REVISITING THE *ALTER EGO* EXCEPTION IN CORPORATE VEIL PIERCING

The seminal decision of the UK Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 ("*Prest*") has clarified the law on corporate veil piercing by (a) jettisoning vague phrases such as "justice of the case" and metaphors such as "sham" or "façade" that had hitherto characterised English jurisprudence in this area; and (b) re-categorising earlier English cases under two underlying principles – the concealment principle and the evasion principle. In the aftermath of *Prest*, the question that ought to be raised in Singapore is whether the local jurisprudence on corporate veil piercing should likewise be re-examined since the earlier Singapore cases have also relied heavily on metaphors and platitudinous phrases; in particular, there is a need to confront the problem of apparently inconsistent judicial statements that seem to categorise the *alter ego* doctrine as a separate ground for corporate veil piercing. To the extent that this is so, the post-*Prest* English position and the Singapore position as set out in the decision of the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 (which did not have the opportunity to consider the decision in *Prest*) appear to be divergent. This article discusses four alternative ways that this perceived inconsistency may be resolved. Moving forward, it is suggested that metaphors such as "sham" or "façade" be eschewed and the principled approach espoused in *Prest* be adopted instead.

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I. Introduction

1 The concept of the company's separate legal personality is the bedrock of company law. Although "the separate personality and

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property of a company is sometimes described as a fiction",[1] this apparent "fiction is the whole foundation of English company … law"[2] and, correspondingly, Singapore's company law, "so much so that it has even been said that it cannot be disregarded on the mere justification that 'justice so requires'".[3]

2 Section 19(5) of the Companies Act[4] allows a company to be reified and made a corporate entity. The classic case of *Salomon v A Salomon & Co Ltd*[5] ("*Salomon*") represents judicial confirmation of the separate entity of the company with its own separate legal personality,[6] allowing for affirmative asset partitioning of the company's assets which are shielded from the reach of external creditors. This separate entity feature also allows for the election of limited liability incorporation[7] which completes the shield of protection for shareholder investors (as the limited liability feature provides for defensive asset partitioning by reserving shareholders' individual assets primarily for their personal creditors).[8]

3 The privileges accorded to companies must operate in accordance with the terms upon which they were granted. The doctrine of corporate veil piercing is premised on the basis that such privileges should work hand in glove with responsibility in order to avoid the possibility of abuse or exploitation. When there is a fracture in the proper operating parameters, the court may ascertain the realities of the situation by removing the corporate shield or veil in order to make the controller behind the company personally liable as if the company were not present.

4 The underlying issue that arises here is the difficulty of determining when the use of the artificial construct falls within the proper bounds of the law and when it infringes upon the standards of fairness and legitimacy. Indeed, corporate history abounds with examples of corporate abuse cases where the external creditors were left high and dry when businesses failed. It is thus little wonder that judges

1 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [8], *per* Lord Sumption.
2 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [8], *per* Lord Sumption.
3 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [90], *per* Lee Kim Shin JC.
4 Cap 50, 2006 Rev Ed.
5 [1897] AC 22.
6 Lord Halsbury LC held in *Salomon v A Salomon & Co Ltd* [1897] AC 22 at [19] that "once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself".
7 Having a separate entity, the company is kept separate from the shareholders who can then opt for shares on a limited liability basis.
8 Henry B Hansmann & Reinier Kraakman, "What is Corporate Law?" in Reinier Kraakman *et al*, *Anatomy of Corporate Law: Comparative and Functional Approach* (Oxford University Press, 2nd Ed, 2009) at pp 1–19.

have historically been under tremendous pressure to sidestep the *Salomon* principle in order to produce results which are more just. As such, the courts must address the vexing question of how to identify when the controllers' dealings through the company reach the threshold where they may rightly be considered opportunistic so as to warrant the removal of the shield privilege. This is what should properly be called corporate veil piercing.

5 This area of corporate veil piercing has hitherto been fraught with conflicting guidelines. Prior to the decisions in *Adams v Cape Industries plc*[9] ("*Adams*") and *Prest v Petrodel Resources Ltd*[10] ("*Prest*"), there was little judicial pronouncement properly delineating the scope of corporate veil piercing. It has even been said that there is no common unifying principle either in the UK or across the common law jurisdictions explaining the occasional court decisions to pierce the corporate veil.[11] The difficulty lies in the fact that the courts have not adhered to a coherent principled approach but opted instead for loosely unhelpful terms (such as "mere cloak or sham"[12] and "façade concealing the real facts")[13] or platitudinous phrases with little content (such as "justice of the case").[14] The use of such protean phrases was strongly viewed with disfavour by the UK Supreme Court; in England, matters are not helped by the fact that language has been used rather ambivalently such that one wonders whether some of the appellations are meant to be taken in the loose sense or even have any technical or defined meaning in the first place. American courts have similarly been cautioned against the loose use of metaphors:[15]

> The whole problem of the relation between the parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. *Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.* We say at times that the corporate entity will be ignored when the parent corporation operates

9 [1990] Ch 433.

10 [2013] 3 WLR 1. Although the observations on veil piercing made by Lord Sumption are technically *obiter*, they are highly persuasive as can be seen from the post-*Prest* cases that have endorsed them: see text at paras 25–26 below.

11 See *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 at 567; *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [75]; and *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [94].

12 See *Gilford Motor Co Ltd v Horne* [1933] 1 Ch 935 at 961.

13 See *Woolfson v Strathclyde Regional Council* [1978] SCHL 90 at 96 and *Adams v Cape Industries plc* [1990] 2 WLR 657 at 759.

14 This phrase has now been clearly judicially eschewed in Singapore by Lee Kim Shin JC in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [90]. See also *Power Supermarkets Ltd v Crumlin Investments Ltd* (22 June 1981) (HC) (unreported); *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers* [1980] 1 MLJ 109 at 111; and *Thode Gerd Walter v Mintwell Industry Pte Ltd* [2009] SGHC 44 at [20].

15 *Berkey v Third Avenue Railway Co* [1926] 155 NE 58 at 61.

> a business through a subsidiary which is characterised as an 'alias' or a 'dummy'. All this is well enough if the picturesqueness of the epithets does not lead us to forget that the essential term to be defined is the act of operation. [emphasis added]

While corporate veil piercing has always sounded attractively catchy as a tag line, it often rings hollow in practice due to the looseness in language and uncertainty surrounding its application. However, the recent seminal decision of the UK Supreme Court in *Prest* has sought to streamline and clarify the law on corporate veil piercing. All related English decisions now have to be revisited. Indeed, *Prest* is such a seminal decision that the Singapore courts will also have to contend with it in future cases on similar issues.

II. Developments in the UK

6 Dignam and Lowry have noticed a historical trend of judicial vacillation[16] between an interventionist attitude (where judges were more willing to pierce the corporate veil) and the orthodox position (where judges upheld the foundational principle expounded in *Salomon*). The prevailing current position is the orthodox one as heralded by *Adams* which, prior to *Prest*, was the seminal English decision that attempted to rein in all the conflicting and amorphous principles in the doctrine of corporate veil piercing.

7 The review of earlier cases in *Adams* led the English Court of Appeal to conclude that corporate veil piercing was not a well-developed concept:[17]

> From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade within the meaning of that word as used by the House of Lords in

16 See Alan Dignam & John Lowry, *Company Law* (Oxford University Press, 4th Ed, 2006) at pp 34–39, where the authors categorise the UK trend into several periods: "classical veil lifting" period from 1897 to 1966; "interventionist years" from 1966 to 1989; and "back to basics" from 1989 onwards. The classical veil-lifting years involved cases such as *Jones v Lipman* [1962] 1 WLR 832 and *Gilford v Horne* [1933] Ch 935 where the courts were slow to intervene. During the interventionist years, the courts were more ready to pierce the corporate veil as reflected in the case of *DHN Food Distributors v Tower Hamlets* (1976) 1 WLR 852 which, however, had been disapproved by the decisions in *Woolfson v Strathclyde Regional Council* [1978] SCHL 90 and *Adams v Cape Industries plc* [1990] Ch 433.

17 *Adams v Cape Industries plc* [1990] Ch 433 at 543 which has been cited with approval in Singapore; see, *eg*, *Public Prosecutor v Lew Syn Pau* [2006] 4 SLR(R) 210; *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [1999] 2 SLR(R) 24; and *Gerhad Hendrick Gispen v Ling Lee Soon Alex* [2001] SGHC 350.

> *Woolfson* … We will not attempt a comprehensive definition of those principles.

The appellate court also found that there appeared to be three categories of corporate veil piercing based on (a) single economic entity; (b) agency; and (c) sham or façade. Of these, the appellate court identified only the third category as a genuine form of corporate veil piercing. The other two categories of single economic entity and agency were explained away by the appellate court: the former could be rationalised as turning on statutory interpretation whilst the latter was to be dealt with entirely under agency principles (which in turn were pivoted on there being consent or agreement for the agent to act on the principal's behalf).

8 Adopting Lord Keith's *dictum* in *Woolfson v Strathclyde Regional Council*[18] ("*Woolfson*"), the appellate court in *Adams* held that the corporate veil could be disregarded only where "special circumstances exist indicating that it is a mere façade concealing the true facts".[19] Apart from such exceptional situations involving deliberate dishonesty where intervention might be allowed, the appellate court maintained that the principle in *Salomon* should be treated as sacrosanct and the orthodox position ought to be upheld in the interest of commercial certainty:[20]

> 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.

9 The significance of *Prest*[21] lies in the UK Supreme Court's refinement and re-rationalisation of the position in *Adams*. As pointed out in *Prest*, corporate veil piercing is essentially concerned with the separate personality of the company being disregarded by the court whereas the other techniques like agency have nothing to do with corporate veil piercing and should not have been categorised as such. Developing further from *Adams*, *Prest* clarified the position further by jettisoning vague phrases such as "justice of the case"[22] and metaphors such as "sham" or "façade" which do not in themselves offer cogent and

18 [1978] SCHL 90.

19 *Woolfson v Strathclyde Regional Council* [1978] SCHL 90 at 96.

20 *Adams v Cape Industries plc* [1990] Ch 433 at 536.

21 See n 10 above. See also C H Tan, "Veil Piercing – A Fresh Start" [2015] 1 JBL 20; Hans Tjio, "Lifting the Veil on Piercing the Veil" [2014] LMCLQ 19; Stephen Bull, "Piercing the Corporate Veil – In England and Singapore" [2014] Sing JLS 24; and Alistair Alcock, "Piercing the Veil – A Dodo of a Doctrine" [2013] 25 Denning LJ 241.

22 See n 14 above for judicial disapproval in Singapore of such a vague term.

structured justification for the special circumstances when the separate personality of the company ought to be disregarded.

10 After analysing in *Prest* the earlier decisions, Lord Sumption held that there is a principle of English law which enables a court in very limited circumstances to pierce the corporate veil:[23]

> The principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are *obiter*, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. … I think that *the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse*. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law. [emphasis added]

The term "piercing the corporate veil" should apply only to:[24]

> … those cases which are true exceptions to the rule in *Salomon* … *ie*, where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.

According to Lord Sumption, there are two "distinct principles … and much confusion has been caused by failing to distinguish between them".[25]

11 Whilst acknowledging that the Court of Appeal in *Adams* may be "regarded as having settled the general law on the subject",[26] the Supreme Court in *Prest* viewed with disfavour the references in *Adams* to "façade" or "sham" because such terms did not offer any insight into the underlying principles which Lord Sumption had conveniently called the concealment principle and the evasion principle:

> (a) The concealment principle constitutes the use of the company to conceal the identity of the true actors. It does "not involve piercing the corporate veil at all … [because] the court is not disregarding the façade but only looking behind it to

23 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [27].
24 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [16].
25 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28].
26 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [23].

discover the facts which the corporate structure is concealing"[27] – analogous to lifting the veil.

(b) In contrast, the evasion principle involves the use of the company to defeat or frustrate the enforcement of a legal right which exists independently of the company's involvement. The court may disregard the corporate veil if there is a legal right against a controller who evades his legal obligation through the interposition of a company.[28]

12 Agreeing with Lord Sumption, Lord Neuberger reiterated that "there are two types of case where judges have described their decisions as being based on piercing the veil, namely those concerned with concealment and those concerned with evasion".[29] He acknowledged that some attempt in shedding light on these two concepts could be found in *Atlas Maritime Co SA v Avalon Maritime Ltd*[30] where Staughton LJ sought to distinguish between lifting and piercing the corporate veil:

(a) "To lift the corporate veil … should mean to have regard to the shareholding in a company for some legal purpose."[31] When the court lifts the corporate veil, it does not mean that liability from the company is attached to the shareholders or controller; it is only when the corporate veil is pierced will liability then be attached to the controller.

(b) "To pierce the corporate veil is an expression … reserve[d] for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders."[32] In essence, the separate legal personality of the corporate vehicle is disregarded and the controller is deprived of the benefit of limited liability associated with incorporation.

13 As Lord Sumption has pointed out, "many cases will fall into both categories, but in some circumstances the difference between them

27 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28]: "It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant."

28 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28]: It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement."

29 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [60].

30 [1991] 1 Lloyd's Rep 563; [1991] 4 All ER 769. *Cf* S Ottolenghi, "From Peeping Behind the Corporate Veil to Ignoring It Completely" [1990] MLR 338.

31 *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 1 Lloyd's Rep 563; [1991] 4 All ER 769 at 779.

32 *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 1 Lloyd's Rep 563; [1991] 4 All ER 769 at 779.

may be critical".[33] The application of these two principles is best illustrated by reference to cases in which the courts had been thought, rightly or wrongly, to have pierced the corporate veil.

A. Application to Gilford Motor Co Ltd v Horne

14 *Gilford Motor Co Ltd v Horne*[34] ("*Gilford*") has generally been viewed by commentators as a classic case of corporate veil piercing. After resigning from Gilford Motor Co Ltd, Horne set up a competing company, J M Horne & Co Ltd (named after his wife), in breach of the restraint-of-trade clause included in the contract that he previously signed with his former employer. The Court of Appeal granted an injunction against both Horne and the company (in which his wife and a business associate were shareholders). Adopting the conceptual framework of *Adams*, the appellate court deemed Horne to have used the company as a façade to conceal the true state of affairs (by avoiding his existing obligations).

15 In *Prest*, however, Lord Sumption refined the conceptual framework and completely recast *Gilford* as a case where both the principles of concealment and evasion were at play. He highlighted that the injunction against Horne in *Gilford* was granted on the concealment principle because the interposition of the company was to maintain the pretence that the competing business was being carried on by others:[35]

> As against Mr Horne, the injunction was granted on the concealment principle. Lord Hanworth MR said … that the company was a 'mere cloak or sham' because the business was really being carried on by Mr Horne. Because the restrictive covenant prevented Horne from competing with his former employer whether as principal or as agent for another, it did not matter whether the business belonged to him or to JM Horne & Co Ltd provided that he was carrying it on.

In a concealment case, the court will not desist from identifying the real controllers merely because of the interposition of a company to conceal the controllers' actual identity. The façade is not disregarded as the court is only looking behind it to discover the facts which the corporate structure is concealing.[36]

16 As for the injunction against J M Horne & Co Ltd, Lord Sumption inferred "from the judgments of Lawrence and Romer LJJ … that they were applying the evasion principle"[37] because of

33 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28].
34 [1933] Ch 935.
35 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29].
36 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28].
37 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29].

Horne's evasive motive for forming the company. This showed that "it was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company"[38] without technically running afoul of the restrictive covenant. In Lord Sumption's view, "the company was restrained in order to ensure that Horne was deprived of the benefit which he might otherwise have derived from the separate legal personality of the company".[39]

17 In addition, Lord Sumption pointed out that corporate veil piercing was not a complete disrobement of the cloak of limited liability. The purpose for which corporate veil piercing was allowed in this case was to grant an injunction for breaching trade restraint covenants, and not for his personal creditors to pursue the company by treating Horne and J M Horne & Co Ltd as one.

18 As an aside, it should also be added that Lord Sumption suggested that *Gilford* could have been based on alternative doctrines without having to invoke corporate veil piercing:[40]

> It is also true that the court in *Gilford* might have justified the injunction against the company on the ground that Horne's knowledge was to be imputed to the company so as to make the latter's conduct unconscionable or tortious, thereby justifying the grant of an equitable remedy against it.

B. Application to Jones v Lipman

19 In *Jones v Lipman*[41] ("*Jones*"), Lipman, who initially agreed to sell his house to Jones, subsequently changed his mind and conveyed the property to a company, Alamed Ltd, which was owned by him and a nominee. The judge granted specific performance against both Lipman and his company. Lord Sumption pointed out in *Prest* that these two orders of specific performance were based on different principles: the order against Lipman was based on the concealment principle whereas the order against Alamed Ltd was based on the evasion principle.

20 With regard to Lipman, Lord Sumption observed that there was no need to pierce the corporate veil at all as the court merely looked past the façade to find out who was the controller behind the company:[42]

38 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29].
39 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29].
40 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29].
41 [1962] 1 WLR 832.
42 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [30].

> As against Lipman, this was done on the concealment principle. Because Lipman owned and controlled Alamed Ltd, he was in a position specifically to perform his obligation to the plaintiffs by exercising his powers over the company. This did not involve piercing the corporate veil, but only identifying Lipman as the man in control of the company.

21 With regard to Alamed Ltd, Lord Sumption explained that the court in *Jones* ordered specific performance against the company controlled by the blameworthy shareholder (*viz* Lipman) under the evasion principle. The court decided to pierce the corporate veil on the ground that Lipman was the controlling mind and will of his company and the company thus had imputed knowledge of the contract for the sale of property:[43]

> On the other hand, as against Alamed Ltd itself, the decision was justified on the evasion principle, … The judge must have thought that in the circumstances the company should be treated as having the same obligation to convey the property to the plaintiff as Lipman had, even though it was not party to the contract of sale.

C. Application to Prest

22 In *Prest*, the appellant was a divorcee wife, Yasmin, whose ex-husband, Michael, controlled a number of companies which owned the matrimonial home and various other properties. Yasmin sought an order against these companies to transfer the properties to herself. During the divorce proceedings, Michael refused to disclose his full assets. However, the court held that the companies could be ordered to transfer the properties to Yasmin since they were holding them on a resulting trust for Michael. The Supreme Court found that the companies were bare trustees of the properties in question for Yasmin.

23 Lord Sumption agreed that the court could not pierce the corporate veil here as the legal interest in the properties was vested in the companies long before the marriage broke up; in other words, Michael set up his companies for legitimate business purposes and not for the intention of evading or frustrating any legal obligation he owed to his wife. This was in contrast to the situations in *Gilford* and *Jones*:[44]

> [I]n both those cases, it so happened that the controller had a pre-existing legal obligation which he was attempting to evade by setting up a company, in the one case a contractual obligation not to compete with his former employers, in the other case a contractual obligation to sell some land to the claimant.

43 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [30].
44 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [91].

Hence, corporate veil piercing may be considered only when the following conditions are fulfilled:

> (a) a person is under an existing legal obligation or liability or subject to an existing legal restriction which exists independently of the company's involvement; and
>
> (b) he deliberately evades or frustrates the obligation by interposing a company under his control.

24 Lord Neuberger added that the court ought to be slow in piercing the corporate veil: "[I]f the court has power to pierce the corporate veil, … it could only do so in favour of a party when all other, more conventional, remedies have proved to be of no assistance."[45] If the facts of a case disclose a legal relationship between the company and its controller (*eg*, trustee-beneficiary or agent-principal) that renders it unnecessary to pierce the corporate veil, it will then be inappropriate to do so as there is no public policy imperative which justifies resorting to piercing the corporate veil. If other legal doctrines can be employed to resolve the case, the court will not resort to corporate veil piercing which should only be used as a last resort.

*D. Application to post-*Prest *cases*

25 The general principles elucidated by Lord Sumption (and generally endorsed by the majority in the Supreme Court) have been applied in subsequent cases. The following observations can be gleaned from such post-*Prest* developments:

> (a) In general, post-*Prest* cases agree that there is a very limited principle of true veil piercing as articulated by Lord Sumption in *Prest*:[46]
>
> > But it is clear from the decision of the Supreme Court that, in the present state of English law, the court can only pierce the corporate veil 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'.
>
> (b) Recent cases have rejected classifying as corporate veil piercing certain fact situations that might have otherwise been categorised as such. In *Antonio Gramsci Shipping Corp v Lembergs*[47] (where the respondent had set up a puppet company

45 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [62].
46 *Antonio Gramsci Shipping Corp v Lembergs* [2013] EWCA Civ 730 at [65].
47 [2013] EWCA Civ 730.

in order to sidestep a jurisdiction clause), the appellate court concluded that:[48]

> … in the light of the decisions in *VTB Capital* and *Prest v Petrodel*, the submission that it is possible to pierce the corporate veil in this case to deem Lembergs to have consented to the jurisdiction clause is untenable.

(c) Subsequent decisions have explicitly applied the framework of concealment and evasion principles in analysing the facts. In *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd*[49] (which involved a director's breach of fiduciary duty and usurpation of corporate opportunities by purchasing assets individually rather than in the company's name), the court impressed a trust (for the benefit of the company) upon the acquisition.

(d) The concealment principle was also applied in the criminal case of *R v Sale*[50] (which involved the receipt of bribes). On the facts, the court found that the evasion principle did not apply since "there was no legal obligation or liability which was evaded or frustrated by the interposition of the company"[51] but the concealment principle was applicable as "the activities of both the appellant and the company were so interlinked as to be indivisible".[52]

26 Accordingly, it is clear that the case of *Prest* is good law in England. In practice, however, there may be some difficulty in drawing a bright line between the two concepts of concealment and evasion[53] and the full implications will probably need to be thrashed out in future cases. In any event, Norris J has pointed out in *Akzo Nobel NV v Competition Commission*[54] that "a majority of the Supreme Court, whilst endorsing Lord Sumption's analysis, did not wholly exclude the possibility that exceptions may also be made in other unspecified but rare circumstances":[55] Lady Hale is "not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion"[56] while Lords Mance and

48 *Antonio Gramsci Shipping Corp v Lembergs* [2013] EWCA Civ 730 at [65].
49 [2013] EWHC 3530 at [116]–[119].
50 [2013] EWCA Crim 1306.
51 *R v Sale* [2013] EWCA Crim 1306 at [39].
52 *R v Sale* [2013] EWCA Crim 1306 at [40].
53 In fact, Lord Sumption recognised that "many cases will fall into both categories": *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [28].
54 [2013] CAT 13.
55 *Akzo Nobel NV v Competition Commission* [2013] CAT 13 at [95].
56 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [92].

Clarke have cautioned that "it is … dangerous to seek to foreclose all possible future situations which may arise".[57]

III. Singapore position

27 In the aftermath of *Prest*, the question that ought to be raised in Singapore is whether the local jurisprudence on corporate veil piercing should be re-examined with a view to rationalising the Singapore position since the earlier local cases (much like those in the UK) have relied heavily on metaphors and platitudinous phrases. In particular, there is a need to confront the problem of apparently inconsistent judicial statements that seem to categorise the *alter ego* doctrine as a separate ground for corporate veil piercing in Singapore (and in other jurisdictions). To the extent that this is so, the Singapore position and the post-*Prest* English position appear to be divergent. However, it remains to be seen whether the Singapore courts[58] will be persuaded by the distinction expounded by the UK Supreme Court in *Prest*.

28 The recent case in Singapore that sets out important *dicta* on the doctrine of corporate veil piercing is the Court of Appeal's judgment in *Alwie Handoyo v Tjong Very Sumito*[59] ("*Tjong*"). The dispute in this case arose after Tjong sold his shareholding interests in certain Indonesian companies and the proceeds were then paid to two shell companies, Aventi Holdings Ltd and Overseas Alliance Financial Ltd ("OAFL"), which were owned by Alwie on behalf of Tjong. However, the transaction subsequently went sour and Tjong alleged that the payment arrangement came about through misrepresentation by the parties close to or controlling the two shell companies which had been unjustly enriched in the process. Of relevance to the discussion in the present article is the claim lodged by Tjong who sought from Alwie the payment remitted to OAFL.

The High Court pointed out in *Tjong Very Sumito v Chan Sing En*[60] that:[61]

57 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [100] and [103].

58 While the recent High Court decision of *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 referred to *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 in brief, this was with a view to supporting certain limited propositions on corporate personality – *not* on veil piercing *per se*. The facts of this case revolved around arbitration and the concept of "single economic entity"; corporate veil piercing was not really in issue.

59 [2013] 4 SLR 308.

60 [2012] 3 SLR 953.

61 *Tjong Very Sumito v Chan Sing En* [2012] 3 SLR 953 at [67]. Likewise, see *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [95] where Lee Kim Shin JC observed that "there is, nevertheless, a general thread that

(*cont'd on the next page*)

> … while there is as yet no single test to determine whether the corporate veil should be pierced in any particular case, there are, in general, two justifications for doing so at common law: first, where the evidence shows that the company is not in fact a separate entity; and second, where the corporate form had been abused for an improper purpose.

In light of the elements of fraudulent misrepresentation and unlawful means conspiracy, the trial judge held that OAFL's corporate veil should be pierced on the basis of *alter ego*: Alwie was the *alter ego* of OAFL which in reality was not operating as a separate entity. The corporate veil could then be disregarded because the company and its controller were not acting as distinct entities.

29 One of the observations raised during the appellate proceedings was that the money was paid into OAFL's bank account which was actually controlled by Alwie. Although OAFL was the named owner of the account, Alwie was the beneficial owner of the account. The Court of Appeal found that "Alwie made no distinction between himself and OAFL"[62] and thus agreed with the High Court that the corporate veil should be pierced on the ground of *alter ego*.

30 The Court of Appeal recast the issue in the following manner:[63]

> The [trial] judge lifted OAFL's corporate veil on the ground that Alwie was OAFL's *alter ego*, not that OAFL was a mere device, sham or façade … *The ground of alter ego is distinct from that based on façade or sham*, and the key question that must be asked whenever an argument of *alter ego* is raised is whether the company is carrying on the business of its controller … [emphasis added]

The appellate court seemed to suggest that the *alter ego* argument is one that is distinct from façade or sham. At first blush, this *obiter* statement appears to establish a separate ground upon which the courts can choose to pierce the corporate veil. Arising from the above *dicta*, there are apparently two distinct bases for corporate veil piercing whereas *Prest* has limited corporate veil piercing to situations satisfying the evasion principle.

31 *Tjong* thus raises a number of issues which will be analysed (under the next heading):

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runs through all the authorities in support of the piercing of the corporate veil: the presence of abuse".

62 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [100].

63 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [96].

(a) whether the Singapore courts intend to create a separate additional ground of corporate veil piercing based on *alter ego*;[64]

(b) whether the concept of "*alter ego*" is instead best understood as falling within existing principles of agency;

(c) whether the concept of "*alter ego*" should best be subsumed under the category of concealment as expounded by the Supreme Court in *Prest*; and

(d) whether the ground of façade and sham should be recast in the light of concealment and evasion doctrine as explicated by *Prest*.

IV. Resolving apparent inconsistencies between UK and Singapore positions

32 It should be pointed out that *Prest* and *Tjong* were decided at around the same time. Hence, the Court of Appeal in *Tjong* did not have the opportunity to consider the seminal decision delivered in *Prest* (which recast and re-rationalised many of the earlier English decisions that the judgment in *Tjong* was based on).

33 To the extent that *Tjong* stands for the proposition that *alter ego* is a distinct basis for corporate veil piercing, there appears to be an inconsistency between the UK and Singapore positions. It is suggested that there are four alternative ways that this perceived inconsistency may be resolved:

(a) One may take the position that *alter ego* is not truly a separate ground for corporate veil piercing. The word "ground" is actually being used in the loose sense in that *alter ego* is not meant to be a separate basis for corporate veil piercing but, if properly understood, is merely a technique or methodology of attribution.

(b) *Alter ego* may be better explained under the principle of agency (as the two are seen working hand in glove with each other).

(c) *Alter ego* may be subsumed under the concealment principle as expounded in *Prest*.

(d) By adopting alternative approaches such as personal liability for torts committed by a director, one can avoid

64 Although this may be an *obiter* statement in *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308, the idea of *alter ego* as a ground for veil piercing has been thrown up in many of the earlier Singapore decisions.

conflating what should properly come under that alternative route of imposing liability with the doctrine of *alter ego*.

Each of these possible re-interpretations will be discussed at length under the ensuing sub-headings.

A. Technique of attribution

34 While the clarification in *Prest* of the corporate veil piercing doctrine is likely to be welcomed by the courts in Singapore, the problem that remains is that a number of local cases in recent years seem to suggest that the *alter ego* exception exists as an independent ground for piercing the corporate veil.[65] At first blush, this appears to be incongruous with the newly established categories of concealment and evasion[66] expounded in *Prest*.[67] However, the perceived inconsistency may be readily resolved if one takes the view that *alter ego* is not actually meant to be a separate basis for corporate veil piercing but is instead meant to be merely a technique or methodology of attribution.

35 The crux of the problem is that the courts (in Singapore as well as foreign jurisdictions) make reference to the *alter ego* ground without having the opportunity of elaborating more fully.[68] In order to ascertain the true meaning of the *alter ego* exception, one needs to trace some of the authorities that the Court of Appeal cited in *Tjong*. It is suggested that *alter ego* is not meant to be a stand-alone ground of corporate veil piercing but the concept requires further amplification. There should instead be focus on explaining the *alter ego* exception *in vacuo* before the wider implications of *Prest* can be meaningfully considered. The term "*alter ego*" remains amorphous despite it being used repeatedly in corporate veil piercing cases for so many years. The problem is compounded by the fact that the references to "*alter ego*" occur only in *dicta* and this arguably limits the opportunity for the courts to fully explore the content of the doctrine.

36 Applying this view of attribution technique, *alter ego* should not be regarded as a distinct ground for corporate veil piercing and any misconception that it is so arises from a conflation of two separate issues – corporate veil piercing and rules of attribution. At the most

65 Apart from *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308, see, *eg*, *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 and *Zim Integrated Shipping Services Ltd v Dafni Igal* [2010] 2 SLR 426.

66 See text accompanying nn 27 and 28 above.

67 Although not without its detractors, *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 remains the headwater from which all future English decisions will flow.

68 See para 27 above.

basic level, the loose definition of this particular term in dictionaries adds to the muddying of issues:

> (a) According to *Black's Law Dictionary*,[69] the *alter ego* rule is "the doctrine that shareholders will be treated as the owners of a corporation's property, or as the real parties in interest, whenever it is necessary to prevent fraud or to do justice".[70]
>
> (b) According to *Words & Phrases*:[71]
>
> > … to establish the *alter ego* doctrine, it must be shown that the stockholders disregarded the entity of the corporation, made the corporation a mere conduit for the transaction of their own private business, and that the separate individualities of the corporation and its stockholders in fact ceased to exist.

37 The manner in which these definitions are phrased seems to suggest that "*alter ego*" is the synonym of "corporate veil piercing". This is not technically correct as the two doctrines are conceptually distinct. Corporate veil piecing has to do with treating the acts or liabilities of the company as the liabilities and acts of the shareholder hiding behind the veil – that is, treating the business of the company as that of its controlling shareholder.[72] On the other hand, the doctrine of *alter ego* has to do with the rules of attribution where one has to ascertain "which acts of which people [that is, human agents] will count as acts of the company"[73] in, for example, the following scenarios:

> (a) attributing criminal acts or tortious acts committed by a person to the company;[74] and
>
> (b) the issue of whether the specific knowledge of that person is to be imputed to the company.[75]

69 Bryan A Garner, *Black's Law Dictionary* (West Publishing Company, 9th Ed, 2009).

70 Bryan A Garner, *Black's Law Dictionary* (West Publishing Company, 9th Ed, 2009) at p 91.

71 *Words & Phrases* vol 1 (Carswell, 1993) at p 439.

72 Len Sealy & Sarah Worthington, *Sealy's Cases and Materials in Company Law* (Oxford University Press, 9th Ed, 2010) at p 53.

73 Len Sealy & Sarah Worthington, *Sealy's Cases and Materials in Company Law* (Oxford University Press, 9th Ed, 2010) at p 77. See also *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500; G R Sullivan, "Attribution of Culpability to Limited Companies" (1996) 55 Camb LJ 515 at 521; and Eilis Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239. In fact, "*alter ego*" has been more accurately defined as "a representative of another person" in *The New Shorter Oxford English Dictionary* (Lesley Brown ed) (Oxford University Press, 1993).

74 See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and *Tesco Supermarkets Ltd v Nattrass* [1971] UKHL 1.

75 See *El Ajou v Dollar Land Holdings plc* [1993] EWCA Civ 4; *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 26; and *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115.

In cases of large companies, an *alter ego* is likely to be someone who is fairly senior such that his act can be identified with that of the company.

38 The editors of *Boyle and Birds*[76] highlight the need to understand the *alter ego* doctrine in the context of criminal law:[77]

> In order to hold a company liable for offences involving proof of *mens rea*, the courts have had to develop a new principle of corporate liability which is sometimes referred to as the *alter ego* doctrine. This allows the law to attribute the mental state of those who in fact control and determine the management to the company itself as being its 'directing mind and will'.

It is clear that the concept of *alter ego* revolves around the possibility of attributing the mental state of the relevant director or officer to the company and should thus be understood as a technique of attribution. However, the problem is that the courts generally appear to have conflated the rules of attribution (which determine issues such as whether the contract entered into by the director or employee is done within the course of the agency such that it is attributable to the company) with the doctrine of corporate veil piercing.

39 The doctrine of *alter ego* has more to do with the rules of identification and attribution rather than corporate veil piercing proper. Functionally, the two doctrines are different and should not be imprecisely identified as synonyms. In essence, *alter ego* is not a basis for corporate veil piercing but rather a conduit that leads to a final outcome. What then is the purpose of trying to apply the doctrine of *alter ego*? It appears that the purpose is to impute *mens rea* for criminal liability upon the company or to impute the knowledge of senior officers to the company for commercial reasons.[78]

40 Hence, it is suggested that the *alter ego* "exception" ought to be properly understood as simply referring to the rules of attribution generally. Indeed, there is much to be said for the view that "there is no clear *alter ego* doctrine for all cases but that the doctrine is a starting point for rules of attribution that must be tailored to the context".[79]

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76 *Boyle & Birds' Company Law* (John Birds *et al* eds) (Jordan Publishing, 8th Ed, 2011).

77 *Boyle & Birds' Company Law* (John Birds *et al* eds) (Jordan Publishing, 8th Ed, 2011) at p 65.

78 *Boyle & Birds' Company Law* (John Birds *et al* eds) (Jordan Publishing, 8th Ed, 2011).

79 See *Law of Insurance Contracts* (Malcom Clarke ed) (Informa Law, 6th Ed, 2009) at para 23-8A2 and G R Sullivan, "Attribution of Culpability to Limited Companies" (1996) 55 Camb LJ 515 at 521. This is a complex and difficult area of law, but it has been said that there is a need for a more context-driven approach

(*cont'd on the next page*)

B. Subset of agency

41 The doctrine of *alter ego* may alternatively be explained under the principle of agency, as suggested by Lord Neuberger in *Prest*. Under this view, *alter ego* is seen as working hand in glove with the agency principle: the primary rules of attribution are generally found in the memorandum and articles (*eg*, board resolution, shareholders resolution, or senior management action) working together with general rules of attribution available to natural persons as under the principles of agency.[80]

42 A relationship of agency is established where the company and its controller have separate identities and the company has authority to contract on behalf of the controller. Under a finding of agency, the company is an agent of its controller. The principal will then be held responsible for the acts of his agent within the scope of agency.[81]

43 The doctrine of *alter ego* as articulated in *Tjong* may fit comfortably within the agency principle. First, OAFL and its controller assumed different identities: OAFL was a company while Alwie was its shareholder and director. Second, OAFL also had authority from Alwie to accept payments from the sales and purchase agreement. Seen in this light, OAFL was merely an agent for Alwie's own actions, and the person whom the court should find liable ought to be Alwie. As the High Court noted, Alwie was "the controller of OAFL … [which was] an extension of himself".[82] Alwie, as a director, owed OAFL a fiduciary duty; that is, there was a legal relationship between them. As Alwie was the sole directing mind of OAFL, it is certainly within the scope of the doctrine of agency to find Alwie as the principal and hold him liable. Viewing the *alter ego* principle in such a manner should thus be seen as sidestepping the problem of corporate veil piercing.

44 Additionally, the decision in *Tjong* was based on the judgment in *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd*[83] ("*NEC*") which in turn relied on the judgment in *Smith, Stone & Knight Ltd v Lord Mayor, Aldermen and Citizens of City of Birmingham*[84] ("*Smith*") to loosely assert that "the *alter ego* argument is another ground to lift the

rather than an anthropomorphic inquiry; see Eilis Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239.

80 See Len Sealy & Sarah Worthington, *Sealy's Cases and Materials in Company Law* (Oxford University Press, 9th Ed, 2010) at p 77 and Eilis Ferran, "Corporate Attribution and the Directing Mind and Will" (2011) 127 LQR 239 at 243.

81 *Adams v Cape Industries plc* [1990] Ch 433 at 545–550.

82 *Tjong Very Sumito v Chan Sing En* [2013] 3 SLR 953 at [70].

83 [2011] 2 SLR 565.

84 [1939] 4 All ER 116. *Smith, Stone & Knight Ltd v Lord Mayor, Aldermen and Citizens of City of Birmingham* had been rationalised on the ground of agency.

corporate veil".[85] The court in *NEC* held that it would have followed Smith in explaining "*alter ego*" on agency grounds if control was in fact proven such that the controller could be considered the company's *alter ego*.[86] In the light of the fact that the roots of the *alter ego* argument lie in Smith which is premised on the agency technique, one would seem justified in concluding that the *alter ego* ground is merely a case of agency. On examining the facts in *Tjong*, it is possible to conclude that agency could be established since the defendant controlled the company and was the directing mind and will of the company. *Tjong* should therefore be understood as falling under the doctrine of agency; this would not involve piercing the corporate veil but merely requires utilising normal agency principles, hence reconciling it with *Prest*.

45 In affirming the trial judge's decision on the point of *alter ego*, the Court of Appeal in *Tjong* cited *NEC* as establishing the test for *alter ego* – *viz*, whether the company is carrying on the business of its controller. However, this may arguably not be a helpful test for practical application because it appears to be somewhat tautological: by definition, a corporate vehicle is routinely used to carry on the controller's business. It is submitted that the crux lies in identifying the threshold at which such utilisation becomes unacceptable as a manner of legal principle, and not whether the company is simply carrying on the controller's business.

46 In *Smith*, the court treated the subsidiary company as an implied agent or nominee of the parent company because the subsidiary company was found to be running the business on behalf of the parent company (since its profits were treated as those of the parent company); in other words, the court appeared to have treated the agency ground as the equivalent of the *alter ego* exception. This invidious loose usage of the term is also perpetrated in other jurisdictions: for example, in the Australian case of *Brewarrana v Commissioner of Highways*[87] Bray CJ used the terms interchangeably when referring to the plaintiff as the "agent trustee or *alter ego*".[88] However, the agency ground was not included in *Prest* as a true exception[89] to the rule in *Salomon* and should thus not be considered as a ground for piercing the corporate veil. It is submitted that this ground of agency (or *alter ego*) is useful as an alternative ground to achieving the same result without having to lift or pierce the corporate veil.

85 *Smith, Stone & Knight Ltd v Lord Mayor, Aldermen and Citizens of City of Birmingham* [1939] 4 All ER 116 at [31].

86 These observations were made by way of *dicta* as the court found inadequate evidence of control to establish that the protagonist was the company's *alter ego*; see *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 at [36].

87 [1973] 4 SASR 476.

88 *Brewarrana v Commissioner of Highways* [1973] 4 SASR 476 at 480.

89 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [16].

47 In *UBAF Ltd v European American Banking Corp*,[90] the phrase "*alter ego*" was also criticised by Ackner LJ as being meaningless:[91]

> He did, however, contend both before Leggatt J and before us that, in order to cause a corporate person to lose protection of the section, the signature must be that of a person who is the corporation's *alter ego* – a description which, with respect, we find largely meaningless, save as an indication of some very wide but undefined authority – and he ultimately felt compelled to accept (and we think rightly) that at least if Macheras had been specifically authorised by a resolution of the board to sign the representations, then the defendants would have been bound.

The phrase "*alter ego*" has been rightly criticised as being hollow as it has been too loosely used. Ackner LJ is correct in noting that the phrase is only an indication of some very wide but undefined authority. This is the reason why it has often been confused with the agency argument. The doctrine of agency requires authority to be conferred on the agent by the principal to act on his behalf; in a true agency situation, this authority is clear. However, the courts have apparently used the phrase "*alter ego*" even when there is no such clear authority – probably what Ackner LJ meant by "undefined authority". The confusion with the agency argument has also been highlighted in *Cristina v Seear*:[92]

> Whether one uses the expression '*alter ego*', which, with respect to some previous judgments, I find some difficulty in doing, or whether one says that in reality the company was merely the agent or manager of the tenants matter not.

48 Not only has the phrase "*alter ego*" been used in a confusing manner; the courts have also employed other epithets such as "puppets"[93] and "clones".[94] However, commentators[95] have suggested that all these terms seem to mean no more than that the company is under a particular individual's control. Again, it is clear that the touchstone of clarity in these muddied waters appears to be "control". In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*[96] ("*Cape Pacific*"), the court considered the instances where the veil may be lifted:[97]

> Many epithets have been used to describe the abuse against which the courts have tried to protect third parties, namely puppets, shams,

90 [1984] 1 QB 713.
91 *UBAF Ltd v European American Banking Corp* [1984] 1 QB 713 at 719.
92 [1985] 2 EGLR 128 at 129.
93 See *Littlewoods Mail Order Stores Ltd v Commissioners of Inland Revenue* [1969] 1 WLR 1241 at 1254 and *Wallersteiner v Moir* [1974] 1 WLR 991 at 1013.
94 See *R v MerBan Capital Corp Ltd* [1985] 1 CTC 1 at 4.
95 See Derek French, Stephen Mayson & Christopher Ryan, *Mayson, French & Ryan on Company Law* (Oxford University Press, 27th Ed, 2010) at p 151.
96 [1993] 2 SA 784.
97 *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* [1993] 2 SA 784 at 816.

> masks and *alter ego*. However, the general principle underlying this aspect of the law of lifting the veil is that, when the corporation is the mere *alter ego* or business conduit of a person, it may be disregarded.

There are already many phrases utilised by the courts to the same effect as "*alter ego*". The court in *Cape Pacific* suggests that there is essentially one principle when all these terms are used – where the individual uses the company to conduct its own business. *Cape Pacific* also cited with approval the English decision of *Moir v Wallersteiner*[98] where Lord Denning elaborated thus:[99]

> He controlled their every movement. Each danced to his bidding. He pulled the strings. No one 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.

Lord Denning referred to the term "puppet" as similar to the phrase "*alter ego*". (However, it is troubling that he also mentioned the term "agent" in his judgment.)

49 Arising from these examples of loose language, the true nature of the agency technique has become much clouded in earlier jurisprudence. *Prest* has arguably provided a much-needed clarion call for a return to discipline in keeping the agency ground conceptually distinct from the other doctrines and concepts such as *alter ego*.

C. Subsumed under concealment

50 Another alternative approach is to subsume the doctrine of *alter ego* under the category of concealment. It is unlikely that the intended effect of *Prest* is to abolish all established exceptions. The concealment and evasion principles expounded in *Prest* should then be seen as broader categories under which all the current judicial exceptions (such as *alter ego*, sham or façade) may be subsumed and categorised in a systematic manner. This would dispense with the unhelpful metaphors without radically changing the law.

51 As it currently stands, the common law in Singapore sets out two grounds for corporate veil piercing – the *alter ego* ground and the sham ground.[100] These two grounds may be recast under the concealment and evasion principles enunciated by Lord Sumption. The

98 [1974] 1 WLR 991.

99 *Moir v Wallersteiner* [1974] 1 WLR 991 at 1013.

100 See, *eg*, *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 at [27] and [31] and *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [96].

sham ground is synonymous with *Prest*'s characterisation of evasion-type cases where the "corporation acts as a façade to allow the … defendant to evade his legal obligations".[101] The *alter ego* argument, however, is analogous to Lindley MR's *dicta* in *Smith* as applicable to the concealment-type cases envisioned in *Prest* where the applicable test is "whether the company is carrying on the business of its controller".[102]

52 It is also pertinent to note how the court in *Prest* re-explained *alter ego* with respect to the earlier decision of *Gencor ACP Ltd v Dalby*[103] ("*Gencor*") where the offshore account of Burnstead (a company controlled by Dalby) was found to be "in substance little other than Dalby's bank account held in a nominee name … [and] … simply the *alter ego* through which Dalby enjoyed the profit which he earned in breach of his fiduciary duty".[104] Lord Sumption explained that *Gencor* should come under the category of concealment:[105]

> Rimer J ordered an account against both Dalby and Burnstead. He considered that he was piercing the corporate veil. But I do not think that he was. … As Rimer J observed, 'the introduction into the story of such a creature company is … insufficient to prevent equity's eye from identifying it with Dalby'. This is in reality the concealment principle. The correct analysis of the situation was that the court refused to be deterred by the legal personality of the company from finding the true facts about its legal relationship with Dalby. It held that the nature of their dealings gave rise to ordinary equitable claims against both. The result would have been exactly the same if Burnstead, instead of being a company, had been a natural person, say Dalby's uncle, about whose separate existence there could be no doubt.

The facts in *Gencor* are similar to those in *Tjong* where Alwie was likewise accused of being the *alter ego* of OAFL as he controlled the bank account belonging to the latter. Hence, *Tjong* could also be analysed on the basis of concealment.

53 Another case "with the same confusion of concepts"[106] is *Trustor AB v Smallbone (No 2)*[107] where Smallbone, the former managing director of Trustor, improperly procured large amounts of money to be paid out of its account to a company called Introcom. Morritt VC held that "the court was entitled to pierce the corporate veil if the company was used as a device or façade to conceal the true facts thereby avoiding

101 *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 at [28].
102 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [96].
103 [2000] 2 BCLC 734.
104 *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 at [26].
105 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [31].
106 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [32].
107 [2001] 1 WLR 1177.

or concealing any liability of those individual(s)".[108] However, Lord Sumption decided otherwise after applying the concealment principle to this particular case:[109]

> As I read Morritt VC's reasons for giving judgment against Smallbone, he did so on the concealment principle. It had been found at the earlier stage of the litigation that Introcom was 'simply a vehicle Smallbone used for receiving money from Trustor' and that the company was a 'device or façade' for concealing that fact. On that footing, the company received the money on Smallbone's behalf. This conclusion did not involve piercing the corporate veil, …
>
> … the analysis would have been the same if Introcom had been a natural person instead of a company. The evasion principle was not engaged, and indeed could not have been engaged on the facts of [the] case.

54 It should also be pointed out that the concealment principle in *Prest* is founded on the same basis of control as in the *alter ego* exception in *Tjong*. The concealment principle involves looking behind the corporate veil to discover the facts which the corporate structure is concealing. Lord Sumption applied this principle by re-explaining the cases of *Gilford* and *Jones*. In *Gilford*, the injunction against Horne was granted on the concealment principle because "the business was really carried on by Horne … [and] … the interposition of the company was to maintain the pretence that it was carried on [or controlled] by others".[110] In *Jones*, the decree of specific performance awarded against Lipman was similarly based on the concealment principle because he was "the man in control of the company".[111] Evidently, the concealment principle, as explained by Lord Sumption, is used to ascertain the true source of control of the company. This is conceptually similar to the *alter ego* exception. Hence, the concealment principle and the *alter ego* exception are both founded on the basis of control as they seek to identify the true actors or controllers of the company and ultimately hold them personally liable; in other words, the concealment principle is conceptually and practically similar to the *alter ego* exception.

55 A further question that needs to be raised for consideration is whether the *alter ego* doctrine should also be based on fraud. Choo Han Teck J drew attention to this in *Sameyeh Pte Ltd v Hassan's Carpets Pte Ltd*:[112]

> The courts have from time to time lifted the corporate veil which hides the shareholders from the gaze of those dealing with the company. The

108 *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177 at [23].
109 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [32] and [33].
110 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [29].
111 *Prest v Petrodel Resources Ltd* [2013] 3 WLR 1 at [30].
112 [2001] SGHC 157 at [11].

> purpose is to render the shareholders accountable for the act of the company but the pre-condition for lifting the corporate veil is clear. *The veil will be lifted only if the company was used as a means of committing a fraud*, or something close to that, on the plaintiff. [emphasis added]

The case of *Nagase Singapore Pte Ltd v Ching Kai Huat*[113] seemed to endorse the requirement of fraud but the substantive result was arguably achieved through conflating the concepts of *alter ego* and fraud:[114]

> I agree that the plaintiff could have (and perhaps should have) brought its claim against the defendant on the basis that he was responsible for the wrongs of the company as its *alter ego* and that, as the plaintiff's claim was one for deliberate overcharging, *it was akin to fraud and therefore justified the piercing of the corporate veil*. [emphasis added]

However, a different view was taken in *NEC* where Belinda Ang Saw Ean J stated very clearly that the *alter ego* argument is a distinct ground from fraud:[115]

> The *alter ego* argument is another ground to lift the corporate veil; *it is a distinct ground, different from the one based on fraud of the company's controller*. The key question that must be asked whenever an argument of *alter ego* is raised is this: is the company carrying on the business of its controller? [emphasis added]

According to Ang J, the test for *alter ego* requires only one key question – whether the company is carrying on the business of its controller. It is interesting to note that the Court of Appeal's *obiter* statement in *Tjong* also includes this very question but without any mention of whether fraud should be taken into consideration.

56 This issue thus remains an open question in Singapore jurisprudence. Given the conflicting pronouncements on the issue from the High Court, the Court of Appeal will have to offer clarification when the occasion arises, and may possibly reevaluate these earlier cases in light of *Prest*.

D. Tort approach

57 Another possible alternative way of reconciling *Tjong* with *Prest* is to utilise the concept of tortious liability which does not involve corporate veil piercing. This analysis is premised on the doctrine of

113 [2008] 1 SLR(R) 80.

114 *Nagase Singapore Pte Ltd v Ching Kai Huat* [2008] 1 SLR(R) 80 at [17].

115 *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 at [31].

personal liability for torts committed by a director being triggered on the facts and entails ascertaining what tort is involved and how to make the director personally responsible. Hannigan[116] lucidly explains the distinction between (a) corporate liability in tort; (b) personal liability for torts committed by the director; and (c) the director's liability for procuring wrongdoing. As suggested by Hannigan, keeping the different categories distinct may be the proper approach to adopt. A company, like a human being, can be sued for the tort it commits. As the company is an inanimate body, its tortious actions can only be committed via its human agents. Apart from the company being made vicariously liable for the acts of its agent or employee, the question which arises is whether the director involved can also be made personally liable. The starting position in such an inquiry is to consider whether the director committed the tort: if he did indeed do so, the director would be personally liable and the company would be jointly liable on the basis of vicarious liability (save for cases of negligent misrepresentation where there must be reliance and assumption of responsibility in order to make the directors personally liable as in *Williams v Natural Life Health Foods Ltd*).[117]

58 As such, an alternative method of making the director liable is to find him a joint tortfeasor with the company when it has been established that the director had authorised, directed or procured the wrongful act even if he did not commit the tort himself (*eg*, when his employee made the misrepresentation). However, the difficulty here lies in "defining the nature and extent of the participation of the director in the tortious acts which render him personally liable on this basis".[118]

59 The issue can be framed thus: Is the director playing a purely constitutional role (*eg*, voting in board meetings) or is he exercising personal control beyond the constitutional role such that he would have been liable if he were not a director or controlling shareholder? In the latter scenario, there is no reason why there should not be joint liability.

60 *TV Media Pte Ltd v De Cruz Andrea Heidi*[119] ("*TV Media*") is a classic example of a case where the court conflated the concepts of tort and *alter ego*, thereby contributing to the muddle. The following excerpts of the judgment illustrate this conflation:[120]

> 128 In sum, we determine that the phrase 'direct, procure and/or authorise' is eminently suited to Andrea's claim in negligence against

116 Brenda Hannigan, *Company Law* (Oxford University Press, 2nd Ed, 2009) at pp 73–81.
117 [1998] 1 WLR 830; [1998] 2 All ER 577.
118 Brenda Hannigan, *Company Law* (Oxford University Press, 2nd Ed, 2009) at p 79.
119 [2004] 3 SLR(R) 543.
120 *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543.

> Semon and that it is irrelevant that Semon stands accused of having directed, procured or authorised a negligent course of omissions rather than a single positive act.
>
> …
>
> 140 On the totality of the evidence, it is patently clear to us that Semon, and Semon alone, had absolute control of Health Biz. It stands to reason that Semon was the person directing its negligent acts or omissions. We find no reason to overturn the judge's finding that nothing was done without Semon's knowledge, and that Semon's involvement in the negligence of Health Biz was not merely very great, but was total.
>
> …
>
> 149 … If Health Biz had sought professional help in interpreting these test reports, the pills would not have been sold and Andrea would not have consumed them or suffered liver failure. This is the precise line of reasoning followed by the judge and we do not see how it can be faulted.
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> …
>
> 157 … TV Media left it to others to take the necessary precautions. … Given its position of responsibility as the promoter and seller of Slim 10 [pills], TV Media cannot now plead ignorance to escape liability. TV Media's actions are clearly a proximate cause of Andrea's liver damage and it is therefore liable for the whole of that damage.

61 In *TV Media*, the Court of Appeal chose to pierce the veil on the ground that the company was an *alter ego* of the director. However, on the facts, it was actually unnecessary to pierce the veil to make the director personally liable: since the director did "direct, authorise and/or procure Health Biz's negligence",[121] he would have been *ipso facto* liable as a joint tortfeasor in any event. Hence, the appellate court did not actually need to resort to the *alter ego* exception to pin liability on the director as the same outcome could have been reached by finding the controller directly liable as a joint tortfeasor. A director who specifically authorises, directs or procures his company to perform a tortious act is personally liable for damages. This removes the need to pierce the corporate veil as there is an alternative method by which to find the controller liable. It is thus suggested that this approach can also possibly be adopted in situations where the parties would otherwise have attempted to advance an *alter ego* argument; a relationship that satisfies the *alter ego* test would likely fall into established legal relationships such as agency and joint tortfeasorship, hence rendering the *alter ego* exception otiose.

121 *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 at [41].

62 The appellate court held in *TV Media* that the level of a director's involvement in the company would naturally determine whether he was the company's *alter ego* and hence whether he was liable for the tortious acts of the company. In all the cases surveyed thus far, the principle that was applied was to ask "whether the company is carrying on the business of its controller"[122] as in *Tjong* and *NEC*. In *TV Media*, the appellate court pierced the corporate veil on the ground that the company was the director's *alter ego* – another instance of loose wording – and made the defendant director personally liable for the company's tort:[123]

> We recognise that the issue of a director's personal liability for his company's torts involves the consideration of difficult policy questions. On the one hand, there is the principle that a company is separate and distinct in law from its shareholders and directors, and that there is a commercial interest in allowing companies to enjoy the benefits of limited liability which are offered by incorporation. On the other hand, directors of companies should not be allowed to escape personal liability to third parties for torts that they personally committed merely because they committed the torts in the course of carrying out their duties as directors of the company. Previous courts have weighed these considerations in the balance and arrived at the conclusion that whether or not a director is personally liable for a tort committed by his company depends on the factual situation at hand. The court must look at the level of his involvement in the company in order to determine the extent to which he is the company's *alter ego* …
>
> In our considered opinion, Semon's level of involvement in Health Biz indicates that he was clearly the controlling mind and spirit of Health Biz. … We accordingly find sufficient reason to lift Health Biz's corporate veil and find Semon personally liable for authorising, directing and/or procuring Health Biz's negligent acts.

63 It is suggested that *TV Media* could have been solely posited on the doctrine of joint tortfeasorship, without the need to rely on the doctrines of *alter ego* and corporate veil piercing to foist responsibility on the director.[124] Although both approaches may lead to the same ultimate result of making the director personally liable for torts committed by the company, they are conceptually different creatures.

122 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [96]. See also *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 at [31].

123 *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 at [144]–[145].

124 See also Tan Cheng Han SC, "Company Law" (2004) 5 SAL Ann Rev 125 at 127, para 7.8.

64 Interestingly, the court in *Jinsung Construction Co Ltd v Roko Trading Pte Ltd*[125] also adopted the technique of joint tortfeasorship to impose liability on the director:[126]

> In other words, two critical elements must be satisfied in order for a director to be held personally liable, as a joint tortfeasor, for a tort committed by his company. First, the director must be the company's controlling mind and spirit. Second, he must have 'procured or directed' the commission of the tort by the company.

Here, the court found that the director was indeed the controlling mind of the company whose involvement was "total" and found him to be personally liable for the tort of conversion jointly with the company of whom he was sole shareholder and main director.[127]

65 A similar technique has been adopted by the UK courts as well. In *MCA Records Inc v Charly Records Ltd*,[128] the court undertook the same enquiry and held that liability as a joint tortfeasor might arise if an individual procured and intended for the infringement to take place. The defendant was held to be liable as he induced the company to copy and issue the recordings to the public.

66 It is evident that the key issue in all these cases lies in whether the company is carrying on the business of the controller. In fact, the court in *Prest* even agreed that the court in *Gilford* could grant an injunction by imputing Horne's knowledge to the company, thereby making the latter's conduct tortious.[129] This lends further support to the argument that attributing tortious liability to the proper person can be adopted as an alternative to piercing the corporate veil.

V. Conclusion

67 In conclusion, it is argued that the *alter ego* exception in *Tjong* ought not to be viewed as a separate veil piercing ground. Instead, it is probably best understood in one of the four alternative ways analysed above, *viz*: (a) as a technique of attribution; (b) as being explained under the principle of agency; (c) as being subsumed within the concealment principle; or (d) as being explained by alternative

125 [2012] SGHC 50.

126 *Jinsung Construction Co Ltd v Roko Trading Pte Ltd* [2012] SGHC 50 at [27].

127 Unfortunately, the court again appeared to have conflated the issues by equating an action in tort to corporate veil piercing: "[T]he fact that the plaintiff was claiming against the director personally for the company's tort, was akin to asking the court to lift the company's corporate veil": *Jinsung Construction Co Ltd v Roko Trading Pte Ltd* [2012] SGHC 50 at [31].

128 [2003] 1 BCLC 93.

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

approaches such as personal tortious liability. The seminal decision in *Prest*, albeit not without its own detractors,[130] provides much needed streamlining and direction in this area of law and should be seriously considered by the Singapore courts. Re-rationalising many of the earlier cases through the lens of concealment appears persuasive. The UK Supreme Court's attempt in *Prest* to maintain discipline in language and force the stream of liability to flow along clear tributaries is laudable, especially in light of the fact that there are alternatives to sidestep the doctrine. Some balance is struck in upholding orthodoxy on the one hand, and yet recognising that fraud or abuse[131] will not be outside the reach of the law.

68 Moving forward, it is suggested that Singapore courts may wish to move away from using metaphors such as "sham" or "façade", and instead consider adopting the principled approach espoused in *Prest* that coheres with commercial reality. The approach in *Prest* is consistent with precedent and sound legal policy and should be seen as a welcome development in the law. The decision strikes an appropriate balance between policy and principle, with the principled approach based on the need to allow the courts to do substantive justice to prevent the abuse of the corporate form. Such rules will engender greater clarity in the law, which in turn enhances commercial certainty.

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130 See, *eg*, P W Lee, "The Enigma of Veil Piercing" (2015) 26 ICCLR 28; Brenda Hannigan, "Wedded to *Salomon*: Evasion, Concealment and Confusion on Piercing the Veil of the One-man Company" (2013) 50 *Irish Jurist* 11; and Ernest Lim "*Salomon* Reigns" (2013) 129 LQR 480.

131 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 at [95].