# VTB Capital - Supreme Court Decision

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What are the legal consequences of "piercing the corporate veil" of a company? If it is appropriate to do so, will the controller of the company be made liable on its contracts? The Supreme Court of the United Kingdom has decided in *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5 that contractual liabilities of a corporation cannot be attributed to its controller by means of "piercing the corporate veil". In addition, the case explains the factors which determine the proper forum for cross-border litigation.

## An outline

VTB plc (VTB) is a bank registered as a public company in England which is owned by a large Russian bank. It lent $225 million to Russagroprom LLC (RAP), incorporated in Russia, under a facility agreement governed by English law. The purpose of the loan was the purchase of six Russian dairy companies from Nutritek International Corp. (Nutritek), a BVI company managed from Russia. The ultimate owner and controller of RAP (through another BVI company and a Russian company) was alleged to be a Mr Malofeev, a Russian resident who conducted the negotiations for the loan with VTB.

RAP defaulted. VTB recovered about $40 million from the security. VTB then sued the holding companies and Mr. Malofeev in England, and obtained permission to serve those defendants out of the jurisdiction. VTB's claim was, originally, that the defendants had entered into a conspiracy to defraud VTB by falsely representing that RAP was independent of Nutritek, whereas in truth both were controlled by Malofeev.

To meet a challenge by the defendants to the permission to serve them outside England, VTB applied to amend its claim to allege that Malofeev and the holding companies could be held to be liable on the facility agreement by piercing the corporate veil of RAP. This would mean that the defendants could be sued as of right in England, because the facility agreement contained a

submission to the jurisdiction of the English Court.

The judge at first instance set aside the permission and refused the amendment. The tort claim, he held, ought to be tried in Russia, and the contract claim was bound to fail. The Court of Appeal dismissed VTB's appeal, agreeing with the judge's reasoning.

The Supreme Court thus had to consider:-

1. Whether the permission granted to VTB to serve the proceedings out of the jurisdiction should be re-instated (the Jurisdiction Appeal); and

2. Whether VTB should be allowed to amend its original pleaded case to include a claim based on piercing the corporate veil that Mr. Malofeev and his associated companies were jointly and severally liable on the facility agreement with RAP (the Corporate Veil Appeal).

## The Jurisdiction Appeal

By a majority of three to two, the Supreme Court upheld the lower courts' refusal to grant VTB permission to serve the proceedings out of the jurisdiction. The point of importance was VTB's contention that a finding that the Court has jurisdiction over the defendant because the tort in issue was committed within the jurisdiction entails the conclusion that that place is the natural forum for the trial. VTB relied on words of Robert Goff LJ in The Albaforth [1984] 2 Lloyd's Rep 91 to the effect that in such a case, it was not easy to imagine what other facts would displace the conclusion that the Courts in the place of commission of the tort were the "natural forum".

Lord Mance pointed out that the House of Lords had already decided in Berezovsky v Michaels [2000] 1 WLR 1004 that this approach (concerned with the practical questions of the weight of the evidence for and against that forum) were not inconsistent with the high-level generalisations constituting the test for permission to serve outside the jurisdiction articulated in *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460 by Lord Goff of Chievely (as he had become), including:

*"The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so"*

In the VTB case, Lord Mance says:

"*The Albaforth* line of authority is no doubt a useful rule of thumb or a prima facie starting point, which may in many cases also prove to give a final answer on the question whether jurisdiction should appropriately be exercised. But the variety of circumstances is infinite, and the *Albaforth* principle cannot obviate the need to have regard to all of them in any particular case. The ultimate over-arching principle is that stated in *The Spiliada*, and, if a court is not

satisfied at the end of the day that England is clearly the appropriate forum, then permission to serve out must be refused or set aside."

1. Governing law - it is generally preferable, other things being equal, that a case be tried in the country whose law applies. This factor is of particular importance if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum. In this case, the Court of Appeal and the judge had been wrong to hold that the proper law of the tort was Russian, and not English, law. England was the place where the events (reliance on representations, and disbursement of money in reliance on them) which constituted the tort of deceit had happened. Accordingly section 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995 applied. The defendants had not shown that the factors connecting this tort with Russia made it "substantially more appropriate" to apply Russian rather than English law (section 12 of the 1995 Act).

2. Place of commission of the tort - in isolation, this is normally the prima facie appropriate jurisdiction. However, particularly in international transactions, the place of commission of the tort may be diminished in importance by countervailing factors. The approach in The Albaforth does not make this factor the "trump card" in favour of that forum.

3. The factual focus and witnesses - where the issues and evidence will be focused is a core factor in considering the question of appropriate forum. Lord Mance noted that the issues and evidence in the VTB case would be focused on matters which happened in and concern Russian and that the oral and documentary evidence, on both factual and expert matters, was likely to be overwhelmingly Russian and to be found in Russia, were it could be heard in Russian without translators.

4 The aim of the alleged torts - the fact that the alleged torts were designed to induce the making of a facility agreement under which England was accepted as the most appropriate and convenient forum is a potentially relevant factor. Although it was a 'pointer' to England, it could not be considered a strong indication in this case, because it concerned a claim in tort and not in contract.

5. Fair trial - as there was no suggestion that this matter could not, or would not, receive a fair or proper trial in Moscow, this matter was not considered.

There are some important points which emerge from the dissenting judgments of Lord Clarke and Lord Reed. Lord Clarke said that the defendant asserting that another forum was more convenient should make a case for that position in evidence or by a draft pleading, showing the issues which would fall to be tried. This would not amount to submission to the jurisdiction if done without prejudice to the resistance to the jurisdiction of the Court.

Lord Clarke also considered that the presence in the contracts of a jurisdiction clause in favour

of the English Courts would weigh in favour of the English forum, even though the controller, against whom fraud and conspiracy were also alleged, was not a party to the contract. Lord Clarke agreed with Professor Adrian Briggs that the absence of a contract claim against an alleged fraudster who induced the contract by fraud "need not entail the irrelevance of a jurisdiction agreement which he engineered" (2012) LMCLQ 364 at 370).

Lord Reed pointed out that the Court of Appeal had given weight to the fact that Russian law would have become relevant if the defendants wished to plead that Russian law was the applicable law". But the defendants had not stated that they did wish to plead that case. The implication is that a defendant who seeks a stay of proceedings in such a case will need to provide reasons why issues will arise which are more conveniently tried in another jurisdiction, especially where the Court seized is the forum of the place of commission of the tort.

## The Corporate Veil Appeal

This question is dealt with in the judgment of Lord Neuberger. The Supreme Court had been asked to say that there were no circumstances in which the Court should "pierce" or "lift" the corporate veil. The Court had heard a "spirited and sustained attack" on the proposition that the Court may pierce the veil of incorporation at all - an attack "worthy of serious consideration".

Lord Neuberger agreed that the cases left the precise nature, basis and meaning of the principle obscure. But this was not the case in which to determine that the Court should not pierce the veil of incorporation unless statute expressly or impliedly provides otherwise.

The reason was that the attempt by VTB failed in any event. What it sought was identification of a controller with a corporation so as to make the controller a party to the corporation's contract. The only case law support for that step were two judgments of Burton J in *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm), [2011] 1 Lloyd's Rep 647 and *Alliance Bank JSC v Aquanta Corporation* [2011] EWHC 3281 (Comm) [2012] 1 Lloyd's Rep 181.

Lord Neuberger said that such identification would contradict the separate legal personality of the corporation. The controller could not be said to have become a party to the contract because he or it was a separate person from the corporation.

The Supreme Court's decision therefore leaves open the fundamental question whether there exists any principled basis on which courts can 'pierce the corporate veil'. But it can now be said at that least one statement of principle has been approved: that of Munby J (now President of the Family Division of the High Court in England) in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) [2009] 1 FLR 115:

*"it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing ... at the time of the relevant transaction(s)".*

The following further useful observations are contained in the judgment of Lord Neuberger:

• *Gilford v Horne and Jones v Lipman*, which are often cited as cases of piercing the corporate veil are not such. The result would be no different if the defendant had used a human stooge instead of a company to carry out the alleged wrongdoing. Cases where the court had pierced the corporate veil *(Gencor ACP Ltd v Dalby and Trustor AB v Smallbone)* afforded no support for the proposition that a wrongdoer could be treated as contractually liable under a contract to which the company was a party.

• Although the process of piercing the corporate veil resembled the rule making an undisclosed principal liable on a contract, that rule was itself an anomaly. Subject to the rule of undisclosed principal, where B and C are contracting parties and A is not, there is simply no justification for holding A responsible for B's contractual liabilities to C simply because A controls B. If A has made any misrepresentations, the law provides redress for C against A in tort.

• It would be wrong to treat Mr. Malofeev as a party to the facility agreement in circumstances where: (i) none of the actual parties to the agreement intended to contract with Mr. Malofeev; (ii) Mr. Malofeev did not intend to contract with any of those parties; and (iii) Mr. Malofeev did not conduct himself or lead any party to believe that he was liable under the facility agreement. Lord Neuberger held that such analysis follows from one of the most fundamental principles of contractual law, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context.

The story does not end here, however; *Petrodel Resources Ltd v Prest [2012] EWCA Civ 1395* is a financial provision case from the Family Division in which the majority rigorously applied the rule in *Salomon v Salomon*, and adopted the principles set out by *Munby J in Ben Hashem v Al Shayif*. The wide application of piercing the corporate veil applied by Thorpe LJ, in the minority will be in issue for the first time in a final appeal. Judgment was given on 12 June 2013 ([2013] UKSC 34) and we will report shortly.

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