UNDER THE WIRE

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PREST V PETRODEL RESOURCES LIMITED: 2013 UKSC 34

The famous case of Salomon v A Salomon & Co established the core principle of company law that a company has separate legal personality distinct from that of its owner(s). By way of example: however simple the structure of Beagle Limited – 1 issued share; 1 owner (Mr Pink) who is also the director - it has a legal life of its own. Beagle Limited owns its own property and is responsible for its own liabilities. Mr Pink cannot take and use Beagle's assets to pay his own debts; nor is he responsible for Beagle's debts. The only exception to this principle occurs with the doctrine of piercing the corporate veil, which occurs when "a person who owns and controls a company is said … to be identified with it in law by virtue of that ownership and control" [para 16]. The owner and controller is fixed with the rights and liabilities of the company. But the circumstances for when that occurs have not been very clearly defined.

This doctrine has been hunted up hill and down dale in recent months; twice in the last year it has outwitted those quickest of predators, the judges of the Supreme Court of the United Kingdom (formerly the House of Lords). It has made it out of the field alive: but only just and in a limited form. On 12 June 2013 the Supreme Court handed down its decision in the second of the two cases, Prest v Petrodel Resources Limited. The case is highly relevant in the Channel Islands and across the common law world, where it will have persuasive effect even where it is not binding, because of the high regard in which the Supreme Court is held.

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This was an ancillary relief case, in which Mrs Prest sought to part-satisfy the monetary order made in her favour by the divorce judge by means of procuring a transfer to her of certain properties, legal title to which was vested in various companies wholly owned, whether directly or indirectly, by her ex- husband. She argued the corporate veils of these companies should be pierced and their assets used to satisfy her husband's debt to her, but in this she failed. Nor did she succeed in showing that that the relevant provisions of the Matrimonial Causes Act gave statutory justification for treating the assets of a wholly owned company as amenable to the property adjustment provisions (as had been found at first instance). Rather, the court found that on the facts of her particular case the various corporate entities held these assets on trust for her husband, and thereby formed part of the property belonging to him, over which the court could therefore exercise a power to order enforcement. The decision was made on principles of traditional property law: the court did not accept the bare assertions of the companies that they were the respective beneficial owners, and inferred from the lack of evidence adduced that the purchase money for the properties had been provided by the husband; therefore in each case there arose a

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"purchase money resulting trust" (where the beneficial ownership is vested in the paying party).

Although this was a case decided on its facts the Supreme Court took the opportunity that it had let go earlier in the year in the first of the two cases on the topic, VTB Capital v Nutritek, to tear some significant strips off the doctrine of piercing the veil. Counsel for the companies had a good go at arguing that the doctrine should be put out of its misery altogether, on the basis that the cases either assumed the doctrine existed without deciding that it did, and/or could be explained on other bases, and because over the course of its relatively short life, it has received a mauling both in courts overseas and in academic writings. They nearly succeeded in persuading, in particular, Lord Neuberger [cf paras 70-80]. But Lord Sumption, giving the leading speech, found that the doctrine was, despite these criticisms, well enough established in the authorities [paras 27, 29-30], and confirmed there needed to be room for it in the exceptional situation where there was no other remedy [para 35], because the law ought "not to be disarmed in the face of abuse"[para 27].

The starting point, therefore, is the policy upheld by the courts that fraud should unravel everything. Any advantages that are obtained by dishonesty cannot stand. Where a company is used as a means of evading the law, then it may often be that the advantages of corporate personality are being used for dishonest means and this will not be allowed.

Whereas previously the courts might have analysed whether or not the relationship of company and its owner constituted a "sham" arrangement, the Supreme Court has now defined two distinct situations: 1. Where one or more companies are interposed to conceal the identity of the true actors ("the concealment principle") and 2. where there is an independent legal right against the controller of the company, and a company is interposed between the holder of that right and the controller in an endeavour to have the separate legal personality of the company defeat its enforcement ("the evasion principle"). Where the concealment principle is engaged, the court simply looks behind the company and will find the controller liable. This does not involve piercing the veil, although it might be described as "lifting" it. But where the evasion principle is satisfied then the court will make the company itself liable (so piercing its veil), so that the abuse of separate corporate personality is not allowed.

It is important to appreciate that there are many situations in which a remedy may be obtained against the company itself directly – for example, if Mr Pink steals money from Brother Fox which is paid straight into Beagle Limited, he is liable to account personally to Brother Fox because Mr Pink is the beneficiary of the proceeds held by Beagle under a bare trust for him, alternatively because Beagle receives it as his agent ("concealment"). Beagle is liable to account personally to Brother Fox because Beagle received the stolen money knowing (through Mr Pink its director) of the theft. In such a case, there is no veil-piercing required, and so the remedy is not available. The key to the evasion principle applying, is that the liability being evaded or frustrated must arise independently of the company. This is why Mrs Prest did not succeed in her veil-piercing claim: her ex-husband, for all his dishonesty, had not used his companies to evade his liability to her, because the corporate ownership of the properties well predated the court order and had genuinely been established for other reasons. It is also why in the other case, VTB Capital v Nutritek, the court would not use the doctrine to justify making the company controllers liable on a company contract.

So, the doctrine survives after quite a critical mauling, but in leaner form.

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