

Clash of cultures

The case of *Chai v Peng* demonstrates what happens when matrimonial and estate planning law collide, write **Adam Carvalho** and **Oliver Blundell**



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Solicitors who provide estate planning and trust advice have become increasingly aware of the need to consider the impact of the matrimonial courts on their area of the law. A recently reported judgment in the long-running matrimonial case of *Chai v Peng* [2017] EWHC 792 (Fam) provides a useful illustration of the issues that can arise. We examine the aspects of this case which may be of interest to estate planning and trust practitioners.

The judge in this case, Mr Justice Bodey, gave a description of the wife (a former beauty queen) and husband. He said that “[t]he wife... is aged 70, although, if I may say so, she does not look it... She would, I think, have been quite feisty on occasions in her dealings with the husband.” The husband was the chairman of MUI Group, which owns a majority stake in the retail chain Laura Ashley. He had been very successful in his career, and “received many accolades in the course of his business dealings”.

The case as a whole is multi-jurisdictional “titanic litigation” involving a “tsunami of information”, and the English proceedings form only a part. Bodey J had encouraged the couple to settle, but, as he said, his words “fell on stony ground”; the husband’s offer was to give the wife £15m, and the wife’s offer was to accept £520m.

The aspect of the judgment which is examined in this article concerns the Rossway Estate in Hertfordshire, which comprises around 1,000 acres. The mansion house was used only by the family, but the rest of the estate contained some rented land and buildings.

The estate and house were owned, respectively, by two BVI companies, Central Point Group Limited and Dunross Properties Limited. Both Central Point and Dunross were owned entirely by a Hong Kong entity called Norcross Limited, which itself was owned by KKP and Soo Lay, two Malaysian companies. Those Malaysian companies were owned 99.98 per cent and 99.99 per cent by the husband respectively (with the remainder owned by the wife).

The question was whether the estate and the house formed part of the matrimonial pot notwithstanding the fact that they were owned within a corporate structure. These issues were pleaded before the court as:

- Whether or not the house and/or estate were held on a resulting trust for the husband by the companies which owned them; and
- If not, whether or not the house and/or the estate and the structure which owned them constituted a post-nuptial settlement, and if so, if and how it should be varied.

Bodey J referred to the principles laid down by the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415. It is helpful to summarise these briefly:

- The court may ‘pierce the corporate veil’ if a company is being used to ‘evade liability’. Where a legal right exists against a person who owns or controls a company, and the company has deliberately been placed between the parties to defeat that right or to frustrate its enforcement, then the court may be entitled to look through the company.
- Concealment is not evasion. If a company has deliberately been used to conceal the identity of the real actors, the court can look behind the façade without disturbing the notion that the company is legally separate from its owner.
- The Matrimonial Causes Act 1973 (MCA) does not provide authority for piercing the corporate veil. There is nothing in the Act to authorise a transfer from one party to another of that which does not belong to the transferor. Courts exercising family jurisdiction do not occupy a ‘desert island’ in which general legal concepts may be suspended or reinterpreted.
- Judges in the Family Division are “entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing”.



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Resulting trusts

In *Chai v Peng*, three of the companies that formed part of the corporate structure owning Rossway were respondents. The companies' case was that the estate was purchased by Central Point (one of the companies), and Central Point had borrowed the purchase monies from Norcross (a second company). The loan monies, when received, were Central Point's, to use as it saw fit, and Central Point had decided to buy the estate. There could, therefore, be no resulting trust of the estate in the husband's favour. Central Point later separated the house from the estate, and transferred the house to Dunross (a third company) for consideration; again, there could be no resulting trust of the house.

Bodey J did not agree with these submissions. Following *Prest*, he drew the inference (based on his experience) that the husband was the ultimate source of funds for the purchase of the estate. It fell, therefore, to the companies and the husband to rebut that inference. Bodey J noted that "the husband has not chosen to deal in evidence with any of the details in respect of the purchase" – and, in those circumstances, had not rebutted the court's presumption.

Lord Sumption had found in *Prest* that it is often appropriate to draw the inference that a matrimonial home is held beneficially for the owner or controller of the company. Bodey J broadened this further. He found that the house certainly could not be described as "the" matrimonial home, but it was undoubtedly "a" matrimonial home. Each of the children of the family had a room, and it was never rented and was kept exclusively for the use of the family.

In light of this, Bodey J concluded that the estate and house were held on resulting trusts for the husband. There was no question as to the corporate status of the companies involved or need to pierce the veil, but in this case the companies did not hold the beneficial interest in the property, despite the intention (partly for tax-planning purposes) of the husband to divest himself of this interest.

Post-nuptial settlements

Section 24 (1) of the MCA gives the court power to vary any ante- or post-nuptial settlement made on the parties to the marriage. A post-nuptial settlement is a settlement made during a marriage by one of the parties which gives some interest to either of the spouses or to their offspring. "Settlement" for these purposes can include corporate structures.

Family judges are willing to define this broadly – Mr Justice Mostyn, in *BJ v MJ*, found that a dual trust structure as a whole was a nuptial settlement, despite the fact that the husband, the wife, and their children were excluded as beneficiaries of one of the trusts, on the basis the second trust was "the left hand" to the first trust's "right hand".

In *Chai v Peng*, Bodey J considered whether or not the corporate structure which owned Rossway was a nuptial settlement. He found that the arrangement of Rossway was such as to provide the husband, the wife, and their children with "a pleasant amenity". It followed, reasoned Bodey J, that the whole set-up could be classified as a post-nuptial settlement.

In the event, this element of the case was adjourned pending the husband's compliance with the lump sum order he had made (on the basis of his finding in relation to the resulting trust point). However, if the wife needs to restore the application, Bodey J indicated that it would be fair to extend the notional licence given to the wife by the holding company (via the husband) to use house for life and for free.

Points to consider

Chai v Peng provides some food for thought for estate planning and trust lawyers.

- The importance of trustees keeping detailed records is highlighted. It would have assisted Mr Peng if he could have produced evidence allowing him to rebut the presumptions that were made in his wife's favour.
- Rossway certainly was not the family's main home, but that did not matter – it was one of the matrimonial homes, and that sufficed for the court to draw the presumption that it was held beneficially for the husband.
- It is interesting to note that Bodey J paid short shrift to the argument that Mr Peng had meant to divest himself of beneficial ownership for tax-planning purposes. This type of approach may seem counter-intuitive to trust and estate practitioners.
- Had the resulting trust arguments not been found in the wife's favour, it is likely that (a) the corporate structure would have been treated as a matrimonial settlement and (b) varied to provide her with lifetime use.

The "clash of cultures" between such practitioners and the matrimonial courts is likely to continue, and to raise issues that planners will need to bear in mind. **SJ**