

Piercing the Corporate Veil as a Remedy of Last Resort after *Prest v Petrodel Resources Ltd*: Inching towards Abolition?

Dr Edwin C. Mujih*

Abstract

This article analyses the veil-piercing rule in the light of the June 2013 decision of the Supreme Court in *Prest v Petrodel Resources Ltd*. The article examines many issues relating to the rule and the corporate personality doctrine. The article seeks to determine whether the Supreme Court clarified the rule in the case and concludes from an examination of the literature that the court clarified some but not all issues relating to the rule. The overriding theme of the article is the future applicability of the rule (and in this regard, it is probably one of the first articles to examine post-*Prest* cases, decided mainly by the Court of Appeal). On this, it is concluded that while the court came close to abolishing the rule, post-*Prest* cases show that the distinction between the concealment and evasion principle which is parallel with the piercing and lifting distinction in the case may lead to the continuous avoidance of the *Salomon* principle in the absence of clarifications on these distinctions.

Key Words

- Piercing/lifting the corporate veil
- *Prest v Petrodel Resources Ltd*
- *Salomon v A. Salomon*
- Corporate personality
- *Gilford Motors v Horne*

Introduction

In a landmark judgment delivered on 12 June 2013 in the case of *Prest v Petrodel Resources Ltd and Others*¹, the United Kingdom Supreme Court (UKSC) reviewed the law relating to piercing the corporate veil. The case is of great significance. It intersects two main areas of law, that is, company law and family law and addresses, or perhaps settles, the long-running conflict between these two areas of law about the circumstances in which it is possible to attack in a divorce assets held in a corporate structure². Lawyers in both subject areas had anxiously awaited the judgment. Equally noteworthy is the relationship between the veil-piercing rule and the concept of limited liability, (which is a consequence of the fundamental company law principle of separate legal personality) although as we shall see later the exact relationship between the veil-piercing rule and limited liability is still debatable. Thus, the relationship between the veil-piercing rule and limited liability means that the Supreme Court's decision inevitably impacted on the fundamental principle of separate legal personality.

The case involves an application by Mrs Prest for financial relief ancillary to a divorce. She 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 question before the court was whether the court had the power to order the transfer of the properties to the wife given that they legally belonged not to her husband but to his companies. The court considered three legal bases on which such a transfer might be ordered: (i) by piercing the corporate veil in order to give effective relief, (ii) transfer under section 24 of the Matrimonial

*Senior Lecturer in Business Law, London Metropolitan University, London.

¹ [2013] UKSC 34

² Shepherd, N., Case Comment "*Petrodel v Prest: Cheat's Charter or Legal Consistency?*" *Private Client Business* [2013], 1, 40-42

Causes Act 1973 and (iii) transfer on the ground that the properties belong beneficially to the husband by virtue of the circumstances in which they came to be vested in the companies. At first instance, the Family Division court concluded that in the absence of any impropriety, there was no general principle of law which entitled the court to reach the companies' assets by piercing the corporate veil. However, the judge, Moylan J., held that in a case such as this where the wife was seeking financial relief ancillary to a divorce, the court had the power to pierce the corporate veil under section 24 of the 1973 Act. The Court of Appeal reversed the decision with Patten L.J. warning that the practice whereby Family Division judges applied rules not relevant to English property and company law when dealing with company-owned assets in ancillary relief applications "now had to cease." On appeal to the Supreme Court, their Lordships held that Mrs Prest's appeal could succeed on the third basis, that is, that the properties were acquired and held by the respondent companies on trust for the husband, but it was dismissed in so far as it relied on piercing the veil of incorporation or on section 24(1) of the Matrimonial Causes Act 1973.

The aim of this paper is to analyse the law on lifting the corporate veil in the light of the Supreme Court's decision in *Prest v Petrodel Resources Ltd* with a view to determining whether the decision is a step towards the abolition of piercing the corporate veil doctrine. The case provides a framework for an examination of a number of issues relating to the veil-piercing rule. These issues will be examined below in order to meet the aim of this paper.

Criticisms of the Rule and Doubts over its Existence: A Redefinition

Criticisms of the Rule

Despite its long, albeit somewhat chequered, history the veil-piercing rule has been criticised and its existence even questioned by the judiciary and academic writers alike on both sides of the Atlantic Ocean. Easterbrook and Fischel have observed that “piercing seems to happen freakishly. Like lightning, it is rare, severe and unprincipled.”³ Professor Stephen Bainbridge echoes Easterbrook and Fischel’s sentiments and describes veil piercing as unjustifiable, unprincipled, rare and arbitrary and goes as far as advocating its abolition.⁴ Part of the problem with the doctrine is its *raison d’être*. The doctrine exists as an exception to the general rule of limited liability, in order to prevent injustice. Consequently, the application of the doctrine has always been fact specific and open-ended.⁵ Similar criticisms have been made by Professor Millon who observes that the rule is notoriously incoherent and results unpredictable.⁶ Writing in 2001, Huss noted that the application of the rule is so seriously flawed that the time has come to reconsider its use.⁷ As far back as 1946, Professor Ballentine observed that “the formulae invoked usually give no guidance or basis for understanding the results reached”.⁸ As observed by Professor Strasser, the core charge is that the rule “is expressed at such high level of

³ Para 77, quoting Easterbrook and Fischel, p. 89, *infra*.

⁴ Bainbridge, S., “Abolishing Veil Piercing” [2000], http://papers.ssrn.com/paper.taf?abstract_id=236967. p. 1. Bainbridge argues that the standards by which veil piercing is effected are vague, leaving judges great discretion. The result has been uncertainty and lack of unpredictability, increasing transaction costs for small business, p. 3. He further argues that veil-piercing cases are highly fact-specific; that successful veil piercing claims differ only in degree, but not in kind from unsuccessful claims, pp. 36-37.

⁵ Cheng, T., “The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines” [2011] 34 *Boston College International and Comparative Law Review*, 329-412, 330-1. Hereinafter cited as “Cheng, 2011”

⁶ Millon, D., “Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability” (2007) 56 *Emory L.J.* 5, 1305 – 1382, 1305.

⁷ Huss, R.J., “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, at 96.

⁸ Ballantine, H.W., *Ballantine on Corporations*, 1946. Quoted in Strasser, K., “Piercing the Veil in Corporate Groups” [2005] 37 *Connecticut L.R.* 637, p. 641.

abstraction that decisions in individual cases are in fact highly discretionary with the courts.”⁹ However, one commentator who has come out in defence of the rule is Professor Kurt Strasser¹⁰. He argues that criticisms of the rule are exaggerated – that if the rule was so bad, the courts would long have abandoned it. And, as will be seen later, the UKSC came close to doing so in *Prest*.

Face with such a barrage of criticisms, it was interesting to see how the highest court in the country would deal with the rule when the opportunity arose. And, the opportunity did arise in 2003 - not once. But like London buses, the opportunity to consider the rule suddenly came before the UKSC twice that year after a long wait; first in *VTB Capital plc v Nutritek International Corp*¹¹ and a few months later in the *Prest* case. Rarely does the Supreme Court have the opportunity to consider, in such quick succession, a rule (intersecting two key areas of law) that has faced mounting criticism from both academic writers and the judiciary. Did the Supreme Court disappoint? This question underlies the discussion in this paper of the various issues relating to the rule. In the *Prest* case the Supreme Court echoed these criticisms in reaching its decision¹² with Lord Neuberger observing that “it is also clear from cases and academic articles that the law relating to the doctrine is unsatisfactory and confused.”¹³ He agreed with critics of the rule such as Easterbrook and Fischel that the rule is unprincipled. Earlier in the judgment, Lord Sumption said that piercing the corporate veil is an expression used indiscriminately to describe a number of different things.¹⁴ Lord Walker agreed with him, stating that it “is not a doctrine at all in the sense of a coherent principle or rule of law. It is

⁹ Strasser, K., “Piercing the Veil in Corporate Groups” [2005] 37 *Connecticut L.R.* 637, p. 641.

¹⁰ Strasser, K., “Piercing the Veil in Corporate Groups” [2005] 37 *Connecticut L.R.* 637, p. 650.

¹¹ [2013] UKSC 5, para 123.

¹² See in particular paragraphs 75-77.

¹³ Para 64.

¹⁴ Para 16

simply a label.”¹⁵ In *VTB Capital plc v Nutritek International Corp*¹⁶, Lord Neuberger observed that the obscure nature of the rule provides support for the claim that it is unprincipled. It is interesting to see not only how their Lordships dealt with the rule beyond acknowledging the criticisms in the *Prest* case, but also how the rule has fared after *Prest*.

Critics find problems not only with the operation of the rule but with the semantics associated with it as well and this has contributed in no small way to the controversy surrounding the rule. Professor Christopher Nicholls notes that the phrase “piercing the corporate veil”, which has been used by the courts in a number of distinct contexts, is analytically vague.¹⁷ As seen above, Lord Sumption made similar remarks in the *Prest* case about the indiscriminate use of the phrase. Earlier in *The Tjaskemolen*¹⁸ Clarke J observed “rightly” according to Lord Neuberger in the *VTB Capital plc v Nutritek* case that “the cases have not worked out what is meant by ‘piercing the corporate veil’. It may not always mean the same thing”. The lack of consensus among the judiciary of the true meaning of the phrase “piercing the corporate veil” is compounded by the interchangeable use of the phrase with “lifting the veil”, although in *Yukong Line Ltd of Korea v Rendsberg Investments Corp of Liberia (No 2)*¹⁹, Toulson J observed that it may not matter what language is used as long as the principle is clear. And, in *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)*²⁰ Staughton LJ expressly separated the two on the basis that “piercing is reserved for treating the rights or liabilities or activities of a company as the rights or liabilities of its shareholders, whereas lifting is to have regard to the shareholding in the company for some legal purpose.” As seen

¹⁵ Para. 106.

¹⁶ [2013] UKSC 5, para 123.

¹⁷ Nicholls, C., “Piercing the Corporate Veil and the “Pure Form” of the Corporation as Financial Innovation” [2008] 46 *Can. Bus. L.J.* 233 – 268, 238-9. Hereinafter referred to as “Nicholls, 2008”.

¹⁸ [1997] 2 *Lloyd’s Rep* 465, 472.

¹⁹ [1998] 1 *WLR* 294, 305

²⁰ [1991] 4 *All ER* 769, 779G

later, this distinction which the Supreme Court appears to have adopted in *Prest* has far-reaching consequences on the future of the veil-piercing rule.

Although “piercing or lifting the veil” is the common nomenclature used in England, “veil” is only one of many metaphors used by the courts.²¹ Other labels, which according to Nicholls are regularly recited but rarely explicated by the courts²² include “cloak”, “alter ego”, “agent”, “mask”, “cloak”, “device”, “dummy”, “sham” and “puppet”. In *Ben Hashem v Al Shayif*²³, Munby J said the expressions are synonymous. In the *VTB Capital plc* case, Lord Neuberger observed that these expressions may be useful metaphors, however, expressions are often dangerous as they risk assisting moral indignation to triumph over legal principle, “and while they may enable the court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law.”²⁴

Ottolenghi questions whether such labels help us or they divert attention from the real substance.²⁵ He refers to a much-quoted statement by New York Court of Appeals Judge Cardozo, in which he said “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”²⁶ According to Ottolenghi, the blanket use by the courts of the term “veil” as a metaphor in various circumstances without distinguishing between the individual cases adds to the confusion.²⁷ Peter Oh laments that “the inherent imprecision in metaphors has resulted in a doctrinal mess.”²⁸ Further problems with

²¹ Ottolenghi, S., “From Peeping Behind the Veil, to Ignoring it Completely” [1990] 53 *Mod. L. R.* 338-353, at 339. Hereinafter referred to as “Ottolenghi – 1990”.

²² Nicholls, 2008, p. 240-241.

²³ [2009] 1 FLR 115, at para 150

²⁴ [2013] UKSC 5, para. 124.

²⁵ Ottolenghi, p. 339.

²⁶ *Berkey v Third Avenue Ry* 155 N.E. 58, 61 (1926). Justice Cardozo’s statement was also quoted by Lord Neuberger in the *Prest* case para. 78.

²⁷ Ottolenghi, 339.

²⁸ Oh, P., “Veil-Piercing” [2010] 89 *Texas L.Rev.* 81, 84. Quoted in *Prest*, para 77. He further laments more recently, that the doctrine which started as a means for creditors to reach into the personal assets of a shareholder has devolved into a doctrinal black hole. He posits vis-à-vis limited liability that veil-piercing is

terminology are identified by Professor Gelb who observes that the terminology used by courts does little to explain the basis of a court's decision.²⁹ Daniel Prentice describes the word “façade”, which the Court of Appeal in *Adams v Cape Industries Plc*³⁰ stated that it is the only ground on which it would pierce the corporate veil, as a word of no real clear meaning.³¹

The numerous labels used by the courts are aimed at identifying the relevant wrongdoing for which the principle of separate legal personality is being abused. In *Prest*, Lord Sumption stated that the labels embody two distinct principles and acknowledged that much confusion has been caused by failing to distinguish them. He called them the concealment principle and the evasion principle.³² It goes without saying that the absence of a clear label clearly adds to the confusion surrounding the veil-piercing rule.

Does the Rule Exist?

Not only has the rule been criticised, but its existence has been questioned. Although Lord Sumption acknowledged the existence of the principle³³ in the *Prest* case, the extent to which their Lordships went to redefine the rule at the same time placed doubts on its existence. Lord Neuberger did not take for granted that the rule exists. He expressed the need in “seeking to decide whether it exists and if so to identify some coherent, practical and principled basis for it.”³⁴ Lord Sumption noted that in strict terms, piercing the corporate veil would only apply as

“misapplied because it is misconceived.” Oh, P., “veil-Piercing Unbound” [2013] 93 *Boston University Law Rev.* 89-137, 91.

²⁹ Gelb, H., “Limited Liability Policy and Veil Piercing” [2009] 9 *Wyoming L. Rev.* 2, 551 – 573, at 555.

³⁰ [1990] 1 Ch. 433

³¹ Prentice, D., “Some Aspects of the Law Relating to Corporate Groups in the United Kingdom” [1999] 13 *Conn. J. Int'l L.* 305-328, at 319

³² Paragraphs 27 and 28.

³³ [2013] UKSC 34, para 27.

³⁴ Para. 65

an exception to the rule in *Salomon v Salomon*³⁵ where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control. Other methods that the courts have used to attribute the acts of a company to the controller such as agency and trust are not veil-piercing cases.³⁶ His Lordship observed that unlike other legal systems, English law has no general principle permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations. The result, in English law, is achieved through a variety of specific principles used in some cases.³⁷

This redefinition of the rule led the Supreme Court to observe that most cases in which the corporate veil was pierced could have been decided on other grounds and that these were not really veil-piercing cases.³⁸ Their Lordships observed that the grounds on which the rule was invoked in these cases are inappropriate. Lord Sumption reviewed *Gencor ACP Ltd v Dalby*³⁹ in which the judge held that, Burnstead, a nominee company controlled by the defendant, Mr Dalby, was simply his alter ego through which he paid secret profit made from his position as a former director of the claimant company. Although the judge considered that he was piercing the corporate veil, Lord Sumption believed that he was not and that both Mr Dalby and Burnstead were independently liable to account to the claimant company as distinct legal persons.⁴⁰ A similar review of the case of *Trustor AB v Smallbone (No 2)*⁴¹ led to the conclusion that the decision in the case did not involve piercing the corporate veil but could be explained on the basis of agency. Their Lordships stated that concealment cases such as *Gilford*

³⁵ [1897] AC 22.

³⁶ [2013] UKSC 34, para. 16.

³⁷ *Ibid*, paragraphs 17 and 18.

³⁸ *Prest* [27]

³⁹ [2000] 2 BCLC 734

⁴⁰ [31]

⁴¹ [32]

*Motor Co v Horne*⁴² and *Jones v Lipman*⁴³ which had been recognised as veil-piercing cases do not involve piercing the corporate veil at all.⁴⁴ Lord Neuberger felt that the application of the doctrine in the *Jones* case was unnecessary.⁴⁵ Regarding *Gilford Motor*, he observed that there is nothing in the judgments to suggest that any member of the Court of Appeal thought that he was “cutting into the well-established and simple principle laid down in *Salomon*.”⁴⁶ Lord Neuberger restated his view expressed a few months earlier in the *VTB Capital*⁴⁷ case that the decision in *Gilford Motor* was not based on piercing the corporate veil. He took the view that the decision that an injunction should be granted against the company, JM Horne and Co Ltd, was justified on the agency principle under which an injunction would have been justified both against Horne and against the company.⁴⁸ His Lordship surmised that the use of the expression ‘cloak or sham’ by the Court of Appeal suggested a principal and agent relationship between Horne and the company.⁴⁹ He went as far as to say that there is not a single case in England in which the doctrine has been invoked properly and successfully.⁵⁰

A major reason for the view that *Gilford Motors* 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

⁴² [1933] Ch 935. In that case, Horne entered into a contract in restraint of trade not to compete with his employers, Gilford Motor. He formed a company which acted in breach of the contract. The Court of Appeal held that the company was a mere sham to cloak the breach and issued an injunction against him and the company as well even though he was neither a member nor a director of the company.

⁴³ [1962] 1 WLR 832

⁴⁴ *Prest* [29, 30, 61, 69-71]. Lord Neuberger said at para 61 that “cases concerned with concealment do not involve piercing the corporate veil at all.” This would include cases such as *Gilford Motor* and *Jones* which Lord Sumption classified as concealment cases [29 and 30]. Lord Sumption said the injunction against Mr Horne in *Gilford Motor* and the specific performance against Mr Lipman and his company in the *Jones* case were all granted on the concealment principle.

⁴⁵ [73]

⁴⁶ [71]

⁴⁷ Para. 134.

⁴⁸ [71]

⁴⁹ [72]

⁵⁰ [64]

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 veil-piercing and backward piercing. *Gilford* is a backward piercing case and the difficulties of recognising such cases as veil-piercing cases is based on this non-recognition, compounded by the fact that the veil-piercing rule was developed in and perhaps for forward piercing cases, hence does not easily fit into backward piercing cases nor satisfy their oddity.

Prest is not the first case in which the courts have doubted the applicability of the veil piercing rule in previous cases. In the *Yukong* decision, the court doubted whether many of the cases which are viewed as exceptions to *Salomon* could really be classified as such. Instead it similarly felt that there was really no need to lift the veil as the cases presented situations where the statute, contract or doctrine in question was wide enough to embrace the company and its shareholders, as in *Gilford Motor*⁵¹.

Not only did the Supreme Court seek to re-define the rule, but their Lordship went as far as casting doubts on the existence of the doctrine. Lord Neuberger's speech is instructive in this regard. After observing that the rule has never been successfully invoked in England he

⁵¹ Prentice, D., op cit, p. 321.

went on to say there is doubt as to whether the doctrine should exist, adding that there is value in seeking to decide whether the doctrine exists.⁵² He further said at paragraph 68 that the application of the doctrine to family cases ‘even if it exists’ is unsound.

The Veil-Piercing Trajectory from *Salomon* to *Prest*: Dissecting the Limited Liability and Veil-Piercing Relationship

A brief consideration of the veil piercing history is necessary for present purposes, particularly given that in *Prest*, the Supreme Court discussed cases where the courts have considered piercing the veil. The veil piercing rule cannot be discussed in isolation of the doctrine of limited liability which is itself an upshot of corporate personality, a cornerstone principle in company law⁵³. Corporate personality is inextricably⁵⁴ connected with the case of *Salomon v A. Salomon & Co Ltd*. In that case, the House of Lords (now the Supreme Court) firmly affirmed the primacy of separate corporate personality and limited liability. Although the concept of limited liability was a statutory invention which pre-dated the *Salomon* case⁵⁴, its affirmation by the House of Lords in *Salomon* was a milestone as it settled or so it seems the controversy, indeed opposition, which had existed hitherto regarding its application to “one-man companies”⁵⁵. However, this opposition to the statutory concept of limited liability with regard to one-man companies in particular was not laid to rest with the House of Lords’ decision in *Salomon*. Like the phoenix in Greek mythology, it re-emerged after *Salomon* in the form of exceptions to the case allowing the court to pierce the corporate veil for varied reasons first with regards to one-man or closely held companies and later in respect of large companies.

⁵² [64, 65].

⁵³ See, contra, Nicholls – 2008. Nicholls argues that the principle of limited liability is separate from corporate personality. The principle has been described by Lord Templeman as the unyielding rock on which company law is constructed. L. Templeman; “Forty Years On” (1990) 11 *Co. Law*. 10.

⁵⁴ It was granted by the Limited Liability Act 1855.

⁵⁵ For a brief discussion of the early opposition to the concept of limited liability see; Cheng, 2011 pp 335 et seq, op cit.

Despite its merits, the veil-piercing rule attenuates the effectiveness of limited liability (a concept enshrined in the Limited Liability Act 1855) which as mentioned earlier is a consequence of the fundamental principle of corporate personality. This is the pith of the debate on whether or not to pierce the corporate veil and is what both the judiciary and academic writers have grappled with. But the debate has gone even further with some advocating, on the one hand, the abolition of the veil-piercing rule⁵⁶ and others advocating, on the other hand, the abolition of limited liability in some areas.⁵⁷ In which of these opposing directions did the UKSC gravitate in *Prest*? This debate among academic commentators and in the judiciary is examined briefly below in the light of the UKSC decision in *Prest*, mainly in the context of the effects of veil piercing on corporate personality.

The Effects of Veil-Piercing on Corporate Personality - Academic

It is clear that veil piercing limits the operation of the concept of limited liability. But the position is less straightforward when corporate personality, that is, the doctrine from which limited liability is generally thought to derive comes into play. This is because although limited liability is generally regarded as a corollary of the doctrine of corporate personality, there are views to the contrary. For example, Christopher Nicholls postulates that limited liability is a distinct concept from corporate personality, conceptually, historically and as a matter of company law statute.⁵⁸ According to him, limited liability is not “merely the product of the court’s interpretation of the scope of the doctrine of separate legal [corporate] personality.”⁵⁹

⁵⁶ For example, Stephen Bainbridge advocates the abolition of veil-piercing in Bainbridge, S., “Abolishing Veil-Piercing” (2000) http://papers.ssrn.com/paper.taf?abstract_id=236967. (Hereinafter referred to as “Bainbridge 2000”).

⁵⁷ Professors Henry Hansmann and Reiner Kraakman argue in favour of the elimination of limited liability with respect to tort claims so as to force investors to internalise those risks. Hansmann, H., and Kraakman, R., “Toward Unlimited Liability for Corporate Torts” [1991] 100 *Yale L.J.* 1879. Cited in Bainbridge 2000, op cit p. 22.

⁵⁸ Nicholls – 2008, p. 251-257.

⁵⁹ *Ibid*, p. 256.

He argues that shareholders did not enjoy limited liability in the earliest general incorporation statutes in England. It was not regarded as a *sine qua non* of incorporation.⁶⁰ He claims that any presumed link between the twin concepts of limited liability and traditional incorporation has been severed.⁶¹

The question for consideration is what is the effect on veil piercing of either treating limited liability as a consequence of corporate personality or as a distinct concept from it? It has been seen above that veil piercing limits the operation of limited liability, although it has been argued that if veil piercing is applied with proper reluctance, it does not subvert limited liability policy.⁶² If the widely held view that limited liability is a consequence of corporate personality is maintained, veil piercing will by implication impact the fundamental principle of corporate personality. It will gradually erode corporate personality. This is because every time the court pierces the veil, it is violating this principle and treating the controlling shareholder as the same person as the company.⁶³ In this regard, it would appear that the effect of the Supreme Court's reluctance to pierce the corporate veil in *Prest* is to uphold the fundamental principle of corporate personality. Or is it the case that it was in recognition of the fact that limited liability is not only a consequence of this fundamental company law principle but that veil piercing impacts on it as well that the Supreme Court avoided piercing the corporate veil in *Prest* and sought other ways to arrive at a just outcome?

⁶⁰ Ibid, p. 253. He argues that limited liability developed separately from corporate personality and is not an offshoot of the courts' interpretation of the scope of the doctrine of corporate personality, pp. 255-256.

⁶¹ Ibid, p. 236.

⁶² Gelb, H., "Limited Liability Policy and Veil Piercing" (2009) 9 *Wyoming L. Rev.* 2, 551 – 573, p. 568. To buttress his argument that veil piercing does not subvert limited liability, Professor Gelb observes that the threat of veil piercing encourages lawyers to advise their clients to follow proper business practices.

⁶³ However, Glynn has noted the inadequacies of veil piercing theories as a vehicle for extending liability to shareholders given the unpredictability, inconsistencies and unprincipled nature of veil piercing. Glynn, T.P., "Beyond "Unlimited" Shareholder Liability: Vicarious Tort Liability for Corporate Officers" [2004] 57 *Vanderbilt L. Rev.* 2, 329, at 333 and 349.

Not only is the interrelation between veil piercing and limited liability widely recognised, but the confused state of the law on veil piercing has been blamed on a lack of understanding of the policy basis of limited liability.⁶⁴ However, veil piercing would appear to have no direct effect on corporate personality under the view that limited liability is distinct from corporate personality. Thus, under this view, the courts can pierce the veil without any concern of disturbing the principle of corporate personality.

The lack of consensus on the relationship between limited liability and corporate personality is not surprising, given that limited liability has itself elicited as much criticism as praise. For example, in its early days it was described by one commentator as the greatest single discovery of modern times surpassing even steam and electricity. On the other hand, it has been attacked as a mode of swindling and a fraud on the honest and confiding part of the public.⁶⁵ Our perception of limited liability might in turn shape our perception of veil piercing. Accepting the latter view that limited liability is a fraud would lead to a welcome reception to veil piercing and indeed its indiscriminate use as a legitimate weapon to quell the perceived fraud that limited liability is. On the other hand, accepting the former view might have one of two effects on the veil piercing rule. In one sense, it might lead to hostility towards the rule as veil piercing would be seen as a threat to this perceived greatest discovery of modern times. Alternatively, the former view might see veil piercing as nothing more than a necessary weapon to prevent the sanctity of limited liability from abuse.

It can be gleaned from the forgoing that the effect of veil-piercing on corporate personality is not entirely clear because of the apparent lack of consensus in the academic circle on the relationship between limited liability and corporate personality. However, in the reverse,

⁶⁴ Millon, D., "Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability" (2007) 56 *Emory L.J.* 5, 1305 – 1382, 1307.

⁶⁵ Matheson, J.H., "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.* 1091-1156, at 1093.

it appears to be the case that corporate personality has shaped, indeed contributed in no small way to the aforementioned problems bedeviling the veil-piercing rule. Corporate personality is an artificial legal construct which encapsulates our understanding of the nature of the corporation. This artificial legal construct bequeaths the problems arising from its artificial nature to any rule remotely connected to it such as veil-piercing. Using a contractual exposition, Easterbrook and Fisher postulate that limited liability takes on the fictitious nature of the corporation which has no existence independent of the contractual relationships between the various corporate stakeholders. In essence “the liability of the corporation is limited by the fact that the corporation is not real.”⁶⁶ They argue that limited liability is not unique to companies. It applies equally to partnerships in the sense that a creditor is not required to contribute additional capital to a partnership whose liabilities has exceeded it’s assets.⁶⁷ They, essentially, question why shareholders should enjoy the protection of limited liability when the other providers of capital to the company, such as lenders, have no such protection.⁶⁸ Indeed, a common criticism of limited liability is the social cost it imposes particularly in respect of tort claimants who have no opportunity of protecting themselves by bargaining with the company.⁶⁹

A similar attack on limited liability which seeks to limit its operation is made by Hansmann and Kraakman. They argue in favour of the elimination of the doctrine in respect of

⁶⁶ Easterbrook F.H., and Fischel, D.H., “Limited Liability and the Corporation” [1985] 52 *U. Chi. L. Rev.*, 89-117, at 89.

⁶⁷ *Ibid*, p. 90.

⁶⁸ *Ibid*. Similar arguments have been advanced by Glynn in relation to limited liability partnerships in the USA. He argues that shareholders are not the only firm participants who enjoy limited liability. That other stakeholders like employees, creditors, etc, risk only their investment in the firm. “Unlimited” Shareholder Liability: Vicarious Tort Liability for Corporate Officers” [2004] 57 *Vanderbilt L. Rev.* 2, 329, at 340-341. It is worth asking if veil-piercing addresses this apparent imbalance. It is suggested that the imbalance is not real as other providers of capital such as lenders can protect themselves in contract in addition to the protection they already enjoy in insolvency rules and other statutory protections.

⁶⁹ Glynn, T.P., “Unlimited” Shareholder Liability: Vicarious Tort Liability for Corporate Officers” [2004] 57 *Vanderbilt L. Rev.* 2, 329, at 330-331. Cites Professor Nina Mandelson “A Control-Based Approach to Shareholder Liability for Corporate Torts” [2002] 102 *Colum. L. Rev.* at 1203 who argues that limited liability increases social cost and encourages excessive risky activities, at 332.

tort claims in order to force investors to internalise risk.⁷⁰ This would have a veil-piercing effect in respect of these type of claims. If limited liability were to be restricted in its operation, piercing the corporate veil would be a useful tool for achieving that result. But from the other end of the spectrum, critics have been influenced perhaps not so much by the damage this veil piercing tool is doing to the fundamental doctrine of corporate personality as by the fact that it is dysfunctional and the arbitrary use of the tool to call for its abolition.⁷¹ Similarly, Millon advocates that limited liability should not be so broad as to protect illegitimate behaviour.⁷² In respect of contract creditors, he suggests that the availability of limited liability should depend on whether the controlling shareholders have managed the business in a financially responsible manner.⁷³

The vexed nature of the debate means that rejoinders are inevitable. For example, Stephen Bainbridge while advocating for the abolition of the veil-piercing rule on the other hand, takes issue with Hansmann and Kraakman's proposal for the elimination of limited liability in respect of tort claims. Hansmann and Kraakman limit this proposal to shareholders. And for Bainbridge, this singling-out of shareholders to effectively make them personally liable for tort claims against the company is a problem. He ceases upon the nexus of contract premise used by Hansmann and Kraakman for their proposal to ask why other constituents in this nexus such as creditors, employees and managers are not liable as well. Shareholders, he posits, are simply one of numerous different sets of inputs and the fact that they hold an equity stake in the company is no answer to the question, as ownership is not a meaningful concept in nexus of contracts theory. But Bainbridge's views have not escaped criticisms. Millon takes issue with his postulation that the law of fraudulent misrepresentation and fraudulent conveyance

⁷⁰ Hansmann and Kraakman, *op cit*, cited in Bainbridge, 2000, p. 26.

⁷¹ Bainbridge, "Abolishing Veil-Piercing" (2000) *op cit*.

⁷² Millon, *op cit*, p. 1307.

⁷³ Millon, p. 1308.

provide sufficient safeguard against abuse of limited liability thereby making the need for veil piercing unnecessary. Millon argues that the law of fraud offers inadequate protection to victims in some cases; it would not reach all of the cases in which shareholders have used limited liability in ways that offend public policy.⁷⁴

The Veil-Piercing Trajectory - Judiciary

It is no doubt in cognisance of the effect of veil-piercing on limited liability that the courts have approached veil-piercing cautiously and have sought to limit its use. This appears to have been an overriding concern of their Lordships in *Prest*. In every case in which the issue of piercing the corporate veil arises, the court has to balance the need to uphold the core principle of corporate personality and the need not to allow the principle to be abused. In other words, the courts will be reluctant to apply the rule if to do so will lead to a manifestly unjust outcome.⁷⁵

The need to balance these competing interests has contributed to the chequered history of the rule in English courts. As observed by Cheng, “the attitude of the English courts toward the rule has oscillated from enthusiasm to outright hostility”.⁷⁶ Cheung divides the history of the doctrine into three periods. The first lasting from the *Salomon* case until around the second world war – a period which he terms the experimentation period, being the period when English courts experimented with different approaches to the doctrine. The second period began after the second world war until the case of *Wolfson v Strathclyde Regional Council*⁷⁷ in 1978 – a period during which the rule enjoyed tremendous success. During this period, the courts

⁷⁴ Millon, pp. 1358-9.

⁷⁵ Moore, p. 182.

⁷⁶ Cheng, T. K., (2011) “The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines” 34 *Boston College International and Comparative Law Review*, 329, p. 334.

⁷⁷ (1978) S.C. (H.L.) 90.

demonstrated great flexibility towards the corporate personality principle, as seen in the case of *D.H.N. Food Distributors Ltd v Tower Hamlets L.B.C.*⁷⁸ where Lord Denning warned against blind adherence to the principle in *Salomon*. The third period begins with the *Woolfson* case and continues until present. This period has seen the rule fall into disfavour, with the courts adopting a cautious approach to the veil-piercing rule.⁷⁹

Overall, the general approach of the courts have been to formulate exceptions to the *Salomon* principle on a piecemeal basis to prevent manifestly unjust outcomes. These include the agency exception which was propounded by Atkinson J. in the case of *Smith, Stone and Knight v Birmingham Corp*⁸⁰ where the judge identified six guiding questions in determining whether a subsidiary company can be said to be carrying on business on behalf of its parent company which would justify piercing the corporate veil. Another exception which the courts have used to pierce the veil is the fraud exception. This exception gained currency in the first half of the twentieth century and was used in cases such as *Gilford Motors v Horne* and *Lipman v Jones*. In *Lazarus Estates Ltd v Beasley*⁸¹, Lord Denning clearly stated that “No court in this land will allow a person to keep an advantage which he has obtained by fraud... Fraud unravels everything.”

Lord Denning sought to expand the veil-piercing rule by using the ‘single economic unit’ exception in the case of *DHN Food Distributors v Tower Hamlets LBC*⁸². In that case, he treated a group of companies as a partnership in which all the “companies are partners”. But this approach was quickly criticised by the House of Lords in the *Woolfson* case. In that case,

⁷⁸ [1976] 1 W.L.R. 852 (A.C.). Lord Denning’s reasoning in this case has come under severe criticisms. In the case, Lord Denning compared a group of companies to a partnership and held that a parent company could claim compensation for disturbance of business even though the business and the land on which it sat were owned by different corporate entities.

⁷⁹ Cheng, pp. 334-5.

⁸⁰ [1939] 4 All E.R. 116 (K.B.).

⁸¹ [1956] 1 QB 702, 712

⁸² [1976] 1 W.L.R. 852; Moore, M., (2006) “A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*” *J.B.L.* 180, p. 182.

their Lordships sought to restrict the operation of the veil-piercing rule with Lord Keith stating that the veil should be pierced “only where special circumstances exist indicating that it is a mere façade concealing the true facts.” This affirms fraud as a main ground for piercing the corporate veil. Lord Keith’s dictum in *Woolfson* was adopted by the Court of Appeal in the *Adams v Cape Industries plc* case in which the Court of Appeal stated that the corporate veil could be disregarded only in cases where it was being used for a deliberately dishonest purpose. Slade LJ said; “the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* merely because it considers that justice so requires.”

It is worth noting that the concept of piercing the veil is, largely, subject specific and limited in scope. In the recent Appeal Tribunal case of *Exmoor Coast Boat Cruises Ltd v The Commissioners for Her Majesty's Revenue & Customs*⁸³, the Judge, Barbara Mosedale attributed the human rights of the sole owner of the company to the company, holding that while the Supreme Court reaffirmed the legal boundaries between a company and its owner in *Prest*⁸⁴, the veil-piercing rule does not apply to the question of whether a company has human rights. Such a question must be answered by reference not to English common law but the European Convention on Human Rights incorporated into English law by the Human Rights Act 1998.

The Family Law and Company law Conflict

Veil-piercing cases are not limited to company law only. They also arise in different context, particularly in the area of family law. One problem highlighted by the *Prest* case is the conflict between family law and company law in veil-piercing cases. Such conflict arises in claims for

⁸³ [2014] UKFTT 1103 (TC)

⁸⁴ See Lord Sumption’s speech in *Prest*, para. 8.

financial relief ancillary to a divorce where assets are vested in a company controlled by one of the parties to the marriage, as in *Prest*. Herein lies the nexus between family law and company law in veil-piercing cases. A nexus that has often given rise to conflict between the Family Division of the High Court which hears family cases and the Chancery Division which hears company cases. Unlike judges in the Chancery Division, judges in the Family Division have, generally, shown a willingness to extend the veil piercing rule and pierce the veil under section 24 of the Matrimonial Causes Act 1973.⁸⁵ In *Prest*, Lord Sumption observed that the reason for this independent line pursued by the Family Division was its concern to make effective its statutory jurisdiction to distribute the property of the marriage upon a divorce.⁸⁶ Section 24(1)(a) provides that “the court may order that a party to a marriage shall transfer to the other party ... such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or in reversion.” It is in the exercise of the powers vested in the courts by this section that the Family Division has generally disregarded the limits placed on the operation of the veil-piercing rule by the other Divisions of the High Court and even the Court of Appeal. And to exercise this power, judges have advocated piercing the veil even where there is no wrongdoing. For example in *Kremen v Agrest (No 2)*,⁸⁷ Mostyn J held that there was a strong practical reason why the cloak should be penetrable even absent a finding of wrongdoing. However, the Court of Appeal has not always favoured the liberal approach of the Family Division. Patten L.J.’s warning in the *Prest* case to judges in the Family Division (seen earlier) is instructive. Furthermore, in *Nicholas v Nicholas*⁸⁸ the Court

⁸⁵ For example in *Nicholas v Nicholas* [1984] FLR 285, the judge ordered the husband to procure the transfer to the wife of a property belonging to a company in which he held a 71% shareholding, the other 29% being held by his business associates. In *Mubarak v Mubarak* [2001] 1 FLR 673, Bodey J went against the Court of Appeal’s proposition in *Adams v Cape Industries* by holding that in claims to ancillary financial relief, the Family Division would lift the veil not only where the company was a sham but “when it is just and necessary” to do so. In *Prest* itself, as seen earlier, the Family Division continued its liberal attitude towards the veil-piercing rule by piercing the corporate veil.

⁸⁶ Para. 23.

⁸⁷ [2011] 2 FLR 490, para 46. Cited in *Prest* para 23.

⁸⁸ [1984] FLR 285.

of Appeal overturned a first instance decision ordering the husband to transfer to the wife property belonging to a company in which he held a majority of the shares.

It is worth noting that not every Family Division decision followed the independent line. In *A v A*⁸⁹ and in *Ben Hashem v Al Shayif*,⁹⁰ Munby J warned against departing from fundamental legal principles, emphasising in the *A v A* case that the same principle applies to both Divisions. In the *Ben Hashem* case, he formulated six principles which effectively limited the instances of piercing the corporate veil. In *Prest*, Lord Sumption made it clear that section 24 does not give the family courts wider veil-piercing powers. The section only empowers the courts to order the transfer of property to which a spouse was “entitled, either in possession or reversion”. He stated that the entitlement referred to in section 24 is a legal right in respect of the property in question and that the concepts invoked in the section is recognised under the general law. Family courts are not to give them a different meaning.⁹¹ Property concepts are to be applied consistently across all three Divisions of the High Court.⁹²

The decision in *Prest* has been interpreted variedly, with some writers arguing that it clarified the law on veil-piercing and others arguing that their Lordships missed the opportunity to do so. However, a preponderance of observers are of the view that it settled the conflict between the Family Division and the other Divisions of the High Court in veil-piercing cases. Both family lawyers and company lawyers had anxiously awaited the Supreme Court’s decision in the case. As observed by Professor Hannigan, the interest of company lawyers in the case lies in what the court had to say on piercing the corporate veil.⁹³ While family lawyers waited to see how the court would respond to the Court of Appeal’s decision that family courts

⁸⁹ [2007] 2 FLR 467

⁹⁰ [2009] 1 FLR 115

⁹¹ Para. 37.

⁹² Hare, C., (2013) 72 *Cambridge L. J.* 3, 511-515, at 514.

⁹³ Hannigan, B., “Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company” [2013] 50 *Irish Jurist*, 11 – 39, at 18.

did not have wider veil-piercing powers under section 24(1) of the Matrimonial Causes Act 1973. Although the Supreme Court agreed with the Court of Appeal on the restrictions of the powers of family courts, its decision to allow Mrs Prest's appeal on the grounds of trust provided some relief to family lawyers. Onaran notes that family law practitioners greeted the Supreme Court's decision with relief as they had feared that a Supreme Court approval of the Court of Appeal's decision would result in more husbands seeking to hide their assets behind sham, artificial devices. The decision, she observes, also appeases corporate lawyers who had been nervous that the Supreme Court might follow the approach taken by judges of the Family Division.⁹⁴

In sum, it appears that *Prest* resolved the impasse between the Family Division and other Divisions of the High Court on when to pierce the veil to provide financial relief in a divorce where assets are held by a company controlled by one of the spouses. But the position is not so clear with regard to the general state of the law in this area, particularly in terms of what the outcome might be in specific cases, taking into account the availability of alternative remedies as the discussion below reveals.

Veil Piercing after *Prest*: Alternative Remedies Distinguished from Piercing the Veil on other Grounds

Although the Supreme Court reviewed the law on veil piercing in many areas in *Prest*, it is not easy to predict the general state of the law on veil piercing after the case. Within a few months of the decision, the case elicited a divergence of opinion on the question of whether their Lordships clarified the law or not. Matthews, argues vehemently that the court missed an opportunity to abandon a doctrine whose weaknesses it had itself acknowledged. He argues

⁹⁴ Onaran, L., "the Trust Behind the Veil" [2013] 5 *Private Client Business*, 273 – 280, at 273.

that either the veil piercing rule be clarified or it be abandoned and *Prest* did neither. According to him, abandoning the doctrine would not prevent justice being done as the courts have always circumvented it by other routes.⁹⁵ While acknowledging that *Prest* clarified certain issues, Hannigan similarly argues particularly in respect of the evasion and concealment distinction that post-*Prest* cases underline a lack of clarity in *Prest* on the distinction between piercing and lifting the veil. Using the Court of Appeal decision in *R v Sale*⁹⁶ where the court refused to *pierce* the veil on the evasion principle but then *lifted* it on the concealment principle, she argues that the case suggests merely change in terminology in *Prest* with the effect of undermining the *Salomon* principle.⁹⁷ Lim justifies the court for failing to clarify definitively the exceptional circumstances that would justify piercing the veil.⁹⁸ On the other hand, Onoran, takes the view that the court used the opportunity to finally resolve, at least, some of the issues relating to the veil piercing rule.⁹⁹ Despite the criticisms of the decision seen above, a preponderant of commentators appear to be of the latter view¹⁰⁰ and on balance it is safe to say that commentators have extended the decision a warm welcome.

The decision in *Prest* where the court allowed Mrs Prest's appeal without piercing the corporate veil necessitates a consideration of alternative remedies. This is also important as their Lordships questioned the existence of the veil-piercing rule thereby raising doubts over its future. But a distinction must be made between alternative remedies, such as remedies in

⁹⁵ Matthews, R., "Clarification of the Doctrine of Piercing the Corporate Veil" [2013] 28 *J.I.B.L.R.* 12, 516 – 520, at 519 - 520.

⁹⁶ [2013] EWCA Crim. 1306.

⁹⁷ Hannigan, p. 35 – 37. She concludes that a major weakness in *Prest* is the lack of clarity on the distinction between evasion and concealment and between piercing and lifting the veil – an unfortunate one given that the consequences of piercing and lifting are remarkably similar, that is, a disregard of *Salomon*. She predicts that the significance of the judgment will be undermined in the long term by its lack of detail about the basis on which the corporate veil might be lifted. p. 39.

⁹⁸ Lim, E., "Salomon Reigns" 129 [2013] 480-485, at 485.

⁹⁹ Onoran, L., Case Comment "The Trust Behind the Veil: *Prest v Petrodel*" [2013] 5 *Private Client Business* 273-280, at 279.

¹⁰⁰ Christopher Hare (op cit) notes, in respect of the court's conclusion on section 24(1) MCA 1973 that the "conclusion has the advantage of ensuring that the property concepts, and insolvency provisions are applied consistently across all three High Court Divisions".

equity, tort and statute and piercing the veil on other grounds such as equity, tort and statute. The *Prest* case falls in the former category¹⁰¹ while the latter remedy was sought, unsuccessfully, in cases such as *Adam v Cape Industries*. In simple terms, alternative remedies exist outside of company law while piercing the veil on other grounds occurs within company law. The relevant ground for piercing the veil is determined by the details of the case including the nature of the relationship between the parties. The *Adam* case shows the conservative attitude of the courts towards piercing the veil on other grounds.¹⁰² And, this is reinforced in *Prest* which suggests that seeking alternative remedies would place the claimant in a better position than asking the court to pierce the veil on other grounds applying company law rules.

Thus following *Prest*, the court would, for example readily entertain an action in equity, tort or statute which is pursued independently of veil-piercing than pierce the veil on equitable, tortious or statutory grounds. This is different from allowing alternative remedies to be used as a veil-piercing tool, as feared by some. Patten L.J's stern warning (endorsed by the Supreme Court in *Prest*) to the Family Division to stop using statute as a veil-piercing instrument is instructive in this regard. It shows a desire by the court to keep alternative remedies separate from veil piercing rather than using the former as a weapon for the latter. As mentioned above, Lord Neuberger was clear that veil-piercing should be pursued only when there are no alternative remedies. Thus, it is submitted that *Prest* has significantly clarified the law in this regard by separating alternative remedies from veil piercing rules.¹⁰³ It will be recalled that

¹⁰¹ The Supreme Court's decision in *Prest* falls in the former category as the court provided a remedy without lifting the veil, although the court of first instance in that case had tried to pierce the veil in the latter, that is, under the MCA 1973.

¹⁰² However, the recent Court of Appeal case of *Chandler v Cape Plc* [2012] EWCA Civ 525, has been used to argue that the courts are now increasingly willing to circumvent the veil piercing rule through more conventional causes of action where justice demands this and it is consistent with existing principle. Matthews, R., "Clarification of the Doctrine of Piercing the Corporate Veil" [2013] 28 *J.I.B.L.R.* 12, 516 – 520, at 520. In that case, the claimant who had contracted asbestosis in the course of his employment with a subsidiary company successfully sued the parent company in tort.

¹⁰³ Although, as seen above the evasion/piercing and concealment/lifting distinction potentially introduces complexities in the area.

prior to *Prest*, the Family Division had confused the two by using statutory remedies as a veil-piercing tool. Post-*Prest* cases have followed the Supreme Court's approach in *Prest* in emphasising the separation of the concept of piercing the veil from the provision of remedies via alternative routes. In the very recent joined case of *R v McDowell and R v Singh*¹⁰⁴, Court of Appeal followed *Prest* on this point, that in a family proceeding involving property legally owned by a company controlled by the husband, the transfer of property where the beneficial interest was held by the husband was a route to enforcement "that did not depend upon the concept of lifting the corporate veil."¹⁰⁵

The non-separation of alternative remedies from veil-piercing rules as well as its relationship with limited liability contributed to the muddle state of the law on veil-piercing resulting in the criticisms of the rule. Millon argues that once a better understanding is achieved, limited liability will then serve the useful function of distinguishing legitimate from illegitimate reliance on statutory limited liability.¹⁰⁶ Specifically in respect of statute, Matthews observes that "*Prest* suggests that the English courts will be reluctant to infer a statute permits corporate personality to be disregarded absent clear wording."¹⁰⁷

This separation hopefully allays the fears of critics regarding the courts' use of statutes in veil piercing cases. For example, prior to *Prest*, Professor Nicholls had observed in relation to the statutory protection of shareholders that "veil piercing cases are not examples of judge-made rules crafted to fill statutory lacuna. They appear instead to be examples of ... disregard of an explicit statutory provision"¹⁰⁸ protecting shareholders. He suggests that decisions in this area of the law might be better described as instances of "judicial disregard of the express

¹⁰⁴ [2015] EWCA Crim 173

¹⁰⁵ *Ibid* para. 37.

¹⁰⁶ Millon, *op cit*, p. 1307.

¹⁰⁷ Matthews, R., "Clarification of the Doctrine of Piercing the Corporate Veil" [2013] 28 *J.I.B.L.R.* 12, 516 – 520, at 519.

¹⁰⁸ Nicholls, C., "Piercing the Corporate Veil and the Pure Form of the Corporation as Financial Innovation" [2008] 46 *Can. Bus. L.J.* 233-268, at 257.

statutory law of shareholder immunity” rather than as “examples of piercing the veil of separate legal personality”.¹⁰⁹ Although Nicholls’ argument is in relation to the statutory protection of shareholders, the theme of statutory disregard by the courts also applies to the present argument in relation to the separation of alternative remedies, such as statute, from piercing the veil on other grounds. Much of the confusion in this area of the law stems from a lack of such a separation as the practice whereby the Family Division used s. 24 of the MCA 1973 to pierce the veil reveals.

This resonates with similar arguments made by both the judiciary and academic writers that cases that are regarded as veil piercing cases could be explained on other grounds, as seen above. But our interest for present purposes is in determining, broadly, how this position affects the relationship between alternative remedies and veil piercing or more specifically how it affects the suggestion that statute may be seen as an alternative to veil piercing. The preceding arguments throw light on this question. The arguments work in favour of using statute as an alternative to veil piercing and upholds the integrity of the separate personality rule. It means that where necessary, justice could be achieved using other methods that would not interfere with the separate personality of the company. And, statutory intervention is just one of these methods. Other alternatives would include agency and equity. In *Prest*, the court did this using the equitable concept of trust. The case provides an excellent example where a remedy was provided not on veil piercing grounds but on other grounds, precisely as a result of the intervention of equity. It should be noted that although the courts have used some of these methods such as agency to pierce the veil, the *Prest* case shows that these methods could on the contrary be used to achieve the same just outcome but without piercing the veil. Any fears

¹⁰⁹ Ibid. See also p. 236.

that statute would lead to an increase in veil-piercing should be allayed by the Supreme Court's restriction of the application of s. 24 of the MCA 1974 in *Prest*.

And, although the outcome might be the same (that is circumventing the *Salomon* principle and ultimately holding the controller liable as in *Prest*) regardless of whether the case is pursued via the alternative remedy route or the veil-piercing route, keeping both separate has the advantage, among others of clarifying the law and achieving justice in specific cases. Treating both together has contributed to the untidy state of the veil-piercing rule. As observed by Ottolenghi,¹¹⁰ there is no piercing of the veil when recourse is made to directors under statute. He observes that when the court resorts to directors, it does so because it regards them as an organ of the company, its alter ego or its agent. Similarly, when it uses its statutory powers e.g. under section 213 of the Insolvency Act 1986, it is not lifting the veil.

It should be noted that this paper does not advocate the creation of new alternative remedies as these already exist. What is needed is the increased utilisation of the existing remedies. As observed by Nicholls in relation to statute, "typically modern corporate statutes do deal explicitly with at least one aspect of veil piercing (imposing personal liability on shareholders), but the courts regularly neglect to consider this legislation."¹¹¹ Indeed, the search for alternative remedies is not a novelty as there is a huge mass of statutory provisions in company law imposing personal liability on controllers without the need to pierce the corporate veil. The section 993 fraudulent trading provision of the Companies Act 2006 and the fraudulent¹¹² and wrongful¹¹³ trading provisions of the Insolvency Act 1986 are but a few examples. The

¹¹⁰ Ottolenghi, MLR, 1990, p. 342.

¹¹¹ Nicholls, p. 236.

¹¹² Section 213

¹¹³ Section 214

confusion in this area which resulted in statute being used as a veil-piercing weapon was an unfortunate development in the law. But *Prest* has hopefully laid this to rest.

It should be clear from the discussion in this paper that the search for alternatives to veil piercing is not a novel undertaking. This is implied in many veil piercing cases, including *Prest*, and when the courts state that cases that have always been regarded as veil piercing cases are not really such, they are really looking for alternatives to veil piercing. The *Yukong* case in which the court adopted a narrow and strict approach to veil piercing and doubted whether many of the cases which were viewed as exceptions to *Salomon* could really be categorised as such, is instructive.¹¹⁴ It will be recalled that the court observed that these cases presented situations where “the statute, contract or doctrine in question was wide enough to embrace the company and its shareholders.”¹¹⁵ In other words, all the parties fell within the liability rule and there was simply no need to pierce the corporate veil.¹¹⁶ Other examples include cases such as *Gilford and Jones*.

It is significant that in *Prest* Lord Neuberger approved Munby J’s suggestion in the *Ben Hashem* case that the court should only exercise its veil piercing power after “all other, more conventional, remedies have proved to be of no assistance.”¹¹⁷ And, the rule should only be invoked as Lord Sumption stated where “a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.”¹¹⁸ In relation to where these alternative remedies sit vis-à-vis the veil piercing rule, this means that the court should apply the alternative remedies first and only apply veil piercing as a last resort.

¹¹⁴ Prentice, pp. 320-321.

¹¹⁵ [1998] 1 W.L.R. 294, at 306.

¹¹⁶ Prentice, p. 321.

¹¹⁷ Para. 62.

¹¹⁸ Para. 35.

Post-*Prest* cases show that the Court of Appeal in particular has heeded to this call to exercise restraint in disturbing the principle in *Salomon*. In the recent case of *R v Hyde*¹¹⁹, the Court of Appeal made a clear separation between the controller of a company and the company by holding that the Crown Court had been wrong to order the forfeiture of firearms on the basis that they had been in the possession of a company director who had been convicted of unlawfully trading in firearms. The Court held that the firearms had been in the possession of the company, not the director, and there was no justification for piercing the corporate veil. Similarly, in the more recent *R v McDowell and R v Singh*¹²⁰ case, two businessmen, Mr McDowell and Mr Singh appealed against a confiscation order. Mr McDowell and Mr Singh each traded openly through a company of which he was the sole director and shareholder. The Crown Court lifted the corporate veil and treated all the company receipts earned while unlicensed or unregistered as personal receipts. On appeal by the businessmen, the Court of Appeal held applying *Prest* that the corporate veil would be lifted for the purpose of ascertaining who was in control and who had obtained the benefit. It had not been necessary to lift the corporate veil of McDowell's company but the court had been entitled to examine the company's receipts and profits to ascertain M's personal benefit.

Conclusion

The UK Supreme Court judgement in *Prest* resonates academic and judicial opinion on the subject. It appears that the effect of the court's decision is to uphold the *Salomon* principle without denying justice in deserving cases. Preventing a fundamental principle in law from abuse and achieving justice in specific cases is always a delicate balance for courts to achieve.

¹¹⁹ [2014] EWCA Crim. 713.

¹²⁰ [2015] op cit.

The court certainly clarified some issues relating to the veil-piercing rule. The seriousness of the problems bedeviling the rule is reflected by the fact that the court even considered abolishing it. And, the court came close to doing this by severely restricting the circumstances under which the rule can be used. Lords Sumption¹²¹ and Neuberger¹²² considered whether to abandon the rule but concluded in favour of retaining it within recognised limits in order to have some flexibility for novel situations not yet envisaged.¹²³ In reaching this conclusion, Lord Neuberger acknowledged that abolishing the rule would render the law clearer and also reduce costs and complications in some cases. The question arises as to whether the abolition of the rule will be reconsidered if the novel situations not yet envisaged do not arise in the foreseeable future. Claimants would now probably be better off seeking alternative remedies first and the circumstances under which the courts would pierce the veil are hard to find following *Prest*. As observed by Hannigan, the veil piercing jurisdiction is so narrow that it could have been abolished as being of little consequence.¹²⁴ She notes that it is doubtful that the rule will be called upon to deal with the yet to be envisaged novel situations for which Lords Sumption and Neuberger decided to retain the rule after considering abolishing it.¹²⁵

Although *Prest* restricted the circumstances under which the veil would be pierced, the *Sale* case suggests that the same outcome might be achieved by the court lifting the veil in the absence of clarifications on the piercing/lifting and concealment/evasion distinction made by the Supreme Court. Indeed, it has been predicted that instead of applications to pierce the veil, there will be applications to lift the veil on the ground that lifting is unaffected by the limitations imposed on piercing in *Prest*.¹²⁶ The effect would be to undermine the *Salomon* principle. And,

¹²¹ Para. 27

¹²² Paragraphs 79 – 80.

¹²³ Hannigan, p. 30

¹²⁴ Hannigan, op cit, p. 30.

¹²⁵ Ibid.

¹²⁶ Ibid, P. 37.

it may be that while *Prest* attempted to clarify the law on piercing, the lack of clarity on the aforementioned distinction and the seeming liberal approach on lifting may have the effect of introducing new levels of confusion and undermining the *Salomon* principle.