

## 38<sup>th</sup> Annual Conference of the Banking & Financial Services Law Association

### “Piercing the corporate veil: recent international developments”

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- 1 The topic of my address is a metaphor of uncertain content: “piercing the corporate veil” or “lifting the corporate veil”.<sup>1</sup> Yet even those slightly different forms of expression can hint at meaning. As has been said,<sup>2</sup> the phrase is used indiscriminately to describe different things. It has been remarked that the judicial decisions on the phrase have often displayed incoherence, inconsistency, and confusion.<sup>3</sup> The phrase has tended to obscure legal reasoning and thought in a number of areas. I will refer to a number of relatively recent cases, in particular in the United Kingdom Supreme Court, in which the doctrine has been recognised, but limited to its proper foundation in fraud, and in which the doctrine was seen as irrelevant to potential liability of an ultimate shareholder for wrongs of its own responsibility. Oddly for a discussion before this commercially named and focused organisation, the three principal cases which I will discuss concern divorce and mass torts.
- 2 It is worth emphasising at the outset that the phrase (in whichever form) is a metaphor, not the expression of a rule or principle.<sup>4</sup> A metaphor is a statement which is the application of a name or descriptive phrase to an object or action to which it is not literally suitable. It is an evocation of another state to describe something. Importantly, a metaphor has its own interiority. Unlike a simile, it does not draw on an express link between one thing and another. Rather, it is an evocative expression of reality. Metaphor is important in the creation of original ideas because it seeks to encapsulate the whole with evoked implicit connotations. Metaphors help us make sense of reality and acknowledge our part in constituting it. For those interested, a reading of the work of an important British thinker and neuroscientist, Dr Iain McGilchrist, will explain

\* Chief Justice of the Federal Court of Australia. I would like to thank my associates, Brandon Smith and Lucy Nason for their research and other valuable assistance.

<sup>1</sup> For a helpful and detailed discussion of the topic see: Stephen M Bainbridge and M Todd Henderson, *Limited Liability: A Legal and Economic Analysis* (Edward Elgar Publishing, 2016), W Day and S Worthington, *Challenging Private Law: Lord Sumption on the Supreme Court* (Hart, 2020), K Vandekerckhove, *Piercing the Corporate Veil* (Wolders Kluwer, 2007), Christian A Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press, 2018) and the academic commentary otherwise referred to below.

<sup>2</sup> Such as by Lord Sumption in *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415 at 478 [16] (*Prest*).

<sup>3</sup> *Prest* at 498-499 [64] (Lord Neuberger).

<sup>4</sup> For metaphor in legal reasoning, see the Rt Hon Lord Justice Lewison, ‘Metaphors and Legal Reasoning’ (2016) 12(4) *The Judicial Review* 375.

that metaphor comes from the right hemisphere of the brain, the source of original ideas from a sense of the whole, of the implied and, of relationships; whereas the left hemisphere is concerned with the parts of the whole, deconstruction, abstraction and taxonomy through explicit expression. The relationship between, and the asymmetry of, the two hemispheres is not unimportant for understanding legal thinking and better approaching legal problems.<sup>5</sup>

3 The metaphor in piercing or lifting the corporate veil assists in appreciating what might be occurring within the legal doctrine. The “corporate veil” assists us to visualise the status of corporations as being legally distinct and separate from their directors, shareholders and employees. A veil has transparency, we can see that corporations are indeed run by people, but a veil is also a physical barrier and imports the notion of protection. The “corporate veil” has been cast over corporations by reason of public policy, that public policy being the prioritisation of the economic and social advantages of corporations enjoying separate personality and limited liability.<sup>6</sup> To “pierce” the veil suggests destruction or renting of the veil: thus of the policy. To “lift” the veil suggests removal to disclose reality. We will see shortly how the UK Supreme Court in the first of the cases which I wish to discuss, *Prest v Petrodel Resources*, deployed the differently expressed metaphors in clarifying the doctrine.

4 Metaphor and its evocative language is and are not to be concretised into a rule or definition. Their place is evoking a relationship or idea: here the separation of the corporation and its owners. McGilchrist sees the left hemisphere (the source of the explicit, the part, and the deconstructed abstraction) as inherently suspicious of metaphor: it sees “obfuscation, or at worst, untruth” in the artful language of metaphor.<sup>7</sup> The philosopher John Locke dubbed metaphors “perfect cheat[s]”.<sup>8</sup> Indeed, there have been calls from within the legal profession for judges to eschew metaphor in judgment writing altogether.<sup>9</sup> The danger when dealing with metaphors in a legal context is that the left hemisphere has a tendency to turn metaphors or the language in which the metaphor is expressed into defined rules and categories in the search for

<sup>5</sup> Refer to Allsop, ‘Thinking About Law: The importance of how we attend and of context’ (Speech, Australian Academy of Law, 21 October 2021) and a reprise of that in Allsop, ‘Thinking About Law: The importance of how we attend and of context’ (Speech, The Honourable Society of the Middle Temple, 18 July 2022).

<sup>6</sup> For a summary of these economic and social advantages see Ford, Austin and Ramsay’s *Principles of Corporations Law* (17<sup>th</sup> ed, LexisNexis, 2018), 138-139 [4.160].

<sup>7</sup> Iain McGilchrist, ‘God, Metaphor and the Language of the Hemispheres’ in Paul Chilton and Monika Kopytowska (eds), *Religion, Language and the Human Mind* (Oxford University Press, 2018), 143.

<sup>8</sup> John Locke, *Essay on Human Understanding*, Book III, as quoted in Peter Walmsley, *Locke’s Essay and the Rhetoric of Science* (Bucknell University Press, 2003), 27.

<sup>9</sup> The Rt Hon Lord Justice Lewison, ‘Metaphors and Legal Reasoning’, 375.

certainty.<sup>10</sup> Their use can distort legal reasoning to be applied to a case. As Toulson J (as his Lordship then was) said in *Yukong Line Ltd of Korea v Rendsberg Investment Corp of Liberia (The Rialto) (No 2)*, in recognising metaphor as illustrative, but also recognising the danger of fixing the language of metaphor as defining:

In a sense, it may not matter what language is used as long as the principle is clear; but there lies the rub. For metaphor can be used to illustrate a principle; it may also be used as a substitute for analysis and may therefore obscure reasoning...<sup>11</sup>

(With respect, an astute recognition of the different places in the law for, and the different reasons or purposes in legal language and thought of, evocative description, on the one hand, and pared, essential definition on the other.)

- 5 The danger of the left hemisphere turning a metaphor into a rigid rule is that the answer to a problem can be determined by the metaphor used to analyse it. In this way, a metaphor itself may become a boundary and constrain the development of thought without a rational, legal, moral or social basis. At worst, the choice of metaphor (perhaps because of its attractiveness) may itself intuit the (perhaps) false answer. As the Full Court of the Federal Court said in the *Gene Patent Case*:

[Metaphor] may risk blinding real illumination that is achieved through analysis of the facts, including the scientific principles involved, by the utilisation of a striking evocation of a simplified structure of analysis that is derived from the metaphor chosen, rather than from the facts existing.<sup>12</sup>

- 6 The great American judge, Benjamin Cardozo cautioned against over-reliance on metaphor in this very context of “piercing the corporate veil”:

The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it. We say at times that the corporate entity will be ignored when the parent corporation operates a business through a subsidiary which is characterized as an ‘alias’ or a ‘dummy.’ All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation. Dominion may be so complete, interference so intrusive, that by the general rules of agency the parent will be a principal and the subsidiary of an agent. Where control is less than this, we are remitted to the tests of honesty and justice...The logical consistency of a juridical conception will indeed be sacrificed at times when the sacrifice is essential to the end that some accepted public policy may be defended or upheld. This is so, for illustration, though agency in

<sup>10</sup> See Allsop, ‘Thinking About Law: The importance of how we attend and of context’ (Speech, Australian Academy of Law, 21 October 2021), 20.

<sup>11</sup> [1998] 1 WLR 294 at 305.

<sup>12</sup> *D’Arcy v Myriad Genetics Inc* [2014] FCAFC 115; 224 FCR 479 at 482 [4].

any proper sense is lacking, where the attempted separation between parent and subsidiary will work a fraud upon the law.<sup>13</sup>

As always, Cardozo provides intuitive guidance enveloped in elegant precision.

- 7 The metaphor “piercing the corporate veil” was never intended to be, and should not be turned into, a principle from which a series of propositions can be derived and applied methodically in statute-like fashion. It is an expression concerning a public policy position grounded in statute and nothing more. From this vantage point of understanding, we may turn to consideration of the circumstances in which courts have found that the veil should be pierced or lifted notwithstanding the public policy considerations underlying it. In doing so, we shall find that “piercing the corporate veil” is but one avenue of imposing liability on those who stand behind companies – directors, shareholders and parent or holding companies. It is and should be recognised as a distinct basis of liability from statute, agency, tort, equity and restitution, which do not involve piercing the corporate veil.
- 8 Before looking at some more recent decisions since, it is helpful to commence with *Salomon v A Salomon & Co Ltd*<sup>14</sup> to see the arguments refuted and the policy of the *Companies Act 1862* vindicated. A familiarity with the facts and reasoning will answer most questions about so-called agency, because of the company being a so-called alter ego. A strong House of Lords which comprised the Lord Chancellor (Lord Halsbury), Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Davey unanimously overturned a Court of Appeal not bereft of legal talent (including, as it did, Lord Justice Lindley), which had affirmed the orders of a highly experienced Chancery judge, Justice Vaughan Williams. The facts and their treatment at all levels reflect the legal problems with which separate corporate liability has caused lawyers to wrestle to the present day. The language and metaphor employed in argument echo through time, as does some of the criticism of evocative language or metaphor hindering, or camouflaging a lack of, reasoning.
- 9 The facts were sympathetically described by Lord Macnaghten, in the face of Mr Salomon being accused of a species of fraud (against his creditors), which the facts manifestly did not make out. Aron Salomon had been for some years living and working as a tolerably successful sole trader boot and shoe manufacturer in Whitechapel, in the East End of London, which was

<sup>13</sup> *Berkey v Third Avenue Railway Co* 244 NY 84 (1927).

<sup>14</sup> [1897] AC 22.

a home for recent immigrants and of a strong Jewish community. From little or no capital (presumably after coming to England), by 1892 Mr Salomon had built up a thriving business and was “in good credit and repute”. The business had a substantial surplus of assets and was probably worth in the tens of thousands of pounds. With a wife, five sons and a daughter, and family tensions about shares in the business, he sold the business to a company that he formed (Aron Salomon and Company, Limited). He remained active in the business. All the formalities of incorporation were attended to. It was a private company; no capital was required from the public. The purchase price was £39,000: extravagant, representing the “sanguine expectations of a fond owner rather than...a businesslike or reasonable estimate of value.” That fact was not reflective of any fraud: Mr Salomon was paid £30,000 from the business, from which he subscribed for fully paid shares; a further sum of £10,000 was paid in debentures; the balance, with the exception of £1,000 which was received by Mr Salomon, was used to pay previous creditors. The world-wide depression of the 1890s then hit resulting in strikes and loss of orders. Attempts to push the business along only led to unsold stock. An external loan of £5,000 was advanced from a Mr Broderip who took Mr Salomon’s debentures as security. But all was to no avail. Mr Broderip’s interest was not paid. A receiver was appointed. Liquidation followed. The forced sale of the company’s assets paid Mr Broderip, but was insufficient to pay the balance of Mr Salomon’s debt under the debentures. The general creditors thus received nothing. The liquidator disputed Mr Salomon’s debentures on the ground of fraud, and sought to rescind the transfer of the business on the same ground. This case fell apart at the trial; but the trial judge, Vaughan Williams J, at the end of the trial, suggested another way home for the liquidator. Like many judicial suggestions on amendment, the point succeeded. The other shareholders (the family members) were mere nominees of Mr Salomon (“dummies” was the word used, really a metaphor invoking unthinking compliance). The company was Mr Salomon in another form. The company name was used as an “alias” (a metaphor invoking criminality). He employed the company as his agent. So the company was entitled to an indemnity from its principal.

- 10 The appeal was dismissed, but on different grounds: that the whole formation of the company, the sale, the issue of the debentures, were “a mere scheme” to enable Mr Salomon to conduct the business in the name of the company, contrary to the true intent of the *Companies Act* and to obtain a preference over general creditors, leading to the conclusion of a trust between the

company (as trustee) and Mr Salomon (as beneficiary) supporting the indemnity (of the trustee against the beneficiary and the trust assets).

- 11 The appeal to the House of Lords was allowed, unanimously. The explicit and implicit charges of fraud were (in most cases, and with the exception of Lord Macnaghten, hardly generously expressed) rejected on the evidence.<sup>15</sup> Underlying all the speeches was a vindication of the operation and policy of the *Companies Act*: to allow, if the formal steps were taken (without fraud) the creation of a separate legal entity and to limit the commercial risk of the incorporator. The so-called agency was nothing more than the fact the business was carried on for and on behalf of the shareholders in the “popular sense”, which did not create in law an agency. The relationship reflects the operation of the *Companies Act* and the vindication of the separate personality of the company. The proper characterisation of the relationship “on behalf of” is in the sense of parent and subsidiary, not principal and agent. The shareholders need not be independent of each other. The metaphors of “puppets”, “alias”, “nominis umbra” (the shadow of a name) were described as stunting and deflecting analysis of the effect and policy of the *Companies Act* from its terms.
- 12 Let me turn to the first of the important recent decisions to discuss. *Prest v Petrodel Resources*<sup>16</sup> was argued over two days in 2013 in the UK Supreme Court, after two days in the Court of Appeal. The case arose from the unprepossessing, but not uncommon, facts of a bitter divorce. The husband had been a successful oil trader and he had conducted the business through a web of companies which were found to be wholly owned or controlled by him. He was evidently intent upon keeping as much of his wealth as possible, secret from his now estranged wife. The relevant provision of the *Matrimonial Causes Act 1973* was found not to be wide enough (contrary to a long standing practice in the Family Division) to reach into the companies’ beneficial ownership of assets. Thus, the Court was urged to “pierce” the corporate veil to achieve the same result, and plain relational justice.
- 13 Lord Sumption delivered the leading judgment. He began with the basal cases: *Salomon, Macaura v Northern Assurance Co Ltd*<sup>17</sup> (a sole owner and controller of a company has no

<sup>15</sup> Only Lord Macnaghten did justice to the humanity of Mr Salomon, in contrast to some of the veiled anti-Semitism of the allegations put and treatment of some of the judges at different levels.

<sup>16</sup> [2013] 2 AC 415.

<sup>17</sup> [1925] AC 619.

insurable interest in the assets of a company), and *Lonrho Ltd v Shell Petroleum Co Ltd*<sup>18</sup> (documents of a subsidiary are not in the “power” of a parent for the purpose of discovery simply by virtue of ownership and capacity to control the group). His Lordship emphasised the legal and economic significance of the subject: limited companies form the basis of commerce, upon which business and the rules of insolvency are based.

- 14 Lord Sumption emphasised that the expression “piercing the corporate veil” meant disregarding the separate personality of the company: where, contrary to the rule of separate personality, a person who owns and controls a company is not to be identified with it by virtue of that ownership and control.<sup>19</sup> The separation comes from the statute. The expression (the metaphor) is to be distinguished from other circumstances (examples to which we will come) where the controller may be *personally* liable without disregarding the company’s separate corporate identity: for something done as an agent or joint actor; for some act or circumstance to which statute attaches liability; for acts or omissions independently creating liability in tort or equity or restitution. Further, property in name owned by the company may be held on trust for the owner or controller.
- 15 This clarity of understanding is central to appreciating the reasons in *Prest*, and appreciating the proper scope of the doctrine under the common law.
- 16 Lord Sumption examined with great care the long line of case law where the phrase had been used. From the cases, he drew the conclusion that a court may in certain circumstances be justified in piercing the corporate veil in the sense he discussed. Most cases that had used the expression were not examples of it at all, but of the application of other legal principles to ground liability of a shareholder or parent. A narrowly confined principle was necessary to prevent the law “being disarmed in the face of abuse”<sup>20</sup>, or it might be said, to disregard the legislature’s will, recognising always that the law will not permit a statute to be used to facilitate a fraud: the well-known metaphor (often deployed in Equity) of the “engine” of fraud. The central question was to identify the relevant wrongdoing. Lord Sumption thought metaphorical language such as “façade” or “sham” begged too many questions.<sup>21</sup> He saw two principles, as discerned below, lying behind this protean language.

<sup>18</sup> [1980] 1 WLR 627.

<sup>19</sup> *Prest* at 479 [16].

<sup>20</sup> *Prest* at 484 [27].

<sup>21</sup> *Prest* at 484 [28].

- 17 For Lord Sumption, the relevant wrongdoing that entitled the court to pierce the corporate veil was the attempted evasion of a pre-existing legal obligation. Lord Sumption identified two broad principles underlying when the veil (that is the separate legal personality) may be disregarded.<sup>22</sup> The first, the ‘concealment principle’ (the *lifting* of the veil) involving circumstances where the corporate form is being used to disguise the true facts and further a fraudulent intent.<sup>23</sup> According to Lord Sumption, cases that raise the ‘concealment principle’ do not involve ‘piercing’ the corporate veil, only the orthodox judicial task of identifying the real actors and applying the general principle that “fraud unravels everything.” The second principle, described as the ‘evasion principle’, is the principle that a court may disregard the corporate veil if a person is subject to a legal obligation, liability or restriction, the enforcement of which is being deliberately frustrated by the interposition of a company. Lord Sumption would confine the circumstances in which it is permissible to pierce the corporate veil to cases where the ‘evasion principle’ is engaged and only to those cases where no other remedy is available.<sup>24</sup>
- 18 Considerations of abuse of the corporate form were thus central to Lord Sumption’s views. Some members of the UK Supreme Court in *Prest* were unwilling to adopt definitively Lord Sumption’s ‘concealment’ / ‘evasion’ dichotomy<sup>25</sup> and “foreclose” all possible future situations of veil-piercing to ‘evasion’ cases.<sup>26</sup> However, there was general agreement that veil-piercing should remain confined to exceptional circumstances and Lord Sumption’s emphasis on an underlying wrongdoing providing the impetus for the piercing of the veil was not challenged.<sup>27</sup>
- 19 Although the UK Supreme Court moved away from the traditional, metaphoric formulation of separate corporate personality being disregarded where it is a mere “sham” or “façade”<sup>28</sup> (a formulation that has also featured in Australian law dealing with the corporate veil<sup>29</sup>), the

<sup>22</sup> *Prest* at 484 [28]. Lord Neuberger agreed with Lord Sumption on this point and endorsed Lord Sumption’s characterisation of those two principles at 498 [60].

<sup>23</sup> See also *VTB Capital plc v Nutritek International Corp and others* [2012] EWCA Civ 808 at [80].

<sup>24</sup> *Prest* at 487-488 [34]-[35], Lord Neuberger agreeing at 498 [61]-[62] and 503 [81].

<sup>25</sup> *Prest* at 506 [92] (Baroness Hale JSC (with whom Lord Wilson JSC agreed)).

<sup>26</sup> *Prest* at 507 [100] (Lord Mance JSC), 508 [103] (Lord Clarke).

<sup>27</sup> *Prest* at 498 [62], 502 [80] (Lord Neuberger), 507 [102] (Lord Mance JSC), 508 [103] Lord Clarke), 508 [106] (Lord Walker).

<sup>28</sup> *Prest* at 484 [28] (Lord Sumption), 502 [78] (Lord Neuberger).

<sup>29</sup> See *James Hardie & Co Pty Ltd v Hall (as administrator of Putt)* (1998) 43 NSWLR 554 at 583-584 (Sheller JA); Ford, Austin and Ramsay’s *Principles of Corporations Law*, 152 [4.250.12].



concealment and evasion analysis draws upon the concern with deceit and fraud in the historical veil-piercing cases.<sup>30</sup>

- 20 In Australia, Justice Jackson in *Dennis Wilcox Pty Ltd v Federal Commissioner of Taxation* approached veil-piercing in a similar way:

[T]he separate legal personality of a company is to be disregarded only if the court can see that there is ...a mere sham or façade in which that company is playing a role, or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated.<sup>31</sup>

- 21 Lord Neuberger also remarked upon the notion of “lifting” the corporate veil as a metaphor suitable for cases of “concealment” of the true actors and transaction; as opposed to “piercing” the veil, being the equating of the controller with the separate entity (based on the destruction of the distinction between, and separateness of, the two entities).

- 22 A concern with the corporate form being used to advance wrongdoing is also present in Singaporean and American jurisprudence. In *Tjong Very Sumito v Chan Sing En*, the Singapore High Court stated that Singaporean courts will be willing to pierce the corporate veil “where the corporate form has been abused to further an improper purpose.”<sup>32</sup>

- 23 Similarly, in surveying the principles applicable to veil-piercing, the United States Court of Appeals for the Tenth Circuit noted:

To be sure, courts sometimes pierce the corporate veil and disregard the corporate form. But we do so to prevent the corporation’s owners from abusing the legal privilege of the corporate form where they seek to use that privilege to perpetrate a fraud or injustice.<sup>33</sup>

- 24 American jurisprudence is, however, fractured on the topic of piercing the veil, with some States adopting the so-called ‘instrumentality’ doctrine and others the so-called ‘alter ego’ doctrine. A finding of wrongdoing is, however, a feature of both approaches.<sup>34</sup> Under the instrumentality doctrine, the corporate veil may be pierced where there is “complete domination” of a corporate entity such that it had no independent existence of its own, and this

<sup>30</sup> See *Prest* at 481 [22] (Lord Sumption), citing *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177.

<sup>31</sup> (1988) 79 ALR 267 at 272.

<sup>32</sup> [2012] SGHC 125 at [67].

<sup>33</sup> *Somerlott v Cherokee Nation Distribs Inc*, 686 F.3d 1144, 1157 n.1 (10<sup>th</sup> Cir, 2012) as cited in *Cyprus Amax Minerals Co v TCI Pacific Communications LLC* 28 F.4<sup>th</sup> 966 (10<sup>th</sup> Cir, 2022) per Briscoe J.

<sup>34</sup> Tan Cheng-Han, Jiangyu Wang and Christian Hoffman, ‘Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives’ (2019) 16(1) *Berkeley Business Law Journal* 140, 160-161. See the general statement in *United States v Milwaukee Refrigerator Transit Co* (1905) 142 F 247 at 255 that American courts pierce the veil “when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime”.

control was used by the defendant “to commit fraud or wrong...or a dishonest and unjust act” which caused the plaintiff injury or loss.<sup>35</sup> Separate corporate personality may be disregarded under the ‘alter ego’ doctrine if “such a unity of interest and ownership exists that the personalities of the corporation and an individual are no longer separate” and “an inequitable result will follow” if separate personality is upheld.<sup>36</sup> Judges and commentators alike have noted that, from these expressions of principle, courts of the United States take a more generous approach to piercing the veil and that may be because courts of that jurisdiction consider that a broader range of wrongdoing justifies that result.<sup>37</sup>

25 As Lord Sumption pointed out in *Prest*,<sup>38</sup> civil law jurisdictions have a broader doctrinal concept of “abuse of rights” permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligation extending not only to illegal or improper invocation of a right, but also to its use for a collateral purpose beyond that for which the right exists.

26 The relationship between instances of wrongdoing to successful cases of piercing the corporate veil is also confirmed by empirical studies. Outside a criminal context, Oh and Dignam found that UK courts were substantially more likely to disregard the corporate veil where the claim involved fraud or deception.<sup>39</sup> Ramsay and Noakes found that Australian courts were most likely to pierce the corporate veil on the grounds of unfairness and fraud.<sup>40</sup>

27 If the rationale behind the imposition of the veil is the economic and societal benefits of separate corporate personality and limited liability, it is logically consistent that the veil should be lifted where the harm done by the maintenance of the privilege of the corporate form in a particular case outweighs those benefits, whether by reference to all the circumstances of the case, or by reference to doctrinal categories or taxonomy. While it may be true that the nature of relevant wrongdoing or the standard of injustice required lacks precise articulation in the

<sup>35</sup> *Lowendahl v Baltimore & Ohio R.R. Co*, 287 NYS 62, 76 (NY App Div, 1936).

<sup>36</sup> *RRX Indus, Inc v Lab-Con Inc*, 772 F 2d 543, 545 (9<sup>th</sup> Cir, 1985).

<sup>37</sup> *Prest v Petrodel* at 502 [76] (Lord Neuberger); Oh and Dignam, ‘Disregarding the Salomon Principle: An Empirical Analysis, 1885-2014’, 27; Tan, Wang and Hoffmann, ‘Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives’, 161, 164.

<sup>38</sup> At 479 [17].

<sup>39</sup> Peter B Oh and Alan J Dignam, ‘Disregarding the *Salomon* Principle: An Empirical Analysis, 1885-2014’ (2019) *Oxford Journal of Legal Studies* 16, 39.

<sup>40</sup> Ian M Ramsay and David B Noakes, ‘Piercing the Corporate Veil in Australia’ (2001) 19 *C&SLJ* 250, 42.

case law,<sup>41</sup> it may be for the best that courts' exercise of their power to pierce the veil, in the rare circumstance where it is merited, remains unconstrained in some degree by bright-line rules.<sup>42</sup> Where remedying of fraud is a foundational concept for a principle, too precise a definition may hamper the aim of the principle.

28 A common feature of the academic literature and case law on piercing the corporate veil is recognition that the *Salomon* doctrine extends to corporate group structures.<sup>43</sup> It is accepted that each company in a corporate group is a separate legal entity, including wholly owned subsidiaries of parent or holding companies, despite the added conceptual difficulties of applying *Salomon* in this context.<sup>44</sup> Lord Justice Templeman noted that this "curious feature" of company law "may generate curious results".<sup>45</sup> Control, even domination, of a subsidiary by a related company does not of itself constitute a sufficient reason to pierce the corporate veil.<sup>46</sup> As Rogers AJA explained in *Briggs v James Hardie & Co Pty Ltd*:

The law pays scant regard to the commercial reality that every holding company has the potential, and, more often than not, in fact does, exercise complete control over a subsidiary.<sup>47</sup>

29 Commentators have remarked that not only does the application of *Salomon* to corporate groups necessitate a certain straining of commercial reality, the rationale behind companies in a group structure enjoying separate personality and limited liability is also more contrived.<sup>48</sup>

<sup>41</sup> See the Court of Appeal's comment in *Adams v Cape Industries plc* [1990] 2 WLR 657 at 759 that the authorities give "rather sparse guidance" as to what kind of arrangements amount to a façade. It should also be noted that in *Adams v Cape Industries plc*, the Court of Appeal found (at 753) that the veil could not be disregarded merely because the court "considers that justice so requires", although this finding is controversial. See Lord Sumption's discussion in *Prest* at 481-482 [23]-[24] and Lord Neuberger's finding that the cases indicate that where a court is of the view "that there is no other method of achieving justice, the doctrine [of piercing the corporate veil] provides a valuable means of doing so" at 500 [69].

<sup>42</sup> Tan, Wang and Hoffmann, 'Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives', 158.

<sup>43</sup> See, eg, *Bank of Tokyo Ltd v Karoon* [1987] AC 45 at 64 (Goff LJ); *Walker v Wimborne* (1976) 137 CLR 567; *Adams v Cape Industries plc* [1990] 2 WLR 657, 753. See also Phillip Lipton, 'The Mythology of *Salomon's Case* and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective' (2014) 40(2) *Monash University Law Review* 452, 454, 467; Ryan J Turner, 'Revisiting the direct liability of parent entities following *Chandler v Cape plc* (2015) 33 C&SLJ 45 at 47, the Hon Chief Justice Marilyn Warren AC, 'Corporate Structures, the Veil and the Role of the Courts' (Speech delivered at the Harold Ford Memorial Lecture, Melbourne Law School, May 2016) as published in (2016) 40 *Melbourne University Law Review* 657 at 669-670.

<sup>44</sup> The Hon Chief Justice Marilyn Warren AC, 'Corporate Structures, the Veil and the Role of the Courts', 668.

<sup>45</sup> *Re Southard & Co Ltd* [1979] 1 WLR 1198, 1208.

<sup>46</sup> See *Varangian Pty Ltd v OFM Capital Ltd* [2003] VSC 444 at [142] where Dodds-Streeton J, citing Rogers AJA in *Briggs v James Hardie*, remarked that "...even the complete domination or control exercised by a parent over the subsidiary is not a sufficient bases for lifting the corporate veil. This is an area in which the law pays scant regard to the commercial reality." See also *Adams v Cape Industries plc* [1990] 1 Ch 433.

<sup>47</sup> (1989) NSWLR 549 at 577.

<sup>48</sup> See Talia Siataga, 'James Hardie and the Development of Parent Company Liability: New Zealand as a Forum for Transnational Human Rights Litigation?' (2021) 28 *Canterbury Law Review* 77, 82.

Yet the distinction of the application of the principle to some companies, but not others, would or might, create intolerable questions of uncertainty.

30 Ramsay and Noakes contend that the benefits for shareholders of the ability to diversify holdings, the reduced need to monitor company management, and the promotion of the free transfer of shares have limited application in a corporate group context where all or the majority of shares in a company are held by other members of the group. Lipton argues that the application of *Salomon* to corporate groups has had “severe adverse effects”, especially upon involuntary creditors of insolvent subsidiaries, and has permitted corporations to profit from all the advantages of limited liability and separate personality while shifting liability for risky behaviour onto others.<sup>49</sup> Justice Rogers in *Qintex Australian Finance Ltd v Schroders Australia Ltd* remarked that “[f]airness or equity seems to have little role to play” in litigation involving conglomerates.<sup>50</sup> The mass tort cases, to which I will shortly come, may, however, be seen to challenge such pessimism.

31 Given this principled criticism, it is perhaps surprising that empirical studies show that courts are less likely to pierce the corporate veil in group contexts compared with non-group contexts.<sup>51</sup>

32 Something should be said of statute. Many jurisdictions have specific statutory provisions which are exceptions to separate corporate personality or limited liability. As noted by Tan, Wang and Hoffman, such exceptions “arise because of a policy choice that the benefits of incorporation ought not to be fully available in such instances.”<sup>52</sup> For example, s 340(1) of the *Companies Act* (Singapore, cap 50, 2006, rev ed) imposes personal liability on a person who was knowingly a party to a company carrying on business with the intention to defraud the company’s creditors or for any other fraudulent purpose. An Australian example in the context of group companies is s 588V of the *Corporations Act 2001* (Cth), which provides that, in certain circumstances, a holding company may be liable to pay debts incurred by an insolvent

<sup>49</sup> Lipton, ‘The Mythology of *Salomon*’s Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective’, 455, 480, 486.

<sup>50</sup> (1990) 3 ACSR 267, 269.

<sup>51</sup> Ramsay and Noakes, ‘Piercing the Corporate Veil in Australia’, 27-29; Oh and Dignam, ‘Disregarding the *Salomon* Principle: An Empirical Analysis, 1885-2014’, 36. See also the academic authority supporting this proposition cited by Jason Harris in ‘Lifting the Corporate Veil on the Basis of an Implied Agency: A Re-evaluation of *Smith, Stone and Knight*’ (2005) 23(1) *C&SLJ*, 9. Oh and Dignam speculate as to the reasons why this “puzzling” finding may be at 37-38.

<sup>52</sup> Tan, Wang and Hoffman, ‘Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives’, 150-151.

subsidiary.<sup>53</sup> When these statutory provisions are in play, the court does not “pierce the veil”. The legislation has, in its terms, provided for additional statutory liability.

33 Let me now turn to agency and tort. As to agency, the above discussion in *Prest* and the approval in *Prest* of the judgment of the “strong” Court of Appeal, to use Lord Sumption’s language<sup>54</sup> of Slade, Mustill and Ralph Gibson LJ in *Adams v Cape Industries plc*<sup>55</sup> (and, indeed, *Salomon* itself) make clear that the mere identification of control or power to dominate a company by a shareholder is not agency in law. Nevertheless, in the context of group companies, agency is frequently sought to be subsumed within the veil-piercing metaphor.<sup>56</sup> The corporate veil will be pierced, so it is said, where the holding company’s control of its subsidiary is so extensive that the acts of the subsidiary are deemed to be those of the holding company.<sup>57</sup> However, this tends to obscure what is in fact occurring in agency cases. Where an agency relationship is found, one person, the agent, is expressly or impliedly acting on behalf of another person, the principal, such that the agent’s actions are imputed to the principal and thus it is the principal that is responsible for any impugned conduct.<sup>58</sup> The liability of the holding company principal is conceptually different from veil-piercing, as liability is founded upon the acts of the holding company itself rather than any disregard of the subsidiary company’s separate legal personality.<sup>59</sup> The fallacy of linking the doctrine of agency with that of piercing the corporate veil was recognised by Besanko J in *ACN 007 528 207 Pty Ltd v Bird Cameron*:

In some cases it has been said that agency is a basis upon which the court lifts the corporate veil. I find it hard to see how such an analysis can be correct. Agency is a relationship well known to the common law. It recognises the existence of the agent and is a relationship between the two legal entities ...for an agency to arise the alleged agent must have consented to act on

<sup>53</sup> See also discussion of this provision, and others, in Ford, Austin and Ramsay’s *Principles of Corporations Law* at 150 [4.245]; the Hon Chief Justice Marilyn Warren AC, ‘Corporate Structures, the Veil and the Role of the Courts’ at 663, 673; Turner, ‘Revisiting the direct liability of parent entities following *Chandler v Cape plc* (2015), 47.

<sup>54</sup> [2013] 2 AC at 480 [21].

<sup>55</sup> [1990] Ch 433.

<sup>56</sup> Harris, ‘Lifting the Corporate Veil on the Basis of an Implied Agency: A Re-evaluation of *Smith, Stone and Knight*’, 8.

<sup>57</sup> Ramsay and Noakes, ‘Piercing the Corporate Veil in Australia’, 8. For criticism of agency as a basis for piercing the corporate veil see generally Harris, ‘Lifting the Corporate Veil on the Basis of an Implied Agency: A Re-evaluation of *Smith, Stone and Knight*’.

<sup>58</sup> Tan, Wang and Hoffmann, ‘Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives’, 159, 163.

<sup>59</sup> See *Idoport Pty Ltd v National Australia Bank Ltd; National Australia Bank Ltd v OAMPS Ltd* [2004] NSWSC 695 per Einstein J where his Honour stated at [144] that: “A finding that one party is the agent of another does not require a disregard of the separate entity. It merely imputes the acts of one party to another under normal agency principles.”

behalf of and subject to the control of another. Therefore, there would be no need to lift the corporate veil where there is an agency relationship.<sup>60</sup>

34 As to the tortious liability of holding companies, there have been recent noteworthy decisions handed down in the UK and New Zealand. As with agency, the tortious liability of holding companies has sometimes (wrongly) been viewed through the lens of the corporate veil in that the sense that acts of a subsidiary are said to be treated as those of a parent notwithstanding the separate personality of each company.<sup>61</sup>

35 By way of introduction to the extremely interesting and valuable tort cases in the UK Supreme Court, it should be said that the subject of parent company liability in the circumstances of harm caused by (at least) the subsidiary raises important questions of corporate governance, and questions of corporate social responsibility. These are large topics, beyond my remit today. But, as the cases to which I will come reveal, the legal structure of parent and subsidiary, and of separate legal personality may not reflect the organisational and management structure of a group, which might be based on functions, lines of business or any number of structures or modes of organisation of a business or its operations. As will be seen, head office may play (by choice or business necessity) a key role in supervising and directing lines of business or functions. Within this potential variety, there intrudes public expectations of responsible and decent behaviour, and often a corporate desire to be seen as fulfilling those expectations. These questions are sometimes looked at narrowly in time: as to present value for present shareholders, without due regard for likely future perceptions of future generations. Social responsibility is, perhaps, better viewed by a board not (or not only) as involving matters extraneous to the interests of current shareholders, but with the eye of an underwriter of long-tail liability business looking at future risk and the possible (present) incurring of (future) liability of the indefinitely continuing company affecting possibly present, but certainly future, shareholders.

36 Some commentators have argued that courts should be more willing to pierce the corporate veil in the context of tort litigation as tort victims are ‘involuntary creditors’ unable to choose the identity of the company that injures them and less likely to be able to protect themselves via

<sup>60</sup> [2005] SASC 204; (2005) 91 SASR 570, 592 [96].

<sup>61</sup> Tan, Wang and Hoffmann, ‘Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives’, 155-157; Turner, ‘Revisiting the Direct Liability of Parent Entities following *Chandler v Cape plc*’, 56.

contract or insurance as compared with other creditors.<sup>62</sup> Others have criticised the effects of tort litigation as “creating an unwarranted inroad” into the foundational company law concept of separate legal personhood.<sup>63</sup> However, the tort liability of holding companies should not be conceptually confused with veil-piercing.<sup>64</sup> The guiding question in tort litigation is whether the defendant owed, and breached, a duty of care to the plaintiff which caused the plaintiff loss or damage. Recall the seminal case of the snail in Mrs Donoghue’s bottle of ginger beer. To determine whether Stevenson, the manufacturer, was liable to a consumer like Mrs Donoghue, who had not herself purchased the drink from the Wellmeadow Café, Lord Atkin asked, “*who, then, in law is my neighbour?*”<sup>65</sup> Where an action in tort is brought against a parent company which, like Mr Stevenson, may be to a degree removed from a plaintiff, a plaintiff is claiming that the parent company nevertheless directly and independently of its subsidiary owed them a duty of care. If a parent is found liable, it is liable in its own right as a tortfeasor by reason of its own acts, not those of its subsidiary. A finding of liability resulting from the application of orthodox principles of the law of torts does not entail disregarding a parent’s separate legal personality, to the contrary, the legal personhood of the parent company is the very foundation of its liability.

- 37 In 2012, in *Chandler v Cape*,<sup>66</sup> Mr Chandler was employed as a brick loader by Cape Products in the 1950s and 1960s and was exposed to asbestos in the course of his employment. He later suffered from asbestosis. By that time, however, Cape Products no longer existed. Mr Chandler brought an action against Cape Products’ parent company, contending that the parent owed him a duty of care as an employee of its subsidiary to ensure a safe system of work. It was common ground at trial that there was “nothing to justify” the piercing of the corporate veil, and the plaintiff’s counsel urged that the “right course” was to apply tort principles to resolve the case.<sup>67</sup>

<sup>62</sup> Lipton, ‘The Mythology of *Salomon*’s Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective’, 481.

<sup>63</sup> See Martin Petrin, ‘Assumption of Responsibility in Corporate Groups: *Chandler v Cape plc*’ (2013) 76 *Modern Law Review* 603, 619.

<sup>64</sup> Sola Abdul, ‘*Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3: Is it Necessary to “Pierce” the Corporate Veil?’ (2021) 10 *ICCLR* 548, 553.

<sup>65</sup> *Donoghue v Stevenson* [1932] AC 562 at 580. See also Talia Siataga, ‘*James Hardie* and the Development of Parent Company Liability: New Zealand as a Forum for Transnational Human Rights Litigation?’, 102.

<sup>66</sup> [2012] EWCA Civ 525; 1 WLR 3111.

<sup>67</sup> *Chandler v Cape plc* [2012] EWCA Civ 525 at [37], [39].

38 The leading judgment of the Court of Appeal was delivered by Lady Justice Arden who, applying the *Caparo* test,<sup>68</sup> found that the imposition of a duty of care was merited. As later decisions showed, this was not the appropriate test, as the category of duty of care was not novel: it concerned the infliction of personal injury. In this case, the business of the parent and subsidiary were the same, with the parent “clearly in the practice” of issuing instructions to its subsidiary with the subsidiary unable to incur capital expenditure without approval; the parent had superior knowledge on matters of work health and safety, having conducted considerable research on the health risks of asbestos products; the parent knew that its subsidiary’s system of work was unsafe; and the parent ought to have foreseen that the subsidiary would rely on its knowledge in relation to health and safety.<sup>69</sup> In finding that a duty of care was owed, Arden LJ emphatically rejected:

any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary’s employees.<sup>70</sup>

With respect, the approach taken by Arden LJ was entirely proper and constitutes an example of the application of the law of negligence. It is an approach (save for her Ladyship’s reliance on *Caparo*) that has been endorsed by the Supreme Court in the cases to which I will come.

39 The importance of the particular circumstances to recognising a duty of care owed by a parent company is highlighted by the different result reached in the case in 2014 in the Court of Appeal of *Thompson v The Renwick Group*.<sup>71</sup> Although this case also involved a victim of asbestos exposure who brought an action against the parent company of his former employer, the Court of Appeal found that there was insufficient evidence to impose a duty of care. The parent and subsidiary lacked the same degree of intimate connection as compared with the companies in *Chandler v Cape*, and there was no evidence that the parent had particular knowledge of the risks of handling asbestos that was relied on by the subsidiary.<sup>72</sup>

<sup>68</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605; [1990] 1 All ER 568.

<sup>69</sup> *Chandler v Cape plc* [2012] EWCA Civ 525 at [73]-[80].

<sup>70</sup> *Ibid* at [69].

<sup>71</sup> [2014] EWCA Civ 635.

<sup>72</sup> *Thompson v The Renwick Group plc* [2014] EWCA Civ 635 at [36]-[39] (Tomlinson LJ).



40 Thus the relevant enquiry is twofold: first as to the proper principle for tortious responsibility; and, secondly, as to the engagement of that principle on the facts proved and found.

41 The next group of cases were appeals on jurisdictional questions. Therefore it should be remembered that the question before the court was whether it was arguable that a duty of care *could* be recognised, not whether it *should* or was to be in a particular case. They were mass tort cases arising from mining and resource activity in the developing world by large groups of companies with head offices in the developed world.

42 *Vedanta Resources plc and another v Lungowe and others (Vedanta)* concerned a mass tort claim brought by poor Zambian citizens against a parent company domiciled in the United Kingdom for loss and damage suffered as a result of the operations of a copper mine owned and operated by the parent's subsidiary in Zambia.<sup>73</sup> The plaintiffs alleged that the UK-based parent, Vedanta, owed them a duty of care because of the high level of supervision and control it maintained over its subsidiary, its knowledge of the likelihood that the activities of its subsidiary would cause environmental harm, and its assumption of responsibility for the environmental standards of its related companies in published material.<sup>74</sup> Vedanta challenged the jurisdiction of the courts of England and Wales to hear the dispute. In 2019, the Supreme Court upheld the decision of the Court of Appeal that the claim disclosed a triable issue and that the case should proceed to trial in England. In doing so, the Supreme Court clarified the appropriate principles to be applied.

43 First, the Court approved the statement in 2018 of Sales LJ in *AAA v Unilever plc* that:

There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case... Helpful guidance as to the relevant considerations was given in *Chandler v Cape plc*; but that case did not lay down a separate test, distinct from general principle, for the imposition of a duty of care in relation to a parent company.<sup>75</sup>

<sup>73</sup> [2019] UKSC 20; [2020] AC 1045 at [1] (Lord Briggs). Note that the Zambian subsidiary, Konkola Copper Mines plc, is the second defendant in this case.

<sup>74</sup> *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20 at [55].

<sup>75</sup> [2018] EWCA Civ 1532, [36] approved in *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20 at [50].

44 Secondly and relatedly, the court rejected the proposition that this case involved the assertion of a novel and controversial new category of case for the recognition of a common law duty of care, thus calling for the application of *Caparo*. The wrong alleged was the poisoning of a waterway, injuring people and poisoning land: the stuff of torts.<sup>76</sup> In relation to multinational group companies, the Court said:

...there is nothing special or conclusive about the bare parent/subsidiary relationship, it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all. They may easily be traced back as far as the decision of the House of Lords in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, in which the negligent discharge by the Home Office of its responsibility to supervise Borstal boys working on Brownsea Island in Poole harbour led to seven of them escaping and causing serious damage to the moored yachts in the vicinity, including one owned by the plaintiff.<sup>77</sup>

45 Thirdly, the Court stressed that whether a duty of care should be imposed in a particular case depends to a large degree on the evidence (often documentary) concerning the level of a parent company's intervention in, and assumption of responsibility for, the affairs of its subsidiary, which are questions of fact.<sup>78</sup> Lord Briggs JSC, speaking on behalf of the Court, said:

But the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence. Direct or indirect ownership by one company of all or a majority of the shares of another company (which is the irreducible essence of a parent/subsidiary relationship) may enable the parent to take control of the management of the operations of the business or of land owned by the subsidiary, but it does not impose any duty upon the parent to do so, whether owed to the subsidiary or, a fortiori, to anyone else. Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity.<sup>79</sup>

46 In the 2021 decision of *Okpabi and others v Royal Dutch Shell plc and another (Okpabi)*, the Supreme Court drew similar conclusions.<sup>80</sup> Once again it was service out of the jurisdiction to be assessed by whether there was a triable issue, that is, a real prospect, that a duty of care could be found. Much like *Vedanta*, this case involved proceedings brought by Nigerian communities against both Royal Dutch Shell Plc, a UK-domiciled company, and the Shell Petroleum Development Company of Nigeria Ltd, a subsidiary of Royal Dutch Shell Plc, in

<sup>76</sup> *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20 at [60].

<sup>77</sup> *Ibid* at [54].

<sup>78</sup> *Ibid* at [44].

<sup>79</sup> *Ibid* at [49].

<sup>80</sup> *HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3; 3 All ER 191.

connection with environmental damage resulting from oil spills allegedly negligently caused by the Nigerian subsidiary, or by third parties acting illegally which activities ought to have been prevented. The plaintiffs claimed that Royal Dutch Shell Plc owed them a common law duty of care because it exercised significant control over its Nigerian subsidiary's operations or assumed control for those operations, including by the "promulgation and imposition" of mandatory environmental policies, standards and manuals.<sup>81</sup> The primary judge and the Court of Appeal found that the plaintiffs had no arguable case that Royal Dutch Shell Plc owed them a duty of care. The plaintiffs appealed that finding to the Supreme Court.

47 In allowing the appeal, the Supreme Court took the opportunity to reiterate the findings of the Court in *Vedanta*. In particular, the Supreme Court stressed that:

- it is incorrect to approach cases alleging that a parent company owed a plaintiff a duty of care by reference to the threefold *Caparo* test for establishing a novel duty because the liability of parent companies in relation to the activities of their subsidiaries is not novel, earlier cases have considered it and the principles involved in determining that liability are themselves neither novel nor distinctive: the harm was the alleged infliction of physical damage and personal injury;<sup>82</sup>
- there is "no special test applicable to the tortious responsibility of a parent company for the activities of its subsidiary";<sup>83</sup> and
- the question of whether a parent company has sufficiently intervened in, controlled, supervised or advised the management of a subsidiary in connection with some relevant aspect of its operations is a "pure question of fact" and consequently, internal corporate documents evidencing operational matters are critically important.<sup>84</sup>

48 The Court made an interesting point as to the relevance of the structure of a corporate group in the application of tort principles. For Sir Geoffrey Vos in the Court of Appeal, the manner in which Royal Dutch Shell plc had structured its foreign operations was relevant to his finding that no duty of care was owed:

<sup>81</sup> Ibid at [7].

<sup>82</sup> Ibid at [24]-[25].

<sup>83</sup> Ibid at [27].

<sup>84</sup> Ibid at [25], [129], [132].

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...it would be surprising if a parent company were to go to the trouble of establishing a network of overseas subsidiaries with their own management structures if it intended itself to assume responsibility for the operations of each of those subsidiaries. The corporate structure itself tends to militate against the requisite proximity.<sup>85</sup>

- 49 However, the Supreme Court cautioned against making presumptions on the basis of corporate structure. As Lord Briggs noted in *Vedanta*, there is “no limit to the models of management and control which may be put in place within a multinational group of companies” and what is relevant is not the specific structure adopted but the extent to which a parent in fact took over or shared the management of the relevant activity with its subsidiary.<sup>86</sup>
- 50 I commend the reading of both *Vedanta* and *Okpabi* for their discussion of corporate and group management, and the place of corporate responsibility in modern, globalised commercial activity.
- 51 Turning to New Zealand authority, in 2019, in *James Hardie v White*, the New Zealand Court of Appeal was invited to consider the question of whether an international holding company could owe a duty of care to New Zealand-based plaintiffs claiming to have suffered loss as a result of defective products made, marketed and sold by a holding company’s wholly owned subsidiary.<sup>87</sup> The claimants were past or present owners of buildings with cladding products supplied by James Hardie’s New Zealand business, which the claimants alleged were defective and not watertight. The claimants brought actions in negligence, breach of duty to warn and negligent misstatement, as well as actions for alleged breaches of statutory provisions against the ultimate parent of the James Hardie Group, James Hardie Industries Plc (JHI), as well as the New Zealand holding company and other related New Zealand-based companies. JHI challenged the jurisdiction of the New Zealand courts to hear the dispute while other James Hardie group members applied for summary judgment.
- 52 The Court of Appeal affirmed that separate legal personality of corporate entities was a “central principle of modern company law” in New Zealand.<sup>88</sup> As a result, a corporate shareholder does

<sup>85</sup> *Okpabi and others (suing on behalf of themselves and the people of the Ogale Community) v Royal Dutch Shell Plc and another; Alame and others v Royal Dutch Shell Plc and another* [2018] EWCA Civ 191 at [196], quoted in *HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3 at [86] and [150].

<sup>86</sup> *HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3 at [150], quoting from the judgment of Lord Briggs in *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20 at [51].

<sup>87</sup> *James Hardie Plc v White* [2019] 2 NZLR 49 at [1].

<sup>88</sup> *Ibid* at [28].

not by reason of their shareholding alone owe a duty of care to those impacted by the actions of its subsidiary.<sup>89</sup> However, the Court also emphasised that a company's legal personality means that legal consequences can attach to a company's actions. There is accordingly no reason why the corporate form should shield a company from the ramifications of its actions with respect to its subsidiaries if those actions are sufficient to justify the imposition of a duty of care:

The principles of liability for a parent company are not therefore inconsistent with New Zealand company law. We do not accept [that the imposition of a duty of care] undermines the policy objectives of the Companies Act, or more generally, the policy behind the development of the principles of incorporation and separate legal personality for the corporate form. Nor do we accept [the] argument that the principle of separate legal personality should be applied to immunise holding companies from the legal consequences of their actions, just because those actions fall into the category of companies doing what they usually do within large corporate groups.<sup>90</sup>

53 Taking note of developments in the law of negligence in other jurisdictions, including the UK, the Court opined that although mere potential on the part of the parent to control a subsidiary, or even actual coordination within a corporate group, was insufficient to impose a duty of care, the existing authorities suggest three categories of potential liability:

- a) where the parent takes over the running of the relevant part of the business of the subsidiary;
- b) where the parent has superior knowledge of the relevant aspect of the business of the subsidiary, the subsidiary relied upon that knowledge, and the parent knew or ought to have foreseen the alleged deficiency in process or product; and
- c) more generally where the parent takes responsibility (irrespective of superior knowledge or skill) for the policy or advice which is linked to the wrongful act or omission.<sup>91</sup>

54 The Court found that, at this preliminary stage of the proceeding, there was sufficient evidential material to suggest that JHI may have been directly involved in making relevant claims about the New Zealand business, may have had superior knowledge with respect to the products' technical qualities and that the group may have adopted a coordinated approach to compliance

<sup>89</sup> Ibid at [32].

<sup>90</sup> Ibid at [64].

<sup>91</sup> Ibid at [65]-[66].

with group policies.<sup>92</sup> On that basis, there was a serious issue to be tried and the Court found that a trial should proceed.<sup>93</sup>

55 Thus, an analysis of recent UK and New Zealand case law tends to confirm that application of the corporate veil metaphor to tort litigation is apt to mislead. The liability of parent companies in connection with the acts or omissions of their subsidiaries is best resolved by the application of orthodox principles of tort law and, where it is found, is the product of the parent company's own conduct.

56 There is no reason why Australian courts will not apply the law of torts to parent companies or controllers of corporations, recognising the fact that applicable tortious principles will be Australian, and not those of the UK or other countries. A survey of Australian cases reinforces this.

57 In 1997, in *CSR Ltd v Wren*, the New South Wales Court of Appeal found that a parent company owed a duty of care to an employee of its former subsidiary.<sup>94</sup> Mr Wren was an employee of Asbestos Products Pty Ltd, a wholly owned subsidiary of CSR, which manufactured asbestos products. Mr Wren later suffered from an asbestos-related illness contracted in the course of his employment at the subsidiary. The Court of Appeal found that CSR owed Mr Wren a duty of care to protect him from the foreseeable risk of injury because of the degree of CSR's control over its subsidiary, which the Court described as "patriarchal".<sup>95</sup> It is notable in this case that it was not pleaded that the Court should pierce the corporate veil and, in any event, the Court found that it was entirely unnecessary to do so:

In particular, [imposing a duty of care] does not do any violence to the principles of corporations law enshrined in *Salomon v Salomon & Co* [1897] AC 22. ...The reason CSR is liable in the circumstances here is because it brought itself into a relationship with the employees of Asbestos Products Pty Ltd by placing its staff in the role of management at Asbestos Products Pty Ltd.<sup>96</sup>

<sup>92</sup> Ibid at [92].

<sup>93</sup> The case was ultimately settled in 2021 according to a James Hardie media release: James Hardie Investor Relations, 'James Hardie Industries Settles New Zealand Weathertightness Case' (3 August 2021) <<https://ir.jameshardie.com.au/news/press-releases/detail/39/james-hardie-industries-settles-new-zealand#:~:text=The%20White%20litigation%20trial%20commenced,submissions%20or%20call%20any%20witnesses>>.

<sup>94</sup> (1997) 44 NSWLR 463 (Beazley and Stein JJA).

<sup>95</sup> Ibid at 470.

<sup>96</sup> Ibid at 485.

58 A similar conclusion was reached a year later in 1998 in *CSR Ltd v Young*.<sup>97</sup> In that case, the plaintiff was not an employee of CSR nor any of its subsidiaries but rather was a resident of a town in which one of CSR's subsidiaries operated. The plaintiff contracted mesothelioma from exposure to asbestos when she was a child and claimed that CSR (as well as its subsidiary) owed her a duty of care to warn her family of the foreseeable risks of exposure. The Court of Appeal found that CSR and its subsidiary owed such a duty to the plaintiff as CSR and its subsidiary knew, at the relevant time, that asbestos was a dangerous substance and that exposure in the town was a risk to health.<sup>98</sup> In so finding, Giles AJA noted that:

The question in a case such as the present is whether the dominant parent, in all the circumstances...was in a relationship of proximity to the injured party. If it was, there is no question of piercing the corporate veil...<sup>99</sup>

59 Notwithstanding the fact that the High Court has since abandoned proximity as an essential test of whether to impose a duty of care in Australian law, these cases provide a foundation for the development of parent company liability in tort in Australia.

60 There is the seemingly contradictory authority in 1998 of *James Hardie v Hall*.<sup>100</sup> This authority presents difficulties not so much in result, but in the approach that was taken by the Court. In this case, the Court of Appeal declined to find that an Australian holding company owed a duty of care to an employee of its New Zealand-based subsidiary who contracted an asbestos-related illness as a result of exposure during the course of his employment. The Court distinguished *CSR Ltd v Wren* on its facts, noting that in that case, unlike the present one before the Court, the employees of the parent controlled the day-to-day operations of its subsidiary on the factory floor and thus had direct control of its operations.<sup>101</sup> Importantly, Sheller JA, who delivered the leading judgment, viewed the case through the prism of the corporate veil:

[The primary judge] did not find, nor could he on the evidence, that James Hardie & Co (NZ) was a mere façade which concealed the true fact that the plaintiff was an employee of the defendants or that James Hardie & Co (NZ) in employing the plaintiff or manufacturing products at Penrose was the defendants' agent. Ultimately the question was whether the control or influence which his Honour found to have existed was such as to impose a duty to the plaintiff of which there was a breach...To suggest that such a duty existed is to ignore James Hardie & Co's separate legal identity and the absence of any evidence that this was a mere façade.<sup>102</sup>

<sup>97</sup> (1998) Aust Torts Reports 81-468.

<sup>98</sup> Ibid at 11 (Giles AJA, Coles AJA agreeing on this point).

<sup>99</sup> Ibid at 7-8.

<sup>100</sup> *James Hardie & Co Pty Ltd and another v Hall (as administrator of the estate of Putt)* (1998) 43 NSWLR 554

<sup>101</sup> Ibid at 583 (Sheller JA).

<sup>102</sup> Ibid at 584.

61 Respectfully, the approach of the Court was misguided, confusing piercing the corporate veil (and the equation of parent and subsidiary) and the application of principles of tort to the parent as an individual. Although Sheller JA noted that the distinction between piercing the corporate veil, an agency relationship, and the imposition of a duty of care is “easily blurred”,<sup>103</sup> the maintenance of distinction between these concepts is important because the legal basis of each is fundamentally different. The result of the application of orthodox principles of tort law in this case may not have led to a different result: as Lipton points out, the Court’s analysis suggests that the holding company may not have exercised a sufficiently high degree of control to found a relationship of ‘proximity’ between itself and the plaintiff, essential at that time for a duty of care to be imposed.<sup>104</sup> However, the influence of the corporate veil metaphor in the Court’s reasoning has the regrettable result of adding confusion to the case law in this area.

62 If Australian courts do follow the judicial trends we have seen in the UK and New Zealand, what are the likely consequences for legal practice? Some commentators have suggested that this international trend in tort law may “open the floodgates” to litigation with plaintiffs increasingly emboldened to sue holding companies in their own right or as co-defendants.<sup>105</sup> However, what must be remembered is that the imposition of a duty of care involves the application by a court of legal principle distinct from any need to put to one side the separate personality of the subsidiary.<sup>106</sup> As the UK and New Zealand authorities suggest, careful examination of the evidence as to the nature of the relationship between a parent and subsidiary is required.<sup>107</sup> Furthermore, to establish liability, a plaintiff must show that a parent company breached its duty of care, caused the plaintiff’s loss, and that the damage suffered is within the scope of liability. These questions raise important considerations of how commercial organisation and management of the group and its business or businesses may affect the parent’s liability for operations nominally undertaken by a subsidiary.

<sup>103</sup> Ibid at 580.

<sup>104</sup> Lipton, ‘The Mythology of *Salomon*’s Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective’, 485 cf The Hon Chief Justice Marilyn Warren AC who described this case as indicative of the “narrowness of the Australian approach” compared with that of the Court of Appeal of England and Wales in *Chandler v Cape*: ‘Corporate Structures, the Veil and the Role of the Courts’ at 683.

<sup>105</sup> Petrin, ‘Assumption of responsibility in Corporate Groups: *Chandler v Cape plc*’, 619.

<sup>106</sup> Sola Abdul, ‘*Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3: Is it Necessary to “Pierce” the Corporate Veil?’, 562; Siataga, ‘*James Hardie* and the Development of Parent Company Liability: New Zealand as a Forum for Transnational Human Rights Litigation?’, 104-105.

<sup>107</sup> *HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3 at [25], [129], [132]; *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20 at [44]; The Hon Chief Justice Marilyn Warren AC, ‘Corporate Structures, the Veil and the Role of the Courts’, 686.



63 Moreover, where a parent company's actions have been found to have caused harm to a plaintiff, why should that company not be held liable for its own actions? It has been suggested that, in practice and whatever their rationale, decisions such as *CSR Ltd v Wren* and *Chandler v Cape* "have the effect of scaling back the benefit of limited liability for group entities."<sup>108</sup> However, it is hard to see that evading liability in tort was ever intended to be a benefit of the corporate form, even though the law of tort was less developed in the 19<sup>th</sup> century than it is now. Indeed, there may be broader societal benefits to the recognition of the possibility of parent company liability in tort including encouraging responsible corporate behaviour by reducing holding companies' appetite to condone risky behaviour by under-capitalised subsidiaries,<sup>109</sup> and greater potential for effective redress for victims of corporate human rights abuses.<sup>110</sup>

64 In terms of considerations for corporate lawyers, it is notable that the UK and New Zealand cases have indicated that careful attention will be paid to what evidence reveals about the substance of the relationship between a parent and a subsidiary: the "proof is in the pudding".<sup>111</sup> How does the group work? How is it organised? How is it seen? The plaintiffs in *Vedanta* and *Okpabi* pointed to sustainability reports, codes of conduct, and business principles published by parent companies to support their case that the parents had an integrated business structure whereby they had assumed responsibility for the environmental impact of their foreign subsidiaries. That may reflect wise commercial structure, but open the possibility of parental liability. But no such supervision may be bad commercial and corporate governance, and still open the parent to criticism of omission to act with knowledge. Whether the documentary evidence in fact established the requisite level of intervention by those parent companies was of course not a matter decided at the preliminary stage of proceedings but both cases were found to be arguable by the Supreme Court.<sup>112</sup> In fact, in *Vedanta* Lord Briggs on behalf of the

<sup>108</sup> The Hon Chief Justice Marilyn Warren AC, 'Corporate Structures, the Veil and the Role of the Courts', 684.

<sup>109</sup> Lipton, 'The Mythology of *Salomon's* Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective', 486.

<sup>110</sup> Siataga, 'James Hardie and the Development of Parent Company Liability: New Zealand as a Forum for Transnational Human Rights Litigation?', 77-78, 103. In this regard, see also the Canadian case of *Choc v Hudbay Minerals Inc* [2013] ONSC 1414.

<sup>111</sup> *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20 at [44] (Lord Briggs).

<sup>112</sup> Ibid at [61]: "But I regard the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, as sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of the operations at the Mine may be demonstrable at trial..."

Court rejected the proposition advanced by counsel that as a general principle, a parent could never incur a duty of care in respect of the activities of its subsidiary merely by laying down group-wide policies and guidelines:

...I am not persuaded that there is any such reliable limiting principle. Group guidelines about minimising the environmental impact of inherently dangerous activities, such as mining, may be shown to contain systemic errors which, when implemented as of course by a particular subsidiary, then cause harm to third parties...

Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.<sup>113</sup>

The New Zealand Court of Appeal in *James Hardie v White* declined to make findings on the general effect of a parent company publishing group-wide policies or guidelines but left open the possibility that such documents could be sufficient to impose a duty of care where that document was implicated in a wrongful act or omission of a subsidiary.<sup>114</sup>

65 With the increasing attention that corporations are paying to matters of economic and social responsibility governance it is important to be cognisant of the potential ramifications of corporate social responsibility policies (and of not having them) in terms of exposure to tortious liability. This is not at all to discourage corporations from adopting such policies, to the contrary, inadequate supervision of a subsidiary in circumstances where intervention is warranted may actually lead to liability being imposed, as it was in *Chandler v Cape*.<sup>115</sup> Rather, lawyers advising corporations on the structure of their operations and on their operating policies should be mindful of the risk that parent companies may be drawn into mass tort litigation where subsidiaries go astray.

66 I have sought to show how the metaphor of “piercing the corporate veil” has been circumscribed to its proper place. In company law, the “corporate veil” is a metaphor for public policy grounded in statute. We recognise that separate personality and limited liability promote efficiency in the economy and entrepreneurial behaviour and hence that it is in the public interest for corporations to enjoy these characteristics. The law on “piercing” that veil is a

<sup>113</sup> Ibid at [52]-[53].

<sup>114</sup> *James Hardie Plc v White* [2019] NSLR 49 at [66].

<sup>115</sup> See *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20 at [52].

testament to the fact that these public policy benefits cannot be pursued at any cost. There are limited circumstances, albeit perhaps ill-defined, when separate corporate personality and limited liability cannot be maintained. Courts are more likely to reach this conclusion and pierce the veil where the corporate form is being abused for an improper purpose, such as to perpetrate fraud and avoid extant legal duties.

67 However, we may dispel the “mists of metaphor” when considering corporate liability resulting from the application of the law of agency and the law of tort. The veil remains undisturbed when a company is found liable as a result of agency or the imposition of a duty of care in tort because in such circumstances a company is being found directly responsible for the consequences of its own actions, or of a real relationship of agency between parent and subsidiary not one said to arise from the existence of control and identity of interest in two separate corporate forms.

68 The recent trend in international case law towards recognising parent company liability in tort is the result of the application of orthodox principles of tort law. While there is nothing doctrinally exceptional about such a development, this is an area in which companies may be increasingly exposed to risk and corporate lawyers should be prepared to give full and frank advice on the potential tort liability of multinational conglomerates. Whilst the proper law of the tort may (not necessarily will) be in the less fully-developed place of the treasure to be extracted, do not expect courts to place some lesser standard of care on parties who take part in careless infliction of injury and damage and the destruction of human life or habitat or the sustaining environment in those places.

69 As to tortious liability, it is important to recognise that the cases to which I have referred were largely about physical damage: poisoning or harming people or their land and environment. Any liability of the parent for the infliction of pure economic loss may be a different analysis.<sup>116</sup> There, questions of reliance and vulnerability, in a multifactorial test, together with proximity play important roles.<sup>117</sup> It may be, in that context, that the duty may be not so straightforwardly imposed.

<sup>116</sup> Although the New Zealand case of *James Hardie v White* was a defective products case.

<sup>117</sup> *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; 216 CLR 515; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36; 264 CLR 185; and see generally D Rolph et al, *Balkin and Davis' Law of Torts* (Lexis Nexis, 6<sup>th</sup> ed, 2021) Ch 13.

- 70 The tort cases do, however, throw up this choice for a board of a group.<sup>118</sup> If the best way of running and managing a business or businesses organised by subsidiary companies in a group involves group-wide policies promulgated, supervised, directed and enforced by officers of the parent, not to be actively involved in such policy promulgation, supervision, direction and enforcement will or may involve business risk; to be so actively involved may involve or heighten liability risk.
- 71 I have concentrated upon one “direction” of the importance of the separate personality: the potential liability of the shareholder (parent) for the acts or position of the subsidiary. The doctrine is relevant in the other direction: the potential liability of the subsidiary for the acts or policies of the shareholder or parent. The example of “phoenixing” (to use another metaphor) comes to mind. One may, perhaps, cast such conduct into the doctrine of evasion set down in *Prest*. Those (creditors) who would benefit from the discharge of pre-existing liabilities of a company from an opportunity now denied to the company by its being taken up by a new company controlled directly or ultimately by the owner of the first company owing the earlier liabilities. But it may not be the only remedy.

**Sydney**

26 August 2022

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<sup>118</sup> I hesitate to call it Hobson’s Choice, though perhaps it should be so-called, as surely there is no choice: the former should be the approach.