

# **Prest v Petrodel Resources and VTB Capital v Nutritek: a Robust Corporate Veil**

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This article discusses the UK Supreme Court's decisions in *Prest* and *VTB Capital* and in particular the circumstances in which the corporate veil might be pierced. Following these decisions, it is arguable that the bar for situations in which the corporate veil might be pierced has been set even higher. The decision in *Prest* is likely to be welcomed by practitioners outside the family law arena as a return to certainty, the Supreme Court having twice now made it clear that extending the circumstances in which the corporate veil might be pierced would cut across established principles of company and insolvency law, both essential for protecting those dealing with companies.

On 12 June 2013, the UK Supreme Court overturned the UK Court of Appeal's decision in the case of *Prest v Petrodel Resources*<sup>1</sup> and in doing so ordered the transfer of several valuable properties to Mrs Prest from companies owned and controlled by Mr Prest as part of a £17.5m divorce settlement. However, the decision is likely to be of interest to practitioners outside the family law arena as the result was achieved by applying the law of trusts, while considering en route whether the corporate veil should be pierced.

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1 *Prest v Petrodel Resources Limited and Others* [2013] UKSC 34.

In particular, the Supreme Court unanimously agreed that it would be contrary to prior authorities and established principles of English law to extend the circumstances in which the corporate veil should be pierced. As in *VTB Capital*,<sup>2</sup> the court was able to reach its decision (and in the case of *Prest* the same decision as was reached at first instance) without piercing the corporate veil and disregarding the separate legal personality of the relevant companies. The decision in *Prest* builds on the comments made in the Supreme Court's decision in *VTB Capital* by Lord Neuberger, who cited with approval the test laid down in *Hashem*,<sup>3</sup> particularly that in order to pierce the corporate veil, 'it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing... at the time of the relevant transaction(s)'. Hence, the court cannot, and should not, pierce the corporate veil merely because it is thought to be necessary in the interests of justice.

It is helpful to consider briefly the relevant facts and the history of the *Prest* case. At first instance, an order for £17.5m was made in favour of Mrs Prest and Mr Prest was ordered to procure the transfer to her of the aforementioned properties, despite those properties being legally owned by the respondent companies, members of the Petrodel Group, in partial satisfaction of the order. Those companies applied to the Court of Appeal to appeal the first-instance decision and were successful on the basis that the Court of Appeal concluded that the company's assets belonged beneficially to the relevant company itself, and not to its shareholders, and accordingly they could not be subject to the order unless the corporate veil could be pierced. Subsequently, the Supreme Court overturned the Court of Appeal's decision and held that Mrs Prest should be entitled to the relevant properties on the basis that the properties in question were, in fact, beneficially owned by Mr Prest and were held on trust for him by the relevant members of the Petrodel Group. The court was able to draw this conclusion on the basis that the relevant properties had been transferred to the companies within the Petrodel Group for nominal consideration or at a significant undervalue, and that to the extent they were acquired by the companies the purchase price was provided by Mr Prest, rather than being derived from profits from the relevant company's trading activities, if any.

The decision in *Prest* has done little to alter the position that, under English law, a body corporate is distinct from, and has separate legal personality to, its shareholders and that that distinction (ie the corporate veil) can only be set aside in extremely limited circumstances. In particular, in both *VTB Capital* and *Prest*, the Supreme Court confirmed that the corporate veil may only be pierced where a corporate structure has been implemented or used to avoid or frustrate

<sup>2</sup> *VTB Capital plc v Nutritek International Corp and Others* [2013] UKSC 5.

<sup>3</sup> *Hashem v Shayif and Another* [2008] EWHC 2380 (Fam).

an existing legal obligation (rather than, for example, as part of the proper structuring of a corporate group). It is also of note that the Supreme Court, clearly concerned that it was within the space of just a few months required to twice consider when and if the corporate veil might be pierced, took the opportunity to state that it disagreed with the Court of Appeal in *VTB Capital*, which stated that it supported the suggestion that ‘it does not follow that a piercing of the veil will be available only if there is no other remedy available against the wrongdoers for the wrong they have committed’. In particular, Lord Sumption (giving the leading judgment in *Prest*, which was approved and supplemented by Lord Neuberger) expressed the view that the concept of piercing the corporate veil has ‘been recognised far more often than it has been applied’. Lord Neuberger stated that, while he was willing to recognise the doctrine, he was of the opinion that it had generally been raised only where the court was seeking to reach a just and equitable outcome when in fact the same outcome could ‘have been arrived at on some other, conventional, legal basis’ of English law.

In conclusion, for situations in which the corporate veil might be pierced, the bar has arguably been set even higher than it was prior to the Supreme Court’s decisions in *VTB Capital* and *Prest*, moving the current position away from the decision in *Antonio Gramsci Shipping*<sup>4</sup> (in which Burton J held that it was possible for a claimant to enforce an agreement against both a company and its controlling shareholders where those shareholders had used the relevant company as a device to conceal their involvement in the relevant transaction, effectively ignoring the doctrine of privity of contract). By moving away from the decision in *Antonio Gramsci Shipping*, the Supreme Court seems to be encouraging the lower courts to apply well-developed principles of English law, such as tort, the law of agency or trusts, to reach their desired outcome(s) (subject, of course, to the boundaries of those constructs) rather than deploy the weapon of piercing the corporate veil in a broad discretionary manner. This return to certainty as regards the circumstances in which the corporate veil might be pierced is likely to be helpful for corporate practitioners, the Supreme Court having twice now made it clear that extending the circumstances in which the corporate veil might be pierced would cut across established principles of company and insolvency law, both essential for protecting those dealing with companies.

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<sup>4</sup> *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm).