Lessons from *Prest*

When is it appropriate for the courts to draw adverse inferences? Daniel Lightman & Emma Hargreaves report post-*Prest*

IN BRIEF

- *Prest* will undoubtedly become a starting point for arguments based on adverse inferences, but the limits of the principle remain open to debate.
- Some cases not referred to in *Prest* provide useful guidance on when the drawing of adverse inferences is, and is not, appropriate in civil proceedings.

The decision of the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] All ER (D) 90 (Jun) was awaited with keen anticipation, as it had the potential radically to change the legal landscape for both family and company lawyers. In the weeks since the judgment was handed down, a flurry of articles have addressed, in particular, Lord Sumption's treatment of the so-called doctrine of piercing the corporate veil and his interpretation of s 24(1)(a) of the Matrimonial Causes Act 1973 (MCA 1973). This article, however, focuses on another aspect of the decision: in what circumstances is it appropriate for the courts to draw adverse inferences?

Case summary

The facts of *Prest* are now well-known and accordingly are not set out in this article (see *NLJ*, 28 June 2013, p 11 & *NLJ*, 21 June 2013, p 27). In short, the dispute arose out of ancillary relief proceedings in which Moylan J ordered Mr Prest to make a lump sum payment to Mrs Prest of £17.5m. The issue in the appeal was whether the court had the power to order the transfer to Mrs Prest of seven UK properties legally owned by the three respondent companies, which had been found by Moylan J to be owned and controlled by Mr Prest.

The Supreme Court rejected Mrs Prest's first argument, based on piercing the corporate veil, and confirmed the long-established principle that a company has a personality and property separate from its shareholders. It also rejected Mrs Prest's second argument, based on s 24(1)(a), MCA 1973, concluding that there was nothing in the statutory language or history of s 24(1)(a) which would permit a finding that Mr Prest was "entitled, either in possession or reversion" to the UK properties legally owned by the companies. In so concluding, the court called a halt to the longstanding practice in the Family Division of treating the assets of companies substantially owned by one spouse as being available to be transferred to the other spouse.

However, the court allowed Mrs Prest's appeal on the ground that the relevant properties were held on resulting trust for Mr Prest. It was in relation to this argument that the notion of drawing adverse inferences came into play. Mr Prest and the companies had failed either to disclose highly material documents, such as the completion statements for the properties or evidence demonstrating the provenance of the purchase monies for each of the properties, or to file any evidence other than an affidavit by Mr Murphy, a director of PRL, who Moylan J found to have been "unwilling rather than unable to attend court".

Drawing adverse inferences

Lord Sumption rejected the "fiercer" statements in *British Railways Board v Herrington* [1972] AC 877 which "appear to convert open-ended speculation into findings of fact" and endorsed the "more balanced" view expressed by Lord Lowry in *R v Inland Revenue Commissioners, Ex p TC Coombs & Co* [1991] 2 AC 283 that: "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

In the future, *Prest* will undoubtedly become a starting point for arguments based on adverse inferences, but save for confirming the well-established general principles (and subject to the modification for ancillary relief considered below), the Supreme Court did not consider the scope of the principle in any great detail and so its limits remain open to debate. Some cases not referred to in *Prest* provide further useful guidance on when the drawing of adverse inferences is, and is not, appropriate in civil proceedings.

Non-disclosure

First, the courts will not draw adverse inferences from the refusal by the other party to waive privilege in respect of legal advice that he has received. This has been well-established since *Wentworth v Lloyd* (1864) 10 HLC 589 and was recently confirmed by the Court of Appeal in *Sayers v Clarke Walker* [2002] EWCA Civ 910.

Secondly, care must be taken as to when inferences may be drawn in the context of the destruction of relevant documents. It appears that the principle is not limited to cases in which the destruction was deliberate (see *Infabrics v Jaytex* [1985] FSR 75), but it was held in *Earles v Barclays Bank Plc* [2009] EWHC 2500 (QB) (Mercantile)

that, unless there has been deliberate destruction, the principle was limited to situations in which a duty to retain documents, such as disclosure obligations under the CPR, had arisen. While this area was considered briefly in *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] RPC 203, the Court of Appeal:

- left open the question of whether or not the deliberate destruction of documents gives rise only to adverse inferences or may pass into the field of a presumption; and
- doubted whether the principle could be used to prove the wrongful act itself.

Failure to call relevant witnesses

Adverse inferences will not be drawn where it is not reasonable to expect a witness to be called. This was made plain in *Polarpark Enterprises v Allason* [2007] EWHC 22 (Ch), a case arising in the special context of possession claims under CPR Pt 55. Under Pt 55.8, the court can, at an initial hearing after the claim form has been issued, decide the claim or give case management directions. In this case, Master Moncaster had decided the claim in the claimant's favour at that early stage. On appeal, the defendant argued that the master should have drawn an inference adverse to the claimant from its failure to call a number of witnesses, that inference being that the claimant feared that such witnesses would give evidence supportive of the defendant's case. However, Briggs J held that since the hearing was not a trial and was similar in substance to a summary judgment hearing, it was not a case in which it was reasonable to have expected the claimant to have deployed the witnesses, with the consequence that the occasion for drawing adverse inferences did not arise.

Dishonesty

In appropriate circumstances, the court may infer the existence of a secret trust from the fact that a party previously lied about his interest in the relevant property, particularly if that party could not later complain of injustice if the court believed that the statements which he made subsequently were also lies. This was the case in *R v Fuller* [2005] EWCA Crim 825, but since that was a criminal appeal against a confiscation order, its applicability in civil proceedings remains unclear, along with the extent to which this approach to dishonesty could be applied by analogy in other contexts.

Lord Sumption's "modification"

In *Prest*, Lord Sumption added a modification in the context of claims for ancillary relief to the principles considered above. He suggested that such proceedings had distinctive features which justified a modified approach. Those features are: the public interest in the proper maintenance of the wife by her former husband; the substantial inquisitorial element to the proceedings; and the differing application of the burden of proof in this context where the wife, albeit technically the claimant, is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her claim. To these, Lady Hale added the duty of the spouse to make full and frank disclosure of all material and relevant facts, not only to the other spouse, but to the court.

> *"Inferences are, after all, no substitute for positive evidence"*

Consequently, Lord Sumption considered that, although this should not be seen as a licence to engage in pure speculation, family judges are entitled to draw on their experience and to "take notice of the inherent probabilities" when deciding what an uncommunicative economically dominant spouse or civil partner is likely to be concealing.

A guide, not a strait-jacket?

Going forward, two points should be borne in mind.

First, Lord Sumption's modification may not amount to a significant change to the approach adopted by matrimonial courts before the decision in *Prest*. The approach of the Family Division to the quantification of assets where the disclosure of one spouse is materially deficient was considered in detail by Mostyn J in *NG v SG (Appeal: Non Disclosure)* [2011] EWHC 3270 (Fam) and makes for remarkably similar reading to the comments made by the Supreme Court in *Prest*. The Supreme Court's judgment does, however, add legitimacy to this approach and will undoubtedly be cited in cases where the economically dominant spouse adopts an obstructive approach to the proceedings. It is important, however, to bear in mind the extent of (in Lord Sumption's words) Mr Prest's "persistent obstruction, obfuscation and deceit, and a contumelious refusal to comply with rules of court and specific orders". It may be, therefore, that the result in *Prest* can be explained as an example of a case where the court took a sufficiently dim view of the manner in which the husband and the relevant companies had chosen to conduct the litigation that it was willing to draw adverse inferences in an almost punitive manner to ensure that a just result was achieved for the wife. Accordingly, in circumstances where the litigation conduct of the economically dominant spouse or civil partner is open to more minor criticism, the courts may be reluctant to draw such inferences. Inferences are, after all, no substitute for positive evidence.

Secondly, one can speculate that in many cases involving offshore company structures set up by wealthy individuals, the "inherent probabilities" will not always point towards the conclusion that the wealthy spouse intended to retain beneficial ownership of properties held by those companies.

There are good reasons, in particular wealth protection and taxation, why wealthy individuals who are not domiciled in the UK choose to hold their assets through offshore companies. Such individuals will commonly be advised that if they own a property in the UK, whether legally or beneficially, it will be subject to inheritance tax. This tax can lawfully be avoided if that individual simply owns the shares in an offshore company which owns the property both legally and beneficially. One would, therefore, expect a court frequently to conclude that it is inherently probable that where assets are held through an offshore corporate structure the wealthy spouse intended to divest himself or herself of the beneficial ownership of those assets: any other conclusion would unjustifiably ignore the realities and advantages of the use of such structures.

On the other hand, the inherent probabilities may be different in the case of a matrimonial home, in the light of Lord Sumption's suggestion that where the matrimonial home is held in the name of a company, it can frequently be inferred that the property is held on trust for the spouse who owns and controls the company. And the Supreme Court inferred that the seven UK properties were held on resulting trust for Mr Prest without going behind Moylan J's finding at first instance that Mr Prest's purpose in using the corporate structure was "wealth protection and the avoidance of tax".

As Lord Sumption emphasised, this is a "highly fact-specific issue" and so the courts must focus on the facts of each case and the inferences that can legitimately be drawn, using previous decisions as a guide but not a strait-jacket. NLJ

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