

IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT OF
JUDICATURE

ON APPEAL FROM A JUDGE IN CHAMBERS OF THE HIGH COURT OF THE SUPREME
COURT OF JUDICATURE

In the matter of Order 46 Rules of the High Court.

BETWEEN:

1. READYMIX CONCRETE LIMITED, a company incorporated in Guyana and continued under the 1991 Companies Act, with its Registered Office situated at Lot 69-72 Eccles Industrial Site, East Bank Demerara.
2. UNIVERSAL TRUCKING INC., a company incorporated in Guyana under the 1991 Companies Act with its registered office situated at 69-72 Eccles Industrial Site, East Bank Demerara.

Appellants

-and-

1. HALIMA KHAIYOUM (a creditor of the Estate of ANTHONY AMRES)
2. MAURICE AMRES (Administrator ad Colligenda bona of the Estate of ANTHONY AMRES, deceased)
3. PAUL STEPHENSON (Intended Administrator of the Estate of ANTHONY AMRES, deceased)
4. SAMANTHA MELODY FISHER (Intended Administratrix of the Estate of ANTHONY AMRES, deceased)
5. SANJEEV DATADIN, Attorney-at-Law of Hadfield and Breda Streets, Werk-en-Rust, Georgetown.

Respondents

The Honourable Justices Navindra Singh and Jo-Ann Barlow, Puisne Judges.

Messrs. A. Nandlall and M. Narayan representing the Appellants.

Ms. S. Glenn representing the First Named Respondent.

Mr. R. Hunte appearing as the Court appointed Receiver.

Heard March 11th, April 8th, April 29th, May 20th, June 13th and June 27th 2016.

DECISION

BACKGROUND

The First Named Respondent secured a consent judgment against Anthony Amres, personally, in Civil Action No. 318/ SA of 2007 on September 24th 2008, which order was entered on March 19th 2009 and wherein Anthony Amres agreed to complete the construction of a building for the benefit of the First Named Respondent at an estimated cost of \$18 000 000 (eighteen million dollars) and also to pay to her the sum of \$10 000 000 (ten million dollars).

Anthony Amres died intestate on July 12th 2009 having only paid the sum of \$2 000 000 (two million dollars) to the First Named Respondent towards the aforementioned judgment.

The Second Named Respondent was then appointed *Administrator Ad Colligenda Bona* of the Estate of Anthony Amres, deceased in his capacity as the duly constituted Attorney of the Fourth Named Respondent, a child of Anthony Amres, by Order of Court dated August 12th 2009.

On March 23rd 2012 the Third Named Respondent, in his capacity as the duly constituted Attorney of the Fourth Named Respondent, applied for Letters of Administration for the Estate of Anthony Amres, deceased. According to the records in the Probate Registry of the Supreme Court this application (272 of 2012) was never granted.

On August 6th 2013 the First Named Respondent instituted Civil Action No. 535/ SA of 2013 against the Second, Third and Fourth Named Respondents seeking orders to, essentially, realize the consent judgment which had remained unsatisfied, probably due to the fact that Anthony Amres had died in July 2009.

By Order of Court dated February 12th 2014 Robin Hunte was appointed Receiver of the Estate of Anthony Amres, deceased by the Court to, it would appear from the wording of the Order, administer the said Estate thereby settling its liabilities and thereby settling the consent judgment.

By Order of Court dated September 29th 2014, the Appellants and the Fifth Named Respondent herein were added as Respondents in Civil Action No. 535/ SA of 2013, based on the fact, it seems, that Anthony Amres was a shareholder in both companies and therefore his shares formed part of the assets of the Estate of Anthony Amres, deceased.

On September 8th 2015, Justice James Bovell-Drakes made the following Order in Civil Action No. 535/ SA of 2013:

“UPON HEARING Attorney-at-Law for the Applicant, the Respondent and the Added Respondents IT IS ORDERED that the Receiver do serve the Affidavit of Report on all parties connected to this matter within seven (7) days from the date hereof AND IT IS FURTHER ORDERED that leave be and is hereby granted to the Receiver to take all necessary steps to effect payment by Readymix Concrete Limited and Universal Trucking Inc. of Judgment Order in Action No. 318/ 2007 - SA dated 24th September, 2008 and entered on 19th March, 2009 to the Applicant/ Judgment Creditor HALIMA KHAIYOUM in the sum of \$26,000,000 (twenty six million dollars) AND IT IS FURTHER ORDERED that leave be and is hereby granted to the parties to file Answer to issues raised in paragraphs 10 to 22 the Affidavit in Report of Receiver dated the 4th September, 2015 within 14 days from the date hereof AND that this matter do stand adjourned to the 6th day of October, 2015 at 9:00 a.m. in Chambers.”

The Appellant companies have herein appealed that portion of the order granting the Receiver the power to take all necessary steps against these companies to effect payment of the judgment that the First Named Defendant has against Anthony Amres, deceased.

ISSUE

Pursuant to the Order of Justice Bovell-Drakes a vehicle owned by Readymix Concrete Limited was levied upon by Marshals of the High Court at the instance of the Court appointed Receiver.

Could the Court have ordered that Readymix Concrete Limited and Universal Trucking Inc., duly incorporated companies, pay/ settle the judgment of a deceased shareholder; a shareholder that is deceased and was deceased at the time of the making of the Order?

FACTS

The Learned Trial Judge in his decision found that the Estate of Anthony Amres is entitled to and receives dividends generated by his shares in the companies.

I have combed through the documents and affidavits filed in Civil Action No. 535/ SA of 2013 and have not found any evidence that shows that the Estate of Anthony Amres receives dividends generated by his shares in the companies. In fact, if this were indeed the case then the Court appointed Receiver ought to have had no difficulty in applying such dividend payments towards the liquidation of the consent judgment.

The Learned Trial Judge in his decision stated that the Receiver informed him that he discerned orchestrated shenanigans perpetrated by the companies in the presentation of their annual accounts and that there were patent defects in the assets valuation report.

The Learned Trial Judge in his decision concluded that he had no reason to challenge the opinion of the Receiver.

The Learned Trial Judge in his decision states that the Receiver thereupon requested that the Court give him the authority to request that Readymix Concrete Limited provide invoices for items and stock purchased during the period 2012 to 2013.

However, the Learned Trial Judge determined that in the circumstances it would be fair and justice better served if he made the aforementioned Order.

LAW

Cases referred to

Saloman v Saloman & Co. Ltd [1897] AC 22

Re Greene, Greene v Greene [1949] 1 Ch. 333

Cases considered

Petrodel Resources Ltd and Others v Prest [2013] UKSC 34

ANALYSIS

Before analyzing the Order of Court that is the subject of this appeal I must address the lamentations of Mr. Hunte in his written submissions dated April 11th 2016, to wit that there does not appear to be any record of appeal and that Counsel for the Appellants informed him that the appeal was purely a question of law and therefore there was no need for a record of appeal, and the Court concurred.

Firstly, there is a Notice of Appeal with grounds thereof and the written decision of the Trial Judge in the Court's file which the Court perused on the bench to ensure that the appeal was in order before dealing with the application for a stay of execution of the auctioning of the vehicle levied upon. I don't recall Mr. Hunte stating that he was not in possession of the Notice of Appeal and grounds thereof that was filed.

Secondly, this Court absolutely did not concur with Counsel for the Appellant and the suggestion by Mr. Hunte that this Court merely followed Counsel for the Appellants is to say the least,

disappointing. The Court intimated to all person present, which included the First Named Respondent's Counsel, Ms. Glenn that since the issue to be determined with respect to the stay of execution and with respect to the appeal was the same issue of law, the Court was willing to proceed with the hearing of the appeal IF all of the parties agreed to such a course of action, which all parties did.

Nevertheless as a result of Mr. Hunte's complaint, the matter was adjourned for the Record of Appeal to be settled, which was done. On June 13th when the matter came up for hearing, all parties were given 7 days to submit any further submissions they wished, now being in possession of the Record of Appeal.

With respect to the Order of Court that is the subject of this appeal, it is indeed mind boggling that the Trial Judge made this Order based on the opinions of the Court appointed Receiver that the annual accounts and the assets valuation report were defective as per his averments in the Affidavit of Report, yet he at the same instance grants leave to file an answer to paragraphs 10 - 22 of the said Affidavit of Report. Upon perusal of that Affidavit, it is seen that those are the very paragraphs through which the Receiver expresses his dissatisfaction with the annual accounts and assets valuation report.

Further, at the very least, one would have expected the Appellants to be given an opportunity to respond to the concerns of the Receiver and also that the concerns of the Receiver be supported by expert evidence.

Mr. Hunte submits that the Trial Judge did not lift the corporate veil of the Appellant companies and he may very well be correct, though I am not sure what describes what the trial judge did by his Order.

The principle that the legal persona created by incorporation is an entity distinct from its shareholders and directors and that even in the case of a one man company is not an alias for the owner was laid down one hundred and nineteen years ago in Salomon v Salomon & Co. Ltd and still stands as a corner stone principle in company law.

There are undoubtedly situations where justice requires that the corporate veil be lifted but that does not mean that a Court is free to act as it pleases on loosely defined parameters of a just and equitable standard.

It has to be established at the very least that the corporation's investors are directly responsible for the corporation's actions and that the corporation is being used as a shield for fraudulent and improper conduct.

The first problem one encounters in this case is the fact that Anthony Amres died July 12th 2009 at which time he would have ceased to be a member of the Appellant companies. Where a shareholder dies, his shares, as personal estate, vest in his executors or administrators. Further, the executors or administrators do not automatically become shareholders.

Section 199 (2) of the Companies Act; CAP 89:01 provides that where an instrument of transfer is prescribed in the by-laws of the company, that instrument must be used to transfer the shares of the company. Also see Re Greene, Greene v Greene.

In fact Article 41 of the Articles of Association of Readymix Concrete Limited requires an application in writing to effect transmission of shares of a deceased shareholder.

The obvious difficulty here is that it was not and could not be established that Anthony Amres set up these companies to defraud and frustrate the First Named Respondent nor that he used it as a shield prior to his death and since he was not a member of these companies after his death could not be said to be using the corporation as a shield at the time that the Order was made.

Based on the evidence before the Trial Judge, under no stretch of the imagination could it be said that the prerequisites for lifting the corporate veil had been established in this case. In fact it is telling that at the moment that the Trial Judge opted to strip the corporation of its lawful protection, the Receiver was merely asking the Court for Orders that would authorize him to demand records to further investigate what he perceived to be improper, irregular or maybe even fraudulent annual accounts and assets valuation report.

Clearly, the Receiver himself recognized that more facts were required to establish that the corporations were acting fraudulently to deny the First Named Respondent the fruits of her 2008 judgment by under valuing the share value.

It is clear that the only thing that the First Named Respondent is entitled to at this stage is the value of the shares in the companies that the Estate of Anthony Amres, deceased, is entitled to and such a valuation was in the possession of the Court. It is that valuation that was being challenged by the Receiver.

Further, to state the obvious, the value of the shares cannot be “collected” by levying on company assets.

Should it be determined, through evidence, by the Court that the value of the shares have been manipulated fraudulently to frustrate and deprive the First Named Respondent, then the Court may embark on an exercise of obtaining a proper and true valuation, which exercise would still not involve the lifting of the corporate veils of the Appellant companies.

Counsel for the First Named Respondent and the Receiver has urged the Court to consider the case of Petrodel Resources Ltd and Others v Prest as authority for the Order made by the Trial Judge (though maintaining that the Trial Judge did not in fact lift the corporate veil).

This case has no application to the fact situation in this case. It cannot be said that Anthony Amres is using the companies to frustrate enforcement of the judgment and the fact that, on the evidence, no one has been administering the Estate of Anthony Amres for at least six years before the Order of Court seems to further defeat such a proposition.

In fact, contrary to what is stated by the Trial Judge in his decision and the Receiver in his written submissions, Anthony Amres was never married to the First Named Respondent.

In the circumstances, based on the foregoing analysis the appeal is allowed and that portion of the Order of Court dated September 8th 2015 that states “... *that leave be and is hereby granted to the Receiver to take all necessary steps to effect payment by Readymix Concrete Limited and Universal Trucking Inc. of Judgment Order in Action No. 318/ 2007 - SA dated 24th September, 2008 and entered on 19th March, 2009 to the Applicant/ Judgment Creditor HALIMA KHAIYOUM in the sum of \$26,000,000 (twenty six million dollars)*” is hereby set aside.

No order as to costs.

Justice N. A. Singh