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**Concealment, Evasion and Piercing the Corporate Veil:
Prest v Petrodel Resources Ltd [2013] 2 A.C. 415**

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Introduction

“Piercing the corporate veil” is a convenient label used to identify cases in which the courts have granted relief which appears at first blush to involve disregarding the separate legal personality of a company from the person or persons who control it. This label has recently come under scrutiny, in particular, in *Antonio Gramsci Shipping Corp v Stephanovs* [2012] 1 All E.R. (Comm) 293 and *VTB Capital Plc v Nutritek International Corp* [2013] 2 A.C. 337 in the context of enforcing a contract against persons who were not party to it, and culminating in the Supreme Court decision on ancillary relief in *Prest v Petrodel Resources Ltd* [2013] 2 A.C. 415. The underlying issue in *Gramsci* and *VTB* was the exercise of the jurisdiction of the English courts over parties who were not resident within the jurisdiction, while in *Prest* it was the fact that family law had developed an approach to company owned assets in ancillary relief applications which amounted almost to a separate system of legal rules unaffected by the relevant principles of English property and company law.

Gramsci

In *Gramsci*, Burton J. had found that there was a “good arguable case” that a party to a contract with a corporation, which was controlled by an individual who had used it as a device or façade to conceal wrongdoing, could proceed against the individual in contract and could establish jurisdiction by virtue of a jurisdiction clause in the contract with the corporate entity because the corporate veil could be pierced in order to place the defender-puppeteer into the company-puppet’s contract:

“There is ... no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppeteer who, all the time, was pulling the strings” (at [26]).

In *Gramsci* it was alleged that the defender had conducted a scheme to defraud the claimants using the defender companies which he controlled. In essence, the companies chartered ships at reduced rates from the claimants and re-hired them at inflated rates.

VTB

In *VTB* the claimant relied, at first instance, on Burton J.’s decision in *Gramsci* to argue that a facility agreement which it had entered into with a company, controlled by the defender, should be enforced against him even though he was not a party to it, again in order to rely upon a

jurisdiction clause. The claimant alleged it had been induced to enter into the facility agreement as a result of fraudulent misrepresentations made by the defender who controlled the company to which the loan had been made and which had defaulted. However, Arnold J. ([2011] EWHC 3107 (Ch)) refused to follow Burton J., saying at [101] that it was not so much a decision to pierce the corporate veil as a decision to ignore privity of contract. The true basis upon which the courts had pierced the corporate veil was that

“the company was being used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely dehors the company”.

In other words, there had to be some “anterior or independent wrongdoing” by the controller (at [98]).

Before the Court of Appeal ([2012] EWCA Civ 808) the claimant argued that the contractual cause of action (rather than delictual) was simply a logical application of the judicial “veil piercing” in reaction to the misuse of a company by those in control of it so as to conceal their own wrongdoing, whereas the defendants argued that there was no such thing as “veil piercing” and that the concept was ultimately meaningless. Lloyd L.J. rejected the latter argument, relying on Lord Keith’s statement in *Woolfson v Strathclyde Regional Council*, 1978 S.L.T. 159 at 161 that

“it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts”.

However, Lloyd L.J. refused the appeal. He noted that the critical submission for VTB was that, as a matter of law, the controller of a company would be regarded as a party to the contract if the controller fraudulently deceived another into entering into a contract with the company, in the belief that the company was in fact in different control, and therefore used the company as a mere façade to conceal the controller’s true identity. He said, at [90], that submission would make a

“fundamental inroad into the basic principle of law that contracts are the result of a consensual arrangement between, and only between, those intending to be parties to them. It is contrary to that principle, which is applicable save in some exceptional cases, none of which applies here, that a stranger to the contract should be held to be a party to it”.

VTB’s appeal to the Supreme Court ([2013] 2 A.C. 337) on this issue was unsuccessful. Lord Neuberger did not consider it appropriate on an interlocutory appeal to decide whether a common law principle of piercing the veil existed but, on the assumption it did exist, held that to extend the principle to the facts in *VTB* would be contrary to authority and principle (at [143]). Lord Clarke at [238] left open the question of whether *Gramsci* had been properly decided.

Prest

The issue was whether the principle of lifting the veil applied to residential properties owned by a group of companies, which the judge had found was effectively the husband’s “money box which he used at will”. Lord Sumption held that the properties were in fact beneficially owned by the husband but held that the principle of piercing the veil did not apply because there was

no suggestion that the husband had incorporated the group to avoid any liability on divorce. He said that lifting the veil was disregarding the separate personality of the company where that separate legal personality was being abused for the purpose of some relevant wrongdoing. He said that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances was necessary if the law was not to be disarmed in the face of abuse and that, provided the limits were recognised and respected, it was consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law (at [27]). However, the difficulty was to identify what was a relevant wrongdoing. He replaced “façade” or “sham” with the “concealment” principle and the “evasion” principle. The concealment principle was the interposition of a company, or perhaps several companies, to conceal the identity of the real actors; the court did not disregard the “façade” but only looked behind it to discover the facts that the corporate structure was concealing. The evasion principle was the court disregarding the corporate veil if there was a legal right against the person in control of it, which existed independently of the company’s involvement, and a company was interposed so that the separate legal personality of the company would defeat the right or frustrate its enforcement (at [28]).

Lord Sumption identified “confusion of concepts” in earlier decisions, for example in *Gencor ACP Ltd v Dalby* [2000] 2 B.C.L.C. 734 where a director had diverted a secret profit to a company he controlled. Although Rimer J. thought that he was piercing the veil when he held the director liable for the profit received by the company, Lord Sumption disagreed; he said it was in reality the concealment principle and that the correct analysis was that the court refused to be deterred by the legal personality of the company from finding the true facts about its legal relationship with the director. Similarly in *Trustor AB v Smallbone (No.2)* [2001] 1 W.L.R. 1177, the corporate veil was not pierced; the concealment principle provided that receipt by a company would count as receipt by the shareholder if the company received the money as his agent or nominee. He referred to the broader principle that the corporate veil might be pierced only to prevent the abuse of corporate legal personality and noted, at [35], that the principle was properly described as a limited one because in almost every case where the test was satisfied, the facts in practice disclosed a legal relationship between the company and its controller which made it unnecessary to pierce the corporate veil.

At [79] Lord Neuberger referred to piercing the veil as “a supposed doctrine” which was controversial and uncertain and which appeared never to have been invoked successfully and appropriately in its 80 years of supposed existence. Although it was arguable the doctrine “should be given its quietus”, he instead adopted Lord Sumption’s formulation at [53] that the doctrine should only be invoked where

“a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control”.

Lord Walker at [106] said that piercing the veil was not a doctrine at all, in the sense of a coherent principle or rule of law, but simply a label often used indiscriminately to describe the disparate occasions on which some rule of law produced apparent exceptions to the principle of the separate juristic personality of a body corporate.

Interestingly, Lady Hale at [95] said that *Stone & Rolls Ltd v Moore Stephens* [2009] 1 A.C. 1391, a case which contains no reference at all to piercing the veil, was an example of going behind the separate legal personality of the company in order to “get at” the person who owned and controlled it, not for the purpose of suing him, but in order to attribute his knowledge to the company so that its auditors could raise a defence of *ex turpi causa* to the company’s allegation that they had negligently failed to detect the fraudulent nature of its business.

Conclusion

The Supreme Court has affirmed the primacy of *Salomon v A Salomon and Co Ltd* [1897] A.C. 22 and all but buried the principle/doctrine/label of piercing the veil. However, the detailed analyses of the case law usefully illustrate that abuse of corporate identity will not go unpunished; corporate litigators just need to mind their language and refer instead to concealment or evasion.