

## **Piercing the Corporate Veil: Where is the Reverse Gear?\***

### **Abstract**

This article examines the absence of an express distinction between forward veil-piercing and backward veil-piercing in English company law and argues that the Supreme Court missed the opportunity to develop the distinction in the case of *Prest v Petrodel Resources Ltd* [2013]. The underlying theme of the article is that the absence of an express distinction has contributed to criticisms on the law in this area, many of which were echoed by the Supreme Court in the *Prest* case. The article contains a brief analysis of US law on the subject to demonstrate that while English law does not expressly recognise the distinction between these two types of piercing, the distinction is well developed in the USA. The article also contains a brief examination of piercing the veil in tort cases and piercing the veil in contract cases and reveals a similar trend whereby the distinction is expressly recognised in US law and literature on the subject but not in Britain.

### **Key Words**

- *Prest v Petrodel Resources Ltd* [2013]
- Piercing the Corporate Veil
- Forward piercing
- Backward/Reverse piercing
- Corporate Personality

## Introduction

When a case goes to the Supreme Court, it is an opportunity for the Court to provide clarity in the relevant area of law. This opportunity arose in the relatively recent case of *Prest v Petrodel Resources Ltd*<sup>1</sup> in which the Supreme Court reviewed the law relating to piercing the corporate veil. In so doing, the Supreme Court echoed the numerous criticisms made by academic writers and the judiciary about the rule to the effect that the law was in a confused and unsatisfactory state.<sup>2</sup> It has been argued elsewhere that there is a consensus that overall, the Supreme Court clarified many facets of the law in that case.<sup>3</sup> However, it will be argued in this article that although the Court engaged in an extensive review of the authorities and certainly clarified the law in many areas relating to the rule, the Court missed the opportunity to develop the law in one significant area of the rule. In that case, Mrs Prest sought the transfer of seven properties belonging to companies in the Petrodel group in order to satisfy a divorce settlement, claiming that in reality the properties belonged to her husband. The companies were wholly owned and controlled by her husband. The Supreme Court refused to pierce the corporate veil, but allowed her appeal on equitable grounds, holding that the properties were acquired and held by the respondent companies on trust for her husband.

While the case undoubtedly raises many issues that are ancillary to the central issue of when a court can lift the corporate veil to satisfy a divorce settlement, the focus of this article is on the distinction between ‘forward piercing’ and ‘reverse piercing’. The leitmotif of the article is that there is a distinction between the two ways of piercing the corporate veil which has not been developed in English company law. It will be seen that the Supreme Court recognised this distinction in the *Prest* case but did not seize the opportunity to develop it. The article will make a brief comparative analysis of US law which recognizes a distinction between forward piercing and backward piercing. While the focus is on the distinction between forward piercing and backward piercing, the article also contains a brief examination of veil-piercing in contract law and veil-piercing in tort which is another area in the veil-

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\*Dr Edwin C. Mujih, Senior Lecturer in Law, London Metropolitan University, UK. I am grateful to my colleague, Mr Barrie Goldstone, for his comments on the draft of this article. However, all errors are mine.

<sup>1</sup> [2013] UKSC 34; [2013] 2 A.C. 415.

<sup>2</sup> For a review of the criticisms about the rule see; E.C. Mujih, “Piercing the Corporate Veil as a Remedy of Last Resort after *Prest v Petrodel Resources Ltd*: Inching towards Abolition?” (2016) 37(2) *Company Lawyer* 39.

<sup>3</sup> E.C. Mujih, “Piercing the Corporate Veil as a Remedy of Last Resort after *Prest v Petrodel Resources Ltd*: Inching towards Abolition?” (2016) 37(2) *Company Lawyer* 39.

piercing doctrine where English law has developed differently from US law in that as in forward piercing and backward piercing, English law does not distinguish between veil-piercing in contract and veil-piercing in tort, whereas such a distinction exists in US law and literature.

### **The Distinction Between Forward Piercing and Reverse Piercing**

The doctrine of corporate personality protects the members of the company from acts done by the company. However, when the court pierces the veil, it holds a member personally liable for a corporate obligation. This is the normal operation of the veil-piercing rule and is referred to in this article as “forward piercing” or “standard piercing”. On the contrary, the court may sometimes be invited to pierce the veil in order to make the company liable for an obligation of a controlling shareholder. This is referred to as “reverse piercing” or “backward piercing” and describes the situation in *Prest*, since the appellant wife was seeking to hold the companies liable for her estranged husband’s obligations.<sup>4</sup>

*Prest* is not the first reverse piercing case. But it is unique in the sense that it was the first case in which the Supreme Court expressly recognised the distinction between seeking a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (forward piercing) and seeking “to convert the personal liability of the owner or controller into a liability of the company”<sup>5</sup> (reverse piercing). However, the court did not use the terms “forward piercing” and “reverse” or “backward piercing” and failed to elaborate on the distinction between the two situations.

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<sup>4</sup> It should however, be noted that the concept of reverse piercing has been described differently as a specific situation in which a company is willing to pierce its own veil. In a recent article, Jeff Chan argues that the main difference between forward piercing and reverse piercing is the identity of the party seeking to pierce the veil. From this perspective, he argues (in contrast to the position taken in this article) that English courts should reject the doctrine of reverse piercing particularly when it is the company itself that is seeking to pierce the corporate veil for its own financial benefits. J. Chan; “Should ‘Reverse piercing’ of the Corporate Veil be introduced into English Law?” (2014) 35(6) *Company Lawyer* 163 at 163.

<sup>5</sup> [2013] 2 A.C. 415, at [92], per Lady Hale.

## Reverse Piercing in Early Cases

The courts have impliedly recognised this distinction in earlier cases, although in a different context. In *Gencor ACP v Dalby*<sup>6</sup>, Mr Dalby (a director of the ACP group of companies) dishonestly diverted assets and opportunities into his nominee company in the British Virgin Islands. Rimer J held that the company was required to disgorge the benefits. Similarly, in *Trustor AB v Smallbone (No. 2)*<sup>7</sup> the defendant managing director of Trustor AB transferred money to a company which he owned and controlled. The court held that although there was no breach of fiduciary duty by the defendant, there was sufficient evidence to lift the corporate veil on the basis that the company was a mere façade. It is clear that the cases of *Gencor* and *Trustor* involve the court piercing the corporate veil in order to impose the controller's liability on the nominee companies, but these cases were not discussed in terms of forward piercing and reverse piercing.

This can be illustrated further by the following two well-known cases. In *Gilford Motor Co Ltd v Horne*<sup>8</sup>, Mr Horne attempted to evade a contract in restraint of trade by forming a company to compete with his previous employer. The Court of Appeal held that the company was a stratagem to avoid the contract and granted an injunction against it in order to prevent competition with Gilford Motor Co Ltd, his previous employer. A similar device for avoiding a contract was used in the later case of *Jones v Lipman*.<sup>9</sup> The defendant, Mr Lipman, agreed to sell a property to Mr Jones. However, he changed his mind before completion and then transferred the property to a company which he had formed for that purpose. The court found that the company was a sham and required specific performance by Mr Lipman and the company. The cases of *Gilford* and *Jones* show that English courts have dealt with cases in which the claimant seeks, in the reverse, to hold a company liable for the wrongful act of its controller. However, the problem is that these cases were never distinguished from standard veil-piercing cases in which the claimant seeks to hold the controlling shareholder liable for the acts of a company.

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<sup>6</sup> [2000] 2 B.C.L.C. 734 Ch.D.

<sup>7</sup> [2001] 3 All E.R. 987; [2001] 1 W.L.R. 1177 Ch.D.

<sup>8</sup> [1933] Ch. 935 C.A.

<sup>9</sup> [1962] 1 All E.R. 442; 1 W.L.R. 832 Ch.D.

## The Piercing and Lifting Distinction

Significantly, the distinction between forward piercing and backward piercing was implied in Staughton L.J.'s separation of the terms "piercing" and "lifting" the corporate veil in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)*<sup>10</sup> which was recently considered by the Supreme Court in *VTB Capital plc v Nutritek International Corp and Others*<sup>11</sup>. Staughton L.J. stated that piercing "is reserved for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders", whereas "lifting ... is to have regard to the shareholding in a company for some legal purpose." Although Staughton L.J. did not expressly use the terms forward piercing and reverse piercing, it is clear that his description of the term "piercing" reflects forward piercing while his description of the term "lifting" reflects reverse piercing.<sup>12</sup>

This distinction between piercing and lifting has a parallel with the distinction between concealment and evasion cases made by Lord Sumption in *Prest*. Making the distinction, Lord Sumption stated that the concealment principle "does not involve piercing the corporate veil at all ... [while with], the evasion principle ... the court may disregard the corporate veil".<sup>13</sup> He stated that lifting is permissible in concealment cases. It appears that reverse piercing (which, as argued above, reflects lifting by applying Staughton L.J.'s categorisation) is more aligned with the concealment principle identified by Lord Sumption, while standard piercing (piercing) is aligned with the evasion principle.<sup>14</sup> The distinction could be expressed as:

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<sup>10</sup> [1991] 4 All E.R. 769, 779G.

<sup>11</sup> [2013] UKSC 5; [2013] 2 A.C. 337, at [118].

<sup>12</sup> It is worth noting that in the *VTB Capital Plc* case, Lord Neuberger of Abbotsbury preferred to use the term "piercing" to "lifting", although he refused to decide whether, in the context, there was any difference between the two terms [119].

<sup>13</sup> [2013] 2 A.C. 415, at [28]. According to Lord Sumption, the courts will lift the veil in concealment cases and pierce it in evasion cases. What then is the difference between lifting and piercing? His Lordship stated that lifting, which is permissible in concealment cases, takes place when the court identifies the real actors behind an interposed company. On the other hand, piercing which is permissible in evasion cases, takes place when the court disregards the corporate veil in order to identify whether there is an evasion of rights or frustration of enforcement by the real actors. Hannigan argues that there seems to be little difference between the two, and that the distinction made by Lord Sumption between lifting and piercing and between evasion and concealment is difficult to apply consistently and objectively. Indeed, concealment is inherent in many evasion cases and the terms "lifting" and "piercing" are often used interchangeably. B. Hannigan, "Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" [2013] 50 Irish Jurist 11 at 30 and 34-35.

<sup>14</sup> For a discussion of the evasion-piercing versus concealment-lifting analysis in *Prest*, see B. Hannigan, "Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" [2013] 50 Irish Jurist 11.

a forward/evasion/piercing v backward/concealment/lifting distinction.

In *Prest*, the Supreme Court stated that most cases in which the corporate veil was pierced (such as *Gencor ACP Ltd*, *Gilford Motor* and *Jones*) are not actually veil-piercing cases and that these cases could have been decided on other grounds.<sup>15</sup> It appears from a perusal of the Supreme Court's judgment in *Prest* that only the former categorisation (that is the forward/evasion/piercing classification) is recognised as real veil-piercing cases. In addition, most of the cases which are said not to involve veil-piercing fall within the latter categorisation. The Supreme Court's review of *Gilford*, *Jones* and other cases in *Prest* reveals a reluctance to recognise concealment cases as veil-piercing cases. For example, Lord Sumption's conclusion that the decisions to grant injunctions against Mr Horne in the *Gilford* case and against Mr Lipman in the *Jones* case were made on the concealment principle is connected to his overall conclusion that these were not veil-piercing cases. Lord Neuberger agreed with Lord Sumption's view that cases concerned with concealment do not involve veil piercing at all and that the evasion principle is the only basis for the court might consider piercing the corporate veil<sup>16</sup>. The view that evasion is the only basis for piercing the corporate veil<sup>17</sup> probably explains why their Lordships felt that the cases in which the corporate veil was pierced were not really veil-piercing cases. These were cases of veil-lifting, in which alternative remedies could have been sought. The Supreme Court's observation in *Prest* that most of the cases<sup>18</sup> in which the veil was pierced were not veil-piercing cases accords with Staughton L.J.'s description of the term "lifting"; however, the court was referring to alternative remedies in trust, agency and statutes. It appears from this analysis of judicial opinion that these cases were lifting or reverse piercing cases which should attract remedies outside company law.

However, it has been argued that post-*Prest* cases are already showing a lack of clarity in *Prest* on the distinction between piercing and lifting the veil.<sup>19</sup> Hannigan discusses the recent Court of Appeal case of *R v Sale*<sup>20</sup> in which the issue was whether the corporate veil should be pierced or lifted in criminal proceedings. She observes that the refusal of the

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<sup>15</sup> [2013] 2 A.C. 415 at [27] and [64]. See also E.C. Mujih, "Piercing the Corporate Veil as a Remedy of Last Resort after *Prest v Petrodel Resources Ltd*: Inching towards Abolition?" (2016) 37(2) *Company Lawyer* 39.

<sup>16</sup> [2013] 2 A.C. 415 at [61].

<sup>17</sup> [2013] 2 A.C. 415, at [83] per Lord Neuberger.

<sup>18</sup> For example, *Gilford*, *Jones*, *Trustor AB* and *Gencor ACP Ltd*.

<sup>19</sup> B. Hannigan, "Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" [2013] 50 *Irish Jurist* 11.

<sup>20</sup> [2013] EWCA Crim 1306; [2013] 1 W.L.R. 663.

Court of Appeal to pierce the veil, but its granting of an application to lift it reflects a mere change in terminology. She predicts that this distinction will experience a rise in applications to lift the veil and a drop in applications to pierce the veil.<sup>21</sup> However, she discerns a distinction between lifting and piercing: piercing cases are concerned primarily with the enforcement of private law rights while lifting cases are concerned with the enforcement of public law rights.<sup>22</sup>

The emphasis here is the absence of an express distinction between forward piercing and backward piercing despite the opportunities that have arisen for such a distinction to be made and the need for a distinction which might at least address some of the problems identified with the veil-piercing rule. *Prest* presented an opportunity for the Supreme Court to develop this distinction. However, the court missed this opportunity, preferring to reject cases that happen to be reverse piercing cases on the ground that they are not veil piercing cases – a rejection which is occasioned by the absence of a distinction between the two types of piercing.

### **A High Rate of Piercing in Reverse Piercing Cases**

This conspicuous absence of a distinction between the two types of piercing is a matter of some curiosity. A perusal of the cases reveals that the courts are more willing to pierce the veil in reverse piercing cases than in forward piercing cases, as seen in *Gencor*, *Trustor*, *Gilford* and *Jones*.<sup>23</sup> These cases can be contrasted with the case of *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia & Others*<sup>24</sup>, a forward piercing case in which Toulson J refused to pierce the corporate veil to make the controller of the company personally liable for the company's debt. This certainly reflects the early version of the rule, where the courts firmly refused to pierce the veil in cases such as *Salomon v Salomon and Co Ltd*<sup>25</sup>, *Macaura v Northern Assurance Co Ltd*<sup>26</sup> and *Lee v Lee's Air Farming Ltd*<sup>27</sup>. It is argued below that the high rate of piercing in backward-piercing cases appears to confirm the

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<sup>21</sup> B. Hannigan, "Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" [2013] 50 Irish Jurist 11 at 37.

<sup>22</sup> B. Hannigan, "Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" [2013] 50 Irish Jurist 11 at 38.

<sup>23</sup> Although, as seen above, the Supreme Court has now held in *Prest* that those cases could have been decided on other grounds.

<sup>24</sup> [1998] 4 All E.R. 82; [1998] 1 W.L.R. 294.

<sup>25</sup> [1897] A.C. 22.

<sup>26</sup> [1925] A.C. 619; [1925] All E.R. Rep 51

<sup>27</sup> [1961] A.C. 12; [1960] 3 All E.R. 420.

observation by the Supreme Court in *Prest* that these are not veil-piercing cases. Hence, despite the companies being imputed the liability of the controlling shareholders, the principle in *Salomon* was still intact. On the other hand, forward piercing cases are real veil-piercing cases which involve the courts upsetting the principle in *Salomon* and the low rate of piercing in such cases shows a reluctance by the courts to violate this fundamental principle.

Either the high rate of piercing in reverse piercing cases is a coincidence or it is the natural outcome of a fundamental distinction between the two types of piercing. If the latter view is correct, then there is a need for this distinction between the two types of piercing to be expressly recognised, and a separate set of rules for reverse piercing might be considered. Indeed, the veil-piercing rule was developed on forward piercing grounds<sup>28</sup> and applying such a rule to cases of a backward piercing nature without a prima facie recognition of the nature of such cases and distinction from forward piercing cases was always bound to be problematic. This may have contributed to the unsatisfactory and confused state of the law in this area - a criticism made by academics and judges. It appears to be the case that much of the sought-after clarity of the rule relies on this distinction being recognised. Lady Hale recognised this distinction in *Prest* when she observed, at [92], that concealment and evasion cases are all cases in which the claimant seeks to convert the company's liability into the personal liability of its controller, unlike cases in which the conversion of the personal liability of the owner into a liability of the company is sought. Unfortunately, she did not elaborate on the distinction or provide further guidance on whether the same rule should apply in both cases beyond saying that in the latter case it is more appropriate to rely upon the concepts of agency and of directing mind. As the *Sale* case reveals, post-*Prest* developments already show the importance of such a distinction.

Since a preponderance of English veil-piercing cases involve a claimant seeking to convert a company's liability into the personal liability of the company's controller, veil-piercing rules have developed on this premise and have been applied indiscriminately to cases in which a claimant seeks to convert a company controller's personal liability into the liability of the company. With the exception of *Stone & Rolls v Moore Stephens*,<sup>29</sup> the Supreme Court (prior to *Prest*) had not had the opportunity to consider the converse situation in which a claimant seeks to convert the personal liability of a company's controller into the

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<sup>28</sup> The rule was enunciated in the *Salomon* case, which was a standard or forward piercing case and applied rigidly in subsequent similar cases. It is worth reiterating that most of the cases where the veil has been pierced are reverse piercing cases.

<sup>29</sup> [2009] UKHL 39; [2009] 1. A.C. 1391.



liability of the company. Yet, in *Prest*, the court applied the veil-piercing rule without an analysis of the distinction between forward piercing and backward piercing. The appropriateness of deciding a backward piercing case such as *Prest* based on rules developed in forward piercing cases must be questioned. As the author of this article argues, this may have contributed to the problems damaging the rule which have attracted a barrage of criticisms from both academic writers and the judiciary. In *Prest*, Lord Neuberger observed as follows at [64]: “It is clear from cases and academic articles that the law relating to the doctrine is unsatisfactory and confused”. It has been suggested that, given the differences between forward veil-piercing and reverse veil-piercing, the latter case requires a different analytical framework from the more routine forward piercing cases.<sup>30</sup>

### **Reverse Piercing Cases not really Veil-Piercing Cases**

It is clear that the best that can be said about cases such as *Gilford Motor* is that they are reverse piercing cases.<sup>31</sup> In addition, perhaps the Supreme Court’s real intention in *Prest* was that reverse piercing cases such as these are not actually veil-piercing cases. The veil-piercing rule was developed in relation to forward piercing cases. As Lady Hale stated, in reverse piercing cases it is appropriate to rely on the concept of agency. The view that reverse piercing cases are not actually veil-piercing cases is tenable. This is because the claimant here seeks to enforce their claim against the company for the controlling shareholder’s a priori liability and no corporate veil is being pierced to make a shareholder liable. Rather, remedies may be sought in other areas of law such as agency and the law of trust since the liability arose outside of the company. In other words, the claimant is the personal creditor of the shareholder and seeks to make the company liable for the shareholder’s debt as in *Prest*. This

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<sup>30</sup> G.S., Crespi, “The Reverse Pierce Doctrine: Applying Appropriate Standards” (1990) 16(3) J. Corp. L. 33 at 37.

<sup>31</sup> A major reason for the view that *Gilford Motors* (which was classified in *Prest* as a concealment case) does not involve veil-piercing is that the injunction was granted both against Mr Horne and his company. The argument is that it was not necessary to lift the veil for this purpose as the same result could have been achieved on the grounds of agency. This much is tenable. However, this view is restrictive as it looks at the outcome of the case only. It is submitted that in deciding whether or not a case is a veil-piercing case, one should not look at the outcome only. The court had to pierce the veil of the company, as a procedural matter, coupled with the fact that Mr Horne was also made liable. This procedural piercing of the veil and Mr Horne’s liability make the case a veil piercing case. It can thus be described as a case in which the court pierced the veil but also held the company liable, unless we are to say that it is the imposition of liability on the shareholder alone that determines whether or not a case is a veil-piercing case. If this were so, company law textbooks would have to be re-written to explain why the case and others have always been wrongly classified as veil-piercing cases. What this problem highlights is the lacuna in English law on the distinction between forward piercing and backward piercing.

is unlike a forward piercing case in which the company is ostensibly the primary debtor and the claimant seeks to make the controlling shareholder personally liable. Here, the court would need to pierce the corporate veil in order to impute on the shareholder what is primarily the company's liability. This is a real veil-piercing scenario determined by company law rules, as in the case of *Salomon v A. Salomon & Co Ltd.*<sup>32</sup>

Control and the use of the company for a legitimate purpose are crucial elements in such cases. In *Ben Hashem v Al Shayif*,<sup>33</sup> Munby J examined a series of cases and observed that in *Gilford, Jones, Gencor* and *Trustor* in which the veil was pierced, the “wrongdoer controlled the company which he used as a façade or device to facilitate or cover up his own wrongdoing”.<sup>34</sup> He stated that the cases are based on the anterior or independent wrongdoing of the controllers whereby the primary liability does not rest with the company, but a company is “used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely dehors the company”.<sup>35</sup> Indeed, in his review of *Jones in Prest*, Lord Sumption stated that because Mr Lipman owned and controlled Alamed Ltd, he was in a position to perform his obligation to the plaintiff by exercising his powers over the company. “This did not involve piercing the corporate veil, but only identifying Mr Lipman as the man in control of the company.”<sup>36</sup> The fact that the wrongdoing is independent and the primary liability does not lie with the company make these cases reverse piercing cases which fit the description of lifting or concealment. It follows that such cases are not determined by reference to company law rules and that the principle in *Salomon* is still intact despite the controlling shareholder being held liable.

With the exception of *Sale*, the Court of Appeal has in recent post-*Prest* cases maintained the *Salomon* principle on the application of *Prest* in the context of confiscation proceedings. The first of these cases is *R v Boyle Transport (Northern Ireland) Ltd.*<sup>37</sup> In that case, the second and third defendants who were the sole directors of a road haulage company were sentenced for conspiracy to make false instruments and a confiscation order was made against them. A new company (the first defendant) was later established with different directors. The assets of the old company were transferred to the new company. The judge

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<sup>32</sup> [1897] A.C. 22.

<sup>33</sup> [2008] EWHC 2380 (Fam); [2009] 1 F.L.R. 115.

<sup>34</sup> [2009] 1 F.L.R. 115 [171].

<sup>35</sup> [2009] 1 F.L.R. 115 at [199].

<sup>36</sup> [2013] 2 A.C. 415 at [30].

<sup>37</sup> [2016] EWCA Crim. 19; [2016] 4 W.L.R. 63.

extended the appointment of an enforcement receiver over the assets of the first defendant. The first defendant appealed against the judge's decision and the second and third defendant applied for leave to appeal.

The Court of Appeal allowed the appeal and the applications applying *Prest*. The Court stated that where an issue of lifting the corporate veil was raised in criminal confiscation cases, Crown Courts were not to depart from the general principles which related to the separate legal status of a limited company. The Court of Appeal further stated that "where a company involved in relevant wrongdoing was solely owned and controlled by the defendant, it did not necessitate a conclusion, in a confiscation case, that it was an alter ego company, whose turnover and assets were to be equated with being property of the defendant himself." The veil should not be lifted simply because the court thought that it was just to do so in a particular case [at 48 and 88].

In a statement that echoed its earlier warning to Family Courts in *Prest*, the Court of Appeal warned Crown Courts not to depart from established principles (of company law) relating to the separate legal status of a limited company in confiscation proceedings and held [at 85 and 89-92], that it is not justified to treat the assets of the old company as realisable property of the second and third defendants. The Court stated that sole ownership and control of a company is not sufficient of itself to justify treating the company as an alter ego of the defendant in a confiscation proceeding under the Proceeds of Crime Act 2002, at [119].

*Boyle* was applied more recently by the Court of Appeal in *R v Powell (Jacqueline)*.<sup>38</sup> Like *Boyle*, *Powell* involves confiscation proceedings. Two company directors who were convicted of consenting or conniving in the company's failure to comply with the condition of an environmental permit were held not to be personally liable under confiscation procedures for the cost of cleaning up the company's polluted site. The Court of Appeal held applying *Prest* and *Boyle* that the company had been formed for a legitimate purpose and there had been no façade or concealment for hiding behind the company's structure in a way which had abused the corporate shield. In relation to the evasion principle in *Prest*, the Court of Appeal found that the obligations to comply with the relevant environmental laws were those of the company and there was no legal right against the directors which existed independently of the company's involvement<sup>39</sup>. The Court of Appeal rejected the Crown's

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<sup>38</sup> [27 July 2016] EWCA Crim 1043.

<sup>39</sup> [2016] EWCA Crim 1043 at [20] and [29].

submission that the respondent directors had an obligation to obey the criminal law irrespective of the company's position and re-stated the rule in *Prest* which expressly limits the application of the evasion principle to rare cases.<sup>40</sup>

Although the issue in *Boyle* was whether the trial judge had been right to pierce the veil of an old company in order to extend the appointment of an enforcement receiver to cover the assets of a new company for the unlawful acts of the applicants, it is unhelpful to attempt to classify the case as either a forward or reverse piercing case.<sup>41</sup> Certainly, many cases involve elements of both categories.<sup>42</sup> And, some cases probably involve neither. *Boyle* and *Powell* may come within the latter, as the companies in both cases were legally formed for a legitimate purpose.<sup>43</sup> They were not formed to conceal the identity of the directors,<sup>44</sup> neither were they formed to evade a legal right of the respondent directors which existed independently of the company.<sup>45</sup> As Treacy LJ said in *Powell*, “this was not a company being run for an unlawful purpose, but rather a legitimate businesses which had broken the criminal law through its failure to observe the necessary regulations.”<sup>46</sup>

Despite the aforementioned criticism of the application of the *Prest* distinction between lifting and piercing in *Sale*, a comparison of *Sale* with the later Court of Appeal decisions in *Boyle* and *Powell* shows that *Prest* has provided a measure of certainty in the law, severely restricting the circumstances under which the veil will be pierced. The decision in *Sale* was based on the facts of the case. Unlike *Powell* in which the court found that there was no concealment or evasion involved in the case since a legal right could not be identified against the respondents independently of the company's involvement<sup>47</sup>, in *Sale*, the court found that the matter fell within the concealment principle identified in *Prest*. Unlike *Powell* and *Boyle* in which the respective companies had more than one shareholder<sup>48</sup> and director, in

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<sup>40</sup> [2016] EWCA Crim 1043 at [30].

<sup>41</sup> In *Powell*, the prosecution accepted that the case could not be brought within either the concealment or evasion principle, [23]. Thus, following the analysis in this article in which the concealment principle is equated with backward piercing and the evasion principle equated with forward piercing, the case cannot be classified as either a forward piercing or backward piercing case.

<sup>42</sup> Lord Sumption recognised this in *Prest* when he stated that “many cases will fall into both categories” [28].

<sup>43</sup> [2016] EWCA Crim 1043 at [25]

<sup>44</sup> [2016] EWCA Crim 1043 at [27]

<sup>45</sup> [2016] EWCA Crim 1043 at [20], [28] and [29].

<sup>46</sup> [2016] EWCA Crim 1043 at [27].

<sup>47</sup> [2016] EWCA Crim at [29] and [30].

<sup>48</sup> The company in *Powell* (Wormtech Ltd) had five shareholders, at [8]. The trial judge found that Mrs Powell exercised the majority of control of the company, but that this was exercised jointly to a limited extent with another shareholder, Mr Westwood. Treacy LJ observed that it was material that the respondents were not

*Sale*, Mr Sale was the sole shareholder and controller of the company. Besides his activities and those of his company were so interlinked as to be indivisible. Both were acting together in corruption, [40 – 41].

### **The Limited Liability and Corporate Personality Nexus**

The veil-piercing rule operates as an exception to the doctrine enunciated in the *Salomon* case that a company is a separate legal person once it is registered. It is often believed that a major corollary of the doctrine of separate legal personality is the concept of limited liability. However, it has been argued elsewhere<sup>49</sup> that there are views to the contrary with some commentators arguing that limited liability is a concept which is distinct to that of separate legal personality; conceptually, historically and as a matter of company law statute.<sup>50</sup> This lack of unanimity on the exact relationship between limited liability and separate legal personality obscures the effect of the veil-piercing rule on the doctrine of separate legal personality, which is a cornerstone principle of company law.<sup>51</sup> If limited liability is a corollary of separate personality (as it is commonly thought), then every time the court pierces the veil, it is diluting this fundamental principle. However, if the two concepts are not interconnected,<sup>52</sup> then the effect of piercing the corporate veil, if any, on corporate personality is unclear.

The discussion of the relationship between limited liability and separate personality in the veil-piercing discourse is also relevant to the forward piercing and reverse piercing distinction. Such interrelationship features in a discussion by Kraakman and others of the different roles of legal personality and limited liability in the distribution of the assets of a company and those of its shareholders. In their discussion of the merits of limited liability, they argue that according to the principle, the company's creditors are favoured over the individual creditors of investors and managers in the distribution of the company's assets;

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the sole shareholders of the company, [28]. Similarly, the company in *Boyle* (Boyle Transport (Northern Ireland) Ltd) had five shareholders, at [8].

<sup>49</sup>E.C. Mujih, "Piercing the Corporate Veil as a Remedy of Last Resort after *Prest v Petrodel Resources Ltd*: Inching towards Abolition?" (2016) 37(2) *Company Lawyer* 39.

<sup>50</sup>C.C., Nicholls, "Piercing the Corporate Veil and the "Pure Form" of the Corporation as Financial Innovation" [2008] 46 *Can. Buss. L.J.* 233 at 251 – 257.

<sup>51</sup> L. Sealy and S. Worthington S., (2010) *Sealy's Cases and Materials in Company Law*, 9<sup>th</sup> ed. Oxford: Oxford University Press, p. 53.

<sup>52</sup> C.C., Nicholls, "Piercing the Corporate Veil and the "Pure Form" of the Corporation as Financial Innovation" [2008] 46 *Can. Buss. L.J.* 233.

while legal personality reserves shareholders' individual assets exclusively for their personal creditors.<sup>53</sup> It is submitted that veil-piercing upsets this equation by allowing a shareholder's personal creditor to claim the corporate assets in the form of reverse piercing and allowing the company's creditor to claim the shareholder's personal assets in the form of forward piercing. As argued above, in forward piercing cases the company is the primary debtor and the claimant seeks to make the controlling shareholder liable. In reverse piercing cases, the shareholder is the primary debtor and the creditor seeks to make the company liable.

Indeed, the above argument of Hansmann and Kraakman develops from their earlier work<sup>54</sup> in which they postulated that the role of company law in protecting shareholder assets from creditors through the concept of limited liability is of secondary importance. They argued that the reverse of limited liability, that is protecting the assets of the organisation from the claims of the personal creditors of the owners, is the real essential aspect of asset partitioning. The crux of their argument is how organisational law facilitates the distribution of assets and redistribution of transaction cost. At the centre of their thesis is a separation between the firm's bonding assets over which the company's creditors have priority and the personal assets of the firm's owners over which the owners' personal creditors have priority. This separation is the defining element of a legal entity. Hansmann and Kraakman divide this distribution of assets into two categories: (1) "affirmative asset partitioning", which occurs when the company's creditors take priority over the personal creditors of its owners in the distribution of the company's assets. (2) "defensive asset partitioning"<sup>55</sup> which occurs when the personal creditors of the company's owners have priority over the company's creditors in the distribution of the personal assets of the company's owners. As observed by the authors, defensive asset partitioning is found in the "rule of limited liability that bars the corporation's creditors from levying on the shareholders' personal assets."<sup>56</sup>

Hansmann and Kraakman's distinction between affirmative and defensive asset partitioning mirrors the forward piercing and backward piercing distinction in this article and underlines the above discussion of the relationship between corporate personality and limited

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<sup>53</sup> J. Armour, R.R. Kraakman and H. Hansmann, "What is Corporate Law?", in Kraakman R.R. et al. (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 2nd edn (Oxford: Oxford University Press, 2009), p.6.

<sup>54</sup> H. Hansmann and R. Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale L.J. 387.

<sup>55</sup> H. Hansmann and R. Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale L.J. 387 at 393.

<sup>56</sup> H. Hansmann and R. Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale L.J. 387 at 394 and 395.

liability.<sup>57</sup> Both types of asset partitioning emphasise the concept of corporate personality and consequently limited liability. It follows that veil-piercing disturbs this rule. Their discourse emphasises a fundamental separation between the assets of the firm and the personal assets of the owners of the firm in a similar way to the forward and backward piercing distinction suggested in this article. However, the separation suggested by Hansmann and Kraakman is mainly in terms of priority. At the heart of their argument is a recognition of the concept of separate legal personality. What they take issue with is the role of “organisational law” and they see the firm as a nexus of contracts. The firm plays a coordinating role for the parties involved in the various contracts within the firm. It is implicit from their discussion that the company is separate from the owners, that the owners of the company have limited liability, and that the personal creditors of the owners have priority over the assets of the owners. Meanwhile the creditors of the company have priority over the assets of the company in the distribution of assets.

However, if the limited liability and corporate personality nexus is not a prominent feature of Hansmann and Kraakman’s distinction between affirmative asset partitioning and defensive asset partitioning, the same cannot be said of their discussion of limited liability in tort. Before examining limited liability in tort, this article will briefly examine the forward piercing and backward piercing distinction in the US.

## **A Comparative Analysis**

The forward piercing and reverse piercing distinction has been recognised and well-developed by US courts. In the US, reverse piercing is further distinguished as either inside reverse piercing or outside reverse piercing.<sup>58</sup> Inside reverse piercing is said to occur when a shareholder seeks to pierce the veil in order to recover debts owed by the owner or controller

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<sup>57</sup> There is an apparent difference in focus between Hansmann and Kraakman’s article and this article in that the former is priority-based. It focuses on the role of organisational law in the distribution of assets (specifically which of two groups of creditors has priority in the distribution of the firm’s assets and in the distribution of the personal assets of the firm’s owners). Meanwhile the latter is liability-based focusing on who is liable for whose misfeasance, that is, the liability of the controller for the company’s misfeasance (forward piercing) and the liability of the company for the controller’s misfeasance (backward piercing). Nonetheless, there are similarities between the two types of asset partitioning and the two types of veil-piercing in the respective articles in terms of the relationship between corporate personality and limited liability.

<sup>58</sup> Although the distinction is recognised in the USA, Richardson has observed that both state and federal courts often apply the same analysis of traditional piercing to reverse piercing cases. M. Richardson, “The Helter Skelter Application of the Reverse Piercing Doctrine” (2010) 79 U. Cin. L. Rev. 1605, at 1606.

of the company from the company. Outside reverse piercing, on the other hand, occurs when a third party creditor seeks to recover the debts of the company controller from the company.<sup>59</sup> *Prest* would be considered as an outside reverse piercing case since Mrs Prest did not own any shares in her husband's companies. It has been observed that although several states in the US have rejected reverse piercing, there is a growing trend towards recognising it as a theory of recovery.<sup>60</sup> One case frequently cited in the discussions about the development of reverse piercing in the US is *Kingston Dry Dock Co. v Lake Champlain Transportation Co*<sup>61</sup> in which the Second Circuit rejected an application to attach the assets of a subsidiary company to satisfy the debts of the parent company, as the subsidiary had not sufficiently participated in the action giving rise to the debt to create liability. The court expressed doubts on the appropriateness of reverse piercing stating that it would be appropriate only in rare circumstances, if ever.<sup>62</sup> However, reverse piercing was permitted in *W.G. Platts, Inc. v Platts*<sup>63</sup> in which, as in *Prest*, the claimant sought to impose liability on her husband's company in order to satisfy a divorce settlement. Unlike, *Prest*, the US court held that the company was the alter ego of the husband and permitted piercing in order to satisfy the decree nisi of the divorce.

In a study on reverse piercing, Allen identifies two approaches used by US courts; the "inverse method of reverse piercing" and the "equitable results approach."<sup>64</sup> According to the inverse method, the court simply takes the requirements of traditional veil-piercing and applies them in the context of reverse pierce. Meanwhile, according to the equitable results approach, the courts imposes additional requirements to better protect the diverse interests

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<sup>59</sup> N.B. Allen, "Reverse Piercing of the Corporate veil: A Straightforward Path to Justice" (2011) 85 *St. John's Law Rev.* 1147 at 1148 and 1163. See also: M. Richardson, "The Helter Skelter Application of the Reverse Piercing Doctrine" (2010) 79 *U. Cin. L. Rev.* 1605 at 1605 – 1606; and for a detailed analysis of the two types of reverse piercing claims, see G.S. Crespi, "The Reverse Pierce Doctrine: Applying Appropriate Standards" (1990) 16(3) *J. Corp. L.* 33. For a discussion of reverse piercing by the owner of the company see M.J. Gaertner, "Reverse Piercing the Corporate Veil: Should Corporation Owners Have it both Ways?" [1989] 30 *William & Mary L. Rev.* 667.

<sup>60</sup> N.B. Allen, "Reverse Piercing of the Corporate veil: A Straightforward Path to Justice" [2011] 85 *St. John's Law Rev.* 1147.

<sup>61</sup> 31 F.2d 265 (2d Cir. 1929).

<sup>62</sup> N.B. Allen, "Reverse Piercing of the Corporate veil: A Straightforward Path to Justice" [2011] 85 *St. John's Law Rev.* 1147 at 1154 and M. Richardson, "The Helter Skelter Application of the Reverse Piercing Doctrine" (2010) 79, *U. Cin. L. Rev.* 1605, at 1605 – 1606, at 1610. Richardson criticises the *Kingston* case above, for failing to clarify the distinction or similarities between reverse piercing cases and traditional veil piercing cases and how this affected the development of the law on reverse piercing cases in the US.

<sup>63</sup> 298 P. 2d 1107 (Wash. 1956).

<sup>64</sup> N.B. Allen, "Reverse Piercing of the Corporate veil: A Straightforward Path to Justice" [2011] 85 *St. John's Law Rev.* 1147 at 1157.



affected by reverse piercing.<sup>65</sup> Additional requirements imposed under the equitable results approach include the question of whether reverse piercing would cause any injury to the company's innocent shareholders and creditors. In *Phillips v Englewood Post No. 322 Veterans of Foreign Wars of the U.S. Inc.*<sup>66</sup> the court found that no injury would be caused to the company's creditors since they were identical to the controlling shareholder's personal creditors. Similarly, reverse piercing did not injure innocent shareholders, since the defendant was the sole shareholder, as in *Prest*.

### **Veil-piercing in Contract and in Tort Cases**

Another distinction which has not attracted much attention in the veil-piercing discourse in England is the distinction between veil-piercing in contract cases and in tort cases.<sup>67</sup> Although a preponderance of English veil-piercing cases are contract cases, the few tort cases that exist have had an enormous impact on the veil-piercing rule. The *Adam v Cape Industries plc* case is a case in which US employees of a wholly owned subsidiary sought to enforce a judgment in England against Cape, the parent English company. The Court of Appeal severely restricted the circumstances under which the veil may be lifted. Although the course of action was based on the law of tort, the case has been regarded as a blanket authority on the limits of the veil-piercing rule without any analysis made between veil-piercing in tort and contract cases.

The distinction is pronounced among academic commentators in the US and it has been invigorated by a debate on whether contract creditors (sometimes known as voluntary creditors) or tort creditors (sometimes known as involuntary creditors) are treated more kindly by the courts. Commentators argue not only that the courts should draw a distinction between the two types of claimants in evaluating veil-piercing claims, but that the case for lifting the veil in favour of tort creditors is more compelling than for contract creditors.<sup>68</sup> The

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<sup>65</sup> N.B., Allen, "Reverse Piercing of the Corporate veil: A Straightforward Path to Justice" [2011] 85 St. John's Law Rev. 1147.

<sup>66</sup> 139 P.3d 639, at 641 (Colo. 2006).

<sup>67</sup> However, it is submitted that one difficulty with this classification is that some cases might not fit neatly into either category. An example is cases where the claimant is seeking to enforce a divorce settlement, as in *Prest*.

<sup>68</sup> F.A. Gevurtz, "Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil" [1997] 76 Oregon L. Rev. 853 at 858. See also M.J., Loewenstein, "Veil Piercing to Non-Owners: A Practical and Theoretical Inquiry" [2011] 41 Seton Hall L. Rev. 839 at 850 and 854; and D.H., Barber, "Piercing

basis for this view is that tort victims are involuntary creditors “who do not have an opportunity to bargain for the personal guarantees of ... shareholders or other protections as many contract creditors would be able to do.”<sup>69</sup> For example, in *Limited Liability and the Corporation*, Professors Frank Easterbrook and Daniel Fischel postulate that veil-piercing is more appropriate in cases involving tort than in cases involving contract because voluntary creditors can protect themselves while involuntary creditors cannot.<sup>70</sup> For example, in the case of a victim of a car accident or an employee who is injured as a result of exposure to dangerous working conditions, the victim or employee does not normally have the opportunity to demand the personal liability of the owners of the company prior to the accident. According to this view, contract creditors, on the other hand have the opportunity to do just that during their pre-contractual negotiations with the company, hence the courts should be less willing to lift the veil in favour of such creditors.<sup>71</sup>

Despite the lucidity of this argument, studies have shown that US courts have a more liberal attitude towards piercing the veil in favour of contract claimants than in favour of tort claimants. In a study carried out on the subject, Professor Robert Thompson<sup>72</sup> “surveyed every reported piercing decision through 1985 contained in the Westlaw database totalling around 1600 decisions.”<sup>73</sup> The survey found that 40% of these cases were contract claims in which veil-piercing occurred and only about 30% were tort claims in which veil-piercing occurred.<sup>74</sup> Presumably, the other 30% were in other areas of law.

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the Corporate Veil”, [1981] 17 *Willamette L. Rev.* 371 at 380; R.B., Thompson, “Piercing the Veil: Is the Common Law the Problem?” [2005] 37 *Connecticut L. Rev.* 619 at 631.

<sup>69</sup> H. Gelb, “Limited Liability Policy and Veil Piercing” (2009) 9(2) *Wyoming L. Rev.* 551, 555, at 565; F.A. Gevurtz, “Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil” [1997] 76 *Oregon L. Rev.* at 853, at 858 - 859.

<sup>70</sup> Easterbrook, F. and Fischel, D., *Limited Liability and the Corporation*, (1985) 52 *U. Chi. L. Rev.* 112. See also, M.J., Loewenstein, “Veil Piercing to Non-Owners: A Practical and Theoretical Inquiry” [2011] 41 *Seton Hall L. Rev.* 839 at 850 and 854.

<sup>71</sup> S.M. Bainbridge, [2002] *Corporation Law and Economics*, 155 (Found Press). Cited in H. Gelb, “Limited Liability Policy and Veil Piercing” (2009) 9(2) *Wyoming L. Rev.* 551, 555, at 565.

<sup>72</sup> Thompson, R.B., “Piercing the Corporate Veil: An Empirical Study” (1991) 76 *Cornell L. Rev.* 1036 at 1044. See also, Thompson, R.B. “Piercing the Veil: Is the Common Law the Problem?” (2005) 37 *Connecticut L. Rev.* 619 at 631-632.

<sup>73</sup> F.A. Gevurtz, “Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil” [1997] 76 *Oregon L. Rev.* 853, at 859; Thompson, R.B., [1991] “Piercing the Corporate Veil: An Empirical Study” (1991) 76 *Cornell L. Rev.* 1036 at 1044. See also J.H. Matheson, “The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent Subsidiary Context” [2009] 87 *North Carolina L. Rev.* 1091 at 1093 and M.J., Loewenstein, “Veil Piercing to Non-Owners: A Practical and Theoretical Inquiry” [2011] 41 *Seton Hall L. Rev.* 839 at 850, 854 and 857.

<sup>74</sup> F.A. Gevurtz, “Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil” [1997] 76 *Oregon L. Rev.* 853 at 859.

The above discussion reveals a schism between theory and practice. While commentators favour a contract/tort distinction with a sympathetic approach towards tort claimants, Professor Thompson's study revealed that US courts are indeed more sympathetic towards contract claimants than they are towards tort claimants in veil-piercing cases. In addition, it has been observed that the contract/tort distinction has received a mixed reception from the courts.<sup>75</sup> The difference between the two has led to commentators observing that the distinction between veil-piercing in contract cases and in tort cases is more academic than judicial. Citing Robert Hamilton's 1971 article in *Texas Law Review*, Professor Gevurtz comments that "long before Professor Thompson's work, other writers had condemned the courts for not perceiving the need to distinguish between contract and tort claimant".<sup>76</sup> He observes that it is not the type of creditor who deserves piercing that is important, but rather the specific facts justifying piercing in favour of either type of creditor.<sup>77</sup> Commenting on the tension in jurisprudential attitudes to veil-piercing, Professor Georgakopoulos similarly observes that academic opinion on veil-piercing is strongly in favour of piercing in tort but not in contract; in contrast, the courts do not favour piercing in tort and favour piercing in contract.<sup>78</sup>

Perhaps the above observation understates the position in some academic circles in the US. Not only is the distinction between contract and tort a prevailing feature in academic commentaries on the subject with strong views ventilated against limited liability in tort, but some writers have gone as far as arguing in favour of abolishing limited liability for corporate tort and suggesting that limited liability should be viewed as a problem of tort law and not a problem of corporate law. They have argued that limited liability should be retained only as a basic rule for contractual creditors.<sup>79</sup> For example, Hansmann and Kraakman argue against limited liability in tort<sup>80</sup>, preferring a regime of unlimited pro rata shareholder liability for

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<sup>75</sup> H. Gelb, "Limited Liability Policy and Veil Piercing" (2009) 9(2) *Wyoming L. Rev.* 551 at 566 citing S.M. Bainbridge, *Corporation Law and Economics*, Foundation Press, 2002 at 155.

<sup>76</sup> F.A. Gevurtz, "Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil" [1997] 76 *Oregon L. Rev.* 853 at 859.

<sup>77</sup> F.A. Gevurtz, "Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil" [1997] 76 *Oregon L. Rev.* 853.

<sup>78</sup> N.L. Georgakopoulos, "Contract-Centered Veil Piercing" [2007] 13 *Stan. J.L. Bus. & Fin.* 121 at 124.

<sup>79</sup> H. Hansmann, and R. Kraakman, *Toward Unlimited Liability for Corporate Tort*, (1991) 100 *Yale L.J.* 1879 at 1881.

<sup>80</sup> They describe limited liability in tort as a "doctrine of very dubious efficiency." H. Hansmann and R. Kraakman, *The Essential Role of Organizational Law*. (2000) 110 *Yale L.J.* 387 at 431.

corporate tort.<sup>81</sup> This would discourage the most severe forms of opportunistic cost externalisation.<sup>82</sup> Limited shareholder liability for corporate tort, they posit, creates incentives for several forms of inefficient behaviours.<sup>83</sup> Large business organisations use numerous strategies to exploit limited liability in order to evade damage claims.<sup>84</sup> An unlimited shareholder liability regime for tort claimants would certainly lead to an increase in the number of claims. However, the question arises whether the popularity of the view that the veil should be pierced in tort cases is more a reflection of the fact that the US is a highly litigious society and views with suspicion any rule which is less favourable to the institution of claims.

What can be said regarding the schism between the judicial approach and academic opinion on the contract and tort distinction in the US is that the court's decisions are based on the facts of individual cases and not on any principle of law which favours lifting the veil in contract cases over tort cases. On the other hand, it is clear that the distinction has received wide attention among academic commentators in the US in a way which is yet to be seen in the UK. Such a distinction is warranted because of the differences between contract and tort. For example, the nature of the relationship between the parties in both types of cases is different and so is the aim of remedies.

## Conclusion

It has been explained that the veil-piercing rule has been subject to intense criticisms. Nevertheless, the criticisms have not been examined in this article as this has been done in depth elsewhere.<sup>85</sup> It is sufficient to note for present purposes that a common criticism of the rule is that it is arbitrary, unprincipled<sup>86</sup> and notoriously incoherent and that its results are

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<sup>81</sup> H. Hansmann, and R. Kraakman, *Toward Unlimited Liability for Corporate Tort*, (1991) 100 Yale L.J. 1879 at 1880.

<sup>82</sup> H. Hansmann, and R. Kraakman, *Toward Unlimited Liability for Corporate Tort*, (1991) 100 Yale L.J. 1883 and 1919.

<sup>83</sup> H. Hansmann, and R. Kraakman, *Toward Unlimited Liability for Corporate Tort*, (1991) 100 Yale L.J. 1879 at 1882.

<sup>84</sup> H. Hansmann, and R. Kraakman, *Toward Unlimited Liability for Corporate Tort*, (1991) 100 Yale L.J. 1879 at 1881.

<sup>85</sup> E.C. Mujih, "Piercing the Corporate Veil as a Remedy of Last Resort after *Prest v Petrodel Resources Ltd*: Inching towards Abolition?" (2016) 37(2) *Company Lawyer*, 39.

<sup>86</sup> F.H. Easterbrook and D.H. Fischel, "Limited Liability and the Corporation" [1985] 52 U. Chi. L. Rev. 89 at 89, quoted by Lord Sumption in *Prest*. See also; Bainbridge, S.M., "Abolishing Veil Piercing" [http://papers.ssrn.com/paper.taf?abstract\\_id=236967](http://papers.ssrn.com/paper.taf?abstract_id=236967). [July 21, 2000] UCLA, School of Law.

unpredictable<sup>87</sup>. The Supreme Court echoed many of these criticisms in *Prest* and even considered abolishing the rule altogether. It had been hoped that *Prest* would provide an opportunity for the Supreme Court to clarify the law on the subject. As explained at the beginning of this article, it is generally agreed that the Supreme Court did clarify the law in many areas of the rule, although some commentators believe (in the light of some post-*Prest* cases such as *Sale*) that the distinction between lifting and piercing may introduce a new level of confusion.<sup>88</sup> *Boyle* and *Powell* show that the circumstances within which the courts will lift the veil are now very rare following *Prest*.

It is clear from the preceding discussion that the lack of a clear distinction between forward piercing cases and backward piercing cases has contributed in no small way to the problems that have bedevilled the veil-piercing rule. As explained above, the rule was developed in the *Salomon* case (a forward piercing case). In addition, a perusal of case law reveals that subsequent cases in which the rule has been applied rigidly are largely forward piercing cases. Meanwhile, cases in which the veil was either pierced or in which the application of the rule was criticised by the Supreme Court in *Prest* are largely backward piercing cases. It follows that most of the problems arise from the application of the rule in the latter category of cases, which have led to different results. This had led to criticisms that veil-piercing is, among others, unjustifiable and unpredictable. The application of a rule which was developed in and perhaps for forward piercing cases to backward piercing cases was always bound to be problematic. The rule does not easily fit into backward piercing cases nor does it satisfy their peculiarity. For example, the application of the rule in a standard veil-piercing case does not negatively affect the interest of the innocent shareholders in the company. On the other hand, they benefit from the controlling shareholder being held personally liable for abuse of corporate power. However, the application of the rule in a backward piercing case might adversely affect the interest of the innocent shareholders where the company is made liable for the private acts of the controller.

A clear distinction between the two types of piercing examined in this article should help clarify the confusion surrounding the rule. Indeed, the Supreme Court's judgment in *Prest* highlights that the remedies sought for in the latter type of (that is, backward piercing) cases can be obtained outside of veil-piercing rules in areas as such the law of trust, equity

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<sup>87</sup> D. Millon, "Revamping Veil-Piercing for all Limited Liability Entities: Forcing the Common Law Doctrine into the Statutory Age" [2007] 56(5) Emory L.J. 1305 at 1305.

<sup>88</sup> B. Hannigan, "Wedded to Solomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" [2013] 50 Irish Jurist at 11.

and contract.<sup>89</sup> This is evident from the Supreme Court's review of past cases such as *Gilford*, *Lipman*, *Gencor* and *ACP*. One need not look further than *Prest* itself (in which the Court applied this line of reasoning) to see the practicality of this statement. This was a backward piercing case in which the Court refused to pierce the veil and preferred to provide a remedy outside of company law (on equitable grounds). In so doing, their Lordships left the principle in *Salomon* intact, and at the same time, provided a remedy which achieved justice in the case at hand.

Unfortunately, the Court did not make a clear distinction between these two types of veil-piercing. However, the distinction is implied and what can be deduced from the case is that forward piercing cases are subject to the principle in *Salomon* and the circumstances within which the rule can be applied are severely limited to cases in which "a person is under an existing legal obligation or liability ... which he deliberately evades ... by interposing a company under his control".<sup>90</sup> On the other hand, remedies in backward piercing cases such as *Prest* are best sought outside of the rule. It is worth emphasising that cases such as *Gilford* and *Lipman* are backward piercing cases because, as in *Prest*, the claimants were seeking a remedy against the company for wrongful acts committed by the defendants. The Supreme Court's intention in *Prest* was that these remedies are obtainable outside the veil-piercing rule. In addition, one might venture to deduce that this implies that backward piercing cases are really not veil-piercing cases at all. However, cases in this category have been decided on veil-piercing rules with unpredictable results. A clear distinction between the two types of piercing might have alleviated the confusion and unpredictability of the law in this area. It is hoped that the distinction made by Lady Hale at [92] in *Prest* will provide an opportunity for the courts in future cases to develop the distinction between the two types of piercing and thus provide much needed clarity in the law.

Dr Edwin Mujih

London Metropolitan University

03 Sep. 16

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<sup>89</sup> As observed by Sealy and Worthington, statutory interventions to impose liability on defaulting directors do not ignore the company's separate personality. The liability imposed is additional to that of the company. Sealy and Worthington, *Cases and Materials in Company Law*, 9<sup>th</sup> ed. (Oxford: Oxford University Press 2010), p. 55.

<sup>90</sup> [2013] 2 A.C. 415, per Lord Sumption at [35].