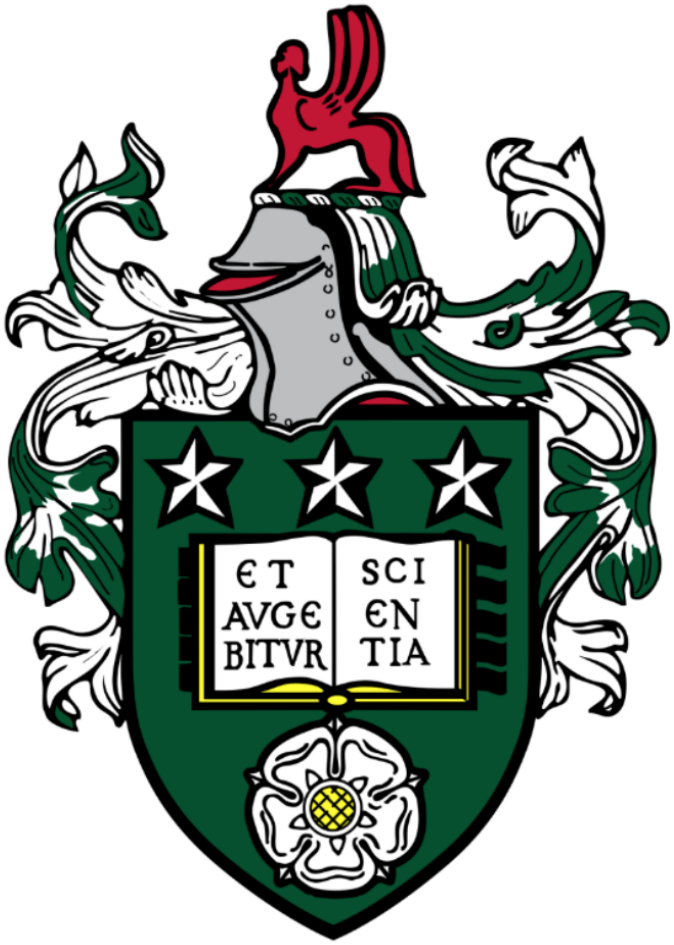
A CRITICIAL EVALUATION OF LIMITED LIABILITY AND SEPARATE LEGAL PERSONALITY AND THEIR ROLE IN FACILITATING AND PERPETUATING CORPORATE IRRESPONSIBILITY.



The University of Leeds

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Abstract

Corporate irresponsibility, arising from abuse of limited liability and separate legal personality, has prevailed as one of the most notorious issues in corporate law. Its wide-reaching impacts on society, evidence its pertinency and why it continues to be a heavily saturated academic area. Ranging from health scandals, stemming from dangerous products or sites, to irresponsible conduct, causing job losses and unfair shortfall to creditors, the vast effects are undeniable. Therefore, this dissertation aims to critically evaluate the role of limited liability and separate legal personality in facilitating and perpetuating corporate irresponsibility. This will be ascertained by, firstly, establishing the benefits provided by the concepts, to then analyse the exploitation of the exposed opportunistic element, through investigating the ramifications to both contract and tort creditors. It will be concluded that limited liability and separate legal personality play a significant role in facilitating and perpetuating corporate irresponsibility. It will be argued that this is permitted with limited interference, due to the common approach to maintain the certainty of the concepts, by restricting measures that impose liability. This view, among other factors, has constrained the effectiveness of veil piercing and lifting, tortious liability and agency, in tackling such behaviour. Thus, it will be asserted that reform is necessary, with tort creditors requiring the most attention. It will be submitted that, an amendment of the wrongful trading provision and the introduction of enterprise liability, are more appropriate measures to mitigate corporate irresponsibility, emanating from abuse of limited liability and separate legal personality.

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Introduction

The concepts of limited liability and separate legal personality are widely considered to be the bedrock principles of corporate law.[1] Their importance is thought to be akin to the steam engine and the discovery of electricity;[2] evidenced by their formation of the essential foundations for what we know a company to be and successfully paving the way for a stable security market.[3] The attractive ability to protect investors against ordinary business failures is vital to the encouragement of entrepreneurial activity.[4] This fundamentally works to explain their longevity and strong support. However, this should not mean they are to be viewed as unproblematic or even an economic necessity.[5] Corporate irresponsibility, arising from abuse of limited liability and separate legal personality, continues to be a pressing issue in corporate law. With the steady increase of incorporated companies, given the ease and low cost of doing so, recent years have seen a surge in the misuse of companies.[6] Thus, contribution to research surrounding how limited liability and separate legal personality have facilitated and perpetuated corporate irresponsibility is imperative, due to its overarching impact on society. There has been a growing consensus in public opinion, seeking to hold corporations accountable for irresponsibility, in wake of corporate scandals inflicting detrimental costs to society; many of which involve large corporate groups.[7]

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[1] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771.

[2] Ron Harris, 'A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing' (2020) 16 Journal of Institutional Economics 643.

[3] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 92.

[4] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1341, 1342.

[5] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837, 839.

[6] Department for Business, Energy & Industrial Strategy, *Corporate Transparency and Register Reform* (White Paper, Cp 638, 2022) 12.

[7] See, for example, Works and Pensions Committee, 'Leadership failures and personal greed led to collapse of BHS' (*UK Parliament*, 25 July 2016) < https://committees.parliament.uk/committee/164/work-and-pensions-committee/news/98027/leadership-failures-and-personal-greed-led-to-collapse-of-bhs/> accessed 3 April 2024; Basia Spalek, 'Corporate Harm and Victimisation: The Case of Farepak' (2008) 71 Criminal Justice Matters 8, 9.

Therefore, this dissertation aims to critically evaluate limited liability and separate legal personality, to ultimately illustrate how they have provided a means for corporate irresponsibility to thrive with limited interference. Thus, it is contended that the current measures available to courts to mitigate this behaviour are insufficient, partly due to the lingering influence of *Salomon v Salomon*.[8] Accordingly, it will be submitted that reform is required. Conclusions are drawn through analysis of close corporations and corporate groups, omitting public companies due to both the constraints of this dissertation and as they typically face fewer criticisms.[9] Notably, the term close corporation here, refers to private companies in which the shareholders also act as directors.

To successfully answer this research objective, this dissertation adopts a doctrinal approach, by analysing a plethora of academic literature, case law and legislation. The suggestions of reform incorporate principles of justice as well as doctrinal research to relay how the law can be improved. This area contains an abundance of literature and research, due to its pertinency, which this dissertation intends to contribute to. Firstly, chapter one will provide an overview of both limited liability and separate legal personality, along with the core measures available to alleviate corporate irresponsibility, namely, veil piercing and lifting, tortious liability and agency. This sets the necessary foundations for chapter two, which analyses how the concepts have permitted irresponsibility and how it remains prevalent. Subsequently discussing effects to both contract and tort creditors. Followed by an evaluation of the identified ways to mitigate abuse. Finally, chapter three suggests reform proposals for each type of corporation, with consideration for balancing the certainty of limited liability and separate legal personality against creditor protection. It is therefore submitted, that

[8] *Salomon v Salomon* [1897] A.C. 22.

[9] See, for example, Daisuke Ikuta, 'The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler v. Cape Plc and Thompson v. Renwick Group Plc' (2017) 6 UCL Journal of Law and Jurisprudence 60, 68; David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1317; Yatin Arora, 'What Went Wrong With Wrongful Trading' (2022) 43 Business Law Review 164, 166.

the wrongful trading provision should be amended,[10] to target abuse within close corporations, and the introduction of enterprise liability for corporate groups, confined to mass torts, human rights violations and environmental harms.

[10] Insolvency Act 1986, s 214.

Chapter One: Overview of Each Concept and the Measures to Tackle Corporate Irresponsibility

Introduction

In order to thoroughly evaluate limited liability and separate legal personality, to assess their inherent role in generating corporate irresponsibility, it is necessary to firstly provide an overview of the current law. Therefore, this chapter will set out the origins of each concept and the three measures available to courts to tackle consequential abuse.

Limited Liability

This section will relay what limited liability is and its evolution to modern day, with the inclusion of its benefits, to enhance the explanation of its desirability. The definition of limited liability is contained in the Companies Act 2006 section 3, which explains that the liability of a company's members is limited by either their shares or by guarantee.[11] This is affirmed by the Insolvency Act 1986 section 74(2)(d), which states, in a company limited by shares, liability will not exceed the amount of their shares.[12] This concept has seemingly existed since the early origins of corporations in some degree. Historically, the lack of statutory assurance resulted in a form of the concept being incorporated contractually, either by 'clauses in insurance policies',[13] or written into the Articles of Association.[14] However, *Hallett v Dowdall*,[15] highlighted the question of the legality around a clause attempting to limit liability. The judges held the clause to be void, declaring it 'an attempt by the parties to do what by the law of England they cannot'.[16] Despite the ruling deeming the clauses invalid, it is thought

[11] Companies Act 2006, s 3(1)(2)(3)(4).
[12] Insolvency Act 1986, s 74(2)(d).
[13] Ron Harris, 'A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing' (2020) 16 Journal of Institutional Economics 643, 651.
[14] Alexander Fallis, 'Evolution of British business forms: a historical perspective' (2017) < https://www.icaew.com/-/media/corporate/files/technical/ethics/evolution-of-british-business-forms.ashx> accessed 15 November 2023.
[15] *Hallett v Dowdall* [1852] 18 Q.B 2.
[16] Ibid, 118 E.R. 1 [33].

this ‘forced Parliament’s hand’ in providing statutory footing, with the Limited Liability Act 1855 being passed a mere 3 years later.[17]

This acknowledgment is vital for understanding the importance of limited liability, particularly as the concept is known to be an indispensable part of the development of modern economic systems and markets.[18] As investors are not liable for more than they invest, it fundamentally facilitated organised security markets and made them possible.[19] The encouragement of investment, alongside the incentive that investors do not need to be involved in management, is undoubtedly beneficial for economic growth.[20] This separation of ownership and control allows investors of all backgrounds to invest in differing companies. Some may have no knowledge of the business and how it works but are assured that those in management are experts and aim to make the best decisions for the company; hence why the availability of separate ownership and control is desirable. This recognition is essential to understand limited liability as a whole,[21] as it explains the significance of the concept, by demonstrating the derived substantial economic benefits. Furthermore, the underlying reason for its success is the shifting of risk away from investors and onto creditors.[22] Mitigation of risk encourages investment with the assurance that personal assets are not vulnerable. It also increases diversification by permitting individuals to invest fractions of their savings in different companies ‘without risking disastrous loss’ in cases of insolvency.[23] Overall, reinforcing the positive attributes of limited liability.

[17] Limited Liability Act 1855.
[18] Martin Petrin and Barnali Choudhury, ‘Group Company Liability’ (2018) 19 European Business Organization Law Review 771, 780.
[19] Frank H Easterbrook and Daniel R Fischel, ‘Limited Liability and the Corporation’ (1985) 52 The University of Chicago Law Review 89, 92.
[20] Phillip I. Blumberg, "Limited Liability and Corporate Groups" (1986) 11(4) J. Corp. L. 573, 604.
[21] Frank H Easterbrook and Daniel R Fischel, ‘Limited Liability and the Corporation’ (1985) 52 The University of Chicago Law Review 89, 92.
[22] Henry G Manne, ‘Our Two Corporation Systems: Law and Economics’ (1967) 53 Virginia Law Review 259, 262.
[23] Ibid.

Separate Legal Personality

This section will outline the doctrine of separate legal personality, focusing on the case of *Salomon v Salomon.*[24] Additionally, its origins prior to this will be briefly discussed, as well as how it works in practice.

The current definition of separate legal personality is contained in section 16 of the Companies Act 2006, namely as a 'body corporate'.[25] This notion is explained in the Key Terms section, which defines words in the Act with a specific meaning. It states: 'a "legal entity" is a body corporate or a firm that is a legal person under the law by which it is governed',[26] with the Explanatory Notes further specifying it is 'distinct from the people who own it and the people who manage it'.[27] However, this concept is not new, nor created from statute. It has been a continued aspect of corporate law, even prior to the emergence of limited liability, highlighting its deep-rooted origins.[28] It is not only a long-standing principle within English law, but categorically vital in many other jurisdictions, which displays its significance.[29]

The monumental case of *Salomon* is essential in the discussion of separate legal personality. Salomon had a prosperous business as a leather merchant for many years, and then incorporated a company with himself, his wife, daughter and four sons as shareholders. His family members only retained one share each. This was compliant with the statutory regulations at the time. Later, the company became insolvent and went into liquidation.[30] The case was appealed to the House of Lords, although, the previous decisions cannot be ignored, as they hold significance for illustrating the differing views at the time. At first instance, the High Court ruled in favour of the creditors. They provided that the company was a mere 'alias' of Salomon, with its fundamental intention being to retain profits whilst being insulated from risk. Further

[24] *Salomon v Salomon* [1897] A.C. 22.
[25] Companies Act 2006, s 16.
[26] Ibid, s 790C(5).
[27] Ibid, Explanatory Notes s 16.
[28] Phillip I. Blumberg, "Limited Liability and Corporate Groups" (1986) 11(4) J. Corp. L. 573, 577.
[29] Ernest Lim, 'Of "Landmark" or "Leading" Cases: Salomon's Challenge' (2014) 41 Journal of Law and Society 523, 530.
[30] *Salomon v Salomon* [1897] A.C. 22 [41].

reinforcing the 'company was an agent for him', thus he was entitled to pay.[31] Similarly, the Court of Appeal agreed, describing the company as a 'mere scheme to enable him to carry on business ... with limited liability contrary to the true intent and meaning of the Companies Act 1862'.[32] However, a successful appeal to the House of Lords provided the landmark ruling to reverse the decision. Lord Herschell emphasised that, so long as the statutory requirements are complied with, the company is valid.[33] Thus, displaying the adoption of a 'literal interpretation', declaring that, provided the formalities are met, the benefits of an incorporated company apply.[34]

Salomon is almost universally considered the most significant case in corporate law, as well as the 'leading authority on the rule of separate legal personality'.[35] This is because it importantly legitimised one-man companies and consequently, corporate groups.[36] Its rigid application has remained prevalent since it was decided; for example, *Prest v Petrodel Resources Ltd* emphasised that *Salomon* has 'stood impeached for over a century' and must be at the forefront of deliberations on the corporate form.[37] This demonstrates how subsequent courts are reluctant to disregard limited liability and separate legal personality.[38] Ultimately asserting a seemingly absolute nature of the corporate form, which retains a high threshold to be revoked.

Moreover, the implications of incorporating a company are necessary to understand separate legal personality, and how it works in practice. Upon incorporation, the company gains immortality, no longer depending on those who operate it. This is core to the concept as this allows a company to retain many attributes of a real person.[39]

[31] *Salomon v Salomon* [1897] A.C. 22, [42].
[32] Ibid.
[33] Ibid, [44] [45] (Laws LH).
[34] Ernest Lim, 'Of "Landmark" or "Leading" Cases: Salomon's Challenge' (2014) 41 Journal of Law and Society 523, 534.
[35] Ibid, 533.
[36] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 774.
[37] *Prest v Petrodel Resources Ltd* [2013] UKSC 34 [66].
[38] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 774.
[39] Leonard W Hein, 'The British Business Company: Its Origins and Its Control' (1963) 15 The University of Toronto Law Journal 134, 139.

Examples of these include the right to hold property, and to sue and be sued in its own name, utterly distinct from its members.[40] Thus, the vast nature of separate legal personality is clear; simultaneously conveying its desirability and importance to corporate law.

Mutually Exclusive Relationship

Despite individual descriptions and being fundamentally distinct, limited liability and separate legal personality are inherently 'twin concepts'.[41] The idea that shareholders are not liable for company debts is enabled by the idea that a company is its own entity, capable of owning debts. In modern day, their mutual exclusivity is universally recognised, with them together forming the 'corporate shield'.[42] This encapsulates the protection afforded to shareholders by their liability being limited to their initial investment, stemming from the basis that the company is its own entity with its own debts. This corporate shield is the focus of this dissertation, as the numerous issues it generates will be explored in relation to it facilitating and perpetuating corporate irresponsibility.

Furthermore, the corporate shield applies equally and as rigidly to corporate groups.[43] These are 'business enterprises which operate using a structure involving parent companies and subsidiaries'.[44] The term subsidiary is defined in section 1159 of the Companies Act.[45] It states that a company is a subsidiary if the other company (parent) either, holds majority of the voting rights, has the right to appoint or remove a majority of its board of directors, retains the power to exercise significant control over it, is a member of it, or it is wholly owned.[46] Additionally, Bob Tricker usefully

[40] Leonard W Hein, 'The British Business Company: Its Origins and Its Control' (1963) 15 The University of Toronto Law Journal 134, 138.
[41] Christopher C Nicholls, 'Piercing the Corporate Veil and the "Pure Form" of the Corporation as Financial Innovation' (2008) 46 Canadian Business Law Journal 233, 236.
[42] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 772.
[43] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837, 848.
[44] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 773.
[45] Companies Act 2006, s1159.
[46] Ibid, s1159(1)(a)(b)(c), (2).

summarised, that corporate groups are 'massive pyramids of wholly or partly owned subsidiaries held at many levels, with each member company incorporated as a legal entity'.[47] This entails that a parent company is typically not liable for the debts of its subsidiaries, even when its assets are insufficient.[48] Thus, it is easy to infer the problems of corporate irresponsibility arising from this.

Measures to Prevent Corporate Irresponsibility

The legitimisation of 'one-man' companies seemingly led to the law generally viewing the corporate form as absolute.[49] However, this is untrue. The severity of abuse compelled courts to forge a limited number of ways to impose personal liability.[50] Namely, these are, veil piercing and lifting, tortious liability, and agency.

i) Piercing and Lifting the Veil

Veil piercing can be described as a 'judicial willingness to impose personal liability on shareholders',[51] by looking for specific facts which allow them to disregard the corporate veil.[52] Notably the notion of the 'corporate veil' is utilised to illustrate the metaphorical legal protection provided by the corporate shield; piercing this essentially suspends 'legal reality'.[53] By doing so, the court provides relief for creditors, who are then able to claim against shareholders' personal assets.[54] The doctrine of

[47] Bob Tricker, 'Re-Inventing the Limited Liability Company' (2019) 19 Corporate Governance: an International Review 384.
[48] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771.
[49] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 109.
[50] Marc Moore, '"A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of Salomon v Salomon' (2006) MAR J.B.L. 180, 181.
[51] Christopher C Nicholls, 'Piercing the Corporate Veil and the "Pure Form" of the Corporation as Financial Innovation' (2008) 46 Canadian Business Law Journal 233, 235.
[52] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 772.
[53] Gregory Allen, 'To pierce or not to pierce? A doctrinal reappraisal of judicial responses to improper exploitation of the corporate form' (2018) 7 Journal of Business Law 559, 579.
[54] Stephen Bainbridge 'Abolishing Veil Piercing' (2001) 26 Journal of Corporation Law 479, 481.

veil piercing is universally recognised to retain uncertain foundations.[55] However, in *Prest v Petrodel Resources Ltd*, the Supreme Court attempted to establish coherence.[56]

The facts of *Prest* are not relevant, as the court did not rely on veil piercing, instead they addressed the issue in obiter. This attempted to define veil piercing and lifting and identified its availability to courts. Prior to *Prest*, various labels had been utilised to reference wrongdoing, such as 'facade' and 'sham'. The judges in *Prest* emphasised such labels are too ambiguous.[57] Thus, Lord Sumption distinguished two principles: the 'concealment and evasion principle'.[58] It was emphasised that the concealment principle does not comprise of veil piercing, rather looking behind it to reveal the true facts, previously concealed by the corporate shield. Conversely, the evasion principle allows the court to 'disregard the corporate veil if there is a legal right against the person in control of it…and separate legal personality will defeat the right or frustrate its enforcement'.[59] Furthermore, it was stated that only exceptional circumstances justify veil piercing, heavily implying that it is a remedy of last resort.[60] Consequently, it is clear the judges wished to curtail the use of veil piercing; however, they were careful not to abolish it entirely, relaying it will be justified to 'prevent abuse of corporate legal personality'. This reinforced that the ability to pierce the veil, despite being limited, 'is necessary if the law is not to be disarmed in the face of abuse'.[61]

Overall, despite confined restrictions on its use, veil piercing remains available to courts as a measure to prevent abuse of the corporate shield.

ii) Tortious Liability

[55] See, for example, Christopher C Nicholls, 'Piercing the Corporate Veil and the "Pure Form" of the Corporation as Financial Innovation' (2008) 46 Canadian Business Law Journal 233, 236.
[56] *Prest v Petrodel Resources Ltd* [2013] UKSC 34.
[57] Ibid, [28].
[58] Ibid.
[59] Ibid.
[60] Ibid, [42].
[61] Ibid, [484].

Tortious liability predominantly applies to corporate groups, with the leading case in the area being *Chandler v Cape Plc*.[62]

Chandler was an employee of a wholly owned subsidiary of Cape plc. There was a factory on site, with open sides, which produced asbestos. This asbestos migrated to where Chandler worked. Fifty years later, he contracted asbestosis, after the subsidiary was dissolved. He subsequently brought a claim against Cape plc, arguing they owed a duty of care to the employees of its subsidiaries.[63] Upon appeal to the Court of Appeal, a criterion was established for when liability could be imposed on a parent company for the health and safety of subsidiary employees.[64] These factors were stated as: '(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or should have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or should have known; and (4) the parent knew or should have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection'.[65] The fourth factor was expanded further, with the judges stating, that courts will look at the relationship broadly and examine past practices of the parent company to find if they previously intervened in the 'trading operations of the subsidiary'.[66] If these factors are satisfied, a parent company would owe a direct duty of care to the employees of subsidiaries.[67]

Although this ostensibly concerned veil piercing,[68] the court stressed that it did not. Relaying their rejection, the judges asserted 'the imposition of a duty of care does not "collapse the principle of limited liability" … there has been an assumption of

[62] *Chandler v Cape Plc* [2012] EWCA Civ 525.
[63] Ibid, 1 W.L.R. 3111.
[64] Ibid.
[65] Ibid, [3131].
[66] Ibid.
[67] Ibid, [3128].
[68] Nicholas Grier, 'Piercing the Corporate Veil*: Prest v Petrodel Resources Ltd*' (2014) 18 Edinburgh Law Review 275, 277.

responsibility without piercing the corporate veil'.[69] Evidently, instead of creating an exception, they utilised tort principles which are already well-established.

iii) Agency

When explaining the use of agency, there are two key cases: *FG Films Re*[70] and *Adams v Cape Industries Plc*.[71]

FG Films concerned an incorporated company, where an American citizen held majority shares. The company had no place of business, except from a registered office and did not employ staff. The British company had contracted to produce a film with an American company, in which the majority shareholder was president; the American company provided all necessary financing and facilities. Subsequently, the British company applied to the Board of Trade to register the film as British but was refused.[72] The court upheld this decision, stating that the British company was a mere agent of the American company. The judge further described the British company's involvement as 'colourable', as it existed purely to enable the film to qualify as British.[73] This discarded the corporate shield by finding an agency relationship, displaying the courts use of this measure to prevent illegitimate use of the corporate form.

However, *Adams* displayed the return to a narrower approach on the ability to find an agency relationship.[74] Cape, an English parent company, and its American subsidiaries, mined and marketed asbestos, which was sold to a factory in Texas. In 1974, the employees and ex-employees of the factory brought claims in Texas against Cape and others, for damages for personal injury due to exposure to asbestos dust. Following this, the victims attempted to enforce the US judgement in a UK court, conditional to proving that Cape was present in the US. The claimants made three arguments to

[69] *Chandler v Cape Plc* [2012] EWCA Civ 525, 1 W.LR. 3111 [3122].
[70] *Re FG (Films) Ltd* [1953] 1 W.L.R 483.
[71] *Adams v Cape Industries Plc* [1990] Ch. 433.
[72] *Re FG (Films) Ltd* [1953] 1 W.L.R 483 [484].
[73] Ibid, [486].
[74] *Adams v Cape Industries Plc* [1990] Ch. 433.

prove this, however only the first is relevant to agency. It was argued that the subsidiaries were agents for Cape, meaning Cape was present in the US via agency.[75] However, the court rejected this.[76] The judge cited several cases in which agency was considered, and the requirements thought necessary to find an agency relationship, such as *The Holstein*[77] and *F. & K. Jabbour v. Custodian of Israeli Absentee Property*.[78] The fundamental test in these cases, was whether the proposed agent could enter into contracts on behalf of the corporation, without their approval.[79] The judges in *Adams* agreed with this, stating that 'where no such authority exists', there is much greater difficulty in establishing an agency relationship.[80] Thus, illustrating the hugely limited grounds by which an agency relationship will be found. As corporate groups are unlikely to structure subsidiaries in such a way, as to explicitly allow them to enter contracts on the parent company's behalf, agency is rarely found.

Therefore, although the ability to find an agency relationship remains at the court's disposal, the extremely strict scope renders it practically obsolete, for attempts to mitigate corporate irresponsibility.

Conclusion:

The core concepts of limited liability and separate legal personality have been detailed, alongside their benefits; overall depicting how they jointly form the corporate shield. Additionally, the measures to prevent corporate irresponsibility and their applicability has been relayed to illustrate the corporate shield is not absolute. However, in the following chapter, the detrimental effect of the corporate shield will be analysed, rebutting many of the surface-level benefits, enhanced by the failure of the measures to prevent corporate irresponsibility.

[75] *Adams v Cape Industries Plc* [1990] Ch. 433, [435].
[76] Ibid, [544].
[77] *The Holstein* [1936] 2 All E.R. 1660.
[78] *F. & K. Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139.
[79] Ibid, [146].
[80] *Adams v Cape Industries Plc* [1990] Ch. 433 [529].

Chapter Two: Critique

Introduction:

Evidently, the corporate form emits numerous benefits and remains firmly cemented in corporate law. However, the very nature of the corporate form has inherently generated adverse opportunism that can be exploited.[81] This is known as the moral hazard problem, which encapsulates the incentive to transfer the cost of excessive risk-taking onto creditors.[82] This chapter will firstly analyse the role of *Salomon* in condoning corporate irresponsibility and its lasting influence. Followed by the detrimental effects to contract and tort creditors (also known as voluntary and involuntary creditors) – highlighting the exacerbation in corporate groups, particularly concerning tort creditors. Finally, it will be illustrated that the existing measures to find liability fail to mitigate irresponsibility.

Adverse effects of the corporate form

Limited liability and separate legal personality, as mentioned previously, form a protective shield around the personal assets of shareholders, making them almost untouchable to creditors. Whilst praised in relation to the protection against ordinary business failure, it quickly becomes problematic upon recognising that creditors also bear the costs associated with excessive risk-taking.[83] In close corporations, there is generally no separation of ownership and control.[84] Thus, shareholders tend to be involved in decision-making, as they are typically directors.[85] This creates issues, as their decisions can be influenced by the protection they receive from the corporate shield, perpetuating the moral hazard problem. Whereas, in corporate groups, abuse manifests as parent companies setting up subsidiaries, individually protected by the corporate shield, to engage in risky behaviour; circumventing liability for the parent.

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[81] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1343.
[82] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 104.
[83] Ibid, 91.
[84] Ibid, 110.
[85] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1314.

Accordingly, the way the corporate form is currently structured and interpreted, there is a compelling argument that irresponsibility is inbuilt, with adverse opportunism being institutionalised.[86] Therefore, this metaphorical shield has been deemed to hold a 'tyrannical sway'.[87] Although this depiction appears overly hyperbolic, through analysis of *Salomon* and the detrimental effects to creditors, its accuracy will be demonstrated.

i) Detrimental consequences arising from Salomon

The decision in *Salomon* has been described as 'calamitous', despite being legally sound.[88] This appropriate characterisation stems from the literal interpretation the judges adopted, which fundamentally 'failed to give effect to the intention of the legislature'.[89] Parliament did not intend for the corporate form to be utilised by partnerships and individual traders, despite liberal provisions within legislation at the time.[90] The lower court judgements rightly echoed this intention, as discussed in chapter one.[91] The apparent oversight of this by the House of Lords has been scrutinised.[92] Most significantly, Higgins stated, the court displayed 'jurisprudential ineptitude' by rejecting the clear intention of the legislature.[93] This critique finds merit upon recognising that the court essentially provided shareholders with a level of protection, 'over and above' that established in Parliament.[94] To support Higgins' cynicism, *Salomon* can be seen to have 'forestalled the legislative process' as, at the time of the case, there were already reform proposals to include one-man companies.

[86] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837, 838, 845.
[87] O Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 The Modern Law Review 54, 56.
[88] Ibid, 54.
[89] Ernest Lim, 'Of "Landmark" or "Leading" Cases: Salomon's Challenge' (2014) 41 Journal of Law and Society 523, 534.
[90] Paddy Ireland, 'The Rise of the Limited Company', (1984) 12 International Journal of the Sociology of Law, 239, 241.
[91] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837, 847.
[92] Ernest Lim, 'Of "Landmark" or "Leading" Cases: Salomon's Challenge' (2014) 41 Journal of Law and Society 523, 535.
[93] Patrick Farrel and Phillips Higgins, *The Law of Partnership in Australia and New Zealand* (Sydney: Law Book Co, 1963) 16.
[94] O Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 The Modern Law Review 54, 55.

Arguably, if the judgment had not provided confirmation on their legality, Parliament would have done so utilising the legislative process, imposing statutory measures to prevent abuse.[95] This works to emphasise that the House of Lords arguably overstepped by extending the corporate form to sole traders, as they should have waited for Parliament to initially decide this.

Moreover, *Salomon* set the 'laissez faire' attitude to deciding the legality of exploitations of the corporate form, which has been continuously followed since.[96] Its rigid application, detailed in chapter one, has widened the scope for opportunistic behaviour, further entrenching corporate irresponsibility.[97] Shareholders are generally aware the judiciary are hesitant to deviate from *Salomon*, allowing it to serve as almost a temptation to both single and group traders to conduct business as a limited company, when a partnership may have previously sufficed.[98] Unfortunately, this has resulted in what Paddy Ireland names a 'shareholder's paradise'.[99] Shareholders enjoy the protections of the corporate shield, being insulated from risk, whilst being able to abuse the ability to make harmful decisions, knowing that courts rarely allow creditors to reach personal assets; perpetuating the false generalisation that the law typically states the corporate form is absolute.[100]

The intention to uphold the *Salomon* principle regardless of economic or moral considerations,[101] has persisted in modern day.[102] This was shown in *Costello v*

[95] Ernest Lim, 'Of "Landmark" or "Leading" Cases: Salomon's Challenge' (2014) 41 Journal of Law and Society 523, 535; Rob McQueen 'Live without Salomon' (1999) 27 Federal Law Review 181, 183, 184.
[96] Marc Moore, '"A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of Salomon v Salomon' (2006) MAR J.B.L. 180, 181.
[97] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837, 848.
[98] O Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 The Modern Law Review 54, 55.
[99] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837, 848.
[100] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 109.
[101] Marc Moore, '"A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of Salomon v Salomon' (2006) MAR J.B.L. 180.
[102] Brenda Hannigan, *Company Law* (6th edn, Oxford University Press, 2021) 37.

MacDonald.[103] A couple created a company to enter a building contract with a construction company, in which they were the only shareholders and directors. The company became insolvent and could not pay the builders. Subsequently, the Court of Appeal held that an order for restitution against the couple could not be made. The reasoning was that it would undermine the contract, which was confined to the builders and the company, despite the benefit being conferred on the couple.[104]

Evidently, *Salomon* has had extensive ramifications.[105] It essentially sanctioned abuse of the opportunistic element within the corporate form and allowed shareholders to immunise themselves from personal liability,[106] whilst showing reluctance to protect creditors.[107] Thus, some justifiably believe the case to have encouraged fraud and ingrained corporate irresponsibility.[108]

ii) Contract creditors

Contract creditors are adversely impacted, yet retain an advantage, by willingly entering contracts with corporations and can investigate and bargain ex ante.[109] However, the overly broad protection of the corporate shield, increases the chances of excessively risky behaviour.[110] This has three crucial implications, which will be analysed consecutively.

Firstly, the benefit that limited liability reduces shareholder monitoring costs (so they are aware of each other's wealth in case of insolvency),[111] has merely shifted the

[103] *MacDonald Dickens & Macklin v Costello* [2011] 3 W.L.R. 1341.
[104] Ibid, [20]-[21].
[105] Ernest Lim, 'Of "Landmark" or "Leading" Cases: Salomon's Challenge' (2014) 41 Journal of Law and Society 523, 525.
[106] Marc Moore, '"A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of Salomon v Salomon' (2006) MAR J.B.L. 180, 182.
[107] Otto Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 The Modern Law Review 54, 55.
[108] Igho Lordson Dabor, 'Limited Liability: a pathway for corporate recklessness?' (PhD Thesis, University of Wolverhampton Law School, 2016) 140.
[109] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1314.
[110] Ibid, 1374.
[111] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 95.

burden onto creditors. As the corporate form extends protection to both opportunistic and good borrowers, Blumberg highlighted, the calculation of risk has been harmfully distorted.[112] This is because creditors must factor into the interest rate the probability that opportunistic behaviour may entail a transfer of risk, which they have not agreed to bear.[113] Thus, creditors must be proactive in investigating the creditworthiness of potential borrowers and 'bear the risk of their own ignorance'.[114] Even if they engage in such costly screenings, which majority do not have the time or resources for, an 'informational problem' persists.[115] Borrowers can provide misleading data, or accrue debts they do not reasonably believe will be repaid.[116] However, crucially, ex ante investigations cannot account for the fundamental issue of behavioural change.

This feeds into the second adverse effect, which occurs when shareholders exhibit behaviour which unfairly increases risk of default on existing creditors.[117] David Millon explained that shareholders – also acting as directors – act opportunistically by committing to high-risk projects that only have a small possibility of generating profits greater than the cost; aware of the significant possibility that there will be insufficient funds to pay creditors.[118] This successfully depicts how the corporate form enables unfair losses to be imposed on creditors, whilst simultaneously implying that shareholders/directors would not commit to such projects if held personally liable.[119]

The limitation to corporate assets is the third detrimental effect and is arguably the most severe. Opportunistic behaviour places corporate assets at greater risk, reducing the likelihood that existing creditors will be repaid.[120] For those creditors who contracted prior to the risky project, their rights have been devalued as their claims

[112] Philip Blumberg, 'Limited Liability and Corporate Groups', (1985) 11 J. Corp. L. 573, 620.
[113] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1381.
[114] Ibid, 1344.
[115] Ibid, 1354.
[116] Ibid, 1381.
[117] Ibid.
[118] Ibid, 1343.
[119] Ibid, 1346.
[120] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 104.

are worth less than they bargained for and now bear too low of an interest rate.[121] This issue was confirmed in the Cork's Committee Report, which carried out a reappraisal of insolvency laws in England and Wales.[122] Part of which assessed abuse of the corporate form. Following their investigation, it found that 'companies are formed, debts run up, the assets milked, and the company is put up for liquidation. Immediately a new company is formed, and the process is repeated'.[123] Concluding the inability of the law to adequately deal with fraudulent practices in the formulation and liquidation of companies.[124]

iii) Tort Creditors

Tort creditors, also known as involuntary creditors, encompass a vast number of people.[125] They lack sufficient bargaining power,[126] thus, include employees and consumers (as employees must work to survive).[127] Inarguably, they are the most adversely impacted by exploitation of the corporate form, with negative implications being exacerbated in corporate groups.

With each member of a corporate group being protected by the corporate form, as described in chapter one, there is no incentive for the parent company to minimise accident costs or to stop engaging in hazardous operations, retaining a high possibility of corporate torts.[128] Thus, it is easy to deduce the grave consequences arising from this. When mass tort cases occur, judgments easily exceed the assets of the corporation/subsidiary.[129] Tort creditors have not agreed to assume the risk of

[121] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1345.
[122] Report of the Review Committee, *Insolvency Law and Practice*, (White Paper, Cm 8558, 1982) p1.
[123] Ibid, Ch 43 para 1741.
[124] Ibid, paras 1741-1743.
[125] Daisuke Ikuta, 'The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler v. Cape Plc and Thompson v. Renwick Group Plc' (2017) 6 UCL Journal of Law and Jurisprudence 60, 62.
[126] Ibid, 80.
[127] Christian A Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press 2018) 96.
[128] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1346.
[129] Ibid, 1315.

insolvency or limited liability, nor have they received ex ante compensation for doing so, unlike contract creditors who can bargain for contractual safeguards.[130] Therefore, their only option is to seek compensation ex post.[131] Unfortunately, limited liability significantly reduces the probability that tort creditors will receive full compensation, due to claims being limited to corporation assets, which, as stated above, are typically minimal and insufficient.[132] Thus, 'they are left to bear the uncompensated costs of injury themselves'.[133]

Furthermore, this issue can be compounded by the likely possibility that companies can lack suitable insurance; this is a greater issue in subsidiary contexts.[134] Although there will be insurance, as made compulsory by Employers' Liability (Compulsory Insurance) Act,[135] it is unlikely to be sufficient to cover compensation claims or may not cover them at all.[136] This is because insurers are reluctant to 'cover excessive product-related and other risks'.[137] Overall, the corporate form can evidently allow close companies and parents to evade liability for the injuries arising from dangerous products or activities. They can abuse the extensive shield provided, as they are aware imposition of personal liability is unlikely.

Adams has been named the 'modern epitome of the English approach towards determining the legality of opportunist uses of the corporate form'.[138] The facts are given in chapter one, however, fundamentally, Cape used the corporate structure to ensure that liability for activities of the group would fall on another member, rather

[130] Philip Blumberg, 'Limited Liability and Corporate Groups', (1985) 11 J. Corp. L. 573, 618.
[131] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1355.
[132] Ibid, 1346.
[133] Ibid, 1355.
[134] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 781.
[135] Employers' Liability (Compulsory Insurance) Act 1969.
[136] This issue was seen in *Chandler v Cape Plc* [2012] EWCA Civ 525 with asbestosis not being covered by insurance.
[137] Christian A Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press 2018) 97.
[138] Marc Moore, '"A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of Salomon v Salomon' (2006) MAR J.B.L. 180, 182.

than them (the parent).[139] Significantly, the court stated, regardless of desirability, corporate groups have 'the right to use a corporate structure in this manner' and further emphasised that the allowance is 'inherent in our corporate law'.[140] Additionally, this case is also vital for illustrating how rigidly courts follow the *Salomon* principle, replicating the 'laissez faire' attitude discussed previously.[141] However, it shows how disadvantaged tort creditors are when attempting to obtain compensation for harm – harm which is unlikely to be so apparent if liability were unlimited and shareholders held responsible.[142]

These issues were exemplified in the collapse of Farepak in 2006. This Christmas Saving Club held around £37 million in consumer money. Crucially, Farepak continued to collect money, despite the high possibility of insolvency, so its parent company, European Home Retailer, could pay other debts.[143] The victims were treated as unsecured creditors, entailing they were last to receive compensation – with many not recouping even half of their losses.[144] It caused distress to thousands of consumers and employees, inflicting substantial harm to society.[145] Despite attracting immense public outrage and desire for accountability, fundamentally, the actions were legal. The Insolvency Service had brought a case against the directors which sought to disqualify them from being directors, yet this was dropped.[146] Due to the corporate form, European Home Retailer and Farepak were not held accountable.[147] This illustrates how tort creditors are negatively impacted by the actions of parents abusing subsidiaries for their own benefit, leaving them without adequate compensation.

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[139] *Adams v Cape Industries Plc* [1990] Ch. 433 [1026] (Slade LJ).
[140] Ibid.
[141] Marc Moore, '"A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of Salomon v Salomon' (2006) MAR J.B.L. 180, 181.
[142] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1346.
[143] HC Deb 14 December 2011, vol 537, cols 325WH.
[144] Ibid, cols 328WH.
[145] Department for Business, Energy and Industrial Strategy, 'Law Commission report on Consumer prepayments on retailer insolvency: government response' (Policy Paper, 2018) 5.
[146] Jane Croft, 'Farepak Case Dropped' (*Financial Times*, 20 June 2012) < https://www.ft.com/content/d30756c2-bae6-11e1-b445-00144feabdc0> accessed 4 December 2023.
[147] Dan Plesch and Stephanie Blankenburg, 'How to Make Corporations Accountable' (*The Institute of Employment Rights*, July 2008) 29.

Exploitation of the corporate form in corporate groups

The extension of the corporate form to corporate groups has been described as 'accidental'.[148] However, the way the corporate form remains rigidly applied to them – described in chapter one – has allowed it to be manipulated in highly questionable ways.[149] This has inevitably generated 'undesirable effects';[150] primarily, the intensification of the moral hazard problem.[151] This underlying issue is amplified by the use of subsidiaries to 'limit the liability of the parent company' and to essentially facilitate various forms of irresponsibility.[152] The way this is executed, will be analysed.

The corporate form fundamentally allows groups 'to insulate each tier of the group, to ultimately achieve layers of insulation for the parent company, from liability for the obligations of its numerous subsidiaries'.[153] By retaining vast, complex ownership structures, which lack transparency, they effectively obscure liability.[154] The moral hazard problem is greater in corporate groups because they can conduct overly risky activities through minimally capitalised subsidiaries, whilst the main assets are concentrated in the parent company, making them almost untouchable.[155] Per legislation stated in chapter one, this is legal, despite moral considerations. If it succeeds, the parent reaps the rewards, but if it fails, the subsidiary declares bankruptcy and the parent merely creates another, commonly with the same directors.[156] Concerningly, the corporate form remains applicable to each company 'even when a parent has complete effective control of a subsidiary whose directors

[148] Philip Blumberg, 'Limited Liability and Corporate Groups', (1985) 11 J. Corp. L. 573, 626.
[149] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837, 848.
[150] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 774.
[151] Ibid, 781.
[152] Ibid, 774.
[153] Philip Blumberg, 'Limited Liability and Corporate Groups', (1985) 11 J. Corp. L. 573, 575.
[154] Bob Tricker, 'Re-Inventing the Limited Liability Company' (2019) 19 Corporate Governance: an International Review 384, 392.
[155] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 781.
[156] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89, 111.

may be nominees, or even the same person, as the directors of the parent'.[157] Where directors of subsidiaries are also directors in the parent,[158] their continued employment mitigates the negative impacts they would experience in the case of the subsidiary's insolvency. This minimal exposure reduces incentives to organise suitable insurance for the subsidiary.[159] This is particularly fatal to tort creditors, as stated above. This goes far beyond the original objective of limited liability, which was to insulate the ultimate investor from ordinary business failures.[160]

Failure of the measures to alleviate abuse

The relentless maintenance of the metaphysical separation between shareholders and a company, can allow them to easily defraud creditors.[161] Resultantly, 'the company has often become a means of evading liabilities and concealing the real interests behind the business'.[162] This perpetual abuse and creditor exposure to harm, lacks mitigation due to the timidity of the courts - notably a consequence of *Salomon*.[163] Thus, whether the available measures effectively alleviate abuse will be explored.

i) Veil piercing and lifting

The doctrine of veil piercing and lifting, as discussed in chapter one, was seemingly clarified by the Supreme Court in *Prest*.[164] However, the attempt to provide coherence proved unsatisfactory, and ultimately 'aggravated the already existing chaos in the area'.[165] This is fundamentally due to the distinction between concealment and

[157] Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2008) 34 Cambridge Journal of Economics 837, 848; Also, exemplified by *Re Polly Peck International plc (In Administration) (No.4)* [1996] B.C.C. 486.
[158] Jessica Donohue,' What is a subsidiary company? Definition, examples and FAQs' (*Diligent*, 1 December 2023) < https://www.diligent.com/en-gb/resources/blog/what-is-a-subsidiary-company> accessed 3 January 2024.
[159] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 781.
[160] Philip Blumberg, 'Limited Liability and Corporate Groups', (1985) 11 J. Corp. L. 573, 575.
[161] Otto Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 The Modern Law Review 54, 56.
[162] Ibid, 55.
[163] Ibid, 56.
[164] *Prest v Petrodel Resources Ltd* [2013] UKSC 34.
[165] Agustin Ricardo Spotorno, 'Piercing the Corporate Veil in the UK: The Never-Ending Mess' (2018) 39 Business Law Review 102.

evasion, and lack of consensus among the judges, resulting in a vague approach.[166] This incoherence prevents the doctrine from being a suitable means of tackling abuse of the corporate form.

Veil piercing and lifting is a notoriously ambiguous area with much confusion.[167] A plethora of scholars have attempted to analyse the doctrine, yet almost all echo similar conclusions. For example, Easterbrook stated that piercing happens 'freakishly, like lightening it is rare, severe and unprincipled'.[168] With Bainbridge making similar sentiments, highlighting its inconsistency with certainty and predictability.[169] Therefore, when *Prest* was decided, a new era of coherence was expected. Whilst some argue that Lord Sumption's concealment and evasion principles met these expectations, many rightly view it as overoptimistic.[170] The dichotomy is evidently unhelpful, considering the review of previous case law, displayed that both principles could apply on the same facts.[171] Interestingly, some scholars have noted that the introduction of new terms created 'more confusion than clarity',[172] and others expressed that *Prest* merely changed the terminology rather than clarifying the law.[173] Overall, however, it showed the adoption of a cautious approach, disfavouring veil piercing, inherently stemming from *Salomon*.[174] This was visible in the judgment, which stated *Salomon* was of 'high authority' and, to maintain clarity, veil piercing must be limited.[175] Thus, the *Salomon* principle is seemingly held on a pedestal, in turn

[166] Adam Liew, 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in Prest v Petrodel Resources Ltd Leads Us Nowhere' (2014) 5 King's Student Law Review 67, 71.
[167] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1330, 1381.
[168] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 The University of Chicago Law Review 89.
[169] Stephen Bainbridge, 'Abolishing Veil Piercing' (2001) 26 Journal of Corporation Law 479, 515.
[170] Adam Liew, 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in Prest v Petrodel Resources Ltd Leads Us Nowhere' (2014) 5 King's Student Law Review 67, 82.
[171] Ibid, 68.
[172] Ariel Mucha, 'Piercing the corporate veil doctrine under English company law after Prest v Petrodel decision' (*Allerhand Working Papers*, 31 August 2017) <http://dx.doi.org/10.2139/ssrn.2962934> accessed 1 March 2024.
[173] Edwin Mujih, 'Piercing the Corporate Veil as a Remedy of Last Resort after Prest v Petrodel Resources Ltd: Inching towards Abolition?' (2016) 37 The Company Lawyer 1, 24.
[174] Ibid, 19.
[175] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [66]-[67].

perpetuating the common theme to restrict exceptions, such as veil piercing.[176] *Prest* confirmed this, making it an 'exceptional event' if it were to happen in future.[177]

Moreover, the other judges expressed disagreement that cases can be placed into two distinct categories, creating more confusion. Lady Hale doubted the classification of concealment and evasion, continuing to leave room in the doctrine for rare cases where piercing is necessary but does not fit into the categories.[178] Lord Mance and Clarke agreed, reiterating the danger of foreclosing all possible cases in which it may arise.[179] This lack of consensus and failure to explain what these cases could be, means the law remains ambiguous due to 'clashing judicial sentiments'.[180] *Antonio Gramsci Shipping Corporation v Recoletos* noted this uncertainty, concluding that the law is still without a principle.[181] Thus, it seems unconvincing to allow legal uncertainty to linger, merely for the sake of some unforeseen cases which may not come under the principles of concealment or evasion.[182]

It must be noted here that, despite Millon's advocation for veil piercing to be the primary tool for addressing abuse, it is evident that this is not a feasible option. He believes that once the doctrine is 'placed on a sound conceptual footing', it can 'provide the means for distinguishing legitimate from illegitimate reliance' on the corporate form.[183] However, the possibility of this is highly unlikely; even more so now that *Prest* attempted to bring coherence, yet evidently could not achieve this. To reinforce this unlikeliness, in *Hurstwood v Rossendale*, the Supreme Court appears to

[176] Igho Lordson Dabor, 'Limited Liability: a pathway for corporate recklessness?', (PhD Thesis, University of Wolverhampton Law School, 2016) 140, 160.
[177] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 775.
[178] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [92].
[179] Ibid, [100]-[103].
[180] Adam Liew, 'Three Steps Forward, Three Steps Back: Why the Supreme Court Decision in Prest v Petrodel Resources Ltd Leads Us Nowhere' (2014) 5 King's Student Law Review 67, 68, 81.
[181] *Antonio Gramsci Shipping Corporation & Ors v Recoletos Ltd* [2013] EWCA Civ 730 [66].
[182] Rian Matthews, 'Clarification of the doctrine of piercing the corporate veil' (2013) 28 J.I.B.L.R. 516, 520.
[183] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1360, 1382.

suggest the abolition of the doctrine in future.[184] Thus, displaying how it would be immensely difficult to clarify the area to be an effective measure against abuse. Although it should be recognised that Millon advocates for broadening the doctrine, and *Prest* sought to narrow it substantially.[185] Overall, the incoherence within veil piercing and lifting and its limited use, prevents it from being an effective tool for mitigating abuse of the corporate form.[186]

ii) Tortious liability

As described in chapter one, *Chandler* provided the four-part test for tortious liability.[187] This was a welcomed start to the imposition of liability on corporate groups. However, by analysing *Chandler's* various flaws, such as ambiguity and grounding in tort law, it will be demonstrated that *Chandler* is insufficient in tackling irresponsibility.

Prior to analysing *Chandler*, the implications of *Thompson v Renwick Group plc* must be acknowledged.[188] In *Thompson*, no duty of care was found, due to a lack of control and superior knowledge. It was held, The Renwick Group was merely a holding company and did not satisfy the *Chandler* test.[189] Notably, a holding company is where the parent company's role is limited to holding shares in subsidiaries, without having their own business activities.[190] Therefore, parent companies who operate as a holding company are protected against tortious liability.[191] This is problematic as it neglects the reality that a holding company may still owe a duty of care and be an appropriate defendant.[192] Additionally, it generates the possibility for parents to

[184] *Hurstwood Properties (A) Ltd and others v Rossendale Borough Council and another* [2021] UKSC 16 [71].
[185] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1361.
[186] Igho Lordson Dabor, 'Limited Liability: a pathway for corporate recklessness?', (PhD Thesis, University of Wolverhampton Law School, 2016) 140, 160.
[187] *Chandler v Cape Plc* [2012] EWCA Civ 525.
[188] *Thompson v Renwick Group plc* [2014] EWCA Civ 635.
[189] Ibid, [36]-[37].
[190] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 776, 777.
[191] Ibid, 777.
[192] Ibid, 778.

circumvent liability by transforming into a holding company, as done by Renwick.[193] Therefore, this displays that, although *Chandler* is good law, it is not enough to effectively tackle abuse.

Moreover, in *Chandler*, 'relevant control' was deemed a crucial factor in deciding whether a duty of care was owed. This has been subjected to much criticism, particularly by Martin Petrin, who raised two key issues. Firstly, the term 'control' lacks clarity and retains ambiguity, as the type and level required to meet the factor is unclear. Secondly, Petrin stated, it is problematically both over- and under-inclusive.[194] Regarding over-inclusivity, he believes that merely retaining a uniform group policy – common in most groups – would be enough to satisfy the control aspect of the test for liability. Whereas, it is supposedly under-inclusive, because it is wrong for claims against a parent company to be disqualified, due to a failure to exercise control.[195] Whilst the under-inclusive criticism holds validity, it is not entirely correct to state it is over-inclusive. Daisuke Ikuta rightly highlighted, the extent of control required is based on the degree of fairness, making it case dependent. Due to this subjectivity, it is unlikely that claims based merely on the existence of group policies, would succeed.[196] However, the rebuttal itself raises a prominent criticism of tortious liability as a whole: its case dependency. The Court of Appeal in *Chandler* stressed that the duty of care does not arise automatically, and that it is assessed on a case-by-case basis.[197] This threatens legal certainty, as it is unknown what nature of control amounts to liability, and is dependent on the parent's state of mind and knowledge of relevant information.[198] To add further ambiguity, Arden LJ stated that the

[193] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 783.
[194] Ibid, 778.
[195] Ibid.
[196] Daisuke Ikuta, 'The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler v. Cape Plc and Thompson v. Renwick Group Plc' (2017) 6 UCL Journal of Law and Jurisprudence 60, 81.
[197] Samuel J Pearse, Raymond L Sweigart and Amina Adam, 'Assumption of Responsibility for a Subsidiary's Responsibilities' (*Law Gazette,* 5 September 2012) <https://www.lawgazette.co.uk/law/assumption-of-responsibility-for-a-subsidiarys-responsibilities/67165.article> accessed 16 March 2024.
[198] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 783.

circumstances laid down in *Chandler*, as when to impose a duty of care, were descriptive, rather than exhaustive.[199] Thus, it appears too subjective to be a sufficient measure of alleviating abuse.

Finally, *Chandler's* grounding in tort principles has rightly been scrutinised. Although the references to the tort law concept of fairness convey an adherence to justice concerns,[200] which show a step in the right direction to holding parent companies accountable, the *Chandler* approach 'uncertainty and unduly stretches established tort principles'.[201] Thus, many agree a better solution is necessary. Ikuta, who praises the *Chandler* approach, admits that for tortious liability to be successful against corporate irresponsibility, the four-part test requires refinement and would need to be utilised in conjunction with veil lifting.[202] However, this is an inappropriate solution as veil piercing and lifting, as discussed above, are ineffective, and a refined version of *Chandler* would still not address the problem where assets are not concentrated in the parent, rather other subsidiaries.[203] Overall, tortious liability is evidently not a suitable solution for addressing corporate irresponsibility in corporate groups. A more principled means of holding groups accountable is required, to importantly provide legal certainty and to create improved outcomes for tort creditors.[204]

iii) Agency

As denoted in chapter one, the use of agency is severely limited. This is because, the general test for an agency relationship, confirmed in *Adams*, is unlikely to be met.[205] Evidence expressly allowing subsidiaries to act on the parent's behalf is often scarce. Parents will take active measures to circumvent this, to maintain the corporate shield

[199] *Thompson v Renwick Group plc* [2014] EWCA Civ 635 [33].
[200] Peter Yeoh, 'A Parent Company's Liability for a Subsidiary's Actions' (2012) 33 Business Law Review, 206, 207.
[201] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 779.
[202] Daisuke Ikuta, 'The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler v. Cape Plc and Thompson v. Renwick Group Plc' (2017) 6 UCL Journal of Law and Jurisprudence 60.
[203] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 784.
[204] Ibid, 770, 783.
[205] *Adams v Cape Industries Plc* [1990] Ch. 433.

in each company of the group.[206] The difficulty in proving this, was displayed in *Re Polly Peck*, where a subsidiary with insufficient capital, no separate management, and a negligible role in company activities, was not deemed an agent of its parent.[207] Overall, emphasising that this measure of imposing liability for irresponsibility is ineffective.

Conclusion

This chapter has explored how the corporate form provides an avenue for corporate irresponsibility, which is frequently abused in both close corporations and corporate groups. The overwhelming negative implications for both contract and tort creditors – with tort creditors posing the greatest issue – have been analysed, to argue that limited liability and separate legal personality play a key role in facilitating and perpetuating corporate irresponsibility. This is reinforced by the evident failure of the current measures to prevent such irresponsibility, partly due to *Salomon* remaining influential. In turn, this indicates the need for reform.

[206] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1332.
[207] *Re Polly Peck International plc (In Administration) (No.4)* [1996] B.C.C. 486 [495].

Chapter Three: Possible Reforms

Introduction:

In the previous chapter, it was concluded that limited liability and separate legal personality have a clear role in facilitating and perpetuating corporate irresponsibility in both close corporations and corporate groups. Thus, reform should be considered to minimise this issue, with regard for the common intention to uphold certainty by limiting exceptions. This dissertation therefore suggests that the wrongful trading provision should be amended, to mitigate abuse in close corporations.[208] Conversely, in corporate groups, an enterprise liability approach should be adopted. This chapter will set out each reform, followed by a recognition of their limitations. Overall, aiming to demonstrate how these proposals work to resolve the issues set out in chapter two.

Close corporations:

It was determined in chapter two that corporate irresponsibility can manifest in close corporations as shareholders, acting as directors, making risky decisions which inflict unfair losses on creditors. It was also highlighted that the Cork Report analysed this issue. The committee suggested implementing a 'wrongful trading' provision, which imposed liability on directors for 'wrongful or reckless conduct'.[209] Promisingly, this was introduced in section 214 of the Insolvency Act 1986,[210] however, in a 'watered down form'.[211] Consequently, this dissertation suggests amending the wrongful trading provision to align more closely with the recommendations of the Cork Committee.

i) Current law and its issues

[208] Insolvency Act 1986, s214.
[209] Report of the Review Committee, *Insolvency Law and Practice*, (White Paper, Cm 8558, 1982) ch 43, para 1774.
[210] Insolvency Act 1986, s 214.
[211] Yatin Arora, 'What Went Wrong With Wrongful Trading' (2022) 43 Business Law Review 164, 165.

This provision can make directors liable for any contribution the court thinks appropriate.[212] For this to occur, firstly, the company must have gone into insolvent liquidation, secondly:

> At some time before the commencement of the winding up of the company the person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and, that person was a director at the time.[213]

The second requirement is explained in s214(4) as:

> The conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained … by a reasonably diligent person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and the general knowledge, skill and experience that that director has.[214]

This sets both an objective and subjective requirement.[215] The incorporation of the subjective element appears to disincentivise claims due to difficulties in proving knowledge.[216] However, further issues arise as courts often require irresponsible behaviour, despite this not being contained in legislation.[217] By doing so, this adds another layer of difficulty to establishing this claim, in turn, decreasing its effectiveness and use. This is exhibited by the little amount of case law involving s214,

[212] Insolvency Act 1986, s 214(1).
[213] Ibid, s 214(2)(a)(b)(c).
[214] Ibid, s 214(4)(a)(b).
[215] Andrew Keay, 'Wrongful trading: problems and proposals' (2014) 65 Northern Ireland Legal Quarterly 63, 66.
[216] Faye Didcote, 'Controlling the abuse of limited liability: the effectiveness of the wrongful trading provision' (2008) 19 International Company and Commercial Law Review 373, 376.
[217] Andrew Keay, 'Wrongful trading: problems and proposals' (2014) 65 Northern Ireland Legal Quarterly 63, 68. Citing the judgment in Re Continental Assurance Co of London plc [2001] BPIR 733.

and the scarce examples of successful recovery under the section,[218] with available evidence showing that between 1986 and 2013, only twenty-nine applications were reported with liability being imposed in just eleven.[219]

Notably, the previous issue of standing, which only permitted liquidators to bring claims, was remedied by the Small Business, Enterprise and Employment Act 2015.[220] This extended standing to administrators and enabled officeholders to assign the right of action, which could be to creditors.[221] However, one of the greatest hinderances to the effectiveness of s214 is the issue of funding. Actions are only likely to be brought when the prospect of success is overwhelming.[222] When attempting to raise funds, creditors retain little incentive to finance claims,[223] or may already be insolvent, compounding this problem.[224] Therefore, amidst these issues, Andrew Keay, among others, astutely relayed that wrongful trading is not effective in recuperating assets to pay creditors and fails to deter abuse of the corporate form.[225] This stems from the legislature's failure to incorporate important suggestions made by the Cork Committee.[226]

ii) How it differs from the Cork Committees recommendations

The Cork Committee wished to ensure that 'downright irresponsibility' was not permitted and that those who do abuse the corporate form are made liable. Thus, it was believed that introducing a wrongful trading provision would strike a balance

[218] Richard Williams, 'What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?' (2015) 78 The Modern Law Review 55, 56.
[219] Yatin Arora, 'What Went Wrong With Wrongful Trading' (2022) 43 Business Law Review 164.
[220] Small Business, Enterprise and Employment Act 2015.
[221] Yatin Arora, 'What Went Wrong With Wrongful Trading' (2022) 43 Business Law Review 164, 165.
[222] Faye Didcote, 'Controlling the abuse of limited liability: the effectiveness of the wrongful trading provision' (2008) 19 International Company and Commercial Law Review 373, 374.
[223] Ibid, 375.
[224] Yatin Arora, 'What Went Wrong With Wrongful Trading' (2022) 43 Business Law Review 164, 172.
[225] Andrew Keay, 'Wrongful trading: problems and proposals' (2014) 65 Northern Ireland Legal Quarterly 63, 64; Richard Williams, 'What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?' (2015) 78 The Modern Law Review 55, 56.
[226] Faye Didcote, 'Controlling the abuse of limited liability: the effectiveness of the wrongful trading provision' (2008) 19 International Company and Commercial Law Review 373, 376.

between encouraging entrepreneurship and protecting creditors.[227] Whilst it is promising that the legislature introduced the general foundations of this provision, the omission of significant recommendations inhibits its potential potency. In the proposal, they sought to remove elements of subjectivity and retain only an objective test.[228] Their provision removed the necessity of fraud or dishonesty.[229] However, the retention of a subjective element in s214(4) contradicts this.[230] Additionally, wrongful trading was not intended to be limited to directors, it included 'any person who was party'.[231] Had this been implemented, it would have arguably increased case law.

iii) Amendment

Whilst the intentions of s214 reflect a drive to curtail abuse of the corporate form, evidently, the law requires amendment to be successful.[232] It has been rightly noted that it would be an effective remedy, if it were not 'derailed by unfortunate statutory requirements'.[233] Keay recommends useful amendments which address some key problems. He begins with s214(2)(b), stating that instead of establishing the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, it should rather be whether 'the director incurred debts or liabilities at a time when he or she knew or ought to have known that the company was unable to pay its debts as they fell due'.[234] Keay recognises that whilst this is also not precisely defined, it is more appropriate than attempting to determine the director ought to have known a future occurrence – one which he cynically notes required a 'crystal ball'. Instead, liability would be imposed if the director knew or ought to have known the company was insolvent when incurring

[227] Report of the Review Committee, *Insolvency Law and Practice*, (White Paper, Cm 8558, 1982) Ch44 para 1805.
[228] Ibid, para 1783.
[229] Ibid, para 1778.
[230] Insolvency Act 1986, s 214(4)(a)(b).
[231] Report of the Review Committee, *Insolvency Law and Practice*, (White Paper, Cm 8558, 1982) Ch44 para 1781.
[232] Andrew Keay, 'Wrongful trading: problems and proposals' (2014) 65 Northern Ireland Legal Quarterly 63, 72.
[233] Richard Williams, 'What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?' (2015) 78 The Modern Law Review 55, 57.
[234] Andrew Keay, 'Wrongful trading: problems and proposals' (2014) 65 Northern Ireland Legal Quarterly 63, 72.

subsequent debts.[235] This is a simpler way of establishing liability, aligning more with the original objective of the provision. Moreover, regarding funding issues, Keay interestingly suggests a central fund, regulated by the Insolvency Service. Access would be granted if a good case was presented, with its financing being sourced via levy on companies.[236] Although, this may not be necessary, if the other amendment increases the possibility of success of claims, as creditors may be incentivised to provide funding. Additionally, on the matter of expanding possible defendants, when attempting to target close private companies, this is not so much an important reform as, in these corporations, there is typically unity in ownership and management.[237]

i) Limitations

However, there are concerns that amending s214 is unlikely to make a positive difference for creditors recovery.[238] Richard Williams strongly advocates that s214 is inherently limited, regardless of what criteria is applied to it.[239] He admittedly highlights a key potential problem with wrongful trading, which is that the success of a claim is reliant upon a director's personal wealth being sufficient to compensate. In some cases, directors may have suffered huge financial loss because of corporate failure. In which case, a claim is not worth pursuing, regardless of reform.[240] However, whilst this limitation holds merit, the provision still acts as a useful deterrent.[241] By expanding its statutory boundaries and simplifying its necessary conditions, it enhances the deterrent nature of s214. Furthermore, although this criticism may materialise in some cases, it will not be all. Overall displaying that, an amended version of wrongful trading, could be an effective tool in mitigating abuse of the corporate form in close corporations.

[235] Andrew Keay, 'Wrongful trading: problems and proposals' (2014) 65 Northern Ireland Legal Quarterly 63, 73.
[236] Ibid, 78.
[237] Yatin Arora, 'What Went Wrong With Wrongful Trading' (2022) 43 Business Law Review 164, 165.
[238] Richard Williams, 'What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?' (2015) 78 The Modern Law Review 55, 83.
[239] Ibid, 75.
[240] Ibid, 77.
[241] Andrew Keay, 'Wrongful trading: problems and proposals' (2014) 65 Northern Ireland Legal Quarterly 63, 67.

Corporate groups:

Following the analysis of corporate form abuse in corporate groups in chapter two, it is evident that reform is desirable, most urgently for tort creditors. However, literature surrounding which model of reform is most suitable, is a heavily debated area. This dissertation is particularly persuaded by advocates of enterprise liability and therefore submits this proposal for reform. This section seeks to explain what enterprise liability is, subsequently suggesting the most appropriate guidelines as to when and how it should apply.

i) Definition

Whilst there is no sole definition of enterprise liability, it can be summarised as 'treating all companies in a group as a single enterprise and holding the single enterprise responsible for harm caused by any individual company within the group'.[242] This disregards their several separate entities and pools together all the assets and liabilities of the group.[243] The fundamental idea behind the approach is to 'marry legal and economic realities'.[244] This refers to the acknowledgment that many corporate groups 'function towards a unified goal', meaning that this economic reality of the group being connected, juxtaposes the legal reality that parent companies and subsidiaries are individually protected by the corporate form.[245] Enterprise liability attempts to close this gap by bringing the legal reality closer to the economic reality.[246] Thus, it is understandable why this approach is widely suggested as a reform. By denying the protection of the corporate shield to each company, it works to solve many of the issues discussed in the previous chapter. It successfully addresses the problem of tort creditors as it forces parent companies to 'internalise the risks of their

[242] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 785.
[243] Adolf A Berle, 'The Theory of Enterprise Entity' (1947) 47 Columbia Law Review 343, 349.
[244] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 210.
[245] Ibid, 209.
[246] Ibid, 210; Surya Deva, 'Briefing paper for consultation: Parent Company Liability' (2015) 3 <https://www.escr-net.org/sites/default/files/parent_company_liability_briefing_paper_first_draft_sept_2015_-_eng.pdf> Accessed 6 April 2024.

subsidiaries'.[247] This adheres to the fact that groups are in a better position than tort creditors, to bear the risk and losses of torts caused by a group member.[248] Additionally, pertaining to the issue raised in chapter two about inadequate insurance and under-capitalisation of subsidiaries, enterprise liability mitigates this. The internalisation of costs forces the parent to purchase sufficient insurance and/or appropriately capitalise subsidiaries.[249] Demonstrating how enterprise liability can remedy such corporate irresponsibility, which stems from abuse of the corporate form in corporate groups.

ii) Application

However, despite a plethora of scholars agreeing on the basic approach of enterprise liability, disagreement emerges around its application. More specifically, defining when it should apply, what constitutes an enterprise, and how liability should be allocated.[250] Beginning with the scope of enterprise liability, Meredeth Dearborn, drawing from Berle, asserted that it should only be implemented in the context of mass torts, human rights violations and environmental harms.[251] This is because these are the most problematic instances where risk is wrongfully externalised to the public.[252] However, Petrin rejects this, on the grounds that it is unnecessary to discern various tortious acts, as he affirms that 'internalisation of any liability costs is desirable, independent of their precise nature and scale'.[253] Whilst both arguments hold validity, Dearborn's approach appears more aligned with current views. Although Petrin is justified in advocating for an expansive scope, considering that - as mentioned in chapter two - the corporate from was not intentionally extended to groups, it was

[247] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 212.
[248] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 791.
[249] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 212.
[250] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 791.
[251] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 260.
[252] Ibid, 211, 212.
[253] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 790, 791.

rather accidental.[254] The approach represents idealistic reform, as opposed to reasonable reform. This stems from the current views discussed in the previous chapter, that the corporate form retains strong support for its rigid application, with heavily limited exceptions. Therefore, curtailing the scope of enterprise liability to solely address the fundamental problem of tort creditors, is both realistic and still effective.

Furthermore, as to what constitutes an enterprise and the allocation of liability, can be examined collectively. Control as a basis for liability is typically advocated,[255] with key scholars, such as Blumberg and Berle, expressing their support.[256] This alludes to liability being imposed when a parent exerts control over subsidiaries. Berle stated that under this model, parent companies have two options. Firstly, it can require its subsidiaries to manage their own affairs and operate as an entirely separate enterprise, with the parent merely retaining investor's interest, to maintain the corporate form. Alternatively, it can merge subsidiary operations with its own, thus, operating as a single enterprise.[257] This has been subjected to much criticism. For example, it faces the same lack of clarity issue as tortious liability, discussed in chapter two. Dearborn summarises it as 'legally and economically problematic',[258] due to it being unclear by what is meant by 'control', and what level is sufficient to impose liability.[259] Additionally, Witting correctly highlighted that control-based liability could instead worsen current issues, as it reduces the incentives for parents to influence

[254] Philip Blumberg, 'Limited Liability and Corporate Groups', (1985) 11 J. Corp. L. 573, 626.
[255] See, for example, Christian A Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press 2018) 181.
[256] Phillip Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37 Connecticut Law Review 605; Adolf A Berle, 'The Theory of Enterprise Entity' (1947) 47 Columbia Law Review 343.
[257] Adolf A Berle, 'The Theory of Enterprise Entity' (1947) 47 Columbia Law Review 343, 357.
[258] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 201.
[259] Ibid, 247.

safety in subsidiaries.[260] Instead, Dearborn proposes a two-pronged test for enterprise liability: the enterprise prong and the tort creditors prong.[261]

The enterprise prong would require a corporation to be economically integrated. The test would be based on economic control, in which the guiding principle would be, parents and subsidiaries who pursue one economic purpose.[262] Dearborn expresses that various non-control-based factors articulated by Blumberg, could assist in determining the existence of an enterprise.[263] These include, collective conduct, 'use of a common public persona' (which may involve similar logos and policies), and 'financial and administrative interdependence' (pertaining to whether the companies function towards the same economic goal).[264] Presence of these factors can amount to finding a unified corporate group, thus, constituting an enterprise.[265] However, if a corporation wishes to prove the subsidiary is not part of its enterprise to avoid liability, the burden should be on the corporation to refute the presumption of economic control.[266]

Subsequently, the tort creditor prong would 'provide a direct cause of action against the parent ... for a victim of corporate-caused mass torts'.[267] Dearborn relies on enterprise liability proposals from other countries to piece together the most appropriate test. Drawing from a proposal in France, she suggests that a system holding parent companies and subsidiaries jointly and severally liable would ultimately force parents to take steps to prevent harm.[268] Although, Petrin has noted that this

[260] Christian A Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press 2018) 182.
[261] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 252.
[262] Ibid.
[263] Ibid, 252, 253.
[264] Phillip Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37 Connecticut Law Review 605, 613.
[265] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 252, 253.
[266] Ibid, 254.
[267] Ibid.
[268] Ibid, 255.

may negatively impact existing creditors and minority shareholders.[269] Despite being a valid concern, the social costs of the types of irresponsibility this reform seeks to address, arguably outweigh this concern. Additionally, she emphasises that 'mass torts' should only encapsulate 'mass torts, human rights disasters, and environmental harms'.[270] This narrow scope works to maintain investment encouragement and to prohibit insignificant litigation.[271]

Overall, this two-pronged test for enterprise liability finds support from Witting – despite his overall rejection of enterprise liability.[272] It presents an in-depth test, grounded in the economic reality of corporate groups, which attempts to remedy the most pressing issues stemming from abuse of the corporate from. This allows it to appeal to larger groups, including those who may contest exceptions to the corporate form. This is due to the broad agreement among scholars that reform is required for tort creditors.

iii) Limitations

Despite avid support, enterprise liability is not without criticism. As it involves 'downplaying' the corporate form,[273] some posit their rejection, insisting it contradicts the core concept of separate legal personality by upholding the economic reality.[274] Subsequently, arguing it could reduce legal certainty. However, Dearborn's two-prong test could serve as a 'stable exception to limited liability',[275] and if so, would preserve legal certainty as its parameters would be clear. Although, when looking at its history, the arguments against enterprise liability could seem to materialise. In *DHN Food*

[269] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 793, 794.
[270] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' (2009) 97 California Law Review 195, 255.
[271] Ibid.
[272] Christian A Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press 2018) 182.
[273] Ibid, 176.
[274] Daisuke Ikuta, 'The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler v. Cape Plc and Thompson v. Renwick Group Plc' (2017) 6 UCL Journal of Law and Jurisprudence 60, 77.
[275] Christian A Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press 2018) 182.

Distributors v Tower Hamlets, Lord Denning suggested the 'single economic unit' theory as a basis for veil piercing.[276] However, this did not obtain acceptance.[277] This would seem to indicate that enterprise liability is unlikely to occur in England and Wales,[278] particularly given the persistence to heavily restrict exceptions to the corporate form – as portrayed in *Prest*. Yet, by limiting enterprise liability to mass torts, human rights violations and environmental harms, as submitted, it does not encroach on the corporate form so much as to threaten the benefits provided. Instead, it seeks to prevent the gravest abuses whilst maintaining the corporate shield ordinarily. Overall, despite potential limitations to enterprise liability, they evidently do not outweigh the social cost to tort creditors by retaining the corporate form in these circumstances.[279]

Conclusion:

It has been submitted that wrongful trading should be amended, so that it more adequately addresses abuse of the corporate form in close corporations. On the other hand, in corporate groups, enterprise liability should be adopted in the context of mass torts, human rights violations and environmental harms. Irrespective of their limitations, these reforms would serve as more effective measures in mitigating corporate irresponsibility than those currently in place.

[276] *D.H.N. Food Distributors Ltd. v Tower Hamlets London Borough Council* [1976] 1 W.L.R. 852 [853].
[277] Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 European Business Organization Law Review 771, 785.
[278] Daisuke Ikuta, 'The Legal Measures against the Abuse of Separate Corporate Personality and Limited Liability by Corporate Groups: The Scope of Chandler v. Cape Plc and Thompson v. Renwick Group Plc' (2017) 6 UCL Journal of Law and Jurisprudence 60, 78.
[279] David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1355.

Conclusion:

In conclusion, the foundational concepts of limited liability and separate legal personality have been evaluated, in addition to veil piercing and lifting, tortious liability and agency. By explaining the benefits of the corporate form, this in turn, illustrated how these positive attributes can be wrongfully exploited. Through analysing the ways in which both close corporations and corporate groups can abuse the corporate form to enable irresponsibility, it has been concluded that limited liability and separate legal personality retain a clear role in facilitating and perpetuating corporate irresponsibility, with the current measures being inadequate to tackle this. It was emphasised that tort creditors in particular are the most adversely affected, posing the most urgent need for increased protections. Therefore, it has been asserted that reform is required. Considerations of reforms were intentionally premised upon the common view – tracing back to *Salomon* – to uphold the certainty of the corporate form by heavily limiting measures that impose liability.

Chapter one began by depicting limited liability and separate legal personality, noting their mutually exclusive relationship, forming the corporate shield. Subsequently, by detailing *Salomon* and its rigid application, it showed to be the root cause as to why the common view intends to restrict deviations from the corporate form. However, it was recognised that the corporate form is not absolute, by portraying the three measures in which courts can impose liability. These are, veil piercing and lifting, tortious liability and agency. Although it was noted that agency is essentially obsolete due to the high threshold to find such relationship. Following this, chapter two relied upon these foundations to analyse the concepts and how they can be abused to perpetuate irresponsibility, with limited possibility of repercussions. This was done so, by firstly exploring how *Salomon* set the permissive approach to abuse. Subsequently, the harmful impacts to contract and tort creditors were examined, as well as how corporate groups specifically are able to behave irresponsibility, through subsidiary operations. This fed into the next section, which concluded that the current measures to impose liability fail to sufficiently address these issues. Concurrent themes of incoherence and ambiguity were highlighted to reach this conclusion. Consequently,

it was established that the mere benefits emitted by the corporate form do not justify ignoration of the array of detrimental impacts, most significantly to tort creditors. Finally, chapter three draws upon the key issues identified, to suggest reasonable reforms. Given the difference in the way abuse manifests in each type of corporation, two separate reforms were proposed. For close corporations, amending wrongful trading was detailed, given the unity of ownership and control. Whereas, for corporate groups, enterprise liability was recommended, solely in the context of mass torts, human rights violations and environmental harms. It was concluded that these suggestions would more appropriately tackle irresponsibility arising from abuse of the corporate form.

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