

**UK SUPREME COURT RULES CORPORATE VEIL CANNOT BE PIERCED IN**  
**VTB v. NUTRITEK**

*VTB Capital plc v. Nutritek International Corp and others*

[2013] UKSC5

**Introduction**

On 6 February 2013, the Supreme Court upheld the decision of the Court of Appeal in *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5, setting out useful guidance in relation to challenges to jurisdiction, piercing the corporate veil and the use of freezing injunctions.

**Legal principles**

A duly incorporated company is a legal person separate from its incorporators and controllers, with its own separate rights and liabilities. Any liability incurred by the company is limited to the company, and does not extend to the incorporators and controllers; conversely, any liability incurred by the incorporators and controllers is limited to them and does not extend to the company. In exceptional cases, the English courts will act to “pierce the corporate veil”, and will not preserve the separate identities of the company and its incorporators and controllers.

**Background**

In 2007, VTB Capital plc (“VTB”), an English incorporated bank (which is part of one of the largest Russian banks), entered into agreements with a Russian company, RAP, under which VTB provided a loan of US\$225,050,000 for the purchase of various assets from Nutritek International Corp (“Nutritek”). In 2008, RAP defaulted on the loan. VTB alleged that it was induced in London to enter into the agreements by misrepresentations made by Nutritek; and sought to hold Nutritek, its ultimate owner and controller, Mr Konstantin Malofeev (a Russian businessman resident in Moscow), and various associated companies jointly and severally liable for the alleged misrepresentations.

VTB obtained permission to serve its claims outside the jurisdiction. Following service, the defendants applied to have that permission set aside. In response, VTB sought to amend its pleading to claim breach of contract against Mr Malofeev and the associated companies on the basis that RAP’s corporate veil should be pierced, and Mr Malofeev and the associated companies treated as jointly and severally liable for the misrepresentations. VTB also obtained a worldwide freezing injunction on Mr Malofeev’s assets.

## **Procedural History**

The issues in this matter were previously considered by both the High Court (<http://www.bailii.org/ew/cases/EWHC/Ch/2011/3107.html>) and the Court of Appeal (<http://www.bailii.org/ew/cases/EWCA/Civ/2012/808.html>).

The High Court was asked to rule firstly whether the permission granted to VTB to serve the claims outside the jurisdiction should be set aside; secondly, whether VTB should be permitted to amend its particulars of claim; and third, whether the worldwide freezing order should be continued or discharged. The High Court found against VTB on each issue, holding that (i) permission to serve the claim outside the jurisdiction should be set aside; (ii) VTB should not be permitted to amend the particulars of claim, and (iii) the worldwide freezing order should be discharged on grounds of deliberate and significant non-disclosure by VTB. In particular, the High Court (declining to follow *Antonio Gramsci Shipping Corp v Stepanovs*[2011] EWHC 333 (Comm)) held that where a claim of wrongdoing was brought against the person controlling the company, it was inappropriate to pierce the corporate veil to allow the claimant to pursue a contractual claim against such a person.

VTB appealed to the Court of Appeal. On appeal, the Court upheld the High Court's ruling on each of the three issues. The Court of Appeal accepted the existence of the principle of piercing the corporate veil, and clarified the circumstances in which this would apply, again providing that this principle should not allow contractual claims to proceed against non-contracting parties.

## **Issues for the Supreme Court**

There were three issues before the Supreme Court:

- (i) whether the permission granted to VTB to serve the proceedings on the defendants 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 and hold Mr Malofeev and the associated companies jointly and severably liable for the misrepresentations (“the corporate veil appeal”); and
- (iii) whether the freezing injunction should be discharged.

## **Judgment**

The Supreme Court found as follows:

- (i) by a majority of three to two (Lord Clarke and Lord Reed dissenting), dismissed the jurisdiction appeal;
- (ii) unanimously dismissed the corporate veil appeal; and
- (iii) unanimously discharged the freezing injunction obtained by VTB against Mr Malofeev's assets.

### *Forum conveniens*

This was the decisive issue in this appeal. Hearings concerning appropriate forum should not involve masses of documents and long argument.

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 of principle or in the considerations taken or not taken into account.

Where the only challenge that could be advanced depended upon persuading an appellate court to balance the various jurisdictional factors differently, an appellate court should not interfere unless the balance struck by the judge can be shown to be plainly wrong.

The majority considered that the governing law was not a concerned factor as the key issues in this litigation were factual, not legal. The issues, oral and documentary evidence were focused on Russian witnesses and matters which happened in and concerned Russia, and could be considered in Russia without translation. The non-exclusive jurisdiction clauses in favour of England were not a strong factor in favour of English jurisdiction.

In contrast, the minority considered that as the claims in tort were governed by English law, and considering the non-exclusive jurisdiction clauses in favour of England, it was appropriate that the claim be determined in the English courts.

#### *Piercing the corporate veil*

The Supreme Court questioned whether any doctrine of lifting the corporate veil exists but stated that a point of such importance should not be determined in this case when it was not necessary to do so.

Finding in favour of VTB on the “piercing the corporate veil” issue would extend the principle beyond its traditional limits, and would be contrary to law and principle – it would effectively mean that a person controlling a 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.

As this case turned on the forum conveniens point, any discussion of the piercing of the corporate veil is strictly obiter. Further clarity on this point may be provided by the Supreme Court in *Petrodel Resources Limited & Ors v. Prest & Or*, which will consider the issue of hiding marital assets behind a corporate veil (to be heard 5-6 March 2013).

#### *Freezing Injunction*

The Supreme Court considered that the current default position of interim relief remaining in place during an appeals process may need to be evaluated in certain cases.

In this case, the freezing injunction was continued against Mr Malofeev despite two successful appeals - the Supreme Court described this continuation as “highly unsatisfactory” in the circumstances.

5<sup>th</sup> March 2013