

## CASE COMMENTARY

### PIERCING THE VEIL – A DODO OF A DOCTRINE?

*Alistair Alcock\**

In the course of the 2012/13 legal year, the Supreme Court has had to consider the doctrine of piercing the corporate veil twice, in *VTB Capital plc v Nutritek International Corpn (VTB)*,<sup>1</sup> and more recently in *Prest v Petrodel Resources Ltd (Prest)*<sup>2</sup> On both occasions, the Court was in effect asked to remove the whole doctrine from English Law, but narrowly failed to do so, begging the question, does the doctrine really serve any purpose now? Let me start with *Prest*.

#### 1. *PREST* AND THE LOWER COURTS

The case involved contentious divorce proceedings and ancillary relief. At first instance,<sup>3</sup> Moylan J held that the matrimonial home, legally owned by one of the husband's companies, was held on trust beneficially for the husband and should be transferred to the wife. This was not appealed, but Moylan J went on to hold that seven other properties held by other companies be likewise transferred to support lump sum and periodical payments. Three different arguments were advanced for such a transfer, namely that:

1. the corporate veil should be pierced as a matter of general principle and the properties treated as the husband's so that they could be transferred to the wife under s 24(1)(a) of the Matrimonial Causes Act 1972;
2. the wording of s 24(1)(a) allowing the transfer property "being property to which the first mentioned party is entitled in possession or reversion" should be interpreted as giving a special statutory power to pierce the veil and effect the transfer; or

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\* Professor Alistair Alcock, Dean of Law and Deputy Vice-Chancellor, University of Buckingham.

<sup>1</sup> [2013] 2 WLR 398, SC(E).

<sup>2</sup> [2013] 3 WLR 1, SC(E).

<sup>3</sup> *Sub nom Prest v Prest* [2011] EWHC 2956 (Fam).

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3. the properties (like the matrimonial home) were held beneficially by the companies on trust for the husband and s 24(1)(a) could be used without piercing the veil.

Moylan J rejected 1., holding that generally the separate legal personality of the company could not be disregarded unless it was being abused for a purpose that was in some relevant respect improper. He also found under 3., that the houses were not held beneficially for the husband, in part because he found under 2., that despite its wording, s 24(1)(a) did give a wide statutory jurisdiction to pierce the corporate veil.

In the Court of Appeal,<sup>4</sup> Thorpe LJ agreed with Moylan J, but the majority judgment given by Rimer LJ, rejected not just this curious interpretation of s 24(1)(a), but also any piercing of the corporate veil and recognition of any beneficial ownership by the husband, leaving the wife without the seven properties to support the lump sum and periodical payments order.

## 2. *PREST* AND THE SUPREME COURT

In a Supreme Court of seven justices, all rejected Moylan J's curious interpretation of s 24(1)(a) and any piercing of the corporate veil, but did find, on the specific facts taken with a set of adverse inferences based on the husband's obstructive behaviour, that the seven properties were held beneficially on trust for the husband. The interesting use of adverse inferences has been considered elsewhere.<sup>5</sup> This article concentrates on where *Prest* has left the general doctrine of piercing the corporate veil.

At all three levels, all the judges rejected any such doctrine applying to the facts in *Prest*, for as Lord Sumption JSC concluded:<sup>6</sup>

“[The properties] were vested in the companies long before the marriage broke up. Whatever the husband's reasons for organising things in that way, there is no evidence that he was seeking to avoid any obligation which is relevant in these proceedings. The judge found that his purpose was ‘wealth protection and the avoidance of tax.’”<sup>7</sup>

Lord Sumption gave the leading judgment of the Court, but on the doctrine of piercing the corporate veil, care must be taken; not only because as Lord Walker of Gestingthorpe pointed out, having decided that the properties

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<sup>4</sup> *Sub nom Prest v Prest* [2013] 2 WLR 557, CA.

<sup>5</sup> For example, (2013) 163 NLJ 7566 at 11.

<sup>6</sup> [2013] 3 WLR 1, SC(E) at para 36.

<sup>7</sup> [2011] EWHC 2956 (Fam) at para 218.

were held beneficially by the husband, it was “not strictly necessary for this court to add further comments on the vexed question of piercing the corporate veil;”<sup>8</sup> but also because as Lord Clarke of Stone-cum-Ebony JSC commented, the concealment-evasion distinction at the heart of Lord Sumption’s judgment “was not a distinction that was discussed in the course of argument.”<sup>9</sup> Indeed, none of the other six Justices of the Supreme Court agreed with Lord Sumption without some qualifications, falling perhaps into two groups, Lords Mance and Clarke JJSC following Lord Neuberger PSC, and Lord Wilson JSC and to a lesser extent Lord Walker following Baroness Hale JSC.

First, Lord Sumption excluded, as not relevant to determine the English doctrine of piercing the veil, all the cases where:<sup>10</sup>

1. it could be said that the corporate veil was being circumvented by a normal legal principle, for example:

The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor.<sup>11</sup> Property legally vested in a company may belong beneficially to the controller...<sup>12</sup>

2. specific statutes required group companies to be treated as one, eg Group accounts and “firms” for the purposes of competition law;
3. equitable remedies, like injunctions or specific performance, were “available to compel the controller whose legal personality is engaged to exercise his control in a particular way”; and
4. *Re Barcelona Traction, Light and Power Co Ltd*<sup>13</sup> was followed, it being a decision of the International Court of Justice based on the domestic civil law jurisdictions involved which, unlike the common law in England, allowed the corporate veil to be pierced for abuse of rights.

Nevertheless, on this last point, Lord Sumption did recognise that English law does have the general principle encapsulated by Lord Denning (then

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<sup>8</sup> [2013] 3 WLR 1, SC(E) at para 105.

<sup>9</sup> *Ibid* at para 103.

<sup>10</sup> *Ibid* at paras 16 and 17.

<sup>11</sup> *Chandler v Cape plc* [2012] 3 All ER 640, CA, for commentary see Gore-Browne on Companies, Special Release 2013, p SR1.

<sup>12</sup> The finding in *Prest* itself.

<sup>13</sup> [1970] ICJ Rep 3.

Denning LJ) as “fraud unravels everything.”<sup>14</sup> Lord Sumption maintained “that there are limited circumstances in which the law treats the use of a company as a means of evading the law as dishonest for this purpose.”<sup>15</sup>

### 3. THE PRECEDENTS

In a review of the precedents, Lord Sumption noted that following the House of Lords’ (albeit Scottish) decision in *Woolfson v Strathclyde Regional Council*<sup>16</sup> and the Court of Appeal decision in *Adams v Cape Industries plc*,<sup>17</sup> Sir Andrew Morritt V-C in *Trustor AB v Smallbone (No 2)*<sup>18</sup> had concluded that there were only two overlapping circumstances when the corporate veil could be pierced. They were where the company was:

1. a “façade or sham”; or
2. involved in some impropriety “linked to the use of the company structure to avoid or conceal liability for that impropriety.”<sup>19</sup>

What was certainly determined in all three cases was that “the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd*<sup>20</sup> merely because it considers that justice requires it.”<sup>21</sup> Nevertheless, in their efforts to ensure effective ancillary relief, this was exactly what some judges of the Family Division continued to do.<sup>22</sup> These judges relied on the words, albeit *obiter*, of Cummings-Bruce and Dillon LJ in *Nicholas v Nicholas*,<sup>23</sup> where they suggested that the only reason that they had not pierced the corporate veil to allow company property to be transferred for ancillary relief was because the company, although controlled by the husband, had independent minority shareholders who would be adversely affected.

At least one Chancery Division judge, Munby J, in cases like *A v A*<sup>24</sup> and *Ben Hashem v Al Shayif*,<sup>25</sup> rejected the approach of the Family Division. In

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<sup>14</sup> *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, CA at p 712.

<sup>15</sup> [2013] 3 WLR 1, SC(E) at para 18.

<sup>16</sup> 1978 SC (HL) 90.

<sup>17</sup> [1990] Ch 433, CA.

<sup>18</sup> [2001] 1 WLR 1177.

<sup>19</sup> *Ibid* at para 22.

<sup>20</sup> [1897] AC 22, HL(E).

<sup>21</sup> *Adams v Cape Industries plc* [1990] Ch 433, CA per Slade LJ at p 546.

<sup>22</sup> For example, see *Green v Green* [1993] 1 FLR 326; *Mubarak v Mubarak* [2001] 1 FLR 673; *Kremen v Agrest (No 2)* [2011] 2 FLR 490.

<sup>23</sup> [1984] FLR 285, CA at pp 287 and 292.

<sup>24</sup> [2007] 2 FLR 467.

<sup>25</sup> [2009] 1 FLR 115.

the latter case, he merged the two circumstances accepted by Sir Andrew Morritt V-C into one when he formulated six principles behind piercing the corporate veil,<sup>26</sup> namely:

1. ownership and control of a company were not of themselves enough to justify piercing;
2. nor was merely being in the interests of justice to do it, even where third party interests were not affected;
3. there must have been some impropriety;
4. that impropriety must have been “linked to the use of the company structure to avoid or conceal liability;”<sup>27</sup>
5. there must have been both control by the wrongdoers *and* impropriety, ie misuse by them as a device or façade to conceal their wrongdoing; but
6. the company may be a façade, even if not originally incorporated with deception in mind, provided it was used for deception at the time of the relevant transactions.

This narrow approach was adopted by the Court of Appeal in *VTB* with two further qualifications:

1. it was not necessary before piercing the corporate veil to show that there was no other remedy available; but
2. it was necessary to show that “the relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts.”<sup>28</sup>

#### **4. *VTB* AND THE SUPREME COURT**

The Supreme Court upheld the Court of Appeal’s decision in *VTB*<sup>29</sup> but, in delivering its judgment, Lord Neuberger was not prepared in an interlocutory

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<sup>26</sup> Ibid at paras 159 to 164.

<sup>27</sup> *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, per Sir Andrew Morritt V-C at para 22.

<sup>28</sup> [2012] 2 BCLC 525, CA at paras 79 and 80.

<sup>29</sup> [2013] 2 WLR 398, SC(E).

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action to go the one step further, proposed by Counsel for one of the defendant companies, and kill off the whole idea of there being a separate doctrine of piercing the corporate veil. Lord Neuberger summarised this argument as follows:<sup>30</sup>

“Mr Lazarus argued that in all, or at least almost all, the cases where the principle was actually applied, it was either common ground that the principle existed...<sup>31</sup> and/or the result achieved by piercing the veil of incorporation could have been achieved by a less controversial route – for instance, through the law of agency...<sup>32</sup> through statutory interpretation...<sup>33</sup> or on the basis that... money due to an individual which he directs to his company is treated as received by him.”<sup>34</sup>

One senses that Lord Neuberger was nearly convinced,<sup>35</sup> but because he was clear that the contractual liability of a company could not be extended to a controlling shareholder as proposed in *VTB*, on the more general doctrine he concluded that:<sup>36</sup>

“... it is unnecessary and inappropriate to resolve the issue of whether we should decide that, unless any statute relied on in a particular case expressly or impliedly provides otherwise, the court cannot pierce the veil of incorporation.”

Having ducked the issue once, he did tackle it in *Prest*, but before examining his views, it is necessary to return to Lord Sumption’s judgment on which Lord Neuberger’s is built.

### 5. LORD SUMPTION’S VIEWS

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<sup>30</sup> *Ibid* at para 125.

<sup>31</sup> *Gilford Motors v Horne* [1933] Ch 935, CA; *Re H* [1996] 2 BCLC 500, CA; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177.

<sup>32</sup> *In re Darby, ex p Brougham* [1911] 1 KB 95; *Gilford Motors v Horne* [1933] Ch 935, CA; *Jones v Lipman* [1962] 1 WLR 832.

<sup>33</sup> *Daimler Company Ltd v Continental Tyre and Rubber Company (Great Britain) Ltd* [1916] 2 AC 307; *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173; *Wood Preservation Ltd v Prior* [1969] 1 WLR 1007; *Re A Company* [2000] 2 BCLC 734.

<sup>34</sup> *Goss v Chilcott* [1996] AC 788; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177.

<sup>35</sup> [2013] 2 WLR 398, SC(E) at paras 127 to 129.

<sup>36</sup> *Ibid* at para 130.

Having reviewed the precedents discussed above, Lord Sumption concluded in *Prest* that:<sup>37</sup>

“... the consensus that there are circumstances in which the court may pierce the corporate veil is impressive... I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse.”

The carefully defined circumstances, according to Lord Sumption, turned on the distinction between:

1. the concealment principle “...the interposition if a company or... companies so as to conceal the identity of the real actors,” and
2. the evasion principle “...if there is a legal right against the person in control... and the company is interposed... [to] defeat the right or frustrate its enforcement.”<sup>38</sup>

Only evasion requires piercing of the corporate veil. Lord Sumption then illustrated this distinction with two cases, *Gilford Motor Co Ltd v Horne (Gilford)*<sup>39</sup> and *Jones v Lipman (Jones)*.<sup>40</sup>

In *Gilford* Mr Horne had entered into a restrictive covenant not to conduct a competing business, but then set up a company under his wife’s apparent control to conduct such a business. The Court of Appeal granted an injunction against Mr Horne and against the new company. Lord Sumption held that the injunction against Mr Horne was on the concealment principle, but that against the company was true piercing of the veil under the evasion principle, though he conceded that the injunction against the company could have been:<sup>41</sup>

“... on the ground that Mr Horne’s knowledge was to be imputed to the company so as to make the latter’s conduct unconscionable or tortious... [Also] it does not follow that [the company] was to be identified with Mr Horne for any other purpose. Mr Horne’s personal creditors would not, for example, have been entitled... to enforce their claims against the assets of the company.”

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<sup>37</sup> [2013] 3 WLR 1, SC(E) at para 27.

<sup>38</sup> *Ibid* at para28.

<sup>39</sup> [1933] Ch 935, CA.

<sup>40</sup> [1962] 1 WLR 832.

<sup>41</sup> [2013] 3 WLR 1, SC(E) at para 29.

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Likewise, in *Jones*, Mr Lipman had entered into a sale of a property, but to defeat an order of specific performance, then sold the property to a company controlled by himself. Specific performance was ordered against Mr Lipman (the concealment principle) and the company (the evasion principle), the latter leaving a bank the creditor of the company for half the purchase price of the property but with the company now without the property.<sup>42</sup>

So far, it might be thought that Lord Sumption's distinction was no more than whether the action was being brought against the controller (concealment) or the company (evasion). But in two further cases, Lord Sumption made it clear that actions against the companies fell within concealment, not evasion.

In *Gencor ACP Ltd v Dalby*<sup>43</sup> Mr Dalby, a director of the plaintiff, had directed payments from a third party to be paid to a company controlled by himself. Rimer J, in ordering the company to be accountable for the sums to the plaintiff, as well as Mr Dalby, claimed to be piercing the corporate veil, but Lord Sumption maintained that this was not the case as the company was clearly just a nominee of Mr Dalby and as such independently liable to account for the moneys and so the case only involved concealment.<sup>44</sup>

In *Trustor AB v Smallbone (No 2)*<sup>45</sup> again a company had been set up to receive illegitimate moneys on behalf of Mr Smallbone as his agent or nominee and was directly liable as such and so again nLord Sumption considered that this was only concealment.<sup>46</sup>

Lord Sumption concluded that:<sup>47</sup>

“... there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control... The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil... I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so.”

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<sup>42</sup> Ibid at para 30.

<sup>43</sup> [2000] 2 BCLC 734.

<sup>44</sup> [2013] 3 WLR 1, SC(E) at para 31.

<sup>45</sup> [2001] 1 WLR

<sup>46</sup> [2013] 3 WLR 1, SC(E) at para 32.

<sup>47</sup> Ibid at paras 33 and 35.

## 6. LORD NEUBERGER'S VIEWS

Lord Neuberger reduced Lord Sumption's review of the history of piercing the corporate veil to six findings:<sup>48</sup>

1. The International Court of Justice recognised the doctrine but only in the context of civil law systems.<sup>49</sup>
2. There were judgments based on the doctrine in family cases, but its application in these cases was unsound.<sup>50</sup>
3. There were two cases outside the family law context, *Gilford* and *Jones* which laid the ground for the doctrine.<sup>51</sup>
4. There were two subsequent cases in which it was assumed the doctrine existed, but they were merely *obiter* observations.<sup>52</sup>
5. The Court of Appeal and High Court had subsequently assumed the doctrine does exist.<sup>53</sup>
6. In only two of those cases had the doctrine been relied on, and that was illegitimate as they could have been decided without recourse to the doctrine.<sup>54</sup>

Although Lord Sumption left *Gilford* and *Jones* as cases of evasion relying on the doctrine, Lord Neuberger determined that the injunction against the company in *Gilford* could easily have been justified on the basis that the company was Horne's agent or nominee (as indeed any natural person, like Horne's wife, could have been). Indeed, Lord Neuberger pointed out that no member of the Court of Appeal in *Gilford* "thought that he was making new

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<sup>48</sup> *Ibid* at para 68.

<sup>49</sup> *Re Barcelona Traction, Light and Power Co Ltd* [1970] ICJ Rep 3.

<sup>50</sup> Based on *obiter dicta* in *Nicholas v Nicholas* [1984] FLR 285, CA.

<sup>51</sup> *Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA; *Jones v Lipman* [1962] 1 WLR 832.

<sup>52</sup> *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, HL(Sc); *Adams v Cape Industries plc* [1990] Ch 433, CA.

<sup>53</sup> For example, *VTB* [2012] 2 BCLC 525, CA and *Alliance Bank JSC v Aquanta Corpn* [2013] 1 Lloyd's Rep 175, CA.

<sup>54</sup> *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734; *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177.

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law, let alone cutting into the well established and simple principle laid down in *Salomon*.<sup>55</sup>

As for *Jones*, Lord Neuberger thought the injunction against the company unnecessary:<sup>56</sup>

“An order for specific performance would have required Lipman not merely to convey the property in question to the plaintiffs, but to do everything which was reasonably in his power to ensure that the property was so conveyed... Lipman could have compelled the company to convey the property to the plaintiffs (on the basis that he would have to account to the company for the purchase price, which would have ensured that the bank was in no way prejudiced).”

Not only is this a more elegant solution than Lord Sumption’s, avoiding as it does the problem of the third party rights of the bank, it should have been Lord Sumption’s, since he had already highlighted early in his judgment, that “equitable remedies, such as an injunction or specific performance, may be available to compel the controller whose personal legal responsibility is engaged to exercise his control in a particular way.”<sup>57</sup>

As Lord Neuberger agreed with Lord Sumption<sup>58</sup> that the courts could only pierce the corporate veil “when all other, more conventional, remedies have been proved to be of no assistance,”<sup>59</sup> he was forced to conclude that:

The history of the doctrine... is... a series of decisions, each of which can be put into one of three categories, namely:<sup>60</sup>

1. decisions in which it was assumed that the doctrine existed, but it was rightly concluded that it did not apply on the facts;
2. decisions in which it was assumed that the doctrine existed, and it was wrongly concluded that it applied on the facts; and
3. decisions in which it was assumed that the doctrine existed and it was applied to the facts, but where the result could have been arrived at on some other, conventional, legal basis, and therefore it was wrongly concluded that it applied.

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<sup>55</sup> [2013] 3 WLR 1, SC(E) at para 71.

<sup>56</sup> *Ibid* at para 72.

<sup>57</sup> *Ibid* at para 16.

<sup>58</sup> Contrary to the Court of Appeal in *VTB* [2013] 2 WLR 557, CA at para 79.

<sup>59</sup> [2013] 3 WLR 1 SC(E) at para 62.

<sup>60</sup> *Ibid* at para 74.

Having established that there had been no cases in the UK that needed to rely on the doctrine, and after reviewing the chaotic judicial and academic views on the doctrine across the common law world,<sup>61</sup> one would have expected Lord Neuberger finally to have decided that the doctrine was at least otiose if not dead. Instead he concluded that:<sup>62</sup>

“...it 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... I am persuaded by [Lord Sumption’s] formulation in para 35, namely that the doctrine should only be invoked where ‘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.’”

Nevertheless, Lord Neuberger seems to have remained conscious of the illegality of this position, and went on really to deny the separate existence of the doctrine.<sup>63</sup>

“In so far as it is based on “fraud unravels everything”... the formulation simply involves the invocation of a well-established principle... [It] is not, on analysis, a statement about piercing the corporate veil at all. Thus it would presumably apply equally to a person who transfers assets to a spouse or civil partner, rather than to a company. Further... it could probably be analysed as being based on agency or trusteeship especially in the light of the words “under his control”. However, if either or both those points were correct, it would not undermine Lord Sumption JSC’s characterisation of the doctrine: it would, if anything, serve to confirm the existence of the doctrine, albeit, as an aspect of a more conventional principle.”

## **7. BARONESS HALE’S VIEWS**

Of the judgments on the doctrine of piercing the corporate veil, the most curious is Lady Hale’s. She draws the distinction between where a remedy is being sought against a controlling shareholder and where it is being sought against the company.<sup>64</sup> However, she then applies the doctrine the wrong way

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<sup>61</sup> Ibid at paras 75 to 78.

<sup>62</sup> Ibid at paras 79 and 80.

<sup>63</sup> Ibid at para 83.

<sup>64</sup> Ibid at para 92; This is a distinction I also draw in *Gore-Browne on Companies*, Chapter 7 at [15].

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around. In *Gilford* and in *Jones*, there was no doubt that the controlling shareholders had broken their contracts, and in *Stone & Rolls v Moore Stephens (Stone & Rolls)*<sup>65</sup> had the fraudulent controlling shareholder been bringing a claim against the auditors, he would clearly have faced the defence of *ex turpi causa*. The problems arose because the remedy was being sought (or defence raised) against the company. Lady Hale may be right to say:<sup>66</sup>

“... where 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 on the concepts of agency and of the ‘directing mind’.”

However, if the doctrine does not have a place in the rules of attribution, it really has no place at all and like her fellow judges, Lady Hale was not prepared to go that far, doubting indeed that:

“... it is possible to classify all the cases in which the courts have been or should be prepared to disregard the separate personality of a company neatly into cases of either concealment or evasion.”<sup>67</sup>

### 8. LORD WALKER’S VIEWS

After pointing out that all commentary on the doctrine of piercing the corporate veil in *Prest* was *obiter*, Lord Walker came the closest to denying the existence of the doctrine altogether. He considered all the cases, with the possible exception of the House of Lords decision in *Stone & Rolls*,<sup>68</sup> could be explained by the application of other legal principles.<sup>69</sup>

### 9. CONCLUSION

In the end, all seven Justices of the Supreme Court held that:

1. the doctrine of piercing the corporate veil was not necessary to decide the case and could not be applied on the facts;
2. nevertheless, the doctrine still existed (Lord Walker most doubtfully);

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<sup>65</sup> [2009] AC 1391, HL(E).

<sup>66</sup> [2013] 3 WLR 1 SC(E) at para 92.

<sup>67</sup> *Ibid* at para 92.

<sup>68</sup> [2009] AC 1391, HL(E).

<sup>69</sup> [2013] 3 WLR 1, SC(E) at para 106.

3. but it might just be a particular application in the corporate context of a more general principle that “fraud unravels everything” or of other legal principles;<sup>70</sup> and
4. that it should only apply if no other basis for a remedy existed.

All seven judges struggled to find examples where the doctrine had actually been necessary. Lords Sumption and Neuberger did agree on the formulation that the doctrine should only be invoked where:<sup>71</sup>

“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.”

This formulation does seem to have been accepted by all but Lord Walker, although Lords Mance and Clarke were reluctant completely to close off the possibility of other circumstances in which the doctrine might be used.<sup>72</sup> *Pace* Lady Hale, the formulation, particularly if based on the evasion/concealment distinction, seems only to apply to actions, or defences raised, against the company, ie is part of the rules of attribution,<sup>73</sup> and herein may lie the answer to the lingering death of the doctrine.

Just as the rule in *Turquand*<sup>74</sup> developed against the background of the *ultra vires* rule, constructive notice, and a far from developed application of agency rules in the corporate context, so the doctrine of piercing the corporate veil was born against a background of restrictive rules of attribution. Now that other legal principles have developed, should both of these two be killed off like the dodo? Certainly in the case of piercing the corporate veil Lord Walker seemed to think so. As he pointed out, all the past cases might be explained by:<sup>75</sup>

“... a statutory provision, or from joint liability in tort, or from the law of unjust enrichment, or from principles of equity and the law of

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<sup>70</sup> Lady Hale put it rather more vaguely as “companies should not be allowed to take unconscionable advantage of the people with whom they do business.” [2013] 3 WLR 1, SC(E).

<sup>71</sup> *Ibid* at paras 35 and 81.

<sup>72</sup> [2013] 3 WLR 1, SC(E), at paras 100 and 103.

<sup>73</sup> As explained by Lord Hoffman in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 BCLC 116, PC.

<sup>74</sup> *Royal British Bank v Turquand* (1856) 6 E&B 327.

<sup>75</sup> [2013] 3 WLR 1, SC(E) at para 106.

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trusts... [or] from the potency of an injunction or other court order in binding third parties who are aware of its terms.”

Even the one possible exception that Lord Walker considered might need the doctrine, *Stone & Rolls*, is interesting. If anything, the majority of the House of Lords in that case came to a very restrictive view of when the wrongs of a controlling shareholder might be attributed to the company to raise the defence of *ex turpi causa* against the company. They were only prepared to allow such attribution in the case of “one man” companies with no innocent minority shareholders affected. This was the same concern raised in the now discredited *obiter dicta* of Cummings-Bruce and Dillon LJ in *Nicholas v Nicholas*.<sup>76</sup> Does this mean that if the doctrine of piercing the corporate veil is to survive, far from it being to cover “a small residual category” of cases,<sup>77</sup> as suggested by the Supreme Court in *Prest*, it should be to act as a restraint on the application of all the other legal principles that might give rise to the attribution to a company of the faults of its controlling shareholder, at least if those principles adversely affect minority shareholders and even creditors as suggested by the House of Lords in *Stone & Rolls*?

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<sup>76</sup> [1984] FLR 285, CA at pp 287 and 292.

<sup>77</sup> [2013] 3 WLR 1, SC(E), *per* Lord Walker at para 106.