

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 404/10
5272262

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| BETWEEN | DUNCAN CARTER Applicant |
| AND | VANDA WHOLESale BLIND CO LIMITED First Respondent |
| | VANDA HOLDINGS LIMITED Second Respondent |

Member of Authority: Dzintra King

Representatives: Blair Edwards, Counsel for Applicant
Timothy Wallace, Advocate for First Respondent
Andrew Caisley, Counsel for Second Respondent

Determination: 7 September 2010

DETERMINATION OF THE AUTHORITY

[1] During the hearing of this matter the applicant sought to join Vanda Holdings Limited (“VHL”) as second respondent. Mr Wallace objected to the proposed joinder. Although Vanda Wholesale Blind Company Limited (“VWBC”) and Vanda Holdings Limited had some shareholders in common, including Mr Tim Wallace, he had no authority to represent VHL. The proceedings were adjourned. Although he was represented by Mr Edwards at the hearing, Mr Carter had filed the Statement of Problem himself and made no mention of VHL as a respondent. Mr Edwards subsequently filed an amended Statement of Problem alleging that Mr Carter had been employed by both VWBC and VHL and that VHL was attempting to hide behind the corporate veil in order to avoid any ongoing obligations to Mr Carter as an employee. The issue of piercing the corporate veil had been raised at the hearing.

[2] Subsequently a conference call was held and the parties and VHL were given an opportunity to provide additional information and submissions on the joinder issue and the piercing of the corporate veil. VWBC did not make submissions but indicated opposition to the joinder.

[3] I have received submissions from Mr Caisley on behalf of VHL and also an affidavit from Mr David Wallace, the director of VHL. It was agreed that the matters be determined on the papers.

[4] I am satisfied that there are no grounds for piercing the corporate veil. VHL has been incorporated since 1991. VWBC was incorporated in 2008. The companies have different directors and while there are some common shareholders there are also shareholders who do not hold shares in both companies. VWBC is not a subsidiary of VHL.

[5] VWBC was set up by Mr Timothy Wallace and Mr Carter. Mr Wallace is the director and both he and Mr Carter (through his family trust) hold shares in the company. Mr Timothy Wallace does not hold shares in VHL. The shareholders are his parents as trustees for the Wallace Family Trust.

[6] In *The Official Assignee as Assignee of the Bankrupt Estate of Alan Cliff Armitage v Sanctuary Propvest Ltd*, HC AK CIV-2009-404-0852 11 June 2009 Asher J noted at para [32] that New Zealand courts would not interfere with lawfully created entities provided the structures were genuine and intended to operate in accordance with their tenor; and that transactions would be enforced even if they were for an ulterior commercial purpose. The parties could choose whatever legal arrangements they wanted, provided they were not shams.

[7] R Grantham and C Rickett in *Company and Security Law: Commentary and Materials* (2002) at 22 state that in general there are three broad grounds for lifting the corporate veil. These are that the company is merely an agent of the shareholders, that the arrangement is a sham or façade or the corporate structure is being used to perpetrate a fraud.

[8] In *Square 1 Service Group v Butler* [1994] 1 ERNZ 667 at 669 Colgan J said that the lifting of the veil was not restricted to circumstances where there was a sham or façade but that cautions regarding lifting of the veil

...must be considered in light of the statutory requirement to act in equity and good conscience and given the special nature of employment relationships, especially between individual persons and corporations.

[9] VWBC and VHL are distinct legal entities. There has been nothing fraudulent or underhand or nefarious in the creation of either company. The fact that there are family connections does not alter that.

[10] Neither company was established or has been used to avoid an existing legal duty.

[11] VWBC found itself in financial difficulties and Mr Carter's position was disestablished. Whether that constitutes an unjustified dismissal is something yet to be determined.

[12] The assertion that Mr Carter was employed by both VWBC and VHL cannot stand. Mr Carter has an employment agreement with VWBC albeit the front page has the VHL logo on it. The parties are clearly stated to be Mr Carter and VWBC. I cannot find that Mr Carter was also an employee of VHL.

[13] I have heard from VHL because in the circumstances it was just to do so but I decline to join VHL as a party. VHL will not be directly affected by any orders made in the proceedings and no relief can be granted against it. VHL was not a party to the employment of Mr Carter and there are no grounds to lift the corporate veil.

[14] The applicant and the first respondent should advise the Authority if they wish a determination to be made on the basis of the evidence already heard or if they wish for a further hearing and the provision of additional evidence. If the parties cannot agree, a conference call will be convened.

[15] I will deal with costs on the substantive matter after determining that issue.

[16] On this matter, the parties should endeavour to resolve the matter of costs. If those are not successful, memoranda should be filed within 28 days of the date of this determination.

Dzintra King

Member of the Employment Relations Authority