DR v GR: The Roadblock Case

Following the Supreme Court decision in *Prest* It is now established principle that the corporate veil cannot be pierced save when a spouse deliberately evades a legal obligation or liability or frustrates enforcement by interposing a company under his control.

This decision, and the Court of Appeal decision before it, has been controversial and has caused alarm to those representing wives in such circumstances. Although the logic and basis of the decision is unarguable the impact on fairness and equality of arms is profound. Many share the concerns of Thorpe LJ that it provides "an open road and a fast car to the money maker who disapproves of the principles developed by the House of Lords that now govern the exercise of the judicial discretion in big money cases."

Fortunately, in the search for equality of arms, as the road clears in that spot a traffic jam builds further along. The profession is now looking much more closely at Trust law and whether the legal title reflects the beneficial interest. This was put to good use in *Prest* as Mrs. Prest secured the result she desired when the Supreme Court accepted argument that the Properties were held by the Companies on Trust for Mr. Prest.

In *DR v GR* Mostyn J went a step further. He considered whether the Company itself could fall within the definition of settlement. If so then the 'settlement' could

be varied and the Company assets distributed. He concluded in appropriate circumstances it could.

DR sought a variation of an overseas trust to provide her with a separate settlement or to distribute the assets of the Trust. The Trust structure was complex and involved an overseas trust, which owned a Liberian Company which in turn owned retirement villages. Ideally *DR* wished to receive one of the retirement villages. It was argued by *GR* and the Companies:

1. The decision in *Prest* applied.
2. The Court had power to vary the Trust but the main asset of the Trust was a share in a Liberian Company not the retirement villages. The only order available to the Court would therefore be to vary the Trust to transfer the share in that Company.
3. As the retirement villages were assets of the UK companies the Court could not pierce the corporate veil to seize them for the benefit of the Wife. (This argument also applied to each of the interposed companies)
4. Whether a Company was owned by a Trust or Husband, respect for the corporate entity meant that the Shareholder (ie: Trust / Husband) could not seize the Company assets to meet it's own needs. Thus, although the Trust could be varied and the shares transferred the assets of the companies could not.

These arguments were rejected by Mostyn J who found that the entire structure was a settlement and any aspect of the structure could be varied to provide for the Wife. Mostyn J went further and held that even if there was no Trust at the top, a Company which had traditionally made provision for the family, could, in itself, amount to a settlement:

> *"16. Indeed it is clear to me that a family company which under an arrangement makes some form of continuing provision for both or either of the parties to a marriage is capable <u>of itself</u> of amounting to a*

variable nuptial settlement whether or not the company is owned by a trust of which the spouses are formal beneficiaries. In Brooks at 391 Lord Nicholls justified the very wide scope of the definition of "settlement" by analogy to the equally wide definition given to that word in section 670 of the Income and Corporation Taxes Act 1988 viz "any disposition, trust, covenant, agreement, arrangement, or transfer of assets". And cases under that section (and its predecessor and successor) have clearly decided that a company can fall within that definition: see, for example, Commissioners of Inland Revenue v Payne (1940) 23 TC 610 (per Sir Wilfred Greene MR) and Jones v. Garnett (Her Majesty's Inspector of Taxes) [2007] UKHL 35, [2007] 1 WLR 2030 at para 47 (per Lord Walker) and at para 80 (per Lord Neuberger)."

If this is correct then any company, which provides for Husband and Wife as Husband and Wife rather than as shareholders (the nuptial element) is capable of variation.

The implications of this decision for the profession is twofold:

- Firstly, it is likely that many parallel applications will be issued under s.24(1)(c) when there is an application under s.24(1)(a) involving a company.
- Secondly, those advising Husband/Wife shareholders in respect of their company and tax affairs should consider the implications of this decision and whether there is a risk that subsequently the Company could fall within the broad category of settlement.

However, this is of course a first instance decision. Whether this finds favour in the higher courts remains to be seen but there is some indication that it may not. Mrs Prest applied to the Supreme Court to be given leave to argue this point - that the companies themselves might be treated as settlements, which were capable of variation. The Supreme Court refused permission to argue this point and observed that they did not believe it was arguable in any event. Whether that view will

prevail once further legal argument is developed remains to be seen. At present there is no Appellate Court decision against the use of S.24(1)(c) suggested by Mostyn J in *DR v GR.*

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July 2013

DR v GR & 5 ORS (FINANCIAL REMEDY: VARIATION OF OVERSEAS TRUST) (2013)

[2013] EWHC 1196 (Fam)

Fam Div (Mostyn J) 10/05/2013

FAMILY LAW - TRUSTS

ADDITION OF PARTIES : DISCRETIONARY TRUSTS : FINANCIAL REMEDIES : OVERSEAS TRUSTS : VARIATION OF SETTLEMENT ORDERS : DISCRETIONARY JERSEY TRUST OWNING VARIOUS COMPANIES : APPLICATION FOR TRANSFER OF ASSETS OWNED BY COMPANIES : PRINCIPLES APPLICABLE TO JOINDER OF PARTIES : JERSEY TRUST : FAMILY PROCEDURE RULES 2010 r.9.26B, Pt 18

The court gave guidance on the principles applicable to the joinder of trustees and/or underlying companies of a trust in variation of settlement cases.

The applicant wife (W) applied for a variation of a settlement order in settlement of monies owed to her by the first respondent husband (H) following divorce proceedings. The third to sixth respondents (X) applied to be disjoined from the proceedings.

Over half of the total assets were held in a post-nuptial settlement. That settlement was the second respondent discretionary Jersey trust (T). T owned the third respondent company which in turn owned the fourth respondent company which owned the fifth and sixth respondent companies which owned two retirement villages and other assets. W wished to receive an outright transfer of one of the retirement villages. Over the course of the proceedings T's trustees and X were joined as parties. No application for joinder was made and neither H nor X nor the trustees had any notice of any application to join; W's counsel had simply turned up with a draft order providing for joinder. The issues for the court were whether (i) the interposition of the companies between the trust at the top of the tree and the assets at the bottom impeded the making of a variation disposing of the assets at the bottom; (ii) X could be disjoined from the proceedings.

HELD: (1) A nuptial settlement was "any arrangement which makes some form of continuing provision for both or either parties of the marriage", Brooks v Brooks [1996] A.C. 375 considered. A family company which, under an arrangement, made some form of continuing provision for both or either spouses was capable of itself of amounting to a variable nuptial settlement whether or not the company was owned by a trust of which the spouses were formal beneficiaries. If under an arrangement "some form of continuing provision for both or either of the parties to a marriage" had been made from assets held by a group of family companies then the entire set-up, when viewed as a whole, was capable of amounting to a variable nuptial settlement. If the top company was owned by a trust of which the spouses were formal beneficiaries then the position was a fortiori. Accordingly, the entire structure comprised a variable post-nuptial settlement and the court was entitled to deal directly with, and to make orders in respect of, the trust assets owned by X, BJ v MJ (Financial Order: Overseas Trust) [2011] EWHC 2708 (Fam), [2012] 1 F.L.R. 667 applied (see paras 8, 15-16, 18, 47 of judgment). (2) The following principles were applicable on the question of joinder: (a) the joinder of trustees or underlying companies was not an essential precondition for the validity of a variation of settlement order; (b) beneficiaries under 18 had to be joined unless the court could

say that the proposed variation would not adversely affect their rights or interests. That requirement could be modified but the court should be very sparing in doing so. Failure to comply with the rule would not nullify any order later made. The application to join minor beneficiaries was to be made at the first appointment following the issue of the application; (c) the applicant, respondent, trustees and/or companies could apply for joinder. In each instance both the substantive terms of, and the procedure prescribed in, the Family Procedure Rules 2010 r.9.26B had to be carefully complied with; (d) under r.9.26B, the applicant for joinder had to show that there was an existing matter in dispute requiring the joinder of the new party for its resolution and that the issue could not be effectually and validly resolved without the joinder; (e) alternatively, under r.9.26B, it had to be shown that there was a separate matter in dispute between a party and the proposed new party which was connected to the main matters in dispute between the parties and that it was desirable to resolve all the issues together; (f) if better enforcement of an order in a foreign jurisdiction was relied on under an application under (d) or (e) there had to be evidence that joinder would actually make a difference; mere assertions of belief would not suffice; (g) an application for joinder had to be made on notice under Pt 18 of the Rules, which required seven days' notice, and be supported by clear evidence. It would be preferable if the application were served on the proposed new party (paras 21-35). Applying those principles to the instant case there was no good reason why either the trustees or the companies had been joined. Apart from the failure to comply with the prescribed procedure it did not appear that either limb of r.9.26B was engaged. The substantive application for joinder did not require the joinder of the proposed new parties in order that it could be effectually resolved. There was no separate dispute between W and either the trustees or X which it would be desirable to determine alongside the variation application. There was no evidence that enforcement of any variation order would be better achieved if the trustees or X were joined. There was a mere assertion to that effect but that was belied by the decision in IMK Family Trust, Re [2009] 1 F.L.R. 664, IMK applied. Accordingly, X succeeded on their application to be disjoined (paras 36-37).

Judgment accordingly
Counsel:
For the applicant: Jonathan Southgate QC
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For the second respondent: No appearance or representation
For the third to sixth respondents: Matthew Haynes (Direct Access)

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