

NUPTIAL SETTLEMENTS

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The jurisdiction to vary an ante-nuptial or post-nuptial settlement

1. s.24(1) of the Matrimonial Causes 1973 Act provides that:

“Property adjustment orders in connection with divorce proceedings, etc.

- (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say—

...

- (c) **an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage**, other than one in the form of a pension arrangement (within the meaning of section 25D below)”

2. The jurisdiction to vary such settlements has existed since the Matrimonial Causes Act 1859.

Meaning of ‘nuptial settlement’

3. Two questions need to be considered: (i) whether a particular transaction or arrangement is a “settlement” for the purposes of section 24, and (ii) whether the settlement has a “nuptial” element. There is an element of overlap in the way in which the authorities have addressed these issues.

4. One of the most frequently cited cases on the meaning of a nuptial settlement is *Princep v Princep* [1929] P 225 where Hill J said at 232:

‘The main point in issue is whether the settlement of August 25 1920 is a ‘post-nuptial settlement on the parties’ within the meaning of s.192 of the Judicature Act 1925. Is it upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state’

5. In *Brooks v Brooks* [1996] 1 AC 375 (considered to be the leading modern case on the topic), the husband had the benefit of a pension scheme trust which had been set up for his benefit. The case pre-dated the power to make pension sharing orders and so the wife sought a variation of the scheme arguing that it was a post-nuptial settlement. Her case went to the House of Lords and she prevailed.

4. On the question of what is a relevant settlement, Lord Nicholls said at 391:

‘In the Matrimonial Causes Act 1973 settlement is not defined but the context of s 24 affords some clues. Certain indicia of the type of disposition with which the section is concerned can be identified reasonably easily. The section is concerned with a settlement “made on the parties to the marriage”. So, broadly stated, the disposition must be one

which makes some form of **continuing provision** for both or either of the parties to a marriage with or without provision for their children.'

At 392 he went on:

'Beyond this the authorities have consistently given a wide meaning to settlement in this context and they have spelt out no precise limitations. This seems right because this approach accords with the purpose of the statutory provision. Financial provision that is appropriate so long as the parties are married will often cease to be appropriate when the marriage ends. In order to promote the best interests of the parties and their children in a fundamentally changed situation, it is desirable that the court should have power to alter the terms of the settlement. The purpose of the section is to give the court this power. This object does not dictate that settlement should be given a narrow meaning. On the contrary the purpose of the section would be impeded, rather than advanced by confining its scope. The continuing use of the archaic expressions "ante-nuptial" and "post-nuptial" does not point in the opposite direction. These expressions are apt to embrace **all settlements in respect of the particular marriage whether made before or after the marriage.**

...

Applying this approach, there is no difficulty with a disposition which creates interests in succession in specified property. Nor is there difficulty where the interests are concurrent but discretionary. Concurrent joint interests are nearer the borderline, such as a case where parties to a marriage hold the matrimonial home as beneficial joint tenants or tenants in common. Even in such a case, however, given the restrictions which would impede any sale of the house while the marriage subsists, this type of case has rightly been held to fall within the scope of the section: see *Brown v. Brown* [1959] P. 86. Periodical payment provisions have also been controversial. But income provision from settled property would readily qualify, and it is only a short step from this to include income provision which takes the form of an obligation by one party to the marriage to make periodical payments to the other. This was held to be so from the earliest days of this statutory provision whose ancestry stretches back to the Matrimonial Causes Act 1859 (22 & 23 Vict. c. 61): see *Worsley v. Worsley* (1869) L.R. 1 P. & D. 648, a decision subsequently affirmed in *Bosworthick v. Bosworthick* [1927] P. 64.'

6. Lord Nicholls further held (in the context of a pension trust) that even a trust set up after a marriage that is used exclusively for the benefit of a party to the marriage will not without more constitute a nuptial settlement, notwithstanding that those assets will be used for the benefit of both parties to the marriage:

"It would be difficult to conclude that a scheme under which benefits were payable exclusively to the scheme member was a marriage settlement, even though in a broad sense the benefits in such a case could be described as family assets. Something more is needed." (at 394C)

In *Brooks*, it was only the fact that the husband had power under the trust to direct that assets should be payable to the wife and the trustee had power to apply assets for the wife's benefit after the husband's death that made it a nuptial settlement (394B-C, referring back to the rules dealt with at 393E- F).

7. In *DR v GR and Others* [2013] 2 FLR 1534 Mostyn J held at para [16] that

“Indeed it is clear to me that a family company which under an arrangement makes some form of continuing provision for both or either of the parties to a marriage is capable of itself of amounting to a variable nuptial settlement whether or not the company is owned by a trust of which the spouses are formal beneficiaries.”

Then after referring to his own decision in *BJ v MJ* (see further below) he said:

“By parity of reasoning I am of the opinion that if under an arrangement "some form of continuing provision for both or either of the parties to a marriage" (which would include, on the authorities, the provision of accommodation) has been made from assets held by a group of family companies then the entire set-up, when viewed as a whole, is capable of amounting to a variable nuptial settlement. If the top company is owned by a trust of which the spouses are formal beneficiaries then the position is a fortiori.”

This decision pre-dated the Supreme Court decision in *Prest v Petrodel Resources Limited* [2013] 3 WLR 1. In that decision it was recorded at para 53 that:

“The wife sought special leave to argue that the companies constituted a nuptial settlement within the meaning of section 24(1)(c) of the Act. The court ruled in the course of the hearing that leave would be refused. The point was not argued below and does not appear to be seriously arguable here.”

It is not clear from the report how the point was argued in *Prest* and therefore whether Lord Sumption's remarks are to be read as being confined to the facts of that case or to refer to the wider proposition that a company is capable of amounting to a nuptial settlement.

Surrounding circumstances: is the Court confined to analysing the settlement itself or are the surrounding circumstances relevant to deciding whether it is nuptial?

8. This issue was addressed by Lord Nicholls in *Brooks* (at 393-394):

If each of these unexceptional features is considered in isolation, it is easy to conclude that the scheme does not constitute a marriage settlement made by Mr. Brooks. The primary benefit is a pension payable to him. The option to cut in a dependant's deferred pension conferred no rights on Mrs. Brooks. The discretionary trust in respect of the death benefits should not colour the character of the whole scheme.

That, however, cannot be the right approach. **In considering the purpose of the husband when entering into the scheme, the scheme must be looked at in the round and in the context of the circumstances then subsisting.** Viewed in this light, the husband is to be taken to have entered into this scheme with the intention of providing for the retirement of himself and his wife by the highly tax efficient means afforded by this scheme. His pension would provide financial support for both of them in his retirement. If his wife was still alive when he retired, he could then direct that part of his pension benefit should be used to make separate provision for her after his death. Should he die prematurely, the death benefits would be available for her. In my view, a disposition of this character falls within the wide meaning given to marriage settlement in the matrimonial legislation. The feature which places this scheme on the marriage settlement side of the line is the presence of rules 1(e) and 2(c).

What features of a trust point towards the conclusion that it is a nuptial settlement?

9. The fact that one or both parties or relevant children are named beneficiaries is obviously an important indicator that the settlement is a nuptial one. The fact that neither party is a named beneficiary is relevant but not decisive.
10. In *C v C (Variation of Post-Nuptial Settlement)* [2004] 2 FLR 1 Wilson J held that he needed to consider the position of the trust in question at its inception when the parties were beneficiaries as opposed to at the date of the hearing by which time they had been removed. However, in the alternative, he considered whether their removal as beneficiaries had deprived the trust of its nuptial features. He said at paras [26] and [27]:

“26. In case my above conclusion is wrong, I turn to consider whether the deed dated 8 January 2001 removed from The Hickory Trust the features which made it nuptial. The relevant circumstances are as follows.

(a) Under the deed of settlement the parties remain its joint protector and must so remain during their joint lives. In parenthesis I ask: can one readily conceive a provision of a trust which demands variation upon divorce more obviously than this?

(b)(i) Under that deed the husband, acting alone, continues to have power to replace the trustees; and (ii) indeed such is a power which he has exercised twice during the last few years.

(c) At any stage the trustees may, with the consent of the protector, add the husband or the wife back into the class of beneficiaries.

(d)(i) The power of the trustees to lend money to the husband or the wife, even without interest, is independent of his or her status as a beneficiary; and (ii) indeed prior to 2000 there was a pattern of such lending to the parties as then apparently gave rise to a debt of £2,185,000.

(e)(i) The power of the trustees to invest in companies or lend money thereto for the indirect benefit of the husband or the wife is also independent of his or her status as a beneficiary; and (ii) indeed, shortly after execution of the deed dated 8 January 2001, the trustees lent £250,000 to a company in order that the husband could operate a business through it.

(f) There is no evidence that the power to make a payment to or for a beneficiary has ever been exercised and the identity of those in the class of beneficiaries from time to time does not appear to have been relevant to the operation of the trust to date.

27 The above circumstances lead me to the conclusion that the presence of the parties until 8 January 2001 in the class of beneficiaries was only one of a **constellation of features** which made The Hickory Trust nuptial and that, even without that feature, the settlement would have been nuptial.”

11. In the Court of Appeal, where the decision is reported as *C v C (Ancillary Relief: Nuptial Settlement)* [2005] Fam. 250, Thorpe LJ held that:

“45 In the present case the facts clearly indicate that the nuptial element of the Hickory Trust was not lost by the instrument of 8 January 2001. The parties remain joint protectors. Their children remain in the beneficial class. The removal was apparently motivated by the desire to preserve the assets against claims that might be brought by the spouses' creditors. The parties may be reinstated to the beneficial class. The powers of the joint protector are extensive. Any decision of the trustees to distribute or accumulate requires the consent of the protector under clauses 8 and 22 of the deed of settlement. Subsequent to the removal of the parties there is clear evidence that the husband has in fact benefited substantially from the Hickory Trust which has provided him with working capital by substantial loans to one of his businesses.

46 Turning to authority, the judgment of Romer LJ in *Prescott (or se Fellowes) v Fellowes* [1958] P 260 provides an apt introduction. He said, at pp 281-282:

"Inasmuch as the deed vested no property in trustees and created no successive legal or beneficial interests it had none of the attributes of a settlement which are familiar to conveyancing practitioners. It has, however, long since been established by decisions which are binding on this court that **a disposition of property may constitute a 'settlement' for the purposes of section 25 of the Matrimonial Causes Act 1950, notwithstanding that it would not be regarded as a settlement of property for any other purpose.** The liberality with which this legislation has been construed is sufficiently exemplified by *Bosworthick v Bosworthick* [1927] P 64. In that case a wife executed, a few years after her marriage, a bond which secured to her husband an annuity for his life. The marriage was dissolved in 1925 and the wife applied to the court for an order extinguishing her liability under the bond. This court, affirming the decision of Lord Merrivale P, held that the bond was a post-nuptial settlement for the purposes of section 5 of the Matrimonial Causes Act 1859, and section 192 of the Supreme Court of Judicature (Consolidation) Act 1925; and the wife's application succeeded. In the course of his judgment Romer J, who was sitting as a member of this court, said that the authorities established 'that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature'."

47 As to the power to control as opposed to the entitlement to benefit, *Compton v Compton and Hussey* [1960] P 201 provides a good illustration. The point clearly emerges from the judgment of Marshall J where he held, at p 210:

"The first point taken by Mr Beyfus on the wife's behalf is fundamental. He has submitted that the four settlements in question are not 'post-nuptial settlements made on the parties whose marriage is the subject of the decree'. This submission was made before the registrar, but later abandoned before the hearing was concluded. It has, however, been revived before me and I must deal with it. If he were right in that submission this court would have no jurisdiction to make any order upon this application. I do not entertain any doubt that this submission is wrong. These settlements are settlements of property made in the course of marriage, and they deal with the interests of the children of the marriage. In the disposal of the property for the benefit of each child the respondent wife has been given a voice both as trustee and under the power of appointment even though it is the husband who provides all the money. Under the settlements on the two daughters she also has a beneficial interest in reversion. A settlement can settle on parties to a marriage power over the disposal as well as over the property itself."

At what date does the court consider whether the settlement is nuptial?

12. In *C v C (Ancillary Relief: Nuptial Settlement)* [2005] Fam. 250 the Court of Appeal held that it was necessary to consider whether the settlement in question was nuptial at the time the court was determining the issue. Thorpe LJ held, *obiter dicta*, that there may be situations in which a settlement which is nuptial at its inception can lose its nuptial character.

Nuptialisation: can a non-nuptial settlement subsequently acquire a nuptial character or become ‘nuptialised’?

13. This is something of a moot point. At the time of writing it is an issue to be considered by the Court of Appeal in *Quan v Bray & Ors*. There have been two recent first instance decisions in which the issue has been considered:

- (a) *Quan v Bray* [2015] 2 FLR 546
- (b) *Joy v Joy-Morancho & Ors (No 3)* [2016] 1 FLR 815

14. In *Quan v Bray* Sir Paul Coleridge held, *obiter dicta*, that in principle it is possible for a non-nuptial settlement to become ‘nuptialised’:

‘[60] In my judgment on the authorities, a settlement which is non-nuptial at its creation could itself later become ‘nuptialised’ if there was, in fact, a flow of benefit to the parties during the marriage from the trust. Alternatively a later disposition from the trust can itself constitute a post nuptial settlement without the main or superior trust necessarily becoming nuptial.’

On the facts of the case he held that the trust in question had not become nuptialised. He further stated at para 69(c) that:

‘...if all that is established is a *vague, unspecified intention at some time in the future, depending on the circumstances then prevailing, to benefit the parties possibly by way of amending the trust deed or in other ways*, that is not enough to turn a non-nuptial settlement into a post-nuptial settlement. That cannot amount to an existing disposition.’

15. This decision was considered but not followed by Sir Peter Singer in *Joy v Joy-Morancho & Ors (No 3)*:

[106] But before coming to the context I must ask myself whether I agree with the propositions of law [in *Quan v Bray*]. They are not of course binding upon me, although equally obviously entitled to respect and careful consideration having regard to their source. In the light of the result, the judge's observations were obiter. But I have indeed reached the conclusion that they do not reflect the law.

[107] Mr Pointer in response directs me to *Burnett* once more and also to *K v K (Ancillary Relief: Deed of Appointment)* [2007] EWHC 3485 (Fam), [2009] 2 FLR 936. He argues that from the passage commencing on p 15 of *Burnett* (quoted below) is derived the proposition that the settlement under consideration for the purposes of establishing its susceptibility to adjustment at the time of the divorce must at the time of its inception (in the case of an ante-nuptial settlement) have been in contemplation of that marriage, between those spouses. Ergo if the marriage in question was not at that time in contemplation, that is to say not looked forward to, then looking back at it cannot retrospectively change the settlement's characterisation from non-nuptial to nuptial. And that certainly was the view taken in the later case of *K v K* which, for Mr Bates to succeed, I would need to find was wrongly concluded. In *K v K (Ancillary Relief: Deed of Appointment)* [2007] EWHC 3485 (Fam), [2009] 2 FLR 936, the conclusion (at paras [79] and [82]) was that *Burnett* 'clearly establishes that a non-nuptial settlement cannot become a nuptial one'.

[108] The passage in question in *Burnett v Burnett* [1936] P 1 is the following, at 15:

'[T]he principal settlement, in order to be "ante-nuptial" within the meaning of s 192 of the 1925 Act, must be made in contemplation of or because of a second marriage, although the settlor at the time when the settlement was made was already married. I do not think that s 192 was intended to cover such a case as this. In order to bring the section into operation, *there must be a marriage which is the subject of the decree of divorce, and it is in contemplation of this marriage and because of this marriage that the settlement must be made.* I do not think that the Legislature intended a spouse of an existing marriage to contemplate a second marriage so as to be able to execute a settlement which is "ante-nuptial" as regards such contemplated marriage, although at the time being he or she is married and, therefore, incapable of entering into a second marriage at that time. [*My emphasis.*]

A second point taken on behalf of the wife on this petition to vary was that the appointment under settlement No 3 by the settlor on his second wife under the powers confirmed by the original settlement No 1 was clearly an ante-nuptial settlement within s 192. I think that this is so, but in my view the Court has no jurisdiction under s 192 of the Judicature Act, 1925, to vary an appointment in such a way that in the result the principal settlement is also varied although that settlement is not within s 192.'

[109] In the Court of Appeal decision in *Charalambous v Charalambous* [2004] EWCA Civ 1030, [2015] Fam 250, [2004] 2 FLR 1093, Arden LJ at para [53], when considering the scope of the word 'made' within the statutory context of a 'settlement ... made on the parties to the marriage' reflected that

‘the word “made” relates back to the moment of creation of the settlement. At that point in time it must be within the description “made on the parties to the marriage”. *It probably must also have been an ante-nuptial or post-nuptial settlement at the date of creation though it is not necessary to decide that point*’. In my view the question left open by the sentence I have italicised is answered conclusively (so far as previous consistent authority is concerned) by the meaning attributed to the second paragraph quoted from *Burnett* which was approved in *K v K*. Were it to be otherwise every truly dynastic settlement, bereft of nuptial character at the outset but providing benefits for an individual who subsequently becomes either a husband or a wife, would arguably become variable under s 24(1)(c) of the MCA 1973 as soon as that individual, once married, received any benefits. I am satisfied that that is not the law, notwithstanding the breadth of attribution historically afforded to settlements treated as nuptial.’

16. As can be seen from the passage above, two other first instance decisions - *Burnett v Burnett* [1936] P 1 and *K v K* [2008] 3 FCR 773 – support the proposition that a non-nuptial settlement cannot subsequently acquire a nuptial character.
17. In *C v C (Ancillary Relief: Nuptial Settlement)* [2005] Fam. 250 Arden LJ expressed the view that it is probably necessary for the settlement in question to have been nuptial at its inception, although her remarks were obiter dicta and hers was a minority judgment.
18. In *N v N & F Trust* [2005] EWHC 2908 (Fam), [2006] 1 FLR 856 the issue was whether an arrangement for the purchase of a home was a nuptial settlement. The home had been purchased by a company owned by a non-nuptial trust (of which the husband was a beneficiary) and thereafter leased to the parties. Coleridge J described his approach thus at para [33]:

“My task is to consider what the real substance of the arrangement was which governed the property. The authorities make it clear that I should consider the question broadly and ask myself whether or not it was an arrangement which made ongoing provision for the husband, wife and/or child in those capacities. Motive is irrelevant.”

He held that this arrangement did indeed amount to a nuptial settlement. There was however no suggestion in that case that the trust itself had become nuptial by virtue of entering into such an arrangement.

19. Similar conclusions – that the grant of a licence to occupy a property amounted to a nuptial settlement without causing the ownership of the property or the structure under which the property was held to amount to a nuptial settlement were reached by Munby J in *Ben Hashem v Al Shayif* [2009] 1 FLR 115 and by Roberts J in *NR v AB* [2016] EWHC 277 (Fam), although in these cases the concept of ‘nuptialisation’ was not argued.

What property is to be regarded as being within the settlement?

20. In *Ben Hashem v Al Shayif* [2009] 1 FLR 115 Munby J followed Coleridge J’s approach in *N v N and F Trust*. The settlement in question was a licence to occupy a property granted to the parties by a company. Munby J emphasised that while the settlement comprised that licence it did not extend to the property itself. A more recent decision to similar effect is *NR v AB* [2016] EWHC 277 (Fam).
21. In *BJ v MJ* [2012] 1 FLR 667 Mostyn J held that a trust (on the face of it non-nuptial in character) was to be regarded as part of an overall scheme and therefore to be considered in conjunction with a separate nuptial trust. The two together formed part of the same nuptial settlement and therefore the court’s powers extended to all of the property held by each of them.

Telescoping: where the settlement comprises a trust which owns companies, can orders be made directly against the underlying assets of the companies?

22. In *Hope v Krecji* [2013] 1 FLR 182 Mostyn J held that in such circumstances the court could make ‘telescoping’ orders directly against the underlying assets of a company. In so concluding, he relied in part upon the judgment of Bodey J in *Mubarak v Mubarak* [2001] 1 FLR 673 (now disapproved of by the Supreme Court in *Petrol Resources Ltd v Prest* (‘*Prest*’) [2013] AC 34).
23. In *DR v GR & Ors (Financial Remedy: Variation of Overseas Trust)* [2013] 2 FLR 1534 Mostyn J reiterated that what he had said in *Hope* on this point had been correct, notwithstanding that *Hope* had been overruled by the Court of Appeal in *Prest* as regards his decision to pierce the corporate veil. He

considered that the decision in *Prest* was confined to orders under section 24(1)(a) of the 1973 Act as opposed to section 24(1)(c) where the language used is different. Of the contrary argument, he said that:

“If this argument is right it would mean that this jurisdiction would be almost totally emasculated. This is because it is only in rare cases that the settlement directly owns the underlying assets (although this does crop up from time to time in cases about landed estates here). In the great majority of cases there is an interposed company, and it is usually off-shore. A grant of relief that leaves the applicant to engage in enforcement proceedings in Monrovia or Tortola or George Town is likely to prove to be a poisoned chalice. That said, if the argument is right the unintended consequence of the destruction of the efficacy of this type of relief is something that will have to be borne.”

24. It is difficult to reconcile Mostyn J’s undoubtedly pragmatic approach with the Supreme Court’s decision in *Prest*. The summary of the argument records that the wife’s case was put as follows to the Supreme Court:

‘Furthermore, the companies and/or the relevant underlying properties could be regarded as constituting “nuptial settlements” capable of variation under section 24(1)(c) . A liberal and purposive approach must be taken to the interpretation of “nuptial settlement” in the context of the Act: see *Blood v Blood* [1902] P 78 , 82; *Bosworthick v Bosworthick* [1927] P 64 , 71, 72; *Prinsep v Prinsep* [1929] P 225 , 232, 235; *Brooks v Brooks* [1996] AC 375 , 391–392; *Ben Hashem v Al Shayif* [2009] 1 FLR 115 , para 234; *E v E (Financial Provision)* [1990] 2 FLR 233 ; *D v D* [2011] 2 FLR 29 ; *BJ v MJ (Financial Order: Overseas Trust)* [2012] 1 FLR 667 and *Hope v Krejci* [2013] 1 FLR 182 . The jurisdiction under section 24(1)(c) is not limited to cases concerning the matrimonial home, nor is there any reason why the powers in section 24(1)(c) should be limited to trust structures. The legislation should be read so as to enable the court to do justice between the parties. The findings of fact made by the judge are consistent with a determination that there is a nuptial settlement.’

25. The wife was refused leave to pursue this argument. During the course of his judgment, Lord Sumption said as follows:

53 The wife sought special leave to argue that the companies constituted a nuptial settlement within the meaning of [section 24\(1\)\(c\)](#) of the Act. The court ruled in the course of the hearing that leave would be refused. The point was not argued below and does not appear to be seriously arguable here.

26. The essence of the decision in *Prest* is that a company has a separate legal personality; the corporate veil can only be pierced in limited circumstances. As

Lord Sumption said:

‘8 Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In *Salomon v A Salomon & Co Ltd* [1897] AC 22, the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. In *Macaura v Northern Assurance Co Ltd* [1925] AC 619, the House of Lords held that the sole owner and controller of a company did not even have an insurable interest in property of the company, although economically he was liable to suffer by its destruction. Lord Buckmaster said, at pp 626–627:

“no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.”

In *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 the House of Lords held that documents of a subsidiary were not in the “power” of its parent company for the purposes of disclosure in litigation, simply by virtue of the latter's ownership and control of the group. These principles are the starting point for the elaborate restrictions imposed by English law on a wide range of transactions which have the direct or indirect effect of distributing capital to shareholders. The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law. As Robert Goff LJ once observed, in this domain “we are concerned not with economics but with law. The distinction between the two is, in law, fundamental”: *Bank of Tokyo Ltd v Karoon (Note)* [1987] AC 45, 64. He could justly have added that it is not just legally but economically fundamental, since limited companies have been the principal unit of commercial life for more than a century. Their separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them.’

These principles of company law are of universal application. It is difficult to see that an exception can be made merely because a company is held within a settlement deemed to be nuptial.

Third party beneficiaries: to what extent can a court make orders in relation to property held by a nuptial settlement where there exist other beneficiaries who are not parties to the marriage?

27. In *Brooks v Brooks* the following was said as regards this issue:

“One feature of the power of the court under the section is to be noted. The section gives the court power to vary a settlement. Inherent in this provision is the notion that the court's jurisdiction extends to all the property comprised in the settlement. Thus it includes any interest the settlor himself thenceforth may have in the settled property by virtue of his own settlement. Further, the court's power is not confined to varying the interests of the parties to the marriage under the settlement. The power includes, for instance, the interests in the settled property of the children or, more widely, of others under an old-fashioned protective trust. *Blood v. Blood* [1902] P. 78 is an example of the former, and *Marsh v. Marsh* (1878) 39 L.T. 107 , 545, of the latter. Conversely, it is also implicit in the section that the court's power does not extend to property which is not part of the settled property. In some cases, of which *Dormer v. Ward* [1901] P. 20 is an example, nice questions may arise over whether property is or is not property brought into the settlement.”

28. In *Ben Hashem v Al Shayif* [2009] 1 FLR 115 Munby J summarised the court's approach to the exercise of discretion as follows at para [290] onwards:

“[290] Surveying all this learning, identifying what is of enduring significance whilst ruthlessly jettisoning what has become more or less irrelevant in modern conditions, I can perhaps summarise matters as follows:

- (i) The court's discretion under s 24(1)(c) is both unfettered and, in theory, unlimited. As Miss Parker put it, no limit on the extent of the power to vary or on the form any variation can take is specified, so it is within the court's powers to vary (at one end of the scale) by wholly excluding a beneficiary from a settlement, to (at the other end) transferring some asset or other to a non-beneficiary free from all trusts. She points to *E v E (Financial Provision)* and *C v C (Variation of Post-Nuptial Settlement: Company Shares)* as illustrations of property held on trust being transferred free from any trusts to the applicant, in *E v E* a sum of £50,000 and in *C v C* shares in a Cayman company.
- (ii) That said, the starting point is s 25 of the 1973 Act, so the court must, in the usual way, have regard to all the circumstances of the case and, in particular, to the matters listed in s 25(2)(a)–(h).
- (iii) The objective to be achieved is a result which, as far as it is possible to make it, is one fair to both sides, looking to the effect of the order considered as a whole.
- (iv) The settlement ought not to be interfered with further than is necessary to achieve that purpose, in other words to do justice between the parties.
- (v) Specifically, the court ought to be very slow to deprive innocent third parties of their rights under the settlement. If their interests are to be adversely affected then the court, looking at the wider picture, will normally seek to ensure that they receive some benefit which, even if not pecuniary, is approximately equivalent, so that they do not suffer substantial injury. As Sheldon J put it in the passage in *Cartwright* which I have already quoted: ‘if and in so far as [the variation] would affect the interests of the child, it should be permitted only if, after taking into account all the terms of the intended

order, all monetary considerations and any other relevant factors, however intangible, it can be said, on the whole, to be for their benefit or, at least, not to their disadvantage.'

[291] Miss Parker submitted that the central theme which permeates these authorities is that it is permissible for the court to invade third party interests within the confines of the trust structure, but only to the extent that fairness so requires. It is acknowledged that in the generality of cases, the court should indeed be slow to do so. Broadly speaking, I accept that submission.

[292] Moreover, as she rightly points out, the court always retains a discretion as to the extent of any variation. Even in circumstances where the court could quite properly vary a post-nuptial settlement so as to transfer (say) the matrimonial home to a wife free from any trusts, it may nonetheless direct some less intrusive form of variation, such as to transfer the property to the wife for life and thereafter to the other beneficiaries, to confirm the right to remain in occupation indefinitely without any form of transfer, or to direct that the applicant has a right to remain in occupation until (say) other orders made have been complied with. All of this depends, of course, as she says, on the court's views as to what is fair on the facts, as it finds them, of the particular case."

29. In *BJ v MJ* [2012] 1 FLR 667 Mostyn J commented upon what had been said by Munby J at para [290] of *Ben Hashem* as follows:

[9] The statement in (iv) is surely of wider application than cases about variation of settlement alone. A respondent's property rights obviously should not be interfered with by way of lump sum or property adjustment order in favour of a claimant further than is necessary to achieve a fair and just result. So I do not read this proposition as importing an extra degree of caution specifically for variation of settlement cases.

[10] The statement in (v) must surely be read in the light of the new distributive regime mandated by the House of Lords in *White v White* [2001] 1 AC 596, and *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618. If the court has decided that the assets of a nuptial settlement amount to matrimonial property which falls to be shared then that sharing may very well be in the form of outright provision which deprives a contingent or discretionary beneficiary down the line of the chance of benefit....

[11] On the other hand, if a trust with authentic third party beneficiaries is set up during the marriage then that may well have been as a result of an agreement, express or tacit, between the parties. In *Miller v Miller; McFarlane v McFarlane* at para [153] Baroness Hale of Richmond stated:

'This is simply to recognise that in a matrimonial property regime which still starts with the premise of separate property, there is still some scope for one party to acquire and retain separate property which is not automatically to be shared equally between them. The nature and the source of the property and the way the couple have run their lives may be taken into account in deciding how it should be shared.'

Lord Mance made similar, arguably stronger, observations at para [170]. Thus it may be argued that the court should hesitate before overriding a decision or agreement made during a marriage to isolate funds in a separate legal structure for the formal benefit not only of the spouses but also of their children and remoter issue.

10.5.16
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