

Piercing the Corporate Veil: An Analysis of Lord Sumption's Attempt to Avail a Troubled Doctrine

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*The principle that a company is a separate legal person is fundamental to modern company law. Over time, case law has emerged supporting the doctrine of “piercing the corporate veil”, enabling courts to look behind a company’s separate legal personality to impose the company’s liabilities on its controllers or vice versa. The doctrine, however, has been applied inconsistently and incoherently. In 2013, the Supreme Court of the United Kingdom in *Prest v Petrodel Resources Ltd* confirmed the existence of the doctrine and attempted to clarify it. In doing so, the leading judgment of Lord Sumption proposed a novel formulation to determine the circumstances in which a court can pierce the corporate veil. Lord Sumption’s formulation creates its own confusion and uncertainty. This article argues that the Supreme Court should have abandoned the doctrine altogether. Alternative legal remedies available to claimants render the doctrine redundant. Moreover, *Prest* exacerbates the doctrine’s lack of clarity. This, in turn, compromises the certainty afforded to commercial actors by virtue of incorporating a company.*

I INTRODUCTION

The limited liability corporation is the greatest single discovery of modern times... Even steam and electricity are far less important than the limited liability corporation.¹

The strength of the limited liability company lies in the fact that commercial actors can be certain that, if a dispute arises, the company’s separate legal personality will be recognised. The House of Lords articulated this principle in the seminal case of *Salomon v A Salomon and Co Ltd*.² In New Zealand, the principle has been codified in s 15 of the Companies Act 1993.

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1 Nicholas Murray Butler as cited in Andrew Hicks “Limiting the Rise of Limited Liability” in Robert Baldwin and Peter Cane (eds) *Law and Uncertainty: Risks and Legal Processes* (Kluwer Law International, Boston, 1996) 95 at 95.

2 *Salomon v A Salomon and Co Ltd* [1897] AC 22 (HL).

Since *Salomon*, the common law has produced a string of decisions in which courts have exercised a power to disregard a company's separate legal personality: the doctrine of "piercing the corporate veil". The doctrine is described as being "characterised by incautious dicta and inadequate reasoning."³ As such, no consistent rule or principle has emerged to guide whether or not a court should pierce the corporate veil. This results in uncertainty for commercial actors.

In 2013, Lord Sumption, delivering the leading judgment of the Supreme Court of the United Kingdom in *Prest v Petrodel Resources Ltd*, outlined a new test for when courts should pierce the corporate veil.⁴ This article focuses on the efficacy of that new test and concludes that Lord Sumption failed to give clarity to the problematic doctrine. Part II of this article examines justifications used to pierce the corporate veil prior to *Prest*. Part III discusses the decision in *Prest*. Part IV analyses the efficacy of Lord Sumption's test by examining its application to cases prior and subsequent to *Prest*. Finally, Part V surmises that *Prest* was a missed opportunity for the Supreme Court to abolish the doctrine. It will illustrate that the existence of alternative legal remedies renders the doctrine redundant.

II THE DOCTRINE OF PIERCING THE CORPORATE VEIL PRIOR TO *PREST V PETRODEL RESOURCES LTD*

It is undisputed that a court may pierce the corporate veil in situations where a statute,⁵ or private agreement,⁶ directs it to do so. What is controversial, however, is whether a court can disregard the *Salomon* principle and pierce the corporate veil in the absence of statutory or contractual authority. Some academics deny that the courts have this power. In their view, where the doctrine has been invoked, it has been used as a shortcut to avoid fully analysing other, more appropriate and better-established, legal principles.⁷

Prior to *Prest*, there was no clear, consistent or compelling justification for piercing the corporate veil. Courts most commonly did so in the following circumstances.

3 *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [19] per Lord Sumption.

4 *Prest*, above n 3.

5 For example, in New Zealand: pooling orders under ss 271 and 272 of the Companies Act 1993; actions against directors for reckless trading under ss 135, 136 and 301 of the Companies Act; and s 9 of the Fair Trading Act 1986, which renders directors liable for misleading creditors even if the statements are made by or on behalf of the company.

6 See Neil Campbell "The consequences of incorporation" in Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (LexisNexis, Wellington, 2011) 43 at 71–72, which illustrates this point with the example of leases.

7 At 80–81 and 92; Peter Watts "Piercing the corporate veil — a device of convenience or a last resort?" [2001] CSLB 93 at 93; and see also *Attorney-General v Equiticorp Industries Group Ltd* [1996] 1 NZLR 528 (CA) at 541.

The Company Structure is a “Mere Façade”, “Sham”, “Cloak” or “Device”

One of the most common and favourable justifications for piercing the corporate veil is that the incorporated company is “a mere façade concealing the true facts”.⁸ If incorporation is used to avoid legal obligations or allow conduct that would otherwise be prohibited, a court can disregard the separate legal personality of the company to reverse the effects of the “sham” arrangement.

Both Lord Neuberger in *VTB Capital plc v Nutritek International Corp*,⁹ and Lord Sumption in *Prest*,¹⁰ criticised the “language of ‘sham’” on the basis that,¹¹ where the doctrine is invoked, the relevant company is not a sham but a properly incorporated legal entity.¹² The problem is not that the company is a “sham”; rather, it is that a legally incorporated company is being used to wrongfully avoid a liability or confer an advantage where it is not due.

Instead of piercing the corporate veil in these situations, courts could make use of the general legal prohibition against sham transactions.¹³ Lord Diplock articulated the sham doctrine in *Snook v London and West Riding Investments Ltd*, where his Lordship described a sham as:¹⁴

... acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. ... [F]or acts or documents to be a “sham”, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating.

The courts will not give effect to a sham transaction.¹⁵ Therefore, the rule against sham transactions can be used to achieve the desired outcome — depriving a controller of undue advantages — without the need to pierce the corporate veil.¹⁶

8 *Woolfsan v Strathclyde Regional Council* [1978] SC 90 (HL) at 96. See also *Adams v Cape Industries plc* [1990] 1 Ch 433 (CA) at 539; and *Official Assignee v 15 Insoll Avenue Ltd* [2001] 2 NZLR 492 (HC) at [22].

9 *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337 at [124].

10 *Prest*, above n 3, at [28].

11 Brenda Hannigan “Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company” (2013) 50 *IJ* 11 at 20.

12 See also Edwin Simpson and Miranda Stewart “Introduction: ‘Sham’ Transactions” in Edwin Simpson and Miranda Stewart (eds) *Sham Transactions* (Oxford University Press, Oxford, 2013) 3 at [1.43]–[1.44]; and Robert Miles and Eleanor Holland “Piercing the Corporate Veil” in Edwin Simpson and Miranda Stewart (eds) *Sham Transactions* (Oxford University Press, Oxford, 2013) 192 at [11.53].

13 Campbell, above n 6, at 85–86.

14 *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA) at 802.

15 Simpson and Stewart, above n 12, at [1.43]–[1.44].

16 See Miles and Holland, above n 12, at [11.53].

Interests of Justice

Generally, both the United Kingdom and New Zealand courts favour a restrictive approach to veil piercing. A judge should not depart from the *Salomon* principle merely because he or she perceives an injustice.¹⁷ Accordingly, the Court of Appeal in *Re Securitibank Ltd (No 2)* noted that departing from the *Salomon* principle “should be watched very carefully.”¹⁸

Although the Privy Council in *Savill v Chase Holdings (Wellington) Ltd* later approved this restrictive approach,¹⁹ at first instance Tipping J stated a court might have jurisdiction to pierce the veil when it would be “unconscionable” not to do so.²⁰ His Honour expressed a similar view in *Chen v Butterfield*, where he stated that a court should pierce the veil when failing to do so would otherwise “create a substantial injustice which the Court simply cannot countenance.”²¹

Tipping J later recognised the potential for uncertainty, qualifying the views he expressed in *Savill*.²²

... I was in no way suggesting by my use of the word “unconscionable” some general test whereby the corporate veil could be lifted if the Court considered that it was inequitable or unfair to allow the veil to remain. To suggest that the corporate veil can be lifted simply if the Court feels that its presence leads to some unfairness or inequity would be quite unsatisfactory and would lead to enormous commercial uncertainty.

This author agrees with Tipping J’s criticism that the ability to pierce the corporate veil in the interests of justice would undermine commercial certainty and consistency.²³

Agency

The courts’ ability to pierce the corporate veil has often been justified on the basis of a relationship of agency between a company and its controller, most commonly where a parent company controls its subsidiaries. A finding of agency does not actually disregard the concept that each of the companies has a separate legal personality. However, the existence of an agency relationship removes the distinction between the obligations of individuals or individual companies and their related entities.²⁴

17 See *Woolfson*, above n 8; and *Adams*, above n 8.

18 *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 (CA) at 159.

19 *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (PC).

20 *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (HC) at 279. On appeal both the Court of Appeal and the Privy Council confined the court’s jurisdiction to the narrower justification of only lifting the veil where there was a sham or façade concealing the true facts.

21 *Chen v Butterfield* (1996) 7 NZCLC 261,086 (HC) at 261,092.

22 *Bentley Poultry Farm Ltd v Canterbury Poultry Farmers Co-operative Ltd* (1989) 4 NZCLC 64,780 (HC) at 64,791.

23 See also *Campbell*, above n 6, at 80 and 88.

24 At 92.

There may indeed be an agency relationship between a parent company and its subsidiary but whether one exists should be decided on the ordinary principles of agency law. An agency relationship should not be imposed merely because a parent company exercises control over its subsidiaries or a company has a sole owner.²⁵

III THE IMPACT OF *PREST V PETRODEL RESOURCES LTD*

In 2013, the Supreme Court of the United Kingdom in *Prest* confirmed the existence of the doctrine of piercing the corporate veil.

The Facts and Findings in *Prest*

Prest involved a dispute between recently divorced Michael and Yasmin Prest. Mr Prest owned and controlled several companies, constituting the Petrodel Group. Mrs Prest sought the transfer of several properties owned by companies in the Petrodel Group so that she would receive from Mr Prest the amount awarded to her in divorce proceedings. Whilst only the first pleading is relevant to this article, Mrs Prest argued that the properties should be transferred on three grounds:²⁶

- (a) The Court should pierce the corporate veil to bring the properties owned by Mr Prest's companies into the pool of assets belonging to him as an individual (which she would then be entitled to);
- (b) Section 24 of the Matrimonial Causes Act 1973 (UK) conferred on the Court a statutory power to pierce the corporate veil; and
- (c) The companies held the properties on trust for her husband and he was the beneficial owner of the properties.

At first instance, Moylan J ordered that the properties be transferred under the second ground.²⁷ His Honour rejected the first ground because there was no impropriety that justified piercing the corporate veil. The Petrodel Group company structure had been established for "wealth protection and the avoidance of tax".²⁸ On appeal, the majority of the Court of Appeal overturned the decision on the basis that the statute could not apply "once

25 See, for example, *Re FG (Films) Ltd* [1953] 1 WLR 483 (Ch); and *Smith, Stone and Knight v City of Birmingham* [1939] 4 All ER 116 (KB). See *Salomon*, above n 2; *Equiticorp*, above n 7, at 539; and William Day "Skirting around the issue: the corporate veil after *Prest v Petrodel*" [2014] LMCLQ 269 at 286–287, where the author notes that the existence of an agency relationship comes from authority given by the principal to the agent, not the level of control exercised by the principal over the agent. This was reinforced in *Adams*, above n 8.

26 *Prest*, above n 3, at [9].

27 *YP v MP* [2011] EWHC 2956 (Fam).

28 At [218].

the judge had rejected the impropriety assertion”,²⁹ since the properties could not be “regarded as properties to which the husband had any entitlement”.³⁰

The Supreme Court allowed Mrs Prest’s appeal on the basis that Mr Prest was the beneficial owner of the properties in question. The Court did not consider it appropriate to pierce the corporate veil because the company structure was established prior to any matrimonial dispute for wealth protection and tax benefits. Accordingly, the company structure had not been used wrongfully.³¹ The Court’s comments in relation to veil piercing are, therefore, strictly obiter.

Lord Sumption’s Test for Piercing the Corporate Veil

Lord Sumption, delivering the leading judgment, found that it was well established that a court can pierce the corporate veil if “a company’s separate legal personality is being abused for the purpose of some relevant wrongdoing”.³² Accepting that what may constitute a “relevant wrongdoing” was a fraught issue,³³ and that “[r]eferences to a ‘façade’ or ‘sham’ beg too many questions to provide a satisfactory answer”, Lord Sumption provided a new test to identify when the doctrine could be invoked.³⁴

His Lordship’s formulation of the doctrine distinguished between two separate principles — concealment and evasion:³⁵

The concealment principle is legally banal and *does not involve piercing the corporate veil at all*. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the “façade”, but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company’s involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.

A further passage crystallises Lord Sumption’s formulation of the doctrine.³⁶

I conclude that there is a limited principle of English law which applies when a person *is under an existing legal obligation or liability or subject to an existing legal restriction which he*

29 *Prest v Prest* [2012] EWCA Civ 1395, [2013] 2 AC 415 at [157].

30 At [157].

31 *Prest*, above n 3, at [36].

32 At [27].

33 At [28].

34 At [28].

35 At [28] (emphasis added).

36 At [35] (emphasis added).

deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

Lord Sumption also characterised the courts' jurisdiction to pierce the corporate veil as a mechanism of last resort. His Lordship stated that, "if it is not necessary to pierce the corporate veil, it is not appropriate to do so".³⁷

Lord Sumption held that Mr Prest's actions did not fall within the evasion principle because he did not transfer the property to his companies in order to evade his legal obligations to Mrs Prest.³⁸

The Other Members of the Bench

The other members of the Supreme Court differed both in their opinion of Lord Sumption's new formulation and of the doctrine's scope as a whole.

Lord Neuberger reviewed the application of the doctrine to date, concluding that there was no evidence in the English courts of it being "invoked properly and successfully".³⁹ His Lordship admitted to being:⁴⁰

... initially strongly attracted by the argument that we should decide that a supposed doctrine, which is controversial and uncertain, and which, on analysis, appears never to have been invoked successfully and appropriately in its 80 years of supposed existence, should be given its quietus. Such a decision would render the law much clearer than it is now, and in a number of cases it would reduce complications and costs

Lord Neuberger categorised all decisions where the doctrine had been invoked as:⁴¹

(i) decisions in which it was assumed the doctrine existed, but it was rightly concluded that it did not apply on the facts; (ii) decisions in which it was assumed that the doctrine existed, and it was wrongly concluded that it applied on the facts; and (iii) decisions in which it was assumed that the doctrine existed and it was applied to the facts, but the result could have been arrived at on some other, conventional, legal basis, and therefore it was wrongly concluded that it applied

Despite criticising the doctrine as "unsatisfactory and confused",⁴² Lord Neuberger regrettably confirmed its existence and was the only other

37 At [35].

38 At [36].

39 At [64].

40 At [79].

41 At [74].

42 At [64].

member of the bench to approve of Lord Sumption's test.⁴³ He appears to have done so on the basis that the doctrine was "generally assumed to exist in all common law jurisdictions, and represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available".⁴⁴ However, this passage contradicts his previous statements. In particular, it contradicts the third category of his Lordship's conclusion above; that there appear to have been no instances where the doctrine was invoked and an alternative legal remedy could not have sufficed.

It is this author's view that the assumption of the doctrine's existence by the lower courts — albeit in several common law jurisdictions — was not a sufficient basis upon which to affirm the doctrine. By Lord Neuberger's own admission, the doctrine had thus far either been misapplied or unnecessary. If Lord Neuberger's analysis of the existing cases is accepted, coupled with Lord Sumption's caveat that "if it is not necessary to pierce the corporate veil [because other more conventional remedies are available], it is not appropriate to do so", it follows that there should have been no need for previous courts to invoke the doctrine and indeed, they should not have done so.⁴⁵

Lord Mance and Lord Clarke (in separate judgments) were more cautious. They agreed the doctrine existed and that it was a doctrine of last resort. However, their Lordships did not endorse Lord Sumption's formulation on the basis that it could "foreclose all possible future situations which may arise".⁴⁶ According to their Lordships, this should not be done "unless and until the court has heard detailed submissions on [the formulation]".⁴⁷

Baroness Hale, with whom Lord Wilson agreed, questioned whether all cases would fall "neatly into cases of either concealment or evasion".⁴⁸ She stated that where the doctrine "is sought to convert the personal liability of the owner or controller into a liability of the company", it would be "more appropriate to rely on the concepts of agency and of the 'directing mind'" than to pierce the corporate veil.⁴⁹ The suggestion that other remedies, such as agency or attribution, are more appropriate seems to resist the view that the doctrine is still relevant or useful.⁵⁰

In a judgment markedly different from those of his fellow Lordships, Lord Walker rejected the doctrine on the basis that it:⁵¹

... is not a doctrine at all It is simply a label—often ... used indiscriminately—to describe the disparate occasions on which some rule of law produces apparent exceptions to [*Salomon*].

43 At [60] and [81].

44 At [80].

45 At [35].

46 At [100].

47 At [103].

48 At [92].

49 At [92].

50 See Alistair Alcock "Piercing the Veil — A Dodo of a Doctrine?" (2013) 25 Denning LJ 241 at 252.

51 *Prest*, above n 3, at [106].

Lord Walker noted that cases in which the doctrine had been invoked could have been explained through other legal principles such as “statutory provision, or from joint liability in tort, or from the law of unjust enrichment, or from principles of equity and the law of trusts”.⁵²

The acknowledgement by several of the Supreme Court Justices that other legal remedies could provide satisfactory relief to claimants, coupled with the incisive criticisms of the doctrine’s lack of coherence (best articulated by Lord Neuberger), should have led more of the Justices to Lord Walker’s position. This author believes the majority of the Court in *Prest* should have refused to recognise the doctrine. The courts should not have a power to disregard the separate legal personality of a company.

Operation of the Evasion and Concealment Principles

1 Evasion

Lord Sumption’s evasion principle means that a court will only be able to pierce the corporate veil in situations where the controller of a company uses the company to avoid a legal obligation otherwise falling upon him or her. In these circumstances, the court will impose the liability upon the company itself, or ignore the company and look to the shareholder(s), in order to disallow the abuse of a company’s separate legal personality.

Lord Sumption’s formulation suggests that motive is relevant to liability. It seems to require an intention to evade a legal liability by creating the corporate structure. This intention must be present to justify piercing the corporate veil. In *Prest*, Lord Sumption noted that the properties “were vested in the companies long before the marriage broke up”, supporting his conclusion that there was “no evidence that [Mr Prest] was seeking to avoid any obligation which is relevant in these proceedings.”⁵³

Although the evasion principle requires a conscious evasion of obligations, this intention can be present at the time the company was incorporated. The evasion principle will presumably also apply if a company is deliberately being used to evade liability in the context of a particular transaction. The requirement for there to be some intention or deliberateness before being able to invoke the doctrine is more consistent with the decision in *Salomon* and the principle that companies have separate legal personalities.

The following hypothetical, modifying the facts in *Prest*, illustrates the mechanics of the evasion principle. If Mr Prest had transferred properties he owned to the companies within the Petrodel Group (of which he was sole controller) *after* a court order granted Mrs Prest a certain amount of money as a result of the couple’s divorce, this would fall within the evasion principle. Here, the controller of the company — Mr Prest — is using the separate legal personality of his companies to put his properties out of reach,

52 At [106].

53 At [36].

thereby allowing him to evade his *existing* legal obligation to make payment to Mrs Prest. This behaviour falls within Lord Sumption’s articulation of the evasion principle and, therefore, would justify piercing the corporate veil.

2 Concealment

The concealment principle is a fact-finding mechanism. A court will consider whether a company is being interposed to mask the identity of the real actor and will seek to expose the true nature of the transaction. In contrast to the evasion principle, there is no veil piercing involved.⁵⁴

Once the court has identified the true nature of the transaction, it can simply apply ordinary legal principles such as the doctrine of sham, agency law or trust law. Lord Sumption himself described the principle as “legally banal”, which is appropriate given it merely means that a court will not stop the factual inquiry into the circumstances just because a contract is with a company.⁵⁵

IV APPLYING LORD SUMPTION’S TEST: EVASION AND CONCEALMENT IN ACTION

Application in Subsequent Cases

In *Antonio Gramsci Shipping Corp v Reoletos Ltd*, the Court of Appeal of England and Wales stated that it was “clear” that the “present state of English law” only allowed the Court to pierce the corporate veil when the evasion principle applied.⁵⁶ However, the Court of Appeal arrived at its conclusion without actually using Lord Sumption’s test. It was careful to note that the disagreement between the judges as to whether Lord Sumption’s test should be adopted meant that there was still no coherent formulation of the doctrine. As a result, the prospect of the doctrine being clarified in the future was slim.⁵⁷

The efficacy of Lord Sumption’s formulation can be evaluated by examining three cases that utilised his Lordship’s test after the decision in *Prest*.

1 *Hyde v R*

In *Hyde v R*, the criminal division of the Court of Appeal of England and Wales considered whether it was appropriate for the trial judge to have made a forfeiture order in relation to a lawful collection of firearms. The controller

54 At [28]. See generally Hannigan, above n 11, at 30–35; and *VTB Capital*, above n 9, for the argument that there is no practical difference between the operation of evasion and concealment.

55 *Prest*, above n 3, at [28].

56 *Antonio Gramsci Shipping Corp v Reoletos Ltd* [2013] EWCA Civ 730, [2014] Bus LR 239 at [65].

57 At [66].

of the company that owned the items was convicted for firearms offences in relation to a different set of weapons.⁵⁸ The Court referred to Lord Sumption's test and stated that where the company was:⁵⁹

... lawfully operating with true, openly-disclosed and regulated ownership of the Bosnian weapons pre-dating any allegations of wrongdoing related to the present conviction, there is simply no basis for piercing the corporate veil. ... [The company] not having been convicted, its property cannot be forfeited as part of the sentence imposed on the [controller of the company].

Without engaging in a thorough analysis of evasion or concealment, the Court nevertheless declined to pierce the corporate veil because the facts did not fall within the evasion principle. Although this does not greatly help the development of the law, it demonstrates how the narrowness of the evasion principle allows courts to dismiss quickly the arguments in favour of piercing the corporate veil if the facts do not fall within its scope. This has the benefit of reducing the time spent entertaining a submission that the court should pierce the corporate veil where it would be clearly inappropriate to do so.

2 R v Sale

In *R v Sale*, the Court of Appeal of England and Wales was asked to consider whether the benefit derived from the corrupt activities of a company's controller was to be determined by considering the controller's individual position or by reference to the benefit derived by the company, which was "advancing those corrupt acts and intentions".⁶⁰ The Court again declined to pierce the corporate veil because these facts fell outside the evasion principle. There was no legal obligation being avoided as a result of the interposition of a company since the company was operating for "bona fide trading purposes" prior to the corrupt conduct of its controller.⁶¹ However, the Court considered that the case did fall within the concealment principle since the controller was the:⁶²

... sole controller of the company, and where there was a very close inter-relationship between the corrupt actions of the [controller] and steps taken by the company in advancing those corrupt acts and intentions, the reality is that the activities of both the [controller] and the company are so interlinked as to be indivisible. ...

Accordingly, insofar as the company was involved, what it did served to hide what the [controller] was doing. ... [I]n this case ...

58 *Hyde v R* [2014] EWCA Crim 713.

59 At [46].

60 *R v Sale* [2013] EWCA Crim 1306, [2014] 1 WLR 663 at [40].

61 At [39].

62 At [40]–[43].

the court is entitled to look to see what were the realities of this [controller's] criminal conduct. We are satisfied that such an exercise ... is to seek to discover the facts which the existence of the corporate structure would otherwise conceal so as properly to identify the [controller's] true benefit.

The Court, therefore, determined the value of the benefit from the corrupt activities with reference to the benefit that the company derived. Hannigan uses this case to support her argument that classifying cases under the concealment principle has the “identical effect in practice” as classifying the case under the evasion principle.⁶³ She argues that the result of Lord Sumption’s formulation is “merely a change in terminology” and a shift of confusion.⁶⁴ Instead of the lack of clarity about when courts can pierce the corporate veil, she suggests there is now confusion over when the court can look behind a transaction and, as she calls it, “lift” the corporate veil.⁶⁵ This shift is important because, if the application of the concealment principle and the evasion principle has the same effect, then *Prest* has not actually limited the situations in which the corporate veil can be pierced, nor provided a clear basis on which to do so.⁶⁶

In *Sale*, the Court decided that the facts fell within the concealment principle and therefore did not formally pierce the corporate veil. However, it did allow the benefits accrued by the company to be considered as those accrued by its controller. This, in effect, achieves the same outcome as piercing the corporate veil. The Court did this because the controller was the sole controller of the company and there was a:⁶⁷

... very close inter-relationship between the corrupt actions of the [controller] and steps taken by the company in advancing those corrupt acts and intentions, ... the activities of both the [controller] and the company [were] so interlinked as to be indivisible.

The better view is that the concealment principle was incorrectly applied in *Sale*, resulting in the wrong decision. The company in this case was duly incorporated. It fully performed its contractual obligations and the other party to the contract received “full value” under those contracts.⁶⁸ There was nothing amiss in relation to the company’s operations or its performance of services. The fact that the company was only commissioned to provide the services because of the corruption of its controller does not justify treating the company and its controller as one. As counsel for the controller submitted, the controller’s “unlawful activities did not involve hiding behind

63 Hannigan, above n 11, at 37.

64 At 37.

65 At 37.

66 At 37–39.

67 *Sale*, above n 60, at [40].

68 At [16].

the company to carry out the offences. He was acting in his own behalf and not using the company as a vehicle for crime”.⁶⁹

The concealment principle operates to expose the reality of a particular arrangement; the court must then apply conventional legal remedies to achieve relief for a claimant. In *Sale*, the company (through its separate legal personality) was not concealing anything. Therefore, the fact that the company performed its obligations and received benefits pursuant to the contract did not justify treating the company and the controller as one, even though the controller acquired the contract through corruption.

The controller’s corruption involved the provision of gifts and bribes paid for both by the controller himself and the company. Because of this, the company should also be liable for corrupt activities and brought to account separately from the controller. It does not justify the Court treating the company and the controller as “inextricably linked”.⁷⁰ This was not a case in which “the interposition of a company ... [has] conceal[ed] the identity of the real actors”.⁷¹ As such, the Court was not required to “[look] behind it to discover the facts which the corporate structure [was] concealing”.⁷²

Ultimately, *Sale* was a case in which neither concealment nor evasion applied. Unfortunately, the Judges’ misapplication of the concealment principle resulted in an outcome that would have been the same had the evasion principle been applied. This is concerning, not only because it evidences the judiciary’s confusion as to how the formulation is applied, but also because the *Salomon* principle will be undermined, irrespective of which principle is applied. Applying the evasion principle will do so openly, whereas concealment will be doing so in substance, though not in form.⁷³

3 Pennyfeathers Ltd v Pennyfeathers Property Co Ltd

Confusion in the application of Lord Sumption’s formulation is also evidenced in the third case, *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd*.⁷⁴ Here, the High Court of England and Wales considered whether the directors of Pennyfeathers UK Ltd were in breach of their fiduciary duties to the company. The question arose because they pursued a farm development — which was supposed to be undertaken by Pennyfeathers UK Ltd — for their own company, Pennyfeathers Jersey Ltd.

Rose J applied the principles of both concealment and evasion. Her Honour first stated that the concealment principle did not allow the directors to interpose Pennyfeathers Jersey Ltd “to disguise the nature of their own conduct in diverting the opportunities that they should have pursued on behalf of Pennyfeathers UK to their own benefit”.⁷⁵ Accordingly, the

69 At [22].

70 At [34].

71 *Prest*, above n 3, at [28].

72 At [28].

73 See generally *McDowell v R* [2015] EWCA Crim 173 for a discussion of *Sale* and *Prest* in the context of confiscation orders.

74 *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 (Ch).

75 At [117].

directors were precluded from arguing that they were not in breach of their fiduciary duties because it was the company that pursued the farm development option.

Her Honour also went on to suggest that the evasion principle applied because the “interposition of Pennyfeathers Jersey and the Trimount Settlement should not be allowed to defeat Pennyfeathers UK’s rights against [the directors] or to frustrate the enforcement of those rights”.⁷⁶ Accordingly, her Honour considered that the directors could be equated with the company because the directors and their families were the only beneficiaries of the trust that owned the company.

The better view, however, is that these facts fall neither within the evasion principle nor the concealment principle. Pennyfeathers Jersey Ltd was indeed incorporated to pursue the farm development option. But the directors believed that Pennyfeathers UK Ltd was no longer functional and had neither the ability, nor the intention, to pursue the development. Thus, Pennyfeathers Jersey Ltd was not incorporated in order to hide the fact that the two directors intended to pursue the farm development for their own company (concealment). Nor was it incorporated to avoid their fiduciary obligations since they did not believe themselves to be in breach of those obligations (evasion). Lord Sumption’s formulation of the evasion principle envisages some level of intention on the part of the controller of a company to avoid meeting an obligation. There was no such intention here. As this was not a case of evasion, the Court should not have pierced the corporate veil.

Additionally, it was not necessary to invoke the doctrine in order to hold the directors accountable for breach of their fiduciary duties. As Rose J pointed out:⁷⁷

There is no need to pierce the corporate veil here. It was a breach of [the directors’] fiduciary duties to divert the opportunity to Pennyfeathers Jersey regardless of the links between them and that company. They were supposed to be pursuing those opportunities for the benefit of Pennyfeathers UK not for any other company.

The evidence in this case suggested that the directors were “sufficiently involved in bringing the opportunities to Pennyfeathers Jersey and encouraging that company to enter into the contracts for that to amount to a breach of their duties to Pennyfeathers UK”.⁷⁸ Accordingly, if Lord Sumption’s reasoning were adopted in full, it would not have been “appropriate” to apply the doctrine in this case because it was not “necessary” given the availability of conventional legal remedies.⁷⁹

This case illustrates the continued confusion that exists in situations where the doctrine is invoked even after *Prest*. It also casts doubt over the

76 At [118].

77 At [117].

78 At [117].

79 *Prest*, above n 3, at [35].

merits of Lord Sumption's formulation and its ability to clarify the doctrine. The fact that the Judge applied both the concealment and evasion principles to a situation where arguably neither was appropriate — nor necessary — supports the view that the doctrine is not capable of clear, consistent application and should have been removed from the common law by the Supreme Court in *Prest*.

Application to Older Cases

In *Ben Hashem v Ali Shayif*, Munby J (whose judgment Lord Sumption endorsed in *Prest*) noted that “[r]eported cases in any context where the claim [of piercing the corporate veil] has succeeded are few in number and striking on their facts.”⁸⁰ Lord Sumption's application of his test to those few cases, as well other pre-*Prest* cases, is instructive.

1 *An Unnecessary Doctrine*

A close examination of cases demonstrates that the doctrine is redundant. In every instance where it has been invoked, there was at least one alternative legal avenue available to achieve the desired result.⁸¹

(a) *Gilford Motor Co Ltd v Horne*

The first case demonstrating the availability of alternative legal remedies was analysed by Lord Sumption himself. In *Gilford Motor Co Ltd v Horne*, Mr Horne was subject to a restrictive covenant limiting his ability to solicit clients of the company of which he was previously a managing director.⁸² He decided to incorporate a new company to conduct the same business as his previous company, as he would have breached the covenant if he had carried out the business himself. The Court granted an injunction against both Mr Horne as an individual and the new company. The injunction against the company was granted on the basis that:⁸³

... the company was a “mere cloak or sham”; I do hold that it was a mere device for enabling [Mr Horne] to continue to commit breaches of [the covenant], and under those circumstances the injunction must go against both defendants

Lord Sumption saw this case as falling within the evasion principle. This permitted the Court to pierce the corporate veil. The injunction prevented Mr Horne from abusing the corporate form to receive an illegitimate advantage.

However, the Court of Appeal had numerous other grounds upon which it could have justified the injunction. First, as recognised by Lord

⁸⁰ *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam), [2009] 1 FLR 115 at [221].

⁸¹ A view that is also held by Day, above n 25, at 296.

⁸² *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (CA).

⁸³ At 961–962.

Sumption himself, an injunction could have been granted based on the attribution of Mr Horne's knowledge of the restrictive covenant to the company (given he was the directing mind and will). This would have made Mr Horne's conduct "unconscionable or tortious, thereby justifying the grant of an equitable remedy".⁸⁴

Secondly, the defendant company could have been liable for inducement of breach of contract. Whilst the plaintiff did bring a claim upon this ground, it did not present evidence upon this point, choosing instead to rely on arguments relating to the validity of the restrictive covenant.⁸⁵ Campbell argues that this ground, had it been properly argued, would have been "a clearer indication of the basis of the decision than the florid language" of device, sham or cloak.⁸⁶

Thirdly, as noted by Farwell J at first instance in *Gilford*, the plaintiff could also have brought a claim against Mr Horne on the basis that he "made use of confidential information which he obtained while he was managing director by using lists of customers which he had obtained from the plaintiff company".⁸⁷

Finally, Lord Neuberger in *Prest* suggested that the injunction against the company could have been justified on the ground that the company was the defendant's agent "for the purpose of carrying on the business".⁸⁸ The fact that the company acted as an agent of Mr Horne would mean that if it was appropriate to grant an injunction against him, the principal, then it would have been equally appropriate to grant an injunction against the agent company. Indeed, a finding of agency on these facts would not have been an unwarranted extension of agency principles; the company was indeed acting on behalf of Mr Horne and with his authority to contract with and sell to third parties. Furthermore, irrespective of the outcome, examining the existence of an agency relationship based on conferral of authority would have been a better way to resolve this issue than by piercing the corporate veil.

However, if Lord Sumption's formulation were applied, the outcome of the case would remain the same. One advantage of Lord Sumption's test is that judicial consideration of whether a fact pattern falls within the evasion principle provides a clearer basis for piercing the corporate veil than reliance on words such as "sham", "cloak" or "device". The Judges in *Gilford* relied on the latter without giving further analysis or explanation beyond those words as to why an injunction against the company — which prima facie is a separate legal entity not covered by the restrictive covenant against Mr Horne himself — was justified.

84 *Prest*, above n 3, at [29].

85 *Gilford Motor Co Ltd*, above n 82, at 944.

86 Campbell, above n 6, at 90.

87 *Gilford Motor Co Ltd*, above n 82, at 944.

88 *Prest*, above n 3, at [71].

(b) *Jones v Lipman*

Lord Sumption also believed that the facts of *Jones v Lipman* fell within the evasion principle.⁸⁹ In this case, Mr Lipman reneged on the sale of a property and transferred the property in question to a company in order to circumvent a court order for specific performance against him. The plaintiff nevertheless succeeded in obtaining a separate order for specific performance against both Mr Lipman and the company. The Court made the order on the basis that Mr Lipman's purchase of the company and subsequent transfer of property "was carried through solely for the purpose of defeating the plaintiff's rights to specific performance".⁹⁰

These facts fall within the evasion principle. Mr Lipman had an obligation under the sale and purchase agreement to convey the property to the plaintiff and instead used a company to evade that responsibility. Accordingly, per Lord Sumption's formulation, the corporate veil can be pierced in order to prevent Mr Lipman using the company to avoid his existing legal obligations.

Again, applying Lord Sumption's formulation achieves the same result as that which was reached in the actual case. *Jones* has been criticised on the basis that by using "terms that had no explanatory force" — such as "sham" — Russell J treated the case as one calling for the piercing of the corporate veil when it was unnecessary to do so.⁹¹ If Mr Lipman's knowledge could be attributed to the company, then the company would still have to transfer the land to the plaintiffs. This is because the company had acquired the land with actual knowledge of the plaintiff's interest in the land; the "purchaser's equitable interest will prevail over the recipient's legal title".⁹² Indeed, Lord Neuberger stated that, had the Court instead ordered specific performance requiring Mr Lipman to do everything he could to ensure the property was transferred to the plaintiff, Mr Lipman would have had to procure the transfer of the property by the company. Since he and one of his solicitor's clerks were the sole shareholders and directors of the company, he could have done so.⁹³

The availability of these other legal remedies makes it "inappropriate" to pierce the corporate veil. This is particularly the case given that, in the course of his judgment in *Prest*, Lord Sumption noted that equitable remedies — such as injunctions and specific performance orders — are an effective means of making the controller of a company direct the company to act a certain way.⁹⁴ Whilst a company has its own legal personality, it is its directors and managers who are in control. Thus, equitable remedies can be used to make those individuals personally

89 At [30]; and *Jones v Lipman* [1962] 1 WLR 832 (Ch).

90 *Jones*, above n 89, at 835.

91 Campbell, above n 6, at 91.

92 At 90. See also Ernest Lim "Salomon Reigns" (2013) 129 LQR 480 at 483–484.

93 *Prest*, above n 3, at [73].

94 At [16].

responsible for wrongfully exercising the control they have over the company.

2 The Murky Distinction Between Concealment and Evasion

Three cases are used in this section to test the distinction between concealment and evasion.

(a) *Gencor ACP Ltd v Dalby* and *Trustor AB v Smallbone (No 2)*

The first two cases to consider are *Gencor ACP Ltd v Dalby*,⁹⁵ and *Trustor AB v Smallbone (No 2)*.⁹⁶ In these cases, the courts pierced the corporate veil. But, according to Lord Sumption, the legal action taken against the companies fell within the concealment principle and, therefore, should not have involved veil piercing.

In *Gencor*, Mr Dalby arranged for money owed to a company of which he was a director to be paid instead into his own company, which the Court held was “Mr Dalby’s offshore bank account held in a nominee name” and his “alter ego”.⁹⁷ Rimer J held that both Mr Dalby and his company were liable to account for the profits received by his company. His Honour justified this finding by invoking the doctrine of piercing the corporate veil. Lord Sumption, however, did not see this case as one in which the corporate veil was actually pierced. Instead, Mr Dalby and his company should have been separately liable to account for the profit.⁹⁸ Mr Dalby was liable because, as Rimer J held, his company was his nominee and received the profit on his behalf. Equally, the company had to account for the profits because Mr Dalby’s knowledge of the first company’s equitable interest in the profit could be attributed to his own company. Lord Sumption categorised this case as one of concealment. The Court looked to the actual arrangement between Mr Dalby and his company; its separate legal personality did not fool the Court as to the true recipient of the profits. After exposing the “concealment”, the Court applied “ordinary equitable claims” in the form of an account of profits from both Mr Dalby and the company.⁹⁹

In *Trustor*, a portion of funds that had gone missing from a company turned up in the accounts of Intercom Ltd. Intercom Ltd was owned and operated by a trust. The previous managing director of the company from which the money had gone missing was a beneficiary of that trust. The Court found that Intercom Ltd was a façade. It, therefore, pierced the corporate veil to allow the company recourse against the managing director himself for the missing money. This was done on the basis that Intercom Ltd’s receipt of the funds amounted to the managing director receiving the funds.

95 *Gencor ACP Ltd v Dalby* [2000] EWHC 1560 (Ch), [2000] 2 BCLC 734.

96 *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 (Ch).

97 *Gencor*, above n 95, at [26].

98 *Prest*, above n 3, at [31].

99 At [31].

Lord Sumption referenced the earlier finding that Intercom Ltd was a “vehicle” used to receive money for the former director.¹⁰⁰ The ordinary legal principle that “receipt by a company will count as receipt by the shareholder if the company received it as his agent or nominee” was enough to make it account for the funds.¹⁰¹ The Court looked at the arrangement and transactions between the director and Intercom Ltd to find that the company’s true nature was that of the director’s agent or nominee. According to Lord Sumption, this process was actually an example of the concealment principle in practice.

Both *Gencor* and *Trustor* are examples of judges justifying their reasoning through the doctrine of piercing the corporate veil where in fact they are simply looking to the true nature of the transaction. By only allowing the corporate veil to be pierced when the facts fall within the evasion principle, Lord Sumption’s formulation may have the benefit of steering judges away from invoking the doctrine in circumstances where veil piercing is unwarranted. This may encourage judges to more fully explain their decisions with reference to other legal principles after ascertaining the true facts of the case. This is the mechanism of the concealment principle. However, if the Supreme Court had simply rejected the doctrine, the same outcome would have been achieved in a more straightforward manner without the need to classify the facts or even consider veil piercing.

Although Lord Sumption viewed *Gencor* and *Trustor* as cases of concealment rather than evasion, in both cases the company was used to hide inappropriately acquired profits. This allowed the controllers to gain an advantage they would not have received but for the interposition of a company with separate legal personality. Therefore, arguably both cases fall within the evasion principle as well as the concealment principle. If so, then Lord Sumption’s formulation does not provide the much needed clarity to the doctrine of piercing the corporate veil — the question of when it is appropriate to do so remains open in instances where the facts of a case fall within both of Lord Sumption’s principles. Furthermore, the categorisation of the cases as falling within the concealment principle and the act of looking behind a transaction to see its true nature do not change the outcome of the case. This provides support for the point discussed earlier; in practice, there may be no real distinction between evasion and concealment. Lord Sumption’s formulation is therefore ineffective and leaves the doctrine devoid of clarity.

(b) *Official Assignee v 15 Insoll Avenue Ltd*

The third case is the New Zealand decision of *Official Assignee v 15 Insoll Avenue Ltd*.¹⁰² Mr Russell incorporated a company under the name of Jojac Holdings Ltd while he was imprisoned for fraud and forgery. The company’s

¹⁰⁰ At [32].

¹⁰¹ At [32].

¹⁰² *15 Insoll Avenue Ltd*, above n 8. Although Lord Sumption did not consider this case, it provides support for the points discussed.

directors did not have true control over the company; Mr Russell either forged their signatures or they signed documents whenever he asked. The shares in the company were transferred to his children, then from one girlfriend to another without any of the parties' knowledge. Once Mr Russell was declared bankrupt, the Official Assignee argued that the company had been "unjustly enriched" because he diverted his income to it and transferred his property to it.¹⁰³ The Official Assignee argued that the company held the assets under an institutional constructive trust for Mr Russell.¹⁰⁴

The High Court found that Jojac was established for the purpose of placing Mr Russell's assets in an independent entity and thus out of the reach of potential creditors. The Official Assignee submitted that the "actions and intentions of Jojac were at all material times the actions and intentions of Mr Russell".¹⁰⁵ Consequently the company was a sham and the property belonged to Mr Russell. Although the Official Assignee did not specifically raise the doctrine, the Court found that this submission effectively asked the Court to pierce the corporate veil. Indeed, Paterson J did so by considering the assets of Jojac to be the assets of Mr Russell, thereby giving the Official Assignee access to those assets. The order was made on the basis that Jojac was a sham masking Mr Russell's true ownership of the property; not piercing the corporate veil would amount to a substantial injustice.¹⁰⁶

This is a case that falls within Lord Sumption's evasion principle. Jojac was interposed to avoid liabilities held by Mr Russell (its controller), who benefited from the protection of his assets afforded by Jojac's separate legal personality. Because the facts fall within the evasion principle and therefore allow the Court to pierce the corporate veil, the outcome achieved through applying Lord Sumption's formulation is the same as the result that was in fact reached.

However, this case could also fall within the concealment principle since Mr Russell used the company to hide the true owner of the assets (himself). If the Court were to look behind the company and see who the true owner of the assets was — and give effect to that by allowing the Official Assignee access to the assets properly owned by Mr Russell (as per the concealment principle) — then one would reach the same outcome that the High Court did by piercing the corporate veil. This supports the view that there is no practical distinction between the operation of concealment and evasion; the outcome achieved in either case is essentially the same.

However, the point remains that the Court could simply have recognised a constructive trust and achieved the same outcome *without* piercing the corporate veil.¹⁰⁷ Therefore, this case also shows that the existence of alternative legal remedies means the doctrine is redundant. To this end, Paterson J acknowledged that an equitable remedy might have

103 At [27].

104 At [29].

105 At [27].

106 At [37]–[38].

107 Campbell, above n 6, at 92; and Watts, above n 7, at 93.

achieved the desired outcome without having to invoke the doctrine.¹⁰⁸ The Official Assignee argued that it would be unconscionable for Jojac to deny the beneficial interest in the property to Mr Russell. This would have meant Mr Russell owned the property at the time of his bankruptcy, which would entitle the Official Assignee to access that property.

This case can be contrasted with *Official Assignee v Sanctuary Propvest Ltd*, in which Asher J resolved a similar situation by recognising a constructive trust rather than piercing the corporate veil.¹⁰⁹ His Honour acknowledged that while “[i]t is on its face odd to apply such a doctrine to a situation such as this, where the essential allegation is that the person beneficially entitled is the person guilty of creating the unconscionable situation”,¹¹⁰ the constructive trust was a “flexible” enough remedy to apply to such a situation.¹¹¹ Paterson J’s failure in *15 Insoll Avenue* to use this remedy demonstrates the use of the doctrine of piercing the corporate veil to “sidestep established private law rules.”¹¹²

3 Consistency

The quality of Lord Sumption’s formulation can be assessed by examining the doctrine’s ability to achieve consistent outcomes when applied to cases that had similar facts but different results.

(a) *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* and *Woolfson v Strathclyde Regional Council*

In both of the first two cases, the claimants sought compensation for the disturbance of business caused by the compulsory acquisition of business premises. Compensation could only be awarded if the owners of the premises were also the occupiers. In *DHN Food Distributors Ltd*, the premises was owned by a subsidiary but occupied by the parent company.¹¹³ The parent company argued that the Court of Appeal should pierce the corporate veil in order to treat the companies as the same legal entity and allow for compensation to be paid. In *Woolfson*, the plaintiff and his company owned the premises jointly.¹¹⁴ However, another company owned by the plaintiff occupied the premises and operated its business there. The plaintiff argued that he and both of his companies should be treated as one legal entity.

In *DHN Food Distributors Ltd*, the Court of Appeal awarded compensation to the group for three reasons, the relevant one being that it was appropriate to pierce the corporate veil. In finding that “[t]he three companies should, for present purposes, be treated as one,” Lord Denning

¹⁰⁸ *15 Insoll Avenue Ltd*, above n 8, at [39].

¹⁰⁹ *Official Assignee v Sanctuary Propvest Ltd* HC Auckland CIV-2009-404-0852, 11 June 2009 at [50].

¹¹⁰ At [46].

¹¹¹ At [47].

¹¹² Campbell, above n 6, at 92; and see also Watts, above n 7, at 93–94.

¹¹³ *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 (CA).

¹¹⁴ *Woolfson*, above n 8.

disregarded the separate legal personality of the parent company from each of its subsidiaries.¹¹⁵ The piercing was justified by the parent company's total control over its subsidiaries. Accordingly, the parent company's claim for compensation succeeded.

The other two members of the Court, Goff and Shaw LJ, found that there was no general jurisdiction to pierce the corporate veil in the context of company group structures. But, on the facts, Goff and Shaw LJ held that the companies could all be treated as one entity because of the parent company's level of control; the subsidiaries had no separate function and had the same directors as the parent company.¹¹⁶

However, in *Woolfsan*, the House of Lords rejected Lord Denning's view and gave effect to the *Salomon* principle. The Court declined to pierce the corporate veil and regarded each company and the plaintiff himself as separate legal entities, thereby rejecting compensation for disturbance of business. In this case, the House of Lords did not seem to regard the lack of compensation as any sort of qualifying injustice.

If viewed using the lens of Lord Sumption's formulation, these facts do not fall within the evasion principle. There is no legal obligation that is being evaded by the interposition of a company. Therefore, these were not cases in which it was appropriate to pierce the corporate veil. Lord Sumption's formulation would have led to the same correct outcome in both of these cases, demonstrating that it may indeed have the benefit of providing greater consistency and coherence in this area of the law.

The doctrine of piercing the corporate veil was not the only ground the claimants relied on in *DHN Food Distributors Ltd*. However, if it had been, Lord Sumption's formulation would have led to a different result. The corporate veil would not have been pierced. As such, the three companies could not be considered as a single economic and legal entity and compensation would not have been awarded. There are two points that follow.

First, the fact that DHN's claim for compensation succeeded on other grounds supports the argument that the doctrine is often unnecessarily invoked. The Court held that DHN had sufficient interest in the land to justify a payment of compensation for disturbance. It had an irrevocable license to occupy the land and an equitable interest in the property since the subsidiary held the property on trust for DHN.¹¹⁷

Secondly, even if the claim for compensation failed because piercing the corporate veil was the only ground relied upon — and could not be pierced in this case based on Lord Sumption's formulation — it is submitted that this would be a better outcome. Recognising the legal independence of subsidiaries from their parent companies advances commercial certainty for those who set up group structures and incorporate separate entities. They can be assured that the companies will be respected as different entities, each

115 *DHN Food Distributors Ltd*, above n 113, at 860.

116 At 861–862 per Goff LJ and 865–868 per Shaw LJ.

117 At 859–860 per Lord Denning MR, 860 per Goff LJ and 867 per Shaw LJ.

with their own legal personality. They will not be conflated as one legal entity by courts whenever they deem it appropriate or when the companies themselves decide they will benefit from doing so. In many cases, protecting the corporate structure will benefit companies. It does not seem unjust that in some cases (as here) there may also be disadvantages to a company of having that corporate structure protected.

(b) *Macaura v Northern Assurance Co Ltd* and *Constitution Insurance Co of Canada v Kosmopoulos*

Two further examples arise in the insurance context. In *Macaura v Northern Assurance Co Ltd*, the House of Lords considered a situation where the plaintiff incorporated his timber business and transferred his estate and timber into the newly formed company.¹¹⁸ His insurance policy was not reissued to the company and, therefore, remained in his own name. A fire destroyed the timber and the insurer rejected the plaintiff's claim. The insurer did so because his personal insurance policy did not cover timber that was owned by the company. The House of Lords found in favour of the insurer on the basis that the plaintiff, the sole shareholder of the company, had no insurable interest in the timber.¹¹⁹

... no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.

That outcome can be contrasted with the Supreme Court of Canada's decision in *Kosmopoulos v Constitution Insurance Co of Canada*.¹²⁰ The plaintiff was director and sole shareholder of a leather goods company. The insurance policy was under his own name rather than that of the company. However, when the company's assets were damaged by fire and the insurers rejected his claim, both the court of first instance and the Ontario Court of Appeal found for the plaintiff. The Supreme Court of Canada declined to allow further appeal, holding that the plaintiff:¹²¹

... was so placed with respect to the assets of the business as to have benefit from their existence and prejudice from their destruction. ... He had, therefore, an insurable interest in them capable of supporting the insurance policy and [was] entitled to recover under it.

118 *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL).

119 At 626–627.

120 *Kosmopoulos v Constitution Insurance Co of Canada* [1987] 1 SCR 2.

121 At 30.

In *Macaura* the separate legal personality of the company was recognised whereas in *Kosmopoulos* it was disregarded in order to allow the company to recover under the controller's insurance policy.

Neither of these cases fall within the evasion principle, as neither case involved the controller of a company interposing the company to evade a legal obligation or frustrate its enforcement. Despite their factual similarities, the two cases had different outcomes. By contrast, if Lord Sumption's formulation had been applied, the same outcome would have been reached in both cases.

Therefore, Lord Sumption's formulation achieves greater consistency in these cases, remedying the pre-*Prest* position where similar cases would reach different outcomes. This is an improvement on the current collection of irreconcilable, arbitrary decisions.

Notably, all the cases in this part involve the claimant company arguing to pierce its own corporate veil in order to take advantage of a benefit it would not otherwise be entitled to. Although Lord Sumption's formulation does not seem to envisage this scenario, his Lordship justifies piercing the corporate veil on the basis that it is for the purpose of "depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality".¹²² It is consistent with that justification that the corporate veil cannot be pierced in the above cases. A court should not grant a company its request to have its own corporate veil pierced in order for it to obtain an undue benefit.

Overall Evaluation of Lord Sumption's Formulation

By examining the application of Lord Sumption's test, the following conclusions can be surmised.

First, the distinction between the concealment principle and the evasion principle is not as clear in practice as it is in the theoretical framework of Lord Sumption's judgment. One problem identified in this article is that the formulation is vulnerable to judicial misunderstanding. This may be resolved over time if the law develops a line of precedent demonstrating how to distinguish properly between situations of concealment and evasion. A more fundamental issue, however, is that the distinction between concealment and evasion is blurred because they produce similar outcomes. This difficulty is unlikely to be resolved given the lack of guidance from the Supreme Court about the precise mechanism of the concealment principle.

The analysis of previous cases showed that most of them would have been decided the same way if Lord Sumption's formula had been used. But the above difficulties demonstrate that even Lord Sumption's formulation has its own uncertainties and leaves room for confusion and inconsistency. Consequently, it is doubtful whether adopting the new formulation advances the doctrine in any meaningful way.

¹²² *Prest*, above n 3, at [35].

Yet the second conclusion, and a more positive one, is that there are a limited number of situations in which Lord Sumption's test for piercing the corporate veil may achieve greater clarity and coherence. Although Hannigan criticises the "narrow" formulation of the evasion principle,¹²³ the principle allows courts to readily dismiss submissions seeking to pierce the corporate veil in cases that clearly fall outside the evasion principle. The application of Lord Sumption's formulation will produce more consistent decisions than those discussed above.

The evasion principle also helps to avoid situations where judges use the doctrine as a "shortcut" to justify decisions that could be decided on the basis of other legal principles. These "other" legal principles — such as constructive or resulting trusts, fraud, attribution of knowledge or unjust enrichment — will involve more complicated analyses. However, it is preferable to have judges engaging in the more robust analysis associated with the application of these principles, rather than hiding behind the doctrine of piercing the corporate veil. The previous line of authorities that justified piercing the corporate veil on the basis that the company was a "façade" or "sham" was not only legally inaccurate but also led to a lack of transparency. Accordingly, Lord Sumption's formulation is preferable because it does not invoke "sham language". Lord Sumption's test gives the doctrine slightly more clarity than it previously had.

V ABOLISHING THE FAILING DOCTRINE OF PIERCING THE CORPORATE VEIL

The Supreme Court in *Prest* refused to abolish the doctrine of piercing the corporate veil. Whilst the Court did not explore the reasons for keeping the doctrine (other than relying upon its previous use by several courts), this author suspects that they were not prepared to make so bold a move as to retire a doctrine that was clearly still in use, regardless of its quality. Perhaps there was also reluctance to limit the flexible manner in which courts could exercise their discretion, as afforded by the doctrine, in comparison to the rigidity of other legal principles.

There are two considerations this author believes are fatal to the continued operation of the doctrine: first, the availability of alternative legal remedies; and secondly, the inherent uncertainty of the doctrine.

Alternative Legal Remedies

The Supreme Court of the United Kingdom was unanimous in finding that the corporate veil should not be pierced if there was another remedy available. There have been no cases where a court has pierced the corporate veil and the desired outcome could not have been achieved through an

¹²³ Hannigan, above n 11, at 30.

alternative legal remedy. Lord Sumption himself described the doctrine as a “limited one” because:¹²⁴

... in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.

Indeed, even in *Prest*, Mrs Prest ultimately gained relief through the Court applying the principles of resulting trusts, rather than by piercing the corporate veil.

Whilst this article has not canvassed every plausible legal remedy that may be pleaded instead of the doctrine, it has illustrated that where the doctrine has been invoked, another legal remedy would have provided satisfactory relief for the claimant. The existence of other legal remedies renders the entire doctrine of piercing the corporate veil redundant. If the doctrine should not be invoked where another legal remedy is available, and there are no conceivable situations in which another legal remedy would not be available, then it follows that there are no circumstances in which the doctrine should be invoked. It is, therefore, obsolete.

Although Lord Neuberger concluded that the doctrine existed and accepted Lord Sumption’s formulation, his Lordship seemed to also agree that the doctrine did not actually exist independently of ordinary legal principles. He commented that the evasion principle:¹²⁵

In so far as it is based on “fraud unravels everything” ... the formulation simply involves the invocation of a well established principle [T]he formulation is not, on analysis, a statement about piercing the corporate veil at all.

In fact, Lord Sumption acknowledged that exceptions to the principle in *Salomon* were based on the general proposition of law that parties should deal with each other honestly; any dishonesty or fraud between parties will allow a court to intervene.¹²⁶ Furthermore, his Lordship concluded that the common thread connecting cases in which the courts specifically considered piercing the corporate veil was the notion that the law “is not to be disarmed in the face of abuse”.¹²⁷ That is, that there should be a way to correct for advantages or gains brought about through wrongdoing or dishonesty.¹²⁸

In many cases, judges who purported to apply the doctrine were in fact applying other ordinary legal principles such as agency, unjust enrichment or the doctrine of sham. Those cases support the conclusion that the doctrine is redundant. The doctrine simply describes the application of ordinary legal principles in the context of company law. It follows that the

¹²⁴ *Prest*, above n 3, at [35].

¹²⁵ At [83].

¹²⁶ At [17]–[18].

¹²⁷ At [27].

¹²⁸ At [17]–[18] and [27].

Supreme Court should have laid the doctrine to rest when it had the opportunity to do so. The Court should have encouraged lower courts to analyse fully, and engage with, alternative legal remedies available in situations where controllers of companies seek to use a company to take advantage of a party with whom they are dealing. This would have removed the uncertainty around the existing doctrine and encouraged the incremental development of those other, more established, areas of the law.

Uncertainty

Hannigan argues that limiting the circumstances where the corporate veil can be pierced to those falling within the evasion principle narrows the doctrine to the extent that it will “hardly ever be relevant or sought in [the] future”,¹²⁹ and “in practice, piercing the corporate veil can be expected to wither into obscurity”.¹³⁰ While that may be true if all the Justices of the Supreme Court had accepted Lord Sumption’s formulation, that the majority of the Court was not prepared to do so reduces the force of this prediction.

The fact that Lord Neuberger was the only member of the bench to adopt Lord Sumption’s test leaves the doctrine in an unsettled state. Although some post-*Prest* cases have acknowledged Lord Sumption’s formulation as representing English law, the majority of the bench’s reluctance to “foreclose” the situations in which the doctrine can be invoked leaves it open to judges to create their own justifications for whether or not the corporate veil should be pierced. It is this author’s view that lawyers will — in the interests of their clients — also seek to expand the situations that justify piercing and continue to push the boundaries of this doctrine. This is particularly the case given that the Supreme Court of the United Kingdom has confirmed that the doctrine is well and truly alive, even if it is not well formulated.

The result is that the certainty hoped for from the Supreme Court’s judgment in *Prest* was not delivered. Although the Court was unanimous as to its existence, the content of the doctrine of piercing the corporate veil remains imprecise and open to inconsistent application. The Court should have taken the opportunity presented in *Prest* to abandon the doctrine in its entirety. The fact that Lord Sumption’s formulation gives rise to challenges and inconsistencies of its own reinforces this conclusion. Overall it fails to clarify an arbitrary rule that is subject to varied judicial interpretation and inconsistent application.

New Zealand case law has thus far supported a restrictive doctrine of veil piercing.¹³¹ Unless there has been actual misuse of the corporate form, courts have not been willing to disregard the separate legal personality of a company.¹³² A decision confirming the existence of the doctrine from

¹²⁹ Hannigan, above n 11, at 30.

¹³⁰ At 39.

¹³¹ See also *Equiticorp*, above n 7; and *Re Securitibank Ltd (No 2)*, above n 18.

¹³² See also *Chen*, above n 21; and *Savill*, above n 19. In these cases the Courts refused to pierce the corporate veil because they did not find that the incorporated companies were shams.

the Supreme Court of the United Kingdom is highly persuasive authority for New Zealand courts. It would be unfortunate if the decision in *Prest* resulted in an increased number of cases in which piercing the corporate veil is pleaded, as well as an increased willingness of courts to entertain the doctrine rather than allow it to fall into disuse.

VI CONCLUSION

Although the Court in *Prest* confirmed the existence of the doctrine of piercing the corporate veil, it failed to improve the doctrine by giving it the content that would allow it to be invoked in a clear and consistent manner. Lord Sumption's formulation may make marginal improvements to the clarity of the doctrine but it also introduces its own uncertainty. Furthermore, the lack of endorsement from other members of the bench leaves the doctrine, as a whole, in an unsettled state.

Accordingly, it remains challenging for the legal community to predict the outcome of a case in which the claimant relies on the courts' jurisdiction to pierce the corporate veil in order to achieve a particular outcome. In turn, it is difficult to advise potential claimants on the likelihood of the success of this action.¹³³ Although the remaining uncertainty about the boundaries of the doctrine means that lawyers representing their clients are likely to attempt to push the boundaries and seek to expand the doctrine, it is also unlikely that they will rely on the doctrine by itself to achieve the outcome they desire. This is especially so given the Court's clear statement that the doctrine should not be invoked where an alternative legal remedy is available and the fact that there appear to be no situations in which an alternative legal remedy could not be found.

It is, therefore, this author's view that courts should not have the power to pierce the corporate veil. The doctrine is redundant both in theory and in practice. It ought not to have survived the decision in *Prest*.

¹³³ Hannigan, above n 11, at 39.