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*M. Kucko. Piercing the Corporate Veil - Should English Law Go Dutch?, LSE, **2018// https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3230296**

Introduction

Limited liability is known as the fundamental principle of modern corporate law.[1] As such, it prescribes that the company as a legal person should bear its own risks and liabilities, therefore shielding its shareholders from any potential third party claims. However, this principle is not absolute – under certain circumstances, the 'veil' of incorporation can be pierced in order to hold a shareholder liable for the company's debts. The shareholder can be legal or a natural person.[2] Thus, 'piercing (or 'lifting') the corporate veil' entails disregarding the autonomy and separate legal character of the company and holding a shareholder responsible for the company's actions as if they were carried out by the shareholder himself. Therefore, veil piercing is a technique frequently adopted by creditors of insolvent companies who attempt to recover their losses from shareholders when their debtor is incapable of satisfying their claims. In the unlikely event of insolvency of a company that is a subsidiary of a larger parent company, the company's creditors will use the technique of veil piercing to try to make the (usually still solvent and wealthy) parent pay for the subsidiary's debts.[3]

As early as 1963, Cohn and Simitis had concluded that '(…) there can be little doubt that the doctrine of the lifting of the veil has come to stay'.[4] This has indeed proven to be the case, as nowadays, a significant amount of legal systems recognise veil piercing as an established doctrine.[5] Although there seems to be widespread agreement that the principle of veil piercing should be applied with caution, slight differences in court approaches do seem to be present from country to country.[6]

In this respect, a legal system that is traditionally known for its robust approach to the principle of limited liability is the English one.[7] As it currently stands, English law only allows the veil to be pierced in exceptional circumstances,[8] and courts are not allowed to engage in veil piercing in the interests of justice.[9] In a group context, this means that in the absence of any contractual guarantees, parent companies are generally allowed to walk away from failure within the group.[10] Consequently, it is evident that in England, the moral hazard problem that is associated with limited liability is very much in place – it is the shareholders who get to benefit from the success of the company but the risk of failure is placed on the company's creditors.[11] Strict adherence to the preservation of the corporate veil thus often

[1] Lucas Bergkamp and Wan-Q Pak, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts' (2001) 8 *Maastricht Journal of European and Comparative Law* 167.
[2] In the context of veil piercing, there is no difference between corporate and natural shareholders, see e.g. Ewan McGaughey, 'Donoghue v Salomon in the High Court' [2011] *Journal of Personal Injury Law* 249, 15.
[3] Robert B Thompson, 'Piercing the corporate veil: an empirical study' (1991) 76 *Cornell Law Review* 1036.
[4] EJ Cohn and C Simitis 'Lifting the Veil in the Company Laws of the European Continent' (1963) 12 *I.C.L.Q.* 189.
[5] MF Carlier, 'De Buitencontractuele Aansprakelijkheid van de Vennoten t.a.v. de Schuldeisers van de Vennootschap' [1995] *T.R.V.* 617.
[6] Karen Vandekerckhove, *Piercing the Corporate Veil* (Kluwer Law International 2007) 1.
[7] Brenda Hannigan, *Company Law* (OUP 2003) 74.
[8] *Standard Chartered Bank v Pakistan National Shipping Corp and Ors* [2003] 1 AC 959 (HL), [37] (Lord Rodger).
[9] *Adams v Cape Industries plc* [1990] Ch 433 (CA).
[10] Ellis Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (2nd edn, OUP 2014) 38.
[11] ibid 17.

results in shareholders encouraging excessive risk-taking by managers as in general, they will not have to bear any liability for losses resulting from the company's insolvency. Ultimately, such robust approach to the principle of limited liability can be characterised as encouraging abuse of the corporate form itself.[12]

However, recent developments in the field of tort law suggest that a change might be in sight in this respect. In *Chandler v Cape plc*,[13] for the first time, liability was imposed on a parent company for a breach of its duty of care to an employee of its subsidiary.[14] By applying the threefold *Caparo*[15] test for establishing a duty of care (foreseeability, proximity and reasonableness), the Court of Appeal ruled that the company in question was liable in negligence to an ex-employee who had contracted asbestosis while working for the company's subsidiary.[16] The Court's approach in *Chandler* was recently confirmed in *Lungowe v Vedanta Resources Plc*,[17] where the High Court held (*obiter*) that, provided that the *Caparo* criteria can be established, a parent company of a subsidiary that discharged waste from a copper mine into local waterways can also become liable to local residents.[18]

The Netherlands, on the other hand, is a country where tort forms the most important basis for veil piercing. The so-called 'indirect piercing of the corporate veil' *('indirecte doorbraak van aansprakelijkheid'*), according to which shareholders can be held liable on the basis of tort, has been applied by courts ever since the 1980s and is deeply embedded in the Dutch legal system.[19] Even though in the Netherlands, 'direct piercing of the corporate veil' ('*vereenzelviging*' or 'identification'), i.e. veil piercing in its literal sense whereby the separate identities the legal (or natural) persons are disregarded, has remained very rare and has to this date never been recognised by the Dutch Supreme Court,[20] the Dutch legal system has found a way to give creditors the possibility of seeking recourse against shareholders by way of circumventing the separate legal personality of corporations through the operation of tort.[20]

The starting point in this paper shall therefore be, that English law in its current form is deficient as it places the risk of corporate failure solely on creditors, and thus, change in the form of a less robust approach to limited liability is needed. *Chandler* has evidently created a 'loophole' that courts could make use of to bring change to the current veil piercing framework. In this respect, inspiration could be taken from the Dutch system where tort law forms the standard basis for shareholder liability. However, would a change in the direction of the Dutch law be desirable? And, more particularly, could a shift in the direction of Dutch law provide for better creditor protection without opening the floodgates to shareholder liability?

This paper will thus attempt to answer this question of whether English law on piercing the corporate veil should develop in the direction of Dutch, tort-based law. The paper acknowledges that the topic of veil piercing is extremely broad – as will become apparent from the first part of the paper, English law provides for an extensive set of 'tools' for addressing potential abuses of the corporate form that can be seen as falling under the doctrine of veil piercing. Hence, the conscious choice has been made to focus solely on how the concept of veil piercing based on *tort* could be expanded in order to, ultimately, provide for better creditor protection. In order to be able to do this, an evaluation of Dutch law as it currently stands will be indispensable.

First, an overview will be given of the English law on corporate veil piercing – the English 'toolbox' for identifying and addressing abuses of corporate form by piercing the veil of incorporation will be analysed in order to then be able to detect its shortcomings. In this

[12] Phillip I Blumberg, *The Multinational Challenge to Corporation Law*, (OUP 1993) 134.
[13] [2012] EWCA Civ 525.
[14] Martin Petrin, 'Assumption of Responsibility in Corporate Groups: *Chandler v Cape plc*' (2013) 76 *MLR* 603.
[15] *Caparo Industries plc v Dickman* [1992] 2 AC 605 (HL).
[16] *Chandler* (n 13).
[17] [2016] EWHC 975 (TCC).
[18] ibid 115-126.
[19] HR (Supreme Court) 25 September 1981, NJ 1982, 43 (*Osby)*; Vandekerckhove (n 6) 25-30. [20] MJ Kroeze, L Timmerman and JB Wezeman, *De kern van het ondernemingsrecht* (3d edn, Kluwer 2013) 230.
[20] Steef M Bartman, Adriaan FM Dorresteijn and Mieke Olaerts, *Van het concern* (9th edn, Wolters Kluwer 2016) 241-242.

context, the importance of negligence as the 'newest' tool for holding shareholders liable for corporation's debts shall be discussed, followed by an extensive analysis of *Chandler* and other cases that have shaped negligence as a new basis for piercing the corporate veil.

The second part of the paper will deal with Dutch law. First, the difference between direct and indirect piercing will be explained, followed by an overview of both veil piercing techniques. Thereby, the importance of indirect veil piercing as the most effective basis for veil piercing will be highlighted, and an overview will be given of the most important cases that have shaped the current indirect veil piercing framework. Lastly, the law on indirect veil piercing as it currently stands in the Netherlands will be evaluated in order to then be able to conclude whether English law should 'go Dutch'.

PART I: ENGLISH LAW

1. Foundation

The foundation for the English approach to the issue of veil piercing can be found in the 1897 landmark decision in *Salomon v Salomon & Co Ltd.*[21] This case forms the starting point for courts when considering whether the corporate veil should be pierced.[22] In *Salomon,* it was ruled that an incorporated company is to be seen as a 'legal person separate and distinct from the people who hold shares in it and who manage it'.[23] Even though *Salomon* concerned a one-man company, the principle that it laid down can be considered as the foundation for the concepts of corporate personality and entrepreneurial liability as we know them today.[24] As a consequence of this early judgment, shareholders of a limited liability company cannot as such be held liable for their company's debts.[25] Although the ruling in *Salomon* has never been successfully challenged, English law has, under certain limited circumstances, recognised exceptions to the principle that shall be discussed below.

However, at this stage, it is important to first mention *Adams v Cape Industries plc*[26] - the leading case on corporate groups. *Adams v Cape* concerned an attempt by victims of tort to obtain enforcement of a US judgment. As the English company in question had certain subsidiaries present in the US, the issue at hand was whether this presence would be enough to have the company fall under the jurisdiction of US courts. In ruling that the various companies were not to be regarded as one group enterprise, it once again reaffirmed the fundamental principle that each company in a group is to be treated as one separate legal entity possessing its own rights and liabilities. Moreover, the Court of Appeal ruled that English courts do not have general discretion to disregard the corporate veil on grounds of justice. According to *Adams*, the veil will not be lifted merely because a group had used the corporate structure to shift liability for future activities from one member to the other. Thus, *Adams* confirmed that the doctrinal position on piercing the corporate veil does not change when the issue is examined from the perspective of corporate groups.[27]

2. The English Toolbox

2.1 Deliberate Evasion of Existing Legal Obligation (previously: sham/façade)

In the past, courts had sometimes held that the veil of incorporation could be pierced if the company was used as a 'sham' or 'mere façade'.[28] However, in *VTB Capital plc v Nutriek International Corp*, Lord Neuberger P remarked that 'the precise nature, basis and meaning of the principle [of veil piercing] are all somewhat obscure, as are the precise nature

[21] *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).
[22] Alexander Daehnert, 'Lifting the Corporate Veil: English and German Perspectives on Group Liability' (2007) 18 *I.C.C.L.R.* 393.
[23] Ferran and Ho (n 10) 12; *Salomon* (n 22).
[24] LBC Gower, *Principles of Modern Company Law* (5th edn, Sweet & Maxwell 1992) 85.
[25] Vandekerckhove (n 6) 52.
[26] *Adams* (n 9).
[27] ibid; Ferran and Ho (n 10) 30-31.
[28] See e.g *Glastnos Shipping Ltd v Panasian Shipping Corpn* [1991] 1 Lloyd's Rep 482, 486 where 'sham' is defined as 'a transaction that is not intended to be valid and effective as between the parties by the parties themselves'; in *VTB Capital plc v Nutriek International Corp and others* [2013] UKSC 5 it was ruled that the veil could be pierced where the company is being used as 'a façade concealing the true facts'.

of circumstances in which the principle can apply.'[29] This view was also backed by several legal commentators that acknowledged that the exact circumstances in which the veil could be pierced were unclear.[30] In *VTB*, it was even considered that statute should be the only ground on which the veil of incorporation could be lifted; however, such an idea was automatically discarded by the Supreme Court's ruling in *Prest v Petrodel Resources Ltd* (now the leading case on the issue),[32] which replaced the notions of 'sham' and 'façade' with the notions of 'concealment' and 'evasion'. Thus, piercing the corporate veil is now recognised as a 'limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose circumstances he deliberately frustrates by interposing a company under his control.'[31] Even though in *Prest*, most of Lord Sumption's statements regarding the courts' ability to pierce the veil were *obiter*, at this point, it seems very likely that courts will adopt his line of reasoning. Thus, it can effectively be said that the notions of 'sham' and 'façade' are to be regarded as 'dead'. However, there is still great uncertainty surrounding this new principle, and (in line with Lord Sumption's reasoning) it has been predicted that this new principle will have a very limited range of application.[32]

2.2 Statutory Provisions

For the purposes of this paper, it is sufficient to mention at this point that there are certain statutory provisions that can form a basis for courts to view companies and shareholders as a unit. However, it needs to be noted that in these cases, courts merely have the task of determining the *scope* of particular pieces of legislation – they are not about directly holding shareholders liable for companies' debts.[33]

2.2.1. Fraudulent and Wrongful Trading

More important derogations from the limited liability rule can be found in s213 and 214 of the Insolvency Act 1986 (IA). According to s213(1), fraudulent trading occurs when the business of a company that is being wound up has been carried on with the intent to defraud creditors or for any other fraudulent purpose. In such an event, the court can declare that *any persons* who were knowingly parties to the carrying on of the business in such a manner are to be held liable to make such contributions to the company's assets as the court determines. Thus, s213 could potentially apply to a shareholder as well. However, as fraud in this context means 'actual dishonesty, involving moral blame',[34] it has in practice proven to be difficult to establish shareholder liability under this section.[35]

On the other hand, s214 on wrongful trading applies only to *directors* of the failed company, and sets out that if they knew or ought to have concluded that the that there was no reasonable prospect of the company avoiding insolvent liquidation, the same type of liability (as under s213) is to apply to them. As this section also applies to *de facto* and *shadow* directors, shareholders can also be caught by this provision. Requirements for establishing both types of directorship can be found in *Re Hydrodam (Corby) Ltd*,[36] but whether such directorship (and consequently, liability) will be established will be largely dependent on the

[29] VTB (n 29) [123].
[30] Lord Wedderburn, 'Multinationals and The Antiquities of Company Law' (1984) 47 *MLR* 87; S Ottolenghi, 'From Peeping Behind the Corporate Veil to Ignoring it Completely' (1990) 53 *MLR* 338. [32] [2013] UKSC 34.
[31] ibid [35].
[32] Robert Miles and Eleanor Holland, 'Piercing the Corporate Veil' in Edwin Simpson and Miranda Steward (eds), *Sham Transactions* (OUP 2013) 206-207.
[33] See e.g. *DHN Food Distributors Ltd v. Tower Hamlets LBC* [1976] 1 WLR 852 (CA) (compensation for expropriation); *Re FG Films Ltd* [1953] 1 WLR 483 (Ch) (Film Act); *Daimler v Continental Tyre and Rubber Co* [1916] 1 AC 307 (HL) (Trading with the Enemy Act); *Scottish Co-op Wholesale Society v Meyer* [1959] AC 324 (HL) (minority oppression remedy); *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* Court of Appeal (Civil Division) [2012] EWCA Civ 1190 (anti-cartel law); *Re Nortel GmbH (in administration) and other companies; Re Lehman Brothers International (Europe) (in administration) and other companies (Nos 1 and 2)* [2013] UKSC 52 (Pensions Act).
[34] *Re Patrick and Lyon Ltd* [1933] 1 Ch 786.
[35] *Re Augustus Barnett & Son Ltd)* [1986] 2 BCC 98904; Vandekerckhove (n 6) 53; Ferran and Ho (n 10) 33.
[36] *Re Hydrodam (Corby) Ltd* [1994] BCC 161.

particular facts of the case. [37] For this reason, in the past, it has sometimes proven to be difficult to establish such a form of liability for shareholders. [38]

2.3 Agency

It is possible for a subsidiary to act as the agent of a parent, and to have liability attached to its parent accordingly.[39] However, for such a liability to be imposed, the subsidiary needs to have had obtained the parent's authority to act on its behalf and in addition, this needs to have been disclosed. In practice, courts have been extremely reluctant to pierce the corporate veil on the basis of agency.[40]

2.4 Fraud

Fraudulent behaviour of shareholders and directors can be seen as a powerful tool to manage abuses of the corporate form – some consider it even as the only 'true' way in which the veil of incorporation can be pierced.[41] It has, for example, been suggested that the outcome of *Salomon v Salomon* would have been completely different, had there been an element of fraud in the case.[42]

2.5 Negligence

Negligence is the fifth and 'newest' tool for the piercing of the corporate veil. As could be inferred from the preceding paragraphs, the landmark case of *Adams* had made it clear that shareholders, and parent companies in particular, would only exceptionally be held liable for the actions of their subsidiaries by lifting the veil of incorporation.[43] As could be inferred from the previous paragraphs, other tools (except for fraud) do not provide for effective solutions either, which has resulted in veil piercing being very rare in England.[44] Consequently, in recent times, various attempts have been made to establish an 'alternative' route to veil piercing by suing parent companies for having breached a direct duty of care.[45] However, only in *Chandler v Cape* did the court actually acknowledge such an indirect veil piercing framework.

2.5.1 Pre-*Chandler*

Chandler followed a decision on a strike out application and a conflict of laws case where claimants were employees of subsidiaries abroad suing UK parent companies in tort. While in neither *Connelly v RTZ Corp plc*[46] nor *Lubbe v Cape plc*,[47] the House of Lords was asked to deal with the substantive issues of the cases, it acknowledged in its *obiters* that under 'appropriate' circumstances, a duty could be imposed on a parent company to protect the health of its subsidiary's workers (*Connelly*),[48] and suggested what an assessment of the parent's alleged responsibility could look like (*Lubbe)*, thereby correctly predicting much of the substance of *Chandler*. The House of Lords proposed that an inquiry be made into: i) what role the parent played in controlling the group's operations, ii) what its directors knew or should have known, iii) what action was taken and not taken, iv) whether a duty of care was owed by the parent to employees of foreign group companies, and, if so, v) whether this duty was broken**.**[49]

A more recent decision on intra group liability was the one in *Newton-Sealy v ArmorGroup Services Ltd*. [50] The decision dealt with a strike out application, and it was held that it is possible for a parent company to owe a duty of care to an employee of a subsidiary

[37] *Standard Chartered Bank v Antico* [1995] 18 ACSR 1, NSW SC.
[38] See e.g. *Gemma Ltd v Davies and another* [2008] 2 BCLC 281 [2008] EWHC 546 (Ch); *Re Paycheck Services No 3, RCC v Holland* [2010] UKSC 51.
[39] Ferran and Ho (n 10) 32.
[40] see e.g. *Adams* (n 9) 532-549; A Wilkinson, 'Piercing the corporate veil and the Insolvency Act 1986' (1987) 8 *Comp. Lawyer* 124, 125-126.
[41] Vandekerckhove (n 6) 130.
[42] Stephen Griffin, *Company Law: Fundamental principles* (3d edn, Pearson Education Limited 2000)
[43] *Adams* (n 9); Petrin (n 14) 604.
[44] Vandekerckhove (n 6) 605.
[45] Petrin (n 14) 604.
[46] [1999] CLC 533 (HL).
[47] [2000] 1 WLR 1545 (HL).
[48] *Connelly* (n 48) 537.
[49] *Lubbe* (n 49) 1555.
[50] [2008] EWHC 233 (QB).

company.[51] The case involved three related companies: parent company ArmourGroup International (AI), ArmirGroup Services (AS) and ArmorGroup Services (Jersey) (ASJ). The claimant (employee) was deployed as a security worker in Iraq. The job was advertised by AI. The employee had his job interview with both AI and AS, but signed an employment contract with ASJ. Written and oral communications suggested that he was dealing with ArmorGroup as a whole.[52] After suffering personal injuries in the course of employment, the claimant sued all three companies, alleging that they had all violated their duties of care towards him. The High Court was then asked to decide whether there was any real prospect that the claim would succeed.[53] The court ruled that this was indeed the case.[54] What persuaded the court was documentation the claimant had received in which repeated reference was made to 'ArmorGroup' or AI, but not to ASJ (the official employer).[55] However, the exact framework under which future parent companies could be held liable for actions of subsidiaries was only established in *Chandler.*[56]

2.5.2 *Chandler v Cape plc*

In *Chandler*,[57] for the first time a parent company was held liable for a breach of duty of care to an employee of its subsidiary.[58] Previously, courts were never given the opportunity to directly address whether a parent company has a direct duty of care when it comes to the health and safety of its subsidiaries' employees.[59]

a) Facts

For several years in the 1960s, David Chandler was employed by Cape Building Products Ltd (Cape Products), a subsidiary of Cape plc (Cape). On its site, Cape Products had two factory buildings- one used for manufacturing bricks and the other for producing asbestos products. Even though the subsidiary had a certain degree of autonomy, Cape as its sole owner still had a considerable influence on various company policies, including Cape Products' health and safety policy, as for example, it had employed a chief chemist as well as a group medical advisor who were both responsible for asbestos-related activities. Cape was also in charge of monitoring (current and former) group employees' asbestos-related diseases and prescribed regular health check-ups for those employees that were exposed to the substance.[60]

Mr Chandler worked stacking bricks on one of the two locations of the site. However, the building in which asbestos products were produced had no sides or any other protection that could prevent asbestos from escaping the lot, which led to Mr Chandler getting exposed to asbestos. In 2007, at the age of 67, Mr Chandler was diagnosed with asbestosis – a disease that might have been caused by inhalation of a single fibre with a possible decades-long incubation period. As at that point, Cape Products had already been dissolved for a long time, Mr Chandler decided to bring his claim for compensation against his former employer's parent company. In line with *Connelly*, *Lubbe* and *Newton-Sealy*, Mr Chandler claimed that as the parent company of his employer, Cape owed him a direct duty of care during his employment at Cape Products and that Cape had breached that duty.[61]

b)Decision

In agreeing with the High Court, the Court of Appeal ruled that Cape had violated its duty of care towards Mr Chandler.[62] It broadened the concept of assumption of responsibility and devised a new test for holding parent companies liable for personal injuries suffered by its

[51] ibid [38].
[52] ibid [27]-[33].
[53] ibid [2].
[54] ibid [26].
[55] Petrin (n 14) 605.
[56] Dalia Palombo, 'Chandler v Cape: An Alternative to Piercing the Corporate Veil Beyond Kiobel v Royal Dutch Shell' (2015) 4 *Brit. J. Am. Legal Stud.* 453, 464-465.
[57] *Chandler* (n 13).
[58] ibid; Petrin (n 14) 603.
[59] *Chandler* (n 13) [40].
[60] ibid [1]-[29].
[61] *Chandler v Cape plc* [2011] EWHC 951, [1]-[7]; McGaughey (n 2) 2.
[62] *Chandler* (n 13).

subsidiaries' employees.[63] While the aforementioned cases had already considered the possibility of holding parent companies liable for their violation of the duty of care, none of them had actually established an extensive test for doing so – most notably, *Newton Sealy* did not specify the elements of proximity that would trigger the parent's liability towards its employees.[64] Thus, in *Chandler,* the court first analysed whether a duty of care existed between Chandler and Cape by applying the three-fold *Caparo* test.[65] According to *Caparo,* a duty of care will be deemed to be present where 1) the injury suffered is reasonably foreseeable, 2) there is a relationship of proximity between the two parties, 3) it is fair, just and reasonable to impose such a duty.[66] After first holding that, under the circumstances, the requirement of foreseeability was satisfied, the Court of Appeal also approved of the High Court's four-part assumption of responsibility test for establishing a duty of care, which it found to fall within the second and the third parts of the three-part *Caparo* test.[67] According to the court, a parent company will thus be held to have assumed responsibility (and ultimately, a duty of care) for the health and safety of its subsidiaries' employees where:

'(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to 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 ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.'[68]

From the court's remark in a previous paragraph of the judgment,[69] it can be inferred that ultimately, these requirements amount to proving overall control of the parent over its subsidiary.[70] Consequently, once a parent is in possession of such overall control over its subsidiary's activities, it will be held to have assumed responsibility and consequently, the relevant duty of care toward its subsidiary's employees will be established.

c)Analysis

Chandler was a landmark because it was the first case in which it was held that the corporate veil is a 'secondary consideration' in deciding whether shareholders can be said to own a duty of care towards the victims of their company's torts.[71] English law, in general, ensures strict compliance with the principle of *pacta sunt servanda* and demands that others' rights are respected. When someone's rights are violated, the law prescribes that that person is brought back into the position he/she would have been, had his/her rights not been infringed upon.[72] This principle can be found in the landmark decision of *Donoghue v Stevenson* as the 'golden rule of reciprocal ethics', according to which we all owe a duty of care to our neighbour.[73] Thus, by shielding liability from shareholders, *Salomon* not only created a veil – it also set aside the principle that people should take care of those in their immediate proximity and be held to obligations that their conduct triggers.[74] While the robust approach to the concept of veil piercing may have given *Salomon* the upper hand for a century,

[63] Petrin (n 14) 603.
[64] Palombo (n 58) 464.
[65] *Caparo* (n 15).
[66] ibid 618.
[67] *Chandle*r (n 13) [62].
[68] ibid [80].
[69] ibid [46].
[70] Petrin (n 14) 610-611; Palombo (n 58) 465-466.
[71] McGaughey (n 2) 1.
[72] NJ McBride and R Bagshaw, *Tort Law* (3d edn, Longman 2008) 13-20.
[73] *Donoghue v Stevenson* [1932] UKHL 100, (1932) AC 562 – 'In the eyes of the law, our neighbour is anyone who is so closely and directly affected by our acts that they ought to have been in our contemplation' [44] (Lord Atkin).
[74] McGaughey (n 2) 2.

Chandler may just have generated a revolution in this respect by placing the principle of commercial morality above the 'exception' of separate legal personality.[75] By creating the possibility of holding parent companies in tort, *Chandler* could be said to have created an indirect, alternative route to piercing the corporate veil that circumvents the 'strict' interpretation of separate legal personality established in *Salomon*,[76] thereby potentially launching a major change in the system.[77]

Moreover, it has been argued that it is highly improbable that the judges in *Salomon* ever had the intention of extending the principle of separate legal personality to torts.[78] In any case, Lord Macnaghten for sure did not, as he stated that the unsecured creditors in *Salomon* 'only had themselves to blame'.[79] On the other hand, tort claimants per definition do not have themselves to blame, and in this respect, it is also highly doubtful that the Parliament had them in mind when construing legislation on limited liability.[80] Moreover, when the decision in *Salomon* came out, tort law was still severely underdeveloped,[81] and the focus of both the Parliament and the court in *Salomon* was on balancing interests of small businesses and large commercial creditors – tort claimants were simply not in the picture at the time.[82]

2.5.3 Post-*Chandler*

After the optimism that *Chandler* had generated, *Thompson v Renwick Group Plc*[83] (another asbestos case) was seen as a slight set-back for employees trying to sue parent companies.[84] Just like in *Chandler*, the court applied the threefold *Caparo* test in order to see whether a duty of care could be imposed on the parent company. It clarified that the four factors cited in *Chandler* were not exhaustive but merely descriptive, i.e. illustrative of ways in which the *Caparo* requirements may be satisfied.[85] In holding that the facts of *Chandler* were 'far removed',[86] the court in *Thompson* held that the parent company in question did not assume a duty of care to employees of its subsidiaries by merely appointing a director of the subsidiary with responsibility for health and safety (by contrast, in *Chandler*, a group medical advisor had been appointed). There was also no sufficient evidence of intermingling of businesses and shared use of resources that would justify the imposition of a duty of care on the parent company. In fact, there was no evidence at all that the parent company had carried on any business at all apart from holding shares of its subsidiaries. Thus, unlike *Chandler*, *Thompson* did not concern a situation where the parent company was better placed, due to its superior knowledge and expertise, to protect the employees of subsidiary companies against any risk of injury.[87] Furthermore, *Chandler* did not specify whether its new duty of care test extends to the multinational context as well.[88] However, the recent decision in *Lungowe v Vedanta Resources Plc* clarified that this was indeed the case.[89] In *Lungowe*, the court ruled that it had jurisdiction over a parent company whose foreign subsidiary had allegedly committed serious environmental harm in a mass tort that took place in Zambia against a couple of thousand Zambian claimants.[90] In the *obiter dictum*, the court held (thereby confirming the approach in Chandler) that, provided that the *Caparo* requirements were

[75] ibid 20.
[76] Vivian Grosswald Curran, 'Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations' (2016) 17 *Chicago Journal of International Law* 403, 436.
[77] Mcgaughey (n 2) 19.
[78] ibid 6.
[79] ibid; *Salomon* (n 22) [53].
[80] McGaughey (n 2) 6; see also Companies Act 2006.
[81] McGaughey (n 2) 7.
[82] ibid 8.
[83] [2014] EWCA Civ (635).
[84] Uglješa Grušić, 'Responsibility in Groups of Companies and the Future of International Human Rights and Environmental Litigation' (2015) 74 *Cambridge Law Journal* 30.
[85] *Thompson* (n 85) [33].
[86] ibid [29].
[87] ibid [37]-[38].
[88] Palombo (n 58) 466.
[89] *Lungowe* (n 17).
[90] ibid.

established, the parent company in question could become liable to the local residents.[91] It should be noted, however, that in *Lungowe* the court went further in its reasoning than in *Chandler,* as it emphasised the parent's strong financial position in comparison to its subsidiary – for example, it considered the possibility of the subsidiary being unable to satisfy the tort claims in the event they prove to be successful.[92] Thereby, it followed the ideas of authors such as Skinner and Oh who had previously proposed that parent company liability should depend on the parent's financial position.[93]

PART II: DUTCH LAW

1. Foundation

Dutch law also recognises that limited liability companies have a legal personality that is distinct from the personality of their shareholders.[94] As a general rule, shareholders of limited liability companies in the Netherlands are not liable for the companies' debts exceeding the capital contribution.[95] However, as was mentioned in the introduction, case law that had followed since the 1980s had established the doctrine on piercing the corporate veil in the Netherlands on the basis of which, under certain circumstances, creditors can directly seek recourse from companies' shareholders. This legal development was triggered in 1977 by the advising opinions of two distinguished Dutch law professors, who acknowledged the potential of Dutch law as it stood at the time to hold shareholders liable for debts of companies - certain circumstances, such as undercapitalisation, overwhelming board interference or intermingling of assets could justify piercing the veil of incorporation.[96]

1.2 Direct vs Indirect Piercing

Under Dutch law, the doctrine of veil piercing can be divided into two main categories: direct and indirect veil piercing.[97] In addition, just like under English law, director's liability resulting from gross mismanagement that caused the bankruptcy of a company could also lead to a form of veil piercing, as the rules extend to *de facto* directors as well.[98]

Liability arising out of direct piercing is based on abstraction of the difference in the identity between the two legal (or natural) persons concerned. This form of veil piercing is called '*vereenzelviging*' or 'identification', as the separate identities of the persons are set aside, [99] allowing debts of a company to be regarded as debts of its shareholder. As direct piercing violates the separate legal personality of companies,[100] it is generally regarded as *ultimum remedium.*[101]

On the other hand, when the veil is indirectly pierced, an act or omission of a shareholder is qualified as a tort against one or more creditors of the company. The term 'indirect piercing' seeks to capture the situation where the shareholder is held liable towards the creditors of the company despite the privilege of limited liability.[102] In legal literature, this form of piercing the corporate veil has also been described as 'quasi piercing'.[103] In the event of indirect piercing, liability does not follow from a direct abstraction of the company's legal personality, but from unlawful action (committing a tortious/negligent act) codified in Article

[91] ibid [106]-[118].
[92] ibid [78]-[79].
[93] Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law' (2015) 72 *Washington & Lee Law Review* 1769, 1780; Peter B Oh, 'Veil-Piercing Unbound' (2013) 93 *Boston University Law Review* 89, 94.
[94] Article 2:5 Dutch Civil Code.
[95] Articles 2:64 and 2:175 Dutch Civil Code.
[96] MJGC Raaijmakers, 'Over Verschuivingen in het Toerekeningspatroon bij Rechtspersonen' and HLJ Roelvink, 'Door Rechtspersonen Heenkijken' in *Handelingen 1977 der Nederlandse JuristenVereniging* (1977).
[97] Bartman Dorresteijn Olaerts (n 21) 241.
[98] Article 2:138 and 2:248 Dutch Civil Code.
[99] Vandekerckhove (n 6) 28.
[100] P van Schilfgaarde on HR (Supreme Court) 27 February 2009, NJ 2009, 318 (*Stichting Waaldijk 8/Aerts q.q.*).
[101] HR (Supreme Court) 13 October 2000, NJ 2000, 698 (*Rainbow*).
[102] J Barneveld, *Financiering en vermogensonttrekking door aandeelhouders* (Kluwer 2014) 471.
[103] G Van Solinge and MP Nieuwe Weme, *Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Deel 2-II* Rechtspersonenrecht, de naamloze en besloten vennootschap* (Kluwer 2009) 1064.

6:162 of the Dutch Civil Code.[104] The piercing is then seen as 'indirect' because no exception is made to the rule that a shareholder cannot be held liable for the debts of the company (Article 2:64/175 Dutch Civil Code). Rather, 6:162 allows circumvention of this fundamental rule by holding the company's shareholder liable in tort – in this sense, one can speak of a *bypass* of liability.[105]

The following paragraphs shall analyse the two bases on which the veil can be pierced under Dutch law in more detail, thereby focussing on the technique of indirect veil piercing as a basis for shareholder liability.

2. Direct Piercing

The practice of identification has been developed by courts – it does not have a basis in legislation.[106] To this date, the Dutch Supreme Court has never ruled that a shareholder should be held liable for its company's debts in the basis of identification – so far, it had only used the method of identification to rule that two sister companies had abused their separate legal personality and are to be regarded as one legal person (see *Krijger/Citco*).[107]

The most famous example of this regular court practice is the Dutch Supreme Court's decision in the *Rainbow* case,[108] where the identification technique as such was acknowledged as a doctrine, but not seen as applicable to the circumstances of the case.[109] Démarrage, a company whose sole shareholder and director was a natural person, Mr De Wit, found itself in financial difficulties. It decided to terminate its activities and transfer all its business to Rainbow Products Ltd, whose sole shareholder and director was again Mr De Wit. The two companies shared a large number of similarities, i.e. same location and same company logo, and Rainbow continued all Démarrages business activities. The Dutch tax authority, who had a large claim against Démarrage, then decided to seize a number of Rainbow's claims on the basis of identification. However, upon hearing the case, the Supreme Court ruled that, given the fact that the evasion of obligations towards the tax authority as creditor was the sole purpose of setting up Rainbow, application of the identification doctrine would go too far in this case. Rather, the creditor was to seek damages in tort – the 'primary' basis for veil piercing.[110]

Rainbow made it apparent, that the Supreme Court would only accept the use of identification as a tool for veil piercing under exceptional circumstances. Yet, it remains unclear what those exceptional circumstances are exactly. Case law does seem to have drawn a *bottom line* – while certain interconnectedness between the legal or natural persons in question is the minimum requirement,[111] it is in itself an insufficient ground for their identification.[112] Consequently, due to its inherent controversial nature and the lack of any guidelines from the Supreme Court,[113] the identification method is seen as *ultimum remedium* in cases where veil piercing is at stake. For this reason, creditors are encouraged to take the 'indirect' route to veil piercing based on tort law.[114]

3. Indirect Piercing

As was noted previously, in the Netherlands, the veil is most frequently pierced on the basis of unlawful action, resulting in shareholders' liability in tort. The doctrine of indirect veil piercing on the basis of unlawful action has been developed by courts, and in particular,

[104] Barneveld (n 104) 471.
[105] Bartman Dorresteijn Olaerts (n 21) 241-242.
[106] FG Laagland, 'Onvrijwillige doorbraak van aansprakelijkheid in concernverband' (2014) 40 *Arbeidsrecht,* 5.
[107] Kroeze Timmerman Wezeman (n 20) 230; HR (Supreme Court) 9 June 1995, NJ 1996, 213 (*Krijger/Citco*).
[108] *Rainbow* (n 103).
[109] Bartman Dorresteijn Olaerts (n 21) 248.
[110] *Rainbow* (n 103); Vandekerckhove (n 6) 353.
[111] Hof (Court of Appeal) Leeuwaarden 27 July 2005, JOR 2005 (*Paas/Carabain*).
[112] See in this context Rb (District Court) Noord-Nederland 21 January 2015, ECLI:NL:RBNNE:2015:151 (*CEG/Liberec c.s*).
[113] Bartman Dorresteijn Olaerts (n 21) 251.
[114] L Timmerman, 'Doorbraak van aansprakelijkheid; de kern van enige recente ontwikkelingen' (1996) *T.V.V.S.* 137.

by several decisions of the Dutch Supreme Court.[115] At the core of every decision where the veil is indirectly pierced is Article 6:162 of the Dutch Civil Code, which obliges the person committing an unlawful action (i.e. the tortfeasor) to compensate for the damage that his actions have caused to the victim.[118]

The most important cases that have contributed to the doctrine concern a parent/subsidiary relationship and they can be divided into five separate categories.[116] In the description of the indirect veil piercing framework, the starting point shall be the famous *Osby* judgment that has set the trend towards holding shareholders liable for the debts of companies on the basis of tort law.[117]

3.1 The *Osby* case

In *Osby,*[118] the Supreme Court was asked to decide whether a parent could be held liable towards a creditor of its wholly-owned subsidiary in a situation where the parent had provided credit to the subsidiary in return for collateral in the form of all future and current assets of the subsidiary. As a result of this transaction, the subsidiary appeared as a financially stable company whereas, in reality, it had no assets in possession that could be used for the satisfaction of its debts. The Supreme Court ruled that a parent company may commit an unlawful action against creditors of its subsidiary when it has such an influence over the subsidiary's management that, at the time of the creation of the security, the parent knew or ought to have known that new creditors would be disadvantaged by the lack of available assets, and still, it failed to take care of the satisfaction of these creditors.[119]

Thus, with this consideration, the Supreme Court developed the duty for shareholders not to disregard the interests of their companies' creditors by linking this duty to the shareholders' factual control. If the shareholder is in a position in which he can foresee that his actions could cause damage to his company's creditors, then the shareholder is under a duty to either prevent that this damage materialises itself or, in the event that this is not possible (anymore), to provide creditors with adequate compensation. If the shareholder omits to do so, he is acting contrary to Article 6:162 of the Dutch Civil Code.

However, with *Osby*, the court had only developed the *negative* duty for shareholders not to violate the interests of creditors when they are actively intervening in their companies' affairs (i.e. in *Osby* the parent had created an illusion of solvency). Only in *Albada Jelgersma II,*[120] and later, *Sobi/Hurks,*[121] did the Supreme Court rule that a shareholder could owe the actual *positive* duty of care towards his company's creditors where he had intensively interfered with the management of the company. Consequently, owing a duty of care to creditors implies that the creditors' interests should proactively be taken into account when making and implementing certain policy choices.[122]

Shareholders with the power to intervene in their companies' affairs as a result of which they owe a duty of care towards their company's creditors belong to the first category of cases concerning indirect veil piercing. The paper shall now proceed with a description of the five categories of situations in which the shareholder can incur tortious liability.

3.2 The Five Categories

I. Having the Power to Intervene

The first category of cases concerns a close-knit group structure as a result of which the shareholder can be said to possess the 'power to intervene' in the affairs of the company. In both *Albada Jelgersma II* and *Sobi/Hurks,* the shareholder (i.e. the parent company) was held to owe a duty of care (the positive duty to act proactively) towards the creditors of the company because of the amount of control it exercised over the company's policy-making. In

[115] FK Buijn and PM Storm, *Ondernemingsrecht- BV en NV in de praktijk* (Kluwer 2013) 432-440. [118] AS Hartkamp and Carla Sieburgh, *Asser 6-IV De verbintenis uit de wet* (14th edn, Wolters Kluwer 2015).
[116] Bastiaan Kemp, *Aandeelhouderaverantwoordelijkheid: De positie en de rol van de aandeelhouder en de aandeelhoudersvergadering* (Wolters Kluwer 2015) 283.
[117] Vandekerckhove (n 6) 25-26.
[118] *Osby* (n 19).
[119] ibid.
[120] HR (Supreme Court) 19 February 1988 NJ 1988, NJ 487 (*Albada Jelgersma II*).
[121] HR (Supreme Court) 21 December 2001, JOR 2002/38 (*Sobi/Hurks*).
[122] Bartman Dorresteijn Olaerts (n 21) 258.

turn, from the shareholder's intensive interference, it followed that it should have foreseen that the creditors' interests would be damaged. The shareholder should have had regard for the interests of the creditors and should have intervened on the basis of its insights and control in order to prevent the creditors from making incorrect assumptions.[123]

Thus, here, norm violation consists of the existence of a structure wherein the shareholder had an insight into the financial situation of the company, the shareholder's power to intervene, the foreseeability that the creditors would be disadvantaged and the shareholder failing (or omitting) to intervene to protect the creditors' interests.[124]

II. Raising Legitimate Expectations

The second category concerns the situation in which a shareholder has raised legitimate expectations on the part of one or more creditors. An important case falling under this category is the *NBM/Securicor* case,[125] where the shareholder (again a parent company) had created an appearance of creditworthiness of the company in question – namely, an employee of the parent (NMB) had made a statement during his conversation with a representative of Securicor on the basis of which Securicor relied on NMB guaranteeing that Securicor would be paid for the services it delivered to Van Luijk Moerdijk, i.e. NBM's subsidiary. NMB was the sole shareholder and director of Van Luijk Moerdijk. After Van Luijk Moerdijk had declared bankruptcy, Securicor turned to NBM for the satisfaction of its claim. The Supreme Court ruled that Securicor was right to turn to NBM to recover Van Luijk Moerdijk's debt as it could rely on the reassuring communication of NBM's employee. A factor that contributed to such a decision was also NBM's role as director of Van Luijk Moerdijk. Thus, the unlawful action in this category lies in the shareholder raising expectations of creditworthiness on the part of a creditor and the subsequent breach of these expectations. [126]

III. Termination of Necessary Funding

The third category concerns a shareholder terminating funding that is indispensable for the company's ordinary course of business. The *Comsys* case provides a good example of this category of cases.[127] *Comsys* concerned a parent company and its four subsidiaries. The group was structured in such a way, that one of the subsidiaries, Comsys Services, always suffered losses. These losses were financed by the parent company and one of the other subsidiaries. After the Rabobank had cancelled its credit to Comsys Services, the parent company filed for the subsidiary's bankruptcy. Subsequently, the curator decided to hold the companies that financed Comsys Services liable for the deficit in the insolvency. The Supreme Court ruled that the risks for the creditors of Comsys Services were a direct consequence of the chosen structure of the group and that therefore, the parent should have concerned itself with the interests of these creditors. The parent company as a shareholder was held to owe a duty of care towards creditors of the subsidiary.

Thus, it can be concluded that norm violation here consists of the construction of a structure that is risky for the creditors of the company and the subsequent termination of funding by the shareholder which resulted in an unlawful violation of creditors' interests.[128]

IV. Exclusion of Certain Parties

The fourth category concerns a shareholder who has unlawfully improved his own position by disadvantaging certain creditors. An important case in this respect is *Coral/Stalt*,[129] where a company, Forsythe International, had sold its shares in Forsythe Cypres to its blockholder, Stalt Holding (Stalt). Forsythe International used the proceeds from this sale to satisfy its creditors as well as a large number of inter company claims. However, it

[123] e.g. in *Albada Jelgersma*, the parent company did not take any measures after it became clear that its bankrupt subsidiary would not be able to honour its suppliers' expectations.
[124] Kemp (n 120) 284.
[125] HR (Supreme Court) 18 November 1994, NJ 1995, 170 (*NBM/Securicor*).
[126] Kemp (n 120) 283-284; see also: Hof (Court of Appeal) Amsterdam 23 March 2000, JOR 2000, 79 (*Beleggingsmaatschappij Observer/Klingler Textil*).
[127] HR (Supreme Court) 11 September 2009, NJ 2009, 656 (*Comsys Holding*).
[128] ibid; Bartman Dorresteijn Olaerts (n 21) 266-268; Kemp (n 120) 284-285.
[129] HR (Supreme Court) 12 June 1998, NJ 1998, 727 (*Coral/Stalt*).

did not pay one of its creditors – Coral Navigation Company (Coral). Coral then sued Stalt for unlawful action. The Supreme Court decided, that as Stalt has intensively interfered with Forsythe International's business activities, it knew or should have known that all creditors and subsidiaries except for Coral would be paid and therefore, it had committed an unlawful action.

The fourth category thus concerns situations in which the unlawfulness lies in a shareholder's intensive interference with its company's affairs whereby a specific creditor is disadvantaged.[130]

V. Improper Distribution to Shareholders

A shareholder can also be held to act tortuously when he participates in a decision to distribute a dividend while he must have foreseen that such a distribution would harm the company's creditors. A famous case illustrating such a situation is the *Nimox* case.[131] Nimox was the sole shareholder of Auditirade, and had arranged for a distribution of dividends (as a result of which almost all reserves had disappeared) at a point where Auditirade had been suffering losses for two years. Nimox was held liable because it was aware of its subsidiary's losses. According to the court, Nimox should have known that if the negative trend in the company had continued, the available reserves would have been necessary to cover losses or they would disappear in Auditirade's liquidation. As Nimox was not able to prove that its subsidiary's insolvency was not foreseeable at the time of the transaction, the court held that it had committed a tort towards Auditirade's creditors.

Therefore, the decisive factor for liability in this category was the possibility that the shareholder's actions would result in a deficit in the company's resources – on the basis of the company's financial position, the shareholder should have been aware that there was a reasonable chance that the reserves would not be enough to satisfy the creditors. [132] The decision in *Nimox* was recently codified for private limited liability companies.[133]

3.3 Analysis of the Framework

Even though the Supreme Court has been criticised for its case-by-case approach, on the basis of a chronological analysis of the cases, two developments in the law on indirect piercing of the corporate veil can be detected:

1. There has been increasing acknowledgment of a positive duty of care that the shareholder owes towards the creditors of his company where the shareholder had intensively interfered with its company's management.[134] As a result of this development, the burden of proof has increasingly been placed on the shareholder.[135]
2. Shareholders are increasingly being held responsible for having *omitted* to interfere in situations where the interests of its company's creditors were threatened to be adversely affected.[136]

In addition, from the criteria that the Supreme Court had devised in the first four categories of cases, a 'guide' to piercing the corporate veil on the basis of tort can be said to have been established. This '*roadmap to piercing*' contains four steps, namely:

1. establishing a close-knit (group) structure and the shareholder's corresponding 'power to intervene'- being the sole shareholder is not enough in this respect;[137]
2. concluding that the shareholder owes a duty of care towards the company's creditors due to this close-knit (group) structure combined with the shareholder's prior intensive interference;

[130] Kemp (n 120) 286.
[131] HR (Supreme Court) 8 November 1991, NJ 1992, 174 (*Nimox*).
[132] ibid; Kemp (n 120) 290.
[133] Article 2:216 Dutch Civil Code; Kemp (n 120) 291.
[134] TFE Tjong Tjin Tai, *Zorgethiek en zorgplichten* (Kluwer 2006) 167.
[135] RM Beltzer, FG Laagland and L van den Berg, *Concernwerkgeverschap – Preadvies* (Wolters Kluwer 2015) 96.
[136] Bartman Dorresteijn Olaerts (n 21) 256.
[137] WJ Slagter and BF Assink, *Compendium Ondernemingsrecht* (Kluwer 2013) 2261.

3. determining the point in time at which the shareholder should have been aware of the company's deplorable condition – the duty of care shall be 'activated' at that point;
4. deciding whether the duty of care has been satisfied.[138]

The fifth category needs to be isolated from the rest as it does not require a close-knit (group) structure and a 'power to intervene'.[139] The shareholder's mere vote in favour of a dividend distribution in combination with having to take into account the possibility of a deficit in the company's resources is enough to establish an unlawful action.[140] Several authors have called it 'striking' that shareholder liability resulting from indirect veil piercing has remained limited to these five categories.[141] However, it has proven to be difficult to establish a causal link between the damage suffered by creditors and the shareholder's actions. It, therefore, does not come as a surprise that case law on this topic mostly concerns insolvency situations. Moreover, in general, it will be difficult to establish that the duty of care owed by the shareholder has been violated. A shareholder has less far-reaching duties than a director and hence, less is to be expected from him. This is a corollary of the principle that unlike directors, shareholders are expected to act in their own interest. Lastly, individual stakeholders often do not have the means to sue a shareholder and in most cases, they are unable to join forces. [142]

Despite the fact that, for the reasons mentioned above, shareholders in the Netherlands will usually manage to escape liability,[143] Dutch tort law has repeatedly been praised for its 'flexible' approach to veil piercing problems, as courts have been able to use the *roadmap to piercing* to solve a variety of different veil-piercing cases where the close-knit group structure was held to be present.[144]

3.4 Cases Involving Employees

The Supreme Court is yet to issue a ruling on the application of the shareholder's duty of care in cases involving employees' claims. However, lower courts have regularly been applying the *roadmap* to labour law cases as well.[145] In addition, even though to this date, Dutch law has never been applied to cases involving corporate social responsibility such as *Chandler* or *Lungowe,*[146] there seems to be widespread agreement that the Dutch tort law framework as set out above should be able to provide an adequate solution – just like creditors, any other third parties would have to establish breach of a duty of care by the parent company.[147]

Conclusion

Ever since the decision in *Salomon*, English courts have strictly complied with the principles of limited liability and separate legal personality, thereby almost never allowing for the veil of incorporation to be pierced. As a result, it has been virtually impossible for creditors to hold shareholders liable for company debts. In the absence of contractual

[138] Bartman Dorresteijn Olaerts (n 21) 265.
[139] Barneveld (n 104) 484.
[140] Kemp (n 120) 291.
[141] Van Solinge and Nieuwe Weme (n 105); Slagter and Assink (n 141); EJJ van der Heijden, WCL van der Grinten and PJ Dortmond, *Handboek voor de naamloze en besloten vennootschap* (Kluwer 2013).
[142] Kemp (n 120) 281.
[143] ibid 295.
[144] Vandekerckhove (n 6) 605; Marie Lennarts, *Concernaansprakelijkheid. Rechtsvergelijkende en internationaal privaatrechtelijke beschouwingen* (Kluwer 1999) 373.
[145] Beltzer Laagland Van den Berg (n 139) 103; see e.g. Hof (Court of Appeal) 's Hertogenbosch 25 February 2014, *JAR* 2014/100 (*BNM Bouwmij*) and Hof (Court of Appeal) Amsterdam 13 January 2015, *RAR* 2015/53 (*Leendertse/Revest*).
[146] NB: in *Akpan/Shell*, a Dutch court had claimed jurisdiction over a case involving environmental damage caused by a multinational's foreign subsidiary. It is to apply foreign law however. See Rb (District Court) Den Haag 30 January 2013, ECLI: NL: RBSGR: 2013: BY9854 (*Akpan/Shell*); Hof (Court of Appeal) Den Haag 17 December 2015, ECL-NL: GHDHA: 2015:3586 (*Dooh/Shell*).
[147] MJC van der Heijden, *Transnational Corporations and Human Rights Liabilities, Linking Standards of International Public Law to Dutch Civil Litigation Proceedings*, (Dissertation, Tilburg University 2011); L Enneking, *Foreign Direct Liability and Beyond* (Eleven International Publishing 2012).

guarantees, under English law, shareholders are generally free to walk away from failure within their company, and it is the creditors who are to bear all the loss.

The fact that under English law, in the absence of any statutory rules and contractual protection, shareholders are under no legal duty to take the interests of the company's creditors when conducting business activities is manifestly unfair to creditors who may not always be wealthy banks, and who often suffer enormous losses as a result of the excessive risk taking that shareholders encourage. In essence, such an approach can be said to be contrary to the golden rule of reciprocal ethics developed in *Donoghue v Stevenson*, according to which one ought to take care of its neighbour – in this case, it is the creditors (i.e. parties who have often provided companies with the means they needed to start their business in the first place) who find themselves in the direct vicinity of the company and its shareholders, and whose interests are adversely affected by the carelessness of shareholders.

Indeed, per definition, and as a direct consequence of limited liability, shareholders have less far-reaching duties than directors, but as we have seen, occasionally, shareholders do tend to intensively interfere with the company's affairs. It is in those situations that Dutch law steps in to protect the interests of creditors on the basis of tort. While *Chandler* brought major change to the English approach to corporate veil piercing by imposing on shareholders the duty of care with respect to their employees, this paper now proposes an even more drastic change - extending the duty of care to the company's creditors according to the Dutch model.

As was noted before, when *Salomon* was decided, tort law was still severely underdeveloped, and was not nearly as advanced as Dutch law on indirect veil piercing is at present. The Dutch approach to the indirect piercing of the corporate veil is now widely regarded as flexible enough to tackle a wide range of cases, while at the same time being inherently restrictive by nature – it appears that in most cases, the veil will only be indirectly pierced where a close-knit company structure combined with the corresponding power to intervene and prior intensive interference can be established. As a result, indirect veil piercing in the Netherlands is still regarded as a relatively rare phenomenon, and thus, taking inspiration from such a framework in England would not suddenly open floodgates to shareholder liability – rather, it would produce a more just result in cases of obvious abuse of the corporate form. In order to avoid any risk of an undesirable shift towards favouring large commercial creditors over 'small' businesses, the approach set in *Lungowe* according to which shareholder liability should depend on his financial position could be further developed.

Finally, fully aware of its limited length and the fact that such a radical change to the English legal framework on piercing the corporate veil has not been suggested before, this paper is hoping to spark further academic debate on the merits of its proposal.

2) Решите задачу.

Юридическое лицо (далее - Заказчик, Ответчик) обратилось к другому юридическому лицу (далее – Подрядчик, Истец), с которым ранее было связано договорными отношениями, с письмом, содержащим просьбу командировать работников для проведения работ по испытанию оборудования. Также данным письмом было гарантировано подписание договора на выполнение этих работ и их оплату.

Ответным письмом Подрядчик согласился провести это испытание, направил Заказчику программу испытаний и указал предположительную стоимость работ.

В свою очередь, Заказчик письмом сообщил, что объем работ его удовлетворяет, а окончательная стоимость будет определена после рассмотрения и согласования обосновывающих цену договора документов.

Подрядчик командировал работников, которые провели необходимые испытания. Заключение по результатам проведенного испытания, а также акты приема выполненных работ были направлены Заказчику.

Направленные Подрядчиком акты приема выполненных работ были подписаны Заказчиком без замечаний.

Однако впоследствии от заключения договора и оплаты работ Заказчик отказался.

Подрядчик, после отказа Заказчика удовлетворить претензию, обратился с иском в суд о взыскании стоимости работ, а также процентов за пользование чужими денежными средствами, начисленных с момента подписания Заказчиком актов приема выполненных работ.

По мнению Подрядчика (Истца), Заказчик (Ответчик) обязан оплатить работы, поскольку:

- заключение по результатам проведенного испытания было им получено и использовано;
- акты приема выполненных работ были подписаны им без замечаний.

Заказчик (Ответчик), также как и претензию, исковые требования не признал по следующим основаниям:

- договорные отношения между ним и Подрядчиком (Истцом) не возникли;
- его работники, подписавшие письма, не обладают полномочиями совершать без доверенности действия, из которых возникают гражданские права и обязанности;
- представленные Подрядчиком (Истцом) документы не свидетельствуют о согласовании стоимости работ.

Проанализируйте ситуацию и ответьте на следующие вопросы, исходя из того, что сведения о фактических обстоятельствах, сообщенные Подрядчиком (Истцом) и Заказчиком (Ответчиком), соответствуют действительности:

1) какие условия необходимы, чтобы в рассматриваемой ситуации можно было признать договорные отношения между Заказчиком и Подрядчиком возникшими?

2) подлежат ли удовлетворению исковые требования Подрядчика (Истца) о взыскании стоимости работ?

3) правомерно ли Подрядчиком (Истцом) предъявлены требования о взыскании процентов за пользование чужими денежными средствами и правильно ли определен момент начала их начисления?

4) что поменяется в оценке рассматриваемой ситуации, если в качестве Заказчика будет выступать акционерное общество, в котором сто процентов акций принадлежит государству?