matters because it affects the burden of proof; the claimant proves objective valuation and the defendant proves subjective devaluation.

A further difference between the approaches of Lords Clarke and Reed turns on whether the defendant's autonomy should be considered at the enrichment or the unjust stage of the inquiry. Lord Neuberger acknowledged that in most cases the choice will only affect procedural analysis rather than outcome. For example, if a kitchen fitter mistakenly enters the defendant's house, rips out his kitchen and installs a new one, when he should have installed it in a neighbour's house, the defendant should not be required to pay for the kitchen, because he should be free to choose whether he wants a new kitchen. Such a result could be achieved by concluding that the defendant's enrichment was not unjust, but this changes the accepted understanding of the unjust factors as being claimant-focused. The defendant's circumstances are usually taken into account through the defence of change of position, but the defendant cannot be considered to have changed his position in this situation. Surely it is preferable to say that the defendant has simply not been enriched. Whilst he had clearly received something of objective value, he should be allowed to say that he did not value it. If the defendant was contemplating purchasing a new kitchen but would only have done so at a significant discount in the sales, it is appropriate to take this into account in reducing the objective value.

The legacy of *Benedetti* is that, whilst there remains a continuing role for subjective devaluation, its ambit has been significantly reduced because of the wider interpretation of objective value, but there is no place for subjective over-valuation when valuing an enrichment.

GRAHAM VIRGO

FAMILY DIVISION, 0; CHANCERY DIVISION, 1: PIERCING THE CORPORATE VEIL IN THE SUPREME COURT (AGAIN)

SUPREME Court decisions are like buses. Following a decades-long wait for the House of Lords to clarify Lord Keith's dictum in *Woolfson v Strathclyde Regional Council* 1978 S.C. (H.L.) 90 that the corporate veil can only be "pierced" at common law "where special circumstances exist indicating that [a company] is a mere façade concealing the true facts", the Supreme Court has now considered this jurisdiction twice in quick succession (its first decision being *VTB Capital plc v Nutritek International Corporation* [2013] UKSC 5; noted [2013] C.L.J. 280).

Prest v Petrodel Resources Ltd. [2013] UKSC 34 concerned an application by Mrs Prest against her husband for ancillary relief under the Matrimonial Causes Act 1973 ("MCA"), ss. 23–24 following their divorce. Mrs Prest joined seven companies, ultimately owned and controlled by her ex-husband, as co-respondents to her application, alleging that they held certain London properties (including the matrimonial home) on behalf of Mr Prest. Moylan J. ordered Mr Prest to pay his ex-wife £17.5m ([2011] EWHC 2956 (Fam)) and to procure the transfer of seven London properties held by Petrodel Resources Ltd ("PRL") and Vermont Petroleum Ltd ("Vermont") in satisfaction of that liability. His Lordship considered that, as Mr Prest "effectively" owned those properties, the MCA's "purpose and intention" justified his ordering their transfer. A majority of the Court of Appeal disagreed ([2012] EWCA Civ 1395), finding no basis at common law or under the MCA for Moylan J.'s property transfer order.

Before a seven-member Supreme Court, Mrs Prest argued that Moylan J.'s property transfer order was justifiable if the court was prepared to pierce the companies' veil (either at common law or pursuant to the MCA) or to accept that the companies held the London properties on trust for Mr Prest, so that he was "entitled, either in possession or reversion" to them under MCA, s. 24(1)(a). The Supreme Court unanimously accepted the latter suggestion. Lord Sumption considered that the meagre evidence pointed to Mr Prest having directly or indirectly provided the purchase price for the London properties. Accordingly, it was presumed that "PRL was not intended to acquire a beneficial interest in [those properties]" and held them on resulting trust for Mr Prest. Moreover, Mr Prest's deliberate refusal to explain the circumstances surrounding the London properties' acquisition meant that there was no evidence to rebut that presumption and that it was open to the Court to draw adverse inferences regarding the ownership of the London properties from Mr Prest's silence. Three points are noteworthy. First, Lord Sumption (with Lord Wilson and Lady Hale) stressed that both the special inquisitorial nature of ancillary relief proceedings (with its concomitant duty of full and frank disclosure on spouses) and the public interest in preventing uncommunicative spouses from avoiding their maintenance obligations made it particularly appropriate for Family Division judges, without engaging in "pure speculation", to draw such adverse inferences from a spouse's silence as the judge's experience and the "inherent probabilities" suggested. Secondly, Lord Sumption's conclusion that the matrimonial home in *Prest* was held on resulting trust might indicate that such trusts have not yet been totally eclipsed by the constructive trust in the matrimonial home context: *Jones v Kernott* [2011] 3 W.L.R. 1121. Thirdly, his Lordship's formulation of the presumption of resulting trust supports Lord Millett's suggestion in *Air Jamaica Ltd v Charlton* [1999] 1 W.L.R. 1399 that the resulting trust "responds to the absence of any intention on [the transferor's] part to pass a beneficial interest to the recipient".

Although strictly unnecessary, the Supreme Court, unanimously rejected both strands of Mrs Prest's veil-piercing argument. Significantly, their Lordships all accepted (although Lord Neuberger hesitated) the existence of a general common law veil-piercing jurisdiction albeit one limited to rare and exceptional circumstances. Such a resounding endorsement is welcome, given that *VTB* left this issue open. In identifying the scope of that jurisdiction, Lord Sumption distinguished between two (potentially overlapping) principles, namely the "concealment" and "evasion" principles (Lord Neuberger applied the alternative labels of "lifting" and "piercing" the corporate veil to those two principles: *The Coral Rose (No. 1)* [1991] 4 All E.R. 769, 779). Whilst their remaining Lordships approved this distinction, Lady Hale and Lords Wilson, Mance and Clarke expressed doubts as to its comprehensiveness. For Lord Sumption, the "concealment principle" only involves "looking behind [the corporate form] to discover the facts which [it] is concealing". An example would be where a third party must identify the company with its controlling shareholder in order to establish some element of its cause of action against that shareholder: *Gencor ACP Ltd. v Dalby* [2000] 2 B.C.L.C. 734; *Trustor AB v Smallbone (No. 2)* [2001] 1 W.L.R. 1177. In contrast, the "evasion principle" (the only true exception to *Salomon v A. Salomon & Co. Ltd.* [1897] A.C. 22) involves disregarding the company's separate personality so as to deprive its controller(s) of any benefit deriving therefrom. It applies "when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control", but not when a controller simply causes his company (or a particular member of a corporate group) to incur a liability in the first place. This echoes the distinction in *Adams v Cape Industries plc* [1990] Ch. 433 between evading pre-existing and future obligations. As Mr Prest's actions involved wealth protection and tax avoidance measures, but not the evasion of any pre-existing legal obligation to his ex-wife, the "evasion principle" did not apply. In contrast, Lord Sumption identified *Gilford Motor Co. Ltd. v Horne* [1933] Ch. 935 and *Jones v Lipman* [1962] 1 W.L.R. 832 as classic examples of that principle's operation. It is difficult, however, to square his Lordship's treatment of those cases with his recognition that *Gilford* might well be explicable on other more conventional grounds and his acceptance that the "evasion principle" will only apply when strictly necessary. Lord Neuberger spotted this tension and (reiterating his views in *VTB*) refused to treat either *Gilford* or *Jones* as examples of the "evasion principle".

Lord Walker agreed. Accordingly, those decisions' precise standing remains obscure.

The alternative argument, that (consistently with Family Division practice) the MCA conferred a "special and wider power" to pierce the corporate veil, fared no better. Although *Adams* accepted that a particular statutory scheme might carve a niche out of the *Salomon* principle, Lord Sumption was concerned that, once recognized, the veil-piercing power under the MCA would inevitably be deployed against honest and dishonest spouses alike. Indeed, his Lordship considered such a power to be inconsistent with the plain wording (and, according to Lady Hale, the statutory history) of MCA, s. 24(1)(a), which only empowered the courts to order the transfer of property to which a spouse was "entitled, either in possession or reversion". These words require a spouse to have a legal or equitable proprietary interest in the relevant assets and not simply control over their disposal. According to *Macaura v Northern Assurance Co. Ltd.* [1925] A.C. 619, however, even a sole shareholder does not acquire any proprietary interest in his company's assets, but merely a right to share in the company's profits and residual assets. It follows that, whilst the assets of a company in which a spouse has a controlling interest may be relevant to the assessment of that spouse's financial resources under MCA, ss. 25(2)(a), those assets are not specifically transferable pursuant to MCA, s. 24(1)(a). This conclusion also has the advantage of ensuring that property concepts, and corporate and insolvency provisions are applied consistently across all three High Court Divisions. Otherwise, property transfer orders risk undermining the capital maintenance doctrine or conflicting with the provisions in the Companies Act 2006 regulating capital reductions or in the Insolvency Act 1986 prohibiting transactions at an undervalue. The Family Division is not a "desert island".

It may be objected, however, that the strict application of commercial principles to ancillary relief proceedings might encourage spouses to shelter assets in corporate shells or hamper the Family Division in dividing the matrimonial assets fairly in such cases. There are two possible rejoinders. First, where a spouse clearly acts with the intention of defeating an ancillary relief claim, a court may invoke the (admittedly limited) anti-avoidance provision in MCA, s. 37. Secondly, where a spouse's financial resources include corporate interests, financial provision for the other spouse could include an order directing the transfer of shares in the company, rather than corporate assets. Such an order both respects the separate corporate personality and avoids unduly prejudicing the company's creditors by judicially removing corporate assets. Whilst, as Lord Sumption accepted, a share transfer order might prove worthless where the relevant spouse and their company are not amenable to the English jurisdiction, an order for the transfer of corporate property may prove no more successful in such circumstances.

CHRISTOPHER HARE

TAKING BALANCE-SHEET INSOLVENCY BEYOND THE POINT OF NO RETURN

THE Insolvency Act 1986 deems a company to be unable to pay its debts following the satisfaction of any one of a number of tests, the most important of which are cash-flow and balance-sheet insolvency. The cash-flow test states that a company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due (s. 123(1)(e)). The balance-sheet test states that a company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities (s. 123(2)).

The question of what triggers these deeming provisions is important, and not just because the answer determines the availability of a range of processes designed amongst other things to turn a company around or wind it up. It has wider significance because many financial instruments governed by English law make reference to the provisions of the Act as "events of default". Triggering an event of default can change the relationship between creditors and debtors, such as allowing the former to accelerate the maturity of an underlying debt, and between classes of creditors, for instance regarding priority of repayment of the principal debt and interest. Given the importance in the financial markets as well as in insolvency proceedings of these provisions, it is perhaps surprising that there has previously been such limited authority on their interpretation. The Supreme Court has now considered the matter.

The facts of *BNY Corporate Trustee Services Limited and others v Eurosail-UK 2007-3BL* [2013] UKSC 28, [2013] W.L.R. 1408 reflect the role of the tests for insolvency in the financial markets. A portfolio of residential mortgages in the UK was securitised. The events of default in the issued notes included the insolvency of the securitisation vehicle, Eurosail-UK 2007-3BL plc, with express reference to the relevant sections of the Act. The rights of the creditor classes shifted on default. Before a default, the A2 Noteholders had priority over the A3 Noteholders as regards repayment of the principal but both ranked equally as regards interest. After a default, both also ranked equally as regards the principal. The A3 Noteholders argued that a strict