

IS VEIL PIERCING REALLY THE MESS THAT COMMENTATORS THINK IT IS?

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1. INTRODUCTION

In appropriate cases, the judiciary or the legislature have decided to disregard the principle of corporate personality in order to ‘look behind the corporate person to its real controllers’¹ and so to reallocate liability among shareholders and corporations². This situation is commonly known as ‘piercing’ or ‘lifting’ the corporate veil and it occurs in an attempt of the courts to focus on the reality of the company instead of its structural form³. The doctrine of veil piercing ‘has been generally assumed to exist in all common law jurisdictions’⁴ but without a well-articulated basis. The courts, though, instead of producing comprehensive doctrines as to when the veil should be lifted, they have tended to use some unhelpful metaphors when describing the process of the doctrine⁵. Particularly, they stated that the corporate veil will be lifted when the company is ‘a mere cloak or sham’⁶, ‘a mere device’⁷, ‘a mere channel’⁸, ‘a mask’⁹, or ‘a façade concealing the real facts’¹⁰. Thus, the absence of a certain principle to veil piercing, ‘has been the subject of intense scrutiny by both judges and scholars’ as it has provoked many issues that need to be examined at theoretical, doctrinal and empirical levels¹¹. In this regard, the very recent decision of the Supreme Court in *Prest v Petrodel Resources Ltd [2013]*¹² has introduced a new approach at the concept of veil. However, it is debated whether *Prest* represents ‘a fresh start to this sometimes vexed area of corporate law’¹³ or if it enhances even more the controversy and complexity of the veil piercing approach.

¹ *Pioneer Concrete Services Ltd v Yelnah Pty Ltd (1986) 5 N.S.W.L.R. 254* at 264.

² Mohamed F. Khimji and Christopher C. Nicholls ‘Corporate Veil Piercing and Allocation of Liability: Diagnosis and Prognosis’ (2015) 30 B.F.L.R. 211

³ Tan Cheng-Han, ‘Veil piercing - a fresh start’ (2015) J.B.L. 1

⁴ *Prest v Petrodel [2013] UKSC 34; [2013] 3 W.L.R. 1* at [80], per Lord Neuberger of Abbotsbury PSC

⁵ *Ibid* (n 3)

⁶ *Gilford Motor Co Ltd v Horne [1933] 1 Ch. 935 CA* at 961, 965 and 969.

⁷ *Jones v Lipman [1962] 1 W.L.R. 832 Ch D* at 836

⁸ *Ibid* (n 6)

⁹ *Ibid* (n 7)

¹⁰ *Woolfson v Strathclyde RC 1978 S.C. (H.L.) 90 HL* at 96; *Adams v Cape Industries Plc [1990] 2 W.L.R. 657 CA (Civ Div)* at 759; *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd [1999] 2 S.L.R.(R) 24* at [39]

¹¹ *Ibid* (n 2)

¹² *Prest v Petrodel [2013] UKSC 34; [2013] 3 W.L.R. 1*

¹³ *Ibid* (n 3)

This essay will critically evaluate the validity of the statement made by John H. Matheson, that veil piercing is ‘generally recognized by both courts and commentators an incomprehensible mess’¹⁴. The most appropriate way to do that is by analysing the process of veil piercing in chronological order¹⁵. For that purpose, this essay will be divided into two sections, the law before and the law after the leading case of *Prest*. The first section will provide information on how the concept of corporate veil started to exist and it will then analyse the judicial and statutory provisions of lifting the veil as these have been occurred before 2013. In this timeframe, it will also be considered the tortious liability in terms of veil piercing. The second section will focus on the very famous case of *Prest*. It will discuss in detail the facts of the case and evaluate the two principles that have been arisen from the judgments; the concealment and evasion principles. That section will then criticise the commentary and cases following the *Prest* and finally, it will provide and evaluate the suggested frameworks for preserving veil piercing. Those frameworks have been proposed by academics who are against the existing situation of veil piercing. Therefore, the argument as to whether or not the concept of veil piercing can indeed be considered messy will be demonstrated through the whole analysis of the document by providing critiques for the situation and operation of the veil lifting before and after *Prest*.

2. THE LAW BEFOR PREST

2.1. Judicial provisions or grounds for lifting the veil before 2013

The very first thing that is needed to be clarified in order to understand the term ‘veil piercing’ is the meaning of the principle which is commonly known as the ‘veil of incorporation’. This principle indicates that a company is a separate legal personality completely distinct from its members and it was firmly established in the case of *Salomon v A Salomon and Co Ltd* [1897]¹⁶ ‘which has been described, as recently as 1986, as the corner-stone of modern company law’¹⁷. In that case, Salomon, a sole trader, transferred his business into a company (*Salomon Ltd.*) incorporated by himself and his family¹⁸. The price from the transfer was paid to Salomon in £10,000 debentures (secured against the

¹⁴ John H. Matheson, ‘The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context’ (2009) 87 NCLRev 1091, 1095

¹⁵ Alan Dignam and John Lowry, *Company Law* (9th edn, OUP 2016) 32

¹⁶ *Salomon v A Salomon and Co Ltd* [1897] AC 22

¹⁷ Lynn Gallagher and Peter Ziegler, ‘Lifting the corporate veil in the pursuit of justice’ (1990) J.B.L. 1990 292, 303

¹⁸ *Ibid* (n 16)

business assets), £20,000 in £1 shares and £9,000 cash¹⁹. Thus, Mr Salomon was the main shareholder with 20001 shares as his family was holding only the remaining six shares²⁰. When the company subsequently collapsed and went into liquidation, Salomon, who was also one of the secured creditor because of the debentures, made a claim against the other creditors²¹. The liquidator alleged that company was a sham because, in fact, 'the company and Mr. Salomon were one and the same or alternatively, that the company carried on business on Salomon's behalf'²². The Court of Appeal (CA), stating the company to be a myth as it had been incorporated against the intention of the Companies Act 1862²³. On appeal, though, the House of Lords held that the company was not fake and that the corporation's debts were not Salomon's debts because these two were two distinct legal entities and so a company 'must be treated like any other independent person with its rights and liabilities appropriate to itself'²⁴.

Since the Salomon case, the principle of separate legal entity 'has been followed as an uncompromising precedent'²⁵ in many later cases such as *Macaura v Northern Assurance Co.*²⁶, *Lee v Lee's Air Farming Limited*²⁷, and the *Farrar case*²⁸. Therefore, the 'legal fiction' of corporate veil affirms that a company is a legal entity distinct and independent from the personalities of its shareholders²⁹ and so, it has different duties or liabilities from those of its shareholders who are only liable for their capital contributions, referred to as 'limited liability'³⁰. This doctrine enables individuals to pursue their financial purpose as a single unit, without disclosure to liabilities or risks in one's own capacity³¹. Hence, under that principle, 'a company can own property, execute contracts, raise debt, make investments and assume other rights and obligations, independent of its members'³². Furthermore,

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² Ibid (n 17)

²³ Ibid (n 16)

²⁴ Ibid *per* Lord Halsbury L.C.

²⁵ Marc Moore, 'A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*' (2006) JBL 180

²⁶ *Macaura v Northern Assurance Co.* (1925) AC 619

²⁷ *Lee v Lee's Air Farming Limited* (1961) AC 12

²⁸ *Farrar v Farrars Ltd.*, (1888) 40 ChD 395

²⁹ Murray A. Pickering, 'The Company as a Separate Legal Entity' (1968) 31 Mod. L. Rev. 481.

³⁰ P.W. Ireland, 'The Rise of the Limited Liability Company' (1984) 12 International Journal of the Sociology of Law 239.

³¹ *Ayton Ltd. v Popely* (2005) EWHC 810 (Ch)

³² John Lowry and Arad Reisberg, *Pettet's Company Law: Company Law and Corporate Finance* (4th edn, Pearson 2012).

veil of incorporation facilitates legal course as corporations can prosecute and be prosecuted on their own name³³. Lastly and importantly, the separate legal personality enables company to survive after the death of its shareholders³⁴.

However, soon after Salomon decision, the human ingenuity started applying the veil of incorporation 'blatantly as a cloak for fraud or improper conduct'³⁵. Therefore, it was required for the Courts 'to break through or lift the corporate veil and look at the persons behind the company who are the real beneficiaries of the corporate fiction'³⁶. In the case of *United States v Milwaukee Refrigeration Transit Company*, it was correctly stated that '[a] corporation will be looked upon as a legal entity as a general rule—but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime the law will regard the corporation as an association of persons'³⁷. Through a detailed discussion of many decisions following Salomon, it undoubtedly became obvious that there were important reasons why corporate veil should be lifted in particular cases³⁸. First of all, notwithstanding a company is considered a legal person, it is impossible to be always treated 'like any other independent person' as Lord Halsbury affirmed in Salomon case³⁹. For instance, a company is unable to perpetrate a crime or a tort which needs evidence of *mens rea* if the courts do not ignore the separate personality and define the purpose of the directors and shareholders⁴⁰. Moreover, by obeying strictly to that principle, there is the possibility to have a misleading or unfair consequence 'if interested parties can "hide" behind the shield of limited liability'⁴¹. And somehow like that, judicial discretion and legislative action started permitting the veil of incorporation to be disregarded when some unfairness or illegality is purposed or would occurred⁴².

Two well-known examples of the first cases that have triggered the 'façade' exception of Salomon are found in *Gilford Motor Co v Horne (1933)* and in *Jones v Lipman (1962)*. In Gilford, the defendant who

³³ Metropolitan Saloon Omnibus Co. Ltd. v Hawkins, (1859) 4 Hurl & N 87.

³⁴ Re Noel Tedman Holdings Pty Ltd. (1967) Qdr 561

³⁵ Lifting of the Corporate Veil (*LawTeacher*, November 2013) <<https://www.lawteacher.net/free-law-essays/business-law/article-on-lifting-of-the-law-essays.php>> accessed 38 November 2017

³⁶ Ibid

³⁷ *United States v Milwaukee Refrigeration Transit Company* 142 F.247 (1906)

³⁸ Pickering, "The Company as a Separate Legal Entity" (1968) 31 M.L.R. 481, 482

³⁹ Ibid (n 16) Lord Halsbury, *supra* n. 10.

⁴⁰ *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Co. Ltd.* [1915] A.C. 705

⁴¹ Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 M.L.R. 54

⁴² Ibid (n 17) 294

was restricted by a covenant not to obtain customers from his previous employers, established a company to do so. The court held that the particular company was but a façade for the defendant and issued an injunction against him and the company. Similarly, in *Jones v Lipman*, the defendant formed a company to which he transferred ownership of the land that has previously agreed under contract to transfer to the claimant. Again, the court found that the company was but a cover for the defendant and ordered specific performance.

At the end of the 1960s, it was observed that the courts started more frequently to ‘free themselves from the precedent they saw increasingly unjust’⁴³ and drafted numerous exceptions to the doctrine of veil corporation⁴⁴. At that period, Lord Denning played a fundamental role in encouraging veil piercing⁴⁵. He correctly stated in *Littlewoods Mail Order Stores v IRC* (1969) that the separate legal personality ‘has to be watched very carefully’ and that the ‘courts can, and often do, pull of the mask’ in order ‘to look what really lies behind’⁴⁶. Another interesting exception of the doctrine is found in *DHN Food Distributors v Tower Hamlets* (1976) where Lord Denning claimed that a group of corporations was actually a ‘single economic entity’ because the holding company controlled substantially the affairs of its subsidiaries and so the group of companies should be regarded as one⁴⁷. Two years later, the aforementioned view has been challenged in *Woolfson v Strathclyde RC* (1978) where it was stated that the veil of incorporation should be espoused unless it was a sham⁴⁸. Denning’s opinions, though, still had significant influence⁴⁹ as it has been illustrated in *Re a Company* (1985) where the CA used again a Lord Denning case to claim that the court will utilise its power to lift the corporate veil if it is needed to attain justice regardless of the legal efficiency of the corporate structure under concern⁵⁰.

The aforementioned cases demonstrate that ‘the courts treat the separate legal personality of the company as an initial negotiating position which could be overturned in the interest of justice’⁵¹. This

⁴³ Ibid (n 15) 33

⁴⁴ Marc Moore, “A temple built on faulty foundations”: piercing the corporate veil and the legacy of *Salomon v Salomon*’ (2006) JBL 1, 2

⁴⁵ Ibid (n 15) 33

⁴⁶ *Littlewoods Mail Order Stores v IRC* [1969] 1 WLR 1241

⁴⁷ *DHN Food Distributors Ltd v Tower Hamlets LBC* (1976) 1 WLR 852

⁴⁸ *Woolfson v Strathclyde Regional Council* (1978) HL SLT 159

⁴⁹ Ibid (n 15) 33

⁵⁰ *Wallesteiner v Moir* [1974] 1 WLR 991

⁵¹ Ibid

general reasoning of the courts seems flexible, fair and reasonable. However, at the same time, it could be argued that this confusing and sometimes contradictory precedent⁵² had produced uncertainty to the notion of corporate personality⁵³. Accordingly, Lowry affirmed that this uncertainty, that naturally arise from veil piercing, ‘casts over the safety of incorporation’ and so it is problematic⁵⁴. Furthermore, Farrar and Hannigan have reasonably deduced that ‘[i]t is difficult to start to rationalise the cases except under the broad, rather question-begging heading of policy’⁵⁵. Thus, although the approach of veil piercing was introduced to avoid injustice and unfair results, the absence of a certain principle, that could be followed by courts, creates problems, uncertainty and controversy in the doctrine of veil of incorporation. So far, the analysis of the essay shows that veil piercing was a mess at the beginning of its existence but this could be overturned until the end of the paper.

The confusion detailed above continued until the decision in *Adams v Cape Industrial Plc* [1990], one of the leading cases on piercing the corporate veil⁵⁶. In that case, Cape Industries was a corporation registered in England which was involved in mining asbestos in South Africa and supplied its products in United States within a complex network of subsidiaries⁵⁷. Some of the company’s employees contracted asbestosis due to their work in the factory and sued Cape and its subsidiaries in a Texas court⁵⁸. The defendant claimed that there was no relevant authority to judge the case and so denied to participate in the US court procedures⁵⁹. Also, actions for enforcing the judgment in the UK failed⁶⁰. The issue was whether Cape was present in the US authority because of its US subsidiaries⁶¹. In order to justify the above, the claimants had to prove that the veil of incorporation could be pierced either by ‘treating the Cape group as one single entity, or finding the subsidiaries were a mere façade or that the subsidiaries were agents for Cape’⁶². The court thoroughly assessed each possibility and finally the CA declined to lift the veil of incorporation⁶³.

⁵² Ibid (n 44)

⁵³ Ibid (n 15) 34

⁵⁴ Ibid

⁵⁵ J.H. Farrar & B.M. Hannigan, *Farrar's Company Law* (4th edn, 1998) 69

⁵⁶ *Adams v Cape Industries Plc* (1990) Ch 443

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid (n 15) 35

⁶³ Ibid

After the decision of the CA in *Adams*, the courts ‘changed their attitude and strengthened the Salomon principle’ by narrowing their capacity to ‘dislodge the corporate veil’⁶⁴ into three circumstances: firstly, where a company is a single economic unit (in construing a statute/document); secondly, where the company is classed as a façade hiding the true facts; and thirdly, where it can be proved that the company is an agent of its shareholders⁶⁵. Before *Adams*, the process for establishing whether a group of companies was a single economic entity was unclear and slightly vague⁶⁶. This was illustrated above in the decisions of *DHN* and *Wolfson*. Since the case of *Adams*, the courts have made it clear that in order to remove the corporate veil of the subsidiary, it is required ‘in addition to a holding company’s control over the policy structure of its subsidiary, the finding of a façade [...] in relation to the incorporation of the subsidiary company’⁶⁷. A façade is found in circumstances where a company operates for illegitimate or fraudulent purposes⁶⁸. Examples of that circumstance were given above in *Gilford Motor Co Ltd v Horne* (1933) and *Jones v Lipman* (1962).

Accordingly, Slade LJ, the judge whose judgment demonstrated the above circumstances, stated that:

[We] do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this way is inherent in our corporate law.⁶⁹

Obviously, the decision in *Adams* restricted importantly the courts’ capability to pierce the veil of incorporation. It could be reasonably supported that ‘gone are the wild and crazy days when the CA would lift the veil’ in order to reach justice irrespective the legal efficiency of the corporate structure,

⁶⁴ Corentin Kerhuel, ‘The corporate personality and the possibility to lift the veil’ (*LegaVox*, 18 February 2009) <<https://www.legavox.fr/blog/corentin-kerhuel/corporate-personality-possibility-lift-veil-230.htm>> accessed 3 December 2017

⁶⁵ *Ibid* (n 15) 35

⁶⁶ *Ibid* (n 64)

⁶⁷ Stephen Griffin, *Company Law fundamental principles* (4th edn, Longman 2005)

⁶⁸ *Ibid* (n 64)

⁶⁹ *Ibid* (n 56) per Slade L.J. at 1026

as it happened in *Re a Company* (1985)⁷⁰. Afterwards, numerous cases followed the decision in Adams such as *Connelly v RTZ Corp Plc* (1998)⁷¹ and *Lubbe v Cape Industries Plc* (2001)⁷². Interestingly, *Creasey v Breachwood Motors Ltd* [1993]⁷³ disregarded the approach in Adams and determined the façade exception by considering whether the directors have breached their duties. This maverick and novel judgment has been overruled in *Ord v Belhaven Pubs Ltd* [1998]⁷⁴ where the decision has been determined again regarding the motive of the companies⁷⁵.

However, ‘the strictness of this approach led to a principle of piercing the corporate veil that existed more as a matter of legal theory than it did a feature of legal practice’⁷⁶.

It has been eventually proved that the approach in Adams ‘has failed to secure a compelling and all-encompassing principle as to when a court is able to tiptoe around *Salomon* to pierce a corporate veil’⁷⁷. This weakness is best shown in *Trustor AB v Smallbone (No 2)* [2001]⁷⁸ where Sir Andrew Morritt VC attempted ‘to classify the circumstances in which the veil could be pierced as those where (i) the company was a sham or (ii) it was involved in some form of impropriety’⁷⁹. The circumstances formulated by Sir Andrew were unclear and so his approach was difficult to be followed⁸⁰. Therefore, a nice observation is that Adams’ approach ‘was good for business in precisely the same way that chocolate is good for children’ and interestingly, it illustrates that it is possible to encompass justice within unclear and uncertain principles⁸¹.

2.2 Torts and Veil Piercing

⁷⁰ Ibid (n 15) 37

⁷¹ *Connelly v RTZ Corporation plc* [1997] UKHL 30

⁷² *Lubbe v Cape Plc* [2000] UKHL 41

⁷³ *Creasey v Breachwood Motors Ltd* [1993] BCLC 480

⁷⁴ *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447

⁷⁵ Ibid (n 15) 38

⁷⁶ James Wibberley and Michelle Di Gioia, ‘Lifting, Piercing And Sidestepping The Corporate Veil’ (*Gardner Leader*)

<<http://www.guildhallchambers.co.uk/uploadedFiles/PiercingtheCorporate%20Veil.JW,MDG.pdf>> accessed 3 December 2017

⁷⁷ ‘The Principle Of Separate Corporate Personality’ (*LawTeacher*, November 2013)

<<https://www.lawteacher.net/free-law-essays/business-law/adams-v-cape.php?cref=1>> accessed 9 December 2017

⁷⁸ *Trustor AB v Smallbone (No 2)* [2001] EWHC 703 (Ch)

⁷⁹ Ibid (n 76)

⁸⁰ Ibid

⁸¹ Ibid (n 77)

Examples of veil piercing cases are also found in Torts when tortious liability for personal injury is under consideration. *Connelly v RTZ Corp* (1998) introduced the probability that a parent company in London could be found liable for the activities of its subsidiaries based abroad and that duty of care could be owed to the employees of the subsidiary by the parent companies⁸². Although, in that case, the parent company was not found liable under the duty of care point but under the responsibility for health and safety at the subsidiary⁸³. *Chandler v Cape Plc* (2012) was the only time where the court held that the accountability for health and safety generated a special relationship among parent company and workers which create a duty of care⁸⁴. Thus, it was the first time that the CA found the parent company liable under the tort principles and for that reason, this case represents one of the most significant veil piercing cases⁸⁵. However, the CA argued that they have not used the veil piercing approach in attaching liability to the parent company and that the parent company was found liable because of its relationship with the employee which is arisen within its control over the subsidiary⁸⁶. This illustrates the beginning of ‘a recent trend in veil lifting cases’ where the courts do not admit that they pierce the veil ‘in ascribing liability to the parent company’⁸⁷. But as Dignam and Lowry have correctly stated, ‘to pretend that somehow this attribution of liability is not lifting/piercing action is erroneous and unhelpful’⁸⁸. It is also worth noting here the striking contrast between the conclusions in the cases of *Adams* and *Chandler*⁸⁹. Both these cases underline the same claim for personal injury from the same company and interestingly, they have different outcomes⁹⁰. The decision in *Chandler* starkly shows the contradiction of the *Cape* decisions grounded around similar facts⁹¹ and so it is another proof that the courts do not follow a stable and clear doctrine in order to pierce the veil. This supports even more the view that piercing the corporate veil is a mess.

Moreover, it is noteworthy here that there is a significant difference between the treatment of tortious liability for personal injury and that for commercial affairs⁹². The influential decision here is

⁸² *Connelly v RTZ Corp* (1998) [1998] AC 854

⁸³ *Ibid*

⁸⁴ *Chandler v Cape plc* [2012] EWCA Civ 525

⁸⁵ *Ibid* (n 15) 43

⁸⁶ *Ibid* 44

⁸⁷ *Ibid*

⁸⁸ *Ibid*

⁸⁹ *Ibid* 46

⁹⁰ *Ibid* (n 15) 46

⁹¹ *Ibid*

⁹² *Ibid*

found in *Williams v. Natural Life Health Foods* (1998) where the court established that a director is not personally liable for a negligent misstatement if there is no 'reasonable reliance by claimant on an assumption of personal responsibility by individual so as to create a special relationship between them'⁹³. A more relaxed approach was given in *MCA Records Inc v. Charly Records Ltd. (No. 5)* (2003) where it was stated that an individual will be found liable for a wrongful act if his involvement or participation 'go beyond the exercise of constitutional control'⁹⁴. Thus the provisions in commercial tort are under construction and their difference with the personal injury torts lies upon the absent of the use of duty of care and the negligent misstatement.

2.3 Statutory provisions for lifting the veil

Apart from the judiciary, statutory provisions have also dealt with the very controversial issue of veil piercing. For example, there are numerous taxation provisions adopted in order to ignore the distinct entities in the group and prevent tax avoidance which is usually aimed through the transferring of assets and liabilities between the groups⁹⁵. Moreover, section 16(2) of the Companies Act 2006 bestows corporate personality to companies⁹⁶. The Act, however, can discard corporate personality and enforce liability on those behind the veil if any of its provisions are infringed⁹⁷. After Salomon case, the Parliament introduced an offence of 'fraudulent trading'⁹⁸. Section 993 of the Company Act 2006 contains the criminal offence of fraudulent trading and ss213-215 of Insolvency Act 1986 contains the civil provisions which are those used to pierce the corporate veil⁹⁹.

Section 213 states that when a company ends up and it seems that any of the company's business has been performed with the intention to defraud creditors, or for any other deceitful purpose, the court may demand any person who consciously contributed in the sham to make such input to the corporation's assets as the court thinks appropriate¹⁰⁰. This provision was operated difficulty in

⁹³ *Williams v. Natural Life Health Foods* (1998) UKHL 17

⁹⁴ *MCA Records Inc v. Charly Records Ltd. (No. 5)* (2003)

⁹⁵ *Ibid* (n 15) 30

⁹⁶ Chrispas Nyombi, 'Lifting the veil of incorporation under common law and statute' (2013) 56 IJLMA 66, 73

⁹⁷ *Ibid*

⁹⁸ *Ibid* (n 15) 30

⁹⁹ *Ibid*

¹⁰⁰ Insolvency Act 1986, Section 213

practice¹⁰¹ as there was the probability to arise a criminal charge too¹⁰². For that reason, the courts established the standard for intent quite high¹⁰³. As the court elucidated in *Re Patrick and Lyon Ltd* (1933), this required evidencing ‘actual dishonesty, involving, according to current notions of fair trading among commercial men, real moral blame’¹⁰⁴. But due to the difficulty in reaching this standard, s214 was added in the Insolvency Act 1986 to cope with what is identified as ‘wrongful trading’¹⁰⁵. Section 214 established that there is no necessity to show dishonesty¹⁰⁶. This provision was named ‘wrongful trading’ and provides that a reasonable director could recognise when company was about to wind up and so to stop business at this point¹⁰⁷. If a director insisted to run the business after this point, he jeopardised having to contribute to the company’s debts¹⁰⁸. This is illustrated in the case of *Re Produce Marketing Consortium Ltd (No 2)* (1989)¹⁰⁹. The difference here is that s213 refers to anyone involved in the company while s214 covers only directors¹¹⁰. Limited liability of the directors may be indirectly affected in small companies where directors are also members of the corporation and in parent companies where directors are performed as a shadow director¹¹¹.

To sum up the aforementioned, there is no doubt that the law before *Prest* was confusing and controversial. Although the decision in *Adams* gave a more specific approach on when the veil should be lifted, ambiguities and divided opinions were still occurring¹¹². Under statute, it was noticed a less controversial approach in terms of lifting the corporate veil but ‘there has been little in terms of development on the statutory exception to the corporate personality doctrine’¹¹³. Therefore, the challenges of yesteryear remained, ‘common law exceptions to the corporate personality doctrine [were] slowly being developed by courts while statutory exceptions [had] remained largely

¹⁰¹ *Re Bank of Credit and Commerce International SA (No 14)* (2003)

¹⁰² *Ibid* (n 15) 31

¹⁰³ *Ibid*

¹⁰⁴ *Re Patrick and Lyon Ltd* (1933) Ch 786

¹⁰⁵ *Ibid* (n 15) 31

¹⁰⁶ *Ibid*

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*

¹⁰⁹ *Re Produce Marketing Consortium Ltd (No 2)* [1989] 5 BCC 569

¹¹⁰ *Ibid* (n 15) 31

¹¹¹ *Ibid*

¹¹² *Ibid* (n 93)

¹¹³ *Ibid*

unchanged¹¹⁴. It was, thus, time for a new era in the company law in order to eliminate that controversy. This derived with the decision in *Prest*.

3. THE LAW AFTER PREST

3.1 Facts and the Principles

The leading case of *Prest* is about a disagreement regarding the allocation of matrimonial assets. Mr *Prest* was the only owner of numerous offshore companies which each had legal title to determined properties¹¹⁵. At the divorce procedures, Mrs *Prest* required to get a transfer of many of these properties¹¹⁶. At the first hearing in the family court, it was held by Moylan LJ that despite the absence of a general principle, the corporate veil could be pierced under s.24(1) of the Matrimonial Causes Act 1973 and so Mr *Prest* was ordered to transfer an amount of properties to Mrs *Prest*¹¹⁷. On appeal to the Court of Appeal, it was concluded that the Family Division was not competent to decide under the particular act for the distribution of the companies' assets owned by one party to the marriage¹¹⁸. The Act did not grant to the courts a broader realm to disregard the company's separate personality than it was obtainable at common law¹¹⁹. Per se, without justification to lift the veil at common law, Mrs *Prest*'s demand could not be obtained¹²⁰. Mrs *Prest* appealed then to the Supreme Court¹²¹. The appeal was allowed on the ground that the properties were held in trust for Mrs *Prest* by the company and not by allowing to pierce the corporate veil¹²².

It is interesting here to mention the thought of Lord Neuberger regarding the doctrine that is available to courts, without statutory power, to lift the corporate veil:

It is [...] clear from the cases and academic articles that the law relating to the doctrine is unsatisfactory and confused. Those cases and articles appear to me to suggest that (i) there is not a single instance in this jurisdiction where the doctrine

¹¹⁴ Ibid

¹¹⁵ [2013] 3 WLR 1

¹¹⁶ Ibid

¹¹⁷ Ibid

¹¹⁸ [2013] 2 AC 415

¹¹⁹ Ibid

¹²⁰ Ibid

¹²¹ [2013] UKSC 34

¹²² Ibid

has been invoked properly and successfully, (ii) there is doubt as to whether the doctrine should exist, and (iii) it is impossible to discern any coherent approach, applicable principles, or defined limitations to the doctrine¹²³.

The aforementioned statement clearly illustrates that the judges themselves realise and recognise the ambiguity and controversy which appear in company law cases involving veil piercing. Since the judges cannot demonstrate a clear view regarding the particular issue and instead they resort to assumptions like the above, it seems that veil piercing may be indeed the mess that commentators think it is.

In that case, the leading judgment regarding the piercing of veil was delivered by Lord Sumption who claimed that the law concerning the situations in which it would be permitted for the courts to lift the veil was identified by ‘inadequate reasoning’¹²⁴. According to Lord Sumption, English law has no general principle of lifting the veil but it has a range of particular principles that lead to the same outcome in some cases¹²⁵. Moreover, he asserted that the conclusion in Adams case, namely that some dishonesty by the company member is needed in order to pierce the veil, was not adequate to be employed and ensure justice in similar cases¹²⁶. He continued by observing that ‘[t]he difficulty is to identify what is a relevant wrongdoing’ and that ‘[r]eferences to a “facade” or “sham” beg too many questions to provide a satisfactory answer’¹²⁷. In this regard, his Lordship suggested ‘two distinct principles’ which can appropriately be named the ‘concealment principle’ and the ‘evasion principle’¹²⁸.

An analogous view has been implemented in Singapore in *Tjong Very Sumito v Chan Sing En*, where it was stated that:

Courts will, in exceptional cases, be willing to pierce the corporate veil to impose personal liability on the company’s controllers. While there is as yet no single test to determine whether the corporate veil should be pierced in any particular case, there are, in general, two justifications for doing so at common law — first, where the evidence shows that the company is not in fact a separate entity; and second,

¹²³ Ibid

¹²⁴ *Prest v Petrodel [2013] UKSC 34* per Lord Sumption at 19

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Ibid at 28

¹²⁸ Ibid

where the corporate form has been abused to further an improper purpose.¹²⁹

In Lord Sumption's view, the concealment principle did not involve true veil-piercing while the evasion principle did involve¹³⁰. Particularly, the Lord specified that:

The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases, the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing.¹³¹

He then continued by explaining the notion of the evasion principle which is completely different from the aforementioned one:

It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.¹³²

After submitting the two principles, Lord Sumption concluded that lifting the corporate veil should be considered as a remedy of last resort and that it should be enforced only where there is no other, more conventional legal mechanism to implement¹³³. The Lord 'attempted to fundamentally restate the law on piercing the corporate veil [but] he did not entirely succeed in doing so due to the only hesitant acceptance by his peers'¹³⁴. The uncertainties observed by the other judges appeared to take two directions – that the test seemed too narrow to cope with corporate abuses; or that it contained

¹²⁹ Tjong Very Sumito and others v Chan Sing En and others [2012] SGHC 125

¹³⁰ Ibid (n 124) per Lord Sumption at 28

¹³¹ Ibid (n 124) per Lord Sumption at 28

¹³² Ibid

¹³³ Ibid at 35

¹³⁴ Alexander Schall, 'The New Law of Piercing the Corporate Veil in the UK' (2016) 13 ECFR 549, 562

an extent of discretion which interpreted into unneeded precariousness¹³⁵. Under the first camp, Baroness Hale doubted the probability of neatly categorising all the cases involving the default of the separate legal entity of a company into two classifications of concealment and evasion. He then expressed a much broader opinion which suggests that individuals who control limited companies should not be entitled to ‘take unconscionable advantage of the people with whom they do business’¹³⁶. Lords Clarke and Mance seemed to have similar concerns. Although they claimed that it will be difficult and rare to occur circumstances where the veil will be lifted outside the spectrum of evasion, they agreed as to the dangerousness ‘to seek to foreclose all possible future situations’ that may exist¹³⁷.

Under the second camp, Lord Walker did not seem to approve Lord Sumption’s narrow notion of veil-lifting as ‘evasion’¹³⁸. He argued that veil lifting was not a coherent doctrine or rule of law, but merely a label defining situations where a rule of law creates obvious exceptions to the principle of separate legal entity¹³⁹. On the other hand, Lord Neuberger did expressly support Lord Sumption’s test of veil lifting¹⁴⁰. Although, his own point of view seemed to be more affiliated with Lord Walker’s than with Baroness Hale’s¹⁴¹. His judgment focused on discussing ‘his initially strong attraction to the argument that the veil-piercing doctrine should be given a *quietus*’¹⁴². Academic views and contradictory observations critical to the consistency of veil lifting doctrine were canvassed, containing the famous statement made by Easterbrook and Fischel, ‘that veil-piercing is akin to lightning’, namely ‘rare, severe and unprincipled’¹⁴³. Eventually, though, Lord Neuberger was convinced to maintain veil lifting in the way expressed by Lord Sumption, namely as a ‘potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available’¹⁴⁴. Therefore, even *Prest* is considered the leading case for lifting the veil today, it appears that the judges of the case itself had

¹³⁵ Zhong Xing Tan, ‘New Era of Corporate Veil-Piercing: Concealed Cracks and Evaded Issues’ (2016) 28 SAclJ 209, 213

¹³⁶ *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at 91

¹³⁷ *Ibid* at [100], [102] and [103]

¹³⁸ *Ibid* at [106]

¹³⁹ *Ibid*

¹⁴⁰ *Ibid* at [81]

¹⁴¹ *Ibid* (n 135) 214

¹⁴² *Ibid* (n 140)

¹⁴³ Frank H Easterbrook & Daniel R Fischel, ‘Limited Liability and the Corporation’ (1985) 52 ChiLRev 89

¹⁴⁴ *Ibid* (n 136) at 80

not agreed in a single principle for lifting the veil and even more interesting is the fact that some of the judges did not agree at all with the idea of veil piercing.

3.2 Cases and Commentary following Prest

Unsurprisingly, only few cases have dealt with the scope of lifting the corporate veil after the limited concept of the doctrine given in Prest¹⁴⁵. Solicitors have noticed that judges are now extremely cautious of seeking to lift the veil due to the strict criteria determined in Prest¹⁴⁶. They are, however, more willing to enforce other methods, such as concepts of agency and the law of agency, secure in the knowledge that these mechanisms do not constitute an assault for the corporate façade¹⁴⁷.

For civil matters, the decision of Mrs Justice Rose in Pennyfeathers Limited v Pennyfeathers Property Company Limited [2013] is probably the most helpful in the area¹⁴⁸. That case concerns the planned residential improvement of a parcel of farmland¹⁴⁹. Here, Rose J implemented both the evasion and concealment principles so as to prevent the investors of the company from sheltering behind the company¹⁵⁰. It has been claimed that Pennyfeathers is possibly a better sample of facts giving effect to the principle of veil piercing 'than it is a helpful analysis of the law'¹⁵¹. However, Wibberley and Di Gioia stated that 'Rose J's reading of Prest is questionable' and 'it is also questionable whether this is a case that actually sees the correct application of the concealment principle'¹⁵².

A slightly rarer application of the principle is found in the case of Antonio Gramsci Shipping Corporation v Lembergs [2013] which concerned a dispute over jurisdiction¹⁵³. In that case, the principle in Prest constituted just 'a fallback policy argument' on the court's view¹⁵⁴. Nonetheless, the comments of CA provided useful explanation on the appropriate interpretation of Prest¹⁵⁵ and

¹⁴⁵ James Wibberley and Michelle Di Gioia 'Lifting, Piercing And Sidestepping The Corporate Veil' <<http://www.guildhallchambers.co.uk/uploadedFiles/PiercingtheCorporate%20Veil.JW,MDG.pdf>> accessed 4 December 2017

¹⁴⁶ Ibid

¹⁴⁷ Ibid

¹⁴⁸ Pennyfeathers Limited v Pennyfeathers Property Company Limited [2013] EWHC 3530

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Ibid (n 145)

¹⁵² Ibid (n 145)

¹⁵³ Antonio Gramsci Shipping Corporation v Lembergs [2013] EWCA Civ 730

¹⁵⁴ Ibid (n 145)

¹⁵⁵ Ibid (n 153) at 65

examined the probability of extending the principle¹⁵⁶. Lord Beat, though, explained that at least for the time being, expansions of the doctrine will be difficult to occur¹⁵⁷.

It is also worth noting here the leading judgment of LJ Treacy in *Regina v Peter Sale* [2013]¹⁵⁸. LJ Treacy summarised the doctrine in *Prest* and explained that the particular case is not ‘coming within the evasion principle referred to at paragraph 28 of *Prest*’¹⁵⁹ but it ‘falls within the concealment principle’¹⁶⁰. Despite the aforementioned argument of Lord Mance that it is yet difficult to extent the *Prest* doctrine, it appears that the judgment in *R v Peter Sale* had slightly extended the concealment principle by ‘allowing it to be applied where an individual and company act in tandem’ and when that exists, ‘the individual will not be able to disavow payments received by the company’¹⁶¹.

While the aforementioned cases have somehow applied the evasion and concealment principles, in *Akzo Nobel N.V v Competition Commission* (2013) the court refused to limit its considerations to concealment and evasion as just two of the judges in *Prest* appeared to be agreed with that two-principle veil piercing exception¹⁶². Particularly, it has been noted 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’¹⁶³ and for that reason the judges of that case found it reasonable not to follow the narrow doctrine of *Prest*. Obviously, the above statement indicates that it is difficult for the law after *Prest* to be developed in a consistent manner because cases usually involve exceptional circumstances.

As Dignam and Lowry stated, the *Prest* case has two sides, on the one hand, it is a significant case in establishing the limited situations in which veil piercing may exist in future; but on the other hand, the judgments of Newberger and Sumption leave the impression that ‘veil lifting has never occurred or at least not to their satisfaction, despite the reality of its presence in the case law over the last

¹⁵⁶ Ibid at 66

¹⁵⁷ Ibid

¹⁵⁸ *Regina v Peter Sale* [2013] EWCV Civ 1306

¹⁵⁹ Ibid at 39

¹⁶⁰ Ibid at 40

¹⁶¹ Ibid (n 145)

¹⁶² *Akzo Nobel N.V v Competition Commission* (2013) CAT 13

¹⁶³ Ibid at 95

century¹⁶⁴. Thus the arrival of *Prest* introduced much debate¹⁶⁵. Some, having realised the new era of veil lifting as ‘a remedy of last resort’, have recommended ‘various causes of action premised on direct legal relationships between corporate controllers and plaintiffs, whether in contract, tort, unjust enrichment, agency or accessorial liability’¹⁶⁶. In the meantime, some others have been more sceptical that conservative private law mechanisms would prove efficient in all circumstances¹⁶⁷.

Much of the commentary has also concentrated on Lord Sumption’s test for veil lifting and the two distinct principles of evasion and concealment¹⁶⁸. The worth asking question here that should be addressed is whether the particular test is certain and workable¹⁶⁹. Again the opinions are divided. On the one side, it has been argued that the particular reformulated test ‘will increase certainty for all concerned using the corporate form’¹⁷⁰. On the other hand, however, the coherence and clarity of the test itself has been criticised. Hannigan supported that the distinction among evasion and concealment ‘is difficult to apply consistently and objectively’ as ‘[c]oncealment is inherent in many evasion cases - indeed, evasion is commonly achieved through concealment’¹⁷¹. The view of *Gencor* and *Trustor* is also interesting here as they pointed out that either by using the evasion or concealment principle, the overall intention of the interposed company was ‘to frustrate enforcement measures against the interposed company's controllers by concealing the whereabouts of the secret profits/misappropriated funds’¹⁷². Lord Sumption’s purpose of the evasion principle was that the veil could have been lifted in order to deprive the related controllers from the illegal benefits that they would alternatively have gained by interposing the corporations in question. Therefore, it is obvious that ‘any blurring of the lines between the concealment and evasion principles would certainly undermine the workability of Lord Sumption's test’, whereas, even supposing a level of clarity and workability, scholars and academics contrast as to whether the test is correctly formulated as a matter

¹⁶⁴ Ibid (n 15) 41

¹⁶⁵ Ibid (n 135) 215

¹⁶⁶ William Day, ‘Skirting around the Issue: The Corporate Veil after *Prest v Petrodel*’ [2014] LMCLQ 269

¹⁶⁷ Ibid (n 135) 215

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Hans Tjio, ‘Lifting the Veil on Piercing the Veil’ [2014] LMCLQ 19, 23

¹⁷¹ Brenda Hannigan, ‘Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company’ (2013) 50 *Irish Jurist* 11, 34

¹⁷² Ibid 33

of principle¹⁷³.

4. CONCLUSION

By taking everything into consideration, the obvious conclusion to be drawn is that veil piercing is indeed the mess that commentators think. The most recent amendment in law of veil lifting is the leading case of *Prest* which has not actually altered the law. Some scholars have declared that the doctrine in *Prest* is to be ‘welcomed’¹⁷⁴ as it recognises both: that the principle in *Salomon* ‘remains a cornerstone of UK company law’¹⁷⁵; and that in the meantime, there are also circumstances in which the veil should be lifted so as to grant a remedy. While the decision in *Prest* does clarify that corporate veil will only be lifted when there has been evasion of liabilities and when no other remedy in law can offer an appropriate remedy, it does not provide the exact circumstances in which the veil piercing may still occur. At the same time, it is fair to admit that it is anyway impossible to categorize those specific circumstances of the cases. Each case involves its own distinct facts which makes it difficult to formulate it under a particular model of treatment. After all, it seems that the court simply repeated the dogmatism approach that the corporate veil could be lifted only in very rare circumstances. Thus, the only thing that the decision in *Prest* achieved, is to contribute even more to the ambiguities surrounding veil piercing. It is therefore well argued that the so broad and controversial commentary which follows the debate regarding veil piercing and then the case of *Prest* creates an unnecessary mess and a useless confusion. The only thing that should be considered in such cases is that ‘the jurisdiction for veil-piercing need not descend into a state of anarchy merely because there is no single principle that defines the circumstances for its operation’¹⁷⁶. Any trial to limit the jurisdiction to vague definitions and principles will always prove to be frustrating and pointless¹⁷⁷. Relatively, the jurisdiction is correctly outlined as a discretion ‘which reflects the latitude needed to respond to the myriad forms by which “abuse” may assume’¹⁷⁸. As every case which involves veil lifting is mainly a request to the court to sustain a policy competing with those underlying

¹⁷³ Ibid (n 135) 216

¹⁷⁴ E Roxburgh, '*Prest v Petrodel Resources Ltd: Cold Comfort for Mrs Prest in Scotland*' (2013) 32 SLT 223, 225

¹⁷⁵ JHY Chan, '*Should “Reverse Piercing” of the Corporate Veil be Introduced in English Law*' (2014) 35 Comp Law 163

¹⁷⁶ Pey Woan LEE, '*The Enigma of Veil-Piercing*' (2015) 26 Int'l CCLR 28, 38

¹⁷⁷ Ibid

¹⁷⁸ Ibid

the distinct corporate personality, ‘clarity and coherence is only achieved by directly addressing the interests at stake, rather than by applying a set of fixed rules’¹⁷⁹.

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