Articles

THE BOUNDARIES OF ANCILLARY RELIEF: *A v A* AND *WHIG v WHIG*

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In ancillary relief, the court is well equipped to 'penetrate outer forms and get to the heart of ownership' (*Thomas v Thomas* [1995] 2 FLR 668). The definition of a 'financial resource' is broad enough to encompass assets to which neither party is entitled, but which are in reality available (*Charman v Charman (No 2)* [2006] EWHC 1879 (Fam), [2007] 1 FLR 593). The court always looks to the substance rather than the label: a spade is a spade and a five-pronged digging implement is a fork even if it is called a spade (*Street v Mountford* [1985] AC 809).

In certain cases, this may lead the court to encroach upon the rights of a third party or company. Where a company is the husband's alter ego and any minority shareholding can for practical purposes be disregarded, the corporate veil may be pierced (*Green v Green* [1993] 1 FLR 326). If a husband has contemptuously set out to bury his resources from view by creating a sham arrangement, the court will 'strain to see through the smoke and will set the structure aside so as to treat the resources as wholly his' (*Minwalla v Minwalla and DM Investments SA, Midfield Management SA and CI Law Trustees Ltd* [2004] EWHC 2823 (Fam), [2005] 1 FLR 771).

However, while a robust approach may be justified and the discretion is almost limitless, the court must not ride roughshod over third party or company rights. As Munby J has made clear in the recent decisions of *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467 and *Whig v Whig* [2007] EWHC 1856 (Fam), [2008] FLR (forthcoming), there is no basis for the 'illusion' that family judges adopt a 'common sense' approach whereas Chancery judges take the strict legal approach. There must be a proper basis for a claim against assets held by a third party.

A v A

In *A v A* the parties' relationship had lasted almost 20 years. The matrimonial assets were worth £2.67 million, including 46% of the shares in a family business. The remaining 54% shareholding was held in two discretionary trusts settled before the marriage by the husband's parents and brother at a time when the husband was about to divorce his first wife. The class of beneficiaries of the trusts was not closed and included the husband's children from his previous marriage. The wife alleged that the trusts were shams, created in the hope of assisting the husband in his first divorce. In the alternative, she alleged that the shares within the trust were available to the husband and that the trustees should be judiciously encouraged to assist (*Thomas v Thomas*).

The sham

Munby J held that there is one single law of sham, equally applicable in all three divisions of the High Court. Both the settlor and the trustee must subjectively have a common intention to create different rights and obligations from those that they give the appearance of creating (*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 and *Re Esteem Settlement* [2004] 1 WTLR 1). Reckless indifference would suffice to create the necessary intention. A trust that

was not initially a sham cannot subsequently become a sham, although it was possible for a sham trust to become bona fide. The allegation of sham is a serious matter and there is a very strong presumption that parties intend to be bound by the agreements they enter into (*National Westminster Bank plc v Jones* [2000] BPIR 1092). On the facts, the wife's case on sham was dismissed as 'lacking in any factual basis … [and] misconceived in law'. In any event, had the sham argument had been successful, the property would have reverted to the original settlors (the father and brother) and not to the husband.

Judicious encouragement

The wife's secondary position was held to be 'wholly inconsistent' with the sham argument, as it required the diametrically opposite conclusion that the trust was genuine. Munby J followed the decision in *TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 and emphasised the inherent limitations of the doctrine. First, the court cannot compel third parties: if the husband was a beneficiary under a trust, the trustees may be under a legal obligation to consider the request, but might decline to assist where there were other beneficiaries. If the third parties were family members, they were well within their rights to say: 'Thank you for your encouragement but I have decided not to assist'. Secondly, the judicious encouragement should not overstep the mark into improper pressure. Thirdly, the court should be careful not to jump too readily to the conclusion that trustees would accede to judicious encouragement. The wife's case – that the trustees would make capital distributions from the trusts – was not made out.

PIERCING THE CORPORATE VEIL

The wife in *A v A* did not assert that the corporate veil should be pierced. The last decision to consider the proper approach was *Mubarak v Mubarak* [2001] 1 FLR 673, in which the two strands of authority in the 'family sphere' and 'company/commercial sphere' met head on. The wife argued that the corporate veil can be lifted 'when it can be shown that the husband controls the company and when any minority interests can properly be disregarded, for example as being mere nominees for the husband' (*Nicholas v Nicholas* [1984] FLR 285). The husband and company challenged the proposition head on and asserted that the 'veil of incorporation can only be lifted in circumstances where a company has been formed or used as a device or sham (*Gilford Motor Co Ltd v Horne* [1933] Ch 935).

In *Mubarak*, Bodey J offered a pragmatic rationalising of approach which allowed for Family Division judges to make orders over a company's assets where the husband is the owner and controller of the company and there are no adverse third parties whose position would be prejudiced. This approach was described as a 'short-circuiting' of the company law route of declaring a dividend which would then be transferred to the wife. Munby J followed this approach and commented:

> 'It may be easier, for example, to "pierce the corporate veil" in the context of a small family company than in some larger scale or more purely commercial context … But what it is important to appreciate (and too often, I fear, is not appreciated at least in this division) is that the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions. There is not one law of "sham" in the Chancery Division and another law of "sham" in the Family Division. There is only one law of "sham", to be applied equally in all three Divisions of the High Court, just as there is but one set of principles, again equally applicable in all three divisions, determining whether or not it is appropriate to "pierce the corporate veil".'

Overall, the outcome was that the wife achieved fractionally over 50% of the assets (excluding the trust assets).

WHIG v WHIG

The case of *Whig* also concerned a relatively long marriage, but with modest assets of £211,000, and between £144,000 and £177,000 net of debt. Due to non-payment of

the mortgage, the mortgagees had obtained a possession order, but had reached an accommodation with the wife who was in receipt of income support. Shortly before the first appointment at Brentford County Court, the husband, who owed £24,000 to various banks and building societies, presented his own petition in bankruptcy. The wife's application to annul the bankruptcy was listed alongside the application for ancillary relief at the High Court. Of a number of issues before the court, the application to annul was crucial in order to preserve the matrimonial home.

BANKRUPTCY AND MOTIVATION

The statutory test for bankruptcy is that a debtor is 'unable to pay his debts' (s 272 of the Insolvency Act 1986). The husband asserted that as at the date of presenting the petition, he had no income and was unable to pay his debts. Munby J held that the burden of proving otherwise fell on the wife and, where the statutory test was met, the husband's motivation was immaterial. Similarly, where a company is unable to pay its debts and goes into administration, the statutory test was fulfilled (Insolvency Act 1986, s 123), and the motivation of a husband to defeat his wife's claims is irrelevant, as Mrs Mubarak found to her cost:

> 'The fact that in ancillary relief proceedings no one has made a distinction between the husband, on one hand, and the assets belonging to the various companies … does not, of course, enable the court when considering the interests of DJL's creditors to disregard the corporate structure through which the business has been conducted.' (Blackburne J in *Re Dianoor Jewels Ltd* [2001] BPIR 234)

FAMILY DIVISION COMMON SENSE v CHANCERY DIVISION STRICT APPROACH

Munby J returned to the point in *A v A* that since the Judicature Acts of the 1870s, the Family Division applies precisely the same principles as the Chancery Division or Queen's Bench Division: 'the illusion that there is some special inspiration of common sense infusing the Family judges … seems to be as prevalent as ever. It cannot be stressed too much that there is simply no basis for this illusion'. On the facts in *Whig*, Munby J held that the wife failed in her application to annul the bankruptcy order. The husband had no way to hold off his creditors at the time of the petition.

CONCLUSION

While the discretion in ancillary relief may be 'singularly broad' (*Parra v Parra* [2002] EWCA Civ 1886, [2003] 1 FLR 942), it exists only between a husband and wife. Where a claim is made over assets in the hands of a third party, the court cannot simply grant relief on the basis that the arrangements seem dodgy. *A v A* and *Whig v Whig* give clear guidance that:

- there must be a proper basis to an assertion of sham or an application to pierce the corporate veil;
- there are real limitations to 'judicious encouragement' of third parties (*Thomas v Thomas*);
- where the statutory test for bankruptcy or administration is met, the motive of a party who has obtained the order is immaterial; and
- all divisions of the High Court apply precisely the same principles in precisely the same way.