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Into reverse: redesigning veil piercing

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Abstract

This paper considers the status of reverse veil piercing (RVP) in the UK courts and provides a framework for developing it in a coherent manner. It considers the recent emergence of RVP and then considers the concept of separability with regard to corporate personality and its impact on veil piercing. In doing so it draws out the important difference between RVP, which impacts entity shielding, and forward veil piercing (FVP), which impacts limited liability. It then considers US jurisprudence on RVP and the development of RVP in the Delaware courts, and then the historical development of shadow RVP in the UK courts. The paper concludes that continuing the process begun by the Supreme Court in *Hurstwood Properties Ltd v Rossendale Borough Council* of unbundling FVP from RVP opens the way for the reemergence of RVP that sets the limits of evasive entity shielding in a similar manner to the Delaware courts and the UK historical shadow case law, while also weighing the wider third party considerations in an RVP. Without this we would argue our law risks judicial intervention through RVP being eroded and evasive entity shielding becoming a mechanism for unscrupulous debtors to avoid outstanding liabilities.

Keywords: company law; reverse veil piercing; corporate personality; *Hurstwood Properties Ltd v Rossendale Borough Council*; *Prest v Petrodel Resources Ltd*; Delaware case law

Introduction

Over the past three decades, it has been at times necessary for both academic and judicial discussion of veil piercing to start with the observation that the area is full of confusion and obfuscation.[1] At issue for the judiciary in any veil-piercing case is a tension between the legitimate use of the corporation to avoid shareholder/corporate liability and when that avoidance is illegitimate. Given that this is an area where the starting point is a corporation designed by the legislature to facilitate the avoidance of shareholder liability and which has become central to the operation of the economy, one can sympathise with our judiciary having to supervise the use of the corporation in sometimes uncomfortable moral, legal and economic territory.[2] Matters have become more complex over time as the use of the corporate form has spread to non-commercial areas such as family law, tort and crime; the judiciary has been called on, again and again, to police the moving boundaries of legitimate and illegitimate liability avoidance across these multiple areas of law.[3] However, as these factors have been present for more than a century, it might have been assumed that there would be more certainty in the area. Moore, for example, before going on to attempt a doctrinal test for veil piercing, observes:

[1]See *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [16], [64] and A Musk 'Piercing the corporate veil: post *Prest*' (2022) 43(5) *Company Lawyer* 133–137.

[2]See *Prest*, above n 1, at [8] and [34]. Sometimes the legislature does intervene, eg group accounts in the Companies Act 2006, s 399.

[3]See *Prest*, above n 1, at [16].

> One of the most uncertain and, as a result, disputed issues in English company law is the circumstances in which a court will be justified in disregarding the autonomous legal personality of a registered company.[4]

Within the academic literature there have broadly been two directions of travel in response to the confusion in the case law. The first views the entire endeavour as conceptually flawed because of the 'calamitous' decision in *Salomon v Salomon*,[5] leading to 'absurdity' in the treatment of parent and subsidiary companies and 'conceptual ossification' in the area.[6] The second, exemplified by Moore above, does not disagree with the first but while it recognises the conceptual confusion it attempts to steer the area towards a workable doctrinal solution. Indeed, at times the judiciary themselves, while simultaneously showing no interest in a conceptual clear-out of the area, express their frustration at the way the doctrine has become so confused.[7] The one point of agreement across academic and judicial commentary on the area is that ideally you probably wouldn't start from here. This paper is in the tradition of the second response to the confusion in trying to move towards a workable doctrinal solution.

In this paper, we argue that categorising piercing into 'forward veil piercing' (FVP) and 'reverse veil piercing' (RVP) provides some important clarity within the veil-piercing precedent and offers a way to manage the legitimate/illegitimate boundary. FVP seems to be particularly problematic for the judiciary as it attacks limited liability in attributing liability to shareholders/controllers, the very opposite of the statutory intention, and the senior judiciary has repeatedly attempted, not uncontroversially, to narrow FVP to the point of disappearance.[8] On the other hand, RVP does not affect limited liability, as it attempts to attribute shareholder/controller liability to the corporation. As such it impacts the separation of corporate assets from the controller's personal assets and liabilities.[9] As we will discuss below the judiciary has repeatedly articulated this as a legitimate form of veil piercing in certain circumstances.

Although relatively novel in the UK, categorising veil piercing as FVP and RVP has received significant judicial attention in the United States,[10] while other jurisdictions such as India, Canada, Singapore and the Philippines have been cautiously debating its use.[11] In UK law, however, the term 'veil piercing' usually refers to attempts to hold the company's controller(s) liable for the acts, debts, or obligations of the said company. This form of veil piercing has been labelled as 'traditional',[12] 'orthodox',[13] 'standard',[14] or for our purposes 'forward' veil piercing.[15] Classically this might involve a creditor seeking to pierce the veil of incorporation to attach liability for a corporate debt to a shareholder with the concomitant implications for the certainty of limited liability (Figure 1 below).

[4]M Moore '"A temple built on faulty foundations": piercing the corporate veil and the legacy of *Salomon v Salomon*' (2006) Journal of Business Law 180.

[5][1897] AC 22.

[6]See O Kahn-Freund 'Some reflections on company law reform' (1944) 7 Modern Law Review 54 and P Ireland 'Company law and the myth of shareholder ownership' (1999) 62(1) Modern Law Review 32 at 45.

[7]Moore, above n 4.

[8]Ibid, at 202.

[9]See *Macaura v Northern Assurance Co Ltd* [1925] AC 619.

[10]See N Allen 'Reverse piercing of the corporate veil: a straightforward path to justice' (2011) 85(3) St John's Law Review 1147 at 1154–1155; K Hespe 'Preserving entity shielding: how corporations should respond to reverse piercing of the corporate veil' (2013) 14 *Journal of Business and Securities Law* 69 at 76–77; M Richardson 'The helter skelter application of the reverse piercing doctrine' (2011) 79(4) *University of Cincinnati Law Review* 1605 at 1610 and G Crespi 'The reverse pierce doctrine: applying appropriate standards' (1990) 16 *Journal of Corporation Law* 33.

[11]On Canada see P Spiro 'Piercing the corporate veil in reverse: comment on *Yaiguaje v. Chevron Corporation*' (2019) 62 *Canadian Business Law Journal* 231. On India see V Singh 'The doctrine of reverse piercing of the corporate veil: its applicability in India' (2021) 27 *Trusts & Trustees* 108. On Singapore see H Tjio and C Tung 'Reverse veil-piercing in Singapore and its consequences' (2018) 30 *Singapore Academy of Law Journal* 1133. On the Philippines see *International Academy of Management and Economics v Litton and Co Inc* 13 December 2017, GR No 191525.

[12]Allen, above n 10, at 1148.

[13]P Oh 'Veil-piercing' (2010) 89 Texas Law Review 81 at 101.

[14]J Chan, '*Should "reverse piercing" of the corporate veil be introduced into English law?*' (2014) 35(6) Company Lawyer 163 at 163, 167, 170.

[15]P-W Lee 'Remedying the abuse of organisational forms: trusts and companies considered' (2019) 13 *Journal of Equity* 211 at 226.

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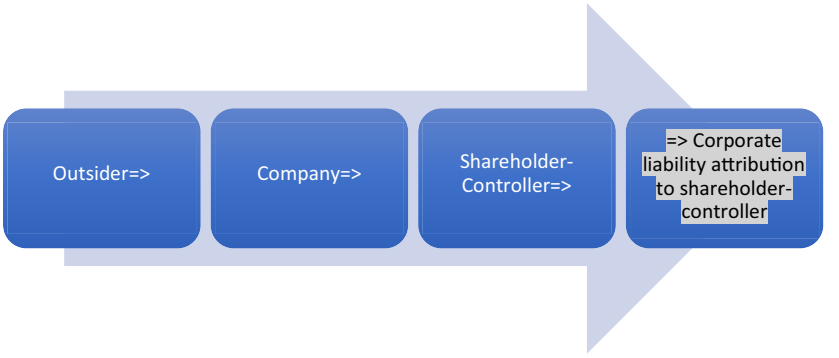

Figure 1. FVP direction of pierce.

RVP, on the other hand, refers to the instances where the acts, debts, or obligations of the controller are imposed on the company.[16] In contrast to FVP claims, which are targeted at the shareholder/controller, the target of RVP claims is the company, as the RVP potentially impacts the separation of shareholder/controller assets/liability and corporate assets/liability in attributing shareholder/controller liability to it. As such an RVP claim might involve a creditor of a shareholder seeking to attribute that liability to the company.[17] In a more complex RVP claim, a creditor may try to attribute parent company liability to a subsidiary company.[18] Unlike FVP, which often features an undercapitalised corporation, RVP can feature a form of evasive capitalisation because of an intent by the shareholder/controller to transfer assets that are subject to pre-existing obligations, to the corporation, rather than providing genuine capital for the corporation. Sometimes a case can feature both an undercapitalised parent company and an evasively capitalised subsidiary.[19]

In essence, FVP goes through the company to get at the shareholder's personal assets or attribute contractual or other liability to the shareholder rather than the company through which the liability normally arises. RVP, on the other hand, is an attempt to attribute shareholder/controller liability to the corporation to get at corporate assets or attribute contractual or other liability to the company (Figure 2 on below).[20]

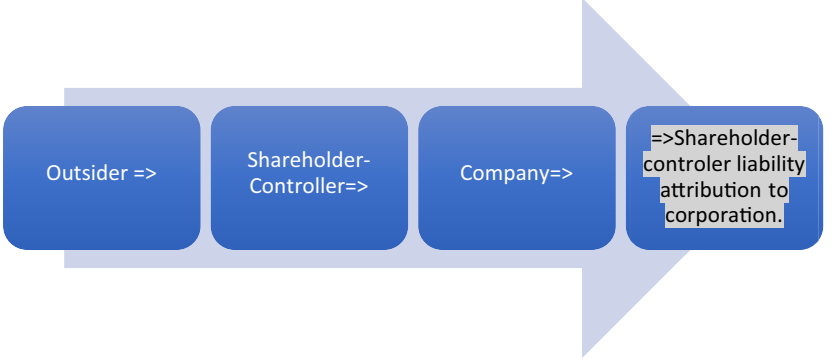

Figure 2. RVP direction of pierce.

[16]Allen, above n 10, at 1153; Hespe, above n 10, at 76.

[17]See Crespi, above n 10, at 55; *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832 and *Jhaveri v Salgaocar* (2018) SGHC 24 at [47].

[18]Allen, above n 10, at 1154.

[19]See *Manichean Capital, LLC v Exela Technologies, Inc* 251 A3d 694 (Del Ch 2021).

[20]There is an additional sub-category of RVP called 'insider reverse veil piercing' where a shareholder/controller attempts to attribute liability to the corporation. It is not relevant to the general UK veil-piercing debate as the UK courts have made clear

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In UK law, while veil piercing has generated a large body of case law, the courts have not, until recently, adopted the terminology of RVP or FVP, often preferring to talk obliquely about the 'converse' to FVP.[21] The distinction between RVP and FVP was therefore not (explicitly) recognised in UK law until 2021, when the Supreme Court in *Hurstwood Properties (A) Ltd and Others v Rossendale Borough Council*[22] used the term RVP for the first time.[23] However, academics have recognised the distinction well before *Hurstwood* and, as we discuss below in considering the shadow case UK law, the courts have historically attributed shareholder/controller liability to the corporation without explicitly using the term RVP.[24]

The paper proceeds as follows. Section 1 considers the recent emergence of RVP in the key veil-piercing decisions made by the Court of Appeal and the Supreme Court in *Adams v Cape Industries*, *Prest v Petrodel Resources Ltd* and *Hurstwood v RBC.*[25] Section 2 examines the concept of separability with regard to corporate personality and the important difference between RVP and FVP, that RVP does not impact limited liability. Section 3 considers the US jurisprudence on RVP and the development of the inverse plus concept for RVP in the Delaware courts. Section 4 discusses the historical development of shadow RVP in UK court cases where the court is engaged in a reverse veil pierce but does not use the term reverse veil pierce. We note the similar development in the UK case law of an inverse plus concept but also the closing of that concept since the *Prest* decision. The paper concludes that continuing the process begun in *Hurstwood* of formally unbundling FVP from RVP opens the way for the reemergence of an inverse plus principle for RVP that sets the limits of harm to third parties in a similar manner to the Delaware courts and the UK historical shadow case law. Without this, our law risks judicial intervention through RVP being eroded and the corporation becoming a mechanism for evasive entity shielding.

1. The recent emergence of RVP

In *Adams*, the Court of Appeal set out a comprehensive, if contested, account of when veil piercing is permissible.[26] In doing so the court claimed that any interests of justice considerations were illegitimate[27] and veil piercing was legitimate in only three situations: (a) interpreting a statute or a document; (b) if the corporation was a mere facade; and (c) if an agency relationship was present.[28] On the mere facade category, the court referred to the case of *Jones v Lipman*[29] as a reference point on this form of piercing. In *Jones*, L contracted to sell a property to J, but he then sold it to a company he controlled, 'solely for the purpose of defeating [J's] rights to specific performance'.[30] Russell J decreed specific performance against L and the company. The latter was held to be 'the creature of [L], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity'.[31] Although not explicitly described as such at the time, *Jones* is a reverse pierce case where the ability to use a corporation to place property beyond a pre-existing obligation of the controller was prohibited.

that these claims will not work. See *Macaura v Northern Assurance Company* [1925] AC 619 and *Short v Treasury Commissioners* [1948] 1 KB 116.

[21]See *Prest*, above n 1, at [92]. In *Banca Turco Romana SA (In Liquidation) v Cortuk* [2018] EWHC 662 (Comm) at [26], RVP is mentioned during a summary of US proceedings.

[22][2021] 2 WLR 1125 at [67].

[23]Searches carried out on 31 May 2024 on Westlaw and LexisNexis using the search terms 'reverse pierc!' and 'reverse veil pierc!', revealed that there were no pre-*Hurstwood* cases in which an appellate court used the words 'reverse piercing' or 'reverse veil piercing'.

[24]D Cabrelli 'The case against "outsider reverse" veil piercing' (2010) 10 *Journal of Corporate Law Studies* 343.

[25]At [1990] Ch 433, [2013] 2 AC 415 and [2021] 2 WLR 1125 respectively.

[26]G Tweedale and L Flynn '*Piercing the corporate veil: Cape Industries and multinational corporate liability for a toxic hazard, 1950–2004*' (2007) 8(2) Enterprise & Society 268.

[27]See *Adams v Cape Industries*, above n 25, at 538 and 544.

[28]On *Adams v Cape Industries* generally see A Dignam and P Oh 'Rationalising corporate disregard' (2020) 40 *Legal Studies* 187 at 188–191.

[29][1962] 1 WLR 832 (Ch).

[30]Ibid, at 835.

[31]Ibid, at 836.

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In *Prest* the Supreme Court dealt with a dispute focused on ancillary financial relief following divorce proceedings. At issue were eight residential properties (one was the matrimonial home) owned by two companies in which Mr Prest held effective controlling shareholdings. In that case Lord Sumption, as the court did in *Adams*, took up the cause of when veil piercing was legitimate by identifying what he claimed were two legal principles within the case law. The first of these he called the concealment principle, where the court seeks the identity of the real actors behind the company and which does not involve veil piercing.[32] Lord Sumption then identified a second principle: the evasion principle. This is where 'the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement', and the said person has interposed a company 'so that the separate legal personality of the company will defeat the right or frustrate its enforcement'.[33] The corporate veil, according to Lord Sumption, may legitimately be pierced under the evasion principle.[34] In doing so Lord Sumption again referenced as legitimate veil piercing *Jones* and also *Gilford Motor Co Ltd v Horne*,[35] where the direction of pierce was in reverse. *Gilford* involved a managing director, H, who left his employer-company, G, to set up a competing business, contrary to his employment contract. He initially did this in his own name, but then he formed a company, J, in which the shareholders were his wife and a business associate. G sought to enforce the covenant in H's employment contract. The Court of Appeal attributed the controller's obligation to the company and granted injunctions against H and J. Lawrence LJ noted that J 'was a mere channel used by the [H] for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of [G]', hence J 'ought to be restrained as well as [H]'.[36]

Since *Prest*, the use of the evasion principle has become a working doctrine for many judges[37] and in *Hurstwood* the Supreme Court placed the evasion principle centrally within their veil-piercing analysis.[38] *Hurstwood* concerned the use of companies for business rates avoidance. A key issue was whether the separate legal personalities of certain special purpose companies could be disregarded. Again in *Hurstwood* the reverse piercing cases, *Jones* and *Gilford*, cited in *Prest*, were considered legitimate veil-piercing cases.[39] It was also asserted in *Hurstwood* that '*Prest* was also a case of this type, i.e. a RVP case, albeit that it was held that the evasion principle was not engaged on the facts' as the necessary evasion was absent.[40] The Supreme Court, as such, recognised not only the different types of veil piercing, but it also recognised that RVP is not a new phenomenon and has been present in the case law in shadow form for some time.

The Supreme Court in *Hurstwood*, in dismissing a central FVP claim, went further than *Adams* and *Prest* and attempted to find a direction of travel for the principles that might apply to an RVP. Indeed, it explicitly used the term 'forward and reverse piercing' for the first time. In doing so it drew attention to '[w]hether the evasion principle is needed or provides the best justification of' *Gilford* and *Lipman*.[41] Reference was made to the remarks in *Prest*, in which Lord Neuberger (who in the earlier case of *VTB Capital v Nutritek International Corpn*[42] sought to eliminate piercing altogether) put forward alternative justifications, in his view concealment, agency and specific performance, for the outcomes in *Gilford* and *Lipman*, but then ultimately went on to agree with Lord Sumption on evasion,[43] and where Lady Hale stated that, in

[32]Ibid, at [28].

[33]Ibid.

[34]The seven Supreme Court judges in *Prest* were not unanimous in recognising that the veil may only be pierced under the evasion principle.

[35][1933] Ch 935 (CA).

[36]*Gilford Motor Co Ltd v Horne*, above n 17, at 965.

[37]See *OB v AB (Outer House of the Court of Session)* [2019] CSOH 102 paras [89]–[90] and *R v Miller (Stanley)* [2023] 4 WLR 6 paras 35–71.

[38]*Hurstwood Properties (A) Ltd and Others v Rossendale Borough Council*, above n 22, at [63]–[76].

[39]Ibid, at [69].

[40]Ibid, at [70].

[41]Ibid, at [68]–[71].

[42][2012] EWCA Civ 808.

[43]In *Prest*, above n 1, see Lord Neuberger paras [80]–[83].

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cases where a party seeks to impose the controller's liability on the company, then it is 'it is usually more appropriate to rely on the concepts of agency and of the "directing mind"' than standard FVP concepts.[44]

In concluding on this point, the Court tentatively returned to the evasion principle. On that basis, the local authorities were unsuccessful in their appeal to the Supreme Court on the FVP issue.[45] In doing so the Court expressed reservations about FVP as a valid form and about the utility of the evasion principle as an FVP tool.[46] However, it recognised the evasion principle's legitimacy when dealing with RVP.[47] While it appears that *Hurstwood* has been interpreted in subsequent case law as a conduit for the evasion principle and the further narrowing of FVP,[48] RVP remains in our view unfinished business. As we discuss below, what is broadly clear within the case law since *Adams*, *Prest* and *Hurstwood*, is that FVP has become increasingly unlikely within the restrictive judicial analytical framework, despite there being a theoretical possibility that it could occur, and arguably good reasons why the doctrine should be developed.[49] Where we are, though, with RVP remains somewhat uncertain as although it now seems to operate through the evasion principle, that principle is insensitive to the different considerations that arise when evasive capitalisation is at issue rather than limited liability. This risks RVP being subjected to the narrow closed judicial development of the evasion principle in the context of FVP and its relationship to limited liability rather than the considerations that should be in play in an RVP where limited liability is unaffected. As Mujih, commenting in 2017 on the high rate of piercing in RVP cases, considered:

> Either the high rate of piercing in reverse-piercing cases is a coincidence or it is the natural outcome of a fundamental distinction between the two types of piercing. If the latter view is correct, then there is a need for this distinction between the two types of piercing to be expressly recognised and a separate set of rules for reverse piercing might be considered. Indeed, the veil-piercing rule was developed on forward-piercing grounds and applying such a rule to cases of a backward-piercing nature without a prima facie recognition of the nature of such cases and distinction from forward-piercing cases was always bound to be problematic. This may have contributed to the unsatisfactory and confused state of the law in this area – a criticism made by academics and judges. It appears to be the case that much of the sought-after clarity of the rule relies on this distinction being recognised.[50]

2. FVP v RVP

Recognising the difference, as Mujih suggests, is crucial. FVP and RVP raise different issues because a corporation has multiple legal attributes that assist the functioning of the corporation and have been layered onto the corporation over time. The company can sue and be sued.[51] It can contract and hold property in its own name.[52] This property-holding capacity generally protects the assets of the company from the shareholders' liability to outsiders (entity shielding) and the presence of limited liability shields

[44] *Prest*, above n 1, at [69]–[73], [71]-[72], [92].

[45] Their appeal on a separate statutory interpretation issue was successful: *Hurstwood Properties (A) Ltd and Others v Rossendale Borough Council*, above n 22, at [9]–[62].

[46] See SHC Lo 'Nature of corporate veil-piercing and revitalization of the evasion principle' (2023) 139 Law Quarterly Review 436 at 441–442.

[47] *Hurstwood Properties (A) Ltd and Others v Rossendale Borough Council*, above n 22, at [9]–[62].

[48] See *Baker v Post Office Ltd* Employment Tribunal, 14 March 2022, Case No 1402149/18; *Rapid Displays Inc v Ahkye* [2022] EWHC 274 (Comm); *K Pub Trading Ltd v Cardiff City and County Council* [2021] EWHC 3011 (Admin).

[49] Moore, above n 4, and Lo, above n 46. On Lady Hale's position see *Prest*, above n 1, at [92] and *Guy's and St Thomas' NHS Foundation Trust v ESMS Global Ltd* [2022] EWHC 2941 (Comm) paras 80–81.

[50] EC Mujih 'Piercing the corporate veil: where is the reverse gear?' (2017) 133 *Law Quarterly Review* 322 at 326.

[51] *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

[52] See *Macaura* and the discussion in *Van Allen v the Assessors*, 70 U.S. 573 (1865) 584 of the earlier UK case law establishing the corporation as property holder.

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the personal assets of shareholders from corporate liability (owner shielding).[53] Significantly, for our purposes, it does not need to contain all these elements to maintain the integrity of corporate personality. As Cabrelli considers:

> none of the institutions of entity shielding, limited liability or separate legal personality are sufficient nor necessary for the others to arise. Each is mutually exclusive and may arise and function in isolation … Entity shielding and limited liability are associated with the concept of separate juristic personality, but the latter is by no means a prerequisite for the establishment of both of the former.[54]

When it comes to veil piercing, often the judiciary, in our view, mistakes this association with limited liability and entity shielding as inseparable parts of corporate personality. As Cabrelli points out above, limited liability can be separate from legal personality.[55] This is particularly true in the UK context, given the origins of registered companies in the Joint Stock Companies Act 1844, where corporate personality did not come originally with limited liability or indeed with the option of full limited liability until 1862, and even then the limited liability company did not become commonplace until much later.[56] It is, of course, also possible to incorporate an unlimited liability company without limited liability but with corporate personality.[57] In our view the judicial articulation of the immutable nature of the *Salomon* principle can often be a signal that they are tightly associating limited liability and corporate personality.[58] As Armour and Whincop consider, this may be because corporate personality affects:

> how lawyers think about the law. Arguably, 'corporate personality' provides a convenient shorthand for thinking about the combined effects of many of the foregoing property law mechanisms, which may act as a useful heuristic for judges and lawyers fleshing out the application of particular rules.[59]

Some judges seem to articulate a tight inseparable association between corporate personality, limited liability and entity shielding while others separate limited liability and evasive entity shielding when an RVP is at issue.[60] If one approaches veil piercing based on the inseparability of corporate personality, limited liability and entity shielding, then veil piercing becomes an extremely complex endeavour as the assumed effects of the pierce are multiple, widespread, unpredictable and possibly unmanageable. The working assumption in inseparability is that a veil piercing will cause these presumed inseparable elements to fail, ie if entity shielding is attacked by a veil piercing then so too is limited liability.

In *Adams*, the Court of Appeal, in its effort to set out clear principles for veil piercing, operated arguably the first clearly articulated separable approach in narrowing the criteria for piercing. Within that analysis, although not using the terms FVP and RVP, FVP is narrowed considerably but RVP, in the centrality of the *Jones* case to the *Adams* analysis, was legitimised. In *Prest* the separability of limited liability was also present, as Lady Hale recognised that the direction of pierce matters and that different

[53]B Hannigan *Company Law* (Oxford: Oxford University Press, 2021) para 3–13.

[54]Cabrelli, above n 24, at 348.

[55]See also T Kuntz 'Asset partitioning, limited liability and veil piercing' (2018) 19 *European Business Organization Law Review* 439 at 445–456.

[56]Joint Stock Companies Act 1844 (7 & 8 Vict c 110). See R Harris 'A new understanding of the history of limited liability' (2020) 16(5) *Journal of Institutional Economics* 643 at 655.

[57]Companies Act 2006, Part 1, s 3. The most high-profile unlimited company is Samuel Smith Old Brewery: see https://find-and-update.company-information.service.gov.uk/company/00188027.

[58]See Rimer LJ and Patten LJ in the Court of Appeal in *Prest* for example: *Prest v Prest* [2013] 2 WLR 557.

[59]J Armour and M Whincop 'The proprietary foundations of corporate law' (2007) 27 *Oxford Journal of Legal Studies* 429 at 461.

[60]Cabrelli, above n 24, at 345–348.

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considerations flow from that 'converse' direction.[61] Lord Sumption also carries separability into his evasion considerations in *Prest*, in a similar manner to the court in *Adams*, by recognising the RVP cases of *Jones* and *Gilford* as legitimate piercing. *Hurstwood* is also significant in moving away from inseparability in its narrowing of FVP and its tentative recognition of RVP using the evasion principle.[62] If one approaches them as separate then piercing becomes somewhat more manageable, as the impacts of the piercing on the individual concepts become more apparent, ie if entity shielding is at issue then limited liability is still protected.

The problem, however, is that simply recognising and allowing RVP via the evasion principle does not appreciate the distinctive character of RVP.[63] As Lady Hale outlined in *Prest*, the direction of pierce brings different considerations. RVP distinguishes itself by having nothing to do with the limited liability of the shareholder and the wider moral, legal and economic concerns that arise from attributing liability to shareholders for corporate actions.[64] Limited liability protects the shareholders' assets from corporate creditors. RVP, as mentioned in the introductory section of this paper, targets the company rather than its owner(s)/controllers. In this respect, a successful RVP can impact that proprietorial separation of assets where that separation is deliberately manipulated by the shareholder/controller while the limited liability of its shareholders and the statutory intention is untouched.[65]

We see this in the difference of judicial approaches to FVP and RVP. FVP, with its potential to attack limited liability and the ability of creditors to commercially adjust to FVP, seems to engage a judicial reluctance to pierce the veil as opposed to RVP and its impact on entity shielding. The reason for that may be that we have the clear statutory intention to allow limited liability, widespread legal warning (Ltd and Plc, for example) to those dealing with the corporation and consequent contractual adjustment by commercial creditors that may explain, despite views to the contrary,[66] the broad judicial historical reluctance to FVP. Evasive entity shielding – where assets such as jewellery, matrimonial homes or cash, which are not intended to genuinely capitalise the company and are subject to pre-existing shareholder/controller obligations, are transferred to a company – engage greater justifiable judicial intervention in the form of RVP, as evasive entity shielding is unrelated to the statutory intention with regard to limited liability, gives no warning and is difficult to adjust for contractually.

Where intervention in the form of RVP may be warranted, it also has – because it is distinct from FVP – differing practical concerns that need to be accounted for. For example, in the context of FVP, undercapitalisation is a big issue.[67] For RVP, however, 'it is more than likely that a third-party creditor is alleging that an individual is incapable of satisfying a debt because she has divested all her assets into a corporate alter ego'.[68] The company may therefore, as we noted earlier, be evasively capitalised where the intention is to avoid a liability rather than provide genuine capital for a company.[69] As we will see when we examine the US case law, this can involve both deliberately undercapitalising a parent company subject to an impending liability and evasively capitalising subsidiaries of the parent to avoid the pending liability of the parent and not for legitimate capitalisation reasons.[70] As a result, the mixing of evasive and legitimate capital in an RVP also raises additional concerns. A company may have a number of

[61] *Prest*, above n 1, at [92]. See also *Guy's and St Thomas'*, above n 49, at [80]–[81] and Mujih, above n 50.

[62] *Hurstwood Properties (A) Ltd and Others v Rossendale Borough Council*, above n 22, paras 68–72.

[63] C Witting *Liability of Corporate Groups and Networks* (Cambridge: Cambridge University Press, 2018) p 309.

[64] J Macey and J Mitts 'Finding order in the morass: the three real justifications for piercing the corporate veil' (2014) 100 *Cornell Law Review* 99 and Hespe, above n 10, at 76.

[65] See Cabrelli, above n 24.

[66] See P Ireland 'The rise of the limited liability company' (1984) 12 *International Journal of the Sociology of Law* 239; Ireland, above n 6, and Moore, above n 4.

[67] Allen, above n 10, at 1159–1160.

[68] Ibid, at 1160.

[69] Ibid.

[70] See *Manichean Capital*, above n 19.

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shareholders, directors, employees and/or creditors, who may suffer the unforeseen consequences of an RVP claim if those impacts are not accounted for by the judiciary when deciding to pierce or not.

In the context of creditors, RVP may prioritise the personal creditors of the controller to the detriment of the creditors of the company.[71] A successful RVP claim enables the shareholder's personal creditors to use the assets of the company to satisfy the shareholder's debt with potentially damaging wider consequences.[72] RVP, if widespread and not accompanied by a balancing of its various impacts, could therefore potentially increase both the financial risk of lending for corporate creditors and the cost of borrowing for companies.[73] A successful RVP using the raw evasion principle might, if not carefully considered, prioritise the claims by the shareholder's personal creditors before the claims of the company's creditors and subvert the insolvency process.[74]

RVP could also prejudice the interests of innocent shareholders.[75] It is likely that they would be concerned about the risk that what they thought was the company's capital could be used to pay off the personal creditors of another shareholder.[76] RVP as such might undermine the shareholders' risk/reward expectation.[77] If these expectations are impaired, then RVP could potentially undermine the capital-raising function of the corporation.[78] It can be difficult to identify whether or not someone has incorporated a company to evade an existing legal obligation, as the information about an individual's personal obligations is not publicly available.[79] In a worst-case scenario it might move investment away from small- and medium-sized companies towards listed companies, where piercing is rare.[80] Beyond shareholders and creditors there are other third parties with connections to the company, such as employees, directors, customers and community, who may feel the impact of RVP.[81] The interests of these constituencies may suffer collateral damage from a successful RVP claim which imperils the company's financial well-being and its resources.[82]

If RVP is permitted under the evasion principle, as the Supreme Court separable approach in *Hurstwood* suggested,[83] the impact of a successful RVP claim may be felt beyond the parties in the dispute, as the evasion principle is not currently sensitive to the potential wider impact of RVP. In *Prest*, Lord Sumption asserted that, if the evasion principle does apply, piercing can occur 'for the purpose … of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality'.[84] In this sense, Lord Sumption appears to be contemplating a one-size-fits-all approach to both RVP and FVP.[85] However, Lord Sumption does then go on to at least obliquely express awareness of the implications of RVP while discussing the order decreed by Russell J in *Jones*:

> It should be noted that he decreed specific performance against the company notwithstanding that as a result of the transaction, the company's main creditor, namely the bank, was prejudiced by its

[71] *In re Hamilton* 186 BR 991, 1000 Bankr D Colo 1995 and Allen, above n 10, at 1184–1186.

[72] Cabrelli, above n 24, at 361, 363 and *Floyd v IRS US*, 151 F3d 1295, 1299 (10th Cir 1998).

[73] See A Lvov 'Preserving limited liability: mitigating the inequities of reverse veil piercing with a comprehensive framework' (2017) 18 *Davis Business Law Journal* 161 at 173 and *Floyd*, above n 72, at 1299.

[74] See Cabrelli, above n 24, at 361.

[75] Lvov, above n 73, at 172 and I Amirian 'Reverse piercing of the corporate veil: the nature and the economic analysis' (8 February 2022), available at https://ssrn.com/abstract=4029772.

[76] Crespi, above n 10, at 64, 65, 67; Richardson, above n 10, at 1624.

[77] Y Elham 'Reverse piercing of the corporate veil: the implications of bypassing "ownership" interest' (2004) 33 *Southwestern University Law Review* 573 at 574.

[78] Crespi, above n 10, at 64; Richardson, above n 10, at 1626.

[79] See Lvov, above n 73, at 172.

[80] Richardson, above n 10, at 1626. See Allen, above n 10, at 1164.

[81] Lvov, above n 73, at 173–174.

[82] Ibid.

[83] *Hurstwood Properties (A) Ltd and Others v Rossendale Borough Council*, above n 22, at [72].

[84] *Prest*, above n 1, at [35].

[85] Ibid, at [28].

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> loss of what appears from the report to have been its sole asset apart from a possible personal claim against Mr Lipman which he may or may not have been in a position to meet. This may be thought hard on the bank, but it is no harder than a finding that the company was not the beneficial owner at all. The bank could have protected itself by taking a charge or registering the contract of sale.[86]

Unfortunately, Lord Sumption did not explore this issue any further and so the potential impact of RVP on third parties was not featured in his articulation of the evasion principle. While *Lipman* was also discussed in *Hurstwood*, the Supreme Court ultimately focused on the raw evasion principle without addressing the wider interests issue. The evasion principle as it stands in raw form, while open to RVP as a one-size-fits-all model, seems not to recognise the difference between FVP and RVP and the need to include differing consideration of the wider impact of RVP. This is, in our view, problematic and so in the next two sections we first draw upon the American jurisprudence on RVP and then the existing shadow UK jurisprudence on RVP[87] where we can observe both the FVP and RVP separable analysis and wider interests impact of an RVP.

3. Developing the law on RVP – the US experience

Within the past decade RVP has been tentatively explored in many jurisdictions with a common law heritage, such as Canada,[88] India,[89] Singapore,[90] and the Philippines.[91] However, the US courts have a long history of classifying veil piercing as FVP or RVP. As such, they have examined the issues with, and consequences of, RVP in far greater detail than any other jurisdiction and there are lessons to be drawn from that experience. It is, though, important to exercise caution in the analysis of the American corporate jurisprudence.[92] US courts have a different tradition with regard to veil piercing. In most US states it is tightly articulated as an equitable remedy with distinct characteristics that operate as a tick list for US judges in helping to decide if the factual elements of the case might give rise to a consideration of veil piercing. In general, formal features such as domination, alter ego, undercapitalisation, lack of formalities, interest of justice considerations, facade, insolvency, commingling of personal and corporate assets need to be present for veil piercing to be an option.[93] In effect, the US jurisprudence on veil piercing, while dealing with the same underlying issues, is the opposite of the UK's tentative, confusing and often polarised, historical veil-piercing jurisprudence.

In the US, corporate law is also primarily a state matter.[94] The law of one state is not applicable directly in another state, 'although the approaches taken to legal problems by the courts of one state may be influential'.[95] Ultimately, it is the state of incorporation and its piercing law that determines the outcome.[96] For those reasons, different state courts have reached different conclusions on whether RVP should be permitted, and whether or not it should be permitted on the same principles which regulate FVP.[97] However, as a result of forum shopping and its specialist corporate Chancery courts, Delaware law has become the incorporation seat of choice for US companies and in turn its laws exert

[86]Ibid, at [30].
[87]RVP cases but the court does not use the term 'reverse veil pierce'.
[88]See above n 11.
[89]See above n 11.
[90]See above n 11.
[91]See above n 11.
[92]See D Kershaw 'Lost in translation: corporate opportunities in comparative perspective' (2005) 25 *Oxford Journal of Legal Studies* 603.
[93]See *Manichean Capital*, above n 19.
[94]See Kershaw, above n 92, at 610.
[95]Ibid.
[96]*Sky Cable, LLC v DirecTV, Inc* 886 F3d 375 (4th Cir 2018) 386. See Kershaw, above n 92, and *United States v Badger* 818 F3d 563, 568, 571 (10th Cir 2016).
[97]See L Spitz 'The case for outside reverse veil piercing in New Mexico' (2021) 51 *New Mexico Law Review* 349 at 362–364.

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outsized influence, operating as a quasi-national corporate law.[98] As we will discuss below, the Delaware Chancery Courts, as with the UK Supreme Court in *Hurstwood*, have embraced the FVP and RVP distinction.

Not all US state jurisdictions have recognised RVP,[99] but among those who have, some have adopted an approach that has been dubbed by one commentator as the 'inverse method'.[100] This is where a court applies standard veil-piercing factors directly to an RVP.[101] This approach is premised on the idea that RVP is the 'logical extension of traditional veil piercing because the underlying equitable goals remain unchanged'.[102] In *State v Easton*[103] the New York court asserted that 'conceptually "reverse" piercing is not inconsistent with nor antithetical to the salutary purposes of traditional piercing'.[104] The court applied the same test that was used for FVP claims to reverse pierce the corporate veil, as '[t]he direction of the piercing is immaterial where the general rule has been met'.[105]

The inverse method focuses more on the jurisprudential aims of veil piercing instead of focusing on the specific issues which may arise with RVP.[106] The inverse doctrine has also been rejected expressly in a number of US jurisdictions.[107] In *Wick v Ach*[108] it was noted that the jurisdictions in which RVP is recognised 'often seem to rely on the superficial similarity between [RVP] and traditional veil-piercing doctrines', but to treat them as being logically the same 'downplays the ways in which [RVP] is distinguishable from traditional veil piercing'.[109] The reasons for rejecting the inverse doctrine's raw application include the impact that it may have on innocent third parties and that it 'bypasses normal judgment-collection procedures'.[110] It has also been sensibly asserted that any major changes to the existing law of veil piercing should be undertaken by the legislature instead of the judiciary.[111]

The raw inverse method and the complete rejection of the doctrine represent the two extremes, but the US state courts have also 'explored nearly every shade in between'.[112] In doing so, the courts began focusing on the difference between FVP and RVP and the wider effects of an RVP claim on corporate constituencies.[113] In *LFC Marketing Group v Loomis*,[114] the court considered that '[c]onceptually, … reverse piercing is not inconsistent with traditional piercing in its goal of preventing abuse of the corporate form'.[115] The court applied the requirements for FVP, but it also recognised that 'there are other equities to be considered in the reverse piercing situation – namely, whether the rights of innocent shareholders or creditors are harmed by the pierce'.[116] Likewise, in *CF Trust Inc v First Flight LP*,[117] the Supreme Court of Virginia recognised additional factors that ought to be considered in RVP claims.[118] It was stated that the court must assess the impact of RVP upon innocent creditors

[98]See State of Delaware 'Annual report statistics – Division of Corporations' at https://corp.delaware.gov/stats/.
[99]Lvov, above n 73, at 171.
[100]Allen, above n 10, at 1157, 1158–1160.
[101]Ibid, at 1157.
[102]Ibid, at 1158. See Hespe, above n 10, at 79–80.
[103]647 NYS2d 904, 909 (Sup Ct 1995).
[104]Ibid.
[105]Ibid and *Litchfield Asset Management Corp v Howell* 70 Conn App 133, 151–156, 799 A2d 298, 312–315 (2002) and *MJ v Wisan* 371 P3d 21, 36 (Utah 2016).
[106]See *Easton*, above n 103, at 909 and *Wisan*, ibid, at 36.
[107]See *TMX Finance, LLC v Goldsmith* 833 SE2d 317, 335 (Ga Ct App 2019) and *Floyd*, above n 72.
[108]2019-Ohio-2405, 139 NE3d 480.
[109]Ibid, at 484.
[110]*Cascade Energy & Metals Corp v Banks* 896 F2d 1557, 1577 (10th Cir 1990). See also *Floyd*, above n 72, at 1300.
[111]*Acree v McMahan* 276 Ga 880, 882, 875.
[112]Richardson, above n 10, at 1616.
[113]Ibid and *Curci Investments, LLC v Baldwin* 14 Cal App 5th 214, 222, 221 Cal Rptr 3d 847, 852 (2017).
[114]116 Nev 896, 8 P3d 841 (2000).
[115]Ibid, at 903, 846.
[116]Ibid, at 905, 847.
[117]266 Va 3, 580 SE2d 806 (2003).
[118]Ibid, at 9–13, 809–811.

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and investors, and whether or not there are other available remedies.[119] In *In re Phillips*,[120] the Supreme Court of Colorado held that RVP is allowed: if, first, 'the controlling insider and the corporation are alter egos of each other';[121] secondly, if 'justice requires recognizing the substance of the relationship over the form because the corporate fiction is utilized to perpetuate a fraud or defeat a rightful claim';[122] and thirdly, if 'an equitable result is achieved by piercing'.[123] It was noted that 'equity requires that innocent shareholders and creditors be adequately protected before [RVP] is appropriate under Colorado law'.[124] If other remedies are available, then RVP is inappropriate.[125]

In the US though, the main incorporation jurisdiction is Delaware and until very recently it did not recognise RVP. However, reflecting a decade-long trend in US jurisdictions[126] to accept RVP, in May 2021,[127] having suggested in a number of cases between 2015 and 2018 that RVP as a concept might be acceptable in certain circumstances,[128] the Delaware Chancery Court embraced the concept in *Manichean Capital, LLC v Exela Technologies, Inc.*[129] In that case, reverse piercing was allowed where a company had deliberately undercapitalised and moved assets to subsidiaries to avoid a contingent liability, which subsequently became a significant liability enforced by a court order against the undercapitalised company.

Vice-Chancellor Slights, having considered Delaware and other state jurisprudence concluded:

> The risks that reverse veil-piercing may be used as a blunt instrument to harm innocent parties, and to disrupt the expectations of arms-length bargaining, while real, do not, in my view, justify the rejection of reverse veil-piercing outright. Rather, the recognition of the risks creates an opportunity to manage them, and to do so in a manner that serves the interests of equity.[130]

He then set out the criteria upon which an RVP claim would be considered utilising both general veil-piercing formal elements and the particular issues RVP raises. In his view, general elements of veil piercing would need to be present before the court should consider specific factors relevant to RVP in the context of asking whether generally the corporate form is being utilised to action a fraud or injustice. Those specific RVP factors included: the effect on other innocent shareholders and shareholders generally; the extent of dominion/control exerted; the harm caused and the control/dominion; the outsider's reasonable reliance on there being no separation between the corporation and the insider; public interest considerations, including the severity of the wrongdoing; any wrongful conduct by the outsider; the impact on third party creditors; any other available remedies; other relevant factors relevant to reaching an equitable result.[131] Notably, Vice-Chancellor Slights utilised general veil-piercing formalities and RVP-specific criteria, recognising that the raw inverse method is insensitive to the harm that a successful RVP claim may have upon non-culpable third parties.

Of course, prohibiting RVP altogether, as some US courts have done, would also protect other third parties, but there are two problems with this logic. First, prohibiting RVP may enable the unscrupulous

[119]Ibid, at 12–13, 811.
[120]139 P3d 639, 644–645 (Colo 2006).
[121]Ibid, at 646.
[122]Ibid.
[123]Ibid.
[124]Ibid.
[125]Ibid, at 647; Allen, above n 10, at 1160–1163 and E Youabian 'Reverse piercing of the corporate veil: the implications of bypassing ownership interest' (2004) 33 *Southwestern University Law Review* 573.
[126]See *Curci*, above n 113.
[127]The same month and year as the *Hurstwood* decision in the UK.
[128]See *Cancan Dev LLC v Manno* 2015 WL 3400789, at 22 and *Sky Cable*, above n 96.
[129]See *Manichean Capital*, above n 19.
[130]Ibid, at 29–30.
[131]Ibid, at 35–37.

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controller to abuse the corporate form while the claimant may be left with no remedies.[132] After all, veil piercing is a last resort rather than a first option; a claimant may have exhausted all other avenues, or be uncertain about whether their claim via the other avenues would succeed. Secondly, RVP's impact upon third parties is a context-specific issue. Not all companies have the same corporate constituents, and not all of them may be affected the same way. It has been judicially recognised, for example, that 'the problems associated with reverse-piercing may be viewed as less serious in cases where a corporation is controlled by a single shareholder', where 'there are, for instance, no third-party shareholders to be unfairly prejudiced by disregarding the corporate form'.[133] As Vice-Chancellor Slights articulated well, RVP may indeed have risks when disregarding entity shielding but that harm can be managed and, as we will observe in the next section, the UK courts have historically engaged in a similar form of RVP.

4. Shadow RVP in the UK courts

RVP via the one-size-fits-all evasion principle in *Prest* is similar to the US raw inverse method. It focuses on the abuse of the corporate form and, in a similar manner to the US raw inverse method, it ignores the wider harmful impact of a successful RVP claim. However, prior to *Prest* the UK courts had been addressing RVP and managing the potential harm to third party interests in a similar manner to some US courts in deciding whether to permit RVP. The courts in these 'shadow' RVP cases were engaged in a reverse pierce but did not use the term reverse piercing. They can be divided into two categories: those which involve the raw inverse method; and those that utilise a modified inverse method, which adopts a careful approach to third-party harm even where evasion may be present.

For example, *Jones* and *Gilford* fall within the raw inverse category where the presence of bank lending and an employee is noted for fact-finding purposes but no potential third-party harm is weighed in the outcome. Similarly, in *Customs and Excise Commissioners v Hare*,[134] as the companies were used to facilitate a large scale fraud, the court pierced the corporate veil, treating the assets of the corporation as the assets of the defendants. In *Raja v Van Hoogstraten*,[135] the court engaged veil piercing to disregard the corporation and treat corporate assets as the assets of the individual. In *Anglo German Breweries Ltd (AGB) v Chelsea Corp Inc (CC)*,[136] it was claimed that CC was formed by Mr A to place his personal assets beyond seizure, as the company 'had no genuine corporate existence, but operated (if at all) as [the latter's] nominee', and Mr A acted as if the property in question 'belonged to him'.[137] The court considered that the relevant aspects of veil piercing 'are both control of the company and its improper use as a device or facade to facilitate or conceal wrongdoing'.[138] In piercing the corporate veil, the court held that CC 'was clearly owned and controlled by [A] who, together with one of his daughters, pulled the corporate strings'.[139] In each of these cases the raw inverse method was used and there was no consideration of broader potential harm to shareholders, employees or creditors.

One of the most significant examples of post-*Prest* raw inverse RVP is *Akhmedova v Akhmedov*.[140] In that case, W applied for orders to enforce a judgment she obtained in previous ancillary relief proceedings against her husband. She asked the court to pierce the 'corporate veil' of a company named 'Straight' that had been interposed by her husband to frustrate the order.[141] Haddon-Cave J pierced the corporate veil

[132]See ibid, at 176 and Allen, above n 10, at 1179.
[133]*Floyd*, above n 72, at 1300.
[134][1996] 2 All ER 391.
[135][2006] EWHC 2564 (Ch).
[136][2012] EWHC 1481 (Ch), [2012] 2 BCLC 632.
[137]Ibid, at [9].
[138]Ibid, at [22].
[139]Ibid, at [23].
[140][2018] EWFC 23 (Fam) and *Akhmedova v Akhmedov & Others* [2021] EWHC 545 (Fam).
[141]Ibid, at [51] and [64].

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under the raw evasion principle from *Prest*,[142] although he did not use the term reverse piercing. H was held to have acted 'with real impropriety and deliberately seeking to evade his legal obligations to W', and he used 'Straight to put legal obstacles in the way of enforcement of the Judgment by her against him'.[143] Although the case engaged complex – and at times evasive – use of many companies, no consideration was given to any harmful impacts of the RVP on wider constituents. The common theme within these cases is that they pierced the veil using the same principles as they would for FVP,[144] without any separate FVP/RVP framing or enquiry as to the wider harm to third parties. This represents the essence of the UK raw inverse method, which in our view fails to articulate the difference between RVP and FVP.

There are, however, many cases in the long history of UK shadow RVP that utilised a modified inverse piercing that not only addressed the interests of third parties directly but have also weighed those interests in determining the outcome of the RVP claim. In *Lonrho Ltd v Shell Petroleum Co Ltd (No 1)*[145] a reverse piercing was declined because of the complexity of the group and the distance of the parent from the subsidiaries. In declining to pierce, the court accepted that a one-person company RVP might warrant a different outcome, as other factors would be at play.[146] Similarly, in *Glencor ACP Ltd v Dalby*[147] the assets of a company were identified with its sole shareholder. In weighing up the factors influencing the RVP, the court considered as significant the total control of the shareholder and the absence of any 'sales force, technical team or other employees capable of carrying on any business'.[148] In *Re K and Others*[149] a controller, who was not a shareholder or director, had corporate assets attributed to him in treating his assets and the assets of four companies as one and the same because of the criminal venture the companies were designed to facilitate. The wider legitimate aspects of the companies that might be harmed by an RVP were examined but did not outweigh the criminality. In *Kensington International Ltd v Congo*,[150] part of a subsidiary structure that had been put in place to defeat existing claims of creditors engaged an RVP on the basis they were a sham and a facade. In doing so the court was cognisant of managing the wider creditor harm of the RVP by making some funds available to creditors where one of the subsidiaries was not entirely a sham. In essence these cases illustrate that a modified form of the inverse method is present within the UK shadow RVP case law that is aware of the RVP/FVP difference and is sensitive to third-party impact.

One area of law, though, has a significant presence within the shadow RVP case law: Family Division cases concerning financial proceedings/ancillary relief between spouses. These types of cases are perhaps most susceptible to RVP, given the increase in the use of entity shielding by the wealthy and London's presence as the jurisdiction of choice for the weaker financial party instigating a divorce.[151] This specific issue of the difference between RVP and FVP, in terms of entity shielding versus limited liability, was recognised by the family courts in *Hope v Krejci & Others*,[152] by Mostyn J, who distinguishing veil piercing in the commercial case of *VTB Capital* from the issue of veil piercing in certain family law cases.[153] He considered that:

[142]Ibid, at [62].

[143]Ibid, at [57] and [64].

[144]See *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 (Ch); *Trustor AB v Smallbone and Others (No 2)* [2001] 1 WLR 1177 (Ch) and *Secretary of State for the Environment, Food and Rural Affairs v Feakins (No 2)* [2002] EWHC 980 (QB).

[145][1980] 1 WLR 627.

[146]Ibid, at 637–638.

[147]2000 WL 1881279.

[148]Ibid, at [26].

[149][2005] EWCA Crim 619.

[150][2006] 2 BCLC 296 at [215].

[151]J Croft 'Half-century-old divorce law on asset splitting set for review' *Financial Times* 17 March 2023, https://on.ft.com/40qMEPS and C Boyle 'Why the exes of the wealthy want to get divorced in London' (2013) *CNBC News* 30 December 2013, https://www.cnbc.com/2013/12/19/why-wealthy-exes-want-to-get-divorced-in-london.html.

[152][2012] EWHC 1780 (Fam).

[153][2012] EWCA Civ 808.

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> It can immediately be seen that the purpose for which the piercing of the veil was sought was very different to that usually encountered in proceedings for a financial remedy following divorce. It was, on the facts of [*VTB*], to seek to deem a puppeteer to be a party to a contract to which it or he plainly was not a party … In a financial remedy case it is rather different: to deem the property of a puppet to be the property of the puppeteer.[154]

Indeed, in family financial proceedings, where the use of a corporation or groups of companies is potentially being used to evade an obligation, we have a clash of the principles of family and corporate law and two potentially conflicting statutory and equitable regimes.[155] In essence, how far will the courts go in allowing the use of a corporation to erode fairness between the parties in family law proceedings? For these reasons, family law RVP cases have, over time and similar to some US states, developed a modified inverse method RVP that was sensitive to third-party harm. The following cases capture the essence of the approaches within the case law regarding the type of third-party interests which are important for RVP purposes and the weight that is attached to those interests.[156]

The first case is *Nicholas v Nicholas*,[157] in which the Court of Appeal allowed a husband's appeal against an order under which he was required to procure the transfer of a property to his wife. The property belonged to a company in which he was the majority shareholder. One of the questions was whether the corporate veil could be pierced to disregard the company's ownership of the property 'and make an order which, in effect, is an order against the husband, an individual shareholder'.[158] The relevance of third-party harm was addressed in the judgment of Cumming-Bruce LJ, in which it was stated that 'where the shareholding is such that the minority interests can for practical purposes be disregarded', the corporate veil may be pierced to 'make an order which has the same effect as an order that would be made if the property was vested in the majority shareholder'.[159] The minority interests were, however, found to be significant and the veil was not pierced.[160] As Dillon LJ asserted, 'If the company was a one-man company and the *alter ego* of the husband, I would have no difficulty in holding that there was power to order a transfer of the property, but that is not this case.'[161]

In *Mubarak v Mubarak*[162] a wife was awarded a lump sum in ancillary relief proceedings against her husband. One of the issues was whether the wife may 'take jewellery belonging to [an English company DIL] … in part satisfaction of a lump sum owing to her by the husband'.[163] Harm to third-party interests were directly relevant in determining this issue. As Bodey J asserted:

> The Family Division can make orders directly or indirectly regarding a company's assets where (a) the husband (as I am assuming) is the owner and controller of the company concerned and (b) where there are no adverse third parties whose position or interests would be likely to be prejudiced by such an order being made. I include as third parties those with real minority interests in the company and (where relevant on the facts) creditors and directors.[164]

Bodey J's enquiry goes further than *Nicholas* vis-à-vis the type of interests to be considered in permitting RVP. The minority interests in *Nicholas* were those of the shareholders, but Bodey J included those of the directors and the creditors of the company too. More importantly, Bodey J's approach is much clearer in its formulation. In *Nicholas*, the approach adopted by Cumming-Bruce LJ and Dillon LJ requires a balancing

[154] *Hope*, above n 152, at [17].
[155] This has also been observed in the US: see Lvov, above n 73, at 168.
[156] On third-party interests, see *Trustor AB*, above n 144.
[157] [1984] FLR 285 (CA).
[158] Ibid, at 287.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] [2001] 1 FLR 673 (Fam).
[163] Ibid, at 674.
[164] Ibid, at 682.

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exercise to determine whether minority interests can be disregarded that suggests a clear outcome if a one-person company is present but not otherwise. In contrast, Bodey J's formulation requires an analysis of the likelihood the RVP would harm broad third-party interests. It is not clear as to what amounts to likely prejudice for these purposes, although Bodey J did note that veil piercing 'is most likely to be acceptable where the asset concerned (being the property of an effectively one-man company) is the parties' former matrimonial home', or if the claim concerned 'other such asset owned by the company other than for day-to-day trading purposes'.[165] On the facts, Bodey J declined to pierce the veil of two companies as they were trading companies, and there were 'genuine third party rights and interests which ought to be respected'.[166] These interests included those of 'bona fide commercial creditors (one of them secured on the jewellery) and the position of directors who have fiduciary duties and who oppose the seizure of stock in trade'.[167]

Similarly, in *Gowers v Gowers*,[168] Holman J refused to RVP as corporate assets were 'far removed from merely owning the former matrimonial home or other matrimonial properties', and there were 'significant third party interests whose position might be prejudiced'.[169] Indeed, there were 'significant minority shareholders … owning 30% between them …' and the company had around 80 employees, including a director who did not own any shares in the company, 'all of whose livelihoods depend on the continuing trading and prosperity of the company'.[170] The company also had 'clients or customers, and it has creditors'.[171] As with Bodey J, Holman J explicitly recognised the interests of a range of corporate constituents which may be impacted if the raw inverse method was used.

The range of historical case law and the family law specific issues suggests that the courts have at times been quite sensitive towards modifying the inverse method in an RVP and to weigh up context-specific third-party potential harm where they are part of a genuine commercial venture.[172] The different approaches to consideration of those interests within the case-law are attributable to the incremental development of the law in this area, but it is also perhaps due to the evidential-specific nature of the inquiry. Not all companies have the same, or as many, corporate constituents.

We recognise also that the approach of the family division of the High Court to veil piercing has been historically controversial. Munby J in *A v A*,[173] for example, while noting the general 'robust' approach to sham usage of companies to entity shield matrimonial assets, also drew attention to the sometime departure of the Family Division from the general law on veil piercing. *Prest*, of course, as a family law case, sits centrally within that family law RVP case law controversy. That controversy reached its peak in the Court of Appeal in *Prest*,[174] where Thorpe LJ gave a remarkably impassioned defence of the Family Division and its approach to RVP, addressed to the other judges on the panel, concluding:

> Once the marriage broke down, the husband resorted to an array of strategies, of varying degrees of ingenuity and dishonesty, in order to deprive his wife of her accustomed affluence. Among them is his invocation of company law measures in an endeavour to achieve his irresponsible and selfish ends. If the law permits him so to do, it defeats the family division judge's overriding duty to achieve a fair result.[175]

Despite this, Rimer LJ and Patten LJ, in allowing the appeal, disagreed strongly with Thorpe LJ and the Family Division's approach to veil piercing and adopted an inseparable approach to the *Salomon* principle whereby limited liability and entity shielding are inseparably bound to corporate

[165]Ibid.
[166]Ibid, at 685–686 and Mostyn J in *Kremen v Agrest* [2010] EWHC 3091 (Fam) at para [44].
[167]Ibid, at 686.
[168][2011] EWHC 3485 (Fam), [2012] 1 FLR 1040.
[169]Ibid, at [52].
[170]Ibid, at [54].
[171]Ibid.
[172]See Munby J in *Re W* [2000] 2 FLR 927 at 938.
[173][2007] 2 FLR 467 at [18]–[19].
[174]*Prest v Prest*, above n 58.
[175]Ibid, at [63] and [65].

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personality.[176] Rimer LJ, in a neo-Dickensian judgment, went on to explicitly consider a spouse and commercial creditors as warranting no differentiation.[177] *Caveat emptor*, it appears, should be applied to marriage and children as well as commercial transactions. Patten LJ, agreeing with Rimer LJ, considered that the leading family law veil-piercing cases had:

> led judges of the Family Division to adopt and develop an approach to company owned assets in ancillary relief applications which amounts almost to a separate system of legal rules unaffected by the relevant principles of English property and company law. That must now cease.[178]

In the Supreme Court, however, Lord Sumption, although he found no evasion that warranted a veil piercing, took a gentler approach to the seeming independence of the Family Division and its attempts to fulfil its statutory role in distributing family property in divorce proceedings. While he clearly recognised that some of the Family Division veil piercing had become too independent of the general law, he also recognised that there were principles applied that stayed centrally within the general veil-piercing canon.[179] Lady Hale (Lord Wilson agreeing) in her judgment followed up on the differing historical role of the Family Division, saying:

> I would only emphasise the special nature of proceedings for financial relief and property adjustment under the Matrimonial Causes Act, which he [Lord Sumption] explains in para 45. There is a public interest in spouses making proper provision for one another, both during and after their marriage, in particular when there are children to be cared for and educated…[180]

While we recognise that the issue of departure from precedent is problematic, what is equally problematic is not recognising that the family courts had become specialists in RVP and its wider effects rather than FVP. As the general precedent did not articulate the FVP/RVP distinction at the time, except in shadow form, Rimer, Patten LJJ and to some extent Lord Sumption (all chancery lawyers), in contrast to Thorpe LJ, Baroness Hale and Lord Wilson (all family lawyers), did not, in our view, fully accommodate or appreciate the nature of the issues that arise in RVP cases and the jurisprudence the Family Division was at the time developing.[181] Indeed, the disapproval of the RVP cases in the Family Division is in itself not entirely balanced, in that many of the RVP cases we have considered above have appropriately and rigorously weighed up the potential third-party harm as crucially determinative and refused to RVP. The disapproval of the family law courts approach has though had effect, in that *Akhmedova*, considered above, a post-*Prest* family law case, uses the raw evasion principle to reverse pierce without the use of the pre-*Prest* family law jurisprudence considering and balancing the harm to wider interests. In our view, this is an error that risks holding RVP development hostage to concerns relevant only to FVP.

Conclusion

It would be perfectly reasonable, given the conceptual and doctrinal confusion that surrounds veil piercing, to consign it to history. Indeed, some judges have pursued avoidant strategies, choosing to rule out even considering veil piercing while, as we noted in the introduction, some academics advocate a conceptual restart.[182] However, even critics such as Lo, who see solutions in other areas of law, ultimately

[176]Ibid, at [71] and [102].
[177]Ibid, at [99] and [155].
[178]Ibid, at [161].
[179]*Prest*, above n 1, at [23]–[25].
[180]Ibid, at [85].
[181]Ibid.
[182]See *Chandler v Cape plc* [2012] EWCA Civ 525.

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concede that there is space for veil piercing.[183] Lord Neuberger, probably the fiercest critic of veil piercing, attempted – as we noted above – to narrow veil piercing in *VTB* but then changed his mind in *Prest* in agreeing with Lord Sumption on the evasion principle.[184] Veil piercing may be a conceptual mess but it is resilient. The reason we end up with cases like *Adams*, *Prest* and *Hurstwood* at the senior court level is that veil piercing remains a workable solution for many judges, particularly at the High Court level.[185] Indeed, even in *Prest*, had the facts indicated the company was used evasively, a pierce would have been possible but not unanimous. The grounds for that pierce though would also likely have been unclear, given the varying views of the seven Supreme Court judges. While Lord Sumption's evasion principle has since established itself as a significant presence in the case law, the differing views in *Prest* have also fuelled a pick-and-mix approach.[186] Our view is that we are at an important inflection point with the doctrine after *Hurstwood* that opens up a path to a more certain interpretation of the doctrine if the difference between FVP and RVP is acknowledged and formally developed.

The emergence of RVP has been piecemeal within the UK case law. Explicit recognition of it and the consequence of that difference is low. Attributing controller liability to a corporation brings differing considerations to the removal of limited liability. Squeezing it within a one-size-fits-all multi-directional FVP/RVP raw evasion principle – as *Prest* and *Hurstwood* have done – is, in our view, both potentially useful but also problematic. Useful, in that the evasion principle is built on examples such as *Jones* and *Gilford* and so is particularly suitable for RVP development; but problematic in that a more concrete understanding of the difference between FVP and RVP and the wider implications of managing potential harm to third parties in an RVP is lacking, or at least not completely understood, as the treatment of the Family Division's historical approach and the Court of Appeal decision in *Prest* illustrates.

FVP, centred around its potential to disrupt limited liability, has different separate considerations to RVP, which centres around the use of the corporation to evasively shield assets that are subject to controller liability. As a result, FVP has been judicially narrowed to the point of disappearance because of its impact on limited liability. While separability has been developed in the case law, it has not – in our view – been explicit enough or taken far enough in the development of the evasion principle as it applies to RVP. Applying a raw evasion principle insensitive to RVP's difference risks leaving our law underdeveloped, as entity shielding brings both difference in the direction of pierce and separate potential harm considerations. Unfortunately, *Adams*, *Prest* and *Hurstwood*, while opening the door to RVP, do not take us through. This makes it difficult to understand where RVP currently fits within the UK law on veil piercing. Evasion principle-based RVP clearly operates *à la Akhmedova* but in raw form, without recognising the direction of pierce and without third-party harm sensitivity.

As we observed above, the Delaware Chancery Courts have, after decades of resisting RVP, successfully developed an inverse plus test for RVP that includes wider RVP stakeholder considerations that attempt to manage the risks to third parties who may be affected by RVP. A comparable development has played out in reverse in the UK case law where originally the courts, particularly the family courts, were – in a similar manner to the Delaware court – applying an inverse plus test that was sensitive to wider RVP issues. Criticism of the family courts' approach to piercing generally in *Prest* and a narrow reading of evasion since *Prest* has produced a raw inverse RVP outcome so far insensitive of harm to wider interests that risks holding RVP hostage to considerations that are only relevant to FVP.[187]

This is, in our view, unsatisfactory, and we would argue for drawing on the domestic UK shadow and US experience of RVP to develop a separate evasion plus principle for RVP, explicitly recognising its

[183]Lo, above n 46, at 457.

[184]See above n 43. In one of his final decisions, he also utilises Lord Sumption's approach in *Persad v Singh* [2017] UKPC 32.

[185]See *Airbus Operations Ltd v Withey* [2014] EWHC 1126 (QB); *JCA BTA Bank v Ablyazov* 2014 WL 3535498 (2014); *Wood v Baker* [2015] EWHC 2536 (Ch); *OB v AB*, above n 37; *Akhmedova*, above n 140; and *R v Miller (Stanley)*, above n 37.

[186]See *Clegg v Pache (Deceased)* 2017 WL 01831355 (2017) and *Guy's and St Thomas' NHS Foundation Trust v ESMS Global Ltd* [2022] EWHC 2941 (Comm) paras 80–81. Even in *VTB* there are two dissenting judgments, including Lord Clarke on the veil-piercing point, at para [238].

[187]See Rimmer LJ in *Prest*, above n 58.

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difference from FVP and weighing the wider potential harm to third parties. The raw inverse evasion one-size-fits-all method, *à la Prest*, does not attempt to strike a balance between ensuring that the corporate form is not abused and protecting the interests of non-culpable parties. Unlike the inverse method articulated in *Prest*, an approach that is sensitive to potential third-party harm would in appropriate circumstances minimise the potential for collateral damage arising from a successful RVP claim. There are, of course, potential downsides to this approach, but these hinge on the type of standards which are adopted for assessing RVP claims. We have in effect a workable evasion principle for RVP but we need to recognise how different RVP is and develop an additional wider harm standard for RVP. Something akin to the evasion principle plus Bodey J's wider third party prejudice test would be a start. As such, the courts could utilise a two-step process. First, explicitly recognising the direction of pierce as RVP and that it does not impact limited liability, the evasion principle would be applied to try to identify 'if there is a legal right against the person in control of [the company] which exists independently of the company's involvement', and the said person has interposed a company 'so that the separate legal personality of the company will defeat the right or frustrate its enforcement'.[188] If that threshold is met, then the second step would be to consider the likely prejudice to the positions or interests of third parties by the piercing of the corporate veil. This draws on the approach historically taken in many shadow RVP cases, most recently in the pre-*Prest* Family Division cases and the Delaware Chancery courts, who have utilised general veil-piercing principles for RVP and then inserted additional contextual evaluation of third-party harm before permitting RVP. Of course, if the standard is too sensitive to third-party interests, then RVP would be ineffective, while insensitivity is equally problematic as third party interests would be damaged.[189] For those reasons, while a separable, impact assessing, contextual approach is, in our view, preferable for assessing RVP, care must be taken to both recognise and balance the sometimes differing interests of third parties before a piercing is allowed, even when the evasion part of the test is met.

While *Hurstwood* signalled the further judicial narrowing of FVP and that the direction of pierce does matter, it did not develop a clear view on where RVP fits within this judicial veil-piercing framework. Recognising RVP would also allow the separate development of FVP, should the judiciary open it out again in the future. In particular, by leaving RVP within an evasion principle insensitive to the different nature of RVP, it risks a future court developing an even narrower evasion principle in the context of an FVP where limited liability is threatened which blindly and unjustifiably impacts the development of RVP where the considerations at play are very different. Given the current state of the law, a court might equally utilise a raw evasion principle and allow an RVP without weighing third-party interests that has significant negative consequences. As Allen sums up, the general danger is that:

> Failure to allow reverse piercing in certain instances, however, essentially provides 'a roadmap' to debtors on how to avoid payment of their outstanding obligations by crafting the outer limits of traditional remedies and placing action outside those limits beyond the reach of judicial intervention.[190]

Not recognising the distinctive nature of RVP and those third-party risks, given our tangled history of shadow RVP and recent comparative developments in the US and elsewhere, risks that 'roadmap' taking our law in the wrong direction.

[188] *Prest*, above n 1, at [28].

[189] M Gaertner 'Reverse piercing the corporate veil: should corporation owners have it both ways?' (1989) 30 *William & Mary Law Review* 667 at 678, 695–696.

[190] Allen, above n 10, at 1166.

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