THE NEW ERA OF CORPORATE VEIL-PIERCING

Concealed Cracks and Evaded Issues?

The purpose of this article is to conduct a critical re-assessment of the framework for corporate veil-piercing articulated by Lord Sumption in *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 ("*Petrodel*") in the light of recent English and Singapore case law and, in particular, to interrogate the notion of veil-piercing as a remedy of last resort, as well as the concealment and evasion principles which demarcate the boundary lines of the veil-piercing doctrine. Moreover, three other important issues raised in the aftermath of *Petrodel* are discussed with a view towards clarifying the scope of veil-piercing: the single economic entity doctrine, statutory veil-piercing and the doctrine of corporate attribution. It is hoped that this analysis will enable the veil-piercing doctrine to re-emerge with greater clarity, consistency and robustness in the limited situations where it is necessitated to tackle abuses of the corporate form.

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I. Introduction

1 It has been more than two years since the Supreme Court decision in *Prest v Petrodel Resources Ltd*[1] ("*Petrodel*") recast the doctrine of corporate veil-piercing. In its immediate aftermath, the decision invited much critical commentary on its various aspects, in particular Lord Sumption's leading restatement which relegates veil-piercing to a remedy of last resort and distinguishes between the evasion and concealment principles, the former which constitutes true veil-piercing but not the latter.[2]

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1 [2013] 3 WLR 1.

2 Nicholas Grier, "Piercing the Corporate Veil: *Prest v Petrodel Resources Ltd*" (2014) 18(2) *Edinburgh Law Review* 275; Leonara Onaran, "The Trust behind the Veil: *Prest v Petrodel*" (2013) 5 *Private Client Business* 273; Rian Matthews, "Clarification of the Doctrine of Piercing the Corporate Veil" (2013) 28 JIBLR 516; Brenda Hannigan, "Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company' (2013) 50 *Irish Jurist* 11; Ernest Lim,

(*cont'd on the next page*)

2 Since then, however, there has been little analysis of the English and Singapore case law considering and applying *Petrodel*. This article seeks to fill this gap in the literature. It conducts a critical re-assessment of the framework for corporate veil-piercing in the light of recent case law, both with a view to examining whether these cases have tracked *Petrodel* closely, as well as to see if their application of *Petrodel*'s principles have demonstrated any latent cracks in the original framework. Furthermore, in demarcating the external boundaries of the veil-piercing doctrine, three related issues touched upon more peripherally in *Petrodel*, and which have invited much recent litigation, are discussed: the single economic entity doctrine, statutory veil-piercing and the doctrine of corporate attribution.

3 This article proceeds as follows. Part II[3] reviews Lord Sumption's test for veil-piercing and the views of the other judges in *Petrodel* in this regard. Part III[4] examines the commentary following *Petrodel* with a view to identifying some of the fracture points in the veil-piercing framework identified early on by commentators. Part IV[5] examines the "last resort", "concealment" and "evasion" principles in light of recent decisions. Importantly, it is found that the framework has not been rigorously applied in some cases; moreover, it may not be sufficiently robust to accommodate the various ways in which corporate controllers might misuse the corporate form. It is argued that this may warrant an extension of the veil-piercing doctrine in limited circumstances. Part V[6] looks beyond the immediate *Petrodel* framework to examine its interaction with the single economic entity doctrine, statutory veil-piercing and corporate attribution. Part VI[7] concludes.

II. The impact of *Petrodel*

A. Lord Sumption's test for veil-piercing

4 The facts of *Petrodel* are well known. For the purposes of this article, it will be recalled that the case concerned a dispute over the division of matrimonial assets where the wife sought a transfer of

"*Salomon* Reigns" (2013) 129 LQR 480; Michael Ashe, "The Veil Unlifted" (2013) 34 Co Law 295; Christopher Hare, "Family Division, 0; Chancery Division, 1: Piercing the Corporate Veil in the Supreme Court (Again)" (2013) 72 Camb LJ 511; Cyril Kinsky, "Piercing the Corporate Veil" (2014) 1 *Private Client Business* 44; Peter Bailey, "Lifting the Veil Becomes a Remedy of Last Resort after *Petrodel v Prest* in Supreme Court" (2013) 336 *Company Law Newsletter* 1.

3 See paras 4–12 below.

4 See paras 13–15 below.

5 See paras 16–40 below.

6 See paras 41–49 below.

7 See paras 50–51 below.

various properties held by offshore companies of which the husband was the sole owner. The Supreme Court upheld the Court of Appeal's decision not to lift the corporate veil and treat the company's property as the husband's property for the purposes of the statutory provisions governing the distribution of assets on divorce.[8] On the issue of veil-piercing, Lord Sumption delivered the leading judgment in which he reformulated the test for veil-piercing as follows:[9]

> [T]here is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

5 Lord Sumption's formulation was important for a number of reasons. Firstly, it relegated veil-piercing to a remedy of last resort, not to be invoked unless other orthodox private law remedies (such as those in tort, agency or accessorial liability) were unavailable. As Lord Sumption noted:[10]

> … the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil … if it is not necessary to pierce the corporate veil, it is not appropriate to do so.

6 Secondly, in rationalising the prior case law on veil-piercing which had frequently invoked ambiguous references to corporate "shams" or "façades",[11] Lord Sumption made the distinction between what he saw as "two distinct principles" of *concealment* and *evasion*.[12] While the latter did involve true veil-piercing, the former did not. Under the concealment principle, where a company is interposed so as to conceal the identity of the real actors, the court may look behind the veil to discover the facts which the corporate structure is concealing without actually disregarding the corporate structure altogether. In contrast, under the evasion principle, the court indeed disregards the veil if a company is interposed so that its separate legal personality will defeat or frustrate the enforcement of a legal right against the controller which exists independently of the company's involvement.[13] Given that both situations involve the interposition of companies, and that many cases

8 Matrimonial Causes Act 1973 (c 18) (UK) s 24(1).
9 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [35].
10 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [35].
11 See *Woolfson v Strathclyde Regional Council* [1978] SC (HL) 90 at 96.
12 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28].
13 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [35].

fall into both the concealment and evasion principles, the critical distinction between the concepts is best illustrated by the cases referred to by Lord Sumption.

7 The first set of cases involve situations which engage both the concealment and evasion principles. In the well-known decisions of *Gilford Motor Co Ltd v Horne*[14] ("*Gilford*") and *Jones v Lipman*[15] ("*Jones*"), corporate controllers had interposed the corporate vehicles in question for illegitimate purposes. In the former, Horne had formed the company to enable business to be carried on under his control but without incurring liability for breaching a non-competition covenant in his previous contract of employment. In the latter, Lipman had bought a shelf company and conveyed to it a piece of property which he had already sold to the plaintiffs in order to make it impossible for the plaintiffs to obtain specific performance.

8 According to Lord Sumption, as against the actual corporate controllers (Horne in *Gilford* and Lipman in *Jones*), the respective remedies of injunctive relief and specific performance were granted on the basis of the *concealment* principle as they simply involved identifying the persons in control of the corporate vehicles.[16] In contrast, as against the companies interposed in each case, the similar remedies granted by the courts were imposed on the basis of the *evasion* principle – *viz*, Horne's "evasive motive"[17] for forming the company to obtain the customers of the plaintiff, and Lipman's attempt to evade his obligation of specific performance by conveying the property to the shelf company.[18] The corporate vehicles were used in both these cases to defeat or frustrate the enforcement of a legal right against the controllers, which existed independently of the interposed company's involvement: in *Gilford*, the plaintiff's right to a non-competition obligation; and in *Jones*, the plaintiff's right to the conveyance of property.

9 To further clarify the evasion/concealment distinction, Lord Sumption referred to a second set of cases where only the concealment principle but not the evasion principle was engaged. In *Gencor ACP Ltd v Dalby*[19] ("*Gencor*"), the plaintiff's claim against its former director Dalby concerned a secret profit which Dalby had procured to be paid to a British Virgin Islands company under his control ("Burnstead"). Though the court in *Gencor* had used the

14 [1933] Ch 935.
15 [1962] 1 WLR 832.
16 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29]–[30].
17 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29].
18 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [30].
19 [2000] 2 BCLC 794.

language of veil-piercing when ordering an account against both Dalby and Burnstead, Lord Sumption rationalised this decision "in reality" as applying the "concealment principle",[20] in that Burnstead was Dalby's nominee for the purpose of receiving and holding the secret profit, which led to the conclusion that Dalby was accountable for the money received by Burnstead. Burnstead's liability rested on the fact that it concealed and hence was identified in law with Dalby himself. The court would simply not be deterred by the legal personality of Burnstead from finding the true facts as to its relationship with Dalby.[21]

10 Similarly, in *Trustor AB v Smallbone (No 2)*[22] ("*Trustor*") Smallbone as the former managing director of Trustor AB ("Trustor") had improperly procured unauthorised payments to be paid to a company called Introcom Ltd ("Intracom"), which was owned and controlled by a Liechtenstein trust of which Smallbone was a beneficiary. Lord Sumption emphasised that the basis for judgment against Smallbone himself was the concealment principle: it had been already found at an earlier stage of the litigation that Intracom was simply a vehicle which Smallbone used for receiving money from Trustor, and that the company was used to conceal that fact.[23] As such, no veil-piercing was required as the company was not interposed to evade an independent liability in a way akin to *Gilford* and *Jones*. The court was simply applying the principle that receipt by a company would count as receipt by the shareholder if the company received it as his agent or nominee.[24]

B. Qualifications on the test?

11 The reformulation of the veil-piercing test, resting on a fine distinction between concealment and evasion, was certainly not endorsed without qualification by other members of the Supreme Court. The doubts appeared to cut both ways – to the effect that the test appeared too narrow to deal with corporate abuses; or alternatively, that it maintained a breadth of discretion which translated into unnecessary uncertainty. In the former camp, Baroness Hale cast doubt over the possibility of neatly classifying all the cases in which courts disregarded the separate legal personality of a company into the typologies of concealment and evasion, suggesting a much broader underlying principle that individuals who operate limited companies should not be allowed to "take unconscionable advantage of the people with whom

20 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [31].
21 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [31].
22 [2001] 1 WLR 1177.
23 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [32].
24 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [32].

they do business".[25] Lords Mance and Clarke appeared to have similar doubts. While suggesting that situations of veil-piercing outside of evasion will be rare and difficult to establish, they agreed that it would be "dangerous to seek to foreclose all possible future situations" which may arise.[26]

12 In the latter camp, Lord Walker did not appear to endorse Lord Sumption's limited notion of veil-piercing as "evasion". He considered that veil-piercing was not a coherent principle or rule of law in the first place, but simply a label describing occasions where a rule of law produces apparent exceptions to the separate legal personality principle, whether that rule arises from statute or common law.[27] Hence, there was little space for any other independent residual category outside of such situations. Lord Neuberger, on the other hand, did expressly affirm Lord Sumption's formulation of the veil-piercing test.[28] However, his own sentiments appeared to be more aligned with Lord Walker's than with Baroness Hale's. Much of his judgment was devoted to explaining his initially strong attraction to the argument that the veil-piercing doctrine should be given a quietus. *Gilford* and *Jones* were explained away as not involving veil-piercing (as various commentators have done previously):[29] the injunction against the company in *Gilford* was justified on the basis that the company was simply Horne's agent for the purpose of carrying on business;[30] while in *Jones*, the order for specific performance against Lipman would have extended to requiring Lipman to do everything reasonably within his power to ensure that the property was conveyed, including compelling the company to convey the property to the plaintiffs.[31] Both comparative observations and academic opinion critical of the coherence of veil-piercing jurisprudence were canvassed, including Easterbrook and Fischel's famous statement that veil-piercing is akin to lightning – "rare, severe and unprincipled".[32] Ultimately, however, Lord Neuberger was persuaded to retain veil-piercing in the form suggested by Lord Sumption as a "potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available".[33]

25 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [91].
26 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [100], [102] and [103].
27 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [106].
28 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [81].
29 See Ernest Lim, "*Salomon* Reigns" (2013) 129 LQR 480 at 483–484.
30 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [71]–[72].
31 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [73].
32 Frank H Easterbook & Daniel R Fischel, "Limited Liability and the Corporation" (1985) 52 U Chi L Rev 89; *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [74]–[77].
33 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [80].

III. Commentary following *Petrodel*

13 The arrival of *Petrodel* invited much debate. Some, having recognised the new reality of veil-piercing as a remedy of last resort, have suggested various causes of action premised on direct legal relationships between corporate controllers and plaintiffs, whether in contract, tort, unjust enrichment, agency or accessorial liability.[34] Others have appeared more skeptical that orthodox private law remedies would prove effective in all circumstances. It is well known that the solution adopted in *Petrodel* (as an alternative to the unsuccessful veil-piercing argument) was the resulting trust device, which enabled the court to find that the husband maintained beneficial ownership of the properties in question, which were legally held by the companies which he owned and controlled.[35] It has been argued that this may not suffice as a workable solution in all "big money" divorce cases involving complex corporate structures, in part because the resulting trust analysis would certainly be a very fact-specific inquiry dependent on the evidence, and furthermore because the family home may only be a "small drop in a large ocean of assets in 'big money' divorce cases".[36]

14 Apart from the issue of relegating the veil-piercing remedy, much of the commentary, both complimentary and critical, has focused on Lord Sumption's test for veil-piercing and the distinction between concealment and evasion. Is it sufficiently certain and workable? It has been said that this reformulated test "will increase certainty for all concerned using the corporate form".[37] On the other hand, some criticism has been directed at the clarity and coherence of the test itself. To paraphrase Rose, there appears to be a mixture of precision and imprecision latent in Lord Sumption's formulation of the veil-piercing test, which may be perceived on one hand as a definitive and comprehensive restatement, and on the other, a prescription for future development on some more basic notion of corporate abuse.[38] Hannigan has argued that the line between evasion and concealment "is difficult to apply consistently and objectively", given that "[c]oncealment is inherent in many evasion cases – indeed, evasion is commonly achieved through concealment".[39] Taking *Gencor* and *Trustor* (the supposed paradigm examples of the "concealment" principle in application), it is

34 William Day, "Skirting around the Issue: The Corporate Veil after *Prest v Petrodel*" [2014] LMCLQ 269.

35 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [52].

36 Rob George, "The Veil of Incorporation and Post-divorce Financial Remedies" (2014) 130 LQR 373 at 377.

37 Hans Tjio, "Lifting the Veil on Piercing the Veil" [2014] LMCLQ 19 at 23.

38 Francis D Rose, "Raising the Corporate Sail" [2013] LMCLQ 566 at 583.

39 Brenda Hannigan, "Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" (2013) 50 *Irish Jurist* 11 at 34–35.

pointed out that in both these cases the interposed company was "intended to frustrate enforcement measures against the interposed company's controllers by concealing the whereabouts of the secret profits/misappropriated funds".[40] Under Lord Sumption's statement of the evasion principle, the veil could be said to have been pierced to deprive the relevant controllers of the illegitimate advantages they would otherwise have obtained by interposing the companies in question. Any blurring of the lines between the concealment and evasion principles would certainly undermine the workability of Lord Sumption's test.

15 Even assuming a degree of certainty and workability, commentators differ over whether the test is, as a matter of principle, correctly formulated. The commentary in this regard tracks the divide between the opinions expressed Lords Neuberger and Walker on the one hand, and Baroness Hale and Lords Mance and Clarke on the other. Hence, it has been observed that there remains no clear justification for the independent existence and utility of the veil-piercing doctrine over and above conventional legal principles or vague notions of undoing wrongdoing or defeating injustice.[41] In similar vein, it has been suggested that the Supreme Court should have taken the opportunity to consign the veil-piercing doctrine to history in the interests of commercial certainty.[42] Yet, on the other hand, a substantial chorus of commentary has emerged echoing and developing Baroness Hale's line of thought that the *Petrodel* formulation is too narrow. For example, Tan has argued that there are necessarily implicit limits on the proper use of the corporate form, even if not expressly articulated in the legislative scheme relating to companies. The misuse or abuse of the corporate vehicle, for example, to perpetrate fraudulent schemes, would be outside the purposes of the legislative scheme, such that the benefits of corporate personality would not be applicable to this extent.[43] As Lee has pointed out, such corporate abuse may not necessarily fit within the restrictive definition of "evasion" put forth by Lord Sumption, which has a "singular focus on the avoidance of a *pre-existing* legal obligation owed by a company's *controller*" [emphasis in original][44] – hence excluding fraudulent schemes perpetrated through companies on the basis that it would not be an abuse to cause a legal liability to be incurred by the company in the first place.

40 Brenda Hannigan, "Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" (2013) 50 *Irish Jurist* 11 at 33.
41 Ernest Lim, "*Salomon* Reigns" (2013) 129 LQR 480 at 484.
42 Rian Matthews, "Clarification of the Doctrine of Piercing the Corporate Veil" (2013) 28 JIBLR 516 at 519.
43 Cheng Han Tan, "Veil-piercing – A Fresh Start" [2015] JBL 20 at 27–30.
44 Pey Woan Lee, "The Enigma of Veil-piercing" (2015) 26 ICCLR 28 at 30–31.

IV. The recent jurisprudence examined: Fractures in the veil-piercing framework?

A. Alternative solutions and the "last resort" principle

16 It will be recalled that Lord Sumption's reformulated test for veil-piercing has prioritised the use of alternative direct causes of action against corporate controllers. One particular context which has invited ongoing litigation in this regard is disputes over family property held through corporate vehicles – the very issue canvassed on the facts of *Petrodel*. Recent cases have tracked *Petrodel* fairly closely, though at times the conclusions reached by courts demonstrate both clarifications and qualifications in this regard.

17 In *M v M*,[45] the dispute between the applicant wife and respondent husband concerned a number of English properties registered in the names of companies (the third to sixth respondents), which were all effectively controlled by the husband. The wife sought, *inter alia*, an order that the husband transfer to her these properties under Pt III of the Matrimonial and Family Proceedings Act 1984.[46] The court's discussion of the authorities clarified an inconsistency between a previous line of cases apparently contrary to *Petrodel*, with respect to presumptions of resulting trusts in situations where a private company is the sole legal owner of the property and the occupier of the house is the sole legal and beneficial owner of the said company's shares. The court considered the argument that in such situations there would be no room for the application of traditional resulting trust presumptions (founded on the well-established notions of voluntary payment for the purchase of property vested in another party, as stated in *Westdeutsche Landesbank Girozentrale v Islington LBC*).[47] This argument was premised on a number of observations in previous cases, including *Stockholm Finance v Garden Holdings Inc*[48] where Robert Walker J had suggested that in such a context:[49]

> [T]here is no basic economic difference between the company being sole beneficial owner of the house, and being a nominee for the occupying shareholder … at a basic level a wholly owned company cannot be seen by its shareholder either as a potential rival to him in claims of ownership of property, or as a potential recipient of bounty from him. What goes out of one economic pocket comes into the

45 [2013] EWHC 2534; [2014] 1 FLR 439.
46 c 42 (UK).
47 [1996] AC 669 at 708A, *per* Lord Browne-Wilkinson.
48 Unreported (26 October 1995). See *M v M* [2013] EWHC 2534; [2014] 1 FLR 439 at [178].
49 *M v M* [2013] EWHC 2534; [2014] 1 FLR 439 at [178].

> other. In these circumstances I can see very little room for the application of the traditional presumptions as between Princess Madawi and Garden [that is, the company she owned].

Counsel for the fourth to sixth respondents in *M v M* also referred to *Nightingale Mayfair Ltd v Mehta*,[50] where the court stated that:[51]

> … the proper and natural inference from the decision by an individual to purchase a property in the name of a company and provide it with the funds to do so, especially where the company is controlled by the individual, is that the company should be the beneficial as well as the legal owner of the money and then the property.

18 The court in *M v M* expressly disavowed this line of authority, stating that the court "should not over state the difficulty in rebutting the presumption in circumstances where the company is controlled by the individual", and further noting that the observations of these earlier cases have to be viewed against the backdrop of Lord Sumption's observation in *Petrodel* that:[52]

> [I]n the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company. In many, perhaps most cases, the occupation of the company's property as the matrimonial home of its controller will not be easily justified in the company's interest, especially if it is gratuitous. The intention will normally be that the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with company's beneficial ownership.

In *M v M*, the court found that the husband placed the properties in the names of the companies not as part of a tax mitigation scheme but in fact to disguise his beneficial interest and to defeat the wife's claims as to the properties.[53] Coupled with the fact that the whole of the purchase price was provided by the husband, the properties did not appear on the company's accounts as its assets, and given that adverse inferences were drawn from the failure of the companies' directors to make proper disclosure, attend court or give evidence, the court found there was no evidence to rebut the presumption that the husband retained the beneficial interest in the properties at all times.[54]

19 The court also referred to Lord Sumption's observations on concealment and evasion in the context of the distribution of assets

50 [2000] WTLR 901.
51 *Nightingale Mayfair Ltd v Mehta* [2000] WTLR 901 at 925C.
52 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [52].
53 *M v M* [2013] EWHC 2534; [2014] 1 FLR 439 at [204]–[205].
54 *M v M* [2013] EWHC 2534; [2014] 1 FLR 439 at [248].

upon the dissolution of a marriage.[55] In contrast to the situation in *Petrodel* where the husband was found to be neither concealing nor evading any legal obligation owed to the wife as his purpose for setting up the corporate structures was found to be wealth protection and tax avoidance,[56] the court in *M v M* found that:[57]

> … this husband set up and used corporate structures in order to conceal and evade his obligation to his wife and frustrate the court from carrying out its statutory duty relating to the distribution of assets upon the breakdown of a marriage.

However, the court ultimately expressed no concluded view on this line of argument given that the wife's case relied on the resulting trust doctrine. *M v M* thus highlights the possibility that in situations where property-holding companies are indeed set up by the husband with a view to placing them beyond his wife's reach rather than primarily for tax reasons (hence falling with the conceptual boundaries of "evasion"), the veil-piercing remedy may yet be available as an alternative to the resulting trust solution; perhaps contrary to the assumption post-*Petrodel* that such family property disputes concerning companies may only be dealt exclusively with through the trust mechanism.

20 This possibility has also been alluded to in the Singapore context. In the recent High Court decision of *TDS v TDT*,[58] which concerned the division of matrimonial assets pursuant to s 112(1) of the Women's Charter,[59] the court in identifying the available assets for division considered one "Admiralty Street property" which was registered in the name of a company, DPL, of which the husband was the sole shareholder. This property had previously been purchased by BSPL, another company of which the husband was the majority shareholder, but later transferred to DPL, allegedly for $800,000. However, as there was no evidence of this payment and no explanation by the husband in this regard, the court found that the property ought to be treated as an asset of BSPL.[60] The court also considered the wife's argument that the husband had beneficial ownership of the property on the basis that the corporate veil of DPL could be pierced. The court was not persuaded on the evidence to lift the corporate veil but did endorse Lord Sumption's observations, noting that *Petrodel* "suggests that the corporate veil can be pierced where a company is interposed for the purpose of evading an existing legal obligation or liability" and that the "test is that of evasion,

55 *M v M* [2013] EWHC 2534; [2014] 1 FLR 439 at [169].
56 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [36].
57 *M v M* [2013] EWHC 2534; [2014] 1 FLR 439 at [169].
58 [2015] SGHCF 7.
59 Cap 50, 2006 Rev Ed.
60 *TDS v TDT* [2015] SGHCF 7 at [22]–[23].

not concealment".[61] In this regard, the wife had to demonstrate that the husband "had transferred the property to DPL in order to deprive the Wife of her rightful share in the property",[62] re-affirming the potential of veil-piercing as an alternative rather than a "last resort" remedy in the appropriate case.

21 *MA v SK*[63] is another recent case which utilises *Petrodel*'s resulting trust solution. The wife's claim related to ownership of various properties, in particular issue being a London property held through S Investments, a company controlled by the husband. Again, the court found that the husband was the beneficial owner of the properties with S Investments as his nominee, given that (a) the husband had provided the entire purchase price; (b) the earlier accounts of the company had indicated that it had in fact no assets; (c) the company operated bearer shares (which the court took as an indication that the husband was "not really concerned about the corporate position"); and (d) there was an express acknowledgement in relation to other similarly held French properties that the husband was in fact the only beneficial owner.[64] The court thus ordered a transfer of the property to the wife based on the resulting trust finding, as well as a transfer of the shareholding in S Investments on a "belt and braces approach".[65] While it might be argued that the latter solution is sufficient on the basis that it "respects the separate corporate personality and avoids unduly prejudicing the company's creditors by judicially removing corporate assets",[66] the result in *MA v SK* may suggest that courts will not only do the minimum necessary to protect spouses' interests in matrimonial assets, but are willing to go further with a range of private law solutions so long as they fall short of actually piercing the veil in Lord Sumption's limited sense of the doctrine.

22 In contrast to the above, *Smith v Bottomley*[67] ("*Smith*") shows that the trust solution does not always work in every circumstance. *Smith* concerned a slightly different context, in that the dispute was between an unmarried couple over an interest in a converted barn owned by a company controlled by B. S's case was based on an equitable cause of action in proprietary estoppel or constructive trust, given certain reassurances allegedly given by B to S in relation to the ownership barn. For the purposes of this article, it suffices to note that

61 *TDS v TDT* [2015] SGHCF 7 at [23].
62 *TDS v TDT* [2015] SGHCF 7 at [23].
63 [2015] EWHC 887.
64 *MA v SK* [2015] EWHC 887 at [79].
65 *MA v SK* [2015] EWHC 887 at [116].
66 Christopher Hare, "Family Division, 0; Chancery Division, 1: Piercing the Corporate Veil in the Supreme Court (Again)" (2013) 72 Camb LJ 511 at 514.
67 [2013] EWCA Civ 953.

the court held that there was no equitable claim against the company as a distinct legal person, since it in no way shared responsibility with B for the alleged promises he made to her.[68] There was also no scope for veil-piercing so as to identify B with the company, nor any inference that the company held the barn as trustee for B. The court contrasted the situation with that of *Petrodel*, holding that:[69]

> … the Company in the present case had paid a substantial sum of its own money to acquire the Barn and the family did not occupy it gratuitously as the family home (other than making use of it for minimal periods of time when visiting England, when it was standing vacant and not being used commercially for short term holiday lettings) … it is clear that if a sale [of the barn] had been achieved the proceeds would have gone to the Company beneficially rather than being held for the benefit of [B].

The fact that the funds for the barn did not come directly from the husband but from the sale of the company's earlier proprietary assets,[70] and the lack of sufficient occupation as the couple's home, was fatal to S's claim. Hence, while the post-*Petrodel* family-type dispute cases concerning properties owned through companies do generally track *Petrodel*'s preference for finding appropriate private law solutions (primarily, resulting or perhaps constructive trusts), there may be limits to this solution where the elements of the resulting trust doctrine are not fully made out.[71]

B. Evasion and concealment

23 How have courts responded to the newly minted evasion and concealment principles? Two lines of cases can be identified in this regard. The first set of cases concerns situations where courts have failed to properly apply the *Petrodel* framework, such that they are open to critique on this basis. The second line of cases is perhaps even more interesting, as the cases concern situations where *Petrodel* appears to have be faithfully applied, but in the process reveal cracks in Lord Sumption's original conceptual structure.

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68 *Smith v Bottomley* [2013] EWCA Civ 953 at [57].

69 *Smith v Bottomley* [2013] EWCA Civ 953 at [58].

70 *Smith v Bottomley* [2013] EWCA Civ 953 at [57].

71 For completeness, one may also note the recent Privy Council decision of *Eutetra Bromfield v Vincent Bromfield (Jamaica)* [2015] UKPC 19 at [9], where Lord Wilson's judgment referred to Lord Sumption's observations in *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1. No veil-piercing issue arose on the facts, as the parties in the matrimonial dispute both agreed that one of the properties originally in question was company property and not owned by the shareholders, as the Jamaican Court of Appeal had wrongly concluded.

24 *Otkritie International Investment Management Ltd v Urumov*[72] ("*Otkritie*") falls within the first line of cases. It involved various allegations of frauds involving approximately US$175m, where O (members of a Russian banking group) claimed against the defendants on the basis of fraudulent misrepresentations relating to a large signing-on fee paid to the first defendant, as well as misrepresentations relating to certain Argentinean warrants that O had been fraudulently induced to purchase for more than their worth. For the purposes of this article, one of the issues concerned a sum of US$120m paid to a Panamanian company set up by the defendants to receive the proceeds of the fraud. The court held that the defendants were, *inter alia*, liable for knowing receipt in relation to that sum by way of damages, equitable compensation, and/or an account. However, the court also noted, citing both *Trustor* and *Petrodel* in this regard, that it was:[73]

> … entitled to 'pierce the corporate veil' in these circumstances on the basis that these companies were plainly used by Mr Urumov as a device or façade to conceal the true facts thereby avoiding or concealing his personal liability.

It is evident that the language used here conflated the notion of veil-piercing by evasion and separate concept of concealment. A strict adherence to Lord Sumption's definitional rigour would have compelled the court to articulate clearly whether the circumstances fell within the *Trustor*-type context of concealment, or the *Jones/Gilford*-type situation which may engage both the evasion and the concealment principles. In so far as *Otkritie* was a "receipt"-type case (that is, where a corporate vehicle is used as an agent or nominee to receive funds siphoned off by its controller from other sources), it would arguably be closer to *Trustor* rather than *Jones/Gilford*, since the company was not interposed to evade any independent liability on the controller such as a restraint of trade clause or an obligation of specific performance.

25 Another case which could have benefited from a more rigorous use of Lord Sumption's framework is the recent Court of Appeal decision of *Swynson Ltd v Lowick Rose LLP*[74] ("*Swynson*"). The issue of veil-piercing here arose in a more unusual manner. S had claimed against an accountancy firm for giving negligent advice which S relied on to make loans to E. Subsequently, E went into financial difficulties and was unable to repay the loan. H, the owner of S, later undertook a refinancing exercise for tax reasons and made funds available to E which enabled it to repay the majority of the loans to S. The main issue was

72 [2014] EWHC 191.

73 *Otkritie International Investment Management Ltd v Urumov* [2014] EWHC 191 at [371].

74 [2015] EWCA Civ 629.

whether the repayment was a collateral matter which went to reducing the damages recoverable from the negligent accountants under the *res inter alios acta* principle that in determining damages, one need not take into account a transaction that gives rise to avoided loss, which itself arises through circumstances collateral to the breach of contract.[75] The majority of the Court of Appeal agreed with the trial judge that the refinancing by H was indeed a collateral matter which did not arise in the ordinary course of business, and hence should not be taken into account to reduce the damages payable by the accountants.[76] Davis LJ dissented on the issue of collateral loss. One key point of disagreement with the majority arose from his opinion that one would effectively be piercing the corporate veil by treating the refinancing as ultimately a payment from H to S. He was of the view that:[77]

> … [o]ne cannot simply disregard the actual form which the transactions took, with a view to achieving what perhaps may appear (to some) to be a 'just' result. In fact, as I see it here, the form *is* the substance. The commercial form which the 2008 arrangements took … was that Mr Hunt … made the loan to EMSL. EMSL then … used most of that money to discharge its obligations to repay Swynson … One cannot ignore the corporate structures involved … [emphasis in original]

On the other hand, both Longmore and Sales LJJ were persuaded that the court had to focus on the "substance of the matter, as against the technical form which may have been adopted",[78] and that taking Davis LJ's view would allow a "triumph of form over substance",[79] since for tax reasons H had channelled the funds through E to S, with the similar object and effect as if H had provided funds directly to S.[80] If so, it would be clear that such payment could not benefit the negligent adviser. H's tax reasons for structuring the financing in such a manner could not affect the "substantive position or the just result" *vis-à-vis* S's claim against the accountancy firm.[81]

26 It is submitted that the reasoning in *Swynson* would have benefited from closer attention to Lord Sumption's restatement. Davis LJ's objection that the majority result promulgated a form of corporate veil-piercing can be addressed by recognising that there was no finding of evasion; H was certainly not evading any sort of legal liability, and E was by no means interposed for any such purpose. On

75 *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629 at [10] and [53].
76 *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629 at [17]–[19].
77 *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629 at [36].
78 *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629 at [54].
79 *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629 at [16].
80 *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629 at [54].
81 *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629 at [54].

the other hand, the majority need not have simply resorted to general arguments on legal form and substance without engaging Lord Sumption's framework. In a sense, the majority was applying the concealment principle to identify the real actors standing behind the corporate structures in the relevant transaction, assuming their identity was legally relevant.[82] As Lord Sumption repeatedly stressed in *Petrodel*, this does not involve veil-piercing. While concealment often involves identifying the relationship between corporate vehicles and their owners or controllers, Lord Sumption's statement of the principle is capacious enough to encompass situations such as *Swynson* where the law simply needs to identify the true source of funds (H) standing behind a non-related entity (E) which channels the payment to another entity (S). It is also in this sense that concealment is "legally banal",[83] not necessarily involving any notion of corporate abuse or misuse (unlike evasion), but simply a process of identifying legally relevant actors and their associated actions.

27 While departures from the *Petrodel* framework may be a cause for concern, perhaps more pressing are the cases which appear to apply it more rigorously, but in so doing reveal various stresses in the conceptual structure of veil-piercing not fully contemplated beforehand. One such stress point alluded to above is the distinction between concealment and evasion. For example, in *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd*[84] ("*Pennyfeathers*"), the plaintiffs sued the second and third defendants for breaching their fiduciary duties to a joint venture company by setting up the first defendant company to take advantage of a corporate opportunity belonging to the joint venture, in this case a piece of farm land and options to buy surrounding land for a residential development. The second and third defendants were beneficiaries of the Trimount Settlement, which in turn held beneficial ownership of the shares in the first defendant.[85]

28 The court's analysis of the defendants' liabilities engaged both the concealment and evasion principles. With respect to the former, the court held that although the first defendant was not a mere offshore bank account held in a nominee name and was sufficiently independent of the second and third defendants in terms of management, the:[86]

82 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28].
83 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28].
84 [2013] EWHC 3530.
85 *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 at [118].
86 *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 at [117].

> … concealment principle mean[t] that [the second and third defendants] cannot interpose [the third defendant] to disguise the nature of their own conduct in diverting the opportunities that they should have pursued on behalf of Pennyfeathers UK to their own benefit instead …

The court stressed that this part of the analysis did not involve corporate veil-piercing but an identification of the fact that the second and third defendants:[87]

> … were sufficiently involved in bringing the opportunities to the [first defendant] and encouraging that company to enter into contracts for that to amount to a breach of their duties to Pennyfeathers UK.

Apart from the concealment principle, the court also pierced the corporate veil of the first defendant by applying the evasion principle. It held that the interposition of the first defendant and the Trimount Settlement "should not be allowed to defeat Pennyfeathers UK's rights against [the second and third defendants] or to frustrate the enforcement of those rights", and found that the benefit of the contracts entered into by the first defendant were to be impressed with the same trust as they would be if they had been entered into by the second and third defendants personally.[88]

29 While this reasoning appears clear on the surface, it in fact reveals some problems with the original *Petrodel* framework. *Pennyfeathers* suggests that one key distinction between concealment and evasion is that the former focuses on *identifying corporate controllers* standing behind interposed companies, while the latter is a means for pinning liability on *companies*; akin perhaps to the distinction used by some commentators between forward veil-piercing (claims by corporate creditors against shareholders which undermine defensive asset partitioning or limited liability), and reverse veil-piercing (claims by shareholders' personal creditors against corporate assets which undermine affirmative asset partitioning or entity shielding).[89] This has never been perfectly clear given the illustrations used by Lord Sumption to distinguish the concepts. For example, while Lord Sumption does suggest that in *Gilford* and *Jones* the claims against each corporate controller were on the basis of the concealment principle, and the claims against each company on the evasion principle,[90] he also suggested that liability to account against both the company and Dalby in the *Gencor* case rested *solely* on the concealment principle.[91] Hence, it is not clear

87 *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 at [117].
88 *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 at [118].
89 See Hans Tjio, "Lifting the Veil on Piercing the Veil" [2014] LMCLQ 19 at 20.
90 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29]–[30].
91 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [31].

that evasion and concealment can be so neatly distinguished on the above basis.

30 Moreover, the court in *Pennyfeathers* expressly referred to *Gencor* as a similar situation where the claim against Dalby was on the basis of his diversion of various business opportunities to Burnstead in breach of his fiduciary duties.[92] This reading of *Gencor* is hard to square with Lord Sumption's rationalisation of the same case as a mere "concealment"-type situation, where Burnstead was simply seen as a vehicle for receiving misappropriated secret profits, rather than it being interposed so as to allow Dalby to evade or frustrate the enforcement of his fiduciary duties by utilising Burnstead to take advantage of the corporate opportunities (which would be a situation closer to *Gilford* where the company is used to compete with the defendant's original employers in the situation where the defendant himself is subject to the non-competition covenant).[93] Hence, if *Gencor* – the only case apart from *Trustor* cited in *Petrodel* as an example of the concealment principle solely in action – is also open to re-interpretation as an application of the *evasion* principle, this would add fuel to the criticism that the boundary lines between evasion and concealment have never been clear.

31 Another fracture point concerns cases which appear to have been "force-fit" into Lord Sumption's framework, which in turn reveals the limitations of the conceptual structure in the first place. A number of these cases have arisen in the criminal context, where a corporate structure is harnessed by the defendant to assist in the facilitation of some illegal or unauthorised activity with a view to making profits, and the veil-piercing issue comes to the fore when it is sought to deprive the corporate controller of his ill-gotten gains pursuant to the relevant criminal regulation. The recent Court of Appeal decision of *R v McDowell (Christopher James)*[94] ("*McDowell*") is a useful starting point for examination of this issue, as it concerned joined cases of one arms dealer and one scrap metal dealer who had respectively been trading without a licence and while unregistered. In both cases, the Crown Court had lifted the corporate veil and treated the company receipts earned through trading while unlicensed/unregistered as the receipts of the appellant-dealers personally for the purposes of confiscation orders pursuant to the Proceeds of Crime Act 2002[95] ("POCA"). Apart from the

92 *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd* [2013] EWHC 3530 at [111].

93 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29].

94 [2015] EWCA Crim 173.

95 c 29 (UK). The relevant provisions of the Proceeds of Crime Act 2002 included s 6(5) which requires the court to make a confiscation order in "the recoverable amount", which by s 7(1) refers to "an amount equal to the defendant's benefit from the conduct concerned". Section 76(4) then provides that "a person benefits

(*cont'd on the next page*)

quantum of the confiscation order in question, the appellants also based their appeal on the argument that there was no basis either on the concealment or evasion principles for lifting the corporate veil so as to treat the receipts of the company as receipts of each appellant personally.[96] The Court of Appeal rejected this argument, citing the observation made in *R v Sale*[97] ("*Sale*") that the concealment principle was operative in these contexts:[98]

> What is clear to us in this case is that the court is entitled to look to see what were the realities of this defendant's criminal conduct. We are satisfied that such an exercise, consistent with the objectives of POCA, is to *seek to discover the facts which the existence of the corporate structure would otherwise conceal so as properly to identify the defendant's true benefit*. [emphasis added]

32 The reasoning of the Court of Appeal is also important because it sought to rationalise similar cases under the rubric of the concealment principle, with the import that a number of cases which had expressly used the language of veil-piercing in the past would not be so considered in light of *Petrodel*. For example, it referred to the decision of *Jennings v Crown Prosecution Service*[99] ("*Jennings*"), which concerned a charge against the appellant in relation to an advance fee fraud carried out by an originally legitimate trading company converted for this purpose, of which the appellant was an employee (though neither shareholder nor director). The Prosecution had contended that each of the conspirators had benefited in the sum of the total obtained by the fraud, though the appellant contended that he could not have received more than his salary and some other minor payments. The House of Lords had expressly referred to the veil-piercing concept in this instance:[100]

> In the ordinary way acts done in the name of and on behalf of a limited company are treated in law as the acts of the company, not of the individuals who do them. That is the veil which incorporation confers. But here the acts done by the appellant and his associate Mr Phillips in the name of the company have led to the conviction of

from conduct if he obtains property as a result of or in connection with the conduct". See further *R v McDowell* [2015] EWCA Crim 173 at [23]–[34].

96 *R v McDowell* [2015] EWCA Crim 173 at [3].

97 [2014] 1 WLR 663.

98 *R v McDowell* [2015] EWCA Crim 173 at [42]. On the facts, the Court of Appeal dismissed the appellant-arms dealer's appeal, though it allowed the appeal of the appellant-scrap metal dealer, on a separate ground that the appellant's criminal activity was only the failure to register before carrying on business, and that the activity of trading while unregistered was not criminal conduct from which benefit accrued: at [52]–[66].

99 [2008] AC 1046.

100 *Jennings v Crown Prosecution Service* [2008] AC 1046 at [16].

> one and a plea of guilty by the other. Thus the veil of incorporation has been not so much pierced as rudely torn away.

33 However, in *McDowell*, the Court of Appeal re-interpreted *Jennings* within the *Petrodel* framework, stating that:[101]

> *Jennings* was not considered by the Supreme Court in *Prest* but it seems to us to be a *classic example of the concealment principle* – the appellant was a mere employee whom the prosecution accused of being a prime mover in a fraud whose *modus* was to use the company for the conspirators' criminal activities. [emphasis added]

34 A similar analysis was undertaken in the more recent decision of *Sale*, which likewise concerned POCA confiscation proceedings in relation to the appellant who was the sole director and shareholder of a company which had secured contracts with one Network Rail by bribing its manager. While the Court of Appeal was not convinced that there was evasion in this case, since the company had existed long before the corrupt conduct and had been a *bona fide* trading vehicle, it considered that the concealment principle applied, holding that:[102]

> In the circumstances of this case, where the defendant was the sole controller of the company, and where there was a very close inter-relationship between the corrupt actions of the defendant and steps taken by the company in advancing those corrupt acts and intentions, the reality is that the activities of both the defendant and the company are so interlinked as to be indivisible. Both entities are acting together in the corruption … Accordingly, in so far as the company was involved, what it did served to hide what the defendant was doing.

35 Not unimportantly, the Court of Appeal in *Sale* also restated the principles of veil-piercing in the criminal context to fit within the boundaries of the concealment principle. Referring to the earlier case of *R v Seager and Blatch*[103] ("*Seager*") it noted that the Court of Appeal had then stated that:[104]

> In the context of criminal cases the courts have identified at least three situations when *the corporate veil can be pierced*. First, if an offender attempts to shelter behind a corporate facade, or veil, to hide his crime and his benefits from it: see *In re H*, at p 402, *per* Rose LJ; *Director of Public Prosecutions v Compton* [2002] EWCA Civ 1720, paras 44–48, *per* Simon Brown LJ and *R v Grainger* [2008] EWCA Crim 2506 at [15], *per* Toulson LJ. Secondly, where an offender does acts in the name of a company which (with the necessary *mens rea*) constitute a criminal offence which leads to the offender's conviction, then 'the veil

101 *R v McDowell* [2015] EWCA Crim 173 at [41].
102 *R v Sale* [2014] 1 WLR 663 at [40]–[41].
103 [2010] 1 WLR 815.
104 *R v Seager and Blatch* [2010] 1 WLR 815 at [76].

> of incorporation has been not so much pierced as rudely torn away': *per* Lord Bingham in *Jennings v Crown Prosecution Service* [2008] AC 1046, para 16. Thirdly, where the transaction or business structures constitute a 'device', 'cloak' or 'sham', *i.e.*, an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts … [emphasis added]

To ensure alignment with *Petrodel*, the court in *Sale* replaced the italicised words "the corporate veil can be pierced" with the phrase "a benefit obtained by a company is also treated in law by POCA as a benefit obtained by the individual criminal", further observing that these three situations "do not necessarily involve a piercing of the corporate veil in the normal limited sense of the evasion principle" but "appear to be consistent with the operation of the concealment principle".[105]

36 The main problem with these restatements in light of *Petrodel*, undertaken by *Sale* and re-affirmed more recently by *McDowell*, is that while the courts presently manage to avoid using the veil-piercing doctrine in deference to Lord Sumption's reformulation, they end up classifying most cases under the "concealment" rubric, which is too narrow a concept to accurately capture the various types of abuses to which the corporate vehicle is harnessed in these criminal-type situations. A quick perusal of the authorities referred to above proves the point. As will be recalled, *Jennings* involved a fraud being perpetrated through the company, where it advertised itself as a lender targeting people with poor credit ratings and collecting administration fees without in fact making such loans.[106] *Sale* concerned the company's involvement in its controller's corruption by managing those contracts obtained through bribery. With respect to some of the cases cited in *Seager* above, *In re H*[107] involved the defendants' use of companies to assist in large-scale fraud, in particular the evasion of excise duties. The court lifted the corporate veil and treated the stock in the companies' warehouses and its vehicles as property held by the defendants.[108] *Crown Prosecution Service v Compton*[109] ("*Compton*") was a case where the corporate veil was said to be pierced in view of the company's involvement in large-scale money laundering, the court observing that:[110]

> … courts should not permit those profiting from crime to escape the confiscation of their gains simply by pursuing under corporate guise

105 *R v Sale* [2014] 1 WLR 663 at [42].
106 *Jennings v Crown Prosecution Service* [2008] AC 1046 at [3].
107 [1996] 2 All ER 391.
108 *In re H* [1996] 2 All ER 391 at 511–512.
109 [2002] EWCA Civ 1720.
110 *Crown Prosecution Service v Compton* [2002] EWCA Civ 1720 at [48].

> what are no more than nominal trading activities as a cover for money laundering operations.

In *R v Grainger*,[111] the court emphasised in *dicta* that "[i]f an offender chooses to use a company as a shield to hide his benefits from crime, it is open to the court to look behind the corporate veil in order to ascertain the true position".[112] As stated, these cases are now understood as situations under the concealment principle.

37 However, they differ in marked ways from the more straightforward type of "concealment" scenarios contemplated by Lord Sumption in *Petrodel*. *Trustor*, for example, is a classic "receipt"-type situation where the company in question simply receives funds as agent or nominee of the corporate controller, and in so doing attempts to "conceal" his identity, which the law will not permit. In the above criminal contexts, however, the corporate form is harnessed to different and arguably greater forms of misconduct and abuse. The companies in *Jennings*, *Sale*, *In re H* and *Compton*, for instance, were not simply used for *concealment* but to *perpetrate* illegal activities in the very first place. These activities could not have been conducted without the involvement of the companies, which provided a degree of legitimacy and even assistance. They were not solely "fronts" or "façades" but integral to maximising the fruits of the illegal endeavours, for example, in *Sale* where the company's involvement in managing illegally obtained contracts, invoicing and collecting payment, and providing labour and materials was crucial and inextricably linked to the controller's own corrupt acts.[113] While these types of involvement by corporate vehicles may not fall within the evasion principle (since they are not interposed to *evade a pre-existing* liability but interposed to *perpetrate illegal acts* which may *consequently create new civil or criminal liabilities*), it is clear that they do not fit squarely within the concealment principle either.

C. The Singapore position

38 Hence, it is submitted that it may be better to recognise that *Petrodel*'s formulation is ultimately founded on the "broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality".[114] While one should resist too malleable or subjective a concept of abuse, it would be myopic to assume that the corporate form can only be abused under the limited notion of evasion. A company can be harnessed to various misuses contrary to the

111 [2008] EWCA Crim 2506.
112 *R v Grainger* [2008] EWCA Crim 2506 at [15].
113 *R v Sale* [2014] 1 WLR 663 at [34].
114 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [34].

purposes for which the privilege of incorporation is granted, indeed both at the time of formation or sometime after it has been trading legitimately. The degree to which the corporate form is abused would also be a fact-specific inquiry, depending on how the controller has utilised various aspects of the corporate vehicle to assist in the perpetration of the relevant wrongdoing.

39 In such situations, whether one retains the metaphor of veil-piercing or simply speaks of disregarding the separate legal personality of the company, the result is to attach penal consequences or civil liabilities to corporate controllers directly. There should not be a misplaced fear that this will make significant inroads into the *Salomon* principle. Firstly, following *Petrodel*, this will usually be a last resort solution. Secondly, it should always be emphasised that where the separate legal personality of the company is disregarded, it is done so only for particular purposes. The corporate form remains intact in respect of any other matter. While it is certainly unhelpful to make continued reference to vague notions of "piercing", "lifting", "peeping" or other metaphors,[115] it cannot be overstated that the nature of the judicial intervention is highly limited. In *McDowell*, for example, there would be no doubt that apart from the confiscation orders under POCA, the asset-partitioning function of the corporate form was for all other purposes preserved, not to mention its capacity to contract, hold property, or possess all other rights that a legal person might have.

40 Is this broader formulation of *Petrodel* consistent with the present state of Singapore law? In *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd*[116] ("*Manuchar*"), the High Court identified the "presence of abuse" as "a general thread that runs through all the authorities in support of the piercing of the corporate veil".[117] While the court referred to Lord Sumption's summary of "what amounts to abuse", *viz*, using the company to evade the law or frustrate its enforcement, its subsequent reference to "some form of abuse"[118] as the lodestar for veil-piercing suggests that while the doctrine is highly limited, it may not only be confined to situations of evasion. One may also have reference to the High Court judgment of *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd*,[119] where K had incorporated the first defendant to avoid being bound by the non-competition provisions in the plaintiff's franchise agreements with K's other companies (the second to sixth defendants). The court held that K was "effectively using the corporate vehicle of D1 to surreptitiously evade the existing obligations imposed

115 See Francis D Rose, "Raising the Corporate Sail" [2013] LMCLQ 566 at 582.
116 [2014] 4 SLR 832 (the details of which are discussed at para 42 below).
117 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [95].
118 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [96].
119 [2014] SGHC 258.

on D2–D6" and that "this was an abuse of the corporate vehicle, which justified the lifting of the corporate veil to extend liability to D1".[120] As this case is highly similar to *Gilford*, it appears that the High Court does seem to endorse some version of the evasion principle, though *Petrodel* was not discussed by the court.[121] On the other hand, it may be that the court's wider reference to "abuse" meant that "evasion" is acknowledged as an *instance* of this broader formulation, rather than *per se* exhausting the entire scope for veil-piercing. For completeness, the Court of Appeal decision in *Gimpex Ltd v Unity Holdings Business Ltd*[122] did consider a veil-piercing argument by the plaintiffs in order to make the third defendant (the sole shareholder of the second defendant, which was in turn a 25% shareholder of the first defendant) liable for the first defendant's various contractual breaches, but rejected it on the basis that the third defendant had little control over the first defendant – not even being a signatory to any of its bank accounts, in addition to having only an indirect minority shareholding stake in the first defendant.[123] As the Court of Appeal has not commented in detail on *Petrodel* formulation, to the extent that this remains an open question, it is submitted that the broader formulation referred to herein should be endorsed.

V. Beyond the *Petrodel* framework

A. The single economic entity doctrine

41 One issue that has constantly received attention by the courts despite its chequered history is the status of the single economic entity doctrine as an exception to the *Salomon* principle. In *Petrodel*, Lord Sumption alluded briefly to the Court of Appeal's decision in *Adams v Cape Industries plc*[124] ("*Adams*") where he described the issue in question as whether the UK parent of an international mining group which was managed as a "single economic unit" was present in the US for the purpose of making a default judgment of a US court enforceable against it in England. It was argued that the parent was present in the US by virtue of the fact that a wholly owned subsidiary was incorporated and carried on business there. Lord Sumption referred to the court's adoption of Lord Keith's *dictum* in *Woolfson v Strathclyde Regional Council*[125] ("*Woolfson*") where he held that the corporate veil could be

120 *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258 at [101].
121 *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258 at [101].
122 [2015] 2 SLR 686.
123 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [191]–[193].
124 [1990] Ch 433.
125 [1978] SC (HL) 90.

disregarded only in cases where it was being used for a deliberately dishonest purpose.[126] Lord Sumption reiterated Lord Keith's well-known observation that:[127]

> … the court is not free to disregard the principle of *Salomon* … merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

Given Lord Sumption's reiteration of the principles articulated in *Adams*, and the limited notion of veil-piercing given by his restatement, it has been fairly clear that arguments based on the single economic doctrine would gain little traction with courts going forward.

42 *Manuchar* is currently the leading authority in the Singapore context on this issue. Here, the court rejected the argument that a foreign arbitral award could potentially be enforceable against a non-party to the arbitration agreement on the basis that the non-party and award debtor were part of a "single economic entity". The court was "not persuaded by the case law that the single economic entity concept was recognised under the common law, or at any rate under Singapore law".[128] In addition to endorsing the rejection of the doctrine by *Adams* and *Woolfson*,[129] and noting that these authorities ensured that "[a]ny glimmer of hope that the single economic entity concept could subsist under English law was swiftly extinguished",[130] it also rationalised the controversial decision of Lord Denning in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*[131] as an instance where the court allowed a parent company to obtain compensation for compulsory acquisition of land owned by its subsidiary on the basis that the parent was the principal responsible for the business, rather than any wider concept of overarching group corporate legal personality.[132] Importantly, the court in *Manuchar* also examined local jurisprudence, in particular the cases of *Win Line (UK) Ltd v Masterpart (Singapore)*

126 *Woolfson v Strathclyde Regional Council* [1978] SC (HL) 90 at 539–540.
127 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [21].
128 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [101].
129 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [102]–[110] and [116].
130 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [117].
131 [1976] 1 WLR 852.
132 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [114].

Pte Ltd[133] ("*Win Line*") and *Public Prosecutor v Lew Syn Pau*[134] ("*Lew*"). In interpreting *Win Line*, the court held that the decision had rejected on principle any submission by the plaintiff that liability for breach of a charterparty with a company ("M") could be extended to a related group company ("D&M") on the basis of the single economic entity doctrine.[135] As to *Lew*, which concerned whether a company had committed an offence of giving prohibited financial assistance for the acquisition of its own shares via the form of a loan by one of the company's subsidiaries, the court in *Manuchar* agreed with the conclusions of Sundaresh Menon JC (as he then was) that the ordering of companies within a broader group structure did not mean that one could dispense with the need to view and understand each entity within the group as a separate legal entity.[136] In the premises, it may not be easy to invoke the single economic entity argument as a common law exception to the *Salomon* principles, outside the confines of specific statutory exceptions (for example, tax and competition law purposes).[137] The broader question of statutory veil-piercing is an issue which will now be discussed.

B. The framework for statutory veil-piercing

43 On one hand, Lord Sumption's focus in *Petrodel* was clearly on restating the common principles relating to veil-piercing, while taking as axiomatic that statutory veil-piercing belonged to a different realm which would not necessarily be governed by the same principles.[138] For example, it has been observed that some aspects of corporate legislation such as the fraudulent or wrongful trading provisions[139] may be seen as "exceptions to *Salomon* or as cases where the parties have not fulfilled conditions upon which the privilege of limited liability is granted",[140] and also that "[i]n view of the near-infinite variety of statutory rules, contexts and purposes, the question must be determined by focusing on the enactment in question",[141] which need not correspond with the common law framework.

133 [1999] 2 SLR(R) 24.
134 [2006] 4 SLR(R) 210.
135 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [123].
136 *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [1999] 2 SLR(R) 24 at [102]; *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [128].
137 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [94].
138 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [16].
139 Insolvency Act 1986 (c 45) (UK) s 213.
140 Francis D Rose, "Raising the Corporate Sail" [2013] LMCLQ 566 at 579.
141 Stephen Bull, "Piercing the Corporate Veil – In England and Singapore" [2014] Sing JLS 24 at 32.

44 On the other hand, it may be argued that on the facts of *Petrodel*, Lord Sumption displayed a restrictive attitude to statutory veil-piercing paralleling his views on the common law doctrine. In particular, he observed that while the construction of s 24(1)(a) of the Matrimonial Causes Act 1973[142] (which provides for the court's power to transfer property to which a spouse is entitled, either in possession or reversion) would be informed by its purposes and social context, it did not follow that "the courts will stop at nothing in their pursuit of that end".[143] There was nothing "irresistibly" clear in the statute or its context that allowed for an interpretation which would trump the basic principle that the company's property was its own (and not the shareholder's).[144] Holding otherwise would also "cut across the statutory schemes of company and insolvency law" and effectively elevate the wife to the position of a secured creditor to the detriment of potential "unsatisfied creditors with no knowledge of the state of the shareholder's marriage".[145]

45 Cases after *Petrodel* have in fact adopted this restrictive approach to veil-piercing, even in the statutory context. In *Antonio Gramsci Shipping Corp v Lembergs*[146] ("*Gramsci*"), G had sued various offshore companies for fraud arising out of its contractual arrangement to charter vessels to the latter. The charters had contained exclusive English jurisdiction clauses. G also sought to sue L (the controller of the offshore companies) in England, on the basis that by piercing the corporate veil of the companies, L could be made a party to the charters. The governing statute was Art 23 of the Brussels Regulation,[147] which provides for the establishment of jurisdiction by European Union member states over disputes via the medium of party agreement. The relevant argument for the purposes of this article was that in interpreting this provision, the court should take into account the policy of preventing fraudsters from sheltering behind corporate structures, and that it should pierce the veil where the defendant had set up a puppet company to defraud an innocent party with whom the puppet contracted in order to avoid being sued in the courts of a member state in which the puppet has agreed to be sued.[148] The Court of Appeal disagreed. It noted that while some of Lord Sumption's observations "may appear to give some support to a policy-based approach", it was

142 c 18 (UK).
143 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [40].
144 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [40].
145 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [41].
146 [2013] EWCA Civ 730; [2013] 4 All ER 157.
147 Council Regulation (EC) No 44/2001 (22 December 2000) (jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).
148 *Antonio Gramsci Shipping Corp v Lembergs* [2013] EWCA Civ 730; [2013] 4 All ER 157 at [63]–[64].

clear that the narrower evasion principle represented the present state of English law, and that to deem L to have consented to jurisdiction on a wider policy basis was "untenable".[149] Beatson LJ also observed that there appeared to be a lack of clear principle grounding the veil-piercing doctrine and that "[a]bsent a principle, further development of the law will be difficult for the courts because development of common law and equity is incremental and often by analogical reasoning".[150] *Gramsci* is thus a case where the interpretation of a statute was clearly influenced by the restrictive English common law framework to veil-piercing.

46 Likewise, in interpreting the regulations governing freezing orders, courts have been reluctant to pierce the veil to extend the scope of such orders to assets of companies controlled by persons subject to those orders. In *Group Seven Ltd v Allied Investment Corp Ltd*[151] ("*Group Seven*"), a freezing order prohibiting the third defendant from disposing of or dealing with his assets contained a statutory standard form clause which stated that the defendant's assets included any asset which he had "the power, directly or indirectly, to dispose of or deal with as if it were his own".[152] The third defendant was the sole director and shareholder of a company, and had acted on behalf of the latter to compromise a claim for recovery of a debt owed to it. The plaintiff then applied to court on the basis that the third defendant had breached the freezing order by disposing of or dealing with the said debt. The court refused the application, emphasising that under settled principles of company law the assets of the company were its own rather than the shareholder's, and further that the third defendant was acting as the company in procuring the compromise agreement, and not in his own capacity.[153] On the issue of veil-piercing, the court suggested that where there was a "real likelihood" that the court would pierce the corporate veil in the main cause of action itself, that may warrant an express extension of the scope of the freezing order to cover the company's assets (though this was not possible given the wording of the order in the present case).[154] The observations in *Group Seven* were affirmed in a similar context in the Court of Appeal decision of *Lakatamia Shipping Co Ltd v Su*,[155] where Rimer LJ, citing *Petrodel*, corrected the trial judge for suggesting that the assets of a company controlled by the defendant subject to a freezing order were the defendant's own assets and hence directly within

149 *Antonio Gramsci Shipping Corp v Lembergs* [2013] EWCA Civ 730; [2013] 4 All ER 157 at [65].
150 *Antonio Gramsci Shipping Corp v Lembergs* [2013] EWCA Civ 730; [2013] 4 All ER 157 at [66].
151 [2014] 1 WLR 735.
152 *Group Seven Ltd v Allied Investment Corp Ltd* [2014] 1 WLR 735 at [7].
153 *Group Seven Ltd v Allied Investment Corp Ltd* [2014] 1 WLR 735 at [66]–[67].
154 *Group Seven Ltd v Allied Investment Corp Ltd* [2014] 1 WLR 735 at [75].
155 [2014] EWCA Civ 636 at [34]–[35].

the scope of the freezing order in question.[156] The above cases are again examples of interpreting a regulation with reference to common law principles. The *Salomon* principle is utilised in demarcating the scope of assets governing by the freezing order, and any exception closely tracks the limited *Petrodel* grounds for veil-piercing under common law. Of course, in dealing with questions of statutory veil-piercing, it is not the case that every regulation will or should be interpreted with reference to the common law framework. Procedural regulations, such as those governing jurisdiction or interim injunctions, are closely connected to the ultimate resolution of the substantive cause of action. Hence, as in *Group Seven*, any potential basis for veil-piercing pursuant to a freezing order (meant to ensure the availability of assets to satisfy the final ruling) should only be as wide as the grounds for veil-piercing at common law, *viz*, to the extent there is a real likelihood of the case falling within the evasion principle. In other regulatory contexts, it is possible that courts may not find incorporation of the common law principles necessary or desirable.

C. Veil-piercing and attribution

47 While Lord Sumption's observations of veil-piercing have been one of the key targets of critique thus far, the potential conflation between the issues of veil-piercing and corporate attribution arise from Lady Hale's comment in *Petrodel* regarding *Stone & Rolls Ltd v Moore Stephens*[157] ("*Stone & Rolls*"), which she described as:[158]

> … an example of *going behind the separate legal personality of the company* in order to 'get at' the person who owned and controlled it, not for the purpose of suing him, *but in order to attribute his knowledge to the company* so that its auditors could raise a defence of *ex turpi causa* to the company's allegation that they had negligently failed to detect the fraudulent nature of its business. [emphasis added]

This is not a mere throwaway remark by a single judge in *Petrodel*, as Lord Walker expressly referred to *Stone & Rolls* as "arguably an example" of a "small residual category" where veil-piercing operates independently of other common law principles or statutory provisions.[159] No other judge appeared to address this issue of doctrinal overlap; thus, *Petrodel*

156 *Lakatamia Shipping Co Ltd v Su* [2014] EWCA Civ 636 at [50]–[52]. The court was able to "indirectly" bring these assets within the scope of the order by holding that the defendant was restrained from procuring the company to make a disposition where this would result in a diminution in value of his *shareholding* in that company (since the defendant's shareholding was covered under the order): at [26].

157 [2009] AC 1391.

158 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [95].

159 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [106].

appeared to raise a question as to the interaction between attribution and veil-piercing.

48 As commentators post-*Petrodel* have noted, it is in fact not helpful to discuss questions of attribution and that of veil-piercing interchangeably as they raise conceptually different issues in law as well as policy. Exegetically, it has been noted that Lords Brown and Walker expressly used the language of corporate attribution in *Stone & Rolls* to describe how the fraud of a sole director and shareholder was attributed to the company in order that its claim against the auditors could be defeated by the latter's invocation of the illegality defence; no authority concerning veil-piercing was utilised to reach this result.[160] *Stone & Rolls*' approach to attribution in this context has been the subject of much critical commentary which will not be rehearsed here.[161] On the substantive issue of the interaction between veil-piercing and attribution, it has been commonly observed that the question of attribution concerns the rules which indicate what acts are to count as acts of the company, such that the company as *persona ficta* can exercise powers and rights, and acquire duties in relation to third parties.[162] Hence Lord Hoffmann's well-known exposition of the categories of rules of attribution in *Meridian Global Funds Management Asia Ltd v Securities Commission*:[163] the primary rules found in the corporate constitution or company law; the general rules of attribution including the law of agency and vicarious liability; and the special rules of attribution which courts fashion where the primary and general rules are inapplicable.[164]

49 While veil-piercing commonly impinges on asset-partitioning, attribution is not concerned with conflating the assets of shareholders and corporate vehicles. If anything, attribution reinforces the sanctity of the corporate veil. The doctrine recognises that the company as separate legal entity needs to be able to act in law – to contract, hold property, or take on other rights and obligations – and to this end, looks to rules of attribution to give fullest expression to the company as a fully fledged and operative legal actor. To illustrate the point more concretely, the basic effect of attribution (for example, through the law of agency) is for a company to enter into a contract in its own right, acquiring its own attendant contractual rights and just as importantly, its own exclusive set

160 Ernest Lim, "*Salomon* Reigns" (2013) 129 LQR 480 at 484–485.

161 See David Halpern, "*Stone & Rolls Ltd v Moore Stephens*: An Unnecessary Tangle" (2010) 73 MLR 487; Peter Watts, "*Stone & Rolls Ltd v Moore Stephens*: Audit Contracts and Turpitude" (2010) 126 LQR 14; and Eilis Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239.

162 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506, *per* Lord Hoffmann.

163 [1995] 2 AC 500.

164 See further Cheng Han Tan, "Veil-piercing – A Fresh Start" [2015] JBL 20 at 32–33.

of obligations. This is the very opposite of forward veil-piercing, which would make the company's liabilities that of the shareholder's by removing limited liability. Neither is it reverse veil piercing, in the sense of making inroads into entity-shielding by making the shareholder's liability that of the company's, as there is no shareholder with a pre-existing independent liability which his creditor is attempting to make the company's – the only obligations created arise at the point where the agent contracts on behalf of the company. Another way of making the distinction is to observe that the "question of attribution is the logically prior inquiry", since attribution is "primarily concerned with the company's role as a *principal* – acting through human agents – in a transaction" [emphasis in original], while veil-piercing "typically assumes that a course of corporate conduct has already been identified, but nevertheless seeks to alter the usual consequences that follow from such conduct".[165]

50 As regards the post-*Petrodel* jurisprudence on this point, it is useful to reference Lord Sumption's observations in the recent and important Supreme Court decision of *Jetivia SA v Bilta (UK) Ltd*[166] ("*Bilta*"). Following *Stone & Rolls* and the later Court of Appeal decision in *Safeway Foodstores Ltd v Twigger*,[167] this case concerned the issue of attributing the shareholder-directors' acts and state of mind to the company for the purposes of raising the illegality defence in the context of the company's claims against the defendant directors and third party accessories. Much of the analysis concerned the approach to attribution and the so-called "fraud exception", as well as competing views regarding the illegality defence,[168] as reflected in the recent cases of *Hounga v Allen*[169] and *Les Laboratoires Servier v Apotex Inc*.[170] For the purposes of the veil-piercing doctrine, Lord Sumption was at pains to clarify its distinction from the attribution issue at hand in *Bilta*:[171]

> [O]nce companies were recognised by the law as legal persons, they were liable to have the mental states of agents and employees such as dishonesty or malice attributed to them for the purpose of establishing civil liability. In the criminal law … [i]t is now well established that a company can be indicted for conspiracy to defraud … or manslaughter … provided that an agent with the relevant state of mind can be sufficiently identified with it. *It cannot be emphasised too strongly that neither in the civil nor in the criminal context does this*

165 Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Singapore: Academy Publishing, 2015) at para 06.031.
166 [2015] UKSC 23.
167 [2010] EWCA Civ 1472; [2011] 2 All ER 841.
168 *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23 at [11]–[31].
169 [2014] 1 WLR 2889.
170 [2014] 3 WLR 1257.
171 *Jetivia SA v Bilta (UK) Ltd* [2015] UKSC 23 at [65].

> *involve piercing the corporate veil. It is simply a recognition of the fact that the law treats a company as thinking through agents, just as it acts through them.* [emphasis added]

This clarification by *Bilta* is significant for implicitly reversing the incorrect understanding propounded in *Petrodel* by Baroness Hale and Lord Walker that attribution constitutes a form of veil-piercing.

VI. Conclusion

50 The purpose of this article has been to conduct a critical re-assessment of the framework for corporate veil-piercing articulated by Lord Sumption in *Petrodel* in the light of recent case law, and in particular, to interrogate the notion of veil-piercing as a remedy of last resort, as well as the concealment and evasion principles which demarcate the boundary lines of the veil-piercing doctrine. Moreover, three other important issues raised in the aftermath of *Petrodel* have been discussed with a view towards clarifying the scope of veil-piercing: the single economic entity doctrine, statutory veil-piercing and the doctrine of corporate attribution.

51 In examining the emerging case law, a number of themes can be identified. With respect to the "last resort" principle, it appears that courts do endeavour to find alternative private law solutions to veil-piercing, especially in matrimonial disputes, though some cases demonstrate the limits of using trust doctrines. The application of the concealment and evasion principles forming the bulwark of Lord Sumption's analysis has been, on reflection, significantly more difficult. While some decisions can be criticised for failing to apply these principles more precisely and rigorously, other cases which attempt to do so demonstrate more fundamental problems with the framework in the first place; namely, that the distinctions between the concepts are not sustainable, and that they in any event may not be sufficiently robust to accommodate the various ways in which corporate controllers may harness corporate vehicles to a range of misuses inconsistent with the purposes upon which the privilege of incorporation is granted. As the author has argued, this may warrant revisiting the scope of the veil-piercing doctrine to take into account situations where the corporate vehicle is abused to perpetrate some wrongdoing, whether or not it was incorporated for a legitimate purpose in the first place. Of course, courts should appreciate that the type and degree of wrongdoing will differ, as will the company's involvement in the nature of that activity, which should be factored into the ultimate analysis of whether there is an abuse of corporate legal personality that will engage the veil-piercing doctrine. Finally, in demarcating the doctrine's external boundaries, it has been argued that the recent case law supports the narrowing of the

single economic entity doctrine, and a clear conceptual distinction between attribution and veil-piercing. Statutory veil-piercing, which has hitherto been under-investigated, appears to be a complex phenomenon which may or may not track the common law framework, depending on the policies under the regulation in question. It is hoped that this analysis of *Petrodel* in the light of recent decisions will enable the veil-piercing doctrine to re-emerge with greater clarity, consistency and robustness in the limited situations where it is necessitated to tackle abuses of the corporate form.