Volume: 1 Issue: 5 Pages: 01-03

International Journal of Research in Academic World

E-ISSN: 2583-1615
Impact Factor: 3.133

Received: 18/November/2021 Int. J Res. Acad. World. 2022; 1(5):01-03 Accepted: 18/January/2022

VTB Capital v Nutritek Case: the Unpredictable and Orthodox Attitude of Supreme Court of the United Kingdom

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Abstract

In the landmark case *VTB Capital Plc (VTB) v Nutritek International Corporation (Nutritek)* two matters were considered and debated including the application of the doctrine of the *"Forum Conveniens"* to the claim of tort and common law jurisdiction to "pierce the corporate veil." This comment is restricted to critical analysis of the orthodox and unpredictable grounds that were assumed by the Supreme Court of the United Kingdom while identifying the *"forum conveniens"* and determining common law jurisdiction to *"pierce the veil of a corporation"*.

Keywords: Forum conveniens; piercing the corporate veil; fraudulent; set service aside

Introduction

Facts of the Case

The English-registered bank named VTB was the subsidiary of a Russian bank, owned by the state of Russia had advanced an amount of US $225,050,000 to a company incorporated in Russia named "Russagroprom LLC" (RAP) with an aim that RAP would buy the dairy farms from a BVI-registered company Nutritek. RAP due to some financial distress defaulted on the loan provided by VTB. VTB alleged that it had entered into the loan agreement due to the fraudulent misrepresentations made by Nutritek and the reason behind inducing VTB to enter into such an agreement was a strong link between the RAP and Nutritek. Additionally, VTB asserted to serve the conspiracy claims and deceit charges not only on Nutritek but also on its parent company i.e. Marcap and Russian National tycoon Konstantin Malofeev. Mr. Malofeev's residence was in Moscow and he was alleged by VTB because he was proprietor, controller, and administrator of "Nutritek, RAP, and Marcap."

Setting Service Aside by Chancery Division and Court of Appeal

The defendants rejected the claims and requested to "set service aside." However, there was a very significant and serious matter to be tried on the merits of its claim of tort and an arguable case that its damages were "sustained with the jurisdiction" in the light of Part 6 of Civil Procedure Rules, VTB remained unsuccessful to demonstrate that the jurisdiction of England was *"forum conveniens."* Consequently, the court had set service aside [2]. A similar decision was made by the Court of Appeal as the court without perusal of record and discussing the important matters set aside in the case [3].

The decision of the Supreme Court and Comment

Forum Conveniens

Mistakes made by the lower courts were detected and identified by their Lordships when the case was presented in front of the Supreme Court. The Supreme Court unanimously concluded that several errors were made by the lower court when identifying the *forum conveniens*, as adding an additional step to *Spiliada Maritime Corp* mandated "one-step enquiry;" restraining the significance, relevance, and the importance of the torts that had been committed or occurred in England; misjudging and miscalculating the influence of jurisdiction of England and selection of the clauses of the law in the agreements of the loan; and the applying of the irrelevant and false law to the claims of the tort.

To the issue of conspiracy and deceit claim, according to Lord Clark, English law should be applied, subsequently, in the light of the universal ruling of the Private International Law Miscellaneous Provisions Act 1995 (hereinafter 1995 Act) Section 11 clause (1) "all the events constituting the tort" means the making of the misrepresentations and fraud by the defendant and reliance of the VTB as well as the subsequent damages happened in England. Moreover, notwithstanding the section 12 clause (1) of the 1995 Act that empowers the court of law to regard a "potentially broader factors" than enshrined in section 11 clause(1) of the 1995 Act containing foregoing or preceding relationship and affiliation amongst both parties-a factor that is currently clearly and expressly acknowledged under the "Rome II Regulation," Article 4 clause (3), however, this apparently had no direct applicability in VTB case such as the circumstances that are quite relevant had happened before the commencement of the Rome II Regulation.

His Lordship while deciding the matter had not pondered the Russian law as the Russian law could be considerably more suitable than the considered English law. More specifically, the law enshrined under the section 11 clause (1) should not be straightforwardly dislodged and only in extremely extraordinary cases where a lucid "preponderance of factors" is pointed somewhere else. Lord Mance, Wilson, and Neuberger observed that the mistakes of the lower court were

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inadequate to "take their setting aside of service outside the domain of acceptable verdicts". Therefore, the *Spiliada Maritime case* was considered which evinced that an "appellate court should be slow to interfere with decisions below." Lords Reed and Clarke were in minority and less reticent and regarded the mistakes of the lower court adequately severe to substantiate the approval to serve out. The Supreme Court basically opposed the assessment of numerous concerning factors and elements on the grounds that the appellate court becomes competent of interfering with the lower court's assessment of the doctrine of *forum conveniens.*

More considerably, the statement of Goff LJ was considered by their Lordships. It can be reflected through the opinion of their Lordships that they referred and validated the statement of Goff LJ in the *Albaforth case* cited as *Cordoba Shipping Co. v. National State Bank, Elizabeth, New Jersey* [4]. Goff LJ stated that "if the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum." Whereas dismissing any recognized, formal and more reasonable legitimate assumption on that subject, Lord Clarke and Mance validated the relevancy of the place where the tort was committed however, Lord Clarke could consider the relevancy of jurisdiction where the losses happened while identifying the "*forum conveniens.*" Accordingly, in the VTB case, England was the place "where the representation was received".

However, their Lordships were not agreed as to the weight that the place of happening of the tort should stand or accept as the part of the enquiry of the *forum conveniens.* The doctrine extracted from the *Albaforth case* could be utilised as a determinative held by Lord Mance. Lord Mance stated that the doctrine of the *Albaforth case* can be a rule of thumb or a prima facie vantage point. Though, his Lordship had stressed that in the international cases of tort the place of occurring of the tort must not usually be viewed in isolation but universally with other more relevant linking factors. Implementing this subjective version of the *Albaforth* doctrine, in the views of Lord Mance, the substitutive factors in the *VTB case* overshadowed the importance of the place of occurrence of the tort. Lord Wilson considered that place of commission of the tort to be exclusively fortuitous. As compared to it, although considering that the strength of the doctrine extracted from the *Albaforth case* may change in accordance with the facts and circumstances, Lords Reed and Clarke had observed the doctrine to be a more reasonable or strong factor, and as Goff L.J. endeavored and strived to identify substitutive circumstances that may point out the "*forum conveniens* to be elsewhere."

However, this last approach sets more meticulously with the former authority, comprising the views of the majority in *Berezovsky v Forbes Inc and Michaels* [5]. Although the *Berezovsky case* faced severe criticism for providing an opportunity to the claimants to forum-shopping by modifying their assertions and claims to fetch themselves within the realm of the doctrine of the *Albaforth case.* Certainly, as the claims of the international libel are exaggeratedly restricted to the circulation of libelous publications within the jurisdiction of England moreover, a specific misrepresentation can be redrafted or reframed to happen there too.

Whereas the principle of the abuse of process may have curtailed the bad "libel tourism" examples [6], an inclusive solution to protect incentives established by the *Berezovsky case* will be, like Lord Mance in the *VTB case* and the minority in the *Berezovsky case,* to decline the role played by the place of happening of the tort in the *forum conveniens* enquiry. Certainly, the repealing of both the rules of jurisdiction for tort's place of commission in the Rules of Supreme Court Order 11 and choice of law, a doctrine of common law held in *Boys v Chaplin* [7], meanwhile *Albaforth case,* makes the continuing fixation with the place of happening of the tort looks outdated and anachronistic. As an alternative, the laws that are applicable in tort practices may give stronger, trustworthy, and reliable grounds to the *forum conveniens.* Indeed the laws that are applicable in tort to be a stronger indicator to *forum conveniens* was considered by Lord Clarke in *Puttick* v. *Tenon Ltd* [8].

Pierce the Corporate Veil

For the strengthening of the claim of the jurisdiction, VTB asserted that the defendants had breached the agreement of loan although they have no privy to the "loan agreement"; hence it applied to add this claim in the pleadings. Furthermore, VTB contended to pierce the veil of RAP consequently, the defendants would become the "co-contracting parties." However, the Supreme Court as well as the lower courts unanimously disagreed to accept such a claim. According to Lord Neuberger, it was impossible to accept the claim of VTB because it would cause a "groundless extension" of the "piercing jurisdiction" as conventionally considered, so Lord Neuberger held that it would be hard to believe that the defendants being the controller of RAP have participated in the fraudulent and misrepresentation committed by Nutritek or they induced RAP to conceal facts from VTB. His lordship stated that otherwise each and every fraud committed in a corporation may activate the "piercing jurisdiction." Lord Neuberger remained unsuccessful in finding any authority excluding *Antonio Gramsci Shipping Corporation v Stepanovs* [9], that might be supportive of an assertion that contractual liability could be imposed on non-contracting parties or contractual liability can be imposed on parties that are no signatory to the contract as an existing legitimate apparatus for being reasonable support to the verdict that veil of the corporate body be pierced. Giving such relief would not sit well with the principles of agency as well as doctrines of formation of a contract because there is no intention of controllers of RAP to be privy to the agreement of loan. Giving such relief would also be an abuse of the doctrine of rights and it would also needlessly overlap the existing claim of tort.

In the views of Lord Neuberger, the VTB's facts for piercing the corporate veil were objectionable. However, this was an unpredictable and uncertain judgment as his verdict had generated unpredictability as to when the veil of a corporation could be pierced at common law. Logically, his lordship had assumed the "piercing the corporate veil's" language to elucidate that when the court of law has the power to impose the liabilities of a corporation on those individuals that are hiding behind the persona of a company. However, his lordship failed to answer whether "lifting", "piercing" or "ignoring" the veil of a corporation points out fundamentally and practically different processes. This is indeed unsatisfactory and unacceptable given attempts to differentiate these terms [10]. Definitely, the use of the expression "lifting" by Lord Wilson in the *VTB* case proposes that the unpredictability of the language will probably exist.

It was questioned by Lord Neuberger whether the courts could invoke their powers at common law to "pierce the veil of a corporate body" beyond definite and precise statutory

examples. The unpredictability of Lord Neuberger was bolstered when his Lordship saw that the "House of Lords" had on no occasion definitely recognized the presence of such power. However, *Woolfson v Strathclyde Regional Council* [11], casts doubt, confusion, and unpredictability over when such powers may essentially be utilised as well as by the probability of elucidating various supposed "piercing" cases on "less contentious" grounds. Even so, his Lordship did note the acknowledgment of "common law piercing jurisdiction" in books, *Adams v Cape Industries plc* [12], *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [13], It will do little, although, for the resolution of ambiguity and to eradicate the unpredictability that the lower court will unquestionably experience when it is demanded to utilise that jurisdiction.

If it is supposed that there is an existence of "common law piercing jurisdiction," Lord Neuberger had cast substantial unpredictability on a condition in which it was acceptably predictable that the courts are competent forums for piercing the corporate veil over the so-called "exception of fraud" where the company form used to avoid legitimate restrictions on conduct or obligations of an individual owed to "third parties." Piercing the corporate veil over the exception of fraud can be seen in *Gilford Motor Company Ltd. v Horne* [14], and *Jones v Lipman,*[15] however, Lord Neuberger has elucidated these judgments and undermined all the others including *Adams v Cape Industries plc,* [16] as not relating "piercing the veil of a corporation" at all.

In *Gilford Motor Company Ltd. v Horne, an* injunction could be a more appropriate remedy and was compulsory to stop a corporation from committing the tort of inducing the infringement of the contract [17], In *Jones v Lipman,* it would be more reasonable if the court granted the decree of specific performance as it was essential for the enforcement of the equitable interest of the purchaser in the subjected property that was wrongly transferred to the corporate body [18]. Beyond refusing to impose the liability of a contract on a third party who is not a party to the contract as a conceivable lawful answer to "piercing the corporate veil," Lord Neuberger shed no light as to what legitimate responses are more probable, whether there is the existence of any other restrictions or which law could govern such matter [19].

Conclusion

The orthodoxy and unpredictability in the attitude of the Supreme Court of the United Kingdom prove the unfriendliness of the United Kingdom judiciary towards the identification of doctrine of the *"forum conveniens"* and determining common law jurisdiction to *"pierce the veil of a corporation."* There is a need to change such an attitude and image so the court should retain the competence, dedication, and sense of responsibility to give just and reasonable verdicts.

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