The realist’s guide to piercing the corporate veil: Lessons from Hong Kong and Singapore

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Anglo-Australian common law has established a number of tests for when the corporate veil should be pierced to hold directors and companies liable. While these are well established they are largely unhelpful in their practical application. The reliance on formalist legal doctrine over-complicates cases and results in injustice. It is out of touch with the realities of corporate structures and ignores the factual uniqueness of each case. Rather than focusing on the metaphysical, the emphasis should be on the realistic. Realism reveals that distinctions about directors’ liability between public and private companies is illusory. In spite of the continuing use of legal tests, analysis of the judicial reasoning reveals realist approaches relating to veil piercing. In particular they can be extracted from the decisions of the courts of Hong Kong and Singapore. They employ the factual matrix guided by general principles, like male fides, to add certainty to veil piercing and to achieve justice as the special facts of each case demand. This overarching equitable discretion should be used, but guided and controlled by general principles that ensure consistency based on the factual matrix and precedent. Three general principles can be identified in veil piercing cases, as extracted from the jurisprudence and the judicial reasoning employed, to give that guidance. These are, where there is (i) control; (ii) an act warranting the piercing of the veil; and, (iii) male fides, that is, no legitimate commercial interests and business purposes for the act, then, the veil should be pierced to hold the controllers liable, irrespective of any artificial legal tests that may allow that person, natural or artificial, to escape liability.

Introduction

Limited liability is the cornerstone of company law. In the common law world, the origins of limited liability reflect an economic drive for a laissez-faire market in which perfect freedom was desired for investors and entrepreneurs. The corporate form itself also, according to Smith, was inherently inefficient and he was opposed to it:

The directors of such companies . . . being the managers of other people’s money than their own, it cannot well be expected that they should watch over it with the same anxious vigilance . . . Negligence and profusion must always prevail, more or less, in the management of such a company.1

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Limited liability is an interference with general principles relating to markets, in particular it creates a right to repudiate and walk away from debts and therefore is an interference with principles of the market. It is an intervention by the state in the market. This was one reason why limited liability for companies by simple registration had been resisted by many, including leading corporate lawyers. Cox wrote in 1857:

The Law of Partnership hitherto has been . . . that he who acts through an agent should be responsible for his agent’s acts, and that he who shares the profits of an enterprise ought also be subject to its losses; that there is a moral obligation, which it is the duty of the laws of a civilised nation to enforce, to pay debts, perform contracts and make reparation for wrongs. Limited Liability is founded on the opposite principle . . .

The metaphysical nature of limited liability fails to recognise that harm and liabilities, in reality, are caused and created by people and real and tangible things. That such real causes of harm and liabilities are to be protected from accountability by some intangible construct of the mind, the corporate veil, is both illusive and a delusion. As a result, the male fide avoidance of criminal or civil liability through reliance on the principle of limited liability has prompted the courts to find exceptions to limited liability by piercing the corporate veil. The tests for piercing the corporate veil merge and are a series of metaphors without precise application. Hong Kong and Singapore, as ‘business hubs’ of Asia and with specialist experience with corporate governance issues, have gradually moved away from this formalist approach to adopt a realist solution to veil piercing based on the factual matrix of the case and the equitable discretion of the courts. The principles take into account the reality of the corporate structure, un-muddled by the imagined existence of formalist legal rules. This approach, although only a subtle shift from traditional Anglo-Australian jurisprudence, reflects the universal principle of good faith in an attempt to create a functional approach to tracing the directors who may be responsible for corporate actions. In turn, more certainty in litigation and a direct policy-based approach to piercing the corporate veil, while keeping ‘rogue’ directors accountable, may also be beneficial for investors who may not wish to invest in a volatile or dangerous market. Inherent in the veil piercing cases in Hong Kong and Singapore is the concept of male fides, or bad faith. In this regard, using a corporate structure capriciously, for an extraneous purpose without regard to legitimate commercial interests, may be a sufficient test, together with control, to pierce the veil. In Hong Kong and Singapore case law, such a test has been the foundation of most decisions regarding piercing the veil. It has no bearing on shareholders who lack the ability to control a company. As a result, the distinction between public and private companies, when seeking to hold directors accountable, is illusory.

While economic determinism may make courts reluctant to hold shareholders liable, this does not hold true for directors. Flowing from this is the contention that where three elements are satisfied, then, the veil should be

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pierced to hold directors accountable. As the proceeding discussion will show, where a director or a company:

1. are in control of a company or group of companies, and
2. are (i) guilty of a crime, domestic or international as defined in the relevant law, (ii) a corporate or personal tort, or (iii) use the company as a sham, façade or to perpetrate fraud, or (iv) use the corporate structure to avoid existing legal liabilities and obligations that will foreseeably become legally enforceable (like prospective contract, enforceable labour rights, payments, foreseeable litigation etc), or (v) for any other reason which the courts have deemed appropriate to lift the corporate veil, and
3. have done so with male fides or in bad faith, capriciously and without legitimate commercial interests

The rigid application of principles cannot deny the fact that the director or company are liable and should not be permitted to hide behind the artificial corporate structure to escape accountability.

Should these elements be shown, even the separate entity doctrine cannot hold sway, because the entities are, in reality, controlled by the one central authority. This male fides approach may also include instances where the corporate structure is used in bad faith, capriciously and without legitimate commercial interests. The use of corporate groups to transfer assets from a company being the respondent in proceedings or the object of impending litigation to avoid foreseeable damages from litigation, and not for any legitimate business purpose, may be one such example. Judging whether this is legitimate is heavily dependant on the facts of the case. However, assistance can be derived from the tests adopted in taxation law, for example, to judge whether the flow and transfer of assets has a legitimate business purpose and is thus legal tax minimisation as opposed to tax avoidance.

This comparative analysis focuses on common law exceptions to limited liability. As a result, statutory tests for piercing the corporate veil in Hong Kong, Singapore and Australia are beyond its scope. In this same vein, focusing on common law systems will allow for a practical analysis of the evolution of case law concerning piercing the corporate veil, to assist in assessing whether these jurisdictions are evolving in harmony with Anglo-Australian law. The comparative analysis is intended to look at the evolution of the common law regarding piercing the corporate veil, as it branched out from its English origins, and Singapore and Hong Kong represent a progressive and original approach to solving corporate governance issues given that they are economically significant ‘business hubs’ in East Asia.

1 Realism and company law

Attention must now be given to the idea of ‘realism’, to clarify the philosophical ideas in this article. Realism is a fragmented school of thought, in which ‘reality’ has different and opposing definitions.3 To elaborate,
however, it follows that the form of ‘realism’ advocated by American Legal
Realists, and in particular Llewellyn and Justice Oliver Wendell Holmes, is the
school of thought that most accurately relates to the contention of this article.
More specifically, the purpose of law is particularly important, and its use may
shed light on this area of law.

The legal realist movement was influenced by the view ‘that there was more
to the study of law than the study of a system of rules; that for most purposes
legal doctrine should be seen in the context of the totality of the social
processes’.4 According to Bix, American legal realists were ‘realists’ ‘in the
sense that they wanted citizens, lawyers, and judges to understand what was
really going on behind the jargon and mystification of the law’.5 Realists, like
Pound and Frank,6 sought to debunk the ‘mechanical jurisprudence’7
advocated by classical formalists by peering beyond ‘paper rules’ to expose
the ‘real rules’ extracted from uniformities in actual judicial behaviour.8 That
is, looking not at the particular decision reached, but the mode of reasoning
employed to reach that decision9 and decisions with similar factual matrix.
The formalists believed that law was of itself an exact science, and the correct
legal solution could be gained by the application of law without reference to
outside social considerations. Cohen’s summary of traditional legal theory
accurately summarises the stance of formalists:

Legal concepts (for example, corporations or property rights) are supernatural
entities which do not have a verifiable existence except to the eyes of faith. Rules of
law, which refer to these legal concepts, are not descriptions of empirical social facts
(such as the customs of [people] or the customs of judges) nor yet statements of
moral ideals, but are rather theorems in an independent system. It follows that a
legal argument can never be refuted by a moral principle nor yet by any empirical
fact. Jurisprudence, then, as an autonomous system of legal concepts, rules, and
arguments, must be independent both of ethics and of such positive sciences as
economics or psychology. In effect, it is a special branch of the science of
transcendental nonsense.10

In contrast, for the realists, judges should look beyond legal doctrine and its
interpretation to behavioural matters including ‘the area of contact, of
interaction, between official regulatory behaviour and the behaviour of those

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4 W Twining, Karl Llewellyn and the Realist Movement, Weidenfeld and Nicolson, London,
1973, p 382. Also see N Andrews, ‘Wormes in the entrayles: the corporate citizen in law?’
5 B Bix, A Dictionary of Legal Theory, Oxford University Press, Oxford; New York, 2004,
p 3.
6 Although, it should be noted that Frank was an outspoken critic of Llewellyn’s ‘rule
scepticism’, as he regarded himself as a ‘rule sceptic’.
7 See R Pound, ‘Mechanical Jurisprudence’ (1908) 8 Columbia L Rev 605.
9 See, eg, Cohen’s analysis of Tausa v Susquehanna Coal Company 220 NY 259; 115 NE 915
Columbia L Rev 809 at 809ff.
10 Ibid, at 821.
The realist’s guide to piercing the corporate veil

affecting or affected by official regulatory behaviour’. One reason for this openness was the recognition by the realists, following Oliver Wendell Holmes Jr, that judges made law and policy. Holmes wrote:

Ours is not a closed system of existing precedent. The law is not such a formal system at all... Courts must make law. Indeed courts are major policy makers in our system of government. We must be wary of petrifying the common law into a rigid system, utterly behind the times and totally at odds with the progress of science and social change.

This is important in company law. For the realists, company law was an alternative set of legal principles and policies which could be used to produce different outcomes to those produced by other legal principles and policies, particularly those relating to agency. The company existed in law as the outcome of this alternative form of legal analysis. It meant that company law was inherently in conflict with other legal doctrines and policies. Realists were critical of judges who saw company law in other ways or the company as a tangible thing. Cohen, for example, criticised judges for implicitly believing that companies were metaphysical beings like angels which had an independent existence apart from the rules which applied to them and a capacity to travel ‘about from State to State as mortal men do’. That imagined existence was then used to resolve issues in a process of ‘transcendental nonsense’ without reference to proper policies involving ‘political or ethical value judgments’.

On the issue whether a company could be sued in a particular state other than the one in which it was incorporated, the issue had been decided by attempting to answer the question ‘Where is the company?’ Questions of this sort, for Cohen, are essentially meaningless, ‘and serve as invitations to equally meaningless displays of conceptual acrobatics’. The proper issues to be considered, according to Cohen, were the hardship to plaintiffs of having to sue out of state and the possible hardship to the firm in having to defend actions in many states, because these were tangible considerations that could be proven with positive evidence and ethical argument. Cohen’s distinction between legal authority backed by the metaphysical as opposed to the pragmatic is important to company law, and in particular veil piercing cases, because it exemplifies the artificiality of legal argument that has little use to the factual matrix. To argue that an entity is a person or a corporation because it can be sued relied on empirical evidence of litigation in reality, as opposed to arguing that an entity can be sued because it is a corporation, which, in the words of Cohen, ignores practical questions of value or of positive fact. The issue here, in the context of veil piercing in particular, is separating the metaphysical cause of limited liability from the physical purpose for limited liability. That is, recognising that a physical cause

12 244 US 205 at 221 per Holmes J (dissenting).
13 Cohen, above n 9, at 810–1. Cohen criticises a decision of Cardozo J in the NY Court of Appeal in which the question whether a Pennsylvanian company could be sued in New York was answered by only reference to the question ‘where is the corporation?’
14 Cohen, above n 9, at 824.
16 Ibid, at 813.
of harm cannot escape liability because of some metaphysical obstruction, because the causative elements of nature dictate that every action must have a consequence and every action must have its source from something physical. The corporate veil cannot be measured physically, nor can the corporation be touched, hand cuffed or made to do hard labour. This is not to say, while it may be true for some, that realists deny the existence of the corporate veil. It only exists, in law, if it has some pragmatic rationalisation and cause or some purpose for which it is worthy to be recognised. If the facts rationalise it and provide purpose for its existence, then its grounding in the pragmatic is evident. Cohen used opium as a useful example, whereby legal arguments couched in terms like ‘corporate entity’ or ‘corporate veil’, which are undefined by empirical facts and ethics, are ‘necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere’s physician’s discovery that opium puts men to sleep because it contains dormative principles’. Cohen continues:

Now the proposition that opium puts men to sleep because it contains a dormative principle is scientifically useful if ‘dormative principle’ is defined physically or chemically. Otherwise, it serves only to obstruct [the relevant facts, and] the path of understanding with the pretense of knowledge.\(^{17}\)

In line with Holmes and Hohfeld, Cohen advocated ‘for the redefinition of every legal concept in empirical terms’. Significantly, he postulated that in law there are only two significant questions: (1) ‘How do courts actually decide cases of a given kind?’ and (2) ‘How ought they decide cases of a given kind?’\(^{18}\) This moves away from the metaphysical, to promote the factual matrix upon which the equitable discretion of the court is called upon to judge, within the confines of legal principles and consistent reasoned guidance. In reality, it can be said that in law these are the only ‘phenomena’ that can in fact be measured with reference to empirical evidence, because all else depends on value judgment, argument and bias. It affirms what is relevant to the litigant in the court room, and to society, beyond the fanciful and metaphysical ideas he regards as transcendental nonsense. In many ways, Holmes advocated a similar stance, in explaining the law in its purest form through the eyes and interests of the ‘bad man’, ‘who cares only for the material consequences which such knowledge enables him to predict’.\(^{19}\) For the ‘bad man’, the actual orders made trump the normative application of distinct legal rules, because ‘from his point of view, what is the difference between being fined and taxed a certain sum for doing a certain thing?\(^{20}\) What matters for the ‘bad man’ is the end result. That is material, and almost tangible. As Holmes explains:

Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find

\(^{17}\) Ibid, at 820.
\(^{18}\) Ibid, at 824.
\(^{20}\) Holmes, ibid.
that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.\footnote{Ibid, at 460–1.}

The realists’ recognition that judges could and should make law added to the uncertainty of the application of legal rules and made legal decisions less predictable. Llewellyn gave this indeterminacy a general purpose for law and a particular purpose in commercial law, which can be used to inform the approach courts should take to corporate law and piercing the corporate veil. For Llewellyn, indeterminacy was necessary for both justice to be generalised as legal rules and for it to be contextualised to the circumstances of each case. This, for Llewellyn, was a constant tension in judicial decision-making but not necessarily a conflict and permitting the law to have ‘Reasonable Regularity’,\footnote{K Llewellyn, \textit{Jurisprudence: Realism in Theory and Practice}, University of Chicago Press, Chicago, 1962, p 286 and n b.} set up so that Law (Certainty) and Justice, as one, give \textit{merged}, moving and reasoned \textit{guidance}.\footnote{Ibid, p 286.} In explaining ‘Reasonable Regularity, he elaborated:

\begin{quote}
the ideal is not [legal] certainty . . . The true ideal is \textit{reasonable regularity} of decision. If there is \textit{regularity}, there is continuity enough . . . The \textit{reasonable} aspect of the regularity, on the other hand, holds out full room to adjust any complex of tension to the hugely variant needs of whatever the relevant type of situation may be.\footnote{K Llewellyn, \textit{The Common Law Tradition}, Little Brown & Co, Boston; Toronto, 1960, p 216.}
\end{quote}

The phrase ‘reasonable regularity of decision’, he adds, ‘is what German-speakers ought to be meaning with \textit{Rechtssicherheit}’.\footnote{Ibid, p 216 n 208.} The principle of ‘legal certainty’ in Germany, or \textit{Rechtssicherheit}, has been loosely defined by Maxeiner:

\begin{quote}
The prevailing German view of legal methods is that norms, ie, rules, are applied syllogistically to the case at hand. The factual case is subsumed under the applicable law.\footnote{J Maxeiner, ‘Legal Certainty: A European Alternative to American Legal Indeterminacy?’ (2007) 15 \textit{Tulane Jnl of International and Comparative Law} 541 at 554.}
\end{quote}

The syllogistic application of legal norms to the factual matrix, which is subsumed under the law to be applied, may be a modern day example of Llewellyn’s notion of ‘Reasonable Regularity’. It no doubt serves as a useful tool in which the equitable discretion of the courts is valuable in taking into account the special features of facts, and in so doing arriving at a decision that is relevant to the case, and creates consistency through a gradually developed ‘type’ of legal situation, applicable to specific facts and within legal precedent. Llewellyn was also aware that two competing schools of thought had emerged in the common law world about the status of equity in commerce: that equitable principles have no place when people are free to act for their ‘own self-advancement and self-protection’, or, that they were required as a
system of commodity exchange ... is possible only on the basis of far-reaching personal confidence in the trust and loyalties of others’. Llewellyn, in drafting the Uniform Commercial Code, sought to give expression to this second view. The Code used ethical standards, such as general principles of unconscionability, which could then be used by the judge to discover the ‘commercial law immanent in the commercial community’.

The use of male fides by judges in Singapore and Hong Kong reflects this approach and avoids having to fit new circumstances into old categories, and thus is a practical example of the guiding force of legal principles. As Freeman explains:

[The Code] has embodied to a noteworthy degree the approach of what Llewellyn has called the ‘Grand Style,’ and so providing a fabric of rules which will give the court the opportunity to apply ‘Situation-sense’ to shape the deciding rule and enable the court to re-test the rules in the light of reason as it evolves from the situation. Moreover the Code’s first canon of construction is: ‘This Act shall be liberally construed and applied to promote its underlying purposes and policies’.

Equitable discretion through the permitted liberal interpretation of statute, to allow leverage for fact finding and consideration to the factual matrix, was clearly then a feature which Llewellyn saw as vital to the evolution of law and its ability to develop with social change. Holmes, like Llewellyn, did not however have a cynical view of the law in the sense that judges had free reign to apply law as they would like it to be. But debunking over-conceptualism in law is an issue for which his work is widely cited. As Harris elaborates:

Much of the law, he believed, had been invented in a historical context which had now been superseded, and the real purposes it served under changed conditions should be constantly reviewed. In no circumstances should it be claimed that the law, according to some conceptually deductive process, was one thing, if the practice of the courts suggested it was something else.

This practice of the courts is an important feature of realism, and in particular realism in its application of veil piercing cases which demands reference to the factual matrix. It exposes the application of formalist legal rules as artificial devices that complicate the real issues that should be applied to the facts, when in fact the practice of the courts, extracted through jurisprudence, provide sufficient guidance. However, this is not to say that the role of judges should not be confined to legal principles, and as a result equitable discretion is to be exercised within the confines of precedent in the form of stare decisis as opposed to stare dictis:

To recognise that there are limits to the certainty sought by words and deduction, to seek to define those limits is to open the door to that other and far more useful judicial procedure: conscious seeking, within the limits laid down, by precedent and statute, for the wise decision. Decisions thus reached, within those limits, may fairly be hoped to be more certainly predictable than decisions are now — for today no

28 Glover, above n 28, p 5.
man can tell when the court will, and when it will not, thus seek the wise decision, but hide the seeking under word. And not only more certain, but what is no whit less important: more just and wise (or more frequently just and wise).31

Llewellyn therefore provides us with insights into how this use of general standards, such as male fides, makes the application of the law an adequate predictability32 by providing a ‘situation sense’ being a type of situation providing a rule or situation for the future.33 He observes that it is often easier to predict the result than to predict the reasons given for it,34 and in so doing identifies 14 ‘major steadying factors’ in the law including ‘legal doctrine’ and ‘known doctrinal techniques’.35 He observed that courts need to be persuaded that both justice and decency require the use of a particular doctrine and also the result which is argued for. This means the manner in which facts are presented, to give the context for the use of the doctrine, is critical,36 ‘for the authoritative tradition speaks with a forked tongue’.37 Judges also have broad but finite leeways, or discretions, in which they can interpret and apply the standards derived from legal doctrine.38 There they are also constrained by other factors including39 those which Fish later developed into a concept of lawyers as members of interpretive communities.40 As a result, any style of precedent will yield conflicting results from multiple techniques, and ‘the only question really is whether the court will employ a style which will produce a more effective and just outcome, and one more adapted to the social needs’.41

The manner in which facts are presented is extremely important in the outcome of a case. Frank, another realist, criticised Llewellyn for what he viewed as Llewellyn’s ‘upper courtitis’ in that he, and others who advocated deficiencies with mere legal rules, were ‘rule skeptics’. Frank, on the other hand, was a ‘fact skeptic’.42 Frank’s analysis focuses on the practical application in the realities of litigation, which are usually tainted by litigation by skirmish and attrition whereby appeals to higher courts may be impossible for a litigant with lesser financial means. The application of rules may well be done by courts which are higher in the judicial hierarchy, in that they may apply, overrule, overturn, follow, quash, not follow etc decisions of lower courts depending on questions of law. As Harris explains of Frank’s view:

31 Llewellyn, above n 22, at 70.
32 Gerwitz notes: ‘But in spite of all his attention to leeways in this book, Llewellyn’s main point was not at all to trumpet law’s indeterminacy but rather to emphasise how an adequate measure of predictability and certainty in the case law system is achieved nevertheless’. P Gerwitz, ‘Introduction’ in K Llewellyn and M Anasaldi (trans), The Case Law System in America, University of Chicago Press, Chicago, 1989, pp ix, xvii.
33 See Llewellyn, above n 24, p 127.
37 Llewellyn, above n 22, p 70.
38 Llewellyn, above n 24, pp 21–3.
41 Freeman, above n 29, at 808.
42 Harris, above n 30, p 100.
even if rules are clear as to interpretation, in lower courts they may have precious little determining effect on decisions because a tribunal of fact, particularly a jury, can always find the facts as it pleases so that a rule will give the decision it wants.\textsuperscript{43}

Be that as it may, the distinction between judgments based on general legal principles and principles based on specific facts breathes life into the dead letters of the law, to apply reality. Sharing the same thread as the abovementioned discussion, ‘functionalism’ referred to law as ‘engines’ having ‘purposes, not values in itself’,\textsuperscript{44} and therefore law has certain functions: ‘law jobs’.\textsuperscript{45} Llewellyn’s concept of ‘law jobs’ displayed that such rules had a particular function, if kept within bounds. For Llewellyn, ‘law jobs’ describe the basic functions of law which are two-fold: first, ‘to make group survival possible’, and, second, a ‘quest for justice, efficiency and a richer life’.\textsuperscript{46}

For Oliphant, the problem centered on the courts’ insistence on applying law as \textit{stare dictis}, basing decisions on general and abstract principles rather than \textit{stare decisis}, basing decisions on specific past cases which share not only similar legal principles, but also key facts, issues and reliance on similar legal arguments.\textsuperscript{47} This meant that the interpretation and distillation of facts would result in the same conclusion, whatever the legal rules to be applied. It follows that the development of legal rules applied as \textit{stare dictis}, without reliance on specific facts, alienated the law from reality by gradually being applied incorrectly and thus evolving into words without an application that could be deemed relevant to the specific facts of the case. Narrow legal principles that oust the equitable discretion of the courts are therefore a catalyst in removing reality from judicial decisions. It is mindful that general principles are vital through providing guidelines and consistency, but reliance on the specific factual matrix of a case must be paramount. It follows that the notion of \textit{stare decisis}, and applying specific legal principles to similar facts, gives expression to the letters within law books by bringing them out into reality and making them apply as ‘law in action’. It is this ‘law in action’ that is increasingly relevant for realists, who seek to de-mystify the law by looking at it, as Holmes would argue, from the view of the ‘bad man’.

2 Separate legal identity and limited liability

Although being established much later than the corporation,\textsuperscript{48} limited liability is the cornerstone of modern day company law. The principle that companies

\begin{footnotes}
\bibitem{43} Ibid, p 100.
\bibitem{44} Llewellyn, above n 11, at 464.
\bibitem{46} Freeman, ibid, at 805.
\end{footnotes}
have separate legal identities, as established in Salomon v Salomon & Co., is universally applied in the common law world, including Australia, Hong Kong and Singapore. In Salomon, the House of Lords established that a company is separate from its owners such that the company owns assets and can accrue benefits and liabilities. Given that the company is an artificial person, it attracts liability itself as an entity separate from its natural person owners. In relation to a group of companies, each company has separate legal identity. This will be discussed below in more detail. Lord Macnaghten famously summarised this legal principle as follows:

The company is at law a different person altogether from the [shareholders and/or directors] . . .; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands received the profits, the company is not in law the agent of the [shareholders and/or directors] or trustee for them. Nor are the [shareholders and directors], as members, liable in any shape or form, except to the extent and in the manner provided for by the Act.

In Hong Kong, Saunders J further explained that ‘this rule must be read together with the fundamental proposition that a shareholder does not have any legal or equitable interest in the assets of the company’. In Macaura v Northern Assurance Co Ltd, this proposition was explained in the following terms:

no shareholder has any right to any item of property owned by the company, for he [or she] has no legal or equitable interest therein.

This view represents both sides of separate legal identity in that shareholders and directors are protected from liability but shareholders do not directly own the property or assets of a company, but rather shares of the company.

Although Saloman involved what was in commercial reality a one person company, even though technically there were six or seven other nominal shareholders as required by English legislation, the case is considered as the premier source of authority for independent company legal personality and limited liability, having been affirmed in both Hong Kong and Singapore.

As a result, when a court looks past a company’s separate legal identity, ‘it is

49 [1897] AC 22.
52 Pacific Electric Wire and Cable Co Ltd v Texan Management Ltd [2008] HKCFI 40 at [245].
54 Ibid, at 627.
55 This was again re-affirmed in the HK Court of Appeal: Yuen Sau Fai v Yuen Jip Auto Services Ltd [1990] HKCA 240 at [4].
56 Vanderkirkhove, above n 48, p 67.
said to be lifting or piercing the corporate veil’. Prior to a discussion of the law of veil piercing, it is vital to consider the economic framework under which this law has been built. The uniqueness of the Asian markets is of particular significance, as it differs from late nineteenth century England when the Salomon case was heard, and more accurately reflects the globalised corporate reality of modern business and law.

3 Economic incentives and rationale for limited liability

Ramsay and Noakes recognise five economic justifications for limited liability. These include: (1) a decreased need for shareholders to monitor managers because the losses from company failure are limited; (2) managers have an incentive to act more efficiently and in the interests of shareholders by allowing the free transfer of shares; (3) this micro efficiency in the firm translates into macro efficiency in the securities market; (4) investment and diversification in shareholdings are promoted which in turn reduces individual investor risk within an economy; (5) optimal decision-making by managers is promoted because investments with a positive net value will be made. Ultimately, the goal of corporations law is to make business more efficient and productive for an efficient and productive overall economy.

As Ramsay and Noakes briefly show, limited liability has various economic justifications. However, unchecked limited liability may in fact be contrary to other public interests, as was recognised in Broderip v Salomon, which was appealed and overturned by the House of Lords. Unlike the House of Lords, the Court of Appeal found against Salomon and held him to be personally liable, a much different outcome came from the appeal to the House of Lords, which further exemplifies the weaknesses in the formalist legal approach. In the trial court Vaughan Williams J had regarded the company as being used by Salomon as his agent, which was one of the later grounds for piercing the veil. Lindley LJ believed that the company was a trustee improperly created by Salomon and was so entitled to be indemnified by him. Kay J was of a similar view, particularly because Salomon had significant personal debts at the time of incorporation, but also stated that it was ‘a perversion’ of the Act as the company never had seven bona fide members as required, and as such it was a ‘pretended association’. In some ways, the initial legal tests for piercing the veil is based on ideas present in the judgment of Vaughan Williams J, being agency, and, more generally, the Court of Appeal, being constructive.
trusteeship which is an equitable remedy for male fides. Extending from this 'male fides' is the fact that personal liability was imposed only because of the purpose for which Salomon had formed the company. As Lindley LJ explains:

The court, being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and, further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismiss the appeal of Aron Salomon with costs.

Lopes LJ concurred, stating that while the formation of the company was perfect, the scheme itself could not be ignored and the business was that of Salomon. In essence, even in 1895, in the judgments in Salomon, we see an approach based on control and male fides which seeks to deconstruct the purpose for which the company was used. Nonetheless, limited liability has evolved considerably since Broderip, and it is arguable that the House of Lords overturned the decision on policy grounds, a consideration that unfortunately has little sway today when speaking of the liability of directors.

The characteristic of limited liability in companies is largely induced by 'the economic exigencies of the large modern business enterprise'. Its origins stem from the economic goal to encourage investment which would otherwise not occur in situations of unlimited liability, particularly limited liability to shareholders, as directors do not invest. Central to Adam Smith's invisible hand theory is that incentives are needed for productivity. For example, in a capitalist society without a welfare net, each individual without pre-existing family wealth is required to work to make a living. Money is therefore an incentive to be productive, and competition for limited resources drives production to be more efficient and, as such, efficiency increases on a macro level. A similar economic rationale was no doubt also considered by the courts and English legislature when establishing the principle of limited liability but this was not necessarily for direct production but, rather, investment. This, in turn, would enhance production through increased industrialisation. It must be stressed that the Salomon case was decided during a time when laissez-faire was at its height in an age of experimenting with the idea of 'perfect freedom'. Importantly, such social forces that influenced Salomon were during a time when labour rights were still largely undeveloped, and the idea of minority shareholders in its infancy. This issue, which will be returned to later, reflects the outmoded policy considerations behind Salomon and the degree to which the courts of the day constructed legal reasoning to fit the employer focused industry of the 1890s. As a result, this 'perfect freedom' reflected the interests of the controllers of companies rather than small shareholders and employees. It was not until after the World Wars that labour rights began to universally emerge as an accepted norm (even though they had existed in Australia in certain industries from the 1880s,

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66 Hansmann and Kraakman, above n 61, p 1.
67 Vandekerckhove, above n 48, p 7.
a time when labour rights and employment law began developing in many jurisdictions). By then, a Salomon type of limited liability had been so deeply entrenched in the common law that only vague and uncertain exceptions to it would follow. Careful not to break the solid line of precedent, the courts have continuously applied legal reasoning that reflects outdated notions of laissez-faire. Such notions were so well entrenched that a 1902 volume of the Law Quarterly Review regards Salomon as ‘cheerfully’ accepted. The relevance of labour rights in this analysis is that the law had yet to recognise the rights of employees, particularly to compensation for workplace injuries, and as a result the Salomon decision did not envisage the demand by employees and unions. It is unsuitable for modern day corporations law, which must now interrelate with labour law and various rights that did not exist at that time.

Although separate legal identity may have an economic incentive, it is doubtful whether the rigid legal framework for piercing the corporate veil which has evolved over time has any economic benefit, if any. Although limited liability acts as an invisible hand giving incentives to shareholders to invest and directors to make business judgments, accountability is a key feature of productivity and sustainable economic growth. As a result, the rationale that limited liability makes perfect business sense because creditors should be wise enough to seek guarantees and security does not ring true for creditors in torts, employees and other like stakeholders who are in a weaker bargaining position with the company. It can even be argued that such relationships give rise to fiduciary responsibilities, akin to the fiduciary duties owed to creditors by directors as a company approaches insolvency. As a result, in Hong Kong and Singapore, in spite of considerable state intervention in the market, a market friendly appearance of minimal interference through ‘direction only’ is maintained to promote optimal economic growth. A subtle divergence between Anglo-Australian and Hong Kong and Singapore company law can be recognised. The courts and academics in Hong Kong and Singapore have called for a more certain approach to piercing the corporate veil. No doubt holding ‘rogue’ companies more accountable will enhance a ‘safer’ market in which people feel comfortable investing, particularly in light of the recent concern about pheonix companies.

A Question of economic determinism

Ramsay and Noakes explain that Anglo-Australian law is reluctant to pierce the corporate veil, mainly for economic reasons relating to holding

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70 E Dunn, ‘James Hardie: No Soul to be Damned and No Body to be Kicked’ [2005] Syd LR 15 at 339.

shareholders accountable. While this has its merits, this does not hold true for company directors. It is true that limited liability allows managers to act more freely and thus, arguably, efficiently. However, this is no different from other businesses that do not have the benefit of incorporation, and therefore it is a weak argument to propose that limited liability results in increased efficiency. It may well be that unlimited liability will enhance corporate social responsibility beyond marketing incentives and perhaps even firm efficiency by promoting better run businesses. As will be noted below, the key test for piercing the corporate veil in Hong Kong and Singapore is that of control. Should a director or board have control and thus cause or allow a criminal act to occur, they should be held accountable, irrespective of any corporate veil or whether the company is a public one. The illusory distinction between public and private companies, for director liability, will be discussed below. The rationale behind the approach of Ramsay and Noakes appears to belong, at least in part, to economic determinism. No economic, or even moral or ethical, incentive exists to use rigid tests to shield the guilty.

While the common law relating to piercing the corporate veil will be considered in more detail below, it is important to first consider the interpretative techniques adopted by the different jurisdictions which are beginning to give this law an expression unique to each jurisdiction, an expression which is arguably clearer, and more practical, in Hong Kong and Singapore.

4 Formalist approach to veil piercing jurisprudence

While Collier argued that the law in relation to piercing the corporate veil is much the same in Asia as in the rest of the common law world, many developments have taken place in the courts of Hong Kong and Singapore since her article was written in 2000.72 Most notably, Lee v Kelly McKenzie Ltd,73 a 2004 HK decision, and Nagase Singapore Pte Ltd v Ching Kai Huat,74 a 2008 Singapore decision. In particular, these decisions and related judgments in these jurisdictions reflect the move away from a formalist interpretation and application of the law, in line with a policy and realist based approach that was advocated by Tan.75

In AGC (Investments) Ltd v Commissioner of Taxation (Cth),76 Hill J explained that ‘the circumstances in which the veil may be lifted are greatly circumscribed’. Windeyer J criticised this circumscription of the doctrine of veil piercing as it led the law to:

unreality and formalism into which the decision in Salomon’s Case [1897] AC 22 has led the law.77

His Honour explained that:

72 See generally Collier, above n 50.
76 (1992) 92 ATC 4239; 23 ATR 287.
77 Gorton v Federal Commissioner of Taxation (1965) 113 CLR 604 at 627. Also see Ramsay and Noakes, above n 60, at 255 (emphasis added).
The utterance of the right ritualistic phrases in their proper sequence, the signing of documents prepared in advance to record that this was done was, if one ignores the transient transmutations theoretically involved, merely an elaborately occult means of making a gift. There is an increasing tendency of courts in England, and perhaps more markedly in the United States, to retreat from the position where they must refuse to look behind the legal personality which the law has given to a private corporation, and to examine the purpose of its creation and the manner of its control.

The façade of veil piercing in Australia and the United Kingdom is certainly evident, where the pursuit of justice is bogged down by ritualistic commitment to the establishment of certain rules and tests. In line with Justice Windeyer’s concerns is the American realist revolt against formalism which advocated that facts and law do not exist separately, but must be used in conjunction with one another for a truly just outcome. Formalism referred to the logical application of reason to jurisprudence ‘with but little urge to link these empirically to the facts of life’. In contrast, Justice Oliver Wendell Holmes view was that the factual matrix of a case is pertinent to the application of legal principles.78 And such insistence on realism over formalism is the significance of the recent approaches adopted by the Courts of Singapore and Hong Kong, as will be shown. In particular, an inflexible application of Salomon would allow a party to hide behind a corporate façade so that escaping liability for various obligations could be a desired and purpose driven objective, and thus reliance on the metaphysical idea of the veil trumps the reality that the artificial device is used in bad faith to avoid real consequences. Reflecting this formalist approach, Rogers AJA in Briggs v James Hardie & Co noted that ‘adherence to the principle in Salomon in the context of corporate groups tended to ignore commercial reality despite legislative recognition that a group of companies could be treated as a single unit’.79

Law, as a creature of public policy and economics, must not be so rigid that it allows mindless formalism such that the pursuit of ritualistic practices can spare a clearly guilty party of liability. In McConnell Dowell Constructors (Aus) Pty Ltd v Gas Transmission Services WA (Operations) Pty Ltd the rigid rules based approach adopted in Australia and the United Kingdom was summarised as follows:

It is trite to observe that on and upon incorporation, a company is a separate legal entity from its members and controllers: . . . There has been a general reluctance both in Australia and the United Kingdom, for courts and tribunals to pierce the corporate veil, unless good reason is shown. Whilst it appears that in Australia there is not any discernible broad principle indicating the circumstances under which the corporate veil may be pierced, the preponderance of authority suggests that it occurs in circumstances including sham arrangements; where a company acts as trustee or agent for another; where a clear agency or partnership relationship is implied or imputed between companies; and where it is apparent that the corporate form is used to avoid an existing legal obligation.81

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78 Freeman, above n 29, at 799–801.
79 Dunn, above n 70, n 45.
80 McConnell Dowell Constructors (Aus) Pty Ltd v Gas Transmission Services WA (Operations) Pty Ltd [2007] VSC 301; BC200707076 at [29] per Habersberger J.
Unlike British authority, the courts of Singapore increasingly view the factual matrix as relevant to a question of whether phoenix company practices require a piercing of the corporate veil. Above, we saw that in Anglo-Australian jurisprudence, a formalist approach is still adopted which keeps veil piercing reliant on rigid legal principles that may be subject to archaic interpretations and thus unworkable in the modern legal landscape. In *McConnell*, the court noted that no discernable broad principle is established in Anglo-Australian law in relation to piercing the corporate veil. However, in recent years, the courts in Singapore and Hong Kong have provided significant guidance in relation to a major common law approach to testing whether the corporate veil should be pierced. Tan has rightly indicated that the concept of malefides, not dissimilar to the doctrine of good faith, has been a mechanism used as a universal principle in most veil piercing cases up to 2005. Beyond that, the various cases mentioned below continue this trend. As such, these developments will be discussed below after a brief overview of the current formalist tests.

**A Formalist tests for piercing the corporate veil**

Shortly after *Salomon*, the courts recognised a need to look beyond the separate legal personality of a company such that natural persons or other companies in control of a company could be held liable or accountable for corporate actions. This, in effect, was viewed as piercing or lifting the corporate veil to see who (natural or incorporated) was in control, and holding those in control responsible. Piercing, or lifting, the corporate veil is an encroachment on the separate legal personality of owners which courts are reluctant to do. It has been described as:

The judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation’s wrongful acts.

Given that the focus of this discussion is the good faith based approach in common law to piercing the corporate veil, only a very brief overview of other relevant reasons for veil piercing will be discussed. The purpose of this discussion will be to highlight the formalist approach as a burden on efficient dispute resolution and market certainty. Various commentators correctly explain that, in the common law world, the corporate veil may be pierced in the following situations:

1. avoiding existing legal obligations;
2. agency;
3. fraud;
4. sham façade;
5. unfairness/injustice; and

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82 Tan, above n 75 and above n 68.
83 Collier, above n 50, at 50.
85 Ramsay and Noakes, above n 60, at 258.
86 Yeo, above n 51, at 41; E Tyler and D Hie, ‘*Hong Kong Company Law*’ [2002] *Hong Kong Law Reports and Digest* 4; Cassidy, above n 59, at 56.
group enterprises.

1 Avoiding existing legal obligations

Put simply, where limited liability is used for the purpose of avoiding a legal obligation, then the courts will lift the corporate veil. In *Jones v Lipman* the court ‘would not allow Lipman to avoid completing a contract for the sale of his house by transferring the land to a company formed for *this specific purpose*’. The court held the company ‘was a mask which [the defendant held] before his face in an attempt to avoid recognition by the eye of equity’. As a result, the court lifted the corporate veil and ordered specific performance of the contract. Clearly, ‘specific purpose’ is relevant in that the company must be made to avoid the legal obligation.

This exception to limited liability will be considered in depth below, particularly in relation to the Hong Kong case of *Lee v Kelly McKenzie*.

2 Agency

As Cassidy explains, ‘where the company is no more than a “puppet”, the principal (the controller) will be liable for the acts of its agent (the company) or entitled to any benefit that may flow from the agent’s conduct of a business’. In coming to this finding both Cassidy and Yeoh refer to the tests of agency established in *Smith, Stone and Knight Ltd v Birmingham Corporation* by Atkinson J. Applied in *Spreag v Paeon Pty Ltd*, Atkinson J in *Smith* noted six points which are relevant in determining the question of agency, and answering the question ‘who was really carrying on the business?’ ‘In all the cases’, his Lordship continues, ‘the question was whether the company . . . could be taxed in respect of all the profits made by some other company, a subsidiary company, being carried on elsewhere’. To establish this, reference to six points must be made:

1. ‘Were the profits treated as the profits of the [parent] company?’
2. ‘Were the persons conducting the business appointed by the parent company?’
3. ‘Was the company the head and the brain of the trading venture?’
4. ‘Did the company govern the adventure, decide what should be done and what capital should be embarked on the venture?’
5. ‘Did the company make the profits by its skill and direction?’
6. ‘Was the company in effectual and constant control?’

As will be shown, this ‘control’ feature is surprisingly similar to the fragmented law relating to piercing the corporate veil for corporate groups. However, unlike Australia, Singapore courts have developed a suspicion of the agency exception to limited liability. As Yeoh et al correctly explain, Singapore courts prefer an analysis of the factual matrix rather than a rigid
application of these tests.\textsuperscript{93} This, again, reflects a shift away from the Anglo-Australian formalist jurisprudence surrounding company law. In fact, only last year in \textit{Datacraft Asia Ltd v Kaufman}\textsuperscript{94} this very issue was considered by the Singapore High Court and the court noted the extreme difficulty in establishing agency in the context of piercing the corporate veil.\textsuperscript{95}

3 Fraud

Using a company as a cloak of deception to perpetrate fraud may warrant a court lifting the veil of incorporation.\textsuperscript{96} This, for example, includes instances where one company sells property to a ‘dummy’ company at an overvalue paid for by the public funds of the ‘dummy’ company as in \textit{Re Darby; Ex parte Broughton}.\textsuperscript{97} However, the fraud argument depends on a sham argument, because a fraud cannot be so if it is ‘real’.\textsuperscript{98} The merging boundaries between the tests in this area of law are such that the fraud exception has rightly attracted much criticism.

4 Sham or façade

Sham or façade, distinguished from deceit to perpetuate fraud, is using a company as a device to perpetuate some other kind of wrong other than fraud. As a result, it is used as a ‘front’ or a ‘device’, such as a smokescreen or buffer.\textsuperscript{99} However, as Cassidy rightly points out, a ‘sham’ means that the company in fact does not exist, and as a result there is no need to pierce the corporate veil.\textsuperscript{100} In essence, sham does not adequately explain the process of veil piercing, but the court in \textit{ICT Pty Ltd v Sea Containers Ltd}\textsuperscript{101} clarified that ‘the so called sham principle is merely an application of the principle that an apparent agreement will not give rise to a binding relationship if the parties had no intention of entering into a contract’.\textsuperscript{102} What is clear is that this concept lacks any solid definition such that its efficient application in the courts is questionable.\textsuperscript{103} This contributes to the discussion below in relation to the inadequacy of the current law given its vagueness and position beyond adequate definition.

5 Unfairness/injustice

The courts may pierce the corporate veil where not doing so will result in injustice, but, as Ramsay and Stokes correctly argue, unjust results in veil piercing cases are commonplace.\textsuperscript{104} The cases on this topic are varied because the application of such a broad discretionary principle is plagued by the idiosyncrasies of judges and has no discernable test or common thread bound

\begin{footnotes}
\item[93] Yeo, above n 51, at 42.
\item[94] [2007] SGHC 111.
\item[95] \textit{Datacraft Asia Ltd and Another v Kaufman} [2007] SGHC 111 at [45].
\item[96] Tyler and Hie, above n 86, at 7 and Yeo, above n 51, at 41.
\item[97] [1911] 1 KB 95.
\item[98] Ramsay and Noakes, above n 60, at 13.
\item[99] Ibid, at 14.
\item[100] Cassidy, above n 59, at 54.
\item[102] Ibid, at 656.
\item[103] For example, even in Hong Kong, its definition and application is uncertain. See Stott, above n 59, at 14.
\item[104] Ramsay and Noakes, above n 60, at 20.
\end{footnotes}
together by clear legal principles. However, its purpose appears as a catch all provision. While adopted in England\textsuperscript{105} for a short time and subsequently adopted in Hong Kong,\textsuperscript{106} the ‘justice of the case’ test has not been followed thereafter. It was in fact rejected in \textit{China Ocean Shipping Co v Mitrans Shipping Co Ltd}\textsuperscript{107} and has been met with significant criticism.\textsuperscript{108} For the reasons outlined by Ramsay and Stokes in relation to its application in Australian cases, this is understandable. However, as this article argues, where a court’s discretion is limited by reference to clear tests, like (1) control, (2) action warranting veil piercing and, (3) male fides, as explained in the introduction of this article and below, then the courts have clear guidelines within which to operate and thus use equitable discretion, an approach embraced in Hong Kong and Singapore.

\section*{6 Group enterprises}

The law relating to piercing the corporate veil in relation to group enterprises and corporate groups will be discussed in detail below.

\subsection*{B Company law as unworkable ‘metaphor’}

In 1999 Tan argued that the application of rigid legal principles in piercing the veil served no discernable end result.\textsuperscript{109} Almost 10 years on, and as the below analysis will show, jurisprudence in Singapore and Hong Kong is such that a realist method is gradually being adopted and the formalist tests gradually eroded to be replaced by a pragmatic approach based on the factual matrix of the case in the context of a policy driven solution to a problem. It follows that an equity type of approach may be most beneficial in the sense that, where it is naturally evident that a company is being controlled for an improper purpose and in bad faith, for instance, to avoid existing legal obligations, then the veil can be lifted. Tan summarised his argument:

It is often said that the separate legal personality of a company may be ignored if the company is a mere ‘sham’ or ‘façade’. In this article, it is submitted that the use of such metaphors masks the true issues. The separate personality of a company should be pierced if public policy makes it undesirable to recognise such personality, and then only to the extent of avoiding the undesirable effects.

In this same vein, an overview of the law applicable in Singapore and Hong Kong in contrast with Anglo-Australian law shows that the rigid legal tests are themselves somewhat of a sham and façade, and the use of the word ‘metaphor’ by Tan is entirely accurate. Bogged down in formalistic interpretation, the courts’ ability to do justice as the facts of the case deserve are limited. However, as the proceeding discussion will show, the nature of the law in these two Asian jurisdictions is such that the factual matrix seems to take precedence over the application of archaic legal principles and tests which lack even a basic meaning, and as such \textit{stare decisis} is in reality

\begin{thebibliography}{9}
\bibitem{Creasey} \textit{Creasey v Breachwood Motors Ltd} [1993] BCLC 480.
\bibitem{HKSAR} \textit{HKSAR v Leung Yat Ming & Another} [1999] 2 HKLRD 402, cited in Tyler and Hie, above n 86, p 3.
\bibitem{Leung} \textit{Leung Yat Ming & Another} [1995] 3 HKC 123.
\bibitem{Tyler} Tyler and Hie, above n 86, p 4.
\bibitem{Tan} Tan, above n 68, at 531.
\end{thebibliography}
favoured to *stare dictis*. The difficulty regarding piercing the corporate veil is in relation to the metaphorical approach adopted. For example, the courts have lifted the corporate veil where the company is a ‘mere cloak or a sham’,\(^\text{110}\) ‘a mere device’, ‘a mere channel’, ‘a mask’,\(^\text{111}\) and/or a ‘façade’.\(^\text{112}\) Extending from the old English cases, Australian cases appear to have followed suit in relation to reiterating the use of metaphor and simile which cast doubt on a direct, efficient and, most important, certain application of law. However, discretion must be used when applying these words to facts given their wide meaning, uncertainty and vagueness.\(^\text{113}\) Lockhart J warned of the ambiguity surrounding the use of these words in *Richard Walter Pty Ltd v Commissioner of Taxation*.\(^\text{114}\) Rogers AJA elaborates on this difficulty in interpretation by explaining that:

The threshold problem arises from the fact that there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities.\(^\text{115}\)

Again, the doctrine of corporate veil piercing in case law is increasingly unclear and lacks clear cut legal principles.\(^\text{116}\) The use of a unifying principle, like *male fides*, which has been successfully applied in the courts of Hong Kong and Singapore, may be the solution sought by Lockhart J.

**V Piercing the corporate veil: The common law approach in Hong Kong, Singapore and Australia**

The analysis above in relation to the corporate veil takes account of the formalist approach to veil piercing, in that metaphorical tests and standards are applied. However, as the following analysis will show, jurisprudence in Hong Kong and Singapore has subtly introduced a common element: using a corporate structure with an improper purpose or in bad faith such that justice and policy require piercing the corporate veil. As Tan explains, ‘it is suggested that there are essentially two justifications at common law for lifting the veil of incorporation’. The first is where the company is not in fact a separate entity. As a result, the proceeding analysis of group companies is relevant. The second is where the corporate form is used for an extraneous or capricious purpose and ‘not for a *bona fide*... transaction’ that reflects legitimate commercial interests.\(^\text{117}\) In many respects, the realist approach intertwines the

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\(^\text{110}\) *Gilford Motor Company Ltd v Horne* [1933] Ch 935 at 961, 965, 969, cited in Tan, above n 68, at 534. More recently, see *Kensington International Ltd v Republic of the Congo* [2006] 2 BCLC 296; [2005] EWHC 2684, the English Queens Bench Division held that an extra element of dishonesty was required as well as a ‘sham’ to lift the corporate veil.

\(^\text{111}\) Ibid. More recently, see *Artedomus (Aust) Pty Ltd v Del Casale* (2006) 68 IPR 577; [2006] NSWSC 146; BC200601201.


\(^\text{114}\) (1996) 67 FCR 243 at 245.


\(^\text{116}\) Ramsay and Noakes, above n 60, at 4.

\(^\text{117}\) Tan, above n 75, at 57. While a broad ‘justice of the case’ test was rejected in *China Ocean*
factual matrix with a common sense objective as to whether the corporate form is being used for a purpose unintended by *Salomon*.

**A Companies, corporate groups and group enterprises**

Corporate groups have traditionally appeared to be immune from the veil piercing doctrine.\(^{118}\) *Adams v Cape Industries*\(^{119}\) is the classic case cited for this proposition. That each company in a group is a separate legal entity has also gained approval in Australian,\(^{120}\) Hong Kong and Singapore\(^{121}\) courts.

Cape Industries, a British multinational corporation, was involved in the asbestos industry. Cape operated and owned Egnep, Capasco and North American Asbestos Corporation (NAAC). Egnep was Cape Industries’ second tier mining subsidiary operating in South Africa, Capasco its worldwide marketing subsidiary operating in England and NAAC its wholly owned marketing subsidiary in the United States. Workers at an asbestos factory in Texas suffered from asbestos disease. Some 426 plaintiffs filed a class action for damages not only against NAAC, but also Cape industries and Egnep. Settlement was reached in the amount of US$20 million. However, clearly with the intent to avoid any further liability, NAAC was put into liquidation.

In 1979, Cape sold its mining and marketing companies to Transvaal Consolidated Exploration Co Ltd, a South African company. A new series of claims commenced in the US courts for asbestos disease contracted by employees who worked for subsidiaries of Cape at the time. Cape, having no assets in the United States, did not appear at the proceedings because they felt the US courts lacked jurisdiction. As a result, the plaintiffs gained default judgment and sought to enforce these judgments in the English courts because Cape had assets in the United Kingdom. While conceding that CPC and NAAC were in fact controlled by Cape, the Court of Appeal refused to pierce the corporate veil to enforce them. It held:

\[\text{it [CPC] had been set up with financial support from Cape, it operated from the same premises with the same employees as NAAC, and it acted in accordance with instructions of a wholly owned subsidiary of Cape in Liechtenstein [in Europe].}\]

In 1995, *Shipping Co v Mitrans Shipping Co Ltd*\(^{122}\) is the issue of the equitable discretion of the court guided by general legal principles is a completely different approach. The issue surrounding groups of companies ultimately goes to the perceived ‘separateness’ of companies in a particular group. The rationale adopted by the courts to conclude on the ‘separateness’ of companies in a group is disputed by this article. While it provides no authority on piercing the corporate veil, on the point of the ‘separateness’ of companies and when boundaries between companies merge, see *Yue Tai Plywood & Timber Co Ltd v Far East Wagner Construction Ltd* [2001] 2 HKLRD 446.

\(^{118}\) Cassidy, above n 59, at 55. Please note that insolvent trading is not within the scope of this article, which would ordinarily be a statutory means of lifting the corporate veil of a group of companies. See, eg, Cassidy, above n 59, at 54ff.


\(^{120}\) *Walker v Wimborne* (1976) 137 CLR 1; 3 ACLR 529.

\(^{121}\) *The Skaw Prince* [1994] 3 SLR 379.

\(^{122}\) Vandekerckhove, above n 48, p 69.
We do not accept as a matter of law that the court is entitled to lift the corporate veil against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect or particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.\(^{123}\)

In contrast, and no doubt a reflection of the factual matrix as opposed to a formalist interpretation of the doctrine, courts in Singapore and Hong Kong (and even Malaysia) are increasingly interested in the individual characteristics of the case. In *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association*\(^{124}\) the Singapore Court of Appeal held that the particular circumstances and facts of the case are to be carefully scrutinised prior to making a judgment on whether a parent company was using a subsidiary to avoid existing legal obligations. However, much like in Australia and the United Kingdom, the minimisation of future liabilities through creating a subsidiary company by a holding company is perfectly legal in Singapore.\(^{125}\) As such, the evasion of existing legal duties may give cause to pierce the corporate veil in a corporate group whereas restricting a company to minimising future liability may not give such legal redress. This stance is the same in Hong Kong where a judge held:

> Without seeking to be exhaustive, the normal circumstances for lifting the corporate veil are the prevention of the corporate form from being used for the purposes of fraud, or as a device to evade a contractual or other legal obligation. On the other hand, using a corporate structure to avoid the incurring of any legal obligation in the first place is not objectionable; the court's power to lift the corporate veil does not exist for the purpose of reversing such avoidance so as to create legal obligations: *China Ocean Shipping Co v Mitrans Shipping Co Ltd* \([1995]\) 3 HKC 123. The court cannot lift the veil merely because it considers that justice so requires: *China Ocean Shipping Co* at page 128B/C to F/G (per Nazareth VP).\(^{126}\)

Cited with approval in the Singapore Court of Appeal in *The Andres Bonifacio*\(^{127}\) the principle from *Cape Industries* is certainly sound law. However, the subtle distinctions and elements upon which it sits can be realigned so that this legal principle can be used in bad faith by companies to avoid existing legal obligations. This is an additional test entirely different from the broad and unworkable discretionary ‘justice of the case’ test, and reflects an equitable discretion controlled by male fides guidelines. As mentioned elsewhere in this article, it is difficult to draw the distinction between exiting and future legal obligations. It is natural to argue that a legal obligation becomes current when an order is made by the court, when settlement is reached, or when consent orders are agreed to by the parties, and accepted by the court. This avoids the idea of liability, and once again complicates the pursuit of justice with formalist legal rules. Clearly, reflecting

\(^{123}\) Ibid, p 69.  
\(^{124}\) [2000] SLR 137.  
\(^{125}\) Tan, above n 75, 65.  
\(^{126}\) Lee Thai Lai v Wong Chung Kai t/a Kai Hing Trading Co and Another [2003] HKCFI 265 at [6].  
\(^{127}\) [1993] 3 SLR 521.
on causation and logic, legal obligations may arise when, for example, knowledge of the harm is communicated to employer companies about asbestos induced diseases amongst its employees. In short, this may include knowledge of a foreseeable legal obligation. This is a particularly useful example given the fiduciary obligations that arise in employer and employee relationships. The moment a company learns that its practice resulted in harm to employees, and that it may be liable for damages in prospective litigation, legal obligations should arise to act in good faith and not use the corporate structure capriciously or for an extraneous purpose unrelated to legitimate commercial interests, including winding up the company once it is sued or transferring assets from that company. The practices adopted in Cape Industries serve as a useful example of how the law is short sighted in this respect, and how it may be improved to reflect a more realist perspective on when legal obligations become current, particularly in relation to fiduciary relationships, and acting in good faith prior to litigation or during the dispute process. It is important to consider this issue, particularly given the litigation brought by employees against employers, including the increasing numbers of class actions for wrongs done in the course of employment.

With the advent of incorporation, holding groups of companies accountable is no now longer restricted to large multinationals. As a result, this changing face of company ownership and control requires protective measures that flow harmoniously with this social and economic change. As Ramsay et al rightly suggest, ‘a court may pierce the corporate veil on the ground of “group enterprises” where there exists a sufficient degree of common ownership and common enterprise’.128 Recently, Byrne J in the Supreme Court of Victoria elaborated on this point and noted, in one paragraph, the legal principles relevant to piercing the veil of incorporation for groups of companies:

There is here present the required common or interlocking shareholdings and a unified capacity in the holding company to control the operators. Furthermore, it is necessary to underline that the questions arise in circumstances where a third party seeks to recover compensation from the holding company for wrongful acts performed by its corporate subsidiary actor. I mention this because it may be that the exercise which I am to undertake may differ depending upon the circumstances in which the question arises. The cases to which I was referred covered a number of these circumstances: questions as to compensation payable to a holding company for the acquisition of a subsidiary’s assets, in insolvency law, in taxation law and claims against a holding company for acts of its subsidiary committed in breach of contract or in breach of tortious or other duties. It may be also relevant to know whether the relationship between the companies is that of members of a corporate group and the nature of their relationship within that group. This is because the courts have been, naturally enough, ready to look behind the corporate structure where this structure has been established merely to avoid liability of the non-actor, to interpose a straw company between a claimant and a wrongdoer, where the corporate structure is a mere sham or where it has been established in circumstances where the public has been misled as to what legal person they were dealing with. I should again emphasis that, in this

128 Ramsay and Noakes, above n 60, at 15.
case, it was not suggested that the corporate structure of the Spotless Group was brought into existence for any of those reasons.\footnote{Premier Building and Consulting Pty Ltd v Spotless Group Ltd [2007] VSC 377; BC200708532 at [332].}

It is no surprise that the Anglo-Australian approach is, again, unclear. In contrast, Le Pichon J of the HK District Court also explained the law on this point. His Honour noted in \textit{Lee v Kelly McKenzie Ltd}:\footnote{(2004) HKLR.}

The whole point of the exercise where the facts so warrant is to go behind the veil or façade to identify the person or persons in control: the real question is one of control. The judge found, and there was ample evidence to support it, that the 2nd and 3rd defendants ‘orchestrated’ the entire ‘show’ including the deliberate decision not to defend HCA 11828 and ultimately letting Linkwaters go into liquidation, the diversion of the goodwill and business of Linkwaters to the 1st defendant and the depletion of the accumulated profits of Linkwaters through dividend payments to ensure that Linkwaters had no funds with which the judgment debt could be satisfied. Thus the intention to evade liability on the part of the 2nd and 3rd defendants could not have been clearer.\footnote{[2004] HKCA 219 at [15].}

This test is quite simple, and refers to the elements of control, and bad faith or malefides. \textit{Lee} involved holding directors personally liable for the bad debts of a phoenix company. In short, Linkwaters Investment Ltd was an employment agency trading under the name of Kelly McKenzie, the first defendant. The plaintiff, Janet, was employed by Linkwaters. The plaintiff then gave notice and thus became entitled to payment of two months in lieu as per a clause in her contract of employment. Two weeks prior to the two months expiry period, Janet was summarily dismissed by Linkwaters, and she subsequently gained default judgment for $403,825. Upon McKenzie failing to pay, Janet successfully petitioned for its winding up. Meanwhile, two sisters who formed the latter two defendants were controlling shareholders and directors of Linkwaters as well as the first defendant, McKenzie Ltd which was formed after Janet gave notice.\footnote{M Quinlan and D Courtness, ‘The University of New South Wales CLE: Directors Duties’, 2005, p 17.} During this time, Linkwaters had transferred and ‘diverted its business to [Kelly McKenzie] so that [Linkwaters] had no funds to pay for the debt owed to Janet’.\footnote{Yeo, above n 51, at 16.} As noted above, Le Pichon J held that the two sisters behind Kelly McKenzie were held liable for the debt of Linkwaters to Janet because they had ‘orchestrated’ the entire ‘show’.

As a result, flowing from the jurisprudence of Hong Kong and Singapore, the following features are relevant in determining whether to pierce the corporate veil. In summary, direct control of a principal company over another, while a key starting point, is insufficient on its own. From the facts of \textit{McKenzie} we find that characteristics of a group of companies operating a sham or a façade include a group that seeks to avoid existing legal obligations in bad faith where the authority of each company is merged seemingly in a single business unit. However, as \textit{Nagase Singapore Pte Ltd v Ching Kai}}
Huat\textsuperscript{134} shows, the courts in Singapore are prepared to pierce the corporate veil for less.

\textbf{1 Use of company structure for improper purpose}

An attempt to use a company as a ‘cloak of deception’\textsuperscript{135} or ‘buffer’ so as to avoid legal obligations is bound to attract the veil piercing doctrine. Put simply, this is because the direct ‘purpose’ of the company is to avoid \textit{existing} legal obligations such as an order of a court, moneys owed to a creditor or existing obligations under contract or tort. This, often happening with groups of companies,\textsuperscript{136} is a clear \textit{male fide} attempt to use the \textit{Salomon} principle for a capricious and extraneous purpose.

For example, in \textit{Tiu v Red Rose Restaurant Sdn Bhd},\textsuperscript{137} the plaintiffs ran a night club in the Red Rose Restaurant (Red Rose) which was wholly owned and controlled by Hotel Berjaya Sdn Bhd (Hotel Berjaya). Hotel Berjaya owned the hotel in which the restaurant was operated. A dispute then arose between the plaintiff, Tiu, and Red Rose in relation to renewing the license for the nightclub. The plaintiffs obtained an interlocutory injunction restraining Red Rose from interfering with its business, but one night it found that the doors to the Red Rose were locked. Red Rose claimed no wrongdoing, and Hotel Berjaya accepted responsibility. ‘The judge found this to be a transparent device to defeat justice and held that Hotel Berjaya and Red Rose were functionally one entity’,\textsuperscript{138} and as a result the judge found them in contempt of court for disobeying the injunction. This case, taken in conjunction with the Hong Kong decision of \textit{Lee} provides sufficient guidance in relation to the law in both Hong Kong and Singapore.

\textbf{2 Direct control: A starting point only}

Central to this element is the view that a principal company that directly controls a subsidiary to do an act, does that act directly. For example, the drug dealer orchestrating the drug mule is himself or herself liable for drug trafficking even though he or she did not directly participate in distributing the illicit drugs. In this same vein, a clear example of this from the Singapore courts is the case of \textit{Trade Facilities Pte Ltd v Public Prosecutor}\.\textsuperscript{139} \textit{Trade Facilities} involved falsely applying trademarks to imports into Singapore. Looi was the owner of all but one of the shares in this company and was subsequently convicted of infringing intellectual property rights by a Magistrate. On appeal, the court upheld this conviction and rejected the argument ‘that the company was liable and not Looi’.\textsuperscript{140} In short, the court held that given Looi owned all but one of the shares in the company, the evidence showed that his ‘mind and will were behind Trade Practices’ such that he ‘could not hide behind the corporate veil’, particularly because only a $2 company had been incorporated and in this instance there was clearly a

\textsuperscript{134} [2007] SGHC 163; [2008] MLJ 80. .
\textsuperscript{135} See, eg, \textit{Liu Hon Y ing v Hua Xin State Enterprise (Hong Kong) Ltd} [2003] 3 HKLRD 347.
\textsuperscript{136} Tan, above n 75, at 63.
\textsuperscript{137} [1984] 2 MLJ 313.
\textsuperscript{138} Tan, above n 75, at 64.
\textsuperscript{139} (1995) 2 SLR 475.
\textsuperscript{140} Collier, above n 52, at 55.
façade. Extending from the reasoning of Le Pichon J in *Lee*, the courts insistence on looking at 'orchestration' was a key element in piercing the corporate veil. As Le Pichon J rightly elaborated:

The whole point of piercing the corporate veil is to look through the façade to those who were exercising real and actual control behind it.\(^{141}\)

Again, the example of the drug mule conjures an excellent mental image of the 'mindless entity' that is merely a vessel for liability. A 100% shareholding may not be sufficient to create liability where another company is incorporated in good faith and without malice. In *Wealth Chase Ltd v Poon Hang Yee*,\(^{142}\) the purchase of $2 shelf companies in Hong Kong was held to be so commonplace that the veil could not be pierced without more. It follows that 'courts will typically not pierce the veil on the ground of control alone'.\(^{143}\) This view was recently affirmed in the Singapore High Court in *Datacraft* where the court noted:

companies in a group remain separate legal entities. This is so even when a holding company in effect exercises complete control over its subsidiary.\(^{144}\)

3 'Merging' boundaries and common purpose

Actions in 'deliberately blurring the edges' in relation to dealings between two companies which had the same directors was held to be adequate to lift the corporate veil. In *Yue Tai Plywood & Timber Co Ltd v Far East Wagner Construction*\(^{145}\) the common practices of the group of companies assisted in indicating that the group of companies had one purpose and operated as one business unit. As a result, in these circumstances, the veil of incorporation can be pierced. However, in the recent decision of *Datacraft Asia Ltd v Kaufman*\(^{146}\) in the High Court of Singapore, Lee Ti Ting AR cited this proposition with disapproval and noted:

The plaintiffs also submitted that the evidence disclosed that Masterpart and D&M were organised as one economic entity and for that reason it would be correct to make D&M responsible for the liabilities normally incurred by Masterpart. That argument is one that has been made in previous cases to justify lifting the corporate veil that exists between a parent company and its subsidiaries within the same group. Even in such a situation the argument has not been well received. In the *Cape Industries* case, the court considered that the concept of the group as a single economic entity could not justify any departure from the normal rule that each 'company in a group of companies . . . is a separate legal entity possessed of separate legal right and liabilities'.\(^{147}\)

From the above analysis, it can be seen that piercing the corporate veil requires the use of a series of metaphors that yield an uncertain and vague approach. However, at the heart of each decision above is the notion that

\(^{141}\) *Lee v Kelly McKenzie Ltd* [2004] HKCA 218 at [16].

\(^{142}\) [2002] HKCFI 462. See, in particular [52] of the judgment.

\(^{143}\) Ramsay and Noakes, above n 60, at 16, citing *Heytesbury Holdings Pty Ltd v City of Subiaco* (1998) 19 WAR 440; 100 LGERA 223; BC9802506.

\(^{144}\) *Datacraft Asia Ltd* [2007] SGHC 111 at [44].


\(^{146}\) [2007] SCHC 111.

\(^{147}\) Ibid, at [42].
avoiding legal obligations for an improper purpose or without regard to legitimate commercial interests is acting with bad faith, and, as such, warrants piercing the corporate veil where the facts of the case demand it.

4 The ‘male fides’ (bad faith) approach

Therefore, now, it would be appropriate to bring the underlying principles adopted in the cases above together, and explain the concept of good faith as it applies to piercing the corporate veil in common law. As Tan rightly notes, the decision in Tiu is ‘clearly correct’.148 He elaborates:

They can be seen as attempts to use the corporate vehicle not for a bona fide transaction but to achieve an improper purpose that will often involve some degree of dishonesty or lack of moral probity.

Further to this point, ‘bad faith’ was a relevant issue of piercing the corporate veil that was noted in passing by the judge in The Grande Properties Management Ltd v Sun Wah Ornament Manufactory Ltd.149 In Hong Kong, the idea of ‘good faith’ also influences whether to pierce the corporate veil. As Tan explains, the only major means in common law of piercing the corporate veil is where ‘the corporate form has been abused to further an improper purpose and not a bona fide, usually commercial, transaction’.150 ‘In general’, he continues, ‘incorporating a company to insulate oneself from personal liability cannot be illegitimate in itself.’ He then goes on to explain the principle case of Adams v Cape Industries, which is discussed above, including its approval in Singapore and Hong Kong. For example, the head note in China Ocean Shipping Co v Mitrans Shipping Co Ltd accurately defines this area of law in one concise paragraph:

Using a corporate structure to evade legal obligations is objectionable. The courts’ power to lift the corporate veil may be exercised to overcome such evasion so as to preserve legal obligations. But using a corporate structure to avoid the incurring of any legal obligation in the first place is not objectionable. And the courts’ power to lift the corporate veil does not exist for the purpose of reversing such avoidance so as to create legal obligations.151

In Nagase Singapore Pte Ltd v Ching Kai Huat,152 the court noted with particular emphasis the importance of male fides as akin to a deliberate plan to take advantage of the corporate structure to take an illegitimate benefit without proper purpose.153 Acting capriciously, without proper purpose and without legitimate commercial interests for a benefit is the classic definition of ‘bad faith’, which breaches the common law duty of good faith. It was this element, the judge stressed, that would entitle the corporate veil to be pierced. The facts clearly show capricious intent, and as such crystallise the decisions above, and given the realist approach which has been emphasised by Tan it is important to outline the facts so as to weave it into the analysis of Prakash J.

The plaintiff company engaged D Logistics to provide various services for

148 Tan, above n 75, at 64.
149 [2005] HKCA 316 at [95].
150 See generally Tan, above n 75, at 64.
151 [1995] HKCA 604. Also see [17].
153 [2008] MLJ 80 at [14]–[17].
the maintenance of warehouses. D Logistics was paid a lump sum fee to operate the warehouses while the plaintiff rented it. Two years after the agreement between D Logistics and the plaintiff, the third defendant (CY), being a non-executive director of the plaintiff, arranged with the first defendant (DC), the majority shareholder of D Logistics, to no longer rent warehouse space to the plaintiff. Instead, the scheme was for the plaintiff to pay D Logistics for both the warehouse and warehousing services. After a series of quotations which were rejected by the plaintiff, CY signed a subsequent quotation which altered the previously agreed rates. After some time the plaintiff discovered that it was being overcharged. The plaintiff alleged that the defendants conspired to injure its interests, and terminated its agreement with D Logistics. In short, the plaintiff relied upon a conspiracy by the defendants, not seeking personal liability through piercing the corporate veil.

While the court could not make an order for piercing the corporate veil because it was, regretfully, not specified in the pleadings, the court nonetheless went to great lengths to explain the connection between male fides and the establishment of circumstances in which the veil should be pierced. In a subtle attack on counsel, the court noted that it would have pierced the corporate veil on the facts provided had counsel requested and argued for it. Again, the underlying elements of the doctrine of good faith are at play. Acting capriciously for an extraneous purpose (high profits) without a legitimate commercial interest based on the life of the contract can be sufficient male fides combined with control to pierce the veil. The facts above clearly indicate two elements: improper purpose and control. The court rightly noted:

[Having regard to the] factual matrix . . . since, in the first judgment, it had been found that DC was the moving spirit and alter ego of D Logistics, the appropriate cause of action was not the tort of conspiracy, but rather a claim based on the position that the corporate veil should be pierced and DC made responsible for the wrongdoing of D Logistics . . . I agree that the plaintiff could have (and perhaps should have) brought its claim against DC on the basis that he was responsible for the wrongs of the company as its alter ego and that, as the plaintiff’s claim was one for deliberate overcharging, it was akin to fraud and, therefore, justified the piercing of the corporate veil.154

Fortunately, despite counsel’s unfortunate lack of skill, Prakash J correctly explained the potential outcome had he sought to pierce the corporate veil. It goes without saying that male fide is now an important consideration as a major common law test for piercing the corporate veil in almost all situations. Given that the above discussion links good faith in contract law to the male fides approach adopted by the courts in Singapore and Hong Kong, it would be useful to briefly examine good faith in contract law, so as to shed light on the idea of good faith.

(a) Legitimate commercial interests and ordinary business dealings: Ideas from contract and tax

The concept of good faith is a very broad test, and in many instances it lacks precise definition. However, judging by the unhelpfulness of the rules relating

154 Ibid, at [16]–[17].
to veil piercing, good faith, as it is applied in corporate law, can be very helpful in achieving justice. While Anglo-Australian authority suggests that the courts’ aim is not to do justice in veil piercing cases, but to simply apply the law, this formalist approach to law debunks the whole idea of law and cannot be sustained. It follows that the equitable discretion of the court, already embraced in Hong Kong and Singapore, is extremely useful in deconstructing legal rules that may, in the end, be twisted to serve the interests of those who have the resources to bend justice, either through insistence on technicalities, legal rules, or even litigation by attrition and skirmish. To avoid this, the test of male fides can be adopted.

The doctrine of male fides, as it is applied in corporate governance cases in Hong Kong and Singapore, can be enriched with legal concepts from other areas of law, in particular the exception of bad faith in contract law, ‘legitimate commercial interests’ and the exception of tax avoidance in taxation law, the pursuit of legitimate or ordinary business purposes. These concepts are useful because they clarify the idea of male fides, while providing helpful insight on the tests that can be used when a company uses the corporate structure in bad faith. At present, a company is free to transfer assets to another company in its group or wind up a company, to avoid future payments, for example, to asbestos victims as shown in Cape Industries. This does not do justice. In fact, it is a manifest injustice. Therefore, it may be helpful to apply as a limb of the male fides approach, a ‘legitimate commercial interests’ or ‘legitimate business purpose’ exception to male fides. That is, where a company undertakes an act capriciously, with the purpose of avoiding payment to, for example, asbestos victims who have a strong claim, then while this act may have business purpose, the question is whether this act is legitimate. While the corporate structure may be used to avoid future liabilities, rationally, a future liability becomes an existing liability when damages are owed, not at settlement or judgment, but when the damage is done and knowledge of such damage communicated. Extending from this, taxation law provides guidance of when an act is done in the usual course of business, as opposed to when it has some capricious or extraneous purpose unrelated to commerciality or legitimate trading.

The main test in tax avoidance is whether the purpose of an arrangement or transaction is to avoid the payment of tax, or whether it is used for a legitimate business purpose. Brennan J (as he then was), when speaking of tax avoidance in Federal Commissioner of Taxation v Gulland,\(^{155}\) nicely summarised the approach adopted in taxation law:

If it can be predicated of an arrangement that among the purposes for which it was made is the purpose of avoiding tax, then, provided that purpose is a substantial, not merely incidental, purpose of the arrangement, it is an arrangement on which s 260 operates (Hollyock v Federal Commissioner of Taxation [1971] HCA 43; (1971) 125 CLR 647, at p 657). To predicate of an arrangement that a purpose for which it was made is the avoidance of tax, something more is needed than a purpose to achieve what the arrangement is apt to effect if the arrangement is apt to effect a variety of consequences only one or some of which is the avoiding of tax.

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\(^{155}\) (1985) 62 ALR 545; [1985] HCA 83 (Three Doctors case).
In *Newton v Federal Commissioner of Taxation* [1958] UKPCHCA 1; (1958) 98 CLR 1, at p 8, Lord Denning delivering the judgment of the Privy Council said:

‘In order to bring the arrangement within the section you must be able to predicate — by looking at the overt acts by which it was implemented — that it was implemented in that particular way so as to avoid tax. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labeled as a means to avoid tax, then the arrangement does not come within the section.’

The explanation given by Denning LJ is particularly useful, because of its insistence that conduct that makes up ordinary business dealings, without the dominant purpose of avoiding tax, cannot be tax avoidance. In this same vein, a company transaction, done for a capricious purpose and without ‘ordinary business dealings’ can be said to be done with male fides. While this example in taxation law is useful, the evolution of the exception to bad faith in contract law, legitimate commercial interests, may be more suitable given its origins in the common law.

Central to the idea of bad faith in contract law is the pursuit of an improper purpose. That is, an act done for an extraneous or capricious purpose is done with an improper purpose unrelated to the performance of the contract, and thus it is likely to be done in bad faith, and not in good faith. A notable test to determine whether an act is done for a proper purpose, and therefore not an improper purpose, is where that act is done for legitimate commercial interests connected to the performance of the contract. For example, if there is the pursuit of legitimate commercial interests and no motive to harm the other party, then this is unlikely to be bad faith as was found in *Far Horizons Pty Ltd v McDonalds Australia Pty Ltd*. The basis of this approach looks at the loyalty to the contract in terms of upholding good faith and, in contrast, disloyalty to the contract in terms of acting in bad faith, whereby the spirit of the bargain is evaded. Similarly, a corporate action done outside the spirit of legitimate profiteering, but rather for an improper purpose outside ordinary business dealings, may constitute male fides as it is envisaged by the courts of Hong Kong and Singapore. Both Finkelstein J and Gordon J, of the Federal Court of Australia, usefully summarised the meaning of bad faith. For Finkelstein J in *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* acting in bad faith was closely related to acting for ‘an ulterior motive or, if it be any different, . . . [acting] arbitrarily or capriciously’. Gordon J explained:

Specific conduct has also been identified by various courts as constituting ‘bad faith’ or a lack of ‘good faith’ including:

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159 [2000] VSC 310; BC200004860.


(1) acting arbitrarily, capriciously, unreasonably or recklessly: eg see Viscount Radcliffe in *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 at 1422–3 cited by Gyles J in *Goldspar* at [173]; and *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288 at [65];

(2) acting in a manner that is oppressive or unfair in its result by, for example, seeking to prevent the performance of the contract or to withhold its benefits: *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288 at [65]–[66];


(4) failing to act ‘reasonably’ in general.162

As a result, the common law surrounding good faith in contract law, as well as the idea of legitimate commercial interests, as well as the statutory interpretation of tax avoidance provisions, shed useful light on how the male fides approach can have practical application for the pursuit of just outcomes.

5 Public versus private companies in veil piercing — a real distinction?

The application of realist principles to trace those in control of company actions may be impacted by the judicial reluctance in common law countries to pierce the corporate veil for public listed companies.163 There is no doubt that, in the interests of public policy and share market activity,164 shareholders should be immune from liability, particularly when the shares are sold off and ownership passed onto the new shareholders.165 While this is an important issue, the approach adopted in Singapore and Hong Kong does not impact on shareholders because the test is one of ‘control’.166 Given that, traditionally, shareholders do not directly control corporate actions, silent shareholders cannot be linked to company decisions. The main argument against holding shareholders in public companies accountable is an economic one. That is, shareholders should not be held liable for corporate actions because such threat of liability will be a disincentive for investment. However, to re-emphasise this point, given that the focus of liability in Hong Kong and Singapore is one of control, shareholders will remain unaffected and free to invest without fear of liability.

The purpose of this article is not to advocate for shareholder liability. Where the nature of share holdings is silent investment, there is no legal basis upon which shareholders can be held accountable for actions beyond their control. The extent of the limited involvement of shareholders in the decisions of companies is shown in the decision of the English Court of Appeal in


163 See generally Ramsay and Noakes, above n 60.

164 Ibid, Part II.


166 On this issue as it relates to Anglo-American veil piercing, see: Ramsay and Noakes, above n 60, at 24.
Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame where it was held that directors were not agents of shareholders and so were not bound to follow any direction from shareholders to dispose of assets. This principle was subsequently affirmed by the NSW Supreme Court in NRMA v Parker in which the court held that shareholders could not even convene a meeting to advise directors or intervene in the exercise of their functions, 'where a corporate constitution confers general powers of management exclusively on the directors'. An answer to this question cannot be found in the law itself. It must be sought in the economic and social background of the law. Like other writers from an institutional economic perspective, Berle and Means found that firms were irresponsible and did not serve the interests of the economy. To this end, the struggle between ownership and control is particularly relevant where shareholders have indirect control through electing directors, but this is a question for the factual matrix, and the extent of the realistic control of shareholders in a particular case. There is no doubt that companies have complex decision-making procedures in place where subcommittees may make decisions and so, in such an environment where conflict of interest may be prevalent, the following of proper procedures by independent directors may make such directors immune from liability. The key point, however, is that where independent directors and shareholders have no, or little, control over activities which may warrant the piercing of the corporate veil, they should not be pursued. This further supports the proposition that the tracing of those who had direct control and influence over a decision of the company should attract liability, as the authorities from both Hong Kong and Singapore show.

For these purposes, the distinction between public and private companies, when considering the criminal and personal liability of company directors, is illusory. For Llewellyn, 'a concept . . . is built for a purpose'. There is no purpose for this distinction, not social, moral, ethical, religious, political or economic. Nor is there any 'legal' reason, for law must be built on purpose, and not be some arbitrary application of words, set in a precise order to have some controlling effect. While Ramsay et al rightly argue the economic purpose of limited liability as it relates to shareholders, no real economic purpose attaches to the liability of directors. In this sense, and reflecting on the social and historical influences on the application of the legal principles relating to piercing the corporate veil and the liability of company directors for criminal activity, 'subjectivity masquerades as objectivity, and the particular limitations of a private individual or class perspective are represented as

167 [1906] 2 Ch 3.
168 (1986) 6 NSWLR 517; 11 ACLR 1; 4 ACLC 609.
172 Llewellyn, above n 22, at 3.
transcendence of all limitations, as objective ‘point-of-viewlessness itself’. Used by Postema to describe the position of women in society, this can be expanded to any social group, whereby the legal structure imposes archaic tests tainted by the ritualistic development of words, misapplied in form, that unnecessarily complicate litigation and, in the end, deny real justice.

(a) Director liability: Personal and criminal liability for direct control

As the basis of jurisprudence in veil piercing seeks to hold accountable those in control of company assets, it appears economically sound to hold directors both personally and criminally liable. The decision of the Supreme Court of Hong Kong in Aktieselskabet Dansk Skibsfinansiering (body corporate) v Wheelock Marden & Co Ltd serves as a useful example. While the decision was reversed in the Hong Kong Court of Final Appeal, the reversal was based on the factual question of whether the conduct was in fact fraudulent and dishonest, not that directors cannot be held liable if these are proven.

In Aktieselskabet Dansk Skibsfinansiering, the Supreme Court of Hong Kong found that the company directors of a Hong Kong public company, Wheelock Maritime International Ltd (WMI), were liable for misrepresentation by omission and fraudulently withholding cash flow information when it was clear the company was doomed financially and should have been put into liquidation. Instead, the directors continued to invest and trade. WMI was a Hong Kong public company, and the principal shipping arm of a group of companies controlled by Wheelock Marden & Co Ltd (WM). WM were general managers of WMI and it conducted its business through Brothers, who was supervised by the managing directors of WM, Lees and Leung. Brothers, Lees and Leung were directors of both WMI and WM. In a plan to modernise its fleet in 1979, WMI contracted to buy vessels, which were subsequently ordered, from the plaintiff, Aktieselskabet Dansk Skibsfinansiering (ADS). Brothers was principally responsible for implementing WMI’s plans. To finance this expansion, WMI borrowed funds in US currency from commercial banks and the funds were placed on deposit in Danish banks in Danish currency at an interest rate of 17–18%, with the payable interest rate at 8%. In 1982, the shipping market dropped, values fell and, by the beginning of 1983, WMI was commercially insolvent. It sought support and continued trading with the advice that it could do so provided it was confident that it could pay its future debts. On representations by WMI and Brothers, ADS entered into a revised loan agreement with the belief that WMI would have the support of WM. ‘In March 1985, WM was taken over by Wharf which refused any further support for WMI.’ On 29 July, ADS defaulted on its loans and WMI was placed in voluntary liquidation on 2 August 1985. Brothers was found to have failed to update ADS on accurate cash flow information, and such withholding of this information was both fraudulent and a misrepresentation.

The decision in Aktieselskabet Dansk Skibsfinansiering is an invaluable

176 [1997] HKCFI 864 at [1.1.2].
example of how courts can find directors of a public company criminally and personally liable, particularly where the actions — being fraud and misrepresentation in that case — were only committed by a director. The fraud and misrepresentation were an act done for an improper purpose that lacked legitimate commercial interests, in line with the rationale and common thread behind all veil piercing cases. In essence, the standard of proof required for fraud showed that the illegal actions of company directors attract the same sanctions as those to which the public is subject. Whether the company is public or private is illusory, and the corporate veil is yet another unnecessary formalist device used to further complicate the area with ‘transcendental nonsense’ swamped with ‘legal magic’ and ‘word juggery’. While the defendants could not be found to have fraudulently traded because it could not be proved that WMI was not going to recover, the court did find that WM and Brothers were fraudulent because Brothers had dishonestly withheld cash flow information and ‘a true picture of WMI’s financial position’. In particular, the court found that Brothers deliberately withheld cash flow information to creditors and stakeholders, and so was dishonest in doing so. As Justice Barnett explained:

I am satisfied that ADS has properly pleaded and established a misrepresentation by omission, namely failure to correct the false impression about WMI’s financial situation created by the 28th February graph and subsequent cash flow.

Aktieselskabet Dansk Skibsfinansiering is an example of how people in control can be held accountable, and those without male fide, criminal or negligent practices can avoid liability. No doubt, those without control will not be held accountable, neither directly or indirectly, because those responsible will be held personally and criminally liable.

(b) Criminal and personal liability: An example

The criminal liability of directors serves as a useful example of the realist approach to veil piercing. Holding directors criminally liable simply puts them in a position comparable to all other members of society. Should a director commit a crime, then a charge should follow. Whether a corporate veil exists or not is immaterial. An action, willed or negligent or reckless, which causes harm recognised by the criminal law, is a crime. As a result, it is not accurate to say that a director cannot be held liable, because the company committed the crime. Much like the puppeteer who controls the puppet, the director controls the company which, like a puppet, lacks a brain. Anglo-Australian company law would, in effect, hold a puppet accountable for the actions of the puppeteer, because the puppet mysteriously did an act while the puppeteer’s hand was tightly clenched within the puppet. The formalist legal principles complicate the law, and as a result the lack of a common
principle cloud the causation test, and deny accountability for those truly responsible. It follows that the cause of the harm is not the metaphysical, but the physical.

While not applied for a traditional criminal act like murder, the now consolidated approach taken by the Federal Court in Australia in relation to breaches of intellectual property by company directors (or the company as some modern company lawyers may argue) provides useful guidance on the point of the personal liability of company directors. In Root Quality Pty Ltd v Root Control Technologies Pty Ltd\footnote{182} Finkelstein J was faced with the question whether a company director could be held personally liable for what the law may perceive as the company’s wrongdoing. On this point, his Honour held that the decision of a director which causes the company to do harm does not result in personal liability attributed to the director, ‘without more’. That is, the director must be ‘so personally involved in the commission of the unlawful act, that it is just that personal liability is incurred’. For Finkelstein J in Root Quality Pty Ltd, a director who deliberately procures an act for the purpose of causing harm or injury, which the director knows is unlawful or is recklessly indifferent to whether the act is unlawful and would cause harm, could and should be held personally liable for that unlawful act. In the end, the factual matrix of each case was considered to be relevant to his Honour but as he rightly noted however the merging boundaries between a director who acts bona fide, and a director ‘who acts deliberately and maliciously to cause harm, cannot be stated with any precision’.\footnote{183} The Full Court of the Federal Court of Australia in Allen Manufacturing Company Pty Limited v McCallum & Co Pty Ltd\footnote{184} comprising Wilcox, French (as he then was) and Dowsett JJ clarified the state of the law:

The authorities were collected and analysed by Beazley J in King v Milpurruru (1996) 66 FCR 474 at 494–500. Her Honour noted the existence of two lines of authority. One line supported what she called the ‘Performing Right Society test’: whether the director had ‘directed or procured’ the company’s infringement. The other line supported ‘the Mentmore test’: whether the director had engaged in ‘the deliberate, wilful and knowing pursuit of a course of conduct that was likely to constitute infringement or reflected an indifference to the risk of it’. Beazley J expressed a preference for the Mentmore test, on the basis that the Peforming Right...
Society test did not ‘pay sufficient regard, either to the separate legal existence of the company, or to the fact that the company acts through its directors’ . . . [40] In Auschina Polaris (at 239–47) Lindgren J also discussed the authorities at some length. As Gyles J recorded, he preferred the Performing Right Society test, as did Merkel J in Henley Arch and Branson J in Goodview Electronics. Also as Gyles J recorded, Finkelstein J expressed a different view in Root Quality. As we read his Honour’s judgment, he adopted the Mentmore test.185

The consolidation of these two tests by the Full Court is obvious, whereby an act procuring or directing an unlawful act clearly satisfies the Mentmore test.186 When speaking to the personal liability of the company director, the Full Court held:

Mr Harper’s sequence of actions, including his actions on behalf of the company, were ‘the deliberate, wilful and knowing pursuit of a course of conduct’ that was likely to constitute infringement or, at least, reflected an indifference to the risk of infringement. Mr Harper himself infringed McCallum’s monopoly in its registered design.187

While the specific facts of the case go to procuring the infringement of designs and the specific personal actions of the director,188 it nonetheless serves as a useful example of when an Australian court will hold a company director personally liable. Logic dictates that this should be no different for breaches of criminal law, tort and other laws. There is much that can be taken from these cases, in the context of this article and the associated development of the common law tests surrounding piercing the corporate veil. In the end, it is clear that the underlying principles adopted reflects the male fides approach, whereby control together with conduct which is malicious and without legitimate commercial interests should be sufficient to pierce the corporate veil to hold company directors personally liable for an unlawful act and any harm caused.189 The lesson from this is that the main question asked was whether the acts did in fact constitute copyright infringement personally. Clearly, the courts can distinguish personal acts from perceived company acts. While differences in the Australian courts are noted, it is no doubt clear that as case law evolves, the question of male fides control is the main consideration which should not be complicated by formalist tests that seek to achieve the same purpose: to hold male fide wrongdoers accountable for actions within their control.

185 Ibid, at [39].

186 See the decision of the Canadian Federal Court of Appeal in Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Company Inc [1978] FCJ No 521 (CA)(at)which involved a patent infringement.

187 Ibid, at [47].

188 ‘This is not a case in which the relevant person acted only as a director of the infringing company. Mr Harper had personal knowledge of the McCallum registered design. He applied, in his own name, for registration of design no 131521, the design for the Allen hinge. He personally granted the licence to use the design to Reginald Harper and personally took back a sub-licence from Reginald Harper’: see Allen Manufacturing Company Pty Ltd v McCallum & Co Pty Ltd (2001) 53 IPR 400; AIPC 91-772; [2001] FCA 1838; BC200108133 at [45].

189 In this regard Finkelstein J refers to ‘unlawful act’ as any civil wrong but, while the specific facts of the case are clearly relevant, different laws should not be an issue unless impacted by specific factual considerations.
Conclusion

It is clear that limited liability in company law produces various economic benefits, particularly for investment reliant economies such as Hong Kong and Singapore. However, in response to this need, these two jurisdictions have sought to hold company directors and shareholders more accountable. While only subtly diverging from Anglo-Australian jurisprudence, the common law approach to piercing the corporate veil in Hong Kong and, in particular Singapore, pays special attention to an overarching test of male fides or ‘bad faith’ where the corporate structure is orchestrated or designed to pursue illegitimate objectives that lack *bona fide* commerciality, and that are not aimed at limiting future liability. While control itself is not enough, the courts in Hong Kong and Singapore have left open the idea that a company controlled in bad faith may give a right to pierce the corporate veil. This realist approach seeks to enhance certainty in veil piercing litigation by providing a test which is clearer than the traditional formalist tests, which are fragmented, vague and metaphoric.

In conclusion, while veil piercing jurisprudence in the common law world remains much the same, Hong Kong and Singapore have broadened the scope of veil piercing in a way that takes into account the factual matrix of each case while guided by principles of male fides to be used with the equitable discretion of the court. As a result, it may well be that differing economic requirements to promote investment have resulted in a subtle evolutionary mutation from the traditional formalist tests to piercing the corporate veil. In the end, the point of law is to achieve justice, and justice cannot be an irrelevant consideration when applying law.