Claim No: 352563

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Encom Alternative Energy Solutions Ltd. v. Enermax Homes Construction Ltd., 2011 NSSM 62

BETWEEN:

ENCOM ALTERNATIVE ENERGY SOLUTIONS LTD.

Claimant

- and -

ENERMAX HOMES CONSTRUCTION LIMITED and PETER STYMEST

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on October 4, 2011

Decision rendered on October 11, 2011

APPEARANCES

For the Claimant	Earl Cormier Counsel
For the Defendants	self-represented

BY THE COURT:

[1] The Claimant supplies solar energy equipment for buildings such as houses. The owner of the Claimant company is Kelly Lunn ("Lunn").

[2] The Defendant Enermax Homes Construction Limited ("Enermax") is a limited company whose sole shareholder and director is the Defendant Peter Stymest ("Stymest"). Enermax is (or was) in the business of building energy efficient homes.

[3] The Claimant had sold equipment to Enermax on one previous occasion, without any problem. Lunn testified that he and Stymest had also talked about other potential projects that never materialized.

[4] In about March of 2011, Lunn received a call from Stymest placing an order for equipment valued at $12,966.25. The equipment was supplied and delivered to a home owned by Stymest, which was being retrofitted with solar equipment and which Stymest was planning to use as a model home and also an office for Enermax. Lunn was directed by Stymest to bill Enermax, which he did without apparent question given that he had sold to Enermax before.

[5] In this instance the bill did not get paid because Enermax either had, or soon ran into financial problems. Lunn testified that he did not press for quick payment because of his past dealings with Stymest. By the time he found out that payment would be a problem, his time for filing a lien under the *Builders' Lien Act* had expired.

[6] The sole question for the court is whether or not Stymest can be held personally responsible for the debt.

[7] The theory advanced by counsel for the Claimant is that it is open to the court, under the circumstances of this case, to “pierce the corporate veil” and hold Stymest responsible for a debt incurred by Enermax, which is legally a distinct entity.

[8] The law in this area has very recently been discussed at length by the Nova Scotia Court of Appeal in *Globex Foreign Exchange Corp. v. Launt* 2011 CarswellNS 494, 2011 NSCA 67. I set out below some of the passages that I believe provide me with the appropriate direction:

> 21 There is a distinction between situations in which courts find that corporations acting as agent for the shareholder who controls the corporation and situations in which courts pierce the corporate veil. The Ontario Court of Appeal has explained the distinction as follows in *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59 (Ont. C.A.):
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> > 80 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 ignores the legal persona of the corporation: Bruce L. Welling, Corporate Law in Canada: The Governing Principles, 2d ed. (Markham, Ont.: Butterworths, 1991) at 122-36.
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> 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 (N.S. C.A.) 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:
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> > 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]
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> [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.
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> > [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";
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> (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
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> (c) where the corporation is merely acting as the controlling shareholder's agent.

[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.

> . . . . .
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> 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.

[9] What I draw from this is that the corporate veil may be lifted where:

a. The corporation is clearly acting as an agent for its principal, namely the shareholder;

b. Where the corporation is the “puppet” of the individual (which may be slightly different from agency);

c. Where to treat the two as separate entities is too flagrantly opposed to justice;

d. Where the corporation has been used to conceal or facilitate an unlawful act or purpose;

[10] Although Stymest was present for the trial, he chose not to give evidence and instead rested on his basic argument that he was not responsible for the debts incurred by his company. Had he testified, there might have been a more complete factual record to assist the court. He might also have faced some tough questions which might have called into question his *bona fides*. While I cannot manufacture facts out of the fact that he chose not to testify, I do believe that I am entitled to infer that his evidence would not have been helpful to him.

[11] As mentioned, had the Claimant filed a lien in time, he would not be facing the situation he is today. The *Builders’ Lien Act* provides in s.6 (1):

> 6 (1) Unless he signs an express agreement to the contrary and in that case subject to Section 4, any person who performs any work or service upon or in respect of, or places or furnishes any material to be used in the making, constructing, erecting, fitting, altering, improving, or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them, for any owner, contractor, or subcontractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees and appurtenances, and the land occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner.

[12] I believe the general philosophy of that Act recognizes that it is the owner who ultimately benefits from work done on real property, and that in some instances it is just and equitable to bypass or short-circuit the contractual chain and impose a direct obligation on the owner to pay for the work - secured by an interest in the land itself. The injustice to be avoided is the prospect of the owner getting a benefit (and the property increasing in value) without the provider of that benefit - a supplier or worker - getting paid.

[13] This statutory remedy has limits, of course. The owner is relieved of any responsibility once a certain amount of time has passed (normally sixty days) and the responsibility of the owner may be limited by other factors including the state of the account between the owner and the general contractor and the amount of the holdback under the construction contract.

[14] This scheme works well and balances the interests nicely when all parties are operating at arm's length from each other. To give an example, if the owner hires an arm's length contractor, who then hires an arm's length sub-contractor, the owner is entitled to pay the contractor, holding back only 10% of the contract amount, until the holdback period has expired, at which time the owner is entitled to presume that the subcontractor has been paid. To require anything more of the owner could result in the clear injustice of the owner paying twice for the same work.

[15] In the case before me, the owner is Stymest. There is no evidence that he had any form of a formal contact with his own company, Enermax, to retrofit his home. And the two were clearly not operating at arm's length. The only evidence (as told to Lunn) was that the home was to serve as an Enermax model home and (as suggested by Stymest on his cross-examination of Lunn) Enermax's office. As such, Enermax did not stand in the classic contractor-owner relationship with Stymest, and in fact my inference from all of the known facts (and from the fact that Stymest chose not to testify) is that this was not the relationship. In other words, there is no evidence that Stymest paid, or planned to pay Enermax, for the work that was done on his property. Had he done so, and this was simply a case of Enermax pocketing that money and failing to pay the subcontractor (the Claimant) then there would be a situation where the scheme of the *Builders' Lien Act* envisions the owner being absolved of liability.

[16] Here the inference is easily drawn that Stymest stands to benefit from the supply of materials by the Claimant, without having supplied any money to Enermax to pay for it - as would be the case in a typical owner-contractor-supplier scenario.

[17] It is therefore my conclusion, based on the law as set out above, that Enermax was acting as an agent for Stymest. There is no other way to characterize a relationship where a company, such as Enermax, orders equipment to be installed in the property of its sole shareholder, without any corresponding financial arrangements as between Enermax and Stymest. I am prepared to infer that had the situation been otherwise, Stymest would have testified to that effect.

[18] Even if I am wrong about the agency, it is a situation where the corporate veil should be pierced in order to avoid a manifest injustice. Another way of characterizing the situation is that it is necessary to hold Stymest personally liable in order to avoid him being unjustly enriched at the expense of the Claimant.

[19] The classic elements of unjust enrichment are:

a. An enrichment
b. A corresponding deprivation, and
c. Lack of a “juristic” reason for the enrichment.

[20] In my view it is clear that Stymest stands to be enriched by the value of the equipment delivered to his property, and the Claimant is deprived of the value of the equipment. The only arguable “juristic” reason that could be advanced by Stymest is that the invoice is made out to Enermax and that he and Enermax are distinct entities. This falls short of being a juristic reason in light of the fact that he - as the sole directing mind behind Enermax - knew or ought to have known that Enermax was in financial difficulty and as such he took unfair advantage of

the Claimant's willingness to believe that this was a normal commercial transaction.

[21] There will accordingly be judgment against both Defendants for the sum of $12,966.25 plus costs of $182.94.

Eric K. Slone, Adjudicator