

Limitations on piercing corporate veil in confiscation proceedings

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Corporate Crime analysis: Edward Henry, barrister at QEB Hollis Whiteman, examines the Court of Appeal's decision in *Boyle Transport (Northern Ireland) Ltd v R; Boyle and another v R* that the judge made an error during confiscation proceedings in piercing the corporate veil and appointing an enforcement receiver.

Original news

Boyle Transport (Northern Ireland) Ltd v R; Boyle and another v R [2016] EWCA Crim 19, [2016] All ER (D) 265 (Feb)

The Court of Appeal, Criminal Division, quashed the appointment of an enforcement receiver over the realisable assets of the appellant company and individual defendants, and allowed the defendants' appeals against confiscation orders, following their guilty plea to conspiring to making false instruments in their road haulage company. The orders had involved the unjustified application of the doctrine of lifting the corporate veil.

What was the background to the appeal?

Patrick and Mark Boyle (the applicants) were road hauliers, convicted of tachograph offences. The company, of which they had been sole directors (Oldco), transferred its assets to a new company (Newco) following their conviction. This transaction occurred after the applicants had resigned as directors, but before confiscation proceedings.

The judge, in determining benefit, treated the turnover of Oldco, or the majority of it, as a benefit obtained by the applicants in person. Having determined that Oldco's assets were indistinguishable from the applicants' realisable property, he ruled that the transfer to Newco was a sham. Thus, he treated the assets of Newco (by virtue of the transfer from Oldco to Newco) as the realisable property of both applicants and appointed an enforcement receiver over the assets of Newco. The Court of Appeal held that this was done in error. The applicants, even though they had not challenged the appointment, were allowed to appeal out of time.

What issues did this case raise?

The Crown Court has no inherent jurisdiction and the Proceeds of Crime Act 2002 (POCA 2002) contains no provision purporting to sanction a departure from ordinary principles of company law. It's therefore an important case, putting the brakes on Crown Court judges agreeing to pierce the corporate veil at the suit of prosecutors—see paras [92] and [93].

The Court of Appeal, in the context of confiscation proceedings, applied the decision of the Supreme Court in *Prest v Petrodel Resources Limited* [2013] UKSC 34, [2013] All ER (D) 90 (Jun). This had previously been relied upon in *R v Sale* [2014] EWCA Crim 1306, which held that the principles concerning the piercing of the corporate veil, adumbrated by the Supreme Court, although obiter, were of general application.

Boyle, however, brings even greater clarity, as the court, presided over by Davies LJ (formerly a company law/contentious chancery silk), analyses the arguments commonly propounded by prosecutors when seeking to lift or pierce the corporate veil at paras [88]–[97] and addresses other misconceptions (eg the 'one man' company) from paras [100]–[119]. In particular, the decision in *Sale* is (as that court observed) confined to its own facts and a cautionary note is struck at paras [115] and [116].

What were the main legal arguments put forward?

Counsel for Newco, at paras [81] and [82], adroitly side-stepped whether the transfer was a sham (which would have required *Wednesbury* unreasonableness) and concentrated on core principles of company law. An enforcement receiver could only be appointed over the assets of Newco with a view to satisfying the confiscation orders. Such assets, however, had to represent realisable property.

The judge had quantified the benefit figure and realisable assets by the inclusion of Oldco's turnover and assets as if it had no distinct corporate personality, and was nothing more than the alter ego of the applicants. This was unjustified. If

Newco's assets (transferred from Oldco) were to be subject to the imposition of an enforcement receiver, this would only be lawful if such assets were not, in law and in fact, the property of Oldco but of the applicants themselves. The facts did not fall within the concealment and/or evasion principles identified by Lord Sumption in *Prest* so as to justify piercing the corporate veil. If the corporate veil could not properly be pierced or set aside, the prosecution would fail. The prosecution conceded that Oldco was not the alter ego of the applicants but argued that the judge was entitled to find as he did, given 'the realities of the case' and that the Court of Appeal 'should not be diverted by labels' or the 'niceties of company law'.

What did the Court of Appeal decide, and why?

A company is a separate legal entity from its shareholders with its own legal rights and obligations. In this case, the prosecution and the judge fell into error during confiscation proceedings, when the prosecution invited the judge to pierce the corporate veil. The transfer of assets from Oldco to Newco was legitimate in that Oldco had a separate corporate personality and discrete property rights which could not be disregarded. Oldco's assets, which it had transferred, could not properly be attributed to the defendants and consequently could not be held by them as realisable property. This is calling time on the broad brush approach:

'Such arguments should not be permitted to distract attention away from the proper application of correct legal principles in this field' (para [93]).

The judge also placed undue reliance on the second of the three situations envisaged in para [76] of *R v Seager; R v Blatch* [2009] EWCA Crim 1303, [2009] All ER (D) 283 (Jun) (ie when an offender did acts in the name of a company which constituted a criminal offence leading to the offender's conviction). This should not be elevated to a free-standing concept nor taken out of context—see paras [109] and [110]. This misinterpretation of *Seager*, together with non-adherence to company law, led the judge into error.

To what extent is the judgment helpful in clarifying the law on piercing the corporate veil in confiscation proceedings?

The judgment confirms that the strict limitations applied to piercing the corporate veil in *Prest* apply with equal rigour to confiscation proceedings. The Court of Appeal has thus scotched any notion of more lax principles applying to proceedings brought under POCA 2002. Lord Sumption, in delivering the leading judgment in *Prest*, concluded that the corporate veil could only be pierced, absent any statutory provision, when 'a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control' and only then for the purpose of 'depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality'.

In setting down these parameters, Lord Sumption hit upon a paradox, because 'in almost every case where the test is satisfied the facts will...disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.'

Are there still any grey areas/unresolved issues lawyers will need to watch out for in this area? If so, how can these be avoided?

Notwithstanding Lord Sumption's exhaustive analysis in *Prest* (and his distillation of the concealment and evasion principles), the scope of the exceptions to the general rule that the corporate veil cannot be pierced remains uncertain following the different emphases in the judgments in *Prest*. Critics have commented upon the lack of clarity on the distinction between evasion and concealment and between piercing and lifting the veil. Not all the SCJJ were convinced by the 'evasion' and 'concealment' principles Lord Sumption enunciated. As Baroness Hale stated:

'I am not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of concealment or evasion.'

Indeed, four of them were not satisfied that the corporate veil could only be pierced in evasion cases. Those principles may well be tested by the prosecution in future, since if the court refused to pierce the veil on the evasion principle it might then lift it via the concealment principle, given as Lord Neuberger said in *Prest* at para [61] that 'cases concerned with concealment do not involve piercing the corporate veil at all'.

Furthermore, Lord Neuberger in the earlier case of *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5 at para [127] suggested that 'it may be right for the law to permit the veil to be pierced in certain circumstances in order to defeat injustice'. This runs contrary to the confident assertion of the Court of Appeal in *Boyle*, at para [88] ('First, the test is not simply one of "justice". So vague an approach would be unprincipled and would give rise to great uncertainty and inconsistency in decision making') which might yet tempt bullish prosecutors to chance their arm.

However, following *Boyle*, one can confidently predict that whatever attempts are made, instances in which the corporate veil will be pierced will be very rare indeed. *R v Hyde* [2014] EWCA Crim 713, [2014] All ER (D) 150 (Apr), a case involving forfeiture, supports this view, where the forfeiture of firearms on the basis that they had been in the possession of a company director, convicted of unlawfully trading in firearms, was set aside. The court held that they had been in the possession of the company, not the director, and that there was no justification for piercing the corporate veil.

What are the implications for corporate crime lawyers?

Company assets may continue to be vulnerable to confiscation by reference to orthodox trust and property law principles, independently of whether the case is one in which the corporate veil may be pierced. Those attempting to evade confiscation by transferring assets via companies may fall liable under resulting trusts. This is consistent with Munby J's (as then was) suggestion in the Ben Hashem case, referred to by Lord Neuberger in *Prest* at para [62], that the court should only exercise its veil piercing power after 'all other, more conventional, remedies have proved to be of no assistance'. Prosecutors would do well to consider these issues with greater rigour and circumspection, and are enjoined to do so at para [93].

At paras [120]–[122] the court also made general observations as to when it might be appropriate to indict the company. It would serve no purpose in many cases but might be justified in regulatory offences. This might have advantages in environmental offences, where a company's profits might be closely correlated to its wrongdoing.

What practical lessons can those advising take away from this case?

It is imperative to obtain specialist and skilful advice. If an application is made to pierce the corporate veil, knowledge of company law is a pre-requisite, whether advising as a prosecutor or defender. Close scrutiny of the prosecution's claims in accordance with company law determined this appeal. Loose generalities ('they were the directing minds' or 'this company was run by wrongdoers') will no longer suffice. The deficiencies in this approach are highlighted in the judgment. With small companies, it is a commonplace that the sole directors are the operating minds, but that does not justify piercing the corporate veil, except in the limited circumstances identified in *Prest*.

Edward Henry's practice encompasses all forms of serious crime, business crime and regulatory matters. His recent fraud and financial cases include the successful defence of a former CEO of The Money Portal on a £60m pension fraud and advising on appeals as a second opinion post-conviction. He is also asked to advise on professional negligence and liability in the context of criminal claims.

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