SUPREME COURT OF NOVA SCOTIA

Citation: *Interlen v. 4325842 Nova Scotia Limited*, 2023 NSSC 337

Date: 20231024
Docket: 518462
Registry: Halifax

Between:

Interlen Ltd.

Plaintiff

v.

4325842 Nova Scotia Limited, operating as Hefler Forest Products
and Paul Sibley

Defendants

Judge: The Honourable Justice Darlene Jamieson

Heard: April 24, 25, 26, 2023, in Halifax, Nova Scotia

Counsel: Jonathan Roth, for the Plaintiff
Colin Bryson, K.C. and Eliza Richardson for the Defendants

By the Court:

Background

[1] The Plaintiff, Interlen Ltd. ("Interlen"), is a corporation incorporated pursuant to the laws of the State of Israel, with a head office in Ashdod, Israel. Interlen carries on business as an importer and marketer of timber. Mr. Moshe Levkovitz is the Chief Operating Officer of Interlen and takes care of the daily business of the company, including purchasing and sales.

[2] The Defendant, 4325842 Nova Scotia Limited ("842 NSL"), operated a sawmill during the relevant period of time (July 2021 to the fall of 2022) located at 230 Lucasville Road, Middle Sackville, Nova Scotia. 842 NSL used the business name Hefler Forest Products ("HFP") during the relevant period of time. The Defendant, Paul Sibley, is the President and a director of 842 NSL.

[3] There is no dispute between the parties that on September 1, 2021, Interlen placed an order for the supply of US $282,750 of lumber and provided a prepayment deposit of US $50,000. Nor is there a dispute that the ordered lumber was never supplied. 842 NSL concedes that it is responsible for the return of the deposit of US $50,000. Interlen says its damages are not limited to the amount of the deposit. It also seeks its expectation damages, saying that if it had received the lumber as agreed, it would have distributed that lumber for profit.

[4] Interlen says Mr. Sibley is personally liable to it for any damages because Interlen contracted with Mr. Sibley personally, not 842 NSL. It says that even if the Court were to find that it contracted with 842 NSL, Mr. Sibley cannot hide behind the corporate veil in the circumstances of this case.

[5] 842 NSL denies liability for damages beyond the US $50,000 and Mr. Sibley denies any liability in his personal capacity.

Evidence at the Trial

[6] Each party called one witness. The Plaintiff called Mr. Levkovitz, while the Defendants called Mr. Sibley. There were a number of exhibits admitted into evidence.

Summary of the Evidence

[7] I have considered all of the testimony and the documentary evidence presented during this hearing, although I will not mention all of it. The following are the facts of this matter as I find them, unless stated to be otherwise.

[8] Prior to 2021, Mr. Levkovitz and Mr. Sibley had done business together. They knew each other for a number of years, perhaps, as far back as 2008. Mr. Sibley supplied lumber to Interlen while he worked at various companies.

[9] While working with Taylor Lumber and New Future Lumber, Mr. Sibley sold timber to Interlen on various occasions, dealing with Mr. Levkovitz each time. There is no evidence that Mr. Sibley ever supplied lumber to Interlen in his personal capacity. Mr. Levkovitz's evidence was that he had a long relationship with Mr. Sibley:

> …we were in a very good relations and he called me and he offered me to purchase again timber from him and I was very happy to do it because we had a long experience of doing business together from certain places from the days of Taylor and then New Horizon, I think, or something like that and in my opinion he was my agent, he was my broker and whenever he had the opportunity to offer timber to us and the quality was fine and the prices were fine, so why not to do business with an old friend.

[10] Mr. Levkovitz gave evidence that he recalled Taylor Lumber and that he got lumber from Mr. Sibley, which was from Taylor Lumber. He said he didn't know whether Mr. Sibley was an employee or the manager of Taylor Lumber at the time. He knew that Mr. Sibley was connected to Taylor Lumber and maybe was a partner. He said he didn't know if Mr. Sibley received a salary or a commission. Mr. Levkovitz also gave evidence that he dealt with Mr. Sibley through a company called New Future Lumber Limited ("New Future"). He said he did not know that Mr. Sibley was an owner of New Future.

[11] Mr. Levkovitz acknowledged buying from Taylor Lumber and New Future more than 10 times, prior to 2021. The following exchange occurred during his cross examination:

> Q. You bought, you bought timber from either…
>
> A. Yes.
>
> Q. …Taylor Lumber or from New Future Lumber over the years…

A. Yes.

Q. …approximately 25 times?

A. Yes. I don't remember.

Q. Well it was more than once, more than 10, several times, you know, your lumber purchases?

A. Yes, yes more than one. Yes, probably more than 10. I don't remember the figure 25.

[12] Mr. Levkovitz also testified, that to his recollection, when he dealt with Taylor Lumber and New Future, the funds were paid from Interlen to Taylor Lumber or New Future.

[13] Mr. Sibley worked for Taylor Lumber for 12 years until 2012, when he and a partner started New Future. Mr. Sibley was President of the company. New Future bought and remanufactured lumber to the specific sizes needed in the Middle East. The company was shut down in approximately 2017.

[14] Mr. Sibley gave evidence that he started supplying lumber to Interlen in 2008 while he worked for Taylor Lumber. He said at that time Taylor Lumber would issue a proforma invoice for a percentage of the total sale – industry standard was usually between 30 and 50%. He said that they would issue the invoice and Mr. Levkovitz would pay, then they would load the containers and put them on a vessel. Once the vessel was loaded and the goods were on the ocean, then they would be wired the balance of funds. Paperwork for the sales would include invoices from the company, the bill of lading from the shipping company, the phytosanitary certificates, etc.

[15] Mr. Sibley said that he continued to ship lumber to Interlen after forming New Future. Mr. Sibley said the invoices were always paid by Interlen to the company he was working for, and the documents were always with the company. He said he has never been a broker. Mr. Sibley estimated that, over the years, he did 25 sales with Interlen through Taylor Lumber and New Future.

[16] HFP was a long standing sawmill and lumber supplier operating in Middle Sackville, Nova Scotia. Mr. Sibley said he had tried to purchase HFP in 2012 and 2016. Mr. Sibley testified that he discussed his interest in acquiring HFP with Mr. Levkovitz because he wanted him to remain a customer.

[17] Mr. Sibley gave evidence that as the result of a receivership in 2020/2021 he tried again to purchase HFP, but the successful bidder was MacAdam Construction

Inc. (“MacAdam Construction”). Mr. Sibley said that when he found out that he lost the bid, he reached out to the owner to see if he could buy HFP directly from him. He said they entered into negotiations for a lease and leased the Lucasville Road property from MacAdam Construction. He said they negotiated for 842 NSL to use the name HFP. Mr. Sibley gave evidence that 842 NSL entered into a lease whereby it leased the premises in order to produce lumber and operate the lumber yard. He said 842 NSL leased the entire facility so they had the sawmill, planer mill, kilns and power plant. Mr. Sibley said the lease came with the right for 842 NSL to use the name HFP, which had been included in the assets MacAdam Construction obtained when it purchased HFP from the receiver.

[18] The lease between 842 NSL and MacAdam Construction was not in evidence. A draft unsigned lease dated May 31, 2021 was in evidence. Mr. Sibley said he no longer had access to his office at the HFP premises where the lease was kept due to a dispute related to MacAdam Construction attempting to terminate the lease. He said MacAdam Construction took possession of the sawmill in March 2023. He offered no explanation as to why the lease had not been produced prior to March of 2023.

[19] Initially in his direct examination Mr. Sibley said he believed the unsigned lease was the same as the signed lease. However, on cross examination, he said it was a draft lease and not the final draft:

> Q. And you agree, first of all, that this lease is an interim lease?
>
> A. Sorry, what type of lease?
>
> Q. An interim lease. If it would help, maybe you would like to turn up the document. It’s at page 49, Exhibit A17.
>
> A. But I believe you only have a draft. What exhibit is it, sorry?
>
> Q. Sorry, page 49, Exhibit A17. If you look at the title on the top of page 49, you’ll see Triple Net Commercial Lease Interim Agreement?
>
> A. Yes.
>
> Q. So, this was an interim lease, right? In the sense that it contemplated that there would be a further lease.
>
> A. No. This was only a draft. This is not the final draft.
>
> Q. Okay. And did, so, that was my next question. In addition to being an interim agreement, this is also a draft document, right?
>
> A. I believe so, yes, yeah.

Q. And it's not signed by you, this copy?

A. No. We didn`t sign a draft, no.

Q. Okay. And you didn`t produce, for the reasons that you gave earlier, you didn't produce the final copy, right?

A. No.

Q. And you didn`t produce a signed copy?

A. No

[20] 842 NSL was incorporated in 2021 for the purposes of leasing the HFP property. Its owners are Ms. Michelle Sibley (Mr. Sibley's wife) and L. Bessery.

[21] 842 NSL took possession of the HFP premises on approximately June 1, 2021. Mr. Sibley said the sawmill and equipment were in a worse state of repair than he expected and they had to do some preventative maintenance. He said they started producing lumber in late July 2021.

[22] HFP is a registered business name belonging to MacAdam Construction. There is no evidence this business name was ever registered to 842 NSL.

[23] Various e-mails were exchanged between the parties in late August of 2021. Each contain at the bottom Mr. Sibley's name followed by a telephone number and "Hefler Forest Products Sackville NS." The parties agree that in addition to the emails, there were some telephone or WhatsApp calls and texts.

[24] By email dated August 30, 2021, Mr. Sibley stated:

> Please find the attached Proforma Invoice. Let me know if this offer would work for you. We are producing every day and I would be very happy to supply you once again with timber. (And hopefully year round). Sawmill produces about 100M3 daily. Please advise if this is acceptable. I can adjust the quantities or sizes to your liking.

[25] The associated invoice bears an August 30, 2021 date and is in the amount of US $257,250. The invoice is noted as being proforma and the name of HFP is at the top of the invoice, along with the Lucasville Road address. There is no reference to either 842 NSL or Mr. Sibley on the invoice.

[26] Mr. Levkovitz responded on August 31, stating:

> I was very happy to hear from you and I hope that you are happy and satisfied with your private life. Yes I am glad to start work again. We need 22x200 as much as

> you can please correct it. All the rest is ok and lets go back to work. When do you think you can ship it?

[27] Mr Sibley replied the same day:

> Likewise ! I am excited to start with you ! It also gives me a visit to come back and visit! How about I up the 22x100 to 10 containers? I will revise and resend if this is acceptable? Of course if I can do more I will ! I should be able to start shipping in 2-3 weeks. I will start to prepare lumber for you right away.

[28] Mr. Levkovitz responded:

> Please take care for the 22x200 not only 22x100

[29] Mr. Sibley stated in reply:

> Ok I can produce a good volume of the 22x200. I will revise the proforma for your review. Coming through shortly

[30] Mr. Sibley then sent an invoice and said:

> Please review if this is acceptable? I humbly ask if you could send $50,000 to help me with production and I would edit that into the proforma. Thank you !

[31] Mr. Levkovitz said that an advance payment was typical for these kinds of deals. Mr. Levkovitz said he knew Mr. Sibley and had trusted him during the years he did business with him, so he saw no reason not to do so again.

[32] Ultimately, a revised invoice dated September 1, 2021 was sent which included 4 containers of the 22 x 200 product that was requested. The total cost for the lumber to be supplied was $282,750 USD. Again, the invoice bore the name HFP.

[33] Also on September 1, 2021 Mr. Sibley sent an email titled “Bank Details”. The email states in part:

> Attached are documents to support Bank and company details. I would like the wire to my USD account listed below….
>
> Company
>
> 4325842 Nova Scotia Limited o/a Hefler Forest Products
>
> 230 Lucasville Road
>
> Sackville NS

Canada

B4E 1R6

…

[34] The above reference to the corporate Defendant, 842 NSL, is the only time the company name appears in the documentation entered at trial. Although it is not clear from the email what the referenced attachments were, it appears that at least one of the attachments was a blank cheque in the name of HFP with the above noted address. The cheque does not reference 842 NSL.

[35] There is no evidence that the US $50,000 was transferred anywhere other than to the noted account of 842 NSL o/a HFP referenced in the email. It is noteworthy that Mr. Sibley failed to produce an account opening statement showing that the account belonged the company rather than to himself personally, as requested by the Plaintiff. On the Friday before trial, two emails with BMO Bank of Montreal (an exchange) were sent from counsel for the Defendants to counsel for the Plaintiff but contained none of the five attachments referenced in the email between BMO and Mr. Sibley of May 26, 2021. Mr. Sibley gave evidence that the emails are from when the company account was opened in May of 2021.

[36] The emails are between Mr. Sibley and Ms. Tina Sweeney-Doucette, Client Services Officer, Canadian Business Banking, BMO. The email from BMO is titled ‘forms to sign’ and refers to forms for Mr. Sibley to sign, one for Michelle to sign, and “2 that all 4 of you need to sign on the same sheet.” Ms. Michelle Sibley was a shareholder along with L. Bessery. It is not clear who the fourth person is that is referenced.

[37] The parties agree that the contract for the supply of lumber was entered into on September 1, 2021. The Plaintiff specifically pleads so in its Statement of Claim. The September 1 invoice contained the products Interlen wished to purchase and the agreement included payment of an advance or deposit of US $50,000.

[38] There is no dispute that the lumber was never shipped. There is no documentary evidence between September 1, 2021 and March of 2022. There is a ZIM booking confirmation for shipping with a sailing date of March 3, 2022. Nothing was shipped on this date. Mr. Levkovitz acknowledged that he and Mr. Sibley would have spoken one or two times in the period between September 2021 and April 2022.

[39] The documentary evidence indicates that Mr. Sibley and Mr. Levkovitz exchanged the following emails beginning in April 2022:

1. April 18, 2022 (the first email post the September 1, 2021 contract) – Mr. Sibley said: I can't get a call to go through to you. Can you please call at your earliest convenience. I will be available all day.

2. April 18, 2022 – Mr. Levkovitz said: I can not reach you, even though I called many times. The only question is are you going to supply the order or not. If yes so when? You did booking with Zim and then you canceled it with out informing us. If not are you going to return the money? I must say that I am very much disappointed….

3. April 18, 2022 – Mr. Sibley said: I am really sorry, I am not sure what's going on with the calls, My Whatsapp I'm told is hacked but will not let me update. The call does now show and then a message pops up for Voice Mail.

   Anyhow, I did not cancel the booking, I could not load in the time Zim allotted because we were having some bad weather, I asked to roll it and Zim just cancel. I am not sure but I assure you I did not cancel. When this happen I am sorry I did not call but I was scrambling to deal with weather and so on. Then spring break up hit and logs became an issue. This is not excuse. I just had a lot going on.

   I will 100% ship you lumber. I promise you. I will fix this. Road are back open now and logs are rolling again. I will make a new booking and send it to you.

   I need to figure out what is going on with my phone….

   You helped me and I need to make it right. I will.

4. April 19, 2022 - Mr. Levkovitz said: O.K. fine. I hope it will be solved soon. Please update me.

5. May 7, 2022 – Mr. Levkovitz said: How are you please inform me if there is anything new regarding the shipment.

6. May 9, 2022 – Mr. Shipley said: …We are accumulating timber for your order now, we are cutting some pine at this time and hope to finish it in the next week or so. After that we should have enough whitewood to prepare a shipment for you. I will update you later next week to confirm.

7. June 23, 2022 – Mr. Levkovitz said:… Days are passing and nothing happens. I must explain something: According the law in Israel you cannot send money outside without any explanation. I wrote to the bank that the money was transferred to purchase timber from you. Timber is not coming and many months has already passed. I must explain what is the reason for that and if not I have to take a lawyer in Canada and sue you. I am very sorry but I do not have any other choice. If you have already send something its very good if not we will have to take you to court…

8. July 4, 2022 – Mr. Sibley said: I just received a letter from a lawyer. Please be a bit patient with me as I am trying to get my Kiln going to fill your order. …I need permission to start the steam plant from the government. I am getting close…It is my bad for not keeping you up to speed on things but I didn't know it was going to take so long. Please call if you can and I can explain everything and why it was delayed more than expected.

9. July 28, 2022 – Mr. Sibley said: I am putting together a container of each for you now to start I have 44x100 x3.0 and 3.6. In the 44x200 is a combination of 3.6, 4.2 and 4.8 acceptable? I will get you the complete tally of each container if these lengths are acceptable. We can also revise the pricing in your favor for the delay in shipment.

10. July 28, 2022 – Mr. Levkovitz said: Do what you think is fair for both sides. Please send asap. …

11. July 28, 2022 – Mr. Sibley said: I am working out a tally on the lengths I have to make it fit in containers.

12. August 6, 2022 – Mr. Levkovitz said: .. when are you going to ship the goods. And I must have b/l and invoice.

13. August 7, 2022 – Mr. Sibley said:… I should be able to confirm booking this week and send you the details and documents. For pricing adjustment at a 12% discount?

14. August 7 and 11, 2022 – Mr. Levkovitz followed up asking for shipment asap.

15. August 17, 2022 – Mr. Sibley gave new pricing and said: I am arranging for the shipping today as last load is coming back from the

drier. Taking it off stickers to pack for shipment and will send you all the details for booking etc shortly.

16. August 17 and 26, 2022 – Mr. Levkovitz followed up.

17. August 29, 2022 – Mr. Shipley said: Hope to send you all the details today. Just organizing shipping details!

18. August 30, 2022 – Mr. Levkovitz again followed up.

19. August 31, 2022 – Mr. Sibley said: I will ship, I've had to request an updated rate to arrange a booking. My rate had expired. CFIA has to inspect to issue a phyto cert…I will update you by Friday with shipment details.

20. August 31, 2022 – Mr. Levkovitz said: I can buy it f.o.b. any port and I will organize the shipment. I must have the material shipped.

21. September 1, 2022 – Mr. Sibley said: That's fine by me. I have a new quote and sent a request for booking. Shipment is from Halifax to Ashdod. I'll send you a copy of the booking when it comes in. Phytosanitary request made as well…

22. September 2, 2022 – Mr. Levkovitz said: It can work if we complete everything till 10 of September. In my opinion nothing will happen but I am willing to wait. And see what kind of stories you are going to tell. After 10 of September I am going to stop writing to you. And all the rest will be done in the court in Canada.

[40] The lumber was never sent. Mr. Sibley gave the following reasons during his evidence:

1. His estimate of shipping within 2 to 3 weeks was based on his prior experience. He didn't realize there were supply chain issues as it had been two or three years since he had shipped lumber in containers. He said he believed that he called Mr. Levkovitz and advised he was not going to be able to make the 2 to 3 week timeline, that it was going to take a little bit longer, and that Mr. Levkovitz was fine with that.
2. There were no containers available in Halifax to ship. He further said there were no shipping containers available and the ones you could get were going for an extremely high premium. So when he couldn`t get containers right away, he sold the lumber that he had for the 44 x

100 to a local broker to keep cash flow going. He said he had had lots of the 44 x 100 lumber in the yard when the proforma invoice was issued to Interlen.

3. He said he had a booking with ZIM but the week they were planning to load the containers, there was a snowstorm. He said he contacted ZIM and asked them to "roll the booking", meaning to ship it the following week. He said this would not normally be an issue, but that ZIM automatically cancelled the booking because there was a long lineup behind him of people wanting the containers.
4. He ran into issues with the kiln, which "really showed their teeth" with the cooler weather in November. The sawmill had been shut down and was in a worse state of disrepair than he had expected. The kiln's steampipes were leaking so he had to repair those. The kiln is what dries the lumber sufficiently for CFIA to issue the phytosanitary certificate required for Israel. The kiln was never fixed.
5. He reached out to some other mills for use of their kilns but kiln time is very scarce in the winter. No other mills had space in their kilns, so he tried to bend the rules a little bit by air drying some lumber in the hope that he could sneak it past CFIA without getting in trouble. But that didn't work.
6. He said he spoke to Mr. Levkovitz about the situation once or twice per month.

[41] On cross examination, Mr. Sibley said the primary reason that he didn't ship the lumber between September 2021 and April 2022 was that he couldn't get a shipping container. He said the lumber product he had for shipping in March had been sourced from another supplier, Brunswick Valley, and he simply called and arranged it. There was no paperwork. He said he has been doing business with Brunswick Valley for 20 years. He said the issues with the kiln started in 2021, essentially from day one, but got increasingly worse.

[42] On January 24, 2022, Mr. Sibley received an email from Maritime Pressure Works concerning the oil fired boiler at HFP. He was advised that the cost to complete the re tube was $57,500, and that there would be other associated costs including scaffolding being required, probably new safety valves, and $2500 for a portable boiler to heat water for a hydro test for inspectors. When Mr. Sibley wrote to Mr. Levkovitz in July about the kiln, he had already decided that he was not going

to repair it, but told Mr. Levkovitz that he was trying to get the kiln going and was getting close to getting permission to start the steam plant.

[43] Mr. Sibley said that when he told Mr. Levkovitz in August 2022 that his wood was coming back from the drier, he meant a place in the yard where lumber was dried by the sun, notwithstanding his knowledge that kiln drying was required for the phytosanitary certificate necessary to ship to Israel. He said he was hoping to bend the rules and ship without the kiln drying.

[44] Mr. Sibley said that the suggestion from Mr. Levkovitz to send the lumber any port f.o.b. would not work without the phytosanitary certificate.

[45] It is clear from the evidence that a number of Mr. Sibley's excuses do not have an air of reasonableness nor believability. While I accept some of Mr. Sibley's evidence, I certainly do not accept that he was truthful in his emails in 2022 concerning the state of the kiln, that he was lining up the phytosanitary certificate, and that he was about to ship the lumber.

[46] Mr. Levkovitz said that he expected the lumber in two to three weeks, however, if the lumber had been delivered in April or May 2022, or even later on, he would have accepted it because he really had no other option. Mr. Sibley was not returning the prepayment so without any lumber, it would be "dead money."

Parties' Positions

[47] Interlen says Mr. Sibley is personally liable to it for damages because Interlen contracted with Mr. Sibley, not 842 NSL. Mr. Levkovitz says he always believed that he was dealing with Mr. Sibley in his personal capacity. Interlen says that even if the Court finds that it contracted with 842 NSL, Mr. Sibley cannot hide behind the corporate veil in the circumstances of this case.

[48] Interlen says the onus is on Mr. Sibley to show that he made the Plaintiff aware that he was an agent of a corporate principal. The fact that a plaintiff is aware of the existence of a corporation or is directed to make payment to a corporation is insufficient to meet this onus.

[49] Interlen says that even if Mr. Sibley meets his onus, he cannot use the corporate Defendant to shield himself from personal liability on these facts. The corporate form does not protect directors/officers who use the corporation for a

fraudulent or improper purpose or where to do otherwise would be unfair and cause a result "flagrantly opposed to justice."

[50] Interlen seeks its expectation damages and says that if it had received the lumber as agreed, it would have distributed that lumber for profit. It says it is entitled to be put in the position it would have been in had the contract been performed.

[51] The Defendants say Mr. Levkovitz would have known that he was dealing with a company and not Mr. Sibley personally due to his history with Mr. Sibley, his pre-contractual conversations with Mr. Sibley, and, in particular, from the September 1, 2021 email which refers to "company details."

[52] The Defendants say that Interlen raises two other issues for which pleading amendments have not been sought - that the contract was with Mr. Sibley and not 842 NSL and that Mr. Sibley is liable pursuant to section 80 (6) of the *Companies Act*, R.S.N.S. 1989, c. 81.

[53] The Defendants say the allegation that Mr. Sibley used 842 NSL as a front was not pled as an alternative argument, and only makes sense if the alleged contract was between Interlen and 842 NSL. The Defendants say this position also only makes sense if there is evidence that the deposit went to Mr. Sibley personally, or that 842 NSL re-routed the deposit to Mr. Sibley personally. There is no such evidence. Further, there can be no valid claim against Mr. Sibley for unjust enrichment.

[54] In relation to the Plaintiff's argument that Mr. Sibley/842 NSL never had any intention of delivering the lumber, the Defendants say that fraud is a serious allegation that should only be upheld on clear and convincing evidence, and that such evidence is not present here.

[55] The Defendants take no issue with the statement that in breach of contract cases such as this, the party not in breach is entitled to "expectation damages." They say, however, that Interlen has not established such a loss on the evidence.

Issues

[56] The issues are as follows:

1) Was the contract with Mr. Sibley personally?

2) If the contract was with 842 NSL, were Mr. Sibley's actions as an officer and director such that the corporate veil should be pierced and Mr. Sibley found personally liable?

3) Did Interlen suffer expectancy damages? If so what is the quantum of the loss?

Law and Analysis

Who were the parties to the contract ?

[57] I am not convinced that the Statement of Claim pleads that the contract was with Mr. Sibley personally. The statements and allegations referencing Mr. Sibley are vague and unspecific. The Defendants say the allegation that the contract was with Mr. Sibley personally is a recent construct. The Plaintiff points to various paragraphs to support its claim that it pleaded the contract was with Mr. Sibley personally. For example, it says that paragraphs 3 and 4 refer directly to Mr. Sibley. These paragraphs state:

> 3. The individual Defendant, Paul Sibley, is the President and a corporate director of HFP. At all material times, the Plaintiff dealt directly with Sibley in connection with the contract giving rise to this Statement of Claim.
>
> 4. On or about September 1, 2021, the Plaintiff placed a purchase order, through Sibley, for $282,750.00 USD worth of timber products for export to Israel. On the same date, the Plaintiff delivered to Sibley, by wire transfer, the sum of $50,000 USD as a prepayment for the timber order. Sibley directed the Plaintiff to make payment to a US bank account held in one or both Defendants' names.

[58] The above paragraphs indicate Mr. Sibley was President and a director and the contract was placed "through" him, not with him.

[59] The Plaintiff also points to paragraphs 7 and 9, which refer to defendants in the plural form, and says this included Mr. Sibley. However, using the word "defendants" would also be consistent with the contract having been made with the corporate defendant. For example, the reference in paragraph 9 to "the Defendants' breach and repudiation of the parties' agreement" implies that both 842 NSL and Mr. Sibley breached and repudiated the contract. Statements like this do not appear to be consistent with an allegation that the contract was with Mr. Sibley in his personal capacity. They are more consistent with the Plaintiff's argument on piercing the corporate veil.

[60] I note as well that paragraph 11 states:

> The Plaintiff alleges that Sibley improperly used HFP as a front to misappropriate the Plaintiff's prepayment for Sibley's own personal benefit and enrichment. Sibley did not intend to deliver any product of HFP, and his statements to the contrary amounted to fraudulent misrepresentation.
>
> [Emphasis added]

[61] This pleading is inconsistent with an allegation that the contract was with Mr. Sibley in his personal capacity. While the Plaintiff maintains that this paragraph is an alternative argument, it is not stated to be such, and it is consistent with the remainder of the allegations, including that Mr. Sibley was unjustly enriched.

[62] Regardless of these above noted concerns, I will go on to consider the merits of the allegation that the contract was with Mr. Sibley personally.

[63] The case law is clear that a person who professes to be carrying on business under a corporate name must take reasonable steps to make it known the contract is with a corporation and not with the individual in their personal capacity. They must disclose the corporation's full and proper name. For example, the Nova Scotia Court of Appeal in *Lohnes v. Corkum,* 1981 CanLII 2694 (N.S. C.A.) said:

> 15 The agreement under which the logging was undertaken and pursued as one entered into by Clayton R. Fancy and Mr. Lohnes following negotiations between them. The consideration for the rights granted under it was $8,000. This payment was made by a cheque, ex 17, of Elmer Lohnes Lumbering Ltd. Much reliance was placed on this circumstance in support of a submission, as put by Mr. Justice Burchell, that the appellant's name appeared on the Fancy agreement "in error as the agreement was always intended to be between the owner and the defendant's company". But if the appellant, who obviously was in full control of his company, wished to pay Mr. Fancy by company cheque I fail to see how that could make the company and not the appellant a party to the agreement. Moreover, if the appellant chose to perform the work of logging through his company and its employees again he could not thereby in effect erase his name from the agreement and substitute for it the name of his company, thus thrusting upon his company what the learned trial judge refers to as "clear obligations in the name of the defendant [appellant] to indemnify the owner for all loss and damage such [as] is the subject of this action". I add only this. If a person incorporates his business as was done by the appellant in 1977 he must make it clear to those with whom he is negotiating contracts that he is doing so on behalf of his company and not in his personal capacity. If he fails not only to do so but also enters into a contract, as here, signing only in his personal capacity he should not thereafter when sued be allowed to hide behind the corporate veil so-called. We should not countenance such an effort.

[Emphasis added]

(See also *Victor (Canada) Ltd. v. Farbetter Addressing and Mailing Ltd.*, [1978] O.J. No. 2687 (Ont. H.C.J.) and *Kobes Nurseries Inc. v Convery*, 2010 ONSC 6499, aff'd 2011 ONCA 662).

[64] The onus is on a defendant to illustrate that the contract was with the corporation, that he made it known to the plaintiff that he was acting for a corporation. (See *Kobes Nurseries Inc., supra; Shelby Huggins Inc. v. Venos,* 2014 ABQB 440; and *Bridge City Electric (1981) Ltd. v. Robertson,* [1986] S.J. No. 396 (Sask. Q.B.). It is the principles of agency which impose liability on an agent who fails to disclose the principal/agent relationship.

[65] In relation to the use of trade names, the court in *Shelby Huggins Inc.*, *supra,* said:

> 32 The case law on this issue is clear. Disclosure of a trade name is not sufficient for a third party to know with whom it is dealing. As Kozak J held in *Clow Darling Ltd. v. 1013983 Ontario Inc.* (1997), 36 B.L.R. (2d) 137 (Ont. Gen. Div.) at para 16, and repeated with approval in *Drury Farms Inc. v. Stevenson*, 2008 SKPC 68 (Sask. Prov. Ct.) at para 11 and *864385 Ontario Inc. v. Desbiens*, [2006] O.J. No. 4973, 153 A.C.W.S. (3d) 1104 (Ont. S.C.J.) at para 3:
>
> > He cannot simply contract in a trade name and expect that the people with whom he is dealing with conclude that he is acting for a limited company.
>
> 33 Similarly, Somers J in *Partners Catering Inc. v. Aboya*, [1998] O.J. No. 5182 (Ont. Gen. Div.) at para 8 said:
>
> > In my view, there is an onus or duty on a person entering into a contract under a business name to make clear to whoever he is dealing with that in fact that person is dealing with a limited company should it thus subsequently become his position that he is not liable and his company is. I have been referred to the recent Court of Appeal decision *Truster v* ***Tri-Lux*** *Fine Homes Ltd.* (1998), 39 C.L.R. (2d) 6 (Ont. C.A.) where at paragraph 22 Finlayson J.A. speaking for the court commented:
> >
> > > I would agree with the trial judge's assessment that they did not take reasonable steps to ensure they were not holding themselves out as individuals rather than as agents of a corporation.
> >
> > [Emphasis added]

[66] The contract was entered into on September 1, 2021. This is not in dispute. The following is the factual background to the contract. First, there was an emailed offer of August 30 and invoice dated August 30, 2021 proposing materials with a

price of US $257,250. Interlen wished to revise the contents of the invoice to add additional materials by asking for as much 22 x 200 lumber as possible. The earlier invoice did not include this dimension of lumber. This revision was agreed to in Mr. Sibley's email of August 31, 2021. Mr. Sibley sent a further e-mail with a proforma invoice on August 31, 2021. In this e-mail, he asked for a US $50,000 prepayment to help with production.

[67] All of the emails sent by Mr. Sibley end with the following:

> Paul Sibley
>
> 902 478 6403
>
> Hefler Forest Products
>
> Sackville NS

[68] It is unclear whether the September 1 invoice was the same invoice attached to the August 31 email. It is not clear what invoice was attached to the August 31 email as there is no invoice in evidence dated August 31. However, there is no dispute that the final proforma invoice is the one dated September 1, 2021 with a total price of US $282,750. This invoice also bears the name HFP along with the Lucasville Road address and a telephone number. On the same date of September 1, 2021, Mr. Sibley sent an e-mail to Mr. Levkovitz of Interlen which, as noted above, states:

> Attached are documents to support Bank and **company details**. I would like the wire to my USD account listed below….
>
> **Company**
>
> **4325842 Nova Scotia Limited o/a Hefler Forest Products**
>
> 230 Lucasville Road
>
> Sackville NS
>
> Canada
>
> [Emphasis added]

[69] There was no evidence led as to what was attached as the referenced documents to "support … the company details." The evidence does indicate that a blank cheque was attached regarding the bank details and contains only the business name HFP.

[70] The evidence is clear that the business name HFP was not registered to 842 NSL at this time. However, I do find that there was a lease in place between 842 NSL and MacAdam Construction at the contract date that allowed the company to use the business name HFP while it leased the Lucasville Road sawmill and facilities.

[71] There is no dispute that the US $50,000 prepayment was paid. There is no documentary evidence to confirm the transfer. Mr. Sibley's evidence at trial was that the US $50,000 was transferred by Interlen to the bank account of 842 NSL, as directed in his September 1, 2021 email. There is no contrary evidence. Mr. Levkovitz said the funds were sent on September 1 or the following day.

[72] The Plaintiff raises section 80(6) of the Nova Scotia *Companies Act,* and says that this is a factor supporting personal liability. It says it is not seeking personal liability under the *Act* per se but raises it as a factor for consideration in relation to assessing personal liability. The section says:

> If any director, manager or officer of a limited company, or any person on its behalf
>
> …
>
> (c) signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, order for money or goods; or
>
> (d) issues or authorizes to be issued any bill of parcels, invoice, receipt or letter of credit of the company,
>
> wherein its name is not mentioned in manner aforesaid, he shall be liable to a penalty not exceeding two hundred dollars, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque or order for money or goods, for the amount thereof, unless the same is fully paid by the company.

[73] While I have considered this argument, personal liability does not necessarily flow from non compliance with such a section (*Truster v. Tri-Lux Fine Homes Ltd.* [1998] O.J. No. 2001 (Ont. CA) at para. 21).

[74] 842 NSL used HFP as a business name. While it was authorized to do so by MacAdam Construction pursuant to a lease, it did not register HFP as a business name of 842 NSL. Section 80(7) of the *Companies Act* requires registration:

> (7) A company may carry on business using any name which it has registered under the *Partnerships and Business Names Registration Act* as well as its proper corporate name.

[75] While the above is also a factor for consideration, I am of the view that it is not significant, given my finding below that the corporate entity was drawn to Interlen's attention at the time the contract was formed on September 1, 2021. The email with the company details has a time stamp of 4:41 pm. It is unclear which time zone this references. The email sets out the company details and indicates that the prepayment is to be made to the company. The September 1, 2021 invoice does not contain a time stamp. Whether the invoice was sent as one of the attachments to this email, before the email or *vice versa* is not clear. Suffice it to say, Interlen had the corporate information before it complied with the prepayment term, which both parties said was a usual part of such contracts. Mr. Levkovitz said the prepayment "started the deal", while Mr. Sibley said that it was usually received before any product was shipped.

[76] For the following reasons, I find that Interlen contracted with 842 NSL and not Mr. Sibley personally:

1. Both Mr. Levkovitz and Mr. Sibley are commercially sophisticated parties. Mr. Sibley had done business with Mr. Levkovitz/Interlen for many years and, during those transactions, the lumber was always purchased from the company which employed Mr. Sibley. Initially, Mr. Sibley worked for Taylor Lumber, and later with New Future. Mr. Levkovitz testified that in the prior transactions with Taylor Lumber, there would have been invoices, shipping documents, and certification that the lumber was kiln dried.
2. Mr. Sibley never acted as a broker for Interlen in the past. Mr. Levkovitz confirmed that he never paid a commission to Mr. Sibley in their past dealings. He further confirmed that he knew Mr. Sibley was connected to Taylor Lumber in some capacity, but did not know whether he was an employee, partner, or manager of the company. He said that when dealing with Mr. Sibley and New Future, he did not know that Mr. Sibley was an owner. Based on the above, Mr. Levkovitz would not have been taken by surprise to learn that there was a corporation behind the previously referenced trade name of HFP.
3. While the documents leading up to the September 1, 2021 invoice did not mention 842 NSL, but only the business name HFP, the email on September 1, 2021 clearly identified the company to be 842 NSL o/a Hefler Forest Products. I am satisfied that this email, dated the same

day as the invoice, clearly advised Interlen that it was contracting with 842 NSL operating as HFP.

4. In the email of September 1, 2021, Mr. Sibley requested a US $50,000 prepayment which was to be made to 842 NSL. The uncontradicted evidence is that Interlen sent the payment to 842 NSL as directed, either on September 1 or the following day. While payment to a corporation, in and of itself, is not determinative of whether a contract is with a corporate entity, in this case, it is consistent with the company details having been relayed to Interlen on September 1, 2021.

[77] Mr. Levkovitz says he understood that he was dealing with Mr. Sibley personally, but that understanding is not supported by the evidence. I find that Mr. Sibley, as President of 842 NSL, provided sufficient information on September 1, 2021 to put Mr. Levkovitz on notice that Interlen was contracting with the corporate entity, 842 NSL.

Piercing the Corporate Veil

[78] A corporation is a separate legal entity from its shareholders. The shareholders of a corporation are not usually personally liable for the corporations debts. Mr. Sibley was not a shareholder but was President and a director of 842 NSL at the relevant time. The piercing or lifting of a corporate veil is an exception to the general rule of separate corporate personality. It envisions, in certain circumstances, the limited liability protection for shareholders and separate corporate personality being ignored (Kevin P. McGuinness, *Canadian Business Corporations Law*, 3rd Edition (Markham, Ont: LexisNexis Canada, 2017) at page 492).

[79] The question becomes, do the facts support the extension of personal liability, given Mr. Sibley's role as president and a director of 842 NSL? I note that while most cases where the so called veil is lifted relate to shareholders, the principle can apply to officers and directors of a company.

[80] From a review of the authorities, the mere fact that Mr. Sibley was acting on behalf of the corporate entity in this case does not necessarily protect him from personal liability. However, the cases also indicate that the corporate veil will not be pierced without some action by the individual that gives rise to a separate tortious liability, something that gives the acts complained of a "separate identity" from the actions of the corporation. It is a fact specific analysis.

[81] The Nova Scotia Court of Appeal in *White v. E.B.F. Manufacturing Ltd*., 2005 NSCA 167, discussed the law in relation to lifting the corporate veil and said:

> [48] The concept that corporations are separate legal entities, despite the fact they may have the same shareholders, has been fundamental to the common law since the House of Lords decision in *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). A more recent commentary on this principle can be found in the Supreme Court of Canada decision in *Kosmopoulos v. Constitution Insurance Co. of Canada*, 1987 CanLII 75 (SCC), [1987] 1 S.C.R. 2, where Wilson, J. stated at ¶ 12:
>
> > As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979) at p. 112. …
>
> [Emphasis added]

[82] The court in *White*, *supra,* set out the situations where courts have lifted the corporate veil, highlighting that the corporate veil may be lifted where the company is a mere agent or used as a puppet of a shareholder:

> 49 At the hearing before us counsel for the appellant and intervenor urged that the corporate veil ought not to be lifted except in the most serious of cases where fraud, or deceit, or use of a corporation for an improper purpose is both pleaded and proved. With respect, I think that submission invites a far too restrictive approach, implying that only the most egregious or criminally unlawful circumstance will entitle a court to lift the corporate veil. I do not understand that to be the law.
>
> 50 In *Littlewoods Mail Order Stores Ltd. v. McGregor*, [1969] 1 W.L.R. 1241 (Eng. C.A.) Lord Denning declared at page 1255:
>
> > . . . The doctrine laid down in *Salomon v. Salomon & Co.*, [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. . . .
>
> 51 In *Le Car GmbH v. Dusty Roads Holdings Ltd.*, 2004 CarswellNS 138 (N.S. S.C.), Murphy, J. accurately identified three situations where courts have lifted the corporate veil:

> (a) where failure to do so would be unfair and lead to a result "flagrantly opposed to justice";
>
> (b) where representations are made or activities undertaken for a fraudulent or other objectionable, illegal or improper purpose to facilitate doing something that would be illegal or improper for an individual to do personally; and
>
> (c) where the corporation is merely acting as the controlling shareholder's agent.
>
> 52 Courts will often pierce the corporate veil where the company is an agent or the mere alter-ego of the controlling shareholder or parent company. There was certainly evidence before McDougall, J. to support a conclusion that FENCE was merely the alter-ego of Bryson and EBF. In *Aluminum Co. of Canada v. Toronto (City)*, 1944 CarswellOnt 71 (S.C.C.), at ¶ 15-16, Rand, J., referred to the Court's earlier decision in the case of *Toronto (City) v. Famous Players Canadian Corp.*, [1936] 2 D.L.R. 129 (S.C.C.) as having:
>
> > 15 . . . settled that the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; when the directing mind and will of the former reaches into and through the corporate façade of the latter and becomes, itself, the manifesting agency.
> >
> > …
> >
> > 16 The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can be said that the latter has, in the true sense of the expression, no independent functioning of its own.
> >
> > [Emphasis added]

[83] The cases illustrate that there are limited circumstances where the courts will disregard the corporate veil and find individuals responsible for corporate actions. The cases indicate that such an equitable remedy should be used "sparingly" (See *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, at para. 70, leave to appeal dismissed [2018] S.C.C.A. No. 255; and *Holmes v Jastek*, 2019 SKCA 132, at para. 121).

[84] Typically a corporate veil will be pierced or lifted when a corporation is a sham set up for an illegal, fraudulent or improper purpose. The Ontario Court of Appeal in *Chevron, supra*, rejected the position that the court can ignore the corporate separateness principle "when the interests of justice demand it." In other

words, they rejected an independent or stand alone just and equitable ground for piercing the corporate veil. The court said:

> [57] It is important to understand the distinction between corporations and their shareholders. Pursuant to s. 15(1) of the *CBCA*, Parliament has made a clear policy choice that corporations have "the rights, powers and privileges of a natural person". This is not, as the appellants suggest, a mere legal fiction. It is a bedrock principle of our corporate law. Consistent with the law established in *Salomon*, Parliament has entrenched in our law the notion of corporate separateness. That means that corporations are separate entities from their shareholders, capable of carrying on business and incurring debts on their own behalf. Thus, if a judgment debtor is a parent corporation, it and not its shareholders or subsidiaries, is responsible for the debts it incurs. It also means that a corporation's assets are its own and do not belong to related corporations.
>
> …
>
> [64] The appellants alternatively submit that this court has the ability to pierce the corporate veil when the interests of justice demand it. In support of that argument, they rely on Wilson J.'s remarks in *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2, [1987] S.C.J. No. 2, where she stated, at p. 10 S.C.R.:
>
> > The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue". [Citation omitted] [page21]
>
> [65] *Kosmopoulos* was decided approximately 30 years ago. Not surprisingly, the law has developed. The starting point is the decision of Sharpe J., as he then was, in *Transamerica*. Justice Sharpe rejected the notion that the test for piercing a corporate veil is "anything like a just and equitable standard"' (p. 433 O.R. [Gen. Div.]). Relying on Gower, *Principles of Modern Company Law*, 5th ed. (London: Sweet & Maxwell, 1992), he found, at p. 433 O.R., that there are only three circumstances where the court will pierce a corporate veil:
>
> > (1) When the court is construing a statute, contract or other document.
> >
> > (2) When the court is satisfied that a company is a "mere facade" concealing the true facts.
> >
> > (3) When it can be established that the company is an authorized agent of its controllers or its members, corporate or human.
>
> [66] With respect to cases where it is alleged that a subsidiary corporation is a mere facade that protects its parent corporation, in order to ignore the corporate separateness principle, the court must be satisfied that (i) there is complete control of the subsidiary, such that the subsidiary is the "mere puppet" of the parent

> corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity: *Transamerica*, at pp. 433-34 O.R.
>
> [67] This court has repeatedly rejected an independent just and equitable ground for piercing the corporate veil in favour of the approach taken in *Transamerica*: see *Boyd v. Wright Environmental Management Inc.*, [2008] O.J. No. 4649, 2008 ONCA 779, 243 O.A.C. 185, at paras. 44-45; *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, [2009] O.J. No. 1195, 2009 ONCA 256, 250 O.A.C. 232, at paras. 50-51; and *Indocondo Building Corp. v. Sloan*, [2015] O.J. No. 5768, 2015 ONCA 752, 259 A.C.W.S. (3d) 691, at para. 9.
>
> [68] The Supreme Court of Canada has protected the principle of corporate separateness without suggesting a stand-alone just and equitable exception. In *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, at para. 238, Cromwell J. rejected the submission that a subsidiary should be liable for a breach of fiduciary duty committed by its parent corporation, holding that "unless there is a legal basis for ignoring the separate corporate personality of separate entities, those separate corporate existences must be respected". See, also, *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, [1998] S.C.J. No. 63, at paras. 108-12.
>
> [Emphasis added]

[85] The basis upon which the Plaintiff relies for piercing the corporate veil of 842 NSL is vague. The Plaintiff pleads at paragraph 11 that Mr. Sibley improperly used HFP as a front to misappropriate the Plaintiff's prepayment for his own personal benefit and enrichment. The Plaintiff further pleads that Mr. Sibley did not intend for HRP to deliver any product to Interlen, and that his statements to the contrary amounted to fraudulent misrepresentations. The Plaintiff also pleads that Mr. Sibley was unjustly enriched.

[86] During submissions, counsel for Interlen said that the Plaintiff relies on the allegation of fraudulent misrepresentation for its argument that personal liability ought to be imposed due to "improper or objectionable purpose." In other words, Interlen argues that Mr. Sibley's representations are sufficient to dispense with the separate corporate entity. Interlen further says that the company was used for an improper purpose, and that allowing Mr. Sibley to rely on the corporate separateness principle yields a flagrantly unjust result. The Plaintiff points to *White, supra*, and says that fraud is not necessary for finding Mr. Sibley personally liable, and that improper conduct can suffice. It says that in following *White*, *supra*, this Court should lift the corporate veil because Mr. Sibley's representations were made for an improper or objectionable purpose, and that to do otherwise would be unfair and cause a result that is "flagrantly opposed to justice."

[87] Intelen says that not a single board was shipped, the funds are gone, and no bank statements were produced. It urges me to draw an adverse inference that, because the documents relating to the company bank account being opened were not produced, the funds transferred by Interlen to the company, went to Mr. Sibley (who was not a shareholder) personally. However, that there is no evidence whatsoever that the funds went to Mr. Sibley personally, and, I find, on the evidence, no real basis upon which to draw such an inference.

[88] Interlen says Mr. Sibley's explanations for not shipping the lumber lack credibility and indicate a pattern of deceit. The evidence does support there being issues with the kiln/boiler. In addition, Mr. Levkovitz himself acknowledged that there were supply issues with shipping containers-it took more time. However, I do find that there were various instances where Mr. Sibley was not truthful with Interlen about the status of the promised lumber shipments. By July 2022, Mr. Sibley had already decided that the kiln would not be repaired, but still sent emails to Mr. Levkovitz that same month saying that he was trying to get the kiln going, that he was putting together a container with various lumber lengths, that he would confirm the booking that week, and that he was arranging for the "shipping today as last load is coming from back from the drier." As there was no functioning kiln in July, Mr. Sibley could not obtain the phytosanitary certificate he needed to ship any lumber to Israel. Mr. Sibley further advised Mr. Levkovitz in September 2022 that he had made the phytosanitary request, again without access to a functioning kiln.

[89] Mr. Sibley tried to explain the above by saying that he had hoped to bend the rules and obtain a phytosanitary certificate for lumber that was dried in the yard, which he had gotten away with in the past. I find that a number of the excuses offered by Mr. Sibley lack credibility and are not even supported by other aspects of his own evidence. The question is, does the fact that Mr. Sibley misrepresented the true state of 842 NSL's ability to supply lumber that could be shipped to Israel, after the contract was formed, justify piercing the corporate veil?

[90] While I agree that a number of the excuses are simply not credible, Mr. Sibley's actions do not rise to the level of misconduct necessary to pierce the corporate veil. I cannot find any wrongdoing in entering into the contract to supply lumber. For example, there is no evidence to suggest that 842 NSL had never produced lumber, or that the sawmill never functioned and was merely a sham to obtain funds for product that would never be supplied. The actions of Mr. Sibley, as frustrating as they may have been for Interlen, do not rise to the level of conduct

required for the court to look behind the corporate veil and make a finding of personal liability.

[91] Fraudulent misrepresentation has not been proven. This is not a case of fraudulent misrepresentation inducing a party to enter into a contract. The contract was already in place when the problems in supplying the lumber surfaced. In addition, by July 4, 2022, Mr. Sibley had already been sent a letter by Interlen's lawyer. He provided the inaccurate excuses at a time when Interlen already knew the shipments were in jeopardy and had retained legal counsel. There is no evidence that 842 NSL was used as a cover for fraud by Mr. Sibley. The mere fact that the lumber was not supplied and that Mr. Sibley provided inaccurate excuses as to why it was not being shipped does not justify lifting the corporate veil. There is also no evidence that Mr. Sibley personally received any of the prepayment of US $50,000 and was unjustly enriched as a result.

[92] Does the evidence in this case support the conclusion that failing to pierce the corporate veil would lead to a result that is flagrantly opposed to justice, or that the incorporation of 842 NSL was undertaken for a fraudulent or otherwise objectionable, illegal or improper purpose? I am of the view that it does not. There is no evidence that 842 NSL was incorporated for an improper purpose or to misappropriate Interlen's funds. The facts do not lead to a conclusion that Mr. Sibley acted independently from 842 NSL, or committed any tortious action of a separate identity or interest from that taken on behalf of 842 NSL. While there is no question that Mr. Sibley misstated the status of the promised shipments in 2022, this is not sufficient in the present circumstances to ignore the legal persona of the corporation.

[93] There is no evidence to support piercing the corporate veil and finding of personal liability on the part of Mr. Sibley. There is simply insufficient evidence that 842 NSL was being used by Mr. Sibley as a shield for fraudulent or improper conduct (see *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, [1996] O.J. No. 1568 (Ont. Gen. Div.), at paras 21-22, aff'd [1997] O.J. No. 3754 (Ont. C.A.)). No principled basis to lift the corporate veil has been shown.

[94] Lifting the corporate veil does not extend to circumstances where declining to do so would simply be unfair (*B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* 1989 CarswellBC 104 (C.A.)). I do not agree that *White, supra,* supports a principle of disregarding the corporate persona when it would be unfair not to do so. The decision refers to a situation where failure to lift the veil would be "unfair and lead to a result flagrantly opposed to justice." A finding that actions are

"flagrantly opposed to justice" is still a high bar to reach. In *Chevron*, *supra*, the Court said that courts do not have the equitable ability to pierce the corporate veil simply because it appears just to do so. Much more is needed. While it is unfair when an entity like Interlen loses its prepayment and also the benefit of resale of the products in circumstances where it did nothing wrong, and where it was promised time and time again that the lumber would be supplied, this is not a sufficient reason to lift the corporate veil and ignore the separate personality of the company. As was said in *Canadian Business Corporations Law*, *supra*:

> It is settled law that the separate personality of a company and its shareholders will not be ignored merely because it might be said on some basis to be fair in the circumstances for this to be done.
>
> …It is always unfair when someone with a meritorious claim goes unpaid. However, if limited liability is to have any meaning such a result is the obvious consequence. If one were to lift limited liability in one case in which a particular creditor went unpaid, then why not lift it in all of them? To do so, of course, would be to disregard the clear meaning of the statute. An overly flexible regime is one on which no one can ever rely. (pages 495 and 502)

Damages

[95] 842 NSL concedes that it is responsible for the return of the deposit of US $50,000. The parties have agreed that the applicable exchange rate is $1.235 Canadian for each US dollar. This results in judgment against 842 NSL for CDN $61,750.

Expectation Damages

[96] There is no dispute between the parties that in breach of contract cases such as this one, expectation damages can be awarded. Where, as here, the non-breaching plaintiff intended to resell the lumber for a profit, the lost profit is the difference between the expected resale price and the costs of the sale to the plaintiff. The costs of the sale are any expenditures that would have to be incurred in reselling the lumber. The only question is whether the evidence presented supports such damages.

[97] Mr. Sibley had done many deals with Interlen in the past and would have known that it imported lumber for resale. A claim for expectation damages was certainly foreseeable in the current circumstances.

[98] Interlen says that as the pandemic eased and supply chain issues arose, lumber prices surged in the domestic market in Israel. In September 2021, Interlen was

selling Finnish spruce – comparable to the lumber it ordered from Mr. Sibley – for US $514.00 per cubic metre. The average price of the order from 842 NSL was US $245.00 per cubic metre. It says the expected gross profit from the order was well above the CDN $147,500 it is seeking in this action under Rule 57.

[99] Mr. Levkovitz gave evidence that the lumber Interlen had ordered was in very popular dimensions and was very good spruce for construction. He said that it was the same quality as the Finnish spruce product and would have been easily sold with a good profit to many of Interlen's customers. At that time, there was a shortage of lumber due to the pandemic, and Interlen needed this lumber.

[100] Mr. Levkovitz provided an invoice whereby Interlen sold Finnish timber to one of its clients. The invoice, dated September 19, 2021, indicates that Interlen sold the client Finnish spruce in the 44 x 100 dimension. The length was 420. The price was 1650 shekels or US $514 per cubic metre (cbm) using the exchange rate applicable in September 2021. He said the spruce from Canada is very good and of the same quality as the spruce which came from Finland and would have been sold to his customers for the same price as the Finnish product. This is the only evidence presented to support the claim for expectation damages, other than Mr. Levkovitz's evidence that this product was comparable to the Canadian product in quality.

[101] Referring to the sale of the Finnish lumber on September 19, 2021, Mr. Levkovitz said the details for this lumber are set out in the invoice, along with the calculated price (for example, the first package – 130 pieces, length of 4.2 metres, width of 10 centimetres, and thickness of 4.4 centimetres). He said that if you do the math, it is 0.044 multiplied by 0.1 multiplied by 420 multiplied by 130 pieces, resulting in 2.402 cbm as shown on the invoice. If you then multiply 2.402 cbm by the price of 1650 shekels (or US $514), the result is 3963 shekels or US $1234.63. This was the price for this package of lumber.

[102] Mr. Sibley gave evidence that he has bought lumber from Finland and shipped it to the Middle East, and that he has always paid more for Finnish lumber than for Canadian lumber. He said that it grows in a colder climate, the knots are smaller, they are tighter, and it has a very tight grain. He said that it's generally considered a better grade than Canadian lumber whitewood. He said that Finnish timber is generally sold at a 10-15 or 10-20% premium over Canadian timber. Mr. Sibley said that in comparing Canadian and Finnish wood, you need to have information about the quality that you are comparing – low grade, premium, etc. He said that if you

compared top quality Canadian spruce to top quality Finnish spruce, the Finnish spruce would be 10-20% more in price.

[103] Courts sometimes have to grapple with quantifying damages where there is no expert evidence and where limited business data is available. Even if damages are difficult to assess, it must be remembered that they arise as a result of the breach of the defendant, and the Court should make all reasonable efforts to assess damages (See *Canlin Ltd. v. Thiokol Fibres Canada Ltd.,* 1983 CarswellOnt 136 (ONCA)).

[104] Interlen argues that based on the invoice from 842 NSL, the average price per cbm was US $245 (1150 cbm with a total price of US $282,750 = US $245/cbm). Interlen says the court can just do the math. Mr. Levkovitz did not do the math, nor did counsel. However, using the assumed sale price of US $514/cbm (from the Exhibit B invoice for Finnish lumber sold in September 2021) for the lumber to be supplied by 842 NSL, this would represent a loss of profit of US $309,305 ($514 – 245 = 269 x 1150 cbm = US $309,350). Interlen says that even taking into account Mr. Sibley's evidence that Finnish spruce is 10-20% more expensive than Canadian spruce, the loss of profit still far exceeds the claimed CDN $147,000.

[105] There are some difficulties with Interlen's position. The September 2021 invoice that Interlen presented to support its claim for expectation damages includes only the 44 x 100 dimension lumber and its pricing and not the other dimensions (22 x 100; 22 x 200; and 44 x 200) ordered from 842 NSL. I have no evidence of the Finnish sale price of these other types of lumber as of September 2021. Mr. Levkovitz did not speak to whether all dimensions of lumber would be the same price per cbm. In submissions, counsel for Interlen argued that although the dimensions on the invoices are different, the price is based on cbm. It says the only difference is how the lumber is cut, and that this will not result in any appreciable difference in the sale price. I cannot simply assume, as counsel suggests, that the price of all dimensions of lumber was the same as the 44 x 100 dimension.

[106] However, there is evidence before me that supports similar per cbm prices for the relevant lumber products. The HFP invoice dated September 1, 2021 for supply of the various dimensions of lumber illustrates a low price of US $240/cbm for the dimensions 22 x 100 and 44 x 100 and a high price of US $255/cbm for the dimensions 44 x 200 and 22 x 200. I am, therefore, comfortable in using the Plaintiff's suggested average of US $245/cbm for the Canadian lumber and US $514/cbm for the resale. Based on the Canadian lumber prices by dimension, the 44 x 100 was the cheaper of the products listed.

[107] In addition, Exhibit B, containing the invoice for Finnish lumber, also appears to support Interlen's position that the price per cbm was similar, regardless of dimension. Attached to Exhibit B is what appears to be an invoice for lumber purchased by Interlen from Conrastock OY in Finland. The attachment to Exhibit B (not specifically addressed in evidence by Mr. Levkovitz) seems to contain slightly different cbm prices for 2 of the relevant dimensions of whitewood (prices of 280, 293, 238, 263 euro). There is one outlier of 415 euro. However, from this document it is not clear what specific whitewood is referenced, nor whether these other dimensions from Finland were comparable. Regardless, I am of the view there is sufficient evidence before me to conclude the per cbm prices were similar for the various dimensions.

[108] The Defendants say that Interlen acquiesced in the delay between September 2021 and April 2022. While there was no written documentation sent to Mr. Sibley expressing concern about the delay in supply of the lumber, Mr. Levkovitz said he tried to reach him. I find that while Interlen had no choice but to hope the lumber would eventually be shipped, given its prepayment of US $50,000, the expectation was that the product would be shipped within two to three weeks, as promised. Using the September 19, 2021 invoice for Finnish lumber together with Mr. Levkovitz's evidence, is reasonable in the circumstances. I find this to be reasonable despite Mr. Levkovitz's evidence that he would have accepted the lumber if it had been shipped before the legal action was started.

[109] The Defendants raised a failure to mitigate by Interlen. The Defendants carry the burden to prove the Plaintiff has failed in its duty to mitigate on a balance of probabilities standard. This initial onus requires the Defendants to show a lack of effort on the part of the Plaintiff to find an alternative supply of the lumber, and also that comparable product was available if the Plaintiff had made such efforts (See *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324).

[110] A non-breaching party has a duty to take reasonable steps to avoid losses resulting from the breach. The common law mitigation obligation is clearly set out by Blair J.A. in *Janiak v. Ippolito*, 1981 CarswellOnt 581, at para. 58, aff'd [1985] 1 S.C.R. 146:

> The general rule of mitigation of damage applicable to both breach of contract and tort is that the aggrieved party must take all reasonable steps to mitigate the loss and cannot claim for avoidable loss ... In the case of contract, damages for breach are reduced by the amount of loss that should have been avoided if the plaintiff had taken reasonable steps to mitigate.

[111] Mr. Levkovitz said that when it became clear he would not receive the lumber from Mr. Sibley, Interlen did its best to buy other lumber but it was in the days where it was a seller's market, and it was very difficult to find alternative timber. He said they couldn't find alternative timber and suffered damages as a result. There was no evidence led regarding the specific attempts Mr. Levkovitz made to replace the timber that was supposed to come from Canada, when such attempts were made, etc. Mr. Levkovitz was not asked these questions. However, I accept Mr. Levkovitz's evidence that he did his best to find another supplier. This is in line with the business realities at the time. He also provided context for his comments, stating that at this time during the pandemic:

> …there was a shortage of lumber, we needed it at this time and it was very important it be shipped and unfortunately it didn't arrive.

[112] Utilizing the above gross loss of profit number of US $309,350 (CDN $382,047 with the agreed upon exchange rate), and assuming that Interlen might have incurred some costs of sale like shipping to the customer, I am of the view that it is reasonable to award to the Plaintiff what was claimed (CDN $147,500). This is significantly below the expectation damages set out above, even using a 20% discount for the price of Canadian versus Finnish lumber. Given that this is a Rule 57 action, the amount of expectancy damages is further reduced as the $147,500 must also include the return of the US $50,000 (CDN $61,750).

[113] Damages in the amount of CDN $147,500 are awarded against 842 NSL. The parties have agreed that prejudgment interest should run only from the date the action was commenced, being October 25, 2022. I ask that counsel for the Plaintiff prepare the Order.

[114] If the parties are unable to agree on costs, I will entertain brief written submissions within 30 days of the date of this decision.

Jamieson, J.