The Road to Prest v Petrodel: An Analysis of the UK Judicial Approach to the Corporate Veil—Part 2

Hamiisi Junior Nsubuga*

Los Watkins**

Abstract

This article examines the judicial approach to the corporate veil post-*Prest v Petrodel Resources Ltd*. Analysis is undertaken of the judgment in *Prest* and of how judges have adapted and applied this judgment in subsequent cases. The article offers an evaluation on whether the judgment in *Prest*, has indeed, provided much needed clarity on the judicial approach to the concealment/evasion principles as grounds for veil-piercing/lifting. The article concludes by advocating for a return to the use of the doctrine of judicial discretion as a tool for addressing legal matters relating to the corporate veil of incorporation.

Introduction

12 June 2020 marked the 7th anniversary of the United Kingdom Supreme Court (UKSC) ruling in *Prest v Petrodel Resources Ltd*,[1] in which Lord Sumption's leading judgment appeared to rationalise the proper ground for veil-piercing/lifting. This had continually blurred the legal lines on the applicability of both principles to matters relating to the corporate veil for decades.[2] The judgment became the defining moment in the history of corporate law of England and Wales as it clarified the law or/grounds for piercing the corporate veil of incorporation, an area of law that had caused interpretative challenges to judges and also, attracted varied academic debates.[3]

* PhD (Law), LLM, MA, LLB, FHEA. Lecturer in Law, School of Law, Middlesex University London, UK.
** LLM, BA, LLB, FHEA. Lecturer in Law, School of Law, Middlesex University, London, UK.

[1] *Prest v Petrodel Resources Ltd* [2013] UKSC 34. (Hereafter, *Prest*).

[2] *Prest*, at [28] and [35] on Lord Sumption's distinction between these two principles.

[3] B. Hannigan, "Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" (2013) 50 *Irish Jurist* 11 – 39; Peter Bailey, "Lifting the Corporate Veil Becomes a Remedy of Last Resort after Prest v Petrodel in Supreme Court" (2013) 336 *Company Law Newsletter*, 1; W. Day, "Skirting Around the Issue: the Corporate Veil after Prest v Petrodel" [2014] *L.M.C.L.Q*. 269; M. Khimji and C. Nicholls, "Corporate Veil Piercing and Allocation of Liability – Diagnosis and Prognosis" (2015) 30 *Banking and Finance Law Review* 211; Edwin C. Mujih, "Piercing the Corporate Veil as a Remedy of Last Resort after Prest v Petrodel Resources Ltd: Itching Towards Abolition?" (2016) 37(2) *Comp. Law*, 39 – 50; Edwin C. Mujih, "Piercing the Corporate Veil: Where is the Reverse Gear?" (2017) 133 *Law Quarterly Review*, 322 – 337.

The leading judgment was given by Lord Sumption who gave some clarity to terms which had been applied in previous cases concerning the wrongdoing of company directors and the misuse of the veil of incorporation. These were the principles of concealment and evasion, the former being "…the interposition of a company or … companies so as to conceal the identity of the real actors" and the latter, "…where there is a legal right against the person in control … and the company is interposed … to defeat the right or frustrate its enforcement."[4]

Therefore, drawing from the above formulation, the proper ground for piercing the corporate veil of incorporation is the evasion principle,[5] where the court can disregard the separate legal personality of the company to pierce the corporate veil to deprive such a person or the company itself, of the advantage otherwise obtained through abuse of the corporate form. This exposition became the leading authority on veil-piercing. However, whether this judgment provided "the" much needed clarity on the subject of veil piercing/lifting that had caused a barrage of confusion, uncertainty and criticisms in earlier cases prior to *Prest*, remained a hotly contestable point of discourse as analysed in the subsequent paragraphs.

This article examines the judicial approach to the corporate veil post-*Prest*. The article analyses the leading judgment as delivered by Lord Sumption and *dicta* from fellow judges on the bench and how the judgment has been welcomed/adapted by judges in subsequent cases. Analysis is also undertaken on whether, the judgment in *Prest* has provided much needed clarity on veil-piercing/lifting. The article concludes by arguing that *Prest* has so far, not provided much needed clarity on the subject of corporate veil-piercing/lifting and that limiting veil-piercing to evasion may constrict the development of this fragile area of law. The article advocates for a return to the use of the conventional English law principle of judicial discretion as the best tool for interrogating conventional legal remedies to address corporate law matters on veil-piercing/lifting.

Prest **– the analysis**

Prior to *Prest*, some of the key concerns drawn from academic literature and judicial decisions were the lack of clarity on what exactly the term "veil-piercing" meant or what it entailed, the lack of judicial consensus on whether, actually, veil-piercing as a doctrine existed and the synonymous use of the phrase "piercing/lifting" the corporate veil among other concerns.[6] For

[4] *Prest*, at [28], [35].
[5] *Prest*, at [35].
[6] L. Gallagher and P. Ziegler, "Lifting the Corporate Veil in the Pursuit of Justice"(1990) *J.B.L* 292; Stephen M. Bainbridge, "Abolishing Veil Lifting" (2001) 26(3) *Journal of Corporate Law*, 470, 481; Mark T. Moore, "A

example, in *Atlas Maritime Co SA v Avalon Maritime Ltd (No.1)*,[7] Staughton LJ attempted to give the distinction between veil-piercing and veil-lifting by suggesting that: "…[p]iercing is reserved for treating the rights and liabilities or activities of a company as the rights and liabilities of its shareholders while lifting is to have regard to the shareholding in the company for some legal purpose."[8]

However, in *Yukong Line Ltd of Korea v Rendsburg Investment Corp of Liberia (No.2)*,[9] Toulson J was of the view that: "…[i]t didn't matter what language was used in describing the two phrases as long as the principle was clear."[10] Earlier in 2013, before *Prest* was heard by the UKSC, Neuberger LJ, in *VTB Capital v Nutrietek*,[11] had observed that "the obscure nature of the rule of veil-piercing supports the point of view that it is unprincipled."[12] He also approved Clark J's observations in *The Tjaskemollen*[13] that cases decided on this subject had not worked out what "piercing the veil meant" as it may not always mean the same thing.[14]

Munby J, in *Ben Hashem v Ali Shayif*,[15] was of the view that these expressions (of veil-lifting/piercing) were synonymous.[16] Therefore, with such a long list of concerns in relation to veil-piercing/lifting before their lordships and ladyship, *Prest* was welcomed with great enthusiasm as a timely solution.[17] However, the question has yet to be answered whether, *Prest* lived up to its expectations to deliver the much needed clarity.

Proponents of Lord Sumption's leading judgment and the distinction between the two principles have praised him, at least, for drawing a fine line on the blurred applicability of these principles to matters relating to the abuse of the corporate form that had caused a barrage of legal uncertainty and confusion for decades.[18] Rationalising the law/grounds for veil-piercing also helped to demystify frequently invoked ambiguous metaphorical references to forms of

---

Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of Salomon v Salomon" (2006) *J. B. L.* 180; Cheng –Han et al, "Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives" (2019) 16(1) *Berkeley Bus. L. J*. 140, 153.

[7] *Atlas Maritime Co SA v Avalon Maritime Ltd (No.1)* [1991] 4 All ER 769 CA. (Hereafter, *Atlas Maritime*).

[8] *Atlas Maritime*, at [779G].

[9] *Yukong Line Ltd of Korea v Rendsburg Investment Corp of Liberia (No.2)* [1998] 1 WLR 294 (*Youkong Line*).

[10] *Youkong Line*, at [305].

[11] *VTB Capital v Nutrietek* [2013] UKSC 5. (Hereafter, *VTB Capital*).

[12] *VTB Capital*, at [123].

[13] *The Tjaskemollen* [1997] 2 Lloyd's Rep. 465 QBD.

[14] *VTB Capital*, at [472].

[15] *Ben Hashem v Ali Shayif* [2009] 1 FLR 115; [2008] EWHC 2380. (Hereafter, *Ben Hashem*).

[16] *Ben Hashem*, at, [150].

[17] Edwin C. Mujih, "Piercing the Corporate Veil as a Remedy of Last Resort after Prest v Petrodel Resources Ltd: Itching Towards Abolition?" (2016) 37(2) *Comp. Law*, 39 – 50; F. Rose, "Raising the Corporate Sail" (2013) *LMCLQ* 566, 583.

[18] L. Onoran, "The Trust Behind the Veil: Prest v Petrodel" (2013) 5 *Private Client Business*, 273, 279.

corporate abuses, such as "facade", "sham", "alter-ego" etc., that had dominated case law prior to *Prest*.[19]

It has also been argued that limiting veil-piercing to grounds of evasion has the advantage that property concepts in judicial proceedings may be applied consistently.[20] Limiting veil-piercing to evasion also meant a limit to unnecessary piercing of the corporate veil by ensuring that it is only invoked as a remedy of last resort.[21] This has the impact that use of other conventional/orthodox private legal remedies, such as those arising out of the law of agency, tort or contract are interrogated to settle legal matters.[22] Per Lord Sumption,…"[t]he facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce corporate veil…if it not necessary to pierce the corporate veil, it is not appropriate to do".[23]

However, despite this minimal gratitude, critics of the judgment in *Prest* have also utilised several platforms to share their assessment of the judgment. However, much of the criticism has been focused on Lord Sumption's distinction between the evasion-concealment principles, and the lack of judicial consensus on the proper grounds for veil-piercing in *Prest* and beyond as analysed below.

Judicial split – *Prest* and beyond

The first point of criticism directed at the judgment in *Prest* is the absence of judicial consensus in support of Lord Sumption's leading judgment amongst the judges that presided over this case. Key issues that contributed to this lack of consensus included, *inter alia*, the narrowness of the redefinition of the concealment and evasion principles, and rationalising evasion as the true ground for veil-piercing but narrowing its parameters to the company or its controller's attempt to evade pre-existing legal obligations or liabilities.[24]

[19] T. Xing, "The New Era of Corporate Veil-Piercing: Concealed Cracks and Evaded Issues?" (2016) *Singapore Academy of Law Journal* 209.
[20] Christopher Hare, "Family Division, 0; Chancery Division, 1: Piercing the Corporate Veil in the Supreme Court (Again)" (2013) 72(3) *Cambridge L.J*. 511, 514.
[21] This point of view has however been subjected to criticism. Particularly, see: R. Matthews, "Clarification of the Doctrine of Piercing the Corporate Veil" (2013) 28(12) *J.I.B.L.R*. 516, 519–520; Peter Bailey, "Lifting the Corporate Veil Becomes a Remedy of Last Resort after Prest v Petrodel in Supreme Court" (2013) 336 *Company Law Newsletter*, 1; Edwin C. Mujih, "Piercing the Corporate Veil as a Remedy of Last Resort after Prest v Petrodel Resources Ltd: Itching Towards Abolition?" (2016) 37(2) *Comp. Law*, 39 – 50.
[22] Xing (n 19).
[23] *Prest*, at [35].
[24] *Prest*, at [28], [35].

Neuberger LJ initially agreed that there were essentially, a number of issues[25] flowing from Lord Sumption's review of the concealment-evasion principles as a potentially valuable judicial tool for undoing wrong-doing in some cases where no other principle is available.[26] He also observed that the doctrine of the veil of incorporation, whilst not actually having been required to have been used, should nevertheless, be considered still part of UK law.[27]

However, he immediately contended that the evasion principle was a mere aspect of a more conventional principle than a distinct principle concerning veil-piercing as it was not founded on judicial antecedents.[28] He also expressed doubt on the existence of legitimate veil-piercing cases as he had previously done in *VTB Capital*, where he claimed that both cases of *Jones v Lipman*[29] and *Gilford Motors v Horne*[30] could have been solved through use of alternative legal remedies.[31]

Lady Hale did not fully support Lord Sumption's reasoning, expressing some doubt whether concealment and evasion neatly and exhaustively categorised all cases that involved disregard of the separate legal personality of the company.[32] Her ladyship drew attention to the issue that cases on the piecing of the veil thus far, had concerned attribution of the thoughts and actions of controlling natural persons to the legal person of the company, suggesting that the remedy lay in the company.[33] She therefore, suggested a broader classification of cases, such that individuals operating limited companies are unable to take unconscionable advantage of people with whom they do business.[34]

This would logically, lead to the doctrine being placed amongst the rules of attribution. However, her ladyship declined to make that connection, considering that "…[w]hat the cases

[25] Essentially, these were that the International Court of Justice had acknowledged the doctrine. However, this was only in the context of civil law systems, rather than common law. Whilst there had been some UK family cases based on the issue, these were not found to be sound for future application, for example, (*A v A* [2007] 2 FLR 467 and *Ben Hashem* [2009] 1 FLR 115) but that the cases of *Gilford Motor Co Ltd v Horne* [1933] Ch 935, and *Jones v Lipman* [1962] 1 WLR 832 were useful, but could have been solved through use of alternative legal remedies. The other issue was that *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 and *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, should have been decided without consideration of the veil doctrine.
[26] *Prest*, at [80].
[27] Ibid., at [80]. "…[i]t would be wrong to discard a doctrine which, while it has been criticised by judges and academics, has been generally assumed to exist in all common law jurisdictions, and represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available."
[28] *Prest*, at [69], [83].
[29] *Jones v Lipman* [1962] 1 WLR 832.
[30] *Guilford Motor Co. Ltd v Horne and another* [1993] Ch. 935.
[31] *Prest*, at [69].
[32] *Prest*, at [91] – [92].
[33] *Prest*, at [92] "…[w]here it is sought to convert the personal liability of the owner or controller into a liability of the company, it is usually more appropriate to rely upon the concepts of agency and of the "directing mind."
[34] *Prest*, at [92].

do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone…"[35]

Lord Clarke is another judge that did not fully endorse Lord Sumption's evasion-concealment distinction. However, he agreed that veil-piercing cases outside of the evasion principle will be rare and difficult to establish. He observed that it would be dangerous to seek to foreclose all possible future situations that may arise.[36]

Lord Walker went somewhat further in his view of Lord Sumption's leading judgment by observing that all the decided cases so far,[37] could have been decided by the application of other legal principles. Although his lordship did not go so far as to deny the existence of the veil altogether, he did consider that: "…[p]iercing the corporate veil" is not a doctrine at all, in the sense of a coherent principle or rule of law. It is simply a label — often used indiscriminately to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate…"[38]

For Lord Mance, although he did not disagree with Lord Sumption's evasion-concealment distinction, he did not support the contention that evasion was the only ground to justify true veil-piercing. He expressed caution against the possibility that veil-piercing outside the evasion principle should be foreclosed as this would inhibit future development of this rule.[39]

Therefore, the lack of judicial consensus on the rationale for true veil-piercing might have signalled a cumbersome journey that the decision in *Prest* was about to take within the judiciary in relation to the doctrine of the corporate veil in English corporate law. There was great optimism on how courts would react to the judgment and the "default position" that veil-piercing should only be invoked as a remedy of last resort after exploring other legal remedies. This perspective is explored below.

***Prest* – in subsequent cases**

Following the decision in *Prest*, judges in subsequent cases relating to the abuse of the corporate form have made references/followed the jurisprudence in *Prest*, especially, when faced with legal questions on whether to "pierce" or "lift" the corporate veil of incorporation.

[35] *Prest*, at [92].
[36] *Prest*, at [100], [103].
[37] With one possible exception, that of *Stone & Rolls Ltd v Moore Stephens (a firm)* [2009] UKHL 39.
[38] *Prest*, at [106].
[39] *Prest*, at [100].

However, it may be submitted, the evasion principle, as articulated by Lord Sumption has not enjoyed much success as in most of the cases discussed below, judges have been reluctant to invoke the evasion principle to pierce the corporate veil.

R v Sale

Almost contemporaneous with *Prest*, albeit in criminal proceedings, the case of *R v Sale,*[40] considered *Prest* as the leading authority while deliberating on whether, a corporate veil of incorporation (in addition to two other issues of assessment of benefits and proportionality of the confiscation order) should be pierced in criminal confiscation proceedings under the Proceeds of Crime Act 2002 (POCA 2002). The case concerned a confiscation order on a one-man company, where the controller of the company had been convicted of offences concerning Network Rail where he had illegally acquired contracts.

Treacy LJ considered the various viewpoints put forward by the Justices in *Prest*, especially on the distinction between concealment and evasion from Lord Sumption and the varying *dicta* from other judges on the bench.[41] He therefore observed that the evasion principle as formulated in *Prest* did not have application in this case. He was convinced that this was a company which had existed long before the corrupt conduct, and which existed for *bona fide* trading purposes.

He therefore concluded that:

> "…[w]e are not persuaded that this is a case coming within the evasion principle referred to at paragraph 28 of *Prest*….. in this case there was no legal obligation or liability which was evaded or frustrated by the interposition of the company in this case whereby the interposition of the company would mean that the separate legal personality of the company would defeat the right or frustrate its enforcement. This was a company which existed long before this corrupt conduct, and which existed for bona fide trading purposes."[42]

Adapting Lord Sumption's concealment as the most applicable principle to the case, he observed that: "…[w]e do, however, consider that in the circumstances of this case, the effect of POCA is that this matter falls within the concealment principle…"[43] Although the evasion

[40] *R v Sale* [2013] EWCA Crim 1306. (Hereafter, *Sale*).
[41] *Sale*, at [26] – [28].
[42] *Sale*, at [39].
[43] *Sale*, at [40].

principle was not invoked to pierce the corporate veil, this case highlighted at least, some of the practical relevance of the decision in *Prest* – a notion that Lord Sumption's concealment-evasion formulation can be applied to extant areas of the law, including criminal proceedings.

On the other hand, the case also highlighted the thin line between the evasion-concealment principles and the challenges they present to judges.[44] This is because, in some cases, it is easier for the courts to apply Lord Sumption's evasion/concealment distinction to legal matters before them where a single party is involved. For example, in *R v McDowell; R v Singh*,[45] the Court of Appeal (CA) followed the jurisprudence in *Prest* to pierce the corporate veil in a case that involved property legally owned by a company controlled by the husband. The CA was convinced that this case was not about lifting but piercing the corporate veil as the defendant husband was the company's sole controller and beneficial owner, and therefore, any benefits/interest received were to his benefit.

However in *M v M*,[46] the court explored Lord Sumption's evaluations on concealment and evasion in the context of property distribution following a petition from the wife to compel the husband to transfer to her a number of properties registered in companies effectively controlled by her husband.[47] The court observed that in *Prest*, the husband's intention for setting up the companies was neither to conceal nor evade legal obligations owed to his wife like it was in this case.[48] The court held that the husband's intention in this case, was to evade his obligations to his wife. This was in addition to frustrating the court's efforts in the distribution of assets following the breakdown of the marriage.[49]

In *Antonio Gramasci Shipping*,[50] a case concerning the unlawful diversion of profits between companies controlled by Mr Lembergs, Beatson LJ observed that a court may only pierce the veil when a person evades an existing legal obligation, and deliberately frustrates that obligation by the interposition of a company under their control. Unfortunately, Beatson LJ did

[44] This notion is further highlighted by Professor Hannigan, who observes that there is a thin line between the two principles of concealment and evasion that is difficult to apply consistently and objectively. This was because concealment is inherent in many cases premised on evasion and indeed, evasion is commonly achieved through concealment. This has meant that post-*Prest* cases harbour a lack of clarity, yet the consequences of veil-piercing/lifting are remarkably similar, in that, both lead to the disregard of the Salomon principle, citing *R v Sale* as an example. See, B. Hannigan, "Wedded to Salomon: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" (2013) 50 *Irish Jurist* 11, 35 – 37.
[45] *R v McDowell; R v Singh* [2015] EWCA Crim. 173.
[46] *M v M* [2013] EWHC 2534 (Hereafter *M v M*]
[47] *M v M*, at [169].
[48] *Prest*, at [36].
[49] *M v M*, at [169].
[50] *Antonio Gramasci Shipping Corp and Others v Lembergs and Others* [2013] 4 All ER 157 (*Antonio Gramasci*).

not take the opportunity to elaborate on the doctrine in any great depth. However, he did seem to take the view that it was not likely that future courts would extend it beyond the existing evasion and concealment principles of *Prest*,[51] thereby highlighting a thin line between concealment and evasion.

Pennyfeathers Ltd v Pennyfeathers Property Co. Ltd.[52]

This case was heard by the court just a few months following *Prest* which presented an opportunity for the judgment in *Prest* to be explored. The case raised issues regarding claims against company directors, (Mr Bowdery and Mr Attwell, the second and third defendants) for breaching their fiduciary duties while acting as directors to Pennyfeathers UK. The claim was that both directors deprived Pennyfeathers UK Ltd of its opportunity and interest, by causing their company (Pennyfeathers Jersey – the first defendant) to exploit a corporate opportunity (a piece of farmland and options to buy surrounding land for a residential property development) that otherwise belonged to Pennyfeathers UK.

Before reaching their decision, the court explored both issues of evasion and concealment, as they were key in unravelling the mysteries behind the alleged directors' breaches and potential liabilities. Exploring the concealment principle, the court held that:"…[t]here was no need to pierce the corporate veil…the concealment principle meant that Mr Bowdery and Attwell could not interpose Pennyfeathers Jersey to disguise the nature of their own conduct in diverting the opportunities they would have pursued on behalf of Pennyfeathers UK for their own benefit instead."[53]

As regards the evasion principle, the judges were of the view that:

> "…[f]ortunately, the position here is not as opaque at it was in *Prest*. ..the interposition of Pennyfeathers Jersey and Trimount Settlement should not be allowed to defeat Pennyfeathers UK's right against the (directors) Mr Bowdery and Attwell or to frustrate the enforcement of those rights".[54]

The court therefore, found that the benefits of the contracts entered into by Pennyfeathers Jersey (first defendant) were to be impressed with the same trust as they would, if entered into

[51] *Antonio Gramasci*, at [66].
[52] [2013] EWHC 3530 (Hereafter, *Pennyfeathers*)
[53] *Pennyfeathers*, at [117].
[54] *Pennyfeathers*, at [118].

by the second and third defendants – the directors personally.[55] It may be noted that this case is one of the few that followed and applied Lord Sumption's formulation and distinction between the concealment and evasion principles and correctly. Credence should be given to the fact that the courts approached the concealment principle in this case, as a tool to ascertain whether the second and third defendants (the directors) were sufficiently involved in diverting the opportunities of Pennyfeathers UK to the first defendant (Pennyfeathers Jersey) and encouraged it to seize that opportunity, which would amount to breach of their duties, and therefore, not a case for veil piercing.[56]

R v Powell

R v Powell,[57] is another example of a case that followed the jurisprudence in *Prest*.[58] The case concerned a company that had caused criminal environmental pollution through non-compliance with environmental permits, under the control of its directors who had been convicted of illegally benefiting from corporate abuse.[59] The defendants relied on the UKSC decision in *Prest* arguing that, as neither of them had been the sole controller nor sole shareholder of the company, neither concealment nor evasion as established in *Prest* should apply.

Before giving its final judgment, the court explored the jurisprudence in *R v Seager & Blatch*[60] (decided pre-*Prest*) which dealt with the defendants hiding under the corporate veil to perpetrate criminal activities that resulted in criminal convictions under POCA 2002. The court examined three issues that are important in POCA proceedings namely; (a) the defendant's benefit from the relevant criminal conduct, (b) the value of the benefit obtained and (c) Sum recoverable from defendants[61] to decide whether, to "lift" or "pierce" the corporate veil. Consequently, the court held that the corporate veil may be pierced in "appropriate circumstances"[62] to obtain a clear picture of the benefit obtained from director's criminal conduct or actions.

Aikens LJ elaborated on these circumstances by stating that: "…[a] court can "pierce" the carapace of the corporate entity and look at what lies behind it only in certain circumstances.

[55] Ibid.
[56] *Pennyfeathers,* at [117].
[57] *R v Powell and another* [2016] EWCA Crim 1043. (Hereafter, *Powell*).
[58] *Powell,* at [20] – [22] and [29], [31].
[59] *Powell,* at [2] – [5].
[60] *R v Seager & Blatch* [2010] 1 Cr App R (S) 60. (Hereafter, *Seager*).
[61] *Seager,* at [68].
[62] *Seager,* at [69].

It cannot do so simply because it considers it might be just to do so….. In the context of criminal cases the corporate veil can be pierced. First, if an offender attempts to shelter behind a corporate facade, or veil, to hide his crime and his benefits from it…Secondly, where an offender does acts in the name of a company…Thirdly, where the transaction or business structures constitute a "device", "cloak" or "sham"... [63]

Following these observations therefore, the court concluded that:

> "...[t]here was no facade or concealment for hiding behind the company's structure in a way which abused the corporate shield ..... this was not a company being run for an unlawful purpose but rather, was a legitimate business which had broken the criminal law ..... the analysis of the evasion principle enunciated by Lord Sumption in *Prest*, demonstrates that the applicant falls well short of establishing the necessary conditions for fixing these respondents with liability."[64]

However, the court emphasised the need to approach the application of the evasion principle to pierce the corporate veil with caution.[65] The court observed that with relation to *Prest*, the evasion doctrine needed to be construed in the narrowest sense, as to do otherwise could run the "…risk (of) making every company director liable to the confiscation regime whenever a company broke the criminal law."[66] Therefore, a restatement that the courts have in a majority of cases following *Prest*, not favoured the invocation of the evasion principle to pierce the corporate veil at the earliest opportunity.

Rossendale Borough Council & Another v Hurstwood Properties Ltd

In November 2018, the CA had another chance to further, test the decision in *Prest* in a tax evasion case petitioned by two borough councils. This was in the case of *Rossendale Borough Council & Ors v Hurstwood Properties Ltd*.[67] In this case, Rossendale and Wigan borough councils sought to recover unpaid Non-Domestic Rates (NDR) for unoccupied hereditaments

[63] *Seager*, at [76].
[64] *Powell*, at [31].
[65] This point of view echoes Prof. Rose's observations that the evasion principle may be perceived as a definitive and comprehensive restatement of factors to be considered for veil-piercing and can also be seen as an imprecise prescription for future development of some basic notion of corporate abuse, especially, the notion of piercing as a remedy of last resort which was not fully explained. See, F. Rose, "Raising the Corporate Sail" (2013) *LMCLQ* 566, 583.
[66] *Powell*, at [30].

[67] *Rossendale Borough Council & Ors v Hurstwood Properties* [2019] EWCA Civ 364. (Hereafter, *Rossendale*).

from the defendants who had granted leases of these hereditaments to newly incorporated Special Purpose Vehicles companies (SPV).

The SPV were shortly placed into voluntary liquidations and later struck off the companies register as dormant companies. This had the effect that the SPV would be exempted from liability for the NDR since under the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008), any property whose owner is a company that is undergoing voluntary liquidation is exempted from NDR liability under regulation 4K.[68]

The main legal argument from the claimants was that the separate legal personality of the SPVs should be disregarded and the corporate veils pierced as companies (SPVs) had been interposed for the sole purpose of avoiding NDR liability, which was an act of impropriety designed to evade a legal obligation.[69]

While delivering the leading judgment, Richards LJ referred extensively to the decision in *Prest* observing that "…[t]he principle of piercing the corporate veil had only been successfully invoked in very rare cases….most of these cases involved instances where corporate vehicles had been used as a "deception, to disguise the true involvement of the defendant", or where the relevant company was acting as the agent of the defendant….in a minority of successful cases (perhaps only two), the so-called evasion principle applied, where, to quote Sumption LJ: "there is a legal right against the person in control of [the company] 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 the enforcement"[70]

Therefore, rejecting the notion for piercing the corporate veil of the SPVs, he concluded that:

> "[i]t is not, in my judgment, possible to apply the evasion principle to the facts of the present cases. The liability that arose on a daily-basis was that of the SPVs alone and not of the defendants….This would be different if the leases were found to be shams but this allegation had been struck out. It is thus as a matter of law, impossible to say, as one must if the evasion principle is to apply, that the defendants were under an existing obligation or liability for NDR during the

[68] *Rossendale*, [11] – [12]
[69] *Rossendale*, at [13], [17].
[70] *Rossendale*, at [50] – [51].

terms of the leases which they deliberately evaded by interposing a company under their control."[71]

His Lordship also confirmed that in his opinion, it was not open to courts to pierce the corporate veils of SPVs.[72] This, can also be viewed as another restatement of the judicial commitment to preserve the Salomon principle, that is, the separate legal personality doctrine upon which English Company Law is built.

Conclusion

As discussed above, the topic of veil-piercing/lifting remains a hotly contestable area of law under UK corporate law. However, what can be drawn from the judicial decisions explored in this treatise is the notion that limiting veil-piercing to evasion alone as promulgated by Lord Sumption may leave veil-piercing as a means of countering corporate abuse in a state of legal quandary. This may not only leave judges in perplexity, but also, litigants seeking legal remedies for wrongdoing suffered at the hands of those in control of companies with whom they do business.

In *Gramsci Shipping Corp. v Lembergs Ltd*,[73] a case decided immediately following *Prest* that concerned the unlawful diversion of profits between companies controlled by Mr Lembergs, the CA observed that; "…[a]bscent 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."[74] Therefore, limiting veil-piercing to evasion may constrict the development of common law relating to the corporate veil.

Corporate abuse as a concept is quite broad and it can be perpetrated in many different ways. For example, it may occur by way of money laundering which may involve concealment of financial transactions and activities of those involved. This can also transcend into evasion where concealed financial transactions lead to evasion of existing obligations such as taxes and liabilities. Therefore, to broaden the parameters within which remedies for corporate abuse and impropriety may be legitimately addressed, there is a need to reconsider limiting veil-piercing to a rule or set of inflexible rules that may lead to unwanted ramifications.[75]

[71] *Rossendale*, [39].
[72] *Rossendale*, [59].
[73] [2013] EWCA Civ 730. (*Gramsci Shipping Corp.*).
[74] *Gramsci Shipping Corp.*, at [66].
[75] For instance, Matthews is of the opinion that the UKSC missed an important opportunity in *Prest* to discontinue/abandon the veil piercing doctrine that had created huge interpretative and procedural confusion

Cases on veil-piercing often call for the disregard of an established and long-standing doctrine of English corporate law – that is, the doctrine of separate legal personality. Therefore, any decisions to disregard this doctrine ought to be approached with utmost clarity. There is a need to clearly ascertain the link between the wrong committed by the controller and the company's involvement, and that having explored all other conventional legal remedies, equities point towards piercing of the corporate veil.[76]

However, this may fairly be achieved through use of judicial discretion. Judicial discretion is an established principle of English law that has for centuries, aided judicial statutory interpretation[77] and decision-making in England and Wales.[78] Owing to this established legal principle, judges in veil-piercing cases should be given the flexibility to explore viable legal structures to find the best approach to solving corporate abuse cases, rather than limiting them to the confines of "who controls or owns" the company and what "pre-existing" obligations/liabilities were being evaded as formulated by Lord Sumption in *Prest*.[79]

As affirmed by the judges in *Prest* that veil piercing should be considered as a remedy of last resort, this notion widens the scope for establishing when it is "necessary" to pierce the corporate veil. This may be achieved after all other conventional legal remedies are explored, which calls for the exercise of judicial discretion. Therefore, the failure by the judges in *Prest* to clearly explain what forms of corporate abuse would constitute evasion to pierce the corporate veil, and relegating veil-piercing to a tool of last resort may be inferred as a judicial invitation to use judicial discretion in addressing corporate abuse cases in subsequent cases following *Prest*, a notion that should be given utmost consideration.

within the legal field. He contends that this doctrine harbours weaknesses that have been acknowledged by the judiciary in many cases preceding *Prest* but the UKSC failed to address them in that case. He therefore calls for the doctrine to either be clarified or abandoned as its abandonment may not inhibit procedural justice in incorporate law matters as judges have always found other conventional routes to circumvent matters around the corporate veil. See, R. Matthews, "Clarification of the Doctrine of Piercing the Corporate Veil" (2013) 28(12) J.I.B.L.R. 516, 519–520.

[76] This aspect would also align veil-piercing to "piercing as a remedy of last resort" as formulated in *Prest*, at [35].

[77] As re-affirmed in *Re Heydon's Case* (1584) 76 ER 637.

[78] Randall McGowan, "The Image of Justice and Reform in Early Nineteenth Century England" (1983) 32 *Buffalo L. Rev*. 89 – 125; Peter King, "Decision Makers and Decision Making in English Criminal Law 1750 – 1800" (1984) 27 (1) *The Historical Journal* 25 – 58.

[79] Pey W. Lee, "The Enigma of Veil Piercing" (2015) 26(1) *I.C.C.L.R* 28, 32.