

Article

Piercing the Corporate Veil, or ‘Alter Ego’ liability, in the Cayman Islands, Bermuda, and the British Virgin Islands

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Creative attempts to ‘pierce the corporate veil’ sometimes come before the Courts of Bermuda, the British Virgin Islands, and the Cayman Islands.

In some cases, an attempt is made to establish personal liability on the part of a company’s individual owners or controllers, for the liabilities, acts or omissions of the company itself.

In other cases, an attempt is made to establish liability on the part of a company for the separate liabilities, acts or omissions of the individuals that control or manage the company’s affairs.

In many such cases, the issue of corporate ‘veil piercing’ arises for consideration well before trial, since it can be particularly significant in the context of freezing injunction applications, as well as on the issue of jurisdiction. The issue can also become important, after trial, in the context of applications to enforce judgments and arbitration awards against related corporate entities.

It has been judicially recognised, of course, that there are only very ‘limited circumstances’ in which the corporate veil may actually be ‘pierced’ or ‘lifted’ by a Court as a matter of law.

Those circumstances usually require clear evidence of fraud and dishonest evasion of pre-existing liabilities through the abuse, or misuse, of the corporate structure.

‘Piercing the veil’ successfully, therefore, is not an easy task for a claimant or judgment creditor.

But it is not necessarily impossible, however, especially in cases of fraud where the evasive conduct is shown to be egregious.

The law in this area also remains under review at an appellate level, as illustrated by the recent May 2021 decision of the United Kingdom Supreme Court in *Hurstwood Properties (A) Ltd & Ors v Rossendale Borough Council* [2021] UKSC 16.

As Lord Briggs and Lord Leggatt recognised in their recent judgment in that case, “*talk of ‘piercing the corporate veil’ is a metaphor that is liable to obscure more than it illuminates*”. Lord Briggs and Lord Leggatt also noted that, despite Lord Sumption’s attempts to rationalise this area of the law into a coherent set of principles in his judgment in *Prest v Petrodel Resources Limited* [2013] UKSC 34, they nonetheless shared the doubts of other judges that “*‘piercing the corporate veil’ was even a ‘coherent principle or rule of law at all’*”.

Is there such a thing as ‘alter ego’ liability?

Neither Cayman Islands law, British Virgin Islands law, nor Bermuda law, recognize a legal doctrine of “*alter ego*” liability as between a company and its shareholders, at least not as a fixed legal concept by that specific name or label.

There have, however, been various occasions on which English judges or lawyers have referred to the concept of ‘piercing the corporate veil’ by the shorthand use of the Latin words ‘alter ego’.

By way of example, in *Hone v Canadian Imperial Bank of Commerce* (1989) 37 WIR 39 PC, in an appeal from the Bahamas, the Privy Council accepted the characterisation of a corporate entity as the ‘alter ego’ of its sole shareholder and controller for the purposes of an unjust enrichment claim. That decision provides an example of the Privy Council ‘piercing the corporate veil’ on the facts of the case.

The Privy Council’s limited reasoning in *Hone v CIBC* is unlikely to be of much persuasive value today, however, in circumstances where the case has not been followed subsequently, and it has been implicitly overruled by later judicial decisions of the Privy Council, including the judgment of the Privy Council in *Persad v Singh* [2017] UKPC 32.

Outside the general law of agency, the closest approximation to “*alter ego*” liability in the corporate context, under Cayman Islands law, British Virgin Islands law, and Bermuda law, is the exceptional concept of ‘piercing the corporate veil’.

‘Veil piercing’ and the separate legal personality of companies

The starting point, in discussing ‘veil piercing’, is that a company limited by shares has a separate legal personality from its shareholders; and the shareholders of a limited company are not ordinarily liable for the debts or other liabilities of a limited company by the mere fact of owning shares in the company (nor by the mere fact of controlling the company, whether as shareholders or as directors).

This gives rise to the concept of the ‘corporate veil’.

The concept of the ‘corporate veil’ follows from the statutory provisions of the jurisdictions’ respective Companies Acts (which expressly provide for the limited liability of shareholders in companies limited by shares), and also from the landmark decision of the English House of Lords in *Salomon v A Salomon and Co Ltd* [1897] AC 22, where the legal separation between a company and its shareholders was firmly established.

In the view of Lord Halsbury LC in the *Salomon* case, a limited company was to be viewed “*like any other independent person with its rights and liabilities appropriate to itself.*” In other words, a Bermuda company, a BVI company, and a Cayman Islands company each has a separate and independent legal personality from that of its shareholders.

As Robert Goff LJ noted in *Bank of Tokyo Ltd v Karoon* (Note) [1987] AC 45, in the context of the separate legal liability of companies, “*we are concerned not with economics but with law. The distinction between the two is fundamental.*”

There have been a number of reported cases in which the corporate veil has been attempted to be pierced or lifted, on the basis that some special or unusual circumstances have arisen in which the incorporation of a company has been used as a dishonest ‘façade’ or ‘sham’ to conceal the true facts, or as a device for an illegal or improper purpose.

The variety of judicial reasoning to be found within the reported cases has caused some confusion over the years as to the precise circumstances in which “veil piercing” is permissible as an exceptional concept.

Until the United Kingdom Supreme Court’s recent judgment in the case of *Hurstwood Properties (A) Ltd & Ors v Rossendale Borough Council* [2021] UKSC 16, the most authoritative summary of the relevant legal principles had been contained in the 2013 judgment of the United Kingdom Supreme Court in *Prest v Petrodel Resources Limited* [2013] UKSC 34.

Evasion or concealment?

As Lord Sumption explained at paragraph 35 of his judgment in *Prest v Petrodel Resources Limited* [2013] UKSC 34, the concept of ‘piercing the corporate veil’ is a limited one “*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.*”

In such a case, the court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company’s separate legal personality.

Lord Sumption (and other members of the Supreme Court) referred to this limited concept of ‘piercing the corporate veil’ as engaging the ‘evasion principle’ (i.e. the evasion of an existing legal liability or an existing legal restriction through the use of a corporate structure).

Lord Sumption acknowledged, however, that in some of the cases where a fraud or dishonest scheme was alleged to have been perpetrated by the use of a company so as to conceal the identity of the dishonest wrongdoers (sometimes giving rise to the use of ‘protean terms’ such as ‘façade’ or ‘sham’), a separate principle was engaged, which he referred to as the ‘concealment principle’: “*The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the “façade”, but only looking behind it to discover the facts which the corporate structure is concealing.*”

It is important to note that *Prest v Petrodel* has been expressly followed and applied by the Privy Council¹, and also by the first-instance and intermediate appellate courts in both Bermuda², the British Virgin Islands³, and the Cayman Islands⁴. There have also been a number of Hong Kong and Singapore judgments that have followed and applied *Prest v Petrodel*.

¹ See *Persad v Singh (Trinidad and Tobago)* [2017] UKPC 32, per Lord Neuberger at paragraph 17.

² See *Athene Holding Ltd v Siddiqui et al.* [2018] SC Bda 52 Civ, and [2019] SC Bda 3 Com

Indeed, in the Privy Council's judgment in *Persad v Singh (Trinidad and Tobago)* [2017] UKPC 32, Lord Neuberger expressly endorsed Lord Sumption's analysis and adoption of the 'evasion principle':

"17. As the Court of Appeal rightly acknowledged, piercing the veil is only justified in very rare circumstances, a point which was implied in the UK Supreme Court's decision in VTB Capital Plc v Nutritek International Corpn [2013] 2 AC 337, paras 127, 128 and 147, and was expressed in terms in its subsequent decision in Prest v Petrodel Resources Ltd [2013] 2 AC 415, paras 35, 81-82, 99-100 and 106. As Lord Sumption explained in Prest at para 35, piercing the veil can be justified only 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". ..."

It is important to note that the mere facts that a shareholder is a sole shareholder, or acts as a director or manager of the company, do not, in and of themselves, provide a basis for a Court to conclude that the corporate veil of a company should be pierced. It is well established that ownership and control of a company are not of themselves sufficient to justify piercing the corporate veil. Equally, the mere fact that a company is part of a group of companies forming a consolidated economic unit is not, in and of itself, sufficient to justify piercing the corporate veil.

As was noted in the English Court of Appeal decision of *Adams v Cape Industries plc* [1990] Ch 433, per Slade LJ at 536: *"the court is not free to disregard the principle of Salomon v Salomon [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities."*

Summary

In summary, the Courts of Bermuda, the British Virgin Islands, and the Cayman Islands all respect the legal importance of the 'corporate veil', and the separate legal personality of corporate entities.

The Courts are equally astute, however, in recognising those exceptional cases of fraudulent abuse, or deliberate evasion, where the 'corporate veil' falls to be pierced, in the interests of justice.

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³ See *Broad Idea International Limited v Convoy Collateral Limited*, BVI Court of Appeal, 29 May 2020, and *Industrial Bank Financial Leasing Co Ltd v Xing Libin*, Eastern Caribbean Supreme Court, 28 January 2020, per Mr. Justice Jack.

⁴ See *Gayhart and Buchanan v Schanck*, FSD No. 206 of 2018, unreported judgment of Kawaley J dated 14 August 2020, *Gol Linhas Aereas SA v Matlinpatterson Global et al*, CICA Civil Appeal 12 of 2019, unreported judgment of the Cayman Islands Court of Appeal dated 11 August 2020, at paragraph 194, and *Hydes et al v Empire Development Company Limited*, G216 of 2016, unreported judgment of Carter J at paragraphs 17 ff.

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