

# Prest v Petrodel Resources Limited: The veil finally pierced?

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## Introduction

The case of *Prest v Petrodel Resources Ltd & Others*<sup>1</sup> could establish certainty to the doctrine of piercing the corporate veil. Namely, the judgment of Lord Sumption is most enlightening, introducing two principles that allow the distinction between true piercing the corporate veil and mere lifting to be better established.

However, there remain a few unclear, yet fundamental, aspects to the case. In particular, the judgment of Lord Sumption fails to provide sufficient clarity to the overlap and interrelation between the two principles, as well as casting unnecessary doubts over the sham/ façade doctrine. Furthermore, the judgment should have gone further so as to foreclose any further expansion of the doctrine beyond its current boundaries.

The article will begin by introducing the key concepts and mischiefs related to the doctrine. After this, it will examine the judgments of *Prest*, namely Lord Sumption's principles of evasion and concealment. Then it will be necessary to consider the overlap between these principles and the impact of the uncertainty created around the sham/ façade doctrine. Finally, the article will conclude by remarking on the need to prevent any further expansion of the doctrine of piercing the corporate veil beyond its current tenants laid down in *Prest*.

## Salomon v A Salomon & Co Ltd<sup>2</sup>

### Principle and 'mischiefs'

Like with any company law discussion, it is necessary to start at the foundations: *Salomon*.

At its core, and relevant to the question of piercing the corporate veil, *Salomon* represents the tension between the mischiefs of certainty and accountability. On the one hand, shareholders need a sense of certainty at the time of incorporation and throughout the lifetime of the company, knowing that the company possess a distinct legal personality with limited liability to the shareholders. However, equally, the accountability of shareholders in certain situations is also key. Traditionally, this accountability has been to the company's creditors, both voluntary and involuntary<sup>3</sup>. In more recent years, it might also be suggested that this accountability extends to a more societal audience whereby society as a whole demands the accountability of shareholders' actions and behaviour, in a hope for more ethical company practises.

Of course, this is not to say that where there is greater accountability, there is less certainty. Accountability can also be certain, provided there are consistent judicial rulings which outline the scope of this accountability. Thus, in this sense, the antithesis of 'accountability' is certainty of freedom from liability. Freedom from liability is important because it incentivises risk-taking. This risk-taking is a feature of entrepreneurship. Too much red-tape could potentially stifle companies from profitable business – an unappealing prospect as we dive into forging a new path with states.

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<sup>1</sup> *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

<sup>2</sup> [1896] UKHL 1.

<sup>3</sup> This may include groups of people who suffer a tort at the hands of the company. For instance, see *Adams v Cape Industries plc* further in this discussion on the involuntary creditor relationship created between the employees and the subsidiary company, and whether the veil could be pierced between the subsidiary and parent companies.

## Facts

In this case, Mr Salomon was a sole trader<sup>4</sup> in leather specialising in boot manufacturing. In 1892, Salomon incorporated his business as a limited company under the Companies Act 1862.<sup>5</sup> The formalities for incorporation were similar to what is required today but with the main difference being that, under the 1862 Act, there needed to be a minimum of seven subscribers to the company. Now, only one shareholder is needed for incorporation (the one-man company).

To meet this requirement of seven shareholders, Salomon cleverly issued 20,007 shares to himself and six shares to six members of his family (one per person). A key contention in the case, was that this was a fraud due to the practical reality being that Salomon was operating the business singularly.

Salomon went on to sell the company receiving, inter alia, £10,000 in debentures (which he assigned to a third party). Therefore, he was both the company's principal shareholder and secured creditor. By being the principal *secured* creditor, Salomon was entitled to protection to ensure that the liquidator used the remaining company assets to secure the £10,000 in debts before any unsecured creditors.

When the company went insolvent, the liquidator tried to argue that they should not have to pay to Salomon because he was using the company structure fraudulently. Salomon's arrangement of setting up a limited liability company was a sham and therefore the incorporation should be set aside. Consequently, the company (Salomon & Co Ltd) was merely an agent of Salomon (as a person) and so Salomon should be forced to use his assets to indemnify the unsecured creditors.

## High Court (first instance)<sup>6</sup>

At first instances, Vaughan Williams J agreed with this argument. He reasoned that the company and Mr Salomon were one and the same, a single unit, of agent and principal. Therefore, he was liable to pay the unsecured creditors directly as principal.

However, such reasoning was circular and, therefore, troublesome. One the one hand, Vaughan Williams J acknowledged that the transaction was a sham but equally concluded that the shareholder-company relationship could be classed as agency. Therefore, the thing did not exist but existed. More precisely, the incorporation did not exist (because it was a sham) but, equally, the relationship between Salomon and the company was that of a principal and agent.

Also, troubling, but as a matter of law, the company was issued with a certificate of incorporation. As stated in s.15(4) of the Companies Act 2006, the effects of registration is "*conclusive evidence that the requirements of this Act as to registration have been complied with and that the company is duly registered under this Act.*"<sup>7</sup> It would seem clear, from the Act, that a certificate of incorporation is an authoritative legal document confirming the legal status of the company, endowing it with the characteristics found in s.16 (effects of registration). Therefore, it is difficult to understand Vaughan Williams J's reasoning, which would directly contradict these absolute terms.

## Court of Appeal<sup>8</sup>

Though the Court also ruled against Salomon, they did so on different reasoning. They argued that the way in which Salomon made himself principal shareholder of the company violated the true intent and

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<sup>4</sup> On the differences between sole trading and limited company, see Sealy, L. S., and Sarah Worthington. *Cases and Materials in Company Law*. Oxford University Press, 2010, 24.

<sup>5</sup> Companies Act 1862.

<sup>6</sup> *Broderip v Salomon* [1893] B 4793.

<sup>7</sup> Companies Act 2006, s.15(4).

<sup>8</sup> *Broderip v Salomon* [1985] 2 Ch 323.

meaning of the Act. As Hannigan puts it, “[i]n essence, he was a sole trader screening himself from liabilities and as such [the company] was a device to fraud creditors.”<sup>9</sup>

So opposed to allowing this unconscionable behaviour, Lopes LJ felt positioned to say, “it would be lamentable if a scheme such as this could not be defeated” (emphasis added).<sup>10</sup>

## House of Lords

However, the House of Lords reaffirmed the separate legal personality of the company, endowed with limited liability. It concluded that the company was not an agent for Mr Salomon. Issuing a bulk of shares to one person does not create an agency relationship because the company is absolutely distinct from its shareholders. This is reflected in the (now) Companies Act 2006, section 16(2).<sup>11</sup> The effect of this is that the company is able to possess its own rights and obligations, independently of any shareholder.<sup>12</sup>

It is important to be clear that this was merely a *reaffirmation* of what was already law— not the establishment of a new principle as it can be inaccurately suggested.<sup>13</sup> The law before (and after the House of Lords decision) Salomon was very similar to what is found in the 2006 Act – namely that incorporation created limited liability up to the extent of paid capital on shares.

Arguably, the Court’s reasoning here was sound and right to overturn the decision of the Court of Appeal. As Lord Macnaghten rightly pointed out, the 1862, and even 2006, Acts make no provision for how many shares must be allotted<sup>14</sup> to any individual person.<sup>15</sup> Therefore, there is no basis in the Act to conclude that the allotment of 20,007 shares was against the purpose and intent of the Act (as argued in the Court of Appeal). Returning to the mischief, shareholders need a degree of certainty as to what they can and cannot do. To that end, it would create too much uncertainty for shareholders when allotting shares. Other than what is required in law, shareholders should not have to make considerations on the basis of creditors, secured or not.

This attitude is reflected in the lack of sympathy<sup>16</sup> the House of Lords had for the unsecured creditors who were duly noted that they were no longer dealing with Salomon (the individual) but rather Salomon & Co Ltd (the company). As further pointed out in *MacDonald, Dickens & Macklin v Costello and another*<sup>17</sup>, if A (unsecured creditor) wants to protect themselves against B’s limited liability as shareholders, A should seek personal guarantees from B. Of course, the obvious counterargument is that economic realities often mean that such a bargaining position is not available to A as well as this creating a distrusting tone between A and B.<sup>18</sup>

Though this is not wrong, these economic realities fall to the very specific facts of the case and parties. The general rule of thumb that should be taken is that of limited liability, and seeking to avoid this should be done through personal guarantees. Not to mention, also, that it would be problematic and complicated to try and account for legal rules that protect A. Sometimes, it is necessary for risk to lay where it sits.

<sup>9</sup> Hannigan, Brenda. *Company Law*. Corporate responsibility. 5th ed., Oxford University Press, 2018, 41.

<sup>10</sup> [1895] 2 Ch 323 at 340 – 1.

<sup>11</sup> Companies Act 2006, s.16(2).

<sup>12</sup> *Lee v Lee’s Air Farming Ltd* [1960] UKPC 33.

<sup>13</sup> For instance, Hannigan states, “[t]his fundamental principle of company law [the Salomon principle] was established by the House of Lords in *Salomon v Salomon & Co Ltd*. [emphasis added]” (n.9).

<sup>14</sup> On the distinction between the allotment and issue of shares, see Sealy, L. S., and Sarah Worthington. *Cases and Materials in Company Law*. Oxford University Press, 2010, 509.

<sup>15</sup> [1897] AC at 53.

<sup>16</sup> Hannigan, Brenda. *Company Law*. Corporate responsibility. 5th ed., Oxford University Press, 2018, 42.

<sup>17</sup> [2011] EWCA Civ 930.

<sup>18</sup> A range of judicial and academic arguments have been made in favour of this more interventionist approach. See, for instance *Crossco No 4 Unlimited v Dolan Ltd* [2012] 2 All ER 754 per Arden LJ at 133 and Ben-Shahar and J Pottow, ‘On the Stickiness of Default Rules’ (2006) 33 Florida State UL Rev 651, 682. Both of these are arguments raised in relation to pre-contractual liability but apply equally here on a point of commerciality.

## Conclusion

Therefore, *Salomon v Salomon & Co Ltd* demonstrates the key policy consideration at the core of limited liability and piercing the corporate veil. As shown, the House of Lords were right to turn the tide in favour of Salomon. Creative compliance<sup>19</sup> should not be at the detriment of the incorporator. Otherwise a shareholder would never be able to ascertain what their obligations and liabilities might be when incorporating a company.

This debate forms a key aspect of the rest of the discussion over 100 years on into *Prest v Petrodel Resources Ltd*.

## Prest v Petrodel Resources Ltd

In the judgments of the Supreme Court, it was unanimously agreed that piercing the corporate veil is a legal concept that must be retained. However, to what extent, and in what circumstances, is where the Court was less consistent. For example, Lord Clarke rejected the distinction of evasion and concealment principle<sup>20</sup> and Baroness (then, Lady) Hale<sup>21</sup> questioned whether these two principles alone were sufficient to account for all cases. She queried whether,

*“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.”*<sup>22</sup> (emphasis added)

It is interesting to note that Lord Sumption and Neuberger did question whether piercing the corporate veil ever existed.<sup>23</sup> However, they ultimately felt that there was sufficient normative reason for its existence as a means of holding shareholders to account.<sup>24</sup> Whilst it was unnecessary for Lord Neuberger to cast doubt over a doctrine that most accept does exist, as the rest of the Court did, it is good that he highlighted its importance ultimately as a mechanism of accountability. Particularly, acknowledging the existence of the doctrine ultimately acts as a clear deterrence to shareholders from behaving in certain ways that might make them liable.

As was alluded to earlier, Lord Sumption’s judgment provides the greatest food for thought. In this judgment, he presents two principles: evasion and concealment. Evasion constitutes true piercing of the corporate veil, whereas concealment reflects the act of lifting the veil. This article will now turn to evaluate these two principles and their overlap.

## Evasion: the true piercing of the corporate veil

### Pre-existing legal obligation...

Restating many past cases, here, the Court held that it would only pierce the veil where there has been an evasion of a pre-existing legal obligation. In doing so, the judgment of Lord Sumption upheld and maintained a clear notion of corporate veil piercing.

<sup>19</sup> For an interesting discussion on whether creative compliance in the company law setting is sufficient, see Doreen McBarnet, ‘After Enron Will ‘Whiter than White Collar Crime’ Still Wash?’ (2006) 46 Brit. J. Criminol 1091.

<sup>20</sup> [2013] UKSC 34, 103.

<sup>21</sup> Ibid, 92. See more on this at “Foreclosing further expansion?”

<sup>22</sup> Ibid, 506.

<sup>23</sup> For example, see Lord Sumption at 27.

<sup>24</sup> Ibid, 502.

For example, in *Gilford Motor Home v Horne*<sup>25</sup>, Horne was the director of Gilford Motor Home. He had entered into an agreement (restrictive covenant) with his former employer that he would not enter into a directly competing business with the company once he left. To evade this obligation, Horne incorporated a company which was involved in the same market with Horne's prior employers.

As mentioned earlier, the case of Salomon reaffirmed separate legal personality and so, on this basis, Horne was able to avoid his legal obligation by arguing he was distinct from the company he incorporated. Whilst Horne continued to have the restrictive covenant agreement, the company did not. In this respect, the interest of certainty with regard to the legal distinction between the metaphor of the company<sup>26</sup> and the shareholder is key.

However, the Court, in line with the countervailing interest of accountability, held that

*"[t]he purpose of [the company] was to try to enable him, under what is a cloak or sham, to engage in business which, on consideration of the agreement which had been sent to him [...] was a business in respect of which he had a fear that the plaintiffs might intervene and object".*<sup>27</sup>

Equally, in *Jones v Lipman*<sup>28</sup>, Lipman contracted to sell a house to Jones, thus creating a legal obligation between the parties, existing before the incorporation of any company. In order to avoid a specific performance order, Lipman then went on to incorporate a company and transferred the property to that company which did not possess the specific performance obligation. However, the Court saw it fit to pierce the corporate veil as Lipman had sought to evade a pre-existing legal obligation whereby Russell J noted,

*"[the company is] the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition".*<sup>29</sup>

On the other hand, the Court cannot pierce the corporate veil because there was no evasion of a pre-existing legal obligation, which was confirmed *Adams v Cape Industries plc*<sup>30</sup>. Here, Cape Industries was head of a group of subsidiary companies. One of the subsidiaries had caused its employees to develop asbestosis giving rise to a tortious claim. However, as the subsidiary did not have the necessary funds to meet the judgment summary, the claimants sought to join Cape Industries to the proceedings.

The Court unanimously rejected the arguments of the claimants. The Court held that the point of piercing the corporate veil was that the claimant had to be evading an obligation it already owed. The setting up of subsidiaries, in order for a parent company to avoid hypothetical and potential liabilities, was the avoidance of *future* legal obligations. These do not constitute grounds for piercing the veil.

### ... and only pre-existing legal obligation

Further adding to this clarity, Lord Sumption, along with Lord Neuberger, reaffirmed, what had now been settled by previous case law: that there was no piercing of the corporate veil beyond the factual situation of evasion of a pre-existing legal obligation. It was arguably important for the justices of the Supreme Court to provide a firm and final judgment on this, as the case law on the matter has seen a pendulum between judicial interventionism and conservatism.

Over several cases, the courts, in a reaction to the tensions of accountability, introduced greater avenues of piercing the corporate veil. However, arguably, doing so came at the great expense of certainty for companies and shareholders.

<sup>25</sup> [1993] Ch 935, CA.

<sup>26</sup> As capable of possessing legal rights and obligations.

<sup>27</sup> [1993] Ch 935, CA per Lord Hanworth MA.

<sup>28</sup> [1962] 1 WLR 832.

<sup>29</sup> *Ibid*, 836.

<sup>30</sup> [1990] BCLC 479.

## Single Economic Unit (SEU)

It has been argued that the adherence to such a strict notion of companies, as each being its own distinct character, is not suitable for the modern business world. So much so, that Lord Denning in *DHN Food Distributors Ltd v Tower Hamlets LBC*<sup>31</sup>, pointed out that “[t]his case might be called the “Three in one.” Three companies in one.” This has often been referred to as the Single Economic Unit argument. The elaborate mechanisms in which group structures interact with each other is often argued as something could never have been contemplated by the court in the case of *Salomon*. As such, there is some support<sup>32</sup> for Lord Denning’s ability to look beyond technicalities and into the reality of the corporate structure: a single unit of economic activity.

However, ever since this case, the courts have consistently held, and strongly affirmed by *Prest*, that there can be no recourse to piercing the corporate veil by means of an SEU argument. As noted earlier, the claimant in *Adams* made an argument of single economic unit. However, this was rejected by the Court who stated that,

*“[...] save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v Salomon & Co Ltd merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities [...]”*<sup>33</sup>

Clearly, the language of the Court of Appeal acknowledges the mischief of “justice” or accountability and the certainty of saying that a company (parent or subsidiary) is a separate personality. Arguably, the Court was correct to argue against the notion of the SEU, opting instead of certainty through a narrower notion of piercing the corporate veil. To that end, Lord Sumption’s judgment in *Prest* is commendable for putting a clear end to any confusion or uncertainty by reaffirming cases such as *Adams* and *Woolfson*<sup>34</sup>.

## Interests of justice

In addition to the notion of an SEU argument, the case law has experienced judicial back and forth in relation to an ‘interests of justice’ argument. *Prest* is good in that, again, it provides a clear end to a long line of questionable case law. In *Re A Company*<sup>35</sup>, a 1985 case, the Court held “*in our view the cases show that the court will use its powers to pierce the veil if necessary to achieve justice*”. This clearly demonstrates the courts willingness, in cases of clear breaches of justice, to pierce the corporate veil, doing what is necessary to hold shareholders to account.

The danger with opening up the avenues of litigation to notions of interests of justice is that it is unclear, and possibly impossible to define what this phrase means. Whilst it is important to ensure a degree of accountability, that might create open-ended questions about what constitutes accountability, the language of interests of justice is far too wide. It too strongly corrodes the stability of clear language and certainty.

In 1990, with the case of *Adams*, the court held “the court is not free to disregard the principle of *Salomon v Salomon & Co Ltd* merely because it considers that justice so requires”. Thus, clearly on the other side of the spectrum, *Adams* is advocating that justice is not itself a sufficient basis in which to pierce.

<sup>31</sup> [1976] 3 All ER 462.

<sup>32</sup> [1976] 3 All ER 462, 467.

<sup>33</sup> [1990] BCLC 479, 513.

<sup>34</sup> *Woolfson v Strathclyde Regional Council* [1979] 38 P & CR 521.

<sup>35</sup> (1985) 1 BCC 99.

The confusion is then furthered three years later by *Creasy v Breachwood Motors Ltd*<sup>36</sup> where it distinguished from *Adams* by arguing that justice would not be done if the court found in favour of the claimant. However, it did not actually explain why it was distinguishing from *Adams*. Then, in 1998, the court in *Ord v Belhaven Pubs*<sup>37</sup> held, alongside *Adams*, that a company would not face piercing the corporate veil because of some argument of justice.

At this point, one would be forgiven for not knowing what the law was on the point of an interest of justice. However, arguably, *Prest* in reaffirming *Adams* and other cases like *Ben Hashim*<sup>38</sup>, has arguably ended this long saga of confusion. Munby J in *Ben Hashim* clearly stated that,

*“The court cannot pierce the corporate veil [...] merely because it is thought to be necessary in the interests of justice [...] I take the view that the dicta to that effect [...] in In re a Company [1985] [...] have not survived what the Court of Appeal said in Cape”.*<sup>39</sup>

Therefore, *Prest* neatly narrows the scope of piercing the corporate veil to the evasion principle, defined as escaping pre-existing obligations. No other avenues can be open to pierce the veil, neither economic realities nor notions of justice.

## Sham/façade

For all that can be said on the success their judgments brought, the first major issue with *Prest* is how Lord Sumption and Neuberger’s dealt with the issue of the long-standing use of the terms of sham and façade in the case law. For example, in *Woolfson*, the Court held, “[...] *it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts [...]*”.<sup>40</sup> Also, in *Jones v Lipman*, the Court needed to be satisfied, in piercing the corporate veil, that the company was “*a device and a sham, a mask which he holds before his face in an attempt to avoid recognition in the eye of equity*”.<sup>41</sup>

In *Prest*, Lord Sumption held the view that “[t]he difficulty is to identify what is a relevant wrongdoing. References to a “facade” or “sham” beg too many questions to provide a satisfactory answer.”<sup>42</sup> To that end, the use of such term is “legally banal” and is only a starting point of enquiry rather than a conclusion of facts. At the heart of their concern was that the terms sham and façade are too ambiguous to be used seriously; it is unclear what exactly constitutes sufficient practise to call a company’s circumstances a sham or a façade. Further, they were concerned that any definition of a sham/façade would be too wide, encroaching on the interests of certainty as to the doctrine of separate legal personality.

However, arguably, such a view is not correct. The courts have been very clear, and narrow, in their definition of a sham/façade. As such, they have been able to provide clear guidelines as to when a company’s evasion of pre-existing legal obligations constitutes a sham or façade, cloaking them from such obligations.

## Mere ownership and control

*Ben Hashem* presents a good case that brings together the several case law that has developed the meaning of sham/ façade, providing both a positive and negative account of the doctrine. First, mere ownership and control of the company is not sufficient to suggest the company is being used as a sham

<sup>36</sup> [1993] BCLC 480.

<sup>37</sup> [1998] 2 BCLC 447.

<sup>38</sup> [2008] EWHC 2380, 160.

<sup>39</sup> *Ben Hashem v Ali Shayif and Another* [2009] 1 FLR 115, 160.

<sup>40</sup> [1979] 38 P & CR 521, per Lord Keith

<sup>41</sup> [1962] 1 WLR 832, 836.

<sup>42</sup> [2013] UKSC 34, 28.

or façade. One-man companies such as that of Saloman and many of the other cases cited does not denote, of itself, the company being used for a purpose sufficient to pierce the corporate veil.

## Impropriety

Second, there has to be evidence of impropriety. However, this is narrowly construed as being when the defendant uses the company structure for the purpose of avoiding or concealing an existing legal obligation. As was pointed out in *Trustor AB v Smallbone*, “companies are often involved in improprieties”<sup>43</sup> When

*“[...] it would make undue inroads into the principle of Saloman v Saloman & Co. Ltd if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.”*<sup>44</sup>

In *Ben Hashem*, the court stated,

*“[...] in each of the cases the wrongdoer controlled the company, which he used a façade or device to facilitate and cover up his own wrongdoing – in the first two cases [Gilford; Jones] as a means of breaching a contract, in the latter two cases [Gencor; Trustor] as a means of receiving money for which he was accountable. In other words, in each of these cases there were present twin features of control and impropriety.”*<sup>45</sup>

The important point here is that the Court is not saying that ownership or control alone is sufficient. Rather, it is the ownership and control used for an improper purpose, namely that purpose being the evasion of a pre-existing legal obligation.

In summarising the claim, Mr Justice Munby stated,

*“[the claimant] asserts that, as a matter of law, control of a company (even if established, which of course she disputes) is not sufficient to permit a court to pierce the corporate veil. There has to be some relevant form of impropriety, that is, [the claimant] says, some impropriety or wrongdoing by an individual – here the husband – in which the company structure is being used by the wrongdoer so as to avoid personal liability for his wrongdoing.”*<sup>46</sup>

Then, His Lordship went on to agree with this summarisation of the law, finding that “I accept both Miss Evans-Gordon’s analysis of the law and her analysis of the facts.”<sup>47</sup> Thus, this demonstrates that ownership, control and/ or impropriety may play a part in finding a sham or façade. However, and importantly, this is not simply a case of finding one or more elements. Rather, the use of ownership or control must be for the aforementioned improper purpose of evading a pre-existing duty.

## Time of the transaction

As a final point to the definitions given to the doctrine of sham/façade,

*“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).”*<sup>48</sup>

<sup>43</sup> [2001] 2 BCLC 436, 22.

<sup>44</sup> Ibid.

<sup>45</sup> [2009] 1 FLR 115, 171.

<sup>46</sup> Ibid, 190.

<sup>47</sup> Ibid, 192.

<sup>48</sup> Ibid., 164.

Therefore, not only does it seem very clear what a sham/ façade is, it also seems the courts have been wary to ensure that the definition does not respect the line drawn by *Salomon*.

It is a shame, then, that Lord Sumption and Neuberger cast doubt on this doctrine, citing reasons that were unfounded. The consequence of this is, now, uncertainty over the future of the doctrine and its role it should play in such cases. Arguably, it has been demonstrated that the courts have been able to tame such a doctrine, and so it should survive past the questions raised in *Prest*. The courts ought to address this issue directly stating its position one way or another (preferably in favour of the principle) in order to iron out this vagueness.

## Concealment

As the doctrine is referred to as “piercing” the corporate veil, it is no surprise that the concealment principle has not received as much attention as it perhaps ought. In its simplest terms, the concealment principle is when the courts do not pierce the veil as above. Instead, it merely lifts the corporate veil to unmask the true legal relationship. As Lord Sumption put it, “[i]n these cases the court is not disregarding the “facade”, but only looking behind it to discover the facts which the corporate structure is concealing.”<sup>49</sup> For example, in *Prest* itself, the veil was lifted to reveal a trust relationship, whereas in *Chandler v Cape plc*<sup>50</sup>, the legal relationship was tortious. *Prest* does a commendable job of distinguishing the core of this principle from the evasion principle, highlighting its theoretical and practical distinction, keeping in line with previous case law.

In *Chandler*, Arden LJ held that the defendant company has assumed a duty of care over the employees of its subsidiary due to the particular facts of that case. Here, the relevant factors including the fact that the parent company was in the same line of business as the subsidiary, it had long experience in the industry which gave it superior knowledge of health and safety issues, the parent ought to have reasonably known that the subsidiary company’s work environment was unsafe and they ought to have foreseen that subsidiary company would rely on the parent company’s experiences.

Critically, she elucidated that this was not a case of piercing the veil but a reinforcement of *Salomon* by recognising that the parent and subsidiary were separate legal entities such that one could assume duty of care over the other. Therefore, there was no need to pierce any veil. All the Court had to do was lift the veil to reveal the duty of care relationship in tort<sup>51</sup> that gave rise to the liability.

This case strongly represents the clear distinction between the legal taxonomy and economic reality in the organisation of corporate groups where the courts have consistently disregarded the latter. As mentioned earlier, *Adams* firmly rejects the notions of an economic structure capable of undermining the separate legal entities of different companies within a group context. Arden LJ’s judgment reaffirms this idea, strengthening the consistency across case law, by allowing one company to have obligations to another within the same group.

Such a judgment cannot be understated in its importance as it realises that there is a fundamental, conceptual distinction between legal taxonomy and practical reality. To conflate the two, would be to not appreciate the differences whilst also damaging the certainty of the doctrine.

Importantly, though the effects of piercing and lifting the corporate veil may seem similar, particularly in this case, they have clearly defined separate principles.

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<sup>49</sup> [2013] UKSC 34, 28.

<sup>50</sup> [2012] EWCA Civ 525.

<sup>51</sup> *Caparo Industries plc v Dickman* [1990] UKHL 2.

This clear legal distinction was then built upon by *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell*<sup>52</sup>. Fraser J stated that when looking at the principles laid down in *Chandler*, it was important to consider two further questions.<sup>53</sup>

First, whether the parent company was better placed than the subsidiary to protect the employees of the subsidiary company? In case this question is answered in the affirmative, the second question rises, namely whether it is fair to infer that the subsidiary would rely on the parent company (developing further, also, on the reasonableness test in *Caparo Industries plc v Dickman*<sup>54</sup>). This case clearly accentuates the characteristics of *Chandler* by reaffirming the distinction it recognised.

## Overlap: an unclear distinction

For the many successful aspects of *Prest* and of Lord Sumption's judgment, there is a large issue that remains unresolved. Namely, there is the relationship (or overlap) between the two principles. Considering how the case law, including *Prest*, has struggled with the determining whether the facts are indicative of piercing or lifting, it is surprising more time was not taken to carefully consider the distinction to avoid confusion.

The stakes of this confusion are best seen in the case of *Trustor AB*. In this case, the original decision was that it was an evasion of a pre-existing legal obligation; that obligation being the duty not to misappropriate the property. However, Lord Sumption and Neuberger, in *Prest*, redefined this case as a concealment (lifting) case.<sup>55</sup> They reasoned that the defendant's hiding of the property into the new company made the company an agent of the defendant. Thus, the invoked, pre-existing law that was concealed behind the shrouds of the company was agency law.

Far from resolving this question, *VTB Capital plc v Nutritek International Corporation*<sup>56</sup> heightens the lack of clarity between the two principles. On the one hand, the Court held that *Trustor AB* was a good restatement of the law and, so, reaffirming that it was an evasion case. On the other hand, *VTB* was decided after *Prest* – though in the same year. As the case came after *Prest*, yet seems to contradict in its attitude towards *Trustor AB*. Hannigan sensibly puts the issue in context. She notes that the line between evasion and concealment is hard to distinguish especially considering particularly if evasion can often be achieved through concealment.<sup>57</sup> For instance, in *Trustor AB*, evasion was achieved by hiding (concealing) the whereabouts of the misappropriated property. Consequently, the facts can be easily manipulated to fit the language of either evasion or concealment.

Does this mean that the Supreme Court in *Prest* intended to contradict *VTB* on this fundamental point about *Trustor AB* or does the issue remain open? The answer is simply unclear.

Nevertheless, there is a possible solution that can be found in the judgments of several cases. In *Prest*, Lord Mance stated the following,

*“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 fall-back”.*<sup>58</sup>

Likewise, in *Ben Hashem*, Munby J refused to pierce the corporate veil on the grounds that the claimant could have alleged a claim in fraud. This position was supported by Lord Clarke in *Prest*.<sup>59</sup>

<sup>52</sup> [2017] EWCH 89.

<sup>53</sup> *Ibid*, 79.

<sup>54</sup> [1990] UKHL 2.

<sup>55</sup> [2013] UKSC 34, 32.

<sup>56</sup> [2013] UKSC 5.

<sup>57</sup> Hannigan, Brenda. *Company Law*. Corporate responsibility. 5th ed., Oxford University Press, 2018, 58.

<sup>58</sup> [2013] UKSC 34, 100.

<sup>59</sup> *Ibid*, 103.

To that end then, piercing the corporate veil, as distinguished in *Prest*, is a tool that should only be called upon by the court as a last resort. Only when other mechanisms have been exhausted, is it then appropriate for the courts to consider the line of enquiry for evasion.

Naturally, such a last resort has the negative effect of meaning that there is little opportunity for successive courts to discuss piercing the corporate veil. Considering the arguments made, whereby there still remain unclear aspects, this may leave such issues unresolved for a while (at least in any *ratio decidendi* case law). As Lord Mance rightly noted, such an approach is likely to create “novel and very rare” cases of true piercing the corporate veil.

Ultimately, however, the last resort principle is appropriate. Most importantly, it shows deference to the mischief of certainty and accountability. The principle allows for the practical effects of accountability without needing the court to flagrantly chip away at the certainty of a more narrowly defined notion of piercing the corporate veil. The clear issues between cases that have sought to widen and restrict the scope the doctrine have represented the ongoing struggle between the two mischiefs. At least with this principle, a balance between the two is more harmoniously met.

It should be stressed that there is a clear difference between this distinction creating rare and novel cases, and it is edging closer towards the abolition of the doctrine.<sup>60</sup> Admittedly, the practical value of the doctrine is reduced and may give off the impression of abolition for all practical purposes. However, there remains a clear public policy reason for this doctrine to exist, as a means of exercising accountability against shareholders who misuse the benefits of separate personality. It is extremely unlikely the Court in *Prest* ever intended to abolish this doctrine, despite remarks questioning its existence, mainly due to the recognition of its important common law role in regulating the activities of shareholders.

## Foreclosing further expansion?

The effect of their Lordships' judgments in *Prest* was to restrict the use of the doctrine to rebalance the mischiefs. That has, by and large, been achieved. However, in doing so, one last major question arises as to the possibility of future expansions of the doctrine.

Baroness Hale seemed also to question the strictness of Lord Sumption's approach but in a much wider way. She queried,

*“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.”*<sup>61</sup>

Here, Hale seems to be suggesting that further expansion is possible as straightjacketing the doctrine into two principles may not be sufficient.

More directly, Lord Mance said, “[i]t is however often dangerous to seek to foreclose all possible future situations which may arise and I would not wish to do so.”<sup>62</sup> Equally, Lord Clarke concurred, “I agree with Lord Mance that it is often dangerous to seek to foreclose all possible future situations which may arise and, like him, I would not wish to do so.”<sup>63</sup>

It is understandable why their Justices would take such a cautious approach. It is ill-advised to foreclose the expansion of any legal doctrine; firmly cementing a rule can lead to rigid and absolutist principles that do not accommodate the changing nature of things. The mischief, as has been regularly referred to throughout, reflects the need for law, and indeed society as a whole, to balance the competing

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<sup>60</sup> Mujih Edwin, *Piercing the corporate veil as a remedy of last resort after Prest v Petrodel Resources Ltd: inching towards abolition?* (2016) 37(2) Comp Law 39.

<sup>61</sup> [2013] UKSC 34, 92.

<sup>62</sup> *Ibid*, 100.

<sup>63</sup> *Ibid*, 103.

interests of certainty and accountability. However, those interests and the extent of them are bound to change through time. The case of *Salomon* is testament to this thought; the attitudes that defined that case are not necessarily, or completely, the attitudes of company regulation and accountability in the legal and public sphere now.

Nevertheless, as true as this may be, this arguably does not justify the degree of uncertainty, and freedom to lower courts, leaving expansion open would create. In *Antonio Gramsci Shipping Corporation v Lembergs*<sup>64</sup>, Lord Justice Beatson ought to have gone further than declaring,

*“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.”*<sup>65</sup>

The law ought to go beyond this hesitant expression to foreclose and completely prevent the further expansion of the doctrine. Subject to the areas in which Lord Sumption's judgment has still left questions, the very fundamental aspects of what constitutes and does not constitute an evasion of a pre-existing legal obligation is clear. To prevent the law from swaying back into judgments of activism and confusion (as has already been seen), the courts should take the opportunity to close further development.

## Conclusion

Finding a balance within the doctrine of piercing the corporate veil has not been easy. This is clearly reflective of several interests and stakeholders that come with the regulation of companies. Nevertheless, something can be said for Lord Sumption's judgment for neatly establishing the distinction between evasion and concealment, whilst remaining consistent with the jurisprudence of law in this area. For the doctrine to develop further beyond the remits outlined by Lord Sumption may jeopardise its future integrity and so should be foreclosed to as it is. It still remains to be seen, however, what the future of the sham/façade principle within this doctrine will be, and how the overlap between evasion and concealment will continue to be defined.

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<sup>64</sup> [2013] EWCA Civ 730

<sup>65</sup> *Ibid.*, 66.