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Case No: FD09P02744
FD08P00693
FD08F01208

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3/12/2010

Before :

THE HONOURABLE MR JUSTICE MOSTYN

- -

Between :

Janna Kremen (formerly Agrest)	**Applicant**
- and -	
Boris Agrest	**Respondent**
- and -	
Everclear Limited (BVI)	**Intervener**

- -

Mr Christopher Stirling (instructed by **Richardson Smith**) for the **Applicant**
Mr Frank Feehan QC (instructed by **Horne, Engall & Freeman**) for the **Intervener**

Hearing dates: 15-17 & 22-24 November 2010

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Judgment

Mr Justice Mostyn :

1. The court is concerned with two applications:

   i) An application by Janna Kremen (W) to set aside the transfer by Boris Agrest (H) to Eduard Kinigopoulo (EK) on 27 September 2007 of the single share in Everclear Ltd, a BVI Company, the sole asset of which is a property South Lodge, Burhill Road, Walton-on-Thames, Surrey ("the first transaction").

   ii) An application by W to set aside the transfer of that same share in Everclear by EK to Georgy Chesnokov (GC) on 27 August 2008 ("the second transaction"). It is W's contention that the operative date for the second transaction was in fact 3 March 2009. This chronological difference is, as will be seen, of critical importance.

2. These applications are the latest instalment in the protracted and complex litigation between H, W and various third parties. The history was summarised in my most recent judgment in the proceedings between H, W and Mr Fishman [2010] EWHC 2571 (Fam) given on 15 October 2010. In those proceedings there was a comparable application by W to set aside a transaction on alternative grounds, namely under section 23 Matrimonial and Family Proceedings Act 1984 and/or that the transaction was a sham.

3. In that judgment I endeavoured to set out and summarise the law obtaining under Section 23 and the law concerning sham transactions. I do not repeat that exposition in this judgment, as I understand that both Mr Stirling and Mr Feehan QC accept my analysis.

4. In my previous judgment I explained that the marriage between H and W disintegrated in the early part of 2007. I found that two agreements entered into on 6 March 2007 between H and Mr Fishman were avoidable under Section 23 but did not meet the stiff test needed to demonstrate a sham, notwithstanding that there were many suspicions and oddities surrounding them. Those transactions were effected in the context of the disintegrating marriage and H's stated intention in May 2007 to render W and the children utterly destitute. I stated in paragraph 5 of my judgment:

> …any transaction undertaken by H from the beginning of 2007 onwards must be judged, at least presumptively, to have been affected with the intention, if not the dominant intention, of achieving that stated end.

5. In relation to the first transaction in hand before me today neither H nor EK have appeared to resist W's claim that it is a complete sham and that at all material times the share in question remained in the ownership of H. On the first day of the hearing I did receive an unsworn written statement from EK and there are Affidavits from H deposing to the bona fides of the transaction. However, it is clear from a number of documents that have been obtained that the transaction was at all times completely fake.

6. The story about South Lodge begins on 3 May 2007 more or less contemporaneously with the foul monologue of abuse by H of W to which I referred in my previous judgment. A letter was written by conveyancers instructed by H to the sellers of the property stating that they acted for W in connection with the proposed purchase of the property in the sum of £1.95m. On 14 May 2007 there is a file note which records:

> Boris Agrest telephoned he said that because of some problems with his wife he would be buying the company through a friend's off shore company.

7. On 4 June 2007 there is a note that records that:

> H said that he was happy to exchange contracts in his name and then assign the benefit of the contract to Kosta.

Kosta appears to be the candidate nominee at that time. On 6 June 2007 contracts were exchanged in relation to South Lodge with H named as purchaser. The purchase money derived from off-shore entities called Garry Trading Inc, Gratex Finance Ltd and Tricommerce SA. On 1 August 2007 South Lodge was transferred into the name of Everclear Ltd as H had earlier assigned the benefit of his contract to buy South Lodge to Everclear upon completion. Thus Everclear was the nominee H decided to use at the time of purchase.

8. On 27 September 2007 a Stock Purchase Agreement was entered into between H and EK. This agreement was stipulated to be governed by English Law and provided that H would sell the sole share in Everclear to EK for £2.1m. There are a number of documents in the bundles purporting to evidence payments by EK to H's off shore entities in satisfaction of the contractual consideration; however, there are inconsistencies between these instructions and the list of payments referred to by EK in his statement of 15 November 2010. I accept the submission of Mr Stirling that whilst it is possible, in fact probable, that money did flow between EK and H this was in all likelihood in respect of other transactions between H and his close associate EK. That the purported transfer of South Lodge (by means of the transfer of the share in Everclear Ltd) is fake is demonstrated beyond any doubt by the EFG memorandum of May 2008 referred to in paragraph 3 of my previous judgment. This memorandum concerned EFG's mortgage over the former matrimonial home, Whitecliff. It records:

> [H] (47 with a 19 year old girlfriend) has moved out of the home and moved into another £3m home in Burhill Park which is another exclusive golf estate in Weybridge. Prior to all the turbulence in the marriage [H] had asked AFL to assist with a loan for this home but obviously this never materialised… [H] informed AFL that he and his ex-wife were attending court in the working week starting 29 April 2008 in order to try and settle the on going dispute between the parties. [H] (in his stubborn way) made it clear that he was not prepared to compromise. He has ensured that his newly acquired UK assets are all held in off shore structures

> and nominees so his ex will not be able to prove his solvency.

The reference to 'newly acquired assets' can only be to South Lodge.

9. Therefore, I have no hesitation at all in declaring that the first transaction is a complete sham and that for the purposes of the second transaction it should be treated as if it never happened and that the second transaction was in truth between H and GC, even if H was acting in it in a disguised way.

10. GC is not a longstanding crony of H. He has however known EK for a long time having met him in 1998 and he has done a deal of business with him in the import and export of jewellery, watches and cars to and from Kazakhstan and Russia. GC was born and lived in Russia until about 1995 when he moved to Florida and it was in Florida that he met EK. GC and his wife Nelly have four children and they became concerned that education at primary and secondary level in Florida was not good enough. His wife had lived in London as a child, her father being a Soviet Diplomat. They formed the view of moving to this country where they believed that the education for their children would be better.

11. In this context EK stated that he knew someone who could show him the schools and introduce him to life in England, and this was H. GC and H met as a result of this introduction in early 2006.

12. W has stated that the two couples became very close but I believe she overstates the position and has embroidered her evidence. They were friendly in the way that the expatriate Russian community here is friendly; there were a few occasions when they were on holiday together; and their child Alexi became friendly with the Agrest's child Maxim - they were in the same class at school.

13. On his arrival here GC was plainly a man of considerable means. A mortgage application form, to which I will refer later, dated 26 August 2008, records him as having a little over £4m of net assets in the UK and £12.5m outside the UK. That fortune had been accumulated a long time before he had ever met H. His relationship with H is to be clearly distinguished from the relationship which H had with Mr Fishman as clearly described in my earlier judgment. That relationship went back many years and involved much mutual business activity. Unfortunately I consider that W has elaborated her evidence in order to play up the nature of the relationship between H and GC. Although it is not mentioned anywhere in her written evidence, she stated for the first time in the witness box that she had voice recordings of the two men which show the closeness of their business relationship. This is an example of exaggeration on the part of W in order to transform what was a casual and not particularly close relationship into something far more substantial.

14. That said the traffic is not all one way and there are certainly oddities, inconsistencies and suspicious features in the case advanced by GC. For example on 27 March 2008 at a time when South Lodge was purportedly owned by EK, a Tenancy Agreement was entered into between Everclear and Jolima. Jolima is a company referred to in paragraphs 21, 30, 31, and 33 of my judgment in the

committal proceedings dated 16 April 2010. It is a company based in Cyprus which purports to be H's employer, but which is obviously H's alter ego.

15. The Tenancy Agreement is in standard form but it is tolerably clear to me that the manuscript details, specifying the date of the agreement, the names of the parties, the term and the rent, were all written by GC who then witnessed the signature of H. I did not receive any satisfactory reason as to why GC should be acting in a role far beyond that of a mere witness in relation to this agreement.

16. In his principal witness statement GC explains that 'he has dealt a lot in investment and banking, and has invested in properties for some considerable time'. He stated that he had two properties in the UK, two in the US and four in Russia. He stated that he purchased Everclear from EK.

17. In his witness statement, GC made a number of statements, some of which have been shown to be inexact. He stated that:

    i) He purchased Everclear Ltd from EK on 1 August 2008. This was incorrect on his own case as confirmed by his own oral testimony. He told me he in fact purchased Everclear on the 27 August 2008.

    ii) The purchase of Everclear appealed to GC as South Lodge was near to his home and it generated a confirmed rental income from Jolima.

    iii) Although it is not mentioned in his witness statement GC told me in his evidence in chief that the deal was conditional on him obtaining a mortgage to furnish part of the money and then it was agreed with EK that were he (GC) not to be able to raise a mortgage then the deal would be off. As will be seen, this averment by him will prove to be very important to the outcome of this case.

    iv) He stated that upon the purchase of Everclear a new Tenancy Agreement was drawn up with Jolima that was dated 1 August 2008. But I was told that this date was also wrong and that the agreement was in fact dated the 27 August 2008 and backdated to 1 August 2008. That Tenancy Agreement provided for £12,000 per month for a term of twelve months.

    v) Exhibited to the witness statement but without any explanation within the text was a document entitled 'Second Amendment to Tenancy Agreement', purportedly dated 2 August 2008. This provided that the term of the tenancy would be 36 months. Again, GC accepted that the date of this amendment was inexact and that the document was in fact created on or after the 27 August 2008.

    vi) GC stated that he knew nothing of the acrimonious proceedings between H and W and that the first that he was aware of any such difficulties was when he received an email from W dated 30 September 2009 enclosing a Court Order relating to South Lodge. As I will explain later, this assertion is impossible to accept.

vii) On 26 August 2008, although not specifically referred to in his witness statement, GC completed a mortgage application form seeking to raise £1.43m. The form, as I have mentioned, declared GC to be a man of means. It stated that the purchase of the mortgage was for 'further property investment – suitable properties not yet identified'. Again, this was not accurate: the purpose of the loan was to furnish the very purchase money for the property.

18. On 27 August 2008 EK as seller and GC as buyer entered into a Stock Purchase Agreement in relation to the single share of Everclear Ltd. The agreement as signed does not specify the exact date of execution. However, by an amendment to the agreement executed on an unspecified date in December 2008 the date of 27 August 2008 is given to the original agreement. The amendment altered the consideration from $4,000,000 to $1 but recorded that Everclear was indebted to EK in the sum of $4m which GC had agreed to repay to EK on closing. It was explained to me that while the economic effect was the same the point of this was to avoid tax.

19. The original agreement provided that the share would be purchased for $4m and that at closing EK would transfer the share free of encumbrances and GC would deliver to EK a Promissory Note in the form exhibited to the agreement. The agreement also stipulated various warranties and representations. It provided that it was governed by Florida Law and that any disputes concerning it should be dealt with by arbitration in Florida.

20. The Promissory Note provided that the consideration should be paid no later than February 2009 and should until that date be interest free.

21. On 27 August 2008 EK, as sole director of Everclear Ltd, resolved that his single share should be cancelled and that a new single share should be issued in favour of GC.

Events subsequent to 27 August 2008

22. I have mentioned above that GC was very clear to me in his evidence that, although it is not recorded in writing anywhere, the deal was conditional upon him raising a mortgage for part of the purchase money of South Lodge. During the course of the hearing the solicitors' file relating to the obtainment of that mortgage was produced and a number of documents from it were placed into the trial bundle. It appears that GC instructed Guillaumes Gosling and Wilkinson to deal with the mortgage on 4 September 2008. A number of matters needed to be dealt with including the preparation of a Tenancy in favour of Jolima in a form acceptable to the bank – this was not completed until 30 January 2009; the obtainment of a statutory declaration on behalf of Jolima – this was achieved on 28 January 2009; and the obtainment of a personal guarantee from GC – this was done on 11 December 2008. At all events it was not until 3 March 2009 that all matters had been dealt with and the bank was in a position to advance the mortgage money. After costs and other expenses the net amount transferred to Everclear Ltd on 3 March 2009 was £1,397,870.98.

23. Although the Promissory Note did not require payment to EK until February 2009 and although payment was not in fact made in full until 3 April 2009 (as will be seen later in this judgment) on a date in November 2008 EK signed a document that acknowledged that the Promissory Note had by then been paid in full. Although GC was not able to give an explanation for this false document I accept Mr Stirling's submission that it was part and parcel of a deceit being practised on the bank. By the mortgage application form GC had represented that the mortgage money was to be used to purchase other investment properties rather than South Lodge and this further document was no doubt intended to demonstrate to the bank that South Lodge had indeed been fully paid for. Mr Stirling accepts that this deceit does not of itself demonstrate the falsity of the transaction with which I am concerned other than to show a regrettable disregard for the truth on the part of GC.

24. I have already mentioned above the Tenancy Agreement purportedly dated 1 August 2008 and the Amendment thereto dated 2 August 2008. It is not disputed that no rent was paid to GC pursuant to those agreements. Nor was any rent paid by Jolima to Everclear under the agreement insisted on by the bank executed on 30 January 2009. Rather, on 1 March 2009 the original Tenancy Agreement was amended to provide that the rent would be £3,000 per month rather than £12,000 per month. £3,000 per month roughly corresponded to the mortgage interest. Thus it can be seen that Jolima (H's alter ego) was paying the interest on the mortgage which had been raised to send part of the consideration to H through his nominee EK. This has all the appearances of a circular transaction.

25. The explanation given to me by GC for this dramatic reduction in rent from £12,000 per month to £3,000 was that on the very same day, 1 March 2009, GC entered into an agreement with Jolima whereby Jolima agreed to act as his agent/consultant in the sale of an ailing Kyrgyzstani bank owned by GC called Akylinvest Bank. The consideration for such agency/consultancy services was stated to be 5% of the transaction price. GC explained to me that the standard rate would have been 7% and he would have expected to pay $50,000 up front. He explained that the quid pro quo for the more benign terms in this contract was the reduction in the rent referred to. Needless to say Jolima failed to find any potential purchasers for the Bank.

26. The reduced rent of £3,000 began to be paid on 30 March 2009 after the mortgage money had been made available. This is wholly consistent with the agreement being conditional upon the receipt of the mortgage funds, as GC had explicitly stated to me. The mortgage money was sent to Everclear via Credit Suisse and thence to a bank account in the name of GC with AUB Bank in Bishkek, Kyrgyzstan. This shows sums arriving from Everclear on 10 March 2009 and being transferred to EK in the converted sum of $1,968,000 on the same day. That dealt with about half of the $4m purchase price. The balance was provided in a way which was unusual to say the least. On 2 April 2009 GC, as part of a wider transaction, purchased bonds issued by AUB Bank in Bishkek with a face value of €1,489,850. These bonds did not mature until 11 March 2011. I do not believe they carried interest. Given the distance of the maturity date GC was able to buy the bonds at a discount to face value of 25% i.e. €372,462. The next day, 3 April

2009, GC signed over the bonds to EK. In a note attached to the copy of the bonds he stated that:

> Copies of the bonds (payment to EK). Second payment. €1,489,850 in April 2009 equals $2,000,000.

It can be seen that by this transaction GC made €372,462 overnight at EK's expense.

27. From September 2008 onwards GC made a number of payments in relation to South Lodge from his own pocket totalling, according to a list he gave me, about £35,000.

28. H had kept very quiet about his disposal of South Lodge. His first mention of this in the proceedings was in an Affidavit in September 2008 where he stated

> …although I purchased Burhill in 2007, I later sold this property to pay off debts and I am simply now a sub-tenant at that property which is rented by my employer.

That account overlooks the fact that the property had been allegedly sold on by EK to GC. As I have stated in my previous judgments, the matter came before Mr Cohen QC on 11 and 12 February 2009. It was for the first time revealed by H during that hearing that the owner of the property was now GC. This caused W to apply to the Court for an injunction preventing Everclear and H from taking, or permitting, any step that led to either a charge, sale, or other dealing with South Lodge, or the creation of any tenancy of it.

29. Having made the application, but before judgment was delivered, W telephoned GC's wife to tell her that the application had been made. In judgment Mr Cohen allowed the application. The information was relayed to GC by his wife. On the following day, 13 February 2009, Mr Betts at Guillaumes emailed GC in these terms:

> You will probably know that David Fuller telephoned me this morning to explain that he had learned from you of a problem which means putting completion of the mortgage on hold: a challenge to the right of the vendor of Everclear Ltd to you, to sell the company to you. You have been told, I understand, that a Court Order has been obtained, in this country, which affects this sale. Naturally we need to see that as soon as possible.

30. On Monday 16 February 2009, GC replied:

> There is no Court Order yet. It will probably be available in a few days.

This was repeated by GC on the telephone on 17 February 2009 the note of which records:

> Attending you when you said there had been no Court Order yet. Meanwhile the claim in fact relates not to the seller of the company to you, but to the previous seller, Boris Agrest, who is in fact the present occupier. In the present circumstances you will go ahead with the mortgage.

31. W told me that in addition to her telephone call on 12 February 2009 she went to GC's house that evening and told GC's wife that the order had been made. I reject that account: it is another example of W embroidering her evidence. It is not mentioned in her Affidavits.

32. W also stated that she posted a hard copy of the order to GC on the day she collected it from the court, 20 February 2009. GC denies receiving a hard copy. W told me that after an incident when she went to South Lodge on 28 May 2008 she spoke to GC's wife on the telephone and was told that GC had not received the Order and he asked for it to be emailed via his wife. W has produced a clear record of an email being sent to GC's wife on 30 May 2009 enclosing the Order. GC says that the first time he saw the Order was in October 2009 after it had been sent by W on 29 September 2009. In this regard I conclude that W did indeed send the Order to GC on 20 February 2009. It would have come as no surprise to GC given his knowledge of it as revealed in the solicitors' file from which I have quoted. Plainly, GC was aware from 20 February 2009 at the latest that there was a dispute between H and W as to the ownership of South Lodge and that W was seeking to prevent H from alienating it to her disadvantage.

33. Following the hearing before me on 16 April 2010 when I sentenced H to a term of imprisonment (suspended) for his wilful refusal to pay W maintenance, H decided to flee the jurisdiction. There was a hearing before me on 17 May 2010 by which time H had bolted and was in Moscow. Since then Jolima has not paid any rent although H's staff remain in South Lodge rent free.

34. It has taken a long time for W properly to formulate her case, although there is some excuse to be found in that she acts in person, apart from at Court hearings themselves. By an Order dated 18 October 2009 W was to set out her case against GC by 31 October 2009. On 17 November 2009 W made an Affidavit 'to clarify my position regarding South Lodge'. W had earlier, on 20 February 2009, made an Affidavit in which she sought the setting aside of H's disposition of South Lodge as being made with the intention of defeating her claim for financial relief. On 16 April 2010 I made an Order that W was to set out her case by 16 May 2010. Again W failed to do so; again her time was extended and yet again she breached the time limits so that her position statement did not materialise until 8 October 2010, a mere twelve days before the original scheduled commencement of this case. The hearing in fact began on 15 November 2010 with a time estimate of 3 days. That was exceeded and a further two and a half days had to be found. Initially there existed 5 court bundles; by the end of the case, by virtue of further documents being produced, they had enlarged by a further 4 bundles. W was represented by Mr Christopher Stirling; H was not represented; GC was represented by Mr Frank Feehan QC. Both counsel advanced their respective cases with great skill.

Conclusions

35. Although the contract was made on 27 August 2008 for the sale of the single share in Everclear, it was amended in December 2008. Much more importantly it was the subject of a clear, albeit unwritten, collateral agreement to the effect that GC could reverse out of the deal if he could not obtain mortgage finance on South Lodge to supply part of the consideration. It is accurate to describe the obtainment of mortgage finance as a condition precedent for performance of the contract. Therefore I agree with Mr Stirling that the effective date of the second transaction for the purposes of Section 23 is 3 March 2009 when the mortgage was completed and the funds made available.

36. Although there are many oddities and suspicious aspects to the second transaction, whether it happened in March 2009 or August 2008, I am not satisfied that the evidence has established with clarity that it was and is a sham. As I stated in my earlier judgment, the test is a stiff one and although I have quite strong misgivings and doubt I am not prepared to say that the evidence carries me over the threshold to a conclusion that the transaction was fake. Equally, if I were to consider the transaction as at 27 August 2008 and absent the collateral agreement I would have difficulty in concluding that GC had not established the defence in Section 23(6). Plainly, full valuable consideration had been contracted for (even if not paid – it is at least arguable that the obligation to pay suffices); and notwithstanding the suspicious features I have referred to, there is a deficit of clear evidence that GC was either acting in bad faith or that he had knowledge, actual or constructive, that H was at that time, and by that transaction, seeking to defeat W's legitimate claims. Evidence that they were friendly is simply not enough to prove the required knowledge.

37. However, as at 3 March 2009 the picture is very different. By then GC plainly knew both of the fact and of the nature of the dispute between H and W concerning South Lodge. If he did not have actual knowledge then he plainly has to be fixed with constructive knowledge, given the circumstances prevailing at that time. I therefore conclude, although my decision is marginal, that the third limb of the defence is not satisfied as at 3 March 2009. Accordingly the transaction is liable to be set aside, all the other elements as between H and W being plainly satisfied, namely that the transaction was done by H with the intention of defeating W's claim and had that effect.

38. The next question is whether I should exercise my discretion to set the charge aside. Mr Stirling argues that in making that decision I should have regard to the relative impact of my decision: who would suffer more - GC or W? Mr Feehan QC strongly disagrees and says that the discretion should only be exercised by reference to the circumstances surrounding the transaction itself. I believe the Court can take into account the full range of facts when deciding whether to exercise its discretion, including the fact that about £600,000 - £800,000 of equity in the property will make a significant difference to W's claims to relief, for the reasons explained in my previous judgment. At this stage it is a question of striking a balance of fairness as between W and GC.

39. I now turn to GC's position. If I were to reverse the sale of the single share in Everclear then I must go on to reverse the assignment of the Kyrgyzstani Bonds to

EK as a consequential Order (no one is suggesting that I can or should reverse the mortgage in favour of the Bank of Scotland). Having regard to the nature of the relationship between EK and GC I have little doubt that the bonds will in fact be returned to GC. Thus other than in relation to some costs referable to South Lodge (including the loss of rent from Jolima since April 2010), he will have suffered minimally if the transaction is set aside. I will in any event order that H indemnify GC against all expenses and costs incurred by him in this transaction and the subsequent litigation to include any cost order made by me against GC in W's favour. Although GC is liable to the Bank of Scotland under the personal guarantee it is unrealistic to think that the Bank will recover its money from any source other than the proceeds of South Lodge.

40. My disposition is therefore as follows:

i) It is declared that at all times EK was acting as nominee for H.

ii) The sale of the single share in Everclear Ltd by H (through his nominee EK) to GC is set aside.

iii) It is declared that Everclear Ltd holds the property beneficially for H, subject to the mortgage in favour of the Bank of Scotland.

iv) The order of Mr Cohen QC dated 12 February 2009 concerning the property is confirmed.

v) The assignment by GC to EK on 3 April 2009 of bonds issued by AUB Bank with a face value of €1,489,850 is set aside.

vi) H shall indemnify GC against all expenses and costs incurred by him in the transaction and in the subsequent litigation to include any costs order made against GC in W's favour.

41. I will hear counsel as to the form of the order and as to costs.

Postscript

42. My judgment up to para 41 was circulated in draft on Thursday 25 November 2010. Counsel pointed out a couple of factual errors, and my text has been corrected. Each counsel has, however, raised a matter of law, on which I now rule.

43. Mr Stirling wishes me to make explicitly clear, given the terms of the judgment of Munby J (as he then was) in *Ben Hashem v Al Shayef* [2009] 1 FLR 115, that I have found actual impropriety on the part of H entitling me to pierce the corporate veil of Everclear and to make the declaration at para 40(iii) above. In that case at paras 159 – 164 Munby J stated:

> **[159]** In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil. This is, of course, the very essence of the principle in *Salomon v A Salomon & Co Ltd* [1897] AC 22, but clear statements to this effect are to be found in *Mubarak* at 682 per Bodey J and *Dadourian* at para [679] per Warren J.

Control may be a necessary but it is not a sufficient condition (see below). As Bodey J said in *Mubarak* at 682 (and, dare I say it, this reference requires emphasis, particularly, perhaps, in this division): 'it is quite certain that company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control'.

[160] Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice. In common with both Toulson J in *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia and Others (No 2)* [1998] 1 WLR 294, [1998] 4 All ER 82 at 305 and 93 respectively and Sir Andrew Morritt V-C in *Trustor* at para [21], I take the view that the dicta to that effect of Cumming-Bruce LJ in *Re A Company* [1985] BCLC 333 at 337–338, have not survived what the Court of Appeal said in *Cape* at 536:

'[Counsel for Adams] described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon & Co Ltd* [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.'

[161] Thirdly, the corporate veil can be pierced only if there is some 'impropriety': see *Cape* at 544 and, more particularly, *Ord* at 457 where Hobhouse LJ said:

'it is clear … that there must be some impropriety before the corporate veil can be pierced.'

[162] Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability. As Sir Andrew Morritt V-C said in *Trustor* at para [22]:

> 'Companies are often involved in improprieties. Indeed there was some suggestion to that effect in *Salomon v A Salomon & Co Ltd* [1897] AC 22. But it would make undue inroads into the principle of *Salomon*'s case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.'
>
> **[163]** Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show *both* control of the company by the wrongdoer(s) *and* impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing. As the Vice Chancellor said in *Trustor* at para [23]:
>
> 'the court is entitled to "pierce the corporate veil" and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s).'
>
> And in this connection, as the Court of Appeal pointed out in *Cape* at 542, the motive of the wrongdoer may be highly relevant.
>
> **[164]** Finally, and flowing from all this, a company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.

44. It certainly came as some surprise to those who practised in ancillary relief cases to discover that that a positive finding of impropriety or "mask" or "façade" or "sham" or "creature" or "puppet" was needed before the corporate veil could be disregarded and a direct order made against the property held 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* [1984] FLR 285 had said precisely that. Cumming Bruce LJ stated at 287:

> Of course it is quite clear, and there is abundant authority, that where the shareholding is such that the minority interests can for practical purposes be disregarded, the court does and will pierce the corporate veil and make an order

> which has the same effect as an order that would be made if the property was vested in the majority shareholder.

And Dillon LJ stated at 292:

> If the company was one-man company and the *alter ego* of the husband, I would have no difficulty in holding that there was power to order a transfer of the property, but that is not this case.

45. Connell J made precisely such an order in *Green v Green* [1993] 1 FLR 326 and I have to say that I do not share Munby J's "great difficulty" with this decision.

46. There is a strong practical reason why the cloak should be penetrable even absent a finding of wrongdoing. In *Mubarak v Mubarak* [2001] 1 FLR 673 Bodey J pointed out that the same end of putting the underlying asset into the hands of the claimant could be achieved by going down a pure company law route rather than violating the sanctity of the corporate veil. He stated:

> 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.

47. 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 the 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.

48. If it is indeed the case that wrongdoing needs to be found in order to penetrate the corporate veil then there is abundant evidence of that here. See paras 6 – 9 above. Thus even under the much stiffer approach of Munby J it is appropriate for me to disregard Everclear and to make the declaration that South Lodge itself now forms part of the pool of assets over which the court's dispositive powers will range.

49. Mr Feehan QC raises a legal point about the operative date of the transfer from H (acting via his nominee EK) to GC. He argues that the existence of (i) the promissory note creating an obligation to pay by a specified time and (ii) the assumption by GC of an obligation to get a mortgage meant that the "condition" was not a condition precedent but rather a term in relation to performance and that therefore the date of purchase was 27 August 2008. He relies on the decision of Slade J (as he then was) in *Johanmammed v Hassam* (The Times 10 June 1976). He submits that it is clear from that case and the two cases discussed within it that in order to create a condition precedent (i.e. in contract law terms to create sufficient uncertainty as to prevent the formation of the contract before satisfaction of the condition) in a contract expressed to be "subject to satisfactory mortgage" (or similar contract) the said condition must be entirely unsupported by any other elements of a contract such as the assumption of the obligation by a named party and/or a time limit on performance and/or amount to be raised etc. Where there is the clear assumption of the obligation and/or a time limit the contract is sufficiently certain and becomes a full contract at the time it is entered into, albeit one that can be rescinded if the performance of the term is found not to be possible by reasonable or enforceable efforts. In such a case, says Mr Feehan QC, there is plainly no condition precedent nor any collateral contract, merely terms of the main contract that can be enforced.

50. Mr Feehan QC argues that here there is a promissory note creating an obligation and a time limit; there is no doubt that GC was responsible for finding the

mortgage and that he used considerable efforts to do so evidencing his assumption of what he considered to be an enforceable obligation; and there is certainty as to price. Thus the implication of a condition precedent in this case cannot stand. That being so the purchase of Everclear/South Lodge took place on 27August 2008 and the defence in section 23 is made out.

51. Mr Stirling meets this argument thus. He says that the ratio of *Johanmammed v Hassam* is that a contract subject to obtainment of a mortgage satisfactory to the applicant is not void for uncertainty. It does not follow however that it is not a conditional contract. Rather, on the facts of that case it was accepted that the condition precedent had been complied with. Mr Stirling concedes that it may well be that the oral agreement in August 2008 was a valid and enforceable conditional contract but that is not the point. It only became enforceable when the condition precedent was fulfilled. The point here is that the condition precedent had not been fulfilled at the time that GC ceased to be acting in good faith and without knowledge. Indeed, at the time of compliance with the condition precedent he could only do so by knowingly breaching a court order to obtain the mortgage. As such, when the transaction completed he could not avail himself of the statutory defence.

52. Mr Stirling points out that there is no definition of "transaction" in s.23 MFPA 1984 (or in s37 MCA 1973) and there is no clear authority on the point. He submits that an anti-avoidance statute such as this should be given a purposive construction. If a party after commencing a transaction but before completion thereof becomes aware that the transaction is for a wrongful purpose it is submitted that he cannot rely on an earlier period of innocence to nonetheless proceed to complete the transaction. *A fortiori* where to do so he must act in defiance of a court order expressly forbidding him from taking the necessary step to fulfil the condition precedent. The logical result of the contention to the contrary is deeply unattractive. For if GC had complied with the court order the transaction would not have concluded. He would have had no mortgage and the sale would not have proceeded. Instead of course he chose to ignore the court order. GC cannot, submits Mr Stirling, be in a better position, i.e. with a completed transaction that is incapable of attack, by reason of such deliberate avoidance of the terms of a court order.

53. I prefer the submissions of Mr Stirling. The authority relied on by Mr Feehan QC does not inform the question of what was the true operative date of the transaction for the purposes of s23. Until the mortgage money was paid GC had every right to exit the transaction. He could not be sued by H (through his nominee EK) for specific performance. Until he received the mortgage money GC did not exercise the basic rights of owner by receipt of rent – if that was paid at all (which I doubt) then it was paid by Jolima to EK. I agree that the statute must be interpreted in a purposive way and that it would be utterly unreal to treat this transaction as having been completed in all respects on 27 August 2008. This transaction actually took place when GC received the mortgage money and set about paying for the property using that very money for half of the purchase price. The fact that the mortgage was formally offered and accepted in December 2008 does not alter the picture.

54. Finally, I accept that the requirement of writing set forth in s2 Law Reform (Miscellaneous Provisions) Act 1989 does not apply to the collateral agreement for the reasons given in Mr Stirling's further written submissions dated 1 December 2010.

55. I therefore do not alter my disposition.

56. The matter is not however free from doubt and is apparently novel. Moreover, the question of how the discretion should be exercised is also unfreighted by authority. I therefore grant GC permission to appeal.