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THREE STEPS FORWARD, THREE STEPS BACK: WHY THE SUPREME COURT DECISION IN PREST V PETRODEL RESOURCES LTD LEADS US NOWHERE

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The recent Supreme Court decision of Prest v Petrodel Resources Ltd and Others ('Prest') has been celebrated by many as much-needed clarification to a fundamental area of English company law – corporate veil piercing. However, to take such a view is to be overoptimistic. The Supreme Court's findings suffer from three key inadequacies: first, Lord Sumption's Piercing/Lifting dichotomy introduces a problem of classification. Indeed, existing cases can be reasoned to engage both the evasion principle and the concealment principle simultaneously. Second, the majority's finding that corporate veil piercing ought to be construed as a remedy of last resort is problematic: the existing authorities do not support such a view. Finally, the majority's recognition that 'rare and novel' circumstances may warrant veil piercing despite the non-engagement of the evasion principle lodges a new thorn of uncertainty in the flesh: such a view brings up a flurry of conceptual confusions that this area can truly do without. This article opines that the best way forward would be to cull the problematic doctrine of corporate veil piercing. After all, the doctrine – which found its way into English case law on tenuous grounds – is not without viable alternatives. If English company law is to make progress with greater certainty, the English courts have to be resolute in its efforts.

INTRODUCTION

The separate legal personality doctrine has had an enduring legacy. Tracing back to the late 18th century, it simply states that the company exists as a separate legal person distinct from its incorporators. The proposition finds authority in the seminal decision of *Salomon v A Salomon & Co Ltd*¹ (*Salomon's case*). Prior to the monumental decision in *Prest v Petrodel Resources Ltd*² (*Prest*), case law recognized a horde of exceptions to the rule: these instances were, in the past, described interchangeably as the court 'piercing' or 'lifting' the corporate veil.³ The effect of this was to hold the company's members liable for the liabilities of the company.

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¹ *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL)

² *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415 (SC)

³ *Yukong Line of Korea v Rendsburg Investments Corp'n of Liberia (No 2)* [1998] 1 W.L.R. 294 (HC) 305 (Toulson J); *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115 (HC) para [150] (Munby J)

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Following *Prest*, the position has changed. There, the Supreme Court held that ‘piercing’ and ‘lifting’ are not interchangeable terms: both entail different consequences. The separate legal personality doctrine is only properly disapplied in the case of the former. Further, the corporate veil can be deemed ‘pierced’ in the proper sense only when a company is interposed for the purposes of evading existing legal obligations. More pertinently, the Supreme Court held that ‘piercing’ is only available as a fallback when more conventional remedies are inadequate.

While some may consider *Prest* a case that imposed some order to the law, this article highlights three key findings to support its central thesis - that despite the progress *Prest* sought to achieve, it lead us nowhere.

The first lies in the distinction Lord Sumption made between ‘piercing’ proper and mere ‘lifting’, the former applying only if cases engage what his Lordship calls the evasion principle and the latter, the concealment principle (the ‘piercing/lifting’ dichotomy). This article argues that the piercing/lifting dichotomy is unhelpful. Since a review of past cases demonstrates that both principles can apply on the same facts, the piercing/lifting dichotomy does not provide a satisfactory solution.

The second lies in the majority’s recognition of the ‘last resort’ rule. It takes the position that the corporate veil should only be ‘pierced’ as a last resort. This article argues that the authorities supporting the ‘last resort’ rule are problematic. To that extent, the ‘last resort’ rule cannot sustain.

Finally, while many celebrate *Prest* for tightening the law in this area, it is important to note that the majority refused to recognize ‘evasion’ as the only ground warranting ‘piercing’ proper. Contrary to the position taken by Lord Sumption, the majority spoke of rare and exceptional cases that would warrant ‘piercing’ despite the evasion principle not applying. However, by failing to explain what these rare and exceptional cases entail, the law in this respect remains ambiguous. In fact, one might argue that whatever progress obtained from the piercing/lifting dichotomy is consequently reversed. To that extent, curial efforts expended in *Prest*, while valiant, were largely otiose.

1. PIERCING/LIFTING THE CORPORATE VEIL BEFORE *PREST*

Before *Prest*, two problems plagued the law on the ‘lifting’ or ‘piercing’ of the corporate veil: (a) Uncertainty and (b) Semantic Ambiguity.

A. Uncertainty

At common law, it is difficult to ascertain when the courts will ‘pierce’ or ‘lift’ the corporate veil. Judicial decisions in this area - where they concerned the courts applying the terms of a contract or a statute - presented less of a problem. It is after all perfectly in line with the separate personality doctrine that parties

should contract out of it⁴. Equally, Parliament is free to decide that the policy of a particular statute requires that the doctrine be overruled. In contrast, common law exceptions have been described as being formulated on the basis of general reasons⁵, and are primarily concerned with doing justice in the cases before them rather than developing a coherent doctrine as to when the separate personality doctrine may be disregarded.⁶ Past instances include where *inter alia* the company functions as the agent of a shareholder⁷, as an instrument of fraud⁸, as a façade or sham,⁹ as a result of the single economic unit theory,¹⁰ and in the interests of justice.¹¹

B. Semantic Ambiguity

Further, it was unclear whether the expressions 'piercing' and 'lifting' were synonymous. Existing case law before *Prest* took different views on the issue. In some cases, courts have determined it a question unnecessary to answer,¹² while others have resolutely deemed both expressions synonymous.¹³ However, Staughton LJ in the Court of Appeal decision of *Atlas Maritime Co. S.A. v Avalon Maritime Ltd*¹⁴ took the view that a perceptible difference existed between both expressions:

'Like all metaphors, this phrase can sometimes obscure reasoning rather than elucidate it. There are, I think, two senses in which it is used, which need to be distinguished. To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose.'

The courts' divided sentiments posed an issue. Depending on whether or not both phrases entailed different meanings, the manner in which lawyers would interpret judicial decisions challenging the corporate veil at common law would differ. For example, if a distinction existed, case authorities that lawyers might seek to rely on in court when arguing for the corporate veil to be 'lifted' or 'pierced' would have to be reexamined.

The Supreme Court in *Prest* sought to provide solutions to both problems.

⁴ Paul L Davies & Sarah Worthington, *Principles of Modern Company Law* (9th Edition, Sweet & Maxwell, London 2012) 214

⁵ *ibid* 217

⁶ Tan Cheng Han, SC, *Walter Woon On Company Law* (3rd Edition, Sweet & Maxwell Asia, Singapore 2009) 65

⁷ *Smith, Stone & Knight Ltd v Birmingham Group* (1939) 4 All ER 116 (HC)

⁸ *Re Darby, ex p Brougham* [1911] 1 K.B 95 (HC)

⁹ *Adams v Cape Industries plc* [1990] Ch 433 (CA)

¹⁰ *DHN Food Distributors v Tower Hamlets* [1976] 1 WLR 852 (CA); rejected in *Adams v Cape*.

¹¹ *Ratiu v Conway* [2005] EWCA Civ 1302, [2006] 1 All E.R. 571 (CA)

¹² *VTB Capital Plc v Nutritek Corp* [2012] EWCA Civ 808, [2012] 2 Lloyd's Rep. 313 (CA) [119]; *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (No 2)* [1998] 1 WLR 294 (CA)

¹³ *Ben Hashem v Ali Syahif* [2008] EWHC 2380 (Fam), [2009] 1 F.L.R. 115 (HC)

¹⁴ *Atlas Maritime Co. S.A. v Avalon Maritime Ltd* [1991] 4 All ER 769 (CA)

2. PREST V PETRODEL RESOURCES LTD – THE FACTS

Michael Prest (the husband) wholly owned and controlled (directly or through intermediate entities) a number of companies belonging to the Petrodel Group. Two of those companies – Petrodel Resources Ltd (PRL) and Vermont Petroleum Ltd (VP) – were the legal owners of seven residential properties (the properties).

When Yasmin Prest (the wife) successfully obtained a divorce from the husband in November 2011, the properties were subject to proceedings for ancillary relief. While PRL and VP were the legal owners of the properties, the wife alleged that the husband was the beneficial owner. To that extent, the properties were amenable for use to partially satisfy the £17.5 million lump sum order made against the husband.

The English courts faced one key issue: did they have the power to order the transfer of the properties to the wife given that they legally belong, not to the husband, but to PRL and VP?

At first instance, Moylan J determined that there was no exception available on the facts that would warrant ‘piercing’ the corporate veil. However, Moylan J relied on the wider jurisdiction allegedly available under section 24 of the Matrimonial Causes Act 1973¹⁵ (MCA) to ‘pierce’ the corporate veil. It was on this ground that Moylan J ordered the transfer of the properties in favour of the wife.

PRL and VP challenged Moylan J’s order in the Court of Appeal, contending that there was no wider jurisdiction under the MCA. As such, Moylan J had erred in making the order he did. The majority of the Court of Appeal agreed. Accordingly, the order was set aside.

In response, the wife brought a further appeal to the Supreme Court, and eventually succeeded in having Moylan J’s order restored. This was achieved without ‘piercing’ the corporate veil. The Supreme Court was unanimous in determining that the circumstances of the case did not give rise to facts that would warrant doing so. Instead, the order was restored on the ground that Mr. Prest was the beneficial owner of the properties. Consequently, PRL and VP could be ordered to transfer the properties to the wife pursuant to the MCA.

3. THE PIERCING/LIFTING DICHOTOMY AND ITS LIMITATIONS

‘Piercing’ And ‘Lifting’ Are Distinct

The first key finding lies in the dichotomy Lord Sumption made between ‘piercing’ the corporate veil and ‘lifting’ the corporate veil (the piercing/lifting dichotomy). Frustrated by what his Lordship describes as ‘an expression rather indiscriminately used to describe a number of different things...[and]

¹⁵ Matrimonial Causes Act 1973 (MCA) s.24

characterized by incautious dicta and inadequate reasoning,¹⁶ Lord Sumption took a definitive stand: 'piercing the corporate veil', properly speaking means, 'disregarding the separate personality of the company.'¹⁷

This should be distinguished from 'lifting' the corporate veil.¹⁸ The latter encompasses a range of situations in which the law attributes the acts or property of a company to those who control it without disregarding its separate legal personality. For example, particular statutes may render one company legally responsible for the acts or business of an associated company such as the provisions of the Companies Act 2006¹⁹ (CA 2006) governing group accounts found in Chapter IV.

To provide further clarity, Lord Sumption went on to determine that there can only ever be one reason for the court to 'pierce' the corporate veil: if the company's separate legal personality was being abused for the purpose of some relevant wrongdoing.²⁰ This serves to ensure that the law is not disarmed in the face of abuse.

At first consideration, the approach is vague. Numerous cases have made references to the court being able to 'pierce' the corporate veil not only in cases of abuse for wrongdoing, but also where it is used as a façade or a sham.²¹ In fact, one should be forgiven for failing to see if there is any real difference: after all, is not the use of the corporate vehicle as a façade or a sham a matter of abuse for wrongdoing as well?

However, Lord Sumption would disagree. His Lordship distinguishes between these situations by employing what he labels the concealment principle and the evasion principle.²²

(A) The Concealment Principle

The concealment principle is legally banal and does not involve 'piercing' proper but mere 'lifting'. Put simply, it tells us that the courts will not be deterred from ascertaining the identity of relevant parties - if material - simply because a corporate entity is interposed. In such cases, the courts are not disregarding the façade of the company but only looking behind to discover facts that the corporate structure is concealing.

(B) The Evasion Principle

On the other hand, the evasion principle is different. Here, the court disregards the corporate veil if there is a legal right against the person in control of it, and

¹⁶ *Prest* (n 2) [16]

¹⁷ *ibid*

¹⁸ *ibid*

¹⁹ Companies Act 2006 (CA)

²⁰ *Prest* (n 2) [27]

²¹ *Prest* (n 2) [28]

²² *ibid*

he interposes a company so that its separate personality may defeat or frustrate the enforcement of that legal right against him.

The Limitations of the Piercing/Lifting Dichotomy

While the rest of the judges largely approved of Lord Sumption's findings, they expressed caution over adopting an overly rigid rule. In particular, Baroness Hale²³ and Lord Mance²⁴ warned against classifying all cases in which the courts have been or should be prepared to pierce the veil neatly into cases of concealment or evasion. It is opined that this is for good reason: the piercing/lifting suffers from one primary difficulty: classification. Existing case law demonstrates that both principles can be simultaneously engaged on the same set of facts.

A. Re Darby ex p Brougham

Consider the case of *Re Darby, ex p Brougham*²⁵ (*Re Darby*). There, Darby and Gyde were undischarged bankrupts with convictions for fraud. They registered a company called the City of London Investment Corporation Ltd (LIC) in Guernsey that purported to register and float a company in England called Welsh Slate Quarries Ltd (WSQ) for £30,000. It bought a quarrying licence and plant for £3500 and sold this to WSQ for £18,000. The prospectus invited the public to take debentures in WSQ. When WSQ failed and went into liquidation, the liquidator claimed Darby's secret profit, which he made as a promoter. Darby objected and argued that LIC was the promoter. In the end, Phillimore J held that LIC 'was merely an alias for [Darby and Gyde] who were 'minded to perpetrate a very great fraud'.

It is difficult to determine if *Re Darby* was a case of evasion or concealment, or both. One may argue that it was one of concealment because the court did not seem to ignore the corporation's existence. Rather, the court looked under the veil to identify the underlying relationship. This is evident when the court pointed out that 'what they did through the corporation they did themselves and represented it to have been done by a corporation of some standing and position, or at any rate a corporation which was more than and different from themselves.' Further, it pointed out that 'the complaint made against the prospectus is that it alleges that the City of London Investment Corporation was the promoter and vendor, whereas in truth and in fact Darby and Gyde were the promoters and vendors.'

Arguably, the facts also engage the evasion principle. Promoters are fiduciaries and therefore owe a fiduciary obligation to the company they incorporate. In this case, the interposition of the corporate form in the form of LIC was meant to avoid what is arguably an existing legal obligation, or an enforceable legal right that WSQ had against LIC. As pointed out by Hon. Frank Russell, K.C: 'Darby and Gyde were the real promoters and vendors and stood in a fiduciary position to the company. It was a breach of trust on their part to plant this worthless slate

²³ *Prest* (n 2) [92]

²⁴ *ibid* [100]

²⁵ *Re Darby, ex p Brougham* [1911] 1 K.B 95 (HC)

quarry on the company, and they ought to account for the undisclosed profit that they made.'

B. Re Bugle Press

In *Re Bugle Press*²⁶, the majority shareholders of the Bugle Press Ltd formed a company of their own called Jackson & Shaw Holdings Ltd and caused it to make a share purchase offer to the shareholders in Bugle Press Ltd. After the majority shareholders accepted this offer – and Treby (the minority shareholder) refused on the ground that the price was too low – Jackson & Shaw gave Treby notice of its intention to purchase his holding compulsorily under s.209 of Companies Act 1948 (what is now CA 2006 s.979 and 986). It was held that since the minority shareholders could show that the offeror and 90% of Bugle Press's shareholders are the same, they have *prima facie* demonstrated that court should disallow the compulsory purchase under s.209: determining otherwise would result in the section being invoked for a purpose different from that contemplated by its existence.²⁷ After all, the provision allowing an offeror to buy out a minority shareholder under s.209 assumes that the offeror is independent of the 90% shares it has successfully obtained. To allow a buy out otherwise would be to give the green light to minority oppression in a different form.

The court noted that the offeror, Jackson & Shaw Holdings, was for all practical purposes entirely equivalent to the nine-tenths of the shareholders who accepted the offer.' It was also pointed out that the arrangement was a sham so hollow that Treby had 'only to shout and the walls of Jericho [would] fall flat.' These findings indicate that this was a case of concealment, where the courts simply needed to 'lift the corporate veil' to determine the arrangements between the majority shareholders and the company. However, one may also argue that this was a case of evasion: the majority shareholders who started Jackson & Shaw Holdings were directors in Bugle Press Ltd and were therefore, under a fiduciary duty - that is, an existing legal obligation – which they sought to evade via the interposition of a corporate form.

C. Agency Cases

It is also worth considering cases that involve agency relationships such as *Re FG Films*²⁸ (*Re FG*). Case law demonstrates that where an agency relationship between companies or between a company and an individual can be evidentially established, courts have been willing to disregard the corporate veil.

In *Re FG*, FG wanted to operate and register its films as British films for tax purposes. Thus, it incorporated a British company, 90% of shares owned by the US company and the remaining 10% in an English man. It was held on the facts that the British entity acted in all purposes and occasions as the nominee and agent of the US Company that had incorporated it. So the films were made by the US company through the British company as an agent.

²⁶ *Re Bugle Press* [1961] Ch. 270 (CA)

²⁷ *Re Bugle Press* (n 25) 276

²⁸ *Re FG Films* [1953] 1 W.L.R. 483 (HC)

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Based on the findings in *Re FG*, one may argue that the court was in fact looking behind the corporate veil to determine the facts. For instance, the court pointed out that, '[the British entity's] participation in [the] undertaking was so small as to be practically negligible, and that they acted, in so far as they acted at all in the matter, merely as the nominee of and agent for an American company called Film Group Incorporated, which seems (among other things) to have financed the making of the film to the extent of at least £80,000 under the auspices and direction of the said American director, who happened to be its president.'²⁹ To that extent, *Re FG* may arguably be deemed an illustration of the concealment principle at work.

Alternatively, one may argue that *Re FG* demonstrates the application of the evasion principle: the corporate veil was pierced because the American entity sought to evade an existing tax obligation that it was liable to account for through the interposition of a British corporate entity.

D. Gilford Motor Co Ltd v Horne

In fact, the difficulty in classification has already led to judges disagreeing on how certain cases should be construed. In *Gilford Motor Co Ltd v Horne*³⁰ (*Gilford Motor*), an injunction was granted against JM Horne Ltd because Lord Hanworth considered the company to be a '*mere cloak or sham*' since the company was really being carried on by Horne. Mr. Horne's evasive motive for forming the company was emphasized and the company was described as 'a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company,' and that therefore, the defendant company ought to be restrained.

However, while Lord Sumption deemed it a classic case of evasion,³¹ Lord Neuberger did not think that the facts and outcome provided much support for the doctrine. Instead, Lord Neuberger deemed it a case of concealment and therefore did not involve piercing at all.³²

As the cases above demonstrate, the piercing/lifting dichotomy is problematic because both the evasion and concealment principle can be reasoned to exist on the same facts. If the *raison d'être* of the piercing/lifting dichotomy is to clarify when the corporate veil can be deemed 'pierced' proper or merely 'lifted', the inherent difficulty in distinguishing between both instances renders it an unsatisfactory solution: that judges have difficulty agreeing whether cases such as *Gilford Motors* engage the evasion principle or the concealment principle lends credence to that proposition.

²⁹ *ibid* 486

³⁰ *Gilford Motor Co Ltd v Horne* [1933] Ch. 935 (CA)

³¹ *Prest* [n 2] [29] (Lord Sumption)

³² *Prest* (n 2) [70] (Lord Neuberger)

4. PIERCING THE CORPORATE VEIL ONLY AS A LAST RESORT: A QUESTIONABLE PREMISE

Piercing the Corporate Veil as a Last Resort

A possible solution to the problem alluded to above lies in the majority's recognition of the 'last resort' rule. This key finding in *Prest* essentially states that 'piercing' proper ought only be turned to as a last resort.³³ If the evasion principle and the concealment principle can be reasoned to exist simultaneously in a number of cases, deeming 'piercing' as a remedy of 'last resort' provides an immediate solution to the problem: the answer to the conundrum would be that corporate veils should be deemed merely 'lifted' by default.

The Language of Last Resort vs The Language of Necessity

However, this article questions the case authorities relied on by the majority to support the existence of the last resort' rule. For instance, Lord Sumption pointed out that in almost every case where the evasion principle is engaged, the facts would in practice disclose a legal relationship between the company and its controller. His Lordship therefore held:

*'I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course.'*³⁴

In finding as his Lordship did, Lord Sumption upheld the findings of Munby J in *Ben Hashem v Al Shayif*³⁵ (*Ben Hashem*) where the latter held:

*'Finally, and flowing from this, a company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.'*³⁶

However, in doing so, Lord Sumption departed from the contrary direction taken by Lloyds LJ in the more recent Court of Appeal decision of *VTB Capital Plc v Nutritek International Corp (VTB)*.³⁷ In addition, Lord Sumption failed to explain his decision to depart from *VTB*. His Lordship simply placed great emphasis on the fact that the corporate veil is a limited principle that always exists beside other facts that indicate a controller-company relationship. Further, while his Lordship spoke briefly of a 'public policy imperative' that supports the

³³ *Prest* (n 2) [35] (Lord Sumption), [62] (Lord Neuberger) and [103] (Lord Clarke)

³⁴ *ibid*

³⁵ *Ben Hashem* (n 13)

³⁶ *ibid* [164]

³⁷ *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808, [2012] 2 Lloyd's Rep. 313 (CA)

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‘last resort’ rule³⁸, he does not go in great detail to discuss what this imperative is.

Ho May Kim (Ho)³⁹ questions whether *Ben Hashem* stands for the ‘last resort’ position taken by Lord Sumption at all. Ho asserts that Munby J’s findings in *Ben Hashem* adopt what she describes as the language of necessity rather than of last resort. This is crucial because both differ in the sense that the test of necessary does not require the remedy to be one of last resort. To support her proposition, Ho cites a selection of public law cases, one of which is the decision of *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*⁴⁰ (*Mohamed*). The case concerned exercising jurisdiction relating to the provision of information and documents under principles set out in *Norwich Pharmacal Co v Customs & Excise Commissioners*⁴¹ (*Norwich Pharmacal*). *Mohamed* made a distinction between the ‘necessity’ standard and the ‘last resort’ standard by holding that the latter demanded more stringent requirements.⁴² The UK Supreme Court, in *The Rugby Football Union v Consolidated Information Services Ltd*,⁴³ held to the same effect by determining that the test of necessity did not require a remedy to be one of last resort.⁴⁴

Indeed, even the tenor of Munby J’s dicta in *Ben Hashem* does not support the ‘last resort’ rule. The essence of his dicta seems directed at emphasising that the mere ‘piercing’ of the corporate veil for one reason does not mean the same will be done for all others. Ho pertinently points out that if Munby J were intent on laying down the groundwork for establishing a ‘last resort’ rule, he would have done so in greater detail than he did when he surveyed a selection of cases in explaining why the courts did or did not ‘pierce’ the corporate veil.⁴⁵ With all these considered, it is opined that Munby J did not have in mind the conception of a ‘last resort’ rule. Instead, he was solely concerned with establishing the principles that would give rise to grounds for the court to ‘pierce’ the corporate veil.⁴⁶

In stark contrast is the more directed analysis by Lloyds LJ in *VTB*.⁴⁷ There, Lloyd LJ referred to the cases of *Gilford* and *Jones v Lipman* as examples where the courts have ‘pierced’ the corporate veil even though it was unnecessary. This, according to his Lordship, demonstrates that the remedy is not one of last resort.

³⁸ *Prest* (n 2) [35]

³⁹ Ho, May Kim, ‘Piercing the corporate veil as a last resort: *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1’ 26(1) *Singapore Academy of Law Journal*, (2014) 249-257

⁴⁰ *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 W.L.R. 2579 (HC)

⁴¹ *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] A.C. 133 (HL)

⁴² *Ibid* [94]

⁴³ *The Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55, [2012] 1 W.L.R. 3333 (SC)

⁴⁴ *ibid* [16]

⁴⁵ Ho (n 35) [15]

⁴⁶ *ibid*

⁴⁷ *VTB* (n 34) [79]

'In Gilford, there was no need to grant any injunction against the company, although it was obviously convenient to do so: we consider that it would, in practice, although less convenient, have been sufficient to grant an injunction against Mr Horne, which would conventionally have been in a form that restrained him from doing the enjoined acts, whether by himself, his servants or agents or otherwise howsoever. In Jones, there was also no need to grant an order for specific performance against the company. It was sufficient to grant the order against Mr Lipman on the basis that his control of the company meant that he was in a position to procure the completion of the contract. We refer in that respect to the decision of this court in Coles (Trustees of the Ward Green Working Men's Club) v Samuel Smith Old Brewery (Tadcaster) (an unlimited company) [2007] EWCA Civ 1461; [2008] 2 EGLR 159, in which, in circumstances very similar to those in Jones, this court made an order for specific performance against the contracting party, but not also against the company in its control to which the land had been sold (see at paragraph 20, per Rimer LJ, with whose judgment Sedley and Pill LJ agreed).'⁴⁸

Those insistent on understanding 'piercing' as a remedy of 'last resort' might then direct us to the findings of Warren J in *Dadourian Group International v Simms (Damages)*⁴⁹ where he held at [686]:

'[t]here is simply no need, in order to give the Claimants redress for that misrepresentation, to lift the veil at all: indeed, to do so would achieve nothing in relation to that wrong.'

Yet, even on close scrutiny, the tenor of Warren J's finding does not disclose an intention to conceive a 'last resort' rule. Ho opines that this dictum related to the test of necessity: a test distinct from the 'last resort' rule.⁵⁰

Clearly, the determination that 'piercing' the corporate veil ought to exist as a remedy of last resort was reached on a questionable premise – a determination reached through a blind, staunch determination to introduce rigid but admittedly much-needed clarity. For the above reasons and the fact that Lord Sumption's findings exist as mere dicta, it is opined that claimants with clever lawyers may seek to challenge this particular finding.

5. PIERCING THE CORPORATE VEIL WITHOUT THE EVASION PRINCIPLE

The final key finding this article is concerned with lies in the majority's refusal to accept that 'piercing' proper can only arise from 'evasion' cases.

While *Prest* has been celebrated for tightening the law by limiting corporate veil 'piercing' to 'evasion' cases, one must approach this proposition with caution.

⁴⁸ *ibid* [79]

⁴⁹ *Dadourian Group International v Simms (Damages)* [2006] EWHC 2973 (HC)

⁵⁰ Ho (n 35) [18]

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Indeed, the majority in the Supreme Court was unwilling to accept that categories warranting veil ‘piercing’ be foreclosed. Instead, they spoke of rare and exceptional circumstances that would demand veil piercing despite the non-applicability of the evasion principle. For instance, consider the words of Lord Clarke at p[103]:

‘... it is often dangerous to seek to foreclose all possible situations which may arise and [I] would not wish to do so... However the situations in which the piercing the corporate veil may be available as a fallback are likely to be very rare.’

Such a view was also taken by Lord Mance who pointed out at [98]:

‘It is ... often dangerous to seek to foreclose all possible future situations which may arise and I would not wish to do so. What can be said with confidence is that the strength of the principle in Salomon’s case and the number of other tools which the law has available mean that, if there are other situations in which piercing the veil may be relevant as a final fallback, they are novel and rare.’

Unfortunately, little guidance is given on what constitutes rare and exceptional circumstances. This is troubling because it detracts from the draconic clarity Lord Sumption sought to achieve via the piercing/lifting dichotomy and the evasion and concealment principles.

Lady Hale is the sole judge that hints at what would constitute a rare and exception situation at [92]:

*‘I am not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion. They may simply be examples of the principle that the individuals who operate limited companies should **not be allowed to take unconscionable advantage** of the people with whom they do business’ [Emphasis added]*

Nevertheless, it is difficult to ascertain what Lady Hale was contemplating. Does the phrase ‘unconscionable advantage’ refer to the now extinct contract law doctrine of unconscionability first recognised by Lord Denning in *Lloyds Bank Ltd v Bundy*?⁵¹ There, Lord Denning was concerned with contracts entered into between parties of unequal positions. His Lordship determined that at default, a customer who signs a bank guarantee or charge cannot get out of it. However, several exceptions were recognised to this general rule – one of which was those falling into what his Lordship labels, ‘unconscionable transactions.’⁵²

⁵¹ *Lloyds Bank Ltd v Bundy* [1974] 3 W.L.R. 501 (HC)

⁵² *ibid* 337E

However, it is difficult to see how the doctrine of unconscionability fits in the context of company law. After all, Lord Denning's primary concern centered around inequality of bargaining power in the context of contractual obligations.

Perhaps some guidance might be sought from the Singapore Court of Appeal decision of *Raffles Town Club Pte Ltd v Lim Eng Hock Peter (RTC)*⁵³. There, the Singapore Court of Appeal pierced the corporate veil on the ground that failure to do so would be to allow 'unconscionable behavior'.

There, the directors of Singapore's Raffles Town Club Pte Ltd sought to rely on the separate personality doctrine to advance a claim that was in substance for their own benefit. Through Raffles Town Club Pte Ltd, they sought to recover damages or losses suffered by the company as a result of a number of alleged breaches by its former directors. The directors could not have done this in their individual capacities because they had agreed, as purchasers of shares in the company, to pay for share prices set after taking into account these alleged breaches. To that extent, Raffles Town Club Pte Ltd served merely as a conduit through which the directors sought to enrich themselves.

The Singapore Court of Appeal held that the directors had clearly acted unconscionably and in bad faith. It pointed out that Raffles Town Club Pte Ltd's action was in substance the directors' action as their economic interests are entirely aligned. To that extent, if the company were to succeed in its action, the directors would effectively be able to retrieve the judgment proceeds themselves.

If we adopted Lord Sumption's analysis in *Prest*, the facts in *RTC* would not engage the evasion principle because the directors did not incorporate the company for the purpose of evading pre-existing obligations. Further, the findings would not fit into the analysis engaging the concealment principle because the Court of Appeal did not merely 'look behind to discover the facts;' it disregarded the corporate entity altogether. Indeed, it described the company as being 'indistinguishable' from the directors and the action taken being 'in substance an action' by the directors.⁵⁴ One must therefore wonder if Lady Hale would consider the facts of this case as falling within those rare circumstances involving an 'unconscionable advantage' that warrants the piercing the corporate veil.

Tangentially, one wonders if Lady Hale's reference to 'unconscionable advantage' shadows that of the dodo exception that once warranted veil piercing: in the interests of justice.⁵⁵ In *Ratui v Conway (Ratui v Conway)*,⁵⁶ the English Court of Appeal held that, in certain circumstances, solicitors owed duties to the persons behind companies and not just to the vehicle these persons set up to front a transaction. Of particular relevance are Aulds LJ's findings of, and Laws LJ's agreement with, 'the readiness of the courts, regardless of the precise issue

⁵³ *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2013] 1 SLR 374

⁵⁴ *ibid* [60]

⁵⁵ Paul L Davies and Sarah Worthington, *Principles of Modern Company Law* (9th Edition, Sweet & Maxwell 2012) at [8-11]

⁵⁶ *Ratui v Conway* [2005] EWCA Civ 1302, [2006] 1 All E.R. 571 (CA)

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involved, to draw back the corporate veil to do justice when common-sense and reality demand it.’ Further, Sedley LJ held to the following effect:

‘I recognise that there is an asymmetry between the law’s longstanding insistence on the discrete legal personality of limited liability companies and its willingness to lift the veil, as the expression is, in a case like the present. But it is the latter, not the former, which accords with common sense and justice when the issue is who a solicitor owes his professional duties to.’⁵⁷

However, it is pertinent to note that this ground was put to rest in *VTB* where Lord Neuberger determined at [88]:

‘The understandable desire to ensure that an individual who appears to have been the moving spirit behind the dishonorable transaction, action or receipt, should not be able to avoid liability by relying on the fact that the transaction was effected through the medium of a company...is not enough to justify piercing the corporate veil.’

Yet, there are persuasive reasons why Lady Hale’s reference to ‘unconscionable advantage’ and veil piercing in the interests of justice might be the same. First, both grounds would involve the court preventing one party’s exploitation and ensuring another party’s protection. In *Ratuu v Conway*, a solicitor sought to exploit the corporate veil to avoid being held responsible for breach of solicitor duties vis-à-vis the individual incorporators: the court lifted the corporate veil for ‘common sense’ and ‘justice’ to protect the interests of the directors who suffered the relevant breaches of duties. Yet, the facts in *Ratuu v Conway* can also be adequately described as the court preventing the use of the corporate veil by the deviant solicitor for his ‘unconscionable advantage.’ Second, what both grounds are principally concerned with is the court giving relief through curial discretion. This is predicated on the court’s motivation to make things right, and would depend on open textured considerations of the unique factual aspects of cases instead of rigid rules.

However, there are persuasive arguments to support the contrary. While Lady Hale’s reference to ‘unconscionable advantage’ seems to concern itself with considerations of unfairness, the dodo exception of ‘in the interests of justice’ is more concerned with preventing ‘reprehensible’ behavior or one lacking in good faith. Such a perspective better accords with Lord Denning’s conception of the unconscionability doctrine in *Lloyds Bank v Bundy*. Indeed, even the Singapore Court of Appeal – which decided *RTC* – takes a similar view. The Singapore case of *GHL Pte Ltd v Unitrack Building Construction Ltd*⁵⁸ lends support to this proposition. There, the Court of Appeal upheld the definition of ‘unconscionability’ as involving ‘unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party.’⁵⁹

⁵⁷ *ibid* [188]

⁵⁸ *GHL Pte Ltd v Unitrack Building Construction Ltd* [1999] 3 SLR(R) 44

⁵⁹ *ibid* [17]

Admittedly, such an argument holds persuasive force. Nevertheless, until the courts get the opportunity to shed more clarity on what these rare and exceptional circumstances constitute, these arguments remain purely speculative.

CONCLUSION

So where does Prest leads us? Nowhere.⁶⁰ The law on this area has been left in an immobilized state as a result of clashing judicial sentiments - on one hand, Lord Sumption's resolute desire to introduce unyielding certainty through the piercing/lifting dichotomy and the evasion and piercing principles, and on the other, the majority's refusal to accept foreclosure by speaking of rare and exceptional circumstances that would warrant veil 'piercing' in non-evasion cases.

Two cases reflect the unspoken tension. In *Antonio Gramsci Shipping Corporation & Ors v Recoletos Ltd and Ors*,⁶¹ the English Court of Appeal had to decide whether or not the corporate veil could be 'pierced' to establish requisite consent on the part of several key individuals to a jurisdiction clause even though the company, itself, did not provide that consent. This was material towards determining whether the English court was deprived of jurisdiction to hear and determine the claim pursuant to Articles 23 and 24 of the Brussels Regulation. Noting Lord Sumption's piercing/lifting dichotomy, Beatson LJ held at [65] that:

'[I]t is clear from the decision of the Supreme Court that, in the present state of English law, the court can only pierce the corporate veil 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.'

Nevertheless, Beatson LJ also noted Lord Mance's, Lord Clarke's and Lady Hale's refusal to foreclose further development of the law, and Lord Neuberger PSC's view that there is a 'lack of any coherent principle in the application of the doctrine' of piercing the corporate veil. To that extent, he determined at [66] that:

'As to further development of the law, doing so by classical common law techniques may not be easy... Absent a principle, further development of the law will be difficult for the courts because development of common law and equity is incremental and often by analogical reasoning.'

⁶⁰ Daniel Lightman and Emma Hargreaves, 'Petrodel Resources Ltd v Prest: where are we now?' 19(9) *Trusts & Trustees* (2013) 877 – 888.

⁶¹ *Antonio Gramsci Shipping Corporation & Ors v Recoletos Ltd and Ors* [2013] EWCA Civ 730, [2013] 4 All E.R. 157 (CA)

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The second case is *Akzo Nobel N.V v Competition Commission*.⁶² There, the Competition Appeal Tribunal had to determine *inter alia* the interpretation and application of the ‘carrying on business’ criterion contained in section 86(1)(c) of the Enterprise Act 2002. Agreeing that the section has to be interpreted in accordance with general company law principles, the tribunal held at paragraph [95]:

‘We note, however, that a majority of the Supreme Court, whilst endorsing Lord Sumption’s analysis, did not wholly exclude the possibility that exceptions may also be made in other unspecified but rare circumstances.’

Indeed, while many have celebrated *Prest v Petrodel Resources Ltd* as a much-needed clarification to what is a convoluted area in company law, such a view is overoptimistic. The findings of the Supreme Court in *Prest* in relation to the ‘piercing’ and ‘lifting’ of the corporate veil are not without its inadequacies. As demonstrated in this article, the judges have left several questions unresolved. If English company law is to make progress, it must demonstrate cutthroat resolution in its efforts.

⁶² [2013] CAT 13