



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No: 185

**BETWEEN:**

**CATS LIMITED**

**Appellant**

**v**

**JULIET WILKINSON**

**Respondent**

## EX TEMPORE JUDGMENT (REASONS)

*Unfair Dismissal / Appeal against decision of Employment Tribunal (RSC O.55)  
Corporate successor liability under section 31 of the Employment Act 2000  
Principles on Piercing of Corporate Veil*

Date of Hearings: Wednesday 23 January 2019

Date of Judgment: Wednesday 23 January 2019

Date of Reasons: Monday 18 February 2019

Appellant Mr. Ben Adamson (Conyers Dill & Pearman Limited)

Respondent Ms. Arisha Flood (AAF & Associates Limited)

JUDGMENT of Shade Subair Williams J

## **Introductory**

1. This is an appeal made under RSC Order 55 against the findings and decision of the Employment Tribunal (“the Tribunal”) in favour of the Respondent employee. Aggrieved by the determination and orders made by the Tribunal, the Appellant filed a Notice of Motion in the Supreme Court on 30 May 2018 pursuant to section 41 of the Employment Act 2000 (“the 2000 Act”).
2. I allowed the appeal at the conclusion of the hearing and indicated that I would provide these written reasons.

## **Background**

3. The Respondent, Ms. Juliet Wilkinson, was employed by an unincorporated association, the Bermuda Feline Assistance Bureau (“the BFAB Association” or “the Association”) in or around (date). On 7 November 2014 she was terminated by a member of the BFAB Association.
4. Ms. Wilkinson alleged that she had been unfairly dismissed by the BFAB Association on the basis that she was a whistleblower in relation to their non-payment of pension payments for its staff members, including her.
5. On 11 December 2014 Ms. Wilkinson corresponded with employment inspector, Ms. Gabrielle Stewart, in pursuit of the statutory complaints process for a complaint of unfair dismissal before the Tribunal, which later found against the Respondent on 27 November 2015.
6. The Respondent thereafter appealed to the Supreme Court in challenge of the Tribunal’s findings (“the first appeal”). The named parties to the first appeal were Ms. Wilkinson and the BFAB Association, although their Counsel, Mr. Adamson, indicated that they would not appear.
7. On 18 September 2017, the learned Mr. Justice Stephen Hellman allowed the appeal and remitted the matter to be heard before a differently constituted panel of the Employment Tribunal (“the new panel”). Hellman J gave specific consideration to the question of who should be named as the proper respondent to the appeal and found that the BFAB association was indeed the appropriate respondent to the appeal. However, he further directed that the new panel should also consider whether the BFAB Association still exists and if its corporate successor ought to be joined.

8. The BFAB Association was incorporated as BFAB Limited (“BFAB Ltd”) on 3 May 2017 and on 26 February 2018 BFAB Ltd changed its name to CATs. The new panel in its ruling considered this change of name to engage section 31(1) of the 2000 Act which addresses the effect of a sham sale purposed to enable an employer to avoid any of his or her legal obligations to the employee or to otherwise deprive that employee of his or her employment rights.
9. The new panel in a written ruling following a 3 May 2018 hearing determined that CATs Limited was BFAB Ltd’s corporate successor and so should be joined as the Respondent to the new panel proceedings. In its final findings, the new panel held that Ms. Wilkinson had been unfairly dismissed and accordingly awarded her 26 weeks wages.
10. Mr. Adamson emphasized that the Appellant, CATs Ltd, never sought to distinguish itself from BFAB Ltd and that the new panel was misguided in forming any view to the contrary. CATs Ltd, according to Mr. Adamson, is and always was obviously the same entity as BFAB Ltd.

### **The Opposing Arguments and Relevant Law**

11. The relevant point of law for this Court’s determination is whether the liabilities of an unincorporated association (ie BFAB Association) can lawfully pass on to corporation (ie BFAB Ltd or CATs Ltd). Mr. Adamson argued that as a matter of trite law, it cannot.
12. Mr. Adamson referred the Court to Tudor on Charities (2015 edition of Sweet & Maxwell) at page 331:  
  
*“A charity formed as an unincorporated association has no legal existence separate from its members.”*
13. Mr. Adamson readily accepted that Ms. Wilkinson had been wronged by the BFAB Association and submitted that she was entitled to sue the Association and join its members personally for enforcement proceedings on any judgment entered against it.
14. Ms. Flood for the Respondent relied on the principles of law for the piercing of the corporate veil, citing *Salomon v Salomon Ltd [1987] AC 22* which attaches high relevance and importance to the motive behind a company’s decision to incorporate in determining whether or not the corporate veil may be dislodged so to impose liability on the members of the company. She argued that board members, Mr. Thomas Gleeson, and Ms Janet Alers

formed part of the governing body of the BFAB Association and the corporate successor, BFAB Ltd and CATs Ltd.

15. However, Mr. Adamson argued that neither section 31 of the 2000 Act nor the piercing of the corporate veil would factually apply to an incorporation which first occurred two and a half years after Ms. Wilkson was terminated. On this point he referred the Court to the uncontroverted affidavit evidence of Ms. Rosalie Powell, the director of CATs Ltd wherein she deposed at paragraphs 2 - 5:

*“2. CATs was formed on 3 May 2017. CATS is a charity which assists with feeding and controlling the feral cat population in Bermuda. CATs was first called BFAB Ltd. but then changed its name on 26 February 2018 to avoid confusion with the previous charity, the Bermuda Feline Assistance Bureau (“BFAB”), the Respondent in this matter, which had the same charitable objects.*

*3. I was a volunteer worker for BFAB and on its governing committee although I was never a member. I came on board after Mr. Thomas Gleeson who previously ran BFAB left. BFAB had for most of its history been entirely run by Mr. Gleeson who until his departure was a tremendous supporter of its work. While at BFB, I was unclear who the actual members of BFAB were. This was one of the reasons why I stepped down from its governing committee and decided to set up CATs.*

*4. I emphasize that CATs does not have any of BFAB’s assets. As far as I am aware, BFAB continues to exist since (I am advised and believe) it is an association of its members. When I stepped down from BFAB’s governing committee, it still had a bank account with a small balance. It still owns the cat traps, since CATs bought its own. While I was on the governing committee I was aware that BFAB ceased to actively solicit donations.*

*5. I understand one of the issues for the Tribunal is whether CATs should be joined as a party to the litigation. I don’t believe it should be. CATs never employed Ms. Wilkinson. It has no knowledge of her employment or her termination.”*

16. Mr. Adamson also submitted that the Court should refrain from drawing any inferences of *mala fides* on the part of directors of a company without having heard evidence tested by cross-examination. Counsel relied on the below extract from the judgment of Simonds J in *In re Smith and Fawcett, Limited C.A. Chancery Division [1942]* at pages 308-309:

*“It is said that on the evidence before us we ought to infer that the directors here were purporting to exercise their power to refuse a transfer not bona fide in the interests of the company but for some collateral purpose, namely the desire of the leading director to*

*acquire part of the shares at an under-value. Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inferences as to the bona fides or mala fides of the actors. If it is desired to charge a deponent with having given an account of his motives and reasons which is not the true account, then the person on whom the burden of proof lies should take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not mean (sic) that it is illegitimate in a proper case to draw inferences as to bona fides or mala fides in cases where there is on the face of the affidavit sufficient justification for doing so, but where the oath of the deponent is before the court, as it is here, and only the grounds on which the court is asked to disbelieve it are matters of inference, many of them of a doubtful character, I decline to give those suggestions the weight which is desired. In the present case, the principal director has sworn an affidavit which, if accepted, makes it clear that, whether rightly or wrongly, the directors have bona fide considered the interests of the company and come to the conclusion that it would be undesirable to register the transfer of the totality of these shares. Accordingly, on the evidence I am satisfied, as the learned judge was satisfied, that there is no ground shown here for saying that the directors' refusal has been due to anything but a bona fide consideration of the interests of the company as the directors see them..."*

## **Analysis and Findings**

17. Having heard Counsel's competing arguments and having considered the affidavit evidence before the Court I find that the Appellant in these proceedings, a corporation first set up years after the Respondent was terminated by the Association, ought not to be held liable for the wrongs of the Association. The facts in this case do not support any inferences leading to the piercing of the corporate veil and I am not satisfied that the test required by section 31 of the 2000 Act has been proved. Such inferences could not properly be drawn from the uncontroverted and untested affidavit evidence in this case which I accept on its face.
18. While there is no controversy that BFAB Ltd and CATs Ltd are the same entity, notwithstanding the simple name-change, it is clear that such a parallel does not apply to CATs Ltd and the unincorporated Association.
19. It is indeed most regrettable that Ms Wilkinson should find herself prey to these circumstances as she is clearly entitled to compensatory relief arising out of the non-payment of pension contributions by her former employer. On my assessment, the Ms. Wilkinson ought to have proceeded against the Association and its members in their personal capacity, as they were during her term of employment.

## **Conclusion**

20. The application to strike out the appeal was dismissed and the appeal was allowed on all grounds.
21. The award decided by the Tribunal is set aside.
22. Counsel for the Appellant appeared on a pro bono basis and confirmed that he would make no application for costs. For that reason I make no order as to costs.

Dated this 18<sup>th</sup> day of February 2019

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**SHADE SUBAIR WILLIAMS**  
**PUISNE JUDGE OF THE SUPREME COURT**