Neutral Citation Number: [2013] EWCA Civ 730

Case No: A3/2012/1905

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION, COMMERCIAL COURT
The Hon. Mr Justice Teare
[2012] EWHC 1887 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2013

Before:

LORD JUSTICE LLOYD
LORD JUSTICE BEATSON
and
LORD JUSTICE RYDER

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Between:

Antonio Gramsci Shipping Corporation and others	**Appellant**
- and -	
Aivars Lembergs	**Respondent**

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- -

Simon Rainey QC and Natalie Moore (instructed by **Clyde & Co LLP**) for the **Appellant**
Anthony de Garr Robinson QC and Laurence Emmett (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date: 10 June 2013

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Approved Judgment

Lord Justice Beatson :

1. Introduction:

1. This is an appeal by Antonio Gramsci Shipping Corporation and others ("Antonio Gramsci") against the Order by Teare J on 24 July 2012 reflecting his judgment handed down on 12 July. The judge held that the courts of England and Wales do not have jurisdiction pursuant to Articles 23 and 24 of the Brussels Regulation[1] over Mr Aivars Lembergs, a wealthy businessman domiciled in Latvia. This appeal is only concerned with Article 23.

2. Article 23 provides that where parties (one or more or whom is domiciled in an EU Member State) "have agreed that … the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, … those courts shall have jurisdiction". Absent an agreement otherwise, such jurisdiction is to be exclusive.

3. As will be seen, in this appeal Antonio Gramsci relies, as it did below, on "piercing" a corporate veil. It does not, however, rely on the principal way jurisdiction pursuant to Article 23 was asserted against Mr Lembergs below. That was a direct contractual route. The appeal is concerned only with the circumstances in which a person who is not a party to a contract containing a jurisdiction clause can be regarded as having given his consent to the chosen jurisdiction. Antonio Gramsci's case is that as a matter of EU law such a person will be so regarded where he is a controller of a corporate entity which is a party to the contract and he has arguably fraudulently caused that corporate entity to enter into the contract in order to defraud the other party to the contract who has brought a claim.

2. The background:

4. The material parts of the factual and procedural background are stated in [2] – [10] of the judgment below, and can be summarised as follows. The substantive dispute concerns sixty-three charterparties of vessels owned by Antonio Gramsci to five offshore companies ("the Corporate Defendants") on the SHELLTIME 4 Time Charterparty form which contained an exclusive jurisdiction clause in favour of the courts of England and Wales. Antonio Gramsci alleges that the charterparties were entered into as part of a fraudulent scheme to charter the vessels from it at less than the market rate, and to sub-charter them at the market rate, thereby depriving it of the difference between the market rate and the charter rates. It alleges that the profits so made by the Corporate Defendants were to be used to enable Mr Lembergs and others who are alleged to have at that time been in control of the Corporate Defendants (including a Mr Stepanovs) to purchase shares in Antonio Gramsci's parent company, the Latvian Shipping Company ("LSC").

5. Proceedings were initially brought only against the Corporate Defendants. Although an application for summary judgment against them was refused by Gross J ([2010]

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[1] Council Regulation (EC) No 44/2001, the Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

EWHC 1134 (Comm)), he permitted them to defend the claim only if they made a substantial payment into court. They did not do this, and in due course Antonio Gramsci obtained judgment against them in its claim for restitution of the profits unlawfully diverted from it. Antonio Gramsci has since sought to make Mr Lembergs and Mr Stepanovs liable for the diverted profits. The allegation is that they, along with others, established the Corporate Defendants and used them as a device for the purpose of diverting the profits, and that Antonio Gramsci is therefore entitled to pierce the corporate veil both in respect of the substantive claims and also to enforce the English jurisdiction clauses.

6. Proceedings against Mr Stepanovs were lodged in October 2010 and he challenged the jurisdiction of the English court. The question for decision for Burton J in that case was whether a party to a contract with a corporation, which is controlled by an individual who has used it as a device or façade to conceal wrongdoing, can proceed against the individual in contract, and can establish jurisdiction by virtue of a jurisdictional clause in the contract with the corporate entity. On 25 February 2011, in *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm) 2011]; 1 Lloyd's Rep 647 ("the *Stepanovs* case") Burton J held there was a good arguable case that the corporate veil could be pierced or lifted to permit this and dismissed Mr Stepanovs' challenge to jurisdiction.

7. Proceedings against Mr Lembergs commenced with an application for a worldwide freezing order which was granted on 13 April 2011, and which, in a decision given on 4 August 2011, Cooke J refused to set aside. Shortly after that, on 24 August, Mr Lembergs issued his challenge to the jurisdiction of this court. At that time, the main way Antonio Gramsci put its case for jurisdiction based on Article 23 was the direct contractual route accepted by Burton J in Mr Stepanovs' case.

8. The hearing before Teare J commenced on 16 November 2011. By then the hearing before Arnold J in *VTB Capital plc v Nutritek International Corp. and others,* had concluded. In that case after a jurisdictional challenge to its pleaded case in tort the claimant sought to amend to raise the direct contractual route to jurisdiction in the *Stepanovs* case. The defendant challenged that route too. The decision in *VTB Capital* ([2011] EWHC 3107 (Ch)) was handed down before the conclusion of the hearing in these proceedings. Arnold J disagreed with Burton J's decision in the *Stepanovs* case and rejected the direct contractual route to jurisdiction. His decision and his view of Burton J's decision was affirmed by this Court in its decision in the *VTB Capital* case on 20 June 2012: [2012] EWCA Civ 808. Teare J, who had deferred giving his decision, pending the outcome of that appeal, held that, in the light of it, he was bound to reject this argument.

9. As a result of permission being given by the Supreme Court for an appeal in the *VTB Capital* case on the direct contractual route to jurisdiction, permission to appeal that aspect of Teare J's decision was given. This ground was properly abandoned by Antonio Gramsci when the Supreme Court affirmed the decision of this court in the *VTB Capital* case: [2013] UKSC 5. That it is untenable has, if anything, been underlined by the very recent decision of the Supreme Court, after the hearing in these proceedings, in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34, on which see [65] and [66] below. Permission to appeal against Teare J's decision that Mr Lembergs had not submitted to the jurisdiction for the purposes of Article 24 of the Brussels Regulation was refused.

3. The question for decision:

10. The sole question for decision in this appeal now is what I, reflecting the substance of its characterisation in the submissions of Mr Rainey QC, on behalf of Antonio Gramsci, will describe as "the EU law point". It is whether the controller of a corporate body who has used the corporate body as a device or façade to conceal wrongdoing by entering into a contract with another containing an English jurisdiction clause can be regarded as having consented to jurisdiction within Article 23, although he is not a party to the contract with that other. In his judgment dated 24 July 2012 Teare J held that unless the controller "himself" has expressed or indicated any willingness that claims brought against him by the other contracting party may be tried in this jurisdiction, the answer is "no". I deal with Mr Rainey's submissions as to why the judge fell into error at [20]-[31]. At this stage it suffices to say that he maintains that the judge gave insufficient weight to the European jurisprudence on this point, in particular an established use in the context of Article 23 of deemed consent in particular circumstances, and that he was unduly and wrongly influenced by English contract law analysis including the analysis of the Court of Appeal in the *VTB Capital* case.

4. The judgment:

11. The judge dealt with the direct contractual route to jurisdiction, now blocked as a result of the Supreme Court's decision in the *VTB Capital* case, under two headings; "the factual issue" between [11] and [48] , and "the legal issue" between [49] and [55]. I have stated that this is no longer a live issue in this appeal. But because of at least the significant factual overlap between it and the "EU law" Article 23 point, I will summarise the part of his judgment dealing with the first of the two headings before dealing with the "EU law" point.

12. Under the heading "the factual issue", the judge dealt with whether there is a good arguable case that Mr Lembergs was a beneficial owner and controller of the Corporate Defendants which were, on Antonio Gramsci's case, incorporated for the purposes of diverting profits from it. He stated (at [11]) that this was the factual case which Antonio Gramsci was required to establish in order to the lay the foundation for its argument the corporate veil may be pierced. At [34] he put the matter as follows:

> "The factual issue is whether or not Mr Lembergs was a beneficial owner of the Corporate Defendants with control over them who had brought about their incorporation with a view to effecting the alleged fraudulent scheme."

That issue was, he stated, relevant both to the jurisdiction gateway, "Did Mr Lembergs agree to the English jurisdiction in the charterparties?", and to whether he was liable in restitution in respect of the charterparties jointly and severally with the Corporate Defendants.

13. The evidence before the judge as to who owned the Corporate Defendants differed from that before Gross and Burton JJ. In particular (see judgment, [17]), there were two statements from Mr Lembergs, a decision of a Latvian criminal court recording testimony from other persons, and five additional pieces of documentary evidence.

14. In his judgment refusing summary judgment to which I have referred at [5], Gross J stated that the evidence adduced by Antonio Gramsci against the Corporate

Defendants gave it the better of the arguments at that stage. The evidence relied upon by Antonio Gramsci in these proceedings was in essence that evidence, in particular that of a Mr Paderov, who stated that he set up the Corporate Defendants "for the purpose of carrying out the charters", and a Mr Kveps, a lawyer who acts for other beneficial owners of the Corporate Defendants. There is, however, a sharp conflict between that evidence and the evidence adduced by and on behalf of Mr Lembergs in these proceedings: see the summary by the judge at [31].

15. The judge addressed the difficulty the court faces in a jurisdiction challenge where there is a conflict of evidence on the factual issues and, in particular, Waller LJ's statement in *Canada Trust v Stolzenberg (No. 2)* [1998] 1 WLR 547 at 555. Waller LJ stated that the court considering jurisdiction must be concerned "not even to appear to express some concluded view on the merits" and that the "good arguable case" test in this context means that one side must have "a much better argument on the material available". The judge also considered the view of Christopher Clarke J in *Cherney v Deripaska* [2008] EWHC 1530 (Comm) at [19] – [44] that the need, in what has become known as "the *Canada Trust* gloss", to avoid expressing a concluded view as to the merits while applying the "good arguable case" test is met because the court, at the jurisdiction stage, is concerned with the arguments in favour of the respective parties rather than any determination on the balance of probabilities.

16. Teare J accepted that he was bound to apply the "*Canada Trust* gloss" but was not sure that concentrating on the arguments avoided the difficulty. He agreed with Hamblen J in *Cecil v Bayat* [2010] EWHC 641 (Comm) that difficulties remained and stated that the court was still at risk of appearing to conduct a trial prior to the trial itself. He also stated (at [42]) that where "the factual dispute is as stark as it is in this case it is difficult to say that the claimants have a much better argument on the material available". Relying on the observations of Toulson J (as he then was) in *Petroleum Investment Co Ltd v Cant-Pan Holdings* [2002] 1 All ER (Comm) 124 at [38] and *WPP Holdings (Italy) v Benatti* [2007] 1 WLR 2316 at [44], he considered (see [45]) that in such a case it was preferable "to concentrate on whether factors exist which allow the court to take jurisdiction".

17. Using the approach based on Toulson J's observations, Teare J concluded (see [48]) that Antonio Gramsci's evidence had "sufficient strength", assuming its submissions on the law were correct, "to allow the court to take jurisdiction". This was "notwithstanding that, by reason of the conflict of evidence and the limitations imposed by the interlocutory process", he was not able to conclude in advance of hearing oral evidence that Antonio Gramsci had "the better of the argument".

18. This court's decision in the *VTB Capital* case was handed down on 20 June 2012, some four months after the conclusion of the oral submissions in this case. After that, Antonio Gramsci's representatives contacted the judge to identify an independent argument which, it maintained, had been pleaded and raised, which could allow it to succeed in invoking Article 23 even if its direct contractual route to jurisdiction based on the *Stepanovs* case was bound to fail as a result of the decision in the *VTB Captal* case. The judge stated (see [58]) that it appeared from three paragraphs of the two skeleton arguments before him that the point had been argued. Mr Emmett, on behalf of Mr Lembergs, accepted that the point, which I have characterised as "the EU law point" had been raised "albeit faintly", and the judge dealt with it at [59] – [62].

19. The judge stated:

> "59. As explained by Burton J. in the *Stepanovs* case at [2011] 1 Lloyd's Rep. 647, paragraphs 31-63, the national law determines who is party to the jurisdiction agreement whereas EU law determines whether there has been sufficient "consensus" between the parties identified by the national law. "Consensus" in article 23 requires a claimant to show that a defendant has clearly and distinctly consented to the alleged jurisdiction agreement.
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> 60. Burton J. does not appear to have alluded to the argument to which Mr. Rainey has referred. But assuming that it is possible to demonstrate consensus in the absence of a formal contract (as Mr. Thomas submitted was indicated by *Berghoefer GmbH v ASA SA* [1985] ECR 2699 and *Powell Duffryn v Petereit* [1992] ECR 1-1745 and as Adrian Briggs has argued in *Agreements on Jurisdiction and Choice of Law* at paragraphs 7.36-38) such consensus must be established on the facts. Adrian Briggs suggests that there must be some "public willingness" to agree to the jurisdiction of the court in question.
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> 61. In circumstances where, on the evidence adduced by [Antonio Gramsci], Mr. Lembergs has induced [Antonio Gramsci] to contract with the Corporate Defendants on terms which included a jurisdiction clause in favour of the English court but where there is no evidence that Mr. Lembergs has himself expressed or indicated any willingness (public or otherwise) that claims brought against him by [Antonio Gramsci] may be tried in the English court, I do not consider that there is an arguable case that Mr. Lembergs has indicated his willingness to be sued in the English court so as to give rise to the sort of consensus required by article 23. Just as it is not permissible to raise the corporate veil to reveal Mr. Lembergs as party to the charterparties and to the jurisdiction clause within them so it is not possible, in my judgment, to raise the corporate veil to reveal Mr. Lembergs as a person expressing his willingness to submit to the jurisdiction of the English court. It is, it seems to me, unrealistic (or, as the Court of Appeal has more forcibly put it, "pure fiction") to say that Mr. Lembergs has demonstrated a willingness to have claims against him brought in the English court when he has, on [Antonio Gramsci's] case, carefully avoided doing that and has, at best, demonstrated only a willingness that claims against the Corporate Defendants be brought in the English court.
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> 62. I therefore hold that [Antonio Gramsci is] unable to establish jurisdiction pursuant to Article 23 of the Brussels Regulation."

5. The submissions on behalf of Antonio Gramsci

20. Mr Rainey's starting point was that, although the judge did not expressly record it as such, in the section of his judgment dealing with "the factual issue" he held that Antonio Gramsci had shown a good arguable case for "piercing" the corporate veil because there was a good arguable case that Mr Lembergs was a beneficial owner and controller of the Corporate Defendants which were incorporated for the purpose of diverting profits from it, he was one of the "masterminds behind the scheme to divert profits" from it, and he "approved the arrangements" for the scheme, including the conclusion of the charterparties. Mr Rainey submitted that these findings of fact were unaffected by the decision of the Supreme Court in the *VTB Capital* case, which was concerned with the position under the law of England and Wales and not EU law, and because the Supreme Court accepted that there are circumstances in which a court should pierce the corporate veil: see [2013] UKSC 5 at [118]-[130] *per* Lord Neuberger.

21. Mr Rainey was critical of the brevity of the judge's treatment of the EU law point on Article 23 and submitted that the judge erred and did not correctly apply that law to his factual findings. He accepted that the explanation for the brevity may be the way the point had been dealt with before and at the hearing. It is clear that the bulk of the written submissions on Article 23 before the judge concerned the direct contractual route. I have referred (see [18] above) to the discussion some four months after the conclusion of the oral submissions in this case in the light of the decision of this court in the *VTB Capital* case. The question was whether Antonio Gramsci had contended that there was a different way Article 23 could apply if it was unable to say that Mr Lembergs was a party to the charterparties and the jurisdiction clauses. The need for that discussion suggests that what Mr Rainey described as Antonio Gramsci's alternative case on Article 23 cannot have played any real part in the oral submissions.

22. The focus of Mr Rainey's criticism was the judge's statement that there must be "some public willingness" to agree to the jurisdiction of the court. He submitted this erred because it did not recognise that the jurisprudence of the ECJ (now the CJEU) is that "deemed consensus" may be sufficient for the purposes of Article 23 of the Brussels Regulation. In particular circumstances, such deemed consensus may suffice irrespective of whether the Defendant actually knew about the jurisdiction clause in question or intended to agree to it and although it is not possible to establish any actual consensus on the facts.

23. Mr Rainey relied in particular on the decision of the ECJ in Case C-214/89 *Powell Duffryn Plc v Petereit* [1992] ILPr 300 and on the decision of the Commercial Court in *Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd v GIE Vision Bale & ors* [2004] EWHC 2919 (Comm). In his oral submissions Mr Rainey stated he was not relying on the principle of succession, in particular succession in the context of bills of lading and the line of cases starting with Case C-71/83 *Tilly Russ v Haven & Vervoerbedrijf Nova NV* [1985] QB 931.

24. In the *Powell Duffryn* case the ECJ accepted that a jurisdiction clause contained in a company's articles of association was "an agreement conferring jurisdiction" within the meaning of the predecessor of Article 23 and that it bound the shareholders of the company even though there was nothing in writing which contained or evidenced the shareholders' agreement to the clause and even where the shareholders had objected to the relevant changes to the articles.

25. In the *Standard Steamship Owners*' case Cooke J, in the context of Article 23, held that in the context of P&I insurance the conclusion of the agreement on jurisdiction in correspondence by agents of the assured and agents for the club sufficed. He stated (at [41]) that the actual consensus between the two agents could not be doubted, and (at [52]) that none of the authorities discussed the position of agents in this context. He then stated (at [54]) that "if the agent has appropriate authority to bind the principal … the agent's consensus is that of the principal and no further enquiry beyond the agent's consensus is therefore required".

26. The *Standard Steamship Owners*' case concerned disclosed agents, but Mr Rainey submitted that the same approach would be applied by the CJEU or the English court if it had to consider whether an undisclosed principal had agreed to a jurisdiction agreement to which his agent had expressly consented, so that consent by the

undisclosed principal would be deemed or presumed. While recognising that the relationship in the present case between Mr Lembergs and the Corporate Defendants is not one of agency, Mr Rainey submitted that this case is analogous to the case of an undisclosed principal.

27. Mr Rainey buttressed his submissions by references to the purposes of the Brussels Regulation. He contended that the judge had erred in not giving sufficient weight to the purpose of securing legal certainty by enabling the parties reliably to foresee which court will have jurisdiction and minimising the possibility of concurrent proceedings in different jurisdictions: see Recitals (11) and (15) to the Regulation and the decision of the ECJ in *Powell Duffryn v Petereit*, in particular [13]-[14], [16]-[18] and [20] of the judgment.

28. He also relied on the need to have regard to the principle of good faith in this, a case of alleged fraud, which has been applied in the interpretation of Article 23. In Case C-221/84 *Berghoefer GmbH & Co KG v ASA SA* [1986] 1 CMLR 13, the court stated (at [15]) that if it is actually proved that jurisdiction was conferred by an oral agreement, and if the written confirmation of the oral agreement given by one of the parties was received by the other who raised no objection in reasonable time, it would be contrary to good faith for the party who had not objected to dispute the existence of a jurisdiction agreement.

29. As to the position of Community law about piercing the corporate veil, Mr Rainey relied on Case C-81/09 *Idrima Tipou AE v Ipourgos Tipou kai Mason Mazikis Enimerosis* [2011] 1 CMLR 42 as indicating (in the opinion of the Advocate General) that doing this is perfectly lawful although the Community legislature does not regulate this itself. He submitted that the need to deal with cases of fraud and improper use of corporate entities justified looking to what he described as the underlying reality and regarding both the corporate entity and the controller as being deemed as having consented to jurisdiction. This, he submitted was necessary so that fraudsters are not able "to shelter behind the corporate structure of companies which they have set up for the purpose of defrauding an innocent party with whom their puppet company contracts in order to avoid being sued in the courts of a Member State in which the puppet company has agreed to be sued".

30. Mr Rainey criticised the judge for not referring to the European jurisprudence and for basing his reasoning "entirely upon a short passage" in Professor Briggs' *Agreements on Jurisdiction and Choice of Law*" (2008) 7.37 which was in a section headed *"Unilateral or bilateral agreement?"*. That passage, he submitted, was dealing with a different point, and did not refer to the decision in *Powell Duffryn v Petereit*. Underlying Mr Rainey's criticisms is an implicit suggestion that the judge did not fully take on board the extent to which this alternative submission was different from the submission that there was a direct contractual route to jurisdiction.

31. In summary, Mr Rainey submitted the judge did not appreciate that EU law has recognised deemed consent in a proper case even where there is no actual consent. He maintained that, before doing so, the court will have in mind the factual matters linking a party to the party to the contract which contains the jurisdiction clause. It will consider the true nature of the legal relationship in the eyes of EU law, and what the agreement is in the light of the way the third party has conducted himself. It will,

he submitted, also take account of the principle of certainty and the need to avoid multiplicity of grounds of jurisdiction where there is a jurisdiction clause.

32. In the event that this court did not accept his submissions as to the proper interpretation of Article 23, Mr Rainey submitted that it make a reference to the CJEU for a preliminary ruling under Article 267 of the Treaty of the Functioning of the European Union ("the TFEU"). He submitted that the question should be:

> "Where:
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> (i) a person A improperly sets up a company B as a vehicle of fraud and causes it to enter into a contract with another party C to defraud C and to conceal his participation from C; and
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> (ii) the contract which A procures contains a jurisdiction clause in favour of the courts of a Member State to which A causes his creature company B to consent, in circumstances where A knows or it is held that he ought to know (a) that the use of the company is improper…[2]; (b) that if the true facts are discovered the corporate veil may be pierced and he may be liable to C in connection with or in respect of the transaction,
>
> will A be deemed to have consented to the same jurisdiction as that to which the company B consented 'to settle any disputes which have arisen or which may arise in connection with a particular legal relationship' under Article 23 of Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters?"

33. He gave three reasons for this submission. First, the meaning of Article 23 in the particular context of this case is not *acte clair.* Secondly, the application of Article 23 to the case of an individual who controls a company and causes it to enter into a contract with a jurisdiction agreement in order to defraud the company's contractual counterparty has not been considered by the CJEU. Thirdly, the question is an important one. It concerns whether the CJEU will allow fraudsters to shelter behind the corporate structure of companies which they have set up for the purpose of defrauding an innocent party with whom their puppet company contracts in order to avoid being sued in the courts of the Member State in which the puppet company has agreed to be sued.

6. Discussion

(i) The approach of an appellate court:

34. I start by reminding myself of the statements in the *VTB Capital* case about the approach of an appellate court to a question such as the one before this court: see [2013] UKSC 5 at [69], [96], [97] and [156] *per* Lord Mance, Lord Neuberger and Lord Wilson. If the judge has erred in law, or taken into account any irrelevant matter or failed to take into account a relevant matter which could influence the conclusion reached, the appeal will be allowed. But they emphasised that, although the question before the judge is not the exercise of a discretion, it is "an evaluative, or a balancing exercise", "a classic interlocutory exercise with which an appellate court should be slow to interfere".

[2] The written submissions stated the circumstances to be "improper and fictive".

(ii) Article 23: Introduction

35. I turn to the Brussels Regulation. The general rule under the Regulation is that jurisdiction is generally to be based on the defendant's domicile. The underlying principle is that it must always be so based, save in well defined situations in which the subject matter of the litigation or the autonomy of the parties requires a different linking fact: see Recital (11) to the Regulation. A further principle (see Recital (15)) is that it is necessary to minimise the possibility of concurrent proceedings.

36. Article 23, which requires a consensus between the parties that a particular court is to have jurisdiction, like its predecessor Article 17 of the Brussels Convention, is based on the autonomy of the parties. Its material part provides:

> "1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
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> (a) in writing or evidenced in writing; or
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> [(b) and (c) are omitted]"

37. The purpose of Article 23 is to ensure that the parties have actually consented to the choice of jurisdiction. The decisions of the ECJ (now the CJEU) make it clear that, to be effective for the purpose of Article 23, an agreement to confer jurisdiction must establish consensus between the parties "clearly and precisely": Case C-24/76 *Estasis Salotti v RÜWA Polstereimaschinen GmbH* [1977] 1 CMLR 345 and case C-25/76 *Galleries Segoura SPRL v Rahim Bonakdarain* [1976] ECR 1851.

38. There is, however, a measure of flexibility. Although (see Case C-313/85 *Iveco Fiat SpA v Van Hool NV* [1986] ECR 3337) the ECJ stated that "the purpose of the formality requirement [in Article 23] is to ensure that the consensus between the parties is in fact established", an oral agreement conferring jurisdiction can suffice. This will be so where the oral agreement is later confirmed in writing by one party and the other party has raised no objection in sufficient time: Case C-221/84 *Berghoefer GmbH v ASA SA* [1986] 1 CMLR 13. *Briggs on Civil Jurisdiction and Judgment* (5th ed 2009, ed Rees) 178 states that the formal requirements "are a means to an end, and are not an end in themselves", and "the only question, sight of which must not be lost, is that the formal requirements are there to ensure that there was consensus. If the consensus can be clearly and precisely established by other means, they serve no additional function, and there is no further need to consider them".

39. Secondly, written consensus may exist in the absence of a binding contract: see Fentiman, *International Commercial Litigation* (2010) at 2.40, giving a non-binding memorandum and an unsigned version of a contract which requires a signature as examples.

40. Despite this measured flexibility, the jurisprudence of the ECJ regards the departures from the general rule of domicile-based jurisdiction, including Article 23, as derogations. In that sense they are regarded as exceptions to the general rule, although

to regard jurisdiction based on Article 23 as exceptional may (see Fentiman, *International Commercial Litigation* (2010) 2.42) risk placing an obstacle to giving effect to party autonomy.

41. There are also statements that departures from the general rule of domicile-based jurisdiction should be strictly construed (see Case C-24/76 *Estasis Salotti v RÜWA* [1977] 1 CMLR 345 at [7] and *Bank of Tokyo-Mitsubishi v Baskan Gida Sanayi Pazarlama* [2004] EWHC 945 (Ch) at [191] *per* Lawrence Collins J, as he then was) and interpreted in "keeping with the spirit of certainty". This means they should be interpreted so as to ensure that they are only applicable in clear cases and without having to delve into the merits of the underlying dispute: see Case C-159/97 *Castelletti v Trumpy* [1999] ILPr 492 at [48]-[49]. This last point has particular relevance when what is under consideration is an enquiry at the interlocutory stage in a case such as this one where there is a sharp conflict of evidence.

(iii) Fact and law

42. With this background I turn to Mr Rainey's submissions about the terms "agreed" and "agreement" in Article 23. Mr Rainey is clearly correct in emphasising that whether a person against whom jurisdiction is claimed by virtue of Article 23 has consented to jurisdiction is an autonomous question of EU law. That was indeed common ground. For examples of statements to this effect see *Powell Duffryn v Petereit* at [13] and [20] and Case C-543/10 *Refcomp SpA v AXA Corporate Solutions Assurance SA* [2013] ILPr 17 at [21] and [39]-[40]. The reason for this autonomous meaning is the need to avoid a multiplicity of grounds of jurisdiction for disputes arising out of the same factual relationship.

43. It is, however, also clear that the autonomous requirement raises a question of fact: see Case C-24/76 *Estasis Salotti v RÜWA* [1977] 1 CMLR 345 at [7] where it was noted that the court must examine "whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties …" (emphasis added). This was repeated in Case C-387/98 *Coreck Maritime v Handelsveem* [1999] ILPr 721 at [13] and [14], where the ECJ added that what is now Article 23 "is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction …".

44. I accept the submission in the skeleton argument of Messrs de Garr Robinson QC and Emmett on behalf of Mr Lembergs that the judge did not find as a matter of fact that the present case was an appropriate one for "piercing" the corporate veil. Mr Rainey's submission (summarised at [20] above) that the judge did so find depends on a rigid separation of the parts of the judgment dealing with "the factual" and "the legal" issue. But, as Lloyd LJ observed during the course of the hearing, courts do not pierce a corporate veil at large and then look at the consequences. They consider whether, in the light of the purpose for which it is desired to pierce the veil, the facts of a case make it an appropriate one for doing so.

45. In this case, the factual issues concerned whether there was a good arguable case that Mr Lembergs was a beneficial owner and controller of the Corporate Defendants and whether they were incorporated for the purpose of diverting profits from Antonio Gramsci. But those questions of ownership and control and alleged fraud are different from the question whether the consequence of establishing them to the requisite

standard is that the corporate veil may be pierced. The latter question is a legal one and the answer to it is a finding of at least mixed law and fact, if not one of pure law. It was so treated by the judge. It is significant that the judge's conclusion at [48] (which I have summarised at [17]) was a conclusion reached on the assumption (which he then rejected) that Antonio Gramsci's argument on the law was correct.

46. The non-automatic nature of "piercing the veil" as a consequence of finding that an individual owns and controls the relevant company at the relevant time and has used it as a façade to conceal the true facts is seen from the statement in this court's judgment in the *VTB Capital* case ([2012] EWCA Civ 808 at [92]) that, "in a case in which it is thought appropriate to pierce the veil, any order made in consequence of such a veil piercing is by way of the exercise by the court of a discretionary jurisdiction".

47. Mr Rainey's approach is, in my judgment, also contrary to the decision of the Supreme Court in the *VTB Capital* case. Lord Neuberger stated ([2013] UKSC 5 at [147]) that on the facts of the *Stepanovs* case, which for these purposes are identical to those of the present case, establishing the requisite facts was not itself "enough to justify piercing the corporate veil for the purpose of holding the individual liable for the transaction, action or receipt, especially where the action is entering into a contract". It should be noted that the words "liable for the transaction … or receipt" indicate wider purposes than making the individual a party to the contract. He also stated (at [146]) that he was not attracted by the notion that the principle of "piercing the corporate veil" should be invoked simply to enable a claimant to justify proceedings being heard in this jurisdiction if they otherwise could not be.

(iv) The relevance of the VTB Capital case

48. Although Mr Rainey relied on the decision of the Commercial Court in the *Standard Steamship Owners'* case in support of his submissions, on EU law and Article 23, he submitted that the *VTB Capital* case was concerned only with the law of England and Wales. He argued that its approach to piercing the veil had no relevance when determining whether there was consensus for the purposes of Article 23. Strictly speaking this may be so. But the submission has an air of unreality about it. The *VTB Capital* case was a challenge to jurisdiction by Nutritek. It was in that context that the lawyers and judges in the case grappled with the question of whether it is possible to pierce the veil to establish that a person is the true party to a contract. Given that context, and Lord Wilson's specific reference to Article 23 at [158], it is likely that the Supreme Court was alive to this aspect of the case.

49. There are two reasons the approach in the judgments in the *VTB Capital* case is very material to the question whether it is possible to show consensus by piercing the veil to establish that a party is to be taken to have agreed to jurisdiction for the purpose of Article 23 irrespective of whether that party is party to the contract containing the jurisdiction clause. First, for the reasons I give at [64], it appears that EU law may leave the regulation of when the veil can be pierced to national law.

50. Secondly, and irrespective of that, the present case is one in which it is said that the veil should be pierced to enable ascertainment of consensus. It is said that Mr Lembergs is to be "deemed" to have given consent or "may be regarded" as having given it for the purpose of EU law because of the piercing of the veil between him and the Corporate Defendants. It is this submission which makes it difficult to assert that

the *VTB Capital* case is not relevant for the purpose of considering consensus and agreement under Article 23. What Antonio Gramsci has sought to assert is that the same facts as have been held not to amount to constituting Mr Lembergs a party to the charterparties containing the jurisdiction clauses show that he is a party to an agreement containing the clauses or that there is consensus between him and Antonio Gramsci about the operation of the clauses.

(v) The EU jurisprudence

51. I turn to the decisions of the ECJ and the CJEU. I do not consider that the cases relied on by Mr Rainey in fact support his case. He was correct not to rely on the *Tilly Russ* line of cases about succession in the context of bills of lading. The reasoning in those cases concerned the consent of the original parties to the bills of lading, not the consent of a subsequent and third-party holder of the bill of lading. The ECJ did not, moreover, rely on "deemed consent" by the third-party holder but (see [1985] QB 931 at [27]) on the fact that the third-party succeeded to the rights and obligations of the shipper when he acquired the bill of lading. It contrasted the position that would have obtained had the third party holder not succeeded to the rights and obligations of the shipper. The ECJ stated that, in those circumstances, the court would have to ascertain "whether [the third party holder] accepted [the jurisdiction] clause having regard to the requirements" in what is now the first paragraph of Article 23. Save for the specific situation in which the holder in due course has succeeded to the shipper's rights and obligations, the ECJ thus emphasised the need to establish actual consent.

52. Notwithstanding the subtlety of Mr Rainey's submissions on *Refcomp SpA v AXA Corporate Solutions Assurance SA* [2013] ILPr 17, I do not consider that he is assisted by that case. He placed particular reliance on the statement of the CJEU at [29]-[30]. The CJEU stated that, while "in order for a third party to rely on the [jurisdiction] clause it is, in principle, necessary that the third party has given his consent to that effect", "the conditions and the forms under which a third party to the contract may be regarded as having given his consent to a jurisdiction clause may vary in accordance with the nature of the initial contract" (emphasis added). He was, however, not able to identify a principle upon which the "nature" of the initial contract would justify a "deemed consent" as opposed to actual consent by the individual.

53. In the *Refcomp* case, the CJEU referred to the *Powell Duffryn* case and the *Tilly Russ* line of cases, but stated (see [32]) that jurisprudence could not be transposed to the relationship between a sub-buyer of goods purchased from an intermediate seller and the manufacturer of those goods. This was because (see [37]) the relationship of succession in string contracts for the sale of goods is not regarded as the transfer of a single contract or the transfer of all the rights and obligations for which it provides. Moreover, in some cases the different contracts in the string may not be on exactly the same terms. It has not been suggested that in the circumstances of the present case there has been a transfer of the charterparties or the transfer of all the rights and obligations under them.

54. That leaves the *Powell Duffryn* case (see [24] above) and the decision of the English Commercial Court in the *Standard Steamship Owners*' case (see [25] and [26] above). I do not consider that either decision assists Antonio Gramsci's case.

55. *Powell Duffryn* was a case in which there was clearly a contract between the company and the shareholder. The question was not as to the existence of a contract or consensus between the claimant and the party against whom jurisdiction was claimed. There was a clear and distinct relationship between the parties in that the party resisting jurisdiction had bought shares in the company. The question was whether by buying the shares, that shareholder was "deemed" to have consented to the jurisdiction clause in the articles of association. The point was not whether there was consensus but the incorporation of the jurisdiction clause in what was undoubtedly a consensual relationship, a contract, between the parties. The statement at [19] of the judgment that "… by becoming and by remaining a shareholder of a company the member agrees to submit to all the provisions of the articles of association … even if he is not in agreement with some of those provisions …" is not an alternative to the requirement to establish agreement in fact, but a finding that the act of becoming and remaining a shareholder amounted to such agreement. The ECJ was working out what the parties actually intended in a common sense way. It regarded (see [16]) the articles of association as "a contract covering both the relations between the shareholders and also the relations between them and the company they set up".

56. The only references to "deeming" in that case concern the requirement of writing in what is now Article 23. For the shareholder to be "deemed to be aware of the clause and to have given actual consent to the conferment of jurisdiction" the ECJ required (see [28] and [29]) that the company's articles of association be lodged at a place which is accessible to the shareholders or kept in a public register. What the case shows is that, where there is clearly an agreement between a claimant and the party resisting jurisdiction, it suffices for there to be an agreement to terms containing a jurisdiction clause and it is not necessary for there to be an agreement specifically as to that jurisdiction clause: see also *Polskie Ratownictwo Okretowe v Rallo Vito and C.Snc* [2009] EWHC 2249 (Comm) at [37] *per* Hamblen J.

57. A situation similar to that of the shareholder in *Powell Duffryn's* case concerns assignment. Assignment involves the transfer of the contractual rights to the assignee. By taking the assignment of a contract containing a jurisdiction clause, the assignee, like the shareholder, agrees to its terms including the jurisdiction clause. In *Bank of Tokyo-Mitsubishi v Baskan Gida Sanayi Pazarlama* [2004] EWHC 945 (Ch) at [191] Lawrence Collins J (as he then was) stated that "an assignee of a contract may be bound by a jurisdiction clause contained in it", citing Case C-201/82 *Gerling Konzern Speziale Kreditversicherung AG v Amministrazione del Tesoro dello Stato* [1983] ECR 2503.

58. *Standard Steamship Owners'* is also a case in which there was no need for "deemed consent". Where a person provides an agent with actual or apparent authority to make agreements on its behalf, that person has agreed to what its agent agrees, within the scope of the authority, on its behalf. In that case the parties knew about the principals, but in principle the position would be the same in the case of an undisclosed principal.

59. As to the analogy which Mr Rainey sought to draw with cases relating to undisclosed principals and the facts of this case, I accept the written submission of Messrs de Garr Robinson QC and Emmett that this does not assist. First, a person can only be held to have contracted as an undisclosed principal where that person has actually authorised the agent to contract on its behalf, although such authorisation may be implied. There is thus consent of the same kind as existed in the *Standard Steamship Owners*' case.

In these proceedings, Antonio Gramsci's case is not that Mr Lembergs authorised the Corporate Defendants to contract on his behalf, but that he specifically sought to avoid this.

60. Secondly, in the *VTB Capital* case the Supreme Court rejected the undisclosed principal doctrine as a suitable analogy in the context of piercing the corporate veil: see [2013] UKSC 5 at [141] *per* Lord Neuberger. His Lordship stated that the rule "has long been regarded as an anomaly". He approved the statement by the Court of Appeal in that case ([2012] EWCA Civ 808 at [89]) that it would be inappropriate to extend an anomaly save where it would be unjust and unprincipled not to do so. He also relied on the statement of Lord Hoffmann in *OBG Ltd v Allen* [2008] AC 1 at [103] and [106] that "an anomaly created by the judges to solve a particular problem" is "an insecure base" on which to justify an extension to a principle, especially when that principle can itself be said to be anomalous.

61. I can deal with the decision of the ECJ in the *Berghoefer* case (see the summary of Mr Rainey's submission on this at [29] above) briefly. That was a case in which there was an oral agreement between the claimant and the party resisting jurisdiction. Here the question is whether there is an agreement between Antonio Gramsci and Mr Lembergs.

62. I return to the question whether there is an underlying principle as to when "deemed consent" will or may suffice and the reference in *Refcomp SpA v AXA Corporate Solutions Assurance SA* [2013] ILPr 17 to the nature of the contract as relevant to this. My consideration of the cases has identified only one principle deployed for doing so. That is where the situation is one in which there has been a transfer of the contract or of all the rights and obligations for which it provides. That is not the position here.

(vi) The policy-based submission

63. It remains to deal with Mr Rainey's policy-based submission (summarised at [29] above). This is that the court needs to prevent fraudsters sheltering behind the corporate structure of companies in circumstances such as the facts alleged in this case. There is undoubted force in this submission. In the context of *forum conveniens* such an approach is favoured by Briggs, [2012] LMCLQ 364, with whom Lord Clarke agreed in his dissenting judgment in the *VTB Capital* case: [2013] UKSC 5 at [221] – [222] and [234] – [235].

64. Mr Rainey's case is that the court can and should pierce the corporate veil where there is a good arguable case that the defendant has set up the puppet company for the purpose of defrauding an innocent party with whom their puppet company contracts in order to avoid being sued in the courts of a Member State in which the puppet company has agreed to be sued. It was in this context that he relied on the Advocate-General's opinion in *Idrima Tipou AE v Ipourgos Tipou kai Mason Mazikis Enimerosis* [2011] 1 CMLR 42. That case may show that piercing the corporate veil is lawful under EU law, but the passage in that case relied on (see [26] above) expressly states that the Community legislature does not regulate this itself. Accordingly, the question of when it is possible to do so is of necessity thrown back to national law.

65. The references in Lord Sumption's judgment in *Prest v Petrodel Resources Ltd and others* [2013] UKSC 34 (at [27] and [34]) to "abuse of corporate legal personality" as

justifying piercing the corporate veil may appear to give some support to a policy-based approach. But it is clear from the decision of the Supreme Court that, in the present state of English law, the Court can only pierce the corporate veil when "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control": see [35], [60] and [98]. Lord Mance and Lord Clarke (see [100] and [103]) did not want to foreclose further development of the law, and Lady Hale's approach (at [91] – [92] appears to be to the same effect, but that is where English law stands at present. In the light of the decisions in *VTB Capital* and *Prest v Petrodel*, the submission that it is possible to pierce the corporate veil in in this case to deem Mr Lembergs to have consented to the jurisdiction clause is untenable.

66. As to further development of the law, doing so by classical common law techniques may not be easy. In *Prest's* case Lord Sumption (at [28]) identified two underlying principles which he called "the concealment principle" and "the evasion principle". But Lord Neuberger was of the view (at [75] that there is a "lack of any coherent principle in the application of the doctrine of "piercing the corporate veil", and Lord Walker's view (at [106]) was that it is not a doctrine in the sense of a coherent principle or rule of law but a label. Lady Hale (at [92]) was "not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion". Absent a principle, further development of the law will be difficult for the courts because development of common law and equity is incremental and often by analogical reasoning. It was because the law governing undisclosed principals was regarded as unprincipled, that, in the *VTB Capital* case, it was not regarded as a suitable analogy: see [60] above. The position in this context appears similar to the former position in the area of law now recognised to be governed by the principle against unjust enrichment. So, in *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104 Lord Diplock stated the circumstances in which a person who discharged the debts of another may recover the sums so paid defeated classification except as an "empirical remedy". He stated that made "particularly perilous any attempt to rely on analogy to justify applying to one set of circumstances a remedy which has been held to be available in another and different circumstances".

(vii) Conclusion

67. Despite the clear, elegant and attractive way Mr Rainey made his submissions, I would dismiss this appeal and would not refer the question he formulated to the CJEU.

Lord Justice Ryder:

68. I agree.

Lord Justice Lloyd:

69. I also agree.