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Articles

Petrodel Resources Ltd v Prest: where are we now?

Daniel Lightman* and Emma Hargreaves**

Abstract

Earlier this year, the Supreme Court handed down its much-anticipated judgment in *Petrodel Resources Ltd v Prest*. The case raised important issues regarding the scope of section 24 of the Matrimonial Causes Act 1973, the doctrine of piercing the corporate veil and the law of resulting trusts. The decision had the potential radically to change the legal landscape for family practitioners, company practitioners, or both. This article considers where the law stands following this landmark decision and reflects on its ramifications for future cases.

Introduction

In the weeks preceding the Supreme Court's decision in *Petrodel Resources Ltd v Prest*,[1] the case was the subject of much attention and commentary, both in the media and legal circles. A clear divide emerged between family practitioners, who warned of a 'cheat's charter', and company practitioners keen to protect the long-established principle of separate corporate personality. As a consequence, the Supreme Court was faced with a difficult task: would it be able to satisfy those on both sides of the divide?

The dispute arose out of ancillary relief proceedings in the context of a divorce between Mrs Prest and her oil-baron husband, Mr Prest. As a result of his blatant disregard for court procedures and court orders, Moylan J was faced with the unenviable task of estimating Mr Prest's allegedly vast wealth on the basis of very limited evidence. Ultimately, he ordered Mr Prest to make a lump sum payment to Mrs Prest of £17.5 million. In part-satisfaction of that lump sum order, Moylan J invoked the jurisdiction under section 24(1)(a) of the Matrimonial Causes Act 1973[2] (the MCA) and ordered the transfer to Mrs Prest of seven UK properties held by three companies in the Petrodel Group—companies which he found to be owned and controlled by Mr Prest. The Group, he said, was 'effectively . . . the husband's money box which he uses at will'[3] and the assets within the companies were 'effectively the

* Daniel Lightman, barrister, Serle Court Chambers, 6 New Square, London, WC2A 3QS. Tel: 0207 7242 6105; Email: dlightman@serlecourt.co.uk.
** Emma Hargreaves, Serle Court Chambers, 6 New Square, London, WC2A 3QS. Tel: 0207 7242 6105; Email: ehargreaves@serlecourt.co.uk.

1. [2013] UKSC 32, [2013] 3 WLR 1.
2. S 24(1) of the MCA provides as follows:

On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say—

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion . . .
(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage . . .

3. *Yasmin Prest v Michael Prest & Ors* [2011] EWHC 2956 (Fam), [217].

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husband's property'.[4] Having so concluded, Moylan J made no findings as to whether the properties were beneficially owned by the husband or by the companies.

The companies appealed and a majority of the Court of Appeal (Rimer and Patten LJJ) firmly held that Moylan J's interpretation of the scope of section 24(1)(a) of the MCA was excessively wide because it violated the long-standing principle of separate corporate personality which had been established by the decision of the House of Lords in *Salomon v A. Salomon & Co Ltd*[5] Section 24(1)(a), they held, only applied to assets beneficially owned by a spouse and could not be used as a means of 'piercing the corporate veil'. In a forceful dissent, Thorpe LJ warned that the majority's decision to reject the Family Division's wide interpretation of the powers given by section 24(1)(a) would be 'an open road and a fast car' to economically dominant spouses.[6]

In the Supreme Court, Mrs Prest sought to uphold Moylan J's order transferring the UK properties to her on three alternative grounds: (i) it was an appropriate case to pierce the corporate veil; (ii) section 24(1) of the MCA gave the court jurisdiction to disregard the corporate veil in matrimonial cases; and/or (iii) the companies held the UK properties on trust for the husband. In short, the court rejected the first two but not the third of those grounds.

This article considers where the law stands following the Supreme Court's important judgment and reflects on its ramifications for future cases in which the same or similar issues arise.

Piercing the corporate veil

As Lord Neuberger noted,[7] *Prest* was the 'second case in the space of a few months when the doctrine has been invoked in this court'. In February 2013, in *VTB Capital plc v Nutritek International Corpn,*[8] the Supreme Court had left the question open, much to the disappointment of those hoping that it would 'grasp the nettle' and take the opportunity to declare that the doctrine of piercing the corporate veil did not in fact exist. In *Prest*, the Court plainly felt that it could avoid the issue no longer.[9] And perhaps Lord Sumption, who gave the main judgment in *Prest* but was not on the panel that heard *VTB*, saw it as a golden opportunity to express his own views on the subject.

The Supreme Court appears to have been unanimous on four points: first, that the long-established principle that a company has a personality and property separate from its shareholders remained valid; secondly, that there is a 'doctrine'[10] of piercing of the corporate veil; thirdly, that the circumstances in which the corporate veil can be pierced are very limited; and finally, that *Prest* was not an appropriate case for the invocation of the 'doctrine'. But the unanimity ended there. It is worth, therefore, exploring the six separate judgments of the seven-judge panel in turn.

Lord Sumption reviewed the case law and noted the 'impressive' consensus that the piercing the corporate veil doctrine exists, in some form at least. He was unwilling to 'explain that consensus out of existence' and accepted that there was a limited power in defined circumstances to pierce the corporate veil. He drew a novel distinction between the 'concealment principle' and the 'evasion principle'.[11] The concealment principle, he said, does not involve the piercing of the veil at all. In cases where a company is interposed to conceal the identity of the real actors, the courts will simply look behind it to discover what is being concealed. He concluded, therefore, that the

4. ibid, [210].
5. [1897] AC 22.
6. *Petrodel Resources Ltd v Prest* [2012] EWCA Civ 1395, [2013] 2 WLR 557, [63]. The judgment of the Court of Appeal is summarised in J McDonagh and T Graham, 'Piercing the Corporate Veil in the Family Division: *Prest* – the Latest from the Court of Appeal' (2013) 19(2) Trusts & Trustees 137–145.
7. [2013] UKSC 32, [2013] 3 WLR 1, [63].
8. [2013] UKSC 5, [2013] 2 WLR 378.
9. [2013] UKSC 32, [2013] 3 WLR 1, [63] (Lord Neuberger) and [105] (Lord Walker).
10. Or, as Lord Walker preferred to call it, [106], a 'label'.
11. [2013] UKSC 32, [2013] 3 WLR 1, [28].

court may only invoke the doctrine where a person uses a company under his or her control deliberately to evade a legal obligation or liability or to frustrate the enforcement of a legal restriction: the 'evasion principle'. If, however, there is an alternative remedy, Lord Sumption emphasized that it would not be appropriate to pierce the veil.[12]

Lord Neuberger admitted that he had initially been attracted by the argument that the doctrine should 'be given its quietus'.[13] Ultimately, however, he accepted the existence of the doctrine and agreed with Lord Sumption's formulation of it in terms of 'evasion'. So far, so good as they say.

The murmurings of uncertainty appear in the following judgments. Lady Hale, with whom Lord Wilson agreed, expressed some doubts as to whether the authorities on the subject could be neatly compartmentalized into cases of either concealment or evasion.[14] Lord Mance accepted that the cases identified by Lord Sumption in which the doctrine can be said to have been critical to the reasoning fall within the 'evasion principle'.[15] Importantly, however, he emphasized that it was

> dangerous to seek to foreclose all possible future situations which may arise and [he] would not wish to do so.[16]

Lord Clarke expressed a similar reluctance.[17] He conceded that Lord Sumption may be right about the distinction between evasion and concealment, but stressed that since it was not a distinction discussed in the course of argument, it

> should not be definitively adopted unless and until the court has heard detailed submissions upon it.

Lord Walker simply welcomed the discussion of the other judges and observed that the doctrine is not a coherent principle of law but rather a label describing the disparate occasions in which the law produces apparent exceptions to the principle in *Salomon v A Salomon and Co Ltd*.[18]

So where does this leave us? Plainly, the law in this area has not been conclusively settled and it remains to be seen how Lord Sumption's newly formulated distinction will be applied in future cases. A majority of the Supreme Court judges (Lords Clarke and Mance and Lady Hale, newly-formulated whom Lord Wilson agreed) did not accept that the circumstances in which the corporate veil can be pierced are confined to those identified by Lords Sumption and Neuberger. In addition, the comments of Lord Clarke and Lord Mance make clear that there remains scope in the future to expand the circumstances in which piercing the corporate veil will be justified.

Unsurprisingly, these comments have not gone unnoticed. In the short time since the Supreme Court's decision, there have already been two cases in which the judgment has been considered. In *Antonio Gramsci Shipping Corpn v Lembergs*, Beatson LJ set out the differing comments considered above and stated[19]:

> As to further development of the law, doing so by classical common law techniques may not be easy . . . Absent a principle, further development of the law will be difficult for the courts because development of common law and equity is incremental and often by analogical reasoning.

And in *Akzo Nobel N.V. v Competition Commission* the Competition Appeal Tribunal noted[20] that the

12. ibid, [35].
13. ibid, [79].
14. ibid, [92].
15. ibid, [99].
16. ibid, [100].
17. ibid, [103].
18. ibid, [105]-[106].
19. [2013] EWCA Civ 730, [65]-[66].
20. [2013] CAT 13, [95].

Supreme Court in *Prest* had not wholly excluded the possibility that exceptions may also be made in other unspecified but rare circumstances.[21]

One suspects, therefore, that claimants with clever lawyers will continue seeking to expand the doctrine where all other arguments fail. *Prest* looks highly unlikely to be the Supreme Court's last word on the doctrine of piercing the corporate veil.

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Section 24(1)(a) of the MCA

The Supreme Court gave Mrs Prest's section 24(1)(a) argument short shrift and for that reason it need not be considered in any great detail here. The Court concluded that there was nothing in the statutory language or history of the section that would permit a finding that Mr Prest was 'entitled, either in possession or reversion' to the UK properties which were legally owned by the companies. Lord Sumption accepted that any other conclusion would

> cut across the statutory schemes of company and insolvency law. These include elaborate provisions regulating the repayment of capital to shareholders and other forms of reduction of capital, and for the recovery in an insolvency of improper dispositions of the company's assets. These schemes are essential for the protection of those dealing with a company, particularly where it is a trading company . . .[22]

In so concluding, the Court called a halt to the apparently 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. The world of commerce can breathe a sigh of relief.

Resulting trusts

The Court ultimately fell back on the third ground of appeal and the question of resulting trusts. Unlike the Court of Appeal, the Supreme Court accepted the wife's contention that the point had been left open by Moylan J. As Lord Sumption noted:

> . . . on the footing that [Moylan J] was wrong about the ambit of section 24(1)(a), it does need to be decided now.[23]

The Supreme Court was, however, faced with a difficult task. 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'. The principal evidence before the Court was that provided by the wife, who stated that the properties were held by the companies for her husband and that he had told her that in the event that anything should happen to him she should sell those properties and use the proceeds to live off. The Court was forced, therefore, to rely on presumptions and any adverse inferences that could legitimately be drawn against the husband in coming to the conclusion that the companies held the properties on resulting trust for him.[24] In this

21. See, too, *R v Peter John Sale* [2013] EWCA Crim 1306, where the Court of Appeal confirmed, at [20], that the principles concerning piercing the corporate veil enunciated in *Prest* apply equally to criminal confiscation order cases. Curiously, the Court of Appeal also suggested that the comments of the Supreme Court were 'obiter to the decision' in *Prest*. It is unclear why this is said to be the case in circumstances where the wife's grounds of appeal were not limited simply to whether section 24 of the MCA 1973 was a statutory power to pierce the corporate veil, but extended to whether the veil could be pierced more generally, for example on grounds of impropriety.

22. [2013] UKSC 32, [2013] 3 WLR 1, [41].

23. ibid, [43].

24. For an analysis of the principles applicable to the drawing of adverse inferences following *Prest*, see the authors' article, *Lessons from Prest* (2013) 163(7569) NLJ 11–12.

regard, Lord Sumption endorsed[25] the balanced approach to the drawing of adverse inferences expressed by Lord Lowry in *R v Inland Revenue Commissioners, Ex p TC Coombs & Co*[26]:

> 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.

To this, Lord Sumption added a modification for ancilliary relief proceedings, stating[27]:

> . . . judges exercising family jurisdiction are entitled to draw on their experience and take notice of the inherent probabilities when decided what an uncommunicative husband is likely to be concealing.

As Lord Sumption noted:

> [w]hether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue.[28]

The Supreme Court did, however, provide some limited guidance for future cases.

The first point to be noted is that the Court confirmed that the presumptions of equity, including those relating to gifts and resulting trusts, remain applicable. There appears to be no room, therefore, for arguments that the presumption of resulting trust is no longer the correct starting point in cases where property has been gratuitously transferred from A to B or where A purchases a property in the name of B. The presumptions will continue to be a useful tool, particularly in cases like *Prest* where the Court is faced with a lack of evidence or deficient documentary disclosure from one party to the proceedings.

Secondly, there can also now be no doubt (if there ever was any before) that the presumption of resulting trust will apply not just where the property has been transferred wholly gratuitously but also where it has been transferred for nominal consideration. Lord Sumption saw no difficulty in concluding that in the case of those properties transferred to the company for the sum of £1 the presumption of resulting trust arose.

Thirdly, following Lord Sumption's tentative suggestion, where the property is the matrimonial home it is likely to be easier to persuade the court that the property is held on trust for the spouse who owns and controls the company. As Lord Sumption noted, in such cases

> [t]he intention will normally be that the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with the company's beneficial ownership.[29]

Unfortunately, however, a number of uncertainties remain following the Supreme Court's decision.

First, it is perhaps surprising that in a case which was ultimately decided on the basis of resulting trusts, there was no detailed consideration of the relevant legal principles and case law in the judgment itself. As a result, some issues remain open to debate in

25. [2013] UKSC 32, [2013] 3 WLR 1, [44].
26. [1991] 2 AC 283, 300.
27. [2013] UKSC 32, [2013] 3 WLR 1, [45].
28. ibid, [52].
29. ibid.

future cases. One such issue is the effect of section 60(3) of the Law of Property Act 1925 ('the LPA 1925'), which provides:

> In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.

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Section 60(3) may accordingly be relevant in cases where the economically dominant spouse has transferred a property owned by him to a company owned by him for no consideration.[30] The effect of this section remains uncertain: whilst dicta in *Lohia v Lohia*[31] and *Ali v Khan*[32] suggest that section 60(3) has the effect of removing the presumption of resulting trust in such cases, academic opinion on the point is mixed.[33] Where there is abundant evidence before the court, the effect of the section may well be of no significance, as there will be no need to rely on the presumption at all. The evidence on its own will be sufficient for the court to ascertain the true intentions of the spouse transferring the property. Where, however, as in *Prest*, there is an evidential gap, the outcome of the case may turn on whether or not there is a presumption of resulting trust.

Secondly, the relevance of the concept of 'wealth protection and taxation' in the resulting trust analysis is unclear. Moylan J had found at first instance that the corporate structure 'was set up and has been used for conventional reasons including wealth protection and the avoidance of tax'.[34] The Supreme Court did not state that they were going behind this finding of fact when determining that the companies were holding the UK properties beneficially for Mr Prest. But one can speculate that in many cases involving similar structures, particularly where that case is heard in the Chancery Division, a finding that the purpose of the spouse in transferring the assets to the company or buying the assets in the company's name was 'wealth protection and taxation' will lead to the court the irresistible conclusion that the spouse intended to divest himself or herself of the beneficial ownership of the UK-based assets.

The wealthy spouse will commonly have been advised that he or she can avoid UK tax by simply holding the shares in an offshore company that in turn owns the UK property both legally and beneficially. A finding that the spouse intended to retain the beneficial ownership would be wholly inconsistent with the underlying purpose of the structure. Even if there is no express finding of fact that this was the underlying purpose, it is arguable that the 'inherent probabilities' in a case where a wealthy 'non-dom' has put assets in the name of an offshore company will also lead to the same conclusion.

The relevance of 'wealth protection and taxation' had been explored in a number of cases prior to the decision in *Prest*. Two opposing strands of authority can be identified, although in such a fact-specific area the differences in result are no doubt explicable on the facts of those cases rather than as a result of a significant disagreement in principle about the correct approach.

30. It will not, of course, be relevant where the property has been bought in the name of the company using purchase monies provided by the spouse. In such circumstances, there is no conveyance of property from the spouse to the company on which s 60(3) LPA can bite.

31. [2001] WTLR 101, 113 (Nicholas Strauss QC).

32. [2002] EWCA Civ 974.

33. Compare, eg, *Chambers on Resulting Trusts* (Clarendon Press, 1997) 18–19, which suggests that the presumption of resulting trust is abolished by s 60(3) and *Snell's Equity* (32nd edn, Sweet & Maxwell, 2010) 25-017, which prefers an interpretation that:

> the provision merely introduces the possibility that the grantee may take the beneficial interest in the land even though the words 'to the use or benefit of the grantee' are not expressed in the conveyance. That is to say, the provision was only intended as a conveyancing reform to simplify the words of limitation in the conveyance not to preclude the application of the substantive law of resulting trust to voluntary conveyances of land.

34. *Yasmin Prest v Michael Prest & Ors* [2011] EWHC 2956 (Fam), [217].

On the one side of the line is the decision of Robert Walker J in *Stockholm Finance Ltd v Garden Holdings Inc*,[35] where he observed[36]:

> If a private company is sole legal owner of the house, and the occupier of the house is sole legal and beneficial owner of all the company's shares, then (so long as the parties remain solvent) there is no basic economic difference between the company being sole beneficial owner of the house, and being a nominee for the occupying shareholder. There will be incidental differences for instance the tax implications – and these may be of some practical importance as we have seen. But at a basic level a wholly owned company cannot be seen by its shareholder either as a potential rival to him in claims of ownership of property, or as a potential recipient of bounty from him. What goes out of one economic pocket comes into the other. In these circumstances I can see very little room for the application of the traditional presumptions as between Princess Madawi and Garden. I do not discount them completely but I must look first for evidence of actual intention before having recourse to the judicial last resort.[37]

This passage was cited with approval by Blackburne J in *Nightingale Mayfair Ltd v Mehta*[38] where he concluded that, where an individual purchases a property in the name of a company which he controls, the existence of this control renders it 'all the more likely' that his intention was that the company should become the legal and beneficial owner of the property. Blackburne J further recognized that the intended tax objectives simply would not have been achieved if the individual in question had remained the beneficial owner; that objective could only be achieved under the corporate structure if the company was the beneficial owner.[39]

The same approach is evident in the important decision of Munby J in *Ben Hashem v Ali Shayif*[40] where he found that the relevant properties were held by a company both beneficially and legally, as otherwise the purpose of the tax saving scheme would fail. The facts of that case were, however, particularly stark and may be readily distinguishable in other cases. The contemporaneous documentation before the court put it beyond doubt that the husband had been advised to set up the company to hold the UK properties with the express purpose that capital gains tax and inheritance tax would thereby be avoided.

On the other side of line are cases like *Sekhon v Alissa*[41] and *Lavelle v Lavelle*[42] which suggest that the 'wealth protection and taxation' point will not automatically rebut a presumption of resulting trust. In *Sekhon v Alissa*, for example, the presumption of resulting trust was not rebutted by the fact that the mother purchasing the property with her daughter thought that there might be a capital gains tax advantage if her contribution to the purchase price were to be treated for tax purposes as a gift. As Hoffmann J noted, this did not necessarily bear any relation to what the beneficial interests were actually intended to be.

In *CR v MZ*,[43] where judgment was given in February 2013, almost four months before the Supreme Court's decision in *Prest*, the matrimonial home was put in the name of a shell company, the shares in which were in the name of the husband. After rejecting an argument that the shares were held by the husband on trust for his father which was based on what the judge found were documents

35. (Unrep, 26 October 1995).
36. ibid, 10–11 of the transcript.
37. This is to be contrasted with Lord Walker's endorsement, nearly 18 years later, of Lord Sumption's resulting trust analysis in *Prest*. Perhaps different approach which Lord Walker took in *Prest* is explicable on the basis of the dim view the Supreme Court took of Mr Prest's obstructive and unacceptable litigation conduct which the Court felt justified the adverse inferences which were drawn against him (and the companies).
38. [2000] WTLR 901, 926.
39. See too *Trade Credit Finance & Others v Bilgin & Others* [2004] EWHC 2732 (Comm), [71] (Gavin Kealey QC) (sitting as a Deputy High Court Judge).
40. [2008] EWHC 2380 (Fam), [2009] 1 FLR 115.
41. [1989] 2 FLR 94.
42. [2004] 2 FCR 418.
43. [2013] EWHC 295 (Fam).

which had been created by the husband and father with a view to misleading the court, Jonathan Cohen QC moved to consider who owned the matrimonial home beneficially. After reviewing *Sekhon*, *Lavelle,* and *Ben Hashem*, he stated that he '[struggled] to reconcile these authorities. It may be that each is fact specific'.[44] He then distinguished *Ben Hashem* on the grounds that in *CR v MZ* there was 'an absence of any clear tax advantage in the scheme' and found that the property was held beneficially for the husband and wife. As he had noted earlier in his judgment,[45] there may have been other valid explanations for the use of the company structure, including, for example, anonymity. However, the judge was unwilling to enter into 'sheer conjecture' on this point. Had this case taken place post-*Prest*, the judge's task would undoubtedly have been easier in the light of Lord Sumption's tentative suggestion that matrimonial homes will frequently be held beneficially by the economically dominant spouse.

How case law will develop on this point following the Supreme Court's decision in *Prest* remains to be seen. It is, however, likely that clear evidence of tax planning advice and sound corporate governance systems within the offshore company owned by the wealthy spouse will help to persuade the courts that assets held by the company are intended to be the company's assets. To this very limited extent, the 'cheat's charter' may yet live on, but as Lord Sumption emphasized, cases like *Prest* are the exception not the rule and in the majority of cases an order transferring the wealthy spouse's shares in the company to the wife is likely to be sufficient.

Section 24(1)(c) of the MCA

In the Supreme Court, the wife sought to advance, for the first time, an alternative argument that the companies constituted a nuptial settlement within the meaning of section 24(1)(c) of the MCA.[46] The Supreme Court ruled during the course of the hearing that permission to appeal on this further ground would be refused and declined to address this argument, save that Lord Sumption commented that the point did 'not appear to be seriously arguable here'.[47] As has been noted above, there can be no doubt that the Supreme Court has firmly closed the door on the use of section 24(1)(a) to achieve a transfer of company assets to the non-economically dominant spouse, but the door arguably remains open, by a crack at least, in relation to arguments based on section 24(1)(c) of the MCA. The point therefore merits a brief consideration here.

> *The Supreme Court has firmly closed the door on the use of section 24(1)(a) to achieve a transfer of company assets to the non-economically dominant spouse, but the door arguably remains open, by a crack at least, in relation to arguments based on section 24(1)(c) of the MCA*

As Mrs Prest argued before the Supreme Court, the section 24(1)(c) jurisdiction has long been recognized to be of wide scope. For more than one hundred years, the courts up to the highest level have adopted a liberal and purposive approach to the interpretation of the term 'nuptial settlement' in the context of the MCA and its predecessors.

44. ibid, [86].
45. ibid, [25].
46. See n 2 above.
47. [2013] UKSC 32, [2013] 3 WLR 1, [53].

For example,[48] in *Blood v Blood*,[49] Gorell Barnes J, considering the ambit of, and policy behind, section 5 of the Matrimonial Causes Act 1859,[50] stated[51]:

> Those words are extremely wide, and I am anxious that they should not, by any construction the Court may put upon them, be narrowed in any way. To narrow them would be undesirable for this reason: the various circumstances which come before the Court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the Court should have power to deal with all the cases that come before it, and, in dealing with them, to meet the justice of the case. I, therefore, do not desire to see any narrow interpretation placed upon the words of the section.[52]

The modern starting point for a consideration of the section 24(1)(c) jurisdiction is the decision of the House of Lords in *Brooks v Brooks*.[53] It is from this case that the definition of 'nuptial settlement' is generally derived. In short, a nuptial settlement is 'any arrangement which makes some form of continuing provision for both or either of the parties to a marriage'.[54] Lord Nicholls (with whom the other Law Lords agreed) emphasized the width of the meaning of the expression 'nuptial settlement'[55]:

> . . . the authorities have given a consistently wide meaning to settlement in this context, and they have spelled out no precise limitations. This seems right, because this approach accords with the purpose of the statutory provision. Financial provision that is appropriate so long as the parties are married will often cease to be appropriate when the marriage ends. In order to promote the best interests of the parties and their children in the fundamentally changed situation, it is desirable that the court should have power to alter the terms of the settlement. The purpose of the section is to give the court this power. This object does not dictate that settlement should be given a narrow meaning. On the contrary, the purpose of the section would be impeded, rather than advanced, by confining its scope.

As Coleridge J stated in *N v N and F Trust*[56]:

> There is nothing in that case which shows any departure from the previous approach of the court over the previous 100 years.

Prior to the Supreme Court's decision in *Prest*, there were three ways in which the non-economically

48. See, too, *Bosworthick v Bosworthick* [1927] 64, 71 (Scrutton LJ) and 72 (Romer J); *Prinsep v Prinsep* [1929] 225, 232, and 235 (Hill J); *Lort-Williams v Lort-Williams* [1951] 395, 403 (Denning LJ); *Prescott (formerly Fellowes) v Fellowes* [1958] 260, 281–282 (Romer LJ); *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [234] (Munby J).
49. [1902] 78.
50. That section provided:

> The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as the Court shall think fit.

51. [1902] 78, 82.
52. This passage was cited in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [234], where Munby J went on to say:

> That policy seems to me to be as important and the approach, in my judgment, is as valid today as a century ago.

53. [1996] AC 375.
54. According to Lord Nicholls. [1996] AC 375, 391:

> broadly stated, the disposition must be one which make some form of continuing provision for both or either of the parties to a marriage with or without provision for their children.

Subsequent cases have read 'disposition' as a synonym for 'arrangement': see, eg, *DR v GR (Financial Remedy: Variation of Overseas Trust)* [2013] EWHC 1196 (Fam), [8] (Mostyn J).
55. [1996] AC 375, 392.
56. [2005] EWHC 2908 (Fam), [2006] 1 FLR 856, [30].

dominant spouse could seek to take advantage of the breadth of the section 24(1)(c) jurisdiction in cases involving company assets.

First, there was an established line of first-instance Family Division decisions to the effect that where the nuptial settlement was a trust, which owned a company, which in turn owned property in the UK, the interposition of the company would not prevent an effective variation of the settlement by an order for the sale of the underlying property.[57] This is to be contrasted with the approach of the Chancery Division in, for example, *Mosley v Popley*,[58] where Michael Brindle QC accepted as 'well-founded' the submission that where there is a trust which owns a company which in turn owns a property, the 'trust property' is not the property but the shares in the company.[59]

Secondly, it was open to the spouse to argue that the underlying property itself constituted a nuptial settlement. This was held to be the case in *N v N & F Trust*,[60] where the matrimonial home was owned by a company, W Ltd, all of the shares in which were owned by the F Trust.[61]

Thirdly, there was limited authority for the proposition that in offshore corporate structures, the companies themselves could constitute nuptial settlements. This was the view held by Mostyn J in *DR v GR & others*[62] in a judgment given on 10 May 2013, after the hearing in the Supreme Court but before judgment was handed down. In that case the settlement was a discretionary trust which owned a Liberian company which in turn owned a UK company which in turn owned two UK companies which owned a number of valuable assets located in the UK.

The wife sought a variation of the settlement under section 24(1)(c). The companies, all of which had been joined to the proceedings, argued that the wide-ranging use of the variation powers under section 24(1)(c) was no longer valid following the decision of the Court of Appeal in *Prest*. In the light of that decision, the court could not, the companies argued, directly deal with the assets at the bottom of the tree.

In response to this, Mostyn J pointed out[63]:

> [i]f [the companies'] argument is right it would mean that this jurisdiction would be almost totally emasculated. This is because it is only in rare cases that the settlement directly owns the underlying assets (although this does crop up from time to time in cases about landed estates here). In the great majority of cases there is an interposed company, and it is usually off-shore. A grant of relief that leaves that applicant to engage in enforcement proceedings in Monrovia or Tortola or George Town is likely to prove to be a poisoned chalice.

Dealing next with the companies' reliance on the judgments of the majority of the Court of Appeal in *Prest*, Mostyn J stated[64]:

> . . . I am quite certain that the argument is not right. The language of the two sub-sections is completely different and the decision of the Court of Appeal in Prest was based solely on the language of s24(1)(a).

Mostyn J went on to conclude[65]:

> I am of the opinion that if under an arrangement 'some form of continuing provision for both or either of the parties to a marriage' (which would include, on the authorities, the provision of

57. See, eg, *E v E (Financial Provision)* [1989] FCR 591, [1990] 2 FLR 233; *C v C (Ancilliary Relief: Nuptial Settlement)* [2004] EWHC 472 (Fam); *BJ v MJ* [2011] EWHC 2708 (Fam), [2012] WTLR 395; *Hope v Krejci* [2012] EWHC 1780 (Fam).
58. [2012] EWHC 3905 (Ch), [2013] W.T.L.R. 521.
59. ibid, [13] and [21].
60. [2005] EWHC 2908 (Fam).
61. ibid, [34] and [40] (Coleridge J).
62. [2013] EWHC 1196 (Fam).
63. ibid, [6].
64. ibid, [7].
65. ibid, [18].

> accommodation) has been made from assets held by a group of family companies then the entire set-up, when viewed as a whole, is capable of amounting to a variable nuptial settlement. If the top company is owned by a trust of which the spouses are formal beneficiaries then the position is a fortiori.

The question, therefore, is the extent to which such arguments are likely to succeed following the Supreme Court's judgment. It is possible that such arguments will prove to be more, if not very, difficult in light of the (albeit obiter, at any rate as regards section 24(1)(c)) comments of Lord Sumption that[66]:

> . . . a transfer of this kind will ordinarily be unnecessary for the purpose of achieving a fair distribution of the assets of the marriage. Where assets belong to a company owned by one party to the marriage, the proper claims of the other can ordinarily be satisfied by directing the transfer of the shares. It is true that this will not always be possible, particularly in cases like this one where the shareholder and that company are both resident abroad in places which may not give direct effect to the orders of the English court. In an age of internationally mobile spouses and assets this is a more significant problem than it once was, but such cases remain the exception rather than the rule. *Section 24 cannot be construed as if it were directed to that problem* . . . so far as a party to matrimonial proceedings deliberately attempts to frustrate the exercise of the court's ancillary powers by disposing of assets, section 37 provides for the setting aside of those dispositions in certain circumstances. *Section 37 is a limited provision which is very far from being a complete answer to the problem, but it is as far as the legislature has been prepared to go* (emphases added).

By referring to 'section 24' as a whole, these comments do not appear to be confined to section 24(1)(a). In consequence, this raises serious questions about the legitimacy of the approach advocated by Mostyn J in *DR v GR*. Going forward and assuming that Parliament does not step in to widen the courts' statutory powers, in 'big money' divorce cases involving attempts to access assets held by an offshore corporate structure controlled by the economically dominant spouse or civil partner, it appears that efforts will be best spent by the less wealthy spouse or civil partner trying to establish an argument based on a resulting trust or, where relevant, section 37 of the MCA. In relation to the use of section 24(1)(c) in such circumstances, the door may be open a crack but, for the reasons given above, in many, if not all cases, it is likely that the door will be slammed in the less wealthy spouse's face.

Conclusion

There can be no doubt that using adverse inferences and the doctrine of resulting trusts, the Supreme Court achieved a just result for Mrs Prest in this case. But legal practitioners seeking clarity on the legal principles to be applied in cases giving rise to similar issues may not be as satisfied with the decision as was Mrs Prest.

Insofar as it relates to section 24(1)(a) of the MCA, the Supreme Court's ruling is unquestionably a landmark decision, putting a firm end to arguments that the courts have jurisdiction under that sub-section to order the transfer of assets which are 'effectively' owned by the other spouse; from now on, the claiming spouse must demonstrate the other spouse's legal or beneficial ownership of such assets in order to succeed.

Regrettably, however, the decision is unlikely to be the final word on a number of other important issues. In particular, there does not appear to be a clear ratio insofar as it relates to the doctrine of piercing the corporate veil and consequently it remains to be seen whether, and if so how, Lord Sumption's new rationalization of the doctrine will be applied in subsequent cases. Further, it appears likely that the section 24(1)(c) jurisdiction will be fertile ground for

66. [2013] UKSC 32, [2013] 3 WLR 1, [40].

argument in cases where section 24(1)(a) was previously used and the Supreme Court may yet have to address its mind to the scope of that jurisdiction in the not so distant future.

Daniel Lightman *is a barrister at Serle Court Chambers and was one of the counsel who represented Mrs Prest in the Supreme Court. Email: dlightman@serlecourt.co.uk*

Emma Hargreaves *is currently a pupil, at Serle Court Chambers. She will become a member of Serle Court Chambers on 1 October 2013, following completion of her pupillage. Email: ehargreaves@serlecourt.co.uk*