



Prest v Petrodel – a new court approach to corporate structures

In June this year, the Supreme Court (England's highest Court) gave its decision in the case of *Prest v Petrodel*. This decision is of considerable importance as it significantly widened the circumstances in which assets held in the name of companies will be treated as being held on trust on behalf of the individual(s) behind that company. As a result of this decision, such a conclusion is likely to be reached where an asset has been transferred to the company for nominal value, or where the individual has provided the company with the monies to purchase the asset.

As a consequence of the decision, the Courts will be required to delve far deeper into the circumstances surrounding the purchase of an asset and the creation of the corporate structures than ever before. This may cause concern where there is a desire to keep such information confidential. Careful consideration will therefore need to be given to the creation of corporate structure and the purchase of assets.

Background

Prest v Petrodel was a “big money” divorce case, concerning assets worth in excess of £17.5million. Many of the assets (primarily properties in London) were held by overseas companies controlled by the husband. In some instances the properties had been transferred by the husband to the company for nominal consideration, whilst in other cases the husband provided the company with the monies to purchase the property. These arrangements had been put in place before any difficulties in the marriage had arisen - they were not designed merely to prevent the properties being available to the wife.

The Court of Appeal had concluded that these assets were owned by the companies themselves, and so were not available to the husband when considering the value of his assets for the purpose of a financial settlement. However, the Supreme Court overruled this decision and concluded that the companies held the relevant properties on trust for the husband. Therefore the properties were available to the husband for the purpose of ancillary relief, meaning the wife was entitled to an appropriate share of the assets as part of the divorce proceedings.

In reaching this decision, the Court looked beyond the corporate structures that were in place and considered all of the facts relating to the control of the companies and ownership of the properties in the round (for example - how the properties had been purchased, as described above). The Supreme Court delved far deeper into the factual circumstances than ever before. This represents a significant departure from existing law. Prior to this decision, Judges were reluctant to look beyond the corporate structure at all, and would only do so with very good reason (for example, where there was a suggestion of fraud).



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As this is a decision of the Supreme Court, it will be binding on all lower courts considering similar factual situations. This will not be limited to divorce cases, but will be applicable to all cases concerning the ownership of valuable assets by corporate vehicles. Judges will now be required to adopt a similar approach to that taken by the Supreme Court. Accordingly, Judges are now unlikely to accept the mere fact that an asset is held by a corporate structure as sufficient evidence of its true beneficial ownership (as they would have done prior to this decision).

They will instead now look to consider all of the facts of the case - for example:

- how and when the asset was purchased,
- how the corporate structure was put in place.
- the nature of the companies holding the assets, and whether the ownership of an asset matches that purpose.

For example, some of the companies holding the properties in *Prest v Petrodel* were oil trading companies. Owning properties in London did not match this purpose.

Likely Consequences

The Supreme Court’s decision is likely to have far reaching consequences, some of which it is difficult to foresee. However, as a result of the decision, merely placing an asset into a corporate structure is unlikely to be sufficient to “divest” that asset. Nor will providing a corporate structure with the funds to purchase assets achieve this.

Rather, in order to successfully divest an asset, careful consideration will need to

be given to establish a suitable corporate structure which is able to demonstrate a sufficient level of independence, such that it is seen by the Courts as owning and controlling the asset without external influence..

There must also be an awareness that, were issues to arise, the arrangements giving rise to the creation of the corporate structure and purchase of the asset will be subject to the scrutiny of the court, meaning it may be difficult to keep these arrangements confidential.

Achieving Divestment and Corporate Independence

Achieving the divestment of an asset will always be dependent on the circumstances and the nature of the asset in question, but consideration will need to be given to the use of SPVs and the appointment of independent directors etc. Purchasing assets through the use of trusts funds will also be relevant. Also of importance will be ensuring suitable documentation and records are in place in order to demonstrate an appropriate level of independence.

How PwC and PwC Legal Can Assist

PwC and PwC Legal are well used to working together on matters relating to the ownership of high value assets. Following the decision in this case, and before disputes arise, PwC Legal can assist you in reviewing your client’s existing structure to assess

whether or not it is at risk following the decision in this case. Where appropriate, we can advise on alternative options in order to minimise that risk. . For example, it may be that the current corporate structure genuinely owns the assets for the purpose of its business, but the way that the purchase was funded has created unnecessary exposure and has increased the risk of a finding of a constructive trust.

Where disputes do arise, our commercial litigation team has significant experience of acting on behalf of high net worth individuals in litigation and other types of disputes, and are able to advise on strategy and tactics in order to best maintain asset divestment. Additionally, in matters such as this it is often advantageous for the corporate structure holding the asset to have separate legal representation. PwC’s commercial litigation team again has substantial experience of acting in these circumstances.

PwC Legal can also assist in dealing with the increased scrutiny of corporate structures. We have an experienced team who are used to dealing with and responding to judicial questioning and disclosure issues.

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