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I. INTRODUCTION

"Piercing the corporate veil"—the phrase conjures up the tantalising pursuit of an exotic being whose identity is shrouded in mystery. Unfortunately, the guiding principles for judicial veil piercing are almost as elusive as the creature behind the veil itself.

Every trial lawyer has experienced the thrill of obtaining a money judgment after a long and hard-fought trial only to experience the disappointment of learning that the corporate defendant is bankrupt. The client is furious and demands to know what the lawyer is going to do. The client asks: "Why can't you go after the shareholder?" Full of the bravado of victory, the lawyer reassures the client that it can be done. But when the lawyer goes to the library and looks up the case law, he comes away confused.

The question of what it takes to pierce the corporate veil is one that should be of interest to all multinational corporations that engage in international trade through local subsidiaries incorporated in other countries. After all, one of the reasons that large listed companies incorporate subsidiaries in other countries is to shield the holding company from claims arising in the jurisdiction in which the subsidiary is situated. The risk of the holding company incurring personal liability for the debts of its foreign subsidiaries is therefore an important one for parent companies to consider before commencing business through a subsidiary in another country. The English law principles in relation to corporate veil piercing are of international significance because the corporate laws of many countries in the British commonwealth are influenced by English law.

This article primarily explores the principles that apply in the quest to pierce the corporate veil under English and South African law. In order to assist international lawyers advising multi-national corporations, it also compares the laws of England and South Africa with the laws of the United States. This comparative analysis shows that all three legal systems are guided by similar principles, although they have some differences. However, variations in outcome from jurisdiction to jurisdiction may have more to do with the public policy of the forum in which the matter is tried than real differences in principle.

Veil piercing is an equitable remedy. As there is no end to human ingenuity when it comes to concocting dishonest business schemes, courts in the three subject jurisdictions have correctly refrained from attempting to definitively state what the exact parameters of the doctrine are. However, this understandable reluctance has resulted in a case by case type of approach in all of the subject jurisdictions that is not always consistent in its outcomes. One Australian judge commented that "there is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities. . . ."[1]

This judicial observation may overstate the haphazard nature of corporate veil piercing. Courts have laid down general principles as to when this drastic remedy will be allowed. The application of the law to the facts has however led to inconsistent results. These inconsistencies have more to do with the public morals of the time when, and the place where, piercing is sought. Nevertheless, many of the outcomes are reasonably predictable.

The English courts have shown themselves to be very conservative in going behind the veil.[2] In South Africa, under the

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1 *Briggs v James Hardie & Co Pty Ltd* [1989] 16 NSWLR 549, 567 (Austl.). *See Amlin (SA) Pty Ltd. v. Van Kooij* 2008 (2) SA 558 (C) at para. 15 (S. Afr.).

2 *See generally* Woolfson v. Strathclyde Reg'l Council [1978] SC 90 (HL) (Eng.) (It "is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts."); *Adams v. Cape Industries*

influence of the nation's new democratic Constitution, the general principles have been liberalised, although successful veil piercing remains a rarity.[3]

The general principles applicable in the various American jurisdictions are not inherently more liberal than those that apply in South Africa.[4] However, an empirical study has shown that veil piercing is one of the most litigated areas of corporate law in the United States and that the plaintiff has been successful on average in approximately 40% of reported cases.[5] Veil piercing claims also tend to be more successful in specific states. [6]

This article evaluates and compares the principles and cases applicable to corporate veil piercing in England, South Africa and the United States and attempts to identify, as much as possible, a common thread that will unravel the veil. Part II of the article discusses the legal principles applicable to veil piercing in the United Kingdom. Part III reviews certain basic principles of South African common law and corporate law as well as the legal principles applicable to veil piercing in South Africa. Part IV contains a brief comparative overview of the law of the various jurisdictions of the United States appertaining to veil piercing.[7]

PLC [1990] Ch 433 (Eng.) (rejecting the single economic unit concept of liability in a corporate group and holding that there was no general principle that "all companies in a group of companies are to be regarded as one."); Ben Hashem v. Al Shayif [2009] 1 FLR 115 (Eng.) (In order for the court to pierce the corporate veil "it is necessary to show *both* control of the company by the wrongdoer(s) *and* impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing.")

3 *See Ebrahim v. Airport Cold Storage (Pty) Ltd.* 2008 (6) SA 585 (SCA) at 594 para. 22 *Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 396 para. 28.

4 *See generally DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir. 1976); *Lowendahl v. Balt. & Ohio R.R.*, 287 N.Y.S. 62 (N.Y. App. Div. 1936), *aff'd*, 6 N.E.2d 56 (N.Y. 1936); *Japan Petroleum Co.v. Ashland Oil, Inc.*, 456 F. Supp. 831 (D. Del. 1978).

5 Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, CORNELL 76 L.REV. 1036, 1048 (1991).

6 *Id.* at 1050–1054. (indicating that the percentage of successful veil piercing cases in CA was 45% but 0% in Delaware).

7 Citations in this Article to South African judgments are mainly to cases reported in various published South African Law Reports, which are obtainable both

As the outcomes in veil piercing cases are fact driven, this article includes comprehensive analysis of the facts of many of the cases in an effort to extract general principles.

II. Piercing the Corporate Veil in England

A. The Concept of Juristic Personality

Importantly, "[a] registered company is a legal *persona* distinct from the members who compose it."[8] This means that the assets of the company vest in the company and not its shareholders. Usually, the shareholders of the company have no liability for the company's debts.[9]

Laurence Cecil Bartlett Gower,[10] arguably the most authoritative writer on English company law, notes that one of the primary purposes for the introduction of the limited liability company in England during the mid-nineteenth century was to "facilitate the investment by members of the public, who were not professional investors, of their surplus funds in the many large capital projects,"

online and in hard copy. There are also references to certain cases that are not reported in the ordinary Law Reports but appear on websites such as Southern African Legal Information Institute ("SAFLII") or Judgments Online ("JOL"). Cases that have the letters "CC" at the end of the citation were decided by the South African Constitutional Court. Cases that have the acronym "SCA" are decided by the South African Supreme Court of Appeal. References to "ZASCA" are SCA cases reported only on the SCA's website. References to "AD" are references to the Appellate Division, the previous name of the Supreme Court of Appeal. The article also contains references to English cases. A reference to "All ER" is a reference to the All England Law Reports. A reference to "QB" is a reference to the Queen's Bench.

8 *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530, 550 (S. Afr.); *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 802F (S. Afr.); Salomon v. Salomon & Co. [1897] AC 22 (HL) (Eng.).

9 *Airport Cold Storage (Pty) Ltd. v. Ebrahim* 2008 (2) SA 303 (C) at 306 para. 6 (S. Afr.).

10 P.B. Morice, *Obituary: Professor Laurence Gower*, INDEPENDENT (Feb. 12, 1998, 1:02 AM), https://www.independent.co.uk/news/obituaries/obituary-professor-laurence-gower-1144314.html.

such as the construction of railways.[11] Public investors lacking expertise in administering companies would be considerably discouraged from buying shares in those companies "if the full range of their personal assets were to be put at risk."[12]

Furthermore, limited liability "facilitates the operation of public securities markets, because it relieves the investor of the need to be concerned about the personal wealth of fellow investors."[13]

As the whole purpose of limited liability is to afford shareholders/investors (who may or may not be closely associated with the company) the benefit and protection of limited liability, the courts in modern mercantile jurisdictions are naturally reluctant to pierce the corporate veil and declare shareholders liable for the debts of the companies in which they have invested. This is particularly so where the company's members own publicly traded securities.[14] The entire modern investment structure and the fluidity of investment funds is premised upon limited liability. It stands to reason that courts will only venture to pierce the corporate veil in the most extreme situations.

One of the earliest attempts to pierce the corporate veil in England arose in the seminal case of *Salomon v. Salomon & Co. Ltd.*[15] In that case, a trader sold a solvent business to a limited liability company with a nominal capital of 40,000 shares of £1 each, the company consisting only of the vendor, his wife, a daughter and four sons, who

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11 PAUL L. DAVIES ET AL., GOWER'S PRINCIPLES OF MODERN COMPANY LAW 191–92 (10th ed. 2016) [hereinafter GOWER'S PRINCIPLES].

12 *Id.* at 192.

13 *Id.* (citing Halpern et al., *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117 (1980)).

14 *See* GOWER'S PRINCIPLES, *supra* note 11, at 206; THOMPSON, *supra* note 5, at 1054–56. Apart from the court's policy aversion to piercing the corporate veil in listed companies, the requisites for corporate veil piercing of listed companies in any jurisdiction are in any event unlikely to be present because: (i) it is rare for any one person or entity to dominate a listed company so completely that it would justify piercing the corporate veil; and (ii) publicly traded companies are heavily regulated so that instances of undercapitalisation and failure to observe corporate formalities are likely to be rare.

15 Salomon v. Salomon & Co. [1897] AC 22 (HL).

subscribed for one share each.[16] All the terms of the sale were known and approved by the shareholders.[17]

As partial payment of the purchase price for the business, debentures forming a floating security were issued to the vendor, Salomon.[18] Over 20,000 shares were also issued to him and were paid for out of the purchase-money.[19] These shares gave the vendor the power to outvote the six other shareholders.[20] No shares other than these 20,007 were ever issued.[21] All requirements of the Companies Act 1862 were complied with.[22] The vendor was appointed managing director.[23] Bad times came, and the company was wound up (i.e. placed in bankruptcy).[24] After satisfying the debentures there was not enough to pay the ordinary creditors.[25]

After the company went into liquidation (i.e. an English form of bankruptcy), the liquidators (i.e. English corporate bankruptcy trustees) lodged a defence to a claim by the shareholder/vendor, Salomon, to enforce the debentures that had been issued to the company and brought a counter-application seeking to have Salomon indemnify the creditors of the company for the company's losses.[26]

The liquidators were initially successful in the lower court.[27] However, the House of Lords held that Salomon was a completely separate entity from the company, with the result that the debentures were enforceable.[28] Salomon could not be held personally liable for the debts of the company.[29] The liquidators sought to argue that Salomon

16 *Id.* at 22.
17 *Id.* at 23.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.*
25 Salomon v. Salomon & Co. [1897] AC 22 (HL) at 23.
26 *Id.* at 24–26.
27 *Id.* at 26.
28 *Id.* at 30–33.
29 *Id.* at 23.

was the dominant personality in the company and that his co-shareholders, who were all family members with a minority shareholding, were in effect not real shareholders but were simply issued shares to enable the company to comply with the relevant statute which required seven shareholders.[30]

The principal judgment of the court was delivered by Lord Halsbury.[31] He reasoned that the company in bankruptcy was a valid "artificial creation" of the Legislature (in the form of the Companies Act of 1862)[32] and had been validly constituted.[33] As long as the company was properly constituted, the court could not add requirements for a valid corporation that were not in the statute.[34] "[T]here were seven actual living persons who held shares in the company" as was required by the Companies Act.[35] The statute did not require that any one of the seven shareholders hold more than one share or that they hold the shares in various proportions.[36] The fact that Salomon was the dominant shareholder and that the other shareholders generally did his bidding did not render him personally liable for the debts of the company.[37] Even if the formation of the company was "a mere scheme to enable Aron Salomon to carry on business in the name of the company[,]" that would not be contrary to the intent of the Companies Act.[38]

Lord Halsbury emphasised that a company that was "legally incorporated . . . must be treated like any other independent person with its rights and liabilities appropriate to itself[;]" the incorporators'

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30 *Id.* at 28–29.

31 *Id.* at 29–34. Lord Halsbury was one of England's greatest jurists and the first editor of Halsbury's Laws of England. 1 Halsbury's Laws of England: 5th Ed: (2008) Introduction.

32 i.e. the Companies Act of 1862.

33 *Id.* at 29.

34 *Id.*

35 *Id.*

36 Salomon v. Salomon & Co. [1897] AC 22 (HL) at 30.

37 *Id.* at 30–31.

38 *Id.*

motives are not relevant to an evaluation of "what those rights and liabilities are."[39]

Lord Watson added that, even if Salomon formed the company in order to limit his liabilities, he simply "availed himself to the full of the advantages offered by the Companies Act [of] 1862" and that there was nothing wrong with that.[40] This was a perfectly legitimate use of corporate personality.

In short, creditors of a company who chose to deal with the company, instead of the individual shareholder behind the company, cannot later be heard to complain that the incorporator should be denied the benefits of the limited liability even when that is the very reason that he incorporated the company. Despite the fact that a company is an entity separate and distinct from its members, there are times when the court will pierce or lift the corporate veil to have regard to the identity of the shareholders behind it.

In *Atlas Maritime Co. SA v. Avalon Maritime Limited The Coral Rose (No 1)*, the English court distinguished between "piercing" the corporate veil and "lift[ing]" it.[41] The veil is "pierce[d]" where the rights or liabilities of a company are treated as the rights or liabilities of the shareholders. "Lift[ing]" the corporate veil or "look[ing] behind it" occurs when the court, "for some legal purpose," has regard to the identity of the shareholders in the company.[42]

In *Atlas Maritime*, a subsidiary company had borrowed money from its parent to purchase and repair a damaged vessel.[43] The plaintiff obtained a Mareva injunction[44] to freeze the subsidiary's assets to

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39 *Id.* at 30.

40 *Id.* at 51–52.

41 Atlas Maritime Co. SA v. Avalon Maritime *Ltd.* [1991] 4 All ER 769.

42 *Id.* at 779.

43 *Id.* at 769.

44 *Id.* A Mareva injunction is an English form of injunction, the parameters of which were first enunciated in Mareva Cia Naviera SA v. Int'l Bulkcarrier SA ("The Mareva") [1975] 2 Lloyd's Rep. 509. In certain circumstances, the court will grant an injunction pending litigation to prevent the defendant from disposing of those assets until the litigation is concluded. *See* COLIN B. PREST, THE LAW AND PRACTICE OF INTERDICTS 103–19 (1996).

protect them from dissipation.[45] The holding company, as a loan creditor of the subsidiary, sought to lift the injunction so the debt owed to it could be repaid by the subsidiary.[46] The court held that this was not a case for piercing the corporate veil in the sense of saddling the holding company with the liability of the subsidiary.[47] However, the court could lift the veil and look behind the debtor company and determine that the creditor was in fact the parent of the debtor company that had been enjoined.[48] Once the identity of the shareholder was recognised and the holding company and creditor were revealed as one and the same, the repayment could not be said to be a repayment in the ordinary course of business and the injunction could not be lifted.[49] As appears from the cases cited below, courts in England and in South Africa have been far more willing to lift the veil than they have been to pierce it.[50]

Daimler Co. Ltd. v. Continental Tyre and Rubber Company (Great Britain) Limited was one of the earliest cases in which an English court pierced or lifted the corporate veil.[51] The case came before the Privy

45 Atlas Maritime Co. SA v. Avalon Maritime *Ltd.* [1991] 4 All ER 769 at 769.

46 *Id.*

47 *Id.* at 779.

48 *Id.* at 779–80.

49 *Id.* at 779–81.

50 *See generally* Gilford Motor Co. v. Horne [1933] Ch 935 (CA) (Eng.) (looking behind the veil to prevent a shareholder who had signed a non-compete agreement with the plaintiff from effectively conducting business in violation of the restraint through a company). *Le'Bergo Fashion CC v. Lee* 1998 (2) SA 608 (C) (S. Afr.); *Die Dros (Pty) Ltd. v. Telefon Beverages CC* 2003 (4) SA 207 (C) at 215 para. 24 (S. Afr.); Jones v. Lipman [1962] 1 All ER 442 (disregarding the separate legal personality of the company where the company was used to avoid a contractual obligation); *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) (S. Afr.) ; Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 (HL) (Eng.) (holding that a company whose shareholders were enemy German nationals was an "enemy" trading with England in violation of war regulations); Ebrahimi v. Westbourne Galleries Ltd. [1972] 2 All ER 492 (HL) (Eng.) (recognizing in a shareholder dispute that there were shareholders behind the company with "rights, expectations and obligations inter se which are not necessarily submerged in the company structure"); *Erasmus v. Pentamed Investments (Pty) Ltd.* 1982 (1) SA 178 (W) (S. Afr.) (following the approach of the House of Lords in *Ebrahami* when it held that a closely held corporation was in substance a partnership).

51 Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 (HL) (Eng.).

Council during the First World War. The court held that a company incorporated in England, whose majority shareholders were all German nationals residing in Germany, was an enemy "alien."[52] As a result, the company could not sue for payment of a debt owed to it that arose before the war commenced because the defendant was not permitted to "pay any sum of money to or for the benefit of an enemy."[53]

Lord Halsbury, enunciated the general principle that "when the object to be obtained is unlawful the indirectness of the means by which it is to be obtained will not get rid of the unlawfulness. . . ."[54] The court held that in that case "the object of the means adopted [was] to enable thousands of pounds to be paid to the King's enemies."[55]

The general principle stipulated above is the foundation upon which successful English veil piercing cases have been based right up to the present day. This principle is entirely consistent with the body of jurisprudence that the English Courts have developed with regard to corporate veil piercing. However, the application of the general principle to the facts of the cases is not always uniform.

Lord Halsbury[56] reasoned that: (i) before the war commenced "an associated body of Germans availed themselves of our English law to carry on a business for manufacturing motor car tyres in Germany and selling them here in England. . . ."[57] At that time there was nothing wrong with the shareholders' action because Germany and England were at peace;[58] (ii) however, after the war commenced the plaintiff company became little more than the "machinery" to accomplish an illegal purpose of "giving money[] to the enemy"[59] (i.e. Germany); (iii)

52 *Id.* at 316.

53 *Id.* at 332.

54 *Id.* at 315. Note how similar the language is to that of the South African court in: *Kilburn v. Estate Kilburn* 1931 AD 501 at 507; *Zandberg v. Van Zyl* 1910 AD 302 at 309; *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530 at 544–548.

55 Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 (HL) at 315.

56 Halsbury also wrote the principal judgment in Salomon v. Salomon & Co. [1897] AC 22 (HL).

57 Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 (HL) at 315.

58 *Id.*

59 *Id.* at 316.

the company was not a living thing capable of loyalty and disloyalty.[60] Accordingly, the court looked to the shareholders to determine the enemy character of the company and concluded that the shareholders constituted a partnership in all but name;[61] (iv) the court therefore set aside the veil to conclude that the company was being utilised as the machinery for performing an illegal purpose.[62]

Lord Halsbury then concluded:

> [I]t seems to be too monstrous to suppose that for an unlawful, because, after a declaration of war, a hostile, purpose [a corporate] institution should be used, and [the] enemies of the State, while actually at war with us, be allowed to continue trading and actually to sue for their profits in trade in an English court of justice.[63]

The emotive language used by Lord Halsbury[64] suggests that the court's decision may have been motivated more by patriotism than principle. The assertion that the plaintiff's shareholders sought to obtain an unlawful object by an indirect means[65] is simply not borne out by the facts. All actions by the plaintiff and its shareholders took place before the war and were legal.[66] The company was incorporated and credit was extended to the defendant before the war had commenced.[67] The notion that a company can be an enemy merely because its shareholders are enemy nationals is antithetical to the basic principle of corporate law — that the company is an entity separate and distinct from its shareholders.[68] The time to stop payment to the "enemy" would have been when the company attempted to declare a

60 *Id.*

61 *Id.* at 316.

62 *Id.*

63 *Id.*

64 Phrases such as "the King's enemies," "monstrous to suppose" and "enemies of the State" *Id.*

65 *Id.* at 308.

66 *Id.* at 315.

67 Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 (HL) at 308.

68 Ironically this doctrine was first enunciated by Lord Halsbury himself in Salomon v. Salomon & Co. [1897] AC 22 (HL) at 30.

dividend, not when it sought to recover a debt that was owing to it by a third party.

The *Daimler* case is of importance for a number of reasons. First, it is probably the first case in which the House of Lords actually set aside or pierced the corporate veil and is therefore a landmark judgment. Second, it enunciated the general principle that, where a corporation is being used to circumvent the law, it is appropriate to pierce or set aside the veil.

However, in evaluating the case in relation to a particular modern fact pattern with which any legal practitioner is presented, it is important to remember that the case is more of a product of its time than a reliable pointer as to how a court will find in future cases. The manner in which Lord Halsbury applied the law to the facts in the context of a war situation demonstrates the extent to which the ultimate outcome of corporate veil cases may be driven by public policy and the social milieu of the time.

B. Subsidiary Companies in a Group and The Agency Principle

During the second half of the twentieth century, the English courts flirted with a different approach to corporate veil piercing where the companies under consideration were part of a corporate group and the ultimate shareholder of those companies was also a corporation.[69] In that context, the courts allowed voluntary veil piercing (i.e. veil piercing sought by the shareholders themselves) on the basis that: (i) the subsidiary company was a mere agent of the holding company;[70] or (ii) the companies in the group were a "single," "economic entity" and were in substance a partnership.[71]

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[69] *See generally* Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 116*;* DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [1976] 3 All ER 462.

[70] *See* Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 116 at 120–22.

[71] DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [1976] 3 All ER 462 at 467, 473.

In *Smith, Stone and Knight Limited v. Lord Mayor, Aldermen and Citizens of the City of Birmingham* the court pierced the corporate veil to assist shareholders in a company, not to hold them liable for the corporation's debt.[72] This is sometimes referred to as a "reverse piercing of the veil,"[73] although voluntary piercing may be a better term.

The claimant, Smith, Stone & Knight Limited ("Smith") owned a property in the City of Birmingham.[74] Smith had a subsidiary called the Birmingham Waste Company Limited ("the Waste Company") which carried on business on the premises for the benefit of Smith.[75] The subsidiary company (i.e. the Waste Company) was technically the entity that carried on business on the premises.[76] The City of Birmingham wanted to purchase the property under its compulsory expropriation powers in order to build a technical college.[77] In an effort to maximise the compensation to which Smith (the ultimate holding company) would be entitled, Smith made a claim for compensation, asserting that the subsidiary (which carried on business on the premises) was merely its agent and that the true owner of the business was Smith.[78] The court upheld Smith's claim on the basis that the Waste Company was a mere agent of Smith with no independent business of its own.[79]

In concluding that the Waste Company was the agent of Smith,[80] the Court utilised a series of questions that were usually used in tax cases:[81] (i) were the profits of the subsidiary reported as the profits of the holding company? (ii) "were the person[s] conducting the business appointed by the parent company?" (iii) was the holding company the "head and brain of the trading venture?" (iv) did the

72 Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 116.

73 *Al-Kharafi & Sons v. Pema* 2010 (2) SA 360 (W) at 380 para. 30 (S. Afr.) (citing "Joubert (ed) The Law of South Africa (first reissue) vol 4(1) para 42").

74 *Id.* at 117.

75 *Id.* at 118.

76 *Id.*

77 *Id.* at 117.

78 *Id.* at 118.

79 *Id.* at 121.

80 *Id.*

81 *Id.*

holding company "govern the venture, decide what should be done" and what capital should be invested? (v) did the holding company "make the profits by its skill and direction?" (vi) was the holding company "in effectual and in constant control?"[82]

Some of the factors that influenced the court in concluding that the Waste Company was an agent of Smith, were that the claimants kept all of the books and accounts of the Waste Company, "[t]here was no tenancy agreement of any sort" between Smith and the Waste Company, no rental payments, and, although the Waste Company was debited a pro rata share of the overheads this amounted to nothing more than a mere book entry.[83]

It is important to emphasise that *Smith* resolved the case on the basis that the Waste Company was a mere agent of the claimant, Smith, so that the business that the Waste Company carried on was in substance the business of Smith.[84]

The principles enunciated in *Smith* are at first blush appealing when a creditor of a subsidiary seeks to impress liability upon a company that is the sole shareholder of that subsidiary company. As the purpose of forming a business as a limited liability company is to protect individuals who choose to invest their capital in the company, one may well ask why a corporate holding company should have the same protections.

However, in the *Smith* case, the court was not piercing the corporate veil in order to satisfy the claim of a jilted creditor of the subsidiary. The court was piercing the veil to assist the very

[82] *Id.* at 121. *Cf. Hamilton v. Water Whole Int'l Corp.* 302 Fed. App'x 789, 794–95 (10th Cir. 2008).

[83] Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 116 at 119–20.

[84] *Id.* at 120–21, This agency principle resonates and bears similarity with American law. *See Irwin & Leighton v. WM Anderson Co.* 532 A.2d 983, 987 (Del. Ch. 1987) ("First the dominant corporation must have controlled the subservient corporation and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control."); *Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 839–40 (D.Del. 1978); *Pacific Can Co. v. Hewes* 95 F.2d 42, 45–46 (9th Cir. 1938).

shareholders that had created the corporate structure in the first place presumably because the court thought it seemed unfair to deprive them of fair compensation arising out of the expropriation. This seems to be an unsound basis for coming to the rescue of the shareholders. One might well ask whether the court would have been as quick to pierce the corporate veil of the subsidiary to saddle liability on the holding company for a debt of the subsidiary. Where shareholders choose to hold property through a company, they have the benefit of limited liability, they should also have to suffer whatever disadvantages that may cause. Nevertheless, the agency principle may be an appropriate way to saddle the holding company with liability to a creditor to the extent that the courts will recognise it again in the future.

A similar situation arose in *DHN Food Distributors Limited v. London Borough of Tower Hamlets.*[85] That case also addressed a claim for compensation for expropriation by the City of London. The property was owned by a company called Bronze, which was a wholly owned subsidiary of the claimant, DHN. DHN could not obtain compensation for the disruption of its business unless it could lift the corporate veil and treat Bronze as its alter ego.[86] In a fairly robust judgment, Lord Denning, without referring at all to *Smith, Stone & Knight*, held that the veil should be lifted and that the holding company should be permitted to claim compensation for business disruption.[87]

The reverse veil piercing that took place in *DHN Food* was accomplished with less analysis than in *Smith, Stone & Knight*. There was no attempt to hold that Bronze was a mere agent of DHN.[88]

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85 DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [1976] 3 All ER 462.

86 *Id.* at 462–63.

87 *Id.* at 467.

88 This agency principle resonates and bears similarity with United States law. *See Irwin & Leighton v. WM Anderson Co.* 532 A.2d 983, 987 (Del. Ch. 1987) ("First the dominant corporation must have controlled the subservient corporation and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control."); *Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 839–40 (D.Del. 1978); *Pacific Can Co. v. Hewes* 95 F.2d 42, 45–46 (9th Cir 1938).

The decision in *DHN Food* is of particular significance because, for the first time, it espoused the "single economic entity theory"—that companies in a group that were treated as one for the purpose of general accounts, balance sheets and profit and loss accounts were effectively a partnership and should be treated as one and the same entity.[89] Lord Denning cited with approval to the well-known English company law academic, *Gower*, who had said that: "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group."[90]

The decision in *DHN Food* has been criticised in other cases in other jurisdictions. In *Pioneer Concrete Services Limited v. Yelnah (Pty) Ltd. and Others*, an Australian court noted that *DHN Food* "gives one the impression that it is one of those 'too hard' cases in which judges have for policy reasons justified the lifting of the corporate veil in that particular case rather than the case which lays down any great new principle."[91] Piercing the corporate veil should be limited to situations where there is in fact and in law a partnership between companies in a group, or alternatively, where one of the companies is a mere "sham" or "façade."[92]

A similar situation came before the House of Lords in *Woolfson v. Strathclyde Regional Council*.[93] This case also examined a claim for compensation from a regional council for expropriation where the real business was carried on by a holding company and not by the property owning subsidiary.[94]

Although the claimants in *Woolfson* initially attempted to rely on *Smith, Stone & Knight*, they subsequently abandoned this argument

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89 DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [1976] 3 All ER 462 at 467.

90 *Id.*

91 *Pioneer Concrete Services Ltd V Yelnah (Pty) Ltd* (1986) 11 ACLR 108, 118–19 (NSW).

92 *Id. See also* Ord v. Belhaven Pubs Ltd. [1998] 2 BCLC 447 (CA) at 456–57 (Eng.)); *Al-Kharafi & Sons v. Pema* 2010 (2) SA 360 (W) at 383–84 para. 35 (S. Afr.).

93 Woolfson v. Strathclyde Reg'l Council 1978 SLT 159 (HL) (Scot.).

94 *Id.* at 159–60.

because theirs was not a clear case of agency.[95] However, they relied heavily on *DHN Food,* contending that the relevant companies "should all be treated as a single entity."[96] The claim was unsuccessful.[97]

In delivering its judgment, the House of Lords was critical of *DHN Food*, although it distinguished it on the facts.[98] The court expressed "some doubts" that in *DHN Food* Lord Denning "properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that there is a mere fa[ç]ade concealing the true facts."[99]

This criticism of *DHN Food* is directed more towards the appropriateness of allowing a voluntary or reverse veil piercing than to the agency theory of liability. The whole concept of piercing the corporate veil is a device invented by the courts to prevent abuse of corporate personality in a manner that adversely prejudices third parties. It is ironic that the English courts have shown a greater willingness to invoke the agency principle to assist shareholders with a reverse or voluntary veil piercing than to apply it for the benefit of aggrieved third-party creditors of the company who have been left high and dry by a corporate structure that somehow squeaks through as genuine.[100]

The issue of group liability and the single economic entity theory came up for consideration by the English Court of Chancery in the landmark case of *Adams v. Cape Industries PLC.*[101] The case arose out of asbestos tort litigation initiated against an American company, NAAC.[102] NAAC was a subsidiary of the defendant, Cape Industries

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95 *Id.* at 161.

96 *Id.*

97 *Id.* at 162.

98 *Id.* at 161–62.

99 *Id.* at 161.

100 The American "instrumentality" doctrine, which is intended to benefit third parties, requires that the behaviour of the majority shareholder is the proximate cause of the injury or loss complained of. *See Lowendahl v. Balt. & Ohio R.R.*, 247 A.D. 144, 156 (N.Y. App. Div. 1936), a*ff'd*, 6 N.E. 2d 56 (N.Y. 1936); *Irwin & Leighton v. WM Anderson Co.* 532 A.2d 983, 987–88 (1987).

101 Adams v. Cape Indus. PLC [1991] 1 All ER 929.

102 Id. at 929, 936.

PLC.[103] Cape Industries had a subsidiary called Cape Asbestos South Africa (Pty) Ltd ("CASAP"), a South African company, which mined asbestos in South Africa.[104]

NAAC was an Illinois registered company that was formed for the purpose of marketing the asbestos products of CASAP in the United States.[105] Although NAAC was a subsidiary of Cape Industries, it conducted business independently.[106] It did its own marketing and had its own board and its own set of accounts.[107] It paid U.S. taxes.[108]

For purposes of its judgment, the court accepted that NAAC had been formed for the purpose of marketing asbestos in the United States because Cape Industries did not wish to expose itself to potential tort claims in the United States arising out of the purchase of asbestos.[109] There was no evidence that Cape Industries exercised control over the commercial activities of NAAC.[110] Although Cape Industries directed the level of dividend paid by NAAC and the level of permitted borrowing, the court held that "[s]uch corporate financial control was no more and no less than was to be expected in a group of companies such as the Cape Group."[111] There was no agency agreement between Cape Industries and NAAC.[112] NAAC did not have authority to represent Cape Industries in any transactions.[113]

At some point, Cape Industries had registered a company in Lichtenstein, Associated Mineral Corp ("AMC"), which it interposed between itself and NAAC.[114]

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103 *Id.* at 935–36.
104 *Id.* at 936–37.
105 *Id.* at 935–36.
106 *Id.* at 1027.
107 *Id.*
108 *Id.*
109 *Id.* at 1025–26.
110 *Id.* at 1028.
111 Adams v. Cape Indus. PLC [1991] 1 All ER 929, at 995.
112 *Id.* at 1028.
113 *Id.*
114 *Id.* at 994.

The plaintiff sued Cape Industries in Texas claiming damages for injury caused by exposure to asbestos dust emanating from an asbestos installation factory to which NAAC had supplied raw asbestos.[115] Cape Industries took the position that it had no presence in Texas or in the United States and that, accordingly, the Texas court had no jurisdiction over it.[116] Cape Industries therefore chose not to defend the lawsuit.[117] A default judgment was obtained, and the plaintiffs sought to enforce the judgment in England.[118]

Cape Industries defended the lawsuit initiated in England and maintained that the Texas court judgment could not stand against it because the Texas court had lacked personal jurisdiction.[119] The question of whether the court had jurisdiction was to be decided under English law.[120] English law would probably recognize jurisdiction over an overseas trading company when it was present within the jurisdiction of the court in the sense that it had "established and maintained at its own expense . . . a fixed place of business of its own in the [relevant] country and for more than a minimal period of time ha[d physically] carried on its own business at or from such premises by its servants or agents. . . ."[121]

The central issue in *Adams* was, therefore, whether Cape Industries, through NAAC, had established a presence in the United States.[122] If NAAC was the defendant's agent in the United States or its alter ego, Cape Industries' presence in the United States would be established and the judgment would be valid.[123] The court concluded that NAAC was not the defendant's agent in the United States or its alter ego. [124]

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115 *Id.* at 987–90.
116 *Id.* at 989, 991–92.
117 *Id.*
118 *Id.* at 989, 991.
119 *Id.* at 992.
120 *Id.* at 1000.
121 Adams v. Cape Indus. PLC [1991] 1 All ER 929, at 1014.
122 *Id.* at 1000, 1014–15.
123 *Id.* at 999–1005.
124 *Id.* at 1016–30.

First, the court considered the "single economic unit" argument and resoundingly rejected it. The court held that "[t]here is no general principle that all companies in a group of companies are to be regarded as one."[125] "On the contrary, the fundamental principle is that 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities.'"[126]

Next, the court considered whether it was appropriate to pierce the corporate veil. The court held that the authorities afforded little guidance on the principles to be utilised in deciding whether the "arrangements of a corporate group involve[ed] a façade. . . ."[127] The court expressly refrained from "attempt[ing] a comprehensive definition of those principles.[128]

The court held that AMC, the Lichtenstein company that been interposed between Cape Industries and NAAC, was "clearly a façade[,]" the "creature of Cape" and "no more than a corporate name."[129] Accordingly, it could be ignored and the court could deal with the matter as if the direct relationship of parent and subsidiary was between Cape Industries and NAAC.[130] It was accordingly irrelevant whether AMC was a façade. The real question was whether NAAC was a façade or "creature of Cape."[131]

The court found that NAAC was a separate company conducting its own operations independently in the United States.[132] On its face, NAAC was not a façade.[133] The question was whether the legal position changed because NAAC was incorporated for the specific purpose of insulating Cape Industries' potential claims arising

125 *Id.* at 1016.
126 *Id.* (quoting The Albazero [1975] 3 All ER 21 at 28).
127 Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1025.
128 *Id.*
129 *Id.*
130 *Id.* at 1025–26.
131 *Id.* at 1025.
132 *Id.* at 1026.
133 *Id.*

out of consumers of asbestos in the United States.[134] The court found that this did not change the position.[135]

The court reasoned as follows: (i) there was no suggestion that there was any "actual or potential illegality or . . . inten[tion] to deprive any one of their existing rights[;]" (ii) whether or not the course adopted by Cape Industries "deserve[d] moral approval", there was nothing illegal about the way Cape Industries organised its affairs; (iii) the fact that the company had deliberately organised its affairs so as to minimise its potential tortuous liability did not justify piercing the corporate veil.[136]

In short, the fact that Cape Industries was itself a corporation did not prevent it from insulating itself from liability by trading through a subsidiary any more than Salomon was prevented from doing so in *Salomon v Salomon & Co.* For purpose of piercing the corporate veil, there was no difference in principle between a corporate or individual shareholder.

Having rejected the argument that the corporate veil should be pierced, the court then considered whether NAAC was a mere agent of Cape Industries.[137] If it was, the holding company, Cape Industries, could be liable for debts incurred by its agent on its behalf. In other words, the court implicitly accepted that a holding company can be held liable for the debts of its subsidiary on an agency principles and that such liability could arise independently of whether the subsidiary was a fraud, a façade or a sham.[138]

The court concluded that NAAC was not a mere agent of Cape Industries.[139] In reaching its conclusion, the court pointed to the following factors: (i) NAAC was itself the lessee of the premises from which it operated, paid rental to the landlord, owned its own office furniture, employed its own staff and ran its own pension scheme; (ii)

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134 *Id.*

135 *Id.*

136 *Id. See* Salomon v. Salomon & Co. [1897] AC 22 (HL).

137 Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1026–29.

138 *Id.*

139 *Id.*

it conducted business "activities as principal on its own account," among other things, buying asbestos from the United States Government and a source in Japan and selling them to United States customers; (iii) it stored the asbestos that it purchased from US Government stocks in warehousing facilities in its own name which it paid for; (iv) it earned profits and paid US taxes; (v) it paid dividends; and (vi) it observed all corporate formalities.[140]

It is interesting to note how closely the factors relied on by the English court compare with the "template" of factors often considered by American courts in deciding whether to pierce the corporate veil.[141] The *Adams* court then noted:

> There is no doubt that the services rendered by NAAC in acting as intermediary in respect of contracts between the United States customers and Egnep or Casap were active and important services which were of great assistance to Cape/Capasco in arranging the sales of their group's asbestos in the United States. Nevertheless, for all the closeness of the relationship between Cape/Capasco and NAAC, strictly defined limits were imposed on the functions which NAAC were authorised to carry out or did carry out as their representative. First, NAAC had no general authority to bind Cape/Capasco to any contractual obligation. Second, . . . there is no evidence that NAAC, whether with or without prior authority from Cape/Capasco, ever effected any transaction in such manner that Cape/Capasco thereby became subject to contractual obligations to any person.[142]

An interesting feature of the judgment from the perspective of English corporations with subsidiaries doing business in the United

140 *Id.* at 1027.

141 *See generally DeWitt Truck Brokers, Inc. v. W. Ray Fleming Fruit Co.* 540 F.2d 681 (4th Cir. 1976); *Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 831 (D.Del. 1978).

142 Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1028.

States is that the English court chose to resolve the issue of veil piercing and agency under English law rather than under the law of the U.S. state in which the subsidiary, NAAC, was incorporated. In coming to this conclusion, the court reasoned that, in deciding whether to enforce a foreign judgment in England, the court had to consider whether English law recognised that Cape Industries had acquired a physical presence of its own in Illinois.[143] In essence, the court appears to have treated the issue as more one of procedure than substance.

The *Cape Industries* case is a landmark decision in England and reflects the current state of the law on this issue. The South African courts have also adopted the reasoning of the English Chancery Division in *Cape Industries* in approaching the liability of a holding company for the acts of its subsidiaries.[144]

The reasoning of the court in *Cape Industries*, while conservative, is consistent with the more recent curbs placed upon the "single economic entity" approach to groups of companies by the House of Lords in *Woolfson v. Strathclyde Regional Council*.[145] However, reading between the lines, another factor motivating the court in *Cape Industries* may have been a concern about opening the floodgates to foreign tort claims (especially from the U.S.) against English holding companies. In this connection, the Chancery Division was so critical of the manner in which the Texas judge dealt with the computation of the damages that it held that even if the corporate veil could have been pierced, the Texas judgment could not be enforced in England because there had not been a proper judicial assessment of the damages.[146] This indicates yet again that the courts are frequently influenced in veil piercing cases by what they perceive to be public policy considerations.

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143 *Id.* at 999–1000.

144 *Wambach v. Maizecor Indus. (Edms) Bpk* 1993 (2) SA 669 (A) at 675 D-E; *Macadamia Finance Bpk v. De Wet* 1993 (2) SA 743 (A) at 748 C-E (In both *Wambach* and *Macadamia*, the courts refused to pierce the veil and to treat the holding company and its subsidiaries as a single economic entity); *Al-Kharafi & Sons v. Pema* 2010 (2) SA 360 (W) at 386 para. 36.

145 *See generally* Woolfson v. Strathclyde Reg'l Council (1978) S.L.T. 159.

146 Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1047–50.

Some academic writers maintain that tort claimants should be able to proceed against shareholders because, after all, they did not deal with the subsidiary voluntarily.[147] However, there is a fallacy in this argument; veil piercing occurs because there has been fraud or improper conduct on the part of the shareholder in relation to a known third party, usually a creditor. Many torts do not involve unlawful conduct on behalf of the shareholder. On the other hand, if the shareholder is a party to the tort, the shareholder would be liable with the subsidiary on ordinary principles of tort law.[148] This may be why cases in which tort claimants have been able to pierce the corporate veil are harder to find in any jurisdiction, even the United States.[149]

It is also interesting how similar *Cape Industries* was to the approach of the U.S. Federal Court in *Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil*[150] when it rejected a claim arising out of Nigeria against a U.S. holding company for the debt of its Nigerian subsidiary engaged in oil exploration in Nigeria.[151]

It is important to note that, in reaching its conclusion, the *Cape Industries* court did not reject the agency theory of holding company liability;[152] it simply imposed tighter restrictions on when it could be applied. There is still scope for the agency principle where, for example, the subsidiary company is itself merely an investment holding company conducting no business activities of its own.

Cape Industries was the death knell for the "single economic entity theory" of corporate groups in England. However, many lawyers may well mourn its passing. The purpose of conferring limited liability on companies was to enable individuals to invest in companies without

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147 FRANKLIN A. GEVURTZ, CORPORATION LAW 69–71 (2d ed. 2010).

148 *See generally Lowendahl v. Balt. & Ohio R.R.* 241 A.D. 156 (N.Y. App. Div. 1936), *aff'd* 6 N.E. 2d 56 (N.Y. 1936).

149 THOMPSON, *supra* note 5, at 1058–59; GEVURTZ, *supra* note 147 at 73.

150 *See generally Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 931 (D.Del. 1978).

151 *See generally Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145 (3d Cir. 1988) (refusing to pierce the corporate veil in order to enable asbestos the plaintiffs who had claims against Cape Industries to pierce the corporate veil to hold Cape Industries' New Jersey holding company liable for the debts of Cape Industries).

152 *See* Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1025–1030.

putting their private assets at risk.[153] It is hard to see how this purpose is served by protecting holding companies from the insolvency of their subsidiaries because, even when the holding company is held liable for the debts of the subsidiary, the personal assets of the ultimate shareholders in the holding company (who may be individuals) are not placed at risk.

At the same time, the sacrosanct principle that a company is an entity that is separate and distinct from its shareholders is violated when the court fails to apply the law uniformly in the case of both individual and corporate shareholders. Another difficulty with the single economic entity theory is that its application significantly increases the business risk for multi-nationals where a subsidiary is located in a different country from the holding company as was the case in *Cape Industries*.[154]

All in all, when one weighs up the factors for and against the single economic entity theory, the decision in *Cape Industries* makes sense from both a legal and a policy perspective because it stresses that a company is an entity separate and distinct from its shareholders.

C. The Company as a Façade or a Sham

Another category of cases in which the English courts have pierced or gone behind the veil are those in which the court holds that the company is a mere "façade" or a "sham" calculated to carry out an improper purpose.[155] Many of these are characterised by a robust expression of distaste by the court for the conduct of the defendant and a lack of careful jurisprudential reasoning. The result is a perceived lack of consistency in outcomes and a failure to set out clear

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153 GOWER'S PRINCIPLES, *supra* note 11, at 191–92.

154 *See generally Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 831 (D.Del. 1978).

155 *See generally* Gilford Motor Co. v. Horn [1933] Ch 935 (CA); Jones v. Lipman [1962] 1 All ER 442 at 445; Wallersteiner v. Moir [1974] 3 All ER 217 at 237; Creasey v. Breach Wood Motors Ltd. [1993] BCLC 480; Gencor ACP Ltd. v. Dalby [2000] 2 BCLC 734 (Ch. D.).

jurisprudential guidelines. As the cases are not always consistent, it is important that their facts be analysed individually.[156]

In *Gilford Motor Company Limited v. Horne*, the court looked behind the veil to prevent a shareholder who had signed a non-compete agreement with the plaintiff from effectively conducting business in violation of the restraint through a company.[157] The court granted an injunction against both the shareholder (who had signed the non-compete undertaking) and the company that he was using to conduct business in an effort to circumvent the restraint.[158] The Court held that the company that Horne had formed was "a mere cloak or a sham" to enable him to "engage in business" in violation of the non-complete clause.[159] Consequently, the court granted an injunction against the company as well as Horne, the defendant who had formed it as a vehicle to enable him to evade the provisions of the restraint.[160]

It bears mentioning that, as robust as the court appeared to be in *Gilford Motor Company*, it did not go so far as to pierce the corporate veil to hold a shareholder liable for the debts of its subsidiary. It is also questionable whether it was necessary for the court to look behind the corporate veil at all to justify granting an injunction against the company which was in any event a party to the defendant's breach of the non-complete clause.[161]

In *Jones v. Lipman*, the first defendant agreed to sell freehold land with registered title to the plaintiffs for £5,250.[162] Upon completion, the first defendant "sold and transferred the land to the second defendant company (having a capital of £100). . . ."[163] The first defendant and his solicitors were the sole shareholders and directors

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[156] Look at how similarly the reasoning of the federal district court in Delaware was. *See generally Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 831 (D. Del. 1978).

[157] Gilford Motor Co. v. Horne [1933] Ch 935 (CA).

[158] *Id.* at 935.

[159] *Id.* at 956.

[160] *Id.* at 965.

[161] See the commentary of the court in VTB Capital PLC v. Nutritek Int'l Corp. [2012] 2 Lloyd's Rep. 313 (CA) at 325–26.

[162] Jones v. Lipman [1962] 1 All ER 442.

[163] *Id.* at 442.

of the second defendant company.[164] The second defendant company purchased the land for £3,000, "of which £1,564 was borrowed by the defendant company from a bank and the rest remained owing to the first defendant."[165]

The plaintiffs successfully sued for a decree of specific performance against both defendants to compel them to transfer the land concerned to the plaintiffs.[166] The court followed *Gilford Motor Company Limited v. Horne*[167] and *Smith v. Hancock*[168] in holding that the company was "a device and a sham, a mask" that concealed the shareholders' actions from "the eye of equity[.]"[169]

Accordingly, *Jones v Lipman* was similarly a case in which the court went behind the veil, not to impose liability for a debt of the company, but to prevent the first defendant from using the company as a "sham" or a "mask" to effectively perpetrate a fraud against the plaintiffs.[170]

The reasoning in *Jones v. Lipman* is terse, robust and to the point.[171] There is an absence of detailed reasoning demonstrating yet again that the court's conclusion was based more on fact than law. The court considered the actions of the Defendants so repulsive to equity that the remedy seemed obvious.[172]

In *Wallersteiner v. Moir*, the plaintiff sued the defendant for libel.[173] The defendant had asserted that certain corporate transactions

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164 *Id.*

165 *Id.*

166 *Id.* at 445.

167 Gilford Motor Co. v. Horne [1933] Ch 935 (CA).

168 Smith v. Hancock [1894] 2 Ch 377.

169 Jones v. Lipman [1962] 1 All ER 442 at 445.

170 *Id.* at 444–45. In *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD), the South African court granted a similar order in similar circumstances.

171 *See* Jones v. Lipman [1962] 1 All ER 442 at 444–45.

172 *See id.* This approach is very similar to the approach followed by the South African Chief Justice in *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530, 547 ("[A] transaction is *in fraudem legis* when it is designedly disguised so to escape the provisions of the law, but falls in truth within these provisions.").

173 Wallersteiner v. Moir [1974] 3 All ER 217 (Eng).

were fraudulent. In the process of delivering judgment in favour of the defendant, Lord Denning MR pierced the corporate veil. He held:

> It is plain that Dr Wallersteiner used many companies, trusts, or legal entities as if they belonged to him. He was in control of them as much as any 'one-man company' is under the control of the one man who owns all the shares and is the chairman and managing director. He made contracts of enormous magnitude on their behalf on a sheet of notepaper, without reference to anyone else. . . . He used their moneys as if they were his own. When the money was paid to him for shares which he himself owned beneficially, he banked it in the name of IFT of Nassau. . . . His concerns always used as their bankers the Anglo-Continental Exchange Ltd. That was a merchant bank in the City of London of which he was chairman and which he effectively controlled. . . . Even so, I am quite clear that they [the companies,] were just puppets of Dr Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. Noone else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures–for whose doings he should be, and is, responsible. At any rate, it was up to him to show that any one else had a say in their affairs and he never did so. . . .[174]

The colourful descriptive language utilised by Lord Denning and the offhand way in which he concluded that the veil should be pierced perhaps demonstrates that in many cases where the corporate

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174 *Id.* at 237–38. It is also interesting to note how similar Lord Denning's list of relevant factors is to the American instrumentality doctrine. *See generally DeWitt Lowendahl v. Balt. & Ohio R.R.* 247 A.D. 156 (N.Y. App. Div. 1936), *aff'd*, 6 N.E. 2d 56 (N.Y. 1936).

veil is pierced the shareholder's behaviour is so obviously wrong that is requires very little reasoning to hold him responsible for the acts of his corporation. Even so, this is not a case in which the corporate veil was pierced to render Dr. Wallersteiner liable for the debts of one of his companies but rather to get to the substance of whether he was behaving dishonestly.

In *Snook v. London and West Riding Investments Ltd.*[175] the court defined the term "sham" in the veil piercing context as "acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations . . . which the parties intended to create."[176] The court held that for a transaction to be a "sham" the parties must have "a common intention" that their acts or documents are intended to in fact create different legal rights and obligations to those that they appear to create.[177]

In *Yukong Line Limited of Korea v. Rendsburg Investments Corp. of Liberia (No 2)*,[178] the court applied the doctrine enunciated above in *Snook's* case. In that case, the plaintiff had contracted with the first defendant, RIC. An individual, Yamvrias controlled RIC.[179] After RIC breached its charter party contract with the plaintiff, Yamvrias caused RIC to transfer its cash assets, totalling $244,965.60, to another company that he controlled, LIC.[180] The plaintiff sought to pierce the corporate veil and hold Yamvrias and LIC liable for RIC's debt. The court refused to pierce the corporate veil because it concluded that the charter party contract between the parties was not a sham.[181]

The approach of the court in *Yukong Line* is too literal. The question should not be whether the charter party contract was a

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175 Snook v. London and West Riding Investments Ltd. [1967] 1 All ER 518 at 528.

176 *Id.*

177 *Id.*

178 Yukong Line Ltd. v. Rendsburg Investments Corp. [1998] 4 All ER 82.

179 *Id.* at 86.

180 *Id.* at 82, 86.

181 *Id.* at 95.

genuine transaction but whether the transfer of funds from an insolvent company by the shareholder to another company that was also his puppet warranted piercing the corporate veil. The answer to that question should have been yes.

In *The "Tjaskemolen" (now named "Visvliet")*,[182] the court held that, where ownership of a sailing vessel had been transferred from A company to B company to avoid the ship being attached to satisfy the debt of the A company, the transfer was a sham or a façade.[183] The basis of the court's decision was that the transfer itself was a sham and therefore ownership had not passed.[184] Accordingly, this case was not about veil piercing as much as setting aside a simulated transaction. Nevertheless, the court, in the process of delivering its judgment, seemed to rely in part upon cases in which the corporate veil was pierced.[185]

The decision in *Tjaskemolen* can be juxtaposed against that of the court in *Yukong Line*. It was the transfer of assets to frustrate an attachment that was held to be a sham. The question of whether the underlying contract between the plaintiff and the original defendant was valid was irrelevant. In comparison, in *Yukong*, the court focused on the genuineness of the original contract between the plaintiff and the defendant rather than the transfer of assets which stripped the defendant of the ability to satisfy its obligations to the plaintiff.[186] For reasons stated above, it is my opinion that the reasoning in *Tjaskemolen* is more likely to be correct than that in *Yukong Line*.

In *Creasey v. Breachwood Motors Limited,*[187] the defendant had divested itself of all of its assets in favour of another company owned by the same shareholders.[188] The transferee of the assets agreed to be responsible for all of the trade debts of the transferor company but not

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182 *The* "Tjaskemolen" (now named "Visvliet") [1997] 2 Lloyd's Rep. 465.

183 *Id.* at 474.

184 *Id.* at 474–75.

185 *Id.* at 469–71; In Re A Company [1985] 1 B.C.C.99; Creasey v. Breachwood Motors Ltd. [1993] BCLC 480.

186 Yukong Line Ltd. v. Rendsburg Investments Corp. [1998] 4 All ER 82 at 95.

187 Creasey v. Breachwood Motors Limited [1993] BCLC 480.

188 *Id.* at 482–83.

the plaintiff's claim against the transferor company for wrongful dismissal.[189] The court pierced the corporate veil to enable the plaintiff to obtain satisfaction of his debt from the transferee company.[190]

In *Ord v. Belhaven Pubs Limited,* the court disapproved of the decision in *Creasey*.[191] In that case, the plaintiff, the legal owners of a public house, had transferred all of the land from which it conducted its operations to its holding company as part of a restructuring in which the land owned by various subsidiaries conducting various public house businesses was transferred to the holding company.[192] The plaintiff contended that this left the defendant company as a shell unable to satisfy the plaintiff's debt, and the plaintiff sought to pierce the corporate veil.[193] The court refused to pierce the corporate veil, noting that the plaintiff had not pointed to any actual improprieties or fraud on the part of the defendant or its holding company.[194] Yet, in the absence of impropriety or fraud, it was not necessary for the court to distinguish *Creasey* because that was a case where the transaction occurred with the deliberate intention of frustrating the plaintiff's rights.

In *Gencor ACP Limited v. Dalby*,[195] the plaintiffs brought an action against D and M, the former director and company secretary, respectively, of a group of companies, "alleging misfeasance on their part in misapplying money and other property belonging to the ACP Group. . . ."[196] The unlawful profits made by the director had been channelled through Burnstead Limited, a British Virgin Islands company controlled by one of the director defendants, Dalby.[197] The Chancery Division pierced the corporate veil and held that those

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189 *Id.*
190 *Id.* at 491–93.
191 Ord. v Belhaven Pubs Ltd. [1998] 2 BCLC 447 (CA).
192 *Id.* at 447, 450–51.
193 *Id.* at 453.
194 *Id.* at 456.
195 Gencor ACP Ltd. v. Dalby [2000] 2 BCLC 734 (Ch.D.).
196 *Id.* at 734–35.
197 *Id.* at 739, 742 paras. 10, 19.

profits that had accrued to Burnstead were in fact profits of the director defendant, Dalby.[198]

The delinquent director, Dalby, argued that he was not accountable to the plaintiff company, ACP, for the commission because he did not receive it personally.[199] It went instead to Burnstead, a separate company.[200] Burnstead he argued, was not in a fiduciary relationship to ACP.[201]

The court rejected this argument.[202] The court noted that Burnstead was wholly owned by Dalby and that "nobody else had any beneficial interest."[203] Burnstead had no "sales force, technical team or other employees capable of carrying on any business."[204] All it did was make and receive payments. In effect, it was nothing more than "Dalby's offshore bank account held in a nominee name."[205]

The court concluded that Burnstead was simply Dalby's alter ego and agent and that the corporate veil should be "lift[ed]" with the result that Burstead must pay the funds over to the plaintiff company.[206]

Once again, this is not a case in which the corporate veil was pierced or lifted in order to hold the shareholder liable for the debts of a puppet company. On the contrary, it is a case where the corporate veil was set aside in order to hold the puppet company liable for the debts of the shareholder. The case is consistent with the decision in *Adams* that held that one of the subsidiary companies of the defendant, Cape Industries, that had been interposed between the defendant and its American subsidiary was a façade because it conducted no business activities of its own for its own account.

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198 *Id.* at 734–735.
199 *Id.* at 744 para. 25.
200 *Id.*
201 *Id.*
202 *Id.* at 744 para. 26.
203 *Id.*
204 *Id.*
205 Gencor ACP Ltd. v. Dalby [2000] 2 BCLC 734 (Ch.D.) at 744 para. 26.
206 *Id.*

A similar situation arose in *Trustor AB v. Smallbone (No 2).*[207] The defendant, Smallbone, was the managing director of a company, Trustor.[208] In breach of his fiduciary duty, he caused Trustor to transfer funds to Introcom Limited, a company which he controlled.[209] The plaintiff argued that the circumstances warranted the court "piercing the corporate veil" and recognising that the receipt of funds by Introcom was a receipt of funds by Smallbone.[210] The court held that the authorities cited to it permitted the corporate veil to be pierced "where the company was shown to be a fa[ç]ade or sham with no unconnected third party involved."[211] It then held:

> In my view these conclusions are such as to entitle the court to recognise the receipt of the money of Trustor by Introcom as the receipt by Mr Smallbone too. Introcom was a device or fa[ç]ade in that it was used as the vehicle for the receipt of the money of Trustor. Its use was improper as it was the means by which Mr Smallbone committed unauthorised and inexcusable breaches of his duty as a director of Trustor.[212]

The decisions in *Gencor* and *Trustor* are consistent. They indicate that where a director, acting in breach of his fiduciary duty, uses another entity that he controls as a vehicle to misappropriate funds or seize a corporate opportunity, the court will pierce the corporate veil to ensure that no injustice is done to the company.[213]

In view of the apparent inconsistencies in outcomes in the cases set out in the subsection above it may seem hard to extrapolate a general principle. However, some central principles can be extracted.

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[207] Trustor AB v. Smallbone [2001] 3 All ER 987.
[208] *Id.* at 987, 989.
[209] *Id.* at 990 paras. 4–8.
[210] *Id.* at 987 and 995 para. 23, 996.
[211] *Id.* at 993 para. 14,994 para. 20.
[212] *Id.* at 995–96 para. 25.
[213] This was also the approach of the South African court in *Robinson v. Randfontein Estates Gold Mining Co.* 1921 AD 168 at 194, where the court treated a trust (not a corporation) as the alter ego of the defendant Robinson who had seized a corporate opportunity from Randfontein Estates Gold Mining Company and diverted it to a trust that he controlled.

First, in cases where a company has been set up in order to enable an individual or a company to escape a contractual obligation, the court will usually go behind the veil and look at the shareholder who is behind the company that is being used to commit the subterfuge.[214] Second, in most of the cases referred to in this section in which the plaintiff was successful, the court did not declare the shareholder liable for the debts of the company. Rather, the court went behind the façade of the company and held the company liable or responsible for the acts of its shareholders. So, for example, in *Gilford Motor Company*[215] and *Jones v Lipman,*[216] the court identified the company with the shareholder to prevent the shareholder from using the company to circumvent a contractual obligation. Similarly, in *Gencor*[217] the court required a company to repay money that a shareholder had misappropriated from another company in breach of his fiduciary duty as a director.

Lastly, Certain of these cases, however, have adopted a more conservative approach, showing a willingness to go behind the veil only where the original transaction is a sham.[218] In these cases, the court declined to examine a subsequent transaction by which one of the defendants disposed of assets to a related party defendant, taking the position that, because the underlying transaction was valid, the second transaction was irrelevant.

D. Summary of the English Law Principles

The state of the English law with regard to corporate veil piercing has been well summarised in *Ben Hashem v. Al Shayif.*[219] The court, in matrimonial proceedings, was asked to pierce the corporate veil in order to hold that a property in which the wife resided that was

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214 *See generally* Gilford Motor Co. v. Hall [1933] Ch 935 (CA); Jones v. Lipman [1962] 1 All ER 442; Gencor ACP Ltd. v. Dalby [2000] 2 BCLC 734 (AC); Trustor AB v. Smallbone [2001] 3 All ER 987; The "Tjaskemolen" (now named "Visvliet") [1997] 2 Lloyd's Rep. 465.

215 Gilford Motor Company Limited v. Hall [1933] Ch 935 (CA).

216 Jones v. Lipman [1962] 1 All ER 442.

217 Gencor ACP Ltd. v. Dalby [2000] 2 BCLC 734 (AC).

218 Snook v. London & West Riding Investments Ltd. [1967] All ER 518; Yukong Line Ltd. v. Rendsburg Investments Corp. [1998] 4 All ER 82.

219 Ben Hashem v. Al Shayif [2009] 1 FLR 115.

owned by a corporation was in fact property of the husband.[220] The husband was not the sole shareholder in the company—his children also held shares.[221] The husband had respected the separate corporate personality of the company, and all monies that he borrowed from the company were reflected as borrowings.[222] The court refused to pierce the corporate veil.[223] In reaching its conclusion the court emphasised, as many other cases have, that there was no intrinsic virtue or "magic" in the term "façade" which is usually now used to connote "an outward appearance or front, especially a deceptive one[.]"[224] The term cannot be used to cover up a failure of proper legal analysis.

The court then set out the following rules for piercing the corporate veil:

> In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil. . . . Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice. . . . Thirdly, the corporate veil can be pierced only if there is some "impropriety".[225] Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The

220 *Id.* at 115, 134–35.

221 *Id.* at 115, 163.

222 *Id.* at 163–66.

223 *Id.* at 167. *Cf. Cattlebreeders Farm (Pvt) Ltd. v. Feldman* 1974 (1) SA 169 (RAD) at 169 F-G, 171 E-H (S. Afr.)(piercing the corporate veil in a matrimonial case where the matrimonial home was owned by a company of which the husband was a 100% shareholder); *Gering v. Gering* 1974 (3) SA 358 (W), 358 H, 359 A-B, 361 A-H (S. Afr.) (compelling in a matrimonial suit a company of which the husband was the sole shareholder and through which he conducted his business to make discovery of financial documents that were relevant to the divorce proceeding). As no fraud or impropriety was alleged or shown, it is questionable whether these South African cases are consistent with the current state of the South African law, which is analysed below.

224 Ben Hashem v. Al Shayif [2009] 1 FLR 115 at 153; Atlas Maritime Co. SA v. Avalon Maritime Ltd. [1991] 4 All ER 769 at 779.

225 This language is similar to the language used by the court in *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 803 C-E.

> impropriety must be linked to the use of the company structure to avoid or conceal liability. . . . Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show *both* control of the company by the wrongdoer(s) *and* impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing. . . . Finally, and flowing from all this, a company can be a façade even though it was not originally incorporated with any deceptive intent.[226] The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only insofar as it is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.[227]

The statement that "the court will pierce the veil only insofar as is necessary to provide a remedy for the particular wrong which those controlling the company have done" has been regarded as erroneous.[228] In *VTB Capital*,[229] the court rejected a submission that there was "no such principle as 'piercing the veil[.]'" Having regard to prior decisions, including *Woolfson v. Strathclyde Regional Council*[230] and *Adams v. Cape Industries PLC*[231] the court held that it was no longer open to it "to question the existence of the 'veil piercing' principle."[232]

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226 *See id.* at 804 B.

227 *Id.* at 154–55.

228 Antonio Gramsci Shipping Corp. v. Stepanovs [2011] EWHC 333 (Comm) at 652–653 paras. 18–21; VTB Capital PLC v. Nutritec Int'l Corp. [2012] EWCA 808 (Civ.) at 329 para. 79, 330 para. 82; *Ex Parte Gore* 2013 (3) SA 382 (WCC) at 392 para. 22.

229 VTB Capital PLC v. Nutritec Int'l Corp. [2012] EWCA 808 (Civ.) at 322 paras. 48–49.

230 Woolfson v. Strathclyde Reg'l Council 1978 SLT 159.

231 Adams v. Cape Industries PLC [1990] Ch 433.

232 VTB Capital PLC v. Nutritec Int'l Corp. [2012] EWCA 808 (Civ.) at 322 paras. 48–49.

An analysis of the cases demonstrates that in recent years, the English courts have approached corporate veil piercing in a more conservative manner; the English courts consider the company to be an important instrument for commerce and will not easily go behind the veil.[233] The courts have shown themselves less reluctant to pierce the corporate veil where this will not result in holding a shareholder liable for the debt of the company that it controls.[234] The courts are also more willing to pierce the corporate veil to saddle a company with the liability of its shareholder in order to assist a plaintiff company to recover funds that were transferred to another entity controlled by one of the plaintiff's directors in breach of the fiduciary duties of that director.[235]

The fact that the shareholder sought to be held liable for the debts of the corporation is a company not an individual does not make the claim to pierce the corporate veil any stronger.[236] The concept that companies in a group constitute a single economic unit should be treated as one that has now been rejected.[237] There is still room for the argument that a holding company may be liable for the debts of its subsidiary where the subsidiary does no business of its own and is simply a conduit or agent for the activities of the holding company.[238]

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[233] *See* GOWER'S PRINCIPLES, *supra* note 11, at 197–206; Salomon v. Salomon & Co. [1897] AC 22 (HL) at 29–31; Woolfson v. Strathcylde Reg'l Council 1978 SLT 151 at 161; Adams v. Cape Industries PLC [1991] 1 All ER 929.

[234] *See generally* Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307; Gilford Motor Co. v. Horne [1933] Ch 985 (CA); Jones v. Lipman [1962] 1 All ER 442.

[235] *See generally* Gencor ACP Ltd. v. Delby [2000] 2 BCLC 734; Trustor AB v. Smallbone [2001] 3 All ER 987.

[236] *See* Adams v. Cape Industries PLC [1991] 1 All ER 929 at 1016.

[237] *See* Woolfson v. Strathclyde Reg'l Council 1978 SLT 159; Adams v. Cape Industries PLC [1991] 1 All ER 929at 1016.

[238] *See generally* Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 116; Adams v. Cape Industries PLC [1991] 1 All ER 929 at 1025; Gencor ACP Ltd. v. Delby [2000] 2 BCLC 734; Trustor AB v. Smallbone [2001] 3 All ER 987; *Rehana Cassim*, *The Legal Concept of a Company*, in CONTEMPORARY COMPANY LAW 52–53 (Farouk HI Cassim ed., 2011).

III. PIERCING THE CORPORATE VEIL IN SOUTH AFRICA

South African common law is essentially Roman-Dutch in origin but is influenced by English law, especially where Roman-Dutch law required further development in order to bring it into line with modern economic structures.[239]

A. Equity in South African Law

Generally speaking, South African courts are not courts of equity and are not usually empowered to apply equitable principles.[240] However, where the common law or statute specifically calls for or contains an equitable principle, the court will be empowered to employ that concept.[241]

In approaching corporate veil piercing, the South African courts have utilised an old Roman law maxim *plus enim valet quod agitur quam quod simulate concipitur* — "that which is done is of more avail than that which seems to have been done."[242] To put it in more modern terms, a court will give effect to the substance rather than to the form of a transaction. For the sake of convenience, I will refer to this principle as "the doctrine of simulation."

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[239] *See* H.R. HAHLO & ELLISON KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 590–596 (1968); FRANÇOIS DU BOIS ET AL., WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW 64–76(François du Bois ed., 9th ed. 2007); *Rood v. Wallach* 1904 TS 187, 201; *Conradie v. Rossouw* 1919 AD 279 at 280–82; *Minister of Justice v. Hofmeyr* 1993 (3) SA 131 (AD) at 154–55; *Haynes v. Kingwilliamstown Mun.* 1951 (2) SA 371 (AD) 378–80 (following English law in determining when it would be appropriate to grant an order of specific form after a contract had been breached).

[240] *See Weinerlein v. Goch Buildings Ltd.* 1925 AD 282, 295.

[241] See generally *Brisley v. Drotsky* 2002 (4) SA 1 (SCA), where the defendant was held bound by an *"entrenchment clause"* in a written contract that provided that there could be no amendments to the contract, or cancellation thereof unless they complied with specific formalities. The defendant sought to avoid the consequences of the entrenchment clause because it was in the circumstances, unreasonable, unfair and in conflict with the principles of *bona fides*. The court held that it could not apply equitable principles or principles of *bona fides* to allow the defendant to escape the consequences of his bargain.

[242] *R.D. Claassen: Dictionary of Legal Words and Phrases:* 2nd Ed: [1997] Vol 3: P-60.

In *Kilburn v. Estate Kilburn*,[243] the court held: "[i]t is a well known principle of our law that Courts of law will not be deceived by the form of a transaction: [they] will rend aside the veil in which the transaction is wrapped and examine its true nature and substance."[244]

In *Zandberg v. Van Zyl*,[245] South Africa's newly established Appellate Division attempted to define the doctrine of simulation as follows:

> Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not frequently, however (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They will call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what in form it purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur*. But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact meant that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been

243 *Kilburn v. Estate Kilburn* 1931 AD 501.

244 *Id.* at 507; *Cf.* Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 at 332 (Eng.).

245 *Zandberg v. Van Zyl* 1910 AD 302.

> attained in another way will not necessarily make the arrangement other than it purports to be.[246]

It may seem anachronistic, but this ancient Roman law doctrine that was enunciated more than a millennium ago is the legal and equitable basis for piercing the corporate veil in modern South African company law.[247] Simulation is as old as law and commerce. The simple application of this doctrine helps to unpack the mass of case law that seeks to explain whether the corporate veil should or should not be pierced. When this principle is applied in the context of corporate veil piercing it can explain why it is perfectly acceptable for a business person to use a corporate structure to avoid personal liability for the debts of the company provided that he keeps the corporate structure separate from his own affairs. Where the shareholder and the subsidiaries are comingled, it may then be appropriate to give effect to the substance over the form.[248]

Although the approach of the South African courts to the application of equity (as opposed to legal) principles has not officially changed in recent times, the enactment of South Africa's first democratic constitution, the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), has made it theoretically possible to broaden the scope of equity based on Constitutional principles. It has certainly encouraged the South African judiciary to adopt a less legalistic approach. In this respect, Section 39(2) of the Constitution requires that "when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[249]

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246 *Id.* at 309.

247 *See Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 802 H-J; *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530, 547.

248 *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 802; *Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 398 para. 33.

249 The Constitution of the Republic of South Africa Act 108 of 1996, section 39(2).

In *Everfresh Market Virginia v. Shoprite Checkers,*[250] the Constitutional Court, in a non-binding *obiter dictum,*[251] indicated that the infusion of the common law of contract with constitutional values should incorporate "values of ubuntu,[252] which inspire much of [South Africa's] constitutional compact."[253] "[Ubuntu] emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness. . . .'"[254] In the new constitutional milieu, under the influence of these principles, there has been some movement in the direction of liberalising the veil piercing remedy.[255]

B. Sources of South African Company Law

South African corporate law is heavily influenced by English company law. Notably, "[t]he first Southern African Companies Act, the Cape Joint Stock Companies Limited Liability Act of 1861 was based on prior English companies legislation."[256] Similarly, the first South African Companies Act enacted after South Africa became the Union of South Africa, the South African Companies Act 46 of 1926, was also based on English statutory law.[257] As the South African company law was largely based on English company law, the "inner common law of companies," being the courts' decisions interpreting sections of the Companies Act, was also based upon English law.[258]

While English judicial decisions in connection with the English Companies Act are not binding on South African courts, they are

[250] *Everfresh Market Virginia v. Shoprite Checkers* 2012 (1) SA 256 (CC) at 276 para. 71 (S. Afr.).

[251] An opinion expressed by a judge during the course of a judgment which is not germane to a decision of the case. Such an opinion is persuasive but not binding; *R.D. Classen; Dictionary of Legal Words and Phrases:* 2nd Ed (1997) Vol 3: p0-1.

[252] A Zulu term.

[253] *Everfresh Market Virginia v. Shoprite Checkers* 2012 (1) SA 256 (CC) at 276 para. 71.

[254] *Id.* (quoting *S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 237).

[255] *See Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 395–97 paras. 27–29. This case is analysed in more detail below.

[256] 4 W.A. JOUBERT & J.A. FARIS, THE LAW OF SOUTH AFRICA, pt. 1, para. 3, at 7 (W.A. Joubert & J.A. Faris eds., LexisNexis Durban 2d ed. 2013) (citing "23 of 1861" in footnote 1).

[257] *Id.*

[258] *Id.*

afforded great respect.[259] However, when looking at English precedents, differences in the respective legal systems and statutes must be taken into account.[260]

The Companies Act 61 of 1973 ("the Old Companies Act") followed the South African Companies Act 46 of 1926. It was based fairly closely upon English law concepts. The Companies Act 71 of 2008 ("the New Companies Act"), while following the essential English law construct, provided for significant changes in the Old Companies Act which were primarily intended to promote flexibility and accountability.[261]

The South African law appertaining to corporate veil piercing prior to the enactment of the 2008 Act follows closely on English law.[262] Section 20(9) has for the first time introduced a statutory basis for piercing the corporate veil. However, section 20(9) has not replaced the common law on piercing the corporate veil. If anything, it creates broad grounds for liability and is therefore supplemental to the common law.[263] The introduction of a statutory basis for piercing the corporate veil will probably, over time, have the effect of expanding and liberalising the common law grounds for veil piercing.[264]

C. The Early Cases

The seminal South African case that first grappled with the issue of the corporate veil is *Dadoo Limited v. Krugersdorp Municipal Council.*[265] The situation that arose in that case has similarities to *Daimler*;an early apartheid statute prohibited land ownership by "Asiatics" except in certain specific delineated areas.[266] The

259 *Id.*
260 *See Joubert*, *supra* note 257.
261 New Companies Act 71 of 2008 § 7 (S. Afr.).
262 *See generally Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD); *Al-Kharafi & Sons v. Pema* 2010 (2) SA 360 (W); *Wambach v. Maizecor Indus. (Edms) Bpk.* 1993 (2) SA 669 (A) at 675 D-E; *Macadamia Finance Bpk. v. De Wet NO* 1993 (2) SA 743(A) at 748 B-D; *Ex Parte Gore NO* 2013 (3) SA 382 (WCC).
263 *Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 399 para. 34.
264 *Id.*
265 *See generally Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530.
266 *Id.* at 530.

shareholders in the plaintiff were both "Asiatics" within the meaning of the statute.[267] They incorporated a company with the object of acquiring and trading in land.[268] The company purchased a property in the city of Krugersdorp.[269] The Krugersdorp Municipal Council sought to set aside the transfer of the land to the company on the basis that the company's acquisition of the land was "an evasion of the[] spirit and intent" of the legislation—i.e., it was *in fraudem legis*.[270] The Appellate Division rejected this argument.[271]

In reaching its decision, South Africa's second Chief Justice Innes, enunciated the following principles: (i) citing to *Salomon* the Court affirmed that a company is "a legal *persona* distinct from the members who compose it[;]"[272] (ii) the company is not legally "the agent of the subscribers or a trustee for them[;]" (iii) the position is not changed where only one person controls all the shares in the company; (iv) the distinction between the company and the its members is "no merely artificial and technical thing" and is "a matter of substance[;]" (v) property vested in the company is property of the company and the company's property cannot be regarded as vested in any of its members.[273]

The court then analysed whether the acquisition had taken place *in fraudem legis* (i.e. in fraud of the law). It stated the basic principle as follows:

> [A] transaction is *in fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions. Thus stated, the rule is merely a branch of the fundamental doctrine that the law regards the substance rather than the form of things, —a doctrine common, one would think, to

267 *Id.* at 531.

268 *Id.*

269 *Id.*

270 *Id.* at 531, 540.

271 *Id.* at 550–53.

272 *Id.* at 550 (citing Salomon v. Salomon & Co. [1897] AC 22 (HL) at 51).

273 *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530, 550 (quoting Salomon v. Salomon & Co. [1897] AC 22 (HL) at 51).

> every system of jurisprudence. . . . And if that be so, then there is no practical difference between our rule on this point and the rule of English law.[274]

Having expressed the view (based upon the English decision of *Salomon* that the company was an entity separate and distinct from its member and that the South African doctrine of "simulation" was similar to that enunciated in English law), the court had to deal with the *Daimler* case. At first blush there was little to distinguish the facts of *Daimler* from the facts of *Dadoo* other than that the legislation sought to be enforced in *Dadoo* (the prohibition of land ownership by Asiatics) was unjust and plainly unpalatable to the court.[275] However, the court distinguished *Daimler* on the somewhat tenuous basis that "[a] company cannot have an enemy character . . . [b]ut it can own land."[276] The court also pointed out that *Daimler* was in any event difficult to reconcile with *Salomon*, which had established that a company was a separate and distinct legal personality.[277]

The wheel came full circle on this issue in the newly democratic South Africa in *Manong & Associates (Pty) Ltd. v. City Manager, City of Cape Town*.[278] In that case, the court held that a juristic person can be the victim of racial discrimination if its shareholders are historically disadvantaged individuals.[279] The court distinguished *Dadoo* and followed *Daimler*.[280]

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274 *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530 at 547. *Cf.* Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 at 315 (Eng.); Snook v. London & West Riding Investments Ltd. [1967] 1 All ER 518 at 528; Yukong Line Ltd. v. Rendsburg Investments Corp. [1998] 4 All ER 82 at 94; *DeWitt Truck Brokers Inc. v. W. Ray Flemming Fruit Co.* 540 F.2d 681 (4th Cir. 1976).

275 Chief Justice Innes stated "No doubt these enactments were passed in furtherance of a policy of social, political and economic inequality as between white and coloured inhabitants of the Republic." *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530, 549 (S. Afr.).

276 *Id.* at 552.

277 *Id.* at 551.

278 *See generally Manong & Associates (Pty) Ltd. v. City Manager, City of Cape Town* 2009 (1) SA 644 (EqC).

279 *Id.* at 655–56 paras. 34–35.

280 *Id.* at 655 paras. 32–33.

Ironically, the *Dadoo* court refused to pierce the corporate veil in part to protect the shareholders from racial discrimination,[281] whereas the *Manong* court pierced the corporate veil in order to protect the shareholders from discrimination in an environment where striving for racial equality has become the constitutional norm.[282]

Once again, as in the cases of *Daimler and Dadoo*, the *Manong* Court was influenced by politics and current public policy in the forum in the manner in which it applied the law to the facts.

D. Towards a General Principle

As appears from what is more fully set forth below, the South African courts have, prior to the enactment of the Companies Act 71 of 2008 ("the New Companies Act"), generally followed English law principles in determining whether to pierce or lift the corporate veil. However, more recent cases have attempted to establish a general principle and at the same time affirm that the courts in post-constitutional South Africa should adopt a more liberal and less hidebound approach to the subject.[283]

To some extent, the need for further development of South African law to allow for more veil piercing in order to render a shareholder liable for a debt owed to a creditor of the company has been inhibited by the presence of alternative remedies that make veil piercing less necessary. In this respect, section 424 of the Companies Act 61 of 1973 ("the Old Companies Act"), which is still applicable after the enactment of the New Companies Act,[284] provides for personal liability of any person "who was knowingly a party to the carrying on of [a company's] business" in way that was "reckless[] or [done] with intent to defraud creditors of the company. . . ."

Section 64(1) of the Close Corporations Act 69 of 1984 ("the Close Corporations Act") (which applies to smaller closely held

[281] *Dadoo Limited v Krugersdorp Municipal Council* 1920 AD 530, 549.

[282] *Manong* at 654–56 paras. 31–35.

[283] *See Ebrahim v. Airport Cold Storage (Pty) Ltd.* 2008 (6) SA 585 (SCA) at 594 para. 22; *Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 395–97 paras. 27–29.

[284] New Companies Act 71 of 2008, Schedule 4 § 9.

corporations) provides personal liability where the business of the close corporation was carried on "recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose. . . ." This means that, where the court finds that there is reckless or fraudulent conduct by the controlling shareholder, there is often no need to pierce the corporate veil in order to render the shareholder personally liable.

In *Shipping Corporation of India Limited v. Evdomon Corporation*,[285] the Appellate Division considered an application to attach a shipping vessel that belonged to a company that was wholly owned by the Government of India.[286] The applicant sought to attach the vessel to found jurisdiction for a lawsuit against the Government of India.[287] The issue therefore arose whether the Government of India could be treated as the owner of the vessel instead of the shipping company in whose name the vessel was registered.[288] The court held that the mere fact that the Government of India was the sole shareholder in the corporation did not entitle the court to lift the corporate veil.[289]

In approaching the subject, the court first cited to the basic principle enunciated in *Dadoo*that "[a] registered company is a legal *persona* distinct from the members who compose it."[290] The court then held:

> It seems to me that generally it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. And in this regard it should not make any difference whether

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285 *See generally Shipping Corp. of India Ltd. v. Evdomon Corp.* 1994 (1) SA 550 (A) (S. Afr.).

286 Id at 550.

287 Id at 550.

288 Id at 551.

289 Id at 568–69.

290 *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530 at 550.

> the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances on which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection, the words 'device', 'strategem', 'cloak' and 'sham' have been used.[291]

In *Cape Pacific Limited v. Lubner Controlling Investments,*[292] the South African Appellate Division was faced with a situation similar to the one that had arisen in England in *Jones v Lipman,*[293] which the court cited to in support of its judgment.[294] The plaintiff had bought shares in a property owning company, from one Lubner.[295] Lubner transferred the shares in the property owning company to another company that he controlled in order to prevent the plaintiff from asserting its rights under the agreement of sale.[296] The court pierced the corporate veil and held that the transferee company could be ordered to deliver the shares to the plaintiff just as if the shares had remained vested in Lubner.[297]

In arriving at its decision, the court enunciated the following main principles in determining whether or not to pierce the corporate veil: (i) the law will have regard to substance over form;[298] (ii) the court

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291 *Shipping Corp. of India Ltd. v. Evdomon Corp.* 1994 (1) SA 550 (A) at 566 C-F (citing *Adams v. Cape Indus. PLC* (1991) 1 All ER 929; *Lategan v. Boyes* 1980 (4) SA 191 (T) at 200 E-202 A (S. Afr.); *Dithaba Platinum (Pty) Ltd. v. Erconovaal Ltd.* 1985 (4) SA 615 (T) at 624 B-625 J (S. Afr.)).

292 *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD).

293 Jones v. Lipman (1962) 1 All ER 442 (Ch).

294 See *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 805 B-C, where the court also endorsed Gilford Motor Co. v. Horne [1933] Ch 935 (CA).

295 *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 795–96.

296 *Id.*

297 *Id.* at 791–92.

298 *Id.* at 802 H-I.

has no "general discretion simply to disregard" the separate personality of the company merely because it thinks that it is "just to do so[;]"[299] (iii) the courts would pierce the corporate veil where "fraud, dishonesty or other improper conduct" is found in the administration of the corporation[;][300] (iv) "[i]t is not necessary that a company should have been conceived and founded in deceit. . . ." It is enough if it is currently behaving fraudulently or improperly;[301] and (v) veil piercing is available, even where another remedy exists.[302]

Despite the fact that South African courts have defined the requirements of piercing the corporate veil in broad discretionary terms, the *Cape Pacific* court relied upon and endorsed a number of English law decisions, including *Salomon, Jones v. Lipman*, *Gilford Motors* and *Cape Industries*.[303] The close inter-relationship between English and South African law has therefore been made very clear.[304]

As noted above, the application of constitutional principles in accordance with Section 35 of the Constitution has heralded in a more liberal, flexible approach in developing the common law. This is evident in some of the post-constitutional decisions on piercing the corporate veil.

In Ebrahim v. Airport Cold Storage[305] the court held:

> In contrast with the United Kingdom, where it seems the equivalent provisions have in recent years 'been very rarely used' to fasten directors with personal liability,[306] the jurisprudence of this Court evidences claimants' spirited reliance on the provision. Though courts will never 'lightly disregard' a corporation's

[299] *Id.* at 803 A.
[300] *Id.* at 803 C-D.
[301] *Id.* at 804 A-C.
[302] *Id.* at 805 G.
[303] *Id.* at 803–05.
[304] *Id.*
[305] *Ebrahim v. Airport Cold Storage (Pty) Ltd.* 2008 (6) SA 585 (SCA) at 594 para. 22.
[306] *Id.* (citing Ad Valorem Factors Ltd. v. Ricketts [2004] 1 All ER 894 (CA) at para. 2 (Eng.)).

> separate identity, nor likely find recklessness, such conclusions when merited can only help in keeping corporate governance true.[307]

This is sound common sense.

In *Ex Parte Gore NO* the South African court (Binns-Ward, J) conducted a thorough review of both English and South African law in an attempt to define the general principles applicable to piercing the corporate veil before the enactment of the New Companies Act.[308] The court came to the following conclusions: (i) In the 1960s–1970s, South African courts indicated a greater "willingness to ignore the separate personality of individual companies in the group context. . . ."[309] (ii) however, in recent years, the courts have followed the more current conservative trend of the English courts evidenced in *Adams v. Cape Industries*[;][310] (iii) recent cases have also indicated that "the separate personality of juristic persons should only be disregarded in exceptional circumstances and as a last resort[;]"[311] (iv) careful analysis of the South African authorities does show that the courts will, however, go behind the veil where that is "just and equitable" and that remedy is not limited to places where "there is no alternative remedy[;]"[312] (v) fraud is not an essential element for piercing the corporate veil.[313]

Having summarised these general principles, Binns-Ward J summed up the approach of the South African courts as follows:

307 *Ebrahim v. Airport Cold Storage (Pty) Ltd.* 2008 (6) SA 585 (SCA) at 594 para. 22.

308 *Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 395–97 paras. 27–29.

309 *Id.* at 395 para. 27.

310 *Id.* (citing Adams v. Cape Industries [1991] 1 All ER 929 (Ch.D)); *Wambach v. Maizecor Indus. (Edms) Bpk* [1993] (2) SA 669 (A) at 675 D-E (S. Afr.); *Macadamia Finance Bpk v. De Wet* 1993 (2) SA 745 (A) at 748 B-D (S. Afr.).

311 *Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 395 para. 27 (citing *Hülse-Reutter v. Gödde* 2001 (4) SA 1336 (SCA) at para. 23; *Al-Kharafi & Sons v. Pema* 2010 (2) SA 360 (W) at 387 para. 37.)

312 *Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 396 para. 28.

313 *Id.* at 396 para. 28.

> 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 other 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.[314]

The balancing act proposed by Binns-Ward J in the latter paragraph pragmatically recognises the difficulties in trying to reconcile the various judgments on this issue. It is a frank assessment of how the courts really seem to arrive at what is in essence a policy-based decision in most cases—they weigh the need to protect the separate juristic personality of the company against other values that have to be recognised in the public interest.

The court's judgment in *Ex Parte Gore* also contains a perspicacious and pithy analysis of the English authorities on the subject.[315] Apart from its utility as a summary, it demonstrates how closely tied South African law on the subject is to the English law. However, the heavy reliance on English law by the South African courts obscures the more liberal nature of veil piercing and the alter ego doctrine in post-constitutional South Africa. The advent of the Constitution and its requirement that the common law be developed in order to conform to the values of the Constitution has inevitably heralded a more liberal and equity oriented approach to the law. In the context of piercing the corporate veil, it should ameliorate the severity of the English law with respect to corporate veil piercing and infuse the courts with the desire to do equity where that is possible without

314 *Id.* at 397 para. 29.
315 *Id.* at 390–394 paras. 19–26.

doing violence to necessary legal and commercial principles like the concept of separate juristic personality.

E. Piercing the Corporate Veil under the New Companies Act

Section 20(9) of the New Companies Act has introduced a statutory basis for piercing or lifting the corporate veil. It provides:

> If, on the application of an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, or 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:
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> (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of a 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 of the court the court considers appropriate to give effect to a declaration contemplated in paragraph (a).

In *Ex Parte Gore*, Binns-Ward J enunciated the following principles with regard to section 20(9) of the New Companies Act: (i) prior to the enactment of the statute, piercing or setting aside the veil was governed by common law. The introduction of a statutory provision was likely to "erode the . . . philosophy" that piercing the corporate veil should only take place in exceptional circumstances. "By expressly establishing its availability simply when the facts of a case justify it," the legislature indicated that the remedy should not be regarded as "exceptional, or 'drastic[;]'"[316] (ii) the use of the term

[316] *Id.* at 399 para. 34 (citing *Amlin (SA) (Pty) Ltd. v. Van Kooij* 2008 (2) SA 558 (C) at para. 23 (S. Afr.); *Knoop N.O. and Others v Birkenstock Properties (Pty) Ltd. and Others* [2009] ZAFSHC 67, at para. 23).

"*unconscionable abuse*" in the statute instead of "*gross abuse*" also extends the availability of the remedy because the former term implies a less stringent test than the latter;[317] (iii) "[t]he term 'unconscionable abuse of the juristic personality' encompasses common law terms such as 'sham', 'device', 'stratagem[,]'" previously used in connection with veil piercing cases but also goes further. The remedy is available "whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced[;]"[318] (iv) the statute is "supplemental" to the common law and does not substitute it;[319] and (v) the remedy is available even when there may be an alternative remedy.[320]

In short, the effect of the enactment of Section 20(9) of the New Companies Act is to considerably enlarge the scope of the common law veil piercing remedy in South African law. The test enunciated by Binns-Ward J is considerably more fluid than the principles set out in prior decisions. It remains to be seen whether South African appeal courts will be able to overcome their inherent conservatism on this issue and significantly broaden the scope of the remedy.

F. Groups of Companies and the Agency Principles in South Africa

The group/agency principle first reared its head in South Africa in *Adcock-Ingram Laboratories Limited v. Lennon Limited,* the issue in that case was whether the use of a trademark by a subsidiary company of the proprietor of the trademark constituted a "permitted use" by the proprietor/holding company.[321] The court, led by Nicholas J, held that there was no evidence that the subsidiary company was using the trademark as the agent of the holding company.[322] The mere fact that the subsidiary was subject to the control of the holding company did not mean that there was a

317 *Ex Parte Gore NO* 2013 (3) SA 382 (WCC) at 399 para. 34 (referring to the term used in Section 20(9) of the New Companies Act).

318 *Id.*

319 *Id.*

320 *Id.*

321 *Adcock-Ingram Laboratories Ltd. v. Lennon Ltd.* 1983 (2) SA 350 (T).

322 *Id.* at 351 H, 352 A-C, 353 A-B.

relationship of agent and principal between them. There was no contract of agency, either express or implied.[323]

The matter arose again some five years later before the same judge (who was now sitting in the Appellate Court) in *Ritz Hotel Limited v. Charles of the Ritz Limited.*[324] The issue was a similar one—whether the use of a trademark by a holding company of the respondent, Charles of the Ritz, amounted to a "permitted use" within the meaning of the relevant trademark law. Nicholas AJA questioned whether he had correctly decided the issue in *Adcock Ingram.*[325] However, the facts of the *Ritz Hotel* case were slightly different in that the court held that, in exercising quality control over the goods manufactured, the holding company acted as the agent of the subsidiary.[326] There was, therefore, a "permitted use" by the South African subsidiary.[327]

Although the facts were slightly different, the approach of the court was also substantively different. Citing to *DHN Food*[328] the court noted a more liberal approach by the English courts to treat subsidiaries in the group as a single economic entity.[329] The South African court cited with apparent approval to a statement of Lord Denning in *DHN Food* that "[t]here is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group."[330]

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323 *Id.* at 353 A-B.

324 *Ritz Hotel Ltd. v. Charles of the Ritz Ltd.* 1988 (3) SA 290 (A).

325 *Id.* at 316 A-B.

326 *Id.* at 317 A-D.

327 *Id.*

328 DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [1976] 3 All ER 462 (CA) at 467 B-C.

329 *Ritz Hotel Ltd. v. Charles of the Ritz Ltd.* 1988 (3) SA 290 (A) at314 H–317 D. As noted above, this principle was subsequently debunked in Adams v. Cape Indus. *PLC* (1991) 1 All ER 929 at 1016 (Eng.).

330 *Ritz Hotel Ltd. v. Charles of the Ritz Ltd.* 1988 (3) SA 290 (A) at 315 F-H (quoting DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [1976] 3 All ER 462 (CA) at 467 B-C.

The court also cited with approval to the judgment of Dillon J in *Revlon, Inc. v. Cripps & Lee Limited*,[331] which held that a narrow emphasis on the individuality of companies in a group "is not in accordance with recent authorities."[332]

Once again, it is necessary to emphasise that the courts in *Ritz Hotel, DHN Food* and *Revlon* were willing to be bold about enunciating a "single economic entity theory" when this was to the advantage of the companies in the group and did not have the effect of unfairly disadvantaging any third parties. The application of the doctrine in so limited a fashion carries with it the seeds of its own destruction. Why should the holding company in a group have the benefit of insulating itself from the liabilities of its subsidiary while at the same time claiming that the members of the group should be treated as one where that is to the benefit of the holding company? While it may be appropriate to pierce the corporate veil of companies in a single economic unit where this is to the benefit of a third party, it is unfair to allow a reverse veil piercing for the benefit of the entity that chose to set up such a convoluted corporate structure in the first place.

The *Ritz Hotel* case was decided before *Cape Industries* finally discredited the "single economic entity theory" in England.[333] After *Cape Industries* was decided, the issue of whether companies in a group could be treated as a single economic entity came before the South African court again in *Wambach v. Maizecor Industries (Edms) Bpk*.[334] This was a tort claim. The Appellate Division refused to pierce the corporate veil to hold that damage done by a mechanical horse and trailer registered in the name of a wholly owned subsidiary (which shared the same directors with the holding company) should be treated as a tort committed by the holding company.[335] The court noted that piercing the corporate veil to treat all companies in the group as one

331 *Ritz Hotel Ltd. v. Charles of the Ritz Ltd.* 1988 (3) SA 290 (A) at 315 H-J (citing Revlon Inc. v. Cripps & Lee Ltd. 1980 FSR 85 (Ch) at 95 (Eng.)).

332 *Ritz Hotel Ltd. v. Charles of the Ritz Ltd.* 1988 (3) SA 290 (A) at 315 H-J (quoting Revlon Inc. v. Cripps & Lee Ltd. 1980 FSR 85 (Ch) at 95 (Eng.)).

333 Adams v. Cape Indus. *PLC* (1991) 1 All ER 929 at 1016 (Eng.).

334 *See generally Wambach v. Maizecor Industries (Edms) Bpk* 1993 (2) SA 669 (AD).

335 *Id.* at 671, 675 B-D.

would lead to "total darkness."[336] Nobody would know what the status of a trademark was or who had property rights in things like the mechanical trailer at issue.[337]

In *Macadamia Finance Bpk v. De Wet*, the court also endorsed *Cape Industries* and concluded that the liquidators (trustees) of a holding company in liquidation had no duty to insure the assets of the subsidiary company.[338]

In *Al-Kharafi & Sons v. Pema*,[339] the issue arose again in a fairly unusual context: the Master of the High Court[340] set aside an assignment[341] from a company called MAK to a related entity, the applicant, Al-Kharafi.[342] The assignment had been effected so that Al-Kharafi would be able to set-off a debt that it owed to the insolvent company against a debt owed by the insolvent company to MAK.[343]

Al-Kharafi argued, based upon cases like *DHN Food*, that the court should ignore the assignment from MAK to Kharafi because they were members of a single economic entity and that, as a result, there had been no assignment in substance.[344] The applicant contended for a "reverse piercing of the veil" — i.e., the applicant was voluntarily asking the court to pierce the corporate veil to assist it rather than to saddle it with liability.[345]

The court delivered a carefully reasoned judgment analysing (and ultimately following) the post-*Cape Industries* English law on this

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336 *Id.* at 675 B-D.

337 *Id.*

338 *Id.* at 744, 748 A-F.

339 *Al-Kharafi & Sons v. Pema* 2010 (2) SA 360 (W) (S. Afr.).

340 An official charged with the overall administration of an insolvent company in South Africa. *See* Insolvency Act 24 of 1936, § 1.

341 Called a "cession" in South Africa. See 2 *WA Joubert & JA Faris Law of South Africa:* Part 2: para 1 (W.A. Joubert & J.A. Faris eds. LexisNexis Durban: 2nd Ed: 2003).

342 *Al-Kharafi & Sons v Pema* 2010 (2) SA 360 (W) at 360–61.

343 *Id.*

344 *Id.* at 368 para. 9.

345 *Id.* at 380 para. 30 (citing "Joubert (ed) The Law of South Africa (first reissue) vol 4(1) para 42")

subject.[346] Based upon the more conservative trends in English law as embodied in *Woolfson v. Strathclyde Regional Council* and *Adams v. Cape Industries*, the court held that the "single economic entity" theory did not apply in South Africa.[347]

The court rejected the concept that the corporate veil ought to be pierced "where the interests of justice require it."[348] Ultimately, the court held that this was, in any event, an inappropriate situation in which to pierce the corporate veil.[349]

The court also rejected the applicant's defence because Kharafi was not a shareholder, directly or indirectly, in MAK.[350] Although they had common shareholders, they were entirely separate entities. The court held that it was "trite that when a court pierces the corporate veil it treats the assets and liabilities of the company as assets and liabilities of the shareholder."[351]

Accordingly, for better or for worse the South African courts have rejected the "single economic entity theory." A holding company cannot be held liable for the debts of its subsidiary simply because they are companies within a group.

IV. PIERCING THE CORPORATE VEIL IN THE U.S.

At first blush, English and American law on this subject may appear to be different, but there are significant similarities. Both jurisdictions have attempted to lay down general principles while at the same time seeking to preserve a significant amount of discretion for the courts to respond to the rich ingenuity of human dishonesty. The judicial opinions of both jurisdictions tend to emphasise that a corporation is an entity separate and distinct from its members before

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346 *Id.* at 382–88 paras. 33–39.

347 *Id.* at 384–88 paras. 35–39.

348 It was the applicant in this case who asserted this argument, which the court quoted. *Id.* at 383, 386 paras. 34, 36. *Cf.* Ben Hashem v. Al Shayif [2009] 1 FLR 115 at 154–55 paras. 160–61.

349 *Id.* at 387–88 para. 39.

350 *Id.*

351 *Id.* at 387 para. 38.

explaining why the court should or should not pierce the corporate veil in the particular instance before it.[352]

It is apparent from the English and South African cases analysed above that legal systems that adhere more closely to English Company Law have been reluctant to pierce the corporate veil to hold a shareholder liable for the debts of the company. They have been less reluctant to lift the veil and treat a shareholder and its subsidiary as one to prevent a dishonest shareholder from utilising a corporation as a sham to skim assets or to conduct activities in violation of a legal obligation. In contrast, American courts have more frequently (although not necessarily easily) permitted the veil to be pierced to hold a shareholder liable for the debts of his company and there are many examples of this in federal law and in the jurisprudence of the fifty states.[353]

It is beyond the scope of this article to attempt a comparative approach to veil piercing in every legal jurisdiction of the United States. I have, therefore, chosen to focus on a small number of federal and state cases which set out the general principles that seem to be followed in most U.S. jurisdictions.

An empirical study undertaken by Professor Robert B. Thompson[354] notes that "[p]iercing the corporate veil is the most litigated issue in [American] corporate law. . . ."[355] Although there are no similar statistical studies in England and South Africa, a careful search of the legal reports in both jurisdictions will produce only a limited number of veil piercing cases and even fewer successful ones. In contrast, Thompson found that in the 1,583 reported U.S. cases on piercing the corporate veil, 40% of the cases resulted in a veil piercing in which the court held the shareholder liable for the debts of its

352 *See generally Pacific Canning Co. v. Hewes* 95 F.2d 42, 45 (9th Cir. 1938); *DeWitt Truck Brokers Inc. v. W. Ray Flemming Fruit Co.* 540 F.2d 681 (4th Cir. 1976); *United States v. Bestfoods* 524 U.S. 51, 61 (1998); Salomon v. Salomon & Co. [1897] AC 22 (HL) (Eng.); *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530 (S. Afr.); *Cape Pacific Ltd. v Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 807.

353 *See* GEVURTZ, *supra* note 147, at 60–111.

354 See THOMPSON, *supra* note 5.

355 *Id.* at 1036.

company.[356] Interestingly, Delaware, the state in which most major U.S. companies are incorporated, has produced no reported successful veil piercing cases.[357]

Thompson notes that there are no instances in which the corporate veil has been pierced to impose liability on public shareholders and that the larger the number of shareholders in a company, the lower the statistical likelihood of corporate veil piercing.[358] There is nothing in the stated legal principles of most U.S. jurisdictions that would account for the significantly greater incidence of veil piercing in the US as compared to England and South Africa. The real explanation may be this. The decision to pierce the corporate veil is a balancing act and the way in which courts resolve it has more to do with the public morals and commercial realities of the jurisdiction in which the veil piercing claim is made.

A. The Template Approach

A common approach of U.S. courts is to utilise a list of potential grounds for piercing the corporate veil, and when some or all of them are present with a sufficiently egregious array of facts, the corporate veil is pierced. *Gevurtz* calls this the "template approach."[359]

In *DeWitt Truck Brokers, Inc. v. W Ray Flemming Fruit Company*[360] the Fourth Circuit enunciated the following principles with regard to the factors that justify corporate veil piercing: (i) the court recognised that the circumstances in which a court would pierce the corporate veil have been "rarely articulated with any clarity[.]" The court noted that this was perhaps the case because every case was *sui generis* depending

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356 THOMPSON, *supra* note 5, at 1048.

357 *Id.* at 1051–53. Thompson attributes this to the fact that "Delaware's traditional focus has been on large corporations" with multiple shareholders, with publicly traded securities in many instances. *Id.* But perhaps it also speaks to a more conservative public morality that recognises how important limited liability is to the state's economy.

358 *Id.* at 1054–55.

359 GEVURTZ, *supra* note 147, at 71.

360 *DeWitt Truck Brokers, Inc. v. W Ray Flemming Fruit Co.* 540 F.2d 681 (4th Cir. 1976).

upon its underlying facts;[361] (ii) proof of "plain fraud" is not a necessary element in a finding to disregard the corporate veil;[362] (iii) where substantial ownership of all of the stock is in the hands of a single individual and there has been a disregard of "the corporate fiction[,]" the courts had little difficulty in applying the "alter ego" or "instrumentality" theory in order to set aside the corporate veil and "fasten liability on the individual stockholder[;]"[363] (iv) regarding the application of both the instrumentality and the alter ego doctrine, the courts "are concerned with reality and not form. . . ."[364] (v) where a one man or closely held corporation is "grossly undercapitalized for the purposes of the corporate undertaking" that will usually justify piercing the corporate veil.[365] Other factors that can be taken into account are a "failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation[366] . . . syphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a fa[ç]ade for the operations of the dominant stockholder or stockholders[;]"[367] (vi) the decision to disregard the corporate veil cannot rest on a single factor. It must involve a number of factors and there must also be present an "element of injustice or fundamental unfairness."[368]

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361 *Id.* at 684 (quoting *Swanson v. Levy*, 509 F.2d 859, 861–62 (9th Cir. 1975)). *Cf.* the South African case of *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 805 B-C (commenting on the difficulties in stating a general rule because circumstances could be so varied); the English case of Adams v. Cape Indus. *PLC* (1991) 1 All ER 929 at 1025.

362 *DeWitt Truck Brokers*, 540 F.2d at 684–85.

363 *Id.* at 685.

364 *Id.*. *Cf. Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 803 (holding that veil piercing was justified in cases of fraud or "*improper conduct*").

365 *DeWitt Truck Brokers*, 540 F.2d at 685.

366 This really overlaps with undercapitalisation.

367 *Id.* at 686–87. The term "façade" is a really a conclusion rather than a fact. In my opinion, it should not be utilised so frequently that it obscures the need to find the necessary factors present for piercing the veil.

368 *Id.* at 687. *See United States v. Pisani* 646 F.2d 83, 88 (1981) (the court followed the *DeWitt* template and held that it set out a federal standard for corporate veil piercing). *See generally United States v. Golden Acres, Inc.*, 702 F. Supp. 1097 (D.Del. 1988) (the court followed *DeWitt* and *Pisani*); *Harco Nat'l Ins. Co. v. Green Farms, Inc.*,

In comparison, English and South African courts both hold that the corporate veil cannot be pierced merely because it is "in the interests of justice" to do so.[369] However, the *De Witt* approach requires "an element of injustice or fundamental unfairness" in addition to the presence of more than one of the factors listed in the template.[370] As more is required than mere injustice, American, English and South African law are not fundamentally different on this issue. It is also interesting to note how similar the template list of factors is to the list of factors that the English court considered in *Cape Industries* in deciding whether the U.S. company, NAAC, was simply an agent of Cape.[371]

In *Harper v. Delaware Valley Broadcasters, Inc.*[372] the United States District Court interpreted Delaware state law as follows:

> Both courts[373] noted that "no single factor could justify a decision to disregard the corporate entity, but . . . some combination of them was required, and that an overall element of injustice or unfairness must always be present, as well." Simply phrased, the standard may be restated as: "whether [the two entities] operate as a single economic entity such that it would inequitable for this Court to uphold a legal distinction between them."[374]

Del. Ch. C.A. No.1131; *Lakota Girl Scout Council, Inc. v. Havey Fund-Raisings Mgmt.*, 519 F.2d 634 (8th Cir. 1975); GEVURTZ, *supra* note 147, at 71 (listing the template factors).

369 Ben Hashem v. Al Shayif [2009] 1 FLR 115 at 154 para. 160 (Eng.); *Ex Parte Gore No* 2013 (3) SA 382 (WCC) at 396 para. 28 (S. Afr.).

370 *DeWitt Truck Brokers*, 540 F.2d at 687.

371 Adams v. Cape Indus. *PLC* (1991) 1 All ER 929 at 1027.

372 *Harper v. Del. Valley Broadcasters, Inc.*, 743 F. Supp. 1076 (D.Del. 1990).

373 *Id.* at 1085 ((citing *Harco Nat'l Ins. Co. v. Green Farms, Inc.*, Del.Ch., C.A. No. 1131, Hartnett, V.C., slip op. at 10, 1989 WL 110537 (Sept. 19, 1989)).

374 *Harper*, 743 F. Supp. at 1085 (quoting *Mabon, Nugent & Co. v. Texas American Energy Corp.*, Del.Ch., C.A. No. 8576, Berger, V.C., mem. op. at 12, 1990 WL 44267 (Apr. 12, 1990));. *Cf.* Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 116 at 120–121; DHN Food Distributors Ltd. v. London Borough of Tower Hamlet [1976] 3 All ER 462 at 467 467; rejected by the English court in Woolfson v. Strathclyde Reg'l Council 1978 SLT 159 at 161.

Harper was not endorsing piercing the corporate veil simply when two entities were "a single economic entity." It is clear from the quotation above that it is only where the entities constitute a single economic entity and there are sufficient template factors present that piercing the corporate veil will be warranted.[375]

In some ways, the template approach of U.S. jurisprudence is a little more definitive, and therefore it should, by its very nature, be more limiting than the English and South African tests. By creating a list of factors and requiring that more than one of them be present together with an "overall element of injustice or unfairness" the court impliedly excludes veil piercing where only one of those factors is possible or where there is no "overall element of injustice or unfairness."[376]

Gevurtz[377] comments with some exasperation on the confusing and somewhat inconsistent manner in which U.S. courts have applied the template approach. The author makes the point that it is not clear what weight each factor should be given in conducting an evaluation.[378] He notes that some factors that the courts consider (such as non-payment of dividends or a mere failure to observe corporate formalities) may be neutral in their effect upon the creditor who seeks to pierce the veil.[379]

Perhaps *Gevurtz* is overestimating the problem; the case law is very clear that one factor alone will not suffice. While it might not be clear exactly how much weight to give each factor, the template has significant advantages in that it affords greater guidance to the courts than the more vague and general approach of the English and South African courts while at the same time retaining flexibility. Although I have differentiated between the template approach and the instrumentality theory, application of the one does not exclude the

375 *See Harper*, 743 F. Supp. at 1085.
376 *See id.*
377 GEVURTZ, *supra* note 147, at 60–61.
378 *Id.* at 71.
379 *Id.* at 71–72.

other. The courts can combine the two factors in their analysis, as happened in *De Witt*.[380]

Thompson's empirical analysis demonstrates that, where certain factors are mentioned they may carry greater weight in the court's decision to pierce the corporate veil.[381] For example, where "instrumentality" was mentioned, it resulted in veil piercing in 97.33% of cases; when under-capitalisation was mentioned, it resulted in veil piercing in 73% of cases; where an overlap in business activities between corporations was noted, it resulted in veil piercing 81% of the time.[382]

In summary, the "template" approach considers a variety of factors, more than one of which must be present for the court to disregard the corporate form. In addition, there must be "an overall element of injustice or unfairness."[383] As each case must be treated on its own facts, the courts have avoided being too didactic in what weight should be given to each factor.

B. Agency, Instrumentality and Alter Ego

A number of U.S. cases approach the question of whether a corporation should be liable for the debts of its subsidiary on an agency, "instrumentality" or alter ego principle. The manner in which American courts have applied this principle to subsidiaries is not significantly different from the approach of the English court in *Adams v Cape Industries*.

One of the earlier American cases that enunciated the agency/instrumentality principle was *Pacific Can Co. v. Hewes*.[384] The Ninth Circuit enunciated the following principles: (i) a corporation "is an entity, distinct in itself[;]" (ii) however, where "resourcefulness of

380 *See generally DeWitt Truck Brokers, Inc. v. W. Ray Flemming* 540 F.2d 681, 685–687 (4th Cir. 1976).

381 *See* THOMPSON, *supra* note 5, at 1063–64.

382 *Id.*

383 *Harper v. Del. Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1085 (D.Del. 1990). *See generally DeWitt Truck Brothers, Inc. v. W. Ray Flemming Fruit Co.* 540 F.2d 681 (4th Cir. 1976).

384 *Pacific Can Co. v. Hewes* 95 F.2d 42 (9th Cir. 1938).

man caused a corporation to be used as a scapegoat for another[,]" the Courts "checked the evil" by piercing the corporate veil; (iii) the corporate veil will be disregarded where the corporation is "so organized and controlled" that it simply constitutes "an instrumentality or adjunct of another corporation[;]" (iv) dominion over the subsidiary "may be so complete" and "interference so obtrusive" that by ordinary laws of agency the parent, as principal, will be liable for the actions of its agent, the corporation; (v) where control is even worse than this, veil piecing can be based upon "honesty and justice."[385]

Accordingly, liability can be based on the application of conventional agency principles as well as upon an instrumentality principle that seeks to unravel a fraud. If the corporation is in fact the agent of the shareholder, liability can be imposed without proof of fraud.

In *Lowendahl v. Baltimore & Ohio Railroad*,[386] the court enunciated the instrumentality test as follows:

> The 'instrumentality' rule may be formulated as follows: Where a parent corporation at the time of the transaction complained of (1) exercises control over its subsidiary not in a manner not normal and usual with stockholders, but to such extent and in such manner, in disregard of the subsidiary's corporate paraphernalia, directors, and officers, that the subsidiary has become a mere instrumentality or department of the parent's own business and the parent, under the unreal form of the subsidiary, is the real actor in the transaction; or where the business and officers of the two corporations have become so inextricably confused that it is impossible or impracticable to identify the corporation that participated in the transaction attacked; and (2) where such control has been used by the parent to commit fraud, or violate other legal duty, or has been used to

[385] *Id.* at 45–46. This is similar to the Anglo-South African approach.

[386] *Lowendahl v. Balt. & Ohio R.R.*, 247 A.D 144 (N.Y. App. Div. 1936), *aff'd*, 6 N.E.2d 56 (N.Y. 1936).

> do an act tainted by dishonesty or unjust conduct violating plaintiff's rights (or under circumstances giving rise to an estoppel); and (except in estoppel cases) (3) where such fraud or wrong results in unjust loss or injury to plaintiff, the court, in disregard of the corporate entity of the subsidiary, will hold the parent liable. Even without the preceding restrictions and limitations, the parent corporation will be liable where the parent has expressly made a subsidiary its agent or has itself committed the tort in suit,[387] as, for example, in the railroad system cases relating to personal injuries where the employees committing the tort were held to be the immediate employees of the parent as well as of the subsidiary.[388]

Accordingly, the holding company can be held liable not only under the instrumentality theory (which is a fairly onerous test as laid out in the judgment), but also on the basis that the parent corporation has expressly made its subsidiary an agent. Insofar as a U.S. court may employ a pure agency theory, the analysis would be closer to that of the English courts in cases like *Smith Stone & Knight*. The three-pronged test enunciated in *Lowendahl* is theoretically more onerous than the test adopted by English and South African courts for determining whether the subsidiary is merely an agent for the shareholder because it requires proof of dishonesty, violation of a legal duty, or other unjust conduct, and that that behaviour proximately caused injury to the plaintiff.[389]

In *Hamilton v. Water Whole Intern. Corp.*,[390] the court considered whether one of the defendants was the "alter ego" of a corporation. Citing to *Wallace v. Tulsa Yellowcab Taxi Baggage Co.*, the court held that

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[387] This may explain why the courts will pierce the corporate veil less often in tort cases than in contract matters. If the shareholder is a party to the tort, then the shareholder can be liable on ordinary principles of tort law. If the shareholder is not a party to the tort, there is no reason to pierce the corporate veil. See *United States v. Bestfoods* 524 U.S. 51, at 61 (1998).

[388] *Lowendahl v. Balt. & Ohio R.R.*, 247 A.D 144, 156–57 (N.Y. App. Div. 1936).

[389] *See id.*

[390] *Hamilton v. Water Whole Intern. Corp.* 302 Fed. App'x 789, 793–94 (10th Cir. 2008).

under circumstances where "'the corporation is so organized and controlled and its affairs so conducted that it is merely an instrumentality or adjunct of another corporation' the two corporations will no longer be considered distinct legal entities."[391] In short, the court appeared to consider that the alter ego theory was just another term for instrumentality.

The court held that the following factors should be taken into account in making the determination:

> (1) whether the dominant corporation owns or subscribes to all the subservient corporations stock, (2) whether the dominant and subservient corporations have common directors and officers, (3) whether the dominant corporation provides financing to the subservient corporation, (4) whether the subservient corporation is grossly undercapitalised, (5) whether the dominant corporation pays the salaries, expenses or losses of the subservient corporation, (6) whether most of the subservient corporation's business is with the dominant corporation or the subservient corporation's assets were conveyed from the dominant corporation, (7) whether the dominant corporation refers to the subservient corporation as a division or department, (8) whether the subservient corporation's officers or directors follow the dominant corporation's directions, and (9) whether the corporations observed the legal formalities for keeping the entities separate.[392]

These cases reveal that there is significant overlap between the template approach and the instrumentality or alter ego doctrines. However, the template approach is concerned more specifically with misconduct in the administration of the corporation while the

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[391] *Id.* (quoting *Wallace v. Tulsa Yellowcab Taxi Baggage Co.*, 178 Okla. 15, 61 P.2d 645, 648 (1936)).

[392] *Hamilton v. Water Whole Intern. Corp.* 302 Fed. App'x 789, 793 (10th Cir. 2008) (quoting *Gilbert v. Sec. Fin. Corp.*, 152 P.3d 165, 175 (Okla. 2006). Compare this with the approach of the English court in Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 117 at 121.

instrumentality approach is more focused on the issue of dominance by one person or entity over another. The *indicia* utilised in *Hamilton* seeks to resolve the control issue.[393]

In *Japan Petroleum Company (Nigeria) Limited v. Ashland Oil*,[394] the court considered the agency or instrumentality theory in the context of an international corporate group. The plaintiff sought to hold the defendant, a Kentucky corporation, liable for the debts of two of its wholly owned subsidiaries engaged in oil exploration in Nigeria. In language that looks very similar (but is more succinct) than that of the English court in *Adams v. Cape Industries*, the court refused to pierce the corporate veil.[395] It held that the Nigerian subsidiaries were not under the "complete domination or control" of the American holding company.[396] The Nigerian companies were in every sense operating companies. Under Nigerian law, the subsidiaries could not have engaged in petroleum exploration and production activity unless they were Nigerian corporations conducting their own operations.[397]

The court enunciated the following principles: (i) it is not necessary to prove fraud or inequity in order to demonstrate that there is an agency relationship between a parent and subsidiary;[398] (ii) the central factual issue in determining whether an agency relationship exists is the issue of control—"whether the parent corporation dominates the activities of the subsidiary[;]"[399] (iii) the fact that one corporation controls the majority of voting shares in another; that the two companies have common officers and directors, and that the parent corporation finances the operations of the subsidiaries do not necessarily support a finding that the subsidiary is "a mere agent or instrumentality for the parent[;]"[400] (iv) in order to decide whether an agency relationship exists, the court looks to a "wide variety of

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393 *See Hamilton v. Water Whole Intern. Corp.* 302 Fed. App'x 789, 793–94 (10th Cir. 2008).

394 *Japan Petroleum Co. v. Ashland Oil, Inc.* 456 F. Supp. 831, 834 (D.Del. 1978).

395 *Id.* at 845–46.

396 *Id.* at 845.

397 *Id.* at 844–45.

398 *See id.* at 840;

399 *Id.* at 841.

400 *Id.*

factors," such as stock ownership, common officers and directors, financing, "responsibility for day-to-day operations, arrangements for payment of salaries and expenses and, [the] origin of [the] subsidiary's business and assets[;]"[401] (v) an important factor in determining whether the Nigerian company was not an agent of the US company was that the Nigerian company was an operating company and not merely a a shell corporation, which was responsible for mining exploration and efforts of production, employees' conduct and "many of the day-to-day operations in connection with these activities[;]"[402] (vi) "[a]rrangements by a parent and subsidiary for economy of expense and convenience of administration" did not necessarily establish an agency relationship.[403]

A further factor in the court's reasoning appears to have been that American corporations should be free to establish foreign subsidiaries with "common management programs which promote administrative convenience without destroying the immunity of the parent from liability for the obligations of its foreign subsidiaries. . . ."[404] This suggests that, as in *Adams v. Cape Industries*, the U.S. court was concerned with protecting local companies from liability for the debts of foreign subsidiaries.

In *Craig v. Lake Asbestos of Quebec Limited*, the court considered the liability of Charter Consolidated PLC under New Jersey law for the tort obligations of the very same Cape Industries that was the defendant in *Adams v. Cape Industries*.[405] Charter had a controlling shareholding in Cape Industries, which was itself a public listed company. The plaintiffs argued that Cape Industries had admittedly set

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401 *Id.*; *See generally Pauley Petroleum, Inc. v. Cont'l Oil Co.* 231 A.2d 450 (The plaintiff sued Continental Oil, a Delaware corporation, for an injunction restraining the Delaware company's Mexican subsidiary from filing certain lawsuits in Mexico. The court found that the Mexican subsidiary was an active corporation which held oil and development contracts with a Mexican government agency and was the actual operator under some of those contracts. Accordingly, the Mexican subsidiary could not be said to be the agent of the Delaware holding company).

401 *Japan Petroleum Co. v. Ashland Oil, Inc.* 456 F. Supp. 831, 846 (D.Del. 1978).

402 *Id.* at 845.

403 *Id.* at 846.

404 *Id.* at 846.

405 *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145, 146–47 (3rd Cir. 1988).

up a U.S. subsidiary to insulate itself from liability for asbestos claims and for that reason Charter (its holding company) should be liable for its debts.[406] The court rejected this argument.[407] This is perhaps not surprising as Cape Industries was itself a listed company. There is no case in the United States that has held the shareholders of a listed company liable for the company's debts.[408]

In reaching its decision, the court reaffirmed the principles enunciated in *Japan Petroleum*. The court reasoned that majority or even total control over stocks is insufficient to warrant piercing the corporate veil. The factors that should be taken into account in determining whether an agency or instrumentality relationship exists include "'gross undercapitalization . . . failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation . . . , siphoning of funds of the [subsidiary] by the dominant stockholder, non-functioning of other officers or directors, [and] absence of corporate records. . . .'"[409]

As in *DeWitt*, the *Craig* Court conflated both the template and instrumentality tests.[410] While this approach may not seem doctrinally pure and may leave the reader in confusion these cases again demonstrate how interrelated the template and instrumentality approaches are.

In summary, the instrumentality theory requires a high degree of control by the parent of the subsidiary. That control must be exercised by the parent to commit fraud, violate a legal duty, or perform other unjust conduct. In addition, and significantly, the unlawful or unjust conduct must be the cause of the Plaintiff's injury. In evaluating whether the subsidiary is a mere instrumentality of its

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406 *Id.*

407 *Id.* at 152.

408 *See* THOMPSON, *supra* note 5, at 1055.

409 *Id.* at 150 (citing *American Bell, Inc. v. Fed'n Tel. Workers*, 736 F.2d 879, 886 (3d Cir. 1984).

410 *See id.*; *DeWitt Truck Brokers, Inc. v. W Ray Fleming Fruit Co.*, 540 F.2d 681, 686–87 (4th Cir. 1976).

holding company, the Court may have regard to the various factors that have been listed above in the template approach.

V. CONCLUSION

The analysis of the case law set out above demonstrates that in each one of the subject jurisdictions, the general principles applicable to corporate veil piercing are reasonably predictable. However, application of the facts to the law in each case is not always consistent. Corporate veil piercing in every jurisdiction requires the court to do a balancing act in which it weighs society's interest in preserving separate corporate identity against the need to pierce or lift the veil where observance of corporate forms would produce an egregious result. Ultimately, outcomes are largely dependent upon the public policy of the forum at the time when the case comes before it. Pragmatic recognition of this reality explains why, despite similarities in the guiding principles in each jurisdiction, the outcome can be very different where the case is argued in England rather than in the state of California.

The review of the case law set out above demonstrates that the legal principles appertaining to piercing the corporate veil are the least liberal in England. Ironically, though, the factors that should be considered in evaluating whether to pierce the corporate veil have been more carefully defined in U.S. jurisdictions. Although South African courts have propounded a broader and more liberal approach than perhaps even the American jurisdictions, they tend to follow the more conservative English approach in practice. However, the recent enactment of a statutory remedy for piercing the corporate veil is likely to significantly expand the scope of the remedy in the future.

Enunciating general principles under American law is more difficult because of the greater frequency of corporate veil piercing litigation coupled with the fact that corporate law varies from state to state within the US. However, the general principles across the board seem to be fairly similar and reconcilable. Statistical variances from state to state may have more to do with differences in public morality than any significant legal principle.

Despite the variances in outcomes between England, South Africa and the U.S. jurisdictions, one can extract certain general principles from all the cases that are consistent in all three of the subject legal systems. The similar general principles in each jurisdiction include the notion that a corporation has an identity separate and distinct from its shareholders and, as a general principle, its shareholders are not liable for the debts of the corporation.[411] Additionally, the jurisdictions share the principle that despite the fact that the controlling shareholder is a corporation rather than an individual does not change the outcome.[412] Next, piercing the corporate veil is not the norm and should only take place in exceptional circumstances.[413] Further, piercing the corporate veil is a discretionary remedy. Accordingly, the courts have intentionally avoided defining the principles in a way that might impose a straitjacket on the courts.[414] Also, the courts in these jurisdictions will pierce the corporate veil when the company is a sham, a façade or a simulation to enable a shareholder to carry out an illegal objective, a fraud, or an impropriety.[415] Moreover, the courts may pierce the corporate veil to give effect to substance over form[416] and none of the subject jurisdictions will pierce the corporate veil simply because it is in the

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411 *See generally* Salomon v. Salomon Co. [1897] AC 22 (HL); *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530, 550; *United States v. Bestfoods* 524 U.S. 51, 61 (1998).

412 *See generally Bestfoods*, 524 U.S. at 60–61; *Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 841 (D.Del. 1978); Adams v. Cape Indus. [1991] All ER 929 at 1026 (Eng.); *Wambach v. Maizecor Indus. (Edms) Bpk* 1993 (2) SA 669 (AD) (S. Afr.).

413 *See* Salomon v. Salomon Co. [1897] AC 22 (HL) at 29–30; *Shipping Corp. of India Ltd. v. Evdomon Corp.* 1994 (1) SA 550 (A) at 566 C-F; *Bestfoods*, 524 U.S. at 61–62.

414 *See generally* Adams v. Cape Industries [1991] All ER 929 at 1025 (Eng.); *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995(4) SA 790 (AD) at 803 B-C (S. Afr.); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.* 540 F.2d 681.

415 *See* Ben Hashem v. Al Shayif [2009] 1 FLR 115 at 155–56 (Eng.); ; *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 803 C-G (S. Afr.); *United States v. Pisani* 646 F.2d 83, 87–89 (1981).

416 *See* Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 at 315; *Dadoo Ltd. v. Krugersdorp Mun. Council* 1920 AD 530, 547; *Pisani* 646 F.2d at 87–89 (1981); *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.* 540 F.2d 681, 685–88 (4th Cir. 1976).

interests of justice to do so. Other factors must be present.[417] Another common principle is that fraud is not a necessary element for veil piercing.[418] Lastly, where a subsidiary company conducts no independent business of its own and is controlled entirely by its shareholder, the court may pierce the corporate veil on an agency, instrumentality or alter ego theory. However, piercing the corporate veil on this basis requires an unusual level of control by the shareholder, such that the corporation no longer has any mind or will of its own.[419]

417 *See* Ben Hashem v. Al Shayif [2009] 1 FLR 115 at 154 para. 160 (Eng.); *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.*, 1995 (4) SA 790 (AD) at 803 A (S. Afr.); *DeWitt Truck Brokers*, 540 F.2d at 685–88.

418 *See generally* Ben Hashem v. Al Shayif [2009] 1 FLR 115 (Eng.); *Cape Pacific Ltd. v. Lubner Controlling Investments (Pty) Ltd.* 1995 (4) SA 790 (AD) at 803 C-E (S. Afr.); *DeWitt Truck Brokers*, 540 F.2d at 684.

419 *See generally* Adams v. Cape Industries [1991] All ER 929 at 1025 (Eng.); *Wambach v. Maizecor Indus. (Edms) Bpk* 1993 (2) SA 669 (A) at 675 D-E (S. Afr.); *Lowendahl v. Balt. & Ohio R.R.*, 247 A.D 144, 154–57 (N.Y. App. Div. 1936), *aff'd*, 6 N.E.2d 56 (N.Y. 1936); *Hamilton v. Water Whole Intern Corp.*, 302 Fed. App'x. 789 (10th Cir. 2008).