



6 February 2013

PRESS SUMMARY

VTB Capital plc (Appellant) v Nutritek International Corp and others (Respondents) [2013] UKSC 5

On appeal from [2012] EWCA Civ 808

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Wilson, Lord Reed

BACKGROUND TO THE APPEAL

In 2007, VTB Capital plc (“VTB”), an English incorporated bank, entered into agreements (“the agreements”) with Russagroprom LLC (“RAP”), a Russian company. Under the agreements, VTB loaned US\$225,050,000 to RAP, primarily to enable RAP to buy six Russian dairy companies and three associated companies (“the dairy companies”) from Nutritek International Corp (“Nutritek”). In 2008, RAP defaulted on the loan. VTB claims that it was induced in London to enter into the agreements by misrepresentations made by Nutritek. Mr Konstantin Malofeev, a Russian businessman resident in Moscow, is said to be the ultimate owner and controller of Nutritek, Marshall Capital Holdings Ltd (“Marcap BVI”), and Marshall Capital LLC (“Marcap Moscow”). VTB claims that Marcap BVI, Marcap Moscow, and Mr Malofeev are jointly and severally liable for these alleged misrepresentations.

To bring proceedings in England, VTB required permission to serve proceedings out of the jurisdiction, because the intended defendants were not resident, or otherwise to be found, within the jurisdiction. After being served, Nutritek, Marcap BVI and Mr Malofeev applied to Mr Justice Arnold for the service to be set aside, largely because England was not considered to be the appropriate forum. In addition to opposing this application, VTB sought to amend its pleaded case to contend that RAP’s corporate veil should be pierced – with the effect that Mr Malofeev, Marcap BVI and Marcap Moscow would be treated as jointly and severally liable with RAP for breaches of, and/or otherwise subject to remedies to enforce, two of the agreements. Mr Justice Arnold found against VTB on both issues, and, while holding that he had gone wrong in certain respects on the first of those issues, the Court of Appeal dismissed VTB’s appeal. VTB appeals on both issues to the Supreme Court. In the meantime, it obtained a worldwide freezing injunction against Mr Malofeev’s assets pending the determination of the legal proceedings (“the freezing injunction”).

There are three issues before the Supreme Court: (i) whether the permission granted to VTB to serve the proceedings out of the jurisdiction should remain set aside (“the jurisdiction appeal”); (ii) whether VTB should be allowed to amend its pleaded case to include the claim based on piercing the corporate veil (“the corporate veil appeal”); and (iii) whether the freezing injunction should be discharged.

JUDGMENT

The Supreme Court (i) by a majority of three to two (Lord Clarke and Lord Reed dissenting), dismisses the jurisdiction appeal, so that VTB may not serve out of the jurisdiction; (ii) unanimously dismisses the corporate veil appeal, so that VTB is not permitted to amend its pleaded case to include a claim on piercing the corporate veil; and (iii) unanimously discharges the freezing injunction obtained by VTB against Mr Malofeev’s assets.

REASONS FOR THE JUDGMENT

The jurisdiction appeal

It is incumbent on a defendant challenging jurisdiction to identify the issues concerned and to state as clearly as possible how they arise or may arise in the proceedings [36]. This does not require the defendant to advance a positive case [39]. A defendant is entitled to keep his powder dry in relation to his evidence [90]. Hearings concerning appropriate forum should not involve masses of documents and long argument.

It is self-defeating if, in order to determine the question of jurisdiction, parties prepare for and conduct a hearing which approaches the putative trial itself [82].

In a case such as this, if a court is not satisfied that England is clearly the appropriate forum in which to bring a claim, then permission to serve out must be refused or set aside [18]. Where a judge has exercised his or her judgment to determine whether England is the appropriate forum, an appellate court should refrain from interfering with that decision, unless satisfied that the judge made a significant error [69]. In this case, the majority consider that there are no grounds which justify interfering with the judge's decision, or, if the Court of Appeal was entitled to re-exercise the power, interfering with the Court of Appeal's decision, on this issue. Whilst the conclusion of the lower courts that Russian law governed the alleged torts was wrong, the correct conclusion that English law governed would not have made any difference. Not only did the judge and the Court of Appeal say as much, but the governing law is a factor of very little, if any, real potency, because the key issues in this litigation will on the face of it be factual not legal [45]-[49],[54]-[55],[100]-[101]. The issues, oral and documentary evidence are focused on Russian witnesses and overwhelmingly on matters which happened in and concern Russia, where they could be considered without translation [62],[66],[154]. The issue of governing law cannot have been decisive in the judge's decision [68]. Whilst agreements relevant to VTB's claims contained non-exclusive jurisdiction clauses in favour of England, such clauses in this case are, as the judge said, not particularly strong factors in favour of English jurisdiction [65]-[66],[105],[111]. There is therefore no basis on which the Supreme Court would be justified in re-exercising the power to decide for itself the jurisdictional issue [69],[98],[113],[156].

The minority agree that, where the only challenge that can be advanced depends upon persuading an appellate court to balance the various jurisdictional factors differently, an appellate court should not interfere [229]. They consider, however, that a number of errors of principle were made in the exercise of the power to decide the jurisdictional issue, which require the Supreme Court to reach its own independent conclusion [191],[231],[241]. This is primarily because it is generally appropriate for a claim in tort governed by English law to be adjudicated upon by an English court [219],[233], and the non-exclusive jurisdiction clauses also point in the direction of England [221]-[222],[234]-[235]. In coming to that independent conclusion, the minority consider that England is the appropriate forum for the trial of the dispute [227],[236]-[237].

The corporate veil appeal

VTB may not amend its pleaded case to include a claim on piercing the corporate veil of RAP in order to attach liability to Mr Malofeev, Marcap BVI, and Marcap Moscow, because VTB's proposed case does not give rise to arguable grounds for contending that the jurisdiction to pierce the corporate veil can be invoked [72],[148],[158],[238],[243]. This is an interlocutory appeal, and so it is unnecessary and inappropriate to resolve the issue of whether, unless any statute relied on in the particular case expressly or impliedly provides otherwise, the court is entitled to pierce the veil of incorporation [130],[158],[238]. On the assumption that the court can pierce the corporate veil on appropriate facts, VTB's case involves an extension to the circumstances where it has traditionally been held that the corporate veil can be pierced [131]. This extension would mean that the person controlling the company could be held liable as if he had been a co-contracting party with the company concerned to a contract where the company was a party but he was not, and where neither he nor any of the contracting parties intended him to be [132]. Such an extension would be contrary to authority and contrary to principle [133]-[147]. Moreover, the extension is not needed to enable VTB to seek redress from Mr Malofeev: if VTB establishes that it was induced to enter into the agreements by the fraudulent statements which he is alleged to have made, then Mr Malofeev will be liable to compensate VTB [146].

The freezing injunction

The worldwide freezing order against Mr Malofeev is discharged, because VTB has not been granted permission to serve proceedings on him [74],[150],[159],[239],[244].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

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