

'Critically consider the extent to which the case of Prest v Petrodel Resources Ltd in 2013

**has permanently altered the law and the effect if any on the meaning of corporate
personality.'**

Introduction

The relatively short judgment in the United Kingdom Supreme Court case of *Prest v Petrodel Resources Ltd*¹ (herein, Prest) has garnered vociferous interest from academics and practitioners. Prest was of particular interest because of the legal cross-over between family law and corporate law. Both sides of the profession were affected differently. The solicitors representing the appellant, Prest, stated that 'the decision is of major importance not only for family law and divorcing couples, but also for company law (...) and, is the most important review since Victorian times' on the law regarding 'piercing the corporate veil'.² Others, in the corporate law field, have expressed concern that the case 'will have significant ramifications and is likely to open Pandora's Box when it comes to the overlap of divorce proceedings and company law'.³ For the purposes of this essay, the focus is solely on the effect of the Supreme Court judgment on corporate law. The two issues that will be critically analysed are whether Prest has permanently altered the law, and whether the case has had any effect on the meaning of 'corporate personality'. It will be argued that the law has not technically been altered, but that the Supreme Court has narrowed the circumstances in which the doctrine of 'piercing the veil' may apply. The overriding theme is that

¹ *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

² Spear's, 'Expert analysis of the Prest judgment' (*Spear's*, 11 June 2013) <<http://www.spearswms.com/expert-analysis-of-the-prest-judgment/>> accessed 23 July 2016.

³ Terri Judd, 'Victory for Nigerian oil tycoon Michael Prest's wife as 'cheats charter' overturned in landmark Supreme Court divorce case' (*Independent*, 12 June 2013) <<http://www.independent.co.uk/news/uk/home-news/victory-for-nigerian-oil-tycoon-michael-prests-wife-as-cheats-charter-overturned-in-landmark-supreme-8655133.html>> accessed 23 July 2016.

the Supreme Court has, nevertheless, left much uncertainty about what those circumstances might be. Before considering those two issues, it is necessary to understand the background of the case and the relevant issues.

(a) Background and relevant issues

The case involved the two core principles in corporate law regarding the ‘corporate personality’ of companies and ‘piercing of the corporate veil’. The meaning of ‘corporate personality’ was best explained by Lord Sumption in *Prest* who stated that:

Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In *Salomon v A Salomon and Co Ltd* [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company.⁴

On ‘piercing the corporate veil’, Lord Sumption stated that:

Properly speaking, it means disregarding the separate personality of the company. There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. The controller may be

⁴ *Prest* (n 1) [8] (Lord Sumption); see also, Alan Dignam and John Lowry, *Company Law* (8th edn, OUP 2014) ch 2.

personally liable, generally in addition to the company, for something that he has done as its agent.⁵

Therefore, the principles mean that companies are separate legal entities and are thus separately liable, however, there are exceptional circumstances in which those working within a company may be personally liable. In *Prest*, Michael and Yasmin Prest had divorced. Michael Prest owned a number of companies which had ownership of a number of properties legally vested in those companies. The issue was whether the properties could be transferred to Yasmin Prest considering that they were owned by the companies and not Michael Prest. The Supreme Court held that the properties were held on resulting trust for the husband.⁶ The following two sections offer a critical analysis of whether, in reaching that decision, the Supreme Court permanently altered the law and what effect the decision had on the meaning of corporate personality.

(b) *Has Prest permanently altered the law?*

The court did not technically alter the law on the facts of the case but restricted the application of the doctrine of ‘piercing the corporate veil’. Indeed, the court did not need to pierce the veil in this case, in effect, preserving—as opposed to altering—the legal status quo with regards to corporate personality. This was because it established in common law that the veil could not be pierced without some relevant impropriety.⁷ The husband had neither concealed nor evaded the law and the veil could, therefore, not be pierced.⁸ Since the facts showed that the husband’s company was

⁵ *Prest* (n 1) [16] (Lord Sumption); see also, Len Sealy and Sarah Worthington, *Cases and Materials in Company Law* (10th edn, OUP 2013) 52.

⁶ *Prest* (n 1) [52] (Lord Sumption).

⁷ *ibid* [36].

⁸ *ibid*.

not intended to acquire a beneficial interest in the properties, the court could only resolve the issue via the use of a resulting trusts analysis based on the very specific facts of the case.

It might have been open to the court alter the law by developing a special or wider principle that could apply specifically to matrimonial proceedings but found it impossible to do so for three reasons.⁹ First, the appellants had relied on section 24(1)(a) of the Matrimonial Causes Act 1973 to argue that one party to a marriage can transfer property to the other, to which the other party is 'entitled, either in possession or reversion'. The court held that 'possession or reversion' refers to 'a proprietary right, legal or equitable'.¹⁰ This does not 'give the court power to order a spouse to transfer property to which he is not in law entitled'.¹¹ The terms 'refer to a right recognised by the law of property',¹² and family law courts 'do not occupy a desert island in which general legal concepts are suspended or mean something different'.¹³ The second reason was based on policy. Piercing the veil would 'cut across the statutory schemes of company and insolvency law [which are] essential for the protection of those dealing with a company'.¹⁴ The third reason was one of principle. It would be unprincipled for the court to 'authorise the appropriation of the company's assets to satisfy a personal liability of its shareholder to his wife [especially where] the company had not consented to that course [and] vigorously opposed it'.¹⁵

It is, therefore, clear that the law was not technically altered by the Supreme Court. The court reaffirmed the well-established judicial conservatism approach that the corporate veil could only

⁹ *ibid* [37].

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *ibid* [86] (Lady Hale).

¹³ *ibid* [37] (Lord Sumption).

¹⁴ *ibid* [41].

¹⁵ *ibid.*

be pierced in ‘a very rare case’.¹⁶ Further, a new principle was impossible to ‘carve out’ on the basis of the facts of the case. It is true however, as Grier notes, that the Supreme Court ‘restricted’ the application of the ‘piercing of the veil’ principle.¹⁷ The next section analyses how—rather than altering the law—the scope of the doctrine of corporate personality has effectively been restricted.

(c) *The effect of Prest on the meaning of ‘corporate personality’*

Whilst the Supreme Court did not alter the law, it did seek to clarify the scope of the doctrine of ‘piercing the corporate veil’ more generally. Previous case law had established the veil could be pierced where a company is a ‘sham’,¹⁸ ‘mask’,¹⁹ ‘device’,²⁰ or a ‘façade’.²¹ In *Prest*, Lord Sumption argued for a narrower and clearer approach by restricting the circumstances in which the veil may be pierced. This was because ‘references to a “façade” or “sham” beg too many questions to provide a satisfactory answer’.²² Instead, Sumption—having analysed much case law²³—stated that the veil could be restricted according to two principles: the ‘concealment principle’ and the ‘evasion principle’.²⁴

¹⁶ *Prest* (n 1) [103] (Lord Clarke); Charrot argues that the restrictiveness of the doctrine ‘has been firmly upheld’, Robin Charrot, ‘Lessons Learned from *Prest v Petrodel*’ (2013) 5 PCB 281, 283; Bowen argues that the doctrine has been all but buried, see Andrew Bowen, ‘Concealment, Evasion and Piercing the Corporate Veil: *Prest v Petrodel Resources Ltd* (2014) 129 Bus LB 1, 3.

¹⁷ Nicholas Grier, ‘Piercing the Corporate Veil: *Prest v Petrodel Resources Ltd*’ (2014) 18(2) *Edin LR* 275, 277.

¹⁸ *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (CA) 961 (Lord Hanworth MR).

¹⁹ *Jones v Lipman* [1962] 1 WLR 832 (Ch) 836 (Russel J).

²⁰ *ibid.*

²¹ *Woolfson v Strathclyde Regional Council* [1978] SC 90 (HL) 92 (Lord Keith); *Adams v Cape Industries Plc* [1990] Ch 433 (CA) 542 (Goff LJ).

²² *Prest* (n 1) [28] (Lord Sumption).

²³ This included another important ‘corporate personality’ decision of the Supreme Court in *VTB Capital Plc v Nutritek International Corp and others* [2013] UKSC 5.

²⁴ *Prest* (n 1) [28] (Lord Sumption).

The ‘concealment principle’ is ‘the interposition of a company or perhaps several companies so as to conceal the identity of the real actors’.²⁵ Sumption noted that this does not actually involve piercing the corporate veil; the court is merely looking behind a façade to discover the facts which the corporate structure is concealing.²⁶ The ‘evasion principle’ applies ‘when a person is under an existing legal obligation or liability (...) which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control’.²⁷ The effect of Sumption’s analysis remains unclear, however, due a lack of agreement from the remaining Justices about the application of those principles; particularly the evasion principle. As Alcock observes, ‘care must be taken [because] none of the other six Justices of the Supreme Court agreed with Lord Sumption without some qualifications’.²⁸

Indeed, Lord Neuberger drew different conclusions regarding the application of the principle on the same cases analysed by Sumption. He argued that they did not appear to ‘provide much direct support for the doctrine’:²⁹ a point also noted in academic commentary which finds that there is ‘substantial uncertainty’ surrounding the operation of the evasion principle.³⁰ Neuberger also found that in all cases where the ‘piercing the veil’ doctrine was considered, it either did not apply on the facts, it was wrongly applied on the facts or it was applied on the facts but the results could have been arrived at on some other legal basis.³¹ Nevertheless, Neuberger conceded that he was persuaded by Sumption that the doctrine can apply very restrictively when there is an evasion.³²

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid* [35].

²⁸ Alistair Alcock, ‘Piercing the Veil — A Dodo of a Doctrine’ (2013) 25 Denning LJ 241, 243.

²⁹ *Prest* (n 1) [69] (Lord Neuberger); Alistair Alcock (n 28) 250.

³⁰ Pey Woan Lee, ‘The Enigma of Veil-Piercing’ (2015) 26(1) ICCLR 28, 30.

³¹ *Prest* (n 1) [74] (Lord Neuberger).

³² *ibid* [81].

Lady Hale and Lord Wilson doubted whether it is possible to classify all cases ‘neatly into cases of either concealment or evasion’.³³ Lord Mance argued that ‘it is dangerous to seek to foreclose all possible future situations which may arise and I would not wish to do so’.³⁴ Lord Clarke argued that Sumption’s distinction ‘should not be definitively adopted unless and until the court has heard detailed submissions upon it’ but agreed that the circumstances in which the doctrine apply are rare.³⁵ Finally, Lord Walker believed that ‘piercing the corporate veil’ is not a doctrine of law at all and is simply a label, but conceded that there may be ‘a small residual category in which the metaphor operates independently’ (although he could not find a clear identifiable example).³⁶ The Supreme Court, therefore, agreed that the circumstances in which the doctrine (if it is one) applies, are rare indeed. However, there was disagreement about restricting its application to cases of evasion and concealment.

(d) Discussion and Conclusion

Bizarrely, it has been suggested in academic commentary that the decision reflects a ‘*progressive* trend’ of restricting the doctrine.³⁷ However, it is hardly *progressive* to slightly narrow the application of a doctrine (which rarely applied anyway) and then to disagree about its future application. Neither does the case represent a ‘significant attempt to formulate a principled approach to veil piercing’.³⁸ Instead, it is submitted that it is more accurate to state that *Prest*

³³ *ibid* [92] (Lady Hale).

³⁴ *ibid* [100] (Lord Mance).

³⁵ *ibid* [103] (Lord Clarke).

³⁶ *ibid* [106] (Lord Walker).

³⁷ Emphasis added, see Akansha Dubey, Emily Charlotte, Kavana Ramaswamy, ‘Family Law’ (2014) 3(1) 214, 217.

³⁸ Tan Cheng-Han, ‘Veil Piercing — a Fresh Start’ (2015) 1 JBL 20, 21.

‘brings a new kind of uncertainty to the traditional issues relating to the doctrine’.³⁹ As Lim observed, there were ‘difficulties’ with Sumption’s conceptualisation of the principles and it was ‘unsurprising’ that none of the judges endorsed Sumption’s approach.⁴⁰ Overall, with regards to concealment and evasion, it may have been more *progressive* and *significant* had the court developed—as Stockin argues should be done—a ‘coherent and logical basis’ for piercing the veil and thus bring more certainty.⁴¹

Nevertheless, the case is to be welcomed, at least, for confirming that the veil will only be pierced in truly exceptional circumstances making the doctrine ‘extraordinarily narrow in scope’.⁴² Despite disagreement between the Justices that concealment and evasion might be too narrow, those principles will likely justify piercing the veil in rare cases.⁴³ The case also demonstrates that the courts will prioritise concerns relating to policy and principle in circumstances where it is suggested the veil should be pierced.⁴⁴ Of course, this does not alter the approach of piercing the veil where there is a statutory basis for it: the Supreme Court’s decision impacts only on cases involving the common law.⁴⁵

Ultimately, four conclusions can be drawn. First, piercing the veil was not necessary in the present case on the facts. Second, the doctrine still exists (although Lord Walker disagrees). Third, it exists very narrowly. Fourth, it should only apply if there are no other remedies.⁴⁶ Further, it should be

³⁹ Chrysthia N Papacleovoulou, ‘“Lifting” or “Piercing” the Corporate Veil in Cyprus: a Doctrine under Challenge — an analysis of English and Cyprus case law analysis’ (2016) 27(4) ICCLR 129, 130.

⁴⁰ Ernest Lim, ‘Salomon Reigns’ (2013) 129 LQR 480, 484 – 485.

⁴¹ Laura Stockin, ‘Piercing the Corporate Veil: Reconciling R. v Sale, Prest v Petrodel Resources Ltd and VTB Capital Plc v Nutritek International Corp’ (2014) 35(12) Comp Law 363, 366.

⁴² Edwin C Mujih, ‘Piercing the Corporate Veil as a Remedy of Last Resort after Prest v Petrodel Resources Ltd: Inching Towards Abolition?’ (2016) 37(2) Comp Law 39, 47; Cheng-Han (n 38) 21; Lee (n 30) 32.

⁴³ Stockin (n 41) 363.

⁴⁴ Lee (n 30) 33.

⁴⁵ Stockin (n 41) 366.

⁴⁶ Alcock (n 28) 252 – 253.

emphasised that the conclusions regarding corporate personality were obiter only since submissions were not made to the judges for considering the doctrine conclusively.⁴⁷ Therefore, it may be time, as George suggests, to conclusively develop statutory remedies to ensure fair outcomes (in divorce cases as he suggests) and more broadly, in other cases, as is suggested in this essay.⁴⁸ The contention that the doctrine can now be ‘returned to the unhallowed ground from which it arose’ is not certainly not true whilst disagreement persists about its application.⁴⁹

⁴⁷ This point was also noted by Bailey, see Peter Bailey, ‘2013: That was the Year that was in Company Law’ [2014] Co LN 1, 2.

⁴⁸ Rob Georg, ‘The Veil of Incorporation and Post-Divorce Financial Remedies’ (2014) 130 LQR 373, 376.

⁴⁹ Thomas Spencer, ‘Curtains for veil’ (*New Law Journal*, 2015)

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