

Uavend Properties Inc v Adsaax Ltd & Vistra Trust (Singapore) PTE Ltd: Hat wearing, metaphysics and inducement

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James Morgan QC

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Queen's Counsel

James Morgan QC is a highly regarded commercial practitioner, with particular expertise in the fields of restructuring and insolvency, company and commercial dispute resolution. He has a wealth of trial experience and considerable expertise in applications for interim relief, including freezing orders and injunctions. James is featured as a leader in his fields of expertise by both Chambers UK Bar and The Legal 500 UK Bar.

James Morgan QC, who acted for the successful second defendant in Uavend Properties Inc v Adsaax Ltd & Vistra Trust (Singapore) PTE Ltd [2020] EWHC 2073 (Comm), summarises the decision and its ramifications in this short article. James was instructed by Druces LLP in this case.

Introduction

A Singapore trust company ("**Vistra**") holds 95% of the shares in a BVI subsidiary ("**Adsaax**") and effectively controls it. Vistra nominates two of its employees and directors ("**the Employees**") to act as directors of the BVI corporate director ("**Prudence**") of Adsaax. In 2014, the latter enters into a contract of loan (signed by the Employees on behalf of Prudence) with a third party ("**Uavend**"), which requires repayment on receipt of certain distributions. On the findings at trial, Adsaax is found to have breached the terms of the loan by entering into a set-off agreement in 2015 (signed by the Employees on behalf of Prudence) by which such distributions were re-directed to satisfy another obligation.

Adsaax is liable to Uavend for breach of contract, but is impecunious. Does Uavend have a claim against Vistra for procuring that breach of contract by reason of (a) any direct act of procurement or (b) it being vicariously liable for the actions of its employees? Although, in the words of the Miss Julia Dias QC (sitting as a Deputy Judge) there were "*interesting questions, bordering at times on the metaphysical*", she answered that question in the negative by reference to the law and the facts.

Direct Procurement

This required identification of (a) a relevant corporate act of Vistra and (b) the individual(s) whose knowledge or state of mind was to be attributed to it for that purpose: *Bilta (UK) Ltd v NatWest Markets plc* [2020] EWHC 546 (Ch).

At one level the case was comparatively simple. Adsaax had a

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separate corporate personality from Vistra. The trust structure recognised a distinction between management of the trust and management of companies that it owned. When the Employees caused Prudence to exercise its powers as director of Adsaax, whilst regard could be had to the wishes of Vistra, ultimately those powers had to be exercised in the interests of Adsaax: *Kuwait Asia Bank plc v National Mutual Life Nominees* [1991] 1 AC 187 at 222B-E; *Hawkes v Cuddy* [2010] BCC 597 at [31]-[33]. Accordingly, the Employees' acts of signature on the set-off agreement was, on the face of it, a corporate act only of Adsaax.

The complication arose because, for reasons of efficiency and cost-effectiveness, Vistra relied on the Employees to maintain a high-level view over the affairs of the trust thereby giving them a dual capacity. The Employees therefore "*wore more than one hat*". There were no Chinese walls separating their functions, all documentation for the trust and Adsaax was stored in the same paper and electronic files, and they had only one e-mail address with a Vistra footer. Further, the settlor of the trust had certain powers under the trust and the Employees sought confirmation and approval from him before signing the set-off agreement.

Uavend therefore argued that Vistra had effectively directed Prudence to sign the set-off agreement by means of the control that it exercised through the Employees. The Deputy Judge rejected this argument for the following reasons:

- a) Whilst it might be possible for a single person doing a single indivisible act to procure himself wearing one hat to do something wearing the other, there was nothing over and above the trust structure to support this;
- b) On the contrary, the evidence was that when the Employees signed the set-off agreement they were only doing so as directors of Prudence. If that was correct then they were simply acting as the alter ego of Prudence and not otherwise;
- c) Furthermore, even if the Employees had been wearing two hats when signing it was difficult to see how there could be any "procurement" when the same individual performs a single indivisible act: if the act of procurement cannot be separated from the breach itself, then logically there cannot be any causal link.

In so concluding, the Deputy Judge drew on a highly persuasive decision of the Singapore Court of Appeal in *Bumi Armada Offshore Holdings v Tozzi* [2018] SGCA(I) 05 in which the "*illuminating discussion*" of such issues was contained in the judgment of one Lord Neuberger, the former President of the Supreme Court.

Although the Deputy Judge was prepared to find that the Employees' knowledge (when wearing either hat) was to be attributed to Vistra, she held on the facts that they did not have the requisite knowledge for the tort. This requires the defendant to know of the existence of the contract and that the act which he is procuring will result in a breach thereof. Negligence is not sufficient: *OBG v Allan* [2008] 1 AC 1 at [39]. It simply did not occur to the Employees that the set-off agreement would involve a breach of the loan agreement.

Vicarious Liability

A claim for vicarious liability requires the employee to have acted wrongfully in the course of his employment: *Various Claimants v WM Morrison* [2020] 2 WLR 941. This alternative formulation of the claim also failed because, in addition to the lack of the required knowledge on the part of the Employees:

- a) Following *Said v Butt* [1920] 3KB 497 and *Welsh Development Agency v Export Finance* [1992] BCC 270, Prudence was not liable for procuring a breach of contract by the company of which it was a director;
- b) When signing the set-off agreement the Employees were acting as the alter ego of Prudence and therefore had not done anything "*wrongful*" which could give rise to a tort on their part;
- c) In any event, the Employees were not thereby acting in the course of their employment with Vistra: their duty to Prudence required them to have regard first and foremost to the interests of Adsaax and they were not acting "*in furtherance of the interests of Vistra*";
- d) There were the same problems with causation arising of the single indivisible act.

Conclusion

Although the Deputy Judge had some sympathy for Uavend's plight, it had not managed its own risk by obtaining security for the loan. Further, she concluded the claim against Vistra was "*...an impermissible attempt to bypass the concept of separate corporate personality*". Particularly in the complex world of international trusts where it may be administratively beneficial for employees to wear different hats, this is likely to come as a welcome conclusion.

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