



Prest v Petrodel Resources (Supreme Court)

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Company Commercial partner Max Hudson examines this recent case from a corporate point of view. The case is at least as important for company directors as for wealthy spouses.

"Laws, like houses, lean on one another": **Edmund Burke.**

There has been widespread comment on this high-profile case with the recent redefining judgment of the Supreme Court, with the leading judgment of Lord Sumption, whose pronouncement was as eagerly awaited as his analysis of *Agincourt* still is.

This judgment arose out of a case which originated in the Family Division. However, its ultimate impact may well be greater in the field of company and trust law.

There were three areas involved:

- 'the corporate veil' - should it be torn aside?
- the Matrimonial Causes Act 1973: could it be used to lock into the assets of third parties?
- the creation of a trust obligation: when could companies be regarded as trustees?

This article looks at the first and third areas. As for the second, we only note first that the relevant Section 23 is not to be regarded as a universal panacea and secondly the reason why it brought the case to the Supreme Court.

The phrase 'the corporate veil' is regarded by Lord Sumption, who gave the main judgment, as a term much misused. Indeed it is not a veil to be used, like Salome to obtain the head of John the Baptist. Rather it is a question of corporate individuality - that a company is a discrete and separate individual entity.

Lord Sumption set out clear guidelines as to when this individuality came to an end. These are listed, as set out below. It was not applied in this instance. The setting up of the companies was not to be impugned.

He reviewed these facts and declared that the companies hold the assets on trust. This poses, in a whole range of circumstances, fundamental questions for directors of a company. These are, for when and in what way, do the directors owe duties as quasi-trustees for people other than their shareholders, employees or creditors and how are these obligations to be satisfied? Such an obligation could arise in

other circumstances - not only in a matrimonial context.

The issue was first determined in favour of the wife in the Family Division by Moylan J who decided the case on the primacy of the Matrimonial Causes Act 1973, refusing to cast aside the 'corporate veil'.

It was reviewed in the Court of Appeal, by Rimer LJ and others, who refused to set aside the 'corporate veil'.

The final judgment of the Supreme Court is reviewed here.

Facts and background:

Mr and Mrs Prest are both in their 50's and have dual Nigerian and British citizenship. Both are highly educated. The couple were married in 1993 and have four (now teenage) children. Mr Prest is a very successful businessman, working in international oil development and trade. The family had a very high standard of living - the final matrimonial home in London is estimated as being worth approximately £4 million and the family also enjoyed the use of properties in the Caribbean and Nigeria.

Most of those properties were held in the name of three companies which the husband controlled.

Wife's Case

Mrs Prest's case throughout had been that her husband was worth significantly more than he had submitted. She contended that the husband's net assets were "tens if not hundreds of millions of pounds", rather than the £48 million that Moylan J at first instance had assessed them to be.

It was Mrs Prest's case that s.24 (1) (a) of the Matrimonial Causes Act 1973 (MCA) enabled orders to be made against some of the companies her husband controlled, thereby allowing her a direct claim to the assets of the companies.

As Rimer LJ sets out at paragraph 87 of the judgment in the Court of Appeal, s.24 (1) (a) is "a clear and uncomplicated provision" and went on to say "The inquiry will show that the asset in question either is, or is not, property of the respondent spouse. If it is, it is vulnerable to the exercise of the section 24 jurisdiction. If it is not, it is not."

The section provides that property, to which the respondent spouse is beneficially entitled to, either in possession or reversion, may be the subject of a property adjustment order. The Court role is to first identify property to which the spouse is beneficially entitled to, and then consider whether to make a property adjustment order in relation to that property.

The key issue for the Court of Appeal was whether the property owned by Mr Prest's companies was subject to the s.24 (1) (a) jurisdiction. Mrs Prest's argument centred around the fact that her husband largely controlled the companies as a single shareholder, and therefore she argued that they amounted to his "alter ego".

It was either on this basis, or the fact that the companies held shares and assets as bare trustee for the husband, that he was in possession of such assets for the purpose of s.24 (1) (a).

Husband's Case

The most significant point for the Supreme Court hearing was that the Husbands companies contained certain properties could not be transferred to the wife as they did not belong to the Husband; because they were owned by a number of companies which had their own separate legal personality and not by him personally. His evidence as to his connection with the various corporations had been decisively rejected by Moylan J at first instance.

The appellants were three of the companies which Mr Prest controlled, not Mr Prest himself. They maintained that the assets of the companies belonged to the companies alone and could not be

acquired by the wife. In order for the company assets to become subject to the s.24 (1) (a), it was put forward on behalf of the companies, the 'corporate veil' would have to be lifted, pierced or similar and there are only a few circumstances in which that can happen. The companies argued that this was not one of those.

Mr Prest's manoeuvring in relation to the concealment and providing of information in relation to the scale of his assets did not assist his case. When it reached the Supreme Court and Lord Sumption did not hold back in his criticism for it - much of his analysis addressed the issue on the individual facts.

The Issues before the Supreme Court

Case history

At first instance, in the High Court Moylan J ordered that the properties held in Mr Prest's companies (value of £17.5 million) should be transferred to Mrs Prest. Since Mr Prest had failed to give truthful and accurate details about the extent of his finances his appeal was dismissed at an early stage.

The next stage was to enforce the order. Moylan J ordered that the London and some overseas properties, owned by Petrodel Resources and two other corporate vehicles be transferred to Mrs Prest.

This was justified by the fact Mr Prest was 'entitled' to the relevant properties within the meaning of S24(1) (a) of the Matrimonial Causes Act, (MCA) albeit he did not own the assets himself. The companies owned by Mr Prest which held the properties appealed on the basis that company assets would require their 'corporate veil to be pierced if they were to submit to S24(1) (a) of the MCA, they contested that this only occurred in extreme circumstances and this was not one of them.

The Court of Appeal overturned the High Court's decision and allowed the appeal. This was on the justification that shareholders of a company have no interest or entitlement to a company's assets as they belonged to the separate legal entity that is the companies, not Mr Prest.

This argument was highlighted by Rimer LJ, who said "*a one-man company does not metamorphose into the one-man simply because the person with a wish to abstract its assets is his wife*"

Mrs Prest then appealed to the Supreme Court, the showdown between corporate law principles and justice on matrimonial grounds was set

The key theme in the early phases of the case was beneficial interest. This was put before Moylan J on the basis that such properties should be treated as beneficially belonging to Mr Prest; the companies were the bare legal title holders only. Mrs Prest argued in the Court of Appeal that Moylan J had not decided this issue as he believed that he had power to transfer the properties under s.24 (1) (a) of the Matrimonial Causes Act 1973. The companies appealed to the Court of Appeal arguing the reasoning given by Moylan J was not sound; i.e. the properties belonged beneficially to the husband.

Rimer and Patten LJJ took the view that Moylan J had decided that there was no beneficial interest and rejected the wife's appeal in this respect. Furthermore, they refused permission to go to the Supreme Court on this ground, while granting permission on the issue as to whether the Court had power to make the transfers of property belonging to the company under s.24 (1) (a). The application to the Supreme Court was renewed and it was granted permission.

Lord Sumption, giving the lead judgment of the Supreme Court, held that the properties were indeed held on bare legal title on trust for the husband. The beneficial interest was capable of transfer and the Supreme Court directed that this should happen. The decision was confirmed by all seven Justices of the Supreme Court. Lord Sumption provided a masterly overview of the appropriate caselaw and with great panache distinguished between the doctrine of 'piercing the corporate veil' and the reality and necessary steps concerning the case at hand. This allowed equity to take its course.

Interpretation of S.24 (1) (a) MCA in the wider context of settled law

Lord Sumption, "*Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different.*"

At first instance Moylan J held that the word "entitled" in this section was sufficiently wide to include assets which a husband could reasonably obtain. This was rejected by the Supreme Court.

Piercing the Corporate Veil

Companies are separate legal entities which can own property and which have their own rights and obligations.

In the seminal House of Lords case of *Salomon v A. Salomon & Company Limited [1899] AC22* the position of the "one man" company was addressed. It was argued that a company which was controlled by one person was not distinguishable from the person who controlled it, even given compliance with formal incorporation requirements had been met.

Lord Halsbury forcefully rejected that argument: saying at page 51 of his judgement:

"Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not."

Companies have a separate identity from that of its shareholders. The difference may be nuanced by events but the Courts have been perceptive in their acknowledgement and definition of it, hence Lord Sumption reviewed how the doctrine of "*piercing the veil*" has evolved through caselaw.

The Courts have made it clear on numerous occasions that no shareholder, even one owning 100% of a company, has any right to any item of property owned by the company. Only the company- not the shareholder or any creditor- has any legal or equitable interest in the company's property.

In *Petrodel*, on first Appeal, Rimer LJ referred to the common misconception of lay people that a husband is "entitled" to a house which is owned by a company which he owns, and said of it that "*a lay person might so think but he would be wrong*". He pointed out that the same lay person carrying on a business through a company would be quick to assert that the liabilities of the company were its alone, to be met out of its assets alone. That, said Rimer LJ, is what limited liability is about.

So, when will the veil be pierced? The most recent authoritative case in relation to the piercing of the corporate veil in a commercial context is another case which Rimer LJ assisted to preside over in the Court of Appeal, *VTB Capital PLC v Nutritek International Corporation [2012] EWCA Civ 808*.

That decision reaffirmed the strict limitations identified in the earlier authority as to the only circumstances in which it would be open to 'piercing the veil'. Importantly in *Woolfson v Strathclyde Regional Council [1978] UKHL 5* the House of Lords said that:

"It is appropriate to pierce the veil only where special circumstances exist indicating that it is a mere façade concealing the true facts."

In *Adams v. Cape Industries Plc [1990] Ch 433* the Court of Appeal said:

"... save in cases which turn on the wording of particular statutes or contracts, the Court is not free to disregard the principle of Salomon v A. Salomon & Co Ltd merely because it considers that justice so requires."

In *Ord v Bellhaven Pubs Ltd [1998] 2 BCLC 447* the issue was whether, where a company had insufficient assets to meet its liabilities, it was open to the Court to substitute as defendants its parent

company and another subsidiary which had taken over its trading operations. The trial judge had approached the case on the basis that it was open to the court to regard the companies as one economic unit and to disregard the distinction between them and then to say that since the company cannot pay. As the shareholders are the people financially interested should be made to pay instead. Reversing the decision, the Court of Appeal said that this approach was radically at odds with the whole concept of corporate personality and limited liability.

In *Trustor AB v Smallbone and others (No 2)* [2001] 1 WLR 117 Sir Andrew Morritt V-C said, at paragraph 23, that "*the Court is entitled to pierce the corporate veil and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts thereby avoiding or concealing any liability of those individual(s)*".

It is fair to say that a rather different and less hard edged approach has evolved in the family courts. The origin of this is probably the decision of *Nicholas v Nicholas* in which Cumming-Bruce LJ said:

"If the company was a one-man company and the alter ego of the husband, I would have no difficulty in holding that there was power to order a transfer of the property."

He went on to say that there was "abundant authority" for this proposition, without actually citing any of it.

In *Petrodel*, Rimer LJ speculated in the Court of Appeal that Cumming-Bruce LJ was probably referring to dicta of Lord Denning MR in *Wallersteiner v Moir* [1974] 1 WLR 991, which were later to be discredited by the Court of Appeal in *Adams*. Nevertheless, *Nicholas* has been repeatedly followed and in extreme cases, such as *Green v Green* [1993] 1 FLR 326, the veil was pierced by reason only of the fact of 100% ownership.

The decision in Prest v Petrodel is not entirely unexpected. Recently, in *VTB Capital plc v Nutritek International* (2013) the Supreme Court, held that on the assumption that the Court can pierce the 'corporate veil' on appropriate facts, it would be contrary to authority and principle to extend the circumstances in which the corporate veil may be judicially pierced to enable a person controlling the company to be held liable, as if he had been a co-contracting party with the company concerned, to a contract where the company was a party but he was not, and where neither he nor any of the contracting parties intended him to be.

Petrodel makes a clear statement in this area. In certain very limited circumstances, a court is entitled to treat the assets of a company as though they were the assets of the controlling shareholder: even this is a subtly different thing from saying that the company itself should be disregarded.

Although it was held that it was not appropriate for the 'corporate veil' to be pierced in this case as the law of trusts was able to provide the solution, Lord Sumption stated the law as being that there remains a limited principle of English law which applies, when a person is under an existing legal obligation or liability, or subject to an existing legal restriction which they deliberately evade or frustrate the enforcement by interposing a company under their control, the Court may then pierce the corporate veil for the purpose of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

As the counsel, Richard Todd QC, representing Mrs Prest said "Ultimately the decision represents a triumph for the recognition of reality." This has been the general reception of this judgment. However, this is an interesting and evolving area of law, and although it has played out in a family case may be most relevant to the areas of company and trust law.

Impact:

This case is relevant for companies, and their directors, where there are disparate groups interested in its ownership. Just as a husband or wife might claim an interest in an asset held by a company, so in the case of a joint venture, one contributor might make the same claim. Its impact in the corporate field

is considerable and claims based upon a trust obligation may be simpler than those based upon 'looking through the corporate veil', where the scope is relatively restricted, although the law in this area has been clarified.

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