

Piercing the Corporate Veil in Cases of Fraud: After Greymountain, is the Law Finally Black and White?

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Introduction

The separateness of the legal personality of a company from that of its members and directors is as fundamental to company law as the ‘neighbour principle’ is to negligence and fundamental rights are to constitutional law. It is an essential part of the fabric of corporate law in the common law world. Nonetheless, the veil of incorporation can sometimes yield to stronger forces and may, for example, be ‘lifted’ or ‘pierced’ by statute or by the courts in order to ensure greater accountability in the use of the corporate form.

Powers v Greymountain Management Ltd (In Liquidation) (“**Greymountain**”)¹ is an important development in Irish company law and serves as a stark reminder to company directors that failure to understand their duties and to act in the interest of the company at all times can have severe personal repercussions. *Greymountain* has shifted Irish company law from the ‘grey’ position whereby it was unclear when courts might pierce the corporate veil and better aligns it with other common law jurisdictions. The decision confirms that in circumstances where limited liability or the corporate form is abused, no-one is above or beyond the law.

Background to the Separateness of Legal Personality/Corporate Veil

The *Salomon* Principle

In *Salomon’s Case* (“**Salomon**”),² the fundamental issue before the House of Lords was whether a company dominated and legally controlled by one person was legally incorporated in accordance

¹ *Powers v Greymountain Management Ltd (In Liquidation)* [2022] IEHC 599.

² *Salomon v A Salomon & Co Ltd* [1897] AC 22.

with the terms of the then governing companies legislation.³ If, in accordance with the terms of the legislation, the company was incorporated legitimately, the responsibility for discharging corporate debts and liabilities rested solely with the company in its guise as a distinct legal person.⁴ On appeal, it was clarified that there is nothing to prevent the formation of what are, in effect, one-person companies, and that (contrary to the finding of the Court of Appeal) Mr Salomon was not an agent of the company.

Implicit from the *obiter* comments was the inference that, had the company been incorporated to pursue an illegitimate purpose, such as a fraudulent or dishonest objective, then the otherwise legitimate incorporation of the company could be contaminated:

If ... the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be proceeded against civilly or criminally.⁵

The separateness of legal personality (“**SLP**”), as vindicated in *Salomon*, is a cornerstone of company law in common law jurisdictions. As had by then been recognised in the creation of bodies by royal charter and by statute, a company too was a legal person distinct from the natural persons (or other companies) who were its members.

Salomon established that, upon incorporation, a new and separate artificial entity – the legal person – comes into existence. This boundary between the company and its members is metaphorically described as the ‘corporate veil’, a veil that the law will rarely penetrate.

³ (UK) Companies Act 1862, s.6.

⁴ Incorporation was accepted in cases of a ‘one-dominated business’ pre-*Salomon*, for example in *Re George Newman & Co* [1885] 1 Ch 674 and *Farrar v Farrar* (1889) 40 Ch D 395.

⁵ *Salomon v A Salomon & Co Ltd* (n2), at 33, per Lord Davey.

As will be discussed, case law since *Salomon* demonstrates that, by applying a flexible yet faithful interpretation of the *obiter* comments of Lord Macnaghten (alluded to above), a strict application of the *Salomon* principle could be displaced in circumstances where, *inter alia*, a company was incorporated to pursue an unjust business activity analogous to an equitable fraud.⁶

Piercing the Corporate Veil

The practical importance of the *Salomon* principle and the ‘veil’ that expresses it cannot be understated. Most significantly, the liabilities of a limited liability company are the company’s liabilities, and the members need only contribute the amount of their paid-up capital if the company is unable to meet its debts. However, incorporation does not fully:

cast a veil over the personality of a limited company through which the courts cannot see...

The courts can, and often do, draw aside the veil... They look to see what really lies behind.⁷

Circumstances in which the corporate veil will be pierced

Some statutory provisions ignore the SLP by attaching responsibility for the company’s obligations to company officers or others. Further, the courts may pierce the corporate veil in cases such as:

- fraud and the misapplication of monies;
- directors removing money from the company inappropriately; and
- negligence or impropriety.⁸

⁶ Stephen Griffin, ‘Disturbing Corporate Personality to Remedy a Fraudulent Incorporation: An Analysis of the Piercing Principle’ (2016) 66(4) Northern Ireland Legal Quarterly 321-41.

⁷ Lord Denning in *Littlewoods Mail Order Stores Ltd v IRC* [1969] 1 WLR 1241.

⁸ *Powers v Greymountain Management Ltd (In Liquidation)* (n1).

Statutory Exceptions

Section 722 of the Companies Act 2014 (the ‘**2014 Act**’) provides that a person is guilty if she or he is knowingly a party to the carrying on of the company business with intent to defraud its creditors or the creditors of any other person, or for any fraudulent purpose.

Significantly, s610 imposes personal liability without limitation, for all or part of the debts of a company, on persons who engage in fraudulent or reckless trading. At common law and under statute, a company and its veil may not be used to cloak or obscure, fraudulent activity.

Consequences of piercing the corporate veil

There are important practical consequences of a court ‘piercing’ the corporate veil. These may include making the assets of one company (the corporate veil of which has been pierced) available to the creditors of another company, or it may involve making the member(s) of a company personally liable for the company’s debts beyond the value of the member(s) paid-up shares (i.e. ignoring members’ limited liability). Therefore, it is a significant step for a court to pierce a company’s corporate veil, with potentially severe repercussions for the members and / or directors.

Looking Back

Despite these long-established principles, until *Greymountain*,⁹ there was no Irish precedent of the corporate veil being pierced by courts to hold directors or members personally liable for the fraud of the company. This has largely been a grey area in which courts have stated *obiter* that they *may*

⁹ *Powers v Greymountain Management Ltd (In Liquidation)* (n1).

have pierced the corporate veil had the circumstances been different, most notably in cases of fraud, without actually doing so in the relevant cases.

In *Ellis v Nolan*,¹⁰ the Court rejected an application for a ‘planning injunction’ under s27 of the Local Government (Planning and Development) Act 1963¹¹ against the directors of a private company *in respect of the alleged wrongs of the company*. In refusing the order, the Court held that, if the circumstances had been different, the ‘directors may well be made responsible for fraud, misrepresentation, or the improper application of money or negligence’.¹²

In *Dublin County Council v Elton Homes Ltd*,¹³ an injunction was sought to compel not only the company, but also its directors, to comply with the conditions of a planning permission. In refusing the application and holding that the directors had ‘merely’ engaged in mismanagement, the Court stated that

if the case were one of fraud, or if the directors had syphoned off large sums of money out of the company, so as to leave it unable to fulfil its obligations, the court might be justified in lifting the veil of incorporation and fixing the directors with personal responsibility.¹⁴

In *Dublin County Council v O’Riordan*,¹⁵ which also concerned an application for an injunction to require the company’s directors to personally fulfil the planning obligations of the company, the court refused to grant the injunction on the basis that there was no evidence of ‘fraud or the misapplication of monies’.¹⁶ In *Dun Laoghaire Corporation v Parkhill Developments*,¹⁷ Hamilton P refused to grant an injunction against a director of a company where they were in total control of

¹⁰ *Ellis v Nolan* (Unreported, High Court, 6 May 1983).

¹¹ Local Government (Planning and Development) Act 1963, s27.

¹² *Ellis v Nolan* (n10), at 10.

¹³ *Dublin County Council v Elton Homes Ltd* [1984] ILRM 297.

¹⁴ *ibid*, at 300.

¹⁵ *Dublin County Council v O’Riordan* [1985] IR 159.

¹⁶ *ibid*, at 166.

¹⁷ *Dun Laoghaire Corporation v Parkhill Developments* [1989] IR 447.

the company and managed it without regard to the requirements of the Companies Act 1963 as he had ‘found no evidence of any fraud or misrepresentation on his part; any siphoning off or misapplication of the funds of the said company’.¹⁸

In *Mastertrade (Exports) Ltd v Phelan*,¹⁹ Murphy J refused to strike out an action on the ground that a controlling shareholder would benefit improperly if it were allowed to proceed, stating that the companies concerned were not ‘in any way tainted with fraud, illegality or deceit’. Such cases laid the foundation whereby, if such a case of fraud through a corporate vehicle was to come before the Irish courts, they would have jurisdiction to hold the officers of that company personally liable for the fraud of the company.

The Seminal Decision: Greymountain

Background

Greymountain Management Ltd (the ‘**Company**’), registered in Ireland, was an essential element of a fraudulent investment scheme in which members of the public, based primarily in the U.S., were defrauded by millions of euro, while misled into believing that they were trading in binary options.²⁰ However, no options were ever purchased and, instead, the money was used primarily for the personal benefit of the Company’s shadow directors.

The use of a company registered in Ireland was a ‘critical factor in the structure and overall success’²¹ of the fraudulent operation and lent a ‘vener of legitimacy’²² to the fraudulent scheme: investors were more confident that their funds were safe in the hands of a company that apparently was subject to Irish and EU regulation.²³ The Company had two Ireland-resident directors, Coates

¹⁸ *ibid*, at 450.

¹⁹ *Mastertrade (Exports) Ltd v Phelan* [2001] IEHC 17.

²⁰ *Powers v Greymountain Management Ltd (In Liquidation)* (n1), at 7.

²¹ *ibid*, at 1.

²² *ibid*, at 8.

²³ *ibid*.

and Grainger (a prerequisite for all companies in Ireland under the 2014 Act²⁴), along with what were held to have been two shadow directors, David Cartu (resident in Dubai but with addresses in Israel and Georgia) and Jonathan Cartu (resident in Israel).

The Company was hopelessly insolvent and Powers sought an order against the Company's Irish directors and foreign shadow directors to make them personally liable for the funds that had been lost as a result of the alleged fraud. However, as discussed above, no court in this jurisdiction had ever pierced the corporate veil in such circumstances. Therefore, the issue for the High Court was whether, considering the *obiter* comments cited above at 2.3, the facts warranted such a groundbreaking step in Irish company law.

Piercing the Corporate Veil

While emphasising that the Court would not pierce the corporate veil lightly, Mr Justice Twomey concluded that the sole purpose of the Company was its function as an instrument of fraud.²⁵ Therefore, he held, the facts justified piercing the corporate veil and fixing the directors with personal liability.

Personal Liability of Shadow Directors

The Court felt there was no reason in principle not to consider the shadow directors in the same capacity as 'full' (*de jure* or *de facto*) directors when determining whether the corporate veil should be pierced.²⁶ Mr Justice Twomey found that the shadow directors had improperly extracted funds from the Company leaving it unable to discharge its liabilities to the plaintiff.²⁷

²⁴ Companies Act 2014, s137.

²⁵ *ibid*, at 145.

²⁶ *ibid*, at 160.

²⁷ *ibid*, at 159.

Reiterating that the Court was not doing so lightly and that this should only be done in exceptional circumstances and in light of the shadow director's moral responsibility for the fraud, Mr Justice Twomey pierced the Company's veil of incorporation. He stated that it would be 'an affront to justice'²⁸ to allow the shadow directors to hide behind the Company's SLP, and, consequently, he pierced the corporate veil in respect of the shadow directors, holding them personally liable for the plaintiff's losses.²⁹

Role of the Irish Directors

Mr Justice Twomey proceeded to consider the role of the Irish directors in the Company. He could not conclude definitively that they had been aware of the fraud or of its extent. Rather, he held that their acts and omissions had been of a 'completely different character'³⁰ in that they abrogated their duties as directors which enabled the shadow directors to use their position to defraud investors, and, in doing so, the Irish directors had unwittingly facilitated the fraud.³¹

The Court distinguished between the differing roles of the directors. Unable to accept that Grainger had a purely administrative role in the Company, akin to that of a company secretary, Mr Justice Twomey found that, in fact, Grainger had had an active role in the Company's operations, including signing payment-processing agreements on its behalf, thereby facilitating the fraud.³² Grainger was a co-signatory on the Company's bank account and prepared and filed CRO documentation, including the Company's audited accounts.³³ Most significantly, Grainger had failed to discharge his director's duty to acquire a sufficient knowledge of the Company's business and, if he had done so, the fraud might potentially have been detected sooner. Grainger had failed

²⁸ *Powers v Greymountain Management Ltd (In Liquidation)* (n1), at 162.

²⁹ *ibid*, at 161.

³⁰ *ibid*, at 169.

³¹ *ibid*, at 198.

³² *ibid*, at 86.

³³ *ibid*, at 184.

to discharge his duty to investigate allegations of irregularities involving the Company, which had been brought to his attention. He also reassured gardai when they enquired about the Company's activities.³⁴

In contrast, Coates was a student and Mr Justice Twomey found that he did not have any active role in the Company: Coates was a director in name only, as its owners 'needed a local person',³⁵ and he had taken the role to pay his college expenses. Mr Justice Twomey held that Coates, like Grainger, had failed to discharge his duty as a director to acquire a sufficient knowledge of the Company's business.³⁶ Coates was also found to have entirely abrogated the running of the Company to the shadow directors, with a total lack of oversight of what the Company was doing.³⁷

Mr Justice Twomey pointed to the fact that both directors had signed a power of attorney in favour of one shadow director on the basis that they were nominee directors and that he was the actual owner of the Company, thereby facilitating the fraud.³⁸ The Court acknowledged that, although this can be standard practice in some commercial settings, the fact that a director is legally empowered to grant a power of attorney to a third party did not mean that it was appropriate to do so in a particular case.³⁹ Furthermore, it was not a defence, where in addition to granting the power of attorney, both directors did not oversee, to any degree, the purpose for which the power of attorney was used.⁴⁰ In other words, '[d]elegation could not be abdication'.

³⁴ *Powers v Greymountain Management Ltd (In Liquidation) (n1)*, at 219.

³⁵ *ibid*, at 186.

³⁶ *ibid*, at 193.

³⁷ *ibid*.

³⁸ *ibid*, at 183.

³⁹ *ibid*.

⁴⁰ *ibid*.

Directors' Failures

Mr Justice Twomey concluded that it was unlikely that the fraud would have occurred without the assistance (albeit unwitting) of the Irish directors who had not taken any steps to find out what the Company was actually doing.⁴¹ The Irish directors had not performed the basic duties of a director as they had failed to:

- inform themselves about the nature of their duties as a director (or if they did, they ignored those duties);
- acquaint themselves with the affairs generally of the Company; and
- exercise appropriate supervision or oversight at a board level in respect of the execution or discharge of whatever tasks or functions had been properly and appropriately delegated to others.⁴²

Personal Liability of the Irish Directors

Mr Justice Twomey held that, although he had 'some sympathy' for Coates and Grainger, he had far greater sympathy for the plaintiff who was the 'completely innocent' party to the transaction.⁴³ Accordingly, the Court pierced the corporate veil in respect of both Irish directors.⁴⁴

The Court noted that Grainger was a 'very experienced company director'.⁴⁵ In choosing not to acquire a sufficient knowledge of the Company to enable him to discharge his duties, he ought to have known that he was in clear breach of those duties. The extent of the dereliction of duty and

⁴¹ *Powers v Greymountain Management Ltd (In Liquidation)* (n1), at 199.

⁴² *ibid.*

⁴³ *ibid.*, at 202.

⁴⁴ *ibid.*, at 170.

⁴⁵ *ibid.*, at 216.

of the impropriety was such that it merited piercing the corporate veil and Grainger being made personally liable to the plaintiff.⁴⁶

Although Coates was not as morally responsible as Grainger or the two shadow directors, the Court found that he had abrogated his duties as a director to such an extent that he should legally face the consequences of what the Company had done. This complete abrogation of his duties as a director gave the shadow directors free rein to use the Company as an instrument of fraud, without any oversight. Mr Justice Twomey held that ignorance of the law was not a defence and the complete and total disregard by Coates of his duties as a director was ‘of an extreme nature’.⁴⁷

Impact of *Greymountain*

Greymountain illustrates the exceptional circumstances in which a court, at common law, may decide to pierce the corporate veil and reiterates that only exceptional circumstances can justify a court doing so (occasions under statute each set their own threshold). The decision, the first of its kind in this jurisdiction, serves as an important reminder for members and directors that a court may go behind the SLP of a company in cases of fraud.

Just as the protection of limited liability for members of a limited company is vulnerable in the case of misuse of that protection, directorship is not a ‘risk-free sinecure’.⁴⁸ Defences such as ignorance of the law or that a person was a director ‘in name only’ will fail. Directors must be aware of their statutory duties and responsibilities to a company and ought not to become a director of an Irish company unless they are prepared to actively perform those duties.⁴⁹ They must also acquaint themselves with the affairs of the company and exercise appropriate

⁴⁶ *ibid*, at 222.

⁴⁷ *Powers v Greymountain Management Ltd (In Liquidation)* (n 1) at 205.

⁴⁸ Mason Hayes & Curran, ‘2022 in Review – Restructuring and Insolvency’, (*mbc.ie*, 2 December 2022), available at <<https://www.mbc.ie/latest/insights/2022-in-review-restructuring-and-insolvency>> accessed 18 September 2023.

⁴⁹ McCann FitzGerald, ‘High Court Pierces Corporate Veil’, (*mccannfitzgerald.ie*, 14 November 2022), available at <<https://www.mccannfitzgerald.com/knowledge/company-secretarial-and-compliance/high-court-pierces-corporate-veil>> accessed 18 September 2023.

supervision and oversight at a board level in respect of the performance of tasks or functions that the board has delegated.⁵⁰ In unambiguous fashion, *Greymountain* demonstrates that, in Irish law, the corporate veil is not absolute and should never be a sanctuary for those who misuse the corporate form in order to harm others.⁵¹

Although *Greymountain* was the first time that the Irish courts have pierced the corporate veil in a case of fraud, such precedent had already been set in other common law jurisdictions, to which this article now turns.

Cross-Jurisdictional Comparison

United Kingdom

Under both common law and statute, a company registered in the UK enjoys a legal personality separate and distinct from that of its members. Similar to Ireland, however, there are circumstances under both statute and common law in which the UK courts will ignore the separateness of corporate personality.

Statute:

The SLP of a company registered in the UK is recognised under s15 of the Companies Act 2006.⁵² Moreover, s213 of the Insolvency Act 1986⁵³ provides that where any person has been knowingly party to the carrying on of a business ‘with intent to defraud creditors of the company or of any other person, or for any fraudulent purpose’, the court may look beyond the corporate veil and hold such persons personally liable.

⁵⁰ William Fry, ‘Irish High Court Lifts Corporate Veil: Directors Personally Liable’, 5 December 2022.

⁵¹ Eversheds Sutherland, ‘High Court makes Irish History: Piercing the Corporate Veil’, (*eversheds-sutherland.com*, 21 December 2022), available at <https://www.eversheds-sutherland.com/global/en/where/europe/ireland/overview/articles/showarticle;ArticleID=en_global_ireland_high_court_makes_irish_history.html> accessed 18 September 2023.

⁵² Companies Act 2006, s.15.

⁵³ Insolvency Act 1986, s.213.

Common Law

A review of pertinent authorities highlights that UK jurisprudence on piercing the veil of incorporation is somewhat unsettled:

*VTB Capital plc v Nutritek International Corp.*⁵⁴

This was the first time the corporate veil doctrine was considered by the UK Supreme Court and, in doing so, the Court questioned the doctrine as an existential matter. The Supreme Court upheld the judgment of the Court of Appeal and declined to pierce the corporate veil, instead finding that, if the fraudulent misrepresentation claims were established, the plaintiff would be able to recover substantial damages in tort from the controllers, therefore providing adequate redress without disregarding the company's SLP. Lord Neuberger stated that, if the corporate veil was to be lifted, in reality it must be 'the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be)',⁵⁵ which was not found to be the circumstance in this case.

Prest v Petrodel Resources Ltd.

When it comes to the circumstances in which the corporate veil may be pierced, the leading authority in the UK is the decision of the Supreme Court in *Prest v Petrodel Resources Ltd* ('**Prest**').⁵⁶ Soon after *VTB Capital*, the decision in *Prest*, while offering clarity in respect of the doctrine, also created much uncertainty, holding that previous cases in which the corporate veil had been pierced,⁵⁷ had been decided incorrectly.

Delivering the leading judgment, Lord Sumption narrowed the scope of the jurisdiction to pierce the corporate veil significantly by designating it a 'rule of last resort'. It was to be an exceptional remedy that should only apply where there is no other legal instrument available, and, when it is applied, should only be done in cases of 'evasion' (such as cases of fraud) as opposed to cases of

⁵⁴ *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808.

⁵⁵ *ibid*, at 142.

⁵⁶ *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

⁵⁷ *Trustor v Smallbone (No 2)* [2001] EWHC 703 (Ch) and *Gencor ACP Ltd v Dalby* [2000] EWHC 1560 (Ch).

‘concealment’.⁵⁸ Consequently, the Supreme Court held that the UK courts have ‘correctly’ pierced the corporate veil in only two cases: *Gilford Motor Co Ltd v Horne* (‘**Gilford**’)⁵⁹ and *Jones v Lipman* (‘**Jones**’).⁶⁰

Lady Hale, in delivering the most pronounced counter-opinion to Lord Sumption’s judgment, accepted that *Gilford* and *Jones* rested on the evasion principle but held that the categories of ‘evasion’ and ‘concealment’ were not exhaustive, nor were ‘evasion’ cases the *only* cases that justified piercing the corporate veil. Citing *Re Darby*⁶¹, Lady Hale opined that these categories were instead to be understood as examples of the underlying principle to prevent companies from being used as “engines of fraud”.⁶²

While there was disagreement amongst the judges in *Prest*, not all is discord and some principles can be drawn from *Prest*. Schall submits,⁶³ and I agree, that three propositions can safely be taken from *Prest* as the new UK common law, while a further, fourth, concerning the crucial scope of the principle, is undecided:

- a) A doctrine of piercing the corporate veil exists under English law, which, after more than a century, finally qualifies the Salomon principle.
- b) Piercing the corporate veil is a remedy of last resort.
- c) Piercing the corporate veil is justified under the evasion principle.
- d) The evasion principle is not exhaustive, but it is the only case of piercing the veil for corporate abuse that is spelt out and other cases will be rare; only a minority of the judges (Lords Sumption and Neuberger) agreed that only the ‘limited’ evasion principle will justify

⁵⁸ *Prest v Petrodel Resources Ltd* (n56), at 28.

⁵⁹ *Gilford Motor Co Ltd v Horne* [1933] Ch 935.

⁶⁰ *Jones v Lipman* [1962] 1 All ER 442.

⁶¹ *Re Darby, ex parte Brougham* [1911] 1 KB 95.

⁶² Lady Hale in (n56) at 89.

⁶³ Alexander Schall, ‘The New Law of Piercing the Corporate Veil in the UK’ (2016) 13 *European Company and Financial Law Review* 549.

the piercing of the corporate veil⁶⁴ so this statement in Lord Sumption's leading judgment cannot be conclusively regarded as stating the common law.

Re Darby:

This case, referred to by Lady Hale in her judgment,⁶⁵ concerned international fraud. The relevant company's SLP was disregarded to hold the controllers personally liable in damages as the judge concluded that the responsibility for the fraud properly rested with the two controllers behind one of the companies involved. *Salomon* was distinguished as, in *Salomon*, the company had not been incorporated with the *intention* of perpetrating a fraud.

Gilford Motor Co Ltd v Horne:

Accepted by the Supreme Court in *Prest* as a case in which the corporate veil *had* been pierced appropriately,⁶⁶ in *Horne* the defendant had been the managing director of the claimant company and had entered into a 'non-solicitation' covenant for the company's customers post-employment. On leaving the company's employment, Horne formed a company to carry on a competing business and that company engaged in soliciting of the claimant's customers. The Court of Appeal held that this company was a mere *façade*, or sham, used to cloak Horne's fraudulent behaviour, and granted an injunction to enforce the covenant against him.⁶⁷

Jones v Lipman:

Also accepted by the Supreme Court as an occasion on which the corporate veil had been pierced appropriately,⁶⁸ in this case the defendant, who had contracted to sell his house to the plaintiff, tried to avoid an order of specific performance being given against him by conveying the house to a company formed by him. Ms Justice Russell rejected a defence based on the company being a

⁶⁴ *Prest v Petrodel Resources Ltd* (n56), at 35.

⁶⁵ *ibid*, at 91.

⁶⁶ *ibid*, at 29.

⁶⁷ *Gilford Motor Co Ltd v Horne* (n59).

⁶⁸ *Jones v Lipman* (n60), at 30.

separate person, describing it as ‘the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity’.⁶⁹

Comparison with Australia

Under both common law and statute, a company registered in Australia enjoys a legal personality separate and distinct from that of its members. However, similar to both Ireland and the UK, there are circumstances both in common law and statute in which the Australian courts will ignore the separateness of corporate personality.

Statute

The SLP of a company registered in Australia is recognised under s124 of the Corporations Act 2001.⁷⁰

Common Law

Although not legally binding on them, Australian courts tend to follow UK common law jurisprudence closely and, therefore, much of the above can be applied to the Australian jurisdiction too. However, it is yet to be seen to what extent *Prest* will be accepted or rejected in Australia.

Dennis Willcox Pty Ltd v Federal Commissioner of Taxation:⁷¹

Commentators have stated that ‘in Australia it is still impossible to discern ... the circumstances in which a court should lift the corporate veil’,⁷² that ‘[it] is impossible to list the cases in which

⁶⁹ *ibid*, at 445.

⁷⁰ Corporations Act 2001, s.124.

⁷¹ *Dennis Willcox Pty Ltd v Federal Commissioner of Taxation* (1988) 79 ALR 267 (FC).

⁷² Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (15th edn, LexisNexis Butterworth 2013) [4.400].

the veil will be lifted'.⁷³ Generally, it seems that the courts will take a fact-based approach on a case-by-case basis.⁷⁴

Dennis Willcox provides guidance on this 'esoteric'⁷⁵ label. In a statement that now echoes that of Lord Sumption's 'evasion' principle in *Prest*, Jenkinson J stated that the corporate veil should be pierced, *inter alia*, if

there is a mere sham or façade in which that company is playing a role, or that the creation or use of the company was designed to enable a legal or fiduciary obligation to be evaded or a fraud to be perpetrated.⁷⁶

Re Edelsten, ex parte Donnelly.⁷⁷

Further guidance was given in this case, whereby it was held that, in Australia, an argument of 'fraud' relates to the alleged use of a corporation by the controller to evade a legal or fiduciary obligation. To be argued successfully, the controller 'must have the intention to use the corporate structure in such a way as to deny the plaintiff some pre-existing legal right.'

Here, the Full Court of the Federal Court held that an argument of fraud is closely related to an argument that the corporate form is a sham or *façade*. The Court held that, in this case, no 'fraud' had in fact been perpetrated as the creation of a business was not to be characterised as a sham merely because 'it was undertaken for the purpose of ensuring that any property acquired after bankruptcy did not fall into the hands of a trustee in bankruptcy.'⁷⁸ Indeed, it might be observed that it would be lawful and common commercial planning to do so.

⁷³ S. Ottolenghi, 'From Peeping Behind the Veil to Ignoring it Completely' (1990) 53 Modern Law Review 338, 352.

⁷⁴ Ian Ramsay and David Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 Company and Securities Law Journal 250-271.

⁷⁵ Herron CJ in *Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NSW) 70.

⁷⁶ *ibid*, at 272.

⁷⁷ *Re Edelsten, ex parte Donnelly* (Unreported, Federal Court, Northrop J, 11 September 1992).

⁷⁸ *ibid*, at 205.

Re Neo:⁷⁹

Here it was found that the more ‘blatant’ the sham, the more likely it is that a fraud has been perpetrated. In this case, the Immigration Review Tribunal was asked to review a decision to refuse an application for a visa where sponsorship had been arranged by a company formed on the same day as the application was lodged, and the company did not carry on any business. The Tribunal held that ‘[T]he company was merely a vehicle used to circumvent Australian migration law. It was only a façade, its true purpose being to allow the applicants to remain in the country.’⁸⁰

Conclusion

The common law and statutory provisions on piercing the corporate veil tread a fine policy line when tensions arise between two core legal principles that more frequently are compatible. When such a tension *does* arise on the facts of a case, is a court to respect the *Salomon*-inspired separate legal personality of a company that is so fundamental to our business and tax systems, or should that principle be diluted, or even ignored, if the interests of justice so require?

The case-law on the piercing of the corporate veil is the expression of this balancing of sometimes-competing interests and *Greymountain* is an important contribution to that evolving debate: although they will not do so lightly, the courts in the UK and Australia, and now in Ireland too, are highly likely to pierce the corporate veil in cases of fraud and deception.⁸¹

Despite this, the importance of the SLP as a core principle of company law must not be understated. As Lord Sumption said most succinctly: ‘The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole

⁷⁹ *Re Neo* (Unreported, Immigration Review Tribunal, Metledge M, 30 July 1997).

⁸⁰ *ibid*, at 7.

⁸¹ Peter Oh and Alan Dignam, ‘Disregarding the Salomon Principle: An Empirical Analysis, 1885–2014’ (2019) 39(1) *Oxford Journal of Legal Studies* 47.

foundation of ... company law'.⁸² Given the principle's central importance to commerce and law and the importance of predictability and certainty in business arrangements, each of the few qualifications of that principle must be clearly defined and applied sparingly. The recent decision in *Greymountain* meets both of those criteria.

⁸² *Prest v Petrodel Resources Ltd* (n56), at 8.