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# The Enigma of Veil-Piercing

**Pey-Woan Lee***

***Abstract:*** *In Prest v Petrodel Resources Ltd [2013] 3 WLR 1, Lord Sumption narrowly confined veil-piercing at common law to those cases where a controller had used a company under his control to evade a pre-existing legal liability. This article argues against this approach as it is so narrow that it practically abolished the jurisdiction. Instead, the jurisdiction should be preserved, and its exercise should be constrained by clearly articulated principles.*

Veil-piercing is an enigma of company law. Its existence is almost universally accepted, yet it is not a principle reducible to distinct elements. The doctrine, if it exists, is uncertain and ill-defined, constructed largely on invectives and metaphors that often furnish no more than moral indignation as reason for particular outcomes. Nevertheless, the concept has endured, and its appeal remains palpable. Although the institution of the company as a legal person is unquestionably the bedrock of modern company law, it is a fiction intended for specific and legitimate purposes. Outside these purposes, the fiction may justifiably be dis-applied.[1] It is no wonder then that when presented with an opportunity to abrogate this unruly doctrine in *Prest v Petrodel Resources Ltd,*[2] the Supreme Court elected instead to affirm it. A limited power to pierce the corporate veil has to be preserved, if only in a severely attenuated form, to counteract abuse.

Notwithstanding this affirmation, exactly what constitutes "abuse" remains obscure. The underlying tension is a familiar one: it concerns the need to mediate between the conflicting goals of certainty (as an essential condition for commerce) and flexibility (to redress and deter the improper exploitation of legal advantages). In *Prest*, Lord Sumption sought to resolve this tension by first acknowledging, at a general level, the importance of both ends but ultimately ascribes far greater weight to certainty through a highly restrictive definition of "abuse". In particular, his Lordship held that the corporate veil can only be pierced to prevent a controller from using the company he controls to evade a pre-existing legal liability. In both the UK and across the Commonwealth, commentators[3] welcomed this

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[1] I Maurice Wormser, *Disregard of the Corporate and Allied Corporation Problems* (Baker, Voorhis & Co, New York, 1927) at 10.

[2] [2013] 3 WLR 1.

[3] See eg, H Tjio, "Lifting the Veil on Piercing the Veil" [2014] LMCLQ 19; E Lim, "Saloman Reigns" 129 (2013) LQR 480; R Grantham, "The Corporate Veil – An Ingenious Device" (2013) 32 U Queensland LJ 311;

development as a definitive step in restoring order and clarity to an area of law hitherto plagued by "incautious dicta and inadequate reasoning".[4] This article argues, however, that Lord Sumption's approach is too narrow in that it effectively denies the courts of any real power to pierce the corporate veil. It suggests, therefore, that this approach should not be adopted *in toto*. Rather, a true measure of discretion should be conferred on the courts to depart from the separate entity rule in exceptional cases. The risks of uncertainty that this may entail is best managed by devising principles that constrain the manner by which the discretion is exercised, and not by eliminating it in the first place.

## *Prest v Petrodel Ltd*

In *Prest*, the issue of veil-lifting arose in a claim for ancillary reliefs following the divorce of Michael and Yesmin Prest. At first instance, Moylan J ordered Mr Prest to make, *inter alia*, a lump sum payment of £17.5 million to Mrs Prest. In partial satisfaction of this payment, the judge also ordered Mr Prest to transfer to the wife seven UK properties legally owned by two offshore companies that he controlled. The latter order was made in purported exercise of the jurisdiction under s 24 of the Matrimonial Causes Act 1973, which empowered the court to order a party to a divorce to transfer to the other such property to which the first-mentioned party is "entitled". Mrs Prest contended that Mr Prest was entitled to the companies' properties on three grounds: first, that the court was entitled, in exceptional circumstances, to pierce the corporate veils of the offshore companies; second, that s 24 of the Matrimonial Causes Act conferred upon the courts a direct power to pierce the veils; and third, that the properties by the companies were held on trust for Mr Prest. The Supreme Court unanimously rejected the first two grounds, but found in favour of Mrs Prest on the last: that the properties were held by the companies on resulting trust for Mr Prest.

In the leading judgment, Lord Sumption sought to rationalise the law on veil-piercing by distilling two principles from the authorities. First, a court may only pierce the corporate veil, or disregard a company's separate personality, in order to prevent its controller from evading a pre-existing legal obligation to which he is bound (the "evasion principle").[5] This discretion is a *specie* of the more general principle that the courts may withhold a legal benefit or privilege that is obtained by dishonesty.[6] The use of a company to evade the law is an instance of such dishonesty. Second, veil-piercing is of no relevance in cases where other conventional principles (such as agency or trusts) are applied to uncover the identity of the real actors concealed by the interposition of one or more companies (the "concealment principle"). Such conventional principles typically do not disregard the company's separate personality. Rather, they are applicable to a company precisely because it is in law a distinct person capable of assuming its own rights and duties. To these two principles Lord Sumption added a third principle to underscore the residual nature of the veil-piercing

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T Heintzman and B Kain, "Through the Looking Glass: Recent Developments in Piercing the Corporate Veil" (2013) 28 BFLR 525; and S Bull, "Piercing the Corporate Veil – in England and Singapore" [2014] SJLS 24.

[4] [2013] 3 WLR 1 at [19].

[5] [2013] 3 WLR 1 at [28] and [35].

[6] [2013] 3 WLR 1 at [18].

jurisdiction: the corporate veil should only be pierced where it is necessary to do so.[7] If an outcome may be achieved by means other than veil-piercing, that means should be employed to the exclusion of the latter. Veil-piercing is, in short, a remedy of last resort.

As Mrs Prest's eventual victory was won on trust principles, their Lordships' observations in *Prest* as to veil piercing are entirely *obiter*. There is also a stark absence of consensus amongst the Law Lords as to how the veil-piercing jurisdiction ought to be demarcated even though they were nearly unanimous in recognising its existence. Moreover, while the most thorough consideration of the doctrine is set out in Lord Sumption's judgment, it was not adopted *in toto* by any of the other Law Lords. Specifically, Lord Neuberger agreed that the authorities could be classified as either cases of evasion or concealment, of which only "evasion" involved piercing in the true sense.[8] But he also thought that the evasion principle was not founded on any judicial antecedents,[9] acknowledging that the evasion principle was not a distinct principle concerning veil-piercing but "an aspect of a more conventional principle" (that "fraud unravels everything").[10] Baroness Hale (with whom Lord Wilson agreed) appeared to accept the "evasion" cases as examples of piercing but doubted whether "evasion" and "concealment" exhaustively explained all cases where the company's separate legal status had been disregarded.[11] Her Ladyship appeared also to favour a broader rationalisation of these cases: that "individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business."[12] Lord Mance expressed general agreement with Lord Sumption's analysis[13] but cautioned against adopting a position that would foreclose future developments.[14] Lord Clarke, too, was unwilling to endorse the evasion-concealment distinction without the benefit of full arguments.[15] Lord Walker, on the other hand, did not think "piercing the corporate veil" existed as a distinct doctrine at all.[16] Given these disparate observations, it is plain that *Prest* has not delivered the definitive principle that has long eluded judges in this perplexed area of law. This may render further development of the law difficult and unlikely.[17] Of course, it remains possible for a future court to adopt Lord Sumption's analysis, but that would not necessarily be the best way forward given the many difficulties that surround that analysis.

## The Evasion Principle

According to Lord Sumption, the evasion principle is[18]

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[7] [2013] 3 WLR 1 at [35].
[8] [2013] 3 WLR 1 at [60] – [ 61] and [81].
[9] [2013] 3 WLR 1 at [69] – [73].
[10] [2013] 3 WLR 1 at [83].
[11] [2013] 3 WLR 1 at [91] – [92].
[12] [2013] 3 WLR 1 at [92].
[13] [2013] 3 WLR 1 at [98].
[14] [2013] 3 WLR 1 at [100].
[15] [2013] 3 WLR 1 at [103].
[16] [2013] 3 WLR 1 at [106].
[17] *Antonio Gramsci Shipping Corporation v Lembergs* [2013] 2 Lloyd's L Rep 295 at [66].
[18] [2013] 3 WLR 1 at [35].

> 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 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.

Support for this principle is located in the classic authorities of *Gilford Motor Co Ltd v Horne*[19] and *Jones v Lipman.*[20] In *Gilford Motor*, the defendant had covenanted not to solicit the plaintiff's customers but subsequently did so through a company he controlled. At the plaintiff's suit, both the defendant and the company were restrained against soliciting the plaintiff's customers. In Lord Sumption's view, the relief against the company involved piercing because "the company was restrained in order to ensure that Horne was deprived of the benefit which he might otherwise have derived from the separate legal personality of the company."[21] In *Jones*, a vendor who had a change of heart after contracting to sell a piece of freehold land conveyed the property to a company he controlled so as to defeat the purchaser's right to specific performance. The purchaser sued for breach, with the result that both the vendor and the company were ordered to convey the property to the purchaser. Once again, this was an example of piercing because the company was treated, in those circumstances, as having the same obligation that the vendor had to convey the property to the plaintiff.[22]

Despite this forceful endorsement, it is doubtful if *Gilford Motor* and *Jones* are true authorities for piercing. The point has been made that both are simply cases in which equitable reliefs were granted to effectively remedy a contractual breach. So the restraint against the company in *Gilford Motor* could be explained on a number of grounds: that the restrictive covenant, broadly construed, extended to activities of a person (whether legal or natural) controlled by the defendant,[23] or that the company was acting as his agent,[24] or that equity would restrain a person inputed with knowledge of the breach.[25] None of these analyses requires the company and the defendant to be treated as a single entity. In each case, the defendant's control of the company is material only for the purpose of establishing the elements of distinct legal principles which did not in any way displace the separate entity rule. Likewise, in *Jones*, the order of specific performance would only have been effective if the defendant had been ordered not merely to convey the property, but to do all within his power to convey the same. This would include exercising its control over the

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[19] [1933] 1 Ch 935.
[20] [1962] 2 WLR 832.
[21] [2013] 3 WLR 1 at [29].
[22] [2013] 3 WLR 1 at [30].
[23] See *Yukong Line Ltd v Rendsburg Invesments Corporation of Liberia (No 2)* [1998] 1 WLR 294 at 307; a view that Lord Neuberger endorsed in *VTB Capital Plc v Nutritek International Corporation* [2013] 2 WLR 313 at [134].
[24] Lord Neuberger preferred this analysis in *Prest*: see [2013] 3 WLR 1 at [71] – [72]. This is an entirely plausible view since the plaintiff in *Gilford Motor* had in fact pleaded that the company was acting as the defendant's (Horne) agent: see [1933] 1 Ch 935 at 956.
[25] See CH Tham, "Piercing the Corporate Veil: Searching for Appropriate Choice of Law Rules" [2007] LMCLQ 22 at 30 – 31.

company to effect the conveyance.[26] Alternatively, the order against the company could have been justified on the ground that it was, by virtue of the defendant's control, imputed with notice of the purchaser's prior equity.[27] Once again, these interpretations do not require the rule in *Saloman*'s case to be displaced.

In *Prest*, Lord Sumption acknowledged the plausibility of these alternative explanations but thought that piercing was nevertheless the true ratonale underlying *Gilford Motor* and *Jones*.[28] Yet a plain reading of both decisions will demonstrate that the language employed (characterised by liberal reliance[29] on the much-disparaged epithets of "cloak", "sham", "device", "strategem", "mask", "channel" and "creature") is consistent with a range of interpretations as noted above. There is thus no positive evidence that the court in either case thought it was departing from *Saloman's* case.[30] This was also the view of Lord Neuberger who, though he endorsed the evasion principle as the exclusive ground for veil-piercing, nevertheless thought that neither *Gilford Motor* nor *Jones* provided any direct support for the principle.[31] Taken together, these considerations suggest that the evasion principle is not supported by the cited authorities.

Even if it is accepted that the evasion principle encapsulates piercing, substantial uncertainty surrounds its operation. On one view, it will appear that defining piercing by reference to the evasion principle has the practical effect of rendering the jurisdiction otiose. Its singular focus on the avoidance of a *pre-existing* legal obligation owed by a company's *controller* would exclude even egregious wrongdoing. For example, the evasion principle (as defined) will exclude fraudulent schemes perpetrated through companies, for "[it] is not an abuse to cause a legal liability to be incurred by the company in the first place."[32] Likewise, fraudulent transfers to defeat creditors' claims will fall outside the ambit of evasion[33] since the liability that is evaded in such cases is typically that of the company rather than the controller. Crucially, it does not seem that piercing is needed even in the archetypal evasion cases (characterised by *Gildford Motor* and *Jones*) because such evasive conduct can usually be redressed by more conventional remedies. Lord Sumption himself admitted as much when he said that "in almost every case where the test [*ie*, as embodied by the evasion pinciple] 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."[34] Implicit in this admission also lies the recognition of an extensive overlap

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[26] This explanation was also preferred by Lord Neuberger in *Prest*: see [2013] 3 WLR 1 at [73].
[27] Lord Cooke of Thorndon, *Turning Points of the Common Law* (Sweet & Maxwell, London, 1997), Ch 1: ''A Real Thing: *Saloman v A Saloman & Co Ltd*'' at 17.
[28] [2013] 3 WLR 1 at [29].
[29] See *Gilford Motor Co Ltd v Horne* [1933] 1 Ch 935 at 956, 961, 965 and 969; and *Jones v Lipman* [1962] 2 WLR 832 at 836 – 837.
[30] See C Kinsky, "Piercing the Corporate Veil" [2014] Private Client Business 44 at 46.
[31] See [2013] 3 WLR 1 at [69] and [81].
[32] [2013] 3 WLR 1 at [34].
[33] Though it is arguable that even the authorities prior to *Prest* do not support the suggestion that such transfers amounted to "evasion": see *eg*, *Yukong Line Ltd v Rendsburg Invesments Corporation of Liberia (No 2)* [1998] 1 WLR 294. But see J Payne, "Lifting the Corporate Veil: A Reassessment of the Fraud Exception" (1997) 56 CLJ 284 for arguments to the contrary.
[34] [2013] 3 WLR 1 at [35].

between “evasion” and “concealment”, which has prompted some to ask if the distinction between the two principles is not in fact illusory.[35]

However, the evasion principle may also appear over-extensive on a different view. Thus far, it has been assumed that the principle can only be utilised to protect a claimant’s *own* legal right. But a literal reading of Lord Sumption’s formulation may also permit its invocation by a third party. Consider an example where A has covenanted not to compete with B but subsequently procures C, a company that A controls, to engage in competing activities in violation of its covenant. In turn, C contracts with D so as to carry out these activities. If D subsequently fails to perform and C brings an action for breach, can D plead the evasion principle in defence? Allowing C’s action would, it may be argued, enable A to circumvent its obligation through a corporate entity it controlled. Of course, it seems obvious that none of the Law Lords who endorsed the evasion principle had such an application in mind. Their Lordships’ repeated emphasis on the narrowness of the principle would also militate against such application. Nevertheless, this example illustrates the uncertain reach of the principle, thus casting doubt on its usefulness.

**The Concealment Principle**

In Lord Sumption’s scheme, *all* cases that have relied on the “sham” or “façade” epithets but which do not involve deliberate evasion are explicable by the concealment principle. This principle is[36]

> … 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.

His Lordship cited *Gencor ACP Ltd Ltd v Dalby*[37] and *Trustor AB v Smallbone (No 2)*[38] to illustrate the concealment principle. In *Gencor*, a managing director (Dalby) argued that he was not liable to account for profits diverted from the company because the profits were paid, not to himself, but to Burnstead, a BVI company under his control. The court rejected this argument. It found that Burnstead was in substance no more than a creature or alter ego of Dalby used for the receipt of Dalby’s dishonest gains. An account was thus ordered against *both* Dalby and B Ltd. A similar issue was raised in *Trustor*, where a managing director (Smallbone) had misappropriated large sums of money from the company (Trustor) by transferring them to a company (Introcom) he controlled. Upon Trustor’s suit, Introcom was held liable for knowing receipt of property obtained in breach of another’s (*ie*,

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[35] See *eg*, B Hannigan, “Wedded to Saloman: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company” (2013) 50 Irish Jurist 11 at 30 – 35.
[36] [2013] 3 WLR 1 at [28].
[37] [2000] 2 BCLC 734.
[38] [2001] 1 WLR 1177.

Smallbone's) fiduciary duty. Importantly, Smallbone was also held to be jointly and severally liable with Introcom for *all* the sums received by Introcom because it was thought appropriate to "pierce the corporate veil" to treat Introcom's receipt as that of Smallbone. For Lord Sumption, however, neither *Gencor* nor *Trustor* was truly concerned with veil-piercing. Rather, they were simply cases where the court had found as a *fact* that the controller was the true recipient of the assets in question. In each case, the remedy against the controller and the controlled entity is justified, not by ignoring the company's separate legal status, but by the operation of equitable principles.

This analysis of *Gencor* and *Trustor* has the obvious merit of simplifying the law by aptly focusing on the reality that the improper gains were ultimately intended for the controller's benefit. But it does not quite explain the actual outcomes of the cases. For example, characterising Introcom as a mere agent or nominee for Smallbone would not explain why Introcom was itself liable to account for knowing receipt. If, indeed, it had merely received the misappropriated funds as agent or nominee of Smallbone, such receipt would be ministerial in nature and is insufficient for establishing recipient liability.[39] It may be that Introcom's liability is better founded on knowing assistance.[40] Even so, it is hard to see why Smallbone and Introcom should be *jointly and severally* liable for funds received by Smallbone alone, for English law does not as yet impose upon an assistant joint and several liability for a *fiduciary's gains*.[41] Likewise, it is not clear if Lord Sumption's analysis would justify the order of an account for profits against both Dalby and Burnstead if indeed Burnstead had done no more than served as a channel for Dalby's receipt. Seen in this light, the concealment principle is not entirely an accurate summation of the rationale underlying these non-evasion authorities.

"Concealment" as defined by Lord Sumption also presupposes that the identity of the "real actor" obscured by the interposition of companies can *always* be discovered by a process independent of veil-piercing. Yet it is not clear that this is so. Consider *Re Darby*,[42] where two infamous bankrupts (Darby and Gyde) set up a nominally-capitalised company (C Ltd) to defraud investors by promoting the issue of debentures by another company (W Ltd). The fraud was effected by causing C Ltd to purchase a cheap quarrying licence which was then sold to W Ltd at a greatly inflated value. Darby was held liable to account as a promoter for the profits made from this sale even though it was C Ltd that effected the sale, and despite the fact that C Ltd was the only named promoter in the prospectuses issued in connection with W Ltd's offer of debentures. At first sight, this looks like a classic instance of concealment: the court had simply found as a *fact* that Darby was liable because he was in truth the promoter.[43] But one may probe deeper: exactly what led the court to identify Darby as the promoter? Clearly, Darby's personal involvement in promoting W Ltd is not enough:

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[39] *Westpac Banking Corpn v Savin* [1985] 2 NZLR 41, 69, cited by Sir Morritt VC in *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 at [19].
[40] Though this would run counter to a finding in earlier proceedings that liability for knowing assistance had not been established: *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 at [5] and [7].
[41] *Ultraframe (UK) Ltd v Fielding* [2005] FSR 17 at [1595] and [1600].
[42] [1911] 1 KB 95.
[43] See *VTB Capital Plc v Nutritek International Corporation* [2012] 2 Lloyd's L Rep 313 at [55].

he could simply have been involved as agent of C Ltd which, being inanimate, necessarily had to act through human agents. A better explanation may be that of implied agency,[44] as the court could be understood to have found that Darby was, by reason of the receipt of profit, the true principal acting through C Ltd as his agent.[45] But recent authorities have cautioned that such implication can only arise on the most exceptional facts,[46] for the ordinary intention of a person who trades through a company is to exclude personal responsibility as principal.[47] Seen as a whole, the facts of *Re Darby* do not lead inevitably to the implication of an agency relationship. Although Darby's appropriation of profit could be seen as an indicium of ownership, the facts remained that it was C Ltd who held the mining licence and sold it to W Ltd. That the court had to pierce the veil of C Ltd (on account of Darby's control and the intention to perpetrate fraud) in order to hold Darby accountable as promoter therefore remains a distinctly plausible explanation of the case.[48]

In view of the foregoing, the concealment principle may be understood as both a restatement of the law as well as a prescription for its development. It underscores the important fact that the respective rights and liabilities of companies and their controllers can often be determined by reference to conventional principles without in any way encroaching on the separate entity rule. But it also goes further, as it seeks to expunge piercing in all but cases of evasion. Bearing in mind that the authorities for evasion may also be understood as instances of concealment, the practical effect of formulating the concealment principle in this manner may be to abolish the veil-piercing jurisdiction.

### Circumventing the corporate veil

Whether or not one agrees with the "evasion-concealment" analysis, an unmistakable theme of *Prest* is that the jurisdiction for piercing the corporate veil is, if it exists, extraordinarily narrow in scope. A litigant who wishes to reach a controller for the acts of the controlled entity (or *vice versa*) will henceforth have to rely substantially, if not wholly, on conventional analyses. If the "evasion-concealment" framework is adopted, this is *a fortiori* so. This renewed emphasis on conventional principles is generally a step in the right direction as it encourages consistency and avoids the proliferation of liability through

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[44] In the line of authority exemplified by *Smith, Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham* [1939] 4 All ER 116.

[45] Some support may be gleaned from the following passage of Phillimore J's judgment in *Re Darby* [1911] 1 KB 95 at 102–103:

> "The fact that they [Darby and Gyde] got their profit by means of the debentures indicates only that that was the machinery by which they obtained the money that was their profit. *Now they made that profit either directly or through the agency of the corporation*, it does not matter which, and they may hold it if they disclosed it at the proper time. They may not hold it if they did not disclose it, and the burden of shewing that they did so disclose it is upon them." (emphasis added)

But this interpretation of the case presumes that the profit was paid to Darby directly and not by way of dividend distribution. The judgment does not describe the precise mode by which Darby was paid.

[46] *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 at 189 – 190.

[47] *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294 at 304.

[48] In *Prest*, Baroness Hale cited *Re Darby* as a decision where the corporate veil was pierced: see [2013] 3 WLR 1 at [91].

(potentially) unprincipled extensions of the law. But it has to be appreciated that this clarification will not alter the substantive issue at hand, which is the proper allocation of right and liability between a company and its controller. Nor will it eliminate the occasional need to displace the separate entity rule in order to reach a just outcome. With the removal or severe curtailment of the discretion to pierce the veil, the burden of explaining such outcomes will simply be shifted to the conventional principles.

Issues specific to the use of private law principles to sidestep a company's separate status has been ably and comprehensively considered elsewhere.[49] For present purposes, it suffices to consider some ways by which veil-piercing issues could re-surface in the application of these principles. In relation to agency, we have already seen from our discussion of *Re Darby* that the concept may sometimes be pressed into service to justify what is essentially an identification of a company with its controller. Similar pressure will likely be exerted on tort principles. Consider, for instance, the circumstances in which a controller may be held to be jointly liable for a company's tort. In general, a person is jointly liable with another if he conspires with or procures or induces that person to commit a tort.[50] Where a company is the primary actor, the question arises as to whether a controller could incur liability as a joint tortfeasor by reason of its control over the company. Plainly, an affirmative answer would undercut the separate entity rule. But to hold otherwise may also be unpalatable, as that will leave incorporators free to perpetrate (through the companies they own) torts with impunity. In cases where the controller is also a director, it is well established that the director may be liable if he has "authorised, directed, or procured" the company's tort.[51] Precisely what level of involvement would suffice for this purpose is not, however, entirely settled. A relatively recent line of authorities[52] appears to suggest that a director will only be liable if he does more than exercise constitutional control over the company (for example, by voting at board meetings).[53] If this test were extended to shareholders generally, then it seems the principles of joint liability are unlikely to operate in such a way as to undermine the separate entity rule. But whether this *ought* to be so is precisely the issue, which cannot be resolved by looking solely to the concept of joint liability. Rather, what has to be mediated are the conflicting policy objectives of tort and company law, that is, the need to prevent and remedy torts on the one hand, and the isolation of business risks on the other.[54] The issue would have been no different if an attempt had been made to to pierce the corporate veil instead.

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[49] See W Day, "Skirting around the issue: the corporate veil after *Prest v Petrodel*" [2014] LMCLQ 269. See also F Rose, "Raising the corporate sail" [2013] LMCLQ 566 at 586 – 591.

[50] *Credit Lyonnais Bank Nederland N.V. (now Generale Bank Nerderland N.V.) v Export Credit Guarantee Department* [1998] 1 Lloyd's LR 19 at 46.

[51] *Rainham Chemical Works Ltd v Belvedere Fish Guano Ltd* [1921] 2 AC 465; *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415.

[52] *MCA Records Inc v Charly Records Ltd* [2003] 1 BCLC 93; applied in *Koninklijke Philips Electonics NV v Princo Digital Disc GmbH* [2004] 2 BCLC 50; and *Società Esplosivi Industriali Spa v Ordnance Technologies (UK) Ltd (formerly SEI (UK) Ltd)* [2008] 2 BCLC 428.

[53] This approach has been criticised for effectively granting directors greater immunity (than other employees) for authorising the company's torts: see N Foster, "Personal Civil Liability of Company Officers" [2008] 16 TLJ 20 at 41.

[54] S Lo, "Liability of Directors as Joint Tortfeasors" [2009] JBL 109 at 118 – 130.

As a further illustration, consider the Court of Appeal's decision in *Chandler v Cape plc*,[55] which held a parent company (Cape) liable for breaching a duty of care that it owed to an employee of its subsdiary. In deciding that such a duty was owed by Cape to the employee, the court placed particular emphasis on Cape's control over the subsidiary, manifested by its involvement in the formulation of the subsidiary's health and safety policies. Interestingly, the court emphatically disavowed that this ascription of direct responsibility to Cape was an instance of veil-piercing.[56] But it must be obvious, on reflection, that the liberal imposition of such liability could make signficant inroads into the separate entity rule. If a parent company could, by exercising control through the formulation of "group" policies, be regarded as having assumed responsibility to third parties dealing with the subsidiary, then it would seem that a parent company's potential liability for the conduct of its subsidiaries is considerably broadened.[57] Once again, this was a situation where the proper resolution of the issue required considerations of both tort and company law objectives, namely, the extent to which a company could be permitted to limit its tort liability through the incorporation of subsidiaries. To approach the question purely as a matter of tort law risked excluding from the outset the legitimate concerns of company law.

## Preserving veil-piercing: a suggested framework

Thus far, the argument made is that the evasion-concealment analysis results in the virtual abrogation of the veil-piercing jurisdiction. On this understanding, Lord Sumption's framework is ultimately inconsistent with their Lordships' (with the possible exception of Lord Walker) professed desire to preserve veil-piercing as a means of countering abuse. But to reject this framework appears, once again, to leave the law in a state of vacuity, for where would that leave litigants in search of guidance?

It is submitted that the jurisdiction for veil-piercing need not descend into a state of anarchy merely because there is no single principle that defines the circumstances for its operation. To make sense of this jurisdiction, it is important to bear in mind that "abuse" is a broad concept that may occur in a wide range of situations. That being the case, any attempt to reduce the jurisdiction to rigid definitions will invariably prove to be futile and frustrating. Rather, the jurisdiction is rightly framed as a *discretion*, which reflects the latitude needed to respond to the myriad forms by which "abuse" may assume. As every argument to pierce the corporate veil is essentially an invitation to the court to uphold a right or policy concern that competes with those underlying the separate entity rule, clarity and cohernce is only achieved by directly addressing the interests at stake, rather than by applying a set of fixed rules.

That is not, however, to say that courts should be given *carte blanche* to pierce the corporate veil. Rather, their exercise of discretion has to be exercised in a principled manner. Thus, it

[55] [2012] 1 WLR 3111.
[56] [2012] 1 WLR 3111 at [69].
[57] See the critique of M Petrin, "Assumption of Responsibility in Corporate Groups: *Chandler v Cape plc*" (2013) 76 MLR 603.

is trite that the mere facts of control and ownership are not sufficient reasons for piercing the veil. Nor can it be pierced simply because it is in the interests of justice to do so. What is needed is proof that the controller has exercised its control over a company to perpetrate or conceal wrongdoing, and for this purpose it is necessary to demonstrate a substantive *link* between the wrongdoing and the company's involvement.[58] To these *Prest* adds the critical "last-resort" principle –that the corporate veil ought not to be pierced when an effective remedy may be achieved through other, more conventional, legal principles. It is true there is as yet no absolute clarity as to what this principle entails. Presumably, in a typical case where the veil is sought to be pierced to impose liability on a controller for the acts of its company, it is not sufficient for this purpose to show that the company is not worth suing because it is insolvent. The evidence must go futher to show that there is no other effective remedy *against the controller*.

A further stricture identified by Lord Sumption is that the jurisdiction cannot be applied to create a new liability where none existed before.[59] This was a principle drawn from *VTB Capital plc v Nutritek International Corpn*,[60] which the Supreme Court had held that a controller could not, by piercing the veil of a company he owned, be made a party to a contract entered into by that company. As regards consensual liability, this holding is clearly right. A party who contracts with a company must, ordinarily, be taken to have accepted the risk of loss arising from its default. The privity rule should not therefore be displaced simply to enable an injured party to pursue those with deeper pockets. But it is doubtful if this restriction should also be extended to cases involving non-consensual liability, such as *Trustor AB v Smallbone (No 2)*.[61] Here, the creation of new liability is necessary for giving effect to an equitable remedy. It does not undermine any prior allocation of risk. In this context, a more pertinent objection to the imposition of fresh liability may lie in the risk of prejudicing rights of third parties (in particular, the creditors of the party on whom liability is imposed). This may therefore warrant a further restriction that the discretion to pierce the corporate veil be exercised only where the court is satisfied that it would not unduly affect third-party rights.

## Conclusion

Lord Sumption's approach in *Prest* has been described as "legalistic, formalist and technical and which expressly avoids looking at the substance and economic effects."[62] This approach has the benefit of promoting certainty, and rightly emphasises the primacy of general legal principles in resolving disputes involving companies. Nevertheless, if it were thought (as the court did in *Prest*) that the discretion to disregard the separate entity rule had to be preserved to deter any abuse of the corporate form, then this discretion ought to be given real content.

[58] *Faiza Ben Hashem v Abdulhadi Ali Shayif* [2009] 1 FLR 115 at [161] – [162].
[59] [2013] 3 WLR 1 at [34].
[60] [2013] 2 WLR 398.
[61] [2001] 1 WLR 1177.
[62] R Grantham, "The Corporate Veil – An Ingenious Device" (2013) 32 U Queensland LJ 311 at 315.

This would mean that it should, *prima facie*, be available where it is established that the company had been used by those in control to perpetrate or conceal serious impropriety. But as is the case with discretionary power in general, its exercise should be constrained by clearly articulated principles. Properly framed, these principles will go a long way in giving clarity and coherence to this difficult area of law.