The Road To Prest v Petrodel: An Analysis of the UK Judicial Approach to the Corporate Veil - Part 1

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Abstract

This article examines the common law approach to the doctrine of separate legal personality in UK Corporate Law, its origin, development and the challenges encountered by judges in the interpretation and application of this doctrine. The article also analyses the grounds/circumstances upon which this doctrine may be disregarded by the judges to 'lift/pierce' the corporate veil. The article then analyses the judicial interpretative approaches to dichotomies and metaphors, such as 'concealment/evasion' and 'shame/façade' et cetera. The conclusion explores whether the UKSC decision in *Prest v Petrodel Resources Ltd* has, indeed, provided much needed clarity in the common law approach to the corporate veil.

Introduction

The seminal decision in *Salomon v Salomon & Co Ltd*[1] (discussed below) introduced the corporate law doctrine of separate legal personality of a company into corporate law of England and Wales and it has been a key feature for over a century. Ever since, courts in England and Wales have applied and upheld this doctrine and emphasised the separate legal personality of the company from its members.[2] However, sometimes courts may be compelled to set aside or disregard the separate legal personality of the company from its members to attribute liability or consequences for the company's acts, omissions or torts to

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[1] *Salomon v Salomon & Co. Ltd* [1897] A.C. 22. (Hereafter, *Salomon*).
[2] See cases such as but not limited to: *Lee v Lee's Air Farming* [1960] AC 12; *Macaura v Northern Assurance Co. Ltd* [1925] AC 619; *DHN Food Distributors Ltd v Tower Hamlet* [1976] 1 WLR 583; *Adams v Cape Industries Ltd* [1990] Ch. 433, among other cases.

its members or directors. This is the process that has been referred to as piercing or lifting the corporate veil.[3]

Therefore in legal terms, piercing /lifting the corporate veil is an exception to the separate legal personality of the company. This concept has been the focus of judicial deliberations in a number of cases until the UK Supreme Court's (UKSC) decision in *Prest v Petrodel Resources Ltd*,[4] where a review of the circumstances that may invoke or compel the court to disregard the separate legal personality of the company to pierce or lift the corporate veil was undertaken.

This paper analyses the approaches adopted by courts in England and Wales in relation to corporate veil lifting or piercing following its introduction in *Salomon*, and how the courts have adopted and applied this decision in subsequent cases involving veil piercing / lifting until the UKSC decision in *Prest*. The paper also analyses whether the UKSC decision in *Prest* has provided much needed clarity to interpretative dichotomies, such as 'lifting / piercing', 'sham / façade' and 'concealment / evasion' principles that have dominated common law decisions involving corporate veil lifting/piercing prior to *Prest*. This is to assess whether this decision has informed a balanced approach to judicial disregard of the separate personality doctrine to pierce or lift the corporate veil of incorporation.

However, the article does not address case law post *Prest* (2013 onwards). This is the subject of a follow-up article [Part 2] offering an analytical evaluation of the judicial adaption and application of decision in *Prest* to subsequent cases and whether the ruling in *Prest*, has indeed, remedied the confusion and uncertainty in the judicial approach to corporate veil piercing/lifting. Initially, a legal – historical analysis of the development of the doctrine of separate legal personality is discussed to inform context.

The Origin of Corporate Legal Personality

The origin of corporate personality in the UK is traceable to the rise of religious orders and local civic institutions, premised on the need to both hold and deal with property, and the resultant issues of suing and being sued.[5] This concept shifted from persons toward commercial entities through the 16th Century onwards, until the concept of the Joint Stock

[3] The terms piercing or lifting the corporate veil have been used interchangeably by courts and various academic writers such as Cheng (n 56), MIllon (n 52), Easterbrook & Fischel (n 57), Moore (n 62), et cetera. However, the House of Lords in *Prest v Petrodel* attempted to give a distinction between the two phrases as will be analysed later in this article.

[4] *Prest v Petrodel Resources Ltd* [2013] UKSC 34. (Hereafter, *Prest*).

[5] James Taylor, *Creating Capitalism: Joint- Stock Enterprise in British Politics and Culture, 1800-1870* (Boydell & Brewer 2014).

Company was brought into the commercial mainstream, generally incorporated by either a Royal Charter or by means of a private Act of Parliament.[6]

In 1602, the Dutch East India Company issued shares which were traded on the Amsterdam Stock Exchange, instigating a move which allowed capital investment from a wider base of shareholders, thereby enhancing trade in those shares.[7] This invention spread to London, with the present London Stock Exchange founded from earlier incarnations in 1801. The early model of the incorporated company was given impetus by the 19th Century rise in both colonial trading through the burgeoning British Empire, and by the enthusiasm for railways in the UK.[8]

The Joint Stock Companies Act (1844) introduced the initial UK system for the incorporation of a company by registration. In addition, it gave that company full legal personality, although limited liability for shareholders did not arrive on the statute books until 1855, with the enactment of the Limited Liability Act (1855). The following year, the latter and the former were combined to form the Joint Stock Companies Act (1856) that provided the legal basis for corporate registration and for the protection of the natural persons of the company from being personally liable for company debts[9] and other obligations.[10] This concept was taken further at common law by the 1897 case of *Salomon* analysed below.

The Birth of Separate Legal Personality – *Salomon v Salomon & Co*.

In this case, Mr Salomon, a sole trader in the business of leather boots diversfied and incorporated a company that seperated himself (Salomon) as a majority shareholder and director, from the legal personality of his company (Salomon & Co.) Unfortunately, his company ran into financial difficulties and he was pursued personally by company creditors on the presumption that he had incorporated his company to avoid financial liabilities.[11] However, owing to the doctrine of separate legal personality, Macnaghten LJ admitted that Mr Salomon had set up the company not for nefarious purposes, but '…[t]o extend the

[6] For example, the Company of Merchant Adventurers to New Lands was chartered in 1553 with 250 shareholders, whilst the Muscovy Company followed in 1555.
[7] Chrispas Nyombi and David J. Bakibinga, "Corporate Personality: The Unjust Foundation of English Company Law" (2014) 65(2) *Labour Law Journal*, 94.
[8] A. Okoye, *Legal Approaches and Corporate Social Responsibility* (London: Routledge, 2016).
[9] *Re Southard Ltd* [1979] 1 WLR 1198, at [1208], per Templeman LJ.
[10] R. Flannigan, "Shareholder Fiduciary Accountability" (2014) 1 *J.B.L*. 1 - 30.
[11] This may have been precipitated on earlier case law referred to favourably by Lord Halsbury in *Salomon*, such as *Re Baglan Hall Colliery Co.* [1870] 5 Ch. App 346, where the owners of a colliery that was experiencing financial difficulties decided to incorporate a limited liability company in order to avoid incurring further personal liabilities.

business and make provision for his family'.[12] Therefore, following this decision, the 'default' view of the courts, if one might describe it thus, is that the corporate veil is fundamentally inviolate, and that there must be an overhelming imperative to lift it.[13]

In addition, Halsbury LC stated that:

> '…[a] limited company was to be viewed like any other independent person with its rights and liabilities appropriate to itself …either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.'[14]

Therefore, the corporate law doctrine of separate legal personality was firmly established and upheld by the courts. The reasoning and decision in *Salomon* was followed in subsequent cases such as *Lee's Air Farming*,[15] where it was confirmed that a one man could not only be a shareholder, but also managing director and an employee with a valid contract of employment from the company they manage.[16]

It was also followed in *Macuara*,[17] where it was held that the insurance policy undertaken by Mr Macaura was invalid as he had no insurable interest in the timber he had insured as it belonged to the company due to the doctrine of separate legal personality. However, the doctrine of separate legal personality soon became a challenge to judges as to its interpretation, circumstances that may lead to its disregard, that is, to either lift or pierce the corporate veil, its application to cases involving groups of companies among other challenges.

Judicial Challenges in applying the *Salomon* Doctrine – Group Companies

Although the separate legal personality doctrine as affirmed in *Salomon* had been followed and upheld in subsequent cases, its application by judges soon became a challenge in cases involving group or parent-subsidiary companies. This was because the application of this doctrine in cases involving group companies raised the question as to whether, a company owned by another company, was also, a separate entity for the purposes of legal action.

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[12] *Salomon*, at [48].
[13] *Adams v Cape Industries* [1991] 1 All ER 929 at [1024], per Slade LJ. (Hereafter *Adams*).
[14] *Salomon*, at [31], per Halsbury LC.
[15] Ibid (n 2).
[16] '…it is a logical consequence of the decision in *Salomon's case* that one person may function in dual capacities…' per Morris L J. *Lee v Lee's Air Farming Ltd* [1961] AC 12, at [26].
[17] Ibid (n 2).

The answer to this question was initially formulated by Denning LJ in *DHN Food Distributor Ltd v Tower Hamlets London Borough Council*.[18] His Lordship used the concept of the 'single economic unit' in his formulation, positing that since the companies' shareholders and the directors, together with the latter's control were the same in all cases, their rights were to be treated as the same, regardless of the particular name or corporate identity of the individual company.[19] Therefore, owing to this case, a group of companies was recognised as a single economic entity. This was, perhaps, the high point of the liberal interpretation of circumstances in which the veil of incorporation may be lifted.

However, this point of view was not adopted by judges in subsequent cases and it became largely repudiated and criticised. Notable among the critics was Roskill LJ in the *The Albazero* case.[20] His Lordship opined that '...[e]ach company in a group of companies ... is a separate legal entity possessed of separate legal rights and liabilities.'[21] Therefore, subsidiaries to the parent company would be treated as separate entities entirely and the parent company could not be made liable for the subsidiaries' liabilities or debts.

Subsequently in *Bank of Tokyo v Karoon,*[22] Goff L J held that:

> "… [t]he corporate structure as a legal entity should be seen as disparate and separate from the economic entity and that '…we are concerned not with economics but with law."[23]

Therefore, the differences in opinions or approaches by judges in cases involving group of companies or parent – subsidiary companies created further confusion as to when the doctrine of separate legal personality could be disregarded by judges to pierce or lift the corporate veil of a company that was part of a group or a subsidiary to a parent company. The Court of Appeal sought to address this issue in the case of *Adams v Cape Industries Plc* analysed below.

A Paradigm Shift – *Adams v Cape Industries Plc*

In 1990, the case of *Adams v Cape Industries Plc*,[24] regarded as a benchmark case for cutting through some of the preceding judicial confusion, and for setting out criteria as to when the

[18] [1976] 3 All ER 462. (Hereafter *DHN Foods*).
[19] *DHN Foods*, at [473]. See also *Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners* [1969] 1 WLR 1241.
[20] *The Albazero* [1977] AC 774.
[21] Ibid, at [808].
[22] *Bank of Tokyo Ltd v Karoon* [1987] AC 45. (*Bank of Tokyo*).
[23] *Bank of Tokyo*, at [477] Goff LJ.
[24] *Adams* (n 2).

veil could be lifted in group companies, reaffirmed the principle of separate legal personality. The issue under consideration in *Adams* was whether Cape Industries could be regarded as falling under the jurisdiction of a US court and therefore, be subject to its jurisdiction. In his judgment, Slade L J disapproved of Lord Denning's view in *DHN Foods* by stating '…[t]here is no general principle that all companies in a group of companies are to be regarded as one" and that "…there is no presumption that the subsidiary is the parent company's alter ego…'[25]

Adams considered that the veil will be pierced only where special circumstances exist.[26] For instance, where the company and its structure is being used as a mere façade concealing the true facts, or when construing a statute, contract or document.[27] In addition, *Adams* established that a court may lift the corporate veil in situations where an agency relationship is thought to exist but where the absence of proof makes that relationship difficult to ascertain. This appears to have been seen as a relatively settled principle until further confusion was highlighted in subsequent cases.

Further Confusions post *Adams v Cape*

In *Dadourian Group International Inc., v Simms*,[28] Warren J suggested that the veil cannot be lifted '…[s]imply because a company has been involved in wrong-doing…it is clear that the veil can be lifted where the company is a sham or façade or…where it is a mask to conceal the true facts. It is, in my judgement, correct to do so only in order to provide a remedy for the wrong which those controlling the company have done.'[29] This line of reasoning had earlier, been witnessed in *Ord v Belhaven Pubs Ltd*[30] where, Hobhouse L J in the Court of Appeal, held that '[t]he reorganisation and establishment of a new and separate company was a legitimate response to the particular issues, and had not been done to avoid an existing obligation'.[31] The veil could not therefore, be pierced in this instance as there had been no impropriety in the actions of the directors.

It is arguable, however, that although the need for 'justice' is no longer considered sufficient for piercing the veil, courts may be seen to enjoy a degree of what might be termed 'equitable discretion' to ascertain the degree to which incorporation has been used as a device or a

[25] *Adams*, at [536].
[26] However, the judgement in *Adams*, where the veil was upheld, has been limited in some circumstances by the decisions in *Lubbe v Cape plc [2000] UKHL 41* and *Chandler v Cape plc [2012] EWCA 525* in holding that a direct duty may be owed in tort by the parent company to a person injured by a subsidiary.
[27] *Dimbleby v National Union of* Journalists (1984) 1 WLR 427.
[28] *Dadourian Groupinternational Inc v Simms* [2006] EWHC 2973. (Hereafter, *Dadourian*).
[29] *Dadourian*, at [683] per Warren J.
[30] *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447. (Hereafter, *Ord*).
[31] *Ord*, at [457] per Hobhouse LJ.

façade.[32] Therefore, it would seem that it is the establishment of an intentional façade of a company which is the issue, rather than the need for the claimant to prove their case by the lifting of the veil.

However, the difficulty in considering whether the company is indeed, a 'mere façade' would seem to be dependant on the particular facts of the case. It does seem clear that the motivation of the individual director is important when considering any misconduct with regard to the company.[33] Misconduct may or may not be contemporaneous with the incorporation,[34] but relevant to the instant case, and the misconduct and use of the company must have some correlation or link in legal terms.[35]

Misconduct or improriety can range quite widely. For instance, it may be an unusual case, such as that of public policy as in the case of *Daimler Co Ltd v Continental Tyre & Rubber Co Ltd*,[36] where the veil was required to be lifted in order to discover the identity and possible involvement of enemy Germans in the company during the First World War. It may be fraud, where the incorporation has been used to conceal criminal activities. Denning L J suggested, in *Lazarus Estates Ltd v Beasley* [37] that 'no court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything'[38] thereby suggesting that fraud should be a factor which would necessitate the lifting of the veil as a matter of course.

However, despite these varying judicial opinions and explanations in a bid to attain judicial certainty in the application of the factors or circumstances that may warrant corporate veil lifting /piercing, confusion was once again looming over judicial use of phrases, especially, 'fraud', 'façade', 'alter ego', 'conceal', 'evade' et cetera and when they could precisely be used to disregard the separate legal personality of the compny to lift or pierce the veil. An attempt to address these concerns was made in the case of *Prest v Petrodel Resources Ltd* as analysed below.

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[32] Angelo Capuano, "The Realist's Guide to Piercing the Corporate Veil" (2009) 23(1) *Australian Journal of Corporate Law*, 56–94.
[33] See *Jones v Lipman* [1962] 1 WLR 832, where the company, a 'mere façade', was formed purely to circumvent and avoid a pre-existing financial obligation (discussed in detail below).
[34] *Ben Hashem v Ali Shayif* [2009] 1 FLR 115.
[35] *Trustor AB v Smallbone (No. 2)* [2001] 1 WLR 1177.
[36] *Daimler Co Ltd v Continental Tyre & Rubber Co Ltd* (1916) 2 AC 307.
[37] *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (Hereafter *Lazarus*).
[38] *Lazarus*, at [712], Denning L J.

Piercing the Corporate Veil: a New Era – *Prest v Petrodel*

The Legal Issues in Prest

The case of *Prest* touched three major areas of law in England and Wales. These included Family Law, Company Law and the Law of Trusts. However, the main focus of judicial deliberations centred on the intersection between the provisions of Family Law and those of Company Law. The legal contention was on whether the provision in s.24 of the Matrimonial Causes Act (MCA) 1973 (property adjustment orders in connection with divorce proceedings)[39] would provide a ground for judges to disregard the separate legal personality of the company conferred under s.16(2) Companies Act (2006) to pierce the corporate veil.

Therefore, in trying to solve the dispute over the division of matrimonial assets following a divorce petition from Mrs Prest, the judge at first instance invoked the provisions of s.24(1) MCA 1973 and disregarded the separate personality of the company and pierced the corporate veil. The judge ordered Mr Prest to transfer six properties and confer interest in the seventh on the ground that the company was held and controlled by Mr Prest, and therefore, there was no separate legal personality between the company and Mr Prest.

In the Court of Appeal, a majority of judges agreed that the Family Division Court was incorrect in treating the assets of the company substantially owned by one party to a marriage as available for distribution under s.24 MCA 1973. They considered that these provisions did not confer broader powers onto courts to disregard the separate legal personality of the company than was available at common law. On subsequent appeal by Mrs Prest to the Supreme Court, the judges were reluctant to disregard the separate legal personality of the company to pierce the corporate veil.

However, the Supreme Court held that the properties were held by the two companies on trust for the husband. This would therefore be a valid ground on which to pierce the corporate veil. While delivering the leading judgment, Lord Sumption observed that although most advanced legal systems recognise separate legal personality of companies, they do impose some limits on its logical applications.[40] This is, especially, where the corporate veil, a product of separate legal personality of the company was being used as a shield for impropriety among other factors.

[39] MCA 1973, s.24(1) - Property adjustment orders with connection to a divorce, such as an order that a property to a marriage be transferred to the other party, family or settlement as the court may specify.
[40] *Prest*, at [17].

Significance of the decision in *Prest*

Prior to the decision by the UKSC in *Prest*, the court had formulated circumstances / grounds upon which the corporate veil may be pierced or lifted in *Adams* as discussed above.The formulation in this case was the most recent authority on the subject of veil piercing / lifting and had been followed in subsequent court cases such as *VTB Capital Plc v Nutritek International Corp,*[41] *Antonio Gramsci Shipping Corp v Recoletos Ltd,*[42] *Ben Hashem v Shayif,*[43] among others for over two decades.

However, this formulation was the subject of varied debates and criticism emanating from semantic ambiguities. This was because at common law, it was still difficult to ascertain with clarity when to 'lift' or 'pierce' the corporate veil and what these terms entailed.[44] Other concerns were that lifting or piercing the corporate veil as common law exceptions to the separate legal personality doctrine could be formulated on the basis of general reason precipitated by the demands of justice and public policy rather than a development of a coherent doctrine.[45]

Further challenge in relation to this formulation lay with the uncertainty as to whether the terms 'piercing' or 'lifting' the corporate veil were synonymous. Judicial explanation of these terms prior to the decision in *Prest* gave different views. While in some cases judges deemed it unnecessary to distinguish between these two terms,[46] other judges resolutely approached these two terms as synonymous.[47]

In *Atlas Maritime Co. SA v Avalon Maritime Ltd,*[48] Staughton LJ tried to explain the difference between these two terms. He stated that:

> ….[t]his phrase can obscure reasoning rather than elucidate it. There are, I think two senses in which it can be used which need to be distinguished. To pierce the corporate veil is an explanation that I would reserve for treating the rights or liabilities or activities of the company, as the rights or liabilities or activities of its shareholders.

[41] *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ. 808. (Hereafter, *VTB Capital*).
[42] *Antonio Gramsci Shipping Corp v Recoletos Ltd* [2013] EWCA Civ. 730.
[43] *Ben Hashem v Shayif* [2008] EWHC 2380.
[44] P. Davies and S. Worthington, *Principles of Modern Company Law*, (9th edn, Sweet & Maxwell, London 2012) 214.
[45] Tan Cheng Han, "Veil Lifting: A Fresh Start" (2015) 1 J.B.L 20 – 36.
[46] *VTB Capital* (n 41).
[47] *Ben Hashem* (n 43).
[48] *Atlas Maritime Co. SA v Avalon Maritime Ltd* [1991] 4 All ER 769 (CA). (Hereafter, *Atlas Maritime*).

> 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"[49]

However, despite this attempt at clarity by Staughton LJ, judicial sentiments towards the 'piercing /lifting' dichotomy continued to pose challenges as courts continued to approach legal questions concerning the corporate veil from different perspectives.[50] Other challenges such as the use of metaphors; 'sham' and 'façade' to justify veil piercing or lifting exacerbated the confusion around the subject of veil piercing or lifting. Therefore, the UKSC decision in *Prest* was welcomed as a timely intervention to address these concerns moving forward. However, the question remained whether, the UKSC decision in *Prest* did provide the much needed clarity on the common law 'piercing/ lifting' dichotomy?

The 'Piercing / Lifting' and 'Concealment / Evasion' Dichotomies

It has been argued that prior to *Prest*, a majority of cases that were thought to have pierced the corporate veil were not doing so *per se*. Rather, they were invoking existing common law principles, such as those under the law of Agency, Trust or Contract to establish the basis of liability.[51] Academic discourse on the subject of piercing the corporate veil at common law also invokes varying debates. Various academic writers have expressed a somewhat disparate critical evaluation of the application of the doctrine of veil piercing or lifting and a majority have called for more clarity to its interpretation and application by judges.

For example, Professor Millon expressed concerns that the application of the rule on veil piercing was the most litigated issue in corporate law, yet the legal doctrine is notoriously incoherent and usually leads to unpredictable results.[52] He argues that incoherence and unpredictability in judicial veil piercing emanates from a lack of understanding of the policy basis on limited liability and that unless a better understanding of this doctrine is achieved, veil piercing cannot serve its useful function.[53]

On a similar note, Professor Bainbridge argues that veil piercing cannot be justified and that the standards by which it is effected are vague, leaving judges great discretion. Therefore, he calls for its abolition.[54] He argues that while applying this doctrine, judges seem to be more

[49] *Atlas Maritime*, at [779].
[50] This point is further argued by Cheng –Han et al, "Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives" (2019) 16(1) *Berkeley Bus. L. J*. 140, 153.
[51] This point was emphasised by Sumption L J in *Prest*, at [8].
[52] D. Millon, "Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability" (2007) 56 *Emory L. J*. 1305, 1382.
[53] Ibid, 1307.
[54] Stephen M. Bainbridge, "Abolishing Veil Lifting" (2001) 26(3) *Journal of Corporate Law*, 470, 481.

concerned with the facts and equities of the specific case at bar than with the implications of personal shareholder liability for society at large.[55]

Professors Cheng,[56] and Easterbrook and Fischel[57] all support the argument that judicial veil piercing calls for improvement. While Easterbrook and Fischel argue that veil piercing seems to happen freakishly and without clear principles,[58] Cheng is of the view that the application of veil piercing has always been fact-specific and open ended.[59]Taken from this analysis, the consensus that can be drawn from academic discourse on corporate veil piercing seems to call for a pragmatic review or approach to judicial application of this doctrine to achieve its potential impact in corporate law setting.[60]

At common law, there exists no single coherent principle guiding the courts on how and when to apply extant common law principles to impose corporate liabilities.[61] This is because the phrase corporate veil is a label, rather than a doctrine used by courts to describe other conventional principles to resolve legal matters.[62] Moreover, existing case law prior to *Prest* faced the same conundrum. This was the classification between circumstances that would entail 'concealment' or 'evasion' to warrant 'piercing' or 'lifting' of the corporate veil. When case law is analysed, a contention may be supported that both terms could be used simultaneously on similar facts. On comparison and contrast of the cases of *Gilford Motors*[63] and *Re Darby*,[64] a light on the 'piercing/ lifting' and 'concealment / evasion' dichotomies may be shed.

In *Prest*, Lord Sumption cited *Gilford Motors* as one of the classic cases of evasion while delivering the judgment and therefore provided a ground for veil piercing.[65] However, Neuberger LJ had a different view on *Gilford Motors*. Lord Neuberger was of the view that *Gilford Motors* was a case of concealment and therefore, it would not warrant veil piercing at

[55] Ibid, 481.
[56] Thomas K. Cheng, "The Corporate Veil Doctrine Revisited: A Comparative Study of the English and US Corporate Veil Doctrines" (2011) 34(2) *Boston College Int'l & Comp. L. Rev*. 329.
[57] Frank L. Easterbrook and Daniel R. Fischel, "Limited Liability and the Corporation"(1985) 52 *Uni. Chi. L. Rev*. 89.
[58] Ibid, 89.
[59] Cheng (n 56), 331.
[60] For more academic views on veil piercing, see, L. Gallagher and P. Ziegler, "Lifting the Corporate Veil in the Pursuit of Justice"(1990) *J.B.L* 292; Mark T. Moore, "A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of Salomon v Salomon" (2006) *J. B. L.* 180; R. J. Huss, "Revamping Veil Piercing for all Limited Liability Entities: Forcing the Common Law Doctrine into the Statutory Age"(2001) 70 *U. Cin. L. Rev*. 95 – 135.
[61] S. McLaughlin, *Unlocking Company Law* (3rd edn, Routledge, 2015) 97.
[62] B. Hannigan, *Company Law*, (4th edn, OUP, 2016) 57.
[63] *Guilford Motor Co. Ltd v Horne and another* [1993] Ch. 935. (Hereafter *Guilford Motors*).
[64] *In re Darby, Ex parte Brougham* [1911] 1 KB 95. (*Hereafter, Re Darby*).
[65] *Prest*, at [29].

all.[66] In *Re Darby*, the court looked behind the corporate veil to establish the true actors and relationships as the prospectus indicated that City of London Investment Corporation (CIL) incorporated by Darby and Gyde was the promoter and vendor where as in fact, Darby and Gyde were the true promoter and vendor. What they had undertaken under the corporation was for their personal endeavours but had presented it as being done by the corporation and perpetrated fraudulent activities under the mask of the company.

However, the most relevant underlying factor in this case is that, it can be approached from aspects of both concealment and evasion. It may be approached as a case of concealment in that, the court did not disregard the separate legal personality of the corporation but just looked behind the corporate veil to establish the actual relationships between the corporation and Darby and Geyd, therefore, not piercing but lifting the veil.

The case can also be approached as a case of evasion as both Darby and Geyd were the real promoter and vendor. They consequently owed fiduciary duties to the corporation but they were interposing the corporation to avoid an existing legal obligation and enforcement of a legal right by WSQ which may be seen as a ground for piercing the veil. Therefore, it may be argued that in some cases, such as *Re Darby*, it is difficult to determine with certainty whether it is a case of concealment or evasion. The piercing /lifting and concealment / evasion dichotomies continue to pose challenges to courts.

Did *Prest* provid much needed clarity on Veil Piercing/Lifting?

While delivering the judgement, Lord Sumption gave an account of two separate principles (concealment and evasion) that have been interchangeably used in previous cases regarding the grounds for veil piercing / lifting but used wrongly.[67] He opined that concealment referred to the interposition of a company or perhaps several companies so as to conceal the identity of the real actors. Therefore, the concealment principle was legally banal and did not involve piercing the corporate veil.[68] In concealment cases, the court is only looking behind the veil to discover the facts which the corporate structure is trying to conceal.[69]

However, Lord Sumption went on to explain that where evasion was concerned, the court disregards the corporate veil if there was a legal right against the person in control which existed independently of the company's involvement and the company was interposed so that

[66] *Prest* at [70].
[67] *Prest* at [29].
[68] *Prest* at [28].
[69] See further on this point, B. Hannigan, "Wedded to Salmon: Evasion, Concealment and Confusion in the Piercing of the corporate veil of the One-man Company" (2015) 50 *Irish Jurist*, 11.

the separate legal personality of the company defeats the right or frustrates its enforcement.[70] He cited *Jones v Lipman*[71] as an example of a case that was of a similar kind to that of *Gilford Motors* as the company was wholly owned and controlled by Mr Lipman who had procured the property to be conveyed to the company for the purposes of defeating the right to specific performance.[72] Therefore, from this distinction, it may be concluded that the proper ground for piercing the corporate veil at common law was evasion.

However, it is important to note that although some judges sitting alongside Lord Sumption, such as Lord Neuberger[73] agreed with his distinction between the concealment and evasion doctrines, and when they should be applied, other judges such as Lady Hale, Lord Mance and Lord Clarke held different views.

Lord Clarke was of the view that:

> '….[i]t is often dangerous to seek to foreclose all possible situations which may arise and I would not wish to do so…. However, the situation in which the piercing of the corporate veil may be available as a fall back are likely to be very rare'[74]

Lady Hale opined that:

> '….[I]am not sure whether it is possible to classify all the cases in which the courts have been or should be prepared to disregard the separate legal personality of the company neatly into cases of either concealment or evasion…'[75]

Lord Mance opined that:

> '…[w]hat can be said with confidence is that the strength of the principle in the Salomon 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, they are novel and rare'[76]

However, despite these opinions from their Lordships and Ladyship, little, albeit no guidance was given on what may constitute 'rare and exceptional' circumstances in corporate veil piercing. It may be argued that the absence of this guidance might have left the *door open* for judicial discretion on what 'rare and exceptional' circumstances may entail and this may

[70] *Prest*, at [28].
[71] *Jones v Lipman* [1962] 1 WLR 832.
[72] *Prest*, at [30].
[73] *Prest* at [60], [61].
[74] *Prest*, at [103].
[75] *Prest*, at [92].
[76] *Prest*, at [98].

detract from Lord Sumption's formulation of the distinction between concealment and evasion and lead to further confusion on the subject of veil piercing.

Conclusion

The issue of veil piercing/ lifting at common has caused varied challenges to judges since the seminal case of *Salomon*. Attempts have been taken by judges in cases that followed *Salomon* to ascertain grounds or circumstances that may lead to the disregard of the separate legal personality of the company to pierce or lift the corporate veil. There was much enthusiasm in 1990 in the case of *Adams* (as discussed above) that certainty, at last, would be achieved in this regard. However, further confusion and challenges ensued until the UKSC decision in *Prest* in 2013, where further attempts at clarity in relation to the grounds for piercing / lifting the corporate veil were taken.

Nevertheless, it may be argued that, although Lord Sumption made utmost attempts to address the interpretative confusion surrounding the 'concealment' and 'evasion' dichotomy, a lack of conscensus from fellow judges, such as Lady Hale, Lord Clarke and Lord Mance (as analysed above) may infer subsequent interpretative confusion. Therefore, although the case of *Prest* was heralded as one that could provide the much needed clarity and legal certainty on the subject of corporate veil piercing / lifting at common law, it fell short of this.

On the other hand, what may be a welcome contribution from this case is that it navigates the focus of veil piercing /lifting away from the metaphorical confusion such as 'sham' or 'façade' that previously dominated the subject of the grounds for piercing/lifting the corporate veil.[77]

[77] On this point, see further; Tan Cheng Han, "Veil Lifting: A Fresh Start" (2015) 1 *J.B.L* 20 – 36.