
JUDGMENT OF THE COURT

- [1] Autodirect and Equipment Limited ("Autodirect") was incorporated on 20 August 1997 with two shareholders, namely Peter Prasad and Amlesh Din ("Mr Din") and three directors, namely Peter Prasad, Mr Din and Navin Prasad. Peter Prasad and Mr Din are cousins. Peter Prasad and Navin Prasad are not related.
- [2] On 21 January 2003 Navin Prasad was removed as a director of Autodirect.
- [3] In October 2002 Navin Prasad on behalf of Autodirect made an offer to supply the Public Works Department with a generator for \$33,000. The offer was accepted and on 26 February 2003 the plaintiff paid \$33,000 to Autodirect.
- [4] On or shortly after 28 February 2003 Peter Prasad caused Autodirect to pay \$15,000 to Navin Prasad and \$18,000 to Mr Din. About three weeks earlier the only other funds of Autodirect namely \$80,000 were paid into an account in the name of Mr Din. Autodirect had no other assets and ceased trading. A generator was never delivered to the Public Works Department
- [5] On 14 December 2005 the plaintiff obtained default judgment against Autodirect in the sum of \$33,000 plus interest but Autodirect had no assets to meet any part of the judgment. The plaintiff then brought proceedings against Autodirect, Peter Prasad and Navin Prasad and on 28 November 2007 Singh J entered judgment against Peter Prasad and Navin Prasad jointly and severally in the sum of \$33,000 plus interest.
- [6] On 4 January 2008 Peter Prasad appealed the judgment of Singh J (Civil Appeal ABU0001 of 2008). The Attorney-General was named as the first respondent, Autodirect as the second respondent and Navin Prasad as third respondent.

Shortly thereafter Navin Prasad filed an appeal from Singh J's judgment, being Civil Appeal ABU0008 of 2008.

- [7] When Peter Prasad's appeal came before the Court of Appeal for hearing on 21 October 2008, Mr N. Shivam appeared for the appellant Peter Prasad and Mr D. Prasad appeared for Navin Prasad as the third respondent. Mr Navin Prasad's written submissions supported the appellant Peter Prasad. The Court was told that the decision in Peter Prasad's appeal would determine the outcome of Navin Prasad's appeal.
- [8] Navin Prasad's appeal ought to have been consolidated with or fixed for hearing together with Peter Prasad's appeal. Both appellants and the respondent should have drawn the Registry's attention to the existence of two appeals from the one judgment. Navin Prasad's appeal cannot have a life beyond the determination of Peter Prasad's appeal and the Court has proceeded to determine them both.
- [9] On 28 February 2008 Peter and Navin Prasad entered into a written agreement pursuant to which Peter Prasad agreed to pay Navin Prasad \$15,000 to, in effect, sever any business relationship between them. The \$15,000 was however, as noted above, paid from Autodirect's account.
- [10] In the proceedings before Singh J and again before this Court it was argued that the plaintiff had no cause of action against Peter and Navin Prasad personally. The cause of action, it was said, was against Autodirect. Peter and Navin Prasad were merely directors and as such only owed a duty to Autodirect and not to Autodirect's creditors. The appropriate course, it was argued, was for the Official Receiver or liquidator to pursue the directors and to account to the plaintiff as a creditor from any moneys recovered from the directors. To lift the corporate veil and allow the plaintiff to sue the directors personally was not permissible and to do so would do grave damage to the fabric of corporations law.

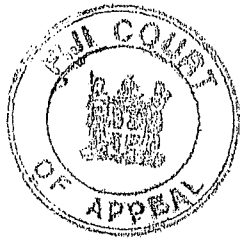
- [11] The trial judge found that the behaviour of both Peter Prasad and Navin Prasad in receiving the \$33,000, dividing the proceeds and refusing to supply the generator knowing that Autodirect had no assets, was “a very, very sharp and devious practice”. The trial judge lifted the corporate veil and gave judgment against Peter Prasad and Navin Prasad on restitutionary grounds.
- [12] On appeal counsel for Peter Prasad acknowledged that his client was guilty of sharp practice but submitted that, following Salomon v Salomon & Company Ltd [1897] AC 22, the Courts could only ignore the separate personality of a company in very limited circumstances and that “unfairness”, which the trial judge made some reference to, was not such a circumstance. The only circumstances, it was submitted, where the corporate veil can be lifted is (i) where the company structure is used to perpetrate a fraud (ii) where a company structure is used with the sole or dominant purpose of enabling another person to avoid an existing legal obligation & (iii) where under-resourced companies were found to be agents of their controllers or to be shams or devices.
- [13] Mr Shivam submitted that because Autodirect was in existence and conducting a bona fide business before its directors decided to take the plaintiff’s money and run, this did not constitute fraud of the type necessary to see the corporate veil lifted.
- [14] Mr Shivam’s candour as to Peter Prasad’s intentions when the plaintiff paid the \$33,000 is admirable and his concern for the maintenance of corporations law was touching, but the Court finds that this was a case where the company structure was used to perpetrate a fraud on the plaintiff and further finds that the intention to perpetrate such a fraud using the company structure does not have to pre-date the formation of the company or to be the only activity of the company.
- [15] It is not possible to set down hard and fast rules but in this case, where all of the shareholders and all of the directors of the company were involved in the fraudulent

enterprise or had knowledge of it, and where the company was left with no assets at all, the Court will lift the corporate veil and the trial judge was right to do so. This is a case where *"in the particular context and circumstances (the corporate veil's) presence would create a substantial injustice which the Court simply cannot countenance"*: *Chen v Butterfield* [1996] 7 NZCLC 261,086

- [16] In his written submissions and in oral submissions Navin Prasad's counsel draws a distinction between his client's conduct and the conduct of Peter Prasad. The evidence, it was submitted, was that while Navin Prasad was aware that the source of the \$15,000 paid to him was the \$33,000 paid to Autodirect by the plaintiff, he was unaware that Peter Prasad would be appropriating the balance of Autodirect's assets and so be unable to deliver the generator to the plaintiff. Navin Prasad, it was emphasised, had been removed as a director of Autodirect a month prior to 28 February 2008.
- [17] The difficulty with this submission is that the trial judge, having noted that Peter Prasad and Navin Prasad each blamed the other for siphoning off the company's money and leaving it as a shell, found that both were involved. This is a finding of fact that an appeal court must be reluctant to interfere with, especially when such a finding is based in part at least on an assessment of the credibility of a witness. It is not a case where no question arises as to truthfulness and where the appeal court is in as good a position as the trial judge to the proper inferences to be drawn from uncontested facts: *Benmax v Austin* [1955] AC 370.
- [18] There was sufficient evidence before the trial judge to infer that when Navin Prasad was paid the \$15,000 he knew that Autodirect would be in no position to deliver the generator. For example in cross-examination he conceded that when he was paid the \$15,000 from Autodirect's account he was aware that Peter Prasad had transferred \$80,000 of the company's moneys into another account. He said he tried to find out whose account it was but said that Peter Prasad would not tell him.

- [19] Further Navin Prasad said that item 3 in his 28 February 2003 agreement namely “*Transfer of all generator stock of arrangements from Auto Direct to Navin Prasad*” meant “*all stock of generators we had in store to be transferred to me.*”
- [20] So it follows that when Navin Prasad received the \$15,000 he knew that the balance of the Autodirect’s funds had been paid to either Peter Prasad or a secret account and he knew that it would have no generators in store to deliver to the plaintiff because all generators were to be transferred to him.
- [21] Accordingly it was open to the trial judge to find as a fact that Navin Prasad was aware that the company structure was being used to perpetuate a fraud.
- [22] Neither appellant in their written or oral submissions challenged the trial judge’s finding, following the lifting of the corporate veil, that they were liable to the plaintiff on restitutionary grounds, namely that when a sum has been paid under a contract and there has been a total failure of consideration, “*then the principles of unjust enrichment dictate that the person who paid is entitled to have his money back: Fibroska Spolka Akeyina v Fairburn Lawson Umbe Barbow (1943) AC 32*”.
- [23] That is the law in Australia (*Pavey & Mathews Pty Ltd v Paul* [1987] 162 CLR 221 and New Zealand (*National Bank of NZ Ltd v Waitaki International Processing Ltd* [1997] 1 NZLR 724) and Fiji (*Daydream Cruises Ltd & Anor v Myers & Ors* [2005] HBC0291 of 1997L).
- [24] The appeals must be dismissed.
- [25] The orders of the Court are:
1. Appeal in proceedings ABU 0001 of 2008 dismissed;

2. Appeal in proceedings ABU 0008 of 2008 dismissed;
3. The appellant in each appeal is to pay the costs of the Attorney-General in each appeal as taxed or as otherwise agreed.



John A. Byrne
Byrne, JA

[Signature]
Hickie, JA

Russell B. Powell
Powell, JA

Solicitors:

Neel Shivam Lawyers, Suva for the Appellant
Office of the Attorney General Chambers, Suva for the First Respondents
No Appearances for the Second/Third Respondent
Diven Prasad Lawyers, Suva for the Third Respondent/Appellant