"CORPORATE IDENTITY AND LIABILITY IN THE MODERN WORLD"

Rowan Pennington-Benton
Barrister,
3 Hare Court Chambers,
Temple, London, EC4Y 7BJ

Delivered at:

"Keep Up! Life outside the (brick and mortar) box"

BBA Whitsun Weekend Law Conference –

7 – 9 June 2019, Sandals Royal, Barbados

Described as a 'leading civil and commercial set', 3 Hare Court Chambers has established a first-class reputation in its fields of practice, providing a wide range of advisory and advocacy services both domestically and internationally in an environment that meets modern business needs.

Rowan Pennington- Benton

Year of Call: 2008

LLB (hons), (First Class), University of Essex;
BCL, (Distinction), St Edmund Hall, Oxford.

Rowan practises in two main areas – commercial law, and public /constitutional law. Much of his work has an international dimension (including commercial international arbitration, advising and appearing in cases from a range of foreign jurisdictions, and dealing with appeals to the Judicial Committee of the Privy Council). Increasing practice in DLT, blockchain and crypto-currency work.

Rowan is rated in the UK Legal 500 (2018):

'He has a brilliant and versatile legal mind and a real passion for his cases and his clients.'

rowanbenton@3harecourt.com

+447762286466 – please, give me your thoughts and stay in touch!

"CORPORATE IDENTITY AND LIABILITY IN THE MODERN WORLD"

Introduction

1. With ever increasing international and cross-border trade; along with the increasing ease and confidence with which people may set up, utilise, and invest in companies based abroad, difficult questions arise as to how to effectively resolve disputes between the 'real people' standing behind or affected by the activities of those companies.

    - How should the law deal with assets held in a complex web of offshore companies or trust mechanisms? Who do the assets 'really' belong to? Is this even a legitimate question?

    - Which corporate entity in a group of companies can or should be held liable for the wrongs of a company within the group, for example, in polluting foreign coastal waters?

    - What about damage caused to the shareholders or creditors of a company, by harm inflicted on the company in which they have invested? Is their loss really only reflective of the 'true loss' sustained by the company?

2. Companies are ubiquitous. But approaches to these issues vary, from legal system to legal system. I wish to explore, far too briefly than the subject deserves, the current approach of the English and Welsh courts to these issues. This approach is likely to be followed certainly in the BOTs but probably also in those states still choosing to appeal to the Privy Council in London.

3. Whenever I come to Barbados, I like to make the point – obvious though it is – that the courts of Barbados, along with other common law jurisdictions, are free to develop the common law in a way and at a pace which suits the local needs. There is no obligation to follow the approach taken in England and Wales, or indeed any other common law jurisdiction. But I do believe in the importance of us all sharing with each other, at events such as this, our experiences and developments in our own

jurisdictions. It allows us to share possible solutions to common problems, and enrich the process of legal understanding and development.

Issue 1: Assets squirreled away in complex corporate structures

4. Here we consider the perennial difficulty of money and assets being held, often overseas, under complex corporate structures. *"It not my money, its the company's"*. The yacht, moored up on the French coast, but owned by a company in the BVI; the house in Spain owned by a Gibraltarian company, on trust for another company somewhere else. How do some of the wealthiest people on the planet, appear to own nothing when it comes to marital breakdowns or bankruptcy? When we know full well as lawyers that some of these people have settled millions of pounds worth of assets under various corporate and trust structures across the world. What does the law do for the 'real people' – the spouses or the creditors in an insolvent liquidation or bankruptcy?

5. In *Prest v Petrodel* [2011] EWHC 2956 (Fam), the High Court in London considered it had found the answer to all this, at least in the case of matrimonial proceedings. Section 24 of the Matrimonial Causes Act allows the court to order that one party to the marriage transfer property or assets to which he or she is entitled, to the other. Mr Prest was extremely wealthy. He had made his fortune through the Petrodel group of companies. He and his wife divorced. Where oh where did all that money go? Even the matrimonial home in which they lived was owned by a company based in the Isle of Man. No less than 7 further UK properties were held by companies based abroad. None of them legally belonged to the husband. The husband had deliberately refused or failed to supply the court with sufficient evidence of the corporate structures and payment chains for the court to decide the beneficial ownership. The High Court judge cut through all this, holding that section 24 of the MCA gave the Court the power to pierce the corporate veil. It could in effect simply ignore the corporate structures, and treat the properties as belonging to Mr Prest. This allowed them to be transferred to Mrs Prest.

6. The case went all the way to the UK Supreme Court [2013] UKSC 34; [2013] 2 AC 415. Lord Sumption, in agreement with the Court of Appeal, held that section 24 did not give to the court the power to simply ignore legal personality. The case gave the opportunity however to evaluate the law in this area, and the powers of the court to pierce the corporate veil. This was an opportunity to possibly expand upon but

rationalise the power of the courts to pierce the corporate veil, when justice so requires.

7. Following his analysis of the existing case law, Lord Sumption concluded that in fact real cases of piercing were few and far between. He distinguished between cases invoking the *"...evasion principle"* which truly were or might be piercing cases. In these cases the wrongdoer interposes a company to break or deflect liability that would otherwise attach to him or her. On the other hand, are those cases involving the *"...concealment principle"* where in reality all the court does is to look behind or beyond the corporate facade so as to decide, as a matter of fact, who was really entitled to the assets or their benefit.

8. In the case of *Gilford Motor Co v Horne* [1933] Ch 935, Mr Horne had worked for Gilford Motor Co. His employment contract forbade him, upon leaving, to set up in competition with his old company. So clever old Mr Horne, when he left, set up a new company to operate business in competition with Gilford Motor Co. Mr Horne was the director and shareholder of newco, but the anti-compete clause did not bite against this company. The court in that case granted injunctive relief both against Mr Horne and newco. In this respect, it did pierce the corporate veil. If treated both Mr Horne and newco as effectively one and the same entity. This was an evasion case. The court properly be said to have pierced the corporate veil.

9. But none of this helped poor Mrs Prest. The off-shore holding companies had not been interposed to deflect Mr Prest's liability to his wife. They had been in place for many years, most likely for tax reasons. She only had a few million pounds in assets, so how will she cope without the rest? Lord Sumption to the rescue. He says forget piercing. You don't need it. All you need is to invoke the concealment principle; to look behind the black-and-white fact of the corporate structure, and determine for whose benefit these holding structures were operating. Determining that is a question of fact. Mrs Prest had all along asserted that the properties held by the overseas companies were so on trust for Mr Prest. The companies were served with proceedings, but failed to respond. The husband's evidence was incomplete, evasive and unhelpful. Lord Sumption takes us back to the case of *British Railways Board v Herrington* [1972] AC 877, and the judgment of Lord Diplock:

   "The appellants... elected to call no witnesses... That is a legitimate tactical move under our adversarial system of litigation. But a litigant who chooses to adopt it cannot complain if the

court draws from the facts that have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold..."

10. Armed with this, Lord Sumption proceeded to hold that the court was entitled to infer with respect to each of the properties held by the foreign companies, that in reality they were, on the balance of probabilities, held on trust for the husband. As a result they were properly distributable in the matrimonial proceedings.

11. Sanity in the world of all things commercial is restored. Corporate legal personality is safe to live another day. But Mrs Prest gets her remedy.

12. So, far from expanding the courts' jurisdiction to pierce corporate structures, the UK Supreme Court narrowly construed the courts' power to do so, confining it to those few cases in which a company was being interposed to break off or avoid a liability that would otherwise attach to the person hiding behind the company. These cases will in reality be rare.

13. However, in doing this, the Court in two senses liberated the law in this area. First, by characterising many cases previously thought of as piercing cases, as not in fact involving piercing at all, the straightjacket of that label along with the judicial reticence to take action in such cases is gone. All the court is doing is looking around the corporate veil to see what is really going on – who really owns those assets; or for whose benefit are they really being held? Does the company own the property outright, or in reality is it held on trust? Are the funds held on discretionary trust, or in reality is the trustee, a nominee or agent taking his instructions from the settlor? Secondly, the Court has, to a degree, breathed fresh life into the controversial area of judicial presumptions and inferences from silence. Hiding behind a web of companies is all very good in theory, but if you face a pleaded case of trust, agency or sham, and yet say nothing – you take the risk of the pleaded case against you being accepted by the court.

14. The burning question is the extent to which one can transpose the approach taken in *Prest*, into areas of commercial application outside of matrimonial proceedings. The UK Supreme Court recognised explicitly in *Prest* that family cases were of a special type.

15. One area in which I have found myself adopting or at least seeking to adopt these principles, is corporate insolvency. This is an area, like family cases, in which there is

an overarching legislative framework with a heavy element of public policy. Realising the assets, including off shore assets, for the benefit of the creditors as a class is an important part of the legislative aim. There is an increasing awareness of the importance of cross-border recognition, enforcement and cooperation in insolvency matters – whether under UNCITRAL, the EU Insolvency regulations of other multilateral agreements. The approach in *Prest* can be an important tool in actions taken by liquidators seeking to locate and realise assets held under complex overseas corporate and trust structures.

16. The idea is to secure, early on in the proceeding, detailed and penetrative disclosure orders, seeking information and evidence about the source of the money which paid for the asset, the identity of the directors and shareholders, trustees and protectors; orders should include disclosure of past transactions, who authorised them and who received the benefit. A failure to abide by these orders, and to disclose the nature, location, payment for, and payment out of, assets located abroad, can form the basis for an application for judgment in the pleader's favour to the effect that the assets are in fact held on trust for the benefit of, or as agent or nominee for, the defendant or insolvent company, as relevant.

17. There are now one or two reported cases of this approach being adopted in the context of general commercial proceedings. In *NRC Holding Ltd v Danilitskiy* [2017] EWHC 1431, the claimant had secured a judgment against Mr Danilitskiy. He sought a charging order against property to which it was said Mr Danilitskiy was entitled. Although the property was owned by a BVI company, the claimant pleaded that it was held on trust for Mr Danilitskiy, the *"effective controller"* of the company. Evidence suggested that Mr Danilitskiy had transferred the purchase money for the property. The judge held that a presumption of a resulting trust arose in his favour. Although there were a number of possible explanations which would or might have rebutted that presumption, Mr Danilitskiy had failed to give any meaningful evidence on that critical question. In accordance with the approach in *Prest v Petrodel* the court was entitled to infer that the property was held for his benefit. The charging order could therefore be made.

18. See also the case of *JSC BTA Bank v Solodchenko* [2015] EWHC 3680 (Comm), in which a judgment debtor who was subject to a freezing order was found, on the basis of the approach in *Prest*, to be the beneficial owner of the shares in BVI companies which were the registered proprietors of two properties, and also the beneficial owner of the properties themselves.

19. One answer, at least, to the first question posed in this talk – namely what to do about assets squirreled away under corporate structures – is the enhanced and more aggressive use of the court's procedural powers to call for evidence and disclosure of information relating to assets. And, in the face of non-disclosure or vague answers by the defendant, to make robust findings of fact based on inferences and presumptions.

Second Issue: the liability of a parent or group company for the wrongs committed by their subsidiaries?

20. This raises a similar issue: different companies, different legal personalities and liabilities. But when companies are owned by each other within a group structure, which in fact operates as a single economic unit, how realistic is to for the law to treat those entities as being distinct in terms of liability and relief?

21. Not all legal orders take the same approach. In a typically forthright and practical approach, the law of the European Union – in particular that governing state aid and competition, does not concern itself with corporate entities, but with the question of whether there is an *"undertaking"*. I am currently dealing with a case resisting enforcement in Gibraltar of an EU Commission Decision on State Aid. It was decided that a company which has since been dissolved and struck off had received unlawful State Aid, in the form, during its period of active trading, of zero tax on royalties and passive interest. My client is the holding company for the dissolved entity. It gets landed with a £100m bill. Forget it, we say; different companies. Not interested says the EU: you are all part of the same *"single economic unit"*. The existence of different corporate entities within that economic unit, is not relevant. (The case trundles on, as the single economic unit principle has not been transposed into the domestic law of Gibraltar, and, we say, it is not a principle of EU law which has 'direct effect'; but the contrast is given as an example of different possible approaches).

22. The approach, however, at common law, remains that each entity within a group of companies is legally distinct. Each has its own separate benefits and liabilities. However, there is a growing willingness on the part of the courts to find liability or at least a relevant duty of care, on the basis of the parent's involvement in the management of the subsidiary – either generally or in relation to the particular tasks or activities said to give rise to primary liability on the part of the subsidiary.

23. Typically this issue arises in the context of jurisdictional challenges; attempts to sue companies with assets, and based in relatively sophisticated jurisdictions with effective legal systems, for the wrongs committed by their subsidiaries based abroad. And from a moral perspective, one might say, why not? It is often the holding company once or twice removed, or the head of the group, which gets the real benefit of the activity on the ground – be it farming, tea growing, mining and so on. Why shouldn't they bear the brunt when something goes wrong? The answer given is, well, this is the whole point of companies. Like it or not, whether a natural or corporate person, the shareholder's rights and liabilities are distinct and separate from those of the company.

24. Well, that's the general principle. But, it depends. It depends on the extent to which the parent (or any shareholders) meddle in the management or conduct of the affairs of the subsidiary.

25. We start with *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 WLR 3111. During the 1950s and 160s, the claimant worked for a company called Cape Building Products. Due to unsafe work practices adopted by his employer, Mr Chandler was exposed to dangerous levels of asbestos and fell ill. That company had however long since been dissolved. However, the parent company, Cape Plc continued to exist. This was one of the first cases in England and Wales in which a parent company had been held liable to an employee, for the wrongs committed by the employer subsidiary. Ultimately it is about proximity and control.

26. The Court of Appeal affirmed that there was no basis for piercing the corporate veil; and, in principle, groups of companies were entitled to organise themselves so as to divide up responsibility for different activities and persons. But, a parent company could be liable for the wrongs of its subsidiaries, in the same way that a third party might assume responsibility – for example by offering advice or giving negligent instructions. Lady Justice Arden effectively accepted that claimant's argument that *"...the imposition of a duty of care does not 'collapse the principle of limited liability. The court can therefore hold that there has been an assumption of responsibility without piercing the corporate veil."* (para 42).

27. Cape Plc exercised a degree of control over the activities of Cape Products, the subsidiary. But it did more. Cape PLC exercised responsibility for protecting employees from harm from asbestos in the atmosphere (para 30). Relevant factors included: (a) a group medical doctor attending to all employees; (b) a group wide

programme looking at ways to reduce dust exposure, (c) Cape Products, the subsidiary, had inherited from the parent company the work practices associated with the exposure to asbestos, when it took over that part of the business; and (d) finally the parent's board, authorised some of the production methods of the claimant's work.

28. So, in essence, the more you meddle, the more you risk being treated as proximate to the end worker, and potentially liable for the wrongs of the subsidiary employer.

29. And the lid is off. The race is on. Find a parent company which takes enough interest in what its subsidiary gets up to and you're away.

30. Next case: *AAA v Unilever PLC* [2018] EWCA Civ 1532. The claimants sought to bring an action in the UK, against Unilever Plc, the UK-based parent company, for losses arising out of the activities of the subsidiary. This was to provide a jurisdictional anchor to sue also the Kenyan subsidiary which ran the tea picking and processing activities on the ground in Kenya. The claim was for damages for personal injury including death to plantation workers caused by riots and inter-tribe attacks following the elections in 2007. It was said that the Kenyan company had failed to have in place sufficient crisis management plans to deal with the riots, and that Unilever Plc could be sued as the anchor defendant as it had played a part in advising or failing to advise on such plans. The Court of Appeal rejected jurisdiction against Unilever Plc, on the ground of lack of proximity.

31. The evidence (which was led at the jurisdictional stage by written evidence only) made it clear that the Kenyan company did not have recourse to the parent company for advice or instructions regarding the running of the plantation, including crisis management (para 14). Although it was accepted by Uniliver Plc that the group of companies acted as a *"...single economic unit"*, each company on the ground ran its own operation. Here we see the real distinction between the single economic unit analysis in EU law (and under some other systems of competition or anti-trust law), and the common law approach to group liability. Lord Justice Sales said as follows:

> *[36] There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. ...The legal principles are the same as would apply in relation to the*

question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary...

[37] Although the legal principles are the same, it may be that on the facts of a particular case a parent company, having greater scope to intervene in the affairs of its subsidiary than another third party might have, has taken action of a kind which is capable of meeting the relevant test for imposition of a duty of care in respect of the parent. The cases where this might be capable of being alleged will usually fall into two basic types: (i) where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with: see Vedanta Resources, at [83]) the subsidiary's own management; or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk. As to claims of the first type, see Chandler v Cape Plc; Vedanta Resources at [83]; and Okpabi at [86]-[89] and [127] (Simon LJ) and [141] (Sales LJ). In Okpabi, Sir Geoffrey Vos C helpfully highlighted and contrasted the second type of case at [196], where he said:

> *"… One can imagine …circumstances where the necessary proximity could be established, even absent the kind of specific facts that existed in Vedanta … Such a case might include the situation, for example, where a parent required its subsidiaries or franchisees to manufacture or fabricate a product in a particular way, and actively enforced that requirement, which turned out to be harmful to health. One might suggest a food product that injured many, but was created according to a prescriptive recipe provided by the parent.…"*

32. These passages were approved in the recent UK Supreme Court case of *Vedanta Resources Plc v Lungowe* [2019] UKSC 20. The claimants in this case were a group of some 1,800 Zambian citizens belonging to rural farming communities in the Chingola District. They claimed that their health and business had been damaged by successive discharges of toxic material into the watercourses in that region, from the Nchanga Copper Mine owned by a Zambian company, KCM. Vedanta Plc was the ultimate parent company of KCM. The claim against both the parent and subsidiary was in negligence and breach of statutory duty under Zambian law. It was argued that the claimants could sue the parent company in the UK, as anchor defendant, due to its high level of control and direction of the Zambian subsidiary.

33. It was initially argued by the UK company, Vedanta, that liability on the part of the parent company to persons based abroad would involve *"...a novel and controversial extension of the boundaries of the tort of negligence"* (para 46); that this was a *"...new category of common law negligence"*. However, the view of Sales LJ in *AAA* eventually prevailed.

The liability of a parent company to persons affected by the subsidiary, is not a distinct category of liability (para 49). Instead, it was a matter of applying the traditional tortious principles to the factual relationship between the companies. Per Lord Briggs: *"Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations...of the subsidiary"* (para 49).

34. Lord Briggs gave a nod to the two categories of cases referred to by Sales LJ, namely (i) where the parent has taken over the management of the subsidiary and (ii) where the parent has given particular advice on how to manage a risk. But he added *"There is no limit to the models of management and control which may be put in place within a multinational group of companies."* In particular, Lord Briggs observed that the laying down of group-wide policies and guidance, and expecting the management of each subsidiary to comply with them, may alone be sufficient in the right case – for example a flawed environmental or safety instruction.

35. On the facts of this particular case, the claimants succeeded in showing that the parent did arguably owe a duty of care on the basis that it had significant board oversight, particularly with regard to issues of discharge into the local water supply. It had also entered into a management service agreement with the subsidiary. A note of warning in all these cases – they are dealing with jurisdictional challenges, so we are in the territory of triable issues as opposed to final decisions on liability or event duties of care. But the principles are the same, and are important.

36. So, in short, the more involvement of the parent in the activities of the subsidiary, the more likely liability, and therefore also jurisdictional access to the parent and its assets, will follow. This may not be the most principled basis of finding or attaching liability to parent companies, as it tends rather to discourage corporate responsibility and the imposition of controls over the operations of subsidiary companies. Relatedly, of course, it does nothing to change the position of the passive investor. If you invest but don't meddle, you take the reward without the burden. However, in the absence of legislative or treaty based intervention, this is where the common law is at the present time.

Third Issue: The rule against recovery of reflective loss

37. Finally, and regretfully briefly, I want to touch upon the question of reflective loss. This is a further and in some respects rather peculiar rule flowing from the status of

companies as distinct legal entities from their owners. In its original and purest form, the principle prevents a shareholder from suing a defendant wrongdoer for loss, such as diminution in value of the shares, which is merely a reflection of the company's loss.

38. The classic case is *Johnson v Gore Wood* [2002] 2 AC 1. A company instructs its solicitors to exercise an option over land. They negligently serve it on the wrong party. Eventually all is put right, but the company makes significant losses by the late exercise of its rights. The company issues and settles a professional negligence claim against the solicitors. Mr Johnson, a disgruntled shareholder, files a further claim against the solicitors seeking damages *inter alia* for diminution in value of his shareholding. The House of Lords rejected the claim. Lord Bingham held that *"Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss... [...]diminution in value of the shareholding ...merely reflects the loss suffered by the company"*. If the company had recovered all of its loss, then there likely would be no diminution in share value. So it is for the company to restore its position, not the shareholder to restore his own by taking direct action.

39. The central rationale for the rule appears to be the prevention of double recovery, but it is also a proper party point: it is for the company to sue for losses it has suffered, not its shareholders. If one or more of the shareholders can claim for losses sustained as a result of the wrong inflicted on the company, then, when the company sues for its losses, there will either be double recovery, or the company will have the quantum of its claim reduced to reflect the damages already paid in the shareholders' action. This may be unfair to the other shareholders, to the company itself and to other creditors. The rule is also suggested to preserve corporate autonomy: if the shareholders have the right to bring separate claims, this might inhibit or discourage the company from settling disputes.

40. In theory, this is all very well and good. In practice it can be harsh and somewhat impractical. Suppose the company decides not to pursue the wrongdoer? Suppose it cannot afford to? Suppose the company is based abroad and it would be costly and impractical for the company to bring the claim? Suppose the company which has been wronged is in insolvent liquidation? The exceptions to the rule are tightly constrained, and apply really only where it is legally impossible for the company to bring a claim.

41. Where all of the shareholders are ad idem, the solution may lie in either funding the company to bring the litigation or having the company assign the claim to the shareholders, but this depends on agreement amongst all of the shareholders and with the board or the liquidator.

42. A further question arises, as to exactly where the edges of the rule lie. In particular, if it applies to shareholders, why not also general creditors?

43. In *Carlos Sevilleja v Marex Financial Limited* [2018] EWCA Civ 1468; [2019] QB 173, the Court of Appeal reviewed this area of law and concluded that the rule against recovery of reflective loss, on principle, could not be restricted in its application only to shareholders. Logically it must also apply to general creditors.

44. The facts are straightforward enough. Marex was a foreign exchange broker; Mr Sevilleja a foreign exchange trader. He traded primarily through two BVI companies. Marex secured judgment against those two BVI companies for US$5m. The allegation was that Mr Sevilleja then dishonestly induced and procured those two companies to divest themselves of assets, rendering them unable to pay the judgment debt. Marex sued Mr Sevilleja in tort. But in order to prove that cause of action, he was required to show that the depletion of the assets of the two BVI companies was a recoverable loss suffered by Marex. The Court of Appeal held that it was not.

45. Consistent with the authorities in this area, the loss fell to be construed as suffered by the BVI companies. The fact that Marex, as a creditor, was no longer able to enforce his debt against the BVI companies did not make the depletion of the assets of those companies, his loss. His loss was merely reflective of the companies' and could not be pursued. A number of the unfortunate possibilities I mentioned above, converged in this case. The two companies were based abroad. They were insolvent and a liquidator had been appointed. They had insufficient unencumbered money (largely because of Mr Sevilleja's wrongs), and in practice there was little prospect of the claims being pursued by the companies. Yet Marex was left without a personal remedy.

46. Marex appealed to the UK Supreme Court, reference UKSC 2018/0178. Their Lordships decided to undertake a thorough review of this area of law – not just as the rule applies to creditors, but generally. I am pleased to say that members of my

Chambers, 3 Hare Court, were involved in the case.[1] They have kindly pointed me in the direction of a useful article on the point. It is entitled *"In the Looking Glass: holding companies and reflective loss"*.[2] The author explains that the rule started off as no more than a protection against double recovery. But the courts have *"...elevated what was a relatively everyday problem concerned with an assessment of damages, into a principle of causation"*.

47. The word on the ground in my Chambers is that the UK Supreme Court is likely to change the law. They have sat as a panel of 7, which is often a reasonable sign of change on the horizon. The odds-on-favourite is a restriction to the rule, solely to prevent double recovery. The defendant should not be sued twice for the same wrong. So, if the company brings a claim, then the shareholders cannot. Where however the company is factually unable or unwilling to bring a claim, it may be possible for the shareholders to do so.

48. If this change happens, it is out of recognition that real people standing behind companies make real losses. In researching for this talk, I re-read a classic passage from the Court of Appeal's judgment in *Prudential Assurance v Newman* [1982] 1 Ch 204, and wondered really just how conceptually realistic an observation it was. In the context of a wrong done to the company, they said: *"...The shareholder does not suffer any personal loss. This only loss is through the company... The plaintiff's shares are merely a right to participation in the company... The shares themselves, his right of participation, are not directly affected by the wrongdoing..."*.

49. I understand the point being made, but surely at the very least it is worth admitting that both the company and the shareholder lose something. The exchange value of the shareholder's asset is immediately depleted. The shareholders suffer a real loss. The question is when and in what circumstances they ought to be allowed to bring an action to recover. That is a question of part principle, and part pragmatics. We will wait to see if this area of law undergoes the liberation anticipated.

Conclusion

50. What we see in the context of the three issues explored in this talk, is the courts striving to uphold even strengthen the traditional understanding of corporate identity.

[1] Peter Knox QC, Richard Samuel, Chloe Shuffrey - https://www.3harecourt.com/content/view/peter-knox-qc-richard-samuel-and-chloe-shuffrey

[2] 2015, Alan Steinfeld QC.

But to use and adapt other rules and procedures in the law, in a bid to seek to deliver routes to substantive justice in individual cases. This is, in the traditions of the common law, a piecemeal process with somewhat patchy effect. Any more significant or radical changes to the nature and liabilities of corporate entities will be made, if at all, at the legislative or international / treaty-based level (as for example it has in various areas of EU law).

Rowan Pennington-Benton
8 June 2019