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Revisiting the Inhibited Doctrine of Piercing the Corporate Veil in English Company Law

Reem Kabour

Introduction

The landmark English company law case of *Salomon*¹ has become renowned as the ‘unyielding rock’² of corporate law. It establishes that a company is neither an agent nor a trustee of its members, but rather a separate legal entity. The *Salomon* principle has been integrated into subsequent legislation, with the Companies Act 2006 stipulating that upon incorporation, a company becomes an independent body corporate. In the wake of the *Salomon* principle came the doctrine of ‘piercing the corporate veil’, which can be traced back to a number of cases decided soon after *Salomon*.³ The Courts have ‘pierced the veil’ separating the legal entity of the company from its constituents to protect the corporate form from being fraudulently used. While there are some general guidelines regarding piercing the corporate veil within the Companies Act 2006 and the Insolvency Act 1986, it was not until Lord Sumption’s obiter comments in *Prest v Petrodel*⁴ that the doctrine of piercing the corporate veil was clarified. Lord Sumption limited the doctrine to genuine exceptions to *Salomon*. The limited liability benefit attached to incorporation is an essential ingredient of economic growth, and the Courts should be careful not to overly restrict it. Previously, the Courts had tended towards hesitance in employing the doctrine of piercing the veil.⁵ This judicial diffidence is the greatest problem company law authors find in the field, with the difficulty faced being to rationalise the case law, which seems to be diverging from the separate entity rule today.⁶

Generally, English Courts have disregarded *Salomon* in cases of sham companies or established agency relationships.⁷ Nonetheless, the varying common law tests employed to determine whether or not the veil should be pierced have created an unclear precedent. Importantly, a coherent line of argumentation linking the ‘sham’ ground to *Salomon* is

¹ *Salomon v Salomon & Co Ltd* [1897] UKHL 1, AC 22.

² *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC.

³ *Apthorpe v Peter Schoenhofen Brewing* [1899] 80 LT 551.

⁴ UKSC 34, [2013] 2 AC.

⁵ S Griffin and M Hirst, *Company Law: Fundamental Principles* (3rd edn, Longman 2000).

⁶ S Ottolenghi, ‘From Peeping Behind the Corporate Veil, to Ignoring It Completely’ (1990) 53 MLR 338, 338.

⁷ *Smith, Stone, and Knight v Birmingham* [1939] 4 All E.R. 116 (KB).

lacking.⁸ Guidelines in cases like *Adams*⁹ have glossed over the fundamental issues that arise from the doctrine. Doctrinal reform is needed in this area in order to bring the English approach closer to the approach adopted by other jurisdictions, which have established a more coherent framework.¹⁰ Today, the doctrine of piercing the corporate veil remains a contentious topic as its legal foundations are yet to be satisfactorily clarified by the English Courts. This paper will highlight the developments of the doctrine in English law, establishing the principles underpinning its modern-day application. Ultimately, the paper argues that piercing the corporate veil's inconsistent lines of authority has served to stagnate the doctrine, leaving its current application unpredictable. It is for this reason that doctrinal reform is required, with more coherent guidelines on the matter requested from the Courts.

1. Piercing the Corporate Veil Doctrine Post-*Prest*: Faulty Foundations or Sufficient Guidelines?

Lord Sumption's Evasion Principle

Lord Sumption's leading judgment in *Prest*¹¹ has come to be cited as the definition of the doctrine of piercing the corporate veil. The doctrine only applies when a person deliberately evades an existing legal obligation, at which point the Courts can pierce the veil to deprive 'the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality'.¹² The doctrine cannot be employed so as to wholly disregard the company's incorporation, and it is also discretionary. As *Prest* was ultimately decided on principles of trust, the approach developed by Lord Sumption in relation to piercing the corporate veil is obiter. This is not a problem, further showing the discretionary nature of the principle and its limited application.

Lord Sumption's interpretation of the doctrine was not adopted *in toto* by subsequent Courts, resulting in variations of approach.¹³ Addressing the comments of Lord Sumption in *Prest*, Lee finds that the judgment failed to deliver a definitive principle in this complex area of law, leaving any future attempts at achieving clarity in a precarious position.¹⁴ In fact, *Prest* only reiterated that the doctrine is to be construed narrowly, and that litigants better rely on conventional approaches. The emphasis on traditional common law principles at least provides a consistent approach and 'avoids proliferation of liability through...unprincipled

⁸ M T Moore, 'A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*' (2006) JBL 180, 184.

⁹ *Adams v Cape Industries Plc* [1990] Ch 433.

¹⁰ K Yu and R Krever, 'The High Frequency of Piercing the Corporate Veil in China' (2015) 23(2) Asia Pacific Law Review 63, 63.

¹¹ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC.

¹² *ibid* [35].

¹³ P Lee, 'The Enigma of Veil Piercing' (2015) 26(1) International Company and Commercial Law Review 28, 28.

¹⁴ *ibid*.

extensions of the law'.¹⁵ Despite *Prest*'s bold move in the area, the case did not resolve the fundamental issue of proper allocation of liability between company and controller. It merely substituted the need to explain outcomes based on piercing the corporate veil with simpler justifications stemming from conventional principles.¹⁶

On a slightly different note, *Prest* modernised the former mere façade requirement to pierce the veil, to a distinction between evasion and concealment. Lord Sumption's evasion definition arguably stems from the more general standard that the Courts may withhold legal benefit obtained by dishonesty.¹⁷ This is in direct contrast with the concealment principle, where a company is used to obscure the identity of the real perpetrators of the unlawful activity.¹⁸ In *Prest*, the concealment principle was adjudged to be applicable where a company conceals the identity of real actors. Lord Sumption crucially noted that it is only in cases of evasion that the Courts will pierce the veil. For concealment to be found, a legal right must be present which exists independently of the company, in order for the company's corporate personality to be defeated. This merely allows for ordinary equitable remedies against the company and the controller. In this case, the Courts will look behind the veil to 'discover the fact which the corporate structure is concealing' – the principle 'not [involving] piercing the corporate veil at all'.¹⁹ In *Tunstall*,²⁰ Lord Justice Ormerod stipulated that 'any departure from (the *Salomon* principle) (...) has been made to deal with special circumstances when a limited company might well be a façade concealing the true facts'.²¹ The Court of Appeal in *Adams*²² likewise addressed the distinction between evading existing legal liabilities and avoiding liabilities that have not yet arisen. *Adams* concerned an English company that presided over a group of internationally distributed subsidiary companies, some of which were in the United States. The three key arguments made in allocating liability in the case were (1) the agency argument that the companies in the US were agents of the English companies, (2) the single economic unit argument, that the companies could be considered together as one, and (3) the corporate veil argument, that the veil of the subsidiaries in the US should be pierced and their presence treated as part of their UK parent company. The Court of Appeal accepted that the subsidiary was a mere façade but rejected that the parent company had a presence in the US through its subsidiary. In that regard, the Court also rejected the corporate veil argument by ruling that the parent company was entitled to use the corporate structure to conceal the exact identities of those affecting a transaction.

To minimise the controversy surrounding the doctrine of piercing the corporate veil, *Prest* stressed that the evasion and concealment principles are not mutually exclusive. Lord Sumption supported the notion that in almost every case in which the evasion principle is relevant, the relationship between the company and its controller allows for alternative

¹⁵ *ibid* [32].

¹⁶ *ibid*.

¹⁷ *ibid* [28].

¹⁸ *R v Sale* [2013] EWCA Crim 1306.

¹⁹ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC.

²⁰ *Tunstall v Steigmann* [1962] 2 QB 593.

²¹ *ibid*.

²² *Adams v Cape Industries plc* [1990] Ch 433.

common law solutions. This predicament does, however, confuse the border separating concealment from evasion by denying a consistent and objective test distinguishing between the two, an issue which is a microcosm of those that plague the overarching doctrine of piercing the corporate veil. Lord Sumption's acknowledgement of the prevalence of concealment in evasion cases, as well as the fact that evasion is equally achievable through concealment, serves as evidence of the blurred lines between the two concepts. Similarly, the interchangeable terms of 'lifting' and 'piercing' are problematic in the sense that they drive the two principles away from a clear distinction. Likewise, Lady Hale and Lord Wilson in *Prest* agreed that it is not easy to class cases into either concealment or evasion. Instead, Lady Hale favoured a less narrow justification entailing that 'individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business'.²³ Lord Mance was hesitant to draw a strict separation line between the concealment and evasion principles until later submissions arose. In addition, Lords Clarke and Mance agreed that an exception to *Salomon* based on the evasion principle will be remarkably difficult to establish. Despite the diversity of the approaches suggested in *Prest*, these stances jointly reflect a position that will not preclude future developments in the doctrine.

In practice, the doctrine of piercing the corporate veil restrains the application of the evasion principle, leaving the concealment principle to cover most of the ground. Academics have responded to this by questioning whether piercing the corporate veil is even a necessary doctrine in the wake of the far-reaching concealment principle, which fundamentally constrains the Courts' ability to take the more drastic measure of disregarding the corporate personality of a company. Lee highlights that the concealment principle's reaffirmation in *Prest* may have intentionally promoted uncertainty in this regard, so as to eliminate the need to pierce the corporate veil in English company law.²⁴ Nevertheless, it fundamentally leaves the judicial position as it was before the creation of the test – an ad hoc system of inconsistent justifications for piercing the corporate veil. Similarly, Khimji and Nicholls argue that the concealment principle is in fact not to be imposed independently to create a more cohesive approach.²⁵ Concealment, therefore, essentially falls under what Lord Walker described in *Prest* as the 'disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate.'²⁶ This does not change the judicial preference for conventional legal principles in asset partitioning functions of separate legal personality and limited liability.²⁷ As such, the current framework has almost rendered the evasion principle as irrelevant in practice.

²³ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC.

²⁴ P Lee (n 13) 28, 32.

²⁵ M Khimji and C Nicholls, 'Piercing the Corporate Veil Reframed as Evasion and Concealment' (2015) 48(2) UBC Law Review 401, 405.

²⁶ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC.

²⁷ M Khimji and C Nicholls (n 25) 401, 446.

Tjio supported Lord Sumption's evasion principle as the test for piercing the corporate veil as one that 'will increase certainty for all concerned using the corporate form'.²⁸ On the other hand, Rose described the test as a short-term solution.²⁹ Hannigan similarly finds that the line between evasion and concealment offered by *Prest* is 'difficult to apply consistently and objectively'.³⁰ Xing agrees that modern case law indicates that the distinction made between evasion and concealment is not sustainable as a mechanism for regulating the diverse possibilities in which a corporate vehicle may be misused.³¹ Regardless, a future Court may choose to adopt Lord Sumption's test in *Prest*, but that may lead to further difficulties as it is attached to a long history of complexities that also need to be addressed.³² The Courts continue to be urged to revisit the scope of the doctrine and formulate a more detailed framework exceeding common law rules.³³

The evasion principle, the Courts' latest attempt at doing just that, has been criticised for being fundamentally flawed in rendering the doctrine of piercing the corporate veil otiose – a singular focus on only pre-existing legal liabilities by a company's controllers whittles the doctrine down to a very narrow jurisdiction.³⁴ Even those who encourage the application of the general doctrine have enquired whether the *Prest*-generated evasion principle is a satisfactory basis for its application. Lee maintains that the evasion principle is too narrow and does not provide genuine power to pierce the corporate veil when necessary.³⁵ This corresponds with Lord Neuberger's elaboration that a detached principle for piercing the corporate veil should not be encouraged but should instead be classed under the wider grounds of Lord Denning's 1956 obiter comment that 'fraud unravels everything'.³⁶ Khimji and Nicholls argue that perhaps it is most efficient to address the issues raised by the evasion principle test independently from the questions triggered by the doctrine of piercing the corporate veil.³⁷ In doing so, the evasion principle will be preserved as a legal mechanism for classifying legal impropriety. Whether the legal outcome can be classed under piercing the corporate veil should be considered individually. Considering all this, the evasion principle remains the main point of reference to piercing the corporate veil despite the uncertainty it evokes. The ongoing struggle, or perhaps the purposeful denial, to draw a distinct line between evasion and concealment begs the question as to how vital the definite the doctrine of piercing the corporate veil actually is. Such an unclear legal basis for a critical legal doctrine should surely be a call to the Courts to finally address what constitutes the foundations of the

²⁸ H Tjio, 'Lifting the Veil on Piercing the Veil' (2014) *LMCLQ* 19, 23.

²⁹ F Rose, 'Raising the Corporate Sail' (2013) *LMCLQ* 566, 583.

³⁰ B Hannigan, 'Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company' (2013) *Irish Jurist* 50, 54.

³¹ T Xing, 'The New Era of Corporate Veil-Piercing: Concealed Cracks and Evaded Issues?' (2016) 28 *Singapore Academy of Law Journal* 209, 209.

³² P Lee (n 13) 29.

³³ Xing (n 31) 209, 240.

³⁴ Lee (n 13) 28, 30.

³⁵ *ibid.*

³⁶ *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC.

³⁷ M Khimji and C Nicholls (n 25).

doctrine of piercing the corporate veil. The current position appears to be that the Court will not pierce the veil of a member of a corporate group simply because of that relationship, with *Prest* only reinstating Slade LJ's position in *Adams*.³⁸

Khimji and Nicholls contend that perhaps the lack of further comment suggests that the test was intentionally left to linger in its premature stage by the courts and not be expanded any further.³⁹ Nonetheless, the evasion-concealment dichotomy contributes to the law on asset partitioning in corporate veil disputes. A 'simple two-category taxonomy'⁴⁰ is far too ambitious a solution for rationalising case law going back over a century that is woefully lacking in general judicial consensus.

The Principle of a 'Single Economic Unit'

During the 19th century, corporate relationships were not as advanced as they are today, and the necessary precautions were not anticipated. A development in this regard was made in *DHN*,⁴¹ where Lord Denning denoted that the veil may be lifted under the single economic unit principle or where a parent company wholly owns the shares of its subsidiaries, ultimately binding the subsidiaries to the parent, treating them as one.⁴² The single economic unit principle, similar to its counterparts that have also been utilised to justify piercing the corporate veil, is confusing insofar as the actions and the mind of the directors can be viewed as those of the company in some cases. Applying this principle is even more difficult in those cases where 'will and knowledge' is required for assessing the criminality or negligence of the company.⁴³ An early demonstration of the principle in action came just two years after *Salomon*, in *Apthorpe*.⁴⁴ In this case, it was held that a UK parent company's activities could not be distinct from those of its US subsidiary due to the 'head and brains' rule. This rule was raised in *St Louis Breweries*,⁴⁵ where it was found that substance, not merely form, is important in determining where to draw the line in cases of business identity.⁴⁶ Moreover, the Companies Acts have historically required the holding company to include its subsidiaries' profits in its accounts, along with their collective assets and liabilities.⁴⁷ The group enterprise approach is also evident in the Corporation Tax Acts, leading Gower to state that 'the only outside creditor in whose favour the *Salomon* rule has been substantially mitigated is the Revenue'.⁴⁸

³⁸ *Adams v Cape Industries Plc* [1990] Ch 433.

³⁹ *ibid* 444.

⁴⁰ *ibid* 405.

⁴¹ *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852.

⁴² *ibid*.

⁴³ *Cornford v Carlton Bank* [1900] 1 QB 22.

⁴⁴ *Apthorpe v Peter Schoenhofen Brewing Co.* [1899] 80 LT 551.

⁴⁵ *St Louis Breweries v Apthorpe* [1898] 79 LT 551.

⁴⁶ *ibid*.

⁴⁷ Companies Act 1985, Section 227.

⁴⁸ Ottolenghi (n 6) 348.

In 1990, the single economic unit principle was once more thrust into the limelight of legal discourse by the Court of Appeal in *Adams*.⁴⁹ The re-emergence of this principle can be attributed to the increase in corporate groups in the modern business world. Some have argued that it would be efficient to treat these companies collectively rather than separately as they act as a group, particularly when raising capital.⁵⁰ Nevertheless, Slade LJ held in *Adams* that the general rule that 'each company in a group of companies is a separate legal entity possessive of the separate legal rights and liabilities'⁵¹ will not be easily disregarded. Varying approaches to the single economic unit principle have been indicative of how the corporate form is viewed in the eyes of the law, as it subsequently defines the repercussions and subsequent corrective regulations that creditors and other third parties may face if the law on corporate enterprise is altered.⁵²

The agency argument in corporate groups was accepted as a ground to pierce the veil in *Smith*.⁵³ Lord Atkinson clarified the circumstances in which an agency relationship can exist between a parent company and its subsidiary. To begin, the Courts enquire as to whether the profits of the subsidiary were treated as profits of the parent company. Furthermore, the Courts ask whether the persons conducting the business of the subsidiary were appointed by the parent company, making the parent company the 'head and brains' of the business venture. Finally, the Courts consider whether the subsidiary governed its spending with its own skill and direction, or whether this activity was done by the parent, to come to a conclusion as to which of the two was in effectual and constant control.⁵⁴

This decision can be rationalised as a consequence of the notion that *Salomon* need only be applied prima facie.⁵⁵ In handing down that ruling, the Court deliberated on whether or not the profits raised unlawfully were by the agent company or the principal members. The Court assessed whether or not it was the company or its controllers that were the 'head and brains'⁵⁶ of the venture, alongside having constant control of the principal. The most recent line of authority indicates that a director will only be liable where he or she exercises more than the usual constitutional control of the company.⁵⁷ *Adams* similarly dictated that Lord Atkinson's factors are insufficient to set aside limited liability and establish an agency relationship, unless it is proven that there is an express agreement to authorise such a relationship.⁵⁸ This prevents the rules of joint liability from undermining the separate personality of the company. Lee recommends that this test be expanded to also encompass shareholders.⁵⁹

⁴⁹ *Adams v Cape Industries Plc* [1990] Ch 433.

⁵⁰ B Hannigan, *Company Law* (4th edn, OUP 2015) 58.

⁵¹ *Albacruz (Cargo Owners) v Albazero 'The Albazero'* [1977] AC 774.

⁵² *Re Polly Peck International Plc (No 3)* [1996] 1 BCLC 428.

⁵³ *Smith, Stone, and Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116.

⁵⁴ *ibid.*

⁵⁵ J Lowry and A Reisberg, *Pettet's Company Law* (4th edn, Pearson 2012).

⁵⁶ *DHN* (n 41).

⁵⁷ *MCA Records Inc v Charly Records Ltd* [2003] 1 B.C.L.C. 93 CA (Civ Div).

⁵⁸ [1990] Ch. 433 (AC) 544.

⁵⁹ P Lee (n 13).

In the past, the Cork Committee pushed for reform of the legislation regulating the doctrine of piercing the corporate veil, so as to protect outside creditors' rights in the case of bankrupt subsidiary companies. The European Commission more recently recommended greater transparency in corporate groups, to improve the current regulatory framework surrounding them.⁶⁰ However, all the attempts at making the law on the single economic unit more comprehensible will continue to be redundant, as long as the 'judicial innovations are even more timid than the legislative'.⁶¹

The Principle of 'Last Resort'

The recurring trend in the law is that all the cases appear to be illustrations of fraud, sham companies, agency, national identity, tax evasion, alter ego criminal companies, tortious liability, contractual guarantees, corporate groups, and the evasion of pre-existing legal obligations. *Gilford*⁶² confirmed that common law concepts, such as agency and trusteeship, are to be resorted to initially to resolve corporate personality disputes in the aforementioned types of cases.⁶³ A recent example was in the tort claim in *Chandler*.⁶⁴ Here, the parent company was held liable for breach of duty of care owed to an employee of a subsidiary. In line with the judicial preference of traditional approaches, the Court, in this case, did not categorise its decision as an instance of piercing the corporate veil, but rather as mere tort liability, despite this form of liability interfering with the company's separate personality.⁶⁵

The scope of the veil-piercing doctrine's jurisdiction was further narrowed when Lord Sumption confirmed the last resort principle in *Prest* - that the corporate veil will not be pierced when an alternative principle can achieve an effective remedy. Essentially, it must be shown that there is no other effective solution against the company's controller.⁶⁶ Thus, the last resort principle has allowed the Courts to follow less controversial common law remedies that are conventionally available to a claimant. Nevertheless, Khimji and Nicholls level criticisms at the veil-piercing doctrine for having a poorly defined legal basis and unclear underlying principles.⁶⁷ Importantly, the doctrine is very rarely activated. The contemporary justification stems from judicial concerns to maintain commercial certainty and benefits of incorporation for companies' members. Finally, the doctrine is so narrowly construed that it could arguably be abolished with minimal collateral damage.

⁶⁰ European Commission, 'Report of the High Level Group of Company Law Experts: A Modern Regulatory Framework for Company Law in Europe', COM (2002).

⁶¹ Ottolenghi (n 6) 350.

⁶² *Gilford Motor Co v Horne* [1933] Ch 935 (AC).

⁶³ *ibid.*

⁶⁴ *Chandler v Cape Plc* [2012] EWCA Civ 525.

⁶⁵ P Lee (n 13) 33.

⁶⁶ *ibid.*

⁶⁷ M Khimji and C Nicholls, 'Corporate Veil Piercing and Allocation of Liability - Diagnosis and Prognosis' (2015) 30 *Banking and Finance Law Review* 211, 212.

2. Reform: Solidifying the Case Law

Davies suggests that perhaps the Courts have been reluctant to dedicate more time to expand on the doctrine due to its rare use.⁶⁸ Relying on a vague legal basis dissuades Courts from taking on this controversial area of law. It is also detrimental as it bars them from revisiting the policy and economic justifications to create a more comprehensive legal framework regarding limited liability.⁶⁹ After more than a century since the conception of the *Salomon* principle, the Courts remain hesitant to set limitations on corporate personality and continue to systematically reject any alternative approaches to piercing the corporate veil, impeding developments in English company law.⁷⁰

Stemming from the corporate veil debate is the question of whether the Courts have been granted too little or too much power in regulating the corporate form. Within the current framework of the doctrine exists the potential for a genuine risk of abuse of the company's veil. Alternatively, there is a danger of misusing the powers granted to the Courts under the doctrine. Therefore, piercing the corporate veil has been viewed as a flaw within the field, with academics like Oh deeming it a 'scourge' on modern company law.⁷¹ Bainbridge's view that the doctrine is at a high risk of being abused due to the lack of strict guidelines to exercise such an immense power over the cornerstone of corporate law finds support in Lee's writings on the matter. However, as controversial as the doctrine of piercing the corporate veil is deemed in the modern day, so was the *Salomon* principle at its birth.⁷² As the modern business complex continues to rapidly develop, the issues that arise in its wake become ever more intricate. Nyombi and Bakibinga find that the corporate form continues to be at high risk of fraud and injustice, which will ultimately renew the source of pressure on the Courts to set aside *Salomon* in a more grounded manner.⁷³ This leaves the doctrine of piercing the corporate veil dangerously lagging behind vis-à-vis internationally employed principles.⁷⁴

Over a century later, *Prest* was held to have revolutionised the field. However, Nyombi and Bakibinga argued that *Prest* has instead established a slippery slope whereby the Courts inconsistently ignore the corporate personality of a company to regulate the use of the corporate form⁷⁵ under the guise of mere façade exceptions. Additionally, they argue that the doctrine of piercing the corporate veil has been overcomplicated to the extent that it is now

⁶⁸ P Davies and S Worthington, *Gower and Davies' Modern Company Law* (4th edn, Sweet & Maxworth 1979) 293.

⁶⁹ Khimji and Nicholls (n 67) 243.

⁷⁰ C Nyombi and D Bakibinga, 'Corporate Personality: The Unjust Foundation of English Company Law' (2014) 65(2) *Labor Law Journal* 94, 94.

⁷¹ P Oh, 'Veil-Piercing' (2010) 89 *Texas Law Review* 81, 145.

⁷² Nyombi and Bakibinga (n 70).

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

too complex to regulate, blurring the pivotal border between proper and improper use of the Courts' discretionary powers.⁷⁶ The Supreme Court in *Prest* justified the presence of the doctrine to avoid the fraudulent advantages gained behind the guise of a company. As both separate legal personality and limited liability are so deeply rooted in both statute and case law, it is no surprise that judges have been reluctant to accept a novel doctrine of piercing the corporate veil that contradicts the former two doctrines.

The common law's shifting guidance on the intrusive judicial procedure of piercing the corporate veil has resulted in an academic demand for better defined doctrinal principles.⁷⁷ Khimji and Nicholls propose that the current hesitance is necessary as the judicial version of a cost-benefit analysis that 'seeks to preserve separate legal personality and [...] limited liability where the benefits outweigh the costs and vice versa'.⁷⁸ Academics continue to push for a distinct doctrine that is separate from other common law and statutory remedies aimed at addressing the costs and benefits linked to the availability of limited liability and separate legal personality.⁷⁹ However, some academics contend that complete Parliamentary reform is far too drastic a measure to resolve the doctrine. For one, Boyle and Bird suggest that Parliament impose a form of personal liability for the company's obligations in individual shareholders or directors.⁸⁰ This approach does avoid the need for a significant doctrinal justification by the Courts, but it would be little more than yet another short-term method to resolve an incredibly pervasive problem.

Whilst the doctrine of piercing the corporate veil is universally accepted,⁸¹ its application varies widely in different jurisdictions. In English company law, the most recent experiment with the doctrine occurred in the 2013 Supreme Court case of *VTB*,⁸² where the debate surrounding the existence, nature, and scope of the doctrine was reignited, with Lord Neuberger criticising its lack of substantiation in later cases.⁸³ This case created further limitations on the scope of the doctrine in its statements that it can only be invoked in 'novel' and 'very rare' cases within a 'small residual category'.⁸⁴ The doctrine's uncertainty is reflected in *Prest*, where Lords Mance and Walker respectively referred to piercing the corporate veil as a 'metaphor' and 'label' rather than an actual doctrine. Talbot finds that perhaps piercing the corporate veil is not a distinct exception to the *Salomon* principle, but is rather an alternative method to enforce contracts that would otherwise be inequitably impeded by the corporate veil.⁸⁵ The judges in *Prest* later agreed that whilst it is broadly deemed a doctrine, it is open-ended as the law regarding it remains incoherent and ambiguous. Despite these interpretations to the contrary, Lord Neuberger concluded that

⁷⁶ *ibid.*

⁷⁷ Khimji and Nicholls (n 67) 212.

⁷⁸ *ibid* 213.

⁷⁹ *ibid* 242.

⁸⁰ A J Boyle and J Birds, *Boyle and Birds' Company Law* (6th edn, Jordan Publishing 2007).

⁸¹ Lee (n 13) 28.

⁸² *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337.

⁸³ *ibid.*

⁸⁴ *ibid.*

⁸⁵ L Talbot, *Critical Company Law* (Routledge Cavendish 2007) 38.

although piercing the corporate veil is a valuable judicial tool, there is possibility that the doctrine does not in fact exist in English company law:

I was initially strongly attracted by the argument that we should decide that a supposed doctrine, which is controversial and uncertain, and (...) appears never to have been invoked successfully...in its 80 years of supposed existence, should be given its quietus. Such a decision would render the law much clearer than it is now, and (...) would reduce complications and costs: whenever the doctrine is really needed, it never seems to apply. However (...) it would be wrong to discard a doctrine which, while it has been criticised by judges and academics, has been generally assumed to exist in all common law jurisdictions, and represents a potentially valuable judicial tool to undo wrongdoing (...) where no other principle is available.⁸⁶

3. Evaluation

The history of approaches by the English Courts indicate a restraint from widening the grounds on which a claim to pierce the corporate veil can be made. Perhaps trying to institute solid guidelines as to when the corporate veil can be pierced is 'judicial overreaching in the eyes of English judges'.⁸⁷ However, avoiding the establishment of solid judicial doctrines is not a long-term policy, stagnating the doctrine as a 'short-term phenomenon' rather than a long-term remedy indoctrinated in sustainable principles.⁸⁸ Yu and Krever refute the English Courts' insinuation that providing a clearer outset on the doctrine would directly cause an influx of claims on its grounds.⁸⁹ This judicial torpor is not limited to English Courts - Murray observes the hesitance by other EU Member States to pierce the corporate veil, with the latter, in doing so, arguably overlooking the realities of how international organisations operate.⁹⁰

In practice, English corporate veil cases share a similar approach to that in the United States, despite the countries' contrasting jurisprudential stances.⁹¹ It is possible, therefore, to construct contemporary doctrines that will bring structure and clarity to the English procedure of piercing the corporate veil where it is operating efficiently elsewhere.⁹² The Courts in the US initiated the use of the corporate veil doctrine with traditional common law concepts, but quickly found this tactic to be insufficient.⁹³ Since then, the most renowned

⁸⁶ *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1, 79.

⁸⁷ T Cheng, 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and US corporate veil doctrines' (2011) 34 Boston College International & Comparative Law Review 329, 337.

⁸⁸ *ibid.*

⁸⁹ Yu and Krever (n 10) 84.

⁹⁰ O Murray, 'Piercing the Corporate Veil: The Responsibility of Member States of an International Organization' (2011) 8 International Organizations Law Review 291, 298.

⁹¹ Cheng (n 87) 329.

⁹² *ibid* 329.

⁹³ *ibid* 356.

principle in the US jurisdiction has been the instrumentality principle, which stands in stark contrast with the controversial evasion principle implemented by English Courts. This is a viewpoint that regards the corporate form as a mere instrumentality. Due to the practical overlap of the two jurisdictions, it is possible for the instrumentality principle to be implanted into the English framework to facilitate a practice similar to that of the US.⁹⁴ This resourcefully mitigates the conflict between separate corporate personality and considerations of justice that English Courts struggle to overcome.⁹⁵ However, the possibility of difficulties in constructing an identical instrumentality doctrine out of the current English case law is appreciated. For one, the US's approach comes at the cost of significant alterations to agency and trust law which clarifies when shareholders and corporations should be prepared for the loss of their limited liability or separate legal personality protections.⁹⁶ An alternative route could be to allow the single economic unit principle to develop further, which would reflect underlying principles parallel to those of the instrumentality doctrine, while allowing English company law to operate in tested waters.⁹⁷

With *Smith*⁹⁸ being the first, and by far the only, case in which a systematic approach was attempted by English Courts, a potential window has been opened for a deeper theoretical refurbishment of the doctrine in English jurisdictions.⁹⁹ In this case, Judge Atkinson set out guidelines as to when a subsidiary company can be said to be carrying out business on behalf of its parent company. Here, the identity of the following must be pinpointed: (1) the party carrying on the business, (2) whether the profits were treated like that of the parent company's, (3) whether the parent company was the head and the brain of the trading venture, (4) whether the parent company made investment decisions, (5) whether the parent company made a profit based on its skill and direction and finally (6) whether the parent company was in 'effectual and constant control'.¹⁰⁰ These six guiding questions are very similar to Powell's¹⁰¹ three-part test applying the instrumentality rule, which has henceforth been adopted in *Lowendahl*.¹⁰²

Firstly, the officer's control needs to be more than that of majority or complete stock control, and must involve the total domination of the corporation's finance, policy, and business practice in the relevant transaction, so as to render the corporate form not to have had an independent mind, will, or existence at the time.¹⁰³ Furthermore, Powell sets out that the instrumentality doctrine also requires that the defendant-controller must have used said

⁹⁴ F Powell, *Parent and Subsidiary Corporations Liability of a Parent Corporation for the Obligations of its Subsidiary* (Callaghan 1931) 8-9.

⁹⁵ Cheng (n 87) 355.

⁹⁶ *ibid* 412.

⁹⁷ *ibid*.

⁹⁸ *Smith, Stone, and Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116.

⁹⁹ *ibid* 337.

¹⁰⁰ *ibid*.

¹⁰¹ Powell (n 94) 82.

¹⁰² *Lowendahl v. Baltimore & Ohio R.R.* 247 A.D. 144, 145 (NY App Div 1936).

¹⁰³ Powell (n 94).

control to inflict a wrong upon or contravene the claimant's rights.¹⁰⁴ Finally, that control must have been the proximate cause of the claimant's injury or unjust loss.¹⁰⁵ While the instrumentality doctrine has acquired a firmly rooted position in the US, the English framework overlooked the *Smith* criteria in consequent cases due to the longstanding preference of resorting to traditional common law principles.¹⁰⁶

Academics such as Anderson have proposed further legislative intervention in order to continue endorsing the single economic unit principle.¹⁰⁷ Here, the director's fiduciary duty to act with care, diligence, and in good faith should be the model for such legislation to 'build on and codify the present liability of parent companies as shadow directors'¹⁰⁸ and what constitutes 'a breach of the duty would be left for courts to decide, as they do [...] in the case of directors' breaches of duty'.¹⁰⁹ The suggested areas of breach appear to stem from the factors that underpin the American adaptation of piercing the corporate veil,¹¹⁰ such as 'under-capitalisation, value transfers away from the subsidiary to the parent company or lack of adequate insurance of the subsidiary'.¹¹¹

In addition to general criticisms of the doctrine and more specifically of the evasion principle, Lee contemplates the clarity of the definition of 'abuse' of the veil¹¹² within the definition of the evasion principle. Such a definition is arguably too narrow, which ultimately furthers the uncertainty of standing for those seeking to trigger the doctrine. While such criticisms have illuminated the need to clarify the evasion principle, academics like Lee have supported the view that it is more efficient to constrain claims to existing equitable remedies.¹¹³ This is a justifiable point of view considering that even the key authority on the principle, *Prest*, was decided on trust principles rather than the evasion principle itself. In considering future legal developments of piercing the corporate veil, the concealment principle can be interpreted as either a re-establishment of the law or as just an opportunity for legal development. Completely abolishing the doctrine of piercing the corporate veil from English law will still allow for assets to be reallocated via trust and agency principles, as this approach avoids legitimacy issues associated with the doctrine.

Before *Prest*, *Adams* clarified the 'mere façade' principle by requiring that the utilisation of the company by the defendant must evade limitations set out or owed to third parties by law. However, this approach left the doctrine's application far too narrow. It was an attempt to

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *Cheng* (n 87) 412.

¹⁰⁷ H Anderson, 'Challenging the Limited Liability of Parent Companies: A Reform Agenda for Piercing the Corporate Veil' (2012) 61(22) *Australian Accounting Review* 129, 137.

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² *Lee* (n 13) 33.

¹¹³ *ibid.*

allegedly avoid commercial uncertainty and promote the benefits of incorporation.¹¹⁴ Anderson maintains that the removal of the veil of incorporation will not impede on entrepreneurship, but will rather 'encourage more acceptable levels of risk taking or protection strategies, such as adequate capitalisation or insurance'.¹¹⁵ This is supported by evidence; piercing the corporate veil in a number of successful economies, like the US, has not deterred economic growth as English judges seem to imply.¹¹⁶ Indeed, the application of the doctrine in the UK and the Republic of Ireland does not in any way prove hindrance to the progress of business.¹¹⁷ Currently, the economic justifications for limited liability only explain why piercing the corporate veil does not pertain to cases of shareholder liability for corporate obligations in public corporations. Before *Prest*, the Law Commission reported that the doctrine of piercing the corporate veil 'will not give rise to any regulatory problems'.¹¹⁸ While the Courts are only willing to impose this doctrine where there is evident abuse, the accuracy of the Law Commission's past comments is questionable. Thus, the doctrine needs to be empirically adjusted to address policy concerns and to formulate the appropriate reform for protection of involuntary creditors and corporate groups. Evidently, the view that 'deregulation strengthens good regulation by removing bad regulation' left the Courts with only a questionable amount of prudence to make heavily influential decisions in a controversial and profoundly scrutinised area of law.¹¹⁹

Conclusion

Following the decision in *Salomon*, English Courts remain conservative in their attempts to address the issues surrounding piercing the corporate veil, supposedly due to the crucial role of limited liability in economic growth. Typically, the doctrine has been utilised in cases with the 'twin features of control and impropriety'.¹²⁰ *Prest* upheld the importance of the separate legal entity rule in advancing that the veil of incorporation may only be pierced in genuine exceptions to *Salomon*. Here, Lord Sumption confined the doctrine to cases of evasion and concealment, developing the previous 'mere façade' stance. Whether his test is workable has been debated to no avail amongst academics and is yet to be endorsed in later judgments. The optimal approach would be to revive common law tests founded in precedent, like those in *Smith and Adams*, alongside the novel obiter test in *Prest*. Doing so would avoid construing a single principle providing a limited definition of 'abuse' that inadvertently constrains the application of the doctrine further.¹²¹ In maintaining the current jurisdiction of veil-piercing, Courts will have the discretion to address a variety of policy concerns that are inevitably

¹¹⁴ P Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' (2010) 34 Cambridge Journal of Economics 915, 917.

¹¹⁵ Anderson (n 107) 137.

¹¹⁶ *ibid* 135.

¹¹⁷ *ibid*.

¹¹⁸ Law Commission, *Fiduciary Duties and Regulatory Rules* (Law Com CP No 124, 1992) 24.

¹¹⁹ A Hicks, 'Corporate Form: Questioning the Unsung Hero' (1997) JBL 306, 314.

¹²⁰ *Ben Hashem v Ali Shayif* [2009] 1 FLR 115.

¹²¹ *ibid*.

attached to the separate entity rule. Perhaps complete reform of the doctrine as a whole is too radical, yet the possibility of repairing its foundations is not too unrealistic. In the meantime, the Courts continue holding back on sufficiently ameliorating piercing the corporate veil, instead maintaining the last resort principle. Grantham has described the test in *Prest* as 'legalistic, formalist and technical', while also remarking that it 'expressly avoids looking at the substance and economic effects'.¹²² While Lord Sumption's formulation promotes certainty and prioritises the legal principles that regulate company law, it fails to supplement the discretionary powers granted to the Courts with a solid and workable framework to effectively deter the abuse of the corporate form.

In *VTB*, Munby J explained that 'the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse'.¹²³ Otherwise, Bainbridge explains that although the current Court discretion has never been exploited, it may be at such risk in the future.¹²⁴ Thus, the Courts should not be given '*carte blanche* to pierce the corporate veil', but should rather take on a principled manner of exercising such a discretion.¹²⁵ This method could include requiring evidence beyond control, ownership, and interests of justice. It is arguably less radical than adopting the complete removal of judicial discretion – a popular public policy argument based on the view that the doctrine acts as a deterrent to corporate enterprise.¹²⁶ Essentially, a substantive link between the controller's wrongdoing and the company's involvement would need to be drawn.¹²⁷ Generating a more systematic approach of piercing the corporate veil would see the English approach draw neck-and-neck with other jurisdictions that have established a successful framework in this area. More importantly, in consolidating the ever-changing judicial remarks on piercing the corporate veil, the doctrine will function efficiently by limiting abuse of the *Salomon* principle, whilst remaining up-to-date with modern business practices. The Courts in the US employed similar traditional common law principles in the past before moving to more specialised procedures, further evincing that the current English method is lagging.

In outlining the development of piercing the corporate veil in English law, this paper recommends a more guided framework that will facilitate the growth of the doctrine. The current discretionary powers granted to the Courts have not been employed to endorse any form of objective test for piercing the corporate veil, which has in turn prematurely halted its doctrinal development. At last, it is contended that the Courts have dangerously neglected the doctrine in merely glossing over the problems raised by the abuse of the corporate form. Thus, it is recommended that piercing the corporate veil be reconstituted doctrinally to provide a more coherent and established framework for the successful operation of the doctrine.

¹²² Lee (n 13) 34.

¹²³ *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [4].

¹²⁴ S Bainbridge, 'Abolishing LLC Veil Piercing' (2005) 1 *University of Illinois Law Review* 77, 78.

¹²⁵ Lee (n 13) 33.

¹²⁶ Bainbridge (n 124) 79.

¹²⁷ Lee (n 13) 33.