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Business Governance

Lifting the veil of incorporation

Prest-v-Petrodel Resources Limited & Ors.

[2013] UKSC 34

Appeal from CA [2012] EWCA Civ 1395- see BLB Nov 2012 edition

The court has a limited power to pierce the corporate veil where there is a legal right against the person in control of the company, which exists independently of the company's involvement, and the company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.

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Findings

In proceedings for financial remedies following a divorce, the Supreme Court unanimously held that the court could not disregard the corporate veil but that, on the facts, properties registered in the names of offshore companies were held on a resulting trust for the husband and therefore available to satisfy financial provision ordered for the wife. In reconsidering the court's power to pierce the corporate veil, the Supreme Court gave recognition to the necessity of the court having a limited power in carefully defined circumstances to ensure it was not disarmed in the face of a company's separate legal personality being abused for the purpose of wrongdoing. On the principles to be applied, Lord Sumption found that references in the existing authorities to where the company was a "facade" or "sham" begged too many questions. There seemed to him to be two distinct principles in play in the authorities and confusion had been caused by failing to distinguish between them. These were the concealment principle and the evasion principle.

The concealment principle did not involve piercing the corporate veil at all. It was the principle that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court was not actually piercing the veil in the sense of disregarding the "facade", but only looking behind it to discover the facts that the corporate structure was concealing. An example of such a case was where receipt of money by a company counted as receipt by the shareholder because in fact the company received the money as his agent or nominee.

The evasion principle was different. It was the principle that the court may disregard the corporate veil if there was a legal right against the person in control of it, which existed independently of the company's involvement, and the company was interposed so that the separate legal personality of the company would defeat the right or frustrate its enforcement. So, where a person used the company's separate legal personality to evade a liability that he would otherwise have had, the court could disregard the veil. An example of such a case was where a person bound by a non-compete covenant established and used a company he controlled to work in completion with the beneficiary of the covenant.

The Supreme Court's formulation of the court's limited power to lift the veil was that it can be exercised when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

Commentary

- The Supreme Court demonstrated its astuteness in using the facts to achieve practical justice without having to interfere with the hallowed legal principle of *Salomon v A Salomon & Co Ltd* which the court was not free to disregard merely because justice so required
- Lord Sumption stressed that the shareholders could never validly consent to their own appropriation of the company's assets for purposes which were not the company's.

11KBW Business Law members regularly act in cases concerning beneficial ownership, asset protection and fraud involving corporations.

Business Reward

Bonus pools

Attrill v Desdner Kleinwort Ltd

[2013] EWCA Civ 394

An oral announcement in a 'town hall' meeting gave employees a contractual right to share in a minimum bonus pool of €400 million. A subsequent attempt to subject bonuses to a 'material adverse change' (MAC) clause breached the implied term of trust and confidence.

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Findings

In 2008, Dresdner Kleinwort Investment Bank risked collapse as a result of staff departures. In order to retain employees, in August 2008, its Chief Executive announced the creation of "*a guaranteed bonus pool*" of €400m at a "*town hall*" meeting, which was broadcast on the company intranet. He announced that the pool would be distributed "*no matter what*", but that it did not give rise to individual guarantees, and that it would be allocated on a discretionary basis by reference to performance. The financial crisis of 2007/08 then deepened. On 19 December 2008, Dresdner sent a "*bonus letter*" to employees stating that a discretionary bonus had been provisionally awarded in a specified sum, but subject to a "*material adverse change*" (MAC) clause. On 17 February 2009, purporting to rely on the MAC, Dresdner cut bonus awards by 90%.

The two issues decided by the Court of Appeal were: (1) whether the announcement of August 2008 created a contractual right to share in the minimum bonus pool of €400m; and (2) even if not, whether the later introduction of the MAC clause breached the implied duty of trust and confidence.

The Court decided both issues in the employees' favour, upholding the High Court's decision below.

On issue (1), the Court's conclusions were as follows. First, the announcement of the pool was an exercise of Dresdner's power of unilateral variation under its employment handbook. This meant that there was no need for employees to "*accept*" any offer. (In any event, citing the case well known to all first year law students, Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256, Elias LJ pointed out that an offeror may dispense with the requirement for acceptance of its offer; here, it was plain that Dresdner had done so). Second, the announcement was made with an intention to create legal relations. Where a change is introduced against the background of an existing contractual relationship, such as that between employer and employee, there is a "*very strong presumption*" of intention to create legal relations. That presumption was reinforced by the particular circumstances. Third, Elias LJ rejected a submission that the pool announcement was not apt for incorporation in individual contracts of employment because (a) it was made to the entire workforce, and (b) while indicating the size of the cake, it gave no indication of the size of individual slices, which would depend on the exercise of management discretion. He accepted that the right to be considered for a share in a defined bonus pool is in itself a valuable right, perfectly capable of constituting a contractual term. Fourth, the bonus announcement was sufficiently certain to be enforced.

On issue (2), Elias LJ concluded that Dresdner's *volte face* on a matter as important as a promise to pay a retention bonus undoubtedly undermined trust and confidence. Moreover, there was no "*reasonable and proper cause*" for the MAC, which had been introduced "*simply as a means of enabling [Dresdner] to go back on the promise*". Indeed, there was a striking absence of evidence from Dresdner to explain why the decision had been taken.

Commentary

- In the light of the "*very strong presumption*" of intention to create legal relations, employers should tread carefully when making oral assurances to staff. Employers should make clear any intention to displace this presumption.
- It is prudent, when making bonus pool commitments, to refer expressly to circumstances in which the pool may be reduced (e.g. financial decline), including by way of claw back.

11KBW Business Law members regularly advise on and act in bonus disputes.

Business Protection

Territorial Jurisdiction

Case C-228/11 Melzer-v- MF Global UK Ltd

CJEU, judgment of 16 May 2013

Court of Justice considers whether Article 5(3) of Brussels I can give jurisdiction over a defendant on the basis of presumed joint participation, where the court would have jurisdiction over the other participant who is not a party

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Findings

Article 5(3) of Council Regulation (EC) No 44/2001 ("Brussels I") permits the courts of a Member State of the EU to take jurisdiction over a person not domiciled in that state in matters relating to tort, if that court is in "the place where the harmful event occurred or may occur".

Mr Melzer, who was domiciled in Berlin, was solicited as a client by WWH, which was based in Düsseldorf. WWH opened an account for Melzer with MFG, brokers based in London. Melzer lost a substantial amount of his invested money and brought a claim in Germany against MFG for assisting WWH deliberately and unlawfully to cause harm. Although the loss was sustained in Berlin (Melzer's bank account) the place where the harmful event (MFG's conduct) occurred was London. However, the German courts would have had jurisdiction over WWH – who Mezler had not sued – and under German procedural law jurisdiction could be based upon reciprocal attribution of the place where the event occurred where there is cross-border participation of several persons in tortious conduct.

The Court of Justice dismissed the suggestion that jurisdiction may be established on the ground of a harmful event, imputed to one of the presumed perpetrators of damage who is not a party to the dispute, over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised. Article 5(3), as an exception to the ordinary rule of jurisdiction by domicile, must be construed restrictively. A particularly close connecting factor between the place of the harmful event and the court was required. The German approach did not seek to identify the place of the harmful event; rather it based jurisdiction on an act committed by another. The connecting factors based on the defendant's acts were absent. The resort to national law would give rise to different outcomes in different Member States and undermine legal certainty.

Commentary

- The judgment of the Court of Justice applies a healthy dose of common sense in considering the scope of the Brussels I Regulation. Article 5(3) provides no textual basis for the breadth of approach the German court sought, and a defendant would be placed in a very difficult evidential position when challenging jurisdiction based upon the acts of a non-party.

- The oddity of the case arose from the decision of Melzer not to also sue WWH. As the Court pointed out, in joint perpetrator cases Article 6(1) will ordinarily allow one co-defendant to be used as the vehicle to ensure jurisdiction is taken over all co-defendants. The Court also suggested that characterizing the cause of action as one in contract might have enabled jurisdiction to be taken under Article 5(1). The result flowed from the litigation tactics of the claimant.

11KBW Commercial Law members regularly represent parties involved in cross-border disputes in which issues of private international law arise.

Business Protection

Confidential Information

Walsh v Shanahan, Leonard and SLH Properties Limited

[2013] EWCA Civ 411

The award of an account of profits is a matter of discretion for the court.

A breach of confidence may be compensated by an award of damages, rather than an account of profits.

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Findings

Mr Walsh had been going to purchase an investment property through his agent Mr Shanahan. Exchange of contracts was imminent, solicitors had carried out significant work and a survey and valuation report had been obtained, when Mr Walsh decided that the deal was not financially viable and informed Mr Shanahan by telephone that he was withdrawing from the proposed purchase.

Mr Shanahan, anxious to avoid losing the income he would have received if Mr Walsh had gone ahead, swiftly found alternative purchasers. They went ahead with the purchase making use of the work done by Mr Walsh's solicitors and Mr Walsh's survey report. They made c. £1 million from developing the property.

Mr Walsh sued for breach of confidence and breach of fiduciary duty. He claimed an account of profits. The Judge at first instance held (and the CA agreed) that there was no breach of fiduciary duty because the agency relationship between Mr Shanahan and Mr Walsh had terminated in the telephone call, despite the continuance of certain correspondence between them.

It was admitted that the use by Mr Shanahan of the work done by the solicitors and the survey and valuation report was a breach of confidence. However, the Judge held (and the CA agreed) that Mr Walsh was not entitled to an account of profits for that breach. The award of an account of profits was an equitable remedy and a matter for the discretion of the court. Contrary to the claimant's contention, that discretion was not limited to refusing to grant relief where, eg. the claimant had not come to court with 'clean hands', but was a general discretion to do justice in the particular case.

The CA further confirmed that the correct way to assess damages for breach of confidence is by reference to the value of the information that the defendants took (following *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809).

Commentary

- The case serves as a useful reminder that whereas an account of profits is available as of right for a breach of fiduciary duty, it is discretionary only in a claim for breach of confidence.

- Note also the CA's *obiter* observation that the value of the same confidential information might be different at different times. Eg. here, the Judge had valued the solicitors' work and survey and valuation report by reference to the fees paid for them. In fact, the timing of the breach may have been crucial to the successful purchase. The value of the confidential information might therefore have been much greater at that point than the fees paid for it.

- Rimer LJ described Mr Walsh's victory as *"akin to that of King Pyrrhus at the battle of Heraclea"* since his damages of £16,965 were far outweighed by an adverse 90% costs order as a result of his failure to accept a Part 36 offer and his loss on the account of profits point.

11KBW Business Law members regularly advise on and act in cases involving breaches of confidence.

Business Regulation

Regulatory Action

R (Willford) v Financial Services Authority

[2013] EWCA Civ 674 & [2013] EWCA Civ 677

It would only very exceptionally be appropriate to judicially review a decision by the FCA to impose penalties on an individual under FSMA 2000. The principal and proper remedy was an appeal to the Tax and Chancery chamber of the Upper Tribunal. In all the circumstances it was also not in the interests of justice to maintain the Claimant's anonymity on appeal.

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Findings

The Claimant had been the Group Finance Director of Bradford & Bingley Plc ("the Bank"). In April 2008, the bank had planned to strengthen its capital reserves by means of a rights issue. An announcement was made to that effect in May 2008. However by 2nd June 2008 the bank was forced to issue an updated trading statement due to the effects of the sub-prime mortgage crisis which amounted to a profits warning. The rights issue had to be substantially restructured and was ultimately largely unsuccessful.

The FSA (now the FCA) commenced an investigation into Mr Willford's conduct at the time of the rights issue. It concluded that he had been at fault in, inter alia, failing to take sufficient steps to ensure that the draft April 2008 results did not raise concerns about the Bank's trading position which could affect the rights issue. It fined him £100,000. Mr Willford successfully sought judicial review of that decision on the ground that the FCA had given insufficient reasons for its decision. He also persuaded Silber J that his name should be anonymised.

The FSA successfully appealed to the Court of Appeal, which held that the judge should not have entertained a claim for judicial review when an alternative appeal procedure existed and in any event the reasons given by the FSA were sufficient. It also refused to continue the anonymity order.

Commentary

- The Court of Appeal's anonymity judgment provides a salutary reminder that individuals cannot generally expect to have their identity protected if they choose to challenge regulatory decisions through the courts;
- Those seeking anonymity will likely need to assemble detailed and cogent evidence of irreparable harm to their professional reputations in order to persuade a Court that such an order is appropriate;
- It will likely be only in the very rarest case that permission to apply for judicial review will be granted where there is a right of appeal to the Upper Tribunal against a regulatory decision of the FCA;
- The FCA is not obliged, when giving its reasons for imposing a penalty, to respond to each and every submission made by an individual. A Decision Notice must simply contain "sufficient reasons to enable the person to whom it is addressed to understand why it has been given".

11KBW Business Law members advise and represent companies and individuals in regulatory proceedings involving the FCA.