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A veritable mix: veil-piercing with respect to a company in liquidation, confiscation orders and environmental pollution

Although the excitement generated by the Supreme Court decision in *Prest v Petrodel* [2013] UKSC 34 ('*Prest*') in recent years has begun to fade, the emerging line of cases considering the application of this authority has provided interesting insights into the variety of factual circumstances in which the evasion or concealment principle might be invoked.

The Court of Appeal judgment in the recent case of *R v Powell* [2016] EWCA Crim 1043 draws on the principles laid down in *Prest* to resolve a rather unusual question, that is whether personal liability for the costs of cleaning up an insolvent company's polluted site could be imposed on two of its directors/shareholders under the Proceeds of Crime Act 2002 ('POCA 2002') confiscation procedures. In other words, could the controllers of a company that had gone into liquidation be held liable to account for any monetary gains which the company had derived from failing to honour its obligations regarding the treatment of controlled waste?

The facts of the matter may be outlined briefly as follows. Wormtech Ltd ('W Ltd') was formed in 2002, and the respondents JP and JW, who were both directors and shareholders of W Ltd, exercised control over the company. The company was granted a permit to recycle tonnes of food and green waste into compost at a site in South Wales. There were repeated breaches of the permit, and by the time the site was found to have been abandoned in 2012, hundreds of tonnes of food waste were rotting and leachate was overflowing. A winding up order was made against W Ltd, but it fell to the Ministry of Defence (apparently as owner of the land) and the public purse to clean up the site, at a cost of approximately £1.125 million.

W Ltd was initially charged, together with JP and JW, with offences in relation to the pollution of the site. However, the prosecution of W Ltd fell away, in the absence of permission to continue proceedings following its entry into liquidation. The failure to convict the company itself of any offences and secure any financial recovery attendant on the conviction of W Ltd, meant that it was even more important to recover some of the costs incurred in cleaning up the site by means of the personal liability ascribed to JP and JW as controllers of the company. JP and JW were convicted of consenting or conniving as a director in W Ltd's failure to comply with the conditions of its environmental permit, and consenting or conniving as a director in W Ltd's offence of involving the treatment, storage and disposal of controlled waste in a manner likely to cause pollution (JW pleaded guilty on the basis that W Ltd's offence was attributable to his neglect, rather than his consent or connivance). In addition to imprisonment, unpaid work and disqualification as a director for 5 years, confiscation and compensation orders under the POCA 2002 were made against both JP and JW by the Crown Court.

The Crown (representing Natural Resources Wales) applied to the Court of Appeal for an upward variation of the confiscation orders of £200,000 and £30,000 granted against JP

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and JW respectively. Its argument was that the costs of disposing of the waste left on the site would have been shouldered by W Ltd if it had continued trading. As the company had kept the controlled waste on the site in a manner likely to cause pollution, it had a responsibility to clear up the site and had succeeded in avoiding the cost of doing so by abandoning the site. Hence, based on s.6(4)(c) and s.76 POCA 2002, the pecuniary advantage derived by W Ltd by virtue of not meeting the costs of cleaning up the site should be attributed to JP and JW in the form of a confiscation order equivalent to the sum avoided. Consideration was given to the question whether the following test from *R v Seager & Blatch* [2010] 1 Cr App R (S) 60, [76] could be applied in a manner which was consistent with *Prest*:

In the context of criminal cases the courts have identified at least three situations when the corporate veil can be pierced... Secondly, where an offender does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the offender's conviction, *then* 'the veil of incorporation is not so much pierced as rudely torn away': *per* Lord Bingham in *Jennings v CPS* [[2008] Cr App R 29] paragraph 16

The parties had no difficulty in accepting that this case could not be brought within the concealment principle. However, it was less clear whether it fell within the scope of the evasion principle articulated by Lord Sumption in *Prest*. It was evident from the nature of the criminality involved that there was no façade or attempt to hide behind W Ltd's structure in a way that abused the shield provided by the corporate form. W Ltd had not been run for an unlawful purpose, but was in fact a legitimate business which had breached the criminal law through its failure to comply with the relevant regulations. The company's purpose following its founding in 2002 had been the disposal of food waste. To this end, it had obtained the necessary permits and incurred significant costs to install the infrastructure required to comply with its obligations, for modest profit margins. It was thus 'a lawful operation which had become unlawful through breaches of conditions'. JP, in addition to making substantial personal investments into W Ltd, had guaranteed the company's overdraft and finance agreements. Ultimately, she had suffered a large financial loss on the failure of the company. Similarly, JW had provided guarantees for the company's debts. It was also noted that JP and JW were not the sole shareholders of W Ltd, a factor to be taken into account in deciding whether JP and JW should in law be treated as having gained the pecuniary advantage arising from W Ltd's failure to clear up the polluted site.

Applying the *Prest* evasion principle that the corporate veil may be disregarded 'if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement', it was clear that there should be a legal right against the persons controlling the company which stood independently of the company's involvement, as exemplified by the restrictive covenant in *Gilford v Horne* [1933] Ch. 935. In this particular case, no legal right, liability, obligation or restriction could be identified with respect to JP and JW, which existed independently of W Ltd. It was the company itself which had incurred

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obligations to comply with the relevant environmental laws when it secured the permit. The criminal liability of JP and JW arose in a secondary manner through the familiar device of attaching criminal responsibility to senior managers and officers of a company in circumstances where the elements of consent, connivance and neglect are present, and the material legislation provides accordingly. W Ltd could not therefore be seen to have been interposed in such a way as to use its separate legal personality to defeat or frustrate the enforcement of particular rights against JP and JW. These were the only circumstances in which the legal personality of a company could be disregarded in favour of imposing liability on parties in the position of JP and JW in the context of procedures such as those related to confiscation. The court was careful to emphasise that 'decisions of this sort in the context of confiscation proceedings must be geared to the facts and circumstances of the particular case'. The facts of this particular case negated any suggestion that it fell within the category of cases in which the benefit obtained by the company should be treated in law as a benefit obtained by an individual criminal under POCA 2002. Consequently, no personal liability for the costs of cleaning up W Ltd's polluted site could be attached to JP and JW under POCA 2002 confiscation procedures, and the Crown's application was refused.

This case is a good illustration of the ways in which the application of the evasion principle is being tested, particularly in circumstances where liability of a criminal nature arises. The Court of Appeal's judgment adds weight to the Supreme Court's qualification in *Prest* that the evasion principle should be applied only in rare cases. The notion of evasion will evidently not be taken at face value where a closely-held company has gone into liquidation, leaving significant environmental damage in the wake of its collapse. Hence, from an environmental protection perspective, the outcome signifies that veil-piercing will not feature among the techniques which are open to the authorities for pursuing *unfortunate* (rather than *dishonest*) operators to recover the costs of any State intervention to clean up polluted sites. While this adherence to the restrictive approach laid down in *Prest* may be regarded as a victory for consistency in this area of law, there is still work to be done in terms of ensuring that the environmental and financial costs of such pollution are not shifted onto the public in consequence of a company's insolvency and the inability to hold its controlling shareholders to account for the company's breaches of environmental law.