

# Introduction

- Tension between Corporate Law and Family Law came to a head this year with the landmark case of **Prest v Petrodel**.
- It highlighted the difficulties in identifying and allocating assets necessary for the process of undertaking the balancing act when dividing assets upon divorce with added complexities which arise for the Family Court in England where assets are held outside that jurisdiction.

## Issues raised

- Could/ would the Family Court ‘continue to “pierce the corporate veil” when it felt it was necessary
- And would it tackle the ‘cheats charter’?

# The Problem

- This becomes a problem for Directors and Trustees in the Isle of Man who hold or administer assets on behalf of a beneficial owner(s) who may be subsequently involved in divorce proceedings

# Prest v Petrodel- The Facts

- Mr & Mrs Prest married 1993, significant wealth with numerous properties in Nigeria Caribbean & London a number of which held in IOM companies, 4 Children
- Mr Prest wealth from oil trading business believed to be at least £37 million
- Manx Companies (inc Petrodel & Vermont) joined as parties but like H did not actively participate in disclosure process at 1st instance

# Prest V Petrodel

- No shareholding in H ownership
- Funds for property purchases originated from H although he claimed inherited wealth
- Properties not obviously engaged in oil trading business
- H showed “determination to frustrate the wife's claims on him”

# Prest v Petrodel

There were two principal issues surrounding the question of whether the husband was 'entitled' to the properties held by the Petrodel Group. The issues were:

- The extent of the husband's wealth - particularly did the husband's control of the respondent companies provide evidence that he was entitled; and therefore
- Whether the court had the power to make orders directly against properties and shares held in the name of the companies, and order them to be transferred to the wife.

## What the Court did

- The 1<sup>st</sup> instance court made orders requiring the H to *transfer or cause to be transferred* assets to Mrs Prest on the basis, common in the Family court, that H was in control of the Companies and the directors stooges or ciphers

# Issues in the Court of Appeal

- Did the Court have the power to make orders directly against properties and shares held by the companies, to then transfer them to the wife?
- Would Mrs Prest be able to recover assets from a corporate structure during family proceedings? Thus, could the 'veil of incorporation be pierced' in family proceedings as an exception to the usual rules in Company Law



# Court of Appeal

## Corporate view

- *“I wish particularly to support Rimer LJ’s criticism of the dicta in Nicholas and his view that these cannot be relied upon as a correct statement of the law following the decision of this court in Adams v. Cape Industries plc. They have led judges of the Family Division to adopt and develop an approach to company owned assets in ancillary relief applications which amounts almost to a separate system of legal rules unaffected by the relevant principles of English property and company law. That must now cease.”*

- Patten LJ §161 CA



## Court of Appeal- family view

- *“If this court now concludes that all these [family veil-piercing] cases were wrongly decided they present 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.”*

- Thorpe LJ, §63 CA jmnt



## Supreme Court Judgment

Although the Supreme Court has now ruled in favour of the ex-Mrs Prest it reiterated the most fundamental principles in company law:

- that companies are distinct from the individuals controlling them (own 'legal personality'). Control does not necessarily equate to ownership
- It is not correct that the corporate veil does not matter in family cases where the H is in sole control of the Company
- It found Mr Prest had bought the properties with his own money in the name of the Companies. The Companies were therefore held on resulting trust for him

# Family Law Property Adjustment Orders

In the past the Family Law Courts in England had used Property Adjustment Orders to adjust shares in property between the parties of the marriage.

The Court has power to:

- alter the share in the family home,
- make orders for immediate sale, or
- to delay the sale until any children have left home or until circumstances change.

This is the same in England or the Isle of Man

# Manx

## Matrimonial Proceedings Act 2003 s29

- (1) For a divorce, annulment or separation order or any time afterwards, Court may make PAO in favour of:
  - either party to the marriage,
  - a child of the parties to the marriage or (for transfer of property order) any other person.
- (2) For divorce or annulment such an order may be made either before or after final order.
- (3) The Court may make a settlement variation order even without children of the parties
- (4) ....

# English

## Matrimonial Causes Act 1973 s24

- (1) For a decree of divorce, nullity of marriage or judicial separation or any time thereafter court may make—
  - (a) an order that a party to the marriage transfers to other party/ any child of the family such specified property, being property the first-mentioned party is **entitled** to, in possession or reversion;
  - (b) an order that settlement of such specified property, be for benefit of other party/ the family children/ either or any of them;
  - (c) an order varying for benefit of the parties/ the family children/ either or any of them any ante-nuptial or post-nuptial settlement (inc. settlement by will or codicil) made on the parties, excepting a pension arrangement
  - (d) an order extinguishing/reducing interest of either party under such pension arrangement; for (a) above, subject to s29(1) and (3) restrictions (orders for property transfer in favour of children aged over eighteen).

## Entitlement to Property

‘Property’ is not defined in the Manx legislation, whereas in comparison the English legislation states ‘specified property’ is property to which the first-mentioned party is entitled, either in possession or reversion.

In previous cases the Family Court in England had considered that a party was entitled if they exercised ‘control’ over the entity and had made Orders requiring third parties (including Trusts or Companies) to transfer assets to the other Party

# 'Piercing the Corporate Veil'

- The corporate 'veil' effectively separates the legal person who owns the company from the company itself.
- Director's assets remain untouched, without misconduct or personal guarantees from the Director.
- In earlier cases the Family Court in England made orders transferring assets if a party had appeared to control them notwithstanding they were held by a company or trust

# Family Law Position

## ***Ben Hashem v Ali Shayif***

- *Piercing the corporate veil* in family cases justified the varied grounds and criteria into six concrete principles:
  1. Ownership
  2. Interests of justice
  3. Impropriety
  4. Conceal Liability
  5. Conceal wrongdoing
  6. Facade
- BUT piercing the corporate veil should only be so far as is necessary to provide a remedy for the particular wrong the controller of the company had done

# Disclosure

## *The View of the English Family Court - J v V*

- Coleridge J stated that in order to prevent an exhaustive search enquiry, respondents to applications for ancillary relief are required to be even more forthcoming with their exposure and explanation of their assets than in conventional onshore cases. Otherwise skulduggery is instantly presumed. Applicants justifiably believe that advantage is being taken to hide assets from view amongst complex corporate undergrowth.
- He reiterated that such offshore structures were now familiar to the Judiciary and they neither intimidated nor fooled anyone. A presumption was made in effect that they had something to hide.
- Finally judge warned those attempting to 'hide' assets in the 'complex corporate undergrowth' that they would be at risk of paying the costs of the enquiry to uncover it.

- The Supreme Court found Mr Prest made sure his assets were not transparent which caused the Judge at first instance to have hesitations and doubts over just how bona fide his Corporate Structure was.
- "The judge's findings about the ownership and control of the companies mean that the companies' refusal to co-operate with these proceedings is a course ultimately adopted on the direction of the husband. It is a fair inference from all these facts, taken cumulatively, that the main, if not the only, reason for the companies' failure to co-operate is to protect the London properties. That in turn suggests that proper disclosure of the facts would reveal them to have been held *beneficially* by the husband, as the wife has alleged."

# Properties held on trust

- How did the court decide that the properties were held on trust?
- Mr Prest's companies owned the properties in question. However Mr Prest was the beneficial owner and sole Director of most of them.
- Most companies just held property.
- Court noted that the ownership of residential investment property in London appears to have nothing to do with the oil trading business in which Petrodel was then engaged
- a consistent pattern can be discerned by which the husband causes properties to be acquired with funds provided by Mr Prest by companies under his control, nominally funded by Petrodel but in fact by himself. Court concluded that in the absence of any explanation of these transactions by the husband or his companies, the properties were *beneficially* owned by Mr Prest.
- Accordingly disputed properties vested in Petrodel and Vermont held on trust for the husband, and Order at 1<sup>st</sup> Instance restored so far as it requires those companies to transfer them to Mrs Prest.

# Variation of Trusts

- BJ v MJ 2011
- Court can view the whole structure when questioning whether it constituted a variable nuptial settlement.
- Trust 1 was found, unquestionably, to be a post-nuptial settlement.
- The husband (settlor), Wife and Child were excluded from benefiting from Trust 2 but it was an integral component of the overall tax arrangement.
- that the entities "viewed as a whole" constituted a post-nuptial settlement capable of being varied, and confirmed a decision upon the principles of needs and sharing.
  - all assets, including all the trust property, constituted matrimonial property and should, in principle, be shared equally.
  - The equal sharing should reflect clear arrangements made during the marriage, assented to by the Wife, to set up a trust ultimately to benefit the Child and future generations.

# Enforcement outside England

The English Family Court has also made Orders purporting to transfer property outside the jurisdiction of England.

Although the legislation is in place, the necessary reciprocal subsidiary orders have not been made and thus it is at present not possible to enforce directly an English Order relating to Capital in the Isle of Man or any Crown Dependencies. This applies to all types of Capital Orders including Pension Shares, transfer of assets out of Company etc.

# Variation of Overseas Trust

MCA 1973 s.24 (i) (c)

‘A family company which under an arrangement makes some form of continuing provision for both or either of the parties to a marriage is capable of itself of amounting to a variable nuptial settlement whether or not the company is owned by a trust.’ [DR v GR\(Financial Remedy\)2013](#)

Not dealt with in Prest

BUT

[Re Yearwood \(IOM 2011 Judgments.im\)](#)

Deemster Corlett stated “had Applicant sought an Order giving recognition to the rewriting of the Trust Deed which was purportedly effected by the English Court.... it would in my view have succeeded”



# Guidance for Trustees

## **Where the proper law of the trust is English Law or there is property in England:**

- the trustees or Directors should consider being joined by the Court so that the interests of other beneficiaries or settlement or the company itself can be represented in the proceedings between the Parties
- Neutrality can be demonstrated by the trustees' solicitors writing simultaneously to both spouses' solicitors.
- Trustees or Directors should have separate legal representation from the outset which helps to give greater weight to what trustees may say.
- It is not good practice to seek to obfuscate or frustrate the Court in England. Advice should be taken if request for information made.



# Guidance for Trustees

## **Where the proper law of the trust is not English law:**

- consider applying to our court for directions on how the trustees should respond, this may be regarding disclosure and/ or intervening in the proceedings.
- As trust lawyers and managers tend to view spouses as useful for tax purposes, settlors and beneficiaries should be warned of the possibility of a future divorce if spouses are to be included in any class of beneficiaries.
- Where one of your beneficiaries of a substantial trust is considering marriage do advise that they consider a pre-nuptial agreement in all relevant jurisdictions. They may not be binding but could be of evidential value.
- Advisers should consider whether there is an opportunity for ‘forum shopping’ in the context of divorce. Some offshore jurisdictions may be more favourable and protect trusts against claims from personal relationship rights.
- onshore assets that are in offshore trusts are still vulnerable (C v C [2003]).



# All change/no change?

1. MCA s.24(1)(a) “entitled” narrow: enforceable right
2. Family courts “do not occupy a desert island” must follow company law principles§37
3. “But one law”: once ownership clear, same results
4. Family law “discretion” confined to owner allocation
5. More work for auditors (as well as wealth-planners)!
6. More preparatory work for CSPs, Trustees and Directors

**Conclusion:** *all* change; + more integrity/respect

– viz. **M v M & others** [2013] EWHC 2534 (14/8/13):

- seek evidence of actual intention (incl by adv. inf)
- in default of evidence, presume payer = owner
- Matrimonial Home(s) quite likely to be held for controller

# And now what!?

- Implications
- Your views and questions?

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