



SEVILLEJA V MAREX: NEW HOPE FOR CREDITORS OF IMPECUNIOUS COUNTERPARTIES?

The English Supreme Court has handed down its long-awaited judgment in *Sevilleja v Marex Financial Ltd*. The key issue the case has dealt with is the scope of the reflective loss principle in English law. This might not mean much to the average person, but the decision is potentially ground-breaking for creditors of companies seeking justice. This short article explains why.

THE REFLECTIVE LOSS PRINCIPLE

Since the seminal decision in *Prudential Assurance Co Ltd v Newman Industries Ltd (no 2)* [1982] Ch 204, the reflective loss principle in English law has held that a **shareholder** cannot sue directors or other third parties for wrongs that damage the company and cause a consequent loss in the value of the shareholder's shares. Only the company would have standing to claim such loss. The logic behind this principle is to prevent a double recovery: if the loss was made good to the company, this would be reflected in a corresponding recovery in the value of the shares. The effect is that companies (often, in effect, liquidators), and not shareholders, would have to proceed against directors or other third parties to try to recoup losses.

In recent years, the English courts have expanded the scope of the principle, as the Court of Appeal held that it also applied to **creditors** of a company ([2018] EWCA Civ 1468). Creditors would therefore not have direct recourse against third parties and would need potentially to fund a liquidator to recoup lost assets for the company, which would then be shared in the liquidation in the usual way.

SEVILLEJA AND ITS EFFECT

The decision in *Sevilleja*, however, has narrowed the principle significantly. The Supreme Court effectively put it back into its original limits to apply only to claims by shareholders who, by reason of actionable loss suffered by the company in which they have shares, have seen the value of their shares or distribution decreased. Accordingly, it has been clarified that the reflective loss principle does not apply to creditors (even where they are shareholders).

The clarity provided by this judgment may have a positive, practical impact on claimants in the shipping and offshore space. Shipping is a unique industry replete with single purpose vehicles, often with few known assets - those behind them are often quick to sell, transfer or can easily 'let go' if things do not go their way.

Viewed in this context, it will be immediately apparent how the *Sevilleja* judgment can potentially assist parties seeking to enforce claims against delinquent counterparties. To illustrate this, consider the example below:

- charterers bring an arbitration claim against owners of a vessel for breach of the charterparty;
- charterers are successful and obtain an award in their favour; and
- charterers seek to enforce their award only to find that the owners' only asset (the vessel) has been sold and the funds from the sale have been dissipated by the directors of the company, in order to avoid payment of the arbitration award.

Sevilleja would provide charterers in the above scenario with an avenue to bring a claim in tort directly against the directors of the company that owned the vessel for the amount of the arbitration award, interest and costs.

Likewise, a common scenario occurs where a previously active charterer has gone to ground after a disponent owner has obtained an award against it. Should it transpire, come enforcement, that assets have been transferred out of the company without a legitimate purpose for the company's benefit, then *Sevilleja* would provide a mode of attack.



The *Sevilleja* option may be particularly effective in jurisdictions such as Singapore where companies are required to have at least one local director, thus having an easy local target for the service of proceedings. Accordingly, where a Singapore registered company has had its assets stripped or dissipated, a creditor may seek to enforce its claim against the director(s) of the company in Singapore directly. This presumes, of course, that the Singapore courts will follow *Sevilleja*. On that note, given that Singapore is a common law jurisdiction and this is a Supreme Court decision, the decision is likely to carry significant weight (and the same should be the case in Hong Kong). Time will possibly tell; for now, it is certain that *Sevilleja* would be available in England and Wales.

The above has dealt with maritime situations specifically but, as it is company law, it will be applicable in all industries.

FIND OUT MORE

For further information, please contact:



STEFFEN PEDERSEN

T: +65 8218 8854

E: steffen.pedersen@penningtonslaw.com



WILLIAM WILSON

T: +44 (0)20 7390 2273

E: william.wilson@penningtonslaw.com

