Case Note

PIERCING THE CORPORATE VEIL AS A LAST RESORT

Prest v Petrodel Resources Ltd
[2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1

This case summary discusses the UK Supreme Court case of *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1 in which the majority held that the corporate veil should only be pierced where all other remedies were not available. There is perhaps some room to question whether the authorities cited by the Supreme Court in *Prest v Petrodel* support this position. *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) held that the corporate veil should only be pierced where it was necessary to do so. However, there are authorities which suggest that the requirement for necessity does not equate with the requirement that the remedy be one of last resort.

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I. Summary of the facts

1 Michael and Yasmin Prest were married in 1993. The wife, Yasmin Prest, petitioned for divorce in March 2008 and a decree absolute was granted in November 2011. The husband, Michael Prest, who was a wealthy man, wholly owned and controlled (directly or through intermediate entities) a number of companies belonging to a group known as the Petrodel Group.

2 Of the companies in the Petrodel Group, Petrodel Resources Ltd ("PRL") was the legal owner of five residential properties in the UK and Vermont Petroleum Ltd ("Vermont") was the legal owner of two more. The question before the Supreme Court was whether the court had power to order the transfer of these seven properties to the wife given that the properties legally belonged not to the husband but to his companies.

3 In proceedings for ancillary relief following the divorce,[1] Moylan J concluded that there was no general principle of law which entitled him to reach the companies' assets by piercing the corporate veil. However, he concluded that a wider jurisdiction to pierce the corporate veil was available under s 24 of the English Matrimonial Causes Act 1973[2] ("MCA"). In the circumstances, Moylan J ordered, *inter alia*, the husband to procure the transfer of the seven UK properties legally owned by PRL and Vermont to the wife in partial satisfaction of the lump sum order of £17.5m. Moreover, in awarding costs to the wife, Moylan J directed that PRL, Vermont and another of the husband's companies in the Petrodel Group, Petrodel Upstream Ltd ("Upstream"), should be jointly and severally liable with the husband for 10% of those costs.

4 The three respondent companies, PRL, Upstream and Vermont, challenged the orders made against them in the Court of Appeal.[3] They argued that there was no jurisdiction to order their property to be conveyed to the wife in satisfaction of the husband's judgment debt.

5 The majority of the Court of Appeal allowed the appeal. Rimer LJ noted that Moylan J had made no primary findings justifying any conclusion other than that the properties were part of the assets of, and belonged beneficially to, the companies that owned them.[4] In the circumstances, Moylan J had no jurisdiction under s 24(1)(a) of the MCA to make the orders he did in relation to them. In so far as Moylan J was suggesting that s 24(1)(a) of the MCA enabled the court to treat a company's property as belonging to its 100% owner, Rimer LJ held that he was wrong.[5]

6 On further appeal to the Supreme Court,[6] Lord Sumption, who gave the leading judgment, noted that there were three possible legal bases on which the assets of PRL, Upstream and Vermont might be available to satisfy the lump sum order against the husband, namely:[7]

> (a) It might be said that this was a case in which, exceptionally, a court was at liberty to disregard the corporate veil in order to give effective relief to the wife.

1 *Yasmin Prest v Michael Prest* [2011] EWHC 2956 (Fam).
2 c 18.
3 *Prest v Prest* [2013] 2 WLR 557.
4 *Prest v Prest* [2013] 2 WLR 557 at 570.
5 *Prest v Prest* [2013] 2 WLR 557 at 605.
6 *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1.
7 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [9]; [2013] 2 AC 415 at 477; [2013] 3 WLR 1 at 10.

(b) Section 24 of the MCA might be regarded as conferring a distinct power to the courts to disregard the corporate veil in matrimonial cases.

(c) The companies might be regarded as holding the properties on trust for the husband, not by virtue of his status as their sole shareholder and controller, but in the particular circumstances of the case.

7 Turning to the first possible legal basis identified by Lord Sumption, the majority of the Supreme Court refused to pierce the corporate veil on this basis. Lord Sumption held that there was a limited principle of English law which applied when a person was under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evaded or whose enforcement he deliberately frustrated by interposing a company under his control.[8] Lord Sumption declined to pierce the corporate veil, *inter alia*, because the husband was not concealing or evading the law relating to the distribution of assets of a marriage upon its dissolution. There was no evidence that the husband was seeking to avoid any obligation which was relevant in the proceedings and the legal interests in the properties were vested in the companies long before the marriage broke up.

8 In relation to the second legal basis identified by Lord Sumption, the Supreme Court held that there was no special and wider principle of lifting the corporate veil which applied in matrimonial proceedings by virtue of s 24(1)(a) of the MCA.

9 The Supreme Court allowed the appeal on the third legal basis. It held that the properties in question were held by the respondent companies on trust for the husband. The companies could therefore be ordered to transfer the seven properties to the wife under s 24(1)(a) of the MCA in partial satisfaction of the lump sum order. Accordingly, the order of Moylan J, in so far as it required PRL and Vermont to transfer the seven properties to the wife, was restored.[9]

II. Discussion

10 Of interest in this case note is the position of the majority of the Supreme Court that the court only has the power to pierce the corporate veil when all other remedies prove to be of no assistance.

8 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [35]; [2013] 2 AC 415 at 488; [2013] 3 WLR 1 at 20–21.

9 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [55]; [2013] 2 AC 415 at 497; [2013] 3 WLR 1 at 30–31.

11 In *VTB Capital plc v Nutritek International Corp*[10] ("*VTB Capital*"), Lloyd LJ accepted the principles on piercing the corporate veil set out by Munby J in *Ben Hashem v Al Shayif*[11] ("*Ben Hashem*") with one qualification. Lloyd LJ held that it did not follow that a piercing of the veil would be available only if there was no other remedy available against the wrongdoers for the wrong they had committed.[12] However, Lord Sumption[13] and Lord Neuberger[14] disagreed with Lloyd LJ's holding in *VTB Capital* in this regard. Further, Lord Neuberger,[15] Lord Mance[16] and Lord Clarke[17] used the language of last resort when dealing with the availability of the remedy of piercing the corporate veil. The other three law lords, Lady Hale, Lord Wilson and Lord Walker, did not address this specific issue.

12 Lord Sumption relied on *Ben Hashem* in rejecting Lloyd LJ's holding in *VTB Capital* that it did not follow that a piercing of the veil would be available only if there was no other remedy available against the wrongdoers. He held that:[18]

> Like Munby J in *Ben Hashem v Al Shayif* [2009] 1 FLR 115, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in *VTB Capital v Nutritek* [2012] 2 Lloyd's Rep 313 who suggested otherwise at para 79.

This begs the question whether *Ben Hashem* stands for the proposition that piercing the corporate veil is available only when there is no other remedy available.

13 In *Ben Hashem*, Munby J held:[19]

> Finally, and flowing from all this, a company can be a façade even though it was not originally incorporated with any deceptive intent.

10 [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep 313.
11 [2008] EWHC 2380 (Fam) at [159]–[164].
12 *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 at [79]; [2012] 2 Lloyd's Rep 313 at 329.
13 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [35]; [2013] 2 AC 415 at 488; [2013] 3 WLR 1 at 20–21.
14 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [62]; [2013] 2 AC 415 at 498; [2013] 3 WLR 1 at 31.
15 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [62]; [2013] 2 AC 415 at 498; [2013] 3 WLR 1 at 31.
16 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [100]; [2013] 2 AC 415 at 507; [2013] 3 WLR 1 at 40.
17 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [103]; [2013] 2 AC 415 at 508; [2013] 3 WLR 1 at 41.
18 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [35]; [2013] 2 AC 415 at 488; [2013] 3 WLR 1 at 20–21.
19 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) at [164].

> The question is whether it is being used as a façade at the time of the relevant transaction(s). *And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.* [emphasis added]

It is worth nothing that Munby J in *Ben Hashem* used the language of necessity, not of last resort. The test of necessity does not require the remedy to be one of last resort. Thomas LJ in *R v Secretary of State for Foreign and Commonwealth Affairs*[20] held, in the context of the exercise of the jurisdiction relating to the provision of information and documents under the principles set out in *Norwich Pharmacal Co v Customs and Excise Commissioners*,[21] that the court would not require the requested information in that case to be provided unless it was necessary. The court went further to hold that there was nothing in any authority to justify a more stringent requirement than necessity by elevating the remedy to being a remedy of last resort.[22] The UK Supreme Court in *The Rugby Football Union v Consolidated Information Services Ltd*[23] also held that the test of necessity did not require the remedy to be one of last resort.[24]

14 Further, the tenor of Munby J's *dicta* in *Ben Hashem* set out above was that the court would pierce the corporate veil only so far as to provide a remedy for the particular wrong which those controlling the company had done, and not for all purposes.[25] It is unlikely that Munby J intended to suggest that piercing the corporate veil is available only where there is no other remedy available, because if that were the case, it would have been apt for him to have dealt with that expressly and as a separate, and further, principle of piercing the corporate veil.

15 Additionally, Munby J's judgment in *Ben Hashem* as a whole does not support the suggestion that piercing the corporate veil is available only where all other remedies have proved to be of no assistance. Munby J discussed extensively cases where the corporate veil was pierced as well as those where the corporate veil was not pierced. He concluded[26] that all those cases discussed[27] were consistent with his

20 [2008] EWHC 2048 (Admin).
21 [1974] AC 133.
22 *R v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin) at [94].
23 [2012] UKSC 55.
24 *The Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55 at [16].
25 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) at [164].
26 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) at [185].
27 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) at [167]–[184].

analysis of the relevant principles of piercing the corporate veil.[28] If one of the principles included the requirement that the remedy of piercing the corporate veil should be available only where all other remedies have proved to be of no assistance, Munby J would have dealt with this requirement in his discussion of *Gilford Motor Co Ltd v Horne*[29] ("*Gilford Motor v Horne*"), *Jones v Lipman*[30] ("*Jones v Lipman*") and *Dadourian Group International v Simms*[31] ("*Dadourian*"). Munby J's omission in this regard is telling given that *Gilford Motor v Horne* and *Jones v Lipman* seem to illustrate the point that the court can pierce the corporate veil even where other remedies can be of assistance.[32]

16 Further, although *Dadourian* could be interpreted as a case in which the corporate veil was not pierced because there were other remedies available, Munby J explained that the claim failed in that case because the requisite degree of control over the company was lacking.[33]

17 Munby J in *Ben Hashem* also recognised that claims which might otherwise have to be made good, if at all, by application of the remedy of piercing the corporate veil can in appropriate circumstances be made good by reliance on other principles.[34] He did not go further to hold that as a result of the other available remedies, the remedy of piercing the corporate veil would be unavailable. This suggests that Munby J did not hold the view that piercing the corporate veil was available only where there was no other remedy available against the wrongdoers.

18 As for *Dadourian*, there was a suggestion that the court would only pierce the corporate veil where it was necessary, but that case does not go so far as to require the remedy to be available only where there are no other available remedies. Warren J in *Dadourian* held that "[t]here is simply no need, in order to give the Claimants redress for that misrepresentation, to lift the veil at all: indeed, to do so would achieve nothing in relation to that wrong".[35] This *dictum* related to the test of necessity, which, as discussed above, is a different requirement from the requirement that the remedy be available only when there are no other available remedies.

28 As set out in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) at [159]–[164].
29 [1933] Ch 935.
30 [1962] 1 WLR 832.
31 [2006] EWHC 2973.
32 As the Court of Appeal noted in *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 at [79]; [2012] 2 Lloyd's Rep 313 at 329.
33 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) at [183] and [184].
34 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) at [221].
35 *Dadourian Group International v Simms* [2006] EWHC 2973 at [686].

19 Furthermore, Warren J in *Dadourian* held that in all of the cases where the court had been willing to pierce the corporate veil, it had been "necessary *or convenient*" [emphasis added] to do so to provide the claimant with an effective remedy to deal with the wrong that had been done to him.[36] This test of convenience is supported by Lloyd LJ in *VTB Capital* where he interpreted *Gilford Motor v Horne* and *Jones v Lipman* as cases where it was convenient to make an order against the company directly, which led the court to pierce the corporate veil in those cases.[37] Munby J in *Ben Hashem* also referred to Warren J's *dictum* in *Dadourian* without any disapproval of the same.[38]

20 Lastly, it was argued by the claimant's counsel in *Dadourian* that it was no answer to a claim that the corporate veil should be lifted that there were concurrent liabilities or remedies in tort and that the claimant must proceed by the tortious route. The counsel for the claimant relied on *Trustor AB v Smallbone*[39] ("*Trustor v Smallbone*") to say that the court in *Trustor v Smallbone* proceeded on the basis of lifting the veil but could have proceeded on a restitutionary basis. In this regard, Warren J held that where there was no overlap between claims, it would be perfectly acceptable to put forward different ways of recovering the same compensation, loss or property.[40]

21 Based on the foregoing discussion, it is arguable that *Ben Hashem* and *Dadourian* do not support the view of the majority of the Supreme Court in *Prest v Petrodel Resources Ltd*[41] that the remedy of piercing the corporate veil is available only when all other remedies have proved to be of no assistance.

22 It is nevertheless noteworthy that certain jurisdictions such as South Africa and the US have adopted the position that there should be no other remedy before the court would pierce the corporate veil. For example, the South African Supreme Court of Appeal in *Hulse-Reutter v Godde*[42] held that the very exceptional nature of the relief which the respondent sought against the appellants (namely that of piercing the corporate veil) required that he should have no other remedy.[43] Further,

36 *Dadourian Group International v Simms* [2006] EWHC 2973 at [682].
37 *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 at [79]; [2012] 2 Lloyd's Rep 313 at 329.
38 *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam) at [165].
39 [2001] EWHC 703.
40 *Dadourian Group International v Simms* [2006] EWHC 2973 at [684].
41 [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1.
42 [2001] ZASCA 102.
43 *Hulse-Reutter v Godde* [2001] ZASCA 102 at [23].

in *Amlin (SA) Pty Ltd v Van Kooij*[44] the Western Cape High Court, Cape Town held:[45]

> I accept that 'opening the curtains' or piercing the veil is rather a drastic remedy. For that reason alone it must be resorted to rather sparingly and indeed as the very last resort in circumstances where justice will not otherwise be done between two litigants. It cannot, for example, be resorted to as an alternative remedy if another remedy on the same facts can successfully be employed in order to administer justice between the parties.

There may be public policy imperatives to justify the remedy of piercing the corporate veil being a remedy of last resort. However, this may unduly limit the availability of the remedy of piercing the corporate veil. It is suggested that the requirement that the corporate veil be pierced only when all other remedies have proved to be of no assistance can be further finessed.

23 Lord Neuberger and Lord Clarke in *Prest v Petrodel*[46] held that it was appropriate to pierce the corporate veil only when all other, *more conventional*, remedies had proved to be of no assistance. However, Lord Neuberger and Lord Clarke neither elaborated on what they determined to be a "more conventional" remedy nor explained the basis of applying such a distinction to the available remedies. In the circumstances, seeking to apply such a distinction to the available remedies may create further uncertainty in the applicability of the remedy of piercing the corporate veil. An alternative is to carry out an inquiry into whether the alternative remedy for piercing the corporate veil is an adequate remedy. In Oregon, the courts have taken the view that the disregard of a legally established corporate entity is an extraordinary remedy which exists as a last resort, where there is no other adequate and available remedy to repair the claimant's injury.[47]

III. Conclusion

24 There is perhaps some room to question whether *Ben Hashem* and *Dadourian* support the holding in *Prest v Petrodel* that piercing the corporate veil should be granted only where all other remedies are not available. The requirement that a remedy be necessary does not equate with the requirement that a remedy be one of last resort.

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44 [2007] ZAWCHC 60.

45 *Amlin (SA) Pty Ltd v Van Kooij* [2007] ZAWCHC 60 at [23].

46 *Prest v Petrodel Resources Ltd* [2013] UKSC 34 at [62] and [103]; [2013] 2 AC 415 at 498 and 508; [2013] 3 WLR 1 at 31 and 41 respectively.

47 See *Amfac Foods Inc v International Systems and Controls Corp* 294 Or 94; 654 P 2d 1092 (1982) and *Hambleton Brothers Lumber Co v Balkin Enterprises Inc* 397 F 3D 1217 at 1225 (9th Cir, 2005).

25 Further, there may be public policy imperatives to uphold the doctrine of separate legal personality and to justify the exceptional nature and narrow scope of the remedy of piercing the corporate veil. However, to hold that the corporate veil should only be pierced where there is no other available remedy would severely limit the availability of the remedy of piercing the corporate veil. The court should perhaps consider whether the alternative remedy to piercing the corporate veil is adequate.