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Judicial Committee of the Privy Council commercial law cases for Trinity term 2017

Article by David Bowden

Executive speed read summary

There are 5 cases that the Judicial Committee of the Privy Council will hear between June and July 2017 which will be of interest to commercial law practitioners. These cases cover hardy perennials such as employment, company, foreign judgements and environmental pollution.

There are these 2 cases of interest to company law practitioners:

- The circumstances in which the corporate veil can be pierced, and
- What does '*loss of the controlling interest*' in a shareholder's agreement mean?

There is 1 employment law case where the Privy Council will have to decide whether, when an employer turned down an employee's request for promotion, this amounted to victimization or harassment by the employer.

It will hear a personal injury appeal in which it will have to decide if the '*but for*' test of causation is made out in a claim arising from environmental contamination. Finally, it will determine what rights do or do not flow from a recognized foreign judgment and whether it created a valid or enforceable equitable charge or not.

1. Susan Lunborg v. James & Carol Walker

What are the relevant agreed facts?

On 29 November 1996 Eleanor Cole obtained a judgment against the Mrs Walker for over \$500,000. That judgment was based on a debt created by a Florida judgment obtained by Ms. Cole against the Mrs Walker. Ms. Cole had sought an order that she be at liberty to sell property belonging to the Walkers to satisfy the judgment debt and had made an agreement with the Ms Lunborg for the sale of that particular property. That sale was approved by the Bahamian court in a decision that was subsequently upheld on appeal to the Privy Council.

The original Florida judgment was discharged on 28 November 2007 by a United States court ('the 2007 Florida Order') and the Walkers sought declarations from the court in the Bahamas that:

- the equitable charge and 1996 enforcement order could no longer be enforced, and
- the orders for sale should be set aside.

What are the issues for the Privy Council?

There are these 3 issues:

- Has the equitable charge arising from the 1996 Enforcement Order ceased to operate? If so was it correct to do so?
- Should the Bahamian Court have recognised the 2007 Florida Order? If so, what is its effect on the 1996 Enforcement Order?
- Was the Court of Appeal correct in its approach to various aspects of the completion of the sale or its finding that Mrs Cole had received her money?

What country or territory does this case come from?

The Commonwealth of the Bahamas

Who will hear the case?

Lords Clarke, Wilson, Sumption, Carnwath and Hughes JJSC

When it is listed for and for how long?

It is listed for 1 day on 14 June 2017.

What happened in the Court of Appeal?

The Court of Appeal allowed the Walkers' appeal.

What happened in the lower courts?

The Chief Justice in the Supreme Court found in favour of Ms Lundborg. He did not set aside any orders for sale and ruled that the 2007 Florida Order did not affect the enforceability of a judgment lien created prior to 2007.

2. Persad v. Singh

What are the relevant agreed facts?

Mr Singh, was the owner of certain premises in Trinidad. Mr Persad approached Mr Singh to inquire about renting the property, and they entered into negotiations. A lease agreement was subsequently prepared by Mr Persad and by Mr Singh's brother acting on Mr Singh's behalf. The agreement named Mr Singh as lessor and a limited liability company, CHTL, as lessee. Mr Singh first became aware that CHTL was the intended lessee when he was sent the agreement in early 2002. The agreement was executed on 1 May 2002. CHTL was incorporated on 2 May 2002.

Mr Persad was the director of CHTL, acted as its agent, and provided it with funding. In 2004 Mr Singh issued proceedings against both CHTL and Mr Persad for arrears of rent and damages for disrepair.

What is the issue for the Privy Council?

The circumstances in which the corporate veil can be pierced.

What country or territory does this case come from?

Trinidad and Tobago

Who will hear the case?

Lord Neuberger PSC, Lords Reed, Carnwath, Hughes and Hodge JJSC

When it is listed for and for how long?

It is listed for 1 day on 21 June 2017.

What happened in the Court of Appeal?

The Court of Appeal dismissed Mr Persad's appeal on the basis that the trial judge was entitled to conclude that Mr Persad had intended from the outset to use the corporate personality of CHTL to evade or frustrate the legal consequences of his actions and that this was sufficient basis to pierce the corporate veil.

What happened in the lower courts?

Even though the tenancy was between Mr Singh and CHTL, the trial judge found that in the circumstances it was appropriate to pierce the corporate veil so as to find Mr Persad personally liable. Her findings were that CHTL had not been present at the negotiations or conclusion of the lease, as it had been incorporated subsequently, and that it had been formed in the hope that Mr Persad would avoid personal liability in the event of a dispute.

Does the law in England and Wales differ to any significant extent?

The law on piercing the corporate veil appears to be similar in both these common law jurisdictions.

What could be the implications of its ruling?

If the ruling results in any widening of the circumstances in which the corporate veil can be pierced, then the judgment will need to be analysed carefully for its implications.

3. Rivnu Investment Limited & Portfolio Investment Management Limited v. United Docks Limited & Axys Group Limited

What are the relevant agreed facts?

On 12 February 2009, Compagnie d'Investissement et de Développement Limitee ('CIDL'), on behalf of Desmem, Rivnu, and PIM brought a claim against UDL.

What is the issue for the Privy Council?

The proper construction of the term '*loss of the controlling interest*' in a shareholders' agreement.

What country or territory does this case come from?

Mauritius

Who will hear the case?

Lords Mance, Clarke, Carnwath, Hughes and Hodge JJSC

When it is listed for and for how long?

It is listed for 1 day on 26 June 2017.

What happened in the Court of Appeal?

The Court of Appeal dismissed Rivnu, CIDI and PIM's appeal on 3 July 2014. It also granted Rivnu and PIM conditional leave to appeal to the Privy Council on 9 September 2014.

What happened in the lower courts?

On 30 October 2012, the Supreme Court dismissed the case. The judge held that at the time of the signature of the SHA there was no shareholder having a controlling interest in UDL and that there therefore could not be any 'loss' of a controlling interest within UDL.

Does the law in England and Wales differ to any significant extent?

The construction of the phrase in issue would seem that it would be construed in accordance with common law principles common to both jurisdictions.

What could be the implications of its ruling?

The phrase is likely to be commonplace in all shareholders agreements. It will be interesting to see whether it is given a wide or narrow construction by the Judicial Committee.

4. Satish Boabul v. Air Mauritius Limited

What are the relevant agreed facts?

Mr Boabul (an aeronautical and mechanical engineer) joined Air Mauritius in 1991 as an Assistant Engineer. He was promoted to Head of Procurement Ground Support Services in 2000, and to Acting Manager Ground Support Services in May 2002 (which involved additional privileges and responsibilities). His request to be confirmed as permanent manager was rejected in November 2002 as was his application for another managerial role in March 2004. From that date, his company car and allowances were withdrawn and he was transferred to a documentation role in Head Office and then transferred three further times.

Mr Boabul alleges that Air Mauritius has acted in bad faith and that he has suffered humiliation, victimisation and harassment, causing him damage and prejudice amounting to 20 million rupees.

What are the issues for the Privy Council?

Whether the Court of Civil Appeal and trial court misdirected themselves and failed to properly assess the evidence or alternatively made a serious mistake in law, in rejecting the appellants' case that he suffered wrongful treatment, victimisation and harassment at the hands of his employer. Alternatively, whether exceptional circumstances exist justifying the Board to depart from the trial judge's findings of fact.

What country or territory does this case come from?

Mauritius

Who will hear the case?

Lady Hale DPSC and Lords Kerr & Hughes JJSC

When it is listed for and for how long?

It is listed for 1 day by video link on 6 July 2017.

What happened in the Court of Appeal?

The Mauritian Court of Civil Appeal dismissed his appeal.

What happened in the lower courts?

The trial judge dismissed his claim.

5. Petroleum Company of Trinidad & Tobago v. Stanley & Athena Ryan

What are the relevant agreed facts?

Mr & Miss Ryan have lived since 1994 on land some 45 yards away from an oil well managed by the Petroleum Company of Trinidad & Tobago. The oil well was initially abandoned in 1943 when it was plugged. From 1999 to mid-2005, the Petroleum Company arranged for a contractor to collect any oil seepage from the well's collection pit on a fortnightly basis.

In 2006, the Petroleum Company decommissioned the oil well by removing the existing plug and re-plugging it. Mr Ryan has been diagnosed with pulmonary fibrosis and Miss Ryan (his daughter) has been diagnosed with reactive airway disease. They claim that these diseases were caused by the negligence or nuisance of the Petroleum Company in allowing emissions harmful to their health to escape from an oil well under the Petroleum Company's control.

What are the issues for the Privy Council?

There are these 4 issues, namely whether the Court of Appeal erred in:

- its approach to findings of fact made by the trial judge,
- making an inference that the Petroleum Company's wrongdoing was a contributory cause of the injury in circumstances where the Ryans' evidence did not satisfy the 'but for' test for causation,
- its assessment that the relevant evidence was within the Petroleum Company's control, and
- holding that the Ryans were entitled to succeed in their alternative claim for nuisance if they failed in respect of their primary claim in negligence.

What country or territory does this case come from?

Trinidad & Tobago

Who will hear the case?

Lady Hale DPSC, Lords Kerr, Wilson, Carnwath and Hughes JJSC

When it is listed for and for how long?

It is listed for 1 day on 17 July 2017

What happened in the Court of Appeal?

The Court of Appeal allowed the Ryans' appeal.

What happened in the lower courts?

The judge dismissed the Ryans' claims, holding that there were no hydrocarbon emissions after 2006, and that the Ryans' medical conditions had not been caused by any such emanations prior to 2006.

Does the law in England and Wales differ to any significant extent?

The 'but for' test is a common law test common to both jurisdictions.

What could be the implications of its ruling?

The case has zig-zagged so far. Without the application of the 'but for' test of causation, the Ryans are in difficulty in proving their claim. If the oil company's claim is dismissed, then that could create some long tail liabilities that insurers will have to pick up.

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