Financial Remedies: *Nicholas v Nicholas* no longer good law

PETRODEL RESOURCES LTD; PETRODEL UPSREAM LTD; VERMONT PETROLEUM LTD – v - YASMIN AISHATU MOHAMMED PREST; MICHAEL JENSEABLA PREST; ELYSIUM DIEM LTD [2012] EWCA Civ 1395

In a very significant decision by a majority of the Court of Appeal dealing with the ability of the Court in financial remedy cases to make orders directly against the assets of a company that is the *alter ego* of one spouse to satisfy the entitlement of the other, *Nicholas v Nicholas* (1984) FLR 285 has not been followed and all the decisions following it have been held to be wrong. As a consequence, Munby J's decision in *Mubarak v Mubarak* (No.1) [2001] 1 F.L.R. 673 has been overruled and *W v H (Family Division: Without Notice Orders)* [2001] 1 All E.R. 300 is overruled in part. To the extent that Mostyn J followed *Nicholas* in *Kremen (formerly Agrest) v Agrest* [2010] EWHC 3091 (Fam), [2011] 2 F.L.R. 490 and in *Hope v Krejci* [2012] EWHC 1780 (Fam) and treated company law principles as inapplicable in family cases, the court disagreed, so *Kremen* and *Hope* are doubted.

Accordingly a property adjustment order under s.24(1(a) of the MCA 1973 cannot be made against the property of a company unless there are legitimate grounds for piercing the company veil, including a finding to the necessary extent of impropriety (and not simply the obfuscating and dissembling conduct in which the husband had indulged in the instant case). The principles set out in *Salomon v Salomon & Co Ltd* [1897] A.C. 22 were stated to apply to all jurisdictions and the principles of legal personality had to be respected.

Thorpe LJ, in a vigorous dissenting judgment, pointed out that the principles in *Nicholas* had stood and been followed by the most specialist judges of the Division for three decades. It had been, he said, a relatively early pronouncement of the power necessary to enable the judge in financial provision
cases to do justice. He went on:

> "If this court now concludes that all these cases were wrongly decided they present 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."

In a final passage in his judgment in response to Rimer LJ's judgment (delivered for the majority) he concluded:

64. In this case the reality is plain. So long as the marriage lasted, the husband's companies were milked to provide him and his family with an extravagant lifestyle. That was only possible because the companies were wholly owned and controlled by the husband and there were no third party interests. Of course in so operating them husband ignored all company law requirements and checks.

65. Once the marriage broke down, the husband resorted to an array of strategies, of varying degrees of ingenuity and dishonesty, in order to deprive his wife of her accustomed affluence. Amongst them is his invocation of company law measures in an endeavour to achieve his irresponsible and selfish ends. If the law permits him so to do it defeats the Family Division judge's overriding duty to achieve a fair result."

However, the majority were very clear that the practice of the Family Division to ignore the basic tenets of company law, and the fact that companies are separate legal entities has to cease.

Patten LJ agreeing with Rimer LJ said this:

160. What needs to be emphasised is that the provisions of s.24(1)(a) of the Matrimonial Causes Act 1973 do not give the court power to disapply the established principles of legal and beneficial ownership or of company law. On the contrary, those principles were plainly intended to define the limits of the court's jurisdiction under the statute and Moylan J was wrong to give the words "entitled, either in possession or reversion" any wider meaning. Married couples who choose to vest assets beneficially in a company for what the judge described as conventional reasons including wealth protection and the avoidance of tax cannot ignore the legal consequences of their actions in less happy times.

161. I wish particularly to support Rimer LJ's criticism of the *dicta* in *Nicholas* and his view that these cannot be relied upon as a correct statement of the law following the decision of this court in *Adams v. Cape Industries plc.* They have led judges of the Family Division to adopt and develop an approach to company owned assets in ancillary relief applications which amounts almost to a separate system of legal rules unaffected by the relevant principles of English property and company law. That must now cease.

Rimer LJ himself, after a lengthy judgment that reviews both the conventional company law authorities and the manner in which the Family Division has found ways around the strict application of those principles, concluded in this way:

Conclusion

154. I have made clear my views on the 'veil piercing' issue, but shall summarise them. *Salomon* is House of Lords authority affirming the distinction between the separate legal personalities of a company and its corporators. It makes no difference to such distinction that the company has a single corporator with total control over its affairs. It is a feature of the principle that a company's assets belong beneficially to the company and that its corporators have no interest in, or entitlement to, them. It is a further feature of it that such assets cannot be looked to in order to satisfy the personal obligations of the corporators, any more than the latters' personal assets can be looked to in order to satisfy the obligations of the company. In special circumstances, in particular in the winding up of an insolvent company, there may be a statutory basis for requiring the corporators to contribute personally to the company's assets, for example if they have misapplied its assets or engaged in wrongful or fraudulent trading (see sections 212 to 214 of the Insolvency Act 1986). Exceptions of that nature are, however, irrelevant for present purposes.

155. Subject to exceptions such as those, and to cases in which it is legitimate to pierce the corporate veil, the separate corporate identity of a company is a fact of legal life that all courts are required to recognise and respect, whatever jurisdiction they are exercising. It is not open to a court, simply because it regards it as just and convenient, to disregard such separate identity and to appropriate the assets of a company in satisfaction either of the monetary claims of its corporator's creditors or of the monetary ancillary relief claims of its corporator's spouse. *Salomon* precludes any such approach; and the same was made clear by the House of Lords in *Woolfson* and by the Court of Appeal in *Adams, Ord* and *VTB*. The obiter dicta in *Nicholas* to different effect are

inconsistent with *Salomon, Woolfson, Adams, Ord* and *VTB* and advance no reasoning why a different principle should apply in the family jurisdiction as compared with other jurisdictions. The *Salomon* principle must apply equally to all jurisdictions. A one-man company does not metamorphose into the one-man simply because the person with a wish to abstract its assets is his wife.

156. *Woolfson, Adams, Ord, Ben Hashem* and *VTB* show that there may be factual circumstances in which it will be legitimate for the court to pierce a company's corporate veil and, to an appropriate extent, disregard the fact of its separate identity from that of its corporators. They all, however, affirm that that can only be done in limited circumstances, central to which is the demonstration of relevant impropriety in the corporators' use of the company. The rationale for such an exceptional jurisdiction is that the controllers of the company have so used the fact of its separate identity for improper purposes that it may be appropriate for the court disregard its separate identity in order that its controllers may not derive the advantage from such abuse that they intended to achieve. It is perhaps a relative of the principle that a wrongdoer cannot ordinarily be allowed to profit from his own wrong. The jurisdiction, whilst of interest to legal theorists, is an exceptional one and there are few reported decisions where it has been applied (including, in particular, in family proceedings). Just as there is no rational ground for regarding the family courts as exempt from *Salomon,* so is there no rational ground for regarding them as exempt from the need to be satisfied as to the conditions affirmed in *VTB* before piercing of a corporate veil. The dicta in *Nicholas* cannot stand with the principles explained in *Woolfson, Adams, Ord, Ben Hashem* and *VTB* and they should no longer be regarded as of any authority. Insofar as Mostyn J has, in

Kremen and *Hope,* treated those principles as inapplicable in family cases, and instead supported the *Nicholas* dicta, I would respectfully disagree with him".

The consequences of this decision are plain. It will be much harder to enforce against the assets of a liable spouse who has tied up his assets (which may well include the matrimonial home) in a company, and against a determined opponent, the possibility of the court being able to do justice will be much impaired.

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29th October 2012

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