UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 82 (LC) **UTLC Case Numbers: LC-2022-518**
Royal Courts of Justice

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)

LEASEHOLD ENFRANCHISEMENT – DEVELOPMENT POTENTIAL – whether the landlord has "any interest in other property", paragraph 5 of Schedule 3 to the Leasehold Reform, Housing and Urban Development Act 1993 – other property owned by a company in the same ownership - piercing the corporate veil

BETWEEN:

ANEESH LIMITED

Appellant

-and-

PETER MARK HINCHLIFFE (1)
JAMES WALTER JOHN WALLACE-JARVIS (2)
ZACHARY GILES LAMDIN (3)
MICHAEL MOORE MCKIMM (4)

Respondents

Re: Flats 3 to 6 Odessa Court,
Odessa Road,
London, E7 9BE

Judge Elizabeth Cooke
28 March 2023
Decision Date: 5 April 2023

Mr Christopher Pask, instructed by Mr Ajay Arora as in-house solicitor for the appellant
Mr Stan Gallagher, instructed by Anthony Gold Solicitors for the respondents

The following cases are referred to in this decision:

Adams v Cape Industries plc [1990] Ch 433

Bishopsgate Parking (No 2) Limited v Welsh Ministers [2012] UKUT 22 (LC)

DHN Food Distrbutors Limited v Tower Hamlets London Borough Council [1976] 32 P & CR 240

Salomon v Salomon Limited [1897] AC 22

Prest v Petrodel Resources Limited [2013] UKSC 34

Woolfson v Strathclyde Regional Council [1978] UKHL 5

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") about the price payable for the collective enfranchisement of leasehold property, 3-6 Odessa Court, London E7 9BE of which the appellant, Aneesh Limited, is the freeholder. Only one element of the price is in issue: the sum to be paid for the development value that the freeholder has lost by virtue of the enfranchisement. The respondents are, jointly, the nominee purchaser, as well as being the participating tenants who seek to acquire the freehold of the building.

2. The appellant was represented by Mr Christopher Pask, and the respondents by Mr Stan Gallagher, both of counsel, and I am grateful to them both.

The factual background and the point in issue

3. Odessa Court is a purpose-built two-storey block of six flats, with a flat roof. It comprises two self-contained sections; the freehold of the part that contains flats 1 and 2 is owned by Haveli Limited and the freehold of the rest of the building, within which are flats 3 to 6, is owned by the appellant. I refer to the two parts simply as "1 - 2" and "3 - 6".

4. The unchallenged evidence before the FTT was that the shares in the appellant and in Haveli Limited are owned, legally and beneficially, by Mr Ajay Arora and his wife Mrs Shiwani Arora. The two companies are therefore owned and controlled by exactly the same people.

5. By a notice of claim dated 18 June 2021, served pursuant to section 13 of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), the leaseholders of flats 3, 4, 5 and 6 exercised their right collectively to acquire the freehold of 3 - 6, and proposed a premium. On 23 August 2021 the appellant served a counter-notice admitting the validity of the claim and counter-proposed a premium. In November 2021 the respondents applied to the FTT for a determination of the premium and terms of acquisition. By the time of the hearing the only matter in issue was how much they would have to pay for the development value arising from the potential to build on the flat roof.

6. Paragraph 5 of Schedule 6 to the 1993 Act reads as follows:

> "(1) Where the freeholder will suffer any loss or damage to which this paragraph applies, there shall be payable to him such amount as is reasonable to compensate him for that loss or damage.
>
> (2) This paragraph applies to—
>
> (a) any diminution in value of any interest of the freeholder in other property resulting from the acquisition of his interest in the specified premises…"

7. Before the FTT the appellant argued that if it were selling the freehold of 3 - 6 on the open market then Haveli Limited would sell the freehold of 1 - 2 as well, or grant an airspace lease, so that the whole roof could be developed; the value of 1 – 2 is therefore diminished by the enfranchisement because the two companies will be deprived of the opportunity to

carry out a joint development of the roof above the whole building. The appellant seeks compensation for that loss of value under paragraph 5(2)(a) above, on the basis that it and Haveli Limited should be treated as a single economic entity.

8. Obviously the appellant does not own 1 – 2. But on the authority of the Court of Appeal's decision in *DHN Food Distributors Limited v Tower Hamlets London Borough Council* [1976] 32 P & CR 240 the appellant argued that the FTT should look at the reality of the situation and pierce the corporate veil so as to treat these companies as a single economic entity.

9. Mr Arora made a witness statement in the FTT, to which he exhibited a deed executed by family companies and individuals. In his statement he explained that he and his wife and siblings manage together the property portfolio built up by his parents. The family, he said, is indifferent as to who owns particular properties, and adopts a "seamless" approach according to what is best for the family as a whole. The deed is dated the day before the witness statement and is an explanation of the way the family manages its property and of the history of the ownership of 1 – 2 and 3 – 6. The building was originally wholly owned by Deeya Limited, another Arora family company of which, again, Mr and Mrs Arora were the sole shareholders. Paragraph 2.8 of the deed states that Deeya Limited "had issues with a single ground rent investment", and the deed goes on to explain that Haveli Limited then enfranchised 1 – 2, and that 999-year leases of the flats in 3 – 6 were granted by Deeya Limited to the appellant and then the freehold transferred to it.

10. The FTT determined that issue at the start of the hearing, so that it could then proceed on a settled basis so far as valuation evidence was concerned, and rejected the appellant's argument. In its later written decision the FTT noted that the split of the ownership was explained, in Mr Arora's witness statement, as having been effected "to spread risk and for tax planning reasons". It gave two reasons for rejecting the argument that the corporate veil could be pierced and the two companies regarded as a single economic entity: first that *DHN* was a decision concerning a very different regime, namely compensation for compulsory purchase, and under a different statute, and second that the decision had been "doubted" and "qualified" in later cases.

11. The appellant appeals on the ground that FTT was wrong to refuse to regard 1 – 2 Odessa Court as other property of the same landlord for the purpose of paragraph 5 of Schedule 6 to the 1993 Act.

The arguments for the appellant

12. For the appellant, Mr Pask of course accepts that since the decision in *Salomon v Salomon Limited* [1897] AC 22 it has been axiomatic that limited companies are separate legal entities. Nevertheless on rare occasions the court will pierce the corporate veil, generally, where the privilege of limited liability has been used for a dishonest purpose. Indeed, in *Prest v Petrodel Resources Limited* [2013] UKSC 34 two members of the Supreme Court (Lord Sumption and Lord Neuberger) held that those were the only circumstances where the veil could be pierced; the three other members of the court did not agree that the veil could be pierced only in cases of dishonesty although they were careful to make it clear that the court will do so only in very rare circumstances.

13. One such case was *DHN*. It was a case about compensation for compulsory purchase, where the acquiring authority had purchased land on which the claimant carried on a greengrocery business. Lord Denning MR, in characteristic storytelling mode, described the situation as follows:

> "This case might be called the "Three in one." Three companies in one. Alternatively, the "One in three." One group of three companies. For the moment I will speak of it as "the firm." In 1963 at Bow in the East End of London there was a firm of grocery and provision merchants. It imported groceries and provisions and distributed them to shopkeepers. It had a warehouse in Malmesbury Road. The firm had lorries which collected goods from the docks and distributed them to shopkeepers. Soon afterwards the firm developed a "cash and carry" business. Private individuals came by car. They bought substantial quantities wholesale. They paid for them in cash and carried them away.

14. However, the land on which the claimant ("DHN Ltd") ran its business was owned not by DHN Ltd but by its wholly-owned subsidiary, Bronze Limited. Another wholly-owned subsidiary owned the vehicles used for delivering goods; hence Lord Denning's trinitarian characterisation of "the firm". Following the acquisition the business could not be relocated and was closed down. On the plain words of the statute Bronze Limited was entitled to the market value of the land but not to compensation for disturbance to its business, because it did not run a business, and DHN Ltd could not be compensated for disturbance because it did not own the land (even though, as the Court of Appeal held, it had an irrevocable licence to occupy the land).

15. It was common ground that if immediately before the compulsory purchase the land had been conveyed by Bronze Limited to the claimant then the claimant would have been entitled to compensation for disturbance.

16. Lord Denning at page 246 said this:

> "These subsidiaries are bound hand and foot to the parent company and must do just what the parent company said. … This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company D.H.N. should be treated as that one. So D.H.N. are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

17. Lord Justice Goff (as he then was) delivered a concurring judgment and found for the claimant on three different bases, one of which was as follows:

> "in my judgment, this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned. I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group

> of companies one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever; thirdly, in: my judgment, the nature of the question involved is highly relevant, namely, whether the owners of this business have been disturbed in their possession and enjoyment of it."

18. Mr Pask relied on *DHN*. He accepts that the circumstances in which the corporate veil will be lifted are going to be rare and narrow but said that this is such a case.

19. Turning to the FTT's decision, Mr Pask said that the two reasons given for distinguishing *DHN* were insufficient. First, the case did indeed concern a different statute, but compulsory purchase is closely analogous to leasehold enfranchisement, where the freehold is acquired whether the freeholder is willing or not. There are, he argued, more similarities than differences between the two regimes.

20. Second, although doubt has been expressed about *DHN* it has not been overruled, and it remains authoritative and binding on this Tribunal. *Woolfson v Strathclyde Regional Council* [1978] UKHL 5 was a compulsory purchase case, where an individual sought compensation for disturbance of the business of a company in which he held the majority of the shares. Lord Keith of Kinkel, with whom the rest of their lordships agreed, expressed some doubt about *DHN*, but distinguished it on its facts. It is not overruled. And in *Adams v Cape Industries plc* [1990] Ch 433 the Court of Appeal had to decide whether judgments obtained in the US against a wholly owned and US domiciled subsidiary of an English parent company could be enforced against the parent company in England. The court had to consider whether the corporate veil could be pierced as it was in *DHN* and said at page 536:

> "the relevant parts of the judgments in the DHN case … must … be regarded as decisions on the relevant statutory provisions for compensation."

21. It added:

> "Save in cases which turn on the wording of particular statutes the court is not free to disregard the principles of *Salomon* merely because it considers that justice so requires."

22. Similarly in *Bishopsgate Parking (No 2) Limited v Welsh Ministers* [2012] UKUT 22 (LC) the Tribunal confirmed that *DHN* has not been overruled and remains binding on this Tribunal.

23. The present case Mr Pask argued, echoing the words used in *Adams v Cape Industries*, turns on the wording of a particular statute. Paragraph 5(2)(a), refers to "diminution in value of any interest of the freeholder in other property" (emphasis added); he said that that is a particularly wide formulation and that the FTT paid insufficient attention to it. It does not matter, he said, that the freeholder, here the appellant, does not own the "other property", being 1 -2. The fact that both companies are controlled by the same two people, the same controlling mind, is sufficient according to Mr Pask to give the appellant an interest in 1 – 2 Odessa Court.

24. Mr Pask referred to the deed annexed to Mr Arora's witness statement, and invited me to infer from paragraphs 2.8 and following that there were reasons why the freehold had to be split between the two companies. But just as Lord Denning MR held that the claimant in *DHN* was not to be defeated on the technical point that it had not taken the necessary conveyancing step, likewise here the appellant should not lose out just because 1 – 2 Court was not conveyed to the appellant before the notice of claim was served in circumstances where those who control the appellant also control Haveli Limited and could have ensured that that step was taken.

The arguments for the respondent

25. For the respondents, Mr Gallagher started from the proposition that on the plain wording of Schedule 6 paragraph 5 the appellant cannot obtain compensation for the loss in value of an interest in another property because it has no interest in 1 – 2. The appellant therefore seeks to rely on the fiction that it owns the freehold of 1 – 2 by demonstrating that the FTT was wrong to regard the two limited companies as separate legal entities. In order to do that the appellant must rely on *DHN*, which Mr Gallagher argued is not open to it; he said it is to be distinguished on a number of bases.

26. First, the factual matrix is different. Haveli Limited is not a subsidiary of the appellant; nor is it a nominee or an agent. It is not said that the appellant funded Haveli Limited's purchase of 1 – 2. The appellant does not have a licence to occupy Haveli Limited's land.

27. Second, Mr Gallagher relied on the point that swayed the FTT, namely that *DHN* was about compulsory purchase and not about leasehold enfranchisement, and it was about compensation for disturbance, not for loss of development value. And as the FTT said, *DHN* has been doubted, distinguished, and closely confined to its own facts, as it was for example in *Woolfson* and in *Adams v Cape Industries* (see paragraph 20 above).

28. He also argued that where the 1993 Act wants associated companies to be treated as one it said so, in particular in section 5(6) (which extends the operation of the ownership aggregation provisions of section 5(3) to flats held by associated companies).

29. Mr Gallagher pointed out that in general the reason why the courts will pierce the corporate veil is to counter dishonest or evasive conduct. For the appellant to have the veil lifted in the present circumstances would be unusual and out of keeping with the development of the law since *DHN* and with the approach of the Supreme Court in *Prest v Petrodel*.

30. Furthermore, the evidence, accepted by the FTT, was that the ownership of the two parts of the building was split "to spread risk and for tax planning reasons", which is of course legitimate, but having decided to operate its business through separate companies for that reason it is not right to allow the family to have the corporate veil pierced

31. Finally, Mr Gallagher pointed out that Haveli Limited's land is not being purchased (unlike the subsidiary's land in *DHN*), and it would be unfair for the leaseholders to have to compensate the appellant for loss in value to land that they are not acquiring.

Discussion and conclusion

32. The appellant had, I think, two distinct arguments. One was that the wording of the statute, "of any interest of the freeholder in other property" is so broad that the appellant should be regarded as having an interest in 1 – 2 by virtue of the fact that the two companies are owned and controlled by the same individuals. That argument cannot succeed. The wording is not broad, it is just what one would expect in order to protect a freeholder from diminution in value of property that it owns or in which it has a proprietary interest, whether legal or equitable, such as an easement. It cannot be stretched to include something that is not a proprietary interest. As Mr Gallagher said, on the plain words of the statute the appellant cannot succeed.

33. So the appellant's only hope of success rests on the argument that the corporate veil should be pierced as it was in *DHN* so that 1 – 2 is regarded as the appellant's property. And I agree with Mr Pask that *DHN* has not been overruled and it remains binding upon this Tribunal for what it decided. But it is worth looking again at exactly what was said in *Bishopsgate*:

> "123. Thus there is no doubt that *DHN* is authority for what it decides on piercing the corporate veil and that this Tribunal is bound by it. What then is it that *DHN* decides? … It is clear from the judgments that the conclusion of the court in this respect was founded on the key facts that DHN was in lawful occupation of the land acquired and carried on there the trading business of the company. In our judgment these facts constitute part of the ratio. ***DHN* thus constitutes authority that, where one company in a group owns the land acquired and another company is in lawful occupation of the land for the purposes of the business of the group, the corporate veil may be pierced so as to give the second company an entitlement to compensation for disturbance**. There is nothing in the decision that would suggest that a group company that is not in occupation of the land may be entitled to compensation under rule (6).

34. The emphasis there is mine, and it highlights the importance of the fact that the parent company was in occupation of the land of its subsidiary.

35. This is not a case in which I need to attempt to say anything general about the circumstances in which the corporate veil can be pierced. There is no need to do so because in my judgment *DHN* is to be distinguished on its facts for two reasons: first because the parent company, DHN Ltd itself, had an irrevocable licence to occupy the land of its subsidiary. The appellant does not have any such right in relation to 1 -2. The appellant and Haveli Limited co-operate in matters such as the maintenance of the building by employing the same management company, but there is no question of either occupying the other's property, let alone having an irrevocable licence such as was seen in *DHN*.

36. Second, the companies in this appeal are closely linked but are not as closely linked as were DHN Ltd itself and its subsidiaries. Bronze Limited was created in order to own the land. It did nothing else, and it owned the land for the parent company's benefit. Its purchase of the land was funded by the parent company. The three companies, parent and subsidiaries, operated as a firm. The appellant and Haveli Limited could not be described in those terms.

The appellant did not fund the purchase of Haveli's land, and Haveli does not own the land for the benefit of the appellant. Their property and operations have been deliberately separated by their shareholders, and for reasons that have not been explained beyond the vague "to spread risk and for tax planning reasons", and paragraph 2.8 of the deed annexed to Mr Arora's witness statement does not clarify that vagueness. The two companies have different directors (Mr Ajay Arora's brother is director of Haveli Limited and Mrs Arora is director of the appellant). Both companies are part of a family portfolio but they are not simply two halves of one business; they are important and distinct cogs in a much larger machine.

37. Whether or not it would be possible to pierce the corporate veil if the differences I have just identified were not present is not relevant to the decision I have to make and I express no view about that. If those differences were not present then other considerations would have to be looked into, such as the language of the rest of the Act (in particular the provisions of section 5(6)), the cautious approach expressed in *Prest v Petrodel*, and the argument that Mr and Mrs Arora cannot have their cake and eat it by separating the companies for their own purposes but then wanting them regarded as one in order to maximise compensation at the leaseholders' expense. But none of that arises because for the two reasons I have given it is not possible to regard the case as being so similar to DHN that the case for piercing the corporate veil has to be further examined.

38. So for those reasons I reach the same conclusions as did the FTT, and the appeal fails; the FTT's assessment of consideration remains undisturbed.

Judge Elizabeth Cooke

5 April 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.