Piercing the Corporate Veil: Exploring Legal Implications and Corporate Accountability

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I hereby declare that I have read and understood the regulations governing the submission of Master's Degree specialising in Commercial Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Chapter 1: Introduction

I. JUSTIFICATIONS FOR THE STUDY

The concept of piercing the corporate veil is a crucial legal doctrine in many jurisdictions. It enables courts to transcend the notion of a company's separate legal personality and attribute personal liability to shareholders or directors for the actions of the company under specific circumstances.

The corporate veil can be pierced when it is considered appropriate to prevent an abuse of the corporate structure. The company's separate legal personality and the limited liability of its shareholders is at the core of any corporate law system, but to temper that core concept where it is abused, one needs to be able to pierce the corporate veil. Separate legal personality distinguishes the legal identity of a company from that of its individual members, shielding them from personal liability. In doing so, factors such as improper conduct, fraud or a mere façade are considered in order to determine whether the corporate veil should be lifted and to hold individuals accountable for the company's obligations.

Although the concept of legal personality will be considered as a point of departure and to provide background, the analysis of piercing the corporate veil will be the main focus.

II. PURPOSE FOR THIS STUDY

This thesis seeks to explore and analyse the concept of piercing the corporate veil within the context of South African corporate law. The purpose of this study is to provide an understanding of the circumstances in which courts in South Africa may disregard the separate legal personality of a company and impose liability on its shareholders or directors for the company's conduct.

To contextualise this discussion, a comparative analysis will also be made between the approach in South African law and the one adopted in the United Kingdom. Additionally, the German stance on piercing the corporate veil will be referred to for further analysis.

III. RESEARCH QUESTION

The key research question of this thesis is to critically evaluate the codified provision for piercing the corporate veil within the Companies Act 71 of 2008 (hereafter 'the Companies

Act') and in particular its application and interpretation by the courts thus far.[1] The evaluation aims to determine its alignment with three fundamental aspects, namely: (1) international practice/approaches, (2) the South African common law regarding veil piercing and (3) the objectives of the Companies Act.

IV. RESEARCH METHODOLOGY

Considering the study's objectives, an analytical and comparative research methodology is suitable. The methodology adopted involves an analysis of primary and secondary legal sources of law including legislation, case law, journal articles, textbooks and internet sources.

A comparative analysis is utilised to juxtapose examples from different jurisdictions with South African law. Primarily, the legal framework of the United Kingdom will serve as the primary source for comparison. In addition, German law regarding veil piercing will be included in this doctrinal research.

V. CONTEXT

Piercing the corporate veil remains a contentious issue within South African law. Historically, veil piercing was governed by the common law before the enactment of the Companies Act. The application of this doctrine is fact-specific, with each case being assessed based on its unique circumstances.

South Africa's Companies Act governs the formation, conduct and dissolution of companies. It replaced the Companies Act 61 of 1973 (hereafter 'the 1973 Act') and brought significant changes to South Africa's corporate legal landscape.[2] Section 20(9) of the Companies Act is essentially an attempt to codify the common law.[3] This provision plays a crucial role in allowing a court to declare directors and shareholders personally liable for the company's debts or obligations under specific circumstances.

Section 20(9) allows the court to pierce the corporate veil when it deems it 'just and equitable' to do so.[4] This offers flexibility to the court to consider the nuances of each case and to make

[1] Companies Act 71 of 2008.
[2] Companies Act 61 of 1973.
[3] Companies Act supra note 1 s20(9).
[4] Ibid.

decisions based on principles of justice and fairness.[5] This provision also aims to prevent the abuse of the corporate structures, ensuring that individuals cannot use the corporate form to engage in fraudulent activities, evade legal obligations or perpetrate injustice.[6] It is evident that Section 20(9) promotes accountability, thereby fostering trust and confidence in the legal system which is a vital element to take into consideration, especially in light of the South African context.[7]

Moreover, section 20(9) safeguards the interests of creditors and third parties who may suffer any harm due to the company's actions.[8] For instance, individuals can be held accountable for the company's debts if the corporate veil is pierced.[9] By holding individuals behind the company accountable, Section 20(9) ensures that directors and shareholders are more conscientious of their actions and discourages unjust actions.[10] Section 20(9) also aligns itself with principles of justice and equity in that the court is able to look beyond the corporate structure to achieve a just and equitable outcome.[11]

Section 20(9) complements the common law principles associated with veil piercing, providing a statutory basis for this legal remedy by codifying and clarifying the courts authority to disregard the corporate personality in instances where it is just and equitable to pierce the corporate veil in the interest of fairness and justice. Section 20(9) strikes a balance between limited liability afforded to shareholders and the need to prevent abuse of the corporate form for fraudulent or improper purposes.[12]

Since the enactment of the Companies Act, particularly Section 20(9), the interpretation of piercing the corporate veil has become more flexible. Initial challenges arose regarding whether this provision superseded the common law and uncertainties surrounded the undefined term 'unconscionable abuse'.[13] Notably, Section 20(9) grants the court the authority to disregard separate legal personality, even when not explicitly requested by the applicant,

[5] Ibid.
[6] Ibid.
[7] C Thornhill 'Accountability. A constitutional imperative' (2015) 23(1) *Administratio Publica*.
[8] Companies Act supra note 1 s20(9).
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid.

underscoring extensive powers vested in this provision.[14] The landmark case of *Ex parte Gore NO and Others NNO* (hereafter '*Gore*') marked the inaugural application of Section 20(9), demonstrating its significant impact on veil piercing jurisprudence.[15] It is crucial to emphasize that Section 20(9) does not override common law instances of veil piercing. Instead, the common law principles serve as a guide in conjunction with Section 20(9). While *Gore* offers insights into statutory veil piercing, it remains a singular judgment, leaving room for further development in this domain. Case law indicates a departure from the conventional approach to veil piercing towards a more open-ended perspective, signaling the need for further exploration and refinement in the realm of statutory veil piercing.

A review of case law and comparative analysis indicates a trend towards a broader interpretation of veil piercing, especially when compared to English law, which traditionally adopted a cautious approach due to lack of coherence in determining when to pierce the corporate veil.[16] In addition, under the English common law, it was found to be rather difficult for the courts to have substantial grounds to justify piercing of the corporate veil.[17] In contrast, Section 20(9) grants the court the authority to disregard separate legal personality, even when not explicitly requested by the applicant, highlighting the broader interpretive powers of the court in South Africa.

It is evident that Section 20(9) has certainly enabled a wider interpretative angle for the concept of veil piercing in South Africa and gave powers to the courts that did not exist under common law. The departure from the traditional narrow scope per the common law reflects South Africa's evolving legal landscape to a new era of veil piercing that is more encompassing and wider reaching. Section 20(9) introduces a novel perspective diverging from traditional common law principles, yet remains cognisant of their enduring significance. As long as it remains consistent with the main provisions of Companies Act and constitutional principles, Section 20(9) provides a justifiable approach to veil piercing within the South African context.

(a) Interpretation and purposes of the Companies Act

[14] Ibid.
[15] *Ex parte Gore NO and Others NNO* 2013 (2) SA 437 (WC).
[16] Bull, Stephen 'Piercing the Corporate Veil—in England and Singapore' (2014) *Singapore Journal of Legal Studies JSTOR*, *http://www.jstor.org/stable/24872231*, accessed on 1 February 2024.
[17] Ibid.

Section 5 of the Companies Act addresses the general interpretation of the Act[18], with Section 5(1) stipulating that the Act 'must be interpreted and applied in a manner that gives effect to the purposes set out in Section 7', thereby adopting a purposive interpretation.[19] Section 7 of the Companies Act delineates the objectives of the Companies Act, underscoring the interdependency between Section 5 and Section 7. In achieving a sound interpretation of a legislative text, interpreters must discern and consider the legislative intent.[20] This includes the purpose of the provision to be interpreted as well as larger units-parts, divisions and the Act as a whole.[21] The purposive approach endorsed by the Constitutional Court, which aligns with the supremacy of the Constitution.[22] Consequently, provisions relating to piercing the corporate veil ought to be consistent with the Constitution rather than contradictory to it. Interpretation should also adhere to the Companies Act, avoiding any semblance of ambiguity or uncertainty.[23]

As mentioned, Section 7, read with section 5, of the Companies Act elucidates the Act's purposes, providing interpretive guidance to interpreters for specific provisions within their contextual framework.[24] The 12 legislative 'purposes' listed in Section 7 provides a roadmap for interpretation, especially in instances where the meaning of a section proves to be unclear. However, with that being said, the list of objectives enclosed in Section 7 can pose challenges in their practical application for interpretation as they are aspirational and abstract in nature.[25] It is interesting to note that the Section uses different verbs to convey the purposes of the Companies Act in the section and that it distinguishes between situations where the stated purpose of the Act is to 'promote', 'encourage', 'create', 'reaffirm', 'provide for', and 'balance' the objectives in question.[26] This can complicate the interaction between Section 5 and Section 7 as the interpretation would have to take into account the nature or extent to which the Act is expected to pursue the objectives. An example is the fact that the words 'provide for'

[18] Companies Act supra note 1 s5.
[19] M.S. Blackman, G.K. Everingham, R. Jooste '*Commentary on the Companies Act*' RS1 (2020) Juta and Co. at 1-34.
[20] Ibid at 1-37.
[21] Ibid.
[22] Ibid at 1-41.
[23] Ibid at 1-49-50.
[24] Companies Act supra note 1 s7.
[25] Blackman et al op cit note 19 at 1-132A.
[26] Ibid.

demonstrate a larger level of commitment or action than the word 'encourage'.[27] Furthermore, the prioritisation among the 12 purposes remains unspecified.[28]

The purposes listed in Section 7 – especially subsection (*b*)(iii) and (*j*) – are relevant in that they relate to the South African context.[29] Section 7(*b*)(iii) states that the purpose of this act is to encourage transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation.[30] Furthermore, Section 7(*j*) states that the purpose of the Companies Act is to encourage the efficient and responsible management of companies.[31] When this section was drafted, a maximalist approach was adopted in order to take into account the social, political and economic issues that face our country. However, it is essential to prevent the abuse of such freedoms, particularly in ensuring that limited liability does not serve as a shield for individuals engaging in misconduct.

(b) Corporate governance

King IV Code of Corporate Governance also plays an important role in this context.[32] King IV comprises of a set of principles and practices that guide organisations in achieving effective corporate governance in South Africa.[33] It builds on the principles of its predecessor, King III and also aligns with international practices. Key principles in King IV include ethical leadership and corporate citizenship, effective control, ethical culture and good performance and integrated reporting that provides a holistic view of the organisation's performance. [34] King IV and the Companies Act work in tandem to create a governance framework that promotes ethical conduct, transparency and accountability within South African companies. Companies are encouraged to adopt the principles set forth in King IV and to comply with the regulatory requirements of the Companies Act in order to ensure sound corporate governance practices.

(c) Can Section 20(9) be open to a more progressive interpretation?

[27] Ibid.
[28] Ibid.
[29] Companies Act supra note 1 s7(*b*)(iii) and (*j*).
[30] Ibid s(*b*)(iii).
[31] Ibid s7(*j*).
[32] The King IV Code on Corporate Governance (2016) Issued by the Institute of Directors in Southern Africa NPC (IoDSA), available at *https://www.iodsa.co.za/page/king-iv*, accessed on 19 December 2023.
[33] Ibid.
[34] Ibid.

Given the aforementioned considerations, it is pertinent to explore whether Section 20(9) could be construed in a more progressive manner. Undoubtedly, there has been a drastic change from the common law to the statutory law in terms of veil piercing and the expansion of its scope. This transition took considerable time for the court to achieve as the courts needed to move away from the common law principles while still acknowledging them, thus paving the way for a new statutory interpretation. One should also bear in mind the challenges that are prominent and unique within the South African context in relation to the potential progression of this remedy. Challenges such as corruption and the like may hinder the progression in some way. The statutory interpretation in itself has proven advantageous when piercing the corporate veil as it has a codified place in statute and provides guidance for courts to follow. While current interpretation may not be flawed, there is room for greater utilisation of the section, albeit evolving gradually over time. The judiciary's inclination towards a more progressive approach signifies a positive trajectory in this regard.

Thus, Section 20(9) of the Companies Act is a vital provision, offering a legal mechanism for piercing the corporate veil when warranted. It serves to strike a balance between the benefits of limited liability and the need for accountability, fairness and justice within the corporate realm. The provision's discretionary nature allows for a case-by-case assessment which ensures that the law remains responsive to the complexities that are associated to the business and legal context.

VI. CHAPTER STRUCTURE

The thesis unfolds in a structured sequence of six chapters, with this introductory chapter laying the groundwork.

The exploration commences with a comprehensive discussion on the concept and origins of separate legal personality, examining the legal ramifications associated with this principle. The landmark case of *Salomon* is highlighted for its pivotal significance, setting the stage for a nuanced understanding.

Chapter three delves into the South African legal landscape surrounding the piercing of the corporate veil. This exploration navigates through both common law and statutory perspectives, drawing insights from case law and crucial statutory provisions.

Chapter four shifts focus to the English legal stance on piercing the corporate veil, delving into its origins, principles and the interplay between common law and statutory provisions. Robust arguments are substantiated by reference to pertinent case law.

The narrative advances to Chapter five, where a detailed discussion unfolds regarding the German legal framework surrounding the piercing of the corporate veil. This chapter elucidates how German courts approach and adjudicate instances involving this legal doctrine.

The culmination of this thesis lies in Chapter six, serving as the final chapter and encapsulating the conclusive findings and insights derived from the study. In this pivotal chapter, the synthesis of information gathered across the preceding chapters is presented, contributing to a comprehensive understanding of the intricate doctrine of piercing the corporate veil within the realms of South African, English and German law.

The abovementioned concerns the basis of the thesis and the chapter that follows deals with the historical background and context of separate legal personality and the terms associated with veil piercing.

Chapter 2: Historical background and context of Separate Legal Personality, Limited Liability and Piercing the Corporate Veil

I. INTRODUCTION

This chapter will outline and define the terms and concepts underpinning the doctrine of piercing the corporate veil within the common law context. It will delve into the concept of separate legal personality, the legal consequences of separate legal personality and the seminal case of *Salomon v Salomon & Co Ltd* (hereafter '*Salomon*').[35]

Piercing the corporate veil remains an unsettled issue in corporate law.[36] Central to company law is the principle that a company possesses a distinct legal personality.[37] There are many consequences that flow from this concept such as limited liability, perpetual succession, and the company's capacity to sue and be sued in its own name to list a few.[38] However, these characteristics of separate legal personality are susceptible to misuse, a concern acknowledged by both the courts and legislature. In instances of abuse, the veil may be pierced.

II. SEPARATE LEGAL PERSONALITY

As mentioned, separate legal personality is often described as 'the very foundation upon which company law rests'.[39] The concept has been widely debated in both legal and academic literature.[40] The famous words accredited to Lord Chancellor Baron Thurlow succinctly captures the idea by emphasizing that a company has 'no soul to damn and no body to kick'.[41] Despite its separate legal personality, it however bears mention that a juristic person is someone that is incapable of performing acts that are of a human nature such as entering into a marriage, appearing before a court or occupying a piece of land.[42] The core function of this idea of separate legal personality gives rise to the term 'entity shielding'.[43] The purpose of this concept

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[35] *Salomon v A Salomon & Co Ltd* 1897 AC 22 (HL).
[36] See for example: Thompson an empirical study pg 1036; Piet Delport et al '*Henochsberg on the Companies Act 71 of 2008'* (Service Issue 33) (2023) Cape Town: Lexis Nexis; Cassim, Rehana 'Piercing the Veil Under Section 20(9) of The Companies Act 71 of 2008: A New Direction' (2014) 26 *SA MERC LJ* 307.
[37] Cassim F HI, Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats *Contemporary Company Law* 3rd ed (2021) Juta, Cape Town at 39 and Companies Act 61 of 1973.
[38] Ibid at 47-54.
[39] *Salomon* supra note 35.
[40] *Cassim* op cit note 36 at 307.
[41] Cassim et al op cit note 37 at 31.
[42] Ibid.
[43] John Armour, Henry Hansmann, and Reinier Kraakman (2009) 'The Essential Elements of Corporate Law: What is Corporate Law?' Harvard John M. Olin Discussion Paper Series, No. 643 6-7.

is used to highlight that it entails shielding the assets of the entity – the corporation – from the creditors of the entity's owners.[44]

Although a juristic person is purely a legal concept and lacks physical existence, it nonetheless possess its own legal personality.[45] From this perspective, one may infer that a company should be capable of entering into contracts, owning property, delegating authority to agents, and assuming rights and responsibilities distinct from those of its directors and shareholders.[46]

In essence, the incorporation of a company gives rise to the so called 'corporate veil'.[47] This metaphorical veil serves as a barrier between the company, recognised as a separate entity, and its members.[48]

Section 19 of the Companies Act effectively codifies this legal status of companies.[49] The concept of separate legal personality is set out in Section 19(1)(*b*).[50] This section in the Companies Act sets forth that:

> '19. (1) From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company –
>
> *(b)* has all of the legal powers and capacity of an individual, except to the extent that—
>
> (i) a juristic person is incapable of exercising any such power, or having any such capacity; or
> (ii) the company's Memorandum of Incorporation provides otherwise.'[51]

Furthermore, the Constitution of the Republic of South Africa of 1996 states in Section 8(4) that a juristic person is entitled to the rights in the Bill of Rights to the extent that is required by the nature of such rights and of that juristic person.[52] However, as the case of *Investigating*

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[44] Ibid.
[45] Cassim et al op cit note 37 at 42 and Sher, H. (1996). Piercing the corporate veil. Juta's Business Law, 4(2), 51.
[46] Armour et al op cit note 43 at 8.
[47] Sher op cit note 45 at 51.
[48] Ibid.
[49] Companies Act supra note 1 s19.
[50] Ibid s 19(1)(*b*).
[51] Ibid.
[52] Constitution of the Republic of South Africa, 1996 s8(4).

Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO confirms, juristic persons do not have the right to human dignity or the right to life.[53] Likewise, the courts have bestowed personality rights only in cases where it is possible and appropriate for this to be done.[54] It is seen to be done on a case by case basis and only in instances where it is allowed.

Several theories have been proposed regarding the legal personality of a company.[55] They include the fiction theory, the organic or realist theory, the theory of the legal entity, the purpose theory, the bracket or symbolist theory and the contract theory.[56]

The fiction theory posits that only natural persons can possess rights legal personality through a legal fiction.[57] In contrast, the realist theory perceives a corporate body as a group of natural persons with its own objective reality and legal personality identical to that of a natural person.[58] The theory of legal entity critiques the fiction and realist theories, arguing that legal personality is inherently artificial and created by law.[59] According to this theory, both the rights and the subject of those rights are established by the law, negating the necessity to infer rights from the concept legal personality.[60]

The purpose theory contends that the only persons are human beings, and property attributed to a company essentially belongs to no one but exists for a particular purpose.[61] The bracket theory is also entrenched on the view that only human beings can be the subjects of rights and it recognises body corporates as a symbol representing intricate legal relationships between humans.[62] The contract theory endeavours to explain this intricate series of relationships by viewing body corporates as voluntary associations of human beings formed by contracts, deserving the same rights and legal protection as all other human beings and organisations.[63]

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[53] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 18.
[54] *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 452 (A) at 461.
[55] Blackman et al op cit note 19 at 2-66.
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid at 2-67.
[63] Ibid.

While these theories offer diverse perspectives on the legal personality of a company, a comprehensive discussion of each falls beyond the scope of this thesis.

III. LEGAL CONSEQUENCES OF SEPARATE LEGAL PERSONALITY

The concept of limited liability is intricately linked with separate legal personality. Limited liability entails that the shareholders are not personally liable for the debts of the company; instead, the company itself bears responsibility.[64] Shareholders are not obligated to pay the company's debts or fulfil its legal obligations. In essence, limited liability safeguards shareholders from assuming the company's liabilities.[65] Historically, 'limited liability' was not inherent to the corporate form, but it has evolved into a universal feature, underscoring its significance as both a contractual tool and a financing mechanism.[66] Limited liability functions as a form of 'owner shielding', which protects the assets of the firm's owners from the claims of the firm's creditors, contrasting with 'entity shielding', which protects the company's assets from the creditors of its owners.[67] Furthermore, Section 19(2) of the Companies Act explicitly states that shareholders, directors or incorporators are not personally liable for the company's liabilities, except to the extent that is specified in the Companies Act or the company's Memorandum of Incorporation provides for otherwise.[68] This concept of limited liability is common in company law regimes of most jurisdictions, fostering the growth and development of companies, which in turn drives economic prosperity by creating wealth and employment opportunities.[69]

Another important concept is perpetual succession, whereby a company retains its legal identity regardless of any changes in membership that may occur through the transfer of shares, deaths or any other reason.[70] Consequently, alterations in membership do not impact the company's existence.[71]

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[64] *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) para 6.
[65] Davies, Paul L *Introduction to Company Law* (2002) Oxford University Press, New York at 11.
[66] Armour et al op cit note 43 at 9.
[67] Ibid.
[68] Companies Act supra note 1 at s19(2).
[69] Cassim et al op cit note 37 at 47.
[70] *Maasdorp v Haddow* 1959 (3) SA 861 (C) 866; *Stern v Vesta Industries (Pty) Ltd* 1976 (1) SA 81 (W) 85.
[71] Blackman et al op cit note 19 at 2-142.

Company assets belong exclusively to the company, not its shareholders.[72] Shareholders only gain a right to a portion of the company's assets upon liquidation, following the settlements of creditor's claims.[73] Shareholders, who have a financial interest in the company's performance, typically receive dividends and may also participate in asset distribution after creditor settlement.[74]

A company is able to sue and be sued in its own name, distinct from its shareholders, incorporators or owners.[75] While shareholders may experience losses through depreciation of their shares, the company bears the brunt of legal actions due to its separate legal personality.[76] Shareholders cannot institute legal proceedings on behalf of the company, as the company possesses the legal capacity to sue and be sued independently.[77]

Lastly, a company may also engage in transactions with its shareholders because in principle, it is separate from its shareholders.[78] Further to this, a company may even employ a shareholder as an employee under a service contract.[79]

It is evident that the advantages of separate legal personality are manifold, with limited liability and perpetual succession standing out as the primary benefits.

IV. THE IMPORTANCE OF *SALOMON V SALOMON & CO LTD*

It is imperative to grasp the concept of separate legal personality within company law, which was established in the famous case of *Salomon*.[80]

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[72] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 550– 1; *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HL(Ir)); *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd* 1962 (1) SA 458 (A) 471– 2; *Francis George Hill Family Trust v South African Reserve Bank* 1992 (3) SA 91 (A) 102; *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A) 565– 6; *Hughes v Ridley* 2010 (1) SA 381 (KZP) para 22; *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) para 9; *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper* 2018 (4) SA 71 (SCA) para 27; *Hlumisa Investment Holdings RF Ltd v Kirkinis* 2020 (5) SA 419 (SCA) para 42 and Blackman et al op cit note 19 at 2-74.
[73] *Stellenbosch Farmers' Winery* op cit note 78 at 471-472; *S v De Jager* 1965 (2) SA 616 (A) 625 and *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA).
[74] Cassim et al op cit note 37 at 48.
[75] Blackman et al op cit note 19 at 2-144.
[76] *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA); Hlumisa op cit note 78 at para 17 & 21; *De Bruyn v Steinhoff International Holdings NV* (29290/2018) [2020] ZAGPJHC 145 (26 June 2020) para 186.
[77] *Magnum Financial Holdings (Pty) Ltd v Summerly* 1984 (1) SA 160 (W) 163 and *Wiseman v Ace Table Soccer (Pty) Ltd* 1991 (4) SA 171 (W) 175.
[78] *Lee v Lee's Air Farming Ltd* 1961 AC 12.
[79] Ibid.
[80] *Salomon* supra note 35.

The notion of separate legal personality was not an overnight phenomenon but rather something that evolved gradually in society. Courts have consistently maintained that a company is an 'artificial' person and thus incapable of physical existence or human characteristics.[81] Rights directly conferred by the law onto the company enable it to protect its interests.[82] The earliest inklings of company law were introduced to South Africa by the Dutch settlers at the Cape.[83]

The facts are well-known, and can be summarised as follows: in the 19th century, Mr Salomon, a leather and boots trader in England, sought to expand his business and while securing benefits such as limited liability and perpetual succession.[84] To achieve this, he registered his sole proprietorship as 'Salomon & Co Ltd', which he then sold to a newly formed company for a nominal capital of 40 000 shares at £1 each.[85] Salomon, his wife, daughter and four sons each subscribed to one £1 share, with Salomon and his two sons becoming directors.[86] The purchase price of £39 000 included 20 000 fully paid in shares to Salomon, £9000 in cash, and £10 000 in debentures secured against the company's assets.[87] Mr Salomon held 20 001 out of the 20 007 shares that were issued by the company, thus making him a shareholder, director, secured creditor and an employee of the company.[88] Unfortunately, the company failed, entering liquidation.[89] The key issue was that as the majority shareholder and largest creditor, Salomon would be prioritised for payment, leaving minimal funds for other unsecured creditors.

The liquidator argued that the company was used by Mr Salomon as a sham or disguise which enabled Mr Salomon to continue business under the name of the company and thus limit the extent of his liability that belonged to the company.[90] It was also argued that since Mr Salomon owned majority of the shares in the company that he and the company were the same person and therefore the debts of the company were his debts.[91]

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[81] Helena Stoop 'Legal Personality of the Company' *The Law of South Africa* vol 6(1) Third Edition (2022).
[82] Ibid.
[83] Stephen D. Girvin 'The Antecedents of South African Company Law' (1992) 13(1) *Journal of Legal History* 69.
[84] *Salomon* supra note 35 para 23.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid para 24.
[89] Ibid.
[90] Ibid para 29.
[91] Ibid para 42-43.

In the Court of Appeal, the liquidator succeeded with his argument in which he held that Mr Salomon was using the company as his agent and that it was a sham.[92] The Court of Appeal contended further that the claims of the ordinary creditors had to be settled first and that payment of the debentures should not be made.[93] The courts during this time were not accustomed with the term limited liability as it was still a rather new concept.

However, the House of Lords reversed the decision of the Court of Appeal and found in favour of Mr Salomon. The House of Lords contrived the opinion that the company was validly formed and registered and that Mr Salomon was not deceitful in any way.[94] Lord Halsbury remarked that once a company has been legally incorporated, it is a separate legal person and thus has its own rights and responsibilities.[95] Lord Macnaghten made an important remark that:

> 'The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them'.[96]

The principle established in the *Salomon* case affirmed that a company has separate legal existence and it is distinct from its members, as expressed by Lord Macnaghten.[97] This same principle was then implemented in the leading South African case of *Dadoo (Pty) Limited v Krugersdorp Municipal Council* (hereafter '*Dadoo*').[98] In this case, the Asiatic Land and Trading Act 37 of 1919 prohibited Indian people from owning immovable property in the Transvaal, including the Krugersdorp Municipality.[99] Nevertheless, a company called Dadoo Ltd was registered by two Indians who held all the shares of that company.[100] They acquired a property in Krugersdorp, which was then let to Dadoo in his personal capacity as a third party, this highlights the utility of separate legal personality. Despite the Krugersdorp Municipality seeking to annul the property transfer for statute violation, the Appellate Division rejected the

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[92] Ibid para 31.
[93] Ibid para 26.
[94] Ibid para 48 & 51.
[95] Ibid para 30.
[96] Ibid para 51.
[97] Ibid.
[98] *Dadoo (Pty) Limited v Krugersdorp Municipal Council* 1920 AD 530.
[99] Ibid para 4.
[100] Ibid para 3 & 4.

claim, affirming that separate legal personality shielded the transaction from statutory constraint.[101] The court confirmed that the statute does not apply to companies. Even if all the shares are held by South Africans of Indian Origin, ownership by Dadoo was not in substance ownership by its Indian shareholders. The company is a separate person at law and the court also confirmed that you cannot attribute race to an entity. *Dadoo* represents a significant advancement in the South African jurisprudence, symbolising the incorporation of *Salomon's* principle into South African law.

Salomon's ruling essentially sanctioned one-man companies, making it a critical judgment in company law.[102] It showed that the concept of incorporation was immediately feasible to a sole trader or a small company, as it was to the larger companies.[103] Moreover, the case dispelled any notion of fraud on Mr Salomon's part or creditors' harm.[104]

Understanding these principles is indispensable given their centrality to the concept of separate legal personality. *Salomon* laid a foundational cornerstone regarding the legitimacy of separate legal personality, echoed in subsequent court decisions. Furthermore, it underscores the legal consequences stemming from separate legal personality.

V. CONCLUSION

The foundation of company law rests on the principle that a company has separate legal existence from its members and incorporators. This construct, pioneered in English Law through the *Salomon* case, found resonance in South African jurisprudence, notably in *Dadoo*. Separate legal personality shields directors and shareholders from being held personally liable for company debts, although subject to the exception of piercing the corporate veil. This doctrine aims to prevent companies from exploiting separate legal personality and evade accountability.

[101] Ibid para 4.
[102] Cassim et al op cit note 38 at 53.
[103] Davies op cit note 65 at 36.
[104] *Salomon* supra note 35 para 54.

Chapter 3: The South African approach to piercing the corporate veil

I. INTRODUCTION

In South African law, the concept of piercing the corporate veil remains unsettled and controversial for several reasons. There is a lack of consistency in determining the appropriateness of piercing the corporate veil, leading to occasional challenges.[105] Traditionally, it was considered a remedy of last resort in most instances, governed by common law prior to the enactment of the Companies Act.[106]

Under certain circumstances justifying it, a court may decide to disregard the separate legal personality of a company, often referred to as 'lifting' or 'piercing' the corporate veil. When this occurs, the legal personality of the company is disregarded to some extent.[107] Notably, some scholars and courts distinguish between 'lifting' and 'piercing' the corporate veil, although this distinction is rather artificial, as observed in the *Gore* case.[108] The court stated that 'nothing really turns on the labels despite the documented debate therein about nuances in the terminology'.[109] It is essential to recognise that while the statute did not replace the common law, it remains applicable as an alternative cause of action.

II. COMMON LAW

The common law did not set out a definitive list of instances in which to pierce the corporate veil or not, and the courts had their reasons for this omission.[110]

In the case of *Dadoo*, discussed above, the court affirmed the notion that a company is a distinct entity from its shareholders and ultimately decided not to pierce the corporate veil.[111] Furthermore, the court in the case of *Botha v Van Niekerk* (hereafter '*Botha*') held that without evidence of an 'unconscionable abuse' suffered by the applicant, personal liability will not be imputed upon the first respondent.[112]

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[105] Cassim F HI, Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats *The Law of Business Structures* (2012) Juta, Cape Town at 48.
[106] Ibid at 67.
[107] *Salomon* supra note 35.
[108] *Gore* op cit note 15.
[109] Ibid para 4.
[110] Cassim et al op cit note 105 at 63.
[111] *Dadoo* supra note 98.
[112] *Botha v Van Niekerk* 1983 (3) SA 513 (W).

The court in the case of *Hulse-Ruetter and Others v Godde* (hereafter '*Hulse-Ruetter*') was faced with the dilemma of whether to uphold the concept of separate legal personality or to hold those in control accountable.[113] The precedent set by the *Salomon* case established that once a company is incorporated, it is considered a separate legal entity.[114] Lord Halsbury in *Salomon* stated that upon incorporation, a company is treated as an independent person, as discussed more comprehensively in the previous chapter.[115]

In the case of *Hulse-Ruetter*, which was decided in terms of Section 424 of the 1973 Act[116], the court encountered a unique situation involving a foreign company, not registered under the 1973 Act. Thus, the court had to consult the common law remedy of piercing the corporate veil despite section 424 normally allowing for statutory liability in similar circumstances.[117] The first and second appellants appealed against an order granted by the Cape Provincial Division of the High Court in terms of which their property had been attached in order to confirm jurisdiction.[118] The appellants were German citizens and thus *peregrini* of South Africa.[119] They were the sole shareholders and in control of Goldleaf, a company with limited liability that was incorporated and registered according to the laws of the Isle of Man.[120]

In February 1995, the respondent entered into a written agreement with Goldleaf in terms of which the respondent had undertook to cede certain claims to Goldleaf that he had against Jürgen Harksen in return for payment.[121] According to the agreement, if Goldleaf failed to make the payment by 10 March 1995, the agreement would become null and void.[122] Goldleaf indeed failed to meet the payment deadline, prompting the respondent to argue that the appellants were personally liable to fulfil Goldleaf's obligations under the agreement.[123] The respondents consulted the common law doctrine of piercing the corporate veil, alleging that the appellants were personally liable to perform Goldleaf's obligations under the agreement and that they used Goldleaf for fraudulent purposes.[124] The respondent applied for an order to attach the

[113] *Hulse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA).
[114] *Salomon* supra note 35 para 41.
[115] *Salomon* supra note 35 para 30.
[116] Companies Act supra note 2.
[117] *Hulse-Reutter* supra note 113 para 5.
[118] Ibid para 7.
[119] Ibid para 1.
[120] Ibid para 5.
[121] Ibid para 4.
[122] Ibid.
[123] Ibid para 5.
[124] Ibid.

appellants property for the intention of confirming the jurisdiction of the appropriate court and such application was successful.[125]

On appeal, Scott JA stated that the court does not have a prevailing discretion to overlook separate legal personality whenever it is convenient to do so.[126] He went on to further state that the instances in which a court will disregard separate legal personality will depend on an analysis on the specific facts of each case.[127] He also emphasized that what should be evident is the misuse or abuse of the distinction between a corporate entity and those who are in control of it which results in an unfair advantage being afforded to the latter.[128] Accordingly, Scott JA refused to pierce the corporate veil because the respondents had failed to prove the misuse or abuse of the corporate structure.[129]

Hulse-Ruetter confirms the principle upheld by our courts that the independence of the corporate entity is a sacrosanct principle and should not be disregarded without proper consideration.[130] When deciding whether or not to pierce the corporate veil, the facts of that particular case will be scrutinised, considering factors such as abuse, or misuse of corporate structure.[131]

The case of *Cape Pacific v Lubner Controlling Investments (Pty) Ltd* (hereafter '*Cape Pacific*') is another significant case under the common law.[132] Prior to *Cape Pacific*, courts struggled to establish a clear foundation for disregarding the separate legal personality of a company.[133] Instead, they relied on a variety of unconnected categories of conduct and there was no uniform policy-based approach.[134] However, *Cape Pacific* marked a shift in this paradigm.

The facts of *Cape Pacific* were relatively complex and gave rise to multiple issues. The case essentially dealt with a sale of shares and loan account in Findon Investments (Pty) Ltd.[135]

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[125] Ibid para 7.
[126] Ibid para 20.
[127] Ibid.
[128] Ibid.
[129] Ibid para 21 and 24.
[130] Jane Bourne 'Lifting the Corporate Veil' (2002) 10(3) Juta's Business Law 115.
[131] Ibid.
[132] *Cape Pacific v Lubner Controlling Investments Limited* 1995 (4) SA 790 (A).
[133] Sher op cit note 45 and ibid para 51.
[134] Ibid.
[135] *Cape Pacific* supra note 132 para 2.

Gerald Lubner owned shares in Findon Investments (Pty) Ltd and as a shareholder he was entitled to personal occupation of an apartment in Clifton.[136] An agreement was reached between the buyer, Cape Pacific and Lubner Controlling Investments (Pty) Ltd (hereafter 'LCI'), which was the holding company of Findon.[137] LCI rejected the agreement and transferred the shares in Findon to a third party, Gerald Lubner Investments (Pty) Ltd (hereafter 'GLI').[138] Accordingly, Cape Pacific sued LCI, GLI and Gerald Lubner in his personal capacity.[139] The court, after careful consideration decided to pierce the veil of both LCI and GLI.[140] The intended effect was to show that LCI, GLI and Gerald Lubner were the same. Since Gerald Lubner exercised complete control over both LCI and GLI, he was seen to be the 'moving spirit' and the 'prime moving force' of both LCI and GLI.[141] By Gerald Lubner instituting the main transfer, he used his influence to obstruct Cape Pacific's right to the shares.[142] By doing this, he retained ownership of his Clifton flat – which was the main goal. Lubner used LCI and GLI as his alter egos or puppets to purport fraud and improper conduct.[143] Lubner's use of both the companies approximated to an abuse of their separate legal personalities. Further to this, Gerald Lubner also controlled the affairs of both LCI and GLI.[144]

Furthermore, the evidence made it clear that: Gerald Lubner had control over the director of LCI, who was also the director of GLI; Gerald Lubner was the controlling shareholder of both LCI and GLI; there was non-compliance in terms of the 1973 Act regarding the sale of shares; and no board meeting was held either.[145] To recapitulate, Gerald Lubner controlled both LCI and GLI for personalised reasons. Gerald Lubner's personal presence in the company resulted in a direct amalgamation of the transactions of both LCI and GLI.[146]

Nel J – from the court of quo – made the decision not to pierce the veil in the High Court, despite evidence of adequate grounds to pierce the corporate veil. He applied the test of unconscionable injustice incorrectly and overlooked Gerald Lubner's unethical conduct. The

[136] Ibid.
[137] Ibid para 7-8.
[138] Ibid para 8.
[139] Ibid para 9-10.
[140] Ibid para 35 & 41-42.
[141] Ibid para 6, 12-26.
[142] Ibid para 33-34.
[143] Ibid para 34-35.
[144] Ibid.
[145] Ibid.
[146] Ibid.

act of transferring the shares was viewed as 'improper', but because the plaintiff knew of the transfer and failed to recover the shares within a reasonable time, it did not amount to an unconscionable injustice.[147] As one can see this is a clear oversight of the part of Nel J. Van Heerden JA acknowledged that he regretted not piercing the veil considering the circumstances.[148] This highlights the lack of consistency and judicial oversight amongst the South African courts.

The appellate division in Cape Pacific was convinced that Gerald Lubner – who was cognisant of his rights in respect of the shares in Findon – obtained the transfer of the shares from LCI to GLI, with the intention of defrauding Cape Pacific. Smalberger JA – who delivered the majority judgment – took the stance that Gerald Lubner exercised complete control over LCI.[149] While there may be instances where South African law appears open to piercing the corporate veil, the reality is that our legal stance on this matter is far from being firmly established.[150] Courts have chosen to pierce the veil according to their discretion on a case by case basis and having regard of the particular circumstances of each case.[151] Despite this, general guidelines can be derived: piercing occurs in exceptional circumstances, it depends on the circumstances of each case; it must be decided on its own facts; it occurs when the company is being misused in relation to fraud, dishonesty and improper use; whether a court should preserve separate legal personality; it does not give the court a general discretion to pierce the veil and it is not a remedy of last resort.[152]

The test of 'unconscionable injustice' – as mentioned above – was formulated by Flemming J in the case of *Botha*.[153] Flemming J concluded that after a comprehensive analysis of the legal position, personal liability would only be justifiable when the third party suffered an unconscionable injustice as a result of unjust actions of the party liable.[154] The appellate division in *Cape Pacific* stated that the test of unconscionable injustice was particularly strict and that a more flexible test should be used, ultimately rejecting this test.[155] This type of test

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[147] Ibid.
[148] JT Pretorius, PA Delport & Michele Havenga et al *Hahlo's South African Company Law through the cases* 6 ed (1999) at 25.
[149] *Cape Pacific* supra note 132 para 39-40.
[150] Ibid para 28.
[151] Ibid.
[152] Ibid para 29-33 & 37-38.
[153] *Botha* supra note 112.
[154] Ibid at para 35.
[155] *Cape Pacific* supra note 132 para 36-37.

suggested that substance should be preferred over form. The stance in *Cape Pacific* may be supported as it provides room for a more flexible approach and sets out criteria that can be consulted when wanting to pierce the corporate veil under the common law.[156] The court in *Cape Pacific* established that a court has no general discretion to pierce the veil whenever it deems appropriate.[157] The court should rather pierce the veil in instances where there is fraud, dishonesty or improper conduct present.[158] While there is no fixed principle governing such cases, the trend suggests a shift towards a more flexible approach. However, this may take time to get the courts to adjust to this different way of thinking and approaching these cases. As seen from above, *Cape Pacific* is one of the most significant and central judgments in South African law.

Courts will not readily pierce the veil, there needs to be a presence of fraud, improper conduct or dishonesty present in order to justify the piercing of the corporate veil.[159] As per the decision in *Cape Pacific*, substance is preferred over form in order to establish the facts of the matter.[160]

As per the abovementioned argument, the test of 'unconscionable injustice' as per the case of *Botha* is not essential as it is too stringent in its nature.[161] However, the test in *Botha* concluded that piercing the corporate veil should be determined by considering the facts of each individual case as they all present different predicaments. The facts of the case should essentially have a cardinal purpose.[162] Steenkamp J in the case of *Cape Pacific* stated that if the facts of a particular case warrant the piercing of the corporate veil, the presence of other remedies or the failure to seek what would have been a viable remedy, should not prevent a court from granting substantial relief.[163] In the case *ADT Security (Pty) Ltd v Botha and Others*, it was held that when piercing the corporate veil, one should rather look at substance over form.[164] *Hulse-Ruetter* emphasised that piecing the veil will depend on the analysis of the facts of each individualised case and policy considerations. There should also be some presence of abuse or misuse of a corporate entity and those who are in control of it.[165] Both these cases strongly

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[156] Ibid para 28.
[157] Ibid para 29.
[158] Ibid para 30.
[159] *Zeman v Quikelberge and Another* 2010 ZALC 122 para 48.
[160] *Cape Pacific* supra note 132 para 33.
[161] Ibid para 37.
[162] *Zeman* supra note 159 para 43 and *Cape Pacific* supra note 132 para 37.
[163] *Cape Pacific* supra note 132 para 38.
[164] *ADT Security (Pty) Ltd v Botha and Others* 2010 ZAWCHC 563 para 17.
[165] *Hulse-Ruetter* supra note 113 para 20.

reinforce the notion that the South African courts should place their emphasis on substance rather than the form of things.[166] There should be a satisfactory balance between both policies in order to effectively pierce the veil in situations that warrant it.

Although there is no coherent formulated principle that the South African courts can apply under these circumstances, there is progress towards establishing clearer guidelines. Progress has been achieved but there is still an enduring road ahead filled with the potential of advancement.

III. STATUTORY LAW

The Companies Act introduced a codified veil piercing procedure.[167] Section 20(9) of the Companies Act codifies the common law position in addition to providing a broadening of the concepts of fraud, dishonesty and improper conduct.[168] Section 20(9) of the Companies Act enables a court to overlook the separate legal personality of a company and to pierce the corporate veil in instances where there is an 'unconscionable abuse of the juristic personality of the company as a separate legal entity'.[169] The effect of Section 20(9) is that a company may be deemed not to be a juristic person in respect of any rights, obligations or liabilities of the company or of another person identified in the declaration.[170] The courts hereby specify these outcomes by means of declaration.[171] Furthermore, the court is enabled to make any further order that it deems appropriate in order to give effect to the aforementioned declaration as expressed in Section 20(9)(a).[172]

The King IV Code on Corporate Governance (hereafter 'King IV') is viewed as one of the world's leading governance codes.[173] It is often referred to as the watchdog of good governance.[174] King IV defines corporate governance as the exercise of ethical and effective

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[166] *Cape Pacific* supra note 132 para 27-30.
[167] Companies Act supra note 1.
[168] Ibid s20(9).
[169] Ibid.
[170] Ibid s20(9)(a).
[171] Ibid s20(9).
[172] Ibid s20(9)(b).
[173] E Davids and R Kitcat 'South Africa' in Petra Zijp (ed) *The Corporate Governance Review* 12 ed (2022) 232-246.
[174] Tsepiso Mofokeng 'Good corporate governance affirms the board (led by the chairperson) as the focal point of governance and the courts have no mandate to undermine this principle' (2020) *Journal of Corporate and Commercial Law and Practice* 6(1) 66.

leadership by the governing body with the goal of achieving four outcomes.[175] The four outcomes mentioned are: ethical culture, good performance, effective control and legitimacy.[176] King IV sets out principles and recommended practices that a company should apply in order to show that they possess good governance standards.[177] It provides guidance regarding the implementation of the principles by listing recommended practices under each of these principles. The principles demonstrate the route towards good corporate governance. The recommended practices describe how each principle should be implemented and it serves as a guideline. These practices can be adapted and varied if necessary but the ultimate goal should be the aim of governance.[178] A company must apply these outcomes effectively and not just state its presence. In light of where the world currently is, corporate governance is a crucial component.

(a) Applying Section 20(9) of the Companies Act

Section 20(9) of the Companies Act states as follows:

> 'If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –
>
> > (*a*) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non- profit company, a member of the company, or of another person specified in the declaration; and
> > (*b*) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (*a*).'[179]

Section 20(9) of the Companies Act can be brought by means of an application procedure by an interested person.[180] The language of the section has been cast in relatively wide terms and

[175] King Code op cit note 32 at 11.
[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] Companies Act supra note 1 s20(9).
[180] Cassim op cit note 36 at 309.

requires extensive intervention.[181] The words 'or in any proceedings in which a company is involved' in Section 20(9) make it apparent that a court can decide on its own accord whether to pierce the corporate veil[182], as confirmed in the *Gore* case.[183] A court is enabled to disregard separate legal personality even in instances where the applicant in the matter has not requested the court to do so.[184] This highlights the wide powers that are encapsulated in Section 20(9) of the Companies Act.[185]

Cassim points out that even though Section 20(9) was accepted in our law, there are many uncertainties that are associated with it.[186] To further elaborate the uncertainty lies in the fact whether Section 20(9) overrides the common law instances of veil piercing; that the term 'unconscionable abuse' is not clearly defined; whether piercing the veil is still considered to be an exceptional remedy used at the last resort and who an 'interested person' is under Section 20(9).[187]

Despite some clarification from provincial courts (discussed below) much of the uncertainty remains to be resolved. The *Gore* case is useful in this regard as it provided valuable understanding concerning the abovementioned questions regarding the interpretation of section 20(9) of the Companies Act.[188] This case dealt with the issue of veil piercing in the context of company groups. The court applied Section 20(9) of the Companies Act to the facts of the case in order to pierce the corporate veil. In addition, this judgment also sought to answer some of the questions and concerns mentioned above. This case paved the way for better insight and understanding regarding this section of the Companies Act.

(b) Examples where Section 20(9) can be applied

Section 20(9) of the Companies Act grants the court authority to pierce the veil when there has been an unconscionable abuse of the company's separate legal personality. In order for the application of Section 20(9) to be successful, an unconscionable abuse of a juristic personality

[181] Ibid.
[182] Ibid.
[183] *Gore* supra note 15.
[184] Cassim op cit note 36 at 309.
[185] Ibid at 309-310.
[186] Ibid at 307.
[187] Cassim, Rehana 'Hiding behind the veil' (2013) *De Rebus* 32 at 35.
[188] *Gore* supra note 15.

must occur in one of the following ways: (i) on the incorporation of a company; (ii) as a result of any use of the company as a legal entity; or (iii) as a result of any act by or on behalf of the company.[189] The wording in Section 20(9) of the Companies Act is straightforward in that this provision may be invoked not only when the incorporation of a company constitutes an unconscionable abuse of separate legal personality but also in instances where a company that was legitimately established was subsequently misused.[190] This position is in agreement with the common law position. In the case of *Cape Pacific*, what was then the Appellate Division stated that under the common law, the corporate personality of a company may be overlooked regardless if the company has been legitimately created and operated but was consequently misused in a way that effects fraud, or for a dishonest or improper purpose and that it is not necessitated for the company to have been 'founded in deceit' before corporate personality can be disregarded.[191] Furthermore, the word 'may' contained in Section 20(9) indicates that courts have the choice of whether or not to pierce the corporate veil.[192] What this is suggesting is that even if the requirements of Section 20(9) are satisfied, a court is under no obligation to pierce the veil but they have a choice of whether to do so.[193]

(c) Gore providing further insight into Section 20(9) of the Companies Act

The leading case concerning the interpretation of Section 20(9) of the Companies Act is *Gore*.[194] *Gore* provides an excellent illustration of the application of Section 20(9) of the Companies Act. *Gore* was the first case handed down in which Section 20(9) was further explained and utilised and it was a momentous occasion in the corporate and legal community.[195]

Gore dealt with the piercing of the corporate veil in the context of groups of companies, which comprised of one holding company and its subsidiaries (forty-one companies in totality).[196] The issue here was whether the court should pierce the corporate veil because the group of companies were conducted in such a manner that there was no apparent distinction between

[189] Cassim op cit note 36 at 310.
[190] Ibid.
[191] *Cape Pacific* supra note 132 at 804.
[192] Companies Act supra note 1 at s20(9).
[193] Cassim op cit note 36 at 310.
[194] Ibid at 307.
[195] *Gore* supra note 15 para 37.
[196] Ibid para 8.

the numerous companies within the group.[197] The King Group comprised of all forty-one companies and was controlled by King Financial Holdings Limited (KFH) – the holding company.[198] The King Brothers were the directors of KFH and the applicants were the liquidators of the King Group.[199] The King Brothers were both directors of KFH and majority shareholders of the King Group – thus dispensing them with wide powers and control.[200] The industry in which the King Group operated in was that they provided financial assistance in the form of marketing investments for immovable and residential commercial property.[201] The activities of King Group attracted the attention of the Financial Services Board and as a result an investigation was initiated by Price Waterhouse Coopers.[202] The way in which King Group dealt with their business was carried out in such a manner that there was no clear distinction between the companies and thus it conflicted their corporate personality.[203]

The court concluded that the entire group operated as a single entity and that the King Brothers 'treated all their companies as one'.[204] The King Brothers failed to make a proper distinction between the companies and when it was time for the company to be liquidated, it was complicated to follow which debts belonged to who. The court declared as follows:

> 'The disregard by the King Brothers of the separate legal personalities of the companies in the King Group was so extensive as to impel the conclusion that the King Group was in fact a sham.'[205]

Further to this, the court also established that there was an unconscionable abuse by the controllers of the juristic personalities of the subsidiary companies as separate entities and that this brought the case in line with Section 20(9) of the Companies Act.[206]

Section 20(9)(*b*) of the Companies Act empowers the court to declare that a company is not considered a juristic person concerning any right, obligation or liability of the company,

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[197] Ibid.
[198] Ibid para 5.
[199] Ibid para 6.
[200] Ibid.
[201] Ibid para 7.
[202] Ibid.
[203] Ibid para 8.
[204] Ibid para 8-15.
[205] Ibid para 15.
[206] Cassim op cit note 187 at 37.

offering broad relief options.[207] In the *Gore* case, the court emphasised that an order issued under Section 20(9)(*b*) of the Companies Act invariably reallocates the right, obligation or liability in question elsewhere.[208] The court concluded that the 'right' concerned in this situation concerned the property held by the subsidiary companies in the King Group and the liability was who had to be held accountable and make payment to the investors.[209] Moreover, the court made another order that the applicants – other than the liquidators of KFH – were to transfer all money that might be unused in each of the King companies after payments have been made to settle liquidation costs, bondholder claims and claims other than those by investors to the liquidators of KFH to be administered as a single pool of assets accessible for circulation amongst the investors.[210] Essentially this was a Ponzi scheme that was concealed as a property scheme.

(d) The court's interpretation of Section 20(9) of the Companies Act

Regarding the interpretation of Section 20(9), the *dicta* of the court answered the questions raised above in relation to *Gore* and the Companies Act.

The main question that arose was whether Section 20(9) of the Companies Act overrode the common law position of piercing the corporate veil. Cassim contended in her article that Section 20(9) did not in any way override the common law instances of piercing the corporate veil.[211] Instead, the common law principles served as useful guidelines regarding interpretation of Section 20(9).[212] These sentiments are confirmed as per the case of *Gore*.[213] In *Gore*, the court found the language of Section 20(9) to be casted in quite a wide net.[214] The legislature noted its appreciation towards this as they stated that it provided a forum in which the ambit of Section 20(9) could be widened.[215] The introduction of this section has broadened the basis and instances in which South African courts are prepared to pierce the corporate veil as opposed to

[207] *Gore* supra note 15 para 34.
[208] Ibid.
[209] Ibid.
[210] Ibid para 37.1.4.
[211] Cassim op cit note 187 at 37.
[212] Piet Delport et al '*Henochsberg on the Companies Act 71 of 2008'* (Service Issue 33) (2023) Cape Town: Lexis Nexis at 112.
[213] *Gore* supra note 15 para 34.
[214] Ibid para 32.
[215] Ibid.

what they were able to do under the common law.[216] It was stated in *Cape Pacific* that there were no concrete instances in which the corporate veil can be pierced.[217] *Gore* supported this position and the court stated that Section 20(9) of the Companies Act would supplement rather than substitute the common law.[218]

In *Gore*, Binns-Ward J endorsed the notion of balancing approach in the framework of piercing the corporate veil.[219]

> 'In my view the determination to disregard the distinctness provided in terms of a company's separate legal personality appears in each case to reflect a policy based decision resultant upon a weighing by the court of the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal considerations that underpin the legal fiction, on the one hand, as against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders, or controllers of a company, on the other'.[220]

Regarding the above quote, the court stated that when deciding whether to pierce the corporate veil, one should balance the importance of giving effect to separate legal personality of a company on one hand against the conflicting effects of condoning an unconscionable abuse of the juristic personality of the company.[221]

When the requirements of Section 20(9) of the Companies Act are not satisfied, the common law remedy of piercing the corporate veil will be at disposal.[222] The common law principles of piercing the corporate veil serve as a useful direction when delineating Section 20(9) of the Companies Act and also in determining what would constitute as unconscionable abuse.[223] The language of Section 20(9) of the Companies Act is cast in wide terms in order to encompass various circumstances and to promote the overall purpose of the Companies Act.[224]

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[216] Cassim op cit note 187 at 37.
[217] *Cape Pacific* supra note 132.
[218] *Gore* supra note 15 para 34 and Delport op cit note 212 at 179.
[219] *Gore* supra note 15 para 29.
[220] Ibid.
[221] Cassim op cit note 36 at 324.
[222] Ibid at 323.
[223] Cassim op cit note 105 at 71 and Delport op cit note 212 at 113.
[224] *Gore* supra note 15 para 32-33.

Consequently, the courts now have a general discretion to pierce the corporate veil through the avenue of the statutory remedy as provided for in the Companies Act.[225]

The term 'unconscionable abuse' is not defined in Section 20(9) nor in the Companies Act and no guidelines have been provided as to what would amount to an unconscionable abuse of the juristic personality of a company, leaving the courts with the duty of determining the meaning and scope of this term.[226] The concept of unconscionability was first introduced in South African law via the Consumer Protection Act 68 of 2008.[227] Unconscionable was defined as 'unethical or improper to a degree that would shock the conscience of a reasonable person'.[228] Furthermore, Section 40 provides more specifics as to what constitutes 'unconscionable conduct'.[229] The case of *Botha* states that the term 'unconscionable abuse' should not be confused with the term 'unconscionable injustice'.[230] The court in *Gore* enabled to find a distinction between these two terms. The term 'unconscionable abuse' related to the conduct that gives rise to the remedy of veil piercing whereas 'unconscionable injustice' applies to the consequences of conduct that is suffered by a plaintiff.[231]

The court in *Gore* distinguished between the terms 'unconscionable abuse' and 'gross abuse', the latter being used in Section 65 of the Close Corporations Act 69 of 1984 in a provision similar to Section 20(9) of the Companies Act.[232] It noted that 'unconscionable abuse' creates a broader scope compared to 'gross abuse'.[233] It is for this reason that the term 'unconscionable abuse' is a minor form of abuse as opposed to 'gross abuse'.[234] In *Gore*, the court alleged that the words 'unconscionable abuse of the juristic personality of a company' as used in Section 20(9) of the Companies Act presume conduct in relation to the formation and use of companies that are wide enough to cover the terms 'sham', 'device' and much more.[235]

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[225] Cassim op cit note 105 at 71.
[226] Cassim op cit note 36 at 316.
[227] Consumer Protection Act 68 of 2008.
[228] Ibid.
[229] Ibid s40.
[230] *Botha* supra note 112.
[231] Cassim op cit note 36 at 317.
[232] Close Corporations Act 69 of 1984 s65.
[233] *Gore* supra note 15 para 34.
[234] Ibid.
[235] Cassim op cit note 187 at 37.

The absence of a clear definition of 'unconscionable abuse' in the Companies Act contributes to its ambiguity, leaving room for judicial interpretation.[236] Owing to judicial interpretation, unconscionable abuse consists of an act by a company to commit fraud, or for a dishonest or improper purpose or where a company is used as a façade to conceal the genuine facts.[237] This was endorsed in the case of *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* (hereafter '*City Capital*') where the supreme court of appeal pierced the veil instantly.[238] In *City Capital*, the court pierced the veil as five companies that were subject to liquidation were declared as a single entity, which was part of an unsustainable scheme.[239] The court expressed no second thoughts in advocating piercing the corporate veil.[240]

Another significant consideration is whether Section 20(9) serves as a remedy of last resort.[241] While there was uncertainty under the common law, *Cape Pacific* asserted that if a case's facts justify veil piercing, then the existence of other remedies should not bar the court from doing so.[242] Conversely, piercing the corporate veil under common law was seen as a drastic remedy as per the case of *Hulse-Ruetter* – having adopted a stricter approach.[243] The case of *Amlin (SA) Pty Ltd v Van Kooij* also adopted the position that piercing the corporate veil should be used as a remedy of last resort.[244] As a result of the disorganised approach under the common law, the court in *Gore* answered this question, stating that it was not a remedy of last resort.[245] *Gore* concluded that Section 20(9) is not to only be applied when all other remedies are of no help.[246] Binns-Ward J eloquently held that:

> 'The newly introduced statutory provision affords a firm, albeit very flexibly defined, basis for the remedy, which will inevitably operate, I think, to erode the foundation of the philosophy that piercing the corporate veil should be approached with an *à priori* diffidence. By expressly

[236] *City Capital SA Property Holding Ltd v Chavonnes Badenhorst St Clair Cooper NO* 2017 ZASCA 177 para 29.
[237] Ibid para 29.
[238] Ibid.
[239] Ibid para 12.
[240] Ibid.
[241] Cassim op cit note 36 at 320.
[242] *Cape Pacific* supra note 132 para 805.
[243] *Hulse-Ruetter* supra note 113 para 23.
[244] *Amlin (SA) Pty Ltd v Van Kooij* 2008 (2) SA 558 (C).
[245] *Gore* supra note 15 para 34.
[246] Cassim op cit note 36 at 322.

> establishing its availability simply when the facts of a case justify it, the provision detracts from the notion that the remedy should be regarded as exceptional, or "drastic"'.[247]

Binns-Ward J's comment paves way for a new perspective on piercing the corporate veil. Even if a court could uphold a company's separate legal personality under Section 20(9) of the Companies Act, Binns-Ward J suggest that the court may still pierce the veil regardless.[248] This shift aligns more closely with the principles expressed in *Cape Pacific*, indicating that piercing the corporate veil should not be a remedy of last resort.[249]

As for the definition of an 'interested person' under Section 20(9), the term remains undefined in the Companies Act.[250] However, in *Gore*, the court stated that no covertness should be attached to the term 'interested person' and held that:

> 'The standing of any person to seek a remedy in terms of the provision should be determined on the basis of well-established principle; see *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A) at 533J534E, and, of course, if the facts happen to implicate a right in the Bill of Rights, Section 38 of the Constitution'.[251]

The question that was raised in *Gore* was whether the applicants, who were the liquidators of the various companies that had been formed as part of the group of companies constituted as 'interested persons' under Section 20(9) of the Companies Act.[252] The court found that the liquidators did have a direct interest in the relief sought to qualify as an 'interested person'.[253] A person claiming relief from a court must establish as a general rule that they have a direct interest in the matter in order to obtain the necessary locus standi to seek relief as noted in the case of *Cabinet of the Transitional Government for the Territory of South West Africa v Eins*.[254] The case of *Jacobs v Waks* (hereafter '*Jacobs*') postulated that the direct interest should not be remote and that it should be a real interest and not a hypothetical one.[255] The case of *Jacobs* further claimed that when determining whether a litigant's interest warrants a direct interest or

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[247] *Gore* supra note 15 para 34.
[248] Cassim op cit note 36 at 322.
[249] *Cape Pacific* supra note 132.
[250] Cassim op cit note 187 at 37.
[251] *Gore* supra note 15 para 35.
[252] Ibid.
[253] Cassim op cit note 187 at 37.
[254] *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) 388.
[255] *Jacobs v Waks* 1992 (1) SA 521 (A).

whether it is too remote would depend solely on the facts of each individual case and that there is no set criteria to be followed.[256] The court in *Gore* did not deal with the issue of whether an 'interested person' under Section 20(9) of the Companies Act should have a financial or monetary interest.[257] The court in *Gore* approved and adopted the guidelines mentioned in *Jacobs*.[258] These are the considerations and criteria that the court has to take into account when determining whether a person qualifies as an 'interested person'.

Before *Gore*, uncertainties surrounding Section 20(9), including its relationship with common law principles, the definition of 'unconscionable abuse', and the identity of an 'interested person'.[259] *Gore* does give some guidance regarding instances in which to pierce the corporate veil but it is only one judgment – a provincial judgment and not a Supreme Court of Appeal judgment. It does give some valuable direction, but it cannot be treated as an absolute answer that solves all the uncertainty regarding piercing the corporate veil.

(e) Achieving clarity and simplicity regarding this area of law

The South African common law still presents problems of uncertainty regarding piercing the corporate veil.[260] The court stated in *Gore* that there are no inarguably ascertainable principles in relation to the grounds upon which the court will pierce the corporate veil.[261] The court in *Gore* agreed with the sentiments made by Smalberger JA in Cape Pacific in that 'the law is far from settled regarding the circumstances that would be permissible to pierce the corporate veil'.[262] It is submitted that South African courts should strive towards ensuring certainty in order to further develop Section 20(9). Cassim contends that there are two ways in which to ensure clarity and simplicity in order to elucidate any confusion that is present under the common law. First, courts should avoid using metaphors.[263] Secondly, courts should not allow morality to triumph over legal principle.[264]

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[256] Ibid.
[257] *Gore* supra note 15 para 35.
[258] Ibid.
[259] Cassim op cit note 187 at 35.
[260] Cassim op cit note 36 at 329.
[261] *Cape Pacific* supra note 132.
[262] Ibid para at 28.
[263] Cassim op cit note 36 at 331.
[264] Ibid.

South African courts should steer away from using metaphors and descriptive words such as 'sham', 'device', 'stratagem', 'mask', 'cloak', 'alter ego' to name a few, this would help alleviate confusion and uncertainty.[265] It was stated in *Gore* that the term 'unconscionable abuse of the juristic personality of a company' used in Section 20(9) of the Companies Act presumes conduct in relation to the formation and use of companies flexible enough to cover all the descriptive terms such as 'sham', 'device', 'stratagem' and much more.[266] Cassim mentions in her article the well-known remark by Justice Cardozo that veil piercing is 'enveloped in the mists of metaphor'.[267] Justice Cardozo alerted that metaphors used in law are to be carefully watched because even though they may be seen as 'devices for liberating thought, they often end up enslaving it'.[268] An explanation for this is that metaphors tend to describe results rather than offering an explanation for the decision.[269]

The courts should also avoid weighing morality over legal principle.[270] The court in *Gore* cited the balancing of the need to give effect to the concept of separate legal personality on one hand and the adverse moral and economic effects of countenancing an unconscionable abuse on the other hand.[271] The court considered the adverse moral effects of unconscionable abuse to be taken into consideration as part of a balancing act. Thus, the concept of morality should not cloud the legal principles as this would cause uncertainty regarding Section 20(9) of the Companies Act and its applicable principles relating to piercing the corporate veil.[272]

(f) Other case law post Gore

The recent case of *The Butcher Shop and Grill CC v The Trustees for the time being of the Bymyam Trust* (hereafter referred to as '*Butcher Shop*') further examines veil piercing.[273] The Supreme Court of Appeal (hereafter 'the SCA') questioned whether Section 20(9) of the Companies Act was a codification of the common law. In simpler terms, did Section 20(9) replace the common law position in connection to when the corporate personality of a company may be disregarded? Keeping in line with previous judgments, the SCA accepted that the

[265] *Gore* supra note 15 para 28.
[266] Ibid para 34 and Delport op cit note 212 at 113.
[267] Cassim op cit note 36 at 332.
[268] Ibid.
[269] Ibid.
[270] Ibid at 333.
[271] *Gore* supra note 15 para 28.
[272] Cassim op cit note 36 at 334-335.
[273] *The Butcher Shop and Grill CC v The Trustees for the time being of the Bymyam Trust* [2023] (5) SA 68 (SCA).

section does not does not contain language which indicates an intention to replace the common law and nor does it define a set of circumstances in which a court may consider in determining whether to disregard the separate legal personality of a company, Section 20(9) rather complements the common law.[274]

While having answered the above question, the court noted previous judgments in setting out the guiding principles for disregarding the corporate personality of a company. These guiding principles were made by Smalberger JA and were as follows: firstly, a court does not have a general discretion to disregard a company's separate legal personality whenever it deems just to do so.[275] Secondly, as a matter of policy, separate legal personality should be upheld. 'Piercing' or 'lifting' of the corporate veil does not occur lightly and then only when considerations of policy favour it.[276] Thirdly, balancing policy considerations will only arise where there is a presence of fraud, abuse or dishonesty in relation to the corporate personality.[277] Lastly, the purpose of piercing the corporate veil is to fix the persons who are responsible for the abuse of separate legal personality.[278] These principles were confirmed in *Hulse-Ruetter*, where the court emphasised that misuse or abuse of the corporate entity as previously discussed above.[279]

The facts of the case were as follows: the respondent, trustees for the time being of the Bymyam Trust (hereafter 'the Trust') concluded a lease agreement with The Butcher Shop and Grill CC (hereafter 'Butcher Shop') in respect of certain premises for the purpose of conducting business as the Butcher Shop and Grill.[280] The Trust became aware that the premises were occupied by Apoldo Trading (Pty) Ltd (hereafter 'Apoldo'), which was conducting the business of the restaurant.[281] The Trust and the Butcher Shop then entered into an addendum to the lease agreement wherein the Trust granted consent to the subletting arrangement with Apoldo.[282] The Butcher Shop agreed to remain responsible for all the terms and conditions of the lease and Apoldo agreed to be jointly and severally equally responsible'.[283]

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[274] Ibid para 41.
[275] Ibid para 43.
[276] Ibid.
[277] Ibid 44.
[278] Ibid.
[279] Ibid para 45.
[280] Ibid para 2.
[281] Ibid para 3.
[282] Ibid.
[283] Ibid para 8.

Due to the Covid-19 national lockdown restrictions the Butcher Shop withheld payment of rent.[284] In 2020, the Trust launched an application in the Western Cape High Court in which it claimed payment of amounts due (the main application) and the Butcher Shop opposed and filed a counter application.[285] The Butcher Shop's case was that its loss of the use and enjoyment of the premises due to the lockdown restrictions caused it a significant loss of turnover in its business, which entitled it to remission or abatement of rent.[286] The sub-tenancy of Apoldo based its case on the following two contentions: firstly, a lessee is entitled to claim remission of rent arising from the loss of a sub-lessee's beneficial occupation on account of *vis major* or *casus fortuitus* and secondly, that the Butcher Shop and Apoldo were in effect, Mr Pick, their sole shareholder in corporate guise and therefore one business entity.[287] The common law either recognises or ought to recognise as a remedy in equity, the entitlement of the Butcher Shop to claim remission of rent because of loss of beneficial occupation suffered by Apoldo.[288] The High Court dismissed the counter application and granted an order in the main application for the Butcher Shop to make payment, but it successfully obtained leave to appeal to the SCA.[289]

Regarding the first contention mentioned above, the SCA stated that unless parties to a lease agreement limit or exclude the right to claim remission of rent in circumstances of *vis major*, a tenant is entitled to claim remission of rent if it is prevented from making use of the property either entirely or to a considerable extent due to the *vis major*, however, provided that the loss of enjoyment of the property is the direct or immediate cause of the *vis major*.[290] The court concluded that the lease agreement did not exclude the right to claim for remission of rent arising from *vis major* event such as the one relied upon by Butcher Shop.[291] However, the effect of the Apoldo sub-tenancy was that it prohibited a claim by the Butcher Shop for remission based on loss suffered by the sub-tenant Apoldo.[292]

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[284] Ibid para 4.
[285] Ibid para 5.
[286] Ibid para 6.
[287] Ibid.
[288] Ibid.
[289] Ibid para 7.
[290] Ibid para 13.
[291] Ibid para 14.
[292] Ibid para 15.

The second contention gave rise to the SCA's consideration as to whether the Butcher Shop could use the loss of use and enjoyment suffered by Apoldo as a defence to the Trust's claim for the rent payable by the Butcher Shop as a result of *vis major*.[293] Counsel acknowledged that Mr Pick – as the sole shareholder – conducted a family business and he did so by the means of two corporate entities.[294] When looking at it from this perspective, there was no *de facto* distinction between the Butcher Shop and Apoldo.[295] The involvement of Apoldo in the conduct of the business was accepted by the Trust and thus indicating that the Trust regarded the Butcher Shop and Apolo as a single trading entity.[296] It was contended that these facts called for the equal treatment of the two corporate entities and that they should be treated as one for the purpose of the rent remission claim.[297]

In concluding this second contention, the SCA cited the following view from the case of *Ochberg v Commissoner for Inland Revenue*:

> 'a company, being a juristic person, remains a juristic person that is separate and distinct from the person who may own all the shares and must not be confused with the latter. To contend that a company maintains a separate persona and yet in the same breath to argue that in substance the person retaining the shares in the company is an attempt to have it both ways, which cannot be allowed'.[298]

Regarding the development of the common law, the SCA held that the existence and effect of Section 20(9) of the Companies Act cannot be overstated.[299] This section supplements the common law rather than replacing it.[300] The court also confirmed that the judgment in *Gore* explains correctly that the use of the term 'unconscionable conduct' broadens the reach of the doctrine.[301] However, this section inarguably considers some form of misuse or abuse of a separate corporate identity as a condition for the successful application of the remedy.[302] The legislature enacted Section 20(9) of the Companies Act in the form that it did and in doing so it did not introduce a general discretion to disregard the separate corporate personality of a

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[293] Ibid para 29.
[294] Ibid para 47.
[295] Ibid.
[296] Ibid.
[297] Ibid para 48.
[298] *Ochberg v Commissoner for Inland Revenue* (1931) AD 215 at 232.
[299] *Butcher Shop* supra note 273 para 60.
[300] Ibid para 60.
[301] Ibid.
[302] Ibid.

company, rather it chose to confirm an essential requirement for the granting of such remedy, name some form of unconscionable abuse.[303]

Butcher Shop supports and confirms the sentiments made in *Gore* that we do not need to see veil piercing as a remedy of last resort. The South African provincial courts seem to be getting behind this *Gore* approach of it not being seen as a remedy of last resort. Even though this case is provincial authority and not SCA authority, it is still includes noteworthy principles to take from it.

IV. CONCLUSION

There is no doubt that Section 20(9) of the Companies Act dispensed widespread powers upon the South African courts to pierce the corporate veil, powers which did not reside under the common law. Section 20(9) of the Companies Act exemplifies a new way of thinking and a move away from the common law principles. It provides an extension of the common law concepts of fraud, dishonesty and improper conduct. The judgment in *Gore* is important for a multitude of reasons. Not only is it the first case in which the statutory remedy of veil piercing was considered but also because of its useful analysis that has enabled the courts and the legal profession to gain more certainty regarding this area of law.[304] Despite the fact that many of the uncertainties and questions were addressed in *Gore*, the general effect of Section 20(9) of the Companies Act remains unclear.

The common law doctrine of veil piercing remains in effect and has not been repealed by Section 20(9) of the Companies Act. The common law principles will continue to serve as a benchmark containing useful guidelines to supplement the interpretation of Section 20(9) of the Companies Act.[305] Decisions by our courts have made it clear that the corporate veil will not be pierced based on it being just an equitable to do so, there must be substantial grounds present. The courts may pierce the veil in scenarios where it is warranted and where there is no alternative remedy present. Courts need to consider the concept of separate legal personality and should apply their minds to each individual case. Although *Gore* is a provincial decision, other cases that have agreed with the approach taken by the court. Case law has also evolved over the years and particularly in this area of the law, thus contributing to its growth. The

[303] Ibid para 62.
[304] Cassim op cit note 187 at 37 and Delport op cit note 212 at 114.
[305] Cassim op cit note 36 at 336.

judgment of *Gore* cautions shareholders and directors that the corporate veil will be pierced in instances where there is an unconscionable abuse of separate legal personality.[306] It is apparent that the statutory remedy is applied by courts with less hesitation as opposed to the common law remedy.

Is it clear that South Africa has moved to a more accepting approach to piercing the corporate veil and it is recognised as a doctrine.[307] While *Gore* addressed many uncertainties, questions remain, indicating the need for ongoing development and clarity in South African corporate law.

[306] Cassim op cit note 187 at 37.
[307] *Gore* supra note 15 para 34.

Chapter 4: The English approach to piercing the corporate veil

I. INTRODUCTION

The English courts have grappled with piercing the corporate veil and the famous case of *Salomon* set the basis upon which company law rests.[308] The *Salomon* case established the legal separation of a company and its shareholders. English courts have approached the concept of piercing the corporate veil cautiously, seldom resorting to it due to their reluctance.[309]

This chapter will discuss the English common law and statutory law approach to piercing the corporate veil, drawing upon relevant case law to illustrate key points.

II. GENERAL APPROACH

The case of *Prest v Petrodel Resources Ltd* (hereafter '*Prest*') stated that the English law did not have general principles enabling the piercing of the corporate veil in instances where there is fraud, misuse, or evasion of legal obligations.[310] As a result of not having a set of standardised principles in which to consult in instances that warrant the piercing of the corporate veil, English courts have thus adopted a variety of principles to achieve the same results. These terms may seem broad at times, but they are viewed as more dependable and include: sham, façade, agency, trusts, enemy, tort and interests of justice.[311] In certain situations, cases concerning the 'alter ego' and tort are considered in the criteria.[312] Agency and trusts are regarded as 'categories premised on the legal concepts applied'.[313] The single economic unit comprises of cases which share a common factual circumstance, meaning that the shareholder at issue is a corporation and the plaintiff is seeking to impose liability on a corporate group.[314] The enemy ground has only been used in a single instance in the history of English veil piercing and that was in reference to war.[315] Fraud is the one ground in which the courts are eager to pierce the veil.[316] The case of *Adams v Cape Industries* contained the first analysis of the principles that were associated with the concept of separate legal personality as well as piercing

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[308] *Salomon* supra note 35.
[309] Ibid para 27.
[310] *Prest v Petrodel Resources Ltd* [2013] UKSC 34 para 17-18.
[311] *Adams v Cape Industries plc* [1990] Ch 433.
[312] Liton Chandra Biswas 'Approach of the UK Court in Piercing Corporate Veil' 13 January 2011 at 2, available at *http://ssrn.com/abstract=2438217*, accessed on 5 November 2023 at 7.
[313] Ibid at 7.
[314] Ibid.
[315] Ibid.
[316] Ibid at 9.

of the corporate veil.[317] It should be noted that the list of these principles is not exhaustive due to the intricacies and variations of how the corporate veil can be misused or abused.

The English law position on piercing the corporate veil is cautious in nature as there is a lack of coherence in determining the instances in which to pierce the corporate veil. Farrar states that English courts have been willing to deviate from the principles set out in *Salomon*, but it has not yet been achieved in a methodical system.[318] The English outlook on piercing the corporate veil can be divided into three periods, including the standard common law grounds and their corresponding developments.[319]

III. COMMON LAW

Under the English common law, it was difficult for the courts to have substantial grounds to justify piercing the corporate veil and therefore there was the emergence of a rather broad set of examples that have been used.

(a) The Experimental Period

The Experimental period spans from the '*Salomon* era' of 1897 until the end of the Second World War in 1945.[320] During this period of time, the courts adopted various approaches to piercing the corporate veil,[321] but it can generally be said that this was a period of noticeable eagerness to pierce the corporate veil.[322] The case of *In Re Darby*, *ex parte Brougham* (hereafter '*Darby*') demonstrates how the courts were willing to pierce the corporate veil, mainly in instances when a company is used to conceal a fraudulent operation.[323] In the case of *Daimler Co Ltd v Continental Tyre and Rubber Co Ltd* (hereafter '*Daimler*'), the House of Lords held that the company is capable of acquiring an enemy character.[324] The court will endeavor to discover the true expression of the separate legal personality of a company, including but not limited to its members, directors and other persons.[325] The cases of *Darby* and *Daimler* revealed how the courts trialed with the application of fraud, trusteeship and enemy

[317] *Adams* supra note 311 para 5.
[318] Farrar JH, NE Furey & BM Hannigan *Farrar's Company Law* 3 ed (1991) Butterworths, London at 73.
[319] Thomas K Cheng 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines' (2011) 34(2) *Boston College International and Comparative Law Review* at 334.
[320] Ibid.
[321] Ibid at 334-338.
[322] Ibid at 336.
[323] *In re Darby, Brougham*, [1911] 1 K.B.
[324] *Daimler Co Ltd v Continental Tyre and Rubber Co Ltd* [1916] 2 AC at 340.
[325] Ibid.

character.[326] However, since these experiments were in no way uniform in their approach, it failed in attempting to achieve a coherent approach.[327] Even though there was a lack of structure in approach, when the situation warranted piercing the corporate veil, the court seemed willing to do so. This was demonstrated again in the case of *Gilford Motor Co Ltd v Horne*.[328]

The case of *Smith, Stone and Knight v Birmingham* (hereafter '*Stone and Knight*') represented the first time that an English court made an attempt to formulate a test for piercing the veil – although it concerned itself specifically with company groups.[329] This case dealt with whether a subsidiary company is able to conduct business on behalf of its holding company.[330] The following guidelines identified by Judge Atkinson were as follows: (1) were the profits treated as profits of the holding company?; (2) were the persons conducting the business appointed by the holding company?; (3) was the holding company the head and brain of the trading venture?; (4) did the holding company govern the venture and decide what should be done and what capital should be embarked on the venture?; (5) were the profits made by the skill and direction of the holding company? and (6) was the holding company in effectual and constant control?.[331] It also dealt with the concepts of agency and the single economic unit.[332] After an extensive analysis of the questions, the court concluded that all six questions were true and held that the relationship between the holding company and subsidiary was that of agency because the subsidiary was an 'agent or employee of the parent'.[333] As a result, the business operated in a manner where the holding company owned the business of the subsidiary company and as such the subsidiary company could not operate on its own but rather on behalf of someone else.[334]

Despite the fact that there were breakthroughs made regarding piercing the corporate veil as per the guidelines that were set forth in the case of *Stone and Knight*, they were mostly

[326] Cheng op cit note 319 at 336.
[327] Ibid at 336.
[328] *Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA.
[329] *Smith, Stone & Knight Ltd v Lord Mayor, Aldermen Citizens of the City of Birmingham* [1939] 4 All ER 116 at 120– 1.
[330] Ibid.
[331] Cassim et al op cit note 37 at 75.
[332] *Smith* supra note 329.
[333] Cassim et al op cit note 37 at 75.
[334] Ibid.

overlooked.[335] A elaboration for this fact is that in applying the corporate veil doctrine, the English courts 'preferred to resort to the traditional Common Law concepts'.[336]

(b) Heyday era

From World War 2, until the case of *Woolfson v Strathclyde Regional Council* in 1978, piercing the corporate veil enjoyed substantial prevalence despite on some occasions where courts were unwilling to disregard the concept of separate legal personality.[337]

Lord Denning – decided several influential corporate veil cases between the 1950s and 1970s – approved the liberal approach to piercing the corporate veil. He affirmed that the doctrine laid down in *Salomon* has to be observed very carefully. He said that courts should draw aside the veil and pull off the mask to see what truly lies behind the veil. The cases of *Littlewoods Mail Order Stores v Inland Revenue Commissioners* and *Brewarrana v Commissioner of Highways* confirms this, and the court concluded that piercing the veil is 'now fashionable'. [338]

Additionally, Lord Denning presided over the case of *DHN Food Distributors Ltd v Tower Hamlets LBC* (hereafter '*DHN Food*') and stated that it was the perfect illustration of the imperative role played by the traditional common law concepts in the English corporate piercing cases.[339]

General approaches to piercing the corporate veil occurred in instances when it was based on the interests of justice.[340] This principle was seen as the guiding light that helped curb instances of abuse to the separate legal personality of a company.[341]

When considering this era, the stance adopted by Lord Denning was notable, considering his vast experience.[342] His emphasis on 'judicial flexibility' while dismissing *Salomon*, a case that

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[335] Cheng op cit note 319 at 337.
[336] Ibid.
[337] *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90.
[338] *Littlewoods Mail Order Stores v Inland Revenue Commissioners* [1969] 1 WLR 1241 (AC) at 1254 and *Brewarrana v Commissioner of Highways* (1973) 4 SASR 476, 480.
[339] *DHN Food Distributors Ltd v Tower Hamlets LBC* (1976) 3 All ER 462 (CA).
[340] Girvin Stephen, Sandra Frisby & Alastair Hudson *Charlesworth's Company Law* 18 ed (2010) Sweet & Maxwell, London at 33.
[341] Ibid.
[342] Cheng op cit note 319 at 338-339.

was seen as a *locus classicus* was laudable.[343] Moreover, as Cheng noted: 'Modern English company law has abandoned the exaggerated view of Salomon's case… English law is now prepared to admit qualifications of, and exceptions to, this principle by lifting the veil of corporateness'.[344] The year of 1976 clearly 'marked the height' of piercing the corporate veil.[345]

The 'heyday' era depicted the peak of veil piercing.[346] Even though there were positive justifications surrounding piercing the corporate veil, inconsistency remained.[347]

(c) From optimism to present day

Since *Woolfson v Strathclyde Regional Council* (hereafter '*Woolfson*') in 1978 to date, there has seen to be much criticism and carefulness towards piercing the corporate veil.[348] The case of *Woolfson* concerned a bridal clothing shop and was purchased by the Glasgow Corporation.[349] The business in the shop was run by a company called Campbell Ltd but the shop itself was composed of different units of the property.[350] Mr Solomon Woolfson owned three units and another company, Solfred Holdings Ltd owned the other two.[351] Woolfson had 999 shares in Campbell Ltd and his wife had the other. Mr Woolfson and Mr Campbell claimed compensation together for loss of business after the compulsory purchase and argued that this situation was similar to the case of *DHN Food*.[352] *Woolfson* demonstrated the beginning of decline for veil piercing in English law.[353] *Woolfson* was the basis of almost all modern instances of veil piercing and there is general consensus that veil piercing has become the exception in English law.[354] Lord Keith delivered a speech in which he recognised that it would only be warranted to pierce the corporate veil in instances where special circumstances are present indicating that there is a façade in concealing the true facts.[355] This statement made by Lord Keith could not have been more appropriate as the House of Lords criticised and overturned the judgment in the case of *DHN Food*.[356] Lord Keith duly noted that *DHN Food*

[343] Ibid.
[344] Ibid.
[345] Ibid.
[346] Ibid.
[347] Ibid at 337.
[348] *Woolfson* supra note 337 and *Prest* supra note 310 para 16, 27, 50, 65, 77, 107.
[349] Ibid supra note 310.
[350] Ibid.
[351] Ibid.
[352] Ibid.
[353] *Capital Plc v Nutritek International Corp and Others* [2013] UKSC 5 para 121.
[354] Cheng op cit note 319 at 339-341.
[355] *Woolfson* supra note 337 at 96.
[356] Cheng op cit note 319 at 339-340.

was not applied properly and that piercing the corporate veil was out of favour.[357] As a result, the judgment of *DHN Food* was not openly received nor developed by the courts.

Despite the perception that the United Kingdom adopted an inflexible approach, there were several case law developments that showed an inclination to pierce the corporate veil. These cases concerned an issue where a company was used to purport a sham or façade in order to evade an existing legal obligation or breach fiduciary duties. In the case of *Trustor AB v Smallbone* (hereafter '*Trustor*') the instances in which the corporate veil was pierced was where the company was a 'façade or sham', where the company was involved in some form of impropriety or where it was necessary to do so in the interests of justice.[358] The court in *Woolfson* stated that the courts are entitled to pierce the veil when the company is used as a façade or device to conceal the true facts.[359] The court did pierce the veil in *Trustor*, stating that the individuals that were in control of the company used the company as a device or façade to conceal the true facts in order to avoid liability.[360] Even though the concept of impropriety was vague in the beginning, the court stated that not every instance of impropriety would justify piercing of the corporate veil.[361]

The concept of impropriety started to gain more hold. The case of *Gencor ACP Ltd v Dalby* (hereafter '*Gencor*') was implemented.[362] In this case, Mr Dalby, a past director of Gencor ACP Ltd misappropriated funds to an offshore account of a company called Burnstead, which he wholly owned and controlled.[363] The court came to the conclusion that Mr Dalby was accountable as Burnstead was merely an alter ego in which Mr Dalby enjoyed the profits he earned while in breach of his fiduciary duties.[364] Taking from this case, there has to be a presence of an impropriety or fraud before it can be justified to pierce the corporate veil. As a result of this, if there is no presence of impropriety or fraud, the courts will not be willing to pierce the corporate veil in such instances.

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[357] Ibid at 340.
[358] *Trustor AB v Smallbone (No.2)* [2001] 1 WLR 1177 para 14.
[359] Ibid para 23.
[360] Ibid.
[361] Ibid para 22.
[362] *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734.
[363] Ibid para 19 and 26.
[364] Ibid para 26.

The concept of impropriety again came to the fore in the case of *Ben Hashem v Al Shayif* (hereafter '*Hashem*').[365] *Hashem* entrenched a reasonably precise reflection on the circumstances in which constitute grounds for piercing the corporate veil.[366] Munby J set forth seven principles that should be considered when piercing the corporate veil.[367] These principles to be considered are: firstly, ownership and control of a company are not sufficient to justify piercing the corporate veil; secondly, the court cannot pierce the corporate veil, even in the absence of third party interests merely because it is thought to be in the interests of justice; thirdly, the corporate veil can be pierced only if there is an occurrence of impropriety; fourthly, on the contrary, the court cannot pierce the corporate veil just because the company is involved is some form of impropriety. Sir Andrew Morritt VC stated in *Trustor* that the impropriety must be associated to the use of the company structure to avoid or conceal liability; fifthly, if the court is willing to pierce the veil, evidence needs to be shown regarding the control of the company by the wrongdoer and the misuse of the company by means of a façade or device to conceal their wrongdoings; sixthly, a company is able to be a façade even though it was initially incorporated without any deceptive intent and lastly, the court will only pierce the veil when necessary to do so in order to provide a remedy for that particular wrong that was done.[368]

Up until the case of *VTB Capital Plc v Nutritek International Corp and Others* (hereafter '*VTB*') it has been shown that English courts have not developed a coherent approach to piercing the corporate veil. Essentially, the English law position on piercing the corporate veil under the Common law represents the view that 'there is no space for a single choice of law to govern this issue'.[369]

(d) Prest v Petrodel

In the seminal judgment of *Prest* in 2013, the United Kingdom Supreme Court questioned the concept of veil piercing and also clarified the law regarding piercing of the corporate veil.[370] This was necessitated as there were many attempts to try and overcome the concepts of separate legal personality and limited liability.[371] The court undertook a review of the principles of

[365] *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115.
[366] *Gore* supra note 15 para 22.
[367] *Ben Hashem* supra note 365 para 159-164.
[368] Ibid.
[369] *VTB Capital Plc v Nutritek International Corp and Others* [2013] UKSC 5 para 123 and 128.
[370] *Prest* supra note 310 para 7.
[371] Alexander Schall (2016) 'The new law of piercing the corporate veil in the UK' *European Company and Financial Law Review* (ECFR) 13(4) 550.

English law to help determine in which instances piercing the corporate veil is necessitated. Prior to *Prest*, a major concern was that there was a lack of clarity on what exactly comprised for grounds to justify veil piercing as well as the use of the phrases 'lifting or piercing' the corporate veil.[372] English company lawyers were notorious for not wanting to pierce the corporate veil.[373] The case of *Prest* illustrates the leading case in the English common law.[374] The case of *Prest* has a wide law application as it involves two areas of law namely family law and company law.

Michael Prest (the husband) and Yasmine Prest (the wife) married in 1993 and got divorced in 2008.[375] The husband is the sole owner as well as controller (directly or through intermediate entities) of several companies belonging to the Petrodel Group.[376] Two of those companies, Petrodel Resources Ltd (hereafter 'PRL') and Vermont Petroleum Ltd (hereafter 'Vermont') were the owners of seven residential properties.[377] Out of the seven properties, three were acquired by PRL for nominal consideration for 1 British pound sterling (hereafter 'GBP').[378] Two properties were acquired by PRL for substantial consideration and the last two properties were acquired by Vermont for significant consideration.[379]

This case involved an application by the wife for financial relief ancillary to a divorce and the properties were subject to this application.[380] She requested the transfer of the seven properties, belonging to the Petrodel Group in order to satisfy the divorce settlement of 17,5 million GBP and she alleged that her husband was the beneficial owner.[381] The court was faced with the question of whether they had the requisite power to successfully order the transfer of property from the husband to the wife.[382] The court then analysed the facts at hand and the assets of Petrodel companies may be sufficient enough to satisfy the large divorce settlement ordered against the husband. There were three plausible options: (1) pierce the corporate veil in order to grant such relief; (2) transfer in terms of Section 24 of the Matrimonial Causes Act 1973

[372] Los Watkins and Dr Hamiisi Junior Nsubuga (2020) 'The road to Prest v Petrodel: an analysis of the UK judicial approach to the corporate veil - Part 2: post Prest' Westlaw.
[373] Schall op cit note 371 at 550.
[374] *Prest* supra note 310.
[375] Ibid para 1.
[376] Ibid para 2.
[377] Ibid.
[378] Ibid para 49.
[379] Ibid para 50 and 51.
[380] Ibid para 2.
[381] Ibid para 4 and 43.
[382] Ibid para 2.

(hereafter 'the Matrimonial Act') and (3) transfer in terms of the properties belonging beneficially – in trust – to the husband by means of the particular circumstances of this case.[383]

In the family law division, Judge Moylan J concluded that since there was an absence of the concept of impropriety, there was no general principle of law which enabled the court to obtain the companies' assets by piercing the corporate veil.[384] Upon a closer look, there was no presence of impropriety found as the company structure of the Petrodel Group was used for a legitimate reason including for the purpose of 'wealth and the avoidance of tax'.[385] The judge established that the matrimonial home was held by PRL on trust for the husband but failed to make a finding regarding the seven other properties and thus refused to make a declaration that the husband was the beneficial owner.[386] The judge purported that when applications have been made for financial relief accompanying a divorce, a wider jurisdiction was available under Section 24 of the Matrimonial Act.[387] These were the grounds that Moylan J used to justify his order to transfer the properties in favour of the wife.[388]

In the court of appeal, PRL, Upstream and Vermont challenged the decision of Moylan J's that he concluded in the family division. They argued that there was no wider jurisdiction under the Matrimonial Act.[389] The statute was unable to be applied once the judge had rejected the impropriety assertion due to the properties not being deemed as properties which the husband had entitlement to.[390] As a result of the Majority criticism of Moylan J's decision, they reversed the decision made by the family decision. In terms of the Matrimonial Act, there is no rule that allows company law matters in matrimonial disputes to be treated differently from any other company law matters.[391] Moylan J suggested that Section 24(1)(a) of the Matrimonial Act enabled the court to treat the company's assets as belonging completely to the owner and thus he erred when delivering his judgment.[392] On the contrary, the dissent of Thorpe LJ stated that if the law enables the husband to get away with depriving his wife of her claim, it would defeat

[383] Ibid para 9.
[384] Ibid para 6.
[385] *Prest v Prest* [2011] EWHC 2956 para 218.
[386] *Prest* supra note 310 para 6.
[387] *Prest* supra note 385 para 193 & 224-227.
[388] *Prest* supra note 310 para 6.
[389] *Prest* supra note 310 para 7 and 37 and *Prest v Prest* [2012] EWCA Civ 1395 para 157.
[390] *Prest* supra note 389 at para 157.
[391] Ibid para 161.
[392] Ibid 157.

the judge's obligation to achieve a fair result in the family division.[393] Given the facts at hand, there was neither abuse nor trust applied and therefore the majority agreed in the court of appeal.[394]

On appeal to the Supreme Court, all seven of the lordships unanimously granted the wife's claim; set aside the decision of the appeal court and refused to pierce the corporate veil as they stated that it was not appropriate to do so in considering the circumstances.[395] The court also rejected the first and second ground. The only basis that was relied upon by the court was the third ground. The third ground dealt with transfer in terms of the properties belonging beneficially – in trust – to the husband by means of the particular circumstances of this case.[396] The properties that were acquired and held by the respondent companies are in a trust for the husband and accordingly they were property to which the husband was entitled to either in possession or reversion.[397] It was discovered in the family division that the husband intentionally obstructed attempts to disclose his assets and attempted to conceal this by means of obstructing court rules and orders.[398] The court implied that failure of the husband to disclose the true nature of the company's properties would in fact indicate that that the husband was the beneficial owner of the properties.[399] The crux of the matter is not who controlled the companies but rather for whose benefit the companies owned the properties.[400]

By the court stating that piercing the corporate veil was not relevant, the court raised an obiter yet prolonged discussion concerning piercing the corporate veil.[401] Preceding the decision made in *Prest*, there was no straightforward and coherent rationale for piercing the corporate veil.[402] The courts instead just used the common law principles, however these principles have since been separated and replaced.

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[393] *Prest* supra note 310 para 64-65.
[394] Ibid para 7.
[395] Ibid para 36.
[396] Ibid para 9.
[397] Ibid para 47, 49-52 and 55.
[398] Ibid para 4.
[399] Ibid para 47.
[400] Ibid.
[401] Ibid para 16.
[402] *VTB* supra note 369 at para 123.

The Supreme Court firmly established that piercing the corporate veil occurs in very limited circumstances.[403] Lord Sumption – while delivering the leading judgment – established that a court is able to pierce the veil in instances where a company's separate legal personality is being abused for the purpose of some form of wrongdoing.[404] However, what qualifies as a 'wrongdoing' is rather difficult to ascertain and as a result has caused confusion.[405] Although there exists a rather large set of grounds in which to pierce the corporate veil, Lord Sumption was not prepared to 'explain that consensus out of existence'.[406] At the same time, he recognised that despite the courts having limited powers, it is necessary to pierce the corporate veil.[407] It was this necessity that encouraged Lord Sumption to provide a new test to identify grounds on which piercing the corporate veil can be enforced.[408] He stated that all English decisions regarding piercing the corporate veil could be categorised as either of the following: the concealment principle or the evasion principle. He stated:

> '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. The *evasion principle* is different. It is that the court *may disregard the corporate veil* if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement'.[409]

To sum up, the concealment principle does not involve piercing the corporate veil. This principle rather identifies a principle-agent, trustee-beneficiary and relationships of a similar manner.[410] Thus, it is a fact-finding mechanism, assigned to identify the real actors and reveal the authentic nature of what the corporate structure is concealing.[411] On the other hand, the evasion principle can only be used in narrow categories of cases in which it is necessary to

[403] *Prest* supra note 310 para 35.
[404] Ibid 27.
[405] Ibid 28.
[406] Ibid 27.
[407] Ibid.
[408] Ibid 28.
[409] Ibid.
[410] Ibid.
[411] Ibid.

apply.[412] Decisively, it purports the only ground that courts are able to pierce the corporate veil. It emerges when:

> 'A person *is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.* The 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'.[413]

As a result, it cannot be enforced to create a new liability that would not exist, it has to pre-exist. In simpler terms, the controller has to invade an existing liability by means of the company being under control by an individual.[414] By applying this viewpoint in *Prest*, Lord Sumption concluded that piercing the corporate veil had no stance in the present case because the husband's actions did not evade or frustrate any legal obligation towards his wife. Additionally, he also stated that he was not covering or evading the law in relation to the distribution of the assets upon dissolution of the marriage.[415] The restructuring occurred before the marriage had ended and the companies were run honestly without any ulterior motives. Presumably speaking, if the husband had in fact transferred the properties to the wife after the court granted relief to the wife regarding the divorce, it would be in line with the evasion principle. In the above scenario, the husband would then intentionally be evading a legal obligation by using the transfer of properties as a means in which to disable the wife from proving a claim, thus denying personal ownership and stating that they rather belong to the Petrodel Group.[416] Strictly speaking, it would mean that the properties were owned by the companies and not by their members.

On the contrary, other Lords of the Supreme Court gave their own thoughts on Lord Sumption's test, each with their own interpretations. Lord Neuberger – who delivered the judgment in *VTB* – was in agreement with Lord Sumption in this assertion that cases fall either into concealment

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[412] Ibid.
[413] Ibid para 35.
[414] Ibid 35.
[415] Ibid para 36.
[416] Nupur Upadhyay 'Piercing the Corporate Veil: An Analysis of Lord Sumption's Attempt to Avail a Troubled Doctrine' (2015) 21 *Auckland University Law Review* 114 at 122-123.

or evasion categories and also agreed with the reasoning behind the two principles.[417] However, he did criticise the decisions relating to piercing the corporate veil.[418] Despite the criticism, he overall had a positive reaction regarding Lord Sumption's approach and test.[419]

Lord Mance and Lord Clarke were more cautious when deciding to agree with Lord Sumption's test. Lord Mance was in agreement with Lord Sumption as well as the comments made by Lord Neuberger.[420] Even though they were in agreement, they were not prepared to limit the instances of piercing the corporate veil to instances of evasion.[421] On the contrary, Lord Walker rejected the veil piercing completely and Lord Hale raised the important question of whether all cases would fit perfectly into cases of either concealment or evasion.[422]

By taking into account Lord Sumption's test as well as the opinions of the other Lords, the concealment principle steers more towards 'lifting' the veil whilst the evasion principle denotes 'piercing' the veil. The court has certainly reformed the well-known principles of 'sham' and 'façade'. The concealment principle would thus be in line with the meaning of sham and the evasion principle would consequently be in line with the meaning of façade.

Despite there being many differences in opinion between the Lords, majority of the Supreme Court acknowledge the presence of piercing the corporate veil. Cheng notes that the de-emphasis of justice and policy has transpired in a rather formalistic attitude towards the concept of veil piercing.[423] Since there has always been a strict adherence to *Salomon*, new legal frameworks regarding veil piercing have not come about. My thoughts on this are that in instances where there was capacity to expand the concept of veil piercing, the courts denied it but when there was a possibility to limit veil piercing, the courts did not hesitate in doing so. The court in *Salomon* made it clear that the default position of limited liability is the separate legal personality of a company has to be respected.[424] Although Lord Sumption made an attempt to address the confusion surrounding the terms of 'concealment' and 'evasion', there was a lack of consensus amongst the judges as mentioned above. The case of *Prest* was

[417] *Prest* supra note 310 para 60-61.
[418] Ibid para 64 and 74.
[419] Ibid para 60, 64, 74 & 81.
[420] Ibid para 97-98.
[421] Ibid para 100 and 103.
[422] Ibid para 92.
[423] Cheng op cit note 319 at 355.
[424] Catherine Wong (2017) 'Has Petrodel v Prest further limited the instances in which courts will pierce the corporate veil' Westlaw.

intended to be the case that helped settle confusion and gain some legal certainty regarding this area of the law, however it fell short of this.[425] Many argue that the decision in *Prest* has limited the instances of veil piercing even more due to the replacement of the terms 'sham' and 'façade' and it being replaced with the term 'concealment' and 'evasion'.[426] However, it can be said that *Prest* did not limit these instances but rather just relabeled the terms.[427]

IV. STATUTORY LAW

Regarding statute, the English Law extends the application of piercing to other forms of legislation and contract.[428] Piercing the corporate veil by means of statutory law is found to be rare unless it is expresses in clear and unambiguous language as was expressed in the case of *Dimbleby & Sons Ltd v National Union of Journalists*.[429] There are very few cases where the courts have established that statute requires that the separate legal personality of a company is to be ignored.[430] It seems to be rather a question of 'whether, and if so, in what circumstances the court possesses the power to pierce the corporate veil where there is absence of authority to do so'.[431]

(a) The general approach followed by English statute

English legislation did not codify a general remedy of piercing the corporate veil, but rather focussed on director liability in relation to corporate wrongs under specific instances.[432] This was especially in the case of the Companies Act 2006 (hereafter 'the 2006 Act').[433] Thus, the separate legal personality is not disregarded but limited liability is expanded.[434]

Chapter X of the Insolvency Act 1986 furnishes information regarding the punishment of directors and officers.[435] In this chapter, a director is responsible to make contributions (if so required) to the company's assets as the courts deems fit, for fraudulent trading held under

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[425] Watkins op cit note 372.
[426] Wong op cit note 424 at 106.
[427] Ibid.
[428] Davies, Paul L & Sarah Worthington *Gower and Davies' Principles of Modern Company Law* 9 ed (2012) Sweet and Maxwell, London at 214.
[429] *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427 (HL).
[430] Davies et al op cit note 428 at 215.
[431] *Prest* op cit note 310 para 59 & 60.
[432] Davies et al op cit note 428 at 215 & 249.
[433] Companies Act 2006 (c 46).
[434] Davies et al op cit note 428 at 225-226.
[435] Insolvency Act 1986.

Section 213 and wrongful trading held under Section 214.[436] Section 216 and 217 state that a director will be held liable for the improper use of an insolvent company's name.[437] If a person is held personally liable under this section for the debts of the company, they are jointly and severally liable for those said debts along with any other person who is also liable.[438]

Furthermore, Section 15 of the Company Directors Disqualification Act 1986 enforces personal liability for the debts of the company due to breach of an order of disqualification.[439]

In other words, the 2006 Act does not provide for piercing the corporate veil in the true sense but rather prefers to broaden the scope of directors liability for any wrongful acts committed.[440] Section 1187 of the 2006 Act provides the closest instance to piercing the corporate veil.[441] This section provides that the Secretary of State may provide, by regulations, that a person who, at a time when he is subject to foreign restrictions, is a director or involved in the management of a UK company, is personally responsible for all debts and other liabilities of the company incurred during that time.[442] In essence they will be held jointly and severally liable.

What is concerning is that although the 2006 Act has 1300 sections – which provide for many different topics under Company law – it is noteworthy that there is no section that deals with piercing the corporate veil and the instances in which it may be done.[443] Although Section 16(2) and (3) permits companies with the concept of separate legal personality, this concept has not been taken any further than this.[444]

Since there has been no concrete plan to attempt to codify instances of piercing the corporate veil, the reluctance of the legislators has been duly noted. It seems as though the answer would rather be sought by referring to the principles of common law instead of attempting to try and develop the statutory law. The courts have not yet attempted to move past the common law as they may not want to override the decision firmly set out in *Salomon*.

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[436] Ibid s213 and 214.
[437] Ibid s216 and 217.
[438] Ibid s217.
[439] Company Directors Disqualification Act 1986.
[440] Companies Act supra note 433 s993.
[441] Ibid s1187.
[442] Ibid s1187(1) and (2).
[443] Ibid.
[444] Ibid s16(2) and (3).

V. CONCLUSION

The issue of piercing the corporate veil at common law did present many challenges since the famous case of *Salomon*. There have been many attempts by judges after *Salomon* to attempt to ascertain grounds that would justify veil piercing and disregard the separate legal personality of a company. *Prest* did attempt to try and settle some of the confusion surrounding piercing the corporate veil. However, it in actuality led to more confusion and challenges. Lord Sumption did attempt to try and address the confusion surrounding the terms 'concealment' and 'evasion' but there was no uniformity in the judges' agreement towards it. On the contrary, *Prest* did contribute largely in the sense that it turned away from the courts focusing on words such as 'sham' or 'façade' that previously controlled the sphere of veil piercing. The judges in *Prest* also stated that veil piercing should only be used as a remedy of last resort once all the criteria have been satisfied in order to appropriately justify the piercing in instances that warrant it. With regards to the statutory position regarding veil piercing in the United Kingdom, there has been no plan to attempt to codify piercing the corporate veil within the statute and provide a definite basis upon which to use in situations where piercing the corporate veil is warranted.

Chapter 5: The German approach to piercing the corporate veil

I. INTRODUCTION

The rules and considerations for piercing the corporate veil vary across different foreign jurisdictions. The concept of piercing the corporate veil (*Durchgriffshaftung*) is a recognised principle under German corporate law.[445] From a doctrinal point of view the concept is seen as underdeveloped and 'murky'.[446] Vague court decisions cause confusion regarding this area of law and have resulted in a number of contradicting interpretations.[447] Thus, Germany is rather cautious about piercing the corporate veil.[448] Presently, commingling of assets is the only situation in which German courts are enabled to pierce the corporate veil.[449]

This chapter will discuss the German approach to piercing the corporate veil and reference to relevant case law will also be made. The general principles pertaining to piercing the corporate veil have already been discussed in preceding chapters and thus this discussion will concentrate solely on the application to German Law.

II. UNDERLYING PRINCIPLES

The doctrine of piercing the corporate veil in Germany focuses on the limited liability of a company (*Gesellschaft mit beschränkter Haftung or GmbH*), as governed by the Limited Liability Company Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (hereafter 'the GmbHG')).[450] The Handelsgesetzbuch is the German Commercial Code (hereafter 'the HGB').[451]

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[445] Bernd Singhof (1999) 'Equity Holders' Liability for Limited Liabilities Companies' Unrecoverable Debts—Reflections on Piercing the Corporate Veil under German Law' 22(2) *Loyola of Los Angeles International & Comparative Law Review* 143 and Thomas Bachner 'Introduction' in *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse* (International Corporate Law and Financial Market Regulation) Cambridge: Cambridge University Press. doi:10.1017/CBO9780511576553.004 32.
[446] Singhof op cit note 445 at 143 and William A. Klein & John C. Coffee Jr., Business Organization And Finance: Legal And Economic Principles 140 (6th Ed. 1996).
[447] Ibid at 144.
[448] Lydia Chao 'Veil-piercing under America, German and Taiwanese Company Law' (2021) Europa-Kolleg Hamburg, Institute for European Integration, No.01, available at *http://www.europa-kolleg-hamburg.de*, accessed on 11 November 2023.
[449] Ibid at 22.
[450] Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG) (Limited Liability Companies Act), April. 20, 1892, RGBl. at 477, last amended by Gesetz [G], Jul. 17, 2017 BGBl I at 2446, art. 10 (Ger.), available at *https://www.gesetze-im-internet.de/gmbhg/*, accessed on 5 January 2024.
[451] Commercial Code in the revised version published in the Bundesgesetzblatt (BGBI, Federal Law Gazette).

The concept of separate legal personality (*Juristische Person*) is set forth in Section 13 of the GmbHG.[452] This section states that 'the company with limited liability as such has its independent rights and duties; it may acquire title and other real property rights and may sue and be sued before the courts'.[453] Therefore, it is the company who incurs the debts as well as acquires the rights.[454]

The advantage of limited liability is that the members are able to participate and have control in the business without their personal assets being at risk.

III. GERMAN APPROACH TO PIERCING THE CORPORATE VEIL

The rules of piercing the corporate veil does not differentiate between the number of an entity's owners, in actuality they are applied more successfully to sole ownership entities.[455] With this in mind, relevant factors such as undercapitalisation and commingling of assets carries substantial weight.[456] Disregarding the legal entity of a company will only be permitted if other factors mentioned below are attached to the owners' conduct.[457]

(a) Undercapitalisation

German companies are overseen by specific statutes. The German Limited Liability Company – GmbH – is governed by the GmbHG as mentioned above. The Stock Corporation – *Aktiengesellschaft* or *AG* – is regulated by the Corporation Act translated to *Aktiengesetz* or *AktG* (hereafter 'the *AktG'*).[458] In 1898, the company with limited liability (GmbH) was brought in together with the present AktG.[459] Once they have been established, a GmbH and AG are legal persons and therefore separate from its shareholders and they benefit from the privilege of limited liability.[460]

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[452] GmbHG supra note 450 s13.
[453] Ibid.
[454] Singhof op cit note 445 at 146.
[455] Carsten Alting (1994) 'Piercing the Corporate Veil in American and German Law - Liability of Individuals and Entities: A Comparative View' 2(2) *Tulsa Journal of Comparative & International Law* 201.
[456] Ibid.
[457] Ibid.
[458] Chao op cit note 448 at 32.
[459] Hans Thummel, 'Piercing the Corporate Veil - Germany' (1978) 6(3) International Business Lawyer 282.
[460] GmbHG supra note 450 §13 and §1 AktG.

Undercapitalisation is a traditional fact pattern in which piercing the corporate veil is discussed.[461] There is a general understanding that in particular circumstances that involve undercapitalisation, the limited liability of a corporation should be disregarded and that shareholders should be held personally liable.[462] It is a requirement under German corporate law that a GmbH is required to have a minimum of EUR 25,000 for its initial capital and an AG is required to have at least EUR 50,000 at the time of establishment.[463]

As a result of the prescribed minimum requirements by statute, most commentators distinguish between nominal and material or qualified undercapitalisation.[464] Nominal undercapitalisation refers to situations where the statutes' minimum requirements are not met.[465] Section 5(1) of the GmbHG sets out the company's minimum share capital amount.[466] Material undercapitalisation describes patterns in which the owners have invested insufficient amounts beyond these requirements.[467] Contrastingly, nominal undercapitalisation refers to a violation of the minimum requirements of the AktG and the GmbHG.[468] The common situation is that the owners have provided their company with loans rather than equity capital.[469]

The following cases illustrate the standard for material undercapitalisation.[470] Even though some cases involve entity forms other than a GmbH, this does not have an impact on the definition of material undercapitalisation.[471] The *Oberlandesgericht* – signifies a trial court for selected criminal matters and a court of appeals – *Hamburg* rejected the liability of shareholders for undercapitalisation where two publics had formed a GmbH for the purpose of editing a new magazine.[472] In supplement to the statutory minimum capital of DM 50 000, they supplied the company with a loan of DM 700 000. The total amount of DM 750 000 was adequate for publication.[473] The enterprise was however unsuccessful and subsequently filed for bankruptcy.

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[461] Alting op cit note 455 at 206.
[462] Ibid.
[463] GmbHG § 5, para 2; AktG § 7 and Andreas Cahn & David Donald 'Constituting the company's share capital' in *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA'* 2 ed (2018) Cambridge: Cambridge University Press. doi:10.1017/9781316888971 189.
[464] Alting op cit note 455 at 207.
[465] GmbHG supra note 450 § 5, para 2; AktG § 7.
[466] Ibid §5(1).
[467] Alting op cit note 455 at 207.
[468] Ibid.
[469] Ibid.
[470] Ibid at 208.
[471] Ibid.
[472] Ibid.
[473] Ibid.

The amount of capital was not sufficient to meet the plaintiff's claim and as a result, the plaintiff claimed that the shareholders were personally liable.[474] The court thus found no material undercapitalisation.

Furthermore, the *Bundessozialgericht* confirmed qualified undercapitalisation in a case where the sole shareholder of a GmbH and a Co.KG – a limited partnership with a GmbH as the general partner – applied for state benefit in order to enable job creation within the company.[475] In the application, the shareholder pledged to invest more than DM 700 000 and hire an additional fifteen employees.[476] Shortly after he obtained state support of DM 120 000, his company filed for bankruptcy.[477] The court established that the company had conducted business of more than DM 1 million per year but did not have sufficient capital to meet any obligations without additional earnings.[478] The court held that the shareholder was personally responsible for the obligations of the limited partnership.[479]

In the case of *Architekten*, the *Bundesgerichtshof* held there was material undercapitalisation where two shareholders formed a GmbH and a Co.KG.[480] The shareholders provided the company with capital of DM 30 000 in order to conclude a contract for the building of forty-one apartments at a fixed price of DM 2 050 000.[481] Because of the sharp increase in prices of land, it became clear that the fixed price would not be sufficient to cover all the running expenses and the investment capital of DM 30 000 would be insufficient to satisfy the creditors' claims.[482]

There was only one case in which the *Bundesgerichtshof* disregarded an entity's limited liability based on a theory of piercing the corporate veil.[483] The members were held responsible and as a result had to pay the increase in the rental amount that was owed by the association.[484]

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[474] Ibid.
[475] HGB § 161.
[476] Alting op cit note 455 at 208.
[477] Ibid.
[478] Ibid at 209.
[479] Ibid at 209.
[480] HGB § 161.
[481] Alting op cit note 455 at 209.
[482] Ibid.
[483] Ibid.
[484] Ibid.

Another imperative case was the 2007 judgment of *Trihotel*, this was where the BGH produced a new approach to hold shareholders accountable for their wrongful conduct that resulted in company bankruptcy.[485] Preceding *Trihotel*, BGH had created a subgroup of veil-piercing – BGH had held shareholders, who exhausted the part of the assets of the company that was intended to repay debts, directly liable to the creditors of the company on the grounds of corporate form of abuse.[486] This was modified in the case of *Trihotel* and this new approach did not entail veil piercing.[487] The liability of the shareholders were based on tortious liability as per Section 826 of the German Civil Code – *Bürgerliches Gesetsbuch* (hereafter 'BGB').[488]

In *Trihotel*, the court considered that it needed to reconsider its preceding veil piercing approach in the context of where shareholders interfere with company assets and thus leads to the company's insolvency.[489] The court elaborated that the act of tampering with assets should be regarded as a breach of the shareholders' duties owed to the company and not directly to the creditors.[490] Additionally, it would be wrong to deduce that any reduction of the company's assets would impact the company's creditors straight away.[491] Starting from *Trihotel*, liability that arises from a withdrawal that destroys the economic basis of a company is to be based on tort law under Section 826 of the BGB.[492]

The court concluded that 'Existenzvernichtungshaftung' or 'liability arising from a withdrawal which destroys the economic basis of company' was likely an internal liability.[493] Thus, unlike the pre- *Trihotel's* ruling of 'liability arising from a withdrawal which destroys the economic basis of a company', the new concept no longer considered this liability as having a veil piercing nature and creditors can thus hold the shareholder directly liable.[494] Under this new

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[485] Bundesgerichtshof [BGH] [Federal Court of Justice] II ZR 3/04, Jul. 16, 2007 (*Trihotel*), 2007 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2689.
[486] Chao op cit note 448 at 33.
[487] Charles Zhen Qu and Björn Ahl (2008) 'Lowering the Corporate Veil in Germany: A case note on BGH 16 July 2007 (Trihotel), available *at https://ouclf.law.ox.ac.uk/lowering-the-corporate-veil-in-germany-a-case-note-on-bgh-16-july-2007-trihotel/* accessed on 12 November 2023.
[488] *Bürgerliches Gesetsbuch* §826.
[489] Chao op cit note 448 at 33.
[490] Tan, Cheng Han and Wang, JiangYu and Hofmann, Christian (2018) 'Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives' (16)1 *Berkeley Business Law Journal*, 140-204 (2019), NUS - EW Barker Centre for Law & Business Working Paper 18/04, NUS Law Working Paper No. 2018/025, *Berkeley Business Law Journal*, Forthcoming, Available at *https://ssrn.com/abstract=3254130* or *http://dx.doi.org/10.2139/ssrn.3254130*, accessed on 3 January 2024 at 177.
[491] Ibid at 76.
[492] §826 BGB.
[493] Chao op cit note 448 at 33.
[494] Ibid.

approach, only the company can invoke Section 826 of the BGB and hold the shareholders responsible.[495] As a result of this, creditors may only sue the company and can no longer reach behind the corporate veil and hold the shareholders accountable.[496] As a result, piercing the corporate veil in German law takes a different approach and seeks the rules in tort law to hold accountability.

The BGH confirmed the abovementioned principles of *Trihotel* in its *GAMMA* ruling.[497] In *GAMMA*, the court reiterated that shareholders are liable to the company and that they do not have any direct duty towards the creditors.[498] The court also maintained that shareholders are compelled to satisfy the minimum capital requirement as laid out in statute at the time of the establishment of the company and to ensure that the company complies with the principle of capital maintenance.[499] Despite this, shareholders are not obliged to continuously inject additional funds in the company for the company to have satisfied liabilities at all times.[500] Such obligation would be inconsistent with the concept of limited liability.[501] That being the case, shareholders are not liable for 'liability arising from a withdrawal which destroys the economic basis of a company merely because the company does not have sufficient assets to pay off the debts but rather they are liable when they deliberately exhaust the assets of the company thus causing the company to be in default of its debts'.[502]

If the corporate veil is pierced for reasons of undercapitalisation, it is established that all the equity owners are thus liable.[503] In this instance, liability extends to the creditor as opposed to the entity. Further to this, liability is not limited to the extent of the undercapitalisation.[504]

The main aim of capitalisation is to ensure that the financial equipment of the company is not subject to the discretion of the shareholders. The shareholders are not entitled to allocate financial risks to the company's creditors.[505] The abovementioned cases highlight that in the

[495] Ibid at 34.
[496] Zhen op cit note 487.
[497] Bundesgerichtshof [BGH] [Federal Court of Justice] II ZR 264/06, Apr. 28, 2008 (*GAMMA*), 2008 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2437.
[498] Tan et al op cit note 490 at 179.
[499] Ibid.
[500] Ibid.
[501] Ibid.
[502] Ibid.
[503] Alting op cit note 455 at 209.
[504] Hachenburg Grobkommentar, Gesellschaften mit Beschränkter Haftung (GmbHG) Anh. § 30.
[505] Alting op cit note 455 at 209.

absence of statutory rules, case law has not been fully developed by the *Bundesgerichtshof* and the other courts in Germany.[506] As a result, it may not present sufficient grounds upon which to successfully impose shareholder liability.[507]

(b) Commingling of assets

Legal writing advocates veil-piercing in cases where shareholders commingle the company's assets with their own.[508] Shareholders in this instance disregard the company's separate legal identity in financial matters.[509] Academic commentators have not been able to reach an agreement on the exact requirements that warrant an exception to the principle of veil piercing.[510]

The *Bundesgerichtshof* (hereafter 'BGH') – the Federal Court of Justice – has recurrently supported this category of veil piercing and helped outline it.[511] In a 2005 ruling, the BGH set out the requirements for personal liability resulting from comingling of corporate assets in ignorance of the capital maintenance principles.[512] It was decided that payment transactions among the company, its shareholder(s) and third parties must lack transparency to the degree that it becomes unfeasible to assign them to the company and that as a result, the corporate assets are not easily distinguishable from the shareholder's personal assets.[513]

As a result, German courts have pierced the veil in situations where shareholders have commingled both corporate and private assets.[514] Commingling currently represents the only situation where German courts are still reliant on the principles of piercing the corporate veil in which the shareholders are directly liable to the creditors of a company.[515] Veil piercing in these cases enables a judge to make a rule that essentially fills a gap that is left by statutory law.[516] Its ideological basis is abuse of the corporate form that causes loss of the entitlement of limited liability and rather leads to the application of Section 128 of the HGB that holds all

[506] Ibid at 210.
[507] Ibid at 210.
[508] Tan et al op cit note 490 at 180.
[509] Ibid.
[510] Ibid.
[511] Ibid.
[512] Ibid.
[513] BGH II ZR 178/03, Nov. 14, 2005, 2006 NZG 350.
[514] Tan et al op cit note 490 at 180.
[515] Ibid at 180-181.
[516] Ibid at 181.

partners of commercial partnerships liable.[517] In order to differentiate between veil piercing with concomitant personal liability to the company's creditors and breaches of the law resulting in shareholders' liability in relation to the company on the other hand, the BGH asserted that unsuitable accounting is not an adequate basis for veil piercing.[518] Even though in principle it amounts to a breach of the law, which would give rise to damages against the directors, this does not justify an exception to the principle of limited liability.[519]

It should be noted that the embezzlement of corporate assets results in shareholder liability under Sections 30 and 31 of the GmbHG and should also amount to 'annihilating interference' but it is not a basis for veil-piercing under the commingling exemption.[520] Shareholders are liable for the repayment to the company under Sections 30 and 31 of the GmbHG when they acquire payments when the company's legal capital is not intact.[521]

Commingling is viewed as an extraordinary exception where the financial situation of the company is so disorganised that utilising the principles of decline of assets and their resultant claims for their return to the company is of no value.[522] The BGH highlighted that the present cases on liability for 'annihilating interference' leave the principles of piercing the veil under the commingling exception untouched.[523] This situation arises when a shareholder hides the fact that the company and themselves are in fact two different legal persons. In these scenarios, the BGH refrained from using any terminology associated with veil piercing and instead applied the principle of good faith to the facts at hand.[524]

IV. COMMENTATORS

Various German legal scholars in their discussions in the past few years have not established specific requirements as to when a company's corporate veil may be lifted.[525] However, they have attempted to give an opinionated justification for the imposition of liability on the owners of an entity.[526]

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[517] BGH s128.
[518] Tan et al op cit note 490 at 181.
[519] Ibid.
[520] Ibid.
[521] Ibid.
[522] Ibid at 182 and Schall op cit note 371 at 574.
[523] Tan et al op cit note 490 at 182.
[524] Ibid at 183.
[525] Alting op cit note 455 at 196-197.
[526] Ibid at 196-197.

Among the many commentators, the most cited scholars in this area of law are Serick, Müller-Freienfels and Rehbinder.[527] However, they do not state any prerequisites regarding when shareholder liability can be imposed. They instead offer domineering justifications if the legal entity is disregarded.[528]

Serick states that a shareholder or member of an entity may be personally liable where the entity's form has been abused in some matter. An example of this is if an individual tries to circumvent any statutory or contractual obligations or causes any damages to third parties.[529]

V. CONCLUSION

The German approach to piercing the corporate veil reflects a nuanced and cautious stance, primarily focused on preserving the limited liability of the company. The underlying principles that are rooted in the GmbHG and HGB emphasise the separation of legal personalities between the company and its shareholders. Two key factors – undercapitalisation and commingling of assets – are the central discussions of piercing the corporate veil in Germany.

The examination of undercapitalisation reveals that German courts consider both nominal and material undercapitalisation. The cases mentioned demonstrate the courts mindful consideration of factors such as the adequacy of capital for the operations of the company and the intentions behind shareholder investments. On the contrary, commingling of assets emerges as a significant trigger for piercing the corporate veil in Germany. The BGH has outlined specific requirements for personal liability resulting from commingling. This exceptional situation enables the courts to close the gaps left by statutory law and hold shareholders liable to the company's creditors, thus deviating from the general principle of limited liability.

The noteworthy *Trihotel* judgment in 2007 introduced a new approach and shifted veil piercing to more liability based under Section 826 of the BGB. This approach emphasised shareholders breach of duties to the company rather than directly to the creditors. The later ruling in *GAMMA* reinforced this contention.

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[527] Ibid at 198.
[528] Ibid.
[529] Ibid.

While the courts have considered other situations by reference to tort law, principles of good faith or by relying on provisions set forth in the GmbHG.[530] It can be seen from the above that the courts in Germany have not developed a single test for piercing the corporate veil.[531] It is quite clear that German courts remain cautious about piercing the corporate veil and prefer to rely on established legal principles, especially in the case of commingling assets.

[530] Tan et al op cit note 490 at 183.
[531] Singhof op cit note 445 at 155.

Chapter 6: Conclusion

This study has illuminated the significance of piercing the corporate veil, highlighting it as a crucial legal doctrine with far-reaching implications across various jurisdictions. The primary justifications for this study stems from the need for courts to scrutinise and hold shareholders or directors personally liable when there is an abuse of the corporate structure. The legal device of piercing the corporate veil serves as a safeguard against such abuse, delving into the intricate relationships between companies and their stakeholders. By focussing on factors like improper conduct, fraud, or façade, the gravity of the decision to lift the corporate veil becomes apparent, ensuring individuals bear responsibility for a company's obligations.

The research question, evaluated the codified veil-piercing provision in the Companies Act, highlighting the importance of aligning its interpretation with international practices, South African common law, and the objectives of the Companies Act.

The contextual background delves into the contentious nature of veil-piercing in South African law, particularly emphasising the significant role of Section 20(9) of the Companies Act. The statutory provision offers an important remedy, enabling courts to hold directors and shareholders personally liable under specific circumstances. The flexibility of Section 20(9) to pierce the corporate veil when it is deemed 'just and equitable' to do so aligns with principles of justice and fairness.

The purpose of this thesis was to provide a comprehensive understanding of when and how South African courts may disregard a company's separate legal personality. Through a comparative analysis with the United Kingdom and Germany, the study adds depth to the exploration, acknowledging global relevance and variations in approaching this legal doctrine.

As evidenced above, the examination of piercing the corporate veil in South African and English law, with reference to the German position, elucidates the multifaceted approaches and divergent principles that govern this complex legal doctrine. South African law, deeply rooted in the common law tradition, demonstrates a more cautious approach towards piercing the corporate veil. The introduction of Section 20(9) of the Companies Act expanded the powers of South African courts in piercing the corporate veil, broadening the remedy beyond common law. Conversely, the United Kingdom's stance on piercing the corporate veil is more limited.

The *Prest* case attempted to address some confusion surrounding piercing the corporate veil, but resulted in further challenges. In contrast to South Africa, the United Kingdom has not codified veil piercing within statute, leading to ambiguity in its application. There are also differences in weight given to policy considerations, with South Africa embracing more flexibility compared to the United Kingdom.[532]

Courts in the United Kingdom are generally reluctant to pierce the corporate veil, considering it an exceptional and sensitive remedy to be used sparingly for the sake of maintaining clarity and simplicity in the law.[533] This point of view has echoed throughout and has been set in stone since the beginning of *Woolfson*.[534] There are unrealistic arguments that exist that state that courts are powerless and only the legislature has the power to effect change.[535] However, when the judges attempted to pierce the veil, their judgments were often met with much critique and many cases have been set aside.[536] The Supreme Court stated that there has not been a single successful case in which piercing the corporate veil has been implemented successfully.[537]

In contrast, the South African judiciary have considered the principles of *Salomon*, and recognise the potential for just and equitable results.[538] South African courts are willing to provide insight into the matter.[539] Section 5 and 7 of the Companies Act also play a large contributing role to this open approach. When drafting the Companies Act, it was the intention of the legislature to adopt a maximalist approach in that it takes into consideration social, political and economic factors that have directly affected South Africa as a result of Apartheid. However, such freedom should not turn into misuse or abuse. Limited liability is achieved whilst monitoring individuals who misuse it. South Africa's position on piercing the corporate veil is rather extensive and it shows a progression from the common law. It is seen as an extension of the common law rather than replacing it. This everchanging and adaptable principle prepares for future instances to be considered. Compared to other jurisdictions, the South African approach to piercing the corporate veil shows that it is progressive and adaptable.

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[532] *Gore* supra note 15 para 34; and *Prest* supra note 310 para 35.
[533] Cheng op cit note 319 at 352.
[534] *Prest* supra note 310 para 20 & 67.
[535] Biswas op cit note 312 at 10.
[536] *Prest* supra note 310 para 29-34, 64 & 68-74.
[537] Ibid para 64.
[538] *Gore* op cit note 15 para 28, 34 & 37.
[539] Chapter 3 as seen through the progression of case law.

The German perspective – influenced by civil law – adds another layer to the discussion, reflecting a cautious stance focused on preserving the limited liability of the company. Two main topics are considered when dealing with piercing the corporate veil and those are undercapitalization and commingling of assets. The German courts have not developed a singular test for piercing the corporate veil. As seen from the above discussion, the German courts remain rather cautious about piercing the corporate veil. The courts or judges have not displayed a conscious effort to successfully attempt to pierce the corporate veil and this has contributed to their stagnant enactment of such a wide-reaching remedy.

The comparative analysis has revealed that despite differences in legal traditions, there is a shared recognition across jurisdictions of the need for equitable considerations when piercing the corporate veil, underscoring the importance of fairness in achieving just outcomes. The comparison between the different jurisdictions is interesting in that it showcases the different approaches taken by each jurisdiction and what they consider to be important factors. This clearly highlights that each jurisdiction is able to have different procedures and justifications as to why they weigh different factors over others. That is what makes the law unique and challenging in that there is no single way of approaching a legal problem. With this being said, it should be done within the parameters of law and nothing should be illegal.

As legal systems continue to grapple with the challenges posed by corporate structures, this study contributes to the ongoing discourse by highlighting diverse perspectives in South African, English, and German law. Striking a balance between upholding limited liability and preventing abuse requires ongoing scrutiny and refinement. As businesses operate in an increasingly interconnected world, a harmonised and internationally informed framework may be essential for fostering legal certainty and ensuring equitable outcomes in cases involving the piercing of the corporate veil. Ultimately, this comparative exploration serves as a foundation for further research and discussions aimed at refining legal principles and adapting them to the evolving complexities of modern corporate structures.

BIBLIOGRAPHY

Primary Sources

Constitution
Constitution of the Republic of South Africa, 1996.

Statutes
South African:
Close Corporations Act 69 of 1984.
Companies Act 71 of 2008.
Companies Act 61 of 1973.
Consumer Protection Act 68 of 2008.

English:
Companies Act 2006 (c 46).
Company Directors Disqualification Act 1986.
Insolvency Act 1986.

German:
Bürgerliches Gesetsbuch.
Commercial Code in the revised version published in the Bundesgesetzblatt (BGBI, Federal Law Gazette).
Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG) (Limited Liability Companies Act), April. 20, 1892, RGBl. at 477, last amended by Gesetz [G], Jul. 17, 2017 BGBl I at 2446, art. 10 (Ger.), available at *https://www.gesetze-im-internet.de/gmbhg/*, accessed on 5 January 2024.
Hachenburg Grobkommentar, Gesellschaften mit Beschränkter Haftung (GmbHG).

Cases
South African:
ADT Security (Pty) Ltd v Botha and Others 2010 ZAWCHC 563.
Airport Cold Storage (Pty) Ltd v Ebrahim 2008 (2) SA 303 (C).
Amlin (SA) Pty Ltd v Van Kooij 2008 (2) SA 558 (C).
Botha v Van Niekerk 1983 (3) SA 513 (W).
Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988 (3) SA 369 (A) 388.
Cape Pacific v Lubner Controlling Investments Limited 1995 (4) SA 790 (A).
City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper 2018 (4) SA 71 (SCA).
Dadoo (Pty) Limited v Krugersdorp Municipal Council 1920 AD 530.
De Bruyn v Steinhoff International Holdings NV (29290/2018) [2020] ZAGPJHC 145 (26 June 2020).
Ex parte Gore NO and Others NNO 2013 (2) SA 437 (WC).
Financial Mail (Pty) Ltd v Sage Holdings Ltd 1993 (2) SA 452 (A).
Francis George Hill Family Trust v South African Reserve Bank 1992 (3) SA 91 (A).
Hlumisa Investment Holdings RF Ltd v Kirkinis 2020 (5) SA 419 (SCA).
Hughes v Ridley 2010 (1) SA 381 (KZP).
Hulse-Reutter and Others v Gödde 2001 (4) SA 1336 (SCA).
In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC).

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd.
Itzikowitz v Absa Bank Ltd 2016 (4) SA 432 (SCA).
Jacobs v Waks 1992 (1) SA 521 (A).
Lee v Lee's Air Farming Ltd 1961 AC 12.
Maasdorp v Haddow 1959 (3) SA 861 (C) 866; *Stern v Vesta Industries (Pty) Ltd* 1976 (1) SA 81 (W) 85.
Macaura v Northern Assurance Co Ltd [1925] AC 619 (HL(Ir)).
Magnum Financial Holdings (Pty) Ltd v Summerly 1984 (1) SA 160 (W) 163.
Ochberg v Commissoner for Inland Revenue (1931) AD 215.
S v De Jager 1965 (2) SA 616 (A).
Salomon v A Salomon & Co Ltd 1897 AC 22 (HL).
Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd 1962 (1) SA 458 (A).
The Butcher Shop and Grill CC v The Trustees for the time being of the Bymyam Trust [2023] (5) SA 68 (SCA).
The Shipping Corporation of India Ltd v Evdomon Corporation 1994 (1) SA 550 (A).
Wiseman v Ace Table Soccer (Pty) Ltd 1991 (4) SA 171 (W).

English:
Adams v Cape Industries plc [1990] Ch 433.
Ben Hashem v Al Shayif [2008] EWHC 2380 (Fam); [2009] 1 FLR 115.
Brewarrana v Commissioner of Highways (1973) 4 SASR.
Capital Plc v Nutritek International Corp and Others [2013] UKSC 5.
Daimler Co Ltd v Continental Tyre and Rubber Co Ltd [1916] 2 AC.
DHN Food Distributors Ltd v Tower Hamlets LBC (1976) 3 All ER 462 (CA).
Dimbleby & Sons Ltd v National Union of Journalists [1984] 1 WLR 427 (HL).
Gencor ACP Ltd v Dalby [2000] 2 BCLC 734.
Gilford Motor Co Ltd v Horne [1933] Ch 935, CA.
In re Darby, Brougham, [1911] 1 K.B.
Littlewoods Mail Order Stores v Inland Revenue Commissioners [1969] 1 WLR 1241 (AC).
Prest v Prest [2011] EWHC 2956.
Prest v Prest [2012] EWCA Civ 1395.
Prest v Petrodel Resources Ltd [2013] UKSC 34.
Smith, Stone & Knight Ltd v Lord Mayor, Aldermen Citizens of the City of Birmingham [1939] 4 All ER 116.
Trustor AB v Smallbone (No.2) [2001] 1 WLR 1177.
VTB Capital Plc v Nutritek International Corp and Others [2013] UKSC 5.
Woolfson v Strathclyde Regional Council 1978 SC (HL) 90.
Zeman v Quikelberge and Another 2010 ZALC 122.

German:
BGH II ZR 178/03, Nov. 14, 2005, 2006 NZG 350.
Bundesgerichtshof [BGH] [Federal Court of Justice] II ZR 3/04, Jul. 16, 2007 (*Trihotel*), 2007 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2689.
Bundesgerichtshof [BGH] [Federal Court of Justice] II ZR 264/06, Apr. 28, 2008 (*GAMMA*), 2008 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2437.

Secondary Sources

Books

Andreas Cahn & David Donald 'Constituting the company's share capital' in *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA'* 2 ed (2018) Cambridge: Cambridge University Press. doi:10.1017/9781316888971 189.

Cassim F HI, Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats *Contemporary Company Law* 3rd ed (2021) Juta, Cape Town.

Cassim F HI, Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats *The Law of Business Structures* (2012) Juta, Cape Town.

Davies, Paul L *Introduction to Company Law* (2002) Oxford University Press, New York.

Davies, Paul L & Sarah Worthington *Gower and Davies' Principles of Modern Company Law* 9 ed (2012) Sweet and Maxwell, London.

E Davids and R Kitcat 'South Africa' in Petra Zijp (ed) *The Corporate Governance Review* 12 ed (2022) 232- 246.

Farrar JH, NE Furey & BM Hannigan *Farrar's Company Law* 3 ed (1991) Butterworths, London at 73.

Girvin Stephen, Sandra Frisby & Alastair Hudson *Charlesworth's Company Law* 18 ed (2010) Sweet & Maxwell, London.

JT Pretorius, PA Delport & Michele Havenga et al *Hahlo's South African Company Law through the cases* 6 ed (1999).

M.S. Blackman, G.K. Everingham, R. Jooste '*Commentary on the Companies Act*' RS1 (2020) Juta and Co.

Paul L Davies *Gower and Davies' Principles of Modern Company Law* 8 ed (2008).

Piet Delport et al '*Henochsberg on the Companies Act 71 of 2008'* (Service Issue 33) (2023) Cape Town: Lexis Nexis.

Thomas Bachner 'Introduction' in *Creditor Protection in Private Companies: Anglo-German Perspectives for a European Legal Discourse* (International Corporate Law and Financial Market Regulation) (2009) Cambridge: Cambridge University Press. doi:10.1017/CBO9780511576553.004 32.

William A. Klein & John C. Coffee Jr., Business Organization And Finance: Legal And Economic Principles 140 (6th Ed. 1996).

Internet Sources

Charles Zhen Qu and Björn Ahl (2008) 'Lowering the Corporate Veil in Germany: A case note on BGH 16 July 2007 (Trihotel), available at *https://ouclf.law.ox.ac.uk/lowering-the-*

corporate-veil-in-germany-a-case-note-on-bgh-16-july-2007-trihotel/ accessed on 12 November 2023.

Liton Chandra Biswas 'Approach of the UK Court in Piercing Corporate Veil' 13 January 2011 at 2, available at *http://ssrn.com/abstract=2438217*, accessed on 5 November 2023.

Lydia Chao 'Veil-piercing under America, German and Taiwanese Company Law' (2021) Europa-Kolleg Hamburg, Institute for European Integration, No.01, available at *http://www.europa-kolleg-hamburg.de*, accessed on 11 November 2023.

NUS Law Working Paper No. 2018/025, Berkeley Business Law Journal, Forthcoming, Available at *https://ssrn.com/abstract=3254130* or *http://dx.doi.org/10.2139/ssrn.3254130*, accessed on 3 January 2024.

Journals

Alexander Schall (2016) 'The new law of piercing the corporate veil in the UK' *European Company and Financial Law Review* (ECFR) 13(4) 550.

Bernd Singhof (1999) 'Equity Holders' Liability for Limited Liabilities Companies' Unrecoverable Debts—Reflections on Piercing the Corporate Veil under German Law' 22(2) *Loyola of Los Angeles International & Comparative Law Review* 143.

Bull, Stephen 'Piercing the Corporate Veil—in England and Singapore' (2014) *Singapore Journal of Legal Studies* pp. 24–40. *JSTOR*, *http://www.jstor.org/stable/24872231*, accessed on 1 February 2024.

C Thornhill 'Accountability. A constitutional imperative' (2015) 23(1) *Administratio Publica*.

Carsten Alting 'Piercing the Corporate Veil in American and German Law – Liability of Individuals and Entities: A Comparative View' (1994) 2 *Tulsa Journal of Comparative and International Law* 2.

Cassim, Rehana 'Hiding behind the veil' (2013) *De Rebus* 32.

Cassim, Rehana 'Piercing the Veil Under Section 20(9) of The Companies Act 71 of 2008: A New Direction' (2014) 26 *South African Mercantile Law Journal* 309.

Catherine Wong (2017) 'Has Petrodel v Prest further limited the instances in which courts will pierce the corporate veil' Westlaw.

Hans Thummel, 'Piercing the Corporate Veil - Germany' (1978) 6(3) International Business Lawyer.

Helena Stoop 'Legal Personality of the Company' *The Law of South Africa* vol 6(1) Third Edition (2022).

Jane Bourne 'Lifting the Corporate Veil' (2002) 10(3) Juta's Business Law 115.

John Armour, Henry Hansmann, and Reinier Kraakman (2009) 'The Essential Elements of Corporate Law: What is Corporate Law?' Harvard John M. Olin Discussion Paper Series, No. 643.

Los Watkins and Dr Hamiisi Junior Nsubuga (2020) 'The road to Prest v Petrodel: an analysis of the UK judicial approach to the corporate veil - Part 2: post Prest' Westlaw.

Nupur Upadhyay 'Piercing the Corporate Veil: An Analysis of Lord Sumption's Attempt to Avail a Troubled Doctrine' (2015) 21 *Auckland University Law Review* 114 at 122-123.

Sher, H. (1996). Piercing the corporate veil. Juta's Business Law, 4(2), 51.

Stephen D. Girvin 'The Antecedents of South African Company Law' (1992) 13(1) *Journal of Legal History* 69.

Tan, Cheng Han and Wang, JiangYu and Hofmann, Christian (2018) 'Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives' (16)1 *Berkeley Business Law Journal,* 140-204 (2019), NUS - EW Barker Centre for Law & Business Working Paper 18/04.

Thomas K Cheng 'The Corporate Veil Doctrine Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines' (2011) 34(2) *Boston College International and Comparative Law Review.*

Tsepiso Mofokeng 'Good corporate governance affirms the board (led by the chairperson) as the focal point of governance and the courts have no mandate to undermine this principle' (2020) *Journal of Corporate and Commercial Law and Practice* 6(1) 66.

Reports

The King IV Code on Corporate Governance (2016) Issued by the Institute of Directors in Southern Africa NPC (IoDSA), available at *https://www.iodsa.co.za/page/king-iv*, accessed on 19 December 2023.

The United Kingdom Corporate Governance Code 2018.