This judgment is being handed down in private on 29 June 2012. It consists of 46 paragraphs and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

Case No: FD00D13664

Neutral Citation Number: [2012] EWHC 1780 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/6/2012

Before :

MR JUSTICE MOSTYN

- -

Between :

GILLIAN CHRISTINE HOPE (aka LEWIS, formerly KREJCI)	Applicant
-and-	
LIBOR STANISLAV KAROL KREJCI	First Respondent
-and-	
TRUSTEES of the KREJCI FAMILY TRUST	Second Respondents
-and-	
DAMSONETTI HOLDINGS LIMITED	Third Respondent

- -

Mr Duncan Brooks (instructed by **Dawson Cornwell**) for the **Applicant**
Mr Timothy Becker (instructed by **direct access**) for the **First and Third Respondents**

Hearing dates: 25 - 26 June 2012

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Judgment

Mr Justice Mostyn :

1. On 18 July 2011 I gave judgment on W's application financial remedies following divorce. That judgment sets out the background and my reasons for my disposal. I ordered H to pay to W a lump sum of £268,000 and a contribution to her costs of £100,000 by 1 October 2011. That contribution was specified to be inclusive of sums recoverable under earlier costs orders including one made by Parker J against Damsonetti (UK) Limited ("DUK") on 4 October 2010.

2. Since my judgment H has not paid anything towards my award. He has unsuccessfully sought to mount appeals in the Court of Appeal against my orders as well as the costs order of Parker J. For her part W initiated proceedings in the Companies Court to wind up DUK. In response H has applied in the Companies Court to seek to prevent advertisement of the winding-up petition and he has sought to litigate by way of appeal in the Queen's Bench Division in relation to default costs certificates issued in relation to the order of Parker J. Further, he has applied in the Queen's Bench Division for pre-action disclosure in relation to a proposed free-standing civil fraud action against W alleging non-disclosure by her of material facts relating to her bankruptcy in the main proceedings before me.

3. As a result of the winding up proceedings W made some recovery of costs from DUK. With interest H now owes W (as at 26 June 2012) £373,082. In addition DUK owes W about £13,500 in relation to costs orders made in the later litigation, which sum is not within my enveloping costs order made on 11 July 2011.

4. In my main judgment I recorded this at para 71:

> "It is the fact that the trustees know nothing of any other assets. Mr Brooks accepts that it would be improbable that any other assets would be owned other than by the trust, but posits the unlikely arrangement that there are vast assets out [there] owned by the trust of which the trustees are ignorant. The fact that some assets such as Canaska do not appear in the trust records (such as they are) does not alter the implausibility of this."

But I found at para 73:

> "I believe that H has managed to put some funds aside which will not be lost in the inevitable failure of Damsonetti UK (where receivers have been appointed by the banks). The best indicator of preserved funds is H's lifestyle which has continued at an indulgent level. I would put the assets at no more than £1m. I do not believe that on the evidence it would right for me to infer the existence of funds of a greater quantum than this. However I do not have to be more specific than this as a result of my conclusions as to how delay should be reflected in this case"

5. In a witness statement made in the Companies Court proceedings on 21 November 2011 H stated: "Mr Justice Mostyn found that I had assets of £1m in his judgment.

Though I disagree with this finding, as he has not made any provision for my ex-wife from such a fund I am not appealing it". And H has not. His appeal was based on other grounds. On 23 February 2012 Thorpe LJ finally refused permission to appeal, on an inter-partes hearing.

6. W has made a portmanteau application for enforcement under the new procedure in rule 33.3 FPR 2010. In addition she has restored her adjourned application for variation of (nuptial) settlement in circumstances where I had stated in my main judgment at para 81:

> "W's claim for variation of nuptial settlement will be adjourned. It may be restored if H does not pay the lump sum by 1 October 2011. This adjournment technique was adopted by Bennett J in a case called *Thacker* the appeal from which was dismissed by the Court of Appeal on 31 July 2007 [(2007) EWCA Civ 912]. "

7. By virtue of orders made by Moor J H has given further disclosure and answered written questions about his means. He has also been orally examined before me. However, this is not some kind of disguised appeal against my primary finding of fact, which cannot be disturbed. The purpose of the further inquiries of H is to discern ways and means whereby my order might be implemented and also to examine carefully whether H in fact has any valid argument for seeking a further deferral of the time in which to pay the sums due.

8. Mr Brooks advances a number of claims. As refined in his final submissions these are as follows. First, he seeks variation of the Krejci Family Trust ("KFT") by pulling out of it a fund of £373,082 for W absolutely, which should include within it (and be specifically vested in W) the following assets which are within England and Wales: 14 and 15 Groveside Court, Battersea (which are owned by the Jersey company Damsonetti Holdings Limited ("DHL"), a motorcycle and two cars (which are also said to be owned by DHL). On that basis Mr Brooks would be content for his enforcement application to be adjourned generally. Additionally Mr Brooks innovatively seeks that under my inherent powers I should make a non-statutory civil restraint order preventing H from embarking on any kind of satellite litigation against W in any court without obtaining the prior permission of this court.

9. The structure, I remind myself, is very familiar. KFT owns DHL which owns DUK. DUK owns the UK commercial properties, now all underwater to a large extent. DHL owns the properties and items of personalty mentioned above. DHL has not guaranteed DUK's liabilities, so when that fails (as I thought it inevitably would when I wrote my first judgment, but now am not so sure, for reasons which I will explain) there will be no recourse against DHL.

10. In para 62 of my main judgment I recorded that on the then available valuations and the level of secured mortgage debt 14 and 15 Groveside Court had net equity of £118,000. It is now said by H that the net equity has fallen to £74,000, and this was not challenged by W. I do not know what the vehicles are worth collectively; even allowing for the fact that one Mercedes has a personalised number plate (LB01) I would be surprised if they were worth more than £16,000.

Variation of settlement

11. In my judgment in *BJ v MJ (Financial Remedy: Overseas Trusts)* [2011] EWHC 2708 (Fam) I attempted at paras 7 – 13 to set out a summary of the law concerning variation of nuptial settlements, particularly where the trust is overseas. In para 7 I stated:

> "If the trust is a nuptial settlement then notwithstanding that the assets are legally held by third parties as trustees, and that yet further third parties may be beneficiaries along with the husband, the trust assets fall within the court's dispositive powers under s24(1)(c) Matrimonial Causes Act 1973. This power to vary is one of the oldest in the canon finding its origin in s5 Matrimonial Causes Act 1859. The trustees are entitled to be heard (FPR 2010 rule 9.13(1) and (4)) and any children beneficiaries must be represented (rule 9.11). The variation powers extend to making outright provision to the applicant, and may even be exercised where the trust is offshore, although, following well-established principle, the court will be unlikely to make a variation order where both the trust and its assets are overseas unless it is satisfied that the order would be implemented by the court exercising effective control over the trust (*Goff v Goff* [1934] P 107, *Hamlin v Hamlin* [1986] Fam 11). If, however, the Court is satisfied that the variation order will be effective against the husband in personam, then the order is more likely to be made (*Razelos v Razelos* [1969] 3 All ER 929)."

12. In most overseas trust situations there will likely be an offshore company interposed between the trust and the underlying asset. This is the position here. The fact that there is an interposition of a company has to my knowledge never been argued, let alone found, to be an impediment to making an effective variation. In *E v E (Financial Provision)* [1990] 2 FLR 233 one of our wisest judges, Ewbank J, was addressed by an array of the most distinguished counsel (as well as myself) in a case where the matrimonial home in Hampstead was held by a Panamanian company the bearer shares of which were held by a Swiss Trust company on trusts the law of which was also foreign. There was not even the faintest suggestion that the interposition of the bearer share Panamanian company amounted to an impediment to an effective variation of settlement, which included some outright provision to the claimant wife. At page 249 G-H Ewbank J stated:

> "Dealing first of all with the post-nuptial settlement, the first consideration is the welfare of the children, and the second consideration, in my judgment, is that I should not interfere with it more than is necessary for the purposes of s. 25. At the moment the wife is a discretionary beneficiary of a settlement in which the discretion can only be exercised with the consent of the father. He will certainly not exercise it in favour of the wife. It is appropriate, therefore, that some portion of that settlement should be removed and made into a fund for the wife. The net value of the settlement is just over £1m subject to

> any claims that the father may make on the trustees. It is appropriate, in my judgment, under s. 25, that £250,000 should be pulled out of the trust and made into a separate fund for the wife. It would be right, in my judgment, although the Official Solicitor has made submissions to the contrary, that some of that should be given absolutely to the wife and some should be settled. I propose that £50,000 should be given absolutely to the wife and the balance of £200,000 should be settled on her for life with the remainder for the children. That fund, of course, will be taken away from the powers of the protector. The remainder of the fund will remain on trust for the husband and the children. It would be right, in my judgment, to remove the father as protector of that fund too and to arrange the fund in such a way that the balance will be available so far as it is needed to provide a home for the husband and the children."

13. Given that the power of variation is almost limitless it would be absurd were the interposition of the Panamanian company to have prevented the variation that Ewbank J intended. I suppose a technically pure variation would have involved directing the corporate trustee (i) to take steps to wind up the Panamanian company, (ii) to distribute the company's property to the trustee, (iii) to sell the property and (iv) to appoint £50,000 to the wife absolutely and £200,000 to the trustees of the new trust, and in default making a direct order for sale of the property in Hampstead and directing a distribution of part of the proceeds to the wife and the new trust. I suppose (although I cannot recall) that it is possible that the order actually provided for that. But even if it did not but merely reflected the actual words of Ewbank J's judgment, I see no problem with that, it being an example of the "short-circuiting" (but which I prefer to call "telescoping") approach rightly and legitimately (in my opinion) identified by Bodey J in *Mubarak v Mubarak* [2001] 1 FLR 673. In my judgment, in a variation of settlement case, the court can, metaphorically speaking, travel right down the lift-shaft from the top floor to the basement, without having to stop at any floor in between.

Piercing the corporate veil

14. Although my primary decision concerning the powers of the court in a case such as this makes it, strictly speaking, unnecessary to address Mr Brooks's careful and extensive arguments concerning the piercing of the corporate veil, I shall nonetheless do so, as he fairly reasons that I may be found to be wrong about that in a higher court. He rightly identifies this as a controversial subject where the Court of Appeal in a civil case has recently considered it in depth (*VTB Capital Plc v. Nutritek International Corp and others* [2012] EWCA Civ 808 (CA)). Further, the appeal from Moylan J's decision in *Prest v Prest* [2011] EWHC 2956 (Fam) will be heard shortly by the Court of Appeal. When granting permission to appeal ([2012] EWCA Civ 325) Thorpe LJ stated at para 13:

> "The time estimate for the appeal is two days and it will be heard by the same constitution as has determined the permission applications today. My Lords have read into the case, and it is simply a saving of resources if we maintain the same constitution. It is also important that there should be a

> very significant Chancery contribution to the argument on the main point, the piercing of the veil."

15. It is said that there is a tension between two points of view in the Family Division. In *Gowers v Gowers* [2011] EWHC 3485 (Fam) Holman J explained this succinctly:

> "45. Both counsel made considerable reference to the seminal judgment of Mr Justice Munby given in September 2008 in *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115 which exhaustively cites from much previous authority, much of it of the Court of Appeal and House of Lords, and also the earlier matrimonial authorities of *Green v Green* [1993] 1FLR 326, Connell J) and *Mubarak v Mubarak* [2001] 1 FLR 673 (Bodey J). To these authorities are now added the recent observations of Mostyn J in *Kremen v Agrest* [2010] EWHC 3091 (Fam); [2011] 2 FLR 490. In essence, and drawing on much previous higher authority, Munby J was insistent in *Ben Hashem* that the corporate veil cannot be pierced unless, as well as "control" there is some "impropriety" which is 'linked to the company's structure to avoid or conceal liability.'
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> 46. He said in summary at paragraph 163 of his judgment, '...It follows from all this that if the court is to pierce the veil it is necessary to show <u>both</u> control of the company by the wrongdoer(s) <u>and</u> impropriety, that is, (mis) use of the company by them as a device or facade to conceal their wrongdoing.' This is echoed in the passage in the reserved judgment of the Court of Appeal Criminal Division in the later case of *Seager* already quoted above:
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> 'A court can pierce the carapace... only in certain circumstances... each of these circumstances involves impropriety and dishonesty.'
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> 47. At paragraphs 172 to 173 of *Ben Hashem* Munby J clearly had 'great difficulty' with the decision of Connell J in *Green* in which there had been no impropriety. At paragraph 218 of *Ben Hashem* Munby J made clear that he did not accept a submission by Miss Judith Parker QC that Bodey J had not considered 'impropriety' to be an essential requirement in *Mubarak*, but opined that if Bodey J had not done so he would have been wrong. Munby J ended that part of his judgment in *Ben Hashem* at paragraph 221 with the comment:
>
> 'Reported cases in any context where the claim (to pierce the veil) has succeeded are few in number and striking on their facts.'
>
> It is worth stressing that in *Mubarak* itself Bodey J did not pierce, but rejected an application to pierce, the veil.

48. Few people have had greater recent experience of practice in ancillary relief cases than Mr Nicholas Mostyn QC. So his observations as Mostyn J in *Kremen v Agrest* are striking, although plainly obiter. In that case he did find 'abundant evidence' of wrongdoing if that was required: See paragraph 48 and paragraphs 6 to 9 where he described certain transactions as ' a complete sham'. But at paragraph 44 he said:

'It certainly came as some surprise to those who practised in ancillary relief cases to discover that a positive finding of impropriety or 'mask' or 'facade' or 'sham' or 'creature' or 'puppet' was needed before the corporate veil could be disregarded and a direct order made against the property made by the company. The understanding had been for years that where the company was wholly owned by one party, or where minority shareholdings could realistically be disregarded, then a direct order could be made against the underlying asset. After all, a strong Court of Appeal in *Nicholas v Nicholas* had said precisely that... Connell J made precisely such an order in *Green v Green*... and I have to say that I do not share Munby J's 'great difficulty' with this decision. There is a strong practical reason why the cloak should be penetrable even absent a finding of wrongdoing.'

49. Mostyn J then quoted passages from the judgment of Bodey J in *Mubarak* which had also been quoted by Munby J in *Ben Hashem* including the following:

'The difficulty remains in defining those situations when lifting the veil is appropriate by way of enforcement following such a concession in ancillary relief proceedings. I would suggest that the Family Division can make orders directly or indirectly regarding a company's assets where (a) the husband (as I am assuming) is the owner and controller of the company concerned and (b) where there are no adverse third parties whose position or interests would be likely to be prejudiced by such an order being made. I include as third parties those with real minority interests in the company and (where relevant on the facts) creditors and directors.'

50. It should be stressed that the context of those observations by Bodey J is where the husband has already made 'a concession' that company/trust assets can be treated as his 'whereafter the case proceeds conveniently on that basis' (Bodey J in *Mubarak* page 682 D). No such concession has ever been made by the husband in the present case and indeed he has always strenuously asserted and argued to the contrary, and still does do so. The passage from *Mubarak* continues:

'I would add that lifting the veil is most likely to be acceptable where the asset concerned (being the property of an effectively

> one-man company) is the parties' former matrimonial home, or other such asset owned by the company other than for day to day trading purposes.'
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> 51. At paragraph 47 of his judgment in *Kremen v Agrest* Mostyn J immediately continued by saying,
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> 'Experience shows that a great many of what I might call single purpose vehicles are incorporated in off-shore havens. So a transfer of a single share in a BVI incorporated company would leave the claimant with the prospect of registering in Tortola the share transfer ordered by this court and then either taking steps to dividend out to her property and/or to take steps to wind out the company in the BVI. This may prove to be a tortuous and expensive process simply to get into her name what may have been the former matrimonial home in Surrey.'
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> 52. In my view it is not necessary for me in this case to add to the jurisprudence on this topic, still less to take a position as between the four distinguished first instance judges I have mentioned (Connell, Bodey, Munby and Mostyn JJ) all of whom were/are highly experienced in matrimonial finance. In my view the present case comes nowhere near any situation in which a court has pierced, or will or may pierce, the veil or carapace. If a finding of impropriety or dishonesty is required, none was made by the district judge. It is of course true that she considered that the husband had treated the company as a 'cash cow' (a finding which I fully accept) but she also, in the critical passage at paragraph 38 of her first judgment, clearly treated the money which the husband had extracted from the company to have been loans. Even if (which I do not need to decide) a less strict approach may be applied in the case of matrimonial ancillary relief, there is still a world of difference between the facts and circumstances of the present case and any of the formulations of Connell, Bodey or Mostyn JJ."

16. *VTB* was a claim by an English-registered bank (which was majority owned by the second largest bank in Russia) against Nutritek, a BVI company that had sold dairy companies to RAB. RAB had borrowed the funds to acquire the dairy companies from VTB. VTB alleged that it had been induced to enter into the facility agreement by fraudulent representations made by Nutritek that the dairy companies were worth more than their true value and that Nutritek was not under common ownership with RAB. The second defendant was Marcap BVI, a holding company that owned a substantial interest in Nutritek. The fourth defendant was Mr Malofev, said to be the ultimate beneficial owner and controller of RAB, Nutritek and Marcap. The facility agreement was between VTB and RAB. VTB sought to amend its claim to allege that Nutritek, Marcap and Mr Malofev were also bound by that contract by piercing the veil of RAP. At first instance, Arnold J declined to give permission to amend, holding that there was no cause of action with a real prospect of success. VTB appealed that decision along with other decisions made by Arnold J at the same hearing. The Court of Appeal dismissed VTB's appeal.

17. It can immediately be seen that the purpose for which the piercing of the veil was sought was very different to that usually encountered in proceedings for a financial remedy following divorce. It was, on the facts of that case, to seek to deem a puppeteer to be a party to a contract to which it or he plainly was not a party. Put another way, it concerned an asserted exception to the doctrine of privity of contract. In a financial remedy case it is rather different: to deem the property of a puppet to be the property of the puppeteer.

18. It is clear that the decision of *Ben Hashem* was cited and considered at some length. However it does not appear that either the Court of Appeal decision of *Nicholas*, or any of the first instance decisions of *Green, Mubarak, Kremen v Agrest, Gowers* or *Prest* were cited to the Court.

19. In para 94 Lloyd LJ (for the Court) stated:

> "Fifth, there remains a question as to whether, even if founded on mistaken reasoning, *Gramsci* and *Alliance* anyway represent a principled development of the law that this court should adopt. We have said enough to show that we consider that they do not. The "veil piercing" cases show that the principle is, in its application, a limited one, which has been developed pragmatically for the purpose of providing a practical solution in particular factual circumstances. The reported authorities certainly proceed on the basis that (in the usual case) the puppet company and the controlling puppeteer are to be closely identified, an identification that will or may be regarded as justifying the grant of a judicial remedy against the puppet as well as the puppeteer, if only on the basis that it will be just and convenient to do so. They do not, however, go to the length of treating the puppet company as other than a legal person that is formally distinct and separate from the puppeteer; and, were they to do otherwise, they would wrongly be ignoring the principles of *Salomon.* Consistently with that, they do not provide any basis for the proposition that the puppeteer should be regarded as having always been a party to a contract to which it or he plainly was not a party. "

20. The intensely fact-specific nature of the application of the principle as highlighted in *VTB* chimes with the observation of Moylan J in *Prest* at para 224:

> "In summary, therefore, in my judgment the answer to the question of whether an asset held in the legal name of a company is property which falls within section 24(1)(a) depends on the facts of the case. It is right, of course, that as a matter of company law a shareholder only has a right of participation in accordance with the terms of the Articles of Association and has no right to any particular item of property. But, what if the shareholder is, in fact, able to procure the transfer to them of a particular item of company property, such as a matrimonial home, as a result of their control and ownership of the company and the absence of any third party

> interests. Am I to ignore the reality that the shareholder is able to procure the transfer to them of that property for the purposes of deciding whether it is property to which they are entitled? ”

21. In *VTB* the Court of Appeal (at paras 78 – 80) considered Munby J’s six principles or criteria in *Ben Hashem* (at paras 159 – 164) which would need to be satisfied before the veil can be pierced, and found them largely to be correct, subject to some qualifications. In summary, and as qualified by the Court of Appeal, those principles are:

    i) Ownership and control of a company are not of themselves sufficient to justify piercing the veil.

    ii) The court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justice.

    iii) The corporate veil can only be pierced when there is some impropriety.

    iv) The relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts.

    v) It follows that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer *and* impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing.

    vi) Contrary to the view of Munby J, 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 he has committed.

22. I can easily see why these principles are critically necessary where the objective is that which was sought in the *VTB* case, namely to deem someone to be a party to a contract to which he plainly is not. But I have great difficulty in seeing why they must be satisfied for the form of piercing of the veil that is the telescoping order, which is almost invariably the situation confronted in financial remedy proceedings.

23. In *Mubarak v Mubarak* [2001] 1 FLR 673 Bodey J described a telescoping order in these terms (at page 682):

> “*Rationalisation of approach*
>
> Ideally the Family Division and the Chancery Division should plainly apply a common approach. However, the fact remains that different considerations do frequently pertain: the company approach, on the one hand, being predominantly concerned with parties at arm’s length in a contractual or similar relationship; the family approach, on the other hand, being concerned with the distributive powers of the court as between husband and wife applying discretionary considerations to what will often be a mainly, if not entirely, family situation.

> I would echo the experience referred to by both Cumming-Bruce LJ and Connell J (above) as regards lifting the veil in the Family Division when it is just and necessary. In practice, especially in 'big money' cases, the husband (as I will assume) will often make a concession that company/trust assets can be treated as his, whereafter the case proceeds conveniently on that basis. It is pragmatic, saves expense and usually works. Problems such as have arisen in this case are rare and anyway can be avoided where there are other assets against which the lump sum order can be enforced.
>
> The difficulty remains in defining those situations when lifting the veil is appropriate by way of enforcement following such a concession in ancillary relief proceedings. I would suggest that the Family Division can make orders directly or indirectly regarding a company's assets where (a) the husband (as I am assuming) is the owner and controller of the company concerned and (b) where there are no adverse third parties whose position or interests would be likely to be prejudiced by such an order being made. I include as third parties those with real minority interests in the company and (where relevant on the facts) creditors and directors. The reason for my including the latter two categories will become apparent later in this judgment.
>
> I adopt the rationalisation of this offered by Mr Hunter, that it would amount merely to a short-circuiting of the full company law route, namely the declaration of a dividend to the husband comprising the company asset concerned (eg the matrimonial home) enabling him and/or the court then to transfer it onwards to the wife. It would amount to his property for the purposes of s 24 in the same sense that the law may look on that as done as ought to be done; whilst the mechanics of the order would be along the lines adopted by Connell J in *Green v Green* [1993] 1 FLR 326 at 341G: '… the respondent do sell, or cause G Ltd to sell, four plots of the blue land to …'.
>
> I would add that lifting the veil is most likely to be acceptable where the asset concerned (being the property of an effectively one-man company) is the parties' former matrimonial home, or other such asset owned by the company other than for day-to-day trading purposes."

24. That rationalisation received criticism from Munby J (as he then was) in *Ben Hashem* at paras 215 – 218:

> [215] In the first place, and with all respect to counsel who appears to have planted the thought in Bodey J's mind, it is not correct to say that 'the law' looks on that as done as ought to be done. The true principle is that 'equity looks on that as done which ought to be done' (emphasis added), this being one of

> the maxims of equity (see John McGee, Snell's Equity (Sweet and Maxwell, 30th edn, 2000) paras 3–25) and not, so far as I am aware, a principle of the common law. Its relevance, if any, to piercing the veil of incorporation – a doctrine which is not equitable in origin – is far from apparent.
>
> [216] Secondly, and in any event, I have to say, with great respect to Bodey J, that so far as concerns this part of his judgment I am far from sure that I would necessarily want to follow his analysis, which comes uncomfortably close to the approach adopted by Connell J in *Green* and which is, I have to say, difficult to reconcile with the authorities – particularly the more recent authorities – stressing the need for 'impropriety' as well as control. But I need not explore this aspect of his judgment any further for the present case does not on any view, given my findings on the other aspects of the matter, satisfy the conditions identified by Bodey J as being necessary if there is to be the 'short-circuiting' he referred to. Here there are other shareholders – the children – who have, to use Bodey J's language, 'real interests'.
>
> [217] Thirdly, and decisively, if it is to be said that anything Bodey J said is properly to be treated as negativing the general principle that impropriety has to be shown if the veil of incorporation is to be pierced, then I can only say that the proposition is, with all respect to those propounding it, plainly inconsistent, not merely with authorities such as Cape and, more particularly, *Ord* but also with Bodey J's own recognition in *Mubarak* that 'company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control'.
>
> [218] I do not accept that in *Mubarak*, as Miss Parker puts it, impropriety 'was not considered to be an essential requirement of piercing the veil'. And if it was – which, to repeat, I do not accept – then Bodey J, with great respect, would have been wrong to take that view. For, as we have seen, in *Ord* (which was cited to Bodey J and which, it is to be noted, he referred to without any critical comment and without the slightest indication that he was not loyally following it) the Court of Appeal made it quite clear, as Hobhouse LJ put it, that: 'there must be some impropriety before the corporate veil can be pierced'.

25. This view of Munby J is to be starkly contrasted with what he earlier stated in *Re W (Ex Parte Orders)* [2000] 2 FLR 927 at 937 – 938:

> "Thus, as can be seen from *Nicholas v Nicholas* [1984] FLR 285, 287E, 292F, and *Green v Green* [1993] 1 FLR 326, 337C, 340B, where property is vested in a one-man company which is the alter ego of the husband, the Family Division will pierce the

corporate veil, disregard the corporate ownership and, without requiring the company to be joined as a party, make an order which has the same effect as the order that would be made if the property were vested in the husband. Indeed, the court can and will adopt this approach even where there are minority interests involved if they are such that they can for practical purposes be disregarded.

Moreover, as Thorpe LJ's forthright observations in *Purba v Purba* [2000] 1 FLR 444, 446F—H, and *Khreino v Khreino (No 2) (court's power to grant injunctions)* [2000] 1 FCR 80, 85a—e, show, the court will not allow itself to be bamboozled by husbands who put their property in the names of close relations in circumstances where, taking a realistic and fair view, it is apparent that the recipient is a bare trustee and where the answer to the real question — Whose property is it? — is that it remains the husband's property. Again, in such cases there is no need for the third party to be joined. As *Purba v Purba* [2000] 1 FLR 444 shows, where a transfer has been made post-separation to a close relative in order to defeat a wife's claims, the court can and will act without going through the formality of joining the third party or making setting aside orders under s 37. And as *Khreino v Khreino (No 2) (court's power to grant injunctions)* [2000] 1 FCR 80 shows, the court can and in appropriate cases will grant Mareva injunctions against both the husband and his offshore company and the relative who holds the bearer shares in the company without requiring either the company or the relative to be joined as parties.

Nothing that I say should be taken as intended to water down in any way the robustness with which the Family Division ought to deal in appropriate cases with husbands who seek to obfuscate or to hide or mask the reality behind shams, artificial devices and similar contrivances. Nor do I doubt for a moment the propriety and utility of treating as one and the same a husband and some corporate or trust structure which it is apparent is simply the alter ego or creature of the husband. On the other hand, and as *Nicholas v Nicholas* [1984] FLR 285 itself demonstrates, the court does not — in my judgment cannot properly — adopt this robust approach where, for example, property is held by a company in which, although the husband has a majority shareholding, the minority shareholdings are what Cumming-Bruce LJ at 287G called 'real interests' held by individuals who, as Dillon LJ put it at 292G, are not nominees but business associates of the husband."

26. It can be seen that in this analysis beyond a finding that the company is the alter ego of the husband there is no suggestion that additional impropriety must be proved. And

I do not think that the mere fact that a husband has run his economy from behind a corporate veil <u>of itself</u> demonstrates impropriety. As Moylan J stated in *Prest*:

> "218. Dealing first with the issue of impropriety, has the wife established that the company structure has been used to avoid or conceal liability? In my judgment the company structure in this case was set up and has been used for conventional reasons including wealth protection and the avoidance of tax. Mr Todd is right, for example, to point to the reference in the annex to the husband's Form E to his transferring his shares in PRL Nigeria to the Nevis company because he was involved in litigation. However, this does not result in the company structure being used to conceal or avoid liability. It is seeking to provide a degree of protection for the wealth, which may or may not be effective depending on the nature of the rights retained by the husband. He is also right to point to the company structure effectively being the husband's money box which he uses at will. This might be contrary to accounting or company law principles but any disregard of those principles does not, in my view, mean that the structure is being used to avoid or conceal liability. From the husband's perspective the wealth and the corporate structure is and remains his but at the same time he is able to take advantage of the tax and other benefits of holding it within a corporate structure.
>
> 219. I also do not accept Mr Todd's submission that the undoubted use by the husband of the corporate structure to seek to deny that the companies or their assets are his resources or are assets available to him amounts to impropriety as that word is used in the authorities. It is simply a husband giving false evidence. Accordingly, I do not consider that the wife has established impropriety in this case."

27. The basic question I have to answer is whether I should revise my views in *Kremen v Agrest* in the light of *VTB*. My views are set out by Holman J in *Gowers* at paras 48 and 51. In *Prest* Moylan J described the judgments in *Nicholas* as *obiter dicta* (see para 190 and 219). I am not so sure. The reasoning went to the very core of the decision not to pierce the corporate veil. Applying the test they had formulated it was held that it was not possible to disregard the minority interests as they were real interests of the husband's business associates. Had the interests been inconsequential then the veil would have been pierced. I therefore conclude that when seeking a telescoping order in the specific factual context almost invariably encountered in financial remedy proceedings *Nicholas* is binding authority, and that nothing said in *VTB* (where *Nicholas* was not referred to) alters that.

This case

28. In my original judgment at paras 63 and 69 I set out a sequence of representations made by H to various banks about his means and my conclusions about them. This has not stopped. I refer to the following matters which were clearly established by the oral and documentary evidence:

i) At para 62 I found that "money was passed up the chain to Damsonetti Holdings enabling it to buy a sailing boat some cars and to hold some cash, in addition to Nos. 14 and 15 Groveside". This was, among other things, based on the email referred to me at para 63(vi) from H to Chris King of RBS on 21 September 2009 that states "Damsonetti Holdings does not own any shares they were bought by trustees and beneficiary is my daughter. Damsonetti Holdings owns two cars motorbike yacht. I did not mention it as I did not think it important. Value approximately £400,000". Also, the trustees had confirmed that the yacht was registered to DHL in the Jersey Register. H had mentioned at the trial that the true beneficial owner of the yacht was the Holtkamp family of Holland, but no documentary evidence was produced to support this. In this round of proceedings H has produced a letter dated 4 September 2011 from "Fam Holtkamp" saying that they are the owner of the yacht and that DHL is the registered keeper and not the owner. In his oral evidence H explained that DHL continues to be the formal owner of the yacht because the Family Holtkamp did not want to pay Dutch VAT at 20% on the purchase and because it did not want to pay the cost of £4,000 annually in setting up a separate Jersey company. The yacht continues to be used by H. This is just another example of the smoke and mirrors which I referred to earlier. When asked in cross-examination for an explanation for the email H stated "It was a letter of comfort to Chris King, who was panicking. It was an exaggeration".

ii) In my original judgment I referred to the fact that DUK (and the Camden venture conducted through Damsonetti Construction) were hopelessly underwater (see paras 59, 61, and 73) and that LPA receivers had been appointed. I concluded that they would inevitably fail. Surprisingly, after my judgment H has negotiated with a Panamanian company Castner Investments SA to sell DHL for £1. Later on 9 December 2011 this altered to an offer to sell DUK and Damsonetti Construction for £1. In a letter from the trustees dated 27 September 2011 it was stated:

> "Damsonetti Holdings limited ("DHL") is the sole trust "asset" and there is a proposal to acquire for £1 the assets <u>and</u> liabilities of DHL. Assets include certain properties held directly and the participations in (1) Damsonetti (UK) limited which owns certain properties and (2) Damsonetti Construction Limited, together with all borrowings secured on such properties, whether owned by DHL or Damsonetti (UK) Limited. The offer comes from certain investors and we readily disclose that Mr Krecji has introduced them. It is not known whether he will benefit personally from the proposed transaction However this aspect is we suggest not relevant since BOTH any success is at best uncertain (see our discussion below) AND Mr Krecji remains, until released, bound by any freezing injunctions, which your client has secured and maintained. Acceptance of the offer will however allow the trust to be closed JTC will not benefit from this proposed transaction, as neither its outstanding professional fees will be paid through it happening, nor will it recover its legal costs incurred in the various proceedings However, closure has a value, as it will prevent

these matters from taking up further time and energy, which are plainly better used on other (productive) matters. "

iii) On 11 June 2012 H produced an email sent by him to Mr Melendez of Castner on 4 December 2011. By this point, as I have mentioned above, the offer had altered to extend to DUK and Damsonetti Construction Limited, but not DHL. In the email H stated "we have option to buy land next to railways with current planning for 9 flats plus 4 flats is no need for 106 agreement, we also have option on land located on south side of river with river views, possibility to build over 100 flats, we also have land available to offset for social housing in different locations". When asked about these options and land H explained, without much embarrassment, that he did not in fact have either but had hoped to acquire them. He nearly managed to negotiate the options but that fell sour; the social housing would be available whenever he wanted it. He did not have an answer to the question how does "I hope to have something" become "I have something"?

iv) Similarly he did not have an answer to the question how Mr Becker was able to say on his behalf to Mr Justice Roth on 13 January 2012 that in relation to Heliport House (owned by DUK) "there has been a new valuation …. new tenants are in the building … this is not a company which is down on its knees". H confirmed that there was no new valuation, and accepted that Mr Becker's statements could only have derived from him.

v) Meantime H is carrying on living at a good rate entirely funded by DUK. He accepted that neither his Czech nor UK old age pension was in payment. All of his living expenses were paid by using DUK's credit card. This includes use of the Chelsea FC gym and the Mercedes LB01, although this is said to be beneficially owned by Mr David Rickl even though DHL is the registered keeper. After the conclusion of submissions H has referred to an "agreement" dated 1 June 2004 which states that the number plate has been sold to Mr Rickl for £5,000 cash but that DUK will be the registered keeper and pay insurance and all other expenses on the car. He also referred to purchase invoices in Mr Rickl's name dated 2003 in the sum of €89,352.

vi) Likewise, after submissions had been concluded H has produced a SORN notice dating from 2007 in respect of the Mercedes W826 RPH, which H says has suffered a seized up engine, and will be scrapped. He has also produced a valuation of the motorcycle in the sum of around £1,900.

29. Nothing I have heard has caused me to doubt my finding as to the scale of H's undisclosed assets. Indeed his modus operandi of complete turbidity remains the same. Nothing is straightforward; nothing is transparent. Even now he refuses to give a simple answer to the question – what is in it for you to sell DHL to Castner for £1? His answer was that he would be relieved from liability as a director, which is specious given that he has given no personal guarantee. If that were the only reason then he would have leapt at W's offer to buy DHL for £5,000. But that was treated with derision: "she is hopeless. Her offer is worthless. It is a joke." Only late in the day, in re-examination, did H explain that if he could sell on DUK he might get some consultancy earnings from them.

30. I do not believe I have been told anything approaching the whole truth about H's plans for DUK. Similarly I do not believe that he told me the truth about his plans for Damsonetti Construction Limited. H has recently learned that the LPA has sold the buildings in Camden for £1.7m. H was very disappointed about this as he was planning to put together an offer of £1.85m for (his own) buildings. No further explanation about this was forthcoming.

31. Mr Brooks has been anxious to persuade me to find that H has been guilty of impropriety in his use of KFT, DHL and DUK in the sense described in Principle No. 4 in para 21 above. The trust structure was set up well before H's bankruptcy. The fact that H thereafter used the trust structure to conduct all his affairs does not of itself mean that there was an "independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts". Nor does the fact that he sheltered behind it in the financial remedy proceedings. I cannot find that there has been improper conduct in the sense described and defined.

32. However, as I have explained, I do not need to find impropriety to make a variation of settlement order. Nor, for the reasons I have explained, even if DHL (or for that matter DUK) were in the direct ownership of H would I need to find impropriety to make a telescoping order in relation to the assets of the company.

33. The only "positive equity" assets within the jurisdiction, and therefore within my direct powers, are 14 and 15 Groveside Court, the motorcycle and the two cars. As I have said these may be worth around £90,000 in combination. If they are to be "pulled out" and vested in W then around £283,000 of my award will remain unsatisfied. Should I order this sum to be pulled out also, given that W in order to get that money via the trust will (i) actually have to identify it in the trustee's hands and (ii) to persuade the Royal Court of Jersey to make a reciprocal enforcement order? There is no evidence that the Royal Court could, or if so, would, make such an order, and thus the weight of authority is against making such an order (see para 11 above). However, where the settlement variation route is being used secondarily as means of satisfying my primary award, to which H has paid no attention whatsoever, I believe that the variation should nonetheless be made, even if that too proves to be an empty vessel in the hands of W.

34. The parties' adult child Gabriella, who is the only other living discretionary beneficiary of the KFT, has formally signified that she does not object to the variation proposed by W.

35. I therefore order that:

    i) The KFT shall be varied to provide that from it the following shall be appointed absolutely to W:

        a) 14 and 15 Groveside Court, subject to their mortgages in favour of Bank of Scotland and Lancashire Mortgage. The mortgagees have been duly served with W's application.

b) The motorcycle and the two Mercedes-Benz motor cars (and the number plate LB01). I am perfectly satisfied that each of these is owned beneficially by DHL.

c) A fund ("the appointed fund") the amount of which is to be calculated by taking of £373,082 and subtracting:

i) The proceeds of sale of 14 and 15 Groveside Court, the motorcycle and the two cars (or their deemed value); and

ii) the proceeds of the paintings referred to in sub-para (iv) below.

ii) Subject to further submissions, W shall sell 14 and 15 Groveside Court, the motorcycle and the two cars. I will allow W to make submissions as to whether she should be required to sell these properties, or whether she can retain them, and if so on what terms (particularly in relation to the mortgage) and at what deemed value.

iii) W shall give credit *pro tanto* against my lump sum award for:

a) The sale proceeds of 14 and 15 Groveside Court, the motorcycle and the two cars; and

b) Such sum as she may recover as a result of proceedings in Jersey in respect of the appointed fund.

iv) I grant W permission to sell the paintings referred to in paras 75 and 80 of my main judgment and to apply the proceeds towards the sums awarded to her.

v) Otherwise, W's enforcement application under rule 33.3 FPR 2010 shall be adjourned generally, with liberty to restore.

vi) I do not give H any further time to pay the lump sum. My primary findings as to the scale of his undisclosed assets are unaltered. In my judgment he has the means to pay now, were he to choose to do so.

Civil Restraint Order

36. Mr Brooks seeks a highly innovative order namely that H should be restrained from making any further application against W in any type of proceedings without the prior permission of this court. This application is not made pursuant to FPR rule 4.8 and PD 4B. Rather, W seeks to invoke the inherent powers of the court in a way that has not happened before (or at least not since 1839).

37. The focus of W's application is H's application dated 21 June 2012 made in the Queen's Bench Division for pre-action disclosure under CPR 31.16 in relation to a proposed free-standing civil fraud action against W alleging non-disclosure by her of material facts relating to her bankruptcy in the main proceedings before me, which I have referred to above at para 2. W seeks that I should in effect bar H under the *Hadkinson* jurisdiction from making that application.

38. In the application H seeks documents from a number of sources in relation to W's bankruptcy. In the application notice he says:

> "The Respondent has refused to provide the documents to the Applicant. The Applicant believes that the Respondent has willfully (sic) misled the Family Division Courts from the commencement of her ancillary relief proceedings (FD00D13664) until the Final hearing of her application in July 2011 regarding her bankruptcy. The disclosure is necessary in order to establish sufficient grounds to plead fraud against the Respondent"

39. In his accompanying witness statement he says:

> "6. Throughout the ancillary relief litigation the Respondent instructed her legal team that she was bankrupt right up to July 2007 and as a result was not able to make her application for ancillary relief. In a rebuttal statement dated 26th June 2011 prepared to rebut my Section 25 statement the Respondent admits that she might have been discharged from bankruptcy on 13th August 2000. Whatever is the truth, the fact is that on 10th August 2001 she made an affidavit in support of her application to lift the suspension of her discharge. There appears no reason at all why she should wait for almost 6 years to annul her bankruptcy. The suggestion that the presence of a tenant in her property at 10 Boleyn Road (sold on 12th August 2004) in some way delayed her annulment and/or discharge just cannot be true.
>
> 7. It is my honestly held belief that the Respondent has always known when she was discharged and has wilfully misled the Court and possibly her lawyers as to the actual date. It may be that her lawyers also knew the date but I presently have no way of making good such an accusation and do not make it at present"

40. The application is incomprehensible. In my main judgment at para 74 I stated:

> "There is no good reason for W's delay of nearly 7 years following her discharge from bankruptcy. W must have known that the effect of her discharge was to enable her to pursue an ancillary relief claim. She had specialist bankruptcy and divorce solicitors acting for her. I believe that she only mounted her claim on becoming aware of the vast improvements in Damonsetti UK's financial position as revealed in the 2007 accounts available in April 2008. W was not able to give me any sensible explanation for her delay"

Therefore the "fraud" complained of by H was fully exposed and weighed by me in my adjudication. I fully took into account W's conduct in misstating her reason for the delay, and the delay generally, in reaching my award, which was seriously

depressed in consequence. For H now to launch this satellite action is a plain attempt to seek to subvert my award, and to vex W twice in respect of matters that have already been fully adjudicated. It is noteworthy that in his witness statement H accepts that he could have pursued the disclosure he now seeks at the main trial before me, but chose not to. It is also significant that on the application for permission to appeal to Thorpe LJ H applied for this disclosure and it was refused.

41. A very similar ploy was mounted by a party in *Harrison v Harrison* [2008] 2 FLR 35, and was despatched by summary judgment with indemnity costs by HHJ Seymour QC. I expect that the same fate will befall this application, but it is not for me to encroach on the jurisdiction of the Master when he hears this application.

42. Mr Brooks argues that H is in plain contempt. There is no denying that. He refers to Lord Bacon's 78th Ordinance of 1618 which laid down that "they that are in contempt are not to be heard neither in that suit nor any other, except the court of special grace suspend the contempt". He accepts that the sweeping extent of this ordinance was restricted by Lord Lyndhurst LC in *Clark v Dew* (1839) 39 ER 40, where he said "the rule must be confined to proceedings in the same cause". That restriction was not lifted by the Court of Appeal in *Hadkinson* [1952] P 285, and was specifically confirmed by Plowman J in *Bettinson v Bettinson* [1965] Ch 465.

43. It would be a strong thing indeed for me to go against this tide, notwithstanding the laconic power of Lord Bacon's words. But (if it were possible) there is an even more potent reason why I should not make this order. Following the decision of the Court of Appeal in *Bhamjee v Forsdick & Others (No. 2)* [2004] 1 WLR 88 (25 July 2003), Parliament approved amendments to the CPR which brought into being with effect from 1 October 2004 the statutory civil restraint order regime within CPR 3.11. With effect from 6 April 2011 the FPR 2011 counterpart has been operative (see FPR 2010 rule 4.8 and PD 4B). Mr Brooks is in effect seeking a limited civil restraint order under PD 4B para 3. But the threshold requirement for making such an order is, per para 3.1, that a party "has persistently made applications which are totally without merit". Thus far H has been found by Costs Master O'Hare on 27 September 2011 to have made an application which was totally without merit. So he has not yet crossed the threshold for a limited civil restraint order under PD 4B para 2 (which require two such findings) let alone the threshold for an extended one.

44. I am of the view that it would be quite wrong to deploy my inherent powers to outflank the statutory scheme. I am not saying that the inherent powers may not sometimes be necessary, as I can see that the *Hadkinson* jurisdiction should not necessarily be confined by rule 4.8 and PD 4B. This very point (namely whether the court had power to impose a general CRO in the inherent jurisdiction of the court, notwithstanding the existence of the new rule-based jurisdiction) was considered by Brooke LJ in *R (on the application of Kumar) v Secretary of State for Constitutional Affairs* [2006] EWCA Civ 990; [2007] 1 WLR 536, CA. At para 62 he stated:

> "The court's inherent jurisdiction to protect its process from abuse, however, has always existed, and has been preserved side by side with the powers conferred on it by the Rules, but it would be a very rare case in which a judge could rely on the inherent jurisdiction in an area which appeared to have been comprehensively covered in the rules"

45. On the facts here I am quite sure that it would be wrong on this ground also to make the order sought by Mr Brooks.

46. I will hear counsel as to costs and the form of the Order.