The Doctrine of Limited Liability and the Piercing of the Corporate Veil in the light of fraud:

A critical multi-jurisdictional study.

Irshad Hameed*

Introduction

Man has, since time immemorial sought to explore mechanisms by which his assets remain protected. Consequently, the Corporation or Company has remained a favoured and common asset protection mechanism which serves to successfully externalise risk arising from business and other transactions. The means by which such externalization of risk is achieved is largely attributed to the legal nature of a corporation as being a distinct legal person capable of suing and being sued in its own name.¹ This externalization manifests itself in varying forms and is achieved through the legal concept of ‘limited liability’, by which the members of the company would ordinarily not be personally liable for the debts or actions of the Company. Thus the law creates a dichotomy or veil between the Company on one hand and the persons who own and control it on the other.² The legal conjuring of legal personality in a company renders the company a legal person capable of engaging in contract, incur liabilities and own property amidst a plethora of other functions, while protecting its owners and controllers from liability for actions carried out in the name of such Company. This degree of control, distinct legal personality and limited liability elevates the Company as being one of the most viable and

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successful innovations in law and perhaps the “greatest single discovery of modern times.” The House of Lords in *Salomon v Salomon* affirmed this legal principle that, upon incorporation, a company is generally considered to be a new legal entity separate from its shareholders, although it was essentially a one person company. Windeyer J, in the High Court in *Peate v Federal Commissioner of Taxation*, stated that a company represents:

“[A] new legal entity, a person in the eye of the law. Perhaps it were better in some cases to say a legal persona, for the Latin word in one of its senses means a mask: Eriptur persona, manet res.”

This protection afforded to the assets of the directors for the liabilities of a company is manifested in the form of the Corporate Veil. It could thus be argued that the concepts of limited liability and the Corporate Veil have a symbiotic relationship. Do circumstances exist which permit the lifting or piercing of this corporate veil and thereby holding the company’s members liable for the liabilities of the company? Indeed, the corporate veil has been lifted in circumstances where *inter alia* the Company functions as the *Agent of the Shareholder*, as an

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5 *Salomon v Salomon & Co [1897] AC 22 (Salomon).*
6 *Peate v Federal Commissioner of Taxation* (1964) 111 CLR 443 (HC, McTiernan, Kitto, Taylor, Windeyer and Owen JJ).
7 Ibid pg 478.
8 *Smith, Stone & Knight Ltd V. Birmingham Group* (1939) 4 All ER 116. However, difficulty has been experienced in sustaining this argument as the Agency argument was rejected in the *Saloman Case.*
instrument of fraud, fraudulent trading, as a matter of statutory interpretation to give effect to the purpose of the statute, single economic unit theory and in the interests of justice.

Thus limited liability is not without its exceptions. The occurrence of fraud inter alia for instance would permit the piercing of the Corporate Veil and recovering the personal assets of the directors. This paper shall delve into the concept of fraud and the basis upon which the courts would allow the piercing of a veil in the circumstance of fraud. However, the attitude of the Courts towards the lifting of the veil even in such circumstances is reluctant at very least, as would be examined. This paper would thus explore the raison d’être of the concept of limited liability which forms the corner stone of the institution of the Corporation or Company, the concept of the Corporate Veil, the piercing of such Corporate Veil in cases of fraud from a multijurisdictional standpoint and also examine the evolution of these concepts in the modern legal agora.

Limited Liability and the Corporation

In the sphere of companies the directors and members of a company ordinarily enjoy extensive protection from personal liability for the actions of the company. This is one of the cornerstones of Company Law not only in Australia but across the Common Law System and beyond. It has

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9 Gilford Motors V. Horne (1933) Ch 935. Jones V. Lipman (1962) 1 WLR 832.
10 Sec 340 (1) (Malaysia: s 304 (1)). As cited in Walter Woon on Company Law, pg 63, revised 3rd Edition, Tan Cheng Han, Sweet and Maxwell.
12 DHN Food Distributors v Tower Hamlets (1976) 1 WLR 852.
13 Ord v Belhaven Pubs Ltd [1998] BCC 607 at 615F.
been so since 1897, when the House of Lords handed down its decision in *Salomon v Salomon & Co Ltd*.\(^{14}\)

Undoubtedly the principal consequences of incorporation is that a corporation, becomes a juristic entity separate from those who control it and is capable of suing and being sued in its name.\(^{15}\) Additionally incorporation also bring about the *limited liability* of the director and members, with the effect that they are generally not liable for the debts of the corporation. Moreover, the assets of a corporation are the exclusive property of the corporation itself and not of those who control it. In *Salomon*,\(^{16}\) the *locus classicus* on this topic by Lord *MacNaghten* elaborated the motives for incorporation in the following terms:

> "Among the principal reasons which induce persons to form private companies … are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company a trade can be carried on with limited liability, and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law."\(^{17}\)

The doctrine of *limited liability* was legislated in England by way of the the *Limited Liability Act*\(^{18}\) as a means by which companies could raise capital by selling company shares without exposing the shareholders to unlimited liability. Bainbridge contends that ‘the corporation is a creature of statute and is legally separate and distinct from its officers, directors and shareholders. The general rule of

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\(^{14}\) [1897] AC 22.
\(^{16}\) Ibid.
\(^{17}\) Ibid at pg 52.
\(^{18}\) 1855.
corporate law is that the corporation is a completely separate, legal entity, and, as such, the corporation, and not its shareholders, is liable for its own contracts, debts and torts.'

In other words, shareholders, directors, officers and employees of a corporation benefit from the doctrine of limited liability, in which none of them are liable for actions taken on behalf of the corporation. This immunity from personal liability has traditionally been one of the luring factors of the corporate form of organization to its shareholders, officers and directors. This limitation to liability is arguably the catalyst for the corporation to be employed as a viable asset protection mechanism.

The Economic Necessity and justification of Limited Liability

Modern economies rely upon the taking of risks and the entrepreneurial spirit of its stakeholders. In essence, the taking of risks which is part and parcel of industry warrants some legal protection being afforded to the risk taker so as to spur industry and prevent investors from retreating into proverbial foxholes. The argument espoused for limited liability is that it ensures that "investors might sleep more easily o’ nights, their rest less frequently disturbed by dreams of bankruptcy and destitution.”

In the United States, the benefit of limited liability has long been extended to corporate shareholders; in other words, limited liability applies to corporations that are shareholders of other corporations.

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21 Phillip I. Blumberg, Limited Liability and Corporate Groups, 11 J. Corp. L. 573, 575 (1985-1986) ("[E]ach corporation is protected from liability for obligations of the other fragments of the enterprise.") Id., at 607 (referring to the laws passed in New Jersey in between 1888-1893, which for the first time in...
It is contended that the need and justification for limited liability is realised in the economic benefits it offers. Sheahan.\textsuperscript{22} observes that the concept of limited liability ‘decreases the costs to shareholders of monitoring the actions of managers; increases the incentive to act efficiently and in the interest of shareholders by promoting the free transfer of shares; increases the efficiency of securities markets since share trading does not depend on an evaluation of the wealth of individual shareholders, only the company itself; encourages shareholders to hold diverse share portfolios, thereby permitting companies to raise capital at lower costs because of the shareholders reduced risks and the facilitation of optimal investment decisions by managers by pursuing projects with positive net present values rather than being concerned with the risk to shareholders that such projects may bring.’

Llanillo\textsuperscript{23} argues that limited liability was conceived, with the objectives, of: (1) encouraging economic expansion through investment (the "Economic Theory"), and (2) democratization of wealth or the opportunity to accumulate it (the "Democratic Theory"). He argues further that Capital-intensive industries require substantial amounts of capital and one way to attract capital is to assure investors that they could invest without risking all their personal assets. With limited liability, owners are set free to invest in various business ventures without the need to incur the


excessive costs necessary to monitor each enterprise closely. Important policy objectives validate this limited liability shield and serves as an incentive for investors through the promise that “they will have no personal liability for the corporation’s debts.”

The concept of limited liability makes a number of other traits of the corporation feasible. For example, the transferability of shares would be severely hampered in the absence of limited liability. Every potential buyer of shares in a company would have to investigate the wealth of all other shareholders in order to determine the exact risk he faces in becoming a shareholder. Insecurity concerning the risk carried by an investment directly results in complications in the valuation of shares. Limited liability consequently enables the existence of stock markets since a single share price can be listed for investors to observe. Under unlimited liability share prices would fluctuate not only due to the operations of the company which affect the present value of future cash flows, but also due to changes in the personal wealth of all shareholders. This simplification of transferability acts as a check and balance against the power of management.

In the absence of limited liability it would be impossible to define the amount of specific risk of a portfolio through diversification since every investment could claim not only invested capital but also personal wealth. In fact, in the case of unlimited liability, diversification would rather increase risks since every investment could potentially go bankrupt. A rational investor would therefore minimize the number of companies he invests in, in order to be able to monitor these


businesses closely and reduce his risk that way instead. Thus it is contended that the concept of limited liability is a *sine qua non* for an efficient and vibrant trading environment.

**Piercing of the Corporate Veil: Casting the rapier forth!**

Blackman\(^26\) argues that “veil piercing takes at least two forms. Firstly, there are cases where the court disregards the company and treats the members or the controllers of the company as if they had been acting in partnership (or where the company has a single member, as if he had been acting on his own behalf), with the consequence that they are, for example, held to be the owners of property otherwise owned by the company, or to be personally liable for its debts and other liabilities.”\(^27\)

Additionally, there are those circumstances where obligations incurred by shareholders in their personal capacity are treated as if they were incurred by the company. Whatever form it takes, veil piercing is an “exceptional procedure.”\(^28\)

A company’s separate existence is metaphorically described as a “veil”. This veil functions as a partition between the company and its directors and other members and protects them from the claims of those who deal with the company. The corporate veil, then, is a fundamental aspect of company law and is a protective device for those who exist behind it.\(^29\) Thus the incorporation of a company casts a metaphorical protective veil over the true controllers of the company. a

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\(^{27}\) MS Blackman et al *Commentary on the Companies Act* (2002) 4–133.


\(^{29}\) N Hawke Corporate Liability (2000) 126.
veil through which the law will not usually penetrate. While the corporate veil normally protects shareholders, officer and directors from liability for corporate debts and obligations, when these individuals abuse the corporate privilege, courts will disregard the corporate fiction and hold them individually liable. In terms of Section 124 (1) of the Corporations Act, a company registered in Australia ‘has the legal capacity and powers of an individual both in and outside this jurisdiction. By virtue of registration, the corporation gains legal personality and thus has the capacity to enter into a legal contract as a separate legal entity in its own right. As such it is axiomatic that a company incorporated under the above provisions in Australia or under Chapter 18 of the Limited Liability Company Act of Delaware, or under the provisions of any viable legal system which recognises the concept of a company being a distinct a person, would have the immunity of limited liability.

The countermeasure to the immunity provided to corporations by the theory of limited liability is the concept of piercing the corporate veil. It is the circumvention of the corporation’s characteristic of limited liability. Scholars argue that the circumstances in which the Courts would pierce the veil are exceptional and that ordinarily the courts would respect the company’s modesty and decline to lift its veil. Ramsay and Noakes argue that, courts tend to

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31 See Saloman V. Saloman (1897) AC 22; Lee v Lee’s Air Farming Ltd (1961) AC 12.
33 1996.
take a fact-based approach to questions of piercing the corporate veil, and no particular trend is readily discernible from an overview of the cases.\textsuperscript{35}

It is material to note that the Piercing of a veil does not contest the validity of the separate legal entity principle but instead is relevant strictly to the concept of \textit{limited liability}. The veil of incorporation is thus relevant essentially to the shareholders of a corporation and not to its officers. Thus, veil piercing is therefore a doctrine to overcome \textit{limited liability} rather than the separate legal entity of the company.

\textbf{The Nomenclature.}

A common misconception lies in the terminology employed. Often the expressions ‘\textit{Piercing the Corporate Veil}’ and ‘lifting the corporate veil’ are used interchangeably with the intent of meaning one and the same. However the English courts have expressly identified a dichotomy to the meaning of the two expressions.

\textit{Staughton} LJ, in \textit{Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)}\textsuperscript{36}, stated that: “To pierce the corporate veil is an expression that \textit{I would reserve for treating the rights and liabilities or activities of a company as the rights or liabilities or activities of its shareholders}. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose.”\textsuperscript{37}

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\textsuperscript{36} \textit{Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)} [1991] 4 All ER 769.
\textsuperscript{37} Ibid, 779.
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Although the existing Australian legal literature does not draw such similar distinction in such expressed terms, the dicta of Young J, in *Pioneer Concrete Services Ltd v Yelnah Pty Ltd*[^38^], defined the expression “lifting the corporate veil” as meaning “[t]hat although whenever each individual company is formed a separate legal personality is created, courts will on occasions, look behind the legal personality to the real controllers.”[^39^] This echoes the observation of Staughton LJ[^40^] on the dichotomy of these expressions.

The distinction between the meanings of the two phrases is perhaps not as widely recognised in Australia, with courts sometimes referring to lifting when the effect is piercing.[^41^] Thus, this paper shall not draw such distinction either.

**The inception of ‘Veil Piercing.’**

Historically, the English corporate veil doctrine experienced the legal limelight during the post 2nd world war era. Notable veil piercing cases in this period included *In re FG (Films)*[^42^], *Jones v. Lipman*,[^43^] *Firestone Tyre and Rubber v. Lewellin*,[^44^] and *Merchandise Transport v. British Transport Commission*.[^45^] Lord Denning considered a series of corporate veil cases between the 1950s and 1970s, including *Scottish Cooperative Wholesale Society v. Meyer*,[^46^] *Littlewoods Mail Order Stores v.*

[^38^]: *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 (SCNSW, Young J).
[^41^]: *Commissioner of Land Tax v Theosophical Foundation Pty Ltd* (1966) 67 SR (NSW) 70 (NSWCA, Herron CJ, Sugerman and McLelland JJA).
[^44^]: [1957] 1 W.L.R. 464 (H.L.) at 464 (appeal taken from Eng.).
Inland Revenue Commissioners,\footnote{47}{[1969] 1 W.L.R. 1241 (A.C.) at 1254} Wallersteiner v. Moir,\footnote{48}{[1974] 1 W.L.R. 991 (A.C.) at 993, 1013 (Eng.).} and D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council.\footnote{49}{[1976] 1 W.L.R. 852 (A.C.) at 857 (Eng.).} His enthusiasm for the doctrine was best encapsulated in his judgment in Littlewoods\footnote{50}{Littlewoods Mail Order Stores v. Inland Revenue Commissioners [1969] 1 W.L.R. 1241 (A.C.) at 1254 (Eng.).}, in his seminal warning against blind adherence to \textit{Salomon}\footnote{51}{\textit{Salomon} v. \textit{Salomon} & Co. \[1897\] A.C. 22.}: \textit{“The doctrine laid down in \textit{Salomon} v. \textit{Salomon} & Co. \[1897\] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit.”}\footnote{52}{[1969] 1 W.L.R. at 1254.} 

As addressed previously, the law has devised a variety grounds which would validate the piercing of the corporate veil.\footnote{53}{See footnotes 8-13.} It must be noted that venturing into such piercing presents a quandary to the courts. This is so as the separate entity theory of a company has several ramifications. It provides a company with the right to sue and to be sued in their own name; retain and enjoy its profits and have the capacity to contract with anybody including their only shareholder.\footnote{54}{Lee v Lee’s Air Farming Ltd (1961) AC 12.} It further benefits and protects shareholders who are not in that capacity liable
for the debts of their company and cannot be held liable for any wrongdoings.
Therefore when presented with an application to pierce a corporate veil, the courts seek a
balancing of these fundamental principles which in turn restricts the application of the piercing
of the corporate veil. Only in exceptional circumstances will the court look beyond and thereby
override the company’s legal personality in order to examine and ascertain the true state of
affairs. *Fraud* is one of the most prominent of those exceptional circumstances, either in
establishing the business or in conducting the business. Where an individual creates or runs a
company to act as a shield for fraudulent purposes *that veil will be lifted, if not ripped or rudely
torn away, to expose the true perpetrators.* 55 In essence, the Courts seek to respect the sanctity of the
idea that a company is a separate legal entity on one hand and acknowledges the need to pull
off its mask on the other when the circumstances warrant it. 56

**Chartering the parameters of Fraud.**

*Fraud is inter alia an unconscionable dealing, a knowing misrepresentation of the truth or concealment of
a material and in equity means an unconscientious dealing.* 57 In the context of *fraud* as a vitiating
factor to contract, Lord Herschell in *Derry V. Peek* 58 observed that ‘*fraud is proved when it is shown
that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3)
recklessly, careless whether it be true or false.’ This dicta provides some understanding in

55 Jennings v CPS [2008] 4 ALL ER 113(HL)
56 See dicta of Lord Denning in Littlewoods Mail Order Stores v. Inland Revenue Commissioners, [1969] 1 W.L.R. at
1254.
58 (1889) 14 App Cas 337 House of Lords. See also Finance and Security Law, Cases and Materials, McCracken and
Everett, pg 207, Butterworths 1998.
deciphering the concept of fraud in a legal setting. Yet the scope of the yardstick of fraud as a basis to pierce the corporate veil was succinctly described by Wormser\textsuperscript{59}, as follows.

> When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web [i.e., veil] of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons.\textsuperscript{60}

The Company functioning as a tool for fraudulent purposes or engaging in fraud would justify the piercing of the corporate veil and holding the members of the company personally liable. In exploring the approach of Courts in confronting the corporate veil in circumstances of fraud, it is material to note that fraud can manifest itself in varying circumstances and cannot be restricted to a strict definition. It is argued that the Courts would take into consideration the circumstances surrounding the trade, business or actions of the company in concluding that a fraudulent act has been committed.

The \textit{raison d'être} of piercing of the corporate veil on the ground of fraud was eloquently expressed by Mr McGrath, QC, in his lecture at the International Fraud Conference convened by Lexis Nexis on ‘Lifting the Corporate Veil’, said:

> ‘What it is not intended to achieve, however, is the protection of those who would seek to commit fraud by abusing the corporate structure and thereby conceal their involvement and ultimate liability. The argument in favour of lifting the veil is based upon stripping the fraudster or fraudsters of the

\textsuperscript{59} I. Maurice Wormser, Piercing the Veil of Corporate Entity, 12 COLUM. L. REV. 496, 517 (1912).

\textsuperscript{60} Ibid.
In elaborating this concept, the use of a company to avoid a legal duty that falls on the controller of the company personally has been held to justify the piercing of the veil. The case in point is the seminal English case of *Gilford Motors V. Horne.* In this Case, Horne was the managing Director of *Gilford Motors Co.,* a company that assembled and repaired cars. Horne’s contract was subject to an anti-competitive trade clause which forbade him from soliciting customers for his own purposes while he worked for the company or after he left the company. Horne left the company and started a business of supplying spare parts for Gilford Cars which amounted to competitive trade with *Gilford Motors Co.* As a means of circumventing his obligation under the anti-competition clause, Horne incorporated his business as a company (*J.M Horne and Co. Ltd*). The directors and shareholders of the Company were Horne’s wife and a former employee of Gilford. Yet Horne himself carried out the business. Upon suit by Gilford Motor Co. for breach of his employment contract, Horne argued on the authority of *Saloman* that the clause bound only him but not the company (*J.M Horne and Co. Ltd*). The English Court of Appeal held that while a company is generally a distinct person and is separate from the individuals who form it, here the company ‘was formed as a device, a stratagem’ to conceal the fact that Horne was in fact running the business in patent infringement of his employment contract, which also served as the purpose of the incorporation of the company. The Court issued an

62 (1933) Ch 935.
injunction against Horne personally and against J.M Horne and Co. Ltd to restrain a breach of the employment contract. Therefore, the incorporation of a company as a facade, in order to avoid personal liability by the controller amounts to 'fraud' for the purposes of veil piercing.\textsuperscript{64}

Similarly in Jones V. Lipman\textsuperscript{65}, Lipman entered into a contract to sell his house to Jones for £6000. Lipman subsequently changed his mind and transferred the house to a company created solely for that purpose. Jones sued for specific performance of the contract. Lipman argued that the company owned the property and that it was a distinct person, on the authority of Saloman.\textsuperscript{66} Yet Jones relied on the authority of Gilford Motors V. Horne\textsuperscript{67} and argued that Lipman’s company was an instrument of fraud for the purposes of avoiding legal obligations. The Court held with Jones and described Lipman’s company as 'a device, a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.'\textsuperscript{68}

It is intriguing to note that the Court resorted to the piercing of the veil in Jones V. Lipman despite the availability of alternative measures. It could be argued that Lipman’s company never really obtained clear title as it took the property with notice of Jones’ claim. Nevertheless, these authorities assist in deciphering the ambit of the notion of fraud, where a company is used as an instrument for the fraudulent evasion of legal obligations. However, it is material to note that in the above cases the court pierced the veil and held the controllers liable in respect of the liabilities of the controllers who employed the company as a facade to avoid their obligations.

\textsuperscript{64} See also Re Darby, ex parte Brougham [1911] 1 KB 95
\textsuperscript{65} (1962) 1 WLR 832.
\textsuperscript{67} (1933) Ch 935.
\textsuperscript{68} (1962) 1 WLR 832.
This must be contrasted from circumstances where liability is incurred by the company itself, which would not justify such veil piercing.

The recent English case of Jennings v Crown Prosecution Service\(^69\), in which the appellant was awaiting trial with three others on a charge of conspiracy to defraud, elucidates veil piercing in cases of fraud. The conspiracy was described by the prosecution as an advance fee fraud which was carried on through a company, UK Finance (Europe) Ltd, which had originally been in legitimate business selling second hand cars and arranging finance for the purchasers. Having pierced the veil of incorporation, the Lord Bingham of Cornhill observed as follows;

"In the ordinary way acts done in the name of and on behalf of a limited company are treated in law as the acts of the company, not of the individuals who do them. That is the veil which incorporation confers. But here the acts done by the appellant and his associate Mr Phillips in the name of the company have led to the conviction of one and a plea of guilty by the other. Thus the veil of incorporation has been not so much pierced as rudely torn away.\(^70\)"

In the recent English case of VTB Capital plc v Nutritek International Corp\(^71\) Mr Justice Arnold concluded, quoting a passage from Justice Mumby in Ben Hashem v Ali Shayif,\(^72\) that the courts have only taken the step of piercing the corporate veil when ‘the company was being used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely

\(^{69}\) [2008] 2 WLR 1148; [2008] 4 All ER 113(HL); [2008] UKHL 29

\(^{70}\) Ibid pg 1153.

\(^{71}\) [2011] EWHC 3107 (Ch).

\(^{72}\) Ben Hashem v Ali Shayif [2008] EWHC 2380 Fam
dehors the company"73. He went on to explain that a wrongdoing 'dehors' the company is one which is 'anterior or independent' of it. This was the case in both Jones V. Lipman74 and Gilford Motors V. Horne75; both Mr. Lipman and Mr. Horne attempted to avoid liability for their own wrongdoing by using a company that they controlled fraudulently as a shield and thus as a tool. In those circumstances the courts were willing to pierce the veil in order to prevent the claimants being denied an effective remedy. It is important to note that in both cases it was an equitable remedy, rather than damages, which the court awarded after piercing the corporate veil. However, the legal parameters of the ground of fraud, where a company is used as a facade or an instrument for fraud, does not remain well settled as evidenced by the recent reaffirmation of the law in the English judgment of VTB Capital plc76 on one hand and the judgement of Antonio Gramsci Shipping Corp v Stepanovs77 on the other, as would be demonstrated below.

A conspicuous case of significance is Trustor AB v Smallbone (No 2).78 Mr Smallbone had transferred out monies in breach of his fiduciary duties to a company he owned, known as Introcom. A suit was instituted for an order that Mr Smallbone be liable for the monies received by Introcom as if he was the company himself. In reviewing the authorities and upholding the claim, Sir Andrew Morritt V.C, stated the following:

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71 Ibid.
72 (1962) 1 WLR 832.
73 (1933) Ch 935.
74 [2011] EWHC 3107 (Ch).
76 [2011] 1WLR 1177.
"In my judgement the court is entitled to 'pierce the corporate veil' and recognise the receipt of the company as that of the individual in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individuals." 

The contemporary perception of veil piercing in England. 

The recent judgements of Antonio Gramsci Shipping Corp v Stepanovs and VTB Capital plc v Nutritek International Corp are material to this study for they reveal the contrasting stances adopted by the English Courts in settling the law on this subject and also because they allowed the seemingly anathematic proposition of holding non-parties to a contract liable for a contract to which they were not a signatory despite it being patently inimical to the theory of privity of contract.

Gramsci involved thirty ‘one ship’ companies incorporated in a number of off-shore jurisdictions, ultimately beneficially owned by the Latvian Shipping Company (‘LSC’). Gramsci claimed that LSC had found that there were substantial profits syphoned off when the corporate Defendants had benefitted from chartering vessels to end users at substantially higher rates than in the head charters from the Claimants. Losses were in the region of US$100million, resulting from this dishonest scheme.

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79 Ibid.
81 [2011] EWHC 3107 (Ch)
82 Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] UKHL 1, [1915] AC 847; Tweddle v Atkinson [1861] EWHC QB J57, (1861) 1 B&S 393, 121 ER 762
83 Antonio Gramsci Shipping Corp v Stepanovs and VTB Capital plc v Nutritek International Corp [2011] EWHC 333 (Comm)
The claimants successfully argued that the corporate veil should be pierced and a certain Mr. Stepanovs treated as a party to certain agreements entered into between the claimants and five companies registered in the British Virgin Islands and Gibraltar, one of which was beneficially owned by Mr. Stepanovs. Justice Burton held that there was a good arguable case that the claimants should be able to enforce a contract against Mr. Stepanovs, the 'puppeteer', despite the contracts being entered into by his 'puppet' company. It is contended that this was a potentially radical decision as it raised the prospect of non-parties being made liable on a contract to which it was not a signatory and at the same time raising the issue as to whether the 'puppeteer' was bound by all the terms of the contract. In reaching his conclusion Justice Burton made a number of findings regarding the court's ability to pierce the corporate veil, which have subsequently received strong criticism from Justice Arnold in VTB Capital.84

In VTB Capital85, the claimants applied to amend their particulars of claim in order to bring a contractual claim against a certain Mr. Malofeev, Marcap BVI and Marcap Moscow, despite these defendants not being parties to the loan facility under which the claimants claimed to have been defrauded. VTB contended that it had been defrauded by the Defendants. VTB entered into a facility agreement under which it lent some US$225 million to fund the acquisition of 6 Russian dairy plants, and 3 associated Companies. There was a default and VTB had only been able to recover US$40 million. VTB alleged it was induced to enter into this facility agreement because of fraudulent representations made by Nutritek. Arnold J was therefore required to consider the

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84 [2011] EWHC 3107 (Ch)
85 Ibid.
law regarding piercing the corporate veil, and in declining to follow Gramsci, criticised the judgment given by Justice Burton and set out the circumstance he believed would justify the courts taking this step and the remedies available once the corporate veil is pierced.

In Gramsci, Justice Burton held that the corporate veil could be pierced, and a claim for damages made, if the conditions in Trustor v Smallbone66 were satisfied. These being (1) fraudulent misuse of the company structure, and (2) a wrongdoing committed 'dehors' the company. Justice Arnold rejected this finding, stating in particular that he did not agree that there can be a claim for common law damages, as distinct from an equitable remedy, whenever the Trustor67 conditions are satisfied.88 Justice Arnold went on to say that a number of authorities show that it is 'inappropriate', where a claim of wrongdoing is made against the controller of a company, to pierce the corporate veil to enable a contractual claim against that person.89 In Justice Arnold’s eyes, Trustor80 is instead authority for the proposition that, in a claim for knowing receipt, the court will treat receipt by a company as receipt by the individual who controls it if both conditions above are satisfied.91 Justice Arnold was critical of what he perceived to be an anomaly created by Justice Burton’s reasoning in Gramsci. The decision in Gramsci, turns on whether the wrongdoer has attempted to conceal his identity by using the company as a facade fraudulently. The result is that if the wrongdoer conceals his involvement in the company then the corporate veil can be pierced, but

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66 (No 2) [2001] WLR 1177; see foot note 62.
67 (No 2) [2001] WLR 1177
68 VTB Capital v Nutritek [2011] EWHC 3107 at 97
69 At paragraph 99.
70 (No 2) [2001] WLR 1177
if he does not conceal his involvement then it cannot. As a consequence the successful claimant in the former case is entitled to the contractual measure of damages, but in the latter he is restricted to the tortious measure.\(^92\) It is argued that Justice Arnold’s contention as to this divergence is valid in law, as a circumstance where the company is not used as a fraudulent facade, given that the identity of the controller was apparent.

Justice Arnold concluded that the effect of the decision is Gramsci was to ignore privity of contract rather than to pierce the corporate veil. Justice Burton had found that there was no good reason why a claimant should not be able to enforce a contract against both the ‘puppet’ company and the ‘puppeteer’ who at all times was pulling the strings. He compared this to the circumstances in Gilford and Jones where, on his reading, the claimants sought to enforce their respective contracts against both the puppeteer and the puppet company.\(^93\) Justice Arnold, conversely, pointed out that in neither of those cases were damages awarded against the puppet for the puppeteer’s breach. Instead, equitable relief was granted against the puppet company to stop the puppeteer evading contractual liability.\(^94\) Justice Arnold expressed dissatisfaction with Burton J’s acceptance of the submission that the notional puppeteer can be made liable for a contract, contending that “as a matter of public policy” he cannot enforce it.\(^95\)

It is rare that the Courts had down judgements so patently at odds with each other. The contrasting decisions in Gramsci and VTB Capital suggest that the law regarding piercing the

\(^{92}\) VTB Capital v Nutritek [2011] EWHC 3107 at 100

\(^{93}\) Gramsci v Stepanovs [2011] EWHC 333 (Comm) at 26

\(^{94}\) VTB Capital v Nutritek [2011] EWHC 3107 at 101

corporate veil is ripe for further clarification by a higher court. An indication that the Courts may favour Justice Arnold’s reasoning can be seen from the Court of Appeal’s refusal to grant the claimants in *Linsen International Limited v Humpuss*[^96] permission to appeal, after the Claimants failed at first instance to persuade the Court to pierce the defendant's corporate veil. Lord Neuberger MR held that the fact that the third defendant had knowingly received assets from the first defendant for the purpose of avoiding the first defendant’s liability under a contract already entered into and breached by the first defendant could not justify effectively treating the third defendant liable as a contractual party. In *Linsen*[^97] Flaux J distinguished Gramsci from *Linsen*[^98] on the basis that in the latter case, no one set out to abuse the corporate structure from the outset. It was a legitimate company which was later used for illegitimate means to defraud. The wrongdoing, after the contract was entered into, attempted to place assets beyond the reach of creditors. If the Defendants in VTB had been set up for the purposes of defrauding from the outset, perhaps the Judge in VTB would have considered matters differently. It seems that he failed to appreciate that the corporate veil could still be lifted even if it was not the intention of the parties to create a company for the purposes of defrauding, but instead, the objectives to defraud came at a later stage after the contract had been entered into, as in *Linsen*. The Judge at first instance agreed with the Defendants, refusing to follow Gramsci citing it as an egregious example.

[^97]: Ibid.
[^98]: Ibid.
A consideration of these determinations reveal that the doctrine of lifting the Corporate Veil in circumstances of fraud should be given more weight than just an equitable remedy, and it seems that following the development of case law, it is within the power and discretion of the English Courts to take such a leap of faith to develop this necessary doctrine of Law.

**The American approach.**

In *Simmons Creek Coal Co v. Doran* (1892)\(^9\) the U.S. Supreme Court created the impetus for the development of the veil piercing doctrine at the level of individual states. In this case, the Court held that the incorporators’ knowledge of an occurrence in a corporation established grounds for veil piercing. Subsequently in 1907, the Circuit Court for the Eastern Division of Wisconsin first expressed the general rule on veil piercing in the seminal case of *United States v. Milwaukee Refrigerator Transit Co.*\(^10\) In this case the Court held that “a corporation will be looked upon as a legal entity as a general rule and until sufficient reason to the contrary appears.”\(^11\) Yet its veil would be pierced: “…. when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons.”\(^12\) In other words, the *Milwaukee*\(^13\) decision held that in the hypotheses described above, the corporation would in effect be treated as a partnership, thus making all of the partners subject to joint and unlimited liability.\(^14\)

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\(^9\) *Simmons Creek Coal Co. v. Doran,* 142 U.S. 417 (1892).


\(^11\) Ibid.

\(^12\) Ibid.

\(^13\) Ibid.

\(^14\) Brian Abramson, *Why the Limited Liability Company Should Sound the Death Knell of the Application*
The American experience of veil piercing was expanded during the twentieth century. Originally the theory revolved, mainly around the concept of fraud in the corporate context. In fact, fraud is a conspicuous ground for veil piercing since it arises in a variety of different contexts: including lies or misrepresentations about the purpose of the entity, its capital, debts, assets, independence, the identity of its representatives or on other representations made to third parties. Fraud may also involve greed, hence implying an illicit transfer of property (monies or assets) not belonging to the transferor. Consequently, a myriad of stakeholders, including shareholders, directors, officers, accountants, and others, and even corporations themselves, may be involved or colluded to perpetrate frauds in multifarious and infinite contexts.

The American Supreme Court held that veil piercing should be allowed in instances where a shareholder had knowledge of a fraud committed by another shareholder. The Court also stated that limited liability should not be enforced “so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities.” This postulation by the American Courts strikes a conspicuously common chord with their cousins across the Atlantic, as evidenced by

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of the ‘Nexus Contracts’ Theory to Corporations, 1 Fiu L. Rev. 185, 213 (2006) (“all partners have unlimited liability for debts arising from both the contracts and torts of the firm.”).


the judgement of the English Courts in Jones V. Lipman\textsuperscript{109}, Gilford Motors V. Horne\textsuperscript{110} and Re Darby, ex parte Brougham\textsuperscript{111}

It is thus contended that in the fashion demonstrated above, the notion of fraud is a well expanded basis for the piercing of veils under the law of the United States of America.

\textit{The Australian legal response}

The \textit{dicta} of Justice Jenkinson, in Dennis Willcox Pty Ltd v Federal Commissioner of Taxation\textsuperscript{112} succinctly demonstrates the Australian stance on this subject:

\begin{quote}
"[T]he separate legal personality of a company is to be disregarded only if the court can see that there is, in fact or in law, a partnership between companies in a group, or that there is a mere sham or facade 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." (EMPHASIS ADDED)
\end{quote}

However the case law in Australia demonstrates that the courts are generally reluctant to lift the corporate veil as would be demonstrated below.\textsuperscript{113} Yet insofar as Australia’s response to defining ‘fraud’ for the purposes of veil piercing is concerned, the Australian case law seems to

\begin{itemize}
\item\textsuperscript{109} (1962) 1 WLR 832.
\item\textsuperscript{110} (1933) Ch 935.
\item\textsuperscript{111} [1911] 1 KB 95.
\item\textsuperscript{112} Dennis Willcox Pty Ltd v Federal Commissioner of Taxation (1988) 79 ALR 267 (FC, Woodward, Jenkinson and Foster JJ) at pg 272.
\item\textsuperscript{113} Hadoplane Pty Ltd v Edward Rushton Pty Ltd [1996] 1 Qd R 156 at 160.
\end{itemize}
echo the English Law on the subject as established in Jones V. Lipman\textsuperscript{114} and Gilford Motors V. Horne.\textsuperscript{115} This is demonstrated in the \textit{locus classicus} of Justice Jenkinson, in \textit{Dennis-Wilcox-Pty-Ltd-v-Federal-Commissioner-of-Taxation}\textsuperscript{116}, as reproduced above; by which the Court may proceed to pierce a veil if the existence of a sham or facade is demonstrated. The case of \textit{Re Neo} \textsuperscript{117}seems to indicate that where the sham is more conspicuous, the greater the likelihood of the commission of fraud is. In \textit{Re Neo}\textsuperscript{118} the Immigration Review Tribunal reviewed a decision to refuse an application for a visa where sponsorship had been arranged by a company which had been formed on the same day that 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 facade, its true purpose being to allow the applicants to remain in the country.”\textsuperscript{119}

\textit{Ramsay and Noakes} argue that an argument of “fraud” relates to the alleged use of a corporation by the controller to evade a legal or fiduciary obligation.\textsuperscript{120} In order to demonstrate the existence of fraud, it must be proved that the controller of the company “must have the intention to use the corporate structure in such a way as to deny the plaintiff some pre-existing legal right.”\textsuperscript{121} This seems to indicate that to the Australian Courts a “fraud” argument is contingent upon the existence of an

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{114} (1962) 1 WLR 832.
\item \textsuperscript{115} (1933) Ch 935.
\item \textsuperscript{116} (1988) 79 ALR 267 (FC, Woodward, Jenkinson and Foster JJ) at pg 272.
\item \textsuperscript{117} \textit{Re Neo} (Unreported, Immigration Review Tribunal, Metledge M, 30 July 1997).
\item \textsuperscript{118} ibid.
\item \textsuperscript{119} ibid, pg 7.
\end{itemize}
\end{footnotesize}
argument demonstrating the existence of a ‘sham’ company, as the courts have held that no fraud can be perpetrated where the corporate form is real and not a facade.\textsuperscript{122} In deciphering what a \textit{sham} is for this purpose, it is argued that the authorities of \textit{Jones V. Lipman}\textsuperscript{123} and \textit{Gilford Motors V. Horne},\textsuperscript{124} shed much light. It is contended that the employment of a company as an instrument to evade the legal responsibility of its controller seems to have been well received in defining a sham company as evidenced in \textit{Re Neo}.\textsuperscript{125}

The case of \textit{Re Edelsten ex parte Donnelly}\textsuperscript{126} involved the trustee of Dr Edelsten’s estate, which was in bankruptcy. The Action instituted claimed that certain property owned by the VIP Group of companies had been obtained by Edelsten before the bankruptcy had been discharged. The trustee argued that the companies \textit{had been incorporated and used for the purpose of evading a legal obligation or perpetrating a fraud}. Northrop J, at first instance, held that: “Even if the whole scheme of the companies was devised by Dr Edelsten for the purpose of defeating his creditors the overall facts of this case do not justify the conclusion that the property of VIP Health Corporation is the after acquired property of Dr Edelsten and thus vests in the trustee.”\textsuperscript{127} On appeal by the trustee,\textsuperscript{128} the Full Court of the Federal Court upheld the decision of Northrop J.

\begin{flushright}
\textsuperscript{122} \textit{Re Edelsten ex parte Donnelly} (Unreported, Federal Court, Northrop J, 11 September 1992).
\textsuperscript{123} (1962) 1 WLR 832.
\textsuperscript{124} (1933) Ch 935.
\textsuperscript{125} (Unreported, Immigration Review Tribunal, Metledge M, 30 July 1997).
\textsuperscript{126} \textit{Re Edelsten ex parte Donnelly} (Unreported, Federal Court, Northrop J, 11 September 1992).
\textsuperscript{127} \textit{Re Edelsten ex parte Donnelly} (Unreported, Federal Court, Northrop J, 11 September 1992) at pg 7.
\textsuperscript{128} \textit{Donnelly v Edelsten} (1994) 13 ACSR 196 (FC, Neaves, Ryan and Lee JJ).\
\end{flushright}
The Full Court also held that an argument of fraud is closely related to an argument that the corporate form is a sham or facade. The court stated:

“The argument [of fraud] is, of course circular. It can only succeed if the argument of sham succeeds, because if no property was acquired by, or devolved upon, Edelsten, no duty capable of being evaded could arise under the Act…The submission that the VIP Group had been used to perpetrate a fraud was coincident, and stood, or fell, with the submissions which sought to have the transactions, by which the VIP Group acquired property, treated as shams.”

Therefore, no “fraud” had been perpetrated because the court found that 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.”

The statistics and the apparent reluctance of Australian Courts to pierce veils in cases of fraud.

Ramsay and Noakes carried out an empirical study which sought to analyse a trend if any, on the propensity of the Australian courts to pierce veils. The study revealed that of the 104 cases brought in Australian courts and tribunals, the argument to pierce the corporate veil was accepted in 40 cases (about 38.5%). The percentage of cases where piercing occurred is lower than in the United States (about 40%) and in the United Kingdom (about 47%).

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129 Ibid, 206.
130 Ibid, 205.
132 See the empirical study of the frequency with which courts in the United States pierce the corporate
distinction in these percentages appear marginal and thus no conspicuous distinction could be identified.\textsuperscript{134}

Their study\textsuperscript{135} also concluded that between the period of 1960 and 1990, while there was a substantial increase in the number of cases where arguments about piercing the corporate veil were postulated there has been a good deal of statistical variance in the piercing rates and no trend is discernible overtime.\textsuperscript{136}

It must be noted that the Australian Courts have demonstrated an inclination towards veil piercing more so in cases concerning proprietary companies as opposed to public companies. It could be argued that the reasoning for this would lie in \textit{inter alia} the fact that the control extended by shareholders in public companies is conspicuously lower than proprietary companies.\textsuperscript{137}

Insofar as the success rates of the grounds urged for the piercing of veils, the study by Ramsay and Noakes indicates that the most successful ground in veil piercing has been \textit{unfairness and justice}\textsuperscript{138} which has been successfully argued in 60\% of the cases in which these grounds have been urged. Fraud and sham companies on the other hand have been successfully argued only in 41.67\% and 37.5\% respectively. The gravitation of the Australian Courts to favouring
unfairness/justice as grounds for veil piercing indicates that the fact that Australian courts have adopted an *ad hoc* approach to veil piercing. These grounds provide for the making of such *ad hoc* orders by virtue of the obvious ambiguity of the terms the terms *unfairness/justice* and their susceptibility to various contextual interpretations.

**De facto veil piercing**

If the objective of veil piercing is to penetrate the legal fiction of limited liability and impose liability on the controllers of the company i.e Directors and Shareholders, it is argued that this could still be achieved through other means as evidenced in the *James Hardie Case*\(^{139}\)* inter alia*. In the *James Hardie Case* the High Court ruled that seven former non-executive directors of *James Hardie Industries misled the Australian stock exchange* about a compensation fund for asbestos victims. In 2001, James Hardie announced the compensation fund it had established for asbestos victims was fully funded, but just two years later it was found to be underfunded by more than $1 billion. The James Hardie group had a system to compensate victims of asbestos related disease, principally because of the business activities of two of its subsidiaries up to 1987. In 2001, after extended planning and discussion by management and at board level, the directors of the parent entity (at that time JHIL) decided to establish a Foundation that would handle asbestos claims. JHIL transferred the shares in the two subsidiaries to the Foundation, and entered into a deed of covenant and indemnity. Under that deed, the subsidiaries indemnified JHIL in respect of asbestos claims, and JHIL covenanted to make

\(^{139}\) 03 May 2012
substantial payments to the Foundation. It had long been recognised by the directors and management that an effective communications strategy would be needed, addressing (amongst other things) the question whether the Foundation would have sufficient funds to meet all asbestos claims. JHIL took actuarial advice on the likely level of asbestos claims for the ensuing 50 years, and prepared a cash flow model for the Foundation.

JHIL made a market announcement which said, among other things, that the Foundation would have 'sufficient funds to meet all legitimate compensation claims anticipated', would be 'fully funded' and provide 'certainty' for both asbestos claimants and shareholders. Later it became clear that the Foundation was very substantially underfunded, to a figure well in excess of $1 billion.

In 2009, the NSW Supreme Court held that seven non-executive directors and the company secretary/general counsel of James Hardie Industries Ltd breached their duties of care and diligence as directors or officers of the company in relation to the release of a misleading announcement to the Australian Stock Exchange about James Hardie’s capacity to fund asbestos claims inter alia. Consequently the Court ordered the individual defendants to pay pecuniary penalties and disqualified them from managing corporations. Upon appeal, the High Court affirmed the order of the Supreme Court of New South Wales.

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140 ASIC v Macdonald (No 11) [2009] NSWSC 287
The Corporations Act *inter alia* imposes a variety of duties on Directors, including a duty to refrain from *misleading or deceptive conduct*\(^1\)\(^{141}\) Additionally Directors of a company owe the company fiduciary duties under the Common Law by virtue of their special opportunity to exercise their power or discretion to the detriment or benefit of the company which is accordingly vulnerable to abuse by the fiduciary by virtue of his position.\(^1\)\(^{142}\) As such a breach of such duties may impose liability on such Directors which may result in orders preventing such directors from managing such companies as evidenced in *James Hardie* or in *ASIC v Macdonald*\(^1\)\(^{143}\), where the Court ordered a pecuniary penalty for each non-executive director of $30,000 and disqualification for five years. Although these judgements did not approach such cases as veil piercings, it appears *ipso facto* that what was carried out in fact was a *de facto* veil piercing. That is to say that the Court side stepped the shield of limited liability and held the Directors accountable for actions which were carried out in the name of the Company.

**Conclusion: Venturing ahead.**

*Limited Liability* is undoubtedly a *sine qua non* for successful trade for it perpetuates the entrepreneurial spirit of industry and encourages economic investment by protecting the shareholder. While it could be argued that for the purposes of shielding the controller for


\(^{143}\) (No 12) [2009] NSWSC 714)
economic liability, insurance may well suffice as a viable alternative, the doctrine of limited liability appears to be a favoured and deep rooted in advanced legal systems.

It is contended that limited liability is necessary for industry in view of the patent incentives it offers to the controller and the economy alike, as emphasized by Sheahan, J\textsuperscript{144} and as demonstrated previously in this paper. As such this paper endorses the argument of the economic necessity of the doctrine of limited liability.

As demonstrated, fraud appears to be a well-received basis for veil piercing across most jurisdictions as this paper reveals including the United Kingdom, the United States of America and Australia. Yet the propensity of the courts of these countries to pierce veils on circumstances of fraud appears to vary. The inference which could be drawn from the statistics presented by Ramsay and Noakes reveals a comparative reluctance of the Australian Courts to pierce veils in cases of fraud readily as they otherwise would in circumstances of unfairness/justice. The apparent gravitation of Australian Courts to pierce veils in cases of unfairness/justice more so than cases of fraud reflects the mindset of courts as favouring a ground of wide scope which easily accommodates veil piercing in a variety circumstances which amount to being unfair or unjust. Thus the Australian response appears to be devoid of an unformed principled approach to veil piercing. As Rogers AJA confirmed in Briggs-v-James-Hardie-\&-Co-Pty-Ltd\textsuperscript{145}: The problem arises from the fact that there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no

\textsuperscript{144} See footnote 22.
\textsuperscript{145} (1989) 16 NSWLR 549, 558 (Rogers AJA).
principled approach to be derived from the authorities. Thus it could be argued that Australian courts have approached veil–piercing cases in an ad hoc and opaque manner with underlying policy considerations in mind.

It is contended that the sanctity of the distinct legal personality of a company must be endorsed and protected in view of its economic benefit and thus this paper contends that a trigger happy approach to penetrating the distinct personality of such companies would be undesirable inasmuch as it would be counterproductive economically. This is so, as a judicial gravitation towards veil piercing would eliminate the incentive offered by limited liability and thus would have the spiral effect of driving economic investment away. While this is so, this paper does not dismiss the idea of piercing such veil in circumstances of fraud where the intention of fraud is manifest as evidenced in Re Neo146 and where the legal device of a company and the privileges it offers is perverted as a modus operandi for fraudulent purposes or as a means of circumventing legal liability or responsibility.

In essence, this paper contends that the sanctity of the doctrine of limited liability must be ensured and furthered, for the raison d’etre of veil piercing is only to prevent the exploitation of this necessary economic concept of limited liability and not to impose itself in a draconian fashion. As such, the stance of the Australian Courts in favouring the ground of unfairness/justice in veil piercing above the ground of fraud and its reluctance to adopt a uniform

146 (Unreported, Immigration Review Tribunal, Metledge M, 30 July 1997).
principle on fraud and consequently approaching the subject of veil piercing in an *ad hoc* fashion is desirable in view of the economic sanctity and sensitivity attached to the corporate veil.

Thus as, Judge Cardozo opined, veil piercing is a doctrine "still enveloped in the mists of metaphor." Today, the doctrine is "lost in a fog "still shrouded by a veil that some scholars wish to tear down, some staunchly defend while some still strive to reform. Yet change should occur only when change is warranted.

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