



Family law and the corporate veil: accessing company assets on marital breakdown after *Prest v. Petrodel Resources Ltd*

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Family Law and the Corporate Veil: Accessing Company Assets on Marital Breakdown after *Prest v Petrodel Resources Limited*

Introduction

When, if ever, can a company's assets be used to meet the family law liabilities of private persons? This question has arisen infrequently in Irish law, perhaps because family lawyers tend to assume that assets held by family companies are relevant to financial provision on marital breakdown. This assumption may appear quite reasonable: why should a family be left in want simply because some assets, perhaps even the family home, are held through a company? This argument is strengthened where a corporate structure may have been used to frustrate family law obligations, or where one spouse was clearly the guiding force behind the company. Yet looking behind corporate structures is problematic, since it contravenes established company law principles and may impact hugely on company creditors.

The Irish courts have not yet specifically addressed the issue of accessing company assets for family law purposes, though the Supreme Court has hinted at the need for a thorough evaluation.¹ Such an assessment now seems likely, following the recent decision of the UK Supreme Court in *Prest v Petrodel Resources*.² The UK Supreme Court repudiated the general practice of 'piercing the corporate veil' in the family law context (though finding for the wife in the circumstances of the particular case), and adopted a restrictive doctrinal approach to the piercing of the corporate veil in general. The decision seems likely to have a serious impact on financial orders in the divorce context in England and Wales, since the exceptional grounds that permitted the wife to succeed in *Prest* are unlikely to be commonly replicated. The question therefore arises as to whether the Irish courts are likely to follow the UK approach on the issue of piercing the corporate veil to make company assets available to satisfy family obligations, and whether they should, in fact, do so.

This article outlines the doctrinal background to the debate and charts the approach taken in Irish family law cases to date. It then considers the key principles set out by the UK Supreme Court in *Prest*, evaluating the ruling and its possible impact on Irish law. In conclusion, it is argued that although the decision in *Prest* will be welcomed by many company lawyers, it creates serious difficulties in the family law context. However, these difficulties are not necessarily insurmountable, since (even if it is followed in Ireland) the ruling leaves open several possible avenues whereby some level of access to company-held resources may still be obtained.

Background: Lifting the Corporate Veil

It has been established since *Salomon v Salomon & Co Ltd*³ that a company possesses a separate legal personality to its shareholders. In principle, therefore, the shareholders cannot be liable for the company's debts, any more than the company can be liable for the shareholders' debts. In practice, however, this principle is not

¹ *BD v JD* [2004] IESC 101, discussed below.

² *Prest v Petrodel Resources Limited* [2013] UKSC 34.

³ *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).

universally applied. Quite apart from various statutory modifications of the rule,⁴ the courts may ‘lift’ or ‘pierce’ the corporate veil to prevent the perpetration of fraud or injustice,⁵ where the company structure is being used in an improper way.⁶ Ottolenghi has identified four ways in which the corporate veil may be pierced, ‘each one used in different circumstances and for different reasons’,⁷ which he categorises as ‘peeping behind the veil’, ‘penetrating the veil’, ‘extending the veil’ and ‘ignoring the veil’.⁸ However, these terms have not been adopted in practice.

While the exact principles applied by different jurisdictions may vary, Keane suggests that the veil may be pierced in Ireland to prevent incorporation being misused ‘for a fraudulent, illegal or improper purpose’, and that even without such misuse ‘the courts may nonetheless infer the existence of an agency or trust if to do otherwise would lead to injustice or facilitate the avoidance of tax liability’.⁹ The courts may also treat a group of companies as a single entity, ‘particularly where to do otherwise would have unjust consequences for outsiders dealing with companies in the group’.¹⁰ Keane also notes that ‘the rule in *Salomon’s* case does not prevent the court from looking at the individual members of the company in order to determine its *character* and *status* and where it legally resides’.¹¹ These propositions were cited with approval by Laffoy J in *Fyffes Plc v DCC Plc*,¹² though the Irish Supreme Court has also emphasised that *Salomon* remains ‘the cornerstone of company law’.¹³

To date, the Irish jurisprudence has not offered a clear test for piercing the corporate veil. In the English case of *Ben Hashem v Al Sharif*,¹⁴ the wife alleged that two UK properties held by a company really belonged to her husband, and that the company was the husband’s *alter ego*, of which he had total control. The husband was the only person to contribute or withdraw funds from the company. The company’s properties could not be sold without the husband’s consent, and he alone received any sale proceeds. Munby J emphasised that the requirements for piercing the corporate veil were identical in family and non-family contexts, and formulated six principles:

1. Ownership and control of a company do not themselves justify piercing the corporate veil.
2. The court cannot pierce the veil simply in the interests of justice, even in the absence of third-party interests.
3. The corporate veil can only be pierced where there is an impropriety.

⁴ For an account of limited statutory exceptions to the principle, see Ronan Keane, *Company Law in the Republic of Ireland* (4th edn, Tottel Publishing Ltd 2007) 127–29.

⁵ *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (CA).

⁶ In the UK at least, injustice alone will not justify the piercing of the corporate veil: see *Adams v Cape Industries Plc* [1990] Ch 433 (CA) 536.

⁷ S Ottolenghi, ‘From Peeping Behind the Corporate Veil to Ignoring it Completely’ (1990) 53 MLR (ns) 338, 340.

⁸ *ibid.*

⁹ Keane, *Company Law* (n 4) 145.

¹⁰ *ibid.*

¹¹ *ibid.* (emphasis in original).

¹² *Fyffes Plc v DCC Plc* [2005] IEHC 477.

¹³ *Allied Irish Coal Supplies Limited v Powell Duffryn International Fuels Limited* [1998] 2 IR 519 (SC) 534.

¹⁴ *Ben Hashem v Al Sharif* [2008] EWHC Fam 2380; [2009] 1 FLR 115.

4. This impropriety must be ‘linked to the use of the company structure to avoid or conceal liability’.¹⁵
5. The wrongdoer must both control the company and have misused it to conceal his wrongdoing.
6. The company may be a ‘façade’ even if it was not originally incorporated as such, as the purpose and use of the company may have changed over time. The question is whether or not it was being used for deception at the time of the relevant transactions. However, the court would only pierce the corporate veil so far as was necessary to provide a remedy for the particular wrong committed by the individuals controlling the company.

On the facts, Munby J held that the wife had not established that the husband possessed the requisite degree of control over the company to justify lifting the veil, and that there was no relevant impropriety to support intervention. The husband had merely taken advantage of the rules on corporate structure, and was entitled to the benefit of the principle in *Salomon*.

Subsequently, in *VTB v Nutritek International Corporation*,¹⁶ the English Court of Appeal held that the ‘relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts’.¹⁷ It also suggested that it was unnecessary to demonstrate a lack of alternative remedies before piercing the corporate veil. However, this second point was rejected by the UK Supreme Court on appeal.¹⁸

In fact, the UK Supreme Court declined to confirm whether or not the courts could ever pierce the corporate veil, casting some doubt on the very existence of the principle. Lord Neuberger (with whom the rest of the Court agreed) stated that there was an ‘obvious attraction in the proposition that the court can pierce the veil of incorporation on appropriate facts, in order to achieve a just result’.¹⁹ However, he held that it was unnecessary to rule on this point conclusively since piercing the veil was inappropriate in the particular circumstances of the case. The Irish Supreme Court, by contrast, has recognised the principle of piercing the veil to some degree, albeit not in a written judgment and only on the point of treating related companies as a single entity in appropriate circumstances.²⁰ However, the leading Irish judgments are High Court decisions,²¹ and the Irish Supreme Court has not yet applied the doctrine in practice.²²

¹⁵ [2008] EWHC Fam 2380 [162] (Munby J).

¹⁶ *VTB Capital Plc v Nutritek International Corpn* [2012] EWCA Civ 808; [2012] 2 Lloyds Rep 313.

¹⁷ [2012] EWCA Civ 808 [80] (Lloyd LJ).

¹⁸ *VTB Capital Plc v Nutritek International Corpn* (Rev 1) [2013] UKSC 5.

¹⁹ *ibid* [121] (Lord Neuberger).

²⁰ *Re Bray Travel Limited and Bray Travel (Holdings) Ltd* (SC, 13 July 1981), approving comments of Costello J in *Power Supermarkets Ltd v Crumlin Investments Ltd* (HC, 22 June 1981). However, Keane notes that the Supreme Court’s comments in *Bray* are of doubtful authority, since the case concerned an interlocutory application and no written judgments were given: see Keane, *Company Law* (n 4) 140, fn 57.

²¹ See, eg, *Fyffes Plc v DCC Plc* [2005] IEHC 477 and *Power Supermarkets Ltd v Crumlin Investments Ltd* (HC, 22 June 1981), though it should be noted that Costello J also held for the plaintiff on a different ground in that case.

²² See, eg, *Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd* [1998] 2 IR 519 (SC).

Can the Corporate Veil Be Pierced in Irish Family Law?

It is clear from the marital breakdown legislation that the courts can and should have regard to all assets held or available to either spouse. Section 20(2)(a) of the Family Law (Divorce) Act 1996 ('the 1996 Act') requires the court to have regard to 'the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future'. Under s 19(1) of the Act, the court may order the sale of property in which either spouse has 'a beneficial interest, either in possession or reversion'. Identical provisions apply on judicial separation.²³ The question is therefore whether property held by a company (as opposed to shares in a company, or earnings or dividends received from a company) can be said to be or to represent 'property or financial resources' that either spouse may have or acquire, or to which s/he is beneficially entitled.

In principle, a spouse could clearly be beneficially entitled, under trusts law, to company assets. This would most commonly arise under a presumed resulting trust, where property is purchased in the name of another, or transferred to another, without consideration. In the absence of alternative explanations for the transfer (such as a loan or gift), there is a rebuttable presumption that the transferor intended the transferee to hold the property on his/her behalf, thus giving rise to an implied trust.²⁴ This would clearly apply where property is purchased in the name of a company using funds supplied gratuitously by one of the spouses, or is transferred by a spouse to the company on a gratuitous basis. Where this is the case, there is no need to pierce the corporate veil to access the asset in the marital breakdown context. The company is presumed to hold the property on trust for the transferring spouse, and the asset therefore falls to be considered under the normal application of the marital breakdown legislation, as it is property to which one of the spouses is beneficially entitled. In practice, however, difficulties of proof may prove insurmountable, especially where the company and the putative beneficial owner are uncooperative. Forensic accounting may prove of some assistance in this regard (means permitting).²⁵ However, where a clear spousal beneficial interest cannot be established, can the court avail of company-held resources?

In practice, the courts clearly have regard to company-held assets in making ancillary orders. For instance, in *FTM v CTM*,²⁶ the family home was held by a company of which the respondent was originally the controlling shareholder. However, by the time of the hearing, the shares were held by a family trust. In varying the terms of the trust settlement, Abbott J took it for granted that assets held by the company were available for sale and distribution, and mostly focused on how this could be done efficiently from a tax perspective. Similarly, in *BD v JD*,²⁷ McKechnie J noted that the husband would be 'solely in charge of this group of companies' and would have 'maximum flexibility to structure his resources in the most advantageous way

²³ Family Law Act 1995, ss 16(2)(a) and 15(1) respectively.

²⁴ For a more detailed account of the resulting trust, see Ronan Keane, *Equity and the Law of Trusts in the Republic of Ireland* (2nd edn, Bloomsbury Professional 2011) ch 12.

²⁵ For a useful summary of this area, see Ann FitzGerald, 'Crouching Tiger, Hidden Dragon: How to Unlock the Assets in Family Law Ancillary Relief Cases' (2009) 2 IJFL (ns) 40.

²⁶ *FTM v CTM* [2006] IEHC 333.

²⁷ *BD v JD* [2003] IEHC 106.

possible from a taxation point of view',²⁸ so as to extract the necessary lump sum payment from the company.

The right to have recourse to company assets in appropriate circumstances was most forcibly asserted by McKechnie J in a later judgment in *BD v JD*.²⁹ Basing his comments on the statutory and constitutional requirement to make proper provision on marital breakdown, McKechnie J commented:

*... I wish to assert as a matter of principle, that this Court has jurisdiction over all the assets of both the applicant and respondent, including those held by the latter through the medium of a limited company, and can make use of them in the most appropriate manner feasible so as to make proper provision for the parties to this marriage. This jurisdiction is found in the relevant statutory provisions of the Family Law Acts and, if necessary, subject only to third parties' vested rights, would take precedence over any business decision made by a corporate entity such as the company in question in this case. I could not under any circumstances accept that this Court could be disabled from performing its constitutional and statutory duties simply by the creation and existence of a private company where its entire affairs are within the exclusive control of one party to the marriage. If there was no other way of achieving proper provision I would not be dissuaded from exercising this jurisdiction and if that involved a company restructure or even a sale then so be it. Whilst obviously such a decision would not be taken lightly and would have to be based on evidence and guided by underlying legal principles, nevertheless if that course was the only course available, then that would likewise also follow. Otherwise I would simply be abdicating my duty and ceding my responsibility to one party of a marriage. That the Court could never do.*³⁰

However, even this strong statement had clear limits, as McKechnie J emphasised that lifting the corporate veil would not be done 'lightly' and would have to respect third-party vested interests, and would only be done '[i]f there was no other way'. Even more significantly, the Supreme Court emphasised on appeal that recourse to company-held assets was not always a foregone conclusion. Hardiman J noted:

*In the present case, no question arose as to the propriety of equating the value of the companies with the assets of the parties or one or other of them or of the making of provision for the wife, in principle, from the assets or earnings of the company. In those circumstances it was no doubt quite proper to proceed in the manner indicated. There was no question, on the evidence, of prejudice to any third party in so doing. But lest the case be regarded as a precedent for proceeding in this way in other, quite different, circumstances, I would remark that the interests of the company itself and of other persons interested in it in any capacity might, in a proper case, require consideration. It must not be forgotten that the company is, in law, a person distinct from its shareholders. A case will no doubt arise where this will be the basis of a submission to the Court.*³¹

²⁸ *ibid* [77] (McKechnie J).

²⁹ *BD v JD* [2005] IEHC 407.

³⁰ *ibid* [28] (McKechnie J).

³¹ *BD v JD* [2004] IESC 101 (Hardiman J).

How, then, is the court likely to respond to an argument on this issue, when the issue inevitably arises?

To Pierce or Not To Pierce?

On a preliminary point, it is not always necessary to pierce the corporate veil to access company-held assets, even where there is no resulting trust. Family law provides a limited scope for reviewing dispositions made for the purposes of defeating family law claims. Section 35 of the Family Law Act 1995 and s 37 of the 1996 Act provide that the court may set aside any disposition (other than a testamentary disposition) made by a spouse or another person with the intention of preventing or limiting relief under either Act, or of frustrating or impeding the enforcement of an order for such relief. Dispositions made for valuable consideration (other than marriage) to a party acting in good faith and without notice of the disponent's intention to frustrate relief under the Acts are excluded from review, but the power of review is otherwise unlimited. The Acts create a presumption that dispositions within three years prior to the application, which have the effect of preventing, limiting, frustrating or impeding relief, were made with the intention of doing so. However, although this presumption does not apply to dispositions made more than three years prior to the application, there is no time limit for reviewing such dispositions. Theoretically, therefore, even dispositions made many years prior to the application are reviewable, though the difficulties of proving the requisite intention in such cases may prove insurmountable. All this suggests that transfers of family assets to a company immediately following marital breakdown might easily be set aside, particularly if such transfers were gratuitous or at an undervalue, or where the knowledge or intentions of a spouse controlling the company were attributed to the company. However, where assets were acquired in the company's name from an early stage, or where a family has employed a company structure to hold property for generations,³² or where *both* spouses opted to avail of corporate structuring for tax reasons or for protection against third parties,³³ it would be extremely difficult to establish the requisite intention.

This possibility aside, arguments may be made both for and against piercing the veil.³⁴ Arguments in favour of piercing the veil predominantly centre on justice concerns; for instance, Ziegler and Gallagher contend that all arguments traditionally advanced in favour of piercing the veil are essentially 'subsets of the one category, *viz.* the prevention of injustice'.³⁵ Moore categorises pro-intervention arguments as essentially premised on either the 'head and brains' (or 'controlling mind') rule, or the 'cloak or sham' rule (whereby the company is a mere façade, disguising the reality of

³² *McM v McM* [2006] IEHC 451. Abbott J noted that the group of companies in this case was founded by the husband's grandfather, with the purpose of 'keeping the business within the family'.

³³ *FTM v CTM* [2006] IEHC 333. Abbott J noted that the couple 'jointly sought to leave many of their assets beyond the reach of potential creditors'.

³⁴ For a detailed analysis of corporate legal personality and lifting the corporate veil, see, eg, Murray A Pickering, 'The Company as a Separate Legal Entity' (1968) 31 MLR (ns) 481; F G Rixon, 'Lifting the Corporate Veil Between Holding and Subsidiary Companies' (1986) 102 LQR (ns) 415; Ottolenghi (n 7); Peter Ziegler and Lynn Gallagher, 'Lifting the Corporate Veil in the Pursuit of Justice' (1990) JBL (ns) 292; and Marc Moore, "'A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*' (2006) JBL (ns) 180.

³⁵ Ziegler and Gallagher (n 34) 293.

the situation).³⁶ Moore criticises both rationales as doctrinally unsound, advocating instead a test based on the ‘genuine ultimate purpose’ of the company.³⁷

A ‘controlling mind’ or ‘*alter ego*’ approach has been employed in Irish family law cases, with judges emphasising the *de facto* unity of the company and the controlling spouse. In *BD v JD*,³⁸ McKechnie J accepted that the husband and the company should be treated as one because the husband had used the company to pay his own extensive legal fees as well as a very substantial lump sum to his wife.³⁹ If the husband is free to draw on the company assets for his own benefit, why should he not be compelled to do so to discharge his obligations to his wife? Such an approach, which Keane has described as ‘seductive’,⁴⁰ fits with much of the case law in this area.⁴¹ However, it should be noted that the husband’s appropriation of company assets for his own benefit in *BD v JD* actually constituted a breach of his obligations to the company, even though, as the controlling shareholder, he did not object to the appropriation, and there were apparently no significant creditors to do so. Should the court countenance, indeed compel, further such breaches of duty?

A connected argument, also elucidated by McKechnie J in *BD v JD*, is that the controlling spouse is intentionally manipulating corporate structures to create difficulties. McKechnie J commented that the real issue in the case was ‘how one party to this litigation has utilised the existence of such a structure in furtherance of his personal position’.⁴² This is essentially an argument that company law is being abused for improper reasons, which the court should not permit. Taken together, the *alter ego* argument and the impropriety argument fit within the generally accepted principles for piercing the corporate veil. On the facts, however, it is clear that, whatever use of corporate structures the husband in *BD v JD* sought to make at trial, the company had been built up long before any family law issues arose. Assets had not been placed with the company with any view to evading marital obligations, so the use of the company structure was not ‘improper’ in that sense, but entirely legitimate. Accordingly, notwithstanding McKechnie J’s comments, it is clear that the situation in *BD v JD* did not come within the formulation propounded in *Ben Hashem*.⁴³

The central argument against piercing the veil is that using company assets to make family provision impacts on the company’s creditors, who may find that the value of the company (and hence its ability to discharge its debts) has diminished significantly. Effectively, the recipient spouse is being given a preferential status, albeit not on any recognised statutory basis. Although the courts have emphasised that the corporate veil should not be pierced if it would prejudice third parties with pre-existing

³⁶ Moore (n 34) 185.

³⁷ *ibid.*

³⁸ *BD v JD* [2005] IEHC 407.

³⁹ *ibid* [31(c)] and [36(c)] (McKechnie J).

⁴⁰ Keane, *Company Law* (n 4) 131.

⁴¹ See, eg, Lord Denning’s comment that the plaintiff’s companies ‘danced to his bidding’ in *Wallersteiner v Moir* [1974] 3 All ER 217 (CA) 238 (Lord Denning MR). However, note the emphasis of Murphy J in *LAC Minerals Ltd v Chevron Ltd* (1995) 1 ILRM 61 (HC) that the decisions of one company must be so dominated by the other that they were in reality identical.

⁴² [2005] IEHC 407 [29] (McKechnie J).

⁴³ Indeed, McKechnie J himself conceded that the husband’s conduct ‘perhaps would attract little adverse comment if these were not family proceedings’ (*ibid.*).

entitlements, such entitlements may not always be obvious, particularly where there are defects in disclosure. Given that the parties to family law cases in Ireland cannot be publicly identified, creditors have no way of knowing that proceedings may affect them.⁴⁴

The Supreme Court has also emphasised that the commercial consequences of extracting company assets must be considered, as well as the tax consequences of the extraction.⁴⁵ In *BD v JD*,⁴⁶ McKechnie J noted that the company could not continue to trade without its assets. Indeed, he also noted that the controlling spouse could manipulate the company's asset dealings to minimise what was available for the applicant.⁴⁷ Accordingly, as Ryan has argued, it may be preferable to order a sale of shares or to order a winding-up and a distribution of any remaining assets to shareholders. These assets could then be used to satisfy family provision orders, while upholding corporate law principles.⁴⁸ However, shares in a private company may not always be readily saleable, particularly in an economic downturn or where the success of the company has been heavily associated with a single individual. A forced sale might therefore be at a considerable undervalue, to the detriment of the family. It also seems undesirable to force the liquidation of a perfectly viable business, particularly since doing so may cause difficulties for the family if it removes the main earner's income stream (potentially impacting on child or spousal support, mortgage payments or other expenses).

The Decision in *Prest*

The case arose out of divorce proceedings between Michael and Yasmin Prest, a British–Nigerian couple who had divorced in 2011. The appeal related to a number of companies, known as the Petrodel Group, which the trial judge, Moylan J, had found to be wholly owned and controlled by Mr Prest. The companies were originally joined as additional respondents to Mrs Prest's claim for ancillary relief, as they were the legal owners of various properties, including the family home. Moylan J held that the family home was held for Mr Prest beneficially, and this was no longer an issue at the appeal, which related to seven other properties held by the group.

The central question was whether or not the court could order the transfer of these properties to Mrs Prest, given that they were legally owned by Mr Prest's companies. Moylan J made no finding that Mr Prest was beneficially entitled to these properties, as he considered it unnecessary. Instead, the debate focused on the interpretation of the UK Matrimonial Causes Act 1973 ('the 1973 Act'). In provisions mirroring the Irish legislation, the 1973 Act permits the court to order a transfer of property to which either party is 'entitled, either in possession or in reversion'.⁴⁹ Also as per its Irish equivalent, the 1973 Act requires the court to have regard to the 'property and other financial resources which each of the parties to the marriage has or is likely to

⁴⁴ Prior to the Courts and Civil Law (Miscellaneous Provisions) Act 2013, a strict *in camera* rule was applied to the hearing of family law cases in Ireland. This requirement has now been removed (though cases may still be heard *in camera* in certain circumstances). However, the 2013 Act does not confer a public right of access to family law cases or permit the parties to be identified in media or other reports.

⁴⁵ See the remarks of Hardiman J in *BD v JD* [2004] IESC 101.

⁴⁶ *BD v JD* [2005] IEHC 407 [25] (McKechnie J).

⁴⁷ *ibid.*

⁴⁸ Gerard Ryan, 'Interaction of Company Law and Family Law' (2009) 1 IJFL (ns) 3.

⁴⁹ s 24(1)(a) of the 1973 Act.

have in the foreseeable future'.⁵⁰ Did company-held properties count as resources to which Mr Prest was entitled? Moylan J felt that they did.

Mr Prest had resisted disclosure at every turn, and Lord Sumption later noted that his conduct was 'characterised by persistent obstruction, obfuscation and deceit, and a contumelious refusal to comply with rules of court and specific orders'.⁵¹ Moylan J therefore found it difficult to assess Mr Prest's financial situation accurately, but was satisfied that his net worth was at least £37.5m. Moylan J ordered Mr Prest to procure the transfer of the family home to Mrs Prest, free of incumbrances, and to make her a lump sum payment of £17.5 million as well as periodical and other payments. He also ordered Mr Prest to procure the transfer of seven UK properties legally owned by the Petrodel Group to Mrs Prest, in partial satisfaction of the lump sum order, and ordered the companies to execute any necessary documentation for this purpose. Significantly, Moylan J concluded that he could not pierce the corporate veil in order to reach the companies' assets, because their legal personality was not being improperly abused. However, Moylan J held that a wider jurisdiction to pierce the corporate veil existed under the 1973 Act.

The companies appealed on the ground that there was no jurisdiction to order their property to be conveyed to Mrs Prest to satisfy Mr Prest's obligations. The majority of the Court of Appeal, both commercial law judges, held that there was no jurisdiction for accessing company assets unless the company's corporate personality was being abused for a relevant improper purpose, or the facts demonstrated that Mr Prest had a beneficial interest in the company's assets. Rimer LJ considered that the trial judge had rejected both of these alternatives on the facts, and so should not have made the order. He rejected any suggestion that a different approach to justice should prevail simply because the issue arose in the family context, stating that 'A one-man company does not metamorphose into the one man simply because the person with a wish to abstract its assets is his wife'.⁵² Patten LJ, concurring, noted that the Family Division had developed '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'.⁵³ He concluded that this practice 'must now cease'.⁵⁴

Thorpe LJ, a senior family law judge, dissented. He contended that if the court overturned family law precedent, they would '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'.⁵⁵ He emphasised that Mr Prest had 'milked' the companies so long as the marriage lasted, to support the family's 'extravagant lifestyle', and that this 'was only possible because the companies were wholly owned and controlled by the husband and there were no third party interests'.⁵⁶ Following the breakdown of the marriage, Mr Prest was trying to invoke company law 'in an endeavour to achieve his irresponsible and

⁵⁰ s 25(2)(a) of the 1973 Act.

⁵¹ [2013] UKSC 34 [4] (Lord Sumption).

⁵² *Petrodel Resources Ltd v Prest* [2012] EWCA Civ 1395 (CA) [155] (Rimer LJ).

⁵³ *ibid* [161] (Patten LJ).

⁵⁴ *ibid*.

⁵⁵ *ibid* [63] (Thorpe LJ).

⁵⁶ *ibid* [64] (Thorpe LJ).

selfish ends'.⁵⁷ Thorpe LJ concluded that permitting Mr Prest to invoke company law in this way 'defeats the Family Division judge's overriding duty to achieve a fair result'.⁵⁸

The divide in the Court of Appeal clearly represented the broader policy divide as to whether company assets should be available to satisfy family obligations. The appeal to the UK Supreme Court therefore presented highly significant issues, not only for Mrs Prest, but for family law cases generally. For Mrs Prest, the case was significant because it seemed likely that the lump sum she had been awarded would not be satisfied without access to the company properties. For family law cases generally, the fear was that the Court of Appeal judgment represented a so-called 'cheat's charter',⁵⁹ which could enable devious spouses to avoid their family obligations. How could the UK Supreme Court reconcile the diverging views on the appropriate policy?

In the leading judgment, Lord Sumption re-affirmed the long-standing principle that a company is a separate legal entity to its shareholders, even where a shareholder is the sole owner and controller of the company. Likewise, a parent company is legally separate from its subsidiaries. Even if this principle was a legal fiction, it was nevertheless 'the whole foundation of English company and insolvency law', as it formed the basis on which third parties dealt with the company.⁶⁰

Lord Sumption identified three possible bases on which the Petrodel companies' assets might be made available to satisfy the lump sum order in favour of Mrs Prest. First, the Court might be justified in piercing the corporate veil. Second, the 1973 Act might confer a jurisdiction to disregard the corporate veil in cases taken under the Act. Third, the specific facts might demonstrate that Mr Prest was beneficially entitled to the properties under trusts law, in which case they would fall within the scope of the 1973 Act, without any need to pierce the corporate veil. Although all three issues were addressed in considerable detail, the core of Lord Sumption's judgment centres on the clarification and doctrinal restructuring of the principle of piercing the corporate veil.

Lord Sumption distinguished 'true' piercing of the corporate veil from situations where 'the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality',⁶¹ such as the beneficial interest in company property being held by a controlling party, or the controller being personally liable (usually in addition to the company) for acts s/he committed as the company's agent. 'True' piercing occurred only 'where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control'.⁶²

⁵⁷ *ibid* [65] (Thorpe LJ).

⁵⁸ *ibid*.

⁵⁹ See, eg, John Bingham, "'Cheats' Charter" Overturned in Landmark Divorce Victory for Oil Tycoon's Wife' *The Daily Telegraph* (London, 12 June 2013) <<http://www.telegraph.co.uk/women/sex/divorce/10115108/Cheats-charter-overturned-in-landmark-divorce-victory-for-oil-tycoons-wife.html>> accessed 12 July 2013.

⁶⁰ [2013] UKSC 34 [8] (Lord Sumption).

⁶¹ *ibid* [16] (Lord Sumption).

⁶² *ibid*.

Lord Sumption based the principle of intervention in the Court's aversion to fraud. Citing Lord Denning's maxim that 'Fraud unravels everything,'⁶³ Lord Sumption considered that the case law demonstrated a broad principle that 'apparently absolute' legal doctrines could be abrogated where the benefit of such a doctrine was dishonestly obtained.⁶⁴ Such dishonesty included using a company to evade the law. However, a court could not disregard the principle established in *Salomon* simply because it considered that justice required this.⁶⁵ The Family Division had 'pursued an independent line, essentially for reasons of policy arising from its concern to make effective its statutory jurisdiction to distribute the property of the marriage upon a divorce'.⁶⁶ Family judges had in practice routinely pierced the corporate veil in the interests of justice, even without an element of wrongdoing.

Stating that 'the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities',⁶⁷ Lord Sumption concluded that 'the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse'.⁶⁸ With regard to what amounted to 'relevant wrongdoing',⁶⁹ Lord Sumption identified two separate and distinct principles, governing different situations, which he felt had caused confusion. These he described as 'the concealment principle' and 'the evasion principle'.⁷⁰ The concealment principle simply related to the use of corporate structures to conceal the identity of the real actors. In this situation the court would not be deterred from looking behind the façade and ascertaining the full facts, where legally relevant, though the façade itself would not be disregarded (that is, the veil would not actually be pierced).⁷¹ The evasion principle, however, meant that 'the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement'.⁷² These categories could overlap, but the distinction could sometimes be crucial. In support of this, Lord Sumption analysed previous case law, explaining that the corporate veil had only truly been pierced in situations of evasion, as opposed to concealment.

Under the concealment principle, the court would look behind the corporate structure where the company was essentially in receipt of property purely as the agent or nominee of the controlling shareholder.⁷³ Ownership and control of the company were only one factor here; the court must also look at 'the circumstances and source of the

⁶³ *ibid*, citing Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) 712.

⁶⁴ *ibid* (Lord Sumption).

⁶⁵ *Adams v Cape Industries Plc* [1990] Ch 433 (CA) 539–40.

⁶⁶ [2013] UKSC 34 [23] (Lord Sumption).

⁶⁷ *ibid* [27] (Lord Sumption).

⁶⁸ *ibid*.

⁶⁹ *ibid* [28] (Lord Sumption).

⁷⁰ *ibid*. Parallels may be drawn with Ottolenghi's categories of 'peeping behind the veil' and (perhaps) 'penetrating the veil' (which seem to fall within Lord Sumption's concealment principle), and 'ignoring the veil' (which seems to accord with Lord Sumption's evasion principle). See generally Ottolenghi (n 7).

⁷¹ [2013] UKSC 34 [28] (Lord Sumption).

⁷² *ibid*.

⁷³ *ibid* [33] (Lord Sumption), discussing *Gencor ACP Ltd v Dalby* [2000] EWHC 1560 (Ch); [2000] 2 BCLC 734; and *Trustor AB v Smallbone (No 2)* [2001] EWHC 703 (Ch); [2001] 1 WLR 1177.

receipt, and the nature of the company's other transactions, if any'.⁷⁴ However, Lord Sumption emphasised that the corporate structure was really irrelevant to the point being decided, since the same decision might equally be reached where the recipient was a natural person.⁷⁵ Therefore, the court was not piercing the corporate veil, as such, but simply establishing and acting on the reality of the particular circumstances. As Lord Neuberger later put it, 'the concealment cases simply involve the application of conventional legal principles to an arrangement which happens to include a company being interposed to disguise the true nature of that arrangement'.⁷⁶

Lord Sumption concluded that 'the corporate veil may be pierced only to prevent the abuse of corporate legal personality'.⁷⁷ This could arise where the company was deliberately used by someone with a pre-existing legal obligation to evade or frustrate the law, but it could not arise simply because the company itself incurred a liability, which was not the controlling party's. This was not an abuse, but rather 'what incorporation is all about'.⁷⁸ Lord Sumption added that the corporate veil could only be pierced where it was actually necessary to do so, and that the court could only pierce the veil to deprive the company or the controlling party of an advantage that would otherwise have been obtained through the use of the company's separate legal personality. He concluded that in many cases where this test was satisfied, piercing the veil would in fact be unnecessary due to the legal relationship between the company and the controlling party (that is, the principle of concealment would apply).⁷⁹ Piercing the veil was therefore likely to arise only in 'a small residual category of cases'.⁸⁰

In *Prest* itself, Moylan J had found that Mr Prest had 'unrestricted access'⁸¹ to the companies' assets, 'unconfined by any board control or by any scruples about the legality of his drawings'.⁸² Moylan J commented that the group was 'effectively ... the husband's money box which he uses at will'.⁸³ This clearly suggested that the companies were Mr Prest's *alter egos*, which for family lawyers might justify piercing the corporate veil. However, Moylan J held that this alone was insufficient, and that he could not pierce the corporate veil without a relevant impropriety, which on the facts did not arise. This view was approved by Lord Sumption, who noted that although Mr Prest had acted improperly in misapplying company assets for his own benefit, he was not, in doing so, concealing or evading legal obligations to his wife under family law. Lord Sumption concluded that the Court could not 'disregard the legal personality of the companies with the same insouciance' as Mr Prest.⁸⁴ Although Mr Prest had attempted to conceal his ownership of the companies, the properties were vested in the companies long before the marriage broke down, and there was no evidence that this was done to evade Mr Prest's legal obligations to Mrs Prest. Hence, Mrs Prest could not pierce the corporate veil under general principles.

⁷⁴ [2013] UKSC 34 [32] (Lord Sumption).

⁷⁵ *ibid* [31] and [33] (Lord Sumption).

⁷⁶ *ibid* [61] (Lord Neuberger).

⁷⁷ *ibid* [34] (Lord Sumption).

⁷⁸ *ibid*.

⁷⁹ *ibid* [35] (Lord Sumption).

⁸⁰ *ibid*.

⁸¹ *YP v MP and Petrodel Resources Ltd and Others* [2011] EWHC 2956 (Fam) [208] (Moylan J).

⁸² [2013] UKSC 34 [15] (Lord Sumption).

⁸³ [2011] EWHC 2956 (Fam) [218] (Moylan J).

⁸⁴ [2013] UKSC 34 [36] (Lord Sumption).

Nor did any additional jurisdiction to pierce the veil arise under the 1973 Act, since no such jurisdiction was specified in that Act. This view was confirmed by Lady Hale's more detailed analysis of the legislative background. The 1973 Act empowered the court to order the transfer of property to which either party was legally or beneficially entitled, but it did not create new property rights or entitle the court to disregard corporate structures. Lord Sumption commented 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... If it does not exist, it does not exist anywhere.'⁸⁵ It was not enough that Mr Prest, as the owner and controller of the companies, had the power to procure the transfer of company assets. Although the statutory objective was clearly to procure a proper division of the marital assets, this did not mean 'that the court will stop at nothing in their pursuit of that end'.⁸⁶ Legislation could not be interpreted so as to overthrow long-established and fundamental legal principles, unless this was explicit in the statutory wording, which was not the case here. The statutory schemes for the protection of company shareholders and creditors were essential to protect anyone dealing with a company, and would be completely undermined if the wife could effectively become a secured creditor. Nor was it an answer to say that the court would protect known creditors, since 'a court of family jurisdiction is not in a position to conduct the kind of notional liquidation attended by detailed internal investigation and wide publicity which would be necessary to establish what its liabilities are'.⁸⁷ Ultimately, the corporate veil did not disappear or cease to matter simply because Mr Prest controlled the company holding particular assets.

Although the Court refused to lift the corporate veil, Mrs Prest's claim succeeded under a trusts analysis. Lord Sumption found that Mr Prest was in fact the beneficial owner of the seven disputed properties held by the Petrodel group. He held that the circumstances in which the companies had acquired the properties raised a presumption of a resulting trust, and that Mr Prest's 'persistent obstruction and mendacity' meant that there was no evidence to rebut this presumption.⁸⁸ Although the Court would not treat speculation as fact, both Lord Sumption and Lady Hale held that the Court would draw inferences from reasonably indicative circumstances, particularly where the person who might shed light on the situation declined to do so. This was especially appropriate in matrimonial provision cases, where there was a strong public interest in ensuring that proper provision was made for both spouses and children, and where the dependent spouse's claim would commonly depend on proper disclosure by the economically dominant party.

On the facts, Lord Sumption found that the properties were acquired by the companies using Mr Prest's funds, and for his purposes. Neither the companies nor Mr Prest had complied with orders for disclosure, and this failure was clearly deliberate. The relevant company officer had not appeared for cross-examination, on what the trial judge found to be spurious grounds. This all strongly suggested that the companies knew that the documentation sought would support Mrs Prest's contention

⁸⁵ *ibid* [38] (Lord Sumption).

⁸⁶ *ibid* [40] (Lord Sumption).

⁸⁷ *ibid* [41] (Lord Sumption).

⁸⁸ *ibid* [43] (Lord Sumption).

that Mr Prest was the beneficial owner of the properties. Since Mr Prest was the beneficial owner of the properties, the Court could order the transfer of the properties to Mrs Prest under the 1973 Act. However, this may have been a Pyrrhic victory for Mrs Prest, since Lady Hale noted that the properties were apparently so encumbered that the transfer might ultimately be of little benefit to her.⁸⁹

Comment

The decision in *Prest* highlights the clash between family law philosophy and company law principles. Significantly, and notwithstanding the result in *Prest* itself, it seems that the rule in *Salomon* has largely prevailed: Mrs Prest's ultimate success was highly fact-specific, and in all the issues of principle, the companies were successful. The ruling confirms the overriding importance of the legal personality of the company, and clarifies that this principle will not be breached simply in the interests of family justice. In the UK at least, it will henceforth be considerably more difficult (though not impossible) to access company-held resources in a family law context.

From a company law perspective, the decision in *Prest* will be welcomed in the UK as confirming, at last, that the corporate veil may be pierced in appropriate – though very restricted – circumstances. Technically, it was unnecessary to affirm the doctrine's existence, since the UK Supreme Court held for Mrs Prest on other grounds.⁹⁰ However, the Court clearly considered that the general confusion on this point merited serious attention. The case is perhaps less significant in Ireland in this regard, given that (as discussed previously) the Irish Supreme Court has already partly affirmed the possibility of piercing the corporate veil. However, the restricted and rather tenuous nature of that affirmation must render the *Prest* decision highly welcome as a persuasive authority that bolsters and clarifies the existence and scope of the doctrine.

Prest also clarifies that, in the UK at least, the veil should only be pierced where there is no alternative, with several members of the Court expressing disapproval of the Court of Appeal's decision in *VTB*.⁹¹ There is no clear Irish authority on this point, but the view accords with McKechnie J's comments in *BD v JD*,⁹² discussed above.

The basis of the doctrine is also now clearer, as it is explicitly based on the prevention of fraud. Lord Sumption grounded the doctrine in the maxim that 'Fraud unravels everything'⁹³; Lord Neuberger emphasised that the approach in the corporate context was simply one application of a broader principle.⁹⁴ Lady Hale felt that lifting the corporate veil in appropriate circumstances was an example of the courts refusing to permit a statute to be used as an engine of fraud.⁹⁵ Lord Walker considered that the doctrine was not really a doctrine at all, 'in the sense of a coherent principle or rule of law'. In his view, it was 'simply a label – often... used indiscriminately – to describe the disparate occasions on which some rule of law produces apparent exceptions to

⁸⁹ *ibid* [96] (Lady Hale).

⁹⁰ See the comments of Lord Neuberger (*ibid* [63]) and Lord Walker (*ibid* [105]).

⁹¹ See, eg, [2013] UKSC 34 [35] (Lord Sumption) and [62] (Lord Neuberger).

⁹² *BD v JD* [2005] IEHC 407 [28] (McKechnie J).

⁹³ [2013] UKSC 34 [16] (Lord Sumption).

⁹⁴ *ibid* [83] (Lord Neuberger).

⁹⁵ *ibid* [89] (Lady Hale).

the principle of the separate juristic personality of a body corporate...⁹⁶ However, this was a minority view, and the majority view certainly accords with Irish analysis of the doctrine,⁹⁷ and indeed with general academic opinion.⁹⁸

The ruling also offers a clear and restrictive legal test for piercing the corporate veil. Under *Prest*, the veil may be pierced only where it is the only way to deprive a company or the individual controlling it of an advantage that would otherwise accrue from the controlling party's use of the company's legal personality to deliberately evade or frustrate the controlling party's existing legal obligations or liabilities. The UK courts will not pierce the veil purely in the interests of justice, an approach that accords with at least some of the limited Irish jurisprudence outside the family law context.⁹⁹ While some Irish case law appears to suggest that the veil may be pierced in the interests of justice alone, this is criticised by Keane as overly broad.¹⁰⁰ Following the UK approach would therefore be welcomed by some Irish commentators, at least.

Although Lord Sumption's analysis of the principles of concealment and evasion is undoubtedly ground-breaking, it is worth noting that only Lord Neuberger agreed wholeheartedly with this aspect of Lord Sumption's judgment.¹⁰¹ Both Lord Mance and Lord Clarke were reluctant to 'foreclose all possible future situations',¹⁰² though Lord Mance considered that 'if there are other situations in which piercing the veil may be relevant as a final fall-back, they are likely to be novel and very rare'.¹⁰³ Lord Clarke felt that the distinction between the evasion and concealment principles 'should not be definitively adopted' until such time as the Court heard detailed submissions on this point.¹⁰⁴ Lady Hale, with whom Lord Wilson agreed, was uncertain that previous case law could all be categorised neatly as 'concealment' or 'evasion' cases. She suggested that the cases 'may simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business'.¹⁰⁵ She also posited a distinction between cases where the claim was essentially an attempt to enforce a company liability against a third party, and cases where the objective was to make the company responsible for the liabilities of its controller. In the second situation, Lady Hale suggested that it might be more appropriate to rely on concepts of agency and the 'directing mind'.¹⁰⁶

The case also sheds new light on previous decisions. Lord Sumption's analysis reveals that the supposed doctrine may not have been applied in many of the cases cited as authority for the principle; Lord Neuberger felt that the principle had never actually been applied in reality in the UK, since even in those cases that purported to

⁹⁶ *ibid* [106] (Lord Walker).

⁹⁷ Keane, *Company Law* (n 4) 129.

⁹⁸ See, eg, Ziegler and Gallagher (n 34).

⁹⁹ See, eg, *Roundabout Ltd v Beirne* [1959] IR 423 (HC).

¹⁰⁰ Keane, *Company Law* (n 4) 140, commenting on the decision of Costello J in *Power Supermarkets Ltd v Crumlin Investments Ltd* (HC, 22 June 1981).

¹⁰¹ [2013] UKSC 34 [60–61] (Lord Neuberger).

¹⁰² *ibid* [100] (Lord Mance); [103] (Lord Clarke).

¹⁰³ *ibid* [100] (Lord Mance).

¹⁰⁴ *ibid* [103] (Lord Clarke).

¹⁰⁵ *ibid* [92] (Lady Hale).

¹⁰⁶ *ibid* [92] (Lady Hale).

apply it, the decisions were better explained on other grounds.¹⁰⁷ Indeed, given the confusion in the area, and the fact that the supposed doctrine was both controversial and never seemed to apply when it was really needed, Lord Neuberger stated that he had been tempted to put the doctrine to rest.¹⁰⁸ However, he ultimately concluded that this would be wrong, since the doctrine ‘has been generally assumed to exist in all common law jurisdictions, and represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available’.¹⁰⁹

Of course, the potential existence of beneficial interests in company-held property (discussed below) must give rise to concern on the part of company investors and creditors. Presumably, the general doctrine of notice applies in this regard, and no more than the standard enquiries need be made. This, however, is only of benefit to secured creditors; unsecured creditors and investors may be unpleasantly surprised in the event of a liquidation. Nevertheless, since the relevant equitable principles are of long standing, it does not seem likely that investors and creditors are any worse off than before the ruling in *Prest*.

From a family law perspective, there is likely to be little rejoicing. *Prest* firmly rejects an established family law practice, and family lawyers, like Thorpe LJ in the Court of Appeal, must be seriously concerned that the ruling will preclude appropriate provision in many cases. A similar concern must apply in Ireland, should the decision be followed here. However, all is perhaps not lost in this regard, as several aspects of the ruling leave grounds for hope.

First, while the UK Supreme Court held that the resources available for distribution under the 1973 Act could not include company-held assets to which the controlling spouse was not beneficially entitled, it does not follow that such resources are entirely irrelevant. Lady Hale noted that company-held assets could be considered when calculating the resources available to spouses for the purposes of determining how the court should exercise its jurisdiction under the 1973 Act¹¹⁰ (and presumably, under the equivalent, almost identical Irish provisions). This perhaps is of little comfort where there are no significant assets held outside the company (as in *Prest* itself), but it may assist some applicants at least.

It also remains possible to establish a beneficial interest in company-held property, under well-established trusts principles (discussed previously). It is not clear how useful this will be in practice, given the potential difficulties of proof, and clearly trusts doctrine will not apply in many cases, as it depends on the specific factual matrix. Although Lady Hale commented in *Prest* that she ‘would be surprised’ if companies controlled by a spouse ‘were not often’ simply nominees for that spouse,¹¹¹ this may perhaps be optimistic. In *Prest* itself, a key factor in Mrs Prest’s success was the dearth of evidence to rebut the presumption of a resulting trust. Had appropriate evidence been given by Mr Prest or on behalf of the Petrodel companies, she might well have failed. Lord Sumption, indeed, emphasised that the issue of beneficial ownership was highly fact-specific, and that no guidance was possible

¹⁰⁷ A detailed analysis of the Irish case law from this perspective is beyond the scope of this paper.

¹⁰⁸ [2013] UKSC 34 [79] (Lord Neuberger).

¹⁰⁹ *ibid* [80] (Lord Neuberger).

¹¹⁰ *ibid* [88] (Lady Hale).

¹¹¹ *ibid* [93] (Lady Hale).

outside of the general principles of equity. However, and most usefully for family lawyers, he suggested (albeit tentatively) that the facts might commonly justify an inference that a company-held family home was held on trust for the spouse who controlled the company.¹¹² It would normally be difficult to explain why a company-held property was occupied and controlled by a family for non-business purposes, particularly on a gratuitous basis. Judges might therefore more easily conclude that the arrangement was a sham. By analogy, it might also be difficult to explain why a spouse used personal funds to purchase assets in the name of a company, without providing for repayment. Arguments regarding tax efficiency and wealth preservation were accepted in *Prest*, but while this meant that the transfers were not intended to frustrate the family law courts, it did not negate the presumption of a resulting trust. Indeed, the whole point of such arguments is presumably that the spouse intended to retain a beneficial interest in the assets. Of course, the applicant spouse may also seek to claim a share in either company-held assets or the company itself (as has indeed been attempted in Ireland)¹¹³; the success of such a claim will again depend on the facts.

Both Lady Hale and Lord Sumption noted the potential utility of the statutory power to review and set aside dispositions intended to frustrate the court's power to order appropriate financial provision. Although the requisite intent was absent in *Prest*, Lady Hale suggested that, had the transfers to the company been made with an intention to frustrate the court under the 1973 Act, 'there might have been an argument that the exception for bona fide purchasers for value... did not apply to a company where the controlling mind was acting with that intention'.¹¹⁴ This possibility might be particularly valuable in actions to review and set aside dispositions to companies. Given that the Irish and UK family law provisions on reviewable dispositions are almost identical, Lady Hale's comment may offer some comfort in the Irish context also.

Finally, Lord Sumption considered that lifting the corporate veil would normally be unnecessary in this type of case, as a transfer of company shares would generally achieve a fair asset distribution. Notwithstanding the caveats previously noted in this article, courts in England and Wales may have to fall back on this solution in family cases, since most of the usual alternatives have now been precluded. Under the UK Supreme Court's ruling, the court cannot order the transfer of company-held assets that are not beneficially owned by either spouse. The Court of Appeal also stated that the court could not simply order the controlling spouse to have the company declare an appropriate dividend, which could then be the basis for a lump sum order, since this would effectively require someone to obtain an asset to which s/he had no current entitlement.¹¹⁵ Should *Prest* be followed in Ireland, similar restrictions must logically also apply here.

Is Ireland Likely to Follow the Ruling in *Prest*?

¹¹² *ibid* [52] (Lord Sumption).

¹¹³ For instance, in *BD v JD* [2003] IEHC 106, the wife initially sought a declaration that her contributions to the family and the business demonstrated an equal partnership, and that she was therefore entitled to (and had been intended to receive) an equal share in the company. This claim was unsuccessful on the facts.

¹¹⁴ [2013] UKSC 34 [94] (Lady Hale).

¹¹⁵ [2012] EWCA Civ 1395 (CA) [149] (Rimer LJ).

The UK Supreme Court's ruling in *Prest* is not binding in Ireland, but it is highly persuasive, both in its provenance and its content. Lord Sumption's judgment is well-reasoned and authoritative, and accords with well-established company law and equitable principles. It maximises consistency across a range of legal areas and has a clear and rational policy basis, albeit a policy based in company rather than family law concerns. However, it is significant that the two family law judges in the case concurred with Lord Sumption's judgment. The test for piercing the veil elucidated by Lord Sumption accords with the principles generally accepted in Ireland and outlined by Keane (above). While the concealment and evasion principles identified in Lord Sumption's judgment are as yet questionable even in the UK, the broader principles clarified in the ruling are unlikely to be successfully contested in Ireland, particularly since the wording of the respective family law statutes is so similar. Nor is it likely that the relevant constitutional provision would make any significant difference: Article 41.3.2°iii of the Irish Constitution requires that 'proper' provision must be made prior to divorce, but it does not mandate piercing the corporate veil to do so.

For these reasons, the decision in *Prest* is likely to be highly appealing to the Irish Supreme Court, when the issue inevitably arises in the Irish context. The Irish Supreme Court has already hinted at doubts regarding current practice in *BD v JD*¹¹⁶ (discussed above). More recently, the issue was briefly (though inconclusively) touched on in the High Court decision in *SQ v TQ*.¹¹⁷ That case centered on the application of a wife, in judicial separation proceedings, for an order to compel her husband to furnish information and documentation regarding the financial circumstances of a company in which he held a controlling interest. The husband contended that he was not in a position to provide the information sought, as it was held by the company. Granting the order, Keane J cited certain aspects of *Prest* with approval in relation to the disclosure issue. However, he also stated (*obiter*) that he was unaware whether the practice of accessing company assets for family law purposes, which had been rejected in *Prest*, had ever been adopted by the Irish High Court.¹¹⁸ As the issue did not arise in the present case, he preferred not to comment on the aspects of *Prest* relating to the piercing of the corporate veil. Perhaps significantly, he added:

*For the avoidance of doubt, I do not consider it appropriate or necessary to consider whether the separate legal personality of the company can or should be disregarded for the purposes of the present application. That is to say, I accept that it would be wrong in law to make any order directed to the company (which is not a party to the proceedings or to the present application), or to make any order that treats the property of the company as, in effect, that of the husband.*¹¹⁹

It seems, therefore, that Irish family lawyers must wait a little longer to establish definitively whether company assets can be accessed for family provision purposes, although Keane J's comments in *SQ* are perhaps indicative. Unpalatable as the ruling in *Prest* may be to many family lawyers, it seems unlikely that the persuasive force of

¹¹⁶ *BD v JD* [2004] IESC 101.

¹¹⁷ *SQ v TQ* [2014] IEHC 389.

¹¹⁸ *ibid* [29].

¹¹⁹ *ibid* [30].

the decision could be resisted. It is therefore significant that, as argued herein, the ruling leaves at least some room for manoeuvre in the family law context.

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