



BRIEFING

WinckworthSherwood

www.wslaw.co.uk

Divorce and company assets - when can the corporate veil be pierced?

Prest (Appellant) v Petrodel Resources Limited & Others (Respondents) [2013] UKSC 34

Yasmin Prest, married to Nigerian oil tycoon Michael Prest, won her landmark divorce ruling when the Supreme Court ordered Mr Prest's companies to transfer to her a number of properties, including the family home, as part of her lump sum award. The decision has been widely reported as clashing with company law and its well-established concept of the "corporate veil".

Facts

The couple married in 1993 and spent most of their married life living in London. They had four children and enjoyed an opulent lifestyle with properties in London, the Caribbean and Nigeria. Mr Prest conducted his oil business through a series of companies collectively known as "the Petrodel Group", all registered offshore.

The marriage broke down in 2008 and Mrs Prest petitioned for divorce and applied for financial relief. The High Court ordered Mr Prest to pay his wife a lump sum of £17.5 million.

It soon became clear that Mr Prest was not able to satisfy the award because his wealth was tied to his properties which were owned by the Petrodel Group. This raised the question: did the Court have the power to order the transfer of these properties to Mrs Prest given that they were assets belonging to companies he owned, rather than owned by him outright?

High Court – Family Division

The High Court considered this dilemma and decided that there was no general legal principle that entitled them to reach the companies' assets. However, it was held that there was a wider jurisdiction to 'pierce the corporate veil' under section 24(1)(a) of the Matrimonial Cause Act 1973 (MCA). This states that the Court may order that *"a party to the marriage shall transfer to the other party...such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion."*

Relying on this construction, the High Court found in favour of Mrs Prest and held that her lump sum award should be met in part by the transfer to her of properties in the relevant companies.

Mr Prest contested this, arguing that the Court did not have the power to order the transfer of these properties.

Court of Appeal

An appeal was brought by the Petrodel Group on the basis that the companies were validly incorporated and therefore were distinct entities separate from Mr Prest. It was argued that the companies were separated from their owners and controllers by a 'corporate veil'.

The Court of Appeal agreed and overturned the order. It decided that the corporate veil should only be pierced in exceptional circumstances, such as

the deliberate abuse of the corporate personality for improper reasons.

The Court did not consider that any exceptional circumstances applied to this case and the media attention focused on this decision, labelling it the “Cheats Charter”. The implication of the Court of Appeal’s decision was potentially that a company could be under the direct control of a spouse, holding assets considered as marital but, unless the exception above applied, they could never form part of the divorce pot.

Lord Justice Thorpe dissented. He preferred to follow established family law principles which would mean a Court could provide fair shares of marital assets to meet the needs of both parties. Thorpe said that if this law, which family courts used to transfer assets held by a company “owned” by a spouse was overturned, it would mean *“an open road and a fast car to the money maker who disapproves of the principles developed by the House of Lords that now govern the exercise of the judicial discretion in big money cases”*.

Mrs Prest appealed.

The Supreme Court

The Supreme Court considered the circumstances extensively, mindful of the effect their decision would have on the principle of the “corporate veil”.

Use of Matrimonial Causes Act

They considered the Family Court’s application of section 24(i)(a) MCA (see page 1 above) and concluded that it *“cut across the statutory schemes of company and insolvency law”* and that the Court had no jurisdiction to use it as a basis to order the transfer of a company’s assets to a spouse. The Supreme Court did, however, confirm that the Court could properly have regard to a spouse’s ownership or control of a company and the practical ability to extract money from it when calculating the parties’ financial resources.

The exceptional circumstances

They considered the Court of Appeal’s analysis of the law and applied it to the facts of this case.

The “evasion principle”

They considered the “evasion principle”, namely that the corporate personality is being abused for the purpose of wrongdoing. It had been applied in past cases to pierce the corporate veil, but very rarely.

Part of the ‘evasion principle’ is the “concealment principle” the possibility that a company has been erected as a smokescreen to conceal the fact that the owner or controller is the true owner of its assets.

On the facts, however, the Supreme Court could find no evidence that Mr Prest had acquired his companies to “evade” his responsibilities in the divorce proceedings and so there had been no deliberate abuse of the corporate personality for improper reasons.

Obstructive Conduct

The Supreme Court regarded Mr Prest’s conduct during the cases to have consisted of *“persistent obstruction, obfuscation and deceit, and a contemptuous refusal to comply with the rules of the court and specific orders”*. Throughout the proceedings, Mr Prest failed to disclose the true extent of his wealth and the Petrodel Group refused to disclose material documents relating to the purchase and ownership of the properties. The Court reached the conclusion that he was a *“wholly unreliable witness”*.

The Court applied the rule that they are permitted to draw *“adverse inferences”* whenever a party deliberately stays silent on an issue where they would reasonably be expected to provide evidence. The Court held that the Family Court was *“entitled... to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing”*.

It was this conduct that proved to be Mr Prest’s downfall. Suddenly the Court was able to infer that Mr Prest was attempting to conceal the true beneficial ownership of the assets. The Court focused on how the properties had been acquired originally by the companies and dealt with by Mr Prest. After receiving unsatisfactory responses, they held that the companies held the properties beneficially for Mr Prest and consequently, they were capable of being transferred to Mrs Prest.

Was the corporate veil pierced?

Interestingly, applying the “concealment principle” does not strictly “pierce the corporate veil”. It is not considered to be going against the concept that a company has a separate legal identity from its owner if the Court looks behind a facade that was designed to dissemble.

The corporate veil can only be pierced where there has been impropriety, not to ensure justice. A property held by a company as nominee or trustee for another person is to be treated as an asset owned by that other person for section 24(1)(a) MCA 1973 purposes. In this case, the properties were found as a matter of fact to be owned beneficially by Mr Prest and thus fell within the ambit of section 24(1)(a) MCA 1973.

Future implications – have the Supreme Court put the kibosh on the fast car and open road?

Following this judgment, there are likely to be a number of future claims by spouses stating that the assets within their spouse's companies should be drawn into the divorce pot on the “held on trust” basis. This case has already been relied on and

referred to in a number of judgments since it was released by the Supreme Court.

Companies will now have to be more cautious about taking on assets from individuals unless they have clear evidence as to the purpose of the transfer and that they maintain the proper corporate documentation to prove this.

In cases where there is uncertainty surrounding the acquisition of a spouse's company assets, any attempt to conceal information or failure to comply with disclosure orders may lead to an “adverse inference” by the Court. This is especially true if the company is controlled by a single individual. As for piercing the corporate veil – the law is there to do it – but only if the Court infers that the spouse is attempting to conceal assets behind the corporate veil can they order companies to transfer assets to a spouse. But it is likely to be rare - after all, the ruling in Prest was the unanimous decision of seven Justices of the Supreme Court who declined to “pierce” in this case.

For further information, please contact:



Amanda Andrews | Partner

T: 020 7593 5009

E: aandrews@wslaw.co.uk



Katie Spooner | Partner

T: 020 7593 5032

E: kspooner@wslaw.co.uk



Anna-Laura Lock | Associate

T: 020 7593 0382

E: alock@wslaw.co.uk



Alex Woolley | Solicitor

T: 020 3735 1916

E: awoolley@wslaw.co.uk