Singapore Journal of Legal Studies
[2014] 24–40

PIERCING THE CORPORATE VEIL—IN ENGLAND AND SINGAPORE

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The legal personality accorded by statute to a company, as distinct from the persons of its members, is probably the most fundamental principle of company law and forms a key building-block of our economic and legal structure. However the principle is not entirely an absolute one: the courts have on occasion asserted their power to disregard that separate personality in order to treat the company as one with its controller. But the rationale and scope of this power have only rarely been articulated in the higher courts. This article focuses on recent judicial analyses of piercing the corporate veil in England, and compares the latest approach of the Singapore courts to the same question.

I. INTRODUCTION

When grumbling about the state of public transport, the British have a saying: you wait ages for a bus, then two or three come along at once. Company lawyers might make a similar observation about the principle of piercing (or lifting[1]) the corporate veil. More than a century after *Salomon v. A Salomon & Co. Ltd.*,[2] rare judicial guidance at the highest level on the issue has recently emerged in two decisions in England. Coincidentally, in the same time period, the Singapore Court of Appeal has addressed the issue in two cases. This turning of the judicial spotlight on to a fundamental, yet notoriously obscure, issue of company law is greatly to be welcomed; particularly valuable is the unusually detailed analysis of the issue found in

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1 The practice of most courts to date has been to treat these terms as interchangeable (see *VTB Capital plc. v. Nutritek International Corpn.* [2013] 2 W.L.R. 398 at para. 118 (S.C.) [*VTB Capital*]) and will be followed in this note. Attempts have occasionally been made to identify *piercing* and *lifting* respectively with the concepts now labelled as "evasion" and "concealment" in *Prest v. Petrodel Resources Ltd.* [2013] 3 W.L.R. 1 at para. 60 (S.C.) [*Prest*] (see *infra* note 21) but these have not gained wide acceptance so far.

2 [1897] A.C. 22 (H.L.). In *Woolfson v. Strathclyde Regional Council* [1978] UKHL 5, there had been a brief (but influential) discussion of the issue in the context of a statutory entitlement; the claim to pierce the veil was rejected on the facts.

the English cases. While the veil-lifting discussion was peripheral to the Singapore decisions, whose reasoning is consequently much briefer, it tends to confirm the rather broader approach that has been taken locally to the meaning and scope of the power. The new decisions present an opportunity to take stock of the law in this area.

The English cases are *Prest v. Petrodel Resources Ltd.*[3] and *VTB Capital plc. v. Nutritek International Corpn.*[4] in the U.K. Supreme Court. The Singapore Court of Appeal decisions are *Alwie Handoyo v. Tjong Very Sumito*[5] and *Raffles Town Club Pte. Ltd. v. Lim Eng Hock Peter.*[6] This note will consider the reasoning in these decisions, insofar as they are relevant to piercing the corporate veil, and some potential implications for Singapore.

II. The Recent English Cases—Evasion and Concealment

A. *Overview*

As far as they relate to the corporate veil issue, the facts of the two cases were not especially complicated. In *VTB Capital* the plaintiff bank (a U.K. subsidiary of a Russian bank) lent US$225 million to a Russian borrower to fund its acquisition of a group of Russian dairy companies. The seller was a British Virgin Islands ("B.V.I.") company under the indirect control of a Russian businessman, Mr. Malofeev. The borrower later defaulted on the loan, leading to losses for the bank, which then alleged that it had been induced to lend to the buyer by fraudulent misrepresentations made to it by the seller. These misrepresentations included the fact that the seller and buyer were not under common control, implying that the acquisition was an arm's length transaction. The bank commenced English proceedings, initially for the torts of deceit and conspiracy against the seller and against Mr. Malofeev and other non-U.K. companies through which he was said to control the seller. Leave to serve proceedings on the defendants outside the jurisdiction was obtained. When the defendants applied to set aside such service, the plaintiff sought leave to add a further claim for breach of the loan agreement, which contained an English jurisdiction clause. Mr. Malofeev, as ultimate controller of the buyer/borrower, was said to be liable for the breach on the basis that the latter's corporate veil could be lifted, exposing him as the "puppeteer". However, the plaintiff's application to add the contract claim was dismissed by the High Court, and its appeals failed in both the Court of Appeal and the Supreme Court. The latter rejected the argument based on lifting the corporate veil: in particular, it held that even if grounds existed in principle to lift the veil, the power could not be exercised so as to make a company's controller liable as a party on the company's contract.

Prest concerned the division of matrimonial property following the divorce of Mr. and Mrs. Prest. The husband was a successful oil trader with a net worth of about £35 million. The English High Court found that he controlled a number of

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3 *Supra* note 1.
4 *Supra* note 1.
5 [2013] 4 S.L.R. 308 (C.A.) [*Alwie v. Tjong*].
6 [2013] 1 S.L.R. 374 (C.A.) [*Raffles Town Club*].

offshore companies (referred to as the "Petrodel group") which held several valuable U.K. residential properties. The wife claimed a share of his assets and the court held that pursuant to the relevant statute[7] she was entitled to a lump sum of £17.5 million. In partial satisfaction of this amount the court ordered Petrodel group companies to transfer several of the U.K. properties to the wife. The Petrodel companies appealed on the grounds that the court's jurisdiction to order transfers was limited to property to which the husband was beneficially entitled, and that the properties in question were both legally and beneficially owned by the companies. The Court of Appeal by a majority allowed the appeal. It rejected on the facts the wife's argument that, even if the companies beneficially owned the properties, their corporate veils should be disregarded so as to treat the properties as belonging to the husband. On the wife's further appeal, a seven-judge bench of the Supreme Court unanimously held that the corporate veil could not be lifted on the facts of the case. The court also rejected an argument that the matrimonial statute should be interpreted in a way that treated the companies' property as the husband's. However, the wife's appeal was allowed on the separate ground that the properties were held on a resulting trust for the husband, taking into account the source of the funds used to acquire them, and drawing factual inferences against the husband in view of his lack of candour and obstructiveness in the proceedings.[8]

In summary, in both cases the Supreme Court ultimately declined to pierce the corporate veil (as had all the lower courts involved). However on both occasions it entered into a detailed analysis of the relevant law even though it was strictly unnecessary to do so. One reason for this was that the defendants, rather than confining their arguments to the scope of the principle, took the more radical position that there existed in law *no* judicial power to lift the corporate veil. But a further reason for squarely addressing the issue was the increasing amount of litigation, in both the commercial[9] and family[10] areas, which had resulted in strong differences of views in the lower courts.

In passing, it may also be noted that in both English cases (and also in *Alwie v. Tjong* in Singapore), the controlled companies were incorporated outside the jurisdiction. This naturally raised the question of what is the appropriate choice of law rule (or rules) for determining whether the court has the power to pierce the veil. It was, however, unnecessary for the court to address that interesting problem as the parties were generally content for the court to apply its domestic rules.[11]

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7 *Matrimonial Causes Act 1973* (U.K.), 1973, c. 18, Part II.

8 *Prest*, *supra* note 1 at paras. 45, 47-52.

9 See *e.g.*, *Lindsay v. O'Loughnane* [2010] EWHC 529 (QB); *Antonio Gramsci Shipping Corp v. Stepanovs* [2011] EWHC 333 (Comm); *Linsen International Ltd. v. Humpuss Sea Transport Pte. Ltd.* [2011] EWHC 2339 (Comm).

10 See *e.g.*, *Nicholas v. Nicholas* [1984] Fam. L.R. 285 (C.A.); *Mubarak v. Mubarak* [2001] 1 Fam. L.R. 673 (H.C.); *Ben Hashem v. Al Shayif* [2008] EWHC 2380 (Fam) [*Ben Hashem*]; *Prest v. Prest* [2013] 2 W.L.R. 557 (C.A.) [*Prest* (C.A.)].

11 See *VTB Capital, supra* note 1 at para. 131 (Lord Neuberger), referring to Chee Ho Tham, "Piercing the Corporate Veil: Searching for Appropriate Choice of Law Rules" [2007] L.M.C.L.Q. 22, 27; *Alwie v. Tjong*, *supra* note 5 at para. 58. See also *Prest* (C.A.), *supra* note 10 at para. 98; the Supreme Court in *Prest*, *supra* note 1 did not mention this issue.

B. *The Existing Law: Lack of a Coherent Principle*

To pierce or lift the corporate veil means, in essence, to disregard the separate personality of a company which is accorded by statute upon its incorporation. The classic objective of seeking to do so is for the company and its controller to be treated as one such that a liability of the company may be treated as attaching to the controller (as argued in *VTB Capital* and *Alwie v. Tjong*), or vice versa (as in effect argued in *Prest*). But there are also many other contexts where the principle has been claimed to be invoked, *e.g.*, to obtain some statutory benefit or to avoid some statutory obligation.[12]

In order to address the impact of the new cases, it may be useful at this point to give a brief indication of various situations, some of them probably overlapping, which have been said to illustrate a power to disregard the veil:[13]

- where a *statutory rule* requires disregarding the veil;
- where *fraud* is present;
- where the controller has used the company to *evade an existing legal obligation* of his;
- where the company is used as a *sham or façade*, in particular to conceal some impropriety by the controller;
- where a company is either the *agent* or *alter ego* of its controller;
- where a corporate group is run as a *single economic entity*; and
- whenever it is necessary in the *interests of justice* to do so.

It may be apparent from this list that there has been uncertainty in defining the basis, and thus the scope and limits, of the court's power to lift the veil. Is there a principle underlying those situations when the court can do so? Or is the phrase simply a "label… used indiscriminately… to describe the disparate occasions on which some rule of law produces apparent exceptions" to legal personality?[14] It has been a widespread view in the common law world that no single coherent principle has yet been developed to explain the law on when the veil may be lifted.[15] In *VTB Capital* the Supreme Court ultimately declined to formulate such a principle, especially in an interlocutory appeal and where it would not affect the outcome of the proceedings. However, only a few months later the court in *Prest*, through Lord Sumption, grasped the nettle and endeavoured to explain the earlier case law in terms of both a rationale and a rule.[16]

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[12] See *e.g.*, *DHN Food Distributors Ltd. v. Tower Hamlets Borough Council* [1976] 3 All E.R. 462 (C.A.).

[13] This categorisation is adapted from Tan Cheng Han, "Incorporation and Its Consequences" in Tan Cheng Han, ed., *Walter Woon on Company Law*, rev. 3rd ed., (Singapore: Sweet & Maxwell, 2009) at para. 2.58 *et seq*.

[14] *Prest*, *supra* note 1 at para. 106 (Lord Walker).

[15] See the *dicta* from the Australian, New Zealand, South African and United States authorities cited by Lord Neuberger in *ibid.* at paras. 75, 76.

[16] Lord Walker commented aptly that it would be "a lost opportunity—even perhaps a minor dereliction of duty" not to attempt such guidance: *ibid.* at para. 105.

C. Prest *and* VTB Capital

1. *Meaning and Rationale of Veil-piercing*

In *Prest*, Lord Sumption's leading judgment began by answering the question of what is properly meant by "piercing the veil" in a narrow sense. In his view, the expression should be used to describe only *true* exceptions to the principle of separate personality. Other situations where a legal rule may attribute acts, or assets, of a company to its controller may have the *effect* of establishing personal liability, or beneficial ownership, in the controller, but these are not veil-piercing in a strict sense. They depend not on any exceptional rule of company law but are simply applications of some other principle—whether of agency, trusts, joint liability, or a specific statutory rule—applied in a corporate context.

In evaluating the rationale for an independent veil-lifting principle in company law, Lord Sumption turned to what he called the law's fundamental assumption of honest dealings—*i.e.*, that the normal incidents of legal relationships between persons will not necessarily be respected where their dealings have not been honest: "fraud unravels everything."[17] Examples of this were the rules that fraud vitiates the consent required in contractual dealings, and that a judgment obtained by fraud could be set aside. However, in his view the principle was broader than those cases: in limited circumstances the use of a company to evade the law was "treated as dishonest."[18]

His Lordship noted that most of the English *dicta* recognising a power to pierce the veil were *obiter*, either because the power was not exercised in the particular case or, where it was, because the decision was justifiable on some other ground.[19] Nevertheless there was a considerable judicial and academic consensus in favour of a *limited* veil-lifting principle for the purpose of *relevant wrongdoing*, to "avoid abuse" of separate personality. Such a principle was, in his view, a necessary one but it must be carefully limited to avoid undermining the vital importance of corporate personality to the legal system and economy.

2. *Scope of the Principle: Evasion and Concealment*

Having decided that there was such a power, Lord Sumption addressed the more difficult question of delineating its scope and limits. Given its purpose, as stated above, the definition of "relevant wrongdoing" was crucial. Eschewing the temptations of metaphor (*e.g.*, "façade", "sham") as confusing,[20] his Lordship's analysis of the decisions which had purported to apply the doctrine led him to propose two (overlapping) categories: the *evasion* principle and the *concealment* principle. Situations within the former would justify lifting the veil in the strict sense, while those

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17 Quoting *Lazarus Estates Ltd. v. Beasley* [1956] 1 Q.B. 702 at 712 (C.A.) (Denning L.J.).

18 *Prest*, *supra* note 1 at para. 18.

19 *Ibid.* at para. 27. To similar effect, see Lord Neuberger at paras. 64, 74.

20 For similar sentiments, see *VTB Capital*, *supra* note 1 at para. 124 (Lord Neuberger).

purely within the latter would not. Evasion was said to occur:[21]

> [W]hen 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.

Concealment was described as:[22]

> [T]he interposition of… [one or more companies] so as to conceal the identity of the real [actor(s)]… [This does not prevent the court from identifying the true actors], assuming that their identity is legally relevant.

The use of the term "concealment *principle*", in contrast with the evasion principle, could be confusing at first sight. Concealment is neither a principle of liability, nor one of non-liability: cases which fall into this category (and not also evasion) are not safe from judicial scrutiny. Such cases may well attract some other applicable legal rule—such as agency, or knowing receipt—which gives rise to a liability in the controller by virtue of his relationship and/or transactions with the company (or vice versa). The principle (if one is necessary[23]) is simply that the court may view and determine the true facts of that relationship and those transactions without artificially blinkering itself. For the metaphorically-inclined, this is peeping behind[24] the veil rather than piercing it, in order to enable the court to decide whether the "other" rule applies.

Lord Sumption illustrated his evasion and concealment categories by reference to the well-known jurisprudence. He considered *Gilford Motor Co. Ltd. v. Horne*,[25] where an ex-employee who was bound by a restrictive covenant set up a company to compete with his former employer, to be a true example of evasion insofar as the court ordered the company to comply. The company, which was not bound by the covenant, was injuncted to ensure that the ex-employee's attempt to evade his obligation did not succeed. The order against the employee himself required no veil-piercing: his situation fell within "concealment". Likewise, in *Jones v. Lipman*[26] a seller of a property, in order to evade his obligation to complete the sale agreement, conveyed the land to a company under his *de facto* control. Again, the company was used by its controller in an attempt to conceal himself; however the court could grant specific performance directly against him without any need to lift the veil. But the order was also extended to the company even though it was not contractually bound: this was the evasion principle at play.

Cases where Lord Sumption thought that veil-lifting had been mistakenly invoked included *Trustor AB v. Smallbone (No. 2)*.[27] A company's managing director improperly caused its funds to be paid to his controlled company. A claim for knowing receipt succeeded against the director himself on the basis that receipt by the controlled vehicle was, by lifting the veil, receipt by the controller. Lord Sumption considered

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21 *Prest*, *supra* note 1 at paras. 28, 35.
22 *Ibid.* at para. 28.
23 Lord Sumption described it as "legally banal": *ibid*.
24 See S. Ottolenghi, "From Peeping Behind the Corporate Veil, to Ignoring It Completely" (1990) 53 Mod. L. Rev. 338.
25 [1933] Ch. 935 (C.A.) [*Gilford*].
26 [1962] 1 W.L.R. 832 (H.C.) [*Jones*].
27 [2001] 1 W.L.R. 1177 (H.C.) [*Trustor*].

that this case could have been treated simply as an example of concealment and not evasion. The company's receipt of the funds was apparently *qua* agent—had it not been, the director would not have been treated as receiving the funds. In other words, his liability on this head was not independent of the involvement of the company. The result of the case was correct: the director was liable, but it was not necessary to lift the veil to achieve this.

His Lordship emphasised the limited nature of the power—it should be exercised only when necessary and to the extent required: "if it is not necessary to pierce the corporate veil, it is not appropriate to do so."[28] The principle is thus regarded as one of last resort.

On the facts of *Prest*, Lord Sumption held that the evasion principle did not apply: it had not been shown that Mr. Prest caused the companies to acquire the properties with a view to avoiding his liability to transfer assets to his wife upon divorce. Not only had the acquisitions occurred long before the marriage broke down, they were made for purposes of (apparently legitimate) wealth protection and tax avoidance. The veil could not be pierced.

One may note the restrictive formulation of the evasion principle. It appears to allow piercing only where the controller is subject to an existing liability or restriction and he deliberately interposes or uses a company to evade or frustrate it. There are possibly other situations which one might argue should also be caught. One is where the company is interposed before the liability came into existence but when it was seriously contemplated. For example, if Mr. Prest had procured the acquisition of the properties when the marriage was in trouble but before any formal step was taken to end it. Lord Sumption's words are not statute and it is conceivable that such a case might be accommodated within his principle, but it is not clear. Secondly, what if a debtor company transferred assets to a parent for the principal purpose of putting them beyond a future liquidator's reach? In this situation, insolvency or creditor law might provide an alternative remedy, depending on the precise facts,[29] which might justify the inapplicability of veil-lifting to this situation.

3. *Other Views on Evasion*

While no other member of the court proffered any developed alternative to the evasion/concealment analysis, neither did they give it their unqualified support. Lord Neuberger, while approving the evasion concept, disagreed on its application to *Gilford* and *Jones* which he thought could be analysed as mere concealment.[30] Thus he considered that there was *no* English case which unequivocally underpinned a power

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[28] *Prest*, *supra* note 1 at para. 35. Lord Sumption preferred the view of Munby J. in *Ben Hashem*, *supra* note 10 at para. 164, over that of the Court of Appeal in *VTB Capital Plc. v. Nutritek International Corpn.* [2012] EWCA Civ 808; [2012] 2 Lloyd's Rep. 313, at para. 79.

[29] *E.g.*, transfer at an undervalue, unfair preference, fraudulent conveyance, unlawful dividend, breach of director's duty, *etc*.

[30] *Prest*, *supra* note 1 at paras. 69-73. For *Gilford*, *supra* note 25, this was on the basis that the company could be seen as acting as its controller's agent in relation to the breach of covenant: the order against the principal could accordingly be extended to the agent. In *Jones*, *supra* note 26, various non-veil-piercing justifications were possible for the order against the company (including that it took with imputed notice of the purchaser's equity). See *Yukong Line Ltd. v. Rendsburg Investments Corporation of Liberia (No. 2)* [1998] 1 W.L.R. 294 (H.C.) (Toulson J.) [*Yukong Line*].

to lift the veil: however he supported the recognition of a limited power as a "valuable judicial tool to undo wrongdoing" in cases where no other solution existed.[31] Given that these two cases were fundamental to Lord Sumption's distillation of the evasion principle, this must go some way to undermine its strength. Lord Clarke agreed that the veil-lifting doctrine existed but stated that the evasion/concealment analysis should not be definitively adopted without fuller argument.[32] He and Lord Mance felt that in any event other possible exceptions to legal personality should not be foreclosed, even if they were likely to be rare. Lord Walker took the most conservative line, denying the existence of a separate doctrine allowing a court to lift the veil at all.[33]

Lady Hale (with Lord Wilson) doubted whether it was possible to fit all the precedents into the evasion/concealment categories.[34] But the examples which she cited of other means of "going behind" the veil could, on Lord Sumption's narrower definition, be regarded as apparent rather than true exceptions. For instance, she suggested that some cases might be explained by a principle against a company's controller taking unconscionable advantage of third parties. She also mentioned the decision in *Stone & Rolls Ltd. v. Moore Stephens*.[35] However, with respect, the issue in that case is better regarded not as veil-lifting, except in a rather loose sense, but as involving the *attribution* to a company of the acts or knowledge of an appropriate individual for the purposes of applying some legal rule to the company. In essence, attribution is used in establishing *how* the relevant rule applies to a company. The typical aim of veil-piercing is to make a remedy available against one person to satisfy a discrete obligation of another.

4. *Fraud*

Does the *Prest* analysis have any effect on fraud or the other grounds that have often been mentioned[36] as justification for lifting the veil? As noted, Lord Sumption identified fraud (in a broad sense) as the rationale underpinning the judicial power to pierce the veil on the ground of evasion. And fraud is an obvious example of wrongdoing which may attract the evasion principle. However it does not follow that fraud *always* unravels *everything*. That is apparent from *VTB Capital*, where it was alleged that the company's controller had fraudulently denied the fact of his control over the company, thereby inducing the plaintiff to enter the contract. The Supreme Court declined to lift the veil so as to make the controller liable on the contract when he was not, and was not intended to be, a party to it. One of the reasons was that the plaintiff would have, on the assumed facts, an alternative remedy in fraudulent misrepresentation; the difference in the measure of damages was said to be insufficient reason to disregard the company's *persona*.[37] This case therefore reinforces the last-resort nature of the power, which applies even in situations of fraud.

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31 *Prest*, *supra* note 1 at paras. 79, 80.
32 *Ibid.* at para. 103.
33 *Ibid.* at para. 106.
34 *Ibid.* at para. 92.
35 [2009] 1 A.C. 1391 (H.L.).
36 See *supra* note 13.
37 *VTB Capital, supra* note 1 at para. 146.

5. *Statute*

The context of the issue in *Prest* was the application of a statutory power, to transfer assets consequent on a divorce. While the court analysed the doctrine of veil-piercing as a matter of general legal principle, it considered separately the wife's argument that the proper interpretation of the term "entitled to property" was wider than its meaning under general law. The High Court had accepted a purposive interpretation, holding that the *practical ability* to procure the companies to transfer the properties was sufficient. However the Supreme Court rejected this for several reasons:[38] it held that, in line with the interpretative principle favouring respect for general law rights, the statute bore the normal meaning of property entitlement. Since an ex-spouse's entitlement could usually be satisfied by the transfer of shares in, rather than assets of, a company, a broader meaning was unnecessary. Further, the wife's argument in this case would in effect make her a secured creditor of the Petrodel companies and so cut across the interests of their other creditors.

The case thus underlines that where a statutory rule is at issue the question is primarily to be resolved by interpretation of the legislation. Although the starting point is that a company is treated as a separate person for legislative purposes, a statute may, even implicitly, require that the corporate veil be disregarded; this will be the case where separate personality is irrelevant for the purposes of the statute. In view of the near-infinite variety of statutory rules, contexts and purposes, the question must be determined by focusing on the enactment in question. It is not strictly necessary to apply "common-law" principles of veil-lifting: these have mainly been developed in the context of private-law rights and obligations, and so may not take into account the particular statutory purpose. In some cases, particularly where the statutory right or liability is closely analogous to a private-law one, it may be appropriate to apply a similar approach: indeed, *Prest* appears to be such an example.

However there are other cases where the statutory purpose may point towards disregarding the veil, whether or not this would be done at common law. *Re FG (Films) Ltd.*[39] may be seen as an instance of this: the statutory question was whether a U.K. company was the "maker" of a "British film" (and so entitled to tax benefits) in circumstances where it had in effect outsourced virtually the whole production to a related American company. The court held that the U.K. company did not qualify: this is sometimes analysed as a case of agency, but it is suggested that in any event the arrangement did not come within the statutory purpose. Perhaps a clearer example is *Reed v. Marriott (Solicitors Regulation Authority)*[40] which involved a rule banning solicitors from paying fees or other rewards to referrers of litigation business. A law firm established an arrangement with an insurance company under which one of the insurer's subsidiaries referred business to the firm, while another subsidiary received payments (partly proportionate to the value of the referred business) from the firm for rendering "outsourced" services to it. The firm argued that the rule was not breached because the referrer and the payee were separate entities. However the

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38 *Prest*, *supra* note 1 at paras. 40-42.

39 [1953] 1 W.L.R. 483 (H.C.).

40 [2009] EWHC 1183 (Admin).

court held that this was irrelevant to the issue:[41]

> [C]onstructing a scheme which notionally separated the introducer from the person receiving payment by establishing two wholly owned subsidiaries went nowhere to dispel the perceived vice which the section… was designed to prevent.

6. *Other Grounds*

Three other of the aforementioned grounds[42] to justify lifting the veil should be mentioned briefly. The "single economic entity" argument, *i.e.* where a group of companies is run as a "functional whole," was not obviously applicable on the facts of *Prest*. The leading case on the point remains *Adams v. Cape Industries plc.* which essentially rejected its existence as an independent ground.[43] Lord Sumption merely commented that that case had been regarded as settling the law on the subject.[44] Secondly, *Prest* did not deal specifically with the "alter ego" argument insofar as it may be a separate ground. This will be addressed in the discussion of the Singapore case of *Alwie v. Tjong* below. Finally, a small number of authorities had propounded the view that the corporate veil could be disregarded whenever it was necessary to achieve justice.[45] But this opinion was disapproved in *Cape Industries*[46] and, despite occasional murmurings of dissent,[47] clearly cannot survive the *Prest* analysis.

7. *The Effect of Piercing*

In *VTB Capital* the leading judgment on veil-piercing was delivered by Lord Neuberger.[48] The issue focused on the *effect* of lifting the veil—it was assumed for the purpose of argument that the power existed. While the judgment did nevertheless discuss the latter issue, the court reached no definite conclusion on it and that discussion has been somewhat overtaken by the later judgment in *Prest*.[49] Therefore, the main ongoing import of *VTB Capital* is probably the holding that the veil cannot be pierced in order to make the controller liable on the company's contract. This view was reached on the basis both of the absence of mutual intention that the controller should be bound, and on the lack of precedential authority.[50]

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41 *Ibid.* at para. 46.

42 See *supra* note 13.

43 [1990] Ch. 433 at 539 (C.A.) [*Cape Industries*].

44 *Prest*, *supra* note 1 at para. 23. The Singapore courts have also declined to embrace the single economic entity argument: see *Win Line (UK) Ltd. v. Masterpart (Singapore) Pte. Ltd.* [1999] 2 S.L.R.(R.) 24 at paras. 43-45 (H.C.) [*Win Line*]; *Public Prosecutor v. Lew Syn Pau* [2006] 4 S.L.R.(R.) 210 at paras. 193-213 (H.C.).

45 See *e.g.*, *Re a Company* [1985] B.C.L.C. 333 (C.A.).

46 *Supra* note 43. For a similar rejection in Singapore see *Lim Chee Twang v. Chan Shuk Kuen Helina* [2010] 2 S.L.R. 209 at para. 96 (H.C.). See also the Malaysian decision in *Law Kam Loy v. Boltex Sdn. Bhd.* [2005] 3 Common Law Journal 355 (C.A.), reversing an earlier stance.

47 See *Conway v. Ratiu* [2006] 1 All E.R. 571 at paras. 75, 186 (C.A.).

48 Lords Mance, Wilson and Reed agreed with Lord Neuberger's discussion on piercing the veil. Lord Clarke, while agreeing with Lord Neuberger's conclusion, reserved his position on the scope of the principle.

49 Four of the five members of the court in *VTB Capital* (excluding Lord Reed) also sat in *Prest*.

50 *VTB Capital, supra* note 1 at paras. 138-145.

Although in *VTB Capital* this holding was framed as a restriction on remedies, Lord Sumption in *Prest* built a similar constraint into his definition of the evasion principle: allowing enforcement of the contract against the controller would impermissibly create a new liability that would not otherwise exist.[51] In whichever way it is viewed, it has the effect of significantly narrowing the power even further, which means that the prospect of obtaining monetary remedies against the controller will be even more remote. In practice it underlines the advantages of pursuing alternative approaches to lifting the veil, in particular agency and knowing receipt, where they are available.

III. The Recent Singapore Cases—Façades, Alter Egos, Agents and Nominees

Neither of the two recent Singapore decisions referred to *Prest* or *VTB Capital*. *Alwie v. Tjong* was argued just after the U.K. Supreme Court decided *VTB Capital* and before the delivery of *Prest*,[52] while *Raffles Town Club* pre-dates both English cases. Thus it is unknown whether the Supreme Court's reasoning would have affected the local decisions. The veil-piercing issue was not central to either Singapore judgment and the impact of the English developments will have to await later cases. Nevertheless it is clearly of considerable interest to compare the approach of the two final appellate courts on veil-lifting with an eye towards the future.

A. Alwie v. Tjong—Et in Arcadia *Alter Ego*

The underlying transaction in this case was described by the court as "convoluted" and "murky".[53] In simplified terms, Tjong, an Indonesian businessman, and others acquired for about US$1.2 million an Indonesian company ("PT Batubara") whose main asset was a coal-mining concession. Just three months later Tjong entered into another agreement to sell a 72% indirect interest in PT Batubara to a buyer, Antig Investments, for US$18 million. This agreement contained very unusual payment provisions whereby US$12 million of the total purchase price was to be paid by the buyer in cash and shares to two B.V.I. companies, OAFL and Aventi, which were not parties to the agreement. OAFL and Aventi were allegedly controlled respectively by another two Indonesian businessmen, Alwie and Johanes, who had been involved in negotiating the deal but who were likewise not parties to the contract. After completion a dispute arose when Tjong asserted that, under the agreement's payment clause, the cash-and-shares payments to OAFL and Aventi were intended to be received by them as Tjong's agents. Accordingly he brought claims against the two recipient companies in unjust enrichment (for the cash) and conversion (for the shares). Further, he claimed against Alwie and Johanes personally on the basis that they controlled OAFL and Aventi respectively and that the latter's corporate veils could be pierced. The Singapore High Court[54] found for Tjong on the underlying

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51 *Prest*, *supra* note 1 at para. 34.

52 Counsel for Alwie in the Court of Appeal confirmed to the writer that neither English case was argued in *Alwie v. Tjong*.

53 *Alwie v. Tjong*, *supra* note 1 at para. 3.

54 *Tjong Very Sumito v. Chan Sing En* [2012] SGHC 125 [*Tjong* (H.C.)].

claims against OAFL, and agreed that OAFL's corporate veil could be lifted on the facts.[55] However the Court of Appeal overturned the judge's findings on unjust enrichment and conversion, holding that on the true interpretation of the agreement the US$12 million was due to OAFL and Aventi for their own accounts. There was therefore no need to consider the issue of piercing the veil. Nevertheless, as the point had been argued the court gave its view that OAFL's veil could indeed have been lifted against Alwie.[56] The Court of Appeal identified two grounds for piercing the veil: first, the use of a company as a "mere device, sham or façade" and secondly, a case where a company was the *alter ego* of its controller. In relation to the latter ground it said that:[57]

> … the key question that must be asked whenever an argument of alter ego is raised is whether the company is carrying on the business of its controller…

The court decided that OAFL had been proved to be Alwie's alter ego based on his admissions in evidence. These included that: (i) OAFL was incorporated for the sole purpose of the transaction and was wholly controlled by Alwie (described by the court as the company's "directing mind and will") (ii) the cash payment was made into a bank account which, although opened in OAFL's name, was beneficially owned by Alwie; and (iii) Alwie had requested the payer to arrange for part of the sum to be converted into Singapore dollars and paid into his personal bank account. The court concluded that "Alwie made no distinction between himself and OAFL."[58]

The differences in meaning between the terms "alter ego" and "sham or façade" are not obvious at first sight. Yet in *Alwie v. Tjong* the Court of Appeal explicitly recognised the two as being distinct in this context, although without defining "sham or façade". It was unnecessary to do so because the decision appealed from was based solely on the alter ego theory. The distinction was elaborated on in the High Court judgment (which was upheld on the corporate veil issue):[59]

> While there is as yet no single test to determine whether the corporate veil should be pierced in any particular case, there are, in general, two justifications for doing so at common law—first, where the evidence shows that the company is not *in fact* a separate entity; and second, where the corporate form has been abused to further an improper purpose…

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55 *Ibid.* at para. 70.

56 Aventi had received the lion's share of the total of $12 million paid to it and OAFL. However the High Court declined to lift Aventi's corporate veil against Johanes because the latter had not been served with the proceedings: *ibid.* at para. 75. As this finding was not appealed, the Court of Appeal addressed the veil-piercing question only in relation to OAFL.

57 *Alwie v. Tjong, supra* note 5 at para. 96, citing only the High Court decisions in *NEC Asia Pte. Ltd. v. Picket & Rail Asia Pacific Pte. Ltd.* [2011] 2 S.L.R. 565 at para. 31 [*NEC Asia*]; and *Zim Integrated Shipping Services Ltd. v. Dafni Igal* [2010] 2 S.L.R. 426 at paras. 86-88.

58 *Alwie v. Tjong, ibid.* at para. 100. It is of interest that the Court of Appeal did not mention the High Court's further ground that Alwie was principally involved in the negotiation of the agreement (*Tjong* (H.C.), *supra* note 54 at para. 73)—possibly because such involvement is entirely consistent with a normal management role.

59 *Tjong* (H.C.) *ibid.* at para. 67 [emphasis in original], adopting the view expressed in Tan, *supra* note 13 at paras. 2.51, 2.52, 2.57.

On this basis it appears that the alter ego ground is essentially founded on the *factual indistinctness* between controller and company,[60] whereas "sham or façade" relates to *improper use* of the company by the controller. While both grounds may apply to the same fact situation, this is not necessary: *Alwie v. Tjong* affirms that factual indistinctness (where made out) is sufficient to pierce the veil even in the absence of improper use of the company. While this two-fold classification as an explanation of the case law[61] seems plausible, it should be noted that the use of "sham or façade" has not always been confined to the improper purpose category, and the term has sometimes been used in situations which are closely akin to factual indistinctness without impropriety.[62]

B. *Potential Implications of the English Decisions*

Do the new English cases, particularly *Prest*, hold any implications for the taxonomy and ambit of veil-piercing in Singapore? A number of general points are worth discussing. The first concerns nomenclature: Lord Sumption's suggestion that the term "piercing the veil" should henceforth be confined to true exceptions to legal personality, as opposed to the invocation of other legal rules even if they have a similar effect. This has not always been the practice in Singapore or elsewhere. It is submitted that on balance adopting this proposition would be beneficial in terms of clarifying issues, sharpening arguments and promoting understanding. It would also assist a more principled development of the law in this area, something which has been lacking in the past.

Secondly, it seems clear that the evasion principle in *Prest* corresponds to the improper use ground which hitherto has often been described, in England and Singapore, in terms of a "sham or façade" to avoid or conceal liability. However, whether Lord Sumption's re-definition of the *scope* of this ground should be followed in this country is perhaps a matter for debate.[63] An argument might be made that the test is drawn too narrowly and may not catch some deserving situations of impropriety.[64] What is to be welcomed in his approach is the leaving behind of imprecise, overlapping and ultimately unrevealing metaphors as a substitute for explaining the reasoning behind veil-lifting. While the use of metaphors in this area has been increasingly deprecated by judges and commentators alike,[65] the approach in *Prest* is likely to fortify such a trend.

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60 Alter ego is sometimes framed in terms of the company's lack of a factually autonomous existence, but it is submitted that there is little difference in practice between the two.

61 See *e.g.*, Tan, *supra* note 13 at para. 2.51.

62 See *e.g.*, *Cape Industries*, *supra* note 43 at 543; *Win Line*, *supra* note 44 at paras. 34-42; Tan, *ibid.* at paras. 2.71, 2.72. This may have been influenced by the use of the term "sham" in a different context, *i.e.*, that of sham *transactions* (*e.g.*, *Snook v. London and West Riding Investments Ltd.* [1967] 2 Q.B. 786 at 802 (C.A.)). The use of that term in relation to companies has been criticised: see the cases cited at *infra* note 65.

63 Except for referring to some non-U.K. *dicta* on the difficulty of identifying a veil-piercing principle (*Prest*, *supra* note 1 at paras. 75, 76), *Prest* concentrates almost exclusively on the U.K. case law.

64 See *supra* note 29, and note the caution expressed in *Prest*, *ibid.*, by Lords Clarke and Mance.

65 See *e.g.*, *Yukong Line*, *supra* note 30 at 305-308; *Ben Hashem*, *supra* note 10 at para. 157; *VTB Capital,* supra note 1 at para. 124; Ottolenghi, *supra* note 24 at 339; J.H. Farrar & B.M. Hannigan, *Farrar's Company Law*, 4th ed., (London: Butterworths, 1998) at 72.

Thirdly, after *Prest*, what is the status of an "alter ego" ground for lifting the veil, in the absence of any relevant wrongdoing? Lord Sumption found the rationale of the veil-piercing power in the fundamental assumption of honest dealings, and the test for exercise of the power in the deliberate evasion of legal obligations. It is the nature of the conduct, rather than the nature of the entity, which justifies the power. It is true that the case appears to have been argued primarily on the basis of Mr. Prest's evasion of his liabilities, rather than his factual disregard of the companies' legal *personae*. However there are a number of references in the judgment to him treating the companies' assets as if they were his own and ignoring the separate personality of his companies.[66] Findings like these would, in Singapore, appear to support lifting the veil even without impropriety, and if the position were the same in England one might have expected some discussion. Instead, the clear implication of Lord Sumption's judgment is that the corporate veil "may be pierced *only* to prevent the abuse of corporate legal personality."[67] And although some of his colleagues expressly reserved their position on the possible recognition of additional grounds, no specific ground was mentioned.

However *Prest* reaffirms the place of agency as an *apparent* exception to legal personality[68]—*i.e.*, falling under concealment rather than evasion. A company is not by virtue of incorporation treated as an agent of its shareholders, but such an agency may be established on the facts and may be express or implied.[69] It may therefore be argued that some situations of factual indistinctness (or alter ego) may be able to be characterised as implied agencies. A well-known example of this is *Smith, Stone & Knight Ltd. v. Birmingham Corporation* where a subsidiary was held to be carrying on a business as implied agent for its parent company, qualifying the parent for a statutory compensation entitlement.[70] The court identified a number of factors which led it to this conclusion. The most potent[71] was that the profits of the subsidiary's business were treated in the parent's accounts as belonging to the latter—*i.e.*, no distinction was drawn between the parent's and the subsidiary's profits (and, by implication, their assets). *Smith, Stone & Knight* involved the contention that the company's whole business was conducted as implied agent for its shareholder: such an arrangement is perhaps inherently so unusual that it will not readily be accepted without strong evidence.[72] However where the claimed agency is confined to a single

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66 See *e.g.*, *Prest*, *supra* note 1 at paras. 15, 41, 42: "There was no formality involved. The husband simply treated the companies' cash balances and property as his own and drew on them as he saw fit… [The group] was effectively… the husband's money box which he uses at will"; "[The] husband made free with the companies' assets as if they were his own"; "Mr. Prest… ignore[d] the separate personality of his company"; "[The] way in which the affairs of the company were conducted meant that the corporate veil had no reality".

67 See *e.g.*, *Prest*, *ibid.* at para. 34 [emphasis added]. See also para. 81 (Lord Neuberger), para. 103 (Lord Clarke).

68 *Ibid.* at paras. 16, 71, 99.

69 *The Gramophone & Typewriter Ltd. v. Stanley* [1908] 2 K.B. 89 at 96, 97 (C.A.); *Yukong Line*, *supra* note 30 at 303.

70 [1939] 4 All E.R. 116 (H.C.) [*Smith, Stone & Knight*].

71 It is submitted that the other factors mentioned were quite consistent with a normal parent-subsidiary (*i.e.* non-agency) relationship. See also *Government of Sierra Leone v. Davenport* [2003] EWHC 2769 (Ch) at para. 60.

72 This may partly account for the somewhat unenthusiastic reception that the case has had from later courts: *e.g.*, *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1989] 1 Ch. 72 at 189, 190 (C.A.).

or small number of acts it may be easier to establish. In *Prest* itself, Lord Sumption reinterpreted the *Trustor* case[73] as involving a receipt of money by the company on the controller's behalf, *i.e.* as agent or nominee, rather than as piercing the veil. The agency was implied from all the facts, not simply the controller's dominance over the company.[74]

In this light, it is possible that the English courts would analyse the facts which led the Singapore court to lift the veil in *Alwie v. Tjong* in terms of agency or nominee-ship. The finding that Alwie was the beneficial owner of OAFL's bank account would be significant. And even if the English courts did recognise an alter ego ground for piercing the veil, it would not be applied if the issue could be resolved through agency, under the "last resort" principle.

Fourthly, with regard to the holding in *VTB Capital* that the veil cannot be lifted to make the controller liable as a party on the company's contracts, similar results have previously been reached in Singapore. Thus, the court in *NEC Asia Pte. Ltd. v. Picket & Rail Asia Pacific Pte. Ltd.* rejected the attempt on the ground that the plaintiff had always regarded the company rather than the controller as its counterparty.[75] However in *Children's Media Ltd. v. Singapore Tourism Board*[76] the Court of Appeal upheld a High Court decision[77] to lift the veil, on the "sham or façade" ground, so as to hold the controller jointly and severally liable on a contract entered by the company alone. It appears that the controller was also liable for misrepresentation, made personally, but it is difficult to explain the result except in terms which are inconsistent with the subsequent ruling in *VTB Capital*. In view of *Children's Media Ltd*., holding a controller liable on the company's contract in an appropriate case cannot be excluded in Singapore, which marks a significant difference from the English approach. Nevertheless the reasoning in *NEC Asia* and similar cases may dissuade a court from lifting the veil in particular situations.

C. Raffles Town Club *Case*

In the final recent case to be discussed, the eponymous Singapore company had been sold by the defendants, who were all of its former shareholders and directors. When significant losses later emerged in the company, the new owners caused the company to sue the former directors for various breaches of fiduciary duty. These included the charging of personal expenses to the company and the receipt by the former directors of profits from an investment owned by the company. The Court of Appeal held that, although there had been *prima facie* breaches of duty, all of these had been unanimously ratified by the shareholders before the share sale and the relevant amounts had been taken into account in calculating the sale price.[78] The court stated that in these circumstances the new owners were, unconscionably and in bad faith, "using [the company] as a nominee" to bring an action which was not available to

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[73] *Supra* note 27.

[74] *Prest*, *supra* note 1 at para. 32.

[75] *Supra* note 57 at para. 38. See also *Sitt Tatt Bhd. v. Goh Tai Hock* [2009] 2 S.L.R.(R.) 44, at paras. 77-81 (H.C.).

[76] [2009] 1 S.L.R.(R.) 524 at para. 9 (C.A.) [*Children's Media Ltd.*].

[77] *Singapore Tourism Board v. Children's Media Ltd* [2008] 3 S.L.R.(R.) 981, at paras. 110-112, 155.

[78] *Raffles Town Club*, *supra* note 6 at paras. 56-60.

them as shareholders, and which would unjustly enrich them. They should not be permitted to make use of the corporate veil in this manner.[79]

At first sight this is a somewhat startling use of the term "nominee." It is established law that directors' duties are owed to the company and not, absent special facts, to its shareholders.[80] The cause of action arising from their breach thus belongs to the company alone; in no sense is it held on trust for the company's shareholders, even if it would ultimately benefit them through the value of their shareholdings. So to say that a company sues as nominee for its shareholders, who have no cause of action for breach of duty, would be incorrect, and to prevent the company from suing in such circumstances would be to deprive it of an asset. Similarly, even ignoring nominee-ship, to treat the company's cause of action as belonging to its shareholders would be a novel kind of lifting the veil. The facts of the case do not seem to fall within either the alter ego or "sham or façade" theories, nor was there any evasion of legal obligation. In any event, it would be unnecessary to resort to veil-lifting in the circumstances: the court held that the breaches of duty had been effectively ratified by shareholder approval—the former directors having constituted 100% of the shareholders.[81] If this is so, the company itself had waived its cause of action against the former directors.

However, while some of the language in the judgment refers to lifting the veil and treating the shareholders as the company, one may query whether this was truly what the Court of Appeal was doing. The court agreed with the former directors' claim that the new owners were acting unconscionably in procuring the company to sue the ex-directors, given that the liability had already been taken into account in the purchase price for the company's shares, and that this amounted to unjust enrichment. On this basis the new shareholders were acting inconsistently with the share purchase agreement signed by them; as such they could be required to exercise their control of the company to avoid unjust enrichment.[82] That amounts to a direct claim against the shareholders involving no piercing of the veil. The court further accepted the former directors' additional claim that the new owners had engaged in a lawful-means conspiracy by causing the company to bring the fiduciary claims. Thus overall it can be seen that, despite some unguarded language in the judgment, lifting the veil was strictly inapposite and unnecessary in the circumstances of the case.

IV. Conclusion

The new English approach found in *Prest* and *VTB Capital* embodies a significantly more restrictive approach to piercing the corporate veil in a number of senses: in the meaning of the phrase, in the grounds on which it is available, in the effect

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79 *Ibid.* at para. 57.

80 *Percival v. Wright* [1902] 2 Ch. 421 (H.C.); *Peskin v. Anderson* [2001] B.C.C. 874 (C.A.); *Law Chin Eng v. Lau Chin Hu* [2008] SGHC 187.

81 The fact of ratification distinguishes this case from *Regal (Hastings) Ltd. v. Gulliver* [1967] 2 A.C. 134 (H.L.) where, on otherwise materially similar facts, the new owners successfully caused the company to sue its former directors for breach of duty. (On the ability to ratify, see also the remarks of Lord Sumption in *Prest*, *supra* note 1 at para. 41).

82 Indeed, the former directors' case on appeal was pleaded as one of unconscionable and/or bad faith actions by the new shareholders: *Raffles Town Club*, *supra* note 6 at para. 48.

which it has, and in its relegation to a principle of last resort. While the new stance should be beneficial in terms of the coherence of the law in this area, it will also place a greater onus on judges to identify and explain alternative analyses in cases where they suspect there is abuse deserving of a remedy. The Singapore courts have, usually without a great deal of analysis[83] (possibly due to the absence of argument by counsel), traditionally adopted a broader approach on all of the above aspects. The extent of the impact which the English cases will have on this area of the law remains to be seen.

[83] With some exceptions, *e.g.*, *Win Line*, *supra* note 44.