Lowick Rose LLP (in liquidation) v Swynson Ltd & Anor [2017] UKSC 32

CASE COMMENT

Case Facts

Mr Hunt was a wealthy investor and beneficially owned the company, Swynson Ltd, whose primary activity was 'lending money to risky businesses'.[1] On the 31st of October 2006 Mr Hunt caused Swynson to lend £15m to Evo Medical Solutions Ltd (EMSL) for a period of a year. The purpose of the loan was to buy-out an American company called Evo. Before entering into the transaction Swynson and EMSL jointly instructed a firm of accountants Hurst, Morrison Thompson (HMT) to carry out due diligence on Evo prior to the buy out. The report failed to identify financial problems with Evo and it was argued if HMT had carried out they task properly the transaction would not have gone ahead.[2]

During 2007 Evo began to show financial problems and as a result Swynson lent a further £1.75m in 2007 and £3m in 2008,[3] it is also important to note that in this year Mr Hunt became a controlling shareholder of EMSL with 85% Equity. In December of 2008 the 2006 and 2007 loans were refinanced with Mr Hunt personally due to the fact Mr Hunt did not want a non-performing loan on Swynson's books,[4] in addition to this as Mr Hunt was a controlling shareholder with the potential for interest, there was a potential tax bill of around £300,000[5] per annum, therefore refinancing on these grounds *prime facie* appeared to benefit both Swynson and Mr Hunt.

In 2012 Swynson and Mr Hunt brought the claim against HMT for damages of £16.157m. The claim being that Swynson & Mr Hunt were due damages as investments were made on the strength of the HMT report. HMT, however, argued that as EMSL had repaid their loans, albeit with a further personal loan from Mr Hunt, that no loss was suffered.

In response to this, four points were argued[6]

(i) The December 2008 refinancing was *res inter alios acta* and did not effect the amount of loss.
(ii) If the loss was not recoverable by Swynson than it was recoverable by Mr Hunt on a duty of care argument.
(iii) Swynson were entitled to recover on the principle of transferred loss.

[1] Lowick Rose LLP (in liquidation) v Swynson Ltd & Anor [2017] UKSC 32 [2]
[2] Ibid [4]
[3] Ibid [5]
[4] Ibid [6]
[5] Ibid [43]
[6] Ibid [11]

(iv) HMT had been unjustly enriched by Mr Hunts funds to pay off the initial loan from Swynson.

In the first instance the before Rose J, the judge accepted point *i* and damages of £15m were awarded[7], with £15m being the cap on the letter of engagement. The Court of Appeal also felt the transaction could be regarded as *res inter alios acta* and agreed with Rose J.

Question being asked to the court

What happens if a claimant is owed a duty, but the loss arising from the breach of that duty is suffered by someone else; can the claimant recover that loss and if so in what circumstances?

Background on separate legal entity.

The Supreme Court commented in the present case that "the distinct legal personality has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating their companies' as indistinguishable from themselves".[8] Lord Sumption makes the observation that despite legal separation between beneficial shareholders and their respective companies, the owners are treating their companies as an extension of themselves. This principle of separate entity splits opinion, as some beneficial shareholders appear to prefer the protection when it benefits them, however in the present case, shareholders are asking the Court to consider them as one and the same, sometimes referred to as reverse veil piercing. Separate legal entity specifically for 'one man companies' was first considered in Salomon v A Salomon & Co Ltd[9] where the Court asserted companies, big or small, were to have the protection of limited liability and separate legal entity.

The limited liability principle has predominately been tested in company law matters and, largely, in matters of insolvency[10] where shareholders have avoided liability due to the principles of separate legal entity. In recent years tortious matters involving duty of care have also been considered within the principles of separate legal entity,[11] likewise with shareholders avoiding liability on the grounds of separate legal entity. In the highly-publicised case of *Prest v Petrodel Resources Ltd and others*[12] the defendant put their assets in the ownership of a company they owned and controlled to prevent his assets being counted in their divorce settlement. Despite the defendant in *Prest* being unsuccessful, this provides insight into the lengths some individuals are willing to go to avoid liability.

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[7] Ibid [9]
[8] Lowick Rose LLP (in liquidation) v Swynson Ltd & Anor [2017] UKSC 32 [1]
[9] [1897] AC 22
[10] See: DHN Food Distributors v Tower Hamlets LBC [1976] 1 W.L.R. 857, Ord and another v Belhaven Pubs Ltd
[11] See: Adams v Cape Industries PLC [1990] Ch. 532, Chandler v Cape PLC [2011] EWHC 951

[12] [2012] EWCA Civ 1395

The present case is therefore the opposite of the norm, to seek to persuade the Court to lift this veil to see the beneficial ownership of the company. An individual, through unfortunate circumstance has suffered a loss whilst trading as a 'single economic unit' between themselves and their company. In this case, the beneficial owner of company is wanting to disregard the principles of separate legal entity. It is therefore a case of significance as it is a case, albeit outside the realms of black letter company law, where the party with the protection of separate legal entity is wanting this protection waived.

Supreme Court Decision

The Supreme court considered the principles of transferred loss and unjust enrichment before concluding that neither Mr Hunt or Swynson had a claim which can be maintained against HMT[13]. The reasoning behind this conclusion appears to be based upon the issue of loss, as EMSL repaid their initial loan to Swynson, therefore, there was no loss in the literal sense of the word and thus no damages to follow. This was decided despite the fact Mr Hunt controlled Swynson and refinanced the loan specifically for this purpose. This case could be argued as somewhat harsh and literal approach, as Mr Hunt personally or via companies he controlled is out of pocket, and the literal interpretation of separate personality has resulted in a loss of damages despite the HMT report being negligent and resulting in the initial loan.

This case could, therefore, limit the circumstances in which unjust enrichment is considered within company law. The Court found that there was no doubt that HMT were indirectly enriched[14] but enrichment as the only element is not sufficient. There is also a requirement that the enrichment must be at the expense of the claimant[15] and for this to happen, both parties would have had to deal directly with one another which they had not in this case. Therefore, for unjust enrichment to be successful there are four elements which must be satisfied. [16]

1) Has the defendant been enriched or benefited?
2) Was the enrichment at the expense of the claimant?
3) Was the enrichment unjust?
4) If all elements are satisfied, are there any defences?

Relevance from a company law perspective

Mr Hunt was arguably seeking the corporate veil to be lifted to benefit himself to show the Court that Swynson and himself were one at the same from an economical point of view. If Swynson were removed from the equation and the initial loan made between Mr Hunt and EMSL then the outcome would have been largely different, however, the fact that a company and its owner are treated separately in law resulted in Mr Hunt, being unable to further his claim. The Courts' resistance to allow Mr Hunt to have this veil lifted, strengthens the principles of separate legal entity. Just

[13] Lowick Rose LLP (in liquidation) v Swynson Ltd & Anor [2017] UKSC 32 [121]
[14] Ibid [57]
[15] Ibid [58]
[16] Ibid [56]

because the beneficial owner wants to disregard the veil to benefit themselves does not automatically mean it will be lifted. This stance is of importance because it provides clarity that the principles of separate entity works both ways, both when the beneficial owner wants separation and when they do not, and that the beneficial owners are not free to choose.

Whilst this case involves asset finance and refinancing of debt, it can be argued to have a binding effect on the principles of separate legal entity and further strengthening the principles outline in *Salomon v A Salomon & Co Ltd*[17]. The Prest case was a Supreme Court decision, in which it was stated that the court may "pierce the corporate veil in the absence of specific statutory authority to do so"[18]. Interestingly in this present case, despite being heard by the same leading Judge, Lord Sumption, the Supreme Court have held that even at the express request of the shareholder 'behind the veil' to have the veil lifted, that this request is not sufficient to set aside the principles of separate legal entity thereby strengthening the original position seen in *Salomon.*

The case of *Prest* is regarded as a case which has "redefined what piercing the veil actually means"[19] and with the introduction of the concealment and evasion principle has codified the way in which the arguments of agency, economic entity and the sham and façade arguments are considered. This present case draws parallels to *DHN Food Distributors v Tower Hamlets LBC*[20] & *Woolfson v Strathclyde RC*[21] in which both cases also attempted to permit veil peircing to allow land compensation. The present case could be argued a landmark decision post the *Prest* decision as it specifically considers requests to have the veil disregarded by the beneficial owners. The Court's refusal to accept this request is not only in line with *Prest* it also reaffirms the earlier decision or *Woolfson* post the landmark *Prest* case.

[17] [1897] AC 22
[18] Practical law, 'Corporate Veil: Power of Court (Supreme Court)' [2013] 12th July
[19] Roach, L. (2016). Card & James' business law. 1st ed. Oxford University Press, p.525.
[20] [1976] 1 W.L.R. 857
[21] 1978 S.C. (H.L.) 90