

Family law news: 'Prest' into a corner? The implications of Prest v Petrodel Resources Limited

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The case of Prest v Petrodel Resources Limited and Others [2013] UKSC 34 has been a battle, through the English High Court, Court of Appeal and Supreme Court, between the principles of corporate integrity on the one hand and fairness on divorce on the other, as much as between Mr and Mrs Prest and the companies in which Mr Prest had an interest. In giving judgment on 12 June 2013, the Supreme Court upheld the sanctity of the principle of corporate integrity but found a solution, on the facts of the case, to provide for Mrs Prest on divorce.

The crux of the case – for determination by the Supreme Court – was whether properties owned by companies of which Mr Prest was the controlling director and shareholder could be sold or transferred to Mrs Prest in order to fund her divorce settlement.

The majority of the wealth generated by Mr Prest during the marriage was held through these corporate structures. Mr Prest claimed that the properties belonged to the companies and not to him – he said he was in fact £48m in debt – and could not therefore be subject to an Order of the English Court on divorce.

Mrs Prest sought over £30m, claiming that her husband was worth tens, if not hundreds, of millions of pounds, to include the value of his corporate assets. One of the main witnesses (a former director of the companies) gave evidence to the effect that the companies were the alter ego of Mr Prest and that he was the effective owner who controlled every business decision and incurred significant personal expenditure through them.

The Supreme Court held as follows:

1. A company is a separate legal personality (upholding years of case law since the 1897 case of Salomon v Salomon & Co Limited): a company's assets are owned by the company, not by its shareholders, who have only a right of participation in accordance with the company's constitution. Therefore, the English Court cannot, save in exceptional circumstances, transfer assets owned legally and beneficially by a company to a spouse on divorce (in the same way that a company's creditors cannot seek to enforce debts owed to the creditors by the company against assets owned by the company's shareholders).
2. The Court may 'pierce the corporate veil', i.e. look through the company and treat the company and a person who owns and controls the company as one and the same, only if the corporate structure has been used for the purpose of avoiding a liability or other legal obligation owed to a third party. In these limited circumstances, the Court may pierce the corporate veil and treat the controller as owning the company's assets directly in order to deprive the company or controller of an advantage that they would otherwise have obtained by virtue of the company's separate personality. As music to the ears of Chancery lawyers, the Supreme Court made it clear that this is a wholly exceptional remedy, which will only be granted if there is no other remedy available to address the wrong.
3. The wording of s.24(1)(a) of the Matrimonial Causes Act 1973, which enables the Court to order a spouse to transfer property on divorce to which he 'is entitled, either in possession or reversion', must be given the same meaning in the Family Division as in the other divisions of the English legal system. The Supreme Court held that 'Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the County Courts. If it does not exist, it does not exist anywhere'. The Supreme Court held that a spouse cannot not be treated as being 'entitled, either in possession or reversion' to property owned by a company simply because he could, as controller of the company, cause the property to be transferred to him.

So where was the comfort for Mrs Prest?

4. The Supreme Court made findings that Mr Prest provided the purchase monies for the properties held by the companies. It decided that Mr Prest had therefore intended to retain, and had retained, the ownership of the properties in dispute, i.e. there was a resulting trust in Mr Prest's favour in respect of the beneficial interest in the properties and, consequently, the Court ordered Mr Prest to transfer the properties to Mrs Prest.

The Supreme Court's findings (as to the ownership of the properties) were based on adverse inferences drawn by the Court against Mr Prest, who was found in the High Court to have engaged in 'persistent obstruction, obfuscation and deceit, and a contumelious refusal to comply with rules of court and specific orders'. The Supreme Court held that the failure of parties, like Mr Prest and the companies who had been joined as Respondents to the proceedings, to engage properly with the proceedings entitled Judges exercising family jurisdiction 'to draw on their

experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing!

The Supreme Court also gave potentially far reaching guidance in relation to the ownership of the matrimonial home. It held that 'in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned control of the company'. If a property owned by a company is being used as a matrimonial home, or perhaps a frequent holiday home, the inference of a resulting trust may be strong, unless there is clear evidence before the Court to the contrary.

Prest into a Corner?

So what are the implications of the *Prest* case going forward?

1. There is likely to be an increase in claims on divorce that properties held by corporate or trust structures are in fact held on trust for the controllers of those corporate/trust structures.
2. Individuals who are transferring assets into corporate or trust structures (and those advising them) will need to set up a watertight paper trail as to the ownership of the assets in question and the intentions of the person who provided the purchase monies.
3. If properly set up, documented and run, it is likely to be very difficult to argue that assets owned by a corporate/trust structure are held on a resulting trust for the effective controller of such structure (or the person who provided the purchase monies for the assets owned by the structure). Individuals and companies should take legal advice at an early stage to ensure proper documentation is in place.
4. The High Court held in *Prest* that the companies had been set up for the purpose of 'wealth protection and the avoidance of tax'. Offshore corporate and trust structures are commonly used by resident non-domiciliaries to hold residential property located in this jurisdiction, in order to take the property out of their estate for inheritance tax purposes (although such residential properties with a value of more than £2m will now be subject to the annual residential property tax charge and increased rates of stamp duty land tax and capital gains tax). Against the litany of adverse inferences coupled with his non-compliance in the proceedings, Mr *Prest's* tax planning objectives were not, held to demonstrate sufficient contrary intention to rebut the presumption of a resulting trust. When setting up structures for tax planning purposes, clear evidence of intention will need to be recorded to counter any later resulting trust claim.
5. The Supreme Court elected not to provide further guidance as to what constitutes a 'nuptial settlement' for the purposes of s.24(1)(c) of the Matrimonial Causes Act 1973 – being the statutory provision which gives the divorce court the power to vary trust structures in certain circumstances.

In the 2013 case of *DR v GR*, Mr Justice Mostyn has fuelled the ambit of that debate by commenting that '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 of which the spouses are formal beneficiaries'. He went on to say that if 'some form of continuing provision for both or either of the parties to a marriage' has been made, 'which would include, on the authorities, the provision of accommodation... from assets held by a group of family companies then the entire set-up, when viewed as a whole, is capable of amounting to a variable nuptial settlement'.

It remains to be seen post-*Prest* whether the appellate courts will accept that rationale.

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