



THE CORPORATE VEIL: A FAÇADE?

N. Leroy Smith

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The case of *Prest v Petrodel Resources Ltd. and others* [2013] UKSC 34 ("*Prest*") sheds much needed light on the fiercely debated issues of if and when the court can 'pierce the corporate veil', i.e. disregard a company's separate legal personality. The issue arising in *Prest* was whether the court could order the disputed properties belonging to the Petrodel Group, which was wholly owned and controlled by the husband, to be transferred to the wife even though the companies were the legal owners of the disputed properties and not the husband. The decision is a landmark one concerning the protection of a company and its assets from the Court's previously overreaching arms in ancillary relief applications.

The earlier case of *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5 expressed that in order to pierce the corporate veil, it is necessary to show that the wrongdoer(s): (1) controls the company and (2) is misusing the company by using it as a device or façade to conceal their wrongdoing at the time of the relevant transaction. *Prest* went further to set out the limited circumstances in which the court will pierce the corporate veil; the circumstances are where a person

interposes a company which he controls in order to either deliberately evade or deliberately frustrate the enforcement of: (1) an existing legal obligation or liability which he is under or (2) an existing legal restriction to which he is subject. Piercing the corporate veil in these circumstances would serve to deprive the company and its controller from the advantages it would have obtained by the company's separate legal personality.

In considering whether it could pierce the corporate veil in order to give the wife effective relief, the Court in *Prest* concluded that there was no general legal principle on which piercing the corporate veil could be justified since the husband had not acted improperly as he was not trying to conceal or evade any legal obligation that he owed to his wife or the law relating to the distribution of assets on the dissolution of a marriage. As there was no general legal principle on which to justify piercing the corporate veil in *Prest*, it could not be said that the court had a special and wider jurisdiction applicable in matrimonial proceedings. Lord Sumption states at paragraph 37 that,

"Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right

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of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere.”

The court can consider a spouse's ownership and control of a company and unrestricted access to the company's assets when assessing what their resources are; but it does not follow that the company's assets are transferable to the other spouse because the spouse's unrestricted access to the company's assets increases that spouse's worth. Though in such proceedings, the court is attempting to achieve a proper division of marital assets, the court will not stop at nothing in pursuit of the same.

However, companies are not in the clear yet. The Court in *Prest* expressed that parties to matrimonial proceedings are under a duty to make full and frank disclosure of all material facts which are relevant to the exercise of the court's powers and to the assessment of that party's resources. Where a party fails to make full and frank disclosure, the court is able to make inferences in deciding what the facts are from available material including: (1) material which has been disclosed, (2) judicial experience of what is likely being concealed and (3) inherent probabilities.

In *Prest*, the court made inferences adverse to the husband because his persistent obstruction of the Court's rules

and orders resulted in the evidence presented being incomplete and obscure. The court also inferred that the reason for the companies' failure to cooperate with the proceedings, which was at the husband's direction, was to protect the properties thus suggesting that proper disclosure of all relevant facts would show the properties to be beneficially owned by the husband. The court therefore ordered the companies to convey the disputed properties to the wife because, due to the circumstances in which the companies became vested with the disputed properties, the husband was beneficially entitled to them and the companies held them on trust for the husband.

It is therefore imperative that transactions relating to the acquisition of assets by companies are properly documented in order to evidence a company's ownership of its assets and prevent those assets having to be transferred to a spouse in ancillary relief proceedings. Companies that are party to such proceedings should seek legal advice as to whether they should make full and frank disclosure to avoid adverse inferences being made by the court. Most importantly, the decision in *Prest* underscores the need to ensure that companies are being properly run as it elucidates that the court does in fact have the ability to disregard the company's separate legal personality in certain limited circumstances.

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N. Leroy Smith is a Partner in the Lyford Cay office. He specializes in all facets of trust law including representing fiduciaries and individual clients (both private and institutional) in a range of trust and estate litigation; and advising international and local institutional clients in the drafting and administration of Bahamian trusts.



THE TRUSTEE EXONERATION CLAUSE

Tom Mylott

What made the case of Spread more interesting, however, was that the alleged breaches of trust against the Trustee arose before the date of amendment of the Guernsey Law.

Questions marks are constantly raised over the performance of a trustee's duties and whether the trustee in question has discharged its obligations in fulfilling those duties. To assist the trustee in protecting itself, the trustee in the majority of, if not in all, cases will look to the protection afforded to it or them by any exoneration clause included within the Trust Deed. Given the ever increasing complexity of a trustee's duties in the 21st century, this issue has been of great interest to trustees.

Exoneration clauses were introduced to protect trustees from liability where the trustee had acted in good faith, and such clauses allowed trustees, who would not otherwise have been prepared to accept such a position, to make decisions with the requisite speed and confidence in an increasingly litigious environment. But how sturdy are exoneration clauses in practice?

The leading judgment on the protection afforded to trustees by an exoneration clause is that provided by Millett LJ in the Court of Appeal decision in *Armitage v Nurse*. It was established in this case that a trustee which has a suitably worded exemption clause can exempt itself from all liability for breaches arising out of its own actions apart from in instances of his own actual fraud or dishonest activity. It followed that a clause which excluded liability for negligence or even "gross negligence" was not, in the laws of England and Wales, contrary to public policy.

With *Armitage* in mind, the position over exoneration clauses was recently reconsidered in the Guernsey case of

Spread Trustee Company Limited v Sarah Ann Hutcheson and others at all levels up to and now including the Privy Council. In this case there was an examination of the standard exoneration clause included in the Trust Deed in question, which stated:

"In the execution of the trusts and powers hereof no Trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure, depreciation or loss of any investments made in good faith or by reason of any mistake or omission made in good faith or of any other matter or thing except wilful fraud and wrongdoing on the part of the Trustee who is sought to be made liable".

This exoneration clause in Guernsey was considered in light of an amendment to the domestic Guernsey Law in 1991 under which Law it was stated that exoneration clauses could not lawfully exclude liability arising out of the Trustee's fraud or wilful default and the amendment to the Law extended this exclusion to gross negligence as well. What made the case of *Spread* more interesting, however, was that the alleged breaches of trust against the Trustee arose before the date of amendment of the Guernsey Law. It was therefore a question of what authority would be used to determine whether the before mentioned exoneration clause would cover the alleged breaches of Trust, which were ones of gross negligence rather than deliberate fraud or wrongdoing.

The Privy Council considered that as a matter of Guernsey (and also English) common law it was possible for a Trustee

to exclude liability for gross negligence thereby reaffirming the position established in *Armitage*.

The Privy Council concluded that:

“Millett LJ summarized his view as being that [the exoneration clause], which excluded liability for anything other than fraud ‘exempts the Trustee from liability for loss or damage to the Trust property no matter how imprudent, lacking in diligence, negligent or wilful he may have been so long as he has not acted dishonestly’. The board agrees”.

While this judgment provides a certain level of comfort for Trustees when considering their position in a dispute over the discharge of their duties, this case creates far from a certain position in that it is possible that a Supreme Court board in a future case may wish to re-examine *Armitage v Nurse*. Further the majority decision by the Privy Council in this case

was far from a convincing majority with the board of the Privy Council being split 3 to 2.

It was considered in this case that gross negligence does not form part of the “irreducible core” of the Trustee obligations and that an exoneration clause can therefore exclude acts of gross negligence. In the case it was considered that “...on the plain meaning of the words and as a matter of logic and common sense, the terms “negligence” and “gross negligence” differ only in the degree or seriousness of the want of due care they describe”. Accordingly, it will be important in cases that arise in the future for courts to consider the definition of “gross negligence” closely and as such it may be very useful when drafting trust deeds across jurisdictions for the term gross negligence to be a defined expression.

Further the majority decision by the Privy Council in this case was far from a convincing majority with the board of the Privy Council being split 3 to 2.

Tom Mylott is a Senior Associate in the Cayman Islands. He is a member of the Private Clients & Wealth Management group specialising in trusts, tax planning and wills.

GOVERNMENT CHANGES IN THE CAYMAN ISLANDS

On Wednesday 22nd May 2013 a general election was held in the Cayman Islands as a result of which there was a change of Government in the Islands. The party which secured the most seats was the People’s Progressive Movement (the “PPM”), which was the opposition party in the last term, winning 9 out of the possible 18 seats available in the Legislative Assembly.

The PPM required a majority of the seats in order to form a government and with the appointment of Juliana O’Connor –

Connolly as the new Speaker of the Legislative Assembly, (the previous acting Premier of the Cayman Islands), the PPM acquired the requisite tenth seat with Ms O’Connor-Connolly becoming a card carrying member of the PPM.

On Wednesday the 29th May, the Legislative Members were formally sworn in by the Cayman Islands Governor, Duncan Taylor. Alden McLaughlin, as leader of the People Progressive Movement provided his first address as

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the newly appointed Premier. The former Premier, McKeeva Bush, stands as the Leader of the opposition party, The United Democratic Party.

One of the first challenges for the new Government to consider will be treatment of those resident workers who applied for and were granted a Term Limit Extension Permit which allowed those workers who were facing Rollover and forced departure in 2011 the opportunity to remain in Cayman for a further 2 years. The Term Limit Extension Permit was implemented because of fears that the 7 year anniversary of the post Hurricane Ivan clean up, (when thousands of people came to Cayman), would trigger the beginning of a mass exodus of workers who had arrived on Cayman at the time when the tourism industry and new Companies were expanding to begin the recovery. Even though the extra two year period was granted to this specific group of residents they could not apply for permanent residency during this period and therefore this decision needs to be made imminently to provide certainty for these people.

Another issue on the near horizon for the new government to consider is the

implementation of legislation to reflect Cayman's position in its response to the US Foreign Account Tax Compliance Act (FATCA). Under FATCA, foreign financial institutions will be expected to identify American persons who hold accounts with them and to report certain information on an annual basis as well as reporting details of substantial American owners of non-financial foreign entities. After consultation with various bodies within the financial services sector in Cayman the Cayman Islands Government announced in March 2013 that Cayman would be adopting a Model 1 Intergovernmental Agreement with the USA whereby the foreign financial institutions within Cayman will report the above information to a Cayman Islands Government Body which will then relay the information to the US authority. Domestic legislation will need to be put into place to set out the obligations of the foreign financial institutions within Cayman in order to ensure compliance with rules.

Since the Government has only just been formed however, the Legislative Members will need some time to consolidate their thoughts and provide a combined view on the administration going forward. - Tom Mylott

SENIOR ASSOCIATE SPEAKS AT 'LONDON LANDFALL' EVENT



Higgs & Johnson was a sponsor of the Bahamas Financial Services Board ("BFSB") London Landfall event. Senior Associate, Nadia J. Fountain spoke on the topic 'Wealth Management: Advantage Bahamas'.

NEW IMMIGRATION PROCEDURES FACILITATE FINANCIAL SERVICES

In a press release, the Ministry of Financial Services and the Department of Immigration affirmed their commitment to maintaining The Bahamas as a world class international financial centre. In this regard, it was noted that the movement of foreign persons through and within The Bahamas to facilitate international business, finance and trade is expected and encouraged. It was further highlighted that it is the duty of the Department of Immigration to facilitate this movement of persons in accordance with Bahamian immigration laws and policy.

The Ministry of Financial Services and the Department of Immigration advised the public of the Immigration and Entry Procedures for short-stay business (less than 2 weeks) and client meetings in The Bahamas where there is no financial gain (i.e. no employment) involved.

With respect to entry to The Bahamas for said purposes, short term work permits are not now required. However, to facilitate the ease of entry into The Bahamas, the Department of Immigration recommends that the travel details of such visitors be advised to the Airport Superintendent of Immigration at least 72 hours prior to the expected date of entry. This information may be forwarded to:

*Mr. Hubert Ferguson -Superintendent
Department of Immigration
Lynden Pindling International Airport
Nassau, Bahamas
Telephone: 242-377-6564, 242-3777033 or 242-702-7246*

The Ministry of Financial Services expressed its gratitude to the Department of Immigration for its continued cooperation in the development of The Bahamas' financial services industry.

PARTNER SPEAKS AT INAUGURAL ELEUTHERA BUSINESS OUTLOOK

(L-R) Thomas Sands, President of Eleuthera Chamber of Commerce; Joan Albury, The Counsellors; and Dr. Earl A. Cash



Dr. Earl A. Cash was the keynote speaker at the very first Eleuthera Business Outlook. He spoke on the topic 'Doing Business in The Bahamas'. Organizers of the event were the Eleuthera Chamber of Commerce and The Counsellors.

FIRM SUPPORTS BAHAMAS PRIMARY SCHOOL STUDENT OF THE YEAR FOUNDATION

(Back Row) Partners Portia J. Nicholson, Tara A. A. Archer and Stephen J. Melvin (Front Row) Mr. Petty (father); Mr. Ricardo Deveaux (President PSTOY); Christa Petty (H&J Scholarship Recipient) with Earl A. Cash (Partner) and Oscar N. Johnson, Jr. (Global Managing Director)



Higgs & Johnson was pleased to support the Bahamas Primary School Student of the Year (PSTOY). PSTOY was established in 1997 with the aim of recognizing a group of students who are often overlooked and seldom appreciated. Over the last 15 years this program has impacted more than 1,100 talented young students and awarded over \$700,000.00 in scholarships and prizes.

President and CEO, Dr. Ricardo Deveaux noted, "On behalf of the Foundation we are thankful to Higgs & Johnson for their financial contribution. This support fosters this important partnership that seeks to reward excellence and inspire another generation. Everyone has the power to make a difference in the life of a child."

Partner, Zarina Fitzgerald said, "We wish to congratulate Ms. Petty on her success at this year's awards and it is our pleasure to provide her with the 'Higgs & Johnson Scholarship'. The Partners of the firm also salute the work of the Foundation and offer congratulations to this year's honourees."

PARTNERS HONOURED DURING 40TH BAHAMIAN INDEPENDENCE CELEBRATIONS



Vivienne M. Gouthro presented with her plaque by the Minister for Grand Bahama, Dr. Michael Darville



N. Leroy Smith (c) with the Governor General, Sir Arthur Foulkes (l) and CEO of JCN, Wendell Jones (r)



Christel Sands-Feaste (c) with the Governor General, Sir Arthur Foulkes (l) and CEO of JCN, Wendell Jones (r)

The Bahamas celebrated 40 years as an independent nation in July at which time a number of persons in the business community were honoured. Higgs & Johnson is proud to note that its partners, Vivienne M. Gouthro, N. Leroy Smith and Christel Sands-Feaste were the recipients of such prestigious honours.

Mrs. Gouthro, who heads the Freeport office, was included in the '40 Gems' honoree list by the Grand Bahama Independence Committee. This group of women were lauded for their tremendous contribution to the growth and development of Grand Bahama, and by extension The Bahamas.

In Nassau, both Mr. Smith and Mrs. Sands-Feaste were included in the '40 Under 40' Awards which was hosted by Jones Communication Network (JCN) in conjunction with the Ministry of Youth, Sports and Culture. They selected young Bahamian trailblazers who are performing with distinction in many spheres of national life.

Higgs & Johnson is proud to be a Bahamian law firm that remains deeply rooted in a tradition of service, honour and integrity. The firm salutes The Bahamas in achieving 40 years of Independence and congratulates its three partners on their well-deserved recognition during this momentous year.

PARTNER ATTENDS IBA BAR LEADERS' CONFERENCE



Tara Archer (r) with Urs Feller, Partner and Head of Litigation and Arbitration at Prager Dreifuss (Zurich)



(L-R) Ueli Sommer, Partner and Head of Employment Law at Walder Wyss, Tara Archer and David Godfrey, Senior Consultant at W Legal Ltd (Zurich)

Higgs & Johnson's Partner, Mrs. Tara A. Archer, attended the International Bar Association's ("IBA") Bar Leaders' Conference and the Mid-year Officers' Meeting that took place in Zurich, Switzerland in May.

The IBA is the world's leading organization of international legal practitioners and provides unparalleled networking and development opportunities through quality conferences, publications and other media, and has a wealth of experience in providing assistance to the global legal community.

The Conference was attended by Bar Leaders from around the world as well as high ranking Officers of the IBA. The Conference focused on the changes to the structure of the IBA, its policies and the IBA activities that are expanding geographically. Focus was also had on planning for the upcoming annual IBA Conference which will be held in Boston, USA this year. It is expected that this Conference will be one of the largest conferences held by the IBA with over 5,000 prominent lawyers from around the world being expected to attend.

Mrs. Archer is currently the Chair of the Consumer Litigation Committee of the IBA. She was also recently re-appointed to its Dispute Resolution editorial advisory board. She is in the process of organizing two (2) sessions at the upcoming annual Conference entitled "Chasing the Seller" and "Demolishing Legal Borders" which is a joint session with the Judge's Forum Committee.

The photos were taken at the Walking Dinner at the Restaurant Rüsterei, Zurich hosted by the top law firms in Switzerland which concluded the Conference.