

Update - "piercing the corporate veil" - Prest v Petrodel Corp [2013] UKSC 34

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More clarity but no more finality on "piercing the corporate veil" - *Prest v Petrodel Corp* [2013] UKSC 34.

VTB Capital plc v Nutritek International Corp and others [2013] UKSC 5 [2013] 2 WLR 398 assumed that a doctrine permitting piercing of the corporate veil of a company existed, but decided that the doctrine could not permit a party to secure the imposition of a company's contractual liability on those who controlled it.

Now the subject recurs a few weeks later in the decision of the UK Supreme Court on the matrimonial affairs of Mr and Mrs Prest, and the involvement of the companies controlled by Mr Prest. The companies owned the legal title to a substantial property portfolio. The trial judge in Family proceedings ordered the transfer of some of those properties by Mr Prest to his wife in satisfaction of a lump sum order. The Court of Appeal by a majority held that he had no power to do so.

Lord Sumption defined the bases on which the Judge might have acted as (i) a power in the Court to disregard the ownership of the properties by the companies; (ii) a power conferred by statute (the Matrimonial Causes Act 1973) to effect the transfers; (iii) a finding that the companies were not, but the husband was, the beneficial owner of the properties.

Lord Sumption, with whom Lords Neuberger, Mance and Walker specifically agreed, concludes that, if there is no statute expressly providing for identification of a company with an individual or another person, the separate identity of a company can be disregarded only for the purposes of terminating concealment by a wrongdoer of his wrongdoing, or evasion by a person of his liabilities. He summarises at paragraph 35:

"...there is 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 he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only 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. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

That agreement constitutes a majority of the Supreme Court: but it is worth noting that Lord Clarke said that he agreed:

"that the court only has power to pierce the corporate veil when all other more conventional remedies have proved to be of no assistance. It is thus likely to be deployed in a very rare case. Lord Sumption may be right to say that it will only be done in a case of evasion, as opposed to concealment, where it is not necessary. However, this was not a distinction that was discussed in the course of the argument and, to my mind, should not be definitively adopted unless and until the court has heard detailed submissions upon it. I agree with Lord Mance that it is often dangerous to seek to foreclose all possible future situations which may arise and, like him, I would not wish to do so."

This is clearly not the last word on this subject so far as English law is concerned: but it is possible to state that most cases in which this metaphor has been used could have been decided in exactly the same way without recourse to this particular metaphor.

All the members of the Court agreed that piercing the corporate veil was not the route to upholding the judge's order. Nor was the suggested statutory power; the Act should not be construed as overturning so important a rule as the separate legal personality of companies. But the properties were, on the evidence, held on trust for Mr Prest, and for that reason, the judge's order could be upheld.

The case is also notable for the analysis of the failure or refusal of the companies to give evidence on the beneficial ownership of the properties. Lord Sumption cited some "fierce" remarks of Lord Diplock concerning the common sense of drawing inferences against a party who calls no evidence on a subject within the knowledge of its employees, but preferred a more moderate statement by Lord Lowry which was unanimously agreed in *R v Inland Revenue Commissioners, Ex p TC Coombs & Co* [1991] 2 AC 283, that if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.

Even so, matrimonial financial proceedings involve a public interest, and are inquisitorial and not adversarial. Accordingly, the burden of proof, which inhibits the drawing of adverse inferences against a claimant or plaintiff, has much less force: the judge should draw such inferences as his experience suggested from the absence of positive evidence led by the party controlling the relevant assets.

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