Published on e-First 20 July 2018

Comment

REVERSE VEIL-PIERCING IN SINGAPORE AND ITS CONSEQUENCES

Piercing the corporate veil has long been an unsettled area of law. It is likely to remain so despite the best efforts of the UK Supreme Court in *Prest v Petrodel Resources Ltd* to limit it to situations where assets were transferred to a company to evade existing obligations owed by the shareholder. In Singapore, its sphere of operation is clearly wider than that but, recent cases suggest, not wide enough to enable controllers of companies to step into a company's shoes to claim its assets or enforce an action. This article examines the implications of not recognising "reverse veil piercing".

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I. Introduction

1 The piercing of the corporate veil is a well-established exception to the principle that a company is a separate legal entity from its shareholders. The concept refers to a situation in which the courts put aside a company's distinct legal identity and treat it as an *alter ego* of the shareholders. That phrase is not precise, however, as it suggests that veil-piercing can be typically applied for the benefit of third parties seeking to establish the shareholder's liability for the company's actions or debts or *vice versa*, and perhaps even more than that. Some, including Lord Sumption in *Prest v Petrodel Resources Ltd*[1] ("*Prest*"), think that true veil-piercing is really just to address the evasion of existing liabilities by a controller transferring assets to a company by depriving

1 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415. See further Pey-Woan Lee, "The Enigma of Veil Piercing" (2015) 26(1) *International Company and Commercial Law Review* 28; Yeo Hwee Ying & Ruth Yeo, "Revisiting the *Alter Ego* Exception in Veil Piercing" (2015) 27 SAcLJ 177; Tan Cheng Han, "Veil Piercing – A Fresh Start" (2015) 1 *Journal of Business Law* 20; Hans Tjio, "Lifting the Veil on Piercing the Veil" [2015] LMCLQ 19; Stephen Bull, "Piercing the Corporate Veil" [2014] Sing JLS 24; Ernest Lim, "Saloman Reigns" (2013) 129 LQR 480.

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them of the advantage obtained by the company's separate legal personality. The position in Singapore, as we shall see, is clearly wider than that. However, it is not clear if it is broad enough to encompass the situation where the doctrine is utilised in aid of a shareholder seeking to assert rights properly belonging to the company.

2 *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva*[2] ("*Salgaocar*") was a putative shareholder's attempt to introduce the concept of "reverse veil piercing" in Singapore, to persuade the Singapore High Court to disregard the company's separate legal identity, and to treat assets held by the companies as belonging to him. The attempt was unsuccessful even though there had been suggestions in an earlier decision, *Koh Kim Teck v Credit Suisse AG, Singapore Branch*,[3] that reverse veil-piercing was "not *unarguable* and *unsustainable*". The High Court in the more recent case took the opportunity to clarify the categories of corporate veil-piercing, and to reiterate the rationale underlying the doctrine. Even more recently, the Court of Appeal in *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*[4] ("*De La Sala*"), while not directly addressing the concept of reverse veil-piercing, found that the "putative beneficial owner" as described in the court below did not in fact own the company's assets even if it owned all the shares in the company.

II. Separate legal entities and corporate veil-piercing in Singapore before *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva*

3 The Singapore courts have always been slow to disregard a company's separate legal identity although the argument comes up very often. In a recent Court of Appeal decision, *Goh Chan Peng v Beyonics Technology Ltd*[5] ("*Beyonics*"), it was said that veil-piercing would generally only be justified by abuse of the corporate form or if it is necessary to give effect to a legislative provision. The concern there was, however, more with the specific situation of veil-piercing in a group of companies. The Court of Appeal reaffirmed that companies within the same corporate group would be treated as separate legal personalities rather than a single economic entity.[6]

2 [2018] SGHC 24.
3 [2015] SGHC 52 at [63].
4 [2018] SGCA 16 at [154], referring to *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [476].
5 [2017] 2 SLR 592 at [75].
6 *Goh Chan Peng v Beyonics Technology Ltd* [2017] 2 SLR 592 at [71]; see also *Public Prosecutor v Lew Syn Pau* [2006] 4 SLR(R) 210, noting Michael Ewing-Chow & Hans Tjio, "Providing Assistance for Financial Assistance" [2006] Sing JLS 465.

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4 A general reluctance to disregard the separate legal personality of corporations is in keeping with the approach adopted by the English courts. In the seminal decision of *Prest*, the UK Supreme Court explained that veil-piercing would only apply if there was no other means for the claimant to achieve an equivalent legal result. Further, even if the claimant could establish that there was no alternative means of recourse, the court would only pierce the veil where the corporate form was used to evade an existing legal restriction or obligation (the "avoidance or evasion principle").[7] As explained by Lord Sumption, who delivered the leading judgment, "the corporate veil may be pierced only to prevent the abuse of corporate legal personality".[8] The rationale for piercing the corporate veil was "depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality".[9] Where the controller sought to use the corporate form to conceal an existing liability (also known as the "concealment principle"), Lord Sumption thought that it may not be necessary in such cases to formally pierce the veil, instead "only looking behind it to discover the facts which the corporate structure is concealing".[10] Put differently, there is nothing to pierce if the concealment can be revealed in other ways. In this regard, it is perhaps relevant that both the Singapore and UK governments have introduced a register reflecting the beneficial ownership (25% and above) of the shares in its unlisted companies and limited liability partnerships although there are some differences in the regimes.[11]

5 Lord Sumption in *Prest* pointed out that "[it] is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's".[12] He was also quite clear that the "objection would have been just as strong if the liability in question had not been consensual",[13] even if the ability to bargain for limited liability, or otherwise, is arguably more constrained in this context.[14] Accordingly, true veil-piercing is only applicable "when a person is

7 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [35], *per* Lord Sumption.
8 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [34].
9 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [35].
10 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [28].
11 See the Companies (Amendment) Act 2017 (Act 15 of 2017) and Limited Liability Partnership (Amendment) Act 2017 (Act 16 of 2017), and the Department of Business, Innovation & Skills, *Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business – Government Response* (April 2014).
12 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [34].
13 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [34].
14 See Francis Rose, "Raising the Corporate Sail" [2013] LMCLQ 566 at 590, pointing out that while contractual liability is determined by "contractual construction", "the circumstances in which tortious liability may arise are less restricted".

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under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control".[15] This is a very narrow conception of abuse, which Lord Neuberger thought was based on a particular form of fraud that could "apply equally to a person who transfers assets to a spouse or civil partner".[16] It is about putting assets beyond the reach of your creditors or spouse when you are liable, or possibly liable, to them.

6 Aside from Lord Neuberger, however, the rest of the UK Supreme Court did not, however, fully agree with such an approach. Lord Walker[17] doubted the existence of a unifying corporate veil-piercing principle, and Lord Mance[18] and Lord Clarke[19] thought that the categories are not closed. Lady Hale (with whom Lord Wilson agreed) said that the cases could "simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business".[20] These other justices were, however, influenced by the same desire to retain some residual discretion outside the narrow evasion cases.

7 A wider discretion to pierce the corporate veil probably sits more easily with the position in Singapore which was until *Salgaocar* best captured in *Tjong Very Sumito v Chan Sing En*[21] where Steven Chong J accepted that there are two justifications for veil-piercing. The first is where the company is one and the same as the controller or is used as a mere front for the controller's affairs and the second where the corporate structure was abused to further an improper purpose, which is closer to what Lord Sumption and Lord Neuberger held in *Prest*. The problem with the first category, where the company is seen variously as an *alter ego*, sham, façade or device,[22] is that by allowing claims against a company to be made against its controllers, thereby removing limited liability or "defensive asset partitioning",[23] it permits more expansive arguments to be made on when the corporate veil should be pierced. Indeed, the *alter ego* ground as seen is quite different from sham, façade

15 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [35], *per* Lord Sumption.
16 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [83], *per* Lord Neuberger.
17 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [106], *per* Lord Walker.
18 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [100], *per* Lord Mance.
19 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [103], *per* Lord Clarke.
20 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [92], *per* Lady Hale.
21 [2012] 3 SLR 953 at [67].
22 In *VTB Capital plc v Nutritek International Corp* [2013] 2 WLR 398 at [124], Lord Neuberger thought that phrases like "façade", "sham" and "device" "risk causing confusion and uncertainty in the law".
23 See Henry Hansmann & Reinier Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale LJ 387.

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or device by the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito*,[24] "and the key question that must be asked whenever an argument of alter ego is raised is whether the company is carrying on the business of its controller". Given the breadth of arguments that can be raised, controllers may in turn argue that if they can be subject to the liabilities of a company, they too are correspondingly entitled to make a claim to the company's assets or to its actions based on the same veil-piercing considerations. Hence, arguments on reverse veil-piercing have recently come before the Singapore courts. This set the stage for the decision in *Salgaocar*, which expressly confirms that reverse veil-piercing is not a recognised common law principle in Singapore. *De La Sala* appears to support this implicitly.

III. Decisions in *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva* and *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*

8 *Salgaocar* concerned two originating summons brought by the plaintiff companies and their legal owner, seeking the discharge of caveats lodged against properties owned by the companies. The caveats were lodged by the defendant, who claimed to be the beneficial shareholder of the companies as the companies were special purpose vehicles set up by him and its legal owner was his nominee pursuant to a December 2003 agreement. In seeking to maintain the caveats, the defendant contended that as the beneficial shareholder of the plaintiff companies, he had a caveatable interest in properties legally owned by the companies by virtue of, amongst others, the principle of reverse veil-piercing. The plaintiff applied to remove the caveats on the basis that the defendant's claim did not raise any serious issue to be tried. The principles to be applied were similar to that in an interlocutory injunction, which also required that the court determine whether the balance of convenience favoured maintaining the caveat. The High Court held that it did not. Kannan Ramesh J found that that December 2003 agreement did not cover the assets of the companies, which still clearly belonged to those separate entities, but only created an express trust over the shares in the company. The latter were not simply shell companies and were incorporated to carry out legitimate commercial activities. The judge distinguished *Prest*, where the UK Supreme Court had allowed the wife's claim in a matrimonial dispute under s 24(1)(a) of the Matrimonial Causes Act 1973,[25] where the husband was "entitled … in possession" to properties held by the companies he transferred the

24 *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [96]; see further Yeo Hwee Ying & Ruth Yeo, "Revisiting the Alter Ego Exception in Corporate Veil Piercing" (2015) 27 SAcLJ 177.

25 c 18 (UK).

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property to on "ordinary resulting trust" principles even if it refused to pierce the veil. There, the husband had funded the acquisition of the properties entirely whereas, here, the companies were financed by other *bona fide* business activities. Consequently, at least some of the companies were holding assets for the purposes of their business activities and acquired the same in the course of their operations.

9 By contrast, in *De La Sala*, the Court of Appeal, while not piercing the veil because a "beneficial interest in a company's shares does not imply a beneficial interest in the company's *assets*",[26] utilised the presumption of resulting trust similar to that in *Prest*. While the relevant companies' assets did not belong to the "putative beneficial owner of *both* the shares and the assets"[27] of the companies, given that these companies did not have "trading operations",[28] their assets were beneficially owned by two other companies. These companies had earlier funded the acquisition of those assets and had not given them over to the relevant companies or transferred them for consideration so that a "resulting trust would remain imprinted on those assets as they passed from corporate vehicle to corporate vehicle".[29] At first instance, however, it was held that the moneys that were transferred out of the bank accounts of the relevant companies by the "putative beneficial owner" into his personal account were his.[30] The Court of Appeal thought, however, that "it is possible for a company to hold its assets on trust for others (including, potentially, its shareholders), but such a trust must arise in the usual ways in which trusts arise; it does not occur as a *necessary incident* of shareholding as such".[31]

10 These cases are perhaps slightly different from the earlier decision of Aedit Abdullah JC (as his Honour then was) in *Koh Kim*

26 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] SGCA 16 at [119].

27 This was as described at first instance in *Compania De Navegacion Palomar, SA v Ernest Ferdinand Perez De La Sala* [2017] SGHC 14 at [478].

28 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] SGCA 16 at [122].

29 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] SGCA 16 at [124].

30 Although these were subsequent mixed and an accounting process was required to determine the shares of others, that meant that the actual effect of the decision was similar to that of the Court of Appeal.

31 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] SGCA 16 at [119]. This is quite separate from the perspective we sometimes have of a director being seen to hold a company's assets on trust for the company for the purposes of, *eg*, limitation periods: see *Burnden Holdings (UK) Ltd v Fielding* [2018] 2 WLR 885 at [16], noting the practice of using corporate structures to hold trust property, for which veil-piercing might be appropriate. A trust also does not arise simply on the creation of security such as an equitable mortgage: *MKC Associates Co Ltd v Kabushiki Kaisha Honjin* [2017] SGHC 317 at [143].

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Teck v Credit Suisse AG, Singapore Branch.[32] While he recognised that traditional cases of piercing the veil were about imposing liability on controllers of the company, he thought that it might be possible for the corporate veil to be pierced for the benefit of those controllers. This case involved a plaintiff who tried to sue a financial adviser for losses incurred by him for what he claimed were breaches of the tortious duty of care owed to him personally. The financial adviser sought to strike out the plaintiff's claim on the ground that it had a contractual relationship not with the plaintiff but a trust company which the plaintiff fully controlled (as well as on grounds of reflective loss, exceptions to which were noted by the judge to be wider under Singapore law,[33] for which see below).[34] In dismissing the bank adviser's appeal against the Registrar's decision not to strike out the claim, Abdullah JC said:[35]

> It is inappropriate to strike out an action that contains a point of law which requires serious argument. However, if the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question (see *Singapore Civil Procedure* at para 18/19/6). In my view, the issue of 'reverse piercing' does require serious argument, and is certainly not *unarguable* and *unsustainable*. This is an issue better resolved at another forum. Thus, I am also not inclined to strike out the *alter ego* averment on the basis that it is an impermissible attempt at 'reverse piercing' the corporate veil. [emphasis in original]

11 In contrast, Ramesh J in *Salgaocar* drew a distinction between "insider reverse piercing" and "outsider reverse piercing".[36] In the former, it is the shareholder who invites the court to disregard the separate legal personality of the company. For outsider reverse piercing, however, a third party invites the court to disregard the separate legal personality of the company and to hold the company liable for the shareholder's obligations. The last category of corporate veil-piercing identified by Ramesh J is standard piercing, where a third party invites the court to disregard the separate legal personality of the company and to hold the shareholder liable for the company's obligations.

32 [2015] SGHC 52.

33 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2015] SGHC 52 at [30].

34 See paras 18–20 below.

35 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2015] SGHC 52 at [63].

36 See *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva* [2018] SGHC 24 at [47], referring to Jeff H Y Chan, "Should 'Reverse Piercing' of the Corporate Veil Be Introduced into English Law?" (2014) 35 *The Company Lawyer* 163 and Gregory S Crespi, "The Reverse Pierce Doctrine: Applying Appropriate Standards" (1990–1991) 16 J Corp L 33 at 37.

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12 The court held that standard piercing and outsider reverse piercing are both available under Singapore law, but that insider reverse piercing is not. Ramesh J said:[37]

> Where one chooses to conduct one's affairs using a company, one takes advantage of the independent legal status of the company and the consequences that flow from that, including the fact that the property of the company does not belong to the shareholder and *vice versa*. It did not seem correct as a matter of principle that, having chosen to claim the benefits of separate legal personality, a shareholder could then avoid the disadvantages of the same by inviting the court to allow insider reverse piercing.

13 His decision was based on the following grounds. First, reverse piercing is unsupported by authority. The court cited two English cases in which reverse veil-piercing claims were rejected: *Macaura v Northern Assurance Co, Ltd*[38] ("*Macaura*") and *Tunstall v Steigmann*.[39] The court noted that there were no Singapore authorities which expressly endorsed the concept. The position in the US, where reverse piercing claims have been allowed (two Minnesota cases were cited), was distinguished on the basis that those cases concerned statutory provisions which policy rationale allowed for reverse piercing, and because Minnesota law (in the US, corporate law is a matter of state and not federal law) adopted a broader and more flexible philosophy than English and Singapore law toward when a company's separate legal personality should be disregarded.[40]

14 Second, reverse piercing is contrary to the underlying rationale for piercing the corporate veil. As elucidated in *Prest* and *Beyonics*, this rationale is to prevent the company's controllers from abusing the separate legal personality of the company to the detriment of third parties. In cases of reverse piercing, however, there is no recognised abuse of the corporate form, as it is the shareholder who seeks to avoid the strictures of separate legal personality. To disregard the separate legal identity of the company in such circumstances would not further the imperative of avoiding abuses of the corporate form, but would instead allow the shareholder to enjoy the benefits that flow from the separate legal personality of the company without any of its corresponding disadvantages.

15 Third and relatedly, it is unnecessary to pierce the corporate veil in such cases because there are other legal means available to the shareholder. These include the commencement of derivative action on

37 *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva* [2018] SGHC 24 at [74].
38 [1925] AC 619.
39 [1962] 2 QB 593.
40 *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva* [2018] SGHC 24 at [68].

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behalf of the company, or reliance on trust principles, as seen in the *De La Sala* case. The High Court adopted the refrain in *Prest* that "if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course".[41]

16 The court recognised, however, that it may be possible, in a rare situation and depending on the interpretation of the relevant statute, to invoke a statutory provision as the basis of a reverse piercing claim. Unfortunately, no example of such a Singapore statutory provision was given in the grounds of decision. Such an approach would explain previously difficult cases from England that were harder to explain on traditional veil-piercing grounds (that were decided on their merits) like *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*.[42] This was an example of removing asset partitioning between a company and its shareholders, and this succeeded to the benefit of the holding company, as it was treated as owners of premises in fact owned by its subsidiary for the purposes of compensation for disturbance of its business. To the same effect is *Smith, Stone & Knight Ltd v Birmingham Corp*,[43] where the court lifted the corporate veil of a subsidiary that was only a tenant on premises that were compulsorily acquired by the Government. This was to allow the parent company, which owned those premises, to obtain compensation as such compensation was only given to owner-occupiers. Both could be seen by the courts in Singapore in light of *Salgaocar* as cases based entirely on the constituent statutes that provided for compensation on the acquisition of property.

IV. Implications of *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva* and *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*

17 Some situations in which the *Salgaocar* rejection of reverse veil-piercing would be relevant, include those in Parts A–C below.[44]

A. Actions concerning groups of companies or joint venture companies

18 A shareholder or a parent company cannot rely on reverse veil-piercing to pursue claims for losses suffered by its subsidiaries, but must establish that it has suffered its own independent loss. Such

41 *Jhaveri Darsan Jitendra v Salgaocar Anil Vassudeva* [2018] SGHC 24, referring to *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [35], *per* Lord Sumption.
42 (1976) 1 WLR 852.
43 [1939] 4 All ER 116.
44 See paras 18–26 below.

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independent loss could be by way of direct loss of investment or overpayment for shares in the company/subsidiary. It should be remembered in this context that Singapore law also generally precludes shareholder claims for loss in the form of a decline in the value of the shareholding in the company, on the basis that such loss is merely a reflection of the loss suffered by the company ("the no-reflective loss principle"). The Court of Appeal in *Townsing Henry George v Jenton Overseas Investment Pte Ltd*[45] ("*Townsing*") adopted this idea which was in a sense revived by the House of Lords in *Johnson v Gore Wood & Co*[46] ("*Johnson*"). In *Townsing*,[47] Chan Sek Keong CJ (as his Honour then was) acknowledged that its origins were from *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*.[48] While personal actions by shareholders are outside the ambit of the proper plaintiff rule in *Foss v Harbottle*,[49] and may not be a true exception as such,[50] in order to prevent the proper plaintiff rule being circumvented, *Johnson* stated that a shareholder with a personal claim is barred from claiming a loss that is reflective of the company's loss. In *Koh Kim Teck*, however, we have seen that Abdullah JC stated that the exceptions in Singapore recognised by the Court of Appeal in *Townsing* were perhaps wider than in England (specifically in that case, the British Virgin Islands, where the trust company which the plaintiff shareholder wholly owned was incorporated).[51]

19 In *Townsing*, the liquidators of a holding company sued its director for breach of fiduciary duty in causing loss to a wholly owned subsidiary (where he was also ultimately the sole director). While there was no doubt that the holding company had a personal right of action against the director for a duty owed to it, and not just one derived from its subsidiary, the Court of Appeal thought that the no-reflective loss principle applied to the claim by the holding company. The starting point is that the subsidiary should have sued for its losses directly. It held, however, that the holding company's claim there was not barred as the director had not pleaded that it was simply reflective of the subsidiary's claim. This is because the Court of Appeal thought that failure to make such a plea denied the holding company a chance to bring itself into one of the existing exceptions accepted by the English

45 [2007] 2 SLR(R) 597 at [69]–[70].
46 [2002] 2 AC 1; see also Charles Mitchell, "Shareholders' Claims for Reflective Loss" (2004) 120 LQR 457.
47 *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597.
48 [1982] Ch 204 at 222–223.
49 (1843) 2 Hare 461; (1843) 67 ER 189.
50 Hans Tjio, Pearlie Koh & Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at 425.
51 *Koh Kim Teck v Credit Suisse AG, Singapore Branch* [2015] SGHC 52 at [30].

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courts.[52] These were, namely, where the company suffers the loss but for some reason has no cause of action to recover it and where the shareholder suffers a loss that is separate and distinct from the company's loss that is caused by the breach of a duty owed independently to it. Further, Chan CJ said that the holding company could have given an undertaking to the court, binding on the subsidiary company, given that it was wholly owned, that the latter would not seek double recovery. This displays the Singapore courts' more pragmatic approach allowing the shareholders rather than the company to sue even where it sees that the loss in the value of shares is reflective of the loss in the value of the assets of the corporation.

20 Given the no-reflective loss principle, even with the broader exceptions in Singapore, and the clear rejection of reverse veil-piercing in Singapore, it is all the more important for parties involved in corporate acquisitions or joint venture arrangements to consider the inclusion of "deeming" clauses by which the purchaser or joint venture party would be deemed to have suffered a loss equal to the loss suffered by the target or joint venture company. This is because the company suffering the loss is, while a separate entity, really a legal fiction ("artificial construct", *per* Chan CJ in *Townsing*)[53] and that loss would immediately impact on its shareholders (and further up the group structure so long as the relevant shareholders are themselves companies).

B. Insurance actions

21 *Salgaocar* makes clear that a shareholder will be unable to rely on reverse piercing to recover under a policy which provides for coverage only for the company, or in respect of losses properly suffered by the company rather than the shareholder, even if the company is wholly owned by the shareholder. Ramesh J relies on the famous House of Lords case of *Macaura v Northern Assurance Co, Ltd*[54] ("*Macaura*") for this proposition. There, it was held that the insurance of an owner of at timber business did not cover the timber that was transferred over to a company that he almost entirely controlled. He did not have an insurable interest in that timber as he had no legal or equitable interest in the company's property. In contrast, it has more recently been

52 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 94–95, *per* Lord Bingham and 121, *per* Lord Millett. In *Giles v Rhind* [2003] Ch 618, the English Court of Appeal suggested that *Johnson v Gore Wood & Co* does not bar a shareholder suit if the company, because of the wrongdoer's breach in which it diverts company assets, was unable to provide security for costs and had to compromise its action.

53 *Townsing Henry George v Jenton Overseas Investment Pte Ltd* [2007] 2 SLR(R) 597 at [77].

54 *Macaura v Northern Assurance Co, Ltd* [1925] AC 619.

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held by the Supreme Court of Canada in *Kosmopoulos v Constitution Insurance Co of Canada*[55] that a shareholder who owned all the shares of a company would have an insurable interest in the company's property based on the "factual expectancy test"[56] rather than proprietary test applicable there. It should also be seen, however, that this does not involve piercing the veil and, in fact, the Canadian Supreme Court expressly rejected that argument, as well as one based on bailment. Rather, the decision recognises that the shareholder has a financial or economic interest in the assets of the company. Further, while *Macaura* is still good law both in company and insurance law in Singapore and England, John Birds has said, "a shareholder can insure his shares against any loss in value due to the failure of an enterprise".[57] Similarly, *MacGillavray on Insurance Law*[58] states that one can "insure not the property but the capital which he has staked on the adventure and the profits which he expects to derive from his investment".[59] Both cite the old decision of *Wilson v Jones*[60] for this proposition, which shows that the position has always been more nuanced than commonly assumed.

22 In such situations, what occurs is not some form of reverse veil-piercing but simply a recognition that the shareholder, who does not have a legal or equitable interest in the assets of the company, still has a financial or an economic interest in those assets. The position at common law remains that a shareholder cannot disregard the company's separate legal personality in order to benefit from the company's claim against a third party. But in some situations, even with the veil intact, the shareholder can be seen to have some contextual interest in those assets or claims.

C. Property actions

23 A shareholder will be unable to rely on reverse piercing to assert proprietary rights in assets held by the company, unless it is able to establish that the property rights are vested in it personally such as by way of trust. We have seen how a resulting trust could be imprinted in *De La Sala* even if that was not for the immediate benefit of the shareholder but for two other companies which had earlier funded the

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55 [1987] 1 SCR 2.

56 Relying on another test proposed by the House of Lords in *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 269; 127 ER 630 which was itself actually relied on in *Macaura v Northern Assurance Co, Ltd* [1925] AC 619.

57 John Birds, *Bird's Modern Insurance Law* (Sweet & Maxwell, 10th Ed, 2016) at p 63.

58 John Birds, Ben Lynch & Simon Paul, *MacGillivray on Insurance Law* (Sweet & Maxwell, 13th Ed, 2017).

59 John Birds, Ben Lynch & Simon Paul, *MacGillivray on Insurance Law* (Sweet & Maxwell, 13th Ed, 2017) at para 1-127.

60 (1867) LR 2 Ex 139.

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acquisition of the relevant companies' assets before transferring them over without consideration. In these situations, the veil is in fact respected as the various corporate actors are seen to be separate entities co-existing in a tripartite situation, with all the other complexity that entails. The *De La Sala* saga has not ended in that regard, as the two beneficiary companies are in turn owned by the appellant (the "putative beneficial owner" of the relevant companies), his siblings and his mother's estate. The Court of Appeal did not, however, determine what their shares were in these earlier companies. The court did, however, provide very useful guidance on the nature of a beneficial interest even had the "putative beneficial owner" succeeded in his claim to such. Andrew Phang Boon Leong JA stated:[61]

> It is for this reason that beneficial 'ownership' has been described as 'a right against a right', *ie*, a right to constrain or control the way another person exercises *his* right to deal with a thing, rather than a right against the thing itself: see Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1. [emphasis in original]

24 Consequently, the decisions in *Salgaocar* and *De La Sala* reinforce the position that the shareholder must establish its independent entitlement to the rights it seeks to assert, and that entitlement may not necessarily amount to a right to simply remove assets from a company without compliance with further legal or equitable formalities. Unless specifically provided for by statute, the shareholder will also find no assistance in the principle of veil-piercing. This would be consistent with the suggestion made that courts in the US recharacterise or ought to recharacterise a transaction when it "thwarts or significantly impairs legislative policies" or "has material improprieties and causes either manifest net harm or intentional externalities".[62] As Ramesh J noted, the latter would only be applicable when third parties are affected and seek either a form of outsider reverse piercing or standard piercing. Insider reverse piercing can only fall within the first category, and is more an issue of statutory interpretation.

25 Even here, the trick may be to respect the existence of the entity but at the same time to adjust the legal incidents that follow from this in order to achieve justice between the parties. In this context, the judgment of Chan J (as he then was) in *Pek Seng Co Pte Ltd v Low Tin Kee*[63] is highly instructive. Here, a wholly-owned subsidiary's assets were subject to a *Mareva* injunction that had been imposed on its holding

61 *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA* [2018] SGCA 16 at [145]; see also *Akers v Samba Financial Group* [2017] AC 424 at [46].
62 Steven L Schwarcz, "Collapsing Corporate Structures: Resolving the Tension between Form and Substance" (2004) 60 *Business Lawyer* 109 at 143.
63 [1989] 2 SLR(R) 314.

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company, as there was a real risk of dissipation of those assets. It was not a case of a holding company having to assume a subsidiary's debts, the "runt of the litter"[64] problem that usually troubles law students. Chan J said, however:[65]

> A shareholder may have no direct interest in the assets of the company of which he is a shareholder. But, in my view, it would fly in the face of reality and common sense for a court to hold, for the purpose of a Mareva injunction, that the sole beneficial owner of the shares in a company is not indirectly the owner of the net assets of the company …

26 Guided, however, by counsels' objection to fully lifting the corporate veil from the perspective of the subsidiary's creditors,[66] Chan J held that this did not mean that the subsidiary's assets fully belonged to the holding company as such and allowed the injunction on the basis that the parties had agreed that the subsidiary be allowed to carry on business and to pay ordinary debts and expenses in the normal course of business.[67] The bifurcated ownership/property structure was not removed in this instance, nor the veil fully lifted, as aligning the claim of the shareholder with the company's assets would have prejudiced the company's own creditors. Instead, entity shielding was weakened[68] in order to provide a solution in the particular context of the case. On Ramesh J's classification in *Salgaocar*, this was for the purposes of outsider reverse piercing merging the company's assets with the shareholder rather than a standard piercing case removing a shareholder's limited liability.

V. Conclusion

27 The position appears to be that in Singapore, in perhaps declining order of equivocation:

(a) A shareholder, even a sole shareholder, does not have a legal or equitable proprietary interest in the assets of the company unless the veil is pierced.

(b) The veil can be pierced if the controller set up the company and transferred his assets to the company to evade his existing liabilities so that creditors can claim against company and not just the controller.

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64 *Re Southard & Co Ltd* [1979] 3 All ER 556.
65 *Pek Seng Co Pte Ltd v Low Tin Kee* [1989] 2 SLR(R) 314 at [13].
66 *Pek Seng Co Pte Ltd v Low Tin Kee* [1989] 2 SLR(R) 314 at [7].
67 *Pek Seng Co Pte Ltd v Low Tin Kee* [1989] 2 SLR(R) 314 at [14].
68 See Henry Hansmann, Reinier Kraakman & Richard Squire, "Law and the Rise of the Firm" (2006) 119 Harv L Rev 1333 about the different levels of entity shielding.

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(c) The veil can be pierced if the company is just an *alter ego*, sham, façade or device of the controller so that any claims against the company can be made against the controller although this requires more involved arguments.

(d) The veil cannot be pierced except in exceptional situations based on statutory interpretation where the controller seeks to bring claims in his own name that originally belonged to the company on the basis that he and the company are one and the same.

(e) In some situations, a shareholder can be seen to have a financial, as opposed to a proprietary, interest in the assets of the company but this depends very much on the context. Here, the veil is not pierced, but courts may be lifting or peeping under it.[69]

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69 Lord Sumption did not draw a distinction between veil-piercing and lifting the veil. Similarly, in *VTB Capital plc v Nutritek International Corp* [2013] 2 WLR 398, Lord Neuberger thought that it was "unnecessary to decide whether, in truth, there is a difference in this context between 'piercing' and 'lifting' the corporate veil": at [119]. Subsequently, in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, however, Lord Neuberger appeared to link lifting with concealment cases and piercing with evasion, with only the latter interfering with the company's separate legal personality: at [61]; *cf* S Ottolenghi, "From Peeping behind the Corporate Veil to Ignoring It Completely" (1990) 53 *The Modern Law Review* 338.

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