmopoulos*, para. 12).

67 Globex also relies on *Clarkson Co. Ltd. v. Zhelka et al.*, [1967] 2 O.R. 565 for the proposition that a corporation can be an agent for a controlling shareholder who is the real "entity liable on the transaction". But the following quotation from *Zhelka* shows what is crucial there (p. 10):

> **80** If a company is formed for the express purpose of doing a wrongful or unlawful act, or, if when formed, those in control expressly direct a wrongful thing to be done, the individuals as well as the company are responsible to those to whom liability is legally owed. [Emphasis added.]

The hallmark of *Zhelka* is wrongful conduct.

68 Finally, Globex relies on the doctrine of "alter ego" and refers to *Buanderie centrale de Montréal Inc. v. Montreal (City)*, [1994] 3 S.C.R. 29 for the proposition that a corporation may simply be the agent for its shareholder where the business done by the corporation is really that of agent for its shareholder(s).

However, it is important to remember that *Buanderie* is a tax case. Many of the cases that use the language of alter ego are tax cases; even so, the alter ego argument was not always successful (ie. *Aluminum Company of Canada Ltd. v. City of Toronto*, [1944] S.C.R. 267; *City of Halifax v. Halifax Harbour Commissioner*, [1935] S.C.R. 215; *Toronto (City) v. Famous Players' Canadian Corp. Ltd.*, [1936] S.C.R. 141). These cases fall squarely into the exception noted by Justice Wilson in *Kosmopoulos* that the corporate veil will be lifted when it is "contrary to the interests of the revenue." Many of the more recent cases rely upon the English decision of *Smith, Stone & Knight Ltd. v. Birmingham Corp*., [1939] 4 All E.R. 116 (K.B.) where Justice Atkinson listed six factors which were said to be relevant in determining whether or not it is appropriate to ignore the independence of a subsidiary corporation, (see para. 64, above).

69 *Smith, Stone & Knight Ltd.* was applied by the Newfoundland Court of Appeal in *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1995] N.J. No. 150 at para. 44. In declining to lift the corporate veil, the Newfoundland Court of Appeal specifically referred to the English decision of *Adams v. Cape Industries*, [1990] Ch. 433 (C.A.) at 544, and endorsed that court's refusal to accept:

> **49** [A]s 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, the right to use a corporate structure in this manner is inherent in our corporate law.

70 Likewise, in *Gregorio v. Intrans-Corp. et al.* (1994), 18 O.R. (3d) 527, at 536-537, the Ontario Court of Appeal rejected the idea that a wholly owned subsidiary could be found the alter ego of its parent in the normal course. The court said:

> ... Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights: see *Pauley Petroleum Inc. v. Continental Oil Co*., 239 A.2d 629 (Del.); *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70; *Aluminum Co. of Canada v. Toronto (City)*, [1944] S.C.R. 267, [1944] 3 D.L.R. 609. [Emphasis added.]

> It is obvious that a finding of agency on conventional grounds is impossible here. **A finding of agency based by analogy on "lifting the corporate veil" requires either wrongful conduct by Mr. Launt or exceptional circumstances. Neither is alleged or in evidence here.** [my emphasis]

[48] The Majority in *Globex* also cite the Ontario Court of Appeal decision in *Dumbrell, supra*, at para. 80, but went on to say:

> **22 However, few courts distinguish between the two scenarios**. **Our Court has said that the corporate veil may be pierced where a corporation is a mere agent or puppet of a shareholder**. In *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167 there is an extensive review of the law and it provides a good summary of the relevant cases. I will quote extensively from the judgment of Saunders, J.A.:
>
> > [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.**, [1897] A.C. 22 (H.L.). 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**, [1987] 1 S.C.R. 2, where Wilson, J. stated at para. 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. 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. [Underlining in original]
> >
> > 49 At the hearing before us 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.** With respect, I think that submission invites a far too restrictive approach, implying that only the most egregious or criminally unlawful circumstance will entitle a court to lift the corporate veil. **I do not understand that to be the law.**
>
> [my emphasis]

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:

> ... 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] N.S.J. No. 140, 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.

[My emphasis]

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] S.C.R. 267, 1944 CarswellOnt 71 (S.C.C.), at paras. 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.

23 A determination of whether an agency relationship exists requires a contextual analysis. The case law, as reviewed by Saunders, J.A. in *White, supra*, shows that there are a few settled legal principles. The cases turn on their facts and what may militate in favour of piercing the corporate veil or finding an agency relationship in one context may not have the same affect in another. This point was also recognized by Laskin, J.A. in *642947 Ontario Ltd. v. Fleischer*, [2001] O.J. No. 4771 (Lexis) (C.A.) where, again, after a thorough review of the law he concluded:

> 69 These authorities indicate that the decision to pierce the corporate veil will depend on the context. They also indicate that the separate legal personality of the corporation cannot be lightly set aside. Yet, however restrictive corporate law principles for piercing the corporate veil may be, in the context of an undertaking to the court, the trial judge's findings support going behind Sweet Dreams and imposing personal liability.

24 The decision to pierce a corporate veil is often discussed in the context of cases where there are allegations of fraud on the part of the shareholders or parties affiliated in some way with the corporation. However, as was made clear by Saunders, J.A. in *White, supra*, a party's conduct does not have to rise to the level of fraud or criminal wrongdoing before the courts will pierce the corporate veil. (*White, supra*, para. 49).

25 I have discussed the case law in some detail to illustrate that a finding of a relationship of agency is highly contextual and fact driven. I will now return to what I consider to be the trial judge's error in this case.

26 In her decision she sets forth the evidence as follows:

> [8] Launt deposes in his affidavit that at no time did he advise the plaintiff that Numberco was entering into any agreements as agent for him, nor was Numberco ever his agent for any purpose.

> [9] There is no evidence before the court documentary or otherwise, which would demonstrate that Launt was ever a party to the contracts in question or that he offered to guarantee the contracts or did he provide any guarantees for payment.
>
> [10] To this end, the court is left with the bare allegations made by counsel for Globex in submissions, but there are no facts pleaded in the statement of claim to support his contention.

27 I pause here to point out that although the Chambers judge found that there were no facts pleaded in the statement of claim to support the contention, the allegation of agency is itself an allegation of fact. The evidence before her to support the allegation of fact was that Numberco was a shell company, did not have any assets, and its ability to enter into the contract was as a result of monies provided to it by Launt. However, the Chambers judge does not analyze the evidence to determine whether it raises an arguable issue. She analyses it to determine the ultimate issue:

> [18] That is exactly the situation in this case. Globex contracted with Numberco. <u>There is no reason to lift the corporate veil on the basis of the evidence before me.</u>
>
> [19] <u>The defendant Launt has in my view demonstrated clearly that he was not the principal in the transactions as alleged, nor was Numberco his agent for any purpose</u>. Launt has demonstrated to my satisfaction that there is no genuine issue of material fact requiring trial. [My emphasis]

28 The Chambers judge is making the determination of whether it would be appropriate to find an agency relationship on the evidence before her. As I expressed earlier, it is not the function of the Chambers judge on a motion for summary judgment, to determine matters of fact or mixed law and fact which are in dispute. The evaluation of credibility, the weighing of evidence and the drawing of factual inferences are functions for the trial judge. The Chambers judge here did all three. She reviewed the evidence, determined, by inference, that Launt was credible in his affidavit evidence and "demonstrated" he was not the principal in these transactions. She then made the finding that an agency relationship did not exist between Launt and Numberco. Again, with respect, that was not her function.

29 In certain circumstances, a Chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts. *Guarantee v. Gordon*, *supra*, para. 30. However, that is not the situation here. This is not a situation where there is a full factual record with no material facts in dispute. Whether the agency relationship existed is in itself a finding of fact, whether to lift the corporate

> **veil involves considerations of whether the failure to do so would be unfair and lead to a result "flagrantly opposed to justice" and/or whether this was a situation where the corporation is merely the puppet of Launt. It is not simply a matter of looking at the denial of Launt that Numberco was not acting as his agent**.
>
> **30** To illustrate further, there is no explanation in the affidavit evidence of Launt as to how it was that Numberco was going to fund the purchase of the contracts, nor is there any explanation for why the transactions did not close; or is there any evidence why a shell company with no assets was entering into the contracts with seemingly no ability to close the transaction. No explanation is given for the business reason or rationale for having Numberco enter into the contracts. The evidence does not disclose what business, if any, had been transacted by Numberco in the past. These are just some of the issues that may be considered by a trial judge with a full factual record in determining whether an agency relationship exists. **I am not satisfied that Launt has satisfied the first part of the test on the evidence submitted.** The prerequisites for summary judgment have not been met. The Chambers judge, by misdirecting herself on her ultimate task, failed to properly analyze the evidence to determine whether there was a material fact which required determination at trial.
>
> **31** Where there is a disputed issue of material fact involving a comparison of parties' respective evidence and positions, as was done by the Chambers judge in this case, it is not a proper case for summary judgment. **The fact in dispute is not an incidental fact, it involves consideration of whether an agency arrangement existed. That fact is essential to the plaintiff's claim.** A proper approach would have focussed the Chambers judge on the ultimate issue as to whether Launt had met the requirements of the first stage of the summary judgment test. Had she done so, the result would have been different.
>
> **32 Although Launt was unsuccessful on this summary judgment motion, I am not deciding or suggesting that a party can never be successful on a summary judgment motion where agency is alleged and pleaded.** I am deciding that the facts, as set out in the affidavit evidence submitted in this case, are insufficient for satisfying the first part of the summary judgment test.
>
> [my emphasis]

Analysis

[49] In essence the Defendants argue that none of the pleaded causes of action as against Michael D. Sutton or Sutton Holdings should survive this motion.

[50] First I must ask myself whether the Defendants have established that there are no material facts in dispute regarding their defence of "no involvement", or in other words do the undisputed material facts show on a *prima facie* basis the absence of a valid claim?

[51] Have the Defendants shown in particular that there are not in dispute the material facts that underlie ??? by the Plaintiff of lifting of the corporate veil – i.e. wrongful conduct by Mr. Sutton; or the corporation is merely a "puppet" for Mr. Sutton; or where failure to do so would lead to a result "flagrantly opposed to justice"?

[52] **The tort of conspiracy** – Duncan, J. discussed the scope of the tort of conspiracy in *Cherubini Metal Works Limited v. Nova Scotia (Atty. Gen.)* 2009 NSSC 386, at paras. 375-376, varied on other grounds, 2011 NSCA 43. To be successful at trial the Plaintiff must establish all the following material facts:

> i-that the defendants agreed and combined to act unlawfully;
>
> ii-that the plaintiff suffered harm;
>
> iii-that harm to the plaintiff was the predominant purpose or a likely result that was known or ought to be known to the defendants when they undertook to act unlawfully.

[53] In the evidence before me there is no direct evidence of any of these material facts. The Plaintiff is in essence asking me to find there is a sufficient evidentiary basis to infer that these facts are disputed. Therefore, they would argue that all these material facts are in dispute. The moving Defendants argue that an examination of the evidence on this motion leads to the inevitable conclusion that the facts underlying their defence of denial of conspiracy are not in dispute.

[54] On a motion for summary judgment on evidence, inferences can be considered as properly drawn where, as Justice Saunders said in *Coady*, at para. 28, quoting from *Canada (Atty. Gen.) v. Lameman*, 2008 SCC 14:

> The chambers judge may make inferences of fact based on undisputed facts before the court, as long as the inferences are strongly supported by the facts… .

[55] After all, as Justice Saunders noted, the purpose of the rule "is to put an end to claims or defences that have no real prospect of success. Such cases are seen by an experienced judges being doomed to fail" (*Coady* at para. 22).

[56] In this case, there is not a shred of direct evidence to support the allegation that the Defendants agreed and combined to act unlawfully. However, it is argued that this is a case where I should draw such an inference. It would be a rare case where a motions judge should refuse to draw a supportable inference [para. 87 item

10 *Coady* supra]. On the other hand, as Justice Bryson stated in *Globex* at para. 82 in relation to the facts in that case:

> By placing before the court affidavit and documentary evidence of the foreign exchange transactions, Mr. Launt has demonstrated a prima facie case that the exchange transactions occurred between Numberco and Globex and not with him as principal. By doing so, Mr. Launt has displaced his initial burden as moving party. It is legally possible that Numberco could be found an agent of Mr. Launt on one of the exceptional bases discussed in paras. 54-70 above. But it is not Mr. Launt's burden to positively disprove these exceptions. Rather, the burden lies on Globex to offer evidence of exceptional circumstances. Accordingly, Mr. Launt's evidence is sufficient to require Globex to lead the evidence that it has a "real chance of success". So what is that evidence?

[57] I conclude that I could not draw such inferences in the case at Bar. There is no material facts in dispute regarding the Defence.

[58] Going on to Step 2, I note that the Plaintiffs rely upon a May 1st, 2011, email from Mike Sutton to Edith Dalton (Exhibit "E" at page 68 of her affidavit), in which Mr. Sutton states:

> Subject – re-: Staples Woodlawn Plaza
>
> I will try to call you midmorning tomorrow.
>
> I wish to terminate my current lease effective the end of June – without getting into all of the problems I've had with previous property managers and the lies and false promises. **I realize my current lease with one of my shell companies does not expire for another year**, but hope that with a few months' notice, you will be able to find another tenant. [emphasis added]

[59] Mr. Sutton's reference to "my shell company" by itself is ambiguous at best. He was not cross-examined as to what he meant thereby. Moreover, the Plaintiff's evidence via the May 12, 2014, Affidavit of Andrea Isabelle, para. 4, Exhibit "A" contains the "Income Statements" for TPL and Sutton Holdings for the fiscal years 2010, 2011 and 2012. I would not draw an adverse inference that TPL is a "shell" company such as was concluded in *Globex, supra*.

[60] Added to this, the Plaintiff suggests, because Mr. Sutton is a director, president and recognized agent for TPL (which was an amalgamation in 2006 of a number of location specific physiotherapy clinics including "The Physio Clinic – Woodlawn according to Exhibit "B" May 12, 2014, Andrea Isabelle affidavit (Registry of Joint Stocks)) and also for Sutton Holdings, that therefore either by way of agency or as an alter ego/"controlling mind", he caused these companies to conspire against the Plaintiff as pleaded.

[61] In relation to the conspiracy allegation, I conclude that there is no material fact in dispute regarding the pleaded Defence, and that the Plaintiff's claims against Michael D. Sutton and Sutton Holding have no real chance of success.

[62] I dismiss that claim.

[63] **Breach of the Assignments and Preferences Act/Statute of Elizabeth** – The elements are discussed in *Re MacArthur,* 2013 NSSC 157 (Registrar Cregan), at paragraph 20. The three basic material facts which are relevant to this motion are:

> i-did the defendants transfer or receive property in question without valuable consideration at a time when a debt was owed to the plaintiff?
>
> ii-for the purposes of the *Assignments and Preferences Act* only – was this done at a time that the transferor was insolvent?
>
> iii-did the defendants intend to defeat, hinder, or delay the plaintiff by transferring such property?

[64] As with the cause of action in conspiracy, the Defendants plead a general denial (i.e. "no involvement") regarding these two causes of action. There is no direct evidence to support the alleged "involvement" of Michael D. Sutton or Sutton Holdings. It is argued, however, that I should draw such inferences in this motion. I conclude I could not do so based on the evidence presented by the parties.

[65] In his February 4th, 2014, affidavit Mr. Sutton swears at paragraph 14:

> MD Sutton Holdings Limited is not, and has never been, a shareholder of The Physio Clinic Limited or Woodlawn Physio clinic Limited and vice versa. MD

> CSutton Holdings Limited had absolutely nothing to do with the Woodlawn Mall location.

[66] At paragraph 17 he states:

> Michael D. Sutton and MD Sutton Holdings Limited are not guarantors or shareholders of The Physio Clinic Limited or Woodlawn Physio Clinic Limited.

[67] These facts are not in dispute, nor were they brought into dispute by the cross examination of Mr. Sutton – (*Globex* at para. 82 per Bryson J.A.) Furthermore, there is no direct evidence that any property was transferred by the Woodlawn Clinic or received by M.D. Sutton Holdings Limited or Michael D. Sutton; nor that TPL was insolvent at the time.

[68] However, having said that, I acknowledge that the Plaintiff at paragraph 40 of its brief relies upon a claim that:

> The Physio Clinic Limited paid dividends in the amount of $1 million and Mr. Sutton himself referred to the corporation as a "shell company" and cited a "long list of creditors". This was at or near the time when rent was due and owing by The Physio Clinic Limited to the Plaintiff. Thus whether such transfers were made, and with the requisite intent, are material facts in dispute.

[69] For this proposition the Plaintiff relies on Exhibit "C" of the February 10, 2014, Affidavit of Andrea Isabelle. I note that the Plaintiff does not appear to have given specific notice to the Court under Rule 39.06(2) by filing a notice to that effect before the deadline for the Plaintiff to file an affidavit on the motion (May 9, 2014). Nevertheless, the reference to the affidavit is contained in the brief of the

Plaintiff filed May 12th, 2014, and in its attached letter to the Prothonotary. Although the Defendants' representative is not legally trained, and therefore at the hearing I would have normally allowed the reference requested by the Plaintiff, in the interests of justice, I note, however, that para. 5 of Ms. Isabelle's February 10, 2014 affidavit reads:

> By way of correspondence dated February 15th, 2012, the defendant's former counsel, Jeff Aucoin provided Cox and Palmer with the 2011 statement of cash flow of the defendant, The Physioclinic Limited. The true copy of this correspondence and the 2011 statement of cash flow is attached hereto and marked as Exhibit "C".

[70] I note that the letter from Mr. Jeff Aucoin, of McInnes Cooper, to Mr. Harry Thurlow, of Cox and Palmer, carries at the top of the letter the words: "without prejudice". Moreover it is clear from the content of the letter that this was written in the context of "settlement" discussions.

[71] On enquiring at the hearing whether the unrepresented Mr. Sutton or the Defendants had expressly waived the privilege, I was advised that they had not done so. I find it appropriate in the circumstances to completely disregard paragraph 5 of Ms. Isabelle's February 10, 2014 sworn affidavit, and the associated Exhibit "C".

[72] Even if I had to consider the suggestion, in the unaudited fiscal year end statement of cash flow of TPL, that $1 million dividends had been paid, the context

provides no meaningful basis for an inference to be drawn. As I earlier observed, that there is no direct evidence that TPL was insolvent. At Exhibit "E" to the affidavit of Edith Dalton (p. 76) there is attached a June 17, 2011, email from Mike Sutton to her indicating that he had cleaned the property up, vacated the premises and offered $10,000 to terminate the lease as a settlement. It reads in part:

> This offer is intended as a goodwill gesture to avoid costly legal complications.… I am hopeful that this offer will lead to a mutually agreeable end to our relationship. I think we both understand that the landlord could become just one more creditor in a long list and we all may be better off with accepting my offer above.

[73] At paragraph 40 of its brief, the Plaintiff argues that:

> Mr. Sutton himself referred in emails to the corporation as a "shell company" and cited a "long list of creditors". This was at or near the time when rent was due and owing by The Physio Clinic Limited to the Plaintiff. Thus, whether such transfers were made and with the requisite intent are material facts in dispute.

[74] Mr. Sutton's remark that "… the landlord could become just one more creditor in a long list…" is not a statement of fact by Mr. Sutton that there was in fact "a long list of creditors" in place at that time. (see also my earlier reference to the TPL "income statements" provided by the Defendants in their Affidavit disclosing documents.) He was not cross-examined about what he meant by this.

[75] There is no direct evidence that TPL was insolvent at the relevant times. There is no direct evidence of any transfer of property; nor that if such transfer could be inferred, that it was for the purpose of delaying, hindering or prejudicing creditors.

[76] I conclude that there is no material fact in issue at stage one as as I could not draw the inferences suggested by the Plaintiffs. Moreover, after an examination of the Defendant's and Plaintiff's evidence on the motion, including the agency and piecing the corporate veil aspects, I find that the Plaintiff has not established its claim against Michael D. Sutton and Sutton Holdings as having "a real chance of success."

[77] Therefore I must grant summary judgment in favour of the Defendants on these causes of action, namely the allegation underlying the *Assignments and Preferences Act* and *Statute of Elizabeth*.

[78] **Intentional interference with economic relations** – the elements are discussed in *Cherubini Metal Works*, 2009 NSSC 386, at paras 298-317, varied on other grounds, 2011 NSCA 43. The three basic material facts which are relevant to this motion are:

i) the Defendants intended to (financially) injure the Plaintiff;

ii) the Defendants' actions were an illegal or unlawful interference with the Plaintiff's business;

iii) consequently an economic loss was suffered by the Plaintiff.

[79] At paragraph 43 of its brief the Plaintiff sets out its position:

> … The defendants unlawfully interfered with the contractual relationship between the plaintiff and The Physioclinic Limited's breach of its obligations under the lease with full knowledge of these obligations. This was intended to and did in fact result in a loss the plaintiff. The plaintiff anticipates that the defendant will challenge these assertions which means that these too are material facts in dispute.

[80] As I stated in relation to the pleaded wrongdoing in relation to the *Assignments and Preferences Act* and the *Statute of Elizabeth*, as well as conspiracy, on the evidence before me, while there are superficial connections between the different Defendants, there is no direct evidence that Michael D. Sutton or Sutton Holdings unlawfully interfered with the contractual relationship between the Plaintiff and TPL. There is no direct evidence that either by way of agency or under the doctrine of "piercing the corporate veil" by way of finding an "alter ego" or "controlling mind" scenario, that Mr. Sutton could be personally liable for any wrongs of Sutton Holdings or TPL. I conclude that there is no material fact in dispute at stage one as I could not draw the inferences suggested by the Plaintiff. Moreover, the Plaintiff has failed to show its claim has a reasonable chance of success.

[81] The Plaintiff suggested that Mr. Sutton was in a position to have a chain of influence upon the respective Defendants herein, and the fact that Sutton Holdings became the landlord of a subsequently opened physiotherapy clinic in Westphal less than a mile from the Woodlawn location after the Woodlawn location was vacated in June 2011, supports their position.

[82] The Plaintiff makes several mentions of Sutton Holdings' refusal to provide a copy of the lease between TPL and Sutton Holdings Limited at the Westphal clinic location at 120 Main Street Dartmouth. They suggest at paragraph 66 (4) of their brief that "either such a lease does not exist, or it is on terms very favorable to [TPL]".

[83] Exhibit "A" to Andrea Isabelle's May 12th, 2014 affidavit contains a true copy of the Defendants' affidavit disclosing documents, dated April 30, 2014. At page 4 of that document it states:

> There are no documents relevant to the transfer of the business assets, cash, goodwill or other things of value between the former Woodlawn Physioclinic, Mr. Sutton, or the new location which was set up with in a 1 mile radius of the former Woodlawn Physioclinic [the "new location"].

[84] Mr. Sutton clarified at the hearing that the reference to that clinic being "within a 1 mile radius of the former Woodlawn" clinic was merely a repetition of

the exact wording of the request made by the Plaintiff and not to be seen as any kind of admission.

[85] Therefore, I dismiss that aspect of their claims as well.

Conclusion

[86] The Defendants Michael D. Sutton and Sutton Holdings have satisfied me that, regarding them, the Plaintiff's Statement of Claim fails to raise a genuine issue for trial in so far as the pleaded causes of action (conspiracy, breaches of the *Assignments and Preferences Act* and/or the *Statute of Elizabeth*, and the intentional interference with economic relations) are concerned.

[87] Having found that the evidence presented regarding those causes of action fail to raise a genuine issue for trial, I must grant summary judgment in relation to those causes of action, and therefore consequently the Statement of Claim issued November 17, 2011, no longer includes a claim against either of them, and they are to be removed as Defendants from the Statement of Claim.

Costs

[88] Generally speaking, this was a typical Special Chambers Summary Judgment Motion. The Tariff "C" amount suggests $750-$1000 per *Rule* 77.05.

While my decision effectively terminates the proceeding against these two Defendants, it still continues against related companies who also appear to be represented by Michael D. Sutton at present. Mr. Sutton is not legally trained. Nevertheless, I still believe costs should be payable to the Defendants (one of whom is Michael D. Sutton). In principle, the *Civil Procedure Rules* do not expressly distinguish between self-represented parties and parties represented by legal counsel when it comes to costs – under the former *Rule* 63 see *Okoro v. Nova Scotia (Human Rights Commission* 2006 NSSC 257 at para. 6. However, the jurisprudence accepts that there is a factual distinction, and therefore self-represented litigants should not generally receive the same level of costs award as those parties who have legal counsel: *National bank Financial Ltd. v. Potter* 2005 NSSC 264 per Scanlan J (as he then was); *Crème v. Crème* 2008 NSCA 115 – on the premise that:

> Self-represented litigants should not recover costs for the time and effort that any litigant would have to devote to the case. Costs should only be awarded to those lay litigants who can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained … and that, as a result, they incurred an opportunity cost by foregoing remunerative activity; per Roscoe JA, citing the Ontario Court of Appeal in *Fong v. Chan* [1995] O.J. No. 4600 (CA) at para. 26

[89] Therefore, I order $1,000 costs in total payable in any event of the cause and forthwith to Michael D. Sutton and MD Sutton Holdings Ltd..

Rosinski, J.

SUPREME COURT OF NOVA SCOTIA
Citation: 4187440 Canada Inc. v. The Physio Clinic Ltd., 2014 NSSC 214

Date: 2014-07-11
Docket: Hfx. No. 363344
Registry: Halifax

Between:

4187440 Canada Inc.

Plaintiff

v.

The Physio Clinic Limited, carrying on business as The Physio Clinic and Woodlawn Physio Clinic; Michael D. Sutton; and M.D. Sutton Holdings Limited

Defendants

Revised Decision: **The style of cause and text of the original decision has been corrected according to the appended Erratum dated July 11, 2014**

Judge: The Honourable Justice Peter P. Rosinski

Heard: Tuesday, May 20, 2014, in Halifax, Nova Scotia

Counsel: Harry Thurlow and Andrea Isabelle, for the Plaintiff
Michael D. Sutton, for the Defendants

Erratum:

[1] Date on original decision should read 2014-07-10.

[2] Citation should read as follows:

4187440 Canada Inc. v. The Physio Clinic Ltd.

[3] Paragraph 89 should read as follows:

[89] Therefore, I order $1,000 costs in total payable in any event of the cause and forthwith to Michael D. Sutton and MD Sutton Holdings Ltd.