Through the international corporate veil

Claims seeking to pierce the corporate veil bring up further unpredictability when involving foreign companies, says **James Maton**

A panel of seven Supreme Court justices heard a case this month which could clarify whether and in what circumstances litigants can lift the corporate veil to sue the owners of a company. The case, *Petrodel Resources Limited & Ors v Prest & Ors*, follows a Supreme Court decision only last month which expressly left open these questions. Until clarity is provided, framing and bringing claims seeking to pierce the veil will be difficult and unpredictable.

Nearly two years has passed since the much criticised first instance judgment of *Antonio Gramsci Shipping Corporation & Ors v Oleg Stepanovs* [2011] EWHC 333. AGSC had obtained judgment against five companies that had been used dishonestly to divert profits away from it. It sought to hold the beneficial owners of the companies liable for the losses.

Mr Justice Burton decided that there was a good arguable case that a victim of fraud is entitled to enforce a contract entered into by a company against both the company and those who control it. The effect was that the corporate veil was pierced so as to bind both a company and its shareholder to a contract to which only one had agreed.

Centre of gravity

The concept was considered by the Supreme Court in a judgment delivered in February 2013 in the case of *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808. VTB had provided a substantial loan to a Russian company to fund an acquisition. The loan agreement conferred jurisdiction on the English court. In entering into it, VTB relied on a representation that the purchaser and target were independent. That representation was given, amongst others, by the beneficial owner of the purchaser.

When repayments were not made, VTB sued the owner for deceit and unlawful means conspiracy, initially obtaining permission to serve the proceedings out of the jurisdiction. That permission was set aside by a judge.

The Court of Appeal and, by a bare majority, the Supreme Court upheld that decision, deciding the case on the narrow ground that VTB had not discharged its burden of establishing that England was "clearly or distinctly the appropriate forum" to determine the disputes for the ends of justice and in the interests of all the parties. It was stressed that the centre of gravity of the dispute lay in Russia.

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The effect was that the Supreme Court refused to allow the doctrine of 'piercing the corporate veil' to be used to bind a shareholder to a contract entered into by its company.

The Supreme Court emphasised two points: first, evidence and argument on forum conveniens should be proportionate; and secondly, appeals should not be brought in the hope of persuading higher courts to interfere with the exercise of judgment.

The judgment was, perhaps, surprising. As the dissenting judgments made clear, the links to England were strong. The critical ingredients of all the torts took place in England. The representations relied upon were made in England and were intended to be relied upon to procure a facility agreement governed by English law and containing an English jurisdiction clause. The losses were all suffered in England. If these factors are not decisive, claimants will in fact be tempted to produce much extensive evidence and argument in order to persuade the court to allow proceedings to be brought in England.

English law?

The judges expressly left open the question of the circumstances in which it is permissible to pierce the corporate veil. Lord Mance appeared to question whether any doctrine of lifting the corporate veil exists apart from circumstances where the language of a statute expressly or implied requires or permits it, specifically casting doubt on whether *Gramsci* was correctly decided.

Petrodel represents an opportunity for the Supreme Court to provide definitive guidance, although the court may well prefer to base its decision on the specific matrimonial statute in issue. If it does so, the uncertainty about the existence and scope of the doctrine will continue.

There is another point which lawyers will want to explore: the question of what law should govern whether the veil of a foreign company should be pierced. Should it be English law or the law of the place of incorporation. That question was raised by Lord Neuberger in *VTB*, but was left unanswered.

Whatever position the English court eventually takes in relation to piercing the corporate veil, there will be opportunities for litigants to argue that the doctrine is either wider or more restrictive in the place of incorporation of foreign companies.

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