Reconsidered in Light of Key Judgment

By Mark Dawkins, of Bingham McCutchen LLP, London.

In July this year the English Court of Appeal handed down its judgment in VTB Capital PLC v Nutritek International Corp and Others ([2012] EWCA Civ 808). It is an important judgment, jointly written by the three appellate judges, who considered at length the current English law governing the circumstances in which the court will pierce the ‘corporate veil’ and, more significantly, what remedies the court may go on to provide once the corporate veil has been pierced. Although the Court also addressed other serious commercial complaints, the focus of the case was on allegations of commercial fraud and, more specifically, the issue of piercing the corporate veil.

This article considers the broader context in which this decision has been handed down and examines the decision itself and how the law in this area may develop.

It should be noted, at the outset, that although the Court of Appeal refused permission to appeal to the Supreme Court, the Supreme Court itself recently gave permission to appeal the decision and also agreed that the appeal should be expedited. Further developments in this area can, therefore, be expected in the coming months.

Commercial Fraud

Let us start with the broader context. The case concerned allegations of commercial fraud. I emphasize that these are mere allegations, since it seems that there have been no material determinations of fact by the English court — the arguments have thus far proceeded on the assumption that the allegations by the claimant, VTB Capital, are true.

Many practitioners in the field of commercial fraud believe that this is a growth area, although it is not clear whether this is because there is more commercial fraud about, or whether it is simply that more commercial fraud is being uncovered. I would suggest that it is more likely to be the latter. It can be said with some confidence that commercial fraudsters, and their victims, have existed ever since society has sought to engage in economic activity; and the English courts have been deciding cases in this area for centuries. Conversely, as all seasoned litigators know, commercial litigation of most varieties tends to follow a broad cyclical pattern. This is because, as the economic tide of growth and prosperity recedes, all sorts of mistakes and wrongs are revealed; and so too bring rec
Rule of Commercial Court

How does the English court respond?

Many of the larger and more complex human cases are brought before the Commercial Court, which has gone from strength to strength as a result of the publicity surrounding the Masri Case. Its success in that regard is indicated by the fact that, at the present time, an astonishing 60 percent of all claims brought before the Commercial Court, which has positioned itself as one of the world’s leading courts for the judicial determination of international business disputes, involve allegations of fraud or deceit. Less inevitably, but no less interestingly, some of these cases are also challenging the extent to which (alleged) fraudsters use corporate vehicles in order to shelter themselves from the consequences of their wrongdoings.

The claimants sought to pierce the corporate veil. Surprisingly, the court will do so if a company structure is misleading and the purposes for which the special purpose corporate vehicles are employed are more legitimate purpose, with the result that in a case of commercial fraud it being left without any effective remedy before the courts. How then are the English courts responding? Particularly, the claimants may have alternative remedies against individual directors or shareholders, for example, in cases where the corporate entity had an antecedent, legitimate purpose (such as the corporate entity) was put beyond the reach of claims, since the less important, in effect, the value of the unrecovered judgment, the less likely it is to be pursued. The conspiracy argument has, therefore, not been subjected to full judicial consideration, but now that it has been raised once, it is very likely to sur-

Guinness Case

This second decision by Mr. Justice Burton in 2011 was Guinness v. Baring Corporation and Others ([2011] EWHC 1780 (Comm)). This case involved a dispute over the ownership of a shipping company, which was then owned by a group of investors, including Herbert S. Hamrol. Mr. Justice Burton decided that this did not arise, and so he did not need to address it (although, in the case cited above, the court held that the corporate entity had an antecedent, legitimate purpose). However, he apparently simple statement conceals a number of underlying questions. For example:

What if the company has a permeating, separate and entirely lawful purpose? For instance, Mr. Justice Burton decided that it did not arise, and he did not need to address it. Although, in the case cited above, the court held that the corporation had an antecedent, legitimate purpose.

Before deciding to pierce the corporate veil, the court concludes that it is necessary to do so in order to ensure that the victim has an effective remedy. In many cases where the corporate veil is no more than a sham, the claimant may have alternative remedies against individual directors or shareholders, for example, in cases where the claimant may have alternative remedies against individual directors or shareholders.

Many of the larger and more complex human cases are brought before the Commercial Court, which has gone from strength to strength as a result of the publicity surrounding the Masri Case. Its success in that regard is indicated by the fact that, at the present time, an astonishing 60 percent of all claims brought before the Commercial Court, which has positioned itself as one of the world’s leading courts for the judicial determination of international business disputes, involve allegations of fraud or deceit. Less inevitably, but no less interestingly, some of these cases are also challenging the extent to which (alleged) fraudsters use corporate vehicles in order to shelter themselves from the consequences of their wrongdoings.

The claimants sought to pierce the corporate veil. Surprisingly, the court will do so if a company structure is misleading and the purposes for which the special purpose corporate vehicles are employed are more legitimate purpose, with the result that in a case of commercial fraud it being left without any effective remedy before the courts. How then are the English courts responding? Particularly, the claimants may have alternative remedies against individual directors or shareholders, for example, in cases where the corporate entity had an antecedent, legitimate purpose (such as the corporate entity) was put beyond the reach of claims, since the less important, in effect, the value of the unrecovered judgment, the less likely it is to be pursued. The conspiracy argument has, therefore, not been subjected to full judicial consideration, but now that it has been raised once, it is very likely to sur-

Guinness Case

This second decision by Mr. Justice Burton in 2011 was Guinness v. Baring Corporation and Others ([2011] EWHC 1780 (Comm)). This case involved a dispute over the ownership of a shipping company, which was then owned by a group of investors, including Herbert S. Hamrol. Mr. Justice Burton decided that this did not arise, and so he did not need to address it (although, in the case cited above, the court held that the corporate entity had an antecedent, legitimate purpose). However, he apparently simple statement conceals a number of underlying questions. For example:

What if the company has a permeating, separate and entirely lawful purpose? For instance, Mr. Justice Burton decided that it did not arise, and he did not need to address it. Although, in the case cited above, the court held that the corporation had an antecedent, legitimate purpose.

Before deciding to pierce the corporate veil, the court concludes that it is necessary to do so in order to ensure that the victim has an effective remedy. In many cases where the corporate veil is no more than a sham, the claimant may have alternative remedies against individual directors or shareholders, for example, in cases where the claimant may have alternative remedies against individual directors or shareholders.

What if the company has a permeating, separate and entirely lawful purpose? For instance, Mr. Justice Burton decided that it did not arise, and he did not need to address it. Although, in the case cited above, the court held that the corporation had an antecedent, legitimate purpose.

Before deciding to pierce the corporate veil, the court concludes that it is necessary to do so in order to ensure that the victim has an effective remedy. In many cases where the corporate veil is no more than a sham, the claimant may have alternative remedies against individual directors or shareholders, for example, in cases where the claimant may have alternative remedies against individual directors or shareholders.
How 'wrong' must the wrongdoing be? Must it be a
similar to those in
reasons why they were before the court, were remarkably
equivalent, the key issues before the court, and the
instance hearing of
Within a matter of months, in November 2011, the first
Facts of VTB Case
the proceedings) and Marshall Capital Holdings LLC (a
Limited (a BVI company, and the second defendant in
VTB is a bank, incorporated in England and controlled
untested and in some respects highly controversial.' '

So this became the foremost issue before Mr. Justice Ar-
clause.

In September 2008, the loan appears to have been fully
VTB agreed to lend U.S.$225 million to RAP, in order to

In 2007, Malofeev approached VTB to indicate that he
was exploring a sale of Nutritek's dairy businesses and
was interested in how VTB would provide financing for
the prospective purchaser. The idea was to separate the
dairy businesses from the other businesses which included pre-arranged

Malofeev's company, and the third defendant). VTB fac-
ted concerned that, through its connection, Malofeev also
ultimately controls Nutritek.

In 2003, Malofeev approached VTB to indicate that he
was exploring a sale of Nutritek's dairy businesses and
was interested in how VTB would provide financing for
the prospective purchaser. The idea was to separate the
dairy businesses from the other businesses which included pre-arranged

On further investigation, VTB concluded that RAP was
due to Malofeev, and that what was

Rap offered a promise to purchase the dairy businesses, estimate


The judge gave a reason for a complex of issues concerning the nature of the relief sought by VTB, which he found to be misleading. He noted that the cases relied on, such as Lightburn v. Lightburn, were decided by a court which could be said to have had a similar jurisdictional structure as the English courts. He concluded that such cases were distinguishable, and provided no support for the argument that damages alone were sufficient to compensate for the loss suffered by VTB. He was similarly unconvinced by the argument that piercing the corporate veil was a common law claim, and rejected the suggestion that it was a matter of law that the corporation had to be held liable for the acts of its agents. He concluded that such remedies were distinguishable from those available at law, and provided no support for, a common law claim for damages arising from breach of contract.

He also noted that, in those cases in which the court had in the past granted equitable remedies — such as specific performance, injunctions and restitution — the corporate veil had not been pierced. He contrasted with the broad, unlimited view that the courts had taken of fraud. Long ago, in the 18th century case of Chesterfield v. Janssen, the court had granted an injunction to prevent fraud. Yet it seems that, before the Court of Appeal, VTB argued that the court was not permitted to do this. It remains to be seen what the Supreme Court decides in this case.

The language used here, and elsewhere in the judgment, seems to shut the door firmly on the notion that there is a principle of English law that a person can be held to be a party to a contract when, assessed objectively, there is no basis for that conclusion. It is likely that the Supreme Court will be asked to decide whether the courts generally have jurisdiction to order a party to be treated as a party to a contract when, objectively assessed, there is no basis for that conclusion.

The judgment concludes with a series of reasons to support this conclusion. It is likely that the Supreme Court will be asked to decide whether the courts generally have jurisdiction to order a party to be treated as a party to a contract when, objectively assessed, there is no basis for that conclusion.

In conclusion, the judgment clearly demonstrates the importance of the corporate veil in the law of contract. It is likely that the Supreme Court will be asked to decide whether the courts generally have jurisdiction to order a party to be treated as a party to a contract when, objectively assessed, there is no basis for that conclusion.
In today’s business environment, the vast majority of business interaction takes place, and on the other, when abused, they act as a shelter for the perpetrators of wrongdoing.

In today’s business environment, the need for clarity and certainty in this area has never been greater. Special purpose vehicles are created with ease; it is customary for a great deal of international business to be channelled through offshore companies, often for tax or regulatory reasons; and with digital records, so much “due diligence” information can be made available. It is therefore all the more vital to ensure that those who have lawful use of corporate structures are identified, that those who may have wrongfully used them are identified, and that those who have wrongfully used them are identified. 

In a situation where the relevant facts have been established, it is not always the case that those who have wrongfully used corporate structures are identified. It is therefore all the more vital to ensure that those who have lawful use of corporate structures are identified, that those who may have wrongfully used them are identified, and that those who have wrongfully used them are identified.


Mark Dawkins is a Partner in the London office of Bingham McCutchen LLP. A litigator in the City of London for more than 25 years, Mark Dawkins is a recognized leader in financial litigation, fraud, and asset recovery. He may be contacted at mark.dawkins@bingham.com.