

I. Introduction

[1] The plaintiff, Ms. Chanderpaul, was injured in a car accident on April 7, 2013. She was one of several passengers in a vehicle driven by Aaron Ramrattan, who later pled guilty to six counts of driving over 80 (impaired) causing bodily harm. In 2014, Ms. Chanderpaul commenced a proceeding against Mr. Ramrattan and the driver of the second vehicle involved in the accident seeking damages for her injuries. As there were several people injured in the accident, multiple actions were commenced. Ms. Chanderpaul settled her claim against the drivers of the cars at a mediation held in 2017.

[2] The defendant, Ceasars Convention Centre Ltd (“Caesars”), carrying on business as Throne Entertainment Venue (“Throne”), operated a nightclub at premises located at 220 Advance Blvd. in Brampton, Ontario (the “property”). The property was owned by the defendant R.K.S. Investments Ltd. (“R.K.S.”) and was leased to Ceasars.

[3] The defendants Rajesh Kaura and Kanta Kaura are spouses. They are the directors and shareholders of both Caesars and R.K.S.

[4] Prior to the car accident, Mr. Ramrattan, and the occupants of his vehicle, including Ms. Chanderpaul, were at Throne. Ms. Chanderpaul alleges that Mr. Ramrattan was overserved alcohol at Throne leading to his intoxication prior to

the car accident. The action against Ceasars relates to this alleged overserving of alcohol. Ceasars was added as a party to the initial claim in January 2015.

[5] Ms. Chanderpaul commenced a second action in December 2015 naming Ceasars, R.K.S., and Mr. and Ms. Kaura as defendants. Ms. Chanderpaul sought a disgorgement of profits under the doctrine of waiver of tort from the defendants on the basis of their alleged improper conduct including allegations of actions to render Ceasars judgement-proof and wrongful conduct to maximize profits for their personal benefit.

[6] A consolidated claim was issued in December 2020 repeating the allegations against Caesars, R.K.S. and Mr. and Ms. Kaura from the first two claims. Although not pleaded in any of the pleadings, Ms. Chanderpaul is seeking to pierce the corporate veil to advance claims against Mr. and Ms. Kaura in their capacity as directors for the alleged wrongdoing of the corporate defendants. She also seeks damages from Mr. and Ms. Kaura personally on the basis that they failed to secure adequate insurance for Caesars.

[7] In June 2023, after being named as parties for 7.5 years, the defendants moved for summary judgment dismissing the claim pursuant to r. 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “*Rules*”). In the alternative, they sought to strike the pleading pursuant to r. 21. The motion was eventually heard on April 29, 2024.

[8] The defendants move for summary judgment to dismiss the action on several grounds including the following:

a) Ms. Chanderpaul has failed to put her best foot forward and lead any admissible evidence for this motion that Mr. Ramrattan was overserved alcohol at Throne;

b) the claims against R.K.S. and Mr. and Ms. Kaura are statute-barred;

c) there is no basis to pierce the corporate veil to attach personal liability on Mr. and Ms. Kaura;

d) Mr. and Ms. Kaura do not owe Ms. Chanderpaul a duty of care in their personal capacity as directors and officers;

e) There is no tenable cause of action against R.S.K.; and,

f) there is no basis to seek a discouragement of profits on the basis of any alleged misconduct on the part of any of the defendants.

[9] In the alternative, pursuant to r. 21.01(1)(b), the defendants seek to strike the claim against R.K.S. and Mr. and Ms. Kaura, without leave to amend, on the basis it fails to disclose a reasonable cause of action.

[10] Ms. Chanderpaul relies on the discoverability principle to extend the limitation period against R.K.S. and Mr. and Ms. Kaura. She asserts that there is a tenable cause of action against each of the defendants and that a trial is required to determine the defendants' liability as there are too many facts in dispute for this court to make a fair and expeditious determination of the issues in dispute on a summary judgment motion.

[11] To be clear, a motion to strike a pleading under r. 21.01(1)(b) of the *Rules* only considers the pleading and not any affidavit evidence. The full evidentiary record will only be considered as it relates to the motion for summary judgment.

[12] The evidentiary record for this motion includes the sworn affidavits of Mr. Kaura, Ms. Chanderpaul, Mr. Julian Dyal, who was also injured in the car accident, Mr. James Wigmore, a toxicologist retained by Ms. Chanderpaul, attaching his report, and Mr. Ken Froese, an accountant retained by Ms. Chanderpaul, attaching his report. The parties also filed various transcripts including those from the cross-examination of each of the deponents who swore affidavits.

[13] For the reasons that follow, the motion for summary judgment against Caesars is dismissed. The action against it as it relates to overserving alcohol can proceed to trial. The motion for summary judgment with respect to R.K.S. and Mr. and Ms. Kaura is granted and the action against them dismissed.

II. **Review of the Pleadings**

a) The First Action

[14] Before reviewing the evidence, I will review the pleadings as that provides the framework for this motion.

[15] On April 8, 2014, Ms. Chanderpaul commenced an action naming as defendants the drivers and owners of the cars involved in the accident, and her own motor vehicle insurer pursuant to the OPCF 44R Family Protection Coverage Endorsement.

[16] On November 20, 2014, Ms. Chanderpaul was granted leave to amend her claim to add Caesars as a defendant on the basis that Mr. Ramrattan was overserved alcohol at Throne. The amended claim was issued on January 27, 2015 and served on Caesars on February 6, 2015.

[17] In the initial pleading naming Caesars, Ms. Chanderpaul alleged that Throne was a tavern and nightclub that had a liquor licence to serve alcohol. According to the claim, Ms. Chanderpaul attended Throne with a group of friends on April 7, 2013 and were served alcohol before leaving in a car operated by Mr. Ramrattan.

[18] Each of the allegations against Caesars is in connection with its operation of Throne and its service of alcohol to Mr. Ramrattan when the employees knew or ought to have know that he was impaired. Ms. Chanderpaul alleges that the car accident was caused by Caesars's negligence for not complying with s. 39 of the *Liquor Licence Act*, R.S.O. 1990 c. L. 9 ("LLA") by overserving Mr. Ramrattan and in breach of its common law duty of care to patrons to whom it served alcohol.

[19] The claim against the two drivers was settled in 2017 at a mediation. Ceasars did not participate in that mediation as it was noted in default in April 2015 when it did not file a defence to the action.

b) The Second Action

[20] On December 29, 2015 Ms. Chanderpaul commenced a second action, naming Ceasars, R.K.S. and Mr. and Ms. Kaura as defendants. The relief sought by Ms. Chanderpaul against all defendants was for an accounting of profits earned by Caesars, and disgorgement of the profits and all other benefits arising from the improper conduct of the defendants under the doctrine of waiver of tort in the amount of \$7.2 million. She also sought punitive damages from R.K.S. and Mr. and Ms. Kaura.

[21] According to the second statement of claim, on September 21, 2015, Ms. Chanderpaul's lawyers conducted a property search after Ceasars was noted in default in the first action, to determine if Caesars had assets to satisfy a judgment. At that time, Ms. Chanderpaul learned that the property where Throne operated was owned by R.K.S. The search also revealed that on May 27, 2014, after the first action was commenced, R.K.S. mortgaged the property to Mr. and Ms. Kaura in the amount of \$7.2 million. A corporate search revealed that Mr. and Ms. Kaura were the directors of both Caesars were R.K.S.

[22] According to the pleading, Ms. Chanderpaul could not have reasonably discovered her cause of action against R.K.S. and Mr. and Ms. Kaura until she did the property search on September 21, 2015.

[23] Ms. Chanderpaul alleges in the claim that R.K.S. and Mr. and Ms. Kaura acted in concert, by agreement or common design, in unlawful conduct directed at her that they knew or should have known was likely to cause her harm. The particulars of the alleged wrongful conduct are as follows:

- i) They incorporated Ceasars, a corporation without assets, as a conduit for the sole purpose of avoiding liability in their business as the owners and operators of taverns, including Throne;
- ii) They engaged in or encouraged a pattern or irresponsible conduct with reckless or deliberate disregard for the safe service of alcohol;
- iii) Either directly or indirectly, through the actions of employees or others, they permitted or encouraged the over-service of alcohol at Throne;
- iv) They sold or permitted to be sold liquor to persons who appeared to be intoxicated;
- v) They created an environment at Throne that enabled patrons to become intoxicated with the goal to maximize profits;
- vi) They encouraged employees to overserve patrons;
- vii) They knew or ought to have known the consequences of their conduct on an at-risk population and refused to take adequate measures to limit the risk of harm to that population;
- viii) They intentionally depleted the assets or created a holding company or other entity for the assets of Ceasars to make it judgement-proof;

- ix) They depleted the assets of R.K.S. for personal gain and/or to thwart future claims against Caesars and/ or R.K.S.

[24] With respect to the claim based on waiver of tort, Ms. Chanderpaul pleads the following:

WAIVER OF TORT

The Defendants knowingly, willfully blind of the consequences, or recklessly flouted, ignored or refused to enforce adherence to the statutory and regulatory requirements for service of alcohol, and encouraged the public to recognize Throne as an establishment that overserved patrons without concern for the consequences, thereby increasing many times the profits through-increased-revenue and the creation of a- "hot spot" that young, at-risk patrons would regularly patronize, the benefit of which is claimed by the Plaintiff.

16. The Defendant knowingly, willfully blind of the consequences, or recklessly decided not to carry adequate insurance over the period of the operation of throne, on the premise that they had rendered Throne judgment-proof, and that any lawsuits arising from their conduct would be frustrated. They therefore experienced a saving on costs of appropriate insurance, the benefit of which is claimed by the Plaintiff.

17. The Defendants should not be allowed to benefit from the increased revenue and decrease in costs that have directly resulted from the conspiracy amongst the defendants to violate the *Liquor License Act* with impunity and repeatedly, which have resulted in the Plaintiff's injuries.

[25] Ms. Chanderpaul also pleaded that the defendants should not be allowed to benefit from increased revenue and decreased costs that directly resulted from the conspiracy amongst the defendants to violate the *LLA*, which resulted in the injuries to her.

[26] With respect to the claim for punitive damages, Ms. Chanderpaul claimed that the defendants' behaviour as described in the claim was high-handed and callous, which put her and others at risk of grievous harm and caused her injury.

[27] On September 16, 2019, when the motion for default judgment against Caesars was scheduled to be heard, the noting in default of Caesars was set aside.

c) The Consolidated Action

[28] In October 2020, Ms. Chanderpaul obtained an order to consolidate the first and second action.

[29] On December 16, 2020 a new claim was issued entitled "Consolidated Fresh Statement of Claim." That claim combined the claims of negligence against Caesars for its alleged overservice of alcohol to Mr. Ramrattan that were particularized in the amended first claim, and the claims against R.K.S. and Mr. and Ms. Kaura to disgorge profits due to their wrongful conduct, as particularized in the second action as set out in paras. 23 and 24 above.

[30] In both the second claim and consolidated claims, Mr. Chanderpaul alleges that Caesars is owned and operated by Mr. and Ms. Kaura and is an alter ego of them and/or R.K.S. She also alleges that R.K.S. is the alter ego of Mr. and Ms. Kaura and/or Caesars.

[31] While much of the pleading was repetitious, there was an additional claim of negligence against Mr. and Ms. Kaura personally that was not in the second claim. Ms. Chanderpaul alleges the following:

NEGLIGENCE OF RAJESH AND/OR KANTA KAURA

42. In the alternative, the Defendants, Rajesh Kaura and/or Kanta Kaura, either directly or through agents or employees:

- a) failed or neglected to ensure that Ceasars was at all material times properly and adequately insured;
- b) neglected or failed to provide accurate and sufficient detail into the operations of Ceasars to its insurer such that the insurer could assess the risk;
- c) failed or neglected to update or correct the information provided to its insurer such that coverage against liability claims would be in place and available at all material times and in the event that Ceasars was sued;
- d) failed to comply with their personal obligation pursuant to municipal licensing requiring that they personally ensure that Ceasars had \$2,000,000 in liability insurance;
- e) Such other grounds of negligence as are within their knowledge.

[32] The defendants filed a statement of defence to this claim in December 2020 denying all allegations.

III. Review of the Evidence

a) The History of the Corporate Defendants

[33] Mr. and Ms. Kaura incorporated R.K.S. in November 1999. In March 2001, R.K.S. purchased the property from which Throne eventually operated. According to Mr. Kaura, while Ms. Kaura is a director and shareholder of R.K.S., she does not play an active role in the business.

[34] In 2011, the tenant leasing the property since 2008 defaulted on its lease and was evicted. That tenant was paying rent of \$20,000 per month pursuant to a written lease with R.K.S. The property remained vacant for nine months.

[35] On June 12, 2012, Mr. and Ms. Kaura incorporated Caesars. Mr. Kaura's evidence is that the company was incorporated as a new tenant could not be found for the property. Caesars initially operated a banquet hall at the property. According to Mr. Kaura, while Ms. Kaura was a director and shareholder of Caesars, she was not actively involved in the business.

[36] On October 15, 2012, Caesars registered the name Throne under the *Business Names Act*, R.S.O. 1990, c. B. 17. Two days later, on October 17, 2012, Caesars obtained a Liquor Sales Licence under the *LLA*. Caesars then began to operate a nightclub named Throne at the property.

[37] It is not in dispute that Caesars leased the property from R.K.S. but did not have a written lease. While the initial arrangement was that Caesars would pay R.K.S. rent of \$15,000 per month, it only paid about \$5,000 per month.

[38] When he was cross-examined, it was Mr. Kaura's evidence that he became aware of the April 7, 2013 accident in either November or December 2013 when he received a notice letter. His evidence was that he forwarded the letter to Intact Insurance Company, who insured Caesars.

[39] On August 4, 2015, after Caesars was noted in default in April 2015, Mr. Kaura dissolved Caesars certifying that there were no proceedings pending.

b) Insurance Issues

[40] Intact Insurance Company of Canada issued an insurance policy to Caesars for the period of August 2, 2012 to August 2, 2013. The policy provided commercial general liability coverage with a limit of \$2 million per occurrence. According to the declarations page of the policy, the business insured was located at 200 Advance Blvd and the business was identified as "Banquet Hall- Facility Rental Only No Food and/or Liquor". There was no reference in the declarations to Throne or the operation of a nightclub with a liquor license.

[41] According to a letter from intact addressed to Caesars, c/o Ms. Kaura dated August 5, 2015, in January 2014, Intact received notice that a motor vehicle accident occurred on April 7, 2013 and that some of those injured would be

looking to Caesars for compensation. Between July 2014 and January 2015, five claims were commenced against Caesars as a result of that accident.

[42] Intact took an off-coverage position and refused to provide a defence or indemnity to Caesars on the basis that it was never informed that Caesars acquired a liquor licence in October 2012 authorizing it to sell and serve alcohol at the property.

[43] According to Mr. Kaura, he believed adequate insurance was arranged and in place for Caesars at the time of the accident that he and Ms. Kaura applied for through an insurance broker. Mr. Kaura alleges that the insurance broker was negligent in failing to procure insurance with adequate coverage.

[44] Aviva insured R.K.S. It denied coverage to R.K.S. in connection with the second action on the basis the relief sought in that proceeding was not covered under its policy.

[45] An action was not commenced against either Intact challenging its off-coverage position or the insurance broker for their alleged negligence. In March 2021, the defendants commenced an action against their former lawyer for negligence in failing to issue such a claim. They sought damages as a result of the lawyer's alleged failure to bring a coverage application against Intact and Aviva, failure to include a limitation period defence in the second action, failure to defend the first action on behalf of Caesars, and failure to commence a claim

seeking contribution and indemnity from a company that provided security at Throne. That action is ongoing.

c) The Operation of Caesars o/a as Throne

[46] While the officers and directors of both Caesars and R.K.S. are the same, according to Mr. Kaura, R.K.S. was not involved in the operation of Caesars. His evidence is that he was involved in the operations of Throne.

[47] According to the defendants, in October 2012, Caesars initially opened a banquet hall in the convention centre portion of the property prior to opening a nightclub.

[48] On January 16, 2013, Caesars o/a Throne obtained a business licence from the City of Brampton that expired on December 31, 2013. That licence states, “Outside Events not permitted, banquet hall permitted only in conjunction with restaurant and on condition of variance A08-168 being met”. This variance was with respect to a re-zoning application filed with the City by Mr. Kaura in September 2008 seeking to re-zone the property as a “Banquet/Restaurant, Community Club and Religious Centre”.

[49] According to Mr. Kaura, Throne was only open two days per week, typically on Thursdays and Saturdays. His evidence was that Throne was not profitable and, as a result, there were weeks that Throne was not open.

[50] According to Mr. Kaura, the manager at Throne was Santino Campea, who was Caesars' only employee.

[51] Mr. Kaura's evidence is that when Throne was open, Caesars retained private security guards through Expert Security Management ("Expert"), to work at Throne. Expert no longer exists, and a copy of its contract with Caesars cannot be located. According to Mr. Kaura, the security guards were all Smart Serve trained. His evidence is that Mr. Campea checked every night to verify that the guards had Smart Serve Certificates that permitted them to work at Throne.

[52] While there is no evidence from Mr. Campea for this motion, time sheets and invoices for the security guards were filed for the months of February to April 2013 and April and November 2024. The time sheets only record the first name of the security guards.

[53] According to the time sheets from Expert for April 6-7, 2013, six security guards worked at Throne for five hours from 10:00 pm to 3 am. There is no evidence from any of the security guards who worked that evening for this motion.

[54] According to Mr. Kaura, Ceasars also hired professional bartenders and staff, who were Smart Serve trained. Again, his evidence is that Mr. Campea checked to verify they had these certificates before they were permitted to work at Throne.

[55] The liquor manager at Throne was a person named Chris. Mr. Kaura does not recall his last name and does not have contact information for him as it was in a cell phone that Mr. Kaura lost in 2015.

[56] No Smart Serve Certificates for the security guards, bartenders or staff were filed, nor was there an affidavit from Mr. Campea regarding the steps he took to confirm that staff were all properly trained.

[57] Mr. Kaura's evidence is that Throne was also open for private functions once or twice per month. On those occasions, the person who rented the venue, who Mr. Kaura described as a promoter, would operate under their own liquor licence, and provide their own liquor, security, serving staff, DJs, equipment, and managers. Mr. Kaura does not have any documentation in connection with these functions but located some online advertisements for events held at Throne, including one for an event called "Spotlight Saturdays".

[58] The online advertisement for Spotlight Saturdays attached to Mr. Kaura's affidavit was for April 6, 2013, the day Ms. Chanderpaul attended at Throne with Mr. Ramrattan. It was the same advertisement that Ms. Chanderpaul attached to her affidavit.

[59] According to Mr. Kaura, the promoter acted as an independent contractor for these events. They made their own marketing materials, including promotion

on social media. His evidence is that Throne did not use any social media nor pay for any advertising on social media.

[60] Mr. Kaura's evidence is that these promoters would set up their own cover charge and have their own staff at the door to collect it. Throne did not receive any portion of these cover charges. If the promoter had any sale of beer/liquor set up with the cover, those sales would be entered into Throne's point of sale system.

[61] Despite this evidence about a promoter operating under its own liquor license at Throne on April 6-7, 2013, there is no claim by Ms. Chanderpaul or a third party claim by the defendants against this alleged promoter. There are no allegations in the pleadings nor were any arguments advanced for this motion that Caesars is not at fault on the basis that it was not operating the nightclub on the evening in question. Accordingly, these reasons will not address that issue.

[62] According to Mr. Kaura, as Throne was not profitable, Ceasars filed Articles of Dissolution on August 4, 2015. Financial statements for Caesars were filed that showed net losses for the 2013, 2014 and 2015 operating years. According to Mr. Kaura, when Ceasars was dissolved, it sold its equipment at a loss.

[63] According to Ms. Chanderpaul, Throne was located in an industrial area. There were no buses operating at the time the nightclub closed on April 7, 2013.

She recalled that there were quite a few cars in the parking lot on the evening in question.

[64] Ms. Chanderpaul attached to her affidavit an online advertisement for Throne for the evening of April 6, 2013 that was the same advertisement attached to Mr. Kaura's affidavit. It is not clear to be where the advertisement was accessed but the document says "CaribanaToronto.com". There is no evidence about whether the April 6, 2013 evening at Thone was part of that event. The advertisement includes statements such as "\$100 bottles before 11 pm" and "\$20 spotlight package: 5 drinks, VIP line bypass and cover". There was a reference to "Bottle Service: Free Grey Goose upgrade before 11 pm". There was also a description of a package for \$350 and the drinks that includes as well as a \$475 package and the drinks included with that.

[65] Ms. Chanderpaul also attached a similar online advertisement for an event at Throne on May 4, 2013.

[66] Ms. Chanderpaul attached to her affidavit photographs from a website called "club crawlers" which she said were photographs from Throne but taken on a different night. Some of the photographs show people dancing and others with people holding drinks (wearing what appears to be St. Patrick's day apparel) and one of a person holding a bottle of Grey Goose. There is another photograph of a person holding what looks to be colourful tubes which may be shooters.

According to Mr. Chanderpaul, these photographs, although taken on a different day, depict what she observed of her evening at Throne with what she described as the free flowing/uncontrolled movement of alcohol and the amount of people at the club.

[67] Ms. Chanderpaul attached to her affidavit sales records from four servers who worked on April 6-7, 2013, additional transaction records for sales of bottles of alcohol, and a document entitled beverage count. In her affidavit, Ms. Chanderpaul makes various conclusions about these documents and what she believes they mean and alleged inconsistencies in the records. Based on her own analysis, Ms. Chanderpaul concludes that there was underreported or omitted revenue including sales of shooters there were not recorded.

[68] Ms. Chanderpaul retained Ken Froese, a forensic accountant, to provide an opinion regarding the following:

- The adequacy of the documentation provided by the defendants with respect to the revenue earned by Throne on April 6-7, 2013;
- Whether the records for the purchase and sale of food was in accordance with normal and expected business practices;
- Whether the tax and financial records disclose additional revenue from subletting;
- Whether the financial statements from R.K.S. reflect the explanation from Mr. Kaura regarding the \$7.2 million mortgage.

[69] In summary, Mr. Froese concluded as follows:

- The documentation produced by the defendants for an accounting of revenue earned by Throne on April 6-7, 2013 was not adequate to ensure accounting information was complete and accurate;
- Most of the records from that evening to adequately account for revenue earned was not produced making it not possible to determine the revenue earned by Caesars;
- It was not possible to determine the extent of unreported or under-reported revenue as the records produced contain inconsistencies;
- The potential financial implications for the corporation include unreliable financial statements and underreporting and underpaying taxes;
- The potential implications for management/owners of receiving unreported cash from their business are primarily tax-related;
- Food sales should have been reported by Caesars. Not recording sales results in under-reporting of HST and income for tax purposes;
- There was insufficient information to conclude definitively whether rental revenue from subletting was or was not included in Caesars' financial statements and corporate tax returns.

d) The Mortgage

[70] Mr. Kaura's evidence is that he and Ms. Kaura decided to register a charge on title to the property, as R.K.S. paid \$4,650,000 to acquire the property in March 2001. The purchase was financed with a mortgage of \$3,700,000. The property increased in value by the time the mortgage was registered on title in May 2014. Mr. Kaura denies that the mortgage was registered to defeat any claim brought by any person including Ms. Chanderpaul. According to Mr. Kaura, the reason the mortgage was registered on title was because he and Ms. Kaura invested a

significant amount of money into R.K.S. and wanted to ensure that the mortgage was the first registration on title.

[71] The mortgage was registered on title eight months before Caesars was served with the amended first claim when it was added to the action and 1.5 years before the second action was commenced naming R.K.S. and Mr. and Ms. Kaura as defendants.

e) The Accident

[72] Mr. Ramrattan was under the age of 19 at the time of this accident. He had fake identification in the name of Keith Persaud that said he was of age. Ms. Chanderpaul was not aware that he was under the age of 19.

[73] Several people, including Ms. Chanderpaul, Mr. Ramrattan, and Mr. Dyal, Ms. Chanderpaul's boyfriend at the time, were out together on the evening of April 6, 2013. They were at a private residence. Ms. Chanderpaul's evidence is that she drank moderately while at the private residence. She did not see Mr. Ramrattan consume any alcohol.

[74] Ms. Chanderpaul left her car at the residence and at midnight departed with Mr. Dyal and others in a car driven by Mr. Ramrattan, arriving at Throne at round 1:05 am. After standing in line to be admitted, Ms. Chanderpaul recalls paying a cover charge of between \$20-\$30 to enter Throne. She did not recall if her identification was checked before she entered. She believes she had two drinks

and that last call was at 2 am. She left the club at 3 am. She did not believe she was intoxicated when she left. She did not recall if anyone working at the nightclub asked her, or anyone in her presence, who would be driving.

[75] Ms. Chanderpaul did not see Mr. Ramrattan consume any alcohol at Throne.

[76] Mr. Dyal filed an affidavit for this motion. His evidence is that he saw Mr. Ramrattan consume alcohol at a friend's house before going to Throne. He saw Mr. Ramrattan holding one drink at Throne but he did not know if that was an alcoholic drink or at what time he made this observation.

[77] Neither Ms. Chanderpaul nor Mr. Dyal observed Mr. Ramrattan showing any signs of intoxication. They only learned that he was intoxicated after he was charged following the accident.

[78] None of the defendants have any knowledge of what occurred that evening.

IV. **Legal Framework for Summary Judgment and Motion to Strike**

[79] The test for summary judgment is set out in r. 20.04(2.1) of the *Rules*. Summary judgment is to be granted where the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. Subrules 20.04(2.1) and (2.2) provide for additional fact-finding powers available to the court. Specifically, rule 20.04(2.1) permits the court to weigh the evidence, evaluate the credibility of the deponent and draw any reasonable inference from

the evidence in order to consider whether there is a genuine issue requiring a trial.

[80] In *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court of Canada held that on a motion for summary judgment, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record without using any of the enhanced fact-finding powers available under subrules 20.04(2.1) and (2.2). The factual record should be reviewed, and summary judgment granted if there is sufficient evidence to fairly and justly adjudicate the dispute. The court should also consider if summary judgment would be a timely, affordable, and proportionate procedure. The Supreme Court specifically found that summary judgment rules are to be interpreted broadly. The focus must be on providing access to justice in a timely manner.

[81] In *Sweda Farms v. Egg Farmers of Ontario*, 2014 ONSC 1200, [2014] OJ No 851, aff'd 2014 ONCA 878, Corbett J. reviewed the process by which the court considers whether summary judgment is appropriate. At para. 33, he found the following:

The court on a motion for summary judgment should undertake the following analysis:

- 1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial.
- 2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits.
- 3) If the court cannot grant judgment on the motion, the court should:
 - a. Decide those issues that can be decided in accordance with the

principles described in 2), above.

b. Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues.

c. In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.

[Citations omitted.]

[82] In a more recent decision in *Oxygen Working Capital v. Mouzakit*, 2021 ONSC 1907, [2021] O.J. No. 1343, Myers J. referred to the “Hryniak Ladder”. At step one, the court must determine if there is a genuine issue requiring a trial based on the record alone and without using the enhanced fact-finding powers in Rule 20.04(2.1). In *Hryniak*, at para. 49, the court described this as follows:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[83] Starting at para. 41 in *Oxygen*, Myers J. described step two on the Hryniak ladder and referred back to *Hryniak* where the court said at para. 66:

If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and more just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole.

[84] The enhanced fact-finding powers in Rule 20.04(2.1) includes weighing the evidence, evaluating the credibility of a deponent, and drawing any reasonable inference from the evidence. Pursuant to Rule 20.04(2.2), the court may find that in order to exercise its powers under 20.04(2.1), it can order that oral evidence can be presented.

[85] Summary judgement motions are decided by evidence of the facts and by inferences drawn from those facts and not by speculation about the facts: *Chernet v. Galaites*, 2017 ONCA 337, [2017] O.J. No. 2094, at para. 12. The summary judgment judge is to assume that the evidence in the motion record is all the evidence the parties would rely on if the matter proceeded to trial. A responding party cannot rely on unsupported allegations in the pleadings or mere assertions that there is a genuine issue requiring a trial.

[86] The defendants also rely on r. 21 to strike certain portions of the consolidated claim on the basis that the pleading does not disclose a reasonable cause of action. No evidence is admissible on such a motion.

[87] There are some general overarching principles that apply to motions to strike pleadings. Unless there is no reasonable prospect of success, the claim will not be struck. Assuming that the facts as stated in the statement of claim can be proven, the question is whether it is plain and obvious that the plaintiff's statement of claim discloses no reasonable cause of action. Neither the length and

complexity of the issues or the novelty of the cause of action nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail should it be struck: *Hunt v. Carey Canada Inc.*, [1990] S.C.J. No. 93, [1990] 2 S.C.R. 959 at p.980.

[88] The test for striking at the pleading stage is high and a difficult burden for the defendant to meet. Only in the clearest of cases should a party be deprived of the opportunity to proceed to trial to claim that the evidence and the law entitles him or her to a remedy.

V. Analysis

a) **Should the claim against Ceasars be Dismissed?**

[89] The defendants argue that the action against Ceasars should be dismissed as it relates to the alleged overservice of alcohol to Mr. Ramrattan on the basis that Ms. Chanderpaul has not put her best foot forward for this summary judgment motion by failing to present any admissible evidence of the alleged overservice. This includes her failure to compel Mr. Ramrattan to testify on this motion and the defendants' assertion that the report filed by a toxicologist retained by Ms. Chanderpaul is inadmissible on the basis that it relies on inadmissible hearsay evidence from a toxicologist who prepared a report in connection with the criminal proceedings.

[90] I will first address the admissibility of the opinion evidence of Mr. Wigmore, the toxicologist retained by Ms. Chanderpaul. If I find that Mr. Wigmore's opinion is not admissible for this motion, then, coupled with the lack of evidence from Mr. Ramrattan, the defendants argue that there is no evidence before the court that Mr. Ramrattan was served alcohol while he was at Throne prior to the car accident and the consolidated claim, on that basis alone, should be dismissed in its entirety.

[91] Mr Wigmore filed an affidavit attaching his report and his C.V. He is a forensic alcohol toxicologist. His C.V. describes his extensive work history and numerous publications in that field. There is no issue with respect to his qualification to give an opinion in this matter. The sole issue is his reliance on the report of Rachelle Wallage who prepared a toxicology report dated September 5, 2013 for the criminal charges involving Mr. Ramrattan.

[92] To prepare his report, Mr. Wigmore reviewed the motor vehicle car accident report, the transcripts from the criminal proceedings involving Mr Ramrattan, an affidavit from Ms. Chanderpaul regarding Mr. Ramrattan's weight and height and her recollection of the accident, and the toxicology report of Ms. Wallage.

[93] From that information, Mr. Wigmore learned that the car accident occurred at 3:18 am on April 7, 2013. Prior to the accident, Mr. Ramrattan was at Throne

having arrived at 1:05 am on April 7, 2013. Last call was at 2:00 am and he left with 6 passengers in his car at approximately 3:00 am.

[94] Mr. Wigmore relied on Ms. Wallage's analysis of a blood sample taken from Mr. Ramrattan at the hospital at 4:20 am. Ms. Wallage's two-page report was filed but there was no affidavit from her attaching the report. Ms. Wallage was retained by the Peel Regional Police in connection with the criminal charges. She analyzed the blood sample taken from Mr. Ramrattan at the hospital at 4:20 am, which was one hour after the accident occurred. Her analysis found that the blood alcohol concentration ("BAC") in the sample taken from Mr. Ramrattan was 180mg/100ml and that the projected BAC at the time of the accident was 180- 200mg/100ml or 179-190mg/100 ml. It was her opinion that a person would be impaired in their ability to operate a vehicle at a BAC within those projected ranges.

[95] It is Mr. Wigmore's opinion that at the time of the collision, Mr. Ramrattan's BAC was between 180 to 200 milligrams of alcohol in 100 millilitres of blood (180-200mg/100ml). The *Criminal Code*, R.S.C. 1985, c. C-46, does not permit a person to drive at a BAC of greater than 80mg/100 ml so he was up to 2.5X over the criminal BAC. Mr. Wigmore's opinion is that Mr. Ramrattan likely engaged in pre-drinking prior to attending at Throne to continue his drinking. As several friends/passengers said that he did not show obvious signs of intoxication during the night, Mr. Wigmore's opinion is that it is more likely that he consumed alcohol

throughout the night, including at Throne, than solely pre-drinking or solely drinking at Throne.

[96] When he was cross-examined, Mr. Wigmore could not say when or where Mr. Ramrattan became intoxicated. He could not say how many drinks he consumed that evening. He also admitted that Mr. Ramrattan could have been intoxicated when he arrived at Throne and his BAC could have been declining before he left Throne.

[97] The defendants argue that Ms. Wallage's report regarding Mr. Ramrattan's BAC reading at the hospital and her opinion about his BAC at the time of the accident is inadmissible. They argue that it should not be admitted under the principled approach to hearsay as Ms. Chanderpaul has not shown any indicia of reliability or necessity to have it admitted. Furthermore, they argue that her report does not say where or when Mr. Ramrattan drank. Lastly, they argue that the report is inadmissible as the search warrant on which the blood sample was obtained was challenged pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms* by Mr. Ramrattan in the criminal proceedings. I note, however, that there was no ruling as to the admissibility of the report as Mr. Ramrattan eventually pled guilty and the report was filed as evidence for the plea hearing.

[98] The defendants have not filed any expert evidence that refutes Mr. Wigmore's opinion. For example, they have not filed expert evidence that based

on Mr. Ramrattan's BAC reading at the hospital, he could not have been drinking at Throne or it cannot be determined whether or not he consumed any alcohol at Throne. Rather, they seek to have Mr. Wigmore's report ruled inadmissible, and then argue there is an absence of any other evidence regarding Mr. Ramrattan's consumption of alcohol at Throne.

[99] There is no dispute that Mr. Ramrattan pled guilty to a charge that is related to his consumption of alcohol on the evening in question. The issue is whether he consumed any alcohol while at Throne or if he was intoxicated when he arrived at Throne and remained that way until he left, driving his vehicle, without consuming any other alcohol at Throne.

[100] I put no weight on the defendants' arguments that Ms. Wallage's report is inadmissible as it does not address when Mr. Ramrattan consumed alcohol and was subject to a s. 8 *Charter* challenge during the criminal proceedings. First, whether Ms. Wallage's report addresses when Mr. Ramrattan consumed alcohol is not relevant to its admissibility. She was retained to provide an opinion regarding Mr. Ramrattan's BAC at the hospital and at the time of the accident and that is what her report addresses. For the purpose of the criminal charges, where Mr. Ramrattan consumed the alcohol to render him impaired was not relevant.

[101] Second, while there may have been an initial challenge to the admissibility of Ms. Wallage's report based on an alleged *Charter* breach, that challenge was

withdrawn and Mr. Ramrattan pled guilty, with the report going in as evidence on consent. As there was no ruling on the admissibility of the report, the fact that there was an initial *Charter* challenge that was not pursued is not a basis to find Ms. Wallage's report inadmissible for this motion.

[102] I agree with the defendants that Ms. Wallage's report is hearsay evidence that is relied upon by Mr. Wigmore. In the context of an expert report, her report is admissible to show the information on which the expert opinion is based but it is not admissible as evidence going to the existence of the facts on which the opinion is based.: *R v. Lavallee*, [1990] 1 S.C.R. 852. Reliance on that hearsay evidence does not however render Mr. Wigmore's report inadmissible for this motion but it is a factor in assessing the weight to be attributed to his opinion. The more an expert relies on facts not proven in evidence, the less weight may be given to the opinion.

[103] Accordingly, while I do not find Mr. Wigmore's report to be inadmissible because of its reliance on Ms. Wallage's report, I place little weight on it. Nonetheless, in the absence of any competing expert opinion from the defendants, it is some uncontroverted evidence before this court that Mr. Ramrattan consumed alcohol at Throne prior to the accident.

[104] I will now address the lack of evidence from Mr. Ramrattan.

[105] Ms. Chanderpaul served Mr. Ramrattan with a summons pursuant to r 39.03 of the *Rules* to attend at a court reporter's office to be questioned for this motion so that a transcript of his evidence would be available for this motion. He did not appear. No additional steps were taken to obtain his evidence for this motion with respect to when he consumed alcohol or if he consumed any alcohol at Throne prior to the accident.

[106] According to r. 39.03(4), with leave of the court, a person may be examined at the hearing of a motion in the same manner as at a trial. Pursuant to r. 30.03(5), that person's attendance under r. 39.03(4) may be compelled in the same manner as provided in r. 53 for a witness to attend at a trial.

[107] Pursuant to r. 53.04(1) a summons to witness may be served personally on a party requiring them to attend at trial to give evidence. Pursuant to r. 53.04(7), if a person does not comply with the summons, the presiding judge may issue an arrest warrant and the witness may then be apprehended anywhere in Ontario and forthwith brought to court.

[108] According to an affidavit of service, on August 16, 2023, a process server served Mr. Ramrattan with a summons to witness by leaving a copy with him at 353 Bristol Road West, Mississauga, Ontario. The notice required him to attend at a court reporter's office on September 21, 2023 at 10 am to be questioned under oath.

[109] On August 28, 2023, the summons and conduct money were returned by registered mail to Ms. Chanderpaul's lawyer and Mr. Ramrattan did not attend for questioning on September 21, 2023. Ms. Chanderpaul then hired a private investigator to contact Mr. Ramrattan. That investigator, Mr. Rigby, filed an affidavit setting out what steps he took to contact Mr. Ramrattan. According to his affidavit, on December 13, 2013, he attended at the address where Mr. Ramrattan was previously served. The person who answered the door said Mr. Ramrattan was not there and closed the door. He attended a second time at that address on December 16, 2023 and a woman answered the door. The investigator explained why he was looking for Mr. Ramrattan. The woman said he was not home, and that Mr. Ramrattan had no intention of assisting in the investigation. She said that Mr. Ramrattan received the last correspondence and mailed it back.

[110] No further attempts were made to serve or contact Mr. Ramrattan.

[111] Given the importance of his evidence, Ms. Chanderpaul could have served Mr. Ramrattan with a summons to appear in court pursuant to r. 53 to testify in person for this motion. If he did not attend, an arrest warrant could have been issued which would have resulted in his arrest. Mr. Ramrattan would then have been brought to court to testify.

[112] Ms. Chanderpaul's failure to secure Mr. Ramrattan's evidence about whether he consumed alcohol at Throne prior to the accident is not, however, fatal as there is other evidence that in my view demonstrates that there is a genuine issue requiring a trial of whether Mr. Ramrattan was overserved alcohol at Throne.

[113] Mr. Ramrattan's criminal conviction is admissible evidence in the civil trial that he was impaired at the time of the accident. The issue is what evidence is there that he was served alcohol at Throne before the accident. Clearly, the best evidence would come from Mr. Ramrattan but that evidence is not before the court for this summary judgment motion.

[114] There is, however, other evidence that Mr. Ramrattan consumed alcohol at Throne. Ms. Chanderpaul filed evidence from Mr. Dyal who saw Mr. Ramrattan drinking alcohol before they went to Throne, and with a drink in his hand at Throne, although he did not know if it was alcohol or at what time he made this observation. The defendants argue that Mr. Dyal's evidence is unreliable as when he was cross-examined, he had very little recollection of what else transpired that night or even in what city Throne was located.

[115] I am not prepared to dismiss Mr. Dyal's evidence on the basis he is not reliable. That is a finding that may be made after hearing his *viva voce* evidence at trial. For this motion, his evidence that he saw Mr. Ramrattan holding a drink

of some kind in his hand at Throne is not contested, other than based on arguments that he is not a reliable witness. It is therefore some evidence that I can consider in determining if there is a triable issue that should proceed to trial.

[116] There is no evidence that anyone saw Mr. Ramrattan demonstrate any signs of intoxication prior to the accident. While there is no evidence from any servers or security staff that they recall Mr. Ramrattan attending at Throne on the evening in question, the uncontroverted evidence from Ms. Chanderpaul and Mr. Dyal is that Mr. Ramrattan was at Throne that evening and left driving a car with six passengers. There is also evidence that he was impaired at the time of the accident, given his criminal conviction.

[117] Even if Mr. Ramrattan did not display any signs of intoxication at Throne, that does not mean that Caesars is not liable if he was served alcohol at Throne that evening. If there were no signs of intoxication, that may reduce Caesars' liability but does not mean that Caesars is not at fault.

[118] A commercial host such as a bar/tavern, has a duty to protect its patrons from reasonably foreseeable harm: *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.). One of the policy reasons driving that duty is that a tavern/bar profits from and is in a position of control with respect to the sale of alcohol at its premises. A bar/tavern can be found liable in a civil proceeding for overserving

alcohol to a patron pursuant to s. 39 of the *LLA*, the governing statute at the time of the accident, or by the common law of negligence.

[119] Section 39 of the *LLA* imposes civil liability on commercial hosts who serve alcohol to patrons where the consumption of alcohol would apparently intoxicate the person or increase their intoxication so that they would be in danger of causing injury to themselves or to another person.

[120] Visible signs of impairment are not necessary for a bar/tavern to be found liable. Under the *LLA*, the mere fact of overservice does not attract liability. The breach occurs if the commercial host serves a patron to or beyond the point of intoxication where it was reasonably foreseeable that the patron's condition was such that they might harm himself or someone else: *Dickerson v. 1610396 Ontario Inc. (Carey's Pub & Grill)*, 2010 ONCA 894, 329 D.L.R. (4th) 542, at paras. 32 and 34.

[121] I am not satisfied that the defendants have discharged their burden for this summary judgement motion. In *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, the defendants moved for summary judgment in a dental malpractice claim alleging that the plaintiff had not provided any expert opinion evidence establishing a breach of the standard of care or causation. In overturning the decision to grant summary judgment, the Court of Appeal found at para. 24 that the defendant dentists, as the moving party, bore the burden of

persuading the court, through evidence, that no genuine issue requiring a trial existed. They were not entitled to rely merely on the allegations in their statement of defence but were required to put their best evidentiary foot forward. The Court found that the defendants failed to file any evidence going to the merits of their defence such as their own affidavits regarding the treatment they gave the plaintiff nor any evidence from an expert regarding the standard of care.

[122] The Court noted that the evidentiary burden on a moving defendant on a summary judgment motion is found in r. 20.01(3), which states that “a defendant may...move with supporting affidavit material or other evidence”. It is only after the moving party has discharged its evidentiary burden of proving there is no genuine issues requiring a trial that the burden shifts to the responding party to prove that its claim has a real chance of success.

[123] Commercial hosts have an obligation to monitor a patron’s consumption of alcohol and should have protocols in place to ensure that reasonable precautions are in place to prevent such patrons from driving: *McIntyre v. Grigg* [2006] O.J. No. 4420, 83 O.R. (3d) 161 (Ont. C.A.), at para. 23. Other than evidence that the security and serving staff at Throne were Smart Serve trained, which included training to recognize signs of intoxication, there was no evidence led by the defendants about what, if any, policies, protocols, or procedures were in place at Throne to control those who entered the club, monitor alcohol consumption, or to find safe transportation for patrons.

[124] Furthermore, there were no Smart Serve certificates filed for the staff working on April 6-7, 2013. There is no evidence that the defendants took any steps to interview the staff working that evening after being notified of the accident. In a nutshell, other than alleging its staff was Smart Serve trained, the defendants have led no evidence to discharge its evidentiary burden of proving there is no genuine issue requiring a trial.

[125] As in *Sanzone*, the defendants have the initial burden to satisfy the court, based on an evidentiary record, that there is no genuine issue that requires a trial. In my view, they have failed to do so.

[126] Even if I find that the defendants discharged its burden, I am satisfied that Ms. Chanderpaul has discharged her burden and I find that there is a genuine issue that requires a trial. The fact that there is no evidence of Mr. Ramrattan displaying signs of intoxication that evening is not determinative of the claim as Caesars could still be found at fault if Mr. Ramrattan was served alcohol at Throne. I am satisfied that there is a triable issue based on the uncontroverted evidence that Mr. Ramrattan was at Throne in the early morning hours of April 7, 2013, was seen with a drink of some kind in his hand and pled guilty to driving over 80 causing bodily injury. I have also considered the opinion of Mr. Wigmore that it is likely that Mr. Ramrattan consumed some alcohol at Throne given his BAC at the time of the accident and the fact that he did not show any signs of intoxication. I have also considered the lack of an expert opinion from the

defendants to counter Mr. Wigmore's opinion, even with the little weight I have placed on that opinion given his reliance on the hearsay evidence of Ms. Wallage.

[127] As a result, based on the totality of the evidence, I am satisfied that there is a genuine issue to be tried regarding whether and to what extent Mr. Ramrattan was served alcohol at Throne and to what extent Ceasars would therefore be liable under the *LLA* and common law commercial host liability.

[128] This is not a matter that can be resolved by an enhanced fact-finding process such as a focused hearing on the issue. Rather, the matter should proceed to trial as I anticipate that several witnesses will be required to testify including, but not limited to Ms. Chanderpaul, Mr. Dyal, Mr. Ramrattan, Mr. Kaura, other managers at Caesars and Throne, any staff who were working that evening that can be located, and expert opinion evidence from Mr. Wigmore and Ms. Wallage and any expert that the defendants may retain.

b) Is the Claim against R.K.S. and Mr. and Ms. Kaura Statute-barred?

[129] The defendants argue that the claim against R.K.S. and Mr. and Ms. Kaura was commenced out of time and should be dismissed on that basis. I am satisfied that this summary judgment motion is the most just and expeditious means to resolve this issue as I can make the necessary findings of fact and decide the limitation issue based on the evidentiary record before me.

[130] A proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered: *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4. The limitation period in this case expired on April 7 2015, which is two years after the accident occurred, if that is when the claim was discovered. The defendants argue that as the claims against R.K.S. and Mr. and Ms. Kaura were commenced on December 29, 2015, which is eight months after the limitation period expired, the action against them is statute-barred. They argue that the claim against Mr. and Ms. Kaura personally in connection with the insurance issue was commenced on December 16, 2000, which is over 1.5 years after the limitation period expired.

[131] Ms. Chanderpaul relies on s. 5(1) of the *Limitations Act*, which addresses when a claim is discovered to argue that the limitation period did not expire on April 7, 2015. According to that section:

- (1) A claim is discovered on the earlier of,
 - (a) the day on which the person with the claim first knew,
 - (i) that the injury, loss or damage had occurred,
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
 - (iii) that the act or omission was that of the person against whom the claim is made, and
 - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
 - (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

- (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

[132] Ms. Chanderpaul argues that she discovered the claim against R.K.S. and Mr. and Ms. Kaura when she did a property search on September 21, 2015.

[133] With respect to the claim against Mr. and Ms. Kaura personally regarding the insurance issue, I presume that Ms. Chanderpaul's position is that she first learned of the cause of action when she became aware that Intact denied coverage to Caesars on the basis that Caesars did not disclose it obtained a liquor licence. The difficulty is that there is no evidence from Ms. Chanderpaul about when she learned of that issue. I have to presume it was prior to when the second claim was commenced as in that pleading, there is an allegation about inadequate insurance coverage in para. 16 under the heading "Waiver of Tort".

[134] The separate pleading against Mr. and Ms. Kaura personally alleging that they were negligent for failing to have adequate insurance in place for Caesars, as set out in paragraph 31 above, was only included in the consolidated claim issued on December 16, 2020. Ms. Chanderpaul was aware of the inadequate insurance issue when the second action was commenced on December 29, 2015. Accordingly, the claims in para. 42 of the consolidated claim against Mr. and Ms. Karau personally are dismissed as the claim was commenced five years after the cause of action was discovered and is therefore statute-barred.

[135] With respect to the claims relating to the alleged misconduct of R.K.S. and Mr. and Ms. Kaura as set out in the balance of the consolidated claim, I must determine when Ms. Chanderpaul first knew or ought to have known the elements of her claim against those defendants as a cause of action arises when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), at para. 39.

[136] The onus is on the defendants to establish that there is no issue requiring a trial with respect to the limitation period. The defendants may rely on the presumption in s. 5(2) of the *Limitations Act* that the claim was discovered on April 7, 2013, which is the day of the act on which the claim is based took place. To rebut that presumption, Ms. Chanderpaul need only prove that her actual discovery of the claim was not on the date of the events giving rise to the claim. Since the defendants are asserting the limitation period defence, the burden remains on them to prove, on a balance of probabilities, that a reasonable person in Ms. Chanderpaul's position ought to have acquired her knowledge of the claims against the defendants before December 29, 2013, the date two years before she commenced the second proceeding: *AssessNet Inc. v Taylor Leibow Inc.*, 2023 ONCA 577, 168 O.R. (3d) 276, at paras. 34-36; and *Essex Condominium Corp. No. 125 v. Heritage Park Villas Inc.*, 2024 ONCA 889, [2024] O.J. No. 5674, at paras. 22-27.

[137] In *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47, 144 O.R. (3d) 385, at para. 42, the Court of Appeal found that the question in determining whether a person has discovered a claim is whether the plaintiff knows enough facts on which to base a legal allegation against the defendant. In *Zeppa*, the court referred to the text by Graeme Mew, Debra Rolph and Daniel Zacks, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis, 2016), at 3.50, where the authors described the knowledge of the facts that may give rise to a claim as more than suspicion and less than perfect knowledge. In other words, the plaintiff need not be certain that the defendant's acts or omission caused or contributed to the loss in order for the limitation period to began to run. Rather, the limitation period begins to run from when the plaintiff had, or ought to have had, sufficient facts to have *prima facie* grounds to infer the defendant's acts or omissions caused or contributed to the loss. According to Mew, Rolph and Zacks, it is reasonable discovery and not the mere possibility of discovery that triggers a limitation period.

[138] In this case, the defendants rely on the two-year presumptive limitation period starting to run from the day of the car accident. Ms. Chanderpaul's uncontroverted evidence is that she did not discover she had a cause of action against R.K.S. and Mr. and Ms. Kaura until her lawyer conducted a title search in September 2015. The onus is on the defendants to satisfy the court that reasonable diligence required that these searches be conducted prior to

December 29, 2013, as the second proceeding was commenced on December 29, 2015.

[139] There is no dispute that Ms. Chanderpaul was aware that she had a cause of action for the injuries she sustained when the car accident occurred on April 7, 2013. She alleges that she did not know that she had a cause of action against R.K.S. or Mr. and Ms. Kaura and did not even know of their identity until her lawyer performed a corporate and title search for Ceasars, learned that the property was owned by R.K.S., that Mr. and Ms. Kaura were directors of both R.K.S. and Ceasars, and that Mr. and Ms. Kaura registered a \$7.2 million mortgage on title to the property in May 2014.

[140] The question is whether Ms. Chanderpaul should have known prior to December 29, 2013 of her cause of action, the identity of those responsible and that a proceeding would be an appropriate means to seek to remedy the loss that she allegedly suffered.

[141] To be clear, the cause of action against R.K.S. and Mr. and Ms. Kaura relates, in general, to their alleged wrongful conduct in how Ceasars was operated and their efforts to render the corporations judgement-proof.

[142] It is important to recall some key dates. First, the car accident occurred on April 7, 2013. In May 2014, Mr. and Ms. Kaura registered the mortgage on title to the property. The claim against Ceasars related to the overserving of alcohol at

Throne was issued on January 27, 2015. On April 21, 2015, a corporate search was done for Ceasars which identified Mr. and Ms. Kaura as two of the directors. Ceasars was noted in default on April 23, 2015. A title search of the property was conducted on September 21, 2015 that revealed that the property was owned by R.K.S. and that a mortgage of \$7.2 million had been registered on title to the property on May 27, 2014 by Mr. and Ms. Kaura. The claim naming R.K.S. and Ms. and Ms. Kaura as parties was issued on December 29, 2015.

[143] The issue is whether the exercise of reasonable diligence included a title and corporate search that ought to have been done prior to December 29, 2013. If not, then the claim commenced on December 29, 2015 would not be outside the two-year limitation period.

[144] The defendants argue that a limitation period cannot be tolled while the plaintiff sits idle and takes no steps to investigate the matters referred to in s. 5(1)(a) of the *Limitations Act: Long v. Maclaren Art Centre*, 2014 ONCA 526, [2014] O.J. No. 3242, at para. 42. However, in this case, even if the defendants are correct and Ms. Chanderpaul ought to have conducted the corporate and title search prior to December 29, 2013, she would not have discovered any of the facts on which she relies to advance the claims against R.K.S. and Mr. and Ms. Kaura. The fact that Mr. and Ms. Kaura were directors of the both the company that owned the property and the company that operated Throne would not be sufficient evidence to advance her claim seeking a disgorgement of the profits

earned by the defendants. Her cause of action, based upon alleged wrongdoings, including the registration of a mortgage on title by Mr. and Ms. Kaura, could not have been discovered until after May 2014, when the mortgage was registered on title.

[145] Ms. Chanderpaul's cause of action against R.K.S. and Mr. and Ms. Kaura is not based on the car accident but on their conduct in how they operated Caesars and also allegedly diverted profits for their personal benefits. The elements for this cause of action could not have been discovered even if Ms. Chanderpaul had conducted a property and corporate search prior to December 29, 2013. The fact that there was common ownership of the two companies would not even raise a suspicion of possible wrongdoing. It was only after Caesars was noted in default and then the discovery of a mortgage registered on title in May 2014 that Ms. Chanderpaul would have had sufficient facts to have *prima facie* grounds to infer the defendants' acts or omissions caused or contributed to her loss.

[146] I therefore find that the action against R.K.S. and Mr. and Ms. Kaura, except for the claim against Mr. and Ms. Kaura personally as set out in para. 42 of the consolidated claim, was commenced within the limitation period.

c) Is there a Tenable Cause of Action against R.K.S. and Mr. and Ms. Kaura and can the Corporate Veil be Pierced?

[147] The defendants argue that there is no tenable or reasonable cause of action against R.K.S. and Mr. and Ms. Kaura for the following three reasons:

- a) there is no basis to pierce the corporate veil to attach personal liability on Mr. and Ms. Kaura for the actions of the corporate defendants;
- b) Separate and apart from piecing the corporate veil, there is no basis to find that Mr. and Ms. Kaura, in their role as directors, owed Ms. Chanderpaul a duty of care for not obtaining appropriate insurance for Caesars and therefore claims against them in their personal capacity should be dismissed; and,
- c) waiver of tort is no longer an independent cause of action.

[148] I will deal with each one of these separately.

i) Can the Corporate Veil be Pierced?

[149] I will first review the legal framework for piecing the corporate veil and then address this issue as a rule 21 motion to strike the pleading and as a r. 20 summary judgment motion.

[150] The defendants argue that the corporate veil cannot be pierced to advance claims against Mr. and Ms. Kaura even though Ms. Chanderpaul did not specifically request this relief in the consolidated action.

[151] A corporation is a legal entity that stands on its own, with rights and responsibilities that are separate and apart from those of the individuals involved

with the corporation such as directors or shareholders: *Salomon v. Salomon & Son*, [1987] A.C. 22, 66 L.J. Ch. 35 (U.K.H.L.).

[152] To attempt to attach personal liability to shareholders or directors of a corporation is referred to as lifting or piercing the corporate veil. That is an exception to the general rule that a corporation is a separate legal entity: *FNF Enterprises Inc. v. Wag and Train Inc.*, 2023 ONCA 92, 165 O.R. (3d) 401, at para. 17.

[153] As it is an exception to the general rule, the test for piercing the corporate veil is a high one. In *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 28 O.R. (3d) 423, [1996] O.J. No. 1568 (C.J. (Gen Div.)), aff'd [1997] O.J. No. 3754 (C.A.), the court set out the following two-part test at pp. 433-434; "courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct".

[154] This test was affirmed by the Court of Appeal in *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1, leave to appeal to S.C.C. refused, [2018] S.C.C.A. No. 255. In *Yaiguaje* the court found that an independent, just, and equitable ground for piecing the corporate veil has been repeatedly rejected by the court in favour of the approach taken in *Transamerica*: at para. 67. That

approach is consistent with the principle reflected in various business statutes in Canada based on the rule of corporate separateness: *Yaiguaje*, at para. 70.

[155] The law recognizes an exception to the rule where the corporate form is being abused such that it is not a truly separate corporation and is being used to facilitate fraudulent or improper conduct: *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2014 ONCA 85, 372 D.L.R. (4th) 90, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 119.

[156] In *FNF*, the Court of Appeal again affirmed the test set out in *Transamerica*. Zarnett, J.A., found that the first part of the *Transamerica* test requires not just ownership or control of a corporation but complete domination or abuse of the corporate form: para. 20. The second part of the test requires fraudulent or improper conduct, “and contemplates that it is that conduct that has given rise to the liabilities the plaintiff seeks to enforce”: at para. 20.

[157] In *FNF*, in addressing the meaning of fraudulent or improper conduct, the court adopted the definition set out in *642947 Ontario Inc, v. Fleischer*, (2001), 56 O.R. (3d) 417, 209 D.L.R. (4th) 182 (C.A.). At para. 68, the court found that the corporate veil is pierced when the company is incorporated for an illegal, fraudulent, or improper purpose and also when those in control direct a wrongful thing to be done.

[158] In my view, there are two basis for finding that the corporate veil cannot be pierced. The first is based on the nature of the alleged wrongful acts of Mr. and Ms. Kaura that Ms. Chanderpaul relies on the second is based on the wording of the pleading itself.

[159] I will start first with the pleading. Paras. 37 to 40 of the consolidated claim, as set out in paras. 23 and 24 above, particularizes the allegations against R.K.S. and Mr. and Ms. Kaura. There is no separate allegation about the alleged wrongful conduct of Mr. and Ms. Kaura as directors of the corporations in those paragraphs. Some of the allegations relate to the alleged overservice of alcohol and breaches of the *LLA*. The gist of the remaining allegations are with respect to the alleged wrongful conduct of R.K.S. and Mr. and Ms. Kaura in the operation of Caesars so as to maximize profits, minimize costs, and deplete assets, to render the corporate defendants judgment-proof.

[160] Throughout the consolidated claim, references are made to “the defendants,” which includes the corporate and individual defendants. In *Twelve Gates Capital Group v. Mizrahi Development Group*, 2018 ONSC 7656, [2018] O.J. No. 6726, at para. 25, Nishikawa J. found that a plaintiff cannot avoid having their pleadings struck by making allegations against “the defendants” generally. She relied on *460635 Ontario Limited Ltd. v. 1002953 Ontario Inc.*, 127 O.A.C. 48, [1999] O.J. No. 4071 (C.A.), at paras. 7-8, where the Court of Appeal held that “properly pleaded” as it relates to personal liability of corporate directors,

officers, and employees must be read as “specifically pleaded”. That is, a separate claim must be stated against the individual in his/her personal capacity.

[161] The only paragraphs that refer to the conduct of Mr. and Ms. Kaura separately is found in para. 42, as set out in para. 31 above. In those paragraphs, however, the claim being advanced is against Mr. and Ms. Kaura personally for failing to arrange for adequate insurance for Caesars and not allegations that the corporate veil should be pierced. The balance of the allegations in the consolidated claim against Mr. and Ms. Kaura are the same as the claims against the corporate defendants.

[162] Absent a separate or differentiated claim against Mr. and Ms. Kaura, other than as it relates to the insurance issue, which I have found is statute-barred, there is no reasonable cause of action against them as officers, shareholders, and employees of R.K.S. and Caesars.

[163] As in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97, 155 D.L.R. (4th) 627 (C.A.), based on the pleading, there is no factual underpinning to support an allegation that the individual defendants were at any time acting outside of their capacity as directors or officers of either R.K.S. and/or Caesars of which they were the directing minds.

[164] If I am incorrect and there are sufficient allegations against Mr. and Ms. Kaura in the pleading about their wrongful conduct, in my view, that conduct is not sufficient to pierce the corporate veil.

[165] It is useful to review the facts in *FNF* in closer detail in order to determine if the alleged wrongful conduct of Mr. and Ms. Kaura as pleaded in the consolidated basis is sufficient to pierce the corporate veil.

[166] In *FNF*, the plaintiff/former landlord, commenced a claim against its former tenant, a corporation, and its sole director, officer, and shareholder. The claim alleged that the corporate tenant abandoned the leased premises before the end of the term of the lease and left the premises in a state of disrepair. It was alleged that the tenant moved to another location and continued its operations under a different name. The landlord sought from the tenant the amount owing to it under the terms of the lease.

[167] The claim also named the sole director of the corporate tenant personally and alleged that she interfered with contractual relations as she made the decision that resulted in the tenant's breach of the lease. The plaintiffs also alleged that the director stripped the value from the corporate tenant knowing it owed money under the lease.

[168] On a r. 21 motion, the claim against the director personally was struck as the motion judge found there was no basis to pierce the corporate veil.

[169] On appeal, the Court of Appeal upheld the finding that the corporate veil could not be pierced but held that the claim that value was stripped from the corporation by the director knowing that the corporation had incurred liabilities by breaching the lease was actionable under the oppression remedy rather than the doctrine of piercing the corporate veil: *FNF*, at para. 6.

[170] The Court of Appeal found that the claim that the director made the decision for the corporation to breach the lease did not amount to the type of improper conduct that justifies piecing the corporate veil, as she could not be held liable for the tort of interference with contractual relations by inducing her own company to breach a contract.

[171] The second allegation was that the director treated the corporation's assets and business as her own and stripped value from it, knowing of its lease obligations. It was not alleged that removing value from the corporation was what led to it breaching the lease. The Court of Appeal found this was important as it was the lease liabilities that the piercing the corporate veil claim sought to impose on the director. It was not alleged that the corporate tenant's entering in the lease was an abuse of the corporate form, or a shield for fraudulent or improper conduct.

[172] The Court found that the situation in *FNF* was unlike cases where courts have pierced the corporate veil given the nexus between the liability the plaintiff

sought to recover by piecing the corporate veil and the wrongful conduct directed by the person in control of the corporation that gave rise to that very liability: at para. 27.

[173] The Court noted the distinction from the facts in *Shoppers Drug Mart* where the court did pierce the corporate veil. In *Shoppers*, the sole director of the corporate defendant directed that funds, which were to be used to pay the plaintiff's utility bills pursuant to an agreement, be misappropriated into another account. The court applied *Fleischer* and found that the corporate veil should be pierced to impose liability for the misappropriated funds as the director expressly directed and caused the wrongful act of misappropriation: at paras. 43-47.

[174] The court in *FNF* found that the link between the alleged wrongful conduct and the liabilities sought to be imposed by piercing the corporate veil was missing. The court noted that it was not alleged that stripping the value of the corporate tenant knowing it had liabilities under the lease constituted misappropriation of the plaintiff/landlord's funds. Piercing the corporate veil was not aimed at whatever value was stripped but was aimed at the lease liabilities themselves, regardless of the amount of value that was stripped. The lease liabilities had a source other than, and independent of, any alleged value stripping: *FNF*, at para. 28.

[175] The Court in *FNF* found that to meet the test in *Transamerica* to pierce the corporate veil, the alleged wrongful conduct of the director/owner of the corporation must have given rise to the lease liabilities that were being sought by the plaintiff/landlord, such that it would be appropriate to lift the corporate veil and consider the liabilities to be those of the director/owner personally: at para. 22.

[176] The Court of Appeal found that while the corporate tenants may have engaged in value stripping that was prejudicial to the plaintiff in their ability to collect from the tenant, the remedy for that was under the oppression remedy and not piecing the corporate veil.

[177] In this case, there are allegations that the conduct of the defendants, including Mr. and Ms. Kaura, were wrongful as they engaged in activities to render the corporate defendants' judgment-proof. They did this by allegedly depleting the assets or creating a holding company or other entity for the assets of Caesars to make it judgment-proof and depleted the assets of R.K.S. for personal gain or to thwart future claims against R.K.S. and Caesars. Ms. Chanderpaul also alleges failure to arrange for adequate insurance was also done to render Caesars judgement-proof.

[178] As in *FNF*, this alleged wrongful conduct might be conduct that could make it difficult for Ms. Chanderpaul to recover damages should it be found that

Mr. Ramrattan was overserved alcohol at Throne but that is not the conduct that led to her injuries.

[179] To pierce the corporate veil, there must be a link or nexus between the alleged wrongful conduct by the individual director/officer/shareholder and the damages sought to be imposed by piercing the corporate veil. In this case, that is missing, save and except for any possible wrongful conduct as it relates to non-compliance with the *LLA* and the alleged overservice of alcohol.

[180] According to the consolidated claim, Ms. Chanderpaul is seeking damages from Caesars for the injuries she sustained in a motor vehicle accident caused by a driver who was allegedly overserved alcohol at Throne. Ms. Chanderpaul is seeking to pierce the corporate veil to impose those damages on the directors personally. If she is not successful in her claim against Caesars for causing or contributing to the car accident, she has no cause of action against R.K.S. or Mr. and Ms. Kaura.

[181] In my view, there is therefore no clear link between Mr. and Ms. Kaura's alleged wrongful conduct in not having proper liability insurance in place at the time of the accident or in depleting corporate assets for their personal gain or to thwart future possible judgments and the damages Ms. Chanderpaul's seeks for her injuries. Those allegations of alleged wrongful conduct are not sufficient to pierce the corporate veil.

[182] I will now address the other allegations of wrongful conduct with respect to how Caesars was operated and how, more specifically, alcohol was served.

[183] In *Sigma Convector Enclosure Corp. v. Fluid Hose & Coupling Incl*, 2022 ONSC 4371, 2022 CarswellOnt 14182 (Ont. S.C.J.) the defendant corporation and its directors were named as parties. The corporate defendant supplied a defective part to the plaintiff and agreed to pay the plaintiff damages for the failure of that part. The plaintiff claimed that the corporate directors knew the corporate defendant would not or was stripped of the ability to pay, withheld payment and diverted money from the corporate defendant. The plaintiff also claimed that the corporate defendants owed it a duty of care to design, manufacture and supply it with a proper part that would not fail.

[184] On a rule 21 motion to strike, Justice Perell found that there was no pleading of fraudulent activity or extraordinary circumstances. The pleading focused on the activities of the directors as the operating mind of the corporate defendant and there was an absence of extraordinary circumstances that would justify ignoring the separate legal personality of the corporate defendant. He found that whatever the directors said or did, they did on behalf of the corporation. Thus, with the exception of a claim for an oppression remedy, all the claims against the directors were struck.

[185] In her pleading, Ms. Chanderpaul does not plead any actions on the part of Mr. and Ms. Kaura that are independent of the actions they took on behalf of the corporations in operating Caesars. The claims against the individual defendants are based on their actions as directing minds of R.K.S. and Caesars in operating the nightclub. There is no separate and distinct act pleaded on the part of either Mr. or Ms. Kaura giving rise to a cause of action against them personally.

[186] The allegations with respect to the operation of Caesars and the alleged violations of the *LLA* including encouraging employees to overserve patrons and creating an environment to enable patrons of Throne to become intoxicated are not separate alleged wrongful acts of Mr. and Ms. Kaura as directors but related to the operation of the corporate defendant itself.

[187] Based on the pleading, it is plain, obvious and beyond doubt that the plaintiff cannot succeed in piecing the corporate veil and the claims against Mr. and Ms. Kaura as set out in paragraphs 37 to 41 should be struck.

[188] In the event the pleading is sufficient and the claims against Mr. and Ms. Kaura should not be struck at the pleading stage, I will consider the evidentiary record to determine if there is a genuine issue to be tried to determine if the corporate veil can be pieced and liability attached to Mr. and Ms. Kaura for the alleged wrongdoing of the corporations.

[189] I will start first with a review of the evidence of the alleged wrongful conduct of Ms. Kaura.

[190] Mr. Kaura's evidence, which was not disputed, was that Ms. Kaura did not play an active role in R.K.S. or Caesars. There is no evidence that she was involved in the operation of Throne. The only evidence that Ms. Chanderpaul relies on with respect to Ms. Kaura's alleged wrongful conduct is the letter from Intact which was addressed to Caesars c/o Ms. Kaura, advising that intact was denying coverage under the insurance policy issued to Caesars and the \$7.2 million mortgage that was registered on title to the property naming she and Mr. Kaura as mortgagees. According to Ms. Chanderpaul, these actions were done to minimize expense to Caesars, thereby increasing revenues and to render both R.K.S. and Caesars judgement-proof.

[191] If the inference from the letter from Intact is that it was Ms. Kaura who applied for insurance for Caesars and then failed to disclose that it obtained a liquor license, that is not wrongful conduct that is linked to Mr. Chanderpaul's claim that her injuries were caused or contributed to by the overservice of alcohol to Mr. Ramrattan.

[192] Furthermore, a corporation is an inanimate legal entity that can only operated through the actions of its directors, officers, and employees. If it was Ms. Kaura who applied for insurance, she did so in her role as a director of

Caesars. It was not activity that took her out of her role as a directing mind of the corporation: *Normart* at para. 18.

[193] With respect to the \$7.2 million mortgage, if the inference is that was done to make R.K.S. judgement-proof, that is not wrongful conduct that is linked to Ms. Chanderpaul's claim for damages against Caesars. As in both *FNF* and *Signa*, allegations of stripping the corporate defendant of assets rendering it judgement-proof and financially benefitting personally from their actions is not a basis to pierce the corporate veil.

[194] In addition, the mortgage, was registered before any claim was commenced against any of the defendants. At that time, Ms. Chanderpaul was not a creditor of either corporate defendant. Thus, registering the mortgage on title was not done to defeat her claim as there was no such claim in existence when the mortgage was registered on title.

[195] Even if Ms. Chanderpaul is successful at trial and Caesars is found at fault for overservice of alcohol to Mr. Ramrattan and thus caused or contributed to the accident, as Caesars does not own the property, whatever equity or lack thereof there is in property has no bearing on an ability to collect a judgment against Caesars as the property could not be used to enforce a judgment against it.

[196] There is no evidence that Ms. Kaura was involved in the operation of Caesars and thus no evidence of any wrongful conduct on her part regarding how alcohol was served at Throne.

[197] I find that based on the evidentiary record before me, I can make the necessary findings of fact to determine this issue. Based on my review of the evidentiary record before me, I am satisfied that there is no genuine issue for trial regarding Ms. Kaura's alleged wrongful conduct. The claim against Ms. Kaura is dismissed as there is no wrongful conduct on her part to support piercing the corporate veil and attach personal liability on her for any corporate wrongdoing.

[198] I will now turn to the evidence against Mr. Kaura.

[199] First, my finding regarding the \$7.2 million mortgage and insurance applies to Mr. Kaura.

[200] Unlike Ms. Kaura, there is evidence that Mr. Kaura worked as a manager at Throne. Ms. Chanderpaul alleges that in that role, he permitted various practices at Throne to encourage the overconsumption of alcohol and various other acts that were in breach of the *LLA*. As reviewed above, her affidavit set out her analysis of receipts and sales records to support her claim of over service of alcohol and underreporting of income. She also alleges that it was wrongful to permit the contracting out of the sale of liquor, and that Mr. Kaura failed to control

the sale of liquor, failed to record revenues to facilitate the underpayment of taxes, encouraged overconsumption of alcohol and pocketed cash sales.

[201] Ms. Chanderpaul relies on the report of Mr. Froese to support her claim that the defendants have failed to provide adequate records to determine how much alcohol was sold on April 6-7, 2013 and to determine what revenues were earned by Caesars and whether all income was declared. As a result, Mr. Froese could not determine tax liability or the extent to which cash may have been pocketed.

[202] The defendants argue that I should place no weight on Mr. Froese's evidence as he is a forensic accountant and is not licensed to audit a company and therefor cannot give an opinion about a corporation's financial statements. For this motion, I reject that argument. Without a fulsome *voir dire* on his qualifications, I am not prepared to reject his opinion on the basis he lacks the proper qualifications to give that opinion.

[203] Even if I accept that there is evidence to support Ms. Chanderpaul's claims about the wrongful conduct of Mr. Kaura in the operation of Throne and the alleged wrongful conduct regarding the finances of Caesars, that is not conduct that supports a claim to pierce the corporate veil. Any evidence that supports breaches of the *LLA* and the operation of Throne is in connection with Mr. Kaura's

conduct in his role as a directing mind of Caesars and not actions that are outside that role.

[204] There is no genuine issue requiring a trial regarding Mr. Kaura's alleged wrongful conduct. The claim against Mr. Kaura is dismissed as there is insufficient evidence of wrongful conduct on his part to support piercing the corporate veil and attach personal liability on him for any corporate wrongdoing.

[205] Other than a bald allegation made by Ms. Chanderpaul, there is no evidence that either R.K.S. or Caesars was incorporated for an improper, illegal, fraudulent, or unlawful purpose. There is no dispute that R.K.S. was incorporated in 1999, long before the events giving rise to this proceeding. There is no dispute that it owns the property from which Caesars operated Throne.

[206] There is no evidence that Caesars was incorporated for an illegal or unlawful purposes. The evidence is that Caesars was incorporated to operate a business at the property. While there is a lack of clarity about when and for how long it operated as a banquet hall before opening as a nightclub, there is evidence that it applied for a liquor license and registered the name Throne before it began to operate as a nightclub. Ms. Chanderpaul's various allegations about how Throne was operated including claims about its failure to comply with the *LLA* and allegations that it encouraged the overconsumption of alcohol and failed to keep proper records and inappropriately contracted out the sale of liquor, is not

evidence that supports the allegation that Caesars was incorporate for an unlawful of illegal purpose.

[207] I will now address the claims against R.K.S. It is a corporation that is separate and apart from Caesars despite having common directors. Although it has the same shareholders as Caesars, that does not mean they are a single enterprise. There is no evidence that R.K.S. was involved in the incorporation of or operation of Caesars. It is not a shareholder in Caesars. Pursuant to an unwritten lease, Caesars was to pay rent to it for leasing the property where Throne operated. It is not in dispute that Caesars did not meet all of its rental obligations to R.K.S. and paid less rent than the prior tenant. There is no evidence that R.K.S. was involved in securing insurance for Caesars.

[208] The defendants have met their burden to prove that the claim against R.K.S. should be dismissed. Ms. Chanderpaul has failed to present any evidence that demonstrates there is a genuine issue to be tried that R.K.S was engaged in wrongful conduct or involved in the operation of Caesars, other than owning the property from which Throne operated. is in any way at fault for her injuries. The claim against R.K.S. should be dismissed.

ii) Do Mr. and Ms. Kaura Personally owe a Duty of Care to Ms. Chanderpaul?

[209] In para. 42 of the consolidated claim, Ms. Chanderpaul alleges that that Mr. and Ms. Kaura personally owe her a duty of care and ought to have arranged for appropriate insurance for Ceasars. She argues that it was reasonably foreseeable that there would be harm to patrons, such as herself, if there was inadequate or no insurance for Throne. This is a separate cause of action against Mr. and Ms. Kaura. While piercing the corporate veil is a means to sue a director/shareholder for the wrongdoings of the corporation, this allegation is that there is some conduct on their part that is either tortious in itself or is independent misconduct from that of the corporation.

[210] I have already found that this claim is statute-barred. In the event I am incorrect and the claim is not out of time, I will address whether the directors of a corporation owe a duty of care to third parties to adequately insure the corporation

[211] Shareholders, directors, officers, and employees may be liable for their own tortious conduct: *ADGA Systems International Ltd. V. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (Ont. C.A.). The plaintiff must plead a cause of action against the individual in his or her personal capacity.

[212] In this case, the alleged tortious conduct is failing to obtain adequate insurance. It is important to note, however, that shareholders, directors, officers or employees cannot be personally liable until there is some activity on their part that takes them out of the role of directing minds of the corporation: *Montreal*

Trust Co. of Canada v. ScotiaMcLeod Inc. (1995), 26 O.R. (3d) 481 (Ont. C.A.)
leave to appeal to the SCC ref'd [1996] S.C.C.A. No 40 (S.C.C.).

[213] When I look at the pleading alone, as a r. 21 motion, the claims against Mr. and Ms. Kaura in the personal capacity are associated with their activities as directors for the corporate defendants. As noted in *Montreal Trust*, a corporation can only operate through the actions of individuals. In this case, whether it was Mr. or Ms. Kaura who applied for insurance, they did so in their role as a director of Caesars.

[214] This finding that the allegations are not based on separate and distinct conduct of Mr. and Ms. Kaura is underscored by the same pleading being made against the corporate defendants and the allegation that the wrongdoing of the corporation should be imposed on the directors through piercing the corporate veil. Accordingly, paragraph 42 of the consolidated claim does not plead the material facts necessary to advance claims against Mr. and Ms. Karau in their personal capacity.

[215] If I am wrong and the pleading does plead a separate action against Mr. and Ms. Kaura in their personal capacity, the next issue is whether they, in their role as directors, personally owed a duty of care to Ms. Chanderpaul to arrange for adequate insurance.

[216] Ms. Chanderpaul did not rely on any jurisprudence that established such a duty of care. In her factum, in one paragraph, she argued that the purpose of obtaining insurance was to protect those entering the business to ensure there are assets to pay for negligent acts occurring on the premises. She argued that there was reasonably foreseeable harm to patrons such as herself and no policy reason to deny liability, relying on *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K.H.L.)

[217] Where there is no established duty of care, determining if a duty of care exists in the particular circumstances of a case is a question of law. There is a two-step analytical approach as set out in *Anns*. This approach was adopted by the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

[218] The three requirements to find a duty of care are:

- a) reasonable foreseeability;
- b) sufficient proximity; and
- c) the absence of overriding policy considerations which negate a *prima facie* duty established by foreseeability and proximity.

[219] This argument, about whether Mr. and Ms. Kaura owed her a duty of care,, was not developed by Ms. Chanderpaul either in her factum or during submissions.

[220] The defendants argue that Mr. and Ms. Kaura did not owe a personal duty of care to Ms. Chanderpaul to ensure that Caesars was properly insured relying on *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191 at para. 88 where the court found that a director has no established duty in law to be mindful of the interests of strangers to the corporation when discharging his or her duties as a director.

[221] I agree that Mr. and Ms. Kaura do not personally owe Ms. Chanderpaul a duty of care to ensure that Caesars was properly insured. Directors owe a duty of care to the corporation and other stakeholders. They have a duty to act in the best interest of the company. This includes ensuring there is proper insurance. Insurance is not arranged to protect third parties but to protect the corporation's assets in the event it is required to pay damages to a third party.

iii) Waiver of Tort/Disgorgement of Profits

[222] The defendants argue that the claims for disgorgement of profit should be dismissed pursuant to r. 21.

[223] In the consolidated claim, Ms. Chanderpaul seeks the following relief:

The Plaintiff, Michelle Chanderpaul, claims as against the Defendants:

- (a) Specifically, against the Defendant, Caesars Convention Centre Ltd., damages in the amount of FIVE MILLION DOLLARS (\$5,000,000.00);

- (b) An accounting of profits for Caesars Convention Centre Ltd ., carrying on business as Throne Entertainment Venue and disgorgement of the said profits, amounts for avoidance of loss, and all other benefits arising from the improper conduct of the Defendants to the Plaintiff under the doctrine of waiver of tort in the amount of 7.2 MILLION DOLLARS (\$7,200,000.00) or as determined by this Honourable Court;
- (c) Additionally, or in the alternative, punitive damages in the amount of 2 MILLION DOLLARS (\$2,000,000.00) against the defendants R.K.S. INVESTMENTS LTD ., RAJESH KAURA, and/or KANTA KAURA;
- (d) Her costs of this action on a substantial indemnity basis plus HST;
- (e) Prejudgment and post-judgment interest pursuant to Sections 128 and 129 of the Courts of Justice Act; and
- (f) Such further and other relief this Honorable Court may deem just.

[224] Prior to 2020, pleading waiver of tort as an independent cause of action allowed plaintiffs to seek a remedy quantified on a defendant's gain, without proof of their own loss or injury. In essence, the plaintiff could seek to disgorge profits derived from a defendant's wrongdoing rather than seeking to recover the amount the plaintiff lost. It was a doctrine often used in class action proceedings to compel defendants to disgorge all profits earned as a result of their alleged wrongdoing.

[225] The Supreme Court of Canada considered the doctrine in *Atlantic Lottery Corporation v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, and unanimously held that waiver of tort is not an independent, valid cause of action and should

not be used to describe what is, in effect, disgorgement. The court found that disgorgement is an equitable remedy that is only available once a plaintiff proves all elements of a recognized cause of action. In order for a plaintiff to claim disgorgement for the defendant's negligence, the defendant must have caused the plaintiff's damages. The plaintiff must first prove their damages before they can seek a disgorgement of profits. The court also found that it was a remedy in a breach of contract case but only in exceptional circumstances. The court did not determine if disgorgement is available in negligence claims.

[226] The court also found that the term "waiver of tort", as used in Ms. Chanderpaul's pleading, is a misnomer and should be abandoned.

[227] As set out in para. 1(b) of the prayer for relief in the consolidated claim, Ms. Chanderpaul seeks a disgorgement of profits on the basis that the defendants made a profit at her expense. Based on *Babstock*, if disgorgement of profits is available as a remedy in a negligence claim, Ms. Chanderpaul must first establish that she is entitled to damages before she can seek disgorgement. As her action is based in negligence, she must prove all the elements of the tort of negligence including that the defendants' owed her a duty of care, breached that duty of care, that the breach caused her injury, and that she suffered harm as a result for which she is seeking compensation.

[228] Disgorgement of profit requires a finding of misconduct. Based on my finding that summary judgment is granted and the claims against R.K.S. and Mr. and Ms. Kaura are dismissed, so too should the claim for disgorgement of profits against them.

[229] With respect to the claim against Caesars, if Ms. Chanderpaul is successful and Caesars is found to have overserved Mr. Ramrattan, I leave it to the trial judge to determine if disgorgement of profits is an alternate remedy available to Ms. Chanderpaul based on the alleged wrongful conduct of Caesars

VI. Conclusion

[230] The claim against Caesars is not statute-barred and can proceed. The claims against R.K.S. and Mr. and Ms. Karau, while commenced in time, are dismissed. There is no reasonable cause of action against R.K.S. There is insufficient evidence of misconduct to support piercing the corporate veil to attach liability on Mr. and Ms. Kaura for any corporate wrongdoing. Lastly, the claim against Mr. and Ms. Kaura personally is dismissed for being commenced out of time and on the basis that they did not, as directors, owe Ms. Chanderpaul a duty of care to ensure Caesars was adequately insured.

[231] I encourage the parties to reach an agreement on costs. If they cannot, the party seeking costs shall serve, file and upload to Case Centre its bill of costs, any relevant offers to settle, and cost submissions, limited to three pages, double

spaced with 12 pt font, by February 17, 2025. The responding party shall file their bill of costs, any relevant offers to settle and cost submissions, limited to three pages, doubled spaced, with 12 pt font, by March 10, 2025. There shall be no right of reply.

L. Shaw J.

Released: January 27, 2025

CITATION: CHANDERPAUL v. CEASARS CONVENTION CENTRE LTD et al,
2025 ONSC 558
COURT FILE NO.: CV-14-1539-00
DATE: 2025-01-27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHELLE CHANDERPAUL

Plaintiff

– and –

CEASARS CONVENTION CENTRE LTD.
Carrying on business as THRONE
ENTERTAINMENT VENUE, R.K.S.
INVESTMENTS LTD., RAJESH KAURA, and
KANTA KAURA

Defendants

**SUMMARY JUDGMENT
REASONS FOR DECISION**

L. Shaw J.

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