

**A COMPARATIVE ANALYSIS OF PIERCING THE CORPORATE
VEIL IN ENGLISH LAW AND SOUTH AFRICAN LAW**

by

Patson Waliwona Manda

13214633

Submitted in fulfilment of the requirements for the degree

LL.M (Corporate Law)

In the Faculty of Law,

University of Pretoria

30 July 2019

Supervisor: Professor Maleka Femida Cassim

Table of Contents

I INTRODUCTION	3
a) Academic and practical reasons for this study	3
b) Purpose.....	5
c) Research Methodology.....	5
d) Context.....	6
e) Chapter Structure.....	8
f) Research question	10
g) Conclusion.....	10
II HISTORICAL CONTEXT: SEPARATE LEGAL PERSONALITY, LIMITED LIABILITY AND PIERCING THE CORPORATE VEIL	11
a) The concept of juristic personality.....	11
i) The importance of <i>Salomon v Salomon</i>	12
b) The legal consequences of separate legal personality	14
i) Commentary on piercing the corporate veil	18
ii) Perspectives on piercing the corporate veil: contrasting common law jurisdictions	21
iii) The difficulty that courts face when piercing the corporate veil.....	22
c) Conclusion.....	22
III SOUTH AFRICAN APPROACH TO PIERCING THE CORPORATE VEIL.....	24
a) Introduction	24
i) General approach adopted by South African courts.....	24
b) South African Common Law: Historical landscape.....	25
i) Introduction: General common law approach to piercing the veil in South African law	25
ii) Fraud: Finite in nature	26
iii) Unconscionable injustice: Gradual progression into expansion.....	27
iv) Fraud, dishonesty or improper use: Transition into a constitutional framework	28
v) Conclusion: Piercing the corporate veil in South African courts.....	42
c) Statutory law.....	43
i) Supplementing the common law: Unconscionable abuse.....	43
ii) <i>Gore</i> : Valuable insight concerning the interpretation of section 20(9)	44
iii) Alternatives remedies in South African statute.....	50
iv) Conclusion: Piercing the corporate veil in South African statute	51
IV ENGLISH APPROACH TO PIERCING THE CORPORATE VEIL.....	53
a) Introduction	53
i) General approach adopted by English Courts.....	53
b) English Common law: Historical landscape.....	54



i) Introduction: A brief history of its evolution over time and its current state.....	54
ii) Experimental period	55
iii) Heyday era	57
iv) From optimism to rigidity	58
v) <i>Prest</i> : Piercing the corporate veil is limited under English law	65
vi) Conclusion: common law	72
c) Statutory law.....	73
i) Introduction	73
ii) General approach followed by English statute	74
iii) Conclusion: statutory.....	76
V JUXTAPOSITION OF MINIMALIST AND MAXIMALIST APPROACHES IN LIGHT OF PIERCING THE CORPORATE VEIL	78
a) Introduction	78
b) Minimalist and Maximalist	79
i) Attitudes and tests: United Kingdom	79
ii) Attitudes and tests: South Africa	85
iii) Remedy of last resort?.....	91
c) Conclusion.....	97
VI CONCLUSION AND RECOMMENDATIONS	98
a) Introduction: Striking differences	98
b) The way forward: How South Africa is in good standing	98
i) Recommendations	102
VII BIBLIOGRAPHY	104
Primary Sources	104
<i>Constitution</i>	104
<i>Statutes</i>	104
<i>Cases</i>	104
Secondary sources	107
<i>Books</i>	107
<i>Internet Sources</i>	108
<i>Journals</i>	108
<i>Reports</i>	110
<i>Speeches</i>	110
<i>Theses</i>	110
<i>White Papers, etc</i>	110

I INTRODUCTION

a) Academic and practical reasons for this study

In modern societies, a main source of economic activity is not dominated by individuals, but by companies that own assets, enter contracts, and incur liabilities that are legally separate from those of their owners, managers and staff.¹ In light of increasing and multifaceted corporate governance issues, South Africa has made great strides, particularly in company law.² Nevertheless, an ambiguity which lingers on in the corporate field (as a whole), is *when will courts pierce the corporate veil?*³ A vast amount of underlying issues has contributed to this lacuna in law. Consequently, catalogues of court decisions are unable to agree on a unified approach.⁴

As a result of such haziness, the precise parameters of veil piercing is muddled in whether piercing the veil is an independent doctrine, or simply one particular expression of other general principles.⁵ To clarify, as a doctrine, piercing the veil entails the *collection* of principles (and metaphors) used to explain the scenario when courts disregard the separate legal personality of a company.⁶ When used as an expression of other general principles, it entails the expression rather indiscriminately to describe a number of things.⁷

The difference between piercing the veil as an independent doctrine, or simply one particular expression of other general principles, is the former recognises ‘piercing the veil’ as a foundational tool that encapsulates *all* epithets and general legal principles which constitute

¹ Henry Hansmann, Reiner Kraakman & Richard Squire ‘Law and the Rise of the Firm’ (2005) 119 *Harvard Law Review* 1335 at 1336.

² South African Company Law for the 21st Century: Guidelines for Corporate Law Reform (GN 1183 in GG 26493 of 23 June 2004) at 13-16. South Africa has made many great strides in developing its company law regime; this began with the Companies Act 46 of 1926, the first national piece of self-determined legislation. Since then, the Companies Act 61 of 1973 was enacted and superseded by the current Companies Act 71 of 2008, which was a welcomed addition; especially considering the adoption of the Constitution of the Republic of South Africa, 1996 and subsequently the Bill of Rights in Chapter 2; see Memorandum on the Objects of the Companies Bill, 2008; also, see Philip Knight ‘Keep it simple and set it free: The new ethos of corporate formation’ in Tshepo H Mongalo *Modern Company Law for a Competitive South African Economy* (2010) at 3-6 & 19-20; and Farouk HI Cassim, Maleka Femida Cassim & Rehana Cassim et al *Contemporary Company Law* 2 ed (2012) at 3. *Ex parte Gore and others NNO* [2013] 2 All SA 437 (WCC) para 19.

³ *Ibid.*

⁴ *Adams v Cape Industries plc* [1990] Ch 433; and in this dissertation, ‘piercing,’ ‘pierce,’ ‘piercing the veil,’ ‘pierced,’ ‘piercing of the corporate veil,’ ‘corporate veil piercing’ & ‘piercing the corporate veil’ will be used interchangeably. They also have the same meaning. See footnote 16 of this dissertation for further guidance.

⁵ *Adams* supra note 5. It is used for the purpose of perpetuating some wrongdoing.

⁶ *Prest v Petrodel Resources Limited* [2013] 2 AC 415 para 16. Such as ‘façade,’ ‘sham,’ or ‘stratagem’.

⁷ See footnote 146 of this dissertation for an inclusive list of terms.

grounds to pierce.⁸ Meanwhile, the later rejects the catch all approach and disregards the separate legal personality based on principles.⁹ Therefore, principles have more individuality, and ‘piercing the veil’ is merely a *label* or *metaphor* which further reinforces those principles.¹⁰

In my view, piercing as a doctrine acknowledges the material practical and legal considerations that underpin legal fiction.¹¹ Meaning, ‘piercing the veil’ is identified as the *reason* and umbrella term as to why the juristic personality was abused and subsequently ignored. As an expression, it is the actual principle(s), metaphor(s) or epithet(s) which are identified in the same manner.¹² The phrase ‘piercing the veil’ is merely a figure of speech or smokescreen for the principle(s), metaphor(s) or epithet(s) — which are believed to be more valuable.¹³

Although legal personality will be discussed, analysis of piercing the veil will be the focus. The scope of both common law and statutory positions in South Africa, as well as topical case law developments in the United Kingdom, will be examined thoroughly.¹⁴ Accordingly, this study aims to contribute and enrich the legal landscape by way of legal comparison between England and South Africa.¹⁵ Hence, the subject of this dissertation is a critical analysis of piercing the veil according to South Africa and England (United Kingdom).¹⁶

⁸ *Le'Bergo Fashions CC v Lee* 1998 (2) SA 608 (C).

⁹ *Adams* supra note 5. Despite most principles lacking clarity.

¹⁰ *Prest* supra note 7 para 24. The court cites *In A v A* [2007] 2 FLR 467 para 21, where Munby J noted:
There is only one law of “sham”, to be applied equally in all three divisions of the high court, just as there is but one set of principles, again equally applicable in all three divisions, determining whether or not it is appropriate to “pierce the corporate veil”.

¹¹ *Gore* supra note 3 para 29.

¹² The acknowledgement of principles comes at the expense of ‘piercing the veil’.

¹³ *Prest* supra note 7 para 106.

¹⁴ As shown in *Gore*, which demonstrates the current South African position respectively, and *Prest*, which represents the current English law position respectively. Also see *VTB Capital Plc v Nutritek International Corp and Others* [2013] UKSC 5 para 114.

¹⁵ Chapter 5.

¹⁶ It is noteworthy how academics, authors & legal practitioners have interchangeably used the terms ‘piercing,’ ‘going behind,’ ‘drawn aside,’ or ‘lifting’ the veil. In the case of *Yukong Line Ltd v Rendsburg Investments Corp (No 2)* [1998] 4 ALL ER 82, the court stated that as long as the principle at hand is clear, it should not matter what language is used. Seeing that the vague use of the metaphor (the ‘veil’) has caused difficulties, the case of *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 4 All ER 769, attempted to achieve clarification. The court held that ‘piercing’ is ‘reserve[ed] for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders’. On the other hand, ‘lifting’ the corporate veil is to ‘have regard to the shareholding in a company for some legal purpose’. However, in *VTB* supra note 14 para 119 & 123, Lord Neuberger in the Supreme Court noted that ‘cases have not worked out what is meant by “piercing the corporate veil”...it may not always mean the same thing’. In this dissertation, for present purposes, I shall use the phrase ‘piercing’ in preference to ‘lifting’. It is the ‘more familiar expression...it is unnecessary to decide whether, in truth, there is a difference in this context between “piercing” and “lifting” the

b) Purpose

The purpose of this study is to convey the jurisprudential approach adopted in South Africa, while also determining the modern impact of the Supreme Court in the United Kingdom. Too, it will highlight some fundamental differences in either jurisdiction, in terms of the treatment of specific case types, and other related issues.

As of recently, the United Kingdom Supreme Court confirmed that piercing the veil is restrictive.¹⁷ Therefore, by displaying a legal comparison between the two respective jurisdictions, South African courts can take cognisance of how its company law system has veered away from the traditional (and influential) English approach.¹⁸ Although they have a long-standing relationship, it will be argued whether or not South African law, as a predecessor and student of the English system, should follow and adopt the newly refined English position.¹⁹ Unsurprisingly, it will be argued to what extent the approach of the courts in the United Kingdom and South Africa is reasonable, considering their legal history and current trends.²⁰ Owing to uncertainties of what powers have been conferred by the Act 71 of 2008, and in particular, interpretations of case law, have given South Africa a slightly unpredictable, yet fairly liberal stance on piercing the corporate veil.²¹

c) Research Methodology

As evidenced above, a comparative approach will be accomplished by interpreting South African law with a non-South African law.²²

Other legal jurisdictions, with similar company law systems, are continuously facing comparable problems in dealing with the matter of piercing the veil.²³ For that reason, it is apparent that in recent times (in South Africa and the United Kingdom), courts are confronted

corporate veil'. See *EBM Co. Ltd v Dominion Bank* [1937] 3 All ER 555 at page 564-565 read with *Daimler Co Ltd v Continental Tyre and Rubber Co Ltd* [1916] 2 AC 307 and *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 (SCNSW, Young J) for application of 'lifting' the veil; and *Tladi Holdings (Pty) v Modise and Others* [2015] ZAGPJHC 331 para 22. In some cases, it may be necessary to pierce the corporate veil. In other cases, it is only necessary to lift the corporate veil.

¹⁷ Chapters 3-5.

¹⁸ *Ebrahim and Another v Airports Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) para 22, [2009] 1 All SA 330 (SCA).

¹⁹ Chapters 5-6; and section 5(2) of the Act 71 of 2008.

²⁰ Chapters 5-6.

²¹ *Gore* supra note 3 para 34; and Rehana Cassim 'Piercing the Veil Under Section 20(9) of The Companies Act 71 of 2008: A New Direction' (2014) 26 *SA MERC LJ* 307 at 335-337.

²² Chapters 3-6.

²³ Chapter 2.

with the question of whether to pierce the corporate veil.²⁴ By drawing inspiration from the Constitution, which aims to promote foreign law in light of the Bill of Rights, a comparative view will emphasis on relevant authorities and relatable situations in both jurisdictions.²⁵ This will be discussed by scrutinising the scope of legislation, but most importantly, common law attitudes.²⁶ In light of this, the approaches on piercing the veil will accompany numerous case law examples, especially *Ex parte Gore and others NNO* [2013] 2 All SA 437 (WCC) and *Prest v Petrodel Resources Limited* [2013] 2 AC 415.²⁷

Appropriate sources that are associated with separate legal personality, limited liability and piercing the veil will be illustrated by general analysis.²⁸ Furthermore, applicable sources from Canada, New Zealand and particularly Australia will provide necessary guidance to this study.²⁹ These jurisdictions of choice, just like South Africa, base their legal frameworks on the common law.³⁰ As well, these jurisdictions are noticeably influenced by British company law.³¹ Additionally, relevant sources from the United States will be applied in order to illustrate the key components that underpin the jurisprudential approach that South African law adopts.³²

The comparative approach ascertains that when South African courts interpret and apply common law, statute and legal principles, they do so in view of the Constitution and developing society, the judiciary and legal system.³³

d) Context

A cornerstone of company law worldwide, the legal status of a company was determined in the foundational case of *Salomon v Salomon*³⁴. In law, Lord Halbury confirmed an *artificial*

²⁴ Chapters 3-6; and *Prest* supra note 7 para 64.

²⁵ Chapters 2-6; and section 39(1)(c) of the Constitution.

²⁶ Chapters 2-6.

²⁷ Chapters 4-5.

²⁸ Chapters 2-6. Primary and secondary sources from South Africa and England.

²⁹ Chapters 2-4.

³⁰ Ibid.

³¹ Chapters 2-5.

³² Chapters 3 & 5.

³³ Section 8(3) read with section 39 of the Constitution.

³⁴ *Salomon v A Salomon & Co Ltd* [1897] AC 22, HL. An earlier case which influenced *Salomon* was the leading decision of *Foss v Harbottle* (1843) 67 ER 189. The case introduced the 'proper plaintiff' principle, whereby if any wrong is done against the company, the proper claimant is the company itself (subject to exceptions). Therefore, by identifying the company as a party in legal proceedings, it by default identifies its legal personality. Individual shareholders cannot sue for wrongs done to a company (or any internal irregularities); and *Ochberg v Commissioner of Inland Revenue* (5 SATC 93) at 99-100.

existence which brings fruit to an independent person with rights and liabilities appropriate to itself.³⁵

Although *Salomon* was delivered in 1897, it is universally accepted precedent that incorporation of a company empowers it to have its own personality — *separate and distinct* from its members (shareholders) who compose it, which invariably creates its own (legal) consequences.³⁶ For that reason, a company is a *juristic person*. This means that in the eyes of the law, it is treated as a person, capable and empowered to own its assets, execute contracts, ‘sue and be sued, have a bank account in its own name, owe money to others and be a creditor of other people and other companies, and employ people to work for it’.³⁷

Accordingly, a major consequence of separate legal personality is the ‘veil of incorporation’ (or shield). The veil of incorporation is a metaphorical figure of speech for the curtain that separates a company from its members.³⁸ The fundamental purpose of this curtain is to

³⁵ *Salomon* supra note 34 at 30. A company is no more than a name for a complex set of contracts amongst its members and contributors of capital; *Madrassa Anjuman Islamia v Johannesburg Municipal Council* 919 AD 439. Since corporate entities have a superficial existence, it would be impossible for a company to be physically present anywhere and everywhere; and Chrispas Nyombi ‘Lifting the veil of incorporation under common law and statute’ (2014) 56(1) *International Journal of Law and Management* 66 at 66. Historically, since they held property and could sue and be sued, legal personality arose from the activities of organisations such as religious orders. In the eighteenth century, the concept began to be applied to commercial entities involved in rail building and colonial trade.

³⁶ *Roundabout Ltd v Beirne & Ors* [1959] IR 423. In law, a company is a distinct entity. Each company is what is known as a legal person. Each company created is distinct in the same way as two distinct individuals. Examples of legal persons are: companies (public, private and state owned), associations, close corporations, societies, non-profit organisations, universities, municipalities, trade unions, cooperatives and corporations; South African law recognises separate legal personality, most notably in section 19(1) of the Act 71 of 2008, at the date and time of registration. Also, in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530, the court notably ruled that a company, once registered, is a legal person separate from its members; a discussion on perpetual succession and limited liability is located in Coenraad Visser, J T Pretorius, Robert Sharrock et al *South African Mercantile and Company Law* 8 ed (2004) at 262-263. Accordingly, despite change in shareholding or control, the identity of a company is not impacted by such changes; and Paul L. Davies *Introduction to Company Law* (2002) at 5-7. The ‘members’ in the corporate context means the shareholders. Shareholders aren’t just a group of people with contractual rights and duties, their interests a predominant within company law – they are the ultimate controllers of the company. Individuals who are involved in the company such as directors / senior managers, employees and selected third parties are not treated as members of a company.

³⁷ A legal conception in contemplation of the law, the definition of ‘company’ is provided in section 1 of the Act 71 of 2008; Geoffrey Morse *Charlesworth & Morse Company Law* 15 ed (1995) at 2, 3 & 5. A company can be liable for torts (delicts) and crimes committed by agents of the company or other servants in their scope of employment or authority; *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL (Ir)) at 630. It was ruled that a shareholder has no legal interest in the property of a company. Read the House of Lords judgment by Lord Summer and also note *Foss* supra note 34; and FHI Cassim and MP Larkin ‘Company Law (including Close Corporations)’ *Annual Survey of South Africa* (2004) 487 at 489-490. The survey cites *Nelson Metropolitan Municipality v Greyvenouw* CC 2004 (2) SA 81 (SE) para 60, and early case law development on legal personality in South Africa.

³⁸ *Salomon* supra note 34 at 51. The law will not go behind the separate legal personality of a company to

protect members from becoming liable for the debts and wrongful acts of the company, also known as the principle of limited liability.³⁹ In general, courts consider themselves bound by this principle.⁴⁰ However, in appropriate and exceptional circumstances, the court will ‘pierce the veil’.⁴¹ Hence, focus then shifts from the company, to the natural persons behind it, as if there was not a dichotomy between the two; in that way, personal liability is directly and personally attributed to someone who misuses or abuses the principle of corporate personality.⁴² Accordingly, piercing of the corporate veil is primarily discussed in context with separate legal personality, limited liability and to a certain extent, director or other official (executive) liability.

In my view, the rationale of piercing the veil is to expose and penalise culprits who blur the lines of distinction between the company and its members.⁴³ In particular circumstances, courts are justified in piercing the veil where disregarding a company's separate legal personality will attribute the liability to someone else, for what is ostensibly acts of the company.⁴⁴ At all times, members should respect and understand the significance of corporate personality, and therefore not promote and perpetuate improper behaviour.⁴⁵

e) Chapter Structure

To begin, legal personality will be discussed in totality, using *Salomon* as a judicial guide.⁴⁶ Understandably, discussion on piercing the veil will be incorporated, since it is interdependent on legal personality.

Afterward, the South African law position on piercing the veil will be accomplished.⁴⁷ Attention will be placed on the common law position, depicting case law by means of a historical landscape.⁴⁸ This will pave the way for an adequate discussion, of not only the

claim from its members, except in exceptional circumstances; and *Mobile Telephone Networks (Pty) Ltd v National Consumer Commission* [2012] ZANCT 3 para 15.

³⁹ Cassim op cit note 2 at 41.

⁴⁰ *Salomon* supra note 34 at 51-55.

⁴¹ *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) para 19; and *Easi Gas (Pty) Limited v Gas Giant CC t/a Independent Gas and Another; In re: Oryx Oil South Africa (Pty) Limited v Gas Giant CC t/a Independent Gas and Another* [2016] ZAGPJHC 73 para 27.

⁴² *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) at 28. The leading case in South African common law. Also cited in *Zeman v Quikelberge and Another* [2010] ZALC 122 para 41.

⁴³ *Cape Pacific* supra note 42 at 41.

⁴⁴ *Esterhuizen v Million-Air Services CC (in liquidation) and Another* [2007] ZALC 14 para 15.

⁴⁵ Ibid.

⁴⁶ Chapter 2.

⁴⁷ Chapter 3.

⁴⁸ Ibid. Case law analysis will be done chronologically in time.

symbolic cases which influenced the leading judgement in *Cape Pacific*, but cases which were subsequently influenced by the ruling.⁴⁹ Hence, I aim to portray the progression of piercing the veil over time.⁵⁰ Following, a fairly lengthy evaluation of the statutory approach adopted in South Africa, and the significant role it plays in the South African legal landscape will be examined.⁵¹

Similarly, the English law position on piercing the veil will be accomplished.⁵² The origins and principles of common law will correspondingly be discussed over time, by way of important case law discussions on *Adams v Cape Industries plc*⁵³, *Ben Hashem v. Shayif*⁵⁴ and several more.⁵⁵ Also, through examination of recent case law developments in the region, it would reveal a downward trend of admiration on piercing the veil.⁵⁶ Ultimately, case law discussion will reveal the anatomy of an unwilling approach to piercing the veil.⁵⁷ This, as above, will be followed by a brief evaluation of the statutory approach.⁵⁸

In closing, the philosophies of both jurisdictions will be juxtaposed.⁵⁹ To start, a comparative assessment will be achieved by assessing the context of South African company law (in relation to its British roots).⁶⁰ In order to compare and portray the impact of both South Africa and England, the *minimalist* approach adopted in the United Kingdom will be encapsulated by *Prest*, and the *maximalist* approach adopted in South Africa will be encapsulated by *Gore*.⁶¹ The examination of both cases and the reasoning of the respective courts will be scrutinized.⁶²

⁴⁹ Chapter 3.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Chapter 4.

⁵³ *Adams supra* note 5.

⁵⁴ *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115.

⁵⁵ Chapter 4.

⁵⁶ Ibid.

⁵⁷ Liton Chandra Biswas ‘Approach of the UK Court in Piercing Corporate Veil’ 13 January 2011 at 2, available at <http://ssrn.com/abstract=2438217>, accessed on 10 November 2018.

⁵⁸ Ibid.

⁵⁹ Chapter 5.

⁶⁰ South African Company Law for the 21st Century op cit note 2 at 4 & 13-18.

⁶¹ The Rt Hon Lady Justice Arden DBE ‘Piercing the Corporate Veil – Old Metaphor, Morden Practice’ (2017) 3 *Journal of Corporate and Commercial Law & Practice* 1 at 1 & 4. A jurisdictional comparison will be discussed in chapter 5.

⁶² Chapter 5.

To conclude, based on the findings of this dissertation, I will provide recommendations and offer a prospective way forward as to how either jurisdiction will quantify piercing of the corporate veil.⁶³

f) Research question

What stands to be concluded is twofold: first, whether the English approach is superior to the South African approach, and secondly, the suitability of both taking into consideration the respective countries legal system and history.⁶⁴ Henceforth, my research questions take substance, namely:⁶⁵

1. What is the South African position regarding piercing the veil;
2. What is the English position regarding piercing the veil; and
3. Taking into consideration the recent judgments in the United Kingdom, should South Africa adopt the same stance on piercing the corporate veil?

g) Conclusion

The backdrop of *Prest* solidified a monumental stride to clarify the current English Law position on piercing the veil.⁶⁶ The Supreme Court deeply aligned itself to a restrictive approach, further supporting its limited occurrence and thus condensing its application.⁶⁷ In addition, the Supreme Court compared the overall vagueness to other comparable jurisdictions.⁶⁸ In light of this, the main question to be answered in this dissertation is: considering the recent judgments in the United Kingdom, should South Africa adopt the same stance on piercing the veil? This new dispensation in English law could be pivotal to the direction that South African law takes heading forward.⁶⁹

⁶³ Chapter 6.

⁶⁴ Chapters 5-6.

⁶⁵ Chapters 3-6.

⁶⁶ In this dissertation, the phrases ‘United Kingdom’, ‘British,’ ‘Britain’ and ‘English’ will be used interchangeably. They will also have the same meaning. See Davies op cit note 36 at 5. The Companies Act (of the United Kingdom, past and present) applies throughout Great Britain. There is separate, but similar legislation in Northern Ireland. The common law applicable to companies might differ between England and Wales, on the one hand, and Scotland on the other, as may procedural matters.

⁶⁷ *Prest* supra note 7 para 28.

⁶⁸ Ibid para 75-6. Specifically, common law jurisdictions.

⁶⁹ *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* [2017] ZASCA 177. The case suggests the stubbornness of South African Company law to not adopt the English approach.

II HISTORICAL CONTEXT: SEPARATE LEGAL PERSONALITY, LIMITED LIABILITY AND PIERCING THE CORPORATE VEIL

a) The concept of juristic personality

Described by Lord Templeman as the 'unyielding rock' of companies and company law, a long-standing principle is when a company is formed, a 'veil' is created.⁷⁰ Metaphorically speaking, the veil is placed between the company on one side, and the members (and other applicable persons) on the other (the curtain); this entails that a company becomes a *separate legal entity* from its members, capable of acquiring rights and incurring obligations — a legal (juristic) person.⁷¹ Fundamentally, it is a creation of a *dual nature*, as both an association of its members and a person separate (and distinct) from its members.⁷² The implication is a company can only act through agents who are properly authorised.⁷³

The corporate veil is accepted in advanced legal systems, and courts generally uphold the principle and its limitations.⁷⁴ A company is a creation of law and exists fictitiously, meaning, it has no physical existence.⁷⁵ By observing a company as an artificial legal construct, it encapsulates our understanding of its nature.⁷⁶ Unlike human beings, who have the capacity to acquire legal rights and incur legal duties, a legal person is very much

⁷⁰ *Salomon* supra note 34 at 30; *Prest* supra note 7 para 66. Lord Templeman referred to the principle set down in *Salomon* as the 'unyielding rock' on which company law is constructed. Further, how 'complicated arguments' might ultimately become 'shipwrecked' because of the judgement.

⁷¹ *Rees and Others v Harris and Others* [2011] ZAGPJHC 237; 2012 (1) SA 583 (GSJ) para 13. For the most part, in law, a legal person is recognized alongside natural persons. Therefore, it is similar to that of a natural person who is a legal subject in respect of a legal object; for an in-depth discussion on a company being a juristic person, see Piet Delpoit *Henochsberg on the Companies Act 71 of 2008* at 82-86; and section 1, 14(4) & 19(1)(b) of the Act 71 of 2008. Companies can: sue or be sued; enter into contracts; contract with employees; own and be liable for assets and debts; and own its profits. For further discussion see footnote 176 of this dissertation.

⁷² *Quigley Meats Ltd v Hurley* [2011] IEHC 192. A company cannot enter contracts by itself because it has no physical existence. Someone must act on its behalf and therefore care must be taken to determine whether one is dealing with the physical person, or the physical person on behalf of the company. Although this can cause practical difficulties, especially in business, it demonstrates the company is distinct from its members; and *National Union of Metal Workers of South Africa v Lee Electronics (Pty) Ltd and Others* (LAC) [2012] ZALAC 33 para 11.

⁷³ *Daimler* supra note 16 at 345.

⁷⁴ *Prest* supra note 7 para 17.

⁷⁵ *Webb & Co Ltd v Northern Rifles* 1908 TS 462 at 464-465; *Rees* supra note 71 para 13. Being an artificial entity, it is obvious that a company cannot act on its own accord; nor can it have a state of mind; and HS Cilliers, ML Benade, JJ Henning et al *Cilliers and Benade: Corporate Law* 3 ed (2000) at 5-8. An entity acquires legal personality depending on the laws of the particular legal system. Legal personality can be acquired in 3 ways, namely: (1) separate Act; (2) general enabling Act; or (3) by conduct.

⁷⁶ *Prest* supra note 7 para 8. A fundamental pillar of company law; and *Continental Tyre and Rubber Co. (GreatBritain) v Daimler Co Ltd* 1915 (112) LTR 324 at 333.

different — is not human in its fibre or being — it cannot eat or sleep, it has no soul (to be damned) or body to be kicked, and thus it cannot enter into agreements that are inherently human in nature.⁷⁷ However, regardless of not possessing a physical existence, a legal person can own a house and do business, and therefore it possesses its own legal personality.⁷⁸

All things considered, most commercial activities that a (human) person can do, a company can also do, therefore, separate legal personality is important in order to separate business affairs from personal affairs.⁷⁹ The extent of such personality is demonstrated in the Constitution, where companies, like human beings, are subject to the Bill of Rights.⁸⁰

i) The importance of *Salomon v Salomon*

Corporate personality is inextricably connected with the renowned case of *Salomon* — regarded by many academics and legal practitioners as the most significant case in (English) company law.⁸¹ The House of Lords endorsed earlier developments in the (British) legal landscape, namely the concept of incorporation, and the principle of limited liability.⁸² Following unfavourable rulings in the high court and court of appeal, the House of Lords unanimously rejected the appeal court.⁸³

⁷⁷ Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim et al *The Law of Business Structures* (2012) at 61-2. Essentially, as far as possible, a company is treated by the law as being. It is a ‘person’ with the same capacity to engage in legal relationships as a human person. This is limited because separate legal personality cannot allow a company to engage in acts such as marriage and being a guardian for a child; Coenraad Visser op cit note 36 at 260; Cassim op cit note 2 at 31; and John Poynder *Literacy Extracts* (1844) at 268. Lord Chancellor Thurlow stated the fictitious nature of a company’s mind.

⁷⁸ *Airport Cold Storage* supra note 41 para 17-8. A company is capable of acquiring rights and incurring obligations that are distinct from the members of the company; and *De Beers Consolidated Mines Ltd v Howe, Surveyor of Taxes* [1906] AC 455 (HL), which cited *Estate Kootcher v Commissioner for Inland Revenue* 1941 AD 256; and see quote as per Buckley L.J in *Continental Tyre and Rubber Co* supra note 76 at 333.

⁷⁹ Nicholas Grier, Stephen Griffin & David Capper *UK Company Law* (1998) at 1.

⁸⁰ Section 8(2) of the Constitution. Interpretation must be in light of section 5(1) read with section 7 of the Act 71 of 2008. See *Dhlomo NO v Natal Newspapers (Pty) Ltd & another* 1989 (1) SA 945 (A) at 2,4 & 6 and *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 18, 38 & 43 ,50-52,54 & 56. Examples of juristic persons having the right to privacy, as per section 14 of the Constitution. However, although juristic persons do enjoy the right to privacy, it is not afforded to the same extent as humans because the degree of intensity is weighed differently; and Cassim op cit note 2 at 32. Since companies have no physical form, they cannot acquire the right to life nor the right to dignity. However, they are capable of being treated ‘equally to other persons, and may sue for defamation if its reputation is injured, or protect its right to privacy’.

⁸¹ *Salomon* supra note 34 at 50-1; and Nyombi op cit note 35 at 67.

⁸² *Salomon* supra note 34 at 51-54, the key dictum by Lord Macnaghten provided dividends for company law. See section 1 definition of ‘juristic person’ in the Act 71 of 2008; and incorporation of a company by registration was introduced in 1844 (Joint Stock Companies Act 1844) and the doctrine of limited liability (Limited Liability Act 1855) shortly followed in 1855, which was subsequently replaced by the Joint Stock Companies Act 1856.

⁸³ *Salomon* supra note 34 at 26, 29, 32 & 51-2. The lords held that subjective views should not be the

The House of Lords concluded that the true intentions of Mr. Salomon were not contrary to, or did not reflect the true intent and meaning of the Companies Act 1862; the company was indeed a valid legal person because it had been formed and registered lawfully, and accordingly, the company was not a façade.⁸⁴ Therefore, despite motives, ideas, schemes, or intentions, the artificial existence of a company should be recognised as separate to its members because once a company is legally incorporated, it ‘must be treated like any other independent person with its rights and liabilities’.⁸⁵ Consequently, Mr. Salomon was not liable to the company's creditors.⁸⁶ Since the company was a legal entity, the business belonged to the company and not Mr. Salomon, therefore, Lord Halsbury confirmed that if a company is validly created, the company is not an agent or trustee to its members.⁸⁷ Ultimately, Mr. Salomon (in circumstances out of his control) did not intend on doing anything dishonest or unworthy.⁸⁸

Lord Macnaghten questioned why Mr. Salomon, an ambitious businessman, could not take advantage of the provisions set out in statute; he was perfectly entitled to do so, and in response, Lord Macnaghten famously stated in his key dictum that:

The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the

basis and function of judges when reading limitations into statute. In the high court, Vaughan Williams J accepted the liquidators’ argument that Mr. Salomon had created the company solely to transfer his business to it. The company was in reality his agent and he as the principal was liable for debts to unsecured creditors; and *Broderip v Salomon* [1895] 2 Ch. 323 (AC) at 340–1 & 347. In the court of appeal, the court pierced the veil and ruled against Mr. Salomon, claiming Mr. Salomon had abused the privileges of incorporation and limited liability. The benefits of incorporation should be conferred on independent bona fide shareholders who have conscious minds and are not merely puppets. The company was used as a vehicle to enable Mr. Salomon to carry on business under the guise of limited liability. At 339 of the judgement, Lindley LJ went as far as saying that ‘Mr. Aron Salomon’s scheme is a device to defraud creditors’. In conclusion, the high court and court of appeal ordered that Mr. Salomon should pay the creditors personally, as the ‘pretended sale to the company was an utter fiction’.

⁸⁴ *Salomon* supra note 34 at 30-1 & 51.

⁸⁵ *Salomon* supra note 34 at 30 & 51; and section 14(4) of the Act 71 of 2008 provides that a registration certificate issued in terms of the Companies and Intellectual Property Commission is conclusive evidence that: (a) all the requirements for incorporation have been complied with and (b), the company is incorporated under the Act 71 of 2008 as from the date, and the time, if any, as stated in the registration certificate. Therefore, the issue of registration is equal to a company acquiring separate legal personality, as confirmed in section 19(1)(a) of the Act 71 of 2008.

⁸⁶ *Salomon* supra note 34 at 51-54.

⁸⁷ *Ibid* at 31. Lord Halsbury confirmed that if it was not a legal company, there was ‘no person and no thing to be an agent at all’. Too, that it ‘is impossible to say at the same time that there is a company and there is not’. The principle of agency was also observed by Lord Halsbury.

⁸⁸ *Ibid* at 32-34. There was no fraud committed by Mr. Salomon as the company was a genuine creature of the Act 1862. There was compliance and it was in line with the requirements of the Registrar of Companies.

company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act... .⁸⁹

In conclusion, the House of Lords cemented the greatest and most central aspects of company law more than a century after the decision was handed down.⁹⁰ As a result, the principle of separate legal personality of a registered company ‘*is of the greatest importance in company law*’.⁹¹ It illustrated that ‘incorporation, separate legal personality and limited are available to all, for any legal purpose’.⁹²

b) The legal consequences of separate legal personality

Despite the tendency to equate the two, piercing the veil cannot be discussed in isolation from *limited liability*, which is, an upshot of corporate personality — they are symbiotic.⁹³ Therefore, it can be established that separate legal personality guarantees limited liability.⁹⁴

As previously mentioned, the veil of incorporation aims to protect members from liability of a company, better known as the principle of ‘limited liability’.⁹⁵ Although subject to lots of

⁸⁹ *Salomon* supra note 34 at 32 & 50-1. There was no requirement in the Companies Act of 1862 which stated that shareholders (subscribers to the memorandum) must all be independent, or that they should have a mind and will of their own, or be unconnected of each other in order to have an independent beneficial interest. This bypass illustrates that courts will give effect to the separate legal personality of a company unless statute explicitly states otherwise. Hence, it can be said that at the time of the decision, the legislator simply lacked the correct oversight and it was merely a matter of judges not looking beyond what the provisions explicitly said. In fact, it was ‘common practice to have nominee shareholders in a company who did not intend to take part in the company’. In other words, if the minimum requirements of the subscribers to the memorandum are met, ‘what can it matter whether the signatories are relations or strangers’; Cassim op cit note 2 at 34; and further, Lord Macnaghten dismissed the ‘one-man company’, see at 53-4 of the judgement. This observation was regarded as a key milestone in settling the controversy surrounding ‘one-man companies’. Also, see *Nel and Others v Metequity Ltd. And Another* [2006] ZASCA 111; [2007] 2 All SA 602 (SCA) para 11. The ‘the mere fact that a company has only one shareholder who is in full control of the company does, however, not constitute a basis for disregarding its separate legal personality’. This also includes circumstances where two companies have the same shareholder and the same directors.

⁹⁰ *Salomon* supra note 34 at 30 & 51-54. Namely, the principle of limited liability and separate legal Personality. It is important to remember the impact of *Foss*, which identified a company’s locus standi; and considering *Tunstall v Steigmann* [1962] 2 QB 593 (CA) 602.

⁹¹ Morse op cit note 37 at 25. It is what distinguishes a company from a partnership and other business structures.

⁹² Stephen Mayson, Derek French & Christopher Ryan *Mayson, French & Ryan on Company Law* 22 ed (2005) at 151.

⁹³ Dr Edwin C. Mujih ‘Piercing the corporate veil as a remedy of last resort after *Prest v Petrodel Resources Ltd: inching towards abolition?*’ (2016) 37(2) *The Company Lawyer* 39 at 43. Limited liability is a common law principle. It was developed when the legal personality of a company was first being recognised; and Davies op cit note 36 at 11. Accordingly, on account of the interdependent nature of separate legal personality and limited liability, separate legal personality facilitates limited liability — it allows the distinction between business assets (owned by the company) and personal assets (owned by the members) to become clearer.

⁹⁴ Davies op cit note 36 at 11. Except in particular circumstances. It is ‘not obligatory to have limited liability’ as some company structures, in rare circumstances, chose to operate in an ‘unlimited’ manner whereby members will be personally liable in particular circumstances.

criticism, limited liability has elicited as much praise.⁹⁶ Since inception, it was described by one commentator as the single greatest discovery of modern times, even surpassing electricity and steam.⁹⁷ In the same breadth, it has been condemned for enabling swindling, passing of the risk to creditors, lowering the standards of professionalism, and exposing fraud to the general public.⁹⁸

Owing to limited liability, an essential consequence of incorporation (of a company or close corporation), is it entails the result that the debts (liabilities) of a company belong to a company.⁹⁹ Hence, if any dispute arises, a company's separate legal personality will be recognised, and members will generally not be liable for company debts (based on the value of their shares and the obligations attached to it).¹⁰⁰ This is entrenched in section 19(2) of the Act 71 of 2008, which provides: 'A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'¹⁰¹

The reasoning and creation of limited liability can trace its roots in economics.¹⁰² Taking risks, which is part and parcel of business and industry, warrants a certain degree of legal protection.¹⁰³ This protection is afforded to shareholders (fully), directors (to certain extent)

⁹⁵ Section 19(2) of the Act 71 of 2008. The liability of a company is limited since the corporation is not real; and Stephen Girvin, Sandra Frisby & Alastair Hudson *Charlesworth's Company Law* 18 ed (2010) at 32. In terms of this principle, claims from creditors are limited to the company only and not its shareholders (and other members). Creditors can only satisfy their claims through company assets and not personal assets. Members are limited by the share investment(s) or contribution(s) made to a company's assets to the extent that they are fully paid up, no further liabilities will accrue.

⁹⁶ For an in-depth discussion on the corporate law theory, see Mayson, French & Ryan op cit note 92 at 172. Especially paragraph 5.3.

⁹⁷ Professor Nicholas Murray Butler (President of Columbia University) *Politics and Economics* (1911) to the 143rd Banquet of the Chambers of Commerce of the State of New York at 43-45.

⁹⁸ Mujih op cit note 93 at 44-5. Individuals can hide behind their corporations and thus their legal obligations. Also, see 1824 editorial of the *The Times* in Thomas K Cheng 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines' (2011) 34(2) *Boston College International and Comparative Law Review* 329 at 335; and N Grier op cit 79 at 7-8.

⁹⁹ *Salomon* supra note 34 at 51-54. Meaning, the debts of a company are not the debts of its members. Liability is limited but the potential to gain is limitless. Since members are not personally liable for company debts, it does not excuse their liability for any contributions; and *Airport Cold Storage* supra note 41 para 17.

¹⁰⁰ *Airport Cold Storage* supra note 41 para 17; Cassim op cit note 2 at 35; and Davies op cit note 36 at 12. As a general principle, the protection of limited liability that is extended to directors is 'entirely different' to that of a shareholder.

¹⁰¹ Section 19(2) of the Act 71 of 2008. By virtue, legal jurisdictions that recognise separate legal personality will recognise limited liability.

¹⁰² For an extensive discussion on the rationale of limited liability, read Paul Davies & Sarah Worthington Gower and Davies' *Principles of Modern Company Law* 9 ed (2012) at 207-212.

¹⁰³ In every business, there exists an inherent risk of loss or failure. For example, accidents, financial and

and *not* the company, which is fully liable for its debts and liabilities.¹⁰⁴ Since limited liability is a feature at the core of company law, in my opinion, it was created to ease the conscious of individuals who partake in business; meaning, without the reassurance of limited liability, investors are less likely to take business risks.¹⁰⁵ This will allow for the synchronisation of commerce, which will successively lead to employment and prosperity.¹⁰⁶ Investors will not have to worry about their other ‘assets being attacked by creditors in the event that the company plummets or is unable to pay its debts. ...the risk of the investor is therefore limited to [their] investment in the company’.¹⁰⁷ Therefore, members ordinarily enjoy all the (economic and social) benefits and protection that limited liability provides, especially with personal liability.¹⁰⁸ Essentially, limited liability is available to anyone who wants it.¹⁰⁹

A widely held view exists that limited liability is a consequence of separate legal personality.¹¹⁰ If such view is maintained, piercing the veil will by implication impact on the fundamental principle of separate legal personality.¹¹¹ One can argue that every time the veil is pierced, the principle gradually erodes.¹¹² To some degree, academic communities are in limbo about the relationship between limited liability and legal personality.¹¹³ Nonetheless,

economic turmoil (recession) and poor management. Relevant business structures formed by owners should have their investment risks capped. In other words, liability is limited to its investment; For economic advantages, see Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (2004) *The Concept of Limited Liability – Existing Law and Rationale* by Counsel Assisting, John Sheahan SC – Annexure T – *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* 413 at 416; Irshad Hameed ‘The Doctrine of Limited Liability and the Piercing of the Corporate Veil in the Light of Fraud: A Critical Multi-Jurisdictional Study’ 18 November 2012 at 5, available at <https://ssrn.com/abstract=2282306>, accessed on 24 March 2018. Because of the legal protection afforded to investors, industry is spurred and people are prevented from hiding away; and Ian M Ramsay & David B Noakes ‘Piercing the corporate veil in Australia’ (2001) 19 *Company and Securities Law Journal* 250 at 254-256.

¹⁰⁴

Cassim op cit note 2 at 35.

¹⁰⁵

Cassim op cit note 2 at 35; and N Grier op cit note 79 at 6.

¹⁰⁶

The United Kingdom Corporate Governance Code 2018 at 1; and Davies op cit note 36 at 63-68. Read for an in-depth rationale of limited liability.

¹⁰⁷

Kim-Leigh Siebritz *Piercing the corporate veil: A critical analysis of section 20(9) of the Companies Act 71 of 2008* (unpublished LLM thesis, University of the Western Cape, 2016) at 14; and N Grier op cit note 79 at 7. For that reason, without limited liability, only the ‘foolish, the prodigal, or the already wealthy would invest’.

¹⁰⁸

Airport Cold Storage supra note 41 para 19.

¹⁰⁹

Davies op cit note 36 at 60. Just like partnerships and sole traders, with their advantages and disadvantages, conducting business via a company has the major advantage of limited liability. So much so that the scope of limited liability allows for ‘one person’ companies and even limited liability companies, therefore, sole traders and partners are suitably accommodated in the company law environment.

¹¹⁰

Salomon supra note 34 at 51.

¹¹¹

Mujih op cit note 93 at 43.

¹¹²

Ibid.

¹¹³

Ibid.

legal personality has contributed much needed dialogue on piercing the veil.¹¹⁴ Perhaps our perception of limited liability could change the extent and application of our perception of piercing the veil.¹¹⁵

In view of limited liability, as great as it is, it is also subject to much misuse. Hence, in instances when a company is being used to perpetuate a façade or fraud, or for the evasion of legal and fiduciary duties, protection from limited liability is not absolute.¹¹⁶ When individuals abuse this veil, courts have the discretion to *pierce the corporate veil* and accordingly thrust personal liability to members for the debts and liabilities of the company.¹¹⁷ In essence, piercing the veil represents an exception to separate legal personality and limited liability. Hence why it is exceptional in nature, it is inconsistent with the rationale for the creation and maintenance of legal fiction — only compelling reasons will justify a court to pierce the veil.¹¹⁸

At its root, piercing the veil remains a protective measure against the misuse of separate legal personality.¹¹⁹ In other words, it can be considered as one of the legal responses to the potential abuse(s) of limited liability. A court can “open the curtains” of a company in ‘order to see for itself what [is] obtained inside’.¹²⁰ In closing, I find it fairly ironic, and hypocritical, how the same motivations (separate legal personality) that induce members to join or create a company, will afterward be misused or abused consistently like it does not have separate legal personality.¹²¹

¹¹⁴ Ibid at 44.

¹¹⁵ Ibid.

¹¹⁶ Examples include *Airport Cold Storage* supra note 41 para 19, *Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA at 943, *Le'Bergo Fashions CC* supra note 8 and *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177; and MP Larkin 'Regarding Judicial Disregarding of the Company's Separate Identity' (1989) 1 *South African Mercantile Law Journal* 277 at 283. When a company is used as a façade to conceal the true facts, there is indeed a universal concession, even among the staunchest of supporters, that it is grounds to pierce the corporate veil. Also see Cassim op cit note 2 at 43-46, for detailed case instances when courts have found it necessary and were willing to pierce the veil.

¹¹⁷ *Airport Cold Storage* supra note 41 para 19; section 20(9) of the Act 71 of 2008; and see commentary on piercing the veil in Delpont op cit note 71 at 86-91.

¹¹⁸ *Airport Cold Storage* supra note 41 para 19 & 21; *Salomon* supra note 34 at 16; and *Cape Pacific* supra note 42 at 31. By refusing to uphold a company's separate legal personality, it would otherwise negate or undermine the policy, principles and consequences that underpin corporate personality.

¹¹⁹ Eben Nel 'Two Sides of a Coin: Piercing the veil and unconscionability in trust law' (2014) 35 *Obiter* 570 at 570-571. Piercing empowers courts to police unjust behaviour and hold culprits liable for any wrongful actions perpetrated in the name of the company.

¹²⁰ *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) 558 (C) para 12.

¹²¹ *Airport Cold Storage* supra note 41 para 26, 34 & 78. Members want to obtain the advantages of

i) Commentary on piercing the corporate veil

Piercing the veil has been described adequately by scholars, practitioners and judges.¹²² Conclusively, it is acknowledged that the corporate form can be misused or abused, as confirmed by legislatures and courts.¹²³ Although many cases are obiter, there is consensus through an impressive catalogue of circumstances in which a court can pierce the veil.¹²⁴ In other words, in order to achieve a just result, piercing the veil can be triggered when a set of appropriate facts presents itself.¹²⁵ This occurs when members dominate the finances, policies and business practices of a company in such a manner that the corporate entity has no separate mind, will or existence of its own.¹²⁶ Here, the court will usually find it necessary to pierce the corporate veil.

At present, many principles developed in company law are recognised.¹²⁷ Still, the courts method to piercing the veil has *no singular or unified* approach.¹²⁸ Frankly, it has been characterised as incautious dicta and inadequate reasoning.¹²⁹ Owing to a lack of general tests and reliance on certain established categories, its application is generally incoherent, rare and unprincipled.¹³⁰ In fact, limited liability as a whole (and conversely piercing the veil) is

separate legal personality without in fact treating it as a separate entity. When it suits them, they chose to ignore the separate legal personality. But when courts want to pierce, they cannot now choose to take refuge behind the corporate veil in order to evade liability for the company's debts.

¹²² Cassim op cit note 2 at 41-43; *Prest* supra note 7 para 75-79; and Biswas op cit note 57 at 2. Undeniably, it is a topic which creates common buzz in the corporate arena.

¹²³ *Ebrahim* supra note 18 para 15. It is recognised that the levels of mismanagement of the corporation's affairs can exceed the merely inept or incompetent, and it becomes heedlessly gross or dishonest. Many directors, shareholders and other responsible persons within a company abuse the power of separate legal personality; especially in *Cape Pacific* supra note at 42 at 28. See *Amlin* supra note 120 para 22; and Lord denning's remarks in *Littlewoods Mail Order Stores v Inland Revenue Commissioners* [1969] 1 WLR 1241 (AC) at 1254.

¹²⁴ *Prest* supra note 7 para 27. When a company is used as a sham or a façade to conceal true facts, or has been an alter ego of the controlling person, courts are inclined to pierce the corporate veil.

¹²⁵ *VTB* supra note 14 para 121.

¹²⁶ *Rees* supra note 71 para 13; *Airport Cold Storage* supra note 41 para 25-6; and Davies op cit note 36 at 61. Commonly, 'if those who benefit from limited liability have direct control over the company, they face a strong temptation to use that control power in an opportunistic fashion as to benefit themselves...'

¹²⁷ Paragraph 2.3 of Cassim op cit note 2 at 31.

¹²⁸ *Cape Pacific* supra note 42 at 28; and *Briggs v James Hardie & Co Pty* (1989) 16 NSWLR 549 (NSWCA, Hope and Meagher JJA, Rogers AJA).

¹²⁹ *Prest* supra note 7 para 19.

¹³⁰ Andrew Domanski 'Piercing of the Corporate Veil: A New Direction' (1986) 103 *SALJ* 224; Lynette C Davids 'The lingering question: Some perspective on the lifting of the corporate veil' (1994) 1 *TSAR* 155 at 155. For further categorizing problems, see *R v Hammersmith and Fulham Borough Council, ex parte People Before Profit Ltd* (1983) 80 *LGR* 322; and Cassim op cit note 2 at 43. There exist strong arguments against embracing a categorising approach. I agree with such arguments, because as will be seen below, due to the intricate and multifactor approach to piercing the veil, categorising stifles piercing and can significantly lead to meaningless principles being developed, hindering piercing in its entirety.

amongst the most perplexing in company law.¹³¹ Since the turn of the twentieth century (and undoubtedly in the twenty-first), the correct approach to piercing the veil has been difficult to ascertain, and courts have subsequently grappled with the issue.¹³² It is practically impossible to mention and reconcile the countless lists of circumstances whereby the veil should be pierced, and therefore it is an *esoteric* label.¹³³ For instance, in *Amlin*, the veil can be pierced in instances of fraud, agency, evasion and abuse of the corporate form, and where there is a mere façade concealing the true state of affairs.¹³⁴ Despite this semi-exhaustive list, judges adopt different criteria to pierce the veil and rarely, if ever, state what their general opinion on corporate personality is.¹³⁵

Besides, academics have described piercing as *freakish*, and specified the irony that despite being so intrinsic to company law, it is so casually overlooked.¹³⁶ Overlooked to the extent that some claim that it has never existed.¹³⁷ It is seen as a ‘threat to the proper functioning of corporate personality and limited liability principles’.¹³⁸ Although critics find problems with its operation, the semantics surrounding piercing the veil have also contributed to controversy.¹³⁹ For that reason, it was described as “irreconcilable and not entirely comprehensible”.¹⁴⁰ It is clear from cases and academic articles that the law relating to piercing the veil is unsatisfactory and confused.¹⁴¹ As well, company lawyers have exerted much effort in trying to figure out the instances in which a court can pierce the corporate veil.¹⁴²

¹³¹ Amin Forji 'The Veil Doctrine in Company Law' 29 September 2007 available at <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>, accessed on 21 May 2018.

¹³² Cassim op cit note 2 at 41 & 43; *Cape Pacific* supra note 42 at 28; and Mayson, French & Ryan op cit note 92 at 153-154.

¹³³ *Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NW) 70. The list of circumstances provided by courts vary considerably. A judge is focused on the facts of their particular case instead of pursuing a holistic view.

¹³⁴ *Amlin* supra note 120 para 23. Piercing will only occur in exceptional circumstances; and Cassim op cit note 43. It must be stated that these are merely examples of when courts tend to pierce the veil and it does not reflect the other numerous circumstances in which courts can pierce the veil.

¹³⁵ Visser op cit note 36 at 261. Authors, jurists and other legal scholars’ resort to different criteria’s to pierce the corporate veil, if any at all. Essentially, piercing the veil seems simple, especially in light of fraud or improper conduct when statute requires it; and Mayson, French & Ryan op cit note 92 at 154.

¹³⁶ *Prest* supra note 7 para 77.

¹³⁷ *Ibid* para 16, 27, 50, 65, 77 & 106-107.

¹³⁸ Biswas op cit note 57 at 4.

¹³⁹ Mujih op cit note 93 at 40.

¹⁴⁰ Biswas op cit note 57 at 4.

¹⁴¹ *Prest* supra note 7 para 64. Lord Neuberger listed three points as to why there is such confusion.

¹⁴² Davies op cit note 36 at 37-8. Company lawyers have much to contribute (to the debate) within the realms of company law, but not out of it.

Indeed, because piercing the veil exists as an exception to limited liability, courts tend to take a fact-based approach and no trend is readily discernible from an overview of cases.¹⁴³

As a phrase, ‘piercing the veil’ is nomenclature.¹⁴⁴ Often used to identify a cover or mask, and portrayed countless as metaphorical jargon, the ‘veil’ has been recited, but rarely explicated by courts.¹⁴⁵ Where the legal personality of a company is used as a means to conceal a wrongdoing or avoid obligations, an assortment of epithets are frequently used; these are namely: ‘device,’ ‘stratagem,’ ‘cloak,’ ‘alter ego,’ ‘mask,’ ‘alias,’ ‘dummy,’ ‘agent,’ ‘puppet,’ and ‘sham’.¹⁴⁶ Although wide-ranging, such expressions can be regarded as synonymous.¹⁴⁷ In aiding courts in achieving just results, expressions may be useful metaphors.¹⁴⁸ Despite that, such pejorative expressions are often dangerous, as they risk legal principle at the expense of moral indignation.¹⁴⁹ Further, they risk causing uncertainty in law.¹⁵⁰ In my view, it is difficult to know whether such metaphors help us, or divert attention from the real substance.¹⁵¹

Notwithstanding the barrage of criticisms, there is notable academic support for piercing the veil. Much of the backlash stems from the view that, on face value, piercing goes against the interests of shareholders or investors.¹⁵² However, Professor Kurt Strasser argued that criticisms are often exaggerated and hypocritical.¹⁵³ The reason being is, if piercing the veil is so profoundly flawed, according to academics; it should have been abolished a long time

¹⁴³ *Cape Pacific* supra note 42 at 37. Enquiring into the facts, once determined, may be of decisive importance. Part of the problem is piercing the veil is *raison d’être*.

¹⁴⁴ Mujih op cit note 93 at 42.

¹⁴⁵ Ibid.

¹⁴⁶ *Cape Pacific* supra note 42 at 31. The court cited *Shipping Corporation of India Pty Ltd v Evdomon Corporation* 1994 (1) SA 550 (AD). The case importantly portrayed one of the first instances where a South African court formulated a test for piercing the veil.

¹⁴⁷ *Hashem* supra note 54 para 150.

¹⁴⁸ *VTB* supra note 14 para 124.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ *Prest* supra note 7 para 78; and Justice Cardozo’s famously affirmed in *Berkey v Third Avenue Railway Co* 244 NY 602 (1927), that ‘metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it’.

¹⁵² Biswas op cit note 57 at 5.

¹⁵³ Mujih op cit note 93 at 40; and BS Smith ' Statutory discretion or common law power? Some reflections on “veil piercing” and the consideration of (the value of) trust assets in dividing matrimonial property at divorce – Part One' (2016) 41 *Journal for Juridical Science* 68 at 74. Amongst some authors, there is a belief that piercing does not mean ignoring a company’s legal personality in its entirety, even the slightest disregard qualifies; and piercing the veil can come in various forms. For example, *reverse* (backward) *piercing* can exist. This occurs when abuse of the juristic personality is perpetrated by the company. Shareholders, or the company itself, attempts to hold the company liable. This is a situation where piercing the veil can be to the benefit and not the detriment of shareholders (and the community at large). See *Al-Kharafi & Sons and Another v Pema and Others NNO* [2008] ZAGPHC 273 para 30 and *Inkunzi Civils CC v Greater Kokstad Municipality* [2012] ZAKZPHC 54 para 22.

ago.¹⁵⁴ In actual fact, piercing has not been abandoned expressly and courts can, and often, do draw aside the veil.¹⁵⁵

ii) Perspectives on piercing the corporate veil: contrasting common law jurisdictions

In my interpretation, the *spectrum* of piercing the veil is tough to measure.¹⁵⁶ Prestigious common law jurisdictions are demonstrating a lack of uniformity to the problem.¹⁵⁷ In Canada, courts usually pierce the veil when a company is used fraudulently and/or improperly as a puppet (or as a tool or conduit) for another company.¹⁵⁸ The Canadian Supreme Court ruled that piercing the veil follows no consistent principle and will only occur where it would be just and equitable, specifically to third parties.¹⁵⁹ In the United States, piercing is based on equity reasons and is better developed in comparison to the other jurisdictions.¹⁶⁰ In spite of this, it is difficult to apply, random and ambiguous in a manner that yields few predictable results.¹⁶¹ In Australia, there is no principled approach that can be derived from authorities.¹⁶² In New Zealand, the court of appeal described piercing the veil as not a principle, but rather a *process* which has no guidance in its application.¹⁶³ Lastly, the United Kingdom (which tests at a vast list of general principles), it is not confidently determined what is meant by 'piercing the veil'.¹⁶⁴ As a legal concept, the general approach adopted is piercing the veil should not defeat the mandatory rules of law.¹⁶⁵

In view of that, internationally, the issue of piercing the corporate veil is not a phenomenon and different jurisdictions deal with the matter more successfully than others.

¹⁵⁴ Ibid.

¹⁵⁵ *Littlewoods* supra note 123 at 1254.

¹⁵⁶ *Amlin* supra note 120 para 13-22.

¹⁵⁷ *Prest* supra note 7 para 75; *Amlin* supra note 120 para 13-22; and R Cassim op cit note 21 at 331. In various jurisdictions, piercing the veil is confusing and uncertain due to cases being heavily driven on facts and subjective interpretation.

¹⁵⁸ *Amlin* supra note 120 para 16.

¹⁵⁹ *Prest* supra note 7 para 75. Citing the Supreme Court of Canada in *Kosmopoulos v Constitution Insurance Co of Canada* v [1987] 1 SCR 2 para 12; and *Amlin* supra note 120 para 14. The court cites the Canadian case of *Lockharts Ltd. v Excalibur Holdings Ltd. et al.* (1987) 47 RPR 8. Davison J provided that 'courts have the duty to look behind the corporate structure if it is being used for a fraudulent or improper purpose or as a "puppet" to the detriment of a third party...'

¹⁶⁰ *Amlin* supra note 120 para 17-8; and Davids op cit note 130 at 156. In the United states, each case is regarded as *sui generis* and is observed on the facts of each case.

¹⁶¹ *Prest* supra note 7 para 75. The court discussed *Secon Service System, Inc. v St. Joseph Bank & Trust Co.*, 855 F.2d (7th Cir, 1988), 406 at 414 and *Allied Capital Corp. v GC-Sun Holdings L.P.*, 910 A.2d 1020 (Del. Ch.2006) at 1042-1043.

¹⁶² *Briggs* supra note 128 at 567.

¹⁶³ *Prest* supra note 7 para 75. The court discussed the New Zealand court of appeal case in *Attorney-General v Equiticorp Industries Group Ltd (In Statutory Management)* [1996] 1 NZLR 528 at 541. McKay J provided that piercing the veil aims to 'remove the cover of separate from the corporation to find out the person who is working behind it'.

¹⁶⁴ *Prest* supra note 7 para 75; and Davids op cit note 130 at 156-157.

¹⁶⁵ *Prest* supra note 7 para 27.

iii) The difficulty that courts face when piercing the corporate veil

To truly measure the spectrum of what is considered abuse or misuse of the corporate personality, one begs to ask the question, *what level* of abuse or misuse is *sufficient*?¹⁶⁶ Corporate veil cases come in a great variety and so courts take cognisance of the principle of substance over form, which will determine the legal appropriateness of whether to pierce or not.¹⁶⁷ Since there is no unified principle as to when courts should pierce the veil, it has blurred the fog of authority.¹⁶⁸ However, it is widely accepted that as a basis, some element of *fraud, dishonesty* or *improper conduct* can constitute grounds for piercing.¹⁶⁹

In conclusion, courts have many factors to consider when piercing the veil. The process is intricate, and it ultimately boils down to the preference and discretion of the court, who, when making an order, have the duty to consider all relevant factors.¹⁷⁰ Although it can be argued that piercing should be wider, it can essentially cause problems.¹⁷¹ In my opinion, a test for piercing the veil should be applied cautiously, while considering the importance of separate legal personality.¹⁷²

c) Conclusion

Due to the legacy of *Salomon*, piercing the veil is at the discretion of judges and courts. Consequently, it has substantially become judge-made law.¹⁷³ In criticism, the House of

¹⁶⁶ *Prest* supra note 7 para 28. Because of metaphors and phrases, identifying the relevant wrongdoing is difficult. It therefore provides more questions than sufficient answers; *Goldfinch Garments CC and Another v The Sheriff of the Court- Newcastle and Another* (2013) ZALCD 21 para 12; and *Amlin* supra note 120 para 19.

¹⁶⁷ *Dadoo* supra note 36 at 547. A fundamental doctrine is ‘the law regards the substance rather than the form of things — a doctrine common, one would think, to every system of jurisprudence and conveniently expressed in the maxim *plus valet quod agitur quam quod simulate concipitur*’; Larkin op cit note 116 at 290-1. The battle between substance and form is important. Substance ‘will enjoy form’s discomfort, and, when this discomfort becomes intolerable, will enjoy many a victory, too, at the expense of form’; and *Kurt Robert Knoop NO and others v Birkenstock (Pty) Ltd* [2009] ZAFSHC 67 para 13. The reluctance to pierce is said to exist because of the deeply seated notion of fair play in South African law.

¹⁶⁸ Mayson, French & Ryan op cit note 92 at 154. Sometimes, courts are faced with the question of piercing the veil and subsequently decide that the circumstances do not allow; and Domanski op cit note 130 at 224. Judges adopt different attitudes to the question and rarely, if ever, state what their general theory of corporate personality is.

¹⁶⁹ *Cape Pacific* supra note 42 at 30-1. When fraud, dishonesty or other improper conduct occurs, other considerations will come into play; and Cassim op cit note 2 at 43-46.

¹⁷⁰ *Kurt Robert* supra note 167 para 10, 14 & 17; and Mayson, French & Ryan op cit note 92 at 164. This can include individuals or other persons who are connected with the company.

¹⁷¹ R Cassim op cit note 21 at 327-329. As evidenced in Brazilian company law, piercing the veil too freely causes problems.

¹⁷² *Cape Pacific* supra note 42 at 31-33.

¹⁷³ Lady Arden op cit note 61 at 2; and Domanski op cit note 130 at 224-225. First, since piercing is derived from common law and secondly, difficult to grasp, judges have observed other judgments to find guidance to the correct approach. In addition, *Salomon* itself can be viewed as the root for ‘categorizing’ piercing the veil cases. This has ultimately led to disorder.

Lords provided no guidance as to the approach courts should consider in applying the concept of legal personality.¹⁷⁴ In addition, it was not contended when contracts would be unenforceable due to the corporate structure.¹⁷⁵ Accordingly, piercing is conservative and courts aim towards protecting legal personality, its benefits and consequences.¹⁷⁶ Ultimately, *Salomon* represents a ‘substantial obstacle’ in the way of arguments to pierce the corporate veil.¹⁷⁷

In its 80 years of supposed existence, controversy surrounding piercing the veil appears to have never been solved appropriately.¹⁷⁸ This has led the law into ambiguity and formalism.¹⁷⁹

Considering the criticisms, piercing the veil remains a viable safeguard. It is one of the primary methods through which courts mitigate the strenuous demands of logical fulfilment of the concept of separate legal personality.¹⁸⁰ It would be wrong to disregard the remedy when it represents a potentially valuable judicial tool for courts.¹⁸¹

¹⁷⁴ Ramsay & Noakes op cit note 103 at 254.

¹⁷⁵ Ibid.

¹⁷⁶ Section 19(1)(b) of the Act 71 of 2008; Cassim op cit note 2 at 35-40. The legal consequences of separate legal personality is: the profits of the company belong to the company; the assets/property of the company, belong to the company; the debts and liabilities of the company, belong to the company; the company inherits perpetual succession; the company can sue and be sued in its own name; the shareholders have no right to manage the company in the capacity as a shareholder; and a company can contract with employees. See *Stellenbosch Farmers Winery Ltd vs Distillers Corporation (SA) Ltd* 1962 (1) SA 458 (A), *Salomon* supra note 34, *Dadoo* supra note 36 at 550, *Macaura* supra note 37 at 630, *S v De Jager* 1965 (2) SA 616 (A) and *Lee v Lee's Air Farming Ltd* [1961] AC 12; [1960] 3 ALL ER 420 (PC) at 25.

¹⁷⁷ *Prest* supra note 7 para 67.

¹⁷⁸ Ibid para 79.

¹⁷⁹ Ibid para 75.

¹⁸⁰ Forji op cit note 131.

¹⁸¹ *Prest* supra note 7 para 80.

III SOUTH AFRICAN APPROACH TO PIERCING THE CORPORATE VEIL

a) Introduction

In South African law, piercing the corporate veil has been controversial and undecided.¹⁸² It is an exceptional procedure and a drastic remedy.¹⁸³ In order to pierce the corporate veil, there is two points of reference, the common law and statute.¹⁸⁴ Before the Act 71 of 2008 came into being, piercing the veil was governed by the common law.¹⁸⁵ In today's climate, the general principle of piercing the corporate veil is codified by section 20(9), and is supplemental to, rather than substitutive of, the common law in respect of piercing the corporate veil.¹⁸⁶

i) General approach adopted by South African courts

South African courts do not lightly disregard the separate legal personality of a company.¹⁸⁷ In most cases, courts tend to uphold the principle of separate legal personality, despite arguments against doing so.¹⁸⁸ There must be 'compelling reasons' for a court to ignore the separate legal personality of a company.¹⁸⁹ However, the grounds upon which courts will pierce the veil has been 'difficult to state with certainty'.¹⁹⁰ Thus, courts have generally not followed consistent principles in 'determining when they will depart from the principle that a company is a separate legal person'.¹⁹¹ Over a long period of time, jurisprudence has shown evidence of adopting conservative approaches towards piercing, and therefore, generally

¹⁸² F Cassim op cit note 77 at 67. For the most part of South African company law history, South African courts have battled with adopting the 'correct approach' in order to determine whether or not to pierce the corporate veil.

¹⁸³ Ibid.

¹⁸⁴ *Cape Pacific* supra note 42 at 27-8; and section 20(9) of the Act 71 of 2008.

¹⁸⁵ *Kurt Robert* supra note 167 para 24-5 read with *Airport Cold Storage* supra note 41 para 20. Piercing takes two forms, first when the court disregards the company and members as if they have been acting in partnership (or where a company has a single member, as if he had been on his own behalf). Secondly, when obligations incurred by shareholders in their personal capacity are treated as if they were incurred by the company.

¹⁸⁶ *Gore* supra note 3 para 34. In other words, the first point of reference is the stance in common law and subsequently its progression into the Act 71 of 2008, which is a modern approach to the topic; and Delpoit op cit note 71 at 106(5).

¹⁸⁷ *Gore* supra note 3 para 27, which cites *Wambach v Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (A) at 675D-E and *Macadamia Finance BK en 'n Ander v De Wet en Andere NNO* 1993 (2) SA 7445 (A) at 748B-D; and *Cape Pacific* supra note 42 at 31. It was held that 'it is undoubtedly a salutary principle that [South African] courts should not lightly disregard a company's separate legal personality but should strive to give effect to and uphold it'.

¹⁸⁸ F Cassim op cit note 77 at 67; and *Kurt Robert* supra note 167 para 12.

¹⁸⁹ F Cassim op cit note 77 at 67.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

accepting the attitude followed by English courts.¹⁹² This can be attributed towards *Dadoo*, a South African case which signified the adoption (into South African law) of the principles set out in *Salomon* — a catalyst for the development of South African company law.¹⁹³ Since then, a general rule adopted is piercing the veil should only occur in exceptional circumstances, and as a remedy of *last resort*.¹⁹⁴

South African courts take cognisance that merely because it would be just and equitable, they enjoy no general discretion to pierce.¹⁹⁵ In addition, there is no definite test as to the circumstances in which a court can exercise its discretion.¹⁹⁶ However, when the circumstances allow, courts will pierce the veil where justice requires it, in order to reveal the ‘true villain of the piece’.¹⁹⁷ In some cases, courts adopt a discernibly more liberal approach to the issue.¹⁹⁸ Subsequently over the years, courts have developed guidelines, principles and alternatives in considering an application to pierce the veil.¹⁹⁹

b) South African Common Law: Historical landscape

i) Introduction: General common law approach to piercing the veil in South African law
In determining whether or not to pierce the veil, the subsequent lack of consistency that is implemented has demonstrated a trend of problematic customs adopted by South African courts.²⁰⁰ Courts generally do not know for certain when they will disregard the separate legal personality of a company.²⁰¹ To a certain degree, the common law has not agreed to a set of circumstances in which it is ‘possible to state with any degree of accuracy’ whether or not to pierce the veil.²⁰² Accordingly, the need to ascertain firm guiding principles as to when a court will pierce the corporate veil is paramount.²⁰³ As demonstrated below, with the aid of the judiciary and Constitution, this urging need for clarification has developed and fostered a

¹⁹² *Gore* supra note 3 para 27.

¹⁹³ *Dadoo* supra note 36 at 550. The court held the ‘conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing... it is a matter of substance’; *Banco de Mozambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T) at 345B-C; *Nel and others* supra note 89 para 11. The court takes cognisance of Lord Macnaghten’s stance on one-man companies. Read footnote 89 of this dissertation.

¹⁹⁴ *Airport Cold Storage* supra note 41 para 19 read with *Kurt Robert* supra note 167 para 23 and *Hülse-Reutter v Gödde* [2002] 2 All SA 211 (A) para 20 & 23; and discussion of piercing the veil being a remedy of last resort will be discussed in chapter 5.

¹⁹⁵ *Gore* supra note 3 para 27-8; and *Hülse-Reutter* supra note 194 para 20.

¹⁹⁶ *Baloyi v Malherbe and Another* unreported case [2015] ZALCJHB 10 para 14.

¹⁹⁷ *Gore* supra note 3 para 27; and *Kurt Robert* supra note 167 para 17.

¹⁹⁸ *Gore* supra note 3 para 27.

¹⁹⁹ *Baloyi* supra note 196 para 14.

²⁰⁰ Cassim op cit note 2 at 48.

²⁰¹ *Cape Pacific* supra note 42 at 28 read with *Hülse-Reutter* supra note 194 para 20.

²⁰² Cassim op cit note 2 at 48.

²⁰³ *Ibid* at 48.

new wave of thinking over time, and moderately cleared the murkiness of confusion in South African company law; a far cry from the previous regime.

ii) Fraud: Finite in nature

Fraud cannot be confined within the constraints of its definition — it manifests in many ways.²⁰⁴ In the words of Lord Denning, ‘no judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud....fraud unravels everything’.²⁰⁵

Early in the 1920s, *Orkin Bros Ltd v Bell*²⁰⁶ signified one of the first instances where a South African court was tackled with the question of piercing the veil.²⁰⁷ The court did pierce the veil, demonstrating how the influence of fraud can amount to piercing.²⁰⁸ Mason J held that in the scenario where company executives order goods from merchants, there is an implied representation of the likelihood of payment.²⁰⁹ However, when there is no likelihood of payment, fraud is committed.²¹⁰ In the end, it seemed that the ‘sole purpose of the transaction was to diminish the personal liability of the directors under a contract of suretyship’.²¹¹ The directors were held jointly and severally liable in their personal capacity.²¹²

The influence of fraud impacted the 1980s, with unexpected judicial affirmations.²¹³ This was first seen in *Lategan v Boyes*²¹⁴, where Le Roux J restricted piercing the veil to *fraudulent use*.²¹⁵ Le Roux J held ‘our courts would brush aside the veil of corporate identity time and time again where fraudulent use is made of the fiction of legal personality’.²¹⁶ In the end, the

²⁰⁴ Hameed op cit note 103 at 13-19. Fraud is seen in the wide sense (i.e. to conceal a wrongdoing).

²⁰⁵ *Lazarus Estates v Beasley* [1956] 1 QB 702.

²⁰⁶ *Orkin Bros Ltd v Bell* 1921 TPD 92. The case represented the liability of agents for debts contracted on behalf of insolvent companies.

²⁰⁷ *Orkin Bros* supra note 206 at 102. A company was in severe financial difficulty. Nevertheless, from the plaintiff, the directors approved the purchase of certain goods on credit while knowing they could not afford such purchases. The company subsequently went into liquidation; and Cilliers op cit note 75 at 13-15. The authors illustrate examples of when courts are willing to pierce the veil.

²⁰⁸ *Orkin Bros* supra note 206 at 102. The conduct of the directors was a ‘reckless indifference as to whether they would be paid for’.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ *Lategan v Boyes* 1980 (4) SA 191 (T) at 201.

²¹² *Orkin Bros* supra note 206 at 102.

²¹³ Larkin op cit note 116 at 278.

²¹⁴ *Lategan* supra note 211.

²¹⁵ Ibid at 201. Concerning a contract (deed) of suretyship, entered in respect of a loan taken up by L company and the two defendants. For further facts, see JT Pretorius, PA Delport & Michele Havenga et al *Hahlo’s South African Company Law through the cases* 6 ed (1999) at 25.

²¹⁶ Ibid. What is meant by the following quote cannot readily be ascertained. There was no application of the principle and the test was vague and narrow.

court did not pierce the veil as no fraud arose.²¹⁷ The matter exemplified the blunt utterance trend of judges who have the tendency to box piercing into categories.²¹⁸

In my view, by reducing piercing to merely fraudulent use, it is both disabling and limiting.²¹⁹ Objectively, it is incorrect to state that fraud is the only prerequisite for piercing the veil.²²⁰ Obviously, fraud would be a special circumstance, but it is not essential.²²¹ Too, the attitude adopted by the transvaal provincial division was questionable; a more relaxed approach should have been implemented. Since the conducts in question were not fraudulent, the court did not intend on delivering such a narrow rule.²²²

iii) Unconscionable injustice: Gradual progression into expansion

The next unexpected judicial affirmation was in *Botha v Van Niekerk*²²³. The court affirmed it will pierce the corporate veil if the plaintiff has suffered an *unconscionable injustice* as a result of improper conduct on the part of the defendant.²²⁴ Flemming J provided:

I mean that in this instance, one could also only come to a conclusion of personal accountability if there was at least conviction that the applicants suffered an unconscionable injustice, and this as a result of something that any sane person would clearly deem an improper conduct on the side of the first respondent.²²⁵

Subsequently, Flemming J formulated the ‘unconscionable injustice test,’ whereby the court will only arrive at a finding of unconscionable injustice if improper conduct is proved is proved against the perpetrator.²²⁶ Despite the conduct in question not satisfying the test, a

²¹⁷ Ibid. There was ‘no evidence that the second defendant fraudulently failed to mention the position of the sureties’ Therefore, it was an obiter judgment on piercing the veil.

²¹⁸ Ibid at 202. The decision in *Orkin Bros* was seen as an example of piercing the veil (as Le Roux J thought as much). However, Le Roux J did note that the principle in *Orkin Bros* was not applied correctly in *In Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA) and *R v Gillet* 1929 AD 364. Here, the directors were held liable in legislation and not piercing the veil; and *Amlin* supra note 120 para 20. *Botha v Van Niekerk* 1983 (3) SA 513 (W) at 519C-D.

²²⁰ Ibid at 519C-E.

²²¹ *Airport Cold Storage* supra note 41 para 25.

²²² *Botha* supra note 219 at 519C-E.

²²³ *Botha* supra note 219 at 519C-E; and Read JT Pretorius op cit note 215 at 26 for factual background.

²²⁴ *Botha* supra note 219 at 525E-F.

²²⁵ Ibid. The quote is translated from Afrikaans to English.

²²⁶ *Botha* supra note 219 at 525E-F. Since there was a possibility that the company (at the time the application was made) had sufficient funds to pay the purchase price of the house, the court did not pierce the veil. The buyer ultimately assumed the liability of the nominee. There was no provision that such nominee must have independent financial means to meet its obligations under contract. The decision is therefore obiter; and Read Domanski op cit note 130 at 227-228. It must be noted that on the facts, the judgement was incorrect. The court had justified grounds to pierce. The decision was ‘based on convenience rather than on principles of law’. The ruling was very unfair on the seller, who had complied with all the formalities of sale and contract. Meanwhile, by using a company, the buyer took steps that were *mala fide* in nature in order to thwart the sale.

‘degree of fairness but nothing more than that’ was achieved.²²⁷ On reflection, this is false. On the facts, the judgement was incorrect as the court had justified grounds to pierce.²²⁸ Moving on, the court spoke on the *Lategan* rule. It was quantified that *Lategan* would only be applicable where fraudulent use of the corporate personality is shown.²²⁹ In my learned opinion, the test formulated in *Botha* was a welcomed extension. In contrast to *Lategan*, it endeavoured to reflect and embody the wide trajectory of piercing.²³⁰ However, in criticism, although it is an extension from mere fraud, what is unconscionable injustice? No guidance was given and hence, confusion and deliberation would still be paramount.²³¹ Further, no guidance was given as to what constitutes as improper conduct. It is unfortunate that the court did not apply a multi-factor approach.²³²

At the time of *Lategan* and *Botha*, courts were completely free to consider alternative methods and approaches to piercing the veil.²³³ Both judgements were obiter and no earlier case in South Africa laid down a rule which was respected in the legal landscape.²³⁴ Therefore, in South African law, no position had been reached where it could be determined when piercing the veil should occur.²³⁵

iv) Fraud, dishonesty or improper use: Transition into a constitutional framework

In the following decade, supplementing *Cape Pacific* and *Hülse-Reutter v Gödde*²³⁶, significant contributions were made in *The Shipping Corporation of India Pty Ltd v Evdomon Corporation*²³⁷. Notably, one of earliest guidelines on piercing the veil was provided.²³⁸ The

²²⁷ *Botha* supra note 219 at 524B.

²²⁸ See footnote 226 of this dissertation.

²²⁹ *Botha* supra note 219 at 519C-E. The conduct in question did not amount to fraudulent use of the company.

²³⁰ *Ibid* at 525F. Flemming J reflected such sentiments. He noted how it is incorrect to state that fraud is the only prerequisite to piercing. Accordingly, he was not bound by *Lategan* (precedent). Regrettably, it was held that the test for unconscionable injustice should be limited to cases like *Botha*.

²³¹ Davids op cit note 130 at 158.

²³² *Ibid*.

²³³ *Amlin* supra note 120 para 21.

²³⁴ *Amlin* supra note 120 para 21; and *Ritz Hotel Ltd v Charles of the Ritz Ltd and Another* 1988 (3) SA 290 (A) at 314H-316B. The court acknowledged the apparent trend of the 1960s and 70s to ignore the separate legal personality in context to group of companies.

²³⁵ F Cassim op cit note 77 at 68.

²³⁶ *Hülse-Reutter* supra note 194 para 20. Although the court initially adopted the *Cape Pacific* approach, the judgment veered away. The court imposed that a further requirement (other than fraud, dishonesty or improper conduct) should be present. Namely, the plaintiff must prove to the court that the defendant received an unfair advantage. It is debatable whether this approach is correct. With respect, the observation was obiter. In any event, the learned judge of appeal did not intend to derogate from the principle affirmed in *Cape Pacific*, where a flexible approach is indicated. For criticisms, see FHI Cassim and MP Larkin ‘Company Law (including Close Corporations)’ *Annual Survey of South Africa* (2001) 506 at 515-517.

²³⁷ *Shipping* supra note 146.

court did not necessary consider, or attempt to define, the circumstances under which the court will pierce the corporate veil.²³⁹ Instead, they will generally need to prove an ‘element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs’.²⁴⁰ The requirement of ‘fraud or other improper conduct’ has connotations in the Close Corporations Act 69 of 1984.²⁴¹ Section 65 is the common law equivalent of piercing the corporate veil.²⁴² The test for liability depends on a finding of *gross abuse* of the juristic personality of the corporation as a separate entity.²⁴³

1. *Cape Pacific*: Much needed clarity

Henceforth, in *Cape Pacific*, a momentous South African Case, the development of ‘fraud or other improper conduct’ is epitomized — they became requisites. In the context of South Africa, the appellate division provided a wonderful and informative analysis on piercing the veil — it is the leading case in common law in regard to the approach of South African courts to piercing the veil.²⁴⁴

The facts of the matter deal with the sale of shares (and loan account) in Findon Investments (Pty) Ltd (F).²⁴⁵ An agreement was reached between Cape Pacific, the buyer, and Lubner Controlling Investments (LCI), the holding company of F.²⁴⁶ Nonetheless, LCI denied a valid agreement and accordingly transferred the shares in F to a 3rd party, Gerald Lubner Investments (Pty) Ltd (GLI).²⁴⁷ Cape Pacific sued GLI, LCI and Gerald Lubner (shareholder in LCI and GLI) in his personal capacity.²⁴⁸ After careful consideration, the court pierced the veil of LCI and GLI.²⁴⁹ By doing this, LCI, GLI and Gerald Lubner are one and the same. Since Gerald Lubner exercised complete control of the companies, he was both LCI and GLI.²⁵⁰ By initiating the main transfer, Gerald Lubner used his influence to thwart or defeat

²³⁸ Ibid.

²³⁹ Ibid at 566C-F.

²⁴⁰ *Shipping* supra note 146 at 566C-F; and Smith op cit note 153 at 72. Improper conduct represents an inclusion of evading legal obligations. This can lead to a company being used as an alter ego.

²⁴¹ *Airport Cold Storage* supra note 41 para 24. See footnote 402 of this dissertation for further discussion. Section 65 of the Act 69 of 1984.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ *Cape Pacific* supra note 42. Post *Cape Pacific*, the principles handed down have been quoted in practically every South African case concerning piercing the veil. See *Kurt Robert* supra note 167 para 11.

²⁴⁵ Ibid at 2. The shares in Findon allowed the owner to occupy and enjoy a luxurious flat in Clifton, Cape Town, South Africa.

²⁴⁶ Ibid at 7-8.

²⁴⁷ Ibid at 8.

²⁴⁸ Ibid at 9-10.

²⁴⁹ Ibid at 35 & 41-2.

²⁵⁰ Ibid at 6, 12-22 & 23-26. Lubner was the ‘moving spirit’ and ‘prime moving force’ of LCI and GLI.

Cape Pacific's rights to the shares.²⁵¹ In doing this, he kept ownership of the Clifton flat (his main aim). He essentially used LCI and GLI as his *alter egos*, *puppets* or *vehicles* to purport improper conduct.²⁵² Further, Gerald Lubner controlled the *affairs* of LCI and GLI.²⁵³ On the evidence, it was seen that: Gerald Lubner controlled the director of LCI, who in turn was the director of GLI; Gerald Lubner was the controlling shareholder of LCI and GLI; there was non-compliance with the formalities of the Act 61 of 1973 in respect of the sale of shares; and no board meeting was held, although a resolution was signed by the director of LCI and Gerald Lubner.²⁵⁴ To encapsulate, Gerald Lubner controlled LCI and GLI for personal reasons on a personal level. This resulted in the direct intermingling of the affairs or transactions of the respective companies.²⁵⁵

In the high court, Nel J refused to pierce the veil. Having incorrectly applied the unconscionable injustice test, and overlooking Gerald Lubner's unscrupulous conduct; there was indeed sufficient grounds to pierce.²⁵⁶ It was held that the transfer of shares could be described as 'clearly improper', but because the plaintiff knew of the transfer, and failed to

The vast extent of Lubner's control and lack of integrity is detailed by the court. A summary of Lubner's foul behaviour is portrayed comprehensively at 26, where 5 points are listed.

²⁵¹ Ibid at 33-4. Supplementary, the transaction did not make financial sense for GLI and LCI. The transfer was 'in fraud of the appellant's rights'.

²⁵² *Cape Pacific* supra note 42 at 34-5. Lubner's use of the companies amounted to abuse of their separate legal personalities; *Cape Pacific Ltd v Lubner Controlling Investment (Pty) Ltd* 1993 2 SA 784 (C) at 815G. The high court held that the first defendant transferred the shares in question to evade the plaintiff's claim. At 821E, the court held the second defendant was the vehicle through which the third defendant held his interest in the shares in F. Despite this, the high court did not pierce the veil as it would not assist the plaintiff in their quest for the shares in F. Further, because LCI had assets more than R 1 000 000, including the shares in F, it could not be described as a 'puppet,' 'sham,' or 'alter ego' of GLI (see at 821G). In addition, because Gerald Lubner controlled LCI, the company was not used as a 'subterfuge or an instrument of fraud or improper conduct' (see at 821H). Similarly, GLI could not be described as a 'puppet,' 'sham,' or 'alter ego' of Gerald Lubner because it had assets more than R2 000 000 (see at 821I). Although Gerald Lubner controlled GLI, it was similarly not used as a tool for 'subterfuge or an instrument of fraud or improper conduct' (see 821); and *Kurt Robert* supra note 167 para 18. Piercing the veil can occur in terms of a specific transaction only. Since courts refrain from imposing illegality on other legitimate and proper corporate activities, it can be deemed a company for all other purposes.

²⁵³ *Lubner Controlling Investments* supra note 252 at 814G-I.

²⁵⁴ Ibid at 796D-E.

²⁵⁵ Ibid at 805F.

²⁵⁶ *Lubner Controlling Investments* supra note 252 at 822. The unconscionable injustice test was applied, but it failed. A strict application of the equity approach would have revealed that unfairness or injustice had occurred. In addition, Nel J's judgement was incorrect. For discussion on such application and for further criticisms of the high court ruling, see Davids op cit note 130 at 159-161; and see JT Pretorius op cit note 215 at 30. For case background, to provide context, in 1987, in the cape provincial division, overseen by Friedman J, Cape Pacific was successful in an action against LCI for delivery of the shares and the loan account in F to Cape Pacific (the original action). LCI subsequently failed in delivery (in 1989) and their appeal was dismissed by the appellate division. In response, an application was instituted by Cape Pacific (contempt of court) in regard to the failed delivery; that was also dismissed. Accordingly, Cape Pacific instituted a new application (action in the 'court of quo') in the high court against LCI, GLI and Gerald Lubner.

timeously recover the shares, it did not result in an unconscionable injustice.²⁵⁷ This was a clear and obvious oversight by Nel J, with whom Van Heerden JA (who delivered the dissenting judgment in the appellate division) admittedly stated that he regretted the decision to not pierce the veil in the matter.²⁵⁸ As seen, this is yet another example of judicial oversight displayed by South African courts. It was indicative of the time, where because it was an era of transition, where courts are drifting away from the influential English approach, judges were extremely conscious, or somewhat afraid of making concrete affirmations which contradicted *Salomon*.

In contrast though, minor oversight was exhibited by the appellate division.²⁵⁹ By considering the factual findings at hand (court of quo), Smalberger JA, who delivered the majority judgment, concluded that Gerald Lubner exercised complete control over LCI.²⁶⁰ Although in certain instances, South African law has shown a willingness to pierce the veil, the law is far from settled on the issue.²⁶¹ Courts rather opt to exercise their discretion on a case by case basis.²⁶² Conversely, crucial *guiding principles* were provided. Namely, that piercing: occurs in *exceptional circumstances*; depends on the *circumstances* of each case and must be decided on its own facts which, once determined, are of decisive importance — this implies that no general formula of principles are formed (anti-categorising approach); will most likely not occur due to the principle of rather upholding the separate legal personality of a company — it is salutary principle that South African courts do not lightly disregard the a company’s separate legal personality; can occur when the company is being misused in relation to *fraud, dishonesty* or *improper use*; brings about a balancing test of whether the court should preserve or maintain a company’s separate legal personality — this occurs when fraud, dishonesty or improper conduct are present; can occur even if a company is incorporated for a legitimate purpose; does not give a court a general discretion to pierce the veil, just because

²⁵⁷ *Lubner Controlling Investments* supra note 252 at 822B. Neither GLI nor LCI could be described as Gerald Lubner’s alter ego; and JT Pretorius op cit note 215 at 30. Cape Pacific were deemed the ‘authors of their own misfortune’ because they had the opportunity of joining GLI as a party to the original action.

²⁵⁸ JT Pretorius op cit note 215 at 34.

²⁵⁹ Ibid at 30. In the appellate division, Cape Pacific alleged that Gerald Lubner, being aware of his rights in respect to the shares in F, procured the transfer of those shares from LCI to GLI, in order to defraud Cape Pacific. Cape Pacific sought for the court to pierce the corporate veil of both LCI and GLI and enforce the original (action) judgement against them, as it was the only method to institute the original judgement against LCI, which was enforceable against GLI and Gerald Lubner.

²⁶⁰ Ibid.

²⁶¹ *Cape Pacific* supra note 42 at 28.

²⁶² Ibid.

it considers it just to do so; is difficult in nature because there is no definite catalogue of cases where the veil should be pierced; and is *not a remedy of last resort*.²⁶³

Evidently, as illustrated in *Cape Pacific*, South African courts are fearful of taking a standpoint; they consistently refrain from providing a circumscribed list of instances in which the veil of a company could be pierced.²⁶⁴ In the same breadth, the guiding principles contributed much needed direction for years to come.²⁶⁵ As demonstrated in *Cape Pacific*, they are several key points that can be identified by the court; they will be discussed below.

Holistically, the guidance in *Cape Pacific*, which supports balancing the needs to uphold the corporate personality with the needs to pierce the veil, exemplifies the approach followed in *Glazer v Commission*.²⁶⁶ The balancing approach entails that conflicting principles are weighed or balanced against each other.²⁶⁷ This method to piercing the veil empowers the courts to look to the substance rather than the form of things to arrive at the facts.²⁶⁸ Amongst South African authors, there is a strong belief that in order to achieve the best results, an equitable approach to piercing the veil is essential and hence, a balancing test ensures this.²⁶⁹ Logically, there is no reason why what amounts to a piercing of the veil *pro hac* should be not be permitted — provided that it can be established, on a balance of probabilities, that the particular transaction complained of were tainted by the fruits of fraud or other improper conduct.²⁷⁰

²⁶³ *Cape Pacific* supra note 42 at 29-33 & 37-8; *Die Dros (Pty)Ltd v Telefon Beverages CC* 2003 (4 SA 207 (C)). An application of fraud, dishonesty or improper use can constitute grounds to pierce. This was demonstrated in F Cassim op cit note 77 at 72, citing *Haygro Caterig BK v Van Der Merwe* 1996 (4) SA 1063 (C). The court pierced the veil as members failed to display the name of the business on the business property. Further, they failed to comply with close corporation documentation; *Kurt Robert* supra note 167 para 15-6. Courts may pierce the veil when a company's use or establishment is 'borne out of deceit, fraud or impropriety'; and *Hülse-Reutter* supra note 194 para 20. The supreme court of appeal reiterated the principle that even when it considers just, or convenient to do so, South African courts enjoy no general discretion to pierce the veil.

²⁶⁴ *Gore* supra note 3 para 21; and Cassim & Larkin op cit note 236 at 517. Courts are 'feeling their way in the dark' when it comes to piercing the veil. Judges rely on instinct in place of principle.

²⁶⁵ Section 20(9) of the Act 71 of 2008.

²⁶⁶ *Glazer v Commission* 431 So. 2d 752 (La.1983) at 757. As seen in section 39(1)(c) of the Constitution, 'when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law'; and *Cape Pacific* supra note 42 at 31, 35, 38-9. Courts must take cognizance of policy considerations. For example, the existence of another remedy, or the failure to pursue one that is available. These may be relevant factors regarding policy considerations, but it cannot be of overriding importance.

²⁶⁷ Cassim op cit note 2 at 49.

²⁶⁸ Ibid.

²⁶⁹ See Davids op cit note 130 at 157; and Domanski op cit note 130 at 231-235 read with *Hülse-Reutter* supra note 194 para 20. Piercing the veil will occur if consideration of policy and judgement outweigh the need to maintain legal personality, like that of the United States.

²⁷⁰ *Cape Pacific* supra note 42 at 33; and *Kurt Robert* supra note 167 para 17.

Following, despite the formulation of the unconscionable injustice test set out in *Botha*, it was categorically rejected in *Cape Pacific*.²⁷¹ The appellate division rejected the test simply on the basis that it was too rigid and more flexible approaches to piercing are better suited going forward.²⁷² This would ultimately allow the facts of each case to ‘determine whether piercing of the corporate veil is called for’ or not.²⁷³ This signals a substantial shift in attitude by South African courts, where there is acknowledgement of the concerns involved in adopting a rigid approach to the matter. Thus, it evidences the judicial cognisance of adopting a wide application of piercing the veil in order to acclimatize to the wide nature of the issue.

As already noted in the appellate division’s guiding principles, it does not matter whether a company is founded on wrongful terms. In fact, it is ‘not necessary that a company should have been conceived and founded in deceit, and never been intended to function genuinely as a company, before its corporate personality can be disregarded’.²⁷⁴ Therefore, what is of paramount importance is whether “it is being used as a façade at the time of the relevant transactions,” not whether it was originally incorporated with no deceptive intention; because a company can be still be a façade despite having no unscrupulous intention at the time of incorporation.²⁷⁵ Accordingly, it was strongly affirmed that:

If a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving full effect to it in other respects.²⁷⁶

Next, the court noted that there is no ‘reason why piercing of the corporate veil should necessarily be precluded if another remedy exists’.²⁷⁷ Seemingly, this statement is in direct conflict with, and in deviation of other South African company law judgements, which concluded that piercing the veil is a remedy of last resort.²⁷⁸ Significantly too, it seems to be in conflict with the appellate division’s own judgement, which stated that piercing the

²⁷¹ *Cape Pacific* supra note 42 at 37.

²⁷² Ibid.

²⁷³ *Cape Pacific* supra note 42 at 37 read with Cassim op cit note 2 at 49.

²⁷⁴ *Cape Pacific* supra note 42 at 32-3 read with Cassim op cit note 2 at 49.

²⁷⁵ Ibid.

²⁷⁶ *Cape Pacific* supra note 42 at 33 read with Cassim op cit note 2 at 49.

²⁷⁷ *Cape Pacific* supra note 42 at 37 read with Cassim op cit note 2 at 49.

²⁷⁸ Discussed in chapter 5.

corporate veil should not lightly be disregarded.²⁷⁹ The view that piercing the veil should not lightly be disregarded is mirrored in *Hülse-Reutter*. The supreme court of appeal in that matter asserted that the ‘separate legal personality of a company is to be recognised and upheld except in the most unusual circumstances’.²⁸⁰ It was further remarked how ‘a court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so’.²⁸¹ These conflicted opinions have created debate in common law as to whether piercing the veil is a remedy of last resort, however, it seems to have been resolved in recent years; owing to statutory interpretation.²⁸²

Succeeding, piercing the veil is far from settled and the scenario when a court will disregard the ‘distinction between a corporate entity and those who control it’ is somewhat blurred.²⁸³ Essentially, the supreme court of appeal in *Hülse-Reutter* emphasised that:

Much will depend on a *close analysis of the facts of each case*, considerations of *policy* and *judicial judgment*. Nonetheless what, I think, is clear is that as a matter of principle in a case such as the present there must at least be some *misuse or abuse* of the distinction between the corporate entity and those who control it which results in an *unfair advantage* being afforded to the latter.²⁸⁴

[Emphasis added]

This reinforces the methodology that South African courts should primarily focus on the substance rather than the form of things in order to determine ‘whether or not it is legally appropriate in [the] given circumstances to disregard corporate personality’.²⁸⁵

In closing, due to *Dadoo*, South African company law adopts the central principles set out in *Salomon*; meaning it too follows the same notion regarding one-man companies.²⁸⁶ Therefore, it is asserted how the ‘the mere fact that a company has only one shareholder who is in full control of the company does, however, not constitute a basis for disregarding its separate legal personality’.²⁸⁷ This also includes circumstances where two companies have the same shareholders and the same directors.²⁸⁸ For that reason, as much as South African

²⁷⁹ Cassim op cit note 2 at 49.

²⁸⁰ *Hülse-Reutter* supra note 194 para 20.

²⁸¹ Ibid.

²⁸² Chapter 5.

²⁸³ *Hülse-Reutter* supra note 194 para 19 & 20.

²⁸⁴ Ibid para 20.

²⁸⁵ *Cape Pacific* supra note 42 at 28.

²⁸⁶ Ibid at 27, 29 & 30.

²⁸⁷ *Nel and others* supra note 89 at para 11.

²⁸⁸ Ibid.

courts are willing, in the appropriate circumstances, to pierce the veil and diverge away from *Salomon*; there is still great regard and obedience to the monumental judgment.

2. The influence of agency, alter ego and company groups

In the last decade or so, particularly in industrial and labour court matters, there has been a willingness to pierce the veil.²⁸⁹ In the circumstance where the company is the agent or alter ego of its shareholders and directors, the courts are concerned with reality of the situation and not its form.²⁹⁰ In essence, what is important is the ‘manner in which the company operated and with the individuals relationship to that operation’.²⁹¹

In *Footwear Trading CC v Mdlalose*²⁹², Nicholson JA held that when a company is the mere alter ego or business conduit of a person, the general principle is to pierce the veil; also known as the alter ego doctrine.²⁹³ In the normal relationship between a company and its shareholders, the company is the principle and the directors are agents of the company.²⁹⁴ However, in certain circumstances, this relationship is inverted. Meaning that the company is the agent, and the shareholders and directors are indeed the principles.²⁹⁵ This occurs in situations where companies (and close corporations) are juggled around like ‘puppets to do the bidding of the puppet master’.²⁹⁶ In other words, the directors or controlling shareholders ‘do not treat the company as a separate entity, but treat it as if it were merely a means of furthering their own private affairs’.²⁹⁷ The company is then regarded as the ‘agent’ or the ‘alter ego’ or ‘instrumentality’ of its directors and shareholders.²⁹⁸ In this instance, the affairs

²⁸⁹ *Zeman* supra note 42 para 56; *Goldfinch Garments* supra note 166 para 28-34. The court pierced the veil and found the first and second applicants are one and the same entity for the purposes of the execution of the writ. They were jointly and severally liable for the due performance of the obligations contained in the arbitration award and writ of execution. The creation of the second applicant, as a legal entity distinct from the first applicant, was no more than ‘a scheme designed to assist the business operated by the first and or second applicants to avoid its legal obligations towards its employees and the second respondent, *in fraudem legis*’; and *Harris v MD Solar (Pty) Ltd t/a Suntank and Others* [2016] ZALCJHB 348 para 21-26.

²⁹⁰ Cassim op cit note 2 at 52.

²⁹¹ Ibid.

²⁹² *Footwear Trading CC v Mdlalose* (2005) 26 ILJ 443 (LAC); [2005] 5 BLLR 452 (LAC).

²⁹³ *Footwear Trading* supra note 292 at 459D. It amounts to improper use. Similar to the Canadian approach, see footnote 158 & 159 of this dissertation; and in *Mobile Telephone Networks* supra note 38 para 27. The court cites an American court of appeal case which formulated the requirements for the alter ego doctrine.

²⁹⁴ F Cassim op cit note 77 at 69.

²⁹⁵ Ibid.

²⁹⁶ *Footwear Trading* supra note 292 at 459E. As seen in *Zeeman* supra note 38 at 463H. The respondent was liable for debts of the close corporation because he was a ‘puppet master...pulling the strings behind the scenes’.

²⁹⁷ F Cassim op cit note 77 at 69.

²⁹⁸ Ibid.

of the company are conducted in such a way that there is no distinguishing between the personal affairs of the directors and shareholders and the business affairs of the company.²⁹⁹ The company does not carry its own business or affairs, but acts ‘merely to further the business or affairs of its directors or controlling shareholders’.³⁰⁰ To sum up, the company’s separate legal personality is abused where the directors or shareholders ‘strive to obtain the advantages of separate legal personality of the company without treating the company as a separate legal person’.³⁰¹ This extension is in contradiction with the normality that piercing is usually used to identify shareholders, or individuals who are the true perpetrators of the company’s acts.³⁰² In *Esterhuizen*, the conduct of the third respondent was described as ‘gravely improper’.³⁰³ The court held: ‘There is no doubt in my mind that the improper purpose was to evade its legal obligations. ...policy considerations strongly suggest that the veil of corporate personality be pierced in this matter to reveal the third respondent as the true puppet master in this case. ...’³⁰⁴ The court pierced the veil and held that the second respondent had the same business operations as the first respondent; who is liable, jointly and severally to the Commission for Conciliation, Mediation and Arbitration (CCMA).³⁰⁵ It was further held that the third respondent was the real employer of the applicant, and was liable, jointly and severally with the second respondent, to pay the amount awarded to the applicant in the CCMA.³⁰⁶

Where a company is treated as the ‘agent’ of its directors and shareholders, ‘the separate legal personality of the company is still recognized’.³⁰⁷ Indeed, it is common practice that when shareholders join a company, it is not their intention for the company to become an agent, and

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² *Zeman* supra note 42 para 55.

³⁰³ *Esterhuizen* supra note 44 para 21. The third respondent was the common denominator in the applicant's dismissal, the liquidation of the first respondent and the incorporation of the second respondent that attempted avoidance of the applicants claim.

³⁰⁴ Ibid.

³⁰⁵ Ibid para 26.1.

³⁰⁶ Ibid para 26.2.

³⁰⁷ F Cassim op cit note 77 at 69; *Salomon* supra note 34 at 31, 42-3 & 53-4. As discussed, Lord Halsbury established that if a company is validly created, the company is not an agent to its members. Accordingly, mere control of a company by its members (and directors) does not constitute that a company is an agent to its members, even if a member owns all the shares (or a director has unlimited control) in a company; Mayson, French & Ryan op cit note 92 at 152 & 157. Agency exists where there is a relationship between two persons (legal or human), namely the principal and agent. Determining whether an agency relationship exists is a question of fact and not assumption, although it can be inferred based on surrounding circumstances, though it can only be established based on consent between the principal and agent. See at 157-159 for more discussion.

in turn they become principals.³⁰⁸ For that reason, in practice, it is unlikely that a company will be found to be an agent of its members; this is even more telling due to separate legal personality, as the business of the company is the company's business not its members.³⁰⁹ Although unlikely, there has been circumstances where an agency relationship is attached to a company setting; and by that virtue, the corporate veil is not pierced but liability is attributed to the directors or shareholders in 'their capacity as the principal of the company'.³¹⁰ The practical effect of piercing the corporate veil 'is achieved by establishing an agency relationship, without having to pierce the veil'.³¹¹

This is common in company groups; where the principles of agency are applied and the subsidiaries are treated as the agents of its holding company.³¹² When the term 'group of companies' is used, it involves various possibilities.³¹³ Thus, it is important to be critical of company affairs; where it is permitted (and intrinsic) in company law (whether or not it is desirable) that a group of companies can be arranged strategically (to avoid potential liabilities) in order to separate the liabilities of the various activities of the group.³¹⁴

³⁰⁸ Mayson, French & Ryan op cit note 92 at 157.

³⁰⁹ Ibid at 157-159. Determining who owns the business is important for tax purposes.

³¹⁰ F Cassim op cit note 77 at 70; Cassim op cit note 2 at 52. Many factors are considered when regarding agency and the alter ego. These factors are seen together as a whole and are not individualistic in nature, meaning, no single factor is relevant; and Mayson, French & Ryan op cit note 92 at 157-158 & 170. Separating the affairs of the company and its owners is of paramount importance when liability is attributed. A circumstance can exist where a company is found to be an agent of someone who is not a member of the company.

³¹¹ Cassim op cit note 2 at 52; and *Salomon* supra note 34 at 31,42-3. Once more, this principle is directly attributed from *Salomon* where the House of Lords rejected the deduction that the company was in reality the agent of Mr. Salomon and he, as the 'principal,' was liable for debts of the unsecured creditors.

³¹² F Cassim op cit note 77 at 69 at 70. The 'mere fact that a group of companies constitutes as a 'single economic unit dies not in itself justify the treatment of the group as a single entity,' unless the subsidiaries are a façade or sham. The approach to 'single economic unit' takes its influence from the United Kingdom, as discussed in chapter 4; Davies & Worthington op cit note 102 at 218. Each company in a group of companies is a separate legal entity with separate rights and liabilities — an unquestionable fundamental principle; JT Pretorius op cit note 215 at 428. When the term 'group of companies' is used, it involves various possibilities. The classic example is when companies are linked because of the holding-subsiary relationship. However, companies can be joined due to other factors. In legislation, it has been shown that acceptance of a 'group' concept has been more forthcoming. In South African law, a subsidiary has the meaning determined in accordance to section 3 of the Act 71 of 2008; and Mayson, French & Ryan op cit note 92 at 170-17. The concept of a 'group of companies' is a vexing question depending on the sector that one operates in.

³¹³ JT Pretorius op cit note 215 at 428-429 & 434-453. The classic example is when companies are linked because of the holding-subsiary relationship. However, companies can be joined due to other factors, including having 'the same directors or the same secretary, or are controlled by the same individual'. In essence, control is exercised when the autonomy of a company within a group is lost. The authors list which provisions in the Act 61 of 1973 regulated 'abuse of control' in a group structure. Many of which have been adopted in the Act 71 of 2008. Between pages 436 & 453, there exists substantial case law discussion on 'abuse of control'.

³¹⁴ Mayson, French & Ryan op cit note 92 at 170-17. The authors cite *Adams* supra note 5 at 544; and Davies & Worthington op cit note 102 at 220.

Accordingly, it is unlikely that a court will overrule such an arrangement, as evidenced in various common law countries.³¹⁵ Liability will be attributed to the holding company and not its subsidiary.³¹⁶ Admittedly, companies which comprise a group of companies does not equate to their separate legal personality being ignored.³¹⁷ For all intents and purposes, just because a group of companies constitutes a ‘single economic unit’ does not mean the group is to be regarded as one entity.³¹⁸ Accordingly, the actions of a holding company are not the actions of its subsidiaries, even wholly owned subsidiaries; and vice versa, the actions of the subsidiaries are not the actions of its holding company.³¹⁹ In fact, the holding-subsidiary relationship is designed to curtail and regulate the possibility of abuse of control and to also ensure proper disclosure in the group in regard to its financial position.³²⁰ Nevertheless, ‘when the corporate veil is pierced in a group of companies, the court treats the group as a single entity as opposed to a collection of different corporate entities’.³²¹

Hence, in South African law, the question of piercing the corporate veil in company groups is particularly difficult to ascertain, as courts either adopted a liberal view or a conservative view.³²² Regarding the liberal view, for many years, the South African approach to piercing the corporate veil in company groups was relaxed, as it derived its general principles from *Cape Pacific* and other liberal English cases; including the basic principles of holding and subsidiary relationships.³²³ Although this is the circumstance, and notwithstanding the relaxed approach, at common law, South African courts have primarily adopted the conservative and rigid stance of *Adams*; a central English case which determined that interpretation of particular statutory or contractual provisions is of high importance when piercing the corporate veil in company groups.³²⁴ In other words, this stricter approach ‘holds

³¹⁵ Mayson, French & Ryan op cit note 92 at 170-17. The authors cite authority from the United Kingdom, Canada and New Zealand.

³¹⁶ F Cassim op cit note 77 at 69 at 70; and N Grier op cit note 79 at 29. Where a group of companies operate in closely connected manner, to such an extent that it forms one commercial unit or economic entity, it is known as the economic entity theory. Consequently, any one member in the group of companies could be liable for the debts of any other member company in the economic entity, ‘but equally, a benefit technically due to any one member company could be treated as due to another member company’.

³¹⁷ Cassim op cit note 2 at 53.

³¹⁸ Davies & Worthington op cit note 102 at 218.

³¹⁹ *Ritz Hotel* supra note 228 at 314.

³²⁰ JT Pretorius op cit note 215 at 421.

³²¹ Cassim op cit note 2 at 54.

³²² As discussed in this chapter, in the history of South African company law, concerning piercing the veil in company groups, courts either adopted a liberal view or a conservative view.

³²³ Cassim op cit note 2 at 54; and Rehana Cassim ‘Hiding behind the veil’ (2013) *De Rebus* 32 at 36.

³²⁴ Davies & Worthington op cit note 102 at 218; and Cassim op cit note 2 at 54-5. The author discusses *Wambach* supra note 187 at 675D-E and *Macadamia* ‘Finance supra note 187.

that courts are not entitled to disregard the separate legal personality of a company in a group simply because it is just to do so'.³²⁵ This was confirmed by *Wambach* and *Macadamia Finance*, two South African cases which approved the *dictum* in *Adams*.³²⁶ They both refused to pierce the corporate veil and 'to view the companies in the group as a single economic entity'.³²⁷ Meaning, for some purposes, interpretation of a particular statute or document can justify a court to treat a company group as one unit.³²⁸ Beyond that, courts are 'unwilling to go'.³²⁹ Accordingly, in terms of common law, if the court is faced with the question of piercing the corporate veil in regard to a group of companies, it is highly likely that the court will refuse to pierce the corporate veil and chose to not view the companies in the group as forming a single economic entity.³³⁰ Unless the wording of contract, statute or other legal document does not provide otherwise, this is believed to be the better view and it maintains the principle that the mere fact that a group of companies constitutes as a single economic unit does not in itself justify the treatment of the group as a single entity.³³¹ This position may be different where the subsidiary is a facade or sham.³³² Nevertheless, despite initially adopting a liberal approach to the matter, in recent years, courts have leaned towards the conservative approach.³³³ However, the approach of the courts still remains unpredictable.³³⁴

Conversely, instead of piercing the corporate veil in relation to company groups, South African courts are more willing to treat a subsidiary company as an agent of the holding company.³³⁵

To sum up, South African courts are more accepting of adopting the principle of agency when dealing with piercing the corporate veil in company groups. In the scenario where a court must question the possibility of piercing the corporate veil in a company group, and thus treating the group as a single entity, South African courts apply a strict approach and

³²⁵ Rehana Cassim op cit 323 at 36.

³²⁶ Cassim op cit note 2 at 54-5.

³²⁷ Rehana Cassim op cit 323 at 36.

³²⁸ Davies & Worthington op cit note 102 at 218.

³²⁹ Ibid.

³³⁰ Cassim op cit note 2 at 54-5.

³³¹ Ibid.

³³² Cassim op cit note 2 at 55; and Davies & Worthington op cit note 102 at 219-220.

³³³ Rehana Cassim op cit 323 at 36.

³³⁴ Rehana Cassim op cit 323 at 36; and JT Pretorius op cit note 215 at 429 & 430. Read for an in depth analysis of the tests that South African law adopts, as well as how it incorporates general legal principles. Also read Mayson, French & Ryan op cit note 92 at 166-168.

³³⁵ Cassim op cit note 2 at 55.

agree that they are not entitled to disregard the separate legal personality of a company simply because it is just to do so, thus still adopting a conservative view on the matter.³³⁶

3. *Cape Pacific*: influential in South Africa's constitutional framework

Since marking the end of the apartheid regime and transitioning into a Constitutional democracy, when dealing with a matter involving piercing of the corporate veil, it has become somewhat compulsory for judges to acknowledge and consider the approach adopted by *Cape Pacific*, regardless of whether they actually consider piercing or not. Therefore, at a fundamental level, courts have more impetus and powers to pierce the corporate veil. In recent years, the sentiments of *Cape Pacific* have been reflected by countless courts. In *ADT Security (Pty) Ltd v Botha and Others*³³⁷, it was eloquently held that:

It is well established that the courts will not countenance the abuse of corporate personality to enable individuals to unconscionably avoid contractual obligations and will therefore in *appropriate circumstances*, on a *fact sensitive basis*, disregard the distinctness of a corporation's personality from those of its members and, for the purpose of deciding a matter, *look at the substance rather than the form of things*.³³⁸ [Emphasis added]

Besides, the supreme court of appeal, in trying to clarify the instances in which constitutes grounds to pierce the veil, emphasised that:

Much will depend on a *close analysis of the facts of each case*, considerations of *policy* and *judicial judgment*. Nonetheless what, I think, is clear is that as a matter of principle in a case such as the present there must at least be some *misuse or abuse* of the distinction between the corporate entity and those who control...³³⁹

This again reinforces the methodology that South African courts should primarily focus on the substance rather than the form of things.³⁴⁰

³³⁶ Ibid at 54-5.

³³⁷ *ADT Security (Pty) Ltd v Botha and Others* [2010] ZAWCHC 563; and *Airlink Pilots Association SA v SA Airlines (Pty) Ltd* [2001] 6 BLLR 587 (LC). The case adopted the *Cape Pacific* approach, taking into consideration a holding-subsidiary relationship.

³³⁸ *ADT Security* supra note 337 para 17 read with *Baloyi* supra note 196 para 16. At times, by focusing on the substance and facts of each case, it can be seen that piercing the veil is undesirable. For example, if piercing does not reflect the economic reality at hand, it can lead to confusion. See *Wambach* supra note 187; and See *Hülse-Reutter* supra note 194 para 20. Reflecting the sentiments of *Cape Pacific*, the supreme court of appeal reiterated that much depends on the facts of each case. See footnote 236 of this dissertation for criticism of *Hülse-Reutter*.

³³⁹ *Hülse-Reutter* supra note 194 para 20.

³⁴⁰ *Cape Pacific* supra note 42 at 27-30.

In the South African space, the influence of *Cape Pacific* is fairly obvious. However, the guidelines provided in *Cape Pacific* are not exclusive to South Africa alone. In *Competition Commission v Delatoy Investments (Pty) Ltd and Others*³⁴¹, it is recognised that the European Union holds a similar stance; that fraud, dishonesty or improper conduct can constitute grounds to pierce.³⁴² The court summarized that in South African law, piercing the veil normally comes into effect when there is suspicion of shams, schemes, stratagems, and abusive conduct.³⁴³

As seen from above, *Cape Pacific* is one of the most influential and pivotal judgements of post-apartheid South Africa. It advocated revision on the lack of thorough analysis of the purpose, and basis for piercing the veil in South African company law.³⁴⁴ It is central to South Africa's company law reform, as evident with the operation of section 20(9) of the Act 71 of 2008 and section 20(9).³⁴⁵ In addition, the judgement coincided with the implementation of South Africa's Constitution and the King Report on Corporate Governance, which sets out pioneering guidelines for the governance of organizations in South Africa.³⁴⁶ This period of business evolution, which is driven by advancements in technology, has been marred by an all too frequent phenomenon of fraud, corruption and other economic crimes being perpetrated in the name of the company.³⁴⁷ So far, four King reports have been issued, with the latest revision (King IV Report) being released in 2016.³⁴⁸ Such regulatory changes reflect how the twenty-first century has been characterised by fundamental changes in business and society.³⁴⁹ Owing to such vulnerability, it spells more of a reason to establish methods which protect the separate legal personality of companies. Henceforth, in regard to piercing the corporate veil at common law, South Africa's equitable approach is well suited to dealing with abuses to the separate legal personality of companies, particularly in light of an ever-changing business world.

³⁴¹ *Competition Commission v Delatoy Investments (Pty) Ltd and Others* [2016] ZACT 37.

³⁴² *Ibid* para 61.

³⁴³ *Ibid* para 60.

³⁴⁴ Davids op cit note 130 at 160.

³⁴⁵ See footnote 2 of this dissertation.

³⁴⁶ The King IV Report on Corporate Governance for South Africa, 2016.

³⁴⁷ Examples include: the tenure of former president of the South Africa, Jacob Zuma; state capture by the Gupta family; Tom Moyane's tenure as the Commissioner of the South African Revenue Service; the looting of VBS Bank; Corruption and irregular expenditure in Eskom and South African Airways; and gross fraud and financial manipulation by Steinhoff, the banking industry and KPMG.

³⁴⁸ The King III Report for Corporate Governance became effective in 2010 and effectively replaced the King II report. King III was regarded as being unique internationally as it contained a chapter dedicated to the governance of Information Technology.

³⁴⁹ King IV Report op cit note 346 at 3-6.

v) Conclusion: Piercing the corporate veil in South African courts

The issue of piercing the corporate veil is far from settled, and each case is decided on analysis of the facts at hand.³⁵⁰ Courts will not easily or readily pierce the veil and will generally require that if a company is misused to perpetuate fraud, dishonesty or any other improper conduct (or purpose), they will generally see no reason in principle, or logic, as to why they cannot pierce.³⁵¹ In these circumstances, courts are entitled to observe the substance rather than the form of things in order to ascertain the true facts.³⁵² In terms of company groups, the application of agency is preferred over piercing the veil, unless it is proven that a subsidiary formed part of a façade or sham.³⁵³ Indeed, the approach to company groups is haphazard but there is a tendency to adopt a conservative view on the matter.³⁵⁴

The ‘unconscionable injustice’ test formulated in *Botha* is not required; it is too rigid in nature.³⁵⁵ Nevertheless, the test in *Botha* determined that piercing should be decided on allowing the facts of each case to have the dominant purpose.³⁵⁶

If another remedy exists, it should not necessarily preclude anyone from piercing the veil.³⁵⁷ As a general rule, if a person has more than one legal remedy at their disposal, they can select any one of them, and they are not obliged to pursue the one rather than the other.³⁵⁸ Nonetheless, since separate legal personality is at the ‘very core of a company’s reason for existence,’ piercing occurs in exceptional circumstances and much weight is put on consideration of policy and judicial judgement.³⁵⁹ For that reason, in light of finding an equilibrium between the policies in favor of separate legal personality, and the policies justifying piercing the veil; piercing will be achieved constructively.³⁶⁰

³⁵⁰ *Zeman* supra note 42 para 42; and *Hülse-Reutter* supra note 194 para 20.

³⁵¹ *Zeman* supra note 42 para 48; and Cassim op cit note 2 at 50.

³⁵² *Cape Pacific* supra note 42 at 33.

³⁵³ Cassim op cit note 2 at 54-5.

³⁵⁴ Rehana Cassim op cit 323 at 36.

³⁵⁵ *Cape Pacific* supra note 42 at 37. Despite being more flexible in its approach than *Lategan*. Also see *Botha* supra note 219 at 519C-E.

³⁵⁶ *Zeman* supra note 42 para 43 read with *Cape Pacific* supra note 42 at 37.

³⁵⁷ Ibid.

³⁵⁸ Ibid. Citing *Cape Pacific*, Steenkamp J provided :

If the facts of a particular case otherwise justify the piercing of the corporate veil, the existence of another remedy, or the failure to pursue what would have been an available remedy, should not in principle serve as an absolute bar to a court granting consequential relief.

³⁵⁹ *ADT Security* supra note 337 para 17. As stated in footnote 266 & 269 of this dissertation; and *Zeman* supra note 42 para 45.

³⁶⁰ *Glazer* supra note 266; and *Kurt Robert* supra note 167 para 14.

Although South African courts have not formulated a consistent principle, they have certainly indicated a tendency.³⁶¹ In fact, courts have shown appreciation that a company's separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted.³⁶²

c) Statutory law

i) Supplementing the common law: Unconscionable abuse

For the first time in South African company law, on the 1 May 2011, a statutory equivalent of piercing the veil became effective.³⁶³ The Companies Amendment Act 3 of 2011 introduced such change.³⁶⁴ In section 20(9) of the Act 71 of 2008, it explicitly empowers the courts to pierce the veil; in instances where if, on application by an interested person or in any proceedings in which a company is involved, a court finds the incorporation, use, or any act by or on behalf of the company, constituted an *unconscionable abuse* of the juristic personality of the company as a separate entity.³⁶⁵ The consequence of the provision is that a company may be deemed not to be a juristic person in respect of any rights, obligations or liabilities of the company, or of a shareholder of the company, or in the case of a non-profit company, a member of the company, or of another person specified in the declaration.³⁶⁶ The courts specify these consequences by declaration.³⁶⁷ In addition, the court can make any further order it considers appropriate to give effect to the declaration contemplated in section 20(9)(a).³⁶⁸

When section 20(9) became operative, the scope of the provision resulted in considerable misunderstanding, and consequently, appropriate interpretation was required.³⁶⁹ The questions to be answered were mainly: the meaning of 'unconscionable abuse'; whether section 20(9) overrides the common law instances of piercing the corporate veil; whether piercing the veil is still to be regarded as an extraordinary remedy that may be used only as a

³⁶¹ *ADT Security* supra note 337 para 17. For example, when assets are transferred from one entity to another with the intention of evading legal obligation(s), it constitutes an improper purpose.

³⁶² *ADT Security* supra note 337 para 16-18. The court cite *Ebrahim* supra note 18 para 15; and Davids op cit note 130 at 161. If the strict application of separate legal personality equates to unfair results, courts are entitled to pierce, taking into consideration a variety of factors.

³⁶³ Section 20(9) of the Act 71 of 2008.

³⁶⁴ Section 13(d) of the Act 3 of 2011.

³⁶⁵ Section 20(9) of the Act 71 of 2008.

³⁶⁶ Ibid section 20(9)(a).

³⁶⁷ Ibid section 20(9).

³⁶⁸ Ibid section 20(9)(b).

³⁶⁹ Rehana Cassim op cit note 323 at 35; and *City Capital* supra note 69 para 26.

last resort; and who is an ‘interested person’ in terms of section 20(9).³⁷⁰ Therefore, notwithstanding such progression, there existed much confusion. However, in *Gore*, the western cape high court provided ‘valuable insight into the questions raised above’.³⁷¹

ii) *Gore*: Valuable insight concerning the interpretation of section 20(9)

The leading case regarding the interpretation of section 20(9) is established in *Gore*.³⁷² The case signified the first time in which a judgement on section 20(9) was handed down, and as such, was much anticipated by the legal and business community.³⁷³

Gore dealt with piercing of the corporate veil in terms of company groups, consisting of one holding company and its various subsidiaries (forty one companies in total).³⁷⁴ The issue was whether the court should pierce the corporate veil, in a group of companies, which were conducted in a manner that maintained no distinguishable corporate identity between the various constituent companies in the group.³⁷⁵ The ‘King Group’ encompassed all forty one companies and was controlled by the holding company, King Financial Holdings Limited (KFH).³⁷⁶ The King Brothers were directors of KFH, and the applicants were the liquidators of the King Group.³⁷⁷ Since the King Brothers were directors of KFH, and majority shareholders of the King Group, it enabled them to exercise complete control.³⁷⁸ As a business, the King Group provided financial assistance in the form of marketing investments for immovable and residential commercial property.³⁷⁹ However, the affairs of the King Group were conducted in such a way that there was no distinguishing between the companies, thus negating their corporate personality.³⁸⁰ The findings of the court were that the entire group operated as one entity and the King Brothers had treated all their companies as one.³⁸¹ In other words: ‘The disregard by the King Brothers of the separate legal personalities of the companies in the King Group was so extensive as to impel the conclusion

³⁷⁰ Rehana Cassim op cit note 323 at 35.

³⁷¹ Ibid.

³⁷² R Cassim op cit note 21 at 307.

³⁷³ *Gore* supra note 3 para 37.

³⁷⁴ Ibid para 2.

³⁷⁵ *Gore* supra note 3 para 8. Piercing the veil also applies in circumstances where the court treats a group (or applicants) of companies as a single entity. In these instances, the court ignores the separate existence of all the companies within the group; and *Goldfinch Garments* supra note 166 para 28.

³⁷⁶ *Gore* supra note 3 para 5.

³⁷⁷ Ibid para 6.

³⁷⁸ Ibid.

³⁷⁹ Ibid para 7. The activities of the King Group caught the attention of the Financial Services Board (FSB) and prompted an investigation (on behalf of the liquidators) from PriceWaterhouseCoopers (PWC).

³⁸⁰ Ibid para 8.

³⁸¹ Ibid para 8-15.

that the [King] Group was in fact a sham.³⁸² Under the provisions of section 20(9)(b) of the Act 71 of 2008, a court may declare that a company is deemed not to be a juristic person in respect of any right, obligation or liability of the company; a subsection which affords the widest powers of consequential relief.³⁸³ The court in *Gore* stated that an order made in terms of section 20(9)(b) will always have the effect of fixing the right, obligation or liability in issue of the company somewhere else.³⁸⁴ The court found that the ‘right’ involved in this matter was the property held by the subsidiary companies in the King Group and the obligation or liability was that which any of them might actually have to account to and make payment to the investors.³⁸⁵

Consequently, the court ordered that the subsidiary companies, also known as the King Companies (consisting of 40 in total), with the exception of KFH, were deemed not to be juristic persons in respect of any obligation by such companies to the ‘investors’.³⁸⁶ The court held further that the King companies were to be regarded as a single entity.³⁸⁷ Their separate legal existence was ignored and the holding company, KFH, was treated as if it were the only company that existed.³⁸⁸ In addition, the court made a further order that the applicants (other than the liquidators of KFH) were directed to transfer all monies that might remain in each of the King companies after payment of all liquidation costs, bondholders’ claims and claims other than claims by investors to the liquidators of KFH to be administered as a single pool of assets available for distribution to the investors.³⁸⁹

Regarding the interpretation of section 20(9), the *dicta* of the court answered the questions raised above.³⁹⁰ First, an important question arose, does section 20(9) override the common law position on piercing the veil?³⁹¹ It was contended that section 20(9) does not override the

382 Ibid para 15.

383 Ibid para 34.

384 Ibid.

385 Ibid.

386 Ibid para 37.1.1 & 37.1.3. In this context, ‘investors’ is defined as:

Individuals or entities that had invested in the King companies by purchasing shareholding in and loan accounts against one or more of the King companies, and includes those individuals and entities who purported either to convert investments in King companies other than King Financial Holdings to shares in King Financial Holdings as well as those who purported to purchase shares in King Financial Holdings from 2008; and ‘investors’ does not include creditors who loaned funds to King companies and secured such loans by means of mortgage bonds, nor does ‘investors’ include trade creditors of the King companies... .

387 Ibid para 37.1.2.

388 Ibid.

389 Ibid para 37.1.4.

390 Rehana Cassim op cit note 323 at 37.

391 *Gore* supra note 3 para 31.

common law instances of piercing the corporate veil.³⁹² As well, that common law principles can serve as useful guidelines in interpreting section 20(9).³⁹³ It was subsequently affirmed that in terms of Act 71 of 2008, the provisions (as a whole) suggest that when the requirements of section 20(9) are not relied upon, the common law remedy would most likely apply, and therefore, there is no express indication that the intention of the legislature is to displace the common law.³⁹⁴ Such sentiments have now been confirmed true.³⁹⁵ As seen already in this chapter, the common law does not provide for a closed list of circumstances in which a court can pierce the veil.³⁹⁶ Indeed, regarding interpretation of section 20(9), the court was ‘unable to identify any discord between it and the approach to piercing the corporate veil evinced in cases decided before it came into operation’.³⁹⁷ Therefore, section 20(9) will not override, but rather supplement the common law.³⁹⁸ Hence, the principles developed at common law will serve as useful guidelines, not only in interpreting section 20(9), but to determine what circumstances constitute an unconscionable abuse.³⁹⁹ Accordingly, the language of section 20(9) is set in very wide terms to include various circumstances, bases and to promote the purpose of the Act 71 of 2008.⁴⁰⁰ As a result, courts now have a general discretion to pierce the corporate veil through a statutory remedy.⁴⁰¹

Next, what is ‘unconscionable abuse’? In order to provide context, in South African law, piercing the veil by means of statute is not new. In the Act 69 of 1984, it provides that piercing the veil, of a *close corporation*, will occur when there is *gross abuse* of the legal personality of the close corporation as a separate entity.⁴⁰² Although worded similarly to section 20(9), gross abuse will occur in rare circumstances; whereas unconscionable abuse is intended (by the legislator) on creating a more inclusive ground.⁴⁰³ For that reason,

³⁹² Rehana Cassim op cit note 323 at 37.

³⁹³ Ibid.

³⁹⁴ *Gore* supra note 3 para 31.

³⁹⁵ Ibid para 34.

³⁹⁶ *Cape Pacific* supra note 42.

³⁹⁷ Rehana Cassim op cit note 323 at 37.

³⁹⁸ *Gore* supra note 3 para 34.

³⁹⁹ F Cassim op cit note 77 at 71.

⁴⁰⁰ *Gore* supra note 3 para 32 & 33.

⁴⁰¹ F Cassim op cit note 77 at 71. This has contributed to corporate integrity. For other legislative examples prior to the Act 71 of 2008, see Cilliers op cit note 75 at 11-2.

⁴⁰² *Gore* supra note 3 para 27 & 30. Section 65 of the Act 69 of 1984 closely resembles, but is not exactly the same as, that in section 20(9) of the Act 71 of 2008. It is only distinguishable by their scopes of abuse. Although close corporations are very similar to companies, they are essentially different and are treated as separate business structures; and *Haygro Caterig* supra note 263. The court held that the conduct in question amounted to a gross abuse of the close corporation. The members were jointly and severally liable for its debts.

⁴⁰³ *Gore* supra note 3 para 34.

‘unconscionable abuse’ is a lesser form of abuse than ‘gross abuse’.⁴⁰⁴ Keeping that in mind, legislatively, the concept of unconscionability was introduced into South African law when ‘unconscionable’, and ‘unconscionable conduct’ was defined in the Consumer Protection Act.⁴⁰⁵ Subsequently, since the implementation of section 20(9), it has been difficult to clarify the meaning of ‘unconscionable abuse’.⁴⁰⁶ Since unconscionable abuse is not defined in the Act 71 of 2008, it has further contributed to the vagueness.⁴⁰⁷ This is because no guidance was provided as to what constitutes an ‘unconscionable abuse’ in terms of section 20(9).⁴⁰⁸ However, due to judicial interpretation, it can be said that unconscionable abuse constitutes the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose, or where the company is used as a device or façade to conceal the true facts.⁴⁰⁹ This was proven in *City Capital*, where the facts at hand permitted the supreme court of appeal to pierce readily.⁴¹⁰ The court echoed their stance on piercing the veil as five companies in liquidation were declared a single entity (the Dividend Investment Scheme).⁴¹¹ The Dividend Invest Scheme, which was part of an unsustainable syndication scheme, engaged in reckless trading and defrauded members of the public who made large investments (far more than the value of property) in relation to a shopping centre in Pretoria, South Africa.⁴¹² The court had no qualms in justifying piercing the veil.⁴¹³

Following, is section 20(9) a remedy of last resort? Considering the haphazard approach in common law, where there exist conflicting judgments on the matter, the court in *Gore* emphatically confirmed that piercing the veil is not a remedy of last resort because the

⁴⁰⁴ Ibid.

⁴⁰⁵ Consumer Protection Act 68 of 2008. The Act 68 of 2008 defines unconscionable as ‘unethical or improper to a degree that would shock the conscience of a reasonable person’. In addition, what constitutes as ‘unconscionable conduct’ is provided in section 40.

⁴⁰⁶ *City Capital* supra note 69 para 26. It is settled that words in a statute must be given their ordinary meaning, unless it results in absurdity. In light of the Constitution, such statutory provisions must be interpreted purposively. What is important is the following: language used; context of provision; purpose and material known to those responsible for its production; Rehana Cassim op cit note 323 at 34; and courts have considered judgments handed down in terms of section 65 of the Act 69 of 1984. See *Haygro Caterig* supra note 263, *TJ Jonck BK h/a Bothaville Vleismark v Du Plessis* 1998 (1) SA 971 (O) and *Airport Cold Storage* supra note 41.

⁴⁰⁷ *City Capital* supra note 69 para 29. ‘Unconscionable’ according to the Oxford English Dictionary means ‘showing no regard of conscience...unreasonable excessive...egregious blatant...unscrupulous’; and Nel op cit note 119 at 577-579. Read for a detailed analysis of unconscionability in law.

⁴⁰⁸ Rehana Cassim op cit note 323 at 37.

⁴⁰⁹ *City Capital* supra note 69 para 29.

⁴¹⁰ Ibid.

⁴¹¹ Ibid para 1.

⁴¹² Ibid para 12.

⁴¹³ Ibid. In this matter regarding liquidation proceedings, the best method to recover investment losses was if the promoter and other companies, in the scheme, were held liable by holding the persons behind the promoter personally responsible for the losses incurred.

context of section 20(9) ‘mitigates against an approach that it should be granted only in the absence of any alternative remedy’.⁴¹⁴

Lastly, in terms of section 20(9), who is an ‘interested person’?⁴¹⁵ An ‘interested person’ is permitted to bring an application to court, requesting the court to deem a company not to be a juristic person; but no definition is provided in the Act 71 of 2008, and therefore, it was unclear what the scope and extent of whom that person is.⁴¹⁶ Nevertheless, the court in *Gore* had no mystique attached to the term ‘interested person’ and relied on the meaning given in the well-established case of *Jacobs en ‘n Ander v Waks en Andere*.⁴¹⁷ Too, the rights provided in the Bill of Rights, especially section 38, will apply if the facts happen to implicate that right.⁴¹⁸

As evident, the case dealt with piercing of the corporate veil in company groups, however, with additional legislative interpretation to consider. Section 1 of the Act 71 of 2008 defines a ‘group of companies’ as ‘holding company and all its subsidiaries’; with each company in the group obtaining its own separate legal personality upon creation, either as a holding company or subsidiary.⁴¹⁹ This entails that the liability for the actions of each company within the group is solely the actions of each individual company and it does not necessarily mean that one must treat the group as a single economic unit.⁴²⁰ The court acknowledged the difficulty involved when courts are faced with piercing the corporate veil; especially in the context of company groups where ‘the courts have been divided in their approach [of] whether, and in what circumstances, the corporate veil may be pierced so that the group is in fact treated as a single entity as opposed to a collection of different corporate entities’.⁴²¹ Since South African courts adopted either a liberal approach or a conservative approach at common law, the dictum set out in *Adams* set a strong precedent whereby South African courts accepted a conservative approach to piercing of the corporate veil in company groups.⁴²²

Suggested by a renowned South African author, it is contended that the court in *Gore* adopted a conservative approach to piercing the veil for the reason that the King Group was a sham, and due to that deceitful arrangement, brought the affairs of the King Group within the ambit

⁴¹⁴ *Gore* supra note 3 para 34.

⁴¹⁵ Rehana Cassim op cit note 323 at 37.

⁴¹⁶ *Gore* supra note 3 para 35.

⁴¹⁷ Ibid para 35.

⁴¹⁸ Ibid.

⁴¹⁹ Rehana Cassim op cit note 323 at 36, read with section 1 of the Act 71 of 2008.

⁴²⁰ Ibid.

⁴²¹ *Gore* supra note 3 para 21; and Rehana Cassim op cit note 323 at 36.

⁴²² Caasim op cit 54-5; and Rehana Cassim op cit note 323 at 37.

of ‘unconscionable abuse’ under section 20(9) of the Act 71 of 2008.⁴²³ However, I humbly disagree with that position. The author subsequently contradicted her argument by citing the English case of *VTB*, which is analysed by Binns-Ward J in *Gore*.⁴²⁴ In *Gore*, the court commented that in *VTB*, a recent United Kingdom Supreme Court case which refused to pierce (and extend) the veil, could have been concluded differently if there existed a statutory position on piercing the corporate veil; even suggesting that *VTB* ‘may not have refrained from piercing the corporate veil if a statutory provision such as s 20(9) of the Act had been applicable’.⁴²⁵ Hence the contradiction; if *Gore* truly adopted a conservative approach to piercing the veil, there would be undesirability and no piercing whatsoever. There existed no ‘judicial hesitancy’ because the court embraced South Africa’s encompassing statutory position and accordingly pierced the corporate veil because it is empowered to do so.⁴²⁶ Further, Binns-Ward J exhibited wide judicial interpretation on section 20(9) of the Act 71 of 2008.⁴²⁷ Therefore, regardless of enjoying judicial tools to pierce the veil, the attitude of courts can particularly determine whether piercing is restrictive or wide in nature. By denoting the impact that statute has, the sheer importance and magnitude of a statutory provision to piercing the corporate veil is clear to see.⁴²⁸ Meaning, although *Gore* applied traditional and conservative English common law concepts, it ultimately (and as a basis) still adopted a wide approach to piercing the veil by willingly applying the wide powers conferred by section 20(9).⁴²⁹ Due to its fundamental guidance, South African courts will somewhat rely on English law developments on piercing, however, it must be logical and based on the overarching framework of section 20(9).

Gore did not only mark the first instance where the statutory remedy of section 20(9) was interpreted, but it sent a clear warning to directors, shareholders and other controllers that the veil will be pierced when unconscionable abuse of separate legal personality occurs.⁴³⁰ Indeed and conclusively, the statutory remedy would be applied by the courts with less reticence than the common law remedy.⁴³¹

⁴²³ Rehana Cassim op cit note 323 at 37.

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ *Gore* supra note 3 para 34-37; and Rehana Cassim op cit note 323 at 37.

⁴²⁷ *Gore* supra note 3 para 34.

⁴²⁸ Ibid para 24.

⁴²⁹ Ibid.

⁴³⁰ Rehana Cassim op cit note 323 at 37.

⁴³¹ Ibid.

Prior to *Gore*, there was mounting uncertainty and confusion regarding section 20(9) of the Act 71 of 2008. To recap, they were namely: the meaning of *unconscionable abuse*; does common law piercing override statutory piercing; who is an ‘interested person’ and is piercing the veil still an exceptional remedy which is used as a last resort?⁴³² However, *Gore* provided valuable and extensive insight into the issues that South African courts face.⁴³³ When courts rely on section 20(9), taking into context the sphere of unconscionability, it requires both a procedural and substantive element.⁴³⁴ This clearly shows how South African courts, when given the circumstance, are willing and able to pierce the veil.

iii) Alternatives remedies in South African statute

Further exploring the Act 71 of 2008, they are alternative remedies that impose liability on directors and prescribed officers. In these particular instances, the separate legal personality is still intact.⁴³⁷ So, courts are not faced with the vexing question of whether the corporate veil ought to be pierced, and do not have a discretion to determine if the veil should be pierced or not, as in the case of common law.⁴³⁸ These alternative remedies are found in sections: 20(6), 22(1), 77, 88(1), 162, 214 and 218(2).⁴³⁹

In terms of section 20(6) of the Act 71 of 2008, a shareholder can institute a claim against any person who intentionally, fraudulently or through gross negligence, disregarded the provisions of the Act or memorandum of incorporation of the company.⁴⁴⁰ Any act in contravention of the Act 71 of 2008 cannot be ratified by special resolution.⁴⁴¹

In order to restrict the scope of when to pierce the veil, section 77 sets out certain instances where a director is personally liable for the loss, damages or costs incurred by the company.⁴⁴² In terms of section 77(3)(a), a director is liable when they act without authority.⁴⁴³ Liability occurs where a director acted in the name of the company, signed

⁴³² *Gore* supra note 3 para 33-35; and Rehana Cassim op cit note 323 at 32.

⁴³³ *Gore* supra note 3 para 30-37.

⁴³⁴ Nel op cit note 119 at 575.

⁴³⁷ Cassim op cit note 2 at 63.

⁴³⁸ Ibid. In statute, policy considerations can determine why the legislature is free to decide that policy requires the veil to be pierced or not.

⁴³⁹ Sections 216-18 of the Act 71 of 2008. Acts which warrant criminal liability include inter alia: breach of confidence; false statements; reckless conduct; and non-compliance. Acts which warrant civil liability include inter alia, fraudulent or gross negligent acts inconsistent with a restriction in the Act 71 of 2008, or the company’s memorandum of incorporation; and Nel op cit note 119 at 574. Instances of when separate legal personality *may* be ignored is located in sections 165(1), 161(1)(b) and 218(2).

⁴⁴⁰ Section 20(6) of the Act 71 of 2008.

⁴⁴¹ Ibid section 20(3).

⁴⁴² Ibid section 77(3)(a)-(e).

⁴⁴³ Ibid section 77(3)(a).

anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so.⁴⁴⁴ In conjunction with section 22(1), section 77(3)(b) states that a director is liable for reckless trading.⁴⁴⁵ Section 77(3)(b) provides that liability occurs when a director has acquiesced in the carrying on of the company's business, despite knowing that it was being conducted in a manner prohibited by section 22(1).⁴⁴⁶ Section 77(3)(c) states that directors will be liable when committing fraud.⁴⁴⁷ Section 77(3)(c) provides that a director is liable when the director has been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose.⁴⁴⁸ Further, a director is liable for making false or misleading statements and unlawful distributions.⁴⁴⁹

In terms of section 88(1), where it is just and equitable to do so, the court has the discretion to liquidate a company, implying the court can go behind the veil and determine the grounds for liquidation.⁴⁵⁰

Section 162 relates to the application to declare the director delinquent or under probation.⁴⁵¹ A court must make an order declaring a person to be a delinquent director under certain instances, including acting in manner which grossly abused and violated the position of director in sections 76 and 77.⁴⁵²

Section 214 provides the scenarios when a director can be found guilty of an offence for false statements, reckless conduct and non-compliance.⁴⁵³

Lastly, section 218(2) states that any person who contravenes any provision of the Act 71 of 2008 is liable to any other person for any loss or damage suffered by that person because of that contravention.⁴⁵⁴

iv) Conclusion: Piercing the corporate veil in South African statute

⁴⁴⁴ Ibid.
⁴⁴⁵ Ibid section 77(3)(b) read with section 22(1).
⁴⁴⁶ Ibid.
⁴⁴⁷ Ibid section 77(3)(c).
⁴⁴⁸ Ibid.
⁴⁴⁹ Ibid section 77(3)(d) and section 77(3)(e).
⁴⁵⁰ Ibid section 88(1).
⁴⁵¹ Ibid section 162.
⁴⁵² Ibid section 77(5).
⁴⁵³ Ibid section 214.
⁴⁵⁴ Ibid section 218(2).

Aligning with the common law position, section 20(9) aims to codify the common law while simultaneously providing an extension from fraud, dishonesty and improper conduct.⁴⁵⁵ I applaud the emergence of the Act 71 of 2008 and the judgment in *Gore* for its statutory application and interpretation of piercing the veil.⁴⁵⁶ *Gore* in particular liberated the approach of section 20(9) and gave it more standing, liberalism and meaning in the face of the law.⁴⁵⁷ This is evidenced by the language used in section 20(9), it is portrayed in very extensive terms, which is indicative of appreciation of widely factual circumstances.⁴⁵⁸ The noticeable advantage of possessing a statutory provision is it provides more certainty and visibility.⁴⁵⁹ In light of section 20(9), it is clear the legislator took steps to observe the policy considerations in favour of piercing. However, it is a shame that since *Gore*, there have not been many judgments on the interpretation of section 20(9).

It is evident that in South Africa, the approach to piercing the veil is more liberal than most jurisdictions.⁴⁶⁰ In providing an element of simplicity, South Africa *officially* recognises piercing the veil as a *doctrine* and not an expression of other general principles.⁴⁶¹ Supplementary, it provides guidelines which are in contemplation with South Africa's open and constitutional society, which is bringing light to vast array of corporate governance issues.⁴⁶²

⁴⁵⁵ *Gore* supra note 3 para 34.

⁴⁵⁶ *Ibid* para 34.

⁴⁵⁷ *Ibid*.

⁴⁵⁸ *Ibid* para 32.

⁴⁵⁹ F Cassim op cit note 77 at 69.

⁴⁶⁰ *Ebrahim* supra note 18 para 22. As seen in chapter 5.

⁴⁶¹ *Gore* supra note 3 para 34. The wording of section 20(9) encompasses all descriptive terms. See chapter 5.

⁴⁶² Section 7 of the Act 71 of 2008, especially section 7(j).

IV ENGLISH APPROACH TO PIERCING THE CORPORATE VEIL

a) Introduction

Given its revered status, there is no doubt that *Salomon* is the ground upon which English company law stands.⁴⁶³ English courts are mindful of the impact that piercing the veil has on the “sacred canon of limited liability, and thus readily accept the general rule of not seeking redress behind the legal personality of a company.⁴⁶⁴ Consequently, the culture of English courts is to approach piercing cautiously and have sought to limit its use — they often express their reluctance to do so and for that reason, piercing occurs rarely.⁴⁶⁵

i) General approach adopted by English Courts

In contrast with other legal systems, English law has no general principle permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations.⁴⁶⁶ By reason of not developing a systematic approach to cases, English courts, in pursuance of justice (and deterrence of unjust results); adopt and confine in a variety of specific principles (known as traditional common law concepts or grounds) which achieve the same results in some cases.⁴⁶⁷ These principles are broad and are rather puzzling at times, however, they are deemed more dependable and are namely: *sham or façade* (fraud), *agency*, *single economic unit* (company groups), *trusts*, *enemy*, *tort* and *interests of justice*.⁴⁶⁸ In special circumstances, cases involving the ‘alter ego’ and tort are included in the criteria.⁴⁶⁹ Agency and trusts are “categories premised on the legal concepts applied”.⁴⁷⁰ Single economic unit consists of cases which share a common factual circumstance.⁴⁷¹ The enemy ground has been used only once in the history of English corporate veil piecing and is

⁴⁶³ Nyombi op cit note 35 at 67.

⁴⁶⁴ Girvin, Frisby & Hudson op cit note 95 at 32-3. In short, English courts aim to protect the principle of limited liability always; Nyombi op cit note 35 at 66-7; and Biswas op cit note 57 at 5-6. English courts are ‘always ready to protect the limited liability principle,’ even when the application for piercing may seem strong.

⁴⁶⁵ *Salomon* supra note 34 at 27.

⁴⁶⁶ *Prest* supra note 7 para 17-8.

⁴⁶⁷ Chapter 5; and Cheng op cit note 98 at 332.

⁴⁶⁸ *Adams* supra note 5. The case represents the first systematic analysis of the legal principles associated with corporate personality and piercing the veil; and Nyombi op cit note 35 at 71, 76-7. This list of principles is not exhaustive, because of the intricacies and variations of how a corporate veil can be misused or abused. As seen in *Daimler* supra note 16 at 345, with an *enemy character*. Read JH Farrar, NE Furey & BM Hannigan *Farrar’s Company Law* 3 ed (1991) at 74 for a comprehensive discussion.

⁴⁶⁹ Biswas op cit note 57 at 7.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.* Namely, ‘that the shareholder at issue is a corporation and the plaintiff is attempting to impose enterprise liability on a corporate group’.

specific to times of war.⁴⁷² Despite its limited use, the principle is still in force today.⁴⁷³ Fraud is one ground in which courts are very eager to pierce the veil and is fairly predictive.⁴⁷⁴

The English position on piercing the veil is *robust* in nature and this has been exemplified in case law — academic analysis ‘has not proceeded much beyond categorization of cases based on a hodgepodge of criteria’.⁴⁷⁵ Due to the ‘lack of an overarching analytical framework’, the legal system has been plagued and the attitude of the English courts has ‘oscillated from enthusiasm to outright hostility’.⁴⁷⁶

Nevertheless, throughout its existence, there have been instances when courts permit the corporate veil to be pierced.⁴⁷⁷ Essentially, ‘what brings an English case under the rubric of the corporate veil...is not that shareholder liability was imposed, but that there was an attempt to set aside separate corporate personality’.⁴⁷⁸ Such exceptions can be classified in two ways: those under judicial interpretation (common law) and those provided expressly in statute.⁴⁷⁹

b) English Common law: Historical landscape

i) Introduction: A brief history of its evolution over time and its current state

Under English common law, it is difficult for courts to find the adequate grounds to pierce the veil, and therefore, the law conveys the topsy-turvy situation in sporadic examples.⁴⁸⁰ Further contributing to the lack of clarity, the need to balance competing interests has caused a chequered history.⁴⁸¹ English courts are willing to deviate from the *Salomon* principle, but

⁴⁷² Ibid.

⁴⁷³ The Trading with the Enemy Act 1939.

⁴⁷⁴ Biswas op cit note 57 at 9.

⁴⁷⁵ *Gore* supra note 3 para 21; and Cheng op cit note 98 at 332.

⁴⁷⁶ Cheng op cit note 98 at 332 & 334. Its application is haphazardness in case law.

⁴⁷⁷ *Jones v Lipman* [1962] 1 WLR 832; [1962] 1 All ER 442 at 836 and *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 (Ch); and *Prest* supra note 7 para 68. Lord Neuberger listed several cases where the courts have considered piercing the veil.

⁴⁷⁸ Cheng op cit note 98 at 346.

⁴⁷⁹ Davies & Worthington op cit note 102 at 214-15.

⁴⁸⁰ Girvin, Frisby & Hudson op cit note 95 at 33; *Group Seven Ltd v Allied Investment Corp Ltd & Others* [2014] 1 WLR 735 para 63. The effect is ‘not to alter the beneficial ownership of the company’s assets: it is simply to provide for such asset to be available in defined circumstances to the claimant’; Cheng op cit note 98 at 332 & 334. Judicial ‘reluctance to pierce the veil can be partly attributed to a perceived haphazardness in the case law’; and for a variety of case law examples, see Mayson, French & Ryan op cit note 92 at 151-155.

⁴⁸¹ Mujih op cit note 93 at 45.

have not achieved it in a systematic fashion.⁴⁸² As follows, the English stance on piercing the veil can be divided into three periods, encompassing the traditional common law grounds and their respective developments.⁴⁸³

ii) Experimental period

To begin, from *Salomon* in 1897 until the end of Second World War (WW2) in 1945, the *experimental period* was born.⁴⁸⁴ During this time, courts adopted different approaches to piercing the veil.⁴⁸⁵ In wake of harsh criticisms of limited liability, English courts started to pierce the veil soon after *Salomon*, as demonstrated in numerous case law examples.⁴⁸⁶ What ensued was a period of considerable enthusiasm for piercing the veil.⁴⁸⁷ Cases such as *In re Darby (ex Brougham)*, *Gilford*, *Trebanog Working Men's Club and Institute, Ltd v MacDonald* and *Daimler* demonstrated how courts experimented with the application of fraud, trusteeship and enemy character.⁴⁸⁸ However, since such experimentations were not unified in nature, it failed in achieving a principled and coherent approach.⁴⁸⁹ Despite the lack of structure, when the situation allowed, courts did pierce the veil.⁴⁹⁰ Still, in the same manner, courts also refused to pierce the veil and maintained the separate legal personality of the company.⁴⁹¹

⁴⁸² Farrar op cit note 468 at 73.

⁴⁸³ Cheng op cit note 98 at 334.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid at 334-338.

⁴⁸⁶ Ibid at 336. These cases evidenced a trend of needing multiple shareholders to constitute grounds to pierce.

⁴⁸⁷ Ibid at 336.

⁴⁸⁸ Cheng op cit note 98 at 336. The case of *In Re Darby, ex parte Brougham* demonstrates how courts are willing to pierce the veil if fraudulent activities are perpetuated in the name of the company, particularly when a company is used to conceal a fraudulent operation. Further, the enemy ground has been used only once in the history of English corporate veil piecing and is specific to times of war. It is worthy precedent of maintaining the separate legal personality while having regard to the shareholding for a specific legal purpose; and JT Pretorius op cit note 215 at 23-4. In *Daimler*, the House of Lords held that the company is capable of acquiring an enemy character (At 340 of the judgment). The court will attempt to discover the true expression of the separate legal personality of a company, including but not limited to its members, directors or other persons.

⁴⁸⁹ Cheng op cit note 98 at 336.

⁴⁹⁰ Girvin, Frisby & Hudson op cit note 95 at 33 & 35; and Farrar op cit note 468 at 76. *Gilford* supra note 116 at 943 is an example of such.

⁴⁹¹ Girvin, Frisby & Hudson op cit note 95 at 33, 34 & 46; and *Daimler* supra note 16 at 340. Although *Daimler* is normally discussed in context with piercing the corporate veil, it is an extreme example of national policy dictating the law, with the veil not necessarily being an issue but instead, the correct interpretation of statute is important in order to 'look behind the artificial persona – the corporation – and take account of and be guided by the personalities of the natural persons, the corpoators...'. Therefore, when English courts concern themselves with piercing of the corporate veil in terms of an enemy character, it will not necessarily deal with piercing in its traditional sense. Instead, it will be an example of maintaining and recognising the separate legal personality of a company, and having regard to the shareholding for a specific legal purpose. This also occurred in *Trebanog* (trust application), see Cheng op cit note 98 at 336. Also see *Atlas Maritime* supra note 16 at 779.

The ‘sentiment of the time’ was perhaps best described by the late Professor Otto Kahn-Freund, whom, in 1944, articulately criticised *Salomon* and observed the decision as ‘calamitous’ — its ripple effects shaped the scope of limited liability.⁴⁹² The Professor even suggested that the principles laid down in *Salomon* should be abrogated by legislation.⁴⁹³

Despite the apparent robust environment of veil piercing during this time, the case of *Smith, Stone and Knight v Birmingham*⁴⁹⁴ represented the first time an English court attempted to formulate a test (in pursuance of consistency) to piercing the veil.⁴⁹⁵ Jude Atkinson identified the following guidelines: (1) who was really carrying the business?; (2) were the profits treated as the profits of the parent company?; (3) was the parent company the head and the brain of the trading venture; (4) did the parent company decide what should be done and how much investment to make in the business?; (5) did the parent company make a profit based on its skill and direction?; and, (6) was the parent company in effectual and constant control?⁴⁹⁶ Instead of piercing the corporate veil, *Stone and Knight* is classic example of English courts relying on the principles of agency in company groups.⁴⁹⁷

Although breakthroughs to piercing the veil were made, afterwards, English courts deviated from the guidelines set out in *Stone and Knight*.⁴⁹⁸ This deviation can be attributed mainly to English judges vigilantly trying to mitigate judicial overreaching.⁴⁹⁹ Generally, English courts ‘have generally preferred to resort to traditional common law concepts’.⁵⁰⁰

⁴⁹² Cheng op cit note 98 at 336-337; and Farrar op cit note 468 at 72. Other criticisms include that the decision by the House of Lords went too far.

⁴⁹³ Cheng op cit note 98 at 337.

⁴⁹⁴ Cassim op cit note 2 at 55-6. The case dealt with whether a subsidiary can conduct business on behalf of its holding company. It simultaneously dealt with agency and the single economic unit. After thorough analysis, the court concluded all six questions to be true, and accordingly held that the arrangement between the holding company and the subsidiary was one of agency because the subsidiary was the “agent or employee; or tool or simulacrum of the parent”. Hence, the business operated in a manner where the holding company owned the business of the subsidiary — the subsidiary did not operate on its own behalf, but rather for someone else, which in this case was the holding company.

⁴⁹⁵ Cheng op cit note 98 at 337.

⁴⁹⁶ Cassim op cit note 2 at 55-6. The guidelines adopted are similar to the equity approach followed by United States courts. This by virtue indicates an early fondness of a judicial philosophy like that of South Africa.

⁴⁹⁷ Ibid. Accordingly, an agency relationship did exist and the holding company was entitled to claim the compensation from the local authority.

⁴⁹⁸ Cheng op cit note 98 at 337.

⁴⁹⁹ Ibid at 337-338. An example is the facts of *Stone and Knight*, which are rare in nature. The parent company pursued to have its own veil pierced to obtain compensation from the government.

⁵⁰⁰ Ibid.

iii) Heyday era

From WW2, until the case of *Woolfson v Strathclyde Regional Council*⁵⁰¹ in 1978, piercing the veil enjoyed considerable success (despite, on occasion, courts being unwilling to disregard the separate legal personality when alternative remedies suffice).⁵⁰²

Encapsulating the enthusiasm of this era, in approving a liberal approach to piercing, Lord Denning, who took part in a string of corporate veil cases between the 1950s and 1970s, approved a liberal approach to piercing when he affirmed:

The doctrine laid down in *Salomon v Salomon* has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. *The courts can and often do draw aside the veil. They can, and often do, pull off the mask.* They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit.⁵⁰⁵
[Emphasis added]

Having regard to this view, in an attempt to develop the single economic theory, Lord Denning presided over the notable case of *DHN Food Distributors Ltd v. Tower Hamlets LBC*⁵⁰⁶ — ‘the perfect illustration of the important role played by traditional common law concepts’ in English corporate veil cases.⁵⁰⁷ Accordingly, at the time, *DHN Food* was seen as the leading case in regard to piercing the veil in terms of company groups.⁵⁰⁸

⁵⁰¹ *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90.

⁵⁰² *Jones* supra note 477 at 445. The impact of fraud still seemed like the only desirable method in which courts would be willing to pierce. As demonstrated in the case of *Re Bugle Press Ltd* [1961] Ch 270, which dealt with the provisions of a takeover bid in terms of section 209 of the Companies Act and the re-enacted version in terms of section 428 of the Companies Act 1985; and Farrar op cit note 468 at 78. Instead of piercing the veil, trust liability is deemed to have the same impact whilst still maintaining the separate legal personality of a company. See *Abbey Malvern Wells Ltd v Ministry of Local Government and Planning*.

⁵⁰⁵ *Littlewoods Mail Order Stores* supra note 123 at 1254; and in *Brewarrana v Commissioner of Highways* (1973) 4 SASR 476, 480 (Bray CJ). The court held that piercing the veil is ‘now fashionable’.

⁵⁰⁶ *DHN Food Distributors Ltd v Tower Hamlets LBC* (1976) 3 All ER 462 (CA). Lord Denning warned against blind adherence to the principles in *Salomon*. The ‘single economic unit’ argument created a new approach to the agency exception. The parent company, conducting business on land owned by the subsidiary, aimed to get compensation as such land was sold. Lord Denning had a positive enthusiasm for veil piercing. In the second half of the twentieth century, he was indeed one of the most influential English jurists to have existed.

⁵⁰⁷ Cheng op cit note 98 at 347; Farrar op cit note 468 at 77. In reaching its decision, the different members of the court of appeal derived their influences from various sources; and Mayson, French & Ryan op cit note 92 at 166-70. There is controversy over whether the separate legal personality of companies in a group of companies may be ignored. Worthy of note, the author cites the ‘enterprise entity’ discussion at 168-170.

⁵⁰⁸ Farrar op cit note 468 at 77; and Cassim op cit note 2 at 54.

Moreover, general approaches to piercing the veil occurred based on *the interests of justice*.⁵⁰⁹ Undeniably, the principle was seen as the ‘guiding light’ in order to curb abuses to the separate legal personality of the company.⁵¹⁰ Therefore, several judges adopted the interests of justice argument; again, Lord Denning was prepared to pierce the corporate veil.⁵¹¹

Analysing the heyday era, the bold stance adopted by Lord Denning was refreshing to see, particularly considering his vast experience.⁵¹² His call for ‘judicial flexibility’ is commendable; he went against the status quo and dismissed the significance of *Salomon* where many others felt obligated to praise it.⁵¹³ Another instance of defiance occurred when a prominent commentator declared that: ‘Modern English company law has abandoned the exaggerated view of *Salomon*’s case....english law is now prepared to admit qualifications of, and exceptions to, this principle, by lifting the veil of corporateness.’⁵¹⁴ That year, in 1976, ‘marked the height’ of piercing the veil.⁵¹⁵

To summarise, the heyday era portrayed the pinnacle of piercing the veil.⁵¹⁶ In spite of positive affirmations, the English judiciary have subsequently portrayed an attitude of disdain towards piercing the veil.⁵¹⁷ Essentially, the heyday era represented misplaced optimism.

iv) From optimism to rigidity

Lastly, beginning from *Woolfson* in 1978 until the present day, there has seen much disapproval and caution towards piercing the veil.⁵¹⁸ Despite the court acknowledging the existence of piercing, *Woolfson* signalled the beginning of its decline.⁵¹⁹ A case involving the *single economic* theory, the influence of *Woolfson* cannot be understated — almost all

⁵⁰⁹ Girvin, Frisby & Hudson op cit note 95 at 33; Morse op cit note 37 at 28; and N Grier op cit note 79 at 28. The interests of justice principle will typically be raised when a company ‘is being used, not necessarily fraudulently, as a cover for conduct that would otherwise be contrary to the spirit of an existing agreement’.

⁵¹⁰ Girvin, Frisby & Hudson op cit note 95 at 33.

⁵¹¹ Morse op cit note 37 at 28. This was proven in the significant case of *Wallersteiner v Moir and Creasey v Breachwood Motors Ltd*. See N Grier op cit note 79 at 28 for further discussion.

⁵¹² Cheng op cit note 98 at 338 & 339. Lord Denning’s judgment ‘opened with these famous words: ‘This case might be called the “Three in One.” Meaning, that the three companies operated as one, just like a partnership where all the companies are partners. They should not be treated separately.

⁵¹³ Ibid. For further discussion and case law examples on the heyday era.

⁵¹⁴ Ibid at 339.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid at 338 & 339.

⁵¹⁷ *Woolfson* supra note 501 at 96; and Cheng op cit note 98 at 337.

⁵¹⁸ *Prest* supra note 7 para 16, 27, 50, 65, 77 & 107; and *Walker v Hungerfords* (1987) 44 SASR 532 at 559 (Bollen J). The court held that piercing the veil is ‘out-of-date’.

⁵¹⁹ *VTB* supra note 14 para 121. It has been acknowledged that Lord Keith’s comments are obiter. The courts power to pierce the veil did not appear a contentious issue.

modern analysis of piercing the veil has taken its starting point from the brief and obiter (but influential) statement of Lord Keith of Kinkel.⁵²⁰ Since *Woolfson* is the basis of practically all modern analysis of piercing, there is wide consensus that piercing the veil has become a rarity in English law.⁵²¹ Lord Keith, delivering the leading speech, observed that ‘it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts’.⁵²² This was nowhere more evident than when the House of Lords openly criticised and overruled the flexible judgement of *DHN Food*.⁵²³ Lord Keith noted that *DHN Food* was not properly applied and thus, ensuing cases make it ‘clear that the single economic unit theory,’ and piercing the corporate veil (as a whole), were ‘were falling out of [favour]’.⁵²⁴ In essence, *Woolfson* characterized the marked decline of piercing the veil in the United Kingdom arena.

1. *Adams*: Reluctance to accept general arguments

This downward trend reached its nadir in the monumental case of *Adams*, which epitomised the undesirable stance of English courts to pierce the corporate veil. In this matter, the court refused to expand and acknowledge (albeit unorthodoxly) the jurisdiction of piercing.⁵²⁵ Therefore, personifying the declining trajectory, *Adams* symbolised the first systematic analysis of piercing the corporate veil.⁵²⁶ The court provided that piercing usually occurs in situations where a corporate structure has been used to evade limitations imposed on conduct by law; and rights of relief which third parties already possess.⁵²⁷ The court rejected *all* arguments to hold Cape liable, and hence, *Adams* firmly established that company law rules reign superior when courts are faced with the question of piercing the veil.⁵²⁸

⁵²⁰ *Prest* supra note 7 para 20. *Woolfson* has been described as a ‘touchstone’ of many cases. See *VTB* supra note 14 para 124.

⁵²¹ Cheng op cit note 98 at 339-341.

⁵²² *Woolfson* supra note 501 at 96. See Girvin, Frisby & Hudson op cit note 95 at 35. The author cites *National Dock Labour Board v Pinn & Wheeler Ltd* (1989) 5 BCC 75 and *Acatos & Hutchenson Plc v Watson* [1995] 1 BCLC 218 for application of the approach taken in *Woolfson*.

⁵²³ Cheng op cit note 98 at 339 & 340.

⁵²⁴ Cheng op cit note 98 at 340; and Mayson, French & Ryan op cit note 92 at 168. As a result, the judgment in *DHN Food* has neither been received with open arms nor developed by courts. Further attempts to piece that rely on *DHN Food* have largely been unsuccessful.

⁵²⁵ *Davies & Worthington* op cit note 102 at 217.

⁵²⁶ *Adams* supra note 5. English law has no general doctrine of this kind. In this case, Cape Industries formed subsidiaries in order to supply asbestos to the United States and reduce exposure to asbestos claims. The court of appeal had to ascertain whether the subsidiaries formed were for a legitimate purpose, despite them forming one economic unit; and *Prest* supra note 7 para 21.

⁵²⁷ *Prest* supra note 7 para 21.

⁵²⁸ Cheng op cit note 98 at 354-355; and *Davies & Worthington* op cit note 102 at 218.

Adopting the stance in *Woolfson*, where, in order to constitute grounds to pierce, the intentions of the company must be deliberately dishonest in nature; it was held that despite policy impetus, courts are not free to disregard the principles set down in *Salomon* merely because it considers that justice requires it — indeed, departing from the *Salomon* principle ‘should be watched very carefully’.⁵²⁹ Accordingly, the court found the interests of justice argument as inherently vague.⁵³¹ Ultimately, it is difficult to ascertain when courts have properly pierced the veil ‘in the interests of justice,’ however, ‘future attempts to [pierce] the veil in the interests of justice are only likely to be successful where there is clear evidence of impropriety’.⁵³² Essentially, it is merely a simpler way of referring to, or encompassing the other common law grounds, a metaphor so to speak.⁵³³

Apart from analysing arguments ‘in the interest of justice,’ the judgement also focused on the legitimacy of the other main principles. First, *façade or sham* was seen as the only independent common law ground whereby courts are in favour to pierce.⁵³⁴ This will occur when a company is a mere façade concealing the true facts.⁵³⁵ Indicative of being a synonym of fraud, standing in place of many epithets, this principle is a well-recognised exception to the rule prohibiting the piercing of the corporate veil.⁵³⁶ Notwithstanding favouritism, it does

⁵²⁹ *Adams* supra note 5 at 536; N Grier op cit note 79 at 28. Subsequently, this stance has been confirmed true in the case of *Ord v Belhaven*; *Prest* supra note 7 para 21, 23 & 24. Notwithstanding the judgment in *Adams*, the family division pursued an independent line in regard to property in marriage. However, there was stern criticisms. Courts have demonstrated inconsistency in this regard; and *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 (CA) at 159.

⁵³¹ Davies & Worthington op cit note 102 at 221.

⁵³² N Grier op cit note 79 at 28.

⁵³³ Davies & Worthington op cit note 102 at 221.

⁵³⁴ *Adams* supra note 5 at 478F-E & 539. Also, in *Trustor AB v Smallbone (No.2)* [2001] 1 WLR 1177 at 23, *Gilford* supra note 116 at 943 and *Jones* supra note 477 at 836. Evidence of consistency in this regard that reinforced the pattern that when a company is used as an instrument of fraud, it can amount to piercing of the corporate veil; Lockhart J, in *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 82 ALR 530 (FC, Lochart, Beaumont and Foster JJ), stated:

A “sham” is....something that is intended to be mistaken for something else or that is not really what is purports to be....it is a spurious imitation, a counterfeit, a disguise or a false front....it is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not....it is something which is false or deceptive.

; *Kensington International Ltd v Republic of Congo* [2006] 2 BCLC 296. If the motives of those setting up the companies are dishonest, that will make it easier for the court to conclude that the company is sham; and for an extensive case law discussion on shams and the circumstances which constitute a façade or sham argument, read Mayson, French & Ryan op cit note 92 at 159-161.

⁵³⁵ *Woolfson* supra note 501 at 96. If incorporation is used to avoid legal obligations or allow conduct which is otherwise prohibited, the courts are inclined to pierce the veil to expose and reverse the effects of the “sham” arrangement. See *Snook v London and West Riding Investments Ltd* [1967] 2 QB 876 (CA) at 802 and *In Re a Company* [1985] BCLC 333, CA.

⁵³⁶ *Adams* supra note 5 at 539 & 543D. The court stated that ‘where a façade is alleged, the motive of the perpetrator may be highly relevant’. It was provided:

From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade...We will not attempt a comprehensive definition of those principles.

not mean that English courts are flexible or willing to pierce. A plaintiff still has the difficult task of proving misrepresentation and intention; and so, the court refused to pierce the veil on this ground, despite the subsidiaries in question clearly representing a façade in the relevant sense.⁵³⁷

Secondly, *single economic unit* was analysed.⁵³⁸ As already stated, a fundamental principle of company law, each company in a group of companies is a separate legal entity with its own rights and duties.⁵³⁹ The court rejected this argument as several authorities were cited.⁵⁴⁰ However, they were all based on the interpretation of particular statutory or contractual provisions, including approving the stance of *Wolfson* on *DHN Food*.⁵⁴¹ Indeed, the state of the single economic unit is in abeyance.

Thirdly, the principle of *agency* was observed. This argument was rejected because there was no presumption of an agency relationship between the company and its shareholders.⁵⁴² Ultimately, it is essential to examine the principles of agency law and the scope of authority within that. The absence of an expressed agreement between parties will prove to be very detrimental in proving an agency relationship.⁵⁴³

Next, *impropriety* was analysed.⁵⁴⁴ Possessing a narrow meaning, like interest of justice, it was also considered vague in nature and therefore its independence as a principle is

⁵³⁷ Ibid at 541G-H, 544A-E. Although a company is set up with the view to minimise or avoid future liabilities, it does not constitute immediate grounds to pierce. Cape Industries were entitled to enjoy the benefits inherent in company law. Proving the intention of the parties is one of the most difficult works in piercing the veil cases.

⁵³⁸ *DHN Food* supra note 506 read with Cheng op cit note 98 at 347 & 348. See Nyombi op cit note 35 at 69; and *Tor Industries (Pty) Ltd v Gee-Six Superweld* CC 2001 (2) SA 146 (W). Although South African, it dealt with legal debate surrounding the holding-subsiary relationship; and Cassim & Larkin op cit note 236 at 518-19.

⁵³⁹ Section 3 of the Act 71 of 2008; and Cassim op cit note 2 at 54.

⁵⁴⁰ Cassim op cit note 2 at 54.

⁵⁴¹ *Adams* supra note 5 at 536B & 536D. The approach in *Wolfson*, of treating companies as separate, unless there are compelling reasons to do otherwise, was approved in *Adams*. It has been evaluated that the ‘single economic unit’ may only succeed when interpreted alongside statute or contract. This ensures that courts can ascertain the economic reality; Mayson, French & Ryan op cit note 92 at 168; and Nyombi op cit note 35 at 69, citing *Linsen International Ltd & Others v. Humpuss Sea Transport PTE Ltd & Another* [2010] EWHC 303 (Comm). The court held that control and impropriety (in the sense of concealing a wrongdoing) will need to be proven in order to validate the ‘single economic unit’.

⁵⁴² *Adams* supra note 5 at 547-549.

⁵⁴³ Davies & Worthington op cit note 102 at 220-1; and Mayson, French & Ryan op cit note 92 at 157-159.

Read for an extensive case law discussion on agency.

⁵⁴⁴ Davies & Worthington op cit note 102 at 220-1. The principle of impropriety entails that ‘the corporate veil can be set aside on the grounds that the company has been used to carry on an unlawful activity or in order to avoid the impact if an order of the court’.

questionable.⁵⁴⁵ This is because an impropriety blurs the lines of distinction and overlaps with other principles.⁵⁴⁶ However, it seems like an impropriety has a very narrow meaning; ‘using the corporate structure to avoid liability which has either arisen or is anticipated’.⁵⁴⁷ Conversely, as seen from above, and subsequently in this dissertation, in English Common law, the requirement that an impropriety must be ‘clear and evident’ has moderately been developed since *Adams*.

Lastly, although the case didn’t directly analyse tort, in a company group setting, it was questioned if the parent company was liable for the obligations towards involuntary tort victims.⁵⁴⁸ In general, besides isolated cases, the use of tort to combat piercing the corporate veil is rare, and hence, it is uncommon for courts in the United Kingdom to ever rely on this ground.⁵⁴⁹ Around the time, such reluctance to develop the application of tort had transcended to other Commonwealth jurisdictions.⁵⁵⁰ In spite of this, in Canada, the use of tort to bypass *Salomon* was ever increasing.⁵⁵¹ They would look at factors such as ‘inducing a breach of contract, deceit and conspiracy’ in order to rely on tort.⁵⁵² Therefore, tort exhibits great potential to go against the principles of *Salomon*.⁵⁵³ Despite not being as justifiable as contract, piercing the veil by means of tort seems to heavily depend on an element of domination and under-capitalisation.⁵⁵⁴

In conclusion, *Adams* left the applicability of piercing the veil to delict (tort) claims in doubt.⁵⁵⁵ After the decision in *Adams*, the door for the English judiciary to pierce the veil was almost entirely closed.⁵⁵⁶ In effect, piercing the veil plays a small role in British company law, especially when the basis of the claim moves outside the area of particular contract or statute.⁵⁵⁷

⁵⁴⁵ *Adams* supra note 5 at 544.

⁵⁴⁶ Davies & Worthington op cit note 102 at 221-222.

⁵⁴⁷ Ibid at 222.

⁵⁴⁸ Ibid at 217.

⁵⁴⁹ Farrar op cit note 468 at 78; and Biswas op cit note 57 at 9. *Williams v Natural Life Health Foods Ltd* set a strong precedent regarding the narrow approach towards using tort to remedy piercing cases.

⁵⁵⁰ Farrar op cit note 468 at 78-9.

⁵⁵¹ Ibid at 78.

⁵⁵² Ibid at 78-9.

⁵⁵³ Ibid at 79; and Chapter 4.

⁵⁵⁴ Farrar op cit note 468 at 79.

⁵⁵⁵ Cheng op cit note 98 at 341.

⁵⁵⁶ Biswas op cit note 57 at 10; and Farrar op cit note 468 at 79.

⁵⁵⁷ Davies & Worthington op cit note 102 at 223.

2. Not all doom and gloom

Nevertheless, in spite of the notion that the United Kingdom adopts a rigid attitude, several case law developments in our millennium have shown a willingness to pierce the veil; adhering to the strict guidelines of *Woolfson*. These are cases where a company is used to purport a sham or façade (usually facilitated by the controlling shareholder) in order to: evade an existing legal obligation; misappropriate property from a principal; and mask a partnership or breach fiduciary duties by appropriating a corporate opportunity or secret commissions.⁵⁵⁸ In *Trustor*, it was provided that authorities were justified in piercing the corporate veil in three, possibly overlapping, cases: (1) where the company was a ‘facade or sham’; (2) where the company was involved in some form of impropriety; and (3) where it was necessary to do so in the interests of justice.⁵⁵⁹ The court, appropriating *Woolfson* and *Adams*, stated that courts are entitled to pierce the veil when the company is used as a device or façade to conceal the true facts.⁵⁶⁰ The court did pierce the veil, noting the individual(s) in control used the company as a device or façade to conceal the true facts, thereby avoiding or concealing any liability.⁵⁶¹ Although the principle of impropriety was initially vague, the court echoed that not every impropriety would lead to piercing the veil.⁵⁶²

As the position of impropriety started to gain traction and become clearer, the case of *Gencor ACP* came to fruition. Mr. Dalby, a former director of Gencor ACP Ltd, misappropriated funds to an offshore account (British Virgin Islands) of a company (Burnstead) to which he wholly owned and controlled.⁵⁶³ The court held that Mr. Dalby was accountable for the money received by Burnstead as it was ‘little other than Mr. Dalby’s offshore bank account held in a nominee name’; Burnstead was ‘simply [an] alter ego through which Mr. Dalby enjoyed the profit which he earned in breach of his fiduciary duties’.⁵⁶⁴ In submission, there must be evidence of an impropriety or fraud before the corporate veil can be pierced.

⁵⁵⁸ *Trustor* supra note 534, *Gencor ACP* supra note 477, *Gilford* supra note 116 at 943, *Jones* supra note 477 at 836 and Smith op cit note 153 at 71.

⁵⁵⁹ *Trustor* supra note 534 para 14. In determining these justifications, Sir Andrew Morritt identified and analysed various cases, these were namely: *Gilford* supra note 116 at 943, *Jones* supra note 477 at 836, *Woolfson* supra note 501 at 96, *Ord* supra note 529 and *Mubarak v Mubarak* [2001] 1 FLR 673. In the latter case, in breach of their fiduciary duties, directors of one company fraudulently diverted substantial sums to another company to which they owned.

⁵⁶⁰ *Trustor* supra note 534 para 23.

⁵⁶¹ Ibid.

⁵⁶² Ibid para 22.

⁵⁶³ *Gencor ACP* supra note 477 para 19 & 26. Nobody, except Mr Dalby had beneficial interest. The affairs of Burnstead was done on Mr. Dalby’s directions and on his directions alone. It had no sales force, technical team or other employees capable of carrying on business. The only function of Burnstead was to make and receive payments.

⁵⁶⁴ Ibid para 26.

Therefore, by implication, in the absence of such impropriety or fraud, courts will not pierce the corporate veil; evidence of impropriety or fraud are prerequisites.⁵⁶⁵

Accordingly, the development of an impropriety was shown *Hashem*, which established a fairly accurate reflection on the circumstances which constitute grounds for piercing the veil.⁵⁶⁶ Munby J set out seven principles which should be considered when piercing the veil, these are: (1) ownership and control of a company are not enough to justify piercing the corporate veil; (2) the court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (3) the corporate veil can be pierced only if there is some impropriety; (4) the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability. As Sir Andrew Morritt VC had said in *Trustor*, "...if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough"; (5) if the court is to pierce the veil it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing; and (6) a company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transaction(s); and (7) the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.⁵⁶⁷

In due course, the considerations in *Hashem* were recently echoed in the landmark decision of *VTB*. The Supreme Court noted the unprincipled nature of piercing and how the existence of an impropriety is not sufficient.⁵⁶⁸ In contemplation with the findings in the court of appeal

⁵⁶⁵ Girvin, Frisby & Hudson op cit note 95 at 35-6.

⁵⁶⁶ *Gore* supra note 3 para 22.

⁵⁶⁷ *Hashem* supra note 54 para 159-164; and *Kensington International* supra note 534. The impropriety must be to the use of the company.

⁵⁶⁸ *VTB* supra note 14 para 123 & 128. The facts of the case involved the extension of circumstances to which courts pierced the veil — to effectively hold the person controlling the company liable as if he had been a co-contracting party where the company was a party alone and the controller was not. The court held there was no basis to make the controller a party to any contract entered by the company. Therefore, the court stood with the doctrine of privity.

(in this matter), it was held that piercing the veil must be limited only when the impropriety is *relevant*.⁵⁶⁹

Despite encouraging signs in the past decade or so, such prosperity was an allusion. Lord Neuberger remarked how courts *enjoyed no powers in law* to pierce the veil; the ‘precise nature, basis and meaning are all somewhat obscure, as are the precise nature of circumstances in which the principle can apply’.⁵⁷⁰ Up until *VTB*, history has shown that English courts have not developed a systematic approach to piercing the veil and solutions the issue have been hard to come by. Ultimately, the English law position on piercing the veil *before Prest* is ‘there is no room for a single choice of law rule to govern the issue’.⁵⁷¹

v) *Prest*: Piercing the corporate veil is limited under English law

Building on the sneering comments of *VTB*, on the 12 June 2013, the United Kingdom Supreme Court got an opportunity to analyse the law in relation to piercing the veil. In an attempt to shed light on the matter, the court undertook a review of the principles of English law which determine in what circumstances, if any, a court may pierce the corporate veil. Accordingly, the momentous case of *Prest* illustrates the leading case in English common law.⁵⁷² This case has wide corporate application which goes beyond matrimonial proceedings; therefore, it is of great significance as it involves two spheres of law, family law and company law.⁵⁷³ Indeed, there has been long running conflict between these two areas of law in circumstances that involve divorce assets held in corporate structures.⁵⁷⁴ Also of significance, the case suggested that piercing the veil is a remedy of *last resort* and other legal remedies provide better satisfactory relief.⁵⁷⁵

Michael Prest (the husband) and Yasmine Prest (the wife) married in 1993 and divorced in 2008.⁵⁷⁶ The husband is the sole owner and controller (directly or through intermediate

⁵⁶⁹ Ibid para 145.

⁵⁷⁰ Ibid para 117, 123, 133-39, 140 & 146-147. In summary, the court did not extend the circumstances of piercing the veil (as mentioned in footnote 568 of this dissertation). The court criticised the judgment in *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm), because it ‘represents an illegitimate and unprincipled extension of the circumstances in which the veil can be pierced’.

⁵⁷¹ Ibid para 131.

⁵⁷² *Prest* supra note 7.

⁵⁷³ Ibid para 9.

⁵⁷⁴ *Prest v Prest* [2011] EWHC 2956 (Fam) para 158, 191-192 & 194. Lawyers from both spheres were eagerly awaiting the judgement. The court discuss the ‘company law approach’ and the ‘family law approach’ whilst citing *Mubarak* supra note 559 at 682B.

⁵⁷⁵ *Prest* supra note 7 para 35, 92 & 106. Discussion will occur in chapter 5.

⁵⁷⁶ Ibid para 1.

entities) of several companies belonging to the Petrodel Group.⁵⁷⁷ Two of those companies, Petrodel Resources Ltd (PRL) and Vermont Petroleum Ltd (Vermont) were the owners of seven residential properties.⁵⁷⁸ Out of the seven, three properties were acquired by PRL for nominal consideration (£1).⁵⁷⁹ Two properties were acquired by PRL for a substantial consideration.⁵⁸⁰ The last two properties were acquired by Vermont for substantial consideration.⁵⁸¹ The properties were subject to an application by the wife for financial relief ancillary to the divorce.⁵⁸² She sought the transfer of these seven properties, belonging to the Petrodel Group, in order to satisfy the divorce settlement (£17.5 million); alleging the husband was the beneficial owner.⁵⁸³ Following their divorce, the court was faced with the question of whether they had the power to order the transfer of properties (legally owned by the husband's companies) to the wife.⁵⁸⁴ The court analysed that given the facts, the assets of the Petrodel companies might be available to satisfy the lump sum order against the husband in three possible legal bases: (1) by piercing the corporate veil in order to give effective relief; (2) transfer in terms of section 24 of the Matrimonial Causes Act 1973; and (3) transfer in terms of the properties belonging beneficially (in trust) to the husband by virtue of the particular circumstances of this case.⁵⁸⁵

At first instance, in the family division, Moylan J held that in the absence of an impropriety, there was no general principle of law which entitled the court to reach the companies' assets by piercing the corporate veil.⁵⁸⁶ No impropriety was found as the company structure of the Petrodel Group was established for conventional reasons including 'wealth and the avoidance

⁵⁷⁷ *Prest* supra note 7 para 2; and for more background on the matter, read *Prest (Fam)* supra note 574 para 15-26. The husband's properties were approximately worth £37.5 million. Therefore, the wife's fair and just award was valued at £17.5 million. This amount is sufficient to meet the wife's needs and is a fair distribution of the likely overall worth.

⁵⁷⁸ *Prest* supra note 7 para 2.

⁵⁷⁹ *Ibid* para 49.

⁵⁸⁰ *Ibid* para 50.

⁵⁸¹ *Ibid* para 51.

⁵⁸² *Ibid* para 2.

⁵⁸³ *Prest* supra note 7 para 4 & 43; and *Prest (Fam)* supra note 574 para 215-16.

⁵⁸⁴ *Prest* supra note 7 para 2.

⁵⁸⁵ *Prest* supra note 7 para 9; section 24(1)(a) of the Act 1973 provides:

An order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion

; and *Prest (Fam)* supra note 574 para 13, citing *Charman v Charman* [2007] 1 FLR 1246 67.

Determination of the factual background, including crucially, the financial position of the parties (spouses) is known as the 'computation' stage.

⁵⁸⁶ *Prest* supra note 7 para 6. The separate legal personality of the company 'could not be disregarded unless it was being abused for a purpose that was in some relevant respect improper'; and *Prest (Fam)* supra note 574 para 183, 185, 197 & 218-19.

of tax'.⁵⁸⁷ The possibility of a resulting trust was analysed throughout the case. The judge found that the matrimonial home was held by PRL on trust for the husband, but regrettably made no corresponding finding about the seven other properties and refused to make a declaration that the husband was their beneficial owner.⁵⁸⁸ Nevertheless, the judge held that in applications for financial relief ancillary to a divorce, a wider jurisdiction to pierce the corporate veil was available under section 24 of the Act 1973.⁵⁸⁹ It was on this ground that Moylan J ordered the transfer of the properties in favour of the wife.⁵⁹⁰

In the court of appeal, PRL, Upstream and Vermont challenged Moylan J's order in the family division. They contended that there was no wider jurisdiction under the Act of 1973.⁵⁹¹ The statute could not apply 'once the judge had rejected the impropriety assertion,' since the properties couldn't be 'regarded as properties to which the husband had any entitlement'.⁵⁹² In criticism of Moylan J, the majority reversed the decision of the family division. In terms of the Act 1973, there exists no special virtues which allow company law matters in matrimonial disputes, to be treated differently from any other company law matters.⁵⁹³ The practice 'must now cease'.⁵⁹⁴ In essence, Moylan J suggested that section 24(1)(a) of the Act 1973 enabled a court to treat the company's assets as belonging one hundred per cent to the owner; as such, he erred when delivering his judgment.⁵⁹⁵ Since the matter was within the jurisdiction of the family division, and Moylan J rejected that

⁵⁸⁷ *Prest (Fam)* supra note 574 para 218.

⁵⁸⁸ *Prest* supra note 7 para 6.

⁵⁸⁹ *Prest (Fam)* supra note 574 para 193 & 224-227.

⁵⁹⁰ *Prest* supra note 7 para 5. Moreover, in awarding costs to the wife, the judge directed that PRL, Petrodel Upstream Ltd (Upstream) and Vermont should be jointly and severally liable with the husband for 10 per cent of those costs. Upstream forms part of the Petrodel Group; and *Prest (Fam)* supra note 574 para 224-227.

⁵⁹¹ *Prest* supra note 7 para 7 & 37. No wider jurisdiction to 'order their property to be conveyed to the wife in satisfaction of the husband's judgment debt'; and *Prest v Prest* [2012] EWCA Civ 1395 (Appeal) para 157.

⁵⁹² *Prest (Appeal)* supra note 591 para 157.

⁵⁹³ *Prest (Appeal)* supra note 591 para 161. Patten LJ provided that the family division developed 'an approach to company owned assets in ancillary relief applications which amounts almost to a separate system of legal rules unaffected by the relevant principles of English property and company law'; and Nicholas Grier 'Piercing the Corporate Veil: *Prest v Petrodel Resources Ltd*' (2014) 18(2) *Edinburgh Law Review* 275 at 276.

⁵⁹⁴ *Prest (Appeal)* supra note 591 para 161.

⁵⁹⁵ *Prest (Appeal)* supra note 591 para 157. Particularly considering that in *Adams* and *VTB*, the courts refused to extend the scope of piercing the corporate veil; and *Prest* supra note 7 para 41-2. Merely because someone has control of a company does not mean that person is the beneficial owner of the company's assets. If mere control is sufficient in order to be the beneficial owner, it would be at the expense of honest controllers (who respect the separate legal personality of a company) because honest controllers would be the beneficial owners of company assets when they had no intention of being in that position.

possibility on the facts, he ought to have not made the order in the family division.⁵⁹⁶ However, in dissent, Thorpe LJ stated that if the law allows the husband to get away with underhanded tactics (to deprive his wife of her claim), it would defeat ‘the family division judge's overriding duty to achieve a fair result’.⁵⁹⁷ On the facts, neither abuse nor trust applied and thus in court of appeal, the majority agreed.⁵⁹⁸

On appeal to the Supreme Court, all seven lordships unanimously granted the wife’s claim; set aside the decision of the appeal court, and declined to pierce the corporate veil, considering it not appropriate in the circumstances.⁵⁹⁹ As well as not being appropriate, it is limited in particular situations.⁶⁰⁰ Accordingly, the first ground was rejected. The court also rejected the second ground. It was questioned why the law of property in section 24(1)(a) was interpreted to mean something different in matrimonial proceedings, as if no normal (general) rules of law applied.⁶⁰¹ Nothing in the statutory history or wording of the Act 1973 suggests otherwise.⁶⁰² After thorough examination, the only basis on which the court relied on was the third ground; that the properties acquired and held by the respondent companies are in a resulting trust for the husband — the companies were accordingly ‘property to which the [husband] is entitled, either in possession or reversion’.⁶⁰³ In the family division, it was discovered that the husband deliberately thwarted attempts to disclose his financial affairs (assets), and sought to conceal this by ‘persistent obstruction, obfuscation and deceit’ of rules of court and specific orders.⁶⁰⁴ The failure to co-operate was to protect the properties; adverse influences could therefore be drawn against him.⁶⁰⁵ The court inferred that failure to disclose and evidence the true nature of the company’s properties would reveal them as being

⁵⁹⁶ *Prest* supra note 7 para 7.

⁵⁹⁷ *Prest (Appeal)* supra note 591 para 64-5.

⁵⁹⁸ *Prest* supra note 7 para 7.

⁵⁹⁹ *Ibid* para 36.

⁶⁰⁰ *Ibid* para 35.

⁶⁰¹ *Ibid* para 37, 40-1. If a ‘right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts....if it does not exist, it does not exist anywhere’. Rules in statute must be given their ordinary meaning, in order to protect the fundamental principles of law. A deviation from the ordinary meaning will only occur if expressly stated otherwise — it cannot be inconsistent.

⁶⁰² *Ibid* para 86-89.

⁶⁰³ *Prest* supra note 7 para 47, 49-52 & 55. The husband had provided the purchase money and was the beneficial owner of the properties; and Grier op cit note 593 at 277. A ‘resulting trust’ is an exclusive term in English Law. ‘Resulting’ has the meaning that ownership spring backs to an owner who does not effectually dispose of such property. See footnote 605 & 828 of this dissertation to that regard.

⁶⁰⁴ *Prest* supra note 7 para 4.

⁶⁰⁵ *Ibid* para 45. The companies within the Petrodel Group were reluctant to disclose statements, transfers, loans and other purchases. Hence, adverse inferences could be drawn against the companies. The companies were acting as resulting trustees for the husband, who was in fact the beneficial owner. Therefore, the properties in question ‘sprang back’ to him personally. It did not matter that the titles to the properties were in the company’s name.

beneficially owned by the husband — the essential point was ‘not who controlled the companies, but for whose benefit the companies owned the properties’.⁶⁰⁶ The court followed that there was no reliable evidence to rebut the most plausible inference from the facts.⁶⁰⁷

By deeming piercing as not relevant, the court adopted an obiter, yet lengthy discussion on piercing the corporate veil.⁶⁰⁸ Prior to the decision in *Prest*, there was no clear, consistent or compelling justification for piercing the corporate veil.⁶⁰⁹ Instead, courts commonly centred on the usual fundamental principles.⁶¹⁰ Nonetheless, these principles have consequently been removed and substituted. Although *Adams* systematically analysed piercing the veil, the plateau formed by *Prest* further consolidated and categorized the topic.⁶¹¹

The Supreme Court confirmed that piercing the veil occurs in limited circumstances.⁶¹² Lord Sumption, delivering the leading judgement, found that it is well established that a court can pierce the veil if ‘a company’s separate legal personality is being abused for the purpose of some relevant wrongdoing’.⁶¹³ However, what constitutes as a ‘relevant wrongdoing’ is difficult to ascertain.⁶¹⁴ Indeed, analysis of previous case law would reveal that most of the authorities are obiter, because the corporate veil was not pierced.⁶¹⁵ Besides, ‘most cases in which the corporate veil was pierced could have been decided on other grounds’.⁶¹⁶ Although it is acknowledged that an impressive catalogue of circumstances exists to pierce the veil, Lord Sumption was not prepared to ‘explain that consensus out of existence’.⁶¹⁷ In same breadth, he recognised that despite the courts limited powers, in carefully defined circumstances, it is necessary to pierce the veil.⁶¹⁸ It is this necessity that inspired Lord Sumption to provide a new test to identify the grounds on which piercing can be invoked.⁶¹⁹ Significantly, in his judgement, practically all English decisions on piercing the veil could be categorised as falling into two principles; the *concealment principle* or the *evasion principle*. He states:

⁶⁰⁶ *Prest* supra note 7 para 47; and Grier op cit note 593 at 277.

⁶⁰⁷ *Prest* supra note 7 para 48-52.

⁶⁰⁸ *Ibid* para 16.

⁶⁰⁹ *VTB* supra note 14 para 123.

⁶¹⁰ *Adams* supra note 5. Grounds evaluated through systemic analysis.

⁶¹¹ *Prest* supra note 7 para 28.

⁶¹² *Ibid* para 35.

⁶¹³ *Ibid* para 27. Case law examples in para 20-26.

⁶¹⁴ *Ibid* para 28. Hence, the entire confusion. The use of epithets has compounded this.

⁶¹⁵ *Ibid* para 27.

⁶¹⁶ *Ibid*.

⁶¹⁷ *Ibid*.

⁶¹⁸ *Ibid*.

⁶¹⁹ *Ibid* para 28.

The *concealment principle* is legally banal and *does not involve piercing the corporate veil at all*. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. ...the *evasion principle* is different. It is that the court *may disregard the corporate veil* if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.⁶²⁰
[Emphasis added]

To summarize, the concealment principle does not truly involve piercing the corporate veil. It rather identifies a principle-agent, trustee-beneficiary, and relationships of a similar manner.⁶²¹ Therefore, it is a fact-finding mechanism, tasked to identify the real actors and expose the true nature of what the corporate structure is concealing.⁶²² It is 'legally banal,' meaning that when courts reveal the true nature of the concealment, it will simply apply the ordinary principles of agency, sham and so forth.⁶²³ Alternatively, the evasion principle can only be used in a 'small residual category of cases' where it is necessary to apply.⁶²⁴ Conclusively, it signifies the *only* ground that courts can pierce the corporate veil. It occurs 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.⁶²⁵
[Emphasis added]

As such, it cannot be invoked to create a new liability that would not otherwise exist — it pre-exists. In other words, a controller must evade an *existing* liability by virtue of the company being under control by an individual.⁶²⁶ In applying this stance in *Prest*, Lord Sumption provided that piercing the veil had no application in the present case because the husband's actions did not evade or frustrate any legal obligation to his wife, nor was he concealing or evading the law in relation to the distribution of assets of the marriage upon its

⁶²⁰ Ibid.
⁶²¹ Ibid.
⁶²² Ibid.
⁶²³ Ibid.
⁶²⁴ Ibid.
⁶²⁵ Ibid para 35.
⁶²⁶ Ibid.

dissolution.⁶²⁷ Restructuring occurred a long time before the marriage ended and it was rather intended for investment security and minimising tax liabilities.⁶²⁸ The companies were run honestly and there was not attempt to hide anything. Hypothetically speaking, if the husband had transferred the properties *after* a court had granted relief to the wife ancillary to the divorce, it would comply with the evasion principle. In this scenario, the husband (using his sole control) would *intentionally* be evading a legal obligation by using the transfer of properties as a vehicle to put his properties out of reach from the wife's claim; and so, denying personal ownership and stating that the properties belong within the Petrodel Group.⁶²⁹ In other words, it would be affirmed that the properties are owned by the companies and not the member(s).

Departing from Lord Sumption's key contribution, the other lords of the Supreme Court provided their own opinions on Lord Sumption's test, with differing interpretations. Lord Neuberger, who delivered the leading judgement in *VTB*, agreed with Lord Sumption that cases fall into two types, concealment and evasion.⁶³⁰ He agreed further with the reasoning and approach of the two principles.⁶³¹ In frank criticism, he negatively categorised all decisions relating to piercing the veil.⁶³² In spite of such damning remarks, Lord Neuberger still confirmed its existence and was the sole member of the bench to approve of Lord Sumption's test.⁶³³

Lorde Mance and Lord Clarke (in separate judgements) were more cautious in aligning with Lord Sumption's test. Lord Mance agreed with Lord Sumption and the supplementary comments of Lord Neuberger.⁶³⁴ However, their lordships were not prepared to confine piercing the veil to 'evasion' cases as it could 'foreclose all possible future situations which may arise'.⁶³⁵ And so, the evasion principle should not be achieved 'unless and until the court had heard detailed submissions upon it'.⁶³⁶ It must be stressed, that no one should be

⁶²⁷ Ibid para 36.

⁶²⁸ Ibid.

⁶²⁹ Nupur Upadhyay 'Piercing the Corporate Veil: An Analysis of Lord Sumption's Attempt to Avail a Troubled Doctrine' (2015) 21 *Auckland University Law Review* 114 at 122-123.

⁶³⁰ *Prest* supra note 7 para 60.

⁶³¹ Ibid para 61.

⁶³² Ibid para 64 & 74.

⁶³³ Ibid para 60, 64, 74 & 81.

⁶³⁴ Ibid para 97-8.

⁶³⁵ Ibid para 100 & 103.

⁶³⁶ Ibid para 103.

encouraged to think that any further exception would be easy to establish, if any exist at all.⁶³⁷

Lord Hale and Lord Walker were less convinced by Lord Sumption's analysis. Lord Walker rejected piercing the veil outright; as it is simply a label, often used indiscriminately, to describe 'the disparate occasions on which some rule of law produces apparent exceptions' to separate legal personality.⁶³⁸ Lord Hale (with whom Lord Wilson agreed) questioned whether all cases would classify 'neatly into cases of either concealment or evasion'.⁶³⁹

By assessing Lord Sumption's test, I believe the concealment principle represents 'lifting' the veil, whereas the evasion principle represents 'piercing' the corporate veil. Furthermore, closer analysis can reveal that the court reformed the principles of 'façade' and 'sham'. Significantly, it would mean that the concealment principle has the same meaning as façade, and the evasion principle would have the same meaning as sham. This would be in line with the sentiment that façade or sham is the only independent common law ground whereby courts are in favour to pierce.

Despite differences in opinion amongst the seven justices, what is clear is the majority of the Supreme Court acknowledge, albeit obiter, the existence of the piercing the corporate veil. Fascinatingly, will English law fully accept that piercing can only be applied as far as the test formulated by Lord Sumption?

vi) Conclusion: common law

The de-emphasis of justice and policy has resulted in formalistic attitudes towards piercing the veil.⁶⁴⁰ Strict adherence to *Salomon* has concurrently evidenced an attitude of praise towards traditional common law concepts, while also rejecting new legal frameworks.⁶⁴¹ Common law concepts are not created with the piercing of the corporate veil situation in mind, and are ill-suited for deciding corporate veil cases.⁶⁴² From my analysis, when opportunities arose to extend or expand piercing, it has been denied; but when the opportunity arose to limit piercing, courts shed no hesitation to embrace it and take advantage.

⁶³⁷ Ibid.

⁶³⁸ Ibid para 106.

⁶³⁹ Ibid para 92.

⁶⁴⁰ Cheng op cit note 98 at 355.

⁶⁴¹ *Salomon* supra note 34 at 51-54; and Farrar op cit note 468 at 80. The range of applications exists in Legitimate, illegitimate or dishonest purposes.

⁶⁴² Cheng op cit note 98 at 355.

This advantage and drift in approach reached an all-time low in *Prest*, which concluded that cases in which the corporate veil is pierced is rare.⁶⁴³ English courts have shown a tendency to contemplate piercing the veil when a company is used to purport a sham or façade.⁶⁴⁴ Hence, *Prest* embraced this notion, as evidenced by the evasion principle which represents the only compelling justification for piercing the veil.⁶⁴⁵ It applies in circumstances when someone evades an existing legal liability by creating a corporate structure.⁶⁴⁶ Intention or deception is fundamental before the principle can be invoked, aligning with the lords approach to Mr. Salomon (and separate legal personality) in *Salomon*.⁶⁴⁷ Therefore, the judicial attitude towards piercing the veil is unaccommodating.⁶⁴⁸ Fundamentally, piercing the veil is merely a label and is consequently seen as an expression of other general principles; where a ‘myriad [of] non-company law concepts’ are used to decide a circumstance which solely involves a company law concept.⁶⁴⁹ In other words, when the argument of piercing the corporate veil is brought before an English court, it will usually not be the sole argument in the case.⁶⁵⁰ It will be ‘incidental to some other argument of substance’.⁶⁵¹

c) Statutory law

i) Introduction

In terms of statute, English law extends the application of piercing to other forms of legislation and contract.⁶⁵² Piercing the veil by means of statutory law is rare, unless expressed in clear and unambiguous language.⁶⁵³ In fact, they are ‘very few, if any, cases where the courts have concluded that the policy of the statute requires the separate legal personality of the company to be ignored’.⁶⁵⁴ The reason being is the legislature would not intend on providing unclear provisions which are undistinguishable with the disorder of

⁶⁴³ *Prest* supra note 7 para 77, 100 & 103.

⁶⁴⁴ *Gilford* supra note 116 at 943, *Jones* supra note 477 at 836, *Trustor* supra note 534 para 23 and the evasion principle in *Prest* supra note 7 para 28 & 35.

⁶⁴⁵ *Prest* supra note 7 para 35.

⁶⁴⁶ *Prest* supra note 7 para 35. Intention must be present, regardless of when the corporate structure was created.

⁶⁴⁷ *Salomon* supra note 34 at 51-54.

⁶⁴⁸ Cheng op cit note 98 at 331.

⁶⁴⁹ Ibid at 348.

⁶⁵⁰ Farrar op cit note 468 at 80.

⁶⁵¹ Ibid. The author cites the American Case of *Re Clark's Will* 2014 Minn 574 at 578 (1939), where Stone J had a similar and in-depth point.

⁶⁵² Davies & Worthington op cit note 102 at 214.

⁶⁵³ *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427 (HL).

⁶⁵⁴ Davies & Worthington op cit note 102 at 215.

common law. It is a question of 'whether, and if so, in what circumstances, the court has power to pierce the corporate veil in the absence of specific statutory authority to do so'.⁶⁵⁵

ii) General approach followed by English statute

English legislation is not necessarily focused on piercing the veil, but rather on director (and other officers) liability for corporate wrongs in specified circumstances.⁶⁵⁶ This is particularly the case in the Companies Act 2006. Therefore, the separate legal personality is not ignored, but limited liability is extended.⁶⁵⁷

In terms of the Insolvency Act 1986, chapter x provides for the penalisation of directors and officers. In terms of this chapter, a director is liable, to make such contributions (if any) to the company's assets as the court thinks proper, for fraudulent trading under section 213, and wrongful trading under section 214.⁶⁵⁸ Further, in terms of sections 216 and 217, a director is liable for improper use of an insolvent company's name.⁶⁵⁹ Where a person is personally responsible under this section for the relevant debts of a company, they are jointly and severally liable in respect of those debts with the company and any other person who, whether under this section or otherwise, is so liable.⁶⁶⁰

⁶⁵⁵ *Prest* supra note 7 para 59 & 60.

⁶⁵⁶ *Girvin, Frisby & Hudson* op cit note 95 at 36-7; *Davies & Worthington* op cit note 88 at 215 & 249. Since 1982, with the induction of the Cork Committee, 'statutory willingness to impose liability on the directors of companies which abuse the mechanism of limited liability has significantly increased'. An example is found in the Senior Courts Act 1981. In terms of section 51, it empowers the courts to make a 'non-party costs order' in favour of a successful party in litigation. It would be applicable when controllers of a company, use the company as a vehicle for litigation without considering whether the company has an independent interest in the litigation, and knowing that it would be unable to meet the costs of failure. It is a policy that imposes costs should fall not on the nominal litigant (the company), but on the person in whose interests the litigation is being conducted.

⁶⁵⁷ *Davies & Worthington* op cit note 102 at 225-226; *Farrar* op cit note 468 at 79, read with *N Grier* op cit note 79 at 28 and *Biswas* op cit note 57 at 7. Interestingly, the façade/sham argument is associated with piercing the veil in tax (revenue or national policy or interests of the public) liabilities. From time to time, when companies participate in tax evasion or schemes involved in tax avoidance, the fiscal policy of tax legislation will disregard the legal personality. This was particularly a topic of the impact of national policy or the interests of the public, where for example, 1950s tax incentives for making films resulted in these incentives being abused. However, the 'question of form and substance in tax law' is fairly complex and won't be discussed.

⁶⁵⁸ Section 213 & 214 of the Act 1986; *Jetivia SA and another v Biltta (UK) Limited (in liquidation)* (2015) UKSC 23 para 65. Liability for fraudulent trading was argued extensively in the Supreme Court; and *Davies & Worthington* op cit note 102 at 227-237.

⁶⁵⁹ Section 216 & 217 of the Act 1986.

⁶⁶⁰ *Ibid* Section 217.

Following, in terms of section 15 of the Company Directors Disqualification Act 1986, it imposes personal liability for the debts of the company due to breach of a disqualification order.⁶⁶¹

In parallel with the above provisions, in terms of the Act 2006, it does not provide for piercing the veil in the true sense; instead, it prefers to enlarge the scope of director liability for wrongful acts committed.⁶⁶² The closest provision to piercing the veil is found in Section 1187. It provides that the Secretary of State may provide, by regulations, that a person who, at a time when he is subject to foreign restrictions, is a director of a UK company, or is involved in the management of a UK company, is personally responsible for all debts and other liabilities of the company incurred during that time.⁶⁶³ Although section 1187 provides for personal liability for debts of the company, it empowers the Secretary of State to 'pierce the veil' and not the courts.⁶⁶⁴ Too, it is limited to scenarios of foreign restrictions.⁶⁶⁵ Therefore, it cannot be regarded as a piercing the veil clause, although it has the foundations for such.

Worthy of note, the Financial Reporting Council (FRC) issued a revised United Kingdom Corporate Governance code (2018). The aim is to adapt on ever changing business environments and help United Kingdom companies achieve the highest levels of corporate governance.⁶⁶⁶ The code is designed to set higher standards of corporate governance in order to promote transparency and integrity in business.⁶⁶⁷ This is vital as good corporate governance can achieve sustainable growth.⁶⁶⁸ The code also aims to promote harmonious changes regarding stakeholder involvement, boardrooms, culture and remuneration.⁶⁶⁹ The importance of the code has been intensified as a result of the (global) financial crisis,

⁶⁶¹ Section 15 of the Company Directors Disqualification Act 1986.

⁶⁶² Section 993 of the Act 2006; and Davies & Worthington op cit note 102 at 226. Although shareholders can also be held liable, it is rare to find examples, because the target of anti-abuse legislation is aimed more specifically at individuals who manage the company and its affairs. The reason being is the concentration of power and authority is in the board of directors and not the shareholders. Shareholders are merely the 'owners' of a company who expect the directors to reflect their interests. Usually, this interest is to make profit.

⁶⁶³ Section 1187(1) & (2) of the Act 2006. A person responsible is jointly and severally liable in respect of those debts and liabilities of the company and any other person who is so liable.

⁶⁶⁴ Ibid.

⁶⁶⁵ Ibid.

⁶⁶⁶ The Corporate Governance Code 2018 op cit note 106 at 1.

⁶⁶⁷ Ibid at 4-7. Emphasis on directors' duties.

⁶⁶⁸ Ibid at 2.

⁶⁶⁹ Ibid at 1.

Britain's willingness to leave the European Union, and high-profile examples of inadequate governance and misconduct, which have led to unfortunate consequences.⁶⁷⁰

Even though the Act 2006 boasts 1300 sections, covering a vast array of company law, I find it startling that it does not have clear section that empowers the courts to pierce the veil.⁶⁷¹ Although section 16(2) & (3) empowers companies with separate legal personality, the attitude is to not take it a step further.⁶⁷²

Evidently, it displays reluctance by the legislators to codify an exception to separate legal personality. Too, it demonstrates how the judiciary would rather find better understanding and solace in the common law.⁶⁷³ The implication is the English judiciary weigh too much esteem in the principals of *Salomon*.⁶⁷⁴ Overall, I believe the English statutory approach exhibits how the separate legal personality of a company is indispensable to the maintenance, harmony and development of company law.

Piercing the veil is a technique available to the courts, but it has not been developed far enough to be the central legal strategy for addressing abuses of limited liability.⁶⁷⁵

iii) Conclusion: statutory

Courts have mustered the courage to look behind the corporate veil, not to disregard the separate legal personality, but rather to impose personal liability on members.⁶⁷⁶ English legislatures do not want to override the precedent set in *Salomon*.⁶⁷⁷ Although the statutory position embodies the reluctance of common law, common law exceptions to corporate

⁶⁷⁰ Ibid. Examples include the liquidation of Carillion, one of the biggest construction contractors for the United Kingdom government. The liquidation threatened more than 19,000 jobs in the United Kingdom as well as the solvency of hundreds of subcontractors and smaller businesses. This was due to a combination of rapid expansion and underbidding for contracts (that had low margins since the financial crisis), which caused huge debts. Many directors in the industry are paid bonuses based on revenue growth, not efficiency. Too, another example is how the House of Fraser, a huge department store chain, went into liquidation. The last 15 years had been a turbulent era for the company: it changed hands twice and became a bid target several times. See Robert Plummer 'House of Fraser: Five things that went wrong' *BBC* 10 August 2018 available at <https://www.bbc.com/news/business-45127423>, accessed on 28 January 2019. For a vast list of businesses who are facing failure, see Centre for Retail Research 'Who's Gone Bust in Retailing 2010-19? to end January 2019' available at <http://www.retailresearch.org/whosgonebust.php>, accessed on 28 January 2018.

⁶⁷¹ The Act 2006.

⁶⁷² Ibid section 16(2) & (3).

⁶⁷³ *Prest* supra note 7 para 28.

⁶⁷⁴ *VTB* supra note 14 para 122.

⁶⁷⁵ Davies & Worthington op cit note 102 at 223.

⁶⁷⁶ Nyombi op cit note 35 at 78.

⁶⁷⁷ *Dimbleby & Sons Ltd* supra note 653.

personality are slowly being developed while statutory exceptions have remained largely unchanged.⁶⁷⁸

⁶⁷⁸ Ibid.

V JUXTAPOSITION OF MINIMALIST AND MAXIMALIST APPROACHES IN LIGHT OF PIERCING THE CORPORATE VEIL

a) Introduction

Although South African company law has operated on the origins and legal framework of English company law, ‘many of the traditional company law doctrines and concepts inherited from nineteenth century [Victorian] England have been abandoned or substantially modified’.⁶⁷⁹

Accordingly, before the Act 71 of 2008 came into operation, there had only been one significant review of South African company law.⁶⁸⁰ This review aided the formation of the Act 61 of 1973, which was still based on the foundations of English Law.⁶⁸¹ Nevertheless, in 2004, the South African department of Trade and Industry (DTI) released a policy paper entitled, *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*.⁶⁸² The paper established a legal framework which simultaneously offered a flexible, modern and simplistic approach to company law whilst still adapting to ever changing business environments.⁶⁸³ Aided by South Africa’s constitutional dispensation and need for modernisation, the Act 71 of 2008 was born — a different version from the English.⁶⁸⁴

⁶⁷⁹ Cassim op cit note 2 at 3; and JT Pretorius op cit note 215 at 1-2. Effectively, the umbilical cord between English and South African company law is cut. For more than a century, South African company law legislation has been adapting to English company law trends. In the Cape, the Joint Stock Companies Limited Liability Act 23 of 1861 (C) was predominately based on the English Limited Liability Act 1855, as incorporated in the Joint Stock Companies Act 1856. This trend of adopting English trends followed in the Transvaal, the Natal and the Free State — however, and currently, ‘the days when South African company law was a mirror image of English Company law have gone for ever’.

⁶⁸⁰ South African Company Law for the 21st Century op cit note 2 at 4 & 13-4. The review was initiated in 1963.

⁶⁸¹ Ibid. The Act 61 of 1973 represented the beginning of the departure from the English system.

⁶⁸² Ibid at 4-5.

⁶⁸³ Memorandum on the Objects of the Companies Bill op cit note 2 at 186-187. Specifically, clauses 1.2.1-1.2.5; and Cassim op cit note 2 at 3-5. The implementation the Act 71 of 2008 was vital. South African company law needed to align with the growth of technology, globalisation and commerce, which has shifted the business landscape exponentially.

⁶⁸⁴ Memorandum on the Objects of the Companies Bill op cit note 2 at 188, clause 2. Compared to the Act 61 of 1973, which focused on shareholder investments and balancing the majority rule, the Act 71 of 2008 has taken cognisance of the importance of facilitating the restructuring of business and economic growth, whilst still having regard of all shareholders, achieving an equilibrium between the interests of all shareholders; and section 39(2) of the Constitution. In South Africa, statutory interpretation had long been rooted in positivism. With the implementation of the Constitution, it significantly changed the legal landscape of the country. A purposive approach is adopted in every sphere of law and the jurisprudential attitude shifted. See Washington Tawanda Zindoga ‘*Piercing of the Corporate Veil in terms of Gore: Section 20(9) of the New Companies Act 71 of 2008*’ (unpublished

b) Minimalist and Maximalist

In light of expressive policy change and in comparison to English courts, South African courts have noticeably adopted a liberal approach to piercing the veil.⁶⁸⁵ Cameron JA provided the following in regard to the comparison:

In contrast with the United Kingdom, where it seems the equivalent provisions have in recent years “been very rarely used” to fasten directors with personal liability, the jurisprudence of this Court evidences claimants’ spirited reliance on the provision. Though courts will never “lightly disregard” a corporation’s separate identity, nor find recklessness, such conclusions when merited can only help in keeping corporate governance true.⁶⁸⁶

Every state has their own unique legal system and consequently piercing the veil is applied differently depending on the jurisdiction. In order to measure how it is applied in various jurisdictions, it must be placed along a spectrum.⁶⁸⁷ This spectrum gives credence to the amount of veil piercing that is allowed by the legislature and judiciary.⁶⁸⁸ Hence, at either end of the spectrum lies respectively what is called the *minimalist* and *maximalist* approaches.⁶⁸⁹ The minimalist approach is rigid in nature and occurs rarely; the maximalist approach is wide in nature and occurs every so often.⁶⁹⁰ By using the English system (*Prest*) as a guide, it will be shown how the United Kingdom standpoint on piercing the veil is greatly at the minimalist end of the spectrum; whereas South Africa is fairly at the maximalist end of the spectrum.⁶⁹¹

i) Attitudes and tests: United Kingdom

Under the current environment, company law in the United Kingdom enjoys no statutory footing, and cases of piercing the veil have been limited to matters that solely constitute the evasion principle.⁶⁹² Not only has criticism of piercing the veil remained constant throughout English legal history, but its existence too.⁶⁹³ The law (to date) relating to piercing the veil is ‘unsatisfactory and confused,’ and as a consequence, it has never ‘been invoked properly and successfully’.⁶⁹⁴ Piercing the veil is understood as a ‘supposed’ remedy which is

LLM thesis, University of Cape Town, 2015) 31-37.

⁶⁸⁵ *Gore* supra note 3 para 27.

⁶⁸⁶ *Ebrahim* supra note 18 para 22.

⁶⁸⁷ Lady Arden op cit note 61 at 4.

⁶⁸⁸ *Ibid.* When evaluating a legal system, its attitude towards piercing the veil is a great indicator of its acceptance. It does not matter whether it is in common law, statute, contract or precedent.

⁶⁸⁹ *Ibid.*

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid* 4 & 7.

⁶⁹² *Prest* supra note 7 para 28 & 35 read with *Antonio Gramsci* supra 570 para 66.

⁶⁹³ *Prest* supra note 7 para 16, 27, 50, 65, 77 & 106-107.

⁶⁹⁴ *Ibid* para 64 & 79.

controversial and uncertain; it is obstructive.⁶⁹⁵ According to the United Kingdom, an unobstructive application would result in clearer laws which ‘reduce complications and costs’, because every time piercing is allegedly required, it would never seem to apply.⁶⁹⁶ Ultimately, it is impossible to ‘discern any coherent approach, applicable principles, or defined limitations’.⁶⁹⁷

Decisions on piercing the veil have existed on the assumption of doubt that it does not exist. It has rightfully and wrongfully been concluded that it did, and did not apply on the facts.⁶⁹⁸ It is observed that piercing the veil is ‘not a doctrine at all, in the sense of a coherent principle or rule of law....It is simply a label’.⁶⁹⁹ To be frank, in English Company law history, there is not a *single instance* whereby piercing the veil has been justified.⁷⁰⁰ Even where the application to pierce the veil has a strong case, courts seem unlikely to do so.⁷⁰¹ In the vast majority of cases, it has not transpired, and therefore many authorities are obiter.⁷⁰² Most cases in which the corporate veil is pierced, ‘could have been decided on other grounds’, and so, they were not piercing cases in the first place.⁷⁰³ *Gencor ACP* and *Trustor* are rare examples of cases which actually relied on piercing the veil.⁷⁰⁴ However, the dependency on piercing is deemed to be pointless and inappropriate.⁷⁰⁵

In regard to the newly formulated principles, concealment does not involve piercing the veil in any sense whatsoever.⁷⁰⁶ Cases such as *Gilford* and *Jones*, which are widely regarded as piercing the veil cases, apply ‘conventional legal principles to an arrangement which happens to include a company being interposed to disguise the true nature of that arrangement’.⁷⁰⁷ By implication, although it may seem that the particular facts at hand are worthy grounds to piercing the veil, it is far from truth.

⁶⁹⁵ Ibid para 79.

⁶⁹⁶ Ibid.

⁶⁹⁷ Ibid para 64.

⁶⁹⁸ Ibid para 64 & 74.

⁶⁹⁹ Ibid para 106.

⁷⁰⁰ Ibid para 64.

⁷⁰¹ Cheng op cit note 98 at 341.

⁷⁰² *Prest* supra note 7 para 27.

⁷⁰³ Ibid.

⁷⁰⁴ Ibid para 68.

⁷⁰⁵ Ibid para 31-3 & 68-74.

⁷⁰⁶ Ibid para 29, 30, 61 & 69-73. Simply, it involves disregarding the separate legal personality of a company for some legal purpose. It does not attribute liability (that otherwise would have been the company’s) to members.

⁷⁰⁷ Ibid para 61, 69-73 & 92. This arrangement is typically of agency. The solution of agency is wrong. See footnote 751 of this dissertation.

The only reason for a court to pierce the veil is if the company's separate legal personality is abused for some relevant wrongdoing.⁷⁰⁸ This serves to ensure that the 'law is not to be disarmed in the face of abuse'.⁷⁰⁹ The test identified to ascertain this relevant wrongdoing is 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.'⁷¹⁰

Even if the requirements for the test are met, a court still has the discretion (and purpose) to initiate piercing or not.⁷¹¹ As said, it is the *one and only* method in which courts are empowered to pierce the veil.⁷¹² The evasion principle is observed as a limited one; in the vast majority of cases in which it applies, it would be unnecessary to pierce the veil as a legal relationship would be revealed in its absence.⁷¹³ This principle is in relation with consistent authority and long-standing principles of legal policy.⁷¹⁴

In closing, because of the inadequacy and limited application of the concealment and evasion principles, piercing the veil has little to no standing the United Kingdom.

1. Criticisms: United Kingdom

Accordingly, in an attempt to redefine piercing the veil, I believe the highest court in the United Kingdom missed the mark.

First, regarding the evaluation of cases deemed to be concealment, the court adopted a restrictive approach, since they focused through on the outcome only.⁷¹⁵ Courts should not only examine the outcome only, but arrive at the findings of a holistic approach; taking into consideration the procedures at hand.⁷¹⁶ For it to be considered a piercing the veil case, the burden of liability should not solely fall on shareholders.⁷¹⁷ Must company law textbooks be rewritten worldwide to explain why many cases have been incorrectly classified?⁷¹⁸ It

⁷⁰⁸ Ibid para 27.

⁷⁰⁹ Ibid.

⁷¹⁰ Ibid para 35.

⁷¹¹ *Prest* supra note 7 para 35. Lord Sumption provided 'the court *may* then pierce the corporate veil'[emphasis added]; and also see Mayson, French & Ryan op cit note 92 at 164-166. A court must consider all relevant matters.

⁷¹² *Prest* supra note 7 para 35. 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'.

⁷¹³ Ibid.

⁷¹⁴ Ibid.

⁷¹⁵ Mujih op cit note 93 at 42.

⁷¹⁶ Ibid.

⁷¹⁷ Ibid.

⁷¹⁸ Ibid.

therefore exposes the issue of English courts in failing to distinguish between forward veil piercing and backward veil piercing.⁷¹⁹ To explain, forward veil piercing would attribute the liability that would otherwise be the company's, to one party, namely the shareholders (and other members); it is piercing the veil in the 'traditional' sense. Backward veil piercing, also known as 'reverse' veil piercing, is the reverse of traditional veil piercing. It is when the debt of a shareholder is imputed onto the company. Conversely, reverse veil piercing occurs when a company is held liable for the debt of an individual. In fact, there are two types of backward veil piercing, *insider* and *outsider* reverse piercing:

One type might be called insider reverse veil piercing, in which a shareholder seeks to disregard the corporate entity.

...

The other is so-called outsider reverse piercing, in which a personal creditor of the shareholder seeks to disregard the corporation's separate legal existence to reach assets of the corporation to satisfy its claim.⁷²⁰

The difference is that in regular, 'forward' veil piercing, a creditor of the company is typically attempting to hold a shareholder personally liable for debts of the company, whereas in reverse piercing, a creditor of the shareholder is typically trying to hold the corporation liable for debts of the shareholder.⁷²¹

The case of *Gilford* denotes backward veil piercing. Backward veil piercing is not adequately recognised because piercing the veil was developed in, and perhaps for forward veil piercing cases.⁷²² The Supreme Court regrettably failed to recognise backward veil piercing because it does not suit the status quo, agenda and progression of piercing the veil throughout the years.

Secondly, whilst it can be celebrated that instances of piercing the veil have been 'limited,' the evasion principle is overoptimistic, problematic and must be approached with utmost caution. On one hand, the majority of the bench was unwilling to accept whether the evasion

⁷¹⁹ Ibid. *Gilford* is not considered a suitable case of piercing the veil because the injunction was granted against both Mr. Horne, and his company (backward veil piercing).

⁷²⁰ Professor Stephen Bainbridge 'Being precise about the two kinds of reverse veil piercing' 13 August 2017 available at <https://www.professorbainbridge.com/professorbainbridgecom/2017/08/being-precise-about-the-two-kinds-of-reverse-veil-piercing.html>, accessed on 27 of January 2019.

⁷²¹ Witnesseth 'Reverse Piercing' available at <https://witnesseth.typepad.com/blog/reverse-piercing.html>, accessed on the 27 of January 2019.

⁷²² Mujih op cit note 93 at 42.

principle was an exhaustive statement of piercing the veil.⁷²³ They opted to rather speak on *why* piercing the veil is exceptional and rare in nature.⁷²⁴ Disappointingly, they provided inadequate guidance as to what constitutes as ‘exceptional and rare’. Consequently, it damages the clarity of not only piercing the veil, but the evasion and concealment principles formulated.⁷²⁵ Lord Hale was the *only* member of the bench who provided any insight. She suggested that piercing the veil is exceptional and rare when ‘individuals who operate limited companies...take *unconscionable advantage* of the people with whom they do business’.⁷²⁶ What is meant by an ‘unconscionable advantage’ is difficult to determine, and regrettably, no guidance was given once again. Although persuasive, it is purely speculation at this point and it needs more clarity.⁷²⁷ In conclusion, the view of the majority was a clear example of the ‘never say never’ attitude.⁷²⁸

On the other hand, the minority had no qualms in viewing the evasion principle as an exhaustive statement of piercing the veil.⁷²⁹ All cases can be drawn into two separate principles.⁷³⁰ Such principles are observed as theoretically clear, limited and do not ‘fall foul of at least most of the strictures which have been made...’⁷³¹ However, such views are naïve and fall short from the realities. The audacity of the minority, to pigeon-hole an abundance of judicial precedent, discretion and research into two distinct categories was hasty and dangerous; particularly considering that the outcome of such categories (past and present) have been unpredictable.⁷³² It is still relatively unclear when the evasion principle is relevant. The law is constantly evolving and possible future situations of piercing the veil cannot be rendered redundant before it has even started.⁷³³ It is telling that Lord Neuberger was the *only* member of the bench to approve Lord Sumption’s test.⁷³⁴

⁷²³ *Prest* supra note 7 para 92, 100, 103 & 106; and Lady Arden op cit note 61 at 10-11.

⁷²⁴ *Prest* supra note 7 para 92, 98 & 103.

⁷²⁵ Adam Liew ‘Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads Us Nowhere’ (2014) 5 *King’s Student Law Review* 67 at 78.

⁷²⁶ *Prest* supra note 7 para 92.

⁷²⁷ Liew op cit note 725 at 78- 81. Read for a case law discussion on the meaning of *unconscionable advantage*.

⁷²⁸ Lady Arden op cit note 61 at 12.

⁷²⁹ *Prest* supra note 7 para 28, 35, 60 & 81.

⁷³⁰ *Ibid* para 28, 35, 60 & 81.

⁷³¹ *Ibid* para 82.

⁷³² *Ibid* para 100 & 103.

⁷³³ *Ibid*.

⁷³⁴ *Ibid* para 60.

To sum up, the view of the minority clearly demonstrates a view of the minimalist end of the spectrum.⁷³⁵ In disparity, the view of the majority was nearer the middle of the spectrum.⁷³⁶ Eventually, the conflict of judicial sentiment between the majority and minority has left the United Kingdom nowhere.⁷³⁷ In the same fold, the conflict between introducing unyielding certainty, and refusal to accept foreclosure, has resulted in the immobilization of company law.⁷³⁸ By simply re-labelling ‘façade’ and ‘sham’ cases as ‘evasion’ and ‘concealment’ situations does not mean it has limited the instances of piercing the veil at all.

Thirdly, since *Prest*, a debate lingers about whether the law relating to piercing the veil is somewhat clarified. The academic community have not hid away from criticism and it is not easy to predict the general state of law after *Prest*.⁷³⁹ The court missed the opportunity to answer several unresolved questions.⁷⁴⁰ In criticism, the court had two options, either piercing the veil should have been clarified, or it should have been abandoned, and neither transpired.⁷⁴¹ In paradox, intense criticism of piercing the veil occurred, yet its existence was confirmed. This is staggering bearing in mind that the court came close to abandoning piercing the veil in its entirety.⁷⁴² This sudden switch in sentiment occurred on the basis that piercing the veil exists in other common law jurisdictions, and is a valuable legal remedy where no other principle is available.⁷⁴³ How can that be the case when earlier in the judgement, it was provided that there were no instances where it was invoked ‘properly and successfully,’ and alternative remedies were not sufficient?⁷⁴⁴ This state of limbo highlights insecurities and confusion. Development of the law through classical common law techniques is not easy, and the court failed to recognise and apply that.⁷⁴⁵ In my perspective, these clear and obvious contradictions exacerbate the sense of cluelessness regarding piercing the veil.

Lastly, this sense of cluelessness has trickled into subsequent case law. English courts are divided about whether to apply the principles of evasion or concealment, or nothing at all; the

⁷³⁵ Lady Arden op cit note 61 at 11.

⁷³⁶ Ibid at 12.

⁷³⁷ Liew op cit note 725 at 81.

⁷³⁸ Ibid.

⁷³⁹ Mujih op cit note 93 at 47.

⁷⁴⁰ Liew op cit note 725 at 82. For example, a directors’ apparent ability to walk away from any responsibility for highly questionable activity.

⁷⁴¹ Mujih op cit note 93 at 47.

⁷⁴² *Prest* supra note 7 para 17, 64, 74, 79 & 80.

⁷⁴³ Ibid para 80.

⁷⁴⁴ Ibid para 62 & 64.

⁷⁴⁵ *Antonio Gramsci Shipping Corporation and Others v Aivars Lembergs* [2013] EWCA Civ 730 para 66.

distinction between the two is blurred because they produce similar outcomes.⁷⁴⁶ The formulation of either principle is unclear, and for that reason, it is damaging to the Supreme Court.⁷⁴⁷ It is not possible to classify all cases neatly into either concealment or evasion'.⁷⁴⁸ Absent a principle, 'further development of the law will be difficult for the courts because development of common law and equity is incremental and often by analogical reasoning'.⁷⁴⁹ That it is why it has proven to be difficult to determine the relevancy of the evasion principle. Even within the context of concealment, subsequent cases involving an 'alter ego,' or the 'directing mind' justification, have been inconsistent and contradictory to high authority and principles of law.⁷⁵⁰ Mere control of a company does not mean that its legal personality is absent. Opposing *Salomon*, it is incorrect to view agency as an appropriate legal mechanism for wrongdoings committed against a company's legal personality. The lasting undesirable impact would be viewing all one-man companies as agents of its controller(s).⁷⁵¹

In conclusion, the lack of clarity on the distinction between evasion and concealment, and hence, between piercing and lifting the veil, has caused a ripple effect whereby piercing the veil has been exposed to further judicial misunderstanding, inconsistencies and challenges.⁷⁵² Little transparency was achieved, and I am of the view that in trying to limit piercing as far as possible, the Supreme Court failed to achieve (future) consistency. Ironically, the Supreme Court placed piercing in familiar uncertain territory and ambiguity. The Supreme Court is mindful that piercing has a place and time in law, but their stubbornness in the face of *Salomon* backfired.⁷⁵³ English courts hold *Salomon* to an irrationally high standard.

ii) Attitudes and tests: South Africa

Unlike the United Kingdom, and under the current environment, company law in South Africa enjoys a statutory footing which is supplemented by the common law. Too, cases of

⁷⁴⁶ *Prest* supra note 7 para 28 & 103. Read Lord Clarke's submission; *R v Sale* [2013] EWCA Crim 1306; [2014] 1 WLR 663 para 22, 34, 39-43. The case represents a situation where neither concealment or evasion applied. Still, the concealment principle was applied incorrectly. A further example of confusion between the application of concealment and evasion is found in *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 (Ch) para 117-18; and Brenda Hannigan 'Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company' (2013) 50 *Irish Jurist* 11 at 35-39. Read for criticism of *Prest* and *Sale*.

⁷⁴⁷ *Prest* supra note 7 para 92.

⁷⁴⁸ *Ibid*.

⁷⁴⁹ *Aivars Lembergs* supra note 745 para 66; and *Prest* supra note 7 para 92.

⁷⁵⁰ *Adams* supra note 5 at 547-549; and *Prest* supra note 7 para 92.

⁷⁵¹ Mayson, French & Ryan op cit note 92 at 161-162; and the notion that control of a one-man company renders it as an agent to its controller is still vague. See *Airbus Operations Ltd v Withey* [2014] EWHC 1126 (QB), *Sale* supra note 746 para 22, 34, 39-43, *Pennyfeathers* supra note 746, *Clegg v Pache* [2017] EWCA Civ 256 para 17 and *Hyde v R* [2014] EWCA Crim 713.

⁷⁵² Hannigan op cit note 746 at 35-37 & 39; and Upadhyay op cit note 629 at 137-138.

⁷⁵³ *Prest* supra note 7 para 80.

piercing the veil have been limited to matters that constitute an unconscionable abuse of the separate legal personality.⁷⁵⁴

South African law has acknowledged the vast amount of criticism and confusion surrounding piercing the veil.⁷⁵⁵ Although initially adopting the conservative approaches of the United Kingdom, instead of attempting to disregard piercing the veil in its entirety, legal developments of the 1980s uncharacteristically laid the foundations for prosperity.⁷⁵⁶ The 1980s signified the first time in which a wide-ranging analysis of piercing the veil occurred.⁷⁵⁷ It was also the first time in which a court questioned what piercing the veil means and entails.⁷⁵⁸ On analysis of the court, piercing the veil emerged triumphant.⁷⁵⁹ This period marked the distinction between piercing the veil in the narrow and wide sense; with the latter being mirrored in the sustained provision of section 20(9) of the Act 71 of 2008.⁷⁶⁰ In South Africa, general academic analysis ‘appears to be strongly in favour’ of piercing the veil.⁷⁶¹ It is regarded as a remedy that will be afforded in suitable or appropriate cases.

Accordingly, section 20(9) of the Act 71 of 2008 permits a court to disregard the separate legal personality of a company, and pierce the corporate veil in instances of ‘an unconscionable abuse of the juristic personality of the company as a separate entity’.⁷⁶² Section 20(9) ‘lies somewhere between the middle and the maximalist end of the spectrum; that is, the [opposite] end of the spectrum from that of the recent [United Kingdom] jurisprudence’.⁷⁶³ This conclusion has been reached for the following reasons.

First, the language provided in section 20(9) has undoubtedly been ‘cast in very wide terms,’ which is indicative of the appreciation by the legislature to apply the provision in ‘widely varying circumstances’.⁷⁶⁴

⁷⁵⁴ Section 20(9) of the Act 71 of 2008 read with *Gore* supra note 3 para 34.

⁷⁵⁵ *Gore* supra note 3 para 19-21.

⁷⁵⁶ *Ibid* para 27.

⁷⁵⁷ *Botha* supra note 219 at 525E-F.

⁷⁵⁸ *Ibid* at 521-523.

⁷⁵⁹ Larkin op cit note 116 at 279.

⁷⁶⁰ *Botha* supra note 219 at 521-523; and although section 65 of the Act 69 of 1984 can be commended for providing procedural advantages, greater certainty and more visibility, it is still vague and restrictive. See Larkin op cit note 116 at 280, particularly footnote 20 & 21.

⁷⁶¹ Larkin op cit note 116 at 281.

⁷⁶² Section 20(9) of the Act 71 of 2008.

⁷⁶³ Lady Arden op cit note 61 at 14.

⁷⁶⁴ *Gore* supra note 3 para 32.

Section 20(9) can be invoked by an interested person, or *mero motu*, ‘in any proceedings in which a company is involved’.⁷⁶⁵ A court can therefore invoke section 20(9) unilaterally, even where the ‘applicant or plaintiff in the matter before it has not requested the court to do so’.⁷⁶⁶ On the face of it, there is a clear intention from the outset of the provision to provide a wide set of powers to the courts.

When there is an unconscionable abuse of the juristic personality, they are three instances in which section 20(9) can be invoked, they are namely: (1) on the incorporation of the company; (2) as a result of any use of the company as a legal person; or (3) as a result of any act by, or on behalf of the company.⁷⁶⁷ Therefore, an instance can include situations where a company was initially incorporated for a legitimate purpose, but thereafter was misused; which is in harmony with the position of common law.⁷⁶⁸ A court still has the discretion of whether to pierce or not, despite the requirements of instance being satisfied.⁷⁶⁹

In terms of section 20(9)(a), the order of the court is fairly straightforward; but the order in section 20(9)(b) empowers the courts with wide discretion it considers reasonable.⁷⁷⁰ Section 20(9)(b) will always have the effect of fixing the right, obligation or liability of the company somewhere else.⁷⁷¹ This illustrates how courts are offered ‘the widest of powers to grant consequential relief’.⁷⁷²

Next, relief regarding section 20(9) may be granted on application by any ‘interested person’.⁷⁷³ An interested person is someone with direct and genuine interest in the matter; it is not remote, abstract, academic or hypothetical.⁷⁷⁴ In actual fact, it ought to be limited to financial interest.⁷⁷⁵ However, it is debatable whether section 20(9) intends on extending the scope of an interested person wider than section 65 of the Act 69 of 1984, where ‘financial or

⁷⁶⁵ Section 20(9) of the Act 71 of 2008; and *Gore* supra note 3 para 35.

⁷⁶⁶ R Cassim op cit note 21 at 309.

⁷⁶⁷ Section 20(9) of the Act 71 of 2008.

⁷⁶⁸ *Cape Pacific* supra note 42 at 32-3. If a company, ‘otherwise legitimately established and operated, is misused in a particular instance...there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question’.

⁷⁶⁹ Section 20(9) of the Act 71 of 2008. The section provides the ‘court *may*’[emphasis added].

⁷⁷⁰ R Cassim op cit 21 at 311. A court has no power to intervene under Section 20(9)(a) where the unconscionable abuse is not in respect of any such right, obligation or liability.

⁷⁷¹ *Gore* supra note 3 para 34.

⁷⁷² Ibid.

⁷⁷³ Ibid para 35.

⁷⁷⁴ *Jacobs en ‘n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 553-534; Lady Arden op cit note 61 at 15. Essentially, an interested person must be someone who stands to gain by grant of relief. Mere ‘busybodies are ruled out’.

⁷⁷⁵ R Cassim op cit note 21 at 316.

monetary interest' is required.⁷⁷⁶ Conclusively, the circumstances of each case will ultimately decide who is an interested person, considering the impact of the Constitution.⁷⁷⁷ Hence, courts will have the discretion to determine if someone is an interested person or not; this should be more often than usual.

As stated before, the term 'unconscionable abuse' is not defined in the Act 71 of 2008.⁷⁷⁸ Further, no guidance (in statute) has been given with regard to the circumstances that constitute an unconscionable abuse of the juristic personality of a company.⁷⁷⁹ This means that its operation depends on the courts finding of unconscionability, and not fraud or deception.⁷⁸⁰ The courts finding is that 'unconscionable abuse' is 'conduct in relation to the formation and use of companies diverse enough to cover all the descriptive terms like "sham", "device", "stratagem"...[and] conceivably much more'.⁷⁸¹ Thus, it can include, but is not limited to, the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose, or where the company is used as a device or façade to conceal the true facts.⁷⁸² For that reason, it allows the courts to exercise discretion under the scope of flexibility. The remedy can be provided 'whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced'.⁷⁸³ Not only can South African courts adopt a very wide interpretation of 'unconscionable abuse,' but they can set a lower standard of abuse than required for close corporations with respect to section 65 of the Act 69 of 1984.⁷⁸⁴ As mentioned several times in this dissertation, the language of section 65 is worded very similar to section 20(9) of the Act 71 of 2008. The only difference is section 65 deems a close corporation not to be a juristic person in instances of 'gross abuse' of the juristic personality of the corporation as a separate entity.⁷⁸⁵ The words 'gross abuse' infer a 'more extreme connotation' than 'unconscionable abuse'.⁷⁸⁶ The implication is 'unconscionable abuse' is a lesser form of abuse than 'gross abuse'.⁷⁸⁷ Courts can therefore pierce the veil in regard to proving a lower standard of abuse. It can be questioned why the court opted for the term 'unconscionable',

⁷⁷⁶ Ibid at 312-16.

⁷⁷⁷ *Jacobs* supra note 631; and section 38 of the Constitution.

⁷⁷⁸ F Cassim op cit note 77 at 71.

⁷⁷⁹ R Cassim op cit note 21 at 316.

⁷⁸⁰ *Van Zyle N.O. and Another v Kaye N.O. and Others* 2014 (4) SA 452 (WCC) para 31-2.

⁷⁸¹ *Gore* supra note 3 para 34.

⁷⁸² *City Capital* supra note 69 para 29.

⁷⁸³ *Gore* supra note 3 para 34.

⁷⁸⁴ R Cassim op cit note 21 at 318.

⁷⁸⁵ Section 65 of the Act 69 of 1984.

⁷⁸⁶ *Gore* supra note 3 para 34.

⁷⁸⁷ Ibid.

bearing in mind that companies and close corporations are essentially the same.⁷⁸⁸ However, I argue that considering the wide interpretation of section 20(9), ‘just about any [form of] abuse of the juristic personality of a company would be unconscionable’.⁷⁸⁹ In conclusion, because of the broad interpretation of ‘unconscionable abuse’, coupled with the view that it encompasses all descriptive terms, South African courts are prepared to pierce the corporate veil in a manner that is considerably extended compared to common law and ultimately, the United Kingdom.⁷⁹⁰

Secondly, the United Kingdom Supreme Court has remarkably acknowledged that adopting a statutory provision could determine different conclusions on the question of whether, and in what circumstances, a court could pierce the corporate veil.⁷⁹¹ It has been confirmed that section 20(9) is a direct manifestation of such a provision.⁷⁹² Although it is difficult to say if section 20(9) would have any influence in English law, ‘the width of the provision appears to broaden the bases upon which the courts in [South Africa], and certainly those in England, have hitherto been prepared to grant relief that entails disregarding corporate personality’.⁷⁹³ The reason being is South African law adopts an impartiality approach (similar to that of the United States). I consider it appropriate to describe it as:

An equitable remedy in the ordinary, rather than technical, sense of the term; one that lends itself to a *flexible* approach to *fairly* and *justly* address the consequences of an unconscionable abuse...in given circumstances.⁷⁹⁴ [Emphasis added]

In conclusion, the United Kingdom Supreme Court is mindful of the potential impact, benefit and clarity of a statutory position. It is indicative of the ‘don’t knock it until you try it’ point of view.

Thirdly, since the intention of section 20(9) is supplemental rather than substitutive, the principles developed at common law serve as a useful guideline in applying section 20(9).⁷⁹⁵ Considering the courts extensive powers to pierce the veil under section 20(9), one particular

⁷⁸⁸ R Cassim op cit note 21 at 318.

⁷⁸⁹ R Cassim op cit note 21 at 318; and *Van Zyle* supra note 780 para 22. The statutory remedy of 20(9) will generally be used when the separate legal personality of a company is used in a dishonest or unconscionable manner to evade a liability or avoid an obligation.

⁷⁹⁰ R Cassim op cit note 21 at 319.

⁷⁹¹ *Gore* supra note 3 para 24. Citing *VTB* supra note 14 para 130.

⁷⁹² *Ibid.*

⁷⁹³ *Gore* supra note 3 para 33.

⁷⁹⁴ *Van Zyle* supra note 780 para 22.

⁷⁹⁵ *Gore* supra note 3 para 34; and R Cassim op cit 21 at 323.

common law principle has managed to ensure that the application of the provision is not disproportionate and inappropriate.⁷⁹⁶ Accordingly, courts must *balance* between the policy considerations to preserve a company's separate legal personality, against policy considerations which arise in favour of piercing the corporate veil.⁷⁹⁷ The balancing test acts as a check and balance procedure; it mitigates any danger of South African courts to disregard the corporate veil too lightly; thus, it does not undermine or negate the policies, consequences and principles that underpin separate legal personality.⁷⁹⁸ The balancing test has proven to be reliable as courts take careful consideration and exercise their discretion cautiously and wisely.⁷⁹⁹

When analysing the assessment of proportionality, South Africa adopts a dissimilar approach to the United Kingdom. Although the United Kingdom achieves an element of balance, it is heavily skewed in preserving the separate legal personality of a company.⁸⁰⁰ This in turn creates an overdependence on the policies of separate legal personality. Ironically, criticisms of piercing are recognized when it is applied too lightly, but not when it is applied too rigidly. The same weight of scrutiny is not quite the same.

Fourthly, it is well documented that piercing the corporate veil is bewildering and uncertain.⁸⁰¹ This is acknowledged by both the United Kingdom and South Africa.⁸⁰² By assessing case law post *Gore*, it can be concluded that South African courts have aimed to find clarity and simplicity to the matter.⁸⁰³ South African courts are 'taking heed of the criticism of the use of metaphors and descriptive terms,' and accordingly determined that 'unconscionable abuse' encompasses all previous, present and future epithets.⁸⁰⁴ Further, they are also cautious of morality triumphing over legal principle.⁸⁰⁵ Too, the rejection of morality

⁷⁹⁶ R Cassim op cit note 21 at 308.

⁷⁹⁷ *Glazer* supra note 266 at 757 read with *Cape Pacific* supra note 42 at 31; and R Cassim op cit note 21 at 324. A court must take into consideration the arguments in favour of maintaining the separate legal personality of a company, against the moral and economic effects of tolerating an unconscionable abuse of the juristic personality of a company.

⁷⁹⁸ *Cape Pacific* supra note 42 at 31; section 19(1) of the Act 71 of 2008; and see *Dadoo* supra note 36 at 550.

⁷⁹⁹ *Van Zyle* supra note 780 para 33. Binns-Ward J provided reasons as to why the applicants failed to show that the company was used in a manner that constituted an unconscionable abuse of its corporate personality; and *Delatoy Investments* supra note 341 para 63.

⁸⁰⁰ *Prest* supra note 7 para 8.

⁸⁰¹ See 'commentary on piercing the corporate veil' in Chapter 2 of this dissertation.

⁸⁰² *Prest* supra note 7 para 16, 64 & 79; *Cape Pacific* supra note 42 at 31; and *Gore* supra note 3 para 19-21.

⁸⁰³ *Van Zyle* supra note 780 para 31-34; and *City Capital* supra note 69 para 29.

⁸⁰⁴ *Gore* supra note 3 para 34; and R Cassim op cit note 21 at 333-334.

⁸⁰⁵ *Ibid.*

and use of metaphors is reinforced by the United Kingdom.⁸⁰⁶ Yet, post *Prest* — case law involving piercing the corporate veil has been full of confusion, inconsistency and debate — arguments against the distinction between concealment and evasion have not been heard, and arguments for the distinction have been ‘essentially premised on biased and unchallenged information, evidence and opinion’.⁸⁰⁷ This should likely continue. At what long term cost to piercing the veil should limiting it apply? In conclusion, I agree with Lord Clarke, that detailed submissions must be heard before the court to apply the distinction correctly.⁸⁰⁸ This should prevent any uncertainty and confusion.

A fifth point, the approach to accepting policy considerations is different between South Africa and the United Kingdom. English courts tend to have reservations of policy considerations.⁸⁰⁹ However, this is not ‘say that the English judges never consider policy arguments’.⁸¹⁰ In contrast, the South African judiciary take heed to policy considerations.⁸¹¹ Since South African courts are receptive to policy arguments, it ‘allows them to show heightened sensitivity to the factual circumstances and legal considerations of each case’.⁸¹² In order to achieve justice, these circumstances are appropriate.

Lastly, when weighing up the fundamental principle of justice, South African courts adopt an open-ended standard.⁸¹³ This came to fruition because South African courts generally analyse cases concerning piercing the veil on a case by case basis.⁸¹⁴ In contrast, the English judiciary tend to agree that ‘justice is but one of many considerations in a corporate veil case’.⁸¹⁵ As a result, tailored approaches to cases involving piercing the veil are met with less urgency.⁸¹⁶

iii) Remedy of last resort?

In terms of section 20(9) of the Act 71 of 2008, there is no hierarchy regarding piercing the veil.⁸¹⁷ Unlike the United Kingdom, it will not be necessary to show that all other avenues

⁸⁰⁶ *Prest* supra note 7 para 78; and *VTB* supra note 14 para 124.

⁸⁰⁷ Kim-Leigh op cit note 107 at 27; and *Prest* supra note 7 para 103.

⁸⁰⁸ *Prest* supra note 7 para 103.

⁸⁰⁹ Cheng op cit note 98 at 351-352. As evidenced by numerous case law examples.

⁸¹⁰ *Ibid* at 352.

⁸¹¹ *Cape Pacific* supra note 42 at 31, 35, 38-9.

⁸¹² Cheng op cit note 98 at 352-353.

⁸¹³ *Ibid* at 353.

⁸¹⁴ *Ibid*.

⁸¹⁵ *Ibid*.

⁸¹⁶ *Ibid* 353-357.

⁸¹⁷ *Lady Arden* op cit note 61 at 15.

have been exhausted before pinning liability on the accused.⁸¹⁸ It is consistent with the legal principle that, where a person has more than one remedy available, the law will allow that person to choose which one to pursue and not make that choice for them — there no reason why piercing of the corporate veil should necessarily be precluded if another remedy exists.⁸¹⁹

In the United Kingdom, a significant finding suggests that piercing the corporate veil ought to be a remedy of last resort.⁸²⁰ It is remarked how ‘if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course’.⁸²¹ As a result, a conservative approach is adopted and piercing the corporate veil will occur when ‘all other, more conventional remedies have proved to be of no assistance’.⁸²² In view of that, and at the expense of piercing the veil itself, the availability of alternative legal remedies comes to the forefront. This development is owed to a culmination of criticisms (of existence and coherency) and opinions that other legal remedies can provide satisfactory relief.⁸²³

Alternative remedies exist outside company law, while piercing the veil on other grounds occurs within company law.⁸²⁴ Where piercing the veil is ‘sought to convert the personal liability of the owner or controller into a liability of the company,’ it is more appropriate to rely upon the concepts of agency and the ‘directing mind’.⁸²⁵ Too, in the alternative, other remedies have proved adequate. These are found in ‘a statutory provision, or from joint liability in tort, or from the law of unjust enrichment, or from principles of equity and the law of trusts’.⁸²⁶

In actual fact, it has been established that trust law can be an adequate remedy in highly specific circumstances.⁸²⁷ A constructive trust can be an equitable remedy to the benefit of a party deprived of rights due to unjust inference.⁸²⁸ Advantages consist of not being in

⁸¹⁸ Ibid.

⁸¹⁹ *Cape Pacific* supra note 42 at 37-8.

⁸²⁰ *Prest* supra note 7 para 35, 62 & 103.

⁸²¹ Ibid para 35.

⁸²² Ibid para 62 & 103.

⁸²³ Ibid para 64-5, 74, 79 & 92. Criticisms of piercing the veil are best expressed by Lord Neuberger.

⁸²⁴ Mujih op cit note 93 at 47.

⁸²⁵ *Prest* supra note 7 para 92.

⁸²⁶ Ibid para 106.

⁸²⁷ *Prest* supra note 7 para 47-51; and Charlotte Kouo ‘Post-Prest Corporate Group Veil Piercing: Alternative Avenues to Justice’ (2016) 4 *Legal Issues Journal* 65 at 71. Trust analysis in company law is highly specific.

⁸²⁸ Kouo op cit note 827 at 71. A trust solution applies when ‘the device company is regarded as a trustee

contradiction to *Salomon*, and providing clarity when a particular set of facts presents itself.⁸²⁹ Therefore, a trust solution can present a practical technique in solving cases involving the principles of evasion, and in particular instances, of concealment.⁸³⁰

Another alternative remedy, which has developed over time, can originate in tort (delict) law. Despite initial scepticism in its application, when a duty of care is owed by a holding company to its subsidiary in relation to health and safety, a tort solution will usually apply.⁸³¹ In this scenario, the court does not pierce the corporate veil; however, the outcome has an equivalent effect in that it imposes liability upon a parent company despite the fact that the parent company is a legal entity separate from that of its subsidiary.⁸³² Nonetheless, it is stressed that the duty of care is not automatic and is only relevant in specific circumstances.⁸³³

In contrast, South African law adopts the attitude that piercing the veil is *not* a remedy of last resort.⁸³⁴ Before this recent affirmation, there existed much uncertainty.

In common law, it was observed how the availability to pierce the corporate veil will at all times be present, even if other remedies exist.⁸³⁵ The existence of another remedy ‘should not in principle serve as an absolute bar to a court granting consequential relief’.⁸³⁶ It is noted that ‘the existence of another remedy, or the failure to pursue one that was available, may be a relevant factor when policy considerations come into play, but it cannot be of overriding importance’.⁸³⁷ Despite these assertions, subsequently and surprisingly, judicial affirmations were in defiance of the ‘not last resort’ approach. Stricter approaches were adopted in this

for its controller, hence rendering the controller liable for misconducts committed in the device company’s name, while preserving the controller’s liability’.

⁸²⁹ Ibid at 72.

⁸³⁰ Ibid.

⁸³¹ *Caparo v Dickman* [1990] 2 AC 605; and *Thompson v The Renwick Group plc* [2014] EWCA Civ 635. Duty of care must be fair, just and reasonable.

⁸³² *Chandler v Cape plc* [2012] EWCA Civ 525. Accordingly, the matter has in effect been superseded by *Lungowe v Vedanta Resources plc* [2019] UKSC 20 para 49-51, 54,55-62 & 65, which held that a parent company could be liable for the actions of a subsidiary on ordinary principles of tort law. This decision in *Adams* has also been limited by the House of Lords decision in *Lubbe v Cape Plc* [2000] UKHL 41 and the ground-breaking decision in *Chandler*, holding that a direct duty may be owed in tort by a parent company to a person injured by a subsidiary.

⁸³³ Ibid para 67 & 80. It has limited application because of the changeable relationship between a parent company and its subsidiary. A duty of care applies when the parent company: (1) and the subsidiary company had similar businesses; (2) ought to have known the subsidiary’s work environment was unsafe and (3) ought to have foreseen that the subsidiary would rely on them for employee protection.

⁸³⁴ *Gore* supra note 3 para 34.

⁸³⁵ *Cape Pacific* supra note 42 at 37-8.

⁸³⁶ Ibid.

⁸³⁷ Ibid.

respect and it was stated that: ‘The very exceptional nature of the relief which the respondent seeks against the appellants requires, in the circumstances of the present case, that he should have no other remedy.’⁸³⁸

Similarly, it was also put forward that piercing the corporate veil must be used as a remedy of last resort. It was stated that:

I accept that “opening the curtains” or piercing the veil is rather a drastic remedy. For that reason alone it must be resorted to rather sparingly and indeed as the very *last resort in circumstances where justice will not otherwise be done between two litigants*. It cannot, for example, be resorted to as an alternative remedy if another remedy on the same facts can successfully be employed in order to administer justice between the parties.⁸³⁹ [Emphasis added]

Therefore, the question arises of whether the same common law principle is to be applied on section 20(9) of the Act 71 of 2008: that is, whether section 20(9) is to be applied only when all other, more conventional remedies, are of no assistance.⁸⁴⁰ *Gore* is ‘authority for the view that the answer to this question is in the negative’.⁸⁴¹ The ‘unqualified availability’ of the remedy was remarked by the court.⁸⁴² It was affirmed by that the notion of piercing the veil being regarded as exceptional, or drastic does not reflect the judicial philosophy of section 20(9).⁸⁴³ Previous judgements which have not been in favour of the ‘not last resort’ view have on occasion been ‘misunderstood to imply that piercing (or lifting) the veil should not be undertaken if the claimant has an alternative remedy’.⁸⁴⁴ Actually, they go no further than to state that, depending on the facts of a given case, the existence of an alternative remedy may be a relevant consideration.⁸⁴⁵ Conclusively, it was held that:

The newly introduced statutory provision affords a firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate, I think, to erode the foundation of the philosophy that piercing the corporate veil should be approached with an à priori diffidence. By expressly

838 *Hülse-Reutter* supra note 194 para 22-23.

839 *Amlin* supra note 120 para 23.

840 R Cassim op cit note 21 at 322.

841 Ibid.

842 Ibid.

843 *Gore* supra note 3 para 34.

844 Ibid.

845 R Cassim op cit note 21 at 321.

establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or “drastic”.⁸⁴⁶

Such interpretation of section 20(9) is confirmed as true and correct.⁸⁴⁷ In conclusion, section 20(9) is not a remedy of last resort. It will always be available, even when alternative remedies exist and it will not be granted in the absence thereof.⁸⁴⁸ This policy change represents a ‘new direction and a sharp shift’ in thinking; it empowers not only claimants but the courts when assessing the facts at hand.⁸⁴⁹ It also brings the position of section 20(9) ‘more into line with the dicta expressed by the appellate division in *Cape Pacific*,’ that piercing the corporate veil is not a remedy of last resort.⁸⁵⁰

In view of dissimilar approaches to whether piercing the veil is a remedy of last resort, the premise of the United Kingdom is problematic.⁸⁵¹ It is questionable how the majority of the Supreme Court arrived to the conclusion that a court only has the power to pierce the corporate veil when it is a remedy of last resort.⁸⁵² In his finding, Lord Sumption upheld the stance of Munby J in *Hashem*, stating that ‘if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course’.⁸⁵³ However, in doing so, Lord Sumption interpreted *Hashem* differently and acted contrary to *VTB*; where Lloyd LJ accepted the principle of piercing the corporate veil as set out by Munby J in *Hashem*.⁸⁵⁴ Lloyd LJ held that it ‘did not follow that piercing the veil would be available only if there is no other remedy available against the wrongdoers for the wrong they had committed’ — however, Lord Sumption and Lord Neuberger disagreed with Lloyd LJ’s holding in *VTB* in this regard.⁸⁵⁵ Accordingly, relying on *Hashem*, Lord Sumption rejected and departed from Lloyd LJ’s holding in *VTB*.⁸⁵⁶ This begs the question of whether *Hashem* ‘stands for the proposition that piercing the corporate veil is available only when there is no other remedy available’.⁸⁵⁷ Lord Sumption erred when relying

⁸⁴⁶ *Gore* supra note 3 para 34.

⁸⁴⁷ R Cassim op cit note 21 at 322.

⁸⁴⁸ *Gore* supra note 3 para 34.

⁸⁴⁹ R Cassim op cit note 21 at 322.

⁸⁵⁰ *Ibid*.

⁸⁵¹ Liew op cit note 725 at 75-77.

⁸⁵² HO May Kim ‘Piercing the corporate veil as a last resort’ (2014) 26 *Singapore Academy of Law Journal (SACLJ)* 249 at 251.

⁸⁵³ *Prest* supra note 7 para 35; and Liew op cit note 725 at 75. Author cites para 164 of *Hashem* supra note 54.

⁸⁵⁴ Kim op cit note 852 at 252.

⁸⁵⁵ Kim op cit note 852 at 252; *Prest* supra note 7 para 35 & 62; and *VTB* supra 14 para 79.

⁸⁵⁶ *Prest* supra note 7 para 35.

⁸⁵⁷ Kim op cit note 852 at 252.

on *Hashem*; it is contradictory and misguided reliance on case law, and justifications of the last resort were not explained properly, if at all.⁸⁵⁸ Lord Sumption simply focused on the limited application of piercing and how its mere existence stems from a controller-company relationship.⁸⁵⁹ Moreover, although a ‘public policy imperative’ justifies that piercing ought to be a last resort, it was not explained in great detail what this imperative is.⁸⁶⁰ Consequently, since Lord Sumption relied on *Hashem*, is the language used in *Hashem* of ‘last resort’?⁸⁶¹ It is asserted that the language used by *Hashem* is of *necessity* rather than of last resort.⁸⁶² The test of necessity does not require the remedy to be one of last resort.⁸⁶³ It is unlikely that Munby J in *Hashem* ‘intended to suggest that piercing the corporate veil is available only where there is no other remedy available...’⁸⁶⁴ Furthermore, as a whole, Munby J did ‘not support the suggestion that piercing the corporate veil is available only where all other remedies have proved to be of no assistance’.⁸⁶⁵ He recognised the importance of alternative remedies to piercing, but did ‘not go further to hold that as a result of the other available remedies, the remedy of piercing the corporate veil would be unavailable’.⁸⁶⁶ Indeed, due to lack of detail, Munby J did not intend on providing ground-breaking analysis on piercing being a remedy of last resort.⁸⁶⁷ He did not want to ‘conceive’ the idea of ‘last resort’ and was ‘solely concerned’ with the situations which would constitute piercing of the corporate veil.⁸⁶⁸

Despite policy imperatives, piercing the veil as remedy of last resort unduly limits the availability of the remedy.⁸⁶⁹ In criticism, although trust and tort solutions are credible alternative remedies, they only apply in limited circumstances. Therefore, they cannot be relied upon in any given scenario — they are *very* exceptional. As abovementioned, more

⁸⁵⁸ Ibid at 252-257.

⁸⁵⁹ Liew op cit note 725 at 75.

⁸⁶⁰ Ibid.

⁸⁶¹ Ibid at 76.

⁸⁶² Kim op cit note 852 at 252-253. Lord Sumption relied on *Hashem* to reject the standpoint in *VTB*. As a result of misinterpretation of the remarks in *Hashem*, the reliance by Lord Sumption is not appropriate. HO May Kim relied on several public law cases to support her proposition.

⁸⁶³ Ibid at 253. Piercing for one purpose does not mean that it will be applied for all purposes.

⁸⁶⁴ Ibid.

⁸⁶⁵ Ibid at 253 & 254. After considering all the scenarios where the corporate veil was, and was not pierced, he concluded that ‘all cases discussed were consistent with his analysis of the relevant principles of piercing the corporate veil’.

⁸⁶⁶ Ibid at 254.

⁸⁶⁷ Liew op cit note 725 at 76.

⁸⁶⁸ Ibid.

⁸⁶⁹ Kim op cit note 852 at 256; and Liew op cit note 725 at 77. Strong arguments in favour of piercing as a ‘last resort’ seem to rely on the findings of Warren J in *Dadourian Group International v Simms (Damages)* at 686. However, even Warren J’s findings don’t truly depend on piercing being a last resort.

conventional remedies are deemed more appropriate; but it is neither determined what a ‘more conventional’ entails nor what is the ‘basis of applying such a distinction to the available remedies’.⁸⁷⁰ In my view, the limited and challenging scope of alternative remedies needs further guidance, scope and application. The United Kingdom should perhaps consider whether alternative remedies to piercing the veil are adequate. If courts fail to prove so, it would be a travesty to anyone who wanted piercing the veil to become redundant. In closing, ‘the determination that “piercing” the corporate veil ought to exist as a remedy of last resort was reached on a questionable premise – a determination reached through a blind, staunch determination to introduce rigid but admittedly much-needed clarity’.⁸⁷¹

c) Conclusion

Undoubtedly, the judicial philosophy adopted in South Africa creates enormous advantages in comparison to the United Kingdom. It leaves room for further development, particularly considering the complexity of piercing.⁸⁷² When attempting to find clarity on piercing the corporate veil, resolving it by means of traditional common law concepts can be beneficial. Nonetheless, common law concepts have caused issues, rigidness and disparity in the United Kingdom. In South Africa, there can be no doubt as to the disposition regarding the existence of piercing the corporate veil; there exists a degree of certainty and visibility. South African law recognises that piercing the veil is ‘not always a perfect tool. ...but, where other rules fail to produce a fair result, it is a useful second best’.⁸⁷³

⁸⁷⁰ Kim op cit note 852 at 256.

⁸⁷¹ Liew op cit note 725 at 77.

⁸⁷² Lady Arden op cit note 61 at 15-6. Developments include, but are not limited to: drawing distinctions between different types of cases; developing a doctrine of enterprise liability; adopting different remedies for different creditors; and exploring the possibility of advancing it to meet new circumstances.

⁸⁷³ Ibid at 15.

VI CONCLUSION AND RECOMMENDATIONS

a) Introduction: Striking differences

As seen from the overall comparison, different approaches to piercing the veil are embraced by South Africa and the United Kingdom. This has been evidenced by the striking difference in weight on policy considerations. English courts put less weight on policy considerations while its counterpart has ‘demonstrated a greater propensity to take into account policy arguments’.⁸⁷⁴ In the United Kingdom, the principle is appropriately described as a limited one, and in South Africa, it is appropriately described as a flexible one.⁸⁷⁵ In *Prest and Gore*, it is no coincidence that these judicial affirmations occurred within the same year, with two polarizing views.

In light of this difference in judicial philosophy, the main focus of this chapter is to determine if South African law should adopt the approach of the United Kingdom.⁸⁷⁶ The proposed findings are in view of the contextual approach to interpretation, as suggested in section 5 (1) and (2) read with section 7 of the Act 71 of 2008.⁸⁷⁷

b) The way forward: How South Africa is in good standing

As discussed in this dissertation, courts in the United Kingdom are very reluctant to pierce the corporate veil. In fact, piercing the corporate veil ‘plays a small role in British company law’ and judicial conservatism will continue for the foreseeable future.⁸⁷⁸ This point of view has been consistent and set in stone since the beginning of *Wolfson*; inferring judicial support and justification from large sectors of the legal community.⁸⁷⁹ Such support is in existence because piercing the corporate veil is an exceptional and sensitive remedy. So, restricting it means ‘the importance of maintaining clarity and simplicity in this area of law’ is achieved.⁸⁸⁰ Further, unearthing an alternative to the central principle of limited liability will present a constant challenge, considering the esteem of *Salomon*.⁸⁸¹ Inferences can be concluded that unforeseen disadvantages will occur; it would lead to undesirable uncertainty

⁸⁷⁴ Cheng op cit note 98 at 352.

⁸⁷⁵ *Gore* supra note 3 para 34; and *Prest* supra note 7 para 35.

⁸⁷⁶ Section 5(2) of the Act 71 of 2008.

⁸⁷⁷ *Gore* supra note 3 para 32.

⁸⁷⁸ Cheng op cit note 98 at 340.

⁸⁷⁹ *Prest* supra note 7 para 20 & 67.

⁸⁸⁰ *Ibid* para 67.

⁸⁸¹ *Ibid* para 66.

and ‘encourages unnecessary litigation because it will not be known whether separate legal personality will be ignored in any particular case’.⁸⁸²

In the United Kingdom, vague and unrealistic arguments exist that courts are powerless, and only the legislature can affect change.⁸⁸³ Fundamentally, the rigidity of piercing the veil is solely blameable on the United Kingdom.⁸⁸⁴ Courts are empowered, and can indeed take the necessary steps towards implementing change in the judicial arena. This has been evidenced by Lord Denning’s comprehensive stance on piercing the veil.⁸⁸⁵ However, when judges have attempted to pierce the veil, their judgments have often been met with stern criticism.⁸⁸⁶ In the same breadth, their judgements have often been set aside at a later stage.⁸⁸⁷ In fact, the Supreme Court expressed, and I emphasise, that in British legal history, there *is not a single instance* whereby piercing the corporate veil has been invoked properly and successfully.⁸⁸⁸ Aligning with the essential principles of courts, these displeasures are done openly and transparently. Judges are undeniably swayed by fear and this has spiralled into conformity. It is questionable whether their reluctance to pierce the corporate veil is genuine.

There is no truthful explanation behind the reluctant approach.⁸⁸⁹ One can argue that the whole point of company law is to protect directors and shareholders through the corporate veil, and the United Kingdom has vehemently maintained that.⁸⁹⁰ On the other hand, if we inspect the fundamental principles of limited liability, it encourages and promotes trade and commerce — a fantastic privilege bestowed on participants in business.⁸⁹¹ Conversely, it cannot be tolerated that individuals abuse this privilege. If anybody does so, I believe the law should revoke this privilege as a remedial measure against misuses of the legal personality of a company.⁸⁹²

⁸⁸² Mayson, French & Ryan op cit note 92 at 171.

⁸⁸³ Biswas op cit note 57 at 10.

⁸⁸⁴ Ibid at 11.

⁸⁸⁵ *Littlewoods Mail Order Stores* supra note 123 at 1254. The ‘courts can and often do draw aside the Veil’.

⁸⁸⁶ *Prest* supra note 7 para 64, 68-74.

⁸⁸⁷ *Prest* supra note 7 para 29-34, 64 & 68-74; and *Wolfson* supra note 501. Lord Keith, commenting on Lord Denning’s (successful and reasonable) application of piercing the veil in *DHN Food* expressed:

I can see no grounds whatever, upon the facts found in the special case, for treating the company structure as a mere facade, nor do I consider that the D.H.N. Food Distributors case (supra) is, on a proper analysis, of assistance to the appellants’ argument.

⁸⁸⁸ *Prest* supra note 7 para 64.

⁸⁸⁹ Biswas op cit note 57 at 11.

⁸⁹⁰ Grier op cit note 593 at 279.

⁸⁹¹ Chapter 2.

⁸⁹² Biswas op cit note 57 at 11-2.

With a total of 1,300 sections and covering nearly 700 pages, and containing 16 schedules, the Act 2006 is 'the 'longest statute ever passed by the UK Parliament'.⁸⁹³ The English company law regime qualifies as the two most important in the common law community. Economically, it is intrinsic to the success of Europe and 'London continues to be a major financial center'; legally, 'English company law continues to influence the development of...a number of jurisdictions'.⁸⁹⁴ Still, there is not a single codification of piercing the corporate veil. Given the value of English company law, I agree that 'no one should support the [reluctant] approach of the United Kingdom'.⁸⁹⁵ Despite the intention of creating order in society, isn't law created to achieve justice? Justice is one of the founding principles of law, and adopting a rigid application hinders that. Ensuring 'justice is in the focal point of every legal system. ...in every case justice should be ensured'.⁸⁹⁶ It is argued that 'the court will use its power to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure...'.⁸⁹⁷ Meaning, the approach adopted by the United Kingdom is unreasonable and restrictive, but also surprising indeed.⁸⁹⁸ As it stands, the future of piercing the veil in the United Kingdom will 'hardly ever be relevant or sought' and in practice, 'the corporate veil can be expected to wither into obscurity'.⁸⁹⁹ Piercing the veil is well and truly alive, even if it is not well formulated.⁹⁰⁰ Regrettably, it echoes the sentiment that because disregarding of corporate the veil hardly ever occurs, it is hardly ever justified, which is untrue. The English judiciary have put faith in traditional common law concepts to solve new problems; it has failed to adapt.⁹⁰¹

In contrast, the South African judiciary have great regard to the principles of *Salomon*, but also understand that piercing the veil can bring just and equitable results in *particular* circumstances.⁹⁰² South African courts are not quick to criticise previous judgments, but are rather willing to provide knowledgeable insight.⁹⁰³ Bearing in mind the open-minded approach of the DTI policy paper, section 5(1) and (2) read with section 7 of the Act 71 of

⁸⁹³ Cassim op cit note 2 at 2.

⁸⁹⁴ Cheng op cit note 98 at 333.

⁸⁹⁵ Biswas op cit note 57 at 12.

⁸⁹⁶ Ibid.

⁸⁹⁷ Ibid.

⁸⁹⁸ Ibid.

⁸⁹⁹ Hannigan op cit note 746 at 30 & 39.

⁹⁰⁰ Upadhyay op cit note 629 at 140.

⁹⁰¹ Cheng op cit note 98 at 346.

⁹⁰² *Gore* supra note 3 para 28, 34 & 37; and *City Capital* supra note 69 para 12. The best method to recover investment losses was by piercing the veil. This achieved true justice. See footnote 413 of this dissertation.

⁹⁰³ Chapter 3. As evidenced by the progression of case law through time, and the influences of *Cape Pacific* on subsequent cases in post-apartheid South Africa.

2008 enjoins the wide nature of piercing the veil in South Africa.⁹⁰⁴ Section 5 provides that the Act 71 of 2008 ‘must be interpreted and applied in a manner that gives effect to the purposes set out in section 7’.⁹⁰⁵ Section 7 provides:

The purposes of this Act are to—

- (a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;
- (b) promote the development of the South African economy by—
 - (i) encouraging entrepreneurship and enterprise efficiency;
 - (ii) creating flexibility and simplicity in the formation and maintenance of companies; and
 - (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
- (c) promote innovation and investment in the South African markets;
- (d) reaffirm the concept of the company as a means of achieving economic and social benefits;
- ...
- (j) encourage the efficient and responsible management of companies;
- (k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and
- (l) provide a predictable and effective environment for the efficient regulation of companies.⁹⁰⁶

The relevant purposes in section 7 are found in sections 7(b)(iii) and (j). When drafting the Act 71 of 2008, the intention of the legislature was to adopt a maximalist approach; taken into consideration the social, political and economic factors of the country, plagued by the legacy of Apartheid. For that reason, individuals who want to facilitate their business (construction) through a company should reap the rewards. Concurrently, such freedom

⁹⁰⁴ Gore supra note 3 para 32.

⁹⁰⁵ Section 5(1) of the Act 71 of 2008.

⁹⁰⁶ Section 7 of the Act 71 of 2008.

should not turn into delusion, abuse or misuse. In other words, limited liability is achieved whilst policing individuals who misuse it.

The lack of codification in South Africa's company law regime, coupled with the interpretation of section 20(9), means there are many loopholes which can be exploited.⁹⁰⁷ I am not naïve to the fact that a wide interpretation has inherent flaws; it can be understood to be vague and consequently, requires vigorous interpretation and improvement.⁹⁰⁸ Be that as it may, I humbly disagree with the view that section 20(9) 'does not take the law forward' and is a 'backward step into the morass of the common law'.⁹⁰⁹ The balanced (equity) approach to unconscionable abuse enriches and further extends the common law. Let us not forget that section 20(9) empowers the court with many options, one of them being that when statutory piercing is not relied upon, the common law is.⁹¹⁰ In addition, 'unconscionable abuse' encompasses the wide trajectory of misuse that can be perpetrated against the legal personality of a company. This is adaptive to the ever-changing scenarios in modern business and globalisation. It is also prepared for instances that occur in future. Compared to comparators, South Africa is the only jurisdiction that has a section that may be considered as having the effect of the common law policy of piercing the corporate veil.⁹¹¹

i) Recommendations

It remains challenging for the legal community to predict the outcome of cases involving piercing the veil.

Although *Prest* provided some much needed clarification (to what is a convoluted area in company law), it did not achieve a model of sustainability.⁹¹² The evasion and concealment principles flatter to deceive, and reliance on alternative remedies is applicable only in defined and rare circumstances. For concerning claimants, it will be difficult for them to rely on piercing, as the likelihood of success is small, particularly when alternative remedies are more advantageous. I recommend that for English company law to make progress, it must

⁹⁰⁷ Kim-Leigh op cit note 107 at 4.

⁹⁰⁸ Ibid at 4, 40, 66-7. Examples include: not providing adequate guidance on the relationship between section 20(9) and the common law; not providing a definition of 'unconscionable abuse'; and adopting the general recommendation that 20(9) needs a workable interpretation that is more practical, predictable and effective in its operation.

⁹⁰⁹ Ibid at 76.

⁹¹⁰ *Gore* supra note 3 para 31 & 34.

⁹¹¹ Kim-Leigh op cit note 107 at 76.

⁹¹² Liew op cit note 725 at 82; and Upadhyay op cit note 629 at 141.

‘demonstrate cutthroat resolution in its efforts’.⁹¹³ This importantly requires reconsideration and rejuvenation, given the important role played by the corporate veil as an exception to separate legal personality and limited liability.⁹¹⁴ That will mean accepting major modifications in policy change. Together with parliament, English courts must support and implement a statutory clause to pierce the corporate veil in the Act 2006. This will have the effect of transferring the liabilities of a company to someone else. It should mirror the policy considerations of South Africa, whilst taking thought of achieving clarity with the evasion and concealment principles. That would include the adoption of a balanced approach and the view that piercing the veil is not being a remedy of last resort. This should achieve justice. And so, the future of the piercing the veil in English law remains to be seen.

In difference, a somewhat maximalist approach benefits all parties who fall victim to abuses of the corporate personality. When observing alternative remedies (of the United Kingdom) to pierce, does the range and scope allow for reasonable justice? In particular circumstances yes, and in other circumstances no. Therefore, permitting a wide spectrum of piercing the veil is a suitable approach and option for claimants. It ‘only becomes necessary and obligatory in circumstances where justice will not otherwise be done to [claimants]’.⁹¹⁵ Therefore, it reflects positively on the Constitutional framework that we are under; allowing a claimant the *freedom, option* and *choice* to seek redress via section 20(9). It also embodies the transparent and open society that South African residents live in. I recommend that South Africa should not adopt the United Kingdom approach to piercing the veil. It should rather strive to clarify its wide meaning with amendments. This should importantly include a definition of ‘unconscionable abuse’. In future, amongst the international legal (common law) community, South Africa should be placed amongst the industry leaders that support a rational and comprehensive stance to piercing the corporate veil.

⁹¹³ Liew op cit note 725 at 82.

⁹¹⁴ Cheng op cit note 98 at 332.

⁹¹⁵ *Amlin* supra note 120 para 12; and Mayson, French & Ryan op cit note 92 at 154 states:

The practical problem for a lawyer is to discover whether what he or she wants the court to do would be regarded by the court as inconsistent with the principle of separate legal personality and so an attempt to disregard the corporate veil. If the court will regard it as disregarding the veil, the lawyer must then discover the conditions on which the court will disregard the veil and try to establish that his or her case satisfies those conditions. The wider the court’s view of the effect of separate legal personality and of the occurrence of disregarding the veil, the more likely it is to accept that disregarding the veil is normal practice. A court taking a narrow [as evidenced in the United Kingdom] will think that disregarding the veil hardly ever occurs and so is hardly ever justified.

VII BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa, 1996.

Statutes

South African:

Close Corporations Act 69 of 1984.

Companies Act 46 of 1926.

Companies Act 61 of 1973.

Companies Act 71 of 2008.

Companies Amendment Act 3 of 2011.

Consumer Protection Act 68 of 2008.

English:

Companies Act 1862.

Companies Act 2006 (c 46).

Company Directors Disqualification Act 1986.

Insolvency Act 1986.

Joint Stock Companies Act 1844.

Joint Stock Companies Act 1856.

Limited Liability Act 1855.

Matrimonial Causes Act 1973.

The Trading with the Enemy Act 1939.

Cases

South African:

ADT Security (Pty) Ltd v Botha and Others [2010] ZAWCHC 563.

Airlink Pilots Association SA v SA Airlines (Pty) Ltd [2001] 6 BLLR 587 (LC).

Airport Cold Storage (Pty) Ltd v Ebrahim 2008 (2) SA 303 (C).

Al-Kharafi & Sons and Another v Pema and Others NNO [2008] ZAGPHC 273.

Amlin (SA) Pty Ltd v Van Kooij 2008 (2) 558 (C).

Baloyi v Malherbe and Another unreported case [2015] ZALCJHB 10.

Banco de Mozambique v Inter-Science Research and Development Services (Pty) Ltd 1982 (3) SA 330 (T).

Botha v Van Niekerk 1983 (3) SA 513 (W).

Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1993 2 SA 784 (C).

Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others 1995 (4) SA 790 (A).

City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO [2017] ZASCA 177.

Competition Commission v Delatoy Investments (Pty) Ltd and Others [2016] ZACT 37.

Dadoo Ltd and Others v Krugersdorp. Municipal Council 1920 AD.

Dhlomo NO v Natal Newspapers (Pty) Ltd & another 1989 (1) SA 945 (A).

Die Dros (Pty) Ltd v Telefon Beverages CC 2003 (4 SA 207 (C).

Easi Gas (Pty) Limited v Gas Giant CC t/a Independent Gas and Another; In re: Oryx Oil South Africa (Pty) Limited v Gas Giant CC t/a Independent Gas and Another [2016] ZAGPJHC 73.

Ebrahim and Another v Airports Cold Storage (Pty) Ltd 2008 (6) SA 585 (SCA), [2009] 1 All SA 330 (SCA).

Esterhuizen v Million-Air Services CC (in liquidation) and Another [2007] ZALC.

Ex parte Gore NO and Others NNO 2013 (2) SA 437 (WC).

Footwear Trading CC v Mdlalose (2005) 26 ILJ 443 (LAC); [2005] 5 BLLR 452 (LAC).

Goldfinch Garments CC and Another v The Sheriff of the Court- Newcastle and Another [2013] ZALCD 21.

Harris v MD Solar (Pty) Ltd t/a Suntank and Others [2016] ZALCJHB 348.

Haygro Caterig BK v Van Der Merwe 1996 (4) SA 1063 (C).

Hülse-Reutter v Gødde [2002] 2 All SA 211 (A).

Inkunzi Civils CC v Greater Kokstad Municipality [2012] ZAKZPHC 54.

Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd 2001 (1) SA 545 (CC).

Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A).

Kurt Robert Knoop NO and others v Birkenstock (Pty) Ltd [2009] ZAFSHC 67.

Lategan v Boyes 1980 (4) SA 191 (T).

Le'Bergo Fashions CC v Lee 1998 (2) SA 608 (C).

Madrassa Anjuman Islamia v Johannesburg Municipal Council 1919 AD 439.

Mobile Telephone Networks (Pty) Ltd v National Consumer Commission [2012] ZANCT 3.

National Union of Metal Workers of South Africa v Lee Electronics (Pty) Ltd and Others (LAC) [2012] ZALAC 33.

Nel and Others v Metequery Ltd. And Another [2006] ZASCA 111; [2007] 2 All SA 602 (SCA).

Ochberg v Commissioner of Inland Revenue (5 SATC 93).

Orkin Bros Ltd v Bell 1921 TPD 92.

Rees and Others v Harris and Others [2011] ZAGPJHC 237; 2012 (1) SA 583 (GSJ).

Ritz Hotel Ltd v Charles of the Ritz Ltd and Another 1988 (3) SA 290 (A).

Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168.

Shipping Corporation of India Pty Ltd v Evdomon Corporation 1994 (1) SA 550 (AD).

TJ Jonck BK h/a Bothaville Vleismark v Du Plessis 1998 (1) SA 971 (O).

Tladi Holdings (Pty) v Modise and Others [2015] ZAGPJHC 331.

Tor Industries (Pty) Ltd v Gee-Six Superweld CC 2001 (2) SA 146 (W).

Van Zyle N.O. and Another v Kaye N.O. and Others 2014 (4) SA 452 (WCC).

Webb & Co Ltd v Northern Rifles 1908 TS 462.

Zeman v Quikelberge and Another [2010] ZALC 122.

American:

Allied Capital Corp. v GC-Sun Holdings L.P., 910 A.2d 1020 (Del. Ch.2006).

Berkey v Third Avenue Railway Co 244 NY 602 (1927).

Glazer v Commission on Ethics for Public Employees 431 So. 2d 752 (La. 1983).

Secon Service System, Inc. v St. Joseph Bank & Trust Co., 855 F.2d (7th Cir, 1988), 406.

Australian:

Brewarrana v Commissioner of Highways (1973) 4 SASR 476, 480 (Bray CJ).

Briggs v James Hardie & Co Pty (1989) 16 NSWLR 549 (NSWCA, Hope and Meagher JJA, Rogers AJA).

Commissioner of Land Tax v Theosophical Foundation Pty Ltd (1966) 67 SR (NW) 70.
Pioneer Concrete Services Ltd v Yelnah Pty Ltd (1986) 5 NSWLR 254 (SCNSW, Young J).
Walker v Hungerfords (1987) 44 SASR 532 (Bollen J).
Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 82 ALR 530 (FC, Lochart, Beaumont and Foster JJ).

Canadian:

Kosmopoulos v Constitution Insurance Co of Canada v [1987] 1 SCR 2.
Lockharts Ltd. v Excalibur Holdings Ltd. et al. (1987) 47 RPR 8.

English:

Adams v Cape Industries plc [1990] Ch 433.
Airbus Operations Ltd v Withey [2014] EWHC 1126 (QB).
Antonio Gramsci Shipping Corporation and Others v Aivars Lembergs [2013] EWCA Civ 730.
Antonio Gramsci Shipping Corporation v Stepanovs [2011] EWHC 333 (Comm).
Atlas Maritime Co SA v Avalon Maritime Ltd [1991] 4 All ER 769.
Ben Hashem v Al Shayif [2008] EWHC 2380 (Fam); [2009] 1 FLR 115.
Broderip v Salomon [1895] 2 Ch. 323 (AC).
Caparo v Dickman [1990] 2 AC 605.
Chandler v Cape plc [2012] EWCA Civ 525.
Clegg v Pache [2017] EWCA Civ 256.
Continental Tyre and Rubber Co. (Great Britain) v Daimler Co Ltd 1915 (112) LTR 324.
Daimler Co Ltd v Continental Tyre and Rubber Co Ltd [1916] 2 AC 307.
De Beers Consolidated Mines Ltd v Howe, Surveyor of Taxes [1906] AC 455 (HL).
DHN Food Distributors Ltd v Tower Hamlets LBC (1976) 3 All ER 462 (CA).
Dimbleby & Sons Ltd v National Union of Journalists [1984] 1 WLR 427 (HL).
Foss v Harbottle (1843) 67 ER 189.
Gencor ACP Ltd v Dalby [2000] 2 BCLC 734 (Ch).
Gilford Motor Co Ltd v Horne [1933] Ch 935, CA.
Group Seven Ltd v Allied Investment Corp Ltd & Others [2014] 1 WLR 735.
Hyde v R [2014] EWCA Crim 713.
In Re a Company [1985] BCLC 333, CA.
Jetivia SA and another v Bilta (UK) Limited (in liquidation) (2015) UKSC 23.
Jones v Lipman [1962] 1 WLR 832; [1962] 1 All ER 442.
Kensington International Ltd v Republic of Congo [2006] 2 BCLC 296.
Lazarus Estates v Beasley [1956] 1 QB 702.
Lee v Lee's Air Farming Ltd [1961] AC 12; [1960] 3 ALL ER 420 (PC).
Littlewoods Mail Order Stores v Inland Revenue Commissioners [1969] 1 WLR 1241(AC).
Lubbe v Cape Plc [2000] UKHL 41.
Lungowe v Vedanta Resources plc [2019] UKSC 20.
Macaura v Northern Assurance Co Ltd [1925] AC 619 (HL (Ir)).
Mubarak v Mubarak [2001] 1 FLR 673.
Ord v Belhaven Pubs Ltd [1998] 2 BCLC 447.
Pennyfeathers Ltd v Pennyfeathers Property Co Ltd [2013] EWHC 3530 (Ch).
Prest v Petrodel Resources Ltd [2013] UKSC 34.
Prest v Prest [2011] EWHC 2956 (Fam).
Prest v Prest [2012] EWCA Civ 1395.
Quigley Meats Ltd v Hurley [2011] IEHC 192.

R v Sale [2013] EWCA Crim 1306; [2014] 1 WLR 663.
Re Bugle Press Ltd [1961] Ch 270.
Roundabout Ltd v Beirne & Ors [1959] IR 423.
Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22.
Snook v London and West Riding Investments Ltd [1967] 2 QB 876 (CA).
Thompson v The Renwick Group plc [2014] EWCA Civ 635.
Trustor AB v Smallbone (No.2) [2001] 1 WLR 1177.
Tunstall v Steigmann [1962] 2 QB 593 (CA) 602.
VTB Capital Plc v Nutritek International Corp and Others [2013] UKSC 5.
Woolfson v Strathclyde Regional Council 1978 SC (HL) 90.
Yukong Line Ltd v Rendsburg Investments Corp (No 2) [1998] 4 ALL ER 82.

New Zealand:

Attorney-General v Equiticorp Industries Group Ltd (In Statutory Management) [1996] 1 NZLR 528.
Re Securitibank Ltd (No 2) [1978] 2 NZLR 136 (CA).

Secondary sources

Books

Cassim F HI, Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats *Contemporary Company Law* 2 ed (2012) Juta, Cape Town.

Cassim F HI, Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats *The Law of Business Structures* (2012) Juta, Cape Town.

Cilliers HS, ML Benade, JJ Henning, JJ Du Plessis, PA Delpont, L De Koker & JT Pretorius *Cilliers and Benade: Corporate Law* 3 ed (2000) Butterworths, Durban.

Davies, Paul L *Introduction to Company Law* (2002) Oxford University Press, New York.

Davies, Paul L & Sarah Worthington Gower and Davies' *Principles of Modern Company Law* 9 ed (2012) Sweet and Maxwell, London.

Delpont, Piet *Henochsberg on the Companies Act 71 of 2008* (2013) LexisNexis South Africa, Durban.

Farrar JH, NE Furey & BM Hannigan *Farrar's Company Law* 3 ed (1991) Butterworths, London.

Girvin Stephen, Sandra Frisby & Alastair Hudson *Charlesworth's Company Law* 18 ed (2010) Sweet & Maxwell, London.

Grier Nicholas, Stephen Griffin & David Capper *UK Company Law* (1998) John Wiley & Sons, Chichester.

Mayson Stephen, Derek French & Christopher Ryan *Mayson, French & Ryan on Company*

Law 22 ed (2005) Oxford University Press Oxford, Oxford.

Mongalo, Tshepo H *Modern Company Law for a Competitive South African Economy* (2010) Juta, Cape Town.

Morse, Geoffrey *Charlesworth & Morse Company Law* 15 ed (1995) Sweet & Maxwell, London.

Poynder, John *Literacy Extracts* (1844) Hatherd and Son, London.

Pretorius JT, PA Delpont, Michele Havenga & Maria Vermaas *Hahlo's South African Company Law through the cases* 6 ed (1999) Juta & Co, Ltd, Cape Town.

Visser Coenraad, J T Pretorius, Robert Sharrock & Marlize Van Jaarsveld *South African Mercantile and Company Law* 8 ed (2004) Juta, Cape Town.

Internet Sources

Bainbridge, Professor Stephen 'Being precise about the two kinds of reverse veil piercing' 13 August 2017 available at <https://www.professorbainbridge.com/professorbainbridgecom/2017/08/being-precise-about-the-two-kinds-of-reverse-veil-piercing.html>, accessed on 27 January 2019.

Centre for Retail Research 'Who's Gone Bust in Retailing 2010-19? to end January 2019' available at <http://www.retailresearch.org/whosgonebust.php>, accessed on 28 January 2018.

Chandra Biswas, Liton 'Approach of the UK Court in Piercing Corporate Veil' 13 January 2011 available at <http://ssrn.com/abstract=2438217>, accessed on 10 November 2018.

Forji, Amin 'The Veil Doctrine in Company Law' 29 September 2007 available at <https://www.llrx.com/2007/09/the-veil-doctrine-in-company-law/>, accessed on 21 of May 2018.

Hameed, Irshad 'The Doctrine of Limited Liability and the Piercing of the Corporate Veil in the Light of Fraud: A Critical Multi-Jurisdictional Study' 18 November 2012 available at <https://ssrn.com/abstract=2282306>, accessed on 24 March 2018.

Plummer, Robert 'House of Fraser: Five things that went wrong' *BBC* 10 August 2018 available at <https://www.bbc.com/news/business-45127423>, accessed on 28 January 2019.

Witnesseth 'Reverse Piercing' available at <https://witnesseth.typepad.com/blog/reverse-piercing.html>, accessed on the 27 of January 2019.

Journals

Arden, The Rt Hon Lady Justice DBE 'Piercing the Corporate Veil – Old Metaphor, Morden Practice' (2017) 3 *Journal of Corporate and Commercial Law & Practice* 1.

- Cassim, Rehana 'Hiding behind the veil' (2013) *De Rebus* 32.
- Cassim, Rehana 'Piercing the Veil Under Section 20(9) of The Companies Act 71 of 2008: A New Direction' (2014) 26 *SA MERC LJ* 307.
- Cheng, Thomas K 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines' (2011) 34(2) *Boston College International and Comparative Law Review* 329.
- Davids, Lynette C 'The lingering question: Some perspective on the lifting of the corporate veil' (1994) 1 *TSAR* 155.
- Domanski, Andrew 'Piercing of the Corporate Veil: A New Direction' (1986) 103 *SALJ* at 224.
- Grier, Nicholas 'Piercing the Corporate Veil: *Prest v Petrodel Resources Ltd*' (2014) 18(2) *Edinburgh Law Review* 275.
- Hansman Henry, Reiner Kraakman & Richard Squire 'Law and the Rise of the Firm' (2005) 119 *Harvard Law Review* 1335.
- Hannigan, Brenda 'Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-Man Company' (2013) 50 *Irish Jurist* 11.
- Kim, HO May 'Piercing the corporate veil as a last resort' (2014) 26 *Singapore Academy of Law Journal (SALJ)* 249.
- Kouo, Charlotte 'Post-*Prest* Corporate Group Veil Piercing: Alternative Avenues to Justice' (2016) 4 *Legal Issues Journal* 65.
- Larkin, MP 'Regarding Judicial Disregarding of the Company's Separate Identity' (1989) 1 *South African Mercantile Law Journal* 277.
- Larkin, MP & FHI Cassim 'Company Law (including Close Corporations)' *Annual Survey of South Africa* (2001) 506.
- Larkin, MP & FHI Cassim 'Company Law (including Close Corporations)' *Annual Survey of South Africa* (2004) 487.
- Liew, Adam 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in *Prest v Petrodel Resources Ltd* Leads Us Nowhere' (2014) 5 *King's Student Law Review* 67 at 78.
- Mujih, Dr Edwin C 'Piercing the corporate veil as a remedy of last resort after *Prest v Petrodel Resources Ltd*: inching towards abolition?' (2016) 37(2) *The Company Lawyer* 39.
- Nel, Eben 'Two Sides of a Coin: Piercing the veil and unconscionability in trust law' (2014) 35 *Obiter* 570.

Nyombi, Chrispas 'Lifting the veil of incorporation under common law and statute' (2014) 56(1) *International Journal of Law and Management* 66.

Ramsay, Ian M & David B Noakes 'Piercing the corporate veil in Australia' (2001) 19 *Company and Securities Law Journal* 250.

Smith, BS 'Statutory discretion or common law power? Some reflections on "veil piercing" and the consideration of (the value of) trust assets in dividing matrimonial property at divorce – Part One' (2016) 41 *Journal for Juridical Science* 68.

Upadhyay, Nupur 'Piercing the Corporate Veil: An Analysis of Lord Sumption's Attempt to Avail a Troubled Doctrine' (2015) 21 *Auckland University Law Review* 114.

Reports

The King IV Report on Corporate Governance for South Africa, 2016.

Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (2004) *The Concept of Limited Liability – Existing Law and Rationale* by Counsel Assisting, John Sheahan SC – Annexure T – Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation.

The United Kingdom Corporate Governance Code 2018.

Speeches

Murray Butler, Professor Nicholas (President of Columbia University) *Politics and Economics* (1911) to the 143rd Banquet of the Chambers of Commerce of the State of New York.

Theses

Siebritz, Kim-Leigh *Piercing the corporate veil: A critical analysis of section 20(9) of the Companies Act 71 of 2008* (unpublished LLM thesis, University of the Western Cape, 2016).

Zindoga Tawanda, Washington 'Piercing of the Corporate Veil in terms of Gore: Section 20(9) of the New Companies Act 71 of 2008' (unpublished LLM thesis, University of Cape Town, 2015).

White Papers, etc

South African Company Law for the 21st Century: Guidelines for Corporate Law Reform (GN 1183 in GG 26493 of 23 June 2004).

Memorandum on the Objects of the Companies Bill, 2008.