

Fraud and trust litigation news - summer: Piercing the corporate veil

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CATEGORY:
ARTICLE

Kensington International Limited v Republic of the Congo [2005] EWHC 2684 Queen's Bench Division (Commercial Court), (Cooke J)

The facts of the case

BP bought two consignments of Congolese oil (the "cargo") from Glencore Energy UK Limited (Glencore). This was an undisputed arms length transaction. Glencore had in turn contracted with Sphynx Bermuda on 18 March 2005 to purchase the cargo. The Claimant, Kensington International Limited ("Kensington") had outstanding and unsatisfied judgments totalling US\$121,365,438 against the Republic of the Congo (the "Congo") and obtained interim third party debt orders against Glencore and injunctive relief in the form of disclosure orders. It was claimed by subsequent third parties joined to the action that the cargo had been sold by Cotrade SA (Cotrade) a fully owned subsidiary of Societe National des Petroles du Congo ('SNPC') the state owned oil company to Africa Oil and Gas Corporation ('AOGC'). Thereafter AOGC had sold the cargo to Sphynx Bermuda who had sold it on to Glencore.

Kensington sought to establish that on the true facts receipt of monies by Sphynx Bermuda for the cargo would in reality be receipt by the Congo and that the monies apparently due from Glencore to Sphynx Bermuda were in reality due to and (if paid) would be paid to the Congo.

The finding that the sale from Sphynx Bermuda to Glencore was a genuine sale transaction, but the other two were not, was of limited use to Kensington: this would leave Glencore owing monies to Sphynx Bermuda while Kensington's judgments were against the Congo. What was needed was a judgment that found that payment by Glencore to Sphynx Bermuda equalled the payment to the Congo i.e. to pierce the corporate veil of Sphynx Bermuda and to show that in fact it was the alter ego of the Congo.

The decision

Cooke J held that although AOGC was a corporate entity which carried on business on its own, its use in the sale of the cargo was a sham. It and its BGF1 bank account were used as a façade or mask to conceal the identity of the seller and the true recipient of the proceeds of sale. Sphynx Bermuda was similarly used as a façade without regard for its corporate nature. Both were utilised in this manner by Mr Gokana in his capacity as President and Director General of SNPC and were ciphers under the control of SNPC through him for that purpose.

The Court held that the sale of the cargo from Sphynx Bermuda to Glencore was a genuine sale transaction; but that the sales from Cotrade to AOGC and from AOGC to Sphynx Bermuda were sham transactions. It also held that the irrevocable assignment by Sphynx Bermuda to AOGC (dated 30 March 2005) of the proceeds due from the sale of the cargo from Glencore was a backdated instrument created by the desire to evade the effect of third party debt orders. It was ineffective. It was noted that under the terms of the agreement between Sphynx Bermuda and Glencore, the latter's consent for such an assignment was required and that such consent had not been given.

As to the reason why Sphynx Bermuda was set up Cooke J found that the main reason for the structure was privacy, the desire for secrecy and concealment of any legal or formal connection between Sphynx Bermuda or Mr Gokana and the State of the Congo. The intention was that Sphynx Bermuda should appear to be an independent oil trading company after the fashion of other independent oil traders.

Points of interest

The Court of Appeal in *Adams v Cape Industries plc [1990] 1 CH 433* which Cooke J referred to in his judgment decided that the corporate veil would be lifted where a Defendant by the device of a corporate structure, attempted to evade such rights of relief against it as third parties already possessed, but rejected the notion that the corporate veil would be lifted where the corporate structure was created to evade rights of relief which third parties might in the future require.

The judgment in *Kensington v The Congo* contains no analysis of what rights of relief any third party had in February 2002 (when Sphynx Bermuda was incorporated) and whether Sphynx Bermuda was created to evade those rights. Rather, given the general tenor of operation, it was assumed that as third party rights against the Congo existed in February 2002 – there was a judgment in Paris on 23 January 2002 at first instance which decided that SNPC was simply an emanation of the Congo – Sphynx Bermuda's creation was designed to evade those rights.

It was not necessary for Kensington as claimant to show that it had existing rights against the Congo as at February 2002 when Sphynx Bermuda was incorporated to enable the Court to pierce the corporate veil of Sphynx Bermuda and grant final third party debt orders in Kensington's favour.

This leads to the conclusion that where a corporate veil is pierced because a company was formed or incorporated into the structure of a group of

companies in order to evade the enforcement of one or more of its then existing liabilities, it remains forever so pierced to the advantage of every other third party creditor thereafter.