

## IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: W.K. Sharpe & Son Contractors Ltd. v. 3237563 Nova Scotia Ltd., 2013 NSSM 12

Claim No: SCK 410469

### BETWEEN:

Name W.K. Sharpe & Son Contractors Limited **Claimant**  
Address 535 Avonport Road  
Avonport, NS B0P 1B0  
Phone (902) 542-5259

Name 3237563 Nova Scotia Limited and **Defendants**  
3264482 Nova Scotia Limited  
Address c/o G. Bernard Conway  
Atlantic Law Group  
92 Webster Street  
Kentville, NS B4N 1H9  
Phone (902) 679-0110

Date of Hearing: February 25, 2013

Date of Decision: March 22, 2013.

Kenneth G. Sharpe, Owner, appeared on behalf of the Claimant.

G. Bernard Conway appeared on behalf of the Defendants.

### DECISION

This is a claim for payment for grading and gravel work performed by the Claimant, W.K. Sharpe & Son Contractors Limited, for Serenity Lindsay Funeral Home at its location at 568 Main Street, Wolfville, Nova Scotia. At the time the services were performed, the premises were owned by the first Defendant, 3237563 Nova Scotia Limited (herein referred to as "3237563") whose sole shareholder was Paul Dawson. The assets of the business, including the property, were subsequently sold to the second defendant, 3264482 Nova Scotia Limited (herein referred

to as "3264482"), whose sole shareholder was Anthony Facey. The shares of 3237563 were subsequently transferred to Mr. Facey.

The initial Statement of Defense included a denial that any service was performed by the Claimant. However, at the night of the hearing, the Defendants withdrew that denial and conceded through their solicitor that the work was done for 3237563 and the Claimant was entitled to the amount invoiced plus interest. At the conclusion of the hearing, I indicated that I would enter judgment for the Claimant against 3237563 for \$9532.52 (representing the invoiced amount of \$7820 plus interest of \$1712.52). In addition, the claimant shall have its costs of \$182.94. In total, the Claimant shall have judgment in the amount of \$9715.46 against the Defendant, 3237563 Nova Scotia Limited. The primary issue of this matter concerns the liability of the second defendant, 3264482 for payment of this invoice.

### **Issues**

The issues in the appeal concern the liability of a subsequent purchaser of a property for an unregistered debt incurred for work performed for the previous owner. On its face, this appears to be a very straightforward issue. The law typically finds no liability on the part of a subsequent purchaser of a property for unregistered debts, assuming the purchaser is bona fide and, otherwise, did not have notice of the debt. Similarly, even if the companies are owned by the same sole shareholder, the companies are still considered separate entities.

However, where actual notice has not been given, the law applies several principles which may lead to liability depending upon the circumstances. I must review the applicable facts and law to address the following:

- Was the Defendant, 3264482, a principal to the contract with the Claimant to assume the debt of 3237563?
- Did Mr. Facey have knowledge of the presence of the debt to the Claimant at the relevant time, prior to the transfer of the assets?
- Were the Defendants essentially one company for the purposes of the contract, such that it is appropriate for this court to "pierce the corporate veil" to grant a remedy to the Claimant?
- Were the assets transferred to the purchaser in a manner designed to defeat or hinder creditors?

I shall deal with the consideration of each issue briefly. For the reasons following, I do not find that there was sufficient evidence adduced on behalf of the Claimant to satisfy me that any of these grounds are appropriate to find liability against 3264482.

### **Evidence**

Kenneth Glenn Sharpe is the President of W.K. Sharpe & Son Contractors Limited. He testified that he was contacted by Paul Dawson when he was the President of 3237563, to perform gravel and grading services for the Serenity Lindsay Funeral Home and Crematorium located at 568 Main Street, Wolfville. The work was done on December 10 and 12<sup>th</sup>, 2011 for which Sharpe's charged \$7820 inclusive of HST. An invoice was rendered for that amount. At the foot of the invoice, it provides that past due accounts are subject to an interest charge of 2% per month, 24% per annum. The bill went unpaid for several months, so he spoke with Mr. Dawson in August, 2012, and was advised that the company was due to be sold and the Claimant's bill would be paid eventually. His research revealed that the property was subsequently sold to 3264482 Nova Scotia Limited, owned by Mr. Anthony Facey. He spoke with Mr. Facey on November 6, 2012 who indicated to him that he was reviewing the paperwork but he would "take care of your (the Claimant's) bill".

Under cross examination by Mr. Conway, Mr. Sharpe acknowledged being aware of the change of ownership of the funeral home. He did not pursue any lien or judgment against the property as he had hoped to be paid by Mr. Dawson. He confirmed his conversation with Dawson in August 2012 where Dawson indicated he would try to get the money together to pay him. He also confirmed his conversation with Facey on November 6. He acknowledged being aware of the second company, 3264482. Facey acknowledged that the debt would be settled in a couple of weeks but it was not made clear who was paying the bill. Facey was not named personally in the action and Mr. Sharpe acknowledged that he was not given the notice. Mr. Sharpe acknowledged not having taken any action against 3237563 when the assets were transferred in October.

Anthony Leonard Facey is the sole director of both defendants. He worked with Mr. Dawson for 18 months prior to September, 2012. He did not assume control of the business until October 2012. His role with Dawson was "financial in nature". However, it was clear from his testimony that what he meant was more to help organize the business, no doubt with a view to purchasing it. While it is not clear what the full extent of his duties were, there was no evidence that they included payment of outstanding bills or debts nor that he served in any type of director's capacity. Dawson owned 100% of the shares of 3237563. Mr. Facey described the mortgages on the properties as significantly in arrears and at risk of foreclosure. When 3264482 purchased the properties from 3237563, it assumed the existing mortgages and made arrangements to pay them out. The deal was a straight asset sale to 3264482. The purchase price was \$1,622,000, a sum representing the registered debts of the company at the time and included the payout of a mortgage in favor of the TD Bank on 568 Main Street, Wolfville, NS. It also included a second mortgage on Lindsay properties in New Ross, Port Williams, Kentville and Berwick. There were two judgments registered against the property at the Registry of Deeds in Kentville as well as \$80,000 in taxes owing to Canada Revenue Agency.

In October 2012, presumably when he took control of the company, he hired Todd James, CA, to prepare the companies' financial statements as there were none prepared since 2010. Mr. Facey testified that he began receiving calls from creditors once the transaction was complete. He

initially thought the company owed approximately \$300,000, but he estimates the company now owes approximately \$900,000 to creditors.

Under cross-examination, he acknowledged promising that Sharpe that would get paid. This conversation took place after the sale of the assets. He did not indicate which of his two companies would pay him. Only that he intended to pay Sharpe from where he contracted, 3237563.

### Exhibits

Mr. Conway tendered several documentary exhibits on behalf of the Defendants. Most of these consisted of screen printouts from the Registry of Joint Stock Companies, however, they also included a deed from 3237563 to 3264482, as well as a screen print of Property On-Line showing the property as owned by 3264482. The Defendants included invoices that were issued by the Claimant. No evidence was called to corroborate or refute the screen prints, and thus I find it to be accurate, saving any limitations mentioned elsewhere in this decision. Taken together, the documentation reveals the following chronology:

December 19, 2011 – Invoice issued by the Claimant to Serenity Lindsay Funeral Home for work completed December 10 and 12, 2011.

May 3, 2012 - 3237563 Nova Scotia Limited is reinstated pursuant to the *Corporations Registration Act* having been revoked for non-payment on April 5, 2012. This is the second time as it was revoked for non-payment on August 5, 2011 and reinstated December 19, 2011.

May 8, 2012 – The business name “Serenity Lindsay Funeral Home & Crematorium” is registered to 3237563. The recognized agent is identified as Paul Dawson.

June 29, 2012 – 3264482 Nova Scotia Limited is incorporated. The positions of President/Secretary and Director are Anthony Facey. Mr. Conway is the Registered Agent.

September 21, 2012 – Warranty Deed from 3237653 Nova Scotia Limited to 3264482 Nova Scotia Limited conveying 568 Main Street. The deed was registered pursuant to the *Land Registration Act* on September 26, 2012.

October 11, 2012 – 3237563 registers a Change of Directors. Anthony Facey is now shown as the sole director.

No evidence was tendered to corroborate the transfer of shares of 3237563 to Mr. Facey. However, his testimony in that respect is unrefuted and I find the transfer was contemporaneous with the Change of Directors.

Interestingly, the initial contract for service with Serenity Lindsay occurred when the business name was unregistered. However, Paul Dawson was not named as a party nor called to give evidence at the hearing.

In assessing the evidence, I was impressed with the evidence of both Mr. Sharpe and Mr. Facey as being very credible testimony. Further, in making my findings, while I have some concerns about the circumstances, I do not find there was any fraudulent or other misleading intention on Mr. Facey's part. Based on the evidence, I find this was probably a misunderstanding of Mr. Facey's intention on the part of Mr. Sharpe, rather than a deliberate attempt to avoid creditors.

While not a factor in this decision, it is clear to me that Mr. Sharpe would have benefited greatly from obtaining legal advice shortly after the bill fell into arrears.

### **The Law**

There are several legal issues in this matter all arising from the transfer of the property to a related corporation. A debt for services is considered a personal obligation to the person or corporation who contracted for it. An exception is made where a judgment has been granted by a court of competent jurisdiction which may be registered against the property at the appropriate registry office. A contractor may also register a lien under the *Builders' Lien Act* which can act as a charge against the property. In most transactions, the purchaser or grantee will require their payout or discharge before the property is transferred, otherwise the charge remains against the property.

A second principle which also applies is the separate identity of a corporation even where the corporation has only one shareholder and director. Further, this applies for two separate companies even where the shareholders and directors are the same. In Canada and other common law countries, the Courts will look past the individual corporate entities where it is proper to do so.

### **Findings**

In reviewing the evidence in light of the applicable law, it is necessary to determine if there was any contractual relationship between the Claimant and 3264482. The evidence establishes clearly that there was none. Specifically, the work was undertaken by the Claimant at the behest of Mr. Dawson. The business name "Serenity Lindsay Funeral Home" was not registered at all. It was not until May 8, 2012 that the name "Serenity Lindsay Funeral Home & Crematorium" was registered to 3237563. The work was conducted in December 2011. Further, I find no evidence that Facey knew or ought to have known about this bill until after the property was transferred to 3264482. Therefore the answer to the first two issues is in the negative.

Where corporations conduct business in their individual names, they are separate legal entities and treated as such in most transactions, even if they are owned by the same shareholder. There

are circumstances when it is appropriate to look behind the corporate name to determine if the owner of the business is using his or her corporation improperly or where it would be in the best interests of justice to do so. This concept is known as “piercing the corporate veil” and has been used by courts in Nova Scotia and elsewhere when dealing with corporate identity.

In *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, the Nova Scotia Court of Appeal per Saunders, J.A. dealt extensively with this issue. In the interests of brevity, I have included the most relevant passages of his Lordship’s decision:

[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.

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....

....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)

Further in the case of *Globex Foreign Exchange Corp. v. Launt*, 2011 NSCA 67, where Justice Farrar states the following for the majority of the Court of Appeal:

[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.

Likewise, in a decision of Justice Roscoe in *GM Kelly Contracting and Landscape Services Limited v. Redden* (1990), 97 N.S.R. (2d) 277 at p. 279:

Whether a person contracts personally or as an agent is a question of fact that must be determined by the intention of the parties and the circumstances surrounding the contract as indicated in *Wolfe Stevedores (1968) Limited v. Joseph Salter's Sons Limited* (1970), 2 N.S.R. (2d) 269 (C.A.)...

The burden of establishing, on the balance of probabilities, that it contracted with the defendant personally rests on the plaintiff. This was established in *Errol B. Hebb & Associates Limited v. Carter* (1983), 58 N.S.R. (2d) 55 (CA).

I do not find that the Claimant has discharged this onus. The evidence establishes that 3264482 purchased the assets of 3237563 for an amount equal to the value of the registered encumbrances against it as well as the claim by Canada Revenue Agency. However, no evidence has been called to suggest that this transaction was not for good consideration. Furthermore, there is no evidence that Mr. Facey and Mr. Dawson were non-arms length parties. As a result, it has not been proven on a balance of probabilities that Mr. Facey either personally or through his corporations acted improperly or that either company was an agent of Mr. Facey personally or of each company. As noted by Justice Saunders in the *White* case above, this court need not find any fraudulent or other improper conduct, but circumstances which dictate that is necessary to do justice by ordering judgment against both corporate defendants. Once again, I do not believe that it is appropriate in this case. I have some discomfort with the facts surrounding the transactions both in terms of timing and the involvement of Mr. Facey with 3237563 prior to purchasing the properties through 3264482. However, it is at least equally probable, if not more so, that Facey and 3264482 were simply a bona fide purchaser without notice of the debt to the Claimant or even the extent to which Serenity Lindsay or 3237563, were facing creditors. I agree with Defendants' counsel's submission that Mr. Sharpe on behalf of the Claimant, could have filed a lien or pursued an action in Court to give notice to Mr. Facey or anyone else. Unfortunately, he trusted in Dawson's promises which were hollow at best. Further, he had thought through Mr. Facey's assurances after the sale that his bill would be paid. However, he has not tendered sufficient evidence to satisfy me on a balance of probabilities that Mr. Facey made these assurances on behalf of 3264482. Further, I cannot find that 3264482 received the benefit of the assets in such a way as to justify piercing the corporate veil. Likewise, I find there was not sufficient evidence to show an intent to defeat, delay or hinder the creditors of 3237563. As a result, the answer to the latter two issues is also in the negative.

## **Conclusion**

As noted at the beginning of this case, I have found in favor of the Claimant against the Defendant, 3237563 Nova Scotia Limited and have ordered judgment inclusive of costs in the amount of \$9715.46.

The action against 3264482 Nova Scotia Limited is dismissed without costs.

An order shall issue accordingly.

Dated at Dartmouth, NS,  
on March 22, 2013;

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**Gregg W. Knudsen, Adjudicator**

Original: Court File  
Copy: Claimant(s)  
Copy: Defendant(s)