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Remedying the Abuse of Organisational Forms: Trusts and Companies Considered

*Pey-Woan Lee**

The private trust and the company are distinct organisational forms widely employed in the commercial context. An important reason for their popularity lies in their ability to facilitate affirmative asset partitioning, which allows one to ringfence a pool of assets against one's personal creditors by designating those assets for a specific enterprise or purpose. The ability to segregate assets in this way is generally beneficial and desirable as it incentivises productive activities by facilitating the efficient allocation of risks and reducing monitoring and transaction costs. However, the use of trusts and companies as asset protection devices raises questions of legitimacy when they are employed principally to shield assets from creditors. Such abuses are a species of equitable fraud as they typically comprise transactions conceived to deceive or impinge on persons who are not parties to the fraudulent design.[1] The problem has attracted both legislative and judicial responses but the focus of this article is on the judicial doctrines developed to counteract the abuses of trusts and corporate structures.

This article examines judicial responses to the abuse of trust and corporate structures using the insight of Hansmann and Kraakman[2] on organisational law. In that framework, Hansmann and Kraakman identify affirmative asset partitioning (or entity shielding) as the most critical function of an organisational form. Both the trust and the corporation are examples of such organisational forms, and are therefore 'legal entities', by reason of their strong affirmative asset partitioning properties. However, the benefits of asset partitioning may be eroded through the opportunistic exploitation of such organisations. Laws are therefore needed to deter such exploitation though these laws must themselves be cost-efficient so as not to undermine the value of asset partitioning. Tracing recent doctrinal developments in relation to 'sham' and 'illusory' trusts as well as 'veil-piercing', I consider the extent to which these developments may be explained by or are coherent with the Hansmann-Kraakman framework. I observe that English judicial response is largely conservative in the context of both trusts and corporations, characterised by the preference for close doctrinal development to safeguard legal certainty. This underscores the fundamental importance of entity shielding as conceived by Hansmann and Kraakman. It also

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[1] *Chesterfield v Hanssen* (1750) 2 Ves Sen 125 at 156 (per Lord Hardwicke):
'A *4th* kind of fraud may be collected or inferred in the consideration of this court from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement.'

[2] H Hansmann & R Kraakmann, 'The Essential Role of Organisational Law' (2000) 110 Yale LJ 387 ('Hansmann & Kraakmann (2000)').

reflects judicial sensitivity to the costs of broad remedial regimes. I further observe, however, that it is unhelpful to treat the trust as a 'legal entity' in the context of English law because the absence of entity status fundamentally distinguishes the trust from the corporation. Significant cost implications follow from that distinction, which explains the retreat from 'veil-piercing' and the preference to counter creditor-evasion schemes through the development of discrete, transaction-specific principles. The judicial endorsement of 'illusory trust' may be seen as an instance of such development.

Affirmative Asset Partitioning (Entity Shielding)

'Asset partitioning' is an integral feature of organisational law that separates the property of a firm from that of its owners and managers. The term was popularised by Hansmann and Kraakman in a seminal article[3] positing it is this ability to create property rights good against the whole world that constitutes the true significance of organisational law. Hansmann and Kraakman analyse asset partitioning as comprising two forms. 'Affirmative asset partitioning' (or 'entity shielding') designates a pool of assets to a firm[4] and grants its creditors priority to those assets over the personal creditors of the firm's owner. By that means, affirmative asset partitioning operates to shield the firm's assets from the personal creditors of its owners. 'Defensive asset partitioning' (or 'owner shielding'), on the other hand, describes the doctrine of limited liability that protects the owner's assets from the creditors of the firm. From an economic perspective, both forms of asset partitioning serve important functions. Affirmative asset partitioning reduces monitoring costs, prevents the premature liquidation of assets and facilitates the efficient allocation of contractual risks.[5] Likewise, defensive asset partitioning lowers monitoring as well as governance costs and provides economies of transfers and risk sharing.[6] Significantly, however, Hansmann and Kraakman consider affirmative asset partitioning to be more the fundamental of the two features as it is not an outcome replicable by private ordering. The transaction costs of contracting for entity shielding would be prohibitive[7] and far exceed that for owner

[3] ibid.

[4] Hansmann and Kraakman use the term 'firm' broadly to mean the 'nexus of contracts' that coordinates the economic activities of a group of persons via contracts: 'It is the common party with whom each of those persons has an individual contract.': ibid 391.

[5] ibid 398 – 405. Specifically, affirmative asset partitioning is 'efficient' because 'In general, one can expect not only that it wil be efficient, but also that the individual transactions that [organisation law] facilitates will be to the advantage of all the contracting parties involved.': ibid 409. This argument is made with voluntary creditors in mind and may well not apply to tort or other involuntary claimants (such as spouses in matrimonial disputes). In respect of *defensive* asset partitioning, Hansmann and Kraakman recognise that 'limited liability in tort is a doctrine of very dubious efficiency' (ibid 431).

[6] ibid 423 – 427.

[7] To create entity shielding simply by contracting, an owner of a firm would have to seek the consent of *all* his existing creditors' agreement to either waive their rights to seize the firm's assets or to subordinate their claims to those of the firm creditors. The transaction costs of drafting and negotiating such waivers and subordination would be prohibitive. The process would also involve moral hazard as an owner would be tempted to opportunistically refrain from seeking waivers to minimise his personal borrowing cost: ibid 406 – 408.

shielding.[8] Consequently, it is entity shielding (rather than owner shielding) that is the 'core characteristic'[9] of organisational law.

For Hansmann and Kraakman, both the limited liability company and the common law trust are archetypes of organisations characterised by strong affirmative asset partitioning. When a company is incorporated as a separate legal person, its assets are segregated from those of its shareholders and reserved for satisfying its creditors' claims to the exclusion of the shareholders' personal creditors.[10] Although the latter may seize the *shares* held by the shareholders in an event of default, they may not generally force a liquidation of the company to satisfy their outstanding claims against the shareholders.[11] But while a company's distinct legal personality renders it an efficient device for asset partitioning, it is not a necessary condition for achieving that outcome. The trust is a classic example of a structure that achieves affirmative asset partitioning without the use of a separate legal entity. When a trust is constituted, the trust assets are segregated from the trustee's personal assets and insulated from his personal creditors. In effect, the trust creates a divided patrimony by conferring upon the trustee two distinct legal capacities: 'a natural person contracting on behalf of himself, and an artificial person acting on behalf of the beneficiaries.'[12] Seen in this light, the core function of the trust is – like the company – to facilitate 'the partitioning of assets into bundles that can conveniently be pledged separately to different classes of creditors'.[13] Additionally, trust assets are shielded from the creditors of the settlor once the latter had completely divested her beneficiary interests in the assets.[14] Consequently, a trust facilitates entity shielding by prioritising – in relation to the trust fund – the claims of trust creditors over those of the trustee's and the settlor's creditors.[15] From this analysis, Hansmann and

[8] Owner shielding or limited liability may be established by incorporating into the firm's contracts provisions that limit or exclude creditors' rights of recourse to the owners' personal assets. The transaction costs may be high but likely vastly less than that incurred for entity shielding since there is no need to renegotiate with all the owner's personal creditors: ibid 429.

[9] ibid 406.

[10] A position entrenched by *Macaura v Northern Assurance Co Ltd* [1925] AC 619, confirming that a shareholder of a company has neither legal nor equitable interests in the company's assets.

[11] Hansmann & Kraakman consider this element of 'liquidation protection' an essential ingredient of 'strong' affirmative asset partitioning: Hansmann & Kraakman (2000) (n 2) 394.

[12] ibid 416.

[13] H Hansmann & U Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) NYU Law Rev 434 at 438 |('Hansmann & Mattei'); G Gretton, 'Trusts Without Equity' (2000) 49 ICLQ 599 at 614.

[14] Hansmann & Kraakman (2000) (n 2) 416 – 417; Hansmann & Mattei (n 13) 545. See also S Worthington, 'The Commercial Utility of the Trust Vehicle' in D Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, 2002).

[15] In English law, a trust creditor does not have direct access to trust assets. Instead, her immediate right of recourse is against the trustee (who is prima facie personally liable for debts incurred in connection with the trust) rather than the trust fund. Although trust creditors do have indirect recourse against the trust fund as they are entitled to be subrogated to the trustee's right to be indemnified out of trust fund for expenses properly incurred, such rights would be curtailed in situations where the trustee is not entitled to be indemnified because (for instance) she has acted in breach of trust: see J Glister & J Lee, *Hanbury & Martin: Modern Equity*, 20th ed (Sweet & Maxwell, 2015) [18-006]. Hence, while the English trust does shield trust assets against the trustee's personal creditors, it accords more limited priority to the trust creditors over the trust assets. In contrast, the prevailing position in American law is that trust creditors may recover directly from the trust fund without recourse to the trustee's personal assets: see eg, Restatement (Third) of Trusts (St Paul: American Law Institute, 2003–12), §105 – 106 ; see also Uniform Trust Code §1010 (2000) ('UTC'). This distinction does not alter the

Kraakman draw the important conclusion that the common law trust is *functionally* a *legal entity*.[16] This follows from their central thesis that organisational law is in essence property law[17] and that 'legal entities' are organisational forms that enable affirmative asset partitioning.

Entity shielding is beneficial primarily as a means of promoting borrowing by lowering the cost of credit. Hansmann and Kraakman recognise, however, that such benefit may be eroded if an owner opportunistically shifts his assets into a firm in order to subordinate the claims of his personal creditors without their consent.[18] That would lead to inefficient outcomes as creditors cognisant of the risk may raise credit rates and thereby drive out honest firms who could otherwise have put the borrowing to productive uses.[19] In their view, the risks of such opportunism are more acute in one-man companies since the shareholders of multiple-owner companies would not normally agree to such asset shifting unless they stand to gain from the manoeuvres.[20] Thus, in as much as entity shielding benefits firm creditors by securing their interests, it also imposes significant costs when asset diversion is motivated by the desire to thwart creditor rights.

Corporate and trust structures have long been popular devices for shielding assets from creditors by reason of its strong entity shielding function.[21] Indeed, the widespread use *and* misuse of the trust as a means of asset protection device is a feature of various offshore financial centres.[22] Unsurpringly, therefore, legislation has intervened to preserve creditor interests. For example, avoidance provisions that enable a liquidator or administrator to 'claw back' assets improperly dissipated, including assets transferred to companies or trusts for no or inadequate value, have long been entrenched features of insolvency legislation.[23] Outwith the insolvency context, an undervalue transaction may also be unwound if it was entered into for the purpose of putting assets beyond the reach of creditors or otherwise prejudicing the interest of creditors.[24] This is a broad remedy that has its roots traceable back to the Statute of Elizabeth 1571, designed to redress transactions aimed at defrauding creditors. It may be

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trust's importance as an asset partitioning tool but it does explain why the American trust is more reified, and more readily accepted as an 'entity', than its English counterpart.

[16] Hansmann & Kraakman (2000) (n 2), 416.

[17] ibid 390 and 440.

[18] ibid 400 – 401.

[19] H Hansmann, R Kraakman & R Squire, 'Law and the Rise of the Firm' (2006) 119 Harvard Law Review 1333, 1351 – 1352 ('Hansmann, Kraakman & Squire').

[20] ibid 1351.

[21] In respect of trusts, Knobel cites a 1999 estimate that 50 – 80% of all trusts are shams, but noted that the estimate may be unhelpful without clarity as to what constitutes a 'sham': see A Knobel, *Trusts: Weapons of Mass Injustice* (Tax Justice Network, 13 Feb 2017) 11, accessible at http://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf. ('Knobel')

[22] For a classic discussion of the features of offshore trusts that facilitate the achievement of this aim, see D Waters, 'Reaching for the Sky: Taking Trusts to the Limit' in D Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International, 2002), 252 – 265.

[23] The transaction must have been entered into within two years before the onset of insolvency and the company must have been insolvent at the time of the transaction or became insolvent as a result of the transaction: see s 238 and 240 Insolvency Act 1986 (UK). The equivalent provisions for personal bankruptcy are 338 and 341 Insolvency Act 1986 (UK).

[24] ss 423 – 425 of the Insolvency Act 1986 (UK).

sought against both individual and corporate debtors by creditors as well as other 'victims' adversely affected by the transaction. Importantly, the remedy is available even when the debtor is not subject to an insolvency regime, and is in fact frequently invoked in that context. Despite the common epithet of 'fraudulent transfers', there is no need to prove fraud or dishonesty on the part of the debtor. A transaction would be conceived 'for the purpose' of defeating creditor claims if the debtor so intended even if that was not the sole or dominant purpose.[25] In the context of matrimonial proceedings, courts are similarly statutorily empowered to set aside dispositions made to defeat a former spouse's claim for financial relief.[26] In addition, these statutory remedies are supplemented by judicial doctrines that may be invoked to unwind a transaction or withhold a statutory privilege in cases where an organisational form is being deployed to avoid legal obligations.[27] Thus, creditors who suspect of improper asset shielding have sought to set aside trusts as 'shams' or, more recently, 'illusory trusts', or attack corporate structures using the proverbial 'veil-piercing' doctrine.

According to Hansmann and Kraakman,[28] laws designed to reduce debtor opportunism add to the costs of entity shielding because their enforcement necessarily generate costs. 'Bright-line rules' may produce high ex ante compliance costs if their effect is to 'straitjacket owners and restrict an entity's practical applications'. Flexible standards, on the other hand, may result in ex post judicial errors (if the flexible standards require resolution by sophisticated courts and generate 'uncertainty of litigation outcomes').[29] For the laws to be efficient, therefore, their costs must not outstrip the value derived from entity shielding. The discussion that follows will trace recent doctrinal developments of judicial remedies for abuses of trust and corporate structures. It will highlight the normative and policy considerations – including economic considerations gleaned from the Hansmaan-Kraakman and related lieterature – that guide (or ought to guide) these developments.

Abuse of Trusts

The trust is a flexible device that can be manipulated and exploited to different ends. As such, the 'abuse' of the trust structure may arise in various forms. In its modern role as a tool for investment and commercial enterprise,[30] the trust is often adapted by private (contractual)

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[25] *Inland Revenue Commissioners v Hashmi* [2002] 2 BCLC 489. But it would not suffice if the transaction merely had the effect or consequence of putting assets beyond the reach of creditors if it that effect was not desired or intended: see *Inland revenue Commissioners v Hashmi* [2002] 2 BCLC 489 [23]; *JSC BTA Bank v Mukhtar Ablyazov* [2018] EWCA Civ 1176.

[26] s 37 Matrimonial Causes Act 1973 (UK).

[27] These doctrines are supplementary and subsidiary in that they are likely to be invoked only where statutory remedies are under-inclusive. For eg, the remedy for fraulent transfers may not be available in cases where the evasive scheme is executed without the transfer of assets near the time of the accrual of debt: see N Allen, 'Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice' (2011) 85 St John's Law Review 1147, 1167 – 1169).

[28] See Hansmann, Kraakman & Squire (n 19).

[29] Ibid, 1352.

[30] Investments funds are now commonly structured as trusts, examples of which would include unit trusts, pension funds, real estate investment trusts and business trusts. In some jurisdictions, the trust structure is also employed to actively engage in business operations. The Australian 'trading trust', for example, would typically

means to closely resemble the company in form and function. This phenomenon has raised concerns as it engenders the perception of parity in their legal exposures though in reality, trust structures present different legal risks as they are neither regulated as a legal person nor by comprehensive legislation (such as that applicable to companies) and are structurally unsuited for purposes of trade. The exploitation of trusts in this way is beyond the scope of this article as it raises more complex questions on the legal and regulatory reform needed to redress the misalignment between form and substance.[31]

Instead, this article is more narrowly focused on the abuse of trust in its traditional role as a donative instrument. In that role, the trust is primarily an asset-holding device that facilitates both the (often gratuitous) transfer and preservation of wealth. Often, however, it is also used to place assets beyond the reach of creditors. Increasingly, such settlements are structured as discretionary trusts so the settlor could not be said to have any proprietary interest in the trust assets even if she were named as a potential beneficiary. At the same time, the settlor would retain wide control by reserving various powers either to himself or his appointed protector or enforcer. Taken together, such an arrangement allows the settlor to divest himself of ownership without actually losing either control of, or access to, the trust assets. To counteract such mischief, claimants have sought to attack the *validity* of trust settlements by arguing that they were 'shams' or, more recently, 'illusory'.

(a) Sham Trusts

A transaction is a sham if it purports to create certain legal effects but is not in fact intended as such.[32] Accordingly, a trust may be struck down as a 'sham' if it was not intended as a genuine disposition of property. The term 'sham trust' is, therefore, a label for a transaction dressed up as a trust but not one in fact.[33] A sham trust was found in *Abdel Rahman v Chase Bank (CI) Trust Company Limited*.[34] There, a settlor had constituted a discretionary trust to ensure he retains the right to manage and control his assets during his lifetime and to effect testamentary dispositions upon his death free from the restrictions of Muslim or other applicable law.[35] Under the terms of the 'trust', the settlor had almost unfettered discretion to appoint both income and capital to himself or his appointee, direct all investment decisions and dispose of the assets at will.[36] Completely deferential to the settlor, the trustee neither interfered nor participated in the management of the trust assets. Consequently, the Royal

confer the trustee the power to carry on business using trust assets. See, generally, J Langbein, 'The Secret Life of the Trust: The Trust as an Instrument of Commerce' (1997) Yale Law Journal 165; S Schwarcz, 'Commercial Trusts as Business Organizations: Unravelling the Mystery' (2003) 58 The Business Lawyer 559; and N D'Angelo, *Commercial Trusts* (LexisNexis, 2014).

[31] See the thorough and illuminating discussion in D'Angelo (n 30).

[32] *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 211 ALR 101 [46]; *Raftland Pty Ltd as Trustee of the Raftland Trust v Commissioner of Taxation* [2008] 246 ALR 406 [145].

[33] BH Lee, 'There is No Such thing as a Sham Trust' (2013) 44 Victoria U Wellington L Rev 115, 117 – 118.

[34] [1991] JLR 103.

[35] [1991] JLR 103, 147.

[36] *Abdel Rahman* [1991] JLR 103, 140 – 147.

Court of Jersey concluded that '[the] trustee was never made the master of the assets'.[37] Instead, the settlor 'exercised dominion and control over the trustee in the administration and management of the settlement', thus rendering the settlement a sham 'in the sense that it was made to appear to be a gift when it was not'.[38] However, while the settlor's control over trust property is a necessary indicium of sham,[39] it is not by itself sufficient.[40] The facts must, as a whole, culminate in the conclusion that the purported trust was set up as a pretence.

The application of sham reasoning to trusts appears now to be well accepted but its precise rationale is disputed. A dominant view is that advocated by Conaglen,[41] who explains sham trusts as an application of a distinct legal doctrine founded on Diplock LJ's dictum in *Snook v London and West Riding Investments Ltd*[42] ('*Snook*'). This approach conceives of shams narrowly as a doctrine developed to counteract deception.[43] Thus, a transaction will only be struck down as a sham if it was formed with the common intention to create false obligations to mislead third parties. According to Conaglen, it is the need to thwart such deception that justifies departing from the objective approach to construction and to look, instead, at the parties' subjective state of mind.[44] More generally, insisting on proof of a common intention to deceive is necessary for preserving certainty in bilateral transactions.[45] A settlor should not be permitted to set aside a trust vis-à-vis the trustee, and defeat the latter's legitimate reliance, only because of his (the settlor's) own undeclared shamming intention.[46]

Conaglen's analysis is influential as it has been explicitly endorsed by judges in Australia[47] and New Zealand.[48] Nevertheless, its correctness has been disputed as its assumes, critically, that trusts are 'fundamentally bilateral [in] nature'.[49] Although a settlor may appoint a trustee by contract, the essential transaction is the conveyance of property to the beneficiary which is a gift rather than a contract.[50] The trust is ultimately constituted by the unilateral acts of the

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[37] ibid 147.
[38] ibid.
[39] L Ho, '"Breaking Bad"—Settlors' Reserved Powers' in R Nolan, K Low and HW Tang (eds), *Trusts and Modern Wealth Management* (Cambridge, Cambridge University Press, 2018) 34, 42.
[40] J Palmer, 'Controlling the Trust' (2011) 12 Otago Law Review 473, 477.
[41] M Conaglen, 'Sham Trusts' [2008] 67 *CLJ* 176; M Conaglen, 'Trusts and Intention' in E Simpson and M Stewart (eds), *Sham Transactions* (Oxford, Oxford University Press, 2013).
[42] [1967] 2 QB 786, 802.
[43] Conaglen (2008) (n 41) 186–87.
[44] ibid 186.
[45] ibid 188.
[46] ibid 188 – 189.
[47] *Raftland Pty Ltd as Trustee of the Raftland Trust v Commissioner of Taxation* [2008] 246 ALR 406 [140] – [142] (per Kirby J). The majority judges (Gleeson, Gummow and Crennan JJ) (at [35]) were ambivalent as to the elements of a sham but the facts of the case were consistent with the requirement of common intention.
[48] *Official Assignee v Wilson* [2008] NZCA 122, [2008] 3 NZLR 45 [49] – [53]. This conception of 'sham' has also prevailed in England: see *Shalson v Russo* [2003] EWHC 1637, [2005] 2 WLR 1213 [190]; *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467 [38]–[40]; *JSC Mezhdunarodniy Promyshlenniy Bank v Sergei Viktorovich Pugachev* [2017] EWHC 2426 [150] ('*Pugachev*') but cf *Painter v Hutchison* [2007] EWHC 758 [114]–[115] where Lewison J confined the requirement for common intention to cases of bilateral trusts.
[49] Conaglen (2008) (n 41) 177.
[50] A See, 'Revisiting Sham Trusts: Common Intention, Estoppel and Illegality' [2018] *Conveyancer & Property Lawyer* 31, 36.

settlor, and the intention of the trustee is irrelevant.[51] Consistently with this orthodoxy, considerable support has emerged in academic literature for the alternative view that 'sham trusts' are based not on a distinct doctrine but are simply instances where a settlor was found not to have intended to create a trust. Thus, Palmer has argued that sham trusts are essentially 'an aspect of the law relating to certainty of intention required for a valid trust'.[52] On this view, the identification of a 'sham trust' is simply a matter of construction. It is not necessary for the trustee to share the shamming intention because it is the settlor's intention alone that determines whether a trust has been validly constituted.[53] Other commentators have likewise explained sham trusts as instances of failure of intention but conceived the 'objective' assessment of settlor intention differently. For example, Douglas and McFarlane take the view that the settlor's intention is only relevant when it has been *communicated*.[54] An uncommunicated intention is of no effect since a trust is only constituted when the settlor's dispositive intent is 'declared'. It is in this sense that a sham is predicated on a 'common' shamming intention – if the settlor had not communicated his ulterior purpose, the trust would not fail as a sham since there is no relevant objective evidence by which to displace the clear intention to create a trust evinced by the trust deed.[55]

In practice, both the *Snook* and failed-intention conceptions of sham trusts will often lead to the same outcome especially if a broad conception of 'objective assessment' is adopted. However, the *Snook* approach is conceptually narrower as it requires proof of deception or dishonesty and courts are slow to impute dishonesty on professional trustees.[56] From a policy perspective, a restrictive approach is justified primarily by the need to preserve commercial certainty.[57] Trust beneficiaries may legitimately expect to receive distributions in accordance with the terms of the trust so long as they are not themselves privy to the settlor's shamming intention.[58] A stricter approach may also be justified from an economic perspective as a rule with greater specificity is more likely to generate lower compliance and enforcement costs.[59] Further, commercial certainty is of value if participants are risk-averse. However, a narrow

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[51] J Palmer, 'Dealing with the Emerging Popularity of Sham Trusts' (2007) New Zealand Law Review 81, 93; P Matthews, 'The Sham Trust Argument, and How to Avoid it' (2007) 21 Tru LI 191, 195 and 198.
[52] Palmer (n 51), 92.
[53] ibid, 93. See also Lee (n 33) 119 – 123. This view is supported by dicta in a number of cases: see eg *Midland Bank plc v Wyatt* [1997] 1 BCLC 242, 245; *Minwalla v Minwalla* [2004] EWHC 2823 (Fam), [2005] 1 FLR 771 [53]–[55]; *Carmen v Yates* [2004] EWHC 3448 (Ch), [2005] BPIR 476 [218]; *Ali v Bashir* [2014] EWHC 3853 (Ch) [26].
[54] Simon Douglas and Ben McFarlane, 'Sham Trusts' in Heather Conway and Robin Hickey (eds), *Modern Studies in Property Law*, vol 9 (Hart Publishing 2017) 237, 243 ('Douglas & McFarlane').
[55] For Douglas and McFarlane, this intention is determined from the objective perspective of a reasonable addressee, who is usually the trustee and exceptionally the beneficiary: see Douglas & McFarlane, ibid, 246. Liew and Mitchell similarly contend that the settlor's intention is only relevant if it is 'externally manifested and objectively assessed' but prefer a broader view of 'objective assessment' that entails assessing *all* her external manifestations: seeYK Liew & C Mitchell, 'The Creation of Express Trusts' (2017) 11 J Eq 133, 135 and 140. See also YK Liew, '"Sham Trusts" and Ascertaining Intentions to Create a Trust' (2018) 12 J Eq 237, 240 – 242.
[56] *National Westminster Bank plc v Rosemary Doreen Jones* [2001] 1 BCLC 98 [59].
[57] *Wilson* [2008] NZCA 122, [2008] 3 NZLR 45 [52].
[58] S*halson v Russo* [2003] EWHC 1637, [2005] 2 WLR 1213 [190].
[59] C Diver, 'The Optimal Precision of Administrative Rules' (1983) Yale LJ 65, 73 – 74; L Kaplow, 'Rules verses Standards: An Economic Analysis' (1992) 57 Duke LJ 557, 569 – 570.

approach may be under-inclusive and hence ineffective in deterring abuses of trust structures. The high evidential threshold of dishonesty may deter litigation and makes it more costly, rendering even more impervious offshore structures that are already resistant to creditor suits.[60] Of course, the economic efficacy of a legal doctrine is ultimately a matter of empirical proof. But the recent recognition that trusts may be 'illusory' even if they are not 'shams' may signal a perceived need to reign in the social costs of using trusts as judgment proofing devices.

(b) Illusory Trust

As with 'sham trust', the term 'illusory trust' is a misnomer that describes not a valid trust but a failed attempt to create one.[61] Historically, the term has its roots in trusts created ostensibly for the payment of creditors but not actually intended (by the debtor) as such.[62] In that context, an 'illusory trust' was a type of *Snook* sham – an intentional attempt to create a form that bore no relation to reality. More recently, however, the term 'illusory trust' has been revived as a shorthand for a trust that has failed because the settlor had reserved so much power under the trust that she could effectively exercise the powers of ownership over the trust property.

The growing significance of the illusory trust analysis as a tool for combatting evasive trust structures is evident in a trilogy of recent decisions. *Clayton v Clayton*[63] was a decision of the Supreme Court of New Zealand concerned with the distribution of matrimonial property. Mr Clayton, the husband, had during the course of the marriage set up (*inter alia*) a trust of which he was the sole trustee. The beneficiaries were himself, his wife and their two daughters. Under the trust, Mr Clayton was appointed the sole trustee and one of the discretionary beneficiaries. As trustee, he was expressly authorised to exercise any power or discretion in his own favour and without regard to the interests of the other beneficiaries.[64] Further, as 'Principal Family Member', he had the power to remove all the other discretionary beneficiaries and appoint all trust assets to himself.[65] The court concluded that Mr Clayton's extensive powers and entitlements were tantamount to a general power of appointment so he could properly be regarded as the effective owner of the trust assets.[66] Such power also constituted 'relationship property' to which Mrs Clayton was entitled under the Property (Relationship) Act 1976 (New Zealand) ('PRA').[67]

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[60] T Graham, 'Sham Revisited: Has *Snook* Passed its Sell-by Date?' (2016) 22 Trusts and Trustees 859, 862. For an interesting account of the use of trust and other structures in offshore wealth management, see B Harrington, 'Tactics and Techniques of Wealth Management' in B Harrington, *Capital Without Borders* (Harvard University Press, 2016), Chapter 4 ('Harrington').

[61] *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 [123] ('*Clayton*'), [129]; *Pugachev* [2017] EWHC 2426 [169].

[62] Ho (n 39) 42 – 43.

[63] *Clayton* [2016] 1 NZLR 551.

[64] ibid [56]–[58].

[65] ibid [62].

[66] ibid [68].

[67] ibid [98].

Given that conclusion, Mrs Clayton's arguments on illusory trusts were no longer of practical significance[68] but the Supreme Court went on to clarify that a trust may fail on the ground that it is 'illusory' even though the settlor had honestly intended to create a trust (and hence not a sham in the *Snook* sense).[69] The two concepts are distinct in that a 'sham' refers to a 'pretence: the terms of the document do not represent what the party or parties really intended.'[70] An illusory trust, by contrast, may arise even if the parties honestly intended to abide by the terms of the trust deed.[71] Whether or not a trust fails on this ground is a matter of construction of the trust deed. The court identified[72] two plausible rationales for the illusory trust analysis: the first is that the settlor had reserved so much power to himself that he could not be said to have divested sufficient control to constitute a trust; or secondly, that the breadth of the powers vested in the settlor calls into question the irreducible core of the trustee's duties set out in *Armitage v Nurse*.[73] However, the court did not express a firm view on the correct rationale of the illusory concept and how it could have applied on the facts since the issue had been resolved under the PRA and that the parties had, by the time of the judgment, reached settlement.[74]

Though *obiter*, the discussion in *Clayton* was subsequently cited by the English High Court for its authoritative pronouncements on illusory trusts in *JSC Mezhdunarodniy Promyshlenniy Bank v Sergei Viktorovich Pugachev*[75] ('*Pugachev*'). The protagonist, Sergei Pugachev (P), was a Russian oligarch who had founded a private bank and acquired much wealth as a result. However, the bank eventually became insolvent and its liquidators successfully brought legal actions against P. In the case that came before the English High court, the issue was whether the properties settled by P in various discretionary trusts could be used to meet the judgment debt. The significant feature was that the settlor was not only a named beneficiary of the trusts but was also their protector. In his capacity as protector, he could veto all major decisions regarding investments, distribution of income and capital, variation of trust deed and appointment of new beneficiaries.[76] On his own initiative, he could also appoint a successor in the event that he is barred by a (legal) disability from acting and remove a trustee (with or without cause) who did not act in accordance with his wishes.[77] Crucially, Birss J found that the powers that P held as protector were personal and not fiduciary in nature. This meant that he could exercise the powers selfishly for his own benefit without regard to the beneficiaries' interests as a class.[78] What led the learned judge to this conclusion was P's extensive powers

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[68] ibid [108].
[69] ibid [123].
[70] ibid [128].
[71] Another significant distinction appears to be that an illusory trust is only defeasible and not void. In *Clayton*, O'Regan J observed ([125]) that while an illusory trust may be defeasible, there is no reason why it may not be operated as a valid trust until the powers are exercised in such a manner as to render it invalid. In a similar vein, he also considered ([124]) it possible that a trust that was 'illusory' at inception could subsequently become valid because for eg, an independent, non-beneficiary trustee is subsequently appointed over the trust.
[72] ibid [124].
[73] *Armitage v Nurse* [1998] Ch 241.
[74] ibid [127].
[75] *Pugachev* [2017] EWHC 2426 [166] – [167]. Birss J, however, avoided the term 'illusory trust', renaming the claim as one concerning the 'True Effects of the Trusts': ibid [169].
[76] ibid [236]–[238].
[77] ibid [238] and [244].
[78] ibid [267].

as a protector combined with his position as settlor and beneficiary of the trusts.[79] Construed against the circumstances in which the trusts were settled and the extensive control wielded by P, the court concluded that the terms of the trust deed did not effectively divest P of the beneficial ownership of the trust assets.[80] Consequently, the assets were simply held on bare for the benefit of P.

Pugachev was followed shortly by *Webb v Webb*[81] ('*Webb*'), a decision of the Cook Islands Court of Appeal involving yet another dispute over matrimonial property. The husband (H) had constituted two trusts the assets of which were alleged to be matrimonial property. Under the trust deeds, H, as sole trustee, could distribute capital and income to himself without any fiduciary accountability.[82] He could also vest all trust property in himself,[83] or nominate himself as the sole beneficiary in substitution for existing beneficiaries.[84] He could, and did, appoint himself as 'consultant', an office that had powers over investments, the removal and replacement of trustees, the acceleration of final vesting and the variation of trust deeds.[85] Citing both *Clayton* and *Pugachev* as authorities for the illusory trust principles, the court stated that the 'ultimate question is whether the powers reserved to this respondent-settlor were consistent with an intention to irrevocably relinquish a beneficial interest.'[86] A settlor would not be regarded as having such intention if he could recover the property without the assent of 'a truly independent person' and is not otherwise subject to 'an enforceable fiduciary duty'.[87] Applying these principles, the court found that the trusts failed.[88] The powers retained by H were of sufficient breadth to enable him to recover, at any time, the property that he had purportedly settled on trust.

Clayton, *Pugachev* and *Webb* thus confirm that excessively broad settlor reserved powers may call into question the very existence of the trust.[89] A purported trust is not a trust if the powers reserved by the settlor are so extensive as to render the arrangement repugnant to the very concept of a trust. But that raises the difficult question of what the *necessary* constituents of a trust are. The orthodox (but conservative) view is that the 'irreducible core' of a trust lies in the trustee's duty to 'perform the trust honestly and in good faith for the benefit of the

[79] ibid [268].
[80] ibid [245].
[81] [2017] CKCA 4.
[82] ibid [61].
[83] ibid [62].
[84] ibid [63].
[85] ibid [59].
[86] ibid [56].
[87] ibid.
[88] ibid [65].
[89] A legal risk that has been widely flagged by commentators, see eg, D Waters, 'Settlor's Reserved Powers' (2006) 25 Est Tr & Pensions 234; TH Tey, 'Reservation of Settlor's Power' (2009) 21 SAcLJ 517; L Smith, 'Mistaking the trust' (2011) 40 HKLJ 787; L Smith, 'Massively Discretionary Trusts' (2017) 70 Current Legal Problems 17.

beneficiaries'.[90] On this conception, a 'trust' is only 'illusory' if the beneficiaries have no means of calling to account the trustee's duties of honesty and good faith.[91]

Pugachev marked a departure from this orthodoxy as it was not a case of 'no accountability'. In that case, P (the settlor) did not hold office as trustee. His powers as protector were largely negative in nature so he could not have exercised them without the complicity of the trustees.[92] That being the case, the trustees remained accountable to the beneficiaries as fiduciaries.[93] In Birss J's analysis, it was not the trustee's (lack of) accountability but the fact of *control* that was decisive. On this approach, discretionary trust is no trust at all if the settlor 'has retained effective control of the assets or at least can recover that control whenever they like'.[94] Equally, both *Webb* and *Clayton* appear to favour a broad conception of an 'illusory trust' based on the settlor's *factual* control. Thus, in *Webb*, it was said that the trust would fail if the settlor could have recovered the trust property without requiring the consent of a 'truly independent person'.[95] In *Clayton*, O'Regan J (who delivered the court's unanimous judgment) contemplated that a trust that is 'illusory' (and invalid) at inception may subsequently become valid because, for instance, an independent, non-beneficiary trustee is subsequently appointed over the trust.[96] These dicta hint at a characterisation that is based on factual rather than legal control.

An approach centred on the settlor's de facto control is controversial as it runs counter to the prevailing orthodoxy that factual control is not by itself a sufficient ground for looking through a trust. As Robertson and O'Regan JJ explained in *Official Assignee v Wilson*, '[the] uptake of control by someone other than an authorised person cannot be sufficient to extinguish the rights of the … beneficiaries under a trust.'[97] Others, however, suggest that *Clayton* and *Pugachev* are better understood as instances where the constitutive elements of a trust were not satisfied.[98] In particular, extensive settlor control could suggest a failure of intention to create a trust since such control is fundamentally incompatible with the concept of a trust (that contemplates the settlor 'drops out' once the trust is constituted). But even with this rationalisation, a broad approach based on 'reality of control'[99] is contestable because modern international trusts are

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[90] *Armitage v Nurse* [1998] Ch 241, 253 (per Millett LJ). See also D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (OUP, 1996) 47, 52-53**.**

[91] M Bennett, 'Competing Views on Illusory Trusts: the *Clayton v Clayton* Litigation in its Wider Contexts' (2017) 11 J Eq 48, 61 ('Bennett'). See eg, *Re AQ Revocable Trust* [2010] Bda LR 26, where a purported inter vivos discretionary trust was found to be illusory because the settlor could absolve himself from all liability to account as trustee.

[92] J Davies, 'New Developments in Settlor Reserved Powers' [2018] *Conveyancer and Property Lawyer* 175, 180 ('Davies').

[93] *Pugachev* [2017] EWHC 2426 [220].

[94] ibid [182].

[95] *Webb* [2017] CKCA 4 [56].

[96] *Clayton* [2016] 1 NZLR 551 [124].

[97] *Wilson* [2008] 3 NZLR 45 [70]. See also Palmer (n 51), 89.

[98] See M Harding, 'Trusts and Purposes' [ ]. This is particularly so if one accepts that intention in this context must be ascertained objectively taking into account not only the ostensible declarations of the trust deed but also other relevant external manifestations of the settlor by word and conduct: see Liew & Mitchell (n 55), 140 – 141. But if this were so, then an illusory trust is no different from a sham – both concern arrangements that are not intended to create the usual legal incidents of a trust despite bearing the appearance of formally valid trusts.

[99] Analysed in Bennett (n 91) 70 – 72.

commonly characterised by wide settlor reserved powers.[100] This is notoriously true of trusts constituted in offshore jurisdictions, where there are legislative enactments to preserve trust validity notwithstanding wide reserved powers.[101] Increasingly, even onshore trusts are constituted with extensive reserved powers to cater to settlor demand.[102] Often, this preference for continued dominion is motivated by the legitimate desire to ensure that trust assets are skilfully invested and ultimately distributed in accordance with trust provisions. Hence, to infer ownership from the mere existence of settlor powers may conflate the distinct concepts of power and property[103] and threaten to unsettle even trusts that reserve wide powers to settlors for legitimate reasons.[104]

These objections suggest that the rationale for 'illusory trusts' must ultimately draw from considerations *external* to the trust's constitutive elements.[105] A critical consideration is whether the trust arrangement is constituted primarily to evade the liabilities of ownership. Thus, it would not be enough to ask if the settlor had the requisite intention to create a trust a trust to decide if it was 'illusory'. Regard must also be had to the purposes that *ought* (or ought not) be facilitated by the use of the device.[106] What this means is that the inquiry – though framed as an exercise in construction – is nevertheless (at least in part) a normative investigation requiring the evaluation of the settlor's purposes. This normative dimension is prominent in *Pugachev*, where Birss J laid stress on the need to construe the trust deeds against the risk that an unscrupulous person may attempt to frustrate enforcement actions by hiding their assets behind trust arrangements.[107] Where there is incontrovertible evidence that P had set out to 'judgment-proof' the trust by engaging a consultancy firm specifically to defend his assets against Russian creditors,[108] the natural inference is that P had reserved powers to himself in order to evade his creditors' claims.[109]

Though necessarily more speculative, the focus on the settlor's purposes may also make sense when viewed through the lens of economic analysis. Recall that in the Hansmann-Kraakman framework, asset partitioning is beneficial chiefly because it could lower the cost of credit by pledging a pool of assets to trust creditors. Where, however, a trust is set up purely as an asset-

[100] See R Lee, 'The Evolution of the Modern International Trust: Developments and Challenges' (2018) 103 Iowa L Rev 2069, 2077 – 2079.
[101] See eg Cayman Islands Trusts Law (2011 Revision), s 14; Trusts (Amendment No 4) Jersey Law 2006; Bahamas Trustee Act 2011, s 81A; Bermuda Trusts (Special Provisions) Act 2014, s 2A; s 86 British Virgin Islands Trustee Act 2013; and the Virgin Islands Special Trusts (Amendment) Act 2013. Other onshore jurisdictions such as Singapore and Hong Kong have also enacted legislation to clarify that a trust is not invalid only by reason of a settlor reserving to himself powers of investment or asset management functions: see Singapore Trustees Act 2004, s 90(5) and Trustee Ordinance (Hong Kong) 2014, s 41X.
[102] *Clayton* and *Pugachev* are striking examples of this trend.
[103] Davies (n 92) 180–181, citing *Re Armstrong* (1886) 17 QBD 521, 531.
[104] G Hogan, 'Case Note: *Mezhprom Bank v Pugachev* [2017] EWHC 2426 (Ch)' (2018) 24 *Trusts & Trustees* 212, 214–15.
[105] Bennett (n 91) 75 – 76.
[106] One conception of the trust's purpose is to enable the settlor or trustee to perform the trust *for the benefit of beneficiaries*: see Harding (n 98) [ ].
[107] *Pugachev* [2017] EWHC 2426 [174] – [187].
[108] *Pugachev* [2017] EWHC 2426 [23], [275]; G Hogan, 'Case Note: *Mezhprom Bank v Pugachev* [2017] EWHC 2426 (Ch)' (2018) 24 *Trusts & Trustees* 212, 214.
[109] D Russell & T Graham, 'Illusory Trusts' (2018) 24 Trusts & Trustees 307, 316.

holding device with little or no trading or charitable activities, any reduction in funding costs is unlikely to be significant. Another, perhaps more pertinent, reason why the trust is thought to be cost-effective is that it is said to greatly reduce third-party informational costs. According to Merill and Smith, the trust 'dramatically reduces' such costs because it allows third parties to deal with the trustee alone as legal owner of the trust corpus without having to investigate whether the property in question is subject to undisclosed future interests.[110] Yet, this advantage would only accrue if trusts are genuinely used to split and convey property interests. If a 'trust' is formally constituted without vesting beneficial ownership in another, there is no true cost savings since the informational costs need not have been incurred in the first place. In other words, the settlor's purpose is relevant because the cost savings assumed in the economic analysis of trusts presuppose that they are designed for particular purposes (eg, to divide and vest property ownership in different persons or partition creditor rights). However, those purposes are not achieved when settlors create 'ownerless trusts' to evade creditors. Instead, these 'trusts' forfeit the benefits of the trust device and inflict on society the costs of opportunism.[111] Of course, a broader regime for invalidating trusts may imply risks of over-inclusion. But while factual control coupled with evasive intent is a wider approach than the ordothox no-accountability test, they are still criteria that can largely be determined ex ante particularly as precedents develop.[112] A broader approach may not therefore inevitably increase enforcement and error costs.

Abuse of Corporate Form

The judicial responses to abuses of trusts and corporate structures diverge for the chief reason that a company is a legal entity while the trust is not. Unlike a trust, a company cannot be invalidated as a 'sham'; its legal existence remains intact even if it has been deployed for improper purposes.[113] Rather, as a legal person, the corporate entity is subject to general principles of law that regulate the conduct of persons. Hence, the creditors of a controller who wish to reach the assets of companies owned or controlled by the latter would typically, as a first line of attack, consider if general principles (such as trusts or agency) could be deployed to establish the controller's legal or beneficial interests in those assets. Additionally, however, there exists a long-standing but contested 'veil-piercing' jurisdiction that allows the courts to negate the company's entity shielding function in certain circumstances. Our discussion here will focus on this limited jurisdiction and its interaction with other general principles of law.

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[110] In the form of 'life estates, remainders, remainders, possibilities of reverter, and executory interests': T Merill & H Smith, 'The Property/Contract Interface' (2001) 101 Colum L Rev 773, 848.
[111] As discussed in text to nn 18–19.
[112] A precedent may convert a standard into a rule with the result that its enforcement will cost no more than that of a rule: Kaplow (n 59), 577.
[113] *Faiza Ben Hashem v Abdulhadi Ali Shayif, Radfan Limited* [2009] 1 FLR 115 [157] ('*Ben Hashem*'); R Miles & E Holland, 'Piercing the Corporate Veil' in E Simpson & M Stewart (eds), *Sham Transactions* (OUP, 2014) [11.53]. Although the company may, of course, enter into a transaction that is a sham in the *Snook* sense.

The corporate form may be exploited in various ways that involve the abuse of entity shielding. Most obviously, a person may transfer his personal assets to a company he controls for the purpose of placing them out of his creditors' reach. So deployed, the company is a passive asset-holding entity that is functionally no different from a trust. A company may also be abused if it is used to evade a personal legal obligation. For example, a director may divert a corporate opportunity to a company he controls to circumvent his fiduciary obligation. Or, a controller may procure a company to enter into a transaction, or carry on a business, when he is contractually prohibited from doing so. In the most serious cases, a company may be set up solely to perpetrate unlawful activities. In such cases, a claimant who has a valid cause of action against the controller may also wish to reach the assets of the 'device company' particularly if the controller is insolvent or if a significant portion of the illicit gains is shielded by the device company.

(a) Reverse veil-piercing

When a company's veil of incorporation is 'pierced', it is identified with its controller for particular purposes. 'Forward veil-piercing' occurs when the creditors of a company seek to attach their claims directly against the company's shareholders (and their personal assets). 'Reverse veil-piercing', on the other hand, arises when a shareholder, or his creditors, seek to ignore the company's separate legal status for particular purposes.[114] Reverse veil-piercing may further be analysed as comprising insider and outsider piercing. Insider reverse piercing, as its name suggests, is typically pleaded by a shareholder asserting unity with the company in order to qualify for particular benefits.[115] By contrast, outsider reverse piercing is asserted by a third party, such as a creditor of the shareholder, to hold the company accountable for the latter's obligations.[116] Its effect is to remove the shield of affirmative asset partitioning and stymie the shareholder's evasive purposes. Our focus, for present purposes, is on outsider reverse piercing.

(b) Evasion and concealment

In *Prest v Petrodel Resources Ltd,*[117] the UK Supreme Court adopted a highly restrictive conception of veil-piercing. In the leading judgment, Lord Sumption explicated veil-piercing as those situations 'where a person who owns and controls a company is said in certain circumstances to be identified with it in law *by virtue of that ownership and control*.'[118] In his

[114] G Crespi, 'The Reverse Pierce Doctrine: Applying Appropriate Standards' (1990) 16 J Corp L 33, 36.
[115] This occurred, for instance, in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, where a parent company was permitted to pierce the veil of its subsidiary in order to claim statutory compensation for compulsory land acquisition.
[116] The concepts of insider and outsider reverse piercing were also discussed by Crespi (n 114) 37. In *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva* [2018] 5 SLR 689, the Singapore High Court accepted ([48]) that both standard piercing and outsider reverse piercing were supported by authority but declined ([50] and [75]) to permit non-statutory insider reverse piercing.
[117] [2013] 3 WLR 1.
[118] ibid [16] (emphasis added).

Lordship's view, the morass of authorities citing 'sham' or 'façade' as a sufficient criterion for veil-piercing may be reduced to two principles. The first is the 'evasion principle', which applies in the very specific context where company's separate personality is disregarded to prevent its controller from evading a *pre-existing* legal obligation.[119] So if A has contracted to sell land to B but transfers it to C, a company that A controls prior to completion of sale to defeat B's right to specific performance, the evasion principle would apply to specifically injunct C to convey the land to B. [120] The veil of C is 'pierced' to ensure that A does not defeat the enforcement of B's rights by interposing C.[121] The second is the 'concealment principle', where the court merely looks behind the façade to identify the 'real actors' concealed by the interposition of one or more companies.[122] The concealment principle does not (according to Lord Sumption) require the veil to be pierced because some other conventional principle (such as agency or trusts) is being applied on the footing that the company and its controller are distinct legal persons. On this analysis, veil-piercing is justified only on the evasion rationale. But this jurisdiction is extremely limited as it is a 'last resort' remedy that should only apply when it is *necessary* to do so.[123]

The evasion principle has direct application to blatant instances of creditor avoidance where, for instance, a debtor transfers assets to corporate entities at an undervalue to defeat the *existing* rights of creditors.[124] However, it is of no assistance in cases where the assets were ringfenced in anticipation of but *before* the accrual of such liabilities. This was the case in *Prest*, where the avoidance was ultimately redressed by the application of trust (concealment) rather than veil-piercing (evasion) principle. The dispute in *Prest* arose in the context of a claim for ancillary reliefs following the divorce of Michael and Yesmin Prest. Having obtained an order for a lump sum payment of £17.5 million in her favour, Mrs Present sought (in partial satisfaction of that debt) the transfer of seven UK properties legally owned by two offshore companies under Mr Prest's control. She would succeed if Mr Prest could properly be regarded as being 'entitled' to the UK properties pursuant to s 24(1)(a) of the Matrimonial Causes Act 1973 ('MCA').[125] Before the Supreme Court, Mrs Prest argued that Mr Prest was entitled to the properties either because the court could (exceptionally) reverse-pierce the corporate veils of the offshore companies to reach their assets or that the companies were only bare trustees holding the properties on trust for Mr Prest. The Supreme Court upheld Mrs Prest's claims in trusts but unanimously rejected the veil-piercing argument. The evasion principle was not engaged as Mr Prest was not seeking to evade pre-existing legal obligations since the properties were vested in the companies long before the marital breakup.[126] Instead,

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[119] ibid [28] and [35].
[120] *Jones v Lipman* [1962] 2 WLR 832, which Lord Sumption regarded as the paradigm of 'evasion' cases: see *Prest* [2013] 3 WLR 1 [30].
[121] *Prest* [2013] 3 WLR 1 [28].
[122] ibid [28].
[123] ibid [35].
[124] See eg, *Akhmedova v Akhmedova* [2018] EWFC 23 (Fam).
[125] s 24(1)(a) of the Matrimonial Causes Act 1973 provides that the court may, on granting a decree of divorce, order a party to the marriage 'to transfer to the other party … such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion'.
[126] *Prest* [2013] 3 WLR 1 [36].

the companies were set up for purposes of ‘wealth protection and avoidance of tax’.[127] Nor could the court read into the specific statutory context a broader veil-piercing jurisdiction than that which existed at common law. Such a departure would be objectionable as it would ‘cut across the statutory schemes of company and insolvency law’, effectively elevating Mrs Prest to the rank of a secured creditor.[128] However, the court found that the UK properties were held by the offshore companies on resulting trust for Mr Prest as he had furnished the purchase price of the properties and there was no evidence to rebut the presumption that he intended to retain beneficial ownership.[129] Instead, such intention was bolstered by his gratuitous occupation of the property as matrimonical home, which cannot usually be justified as being in the company’s interest and is hence inconsistent with the company’s beneficial owenership.[130]

Lord Sumption’s analytical framework is not without difficulties[131] but it has (despite being a minority view[132]) elucidated this murky area of law in important ways. First, in restricting evasion to the circumvention of *pre-existing* legal obligations, *Prest* is effectively entrenching the position established since *Adams v Cape Industries plc*.[133] In that case, the English Court of Appeal made clear that the use of corporate structures to limit shareholders’ *future* legal liability is generally unobjectionable since that is often the primary purpose of incorporation. This approach underscores the primacy of entity shielding.[134] Economic actors are entitled to segregate assets for the pursuit of particular enterprise and to prioritise the claims of creditors engaged in that enterprise. So fundamental is this function that any erosion thereof should only be rarely permitted. Second, the reasoning in *Prest* usefully reinforces the structural distinction between the trust and the corporation. That the court was willing to recharacterise the transactions applying trust principles but not undermine the integrity of the corporate personhood is consistent with its entrenched deference to the latter’s *legal* status. So even if they could, as Hansmann and Kraakman suggest, be understood as *economic* entities by reason of their asset partitioning functions, their distinct *legal* constitutions exert different effects on creditors. Third – and this, too, follows from the corporation’s distinct status – the framework signals a shift to conventional principles (‘under ‘concealment’) as the preferred route for developing remedies for alleged abuses of the corporate form. Such an approach has (or is thought to have) the advantage of greater certainty and predictability as litigants would have recourse to the jurisprudence that has already developed in those areas. Assuming that those

[127] ibid [36].
[128] ibid [41].
[129] ibid [49] – [51].
[130] ibid [52].
[131] See discussion in text to nn 136 –162.
[132] Apart from Lord Neuberger, who accepted (*Prest* [2013] 3 WLR 1 [81]) the evasion principle as a correct basis for piercing the corporate veil, most of the other law lords had reservations as to whether ‘veil-piercing’ should be so narrowly defined. Lord Walker preferred (ibid [106]) the more radical view that ‘piercing the corporate veil’ is not a doctrine at all.
[133] *Adams v Cape Industries plc* [1990] 1 Ch 433, 544.
[134] To this limited extent, the reasoning in *Prest* could be seen as vindicating Hansmann & Kraakman’s diagnosis (n 19) that it is more pressing to protect entity shielding, as opposed to owner shielding, against abuse. This is because while the conduct of business on the basis of limited liability is generally lawful and legitimate, the deliberate diversion of assets to put them beyond the reach of one’s creditors is not: see H Tjio, ‘Lifting the Veil on Piercing the Veil’ [2014] LMCLQ 19, 23 – 24.

principles are relatively clear and stable, that will likely result in lower compliance and enforcement costs.

(c) The instability of the evasion-concealment dichotomy

Post-*Prest*, the evasion-concealment framework appears to have conduced greater certainty by enabling courts to dismiss veil-piercing arguments more quickly when the facts plainly do not fall within the narrow remit of the evasion principle.[135] However, the confusing analyses of some cases have also revealed certain 'fractures'[136] in the framework. A dominant reason for that lies in the conceptual overlap between evasion and concealment. Despite Lord Sumption's insistence that concealment is 'legally banal and does not involve veil-piercing at all',[137] a closer scrutiny of the authorities demonstrates that veil-piercing reasoning is often implicit in the concealment cases. Or, as Hannigan has observed, 'concealment is inherent in many evasion cases [and] indeed, evasion is often achieved through concealment'.[138]

In *Prest*, Lord Sumption cited as examples of concealment *Gencor ACP Ltd v Dalby*[139] ('*Gencor*') and *Trustor AB v Smallbone (No 2)*[140] ('*Trustor*'), both of which concerned the diversion of funds by a fiduciary from the claimant to a company under his control. Although both decisions were decided on the basis of 'piercing' the recipient company's veil to treat its receipt as that of the fiduciary, Lord Sumption thought 'the true facts were that the company had received the money as their *agent or nominee*' for the controller. Yet, it is not difficult to see that both cases also fit the 'evasion' paradigm. To the extent that the controllers had used the companies to shield the misappropriated funds or unauthorised profits from enforcement proceedings, were they not also interposing the corporate entities to evade pre-existing liabilities?[141] Furthermore, Lord Sumption did not explain how agency or nomineeship was justified on the facts of *Gencor* and *Trustor*. As a general rule, the mere fact that a shareholder owns and controls a company is not a sufficient basis for inferring agency or nomineeship. On the contrary, the ordinary intention of those who conduct business through a company is to *exclude* agency, that is, to have the company carry on the business as principal rather agent.[142] In *Prest*, Lord Sumption acknowledged that the shareholder's ownership and control is only one of the relevant facts that establishes the parties' 'true legal relationship' but furnished little guidance on what other factors are.[143] Can it be, then, that the inferences

[135] See eg, *Persad v Singh* [2017] BCC 779; *M v M* [2014] 1 FLR 439; *The Tartan Army Ltd v Sett GmbH* [2015] CSOH 141.
[136] To borrow the description of ZX Tan, 'The New Era of Corporate Veil-Piercing: Concealed Cracks and Evaded Issues?' (2016) 28 Singapore Academy of Law Journal 209, Part IV.
[137] [2013] 3 WLR 1 [28].
[138] B Hannigan, *Company Law*, 5th ed (Oxford University Press, 2018) [3.39].
[139] [2000] 2 BCLC 734.
[140] [2001] 1 WLR 1177.
[141] B Hannigan, 'Wedded to Saloman: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company' (2013) 50 Irish Jurist 11, 32.
[142] *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (No 2)* [1998] 1 WLR 294, 304.
[143] [2013] 3 WLR 1 [32].

of agency or nomineeship were really drawn from a combination of the controller's *de facto* control and her evasive intention?[144]

Further instances of 'loose' agency reasoning can be found in cases involving confiscation proceedings commenced under the Proceeds of Crimes Act 2002 (UK). Here, the courts have had to decide if a person convicted of a crime has 'benefited' from the crime in order to determine the recoverable amount of the confiscation order.[145] For this purpose, it has been established prior to *Prest* that the court may, where appropriate, include the benefits enjoyed by a company that was used to perpetrate the offence.[146] This would be achieved by 'piercing' the corporate veil of the company. In *R v Sale*,[147] Treacy LJ interpreted the earlier authorities to be consistent with the principles enunciated in *Prest*, except that the cases previously thought to involve veil piercing would now be instances of concealment. In this case, the appellant had secured large contracts for a company of which he was the sole owner and controller by bribing an employee of Network Rail. The court agreed with the Crown that the confiscation order should include the company's invoiced receipts amounting to £1.9m.[148] This was because 'the activities of both the appellant and the company are so interlinked as to be indivisible'.[149] Although this language was redolent of erstwhile veil-piercing reasoning, Treacy LJ regarded this as an application of the concealment principle 'to discover the facts which the existence of the corporate structure would otherwise conceal so as properly to identify the appellant's true benefit'.[150] *Sale* was followed by *R v McDowell*,[151] which likewise treated the receipts of a company as those of an offender because he was the sole shareholder and alter ego of the company. Both *Sale* and *McDowell* have been criticised because neither was a true case of 'concealment'.[152] In each case, the company was not used to conceal the offender's identify but had participated in the crimes for its own benefit. Seen in that light, the facts were arguably closer to those of 'evasion' in that the companies were being used to shield the benefits of the controller's illegal conduct against recovery by the State.

In the more recent case of *Boyle Transport (Northern Ireland) Ltd v R*,[153] the Court of Appeal reaffirmed the *Prest* framework in the context of criminal confiscations but took a more

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[144] G Allen, 'To Pierce or Not to Pierce? A Doctrinal Reappraisal of Judicial Responses to Improper Exploitation of the Corporate Form' [2018] JBL 559, 562 – 563, 579. The difficulties associated with the agency rationale have caused others to rationalise the outcomes of *Gencor* and *Trustor* as instances on constructive trust principles: see G Allen & S Griffin, 'Corporate Personality: Utilising Trust Law to Invoke the Application of the Concealment Principle' (2018) 38 Legal Studies 79. I am grateful to Vincent Ooi for bringing this article to my attention.

[145] s 6(4) Proceeds of Crime Act 2002 (c 29) (UK).

[146] *R v Seager* [2010] 1 Cr App R (S) 60 (p 378) [76].

[147] [2014] 1 Cr App R (S) 60 (p 381) [42].

[148] Although this amount was ultimately reduced significantly by applying the test of proportionality: see ibid [60].

[149] ibid [40].

[150] ibid [43].

[151] [2015] 2 Cr App R (S) 14 (p 137) [55].

[152] Tan (n 136) [36]; J Wibberley & M Di Gioia, 'Lifting, Piercing and Sidestepping the Corporate Veil', available at http://www.guildhallchambers.co.uk/uploadedFiles/PiercingtheCorporate%20Veil.JW,MDG.pdf, [53].

[153] [2016] BCC 746.

conservative view of the circumstances that would justify an inference of concealment. Davies LJ, who delivered the court's judgment, stressed that criminal courts in confiscation proceedings have no wider jurisdiction than their civil counterparts to disregard the company's separate legal status.[154] Although veil lifting (in the sense of concealment) is not rare in confiscation proceedings, they typically involve situations where the company was set up specifically for perpetrating the offence.[155] These are therefore situations where the company can properly be regarded, under the concealment principle, as the alter ego or agent of the criminal controller. Importantly, however, a company is not the alter ego of the offender merely because it is solely owned and controlled by the latter.[156] To the extent that *Sale* and *McDowell* suggests otherwise, they should be understood as cases decided on their own facts. Beneficial ownership of a company's shares is not to be conflated with the ownership of its assets and receipts.[157]

Boyle is seen to have laid out 'helpful guidance'[158] for legal practitioners in so far as it has made clear that veil-piercing will be limited to 'a small number of cases'[159] in confiscation proceedings. But while this 'retreat' has the effect of moderating the expansive effects of *Sale* and *McDowell*, it will not completely eliminate those effects because the question whether a company has carried on an unlawful business or a lawful business through unlawful means is often a question of degree[160] that is difficult to discern with confidence.[161] Conceptually, it is also unclear how a finding of agency or alter ego is enhanced simply because the company was set up or used primarily for a criminal purpose, unless the true rationale is that *the law* would not in such circumstance allow a criminal to evade the State's confiscatory powers by the interpolation of a corporate vehicle. But if that were so, 'concealment' is in substance no different from 'evasion'. When concepts of agency, alter egos and nominees are invoked, it is often the fact of control coupled with clear evidence of evasive intention that warrants the identification of the company with its controller.[162] That would be classic veil-piercing reasoning whether it is labelled 'concealment' or 'evasion'. The practical effect of this fuzzy evasion-concealment distinction is therefore to enable courts to shoehorn 'deserving' veil-piercing cases into the more malleable concept of 'concealment'.

To sum up, the modern English approach to reverse veil-piercing is to tightly circumscribe this exceptional jurisdiction in the interests of doctrinal coherence and commercial certainty. Indeed, 'evasion' as delimited by Lord Sumption appears to be so narrow that some commentators have declared the doctrine to have been 'defined out of existence'.[163] This caution is also consistent with Hansmann and Kraakman's analysis. By allowing the creditors

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[154] ibid [89].
[155] ibid [94].
[156] ibid [96] and [115].
[157] ibid [117].
[158] R Fortson, '*R v Boyle Transport (Northern Ireland) Ltd*' [2016] Crim L Rev 658, 662.
[159] K Laird, 'Piercing the Corporate Veil in Confiscation Proceedings' (2017) 133 LQR 217, 221.
[160] *R v Sale* [2014] 1 Cr App R (s) 60 (p 381) [40].
[161] Laird (n 159) 221.
[162] Allan (n 144) 562 – 563.
[163] Miles & Holland (n 113) [11.56].

of shareholders to 'jump the queue above, and be paid out before, the creditors of the company,'[164] reverse veil-piercing alters the property rules on priority and negates the economic benefits promised by entity shielding. Adopting a liberal approach to veil-piercing would likely lead to a surge in the cost of credit as lenders price in the higher risk of non-recovery from corporate assets. Moreover, uninvolved minority shareholders are disadvantaged as their investments are devalued when corporate assets are seized to meet the liabilities of majority shareholders.[165] That would further erode the advantage of the corporate form and deter investments as investors will have to weigh not only the risks of the business of an investee company but also the risks of loss of assets to (the creditors of) unscrupulous co-owners. By confining veil-piercing to 'evasion' of pre-existing legal obligations, *Prest* may also be seen as an attempt to mitigate enforcement costs by substituting vague standards (of 'shams' and facades') with a narrow regime delimited by more specific rules.[166]

Despite Lord Sumption's effort at circumscribing veil-piercing, the developments post-*Prest* suggest that the regime remains sufficiently 'elastic' to be prayed in aid of in the face of apparent abuses. In large part, this elasticity is due to the conceptual vagueness of the evasion-concealment framework. What ultimately drive the exploitation of this uncertainty are the forces of practical reality. In contexts such as that of criminal confiscations, statutory policies may implicitly or explicitly contemplate the identification of an offender with corporate entities deployed in the offence. In other cases, a robust 'look-through' mechanism is needed to foil the debt-proofing intent of complex trust and corporate structures.[167] On occasion, a veil-piercing order may also be needed to secure more effective offshore enforcement. In *Akhmedova v Akhmedova*,[168] for instance, Hadden-Cave J observed that it was 'necessary' to make a 'veil-piercing' order (over and above orders based on trust principles) because that might have been the only order that the Dubai International Financial Centre would recognise and enforce. The Herculean difficulties that claimants face in gathering evidence particularly of offshore entities may also compel claimants to continue to seek veil-piercing as a fall back remedy utilising both the 'evasion' and 'concealment' labels. The veil-piercing jurisdiction thus continues to be relevant, possibly because an 'optimal' remedial regime will always be elusive given the boundless ingenuity of those whose purpose is to evade creditors.

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[164] D Cabrelli, 'The Case Against Outsider Reverse Veil Piercing' (2010) 10 J Corp L Stud 343 at 361.

[165] M Richardson, 'The Helter Skelter Application of the Reverse Pierce Doctrine' (2011) 79 U Cin L Rev 1605, 1625 – 1627.

[166] See Kaplow (n 59), 562 – 563, although the author goes on to explain that other costs (eg of seeking legal advice) and factors (individual behavior, frequency of enforcement and complexity of rules and standards) may be relevant. See also Hansmann, Kraakman & Squire (n 19), 1352.

[167] See eg, *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530, where the claimant had sued its directors (D2 and D3) for diverting corporate opportunities to the first defendant company (D1). Even though it found that D2 and D3 did not control D1, the English High Court held, applying the evasion principle, that D1 was liable to account for the benefits of the diverted opportunities in the same way that D2 and D3 would have had to account had they personally exploited the opportunities. This application of the evasion principle is likely misconceived. Absent the requirement of control, it is difficult to see how the company was 'interposed' or 'abused' in the first place. Nevertheless, the case demonstrates judicial willingness to exploit the 'spirit' of the evasion principle to reach a desired outcome.

[168] [2018] EWFC 23 (Fam) [65].

Contrasts and Convergence

The analysis of Hansmann and Kraakman provides a unique vantage point for understanding the economic functions of trusts and corporations. Departing from the (then) received wisdom that corporations are mere nexus of contracts characterised by limited liability, Hansmann and Kraakman convincingly demonstrated that both corporate and trust structures are economically significant by reason of their property functions in ordering creditor rights. Because they conceive of entity shielding as the defining feature of a legal entity, Hansmann and Kraakman would analogise the trust with the corporation and treat it as a 'legal entity'. In their scheme, debtor opportunism represents the most significant cost that, if unbridled, could destroy the value of entity shielding. Laws designed to curb such opportunism are therefore necessary. However, these laws are only efficient if their compliance and enforcement costs do not exceed the value of entity shielding.

Our review demonstrates that the judicial response to abuses of entity shielding functions of trust and corporate structures cohere with the Hansmann-Kraakman framework in two broad aspects. First, both regimes affirm the fundamental importance of entity shielding. The common starting point is therefore a scepticism of attempts to undermine the asset protective functions of trusts and companies, and to frame its responses in narrow doctrines with a view to preserving legal certainty and transactional security. The insistence on proof of a common intention to deceive in the context of 'sham trusts' and the restriction of veil-piercing to the evasion of pre-existing legal obligations exemplify such judicial scepticism. Secondly, judges acting in both contexts are clearly cognisant of the inefficiencies and costs generated by the remedies they fashion (though they do not always articulate them in those terms). The desire to minimise such costs is reflected in their persistent emphasis on certainty and coherence, and their preference to redress even brazen attempts at defeating creditor rights by developing extant legal doctrines incrementally as opposed to formulating a free-standing, anti-avoidance doctrine. That approach is evident in *Pugachev*, which inaugurated a broader approach to invalidating (discretionary) trusts but did so in orthodox, doctrinal terms. Whether a trust fails for being illusory is decided by construing the trust deed in the light of the surrounding circumstances to determine if its constitutive elements are present. Even more apparent is this predilection in favour of accretive doctrinal development in the context of companies. The narrowing of 'evasion' to the point of near extinction, coupled with a generous view of conventional principles under 'concealment', are calculated to ensure that future developments (if any) occur within established legal doctrines.

Beyond these broad points of convergence, however, judicial responses in the two contexts do deviate in both techniques and assumptions by reason of *structural* differences between the trust and the corporation. Most fundamental, of course, is the fact that the trust is a transaction that creates a relationship (or a set of relationships) while a corporation is a legal entity capable of transacting on its own behalf. The implications of this critical distinction are various. For a start, the fact that the trust is not an entity means that creditors contract directly

with the trustee. Trustees *are* therefore personally liable for trust debts unless they specifically exclude liability by contract.[169] Although that is routinely done, exemption clauses are an imperfect instrument for achieving limited liability as they may be defective by reason of poor drafting.[170] This means that, in general, the trust is relatively weaker than the corporation as a device for defensive asset partitioning (or limited liability). Conversely, however, it is likely more effective in respect of affirmative asset protection because it is typically constituted by a settlor divesting of his beneficial ownership in an asset. Once that is effected, the asset is beyond the reach of the settlor's creditors since she no longer owns it. In contrast, a person who sets up a company usually retains control through shareholding. Her personal creditors would have no direct access to corporate assets but they may still seize her *shares* in the company.[171] So, unless she relinquishes share ownership (or conceal her ownership through the use of nominees), creditors are (at least in theory) not completely devoid of remedy. The trust's relative strength in affirmative asset partitioning function may explain why it remains the favoured instrument for debt avoidance and 'nothing has challenged the trust's primacy in frustrating creditors'.[172] Although the the modern trust is now extensively used in commercial activities (for instance, in mutual funds and asset securitisation), its popularity in those fields is still due to its uniqueness as an asset-holding device.[173]

In contrast to the trust, the corporation is presumptively a vehicle for trade. Apart from the fact that it provides stronger defensive asset partitioning, the corporation is also superior in its protection of unsecured creditors. As noted,[174] trust creditors do not (at least in English law) have direct recourse to trust assets. Instead, they are paid out of trust property when they are subrogated to the trustee's right of indemnity in repsect of liability properly incurred on behalf of the trust. This right of indemnity, however, is lost when the trustee has acted in breach of her duties and creditors are, to that extent, exposed. Further, the unsecured creditor's rights are weakened by the fact that subrogation is an equitable remedy the avaialability of which is subject to procedures, limitations and defences in equity.[175] These constraints find no analogue in relation to corporations, whose unsecured creditors would ordinarily expect to be paid out of corporate assets on a *pari passu* basis in the event of the corporation's insolvency. Misconduct on the part of directors would not undermine the creditors' rights of recovery. While the insolvency of a corporation is regulated by a statutory regime that oversees the realisation of corporate assets and distribution to creditors on an orderly, fair and rateable basis, no such process governs the 'insolvency' of a trust.[176] The fact that the trust is not a legal person means that 'it is in effect invisible to [the law of

[169] See n 15.
[170] See D'Angelo (n 30) 193 – 195.
[171] See *Prest* [2013] 3 WLR 1 [40].
[172] Harrington (n 60) 155.
[173] Lau argues that it is precisely because the trust lacks the features (ie legal personality and intra-firm transfers) that facilitate productive activities that renders it particularly suitable for asset-holding: see M W Lau, *The Economic Structure of Trusts* (OUP, 2011) 100–102.
[174] See n 1515.
[175] D'Angelo (n 30) 232 – 236.
[176] See ibid Chapter 7 for an excellent discussion of the intricate issues that arise because of the lack of an insolvency regime specific to trusts in the Australian context.

insolvency].'[177] Indeed, the 'insolvent trust' is prima facie a 'legal nonsense'[178] since it is unclear how the concept of insolvency could even apply to a non-entity. Creditor protection is thus a core concern in corporate regulation but of incidental interests in the regulation of trusts, which remains centred on the protection of the beneficiary vis-à-vis the trustee. This divergent treatment of creditor interests is clearly observed in *Prest*. It will be recalled[179] that Lord Sumption had in that case declined to pierce the corporate veils on the ground that it would effectively prioritise Mrs Prest's claims above those of other unsecured creditors. However, the same concern did not feature when the his Lordship concluded that the relevant properties were held on resulting trust for Mr Prest.[180] Presumably, this was because a finding of resulting trust merely establishes Mr Prest's beneficial ownership and so did not *per se* offend the *pari passu* principle. In contrast, a company law analysis frames the issue largely as a contest between creditors. Nevertheless, it is clear that both (resulting trust and veil-piercing) analyses were means of displacing creditor rights. That such interests featured prominently in the corporate, but not the trust, anlaysis reflects the inherently distinct policy underpinnings of the two regimes.

That the corporation is structurally more suited (than the trust) for enterprise explains the more draconian effects of veil-piercing. Because it could dismantle the hedge around (potentially all of) a corporation's assets, veil-piercing has more severe ramifications for the corporation's creditors than the application of other 'conventional principles' which are usually asset or transaction (as opposed to entity) specific. And since corporations are more likely (than trusts) to have a much larger creditor base, the costs of the remedy (in the form of increased borrowing rates[181]) will likely be more significant. Similarly, costs of enforcement (such as error costs arising from an over-inclusive legal principle) will also increase in tandem. Once again, these considerations vindicate the very stringent approach adopted in *Prest* – veil-piercing should be very narrowly delimited because it is an extremely costly remedy. Exceptionally, however, the veil may be pierced if the corporate *entity* (as opposed to a transaction) is set up not for any genuine trading or business activities but purely as a device to frustrate creditor claims. These schemes ought to be deterred as they are likely to generate opportunism costs without the compensating advantage of socially beneficial production.[182] It would also follow that cases that seek to achieve this outcome utilising 'agency' or 'nomineeship' reasoning are better understood as true instances of veil piercing.[183]

Hansmann and Kraakman are undoubtedly right that both the trust and the corporation are economically important by reason of their strong entity shielding functions. Our discussion here has sought, however, to demonstrate that it is unhelpful to equate them as 'legal

[177] ibid 304.
[178] ibid 290.
[179] See text to n 128.
[180] For criticisms of this aspect of *Prest*, see R Tarling, 'The Resulting Trust and the Unsecured Creditor' (2016) 37 Co Law 299.
[181] See text to nn 164–165.
[182] Similar to the arguments made in text to nn 109–112.
[183] As discussed in text to nn 161–162.

entities'. Instead, the commercial function of the trust is distinguished from that of the corporation precisely because the former lacks legal personality. For that reason, the use and abuse of the two structures may have different cost implications. In particular, veil-piercing is likely a far more costly remedy because it threatens to unsettle an entire nexus of productive activities that corporations are typically engaged in. By comparison, the consequences of setting aside a private donative trust as a sham or illusory trust are more contained given its dominant role as a passive asset holding device. Against that backdrop, the development of conventional principles to combat aggressive evasive schemes is generally preferred. The recognition of 'illusory trusts' may be seen as a step in that direction.

Conclusion

The trust and the corporation have long been the favourite devices for wealth and asset management by reason of their ability to facilitate affirmative asset partitioning. However, this unique advantage is vulnerable to abuse, the risk of which is heightened by the 'race to bottom' pressures of permissive offshore jurisdictions. Overall, the English judicial response to this threat is primarily tentative and conservative. From an economic perspective, such prudence is explicable by the need to avoid the destabilising effects and ensuing social costs of a broad and flexible standard. In the corporate context, such costs are more dramatic because they are magnified by the high frequency of interactions with third parties (or creditors). That would explain and justify Lord Sumption's attempt in *Prest* to delimit 'evasion' so narrowly. Likewise, in the field of trusts, the threshold for invalidating a trust as a 'sham' has traditionally been pegged at a high level requiring a common intention to deceive. In both contexts, however, litigants continue to agitate for more robust judicial remedies against alleged abuses of entity shielding. Attempts to achieve the effect of veil-piercing through the more malleable concept of 'concealment' and the recognition of 'illusory trusts' in the field of trusts are instances of such agitation. Again, severe cost ramifications in the corporate context may warrant greater caution and resistance to the former (attempts to extend 'evasion' through 'concealment') but the latter could be seen as a measured development if the criteria that render a trust 'illusory' can be clearly distilled over time.