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**Abstract**
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In this paper I focus on comparative corporate law and deal briefly with piercing the veil in favour of creditors. I then discuss the courts' power to order pooling in the case of corporate groups. In doing so, I compare British Commonwealth and US laws.

**Keywords**
company, corporate, law, legistration, entities

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# PIERCING THE CORPORATE VEIL IN FAVOUR OF CREDITORS AND POOLING OF GROUPS – A COMPARATIVE STUDY

PROFESSOR JOHN H FARRAR*

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## I PIERCING THE VEIL IN FAVOUR OF CREDITORS

Elsewhere I have recently written about Doctrinal Incoherence and Complex Variables in Piercing the Corporate Veil Cases.[1] British Commonwealth and US case law differ on the willingness to pierce the corporate veil in favour of creditors. There is little coherent doctrine in British Commonwealth company law. Where innovation has come it has been by statute and even this has been done in a fragmented way.[2] *Salomon v Salomon & Co Ltd* recognised the separate legal personality of a one man company.[3] The circumstances under which the courts will disregard this and pierce the veil tend to fall under descriptive rather than analytical categories.[4] Thus, the cases fall under the following headings:

- where there is agency in fact
- fraud and misrepresentation
- trust
- where there is separate liability in tort

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1 J H Farrar, 'Doctrinal Incoherence and Complex Variables in Piercing the Corporate Veil Cases' (2014) 29 *Australian Journal of Corporate Law* 23.

2 See eg N Coburn, *Coburn's Insolvent Trading* (Lawbook Co, 2nd ed, 2003) ch 2.

3 [1897] AC 22.

4 See J Farrar and B Hannigan, *Farrar's Company Law* (Butterworths, 4th ed, 1998) 69.



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- enemy cases in time of war
- group enterprise (in exceptional cases)
- under specific statutory provisions.[5]

A recent attempt in the UK Supreme Court6 to impose a new analytical scheme of concealment and evasion seems to be a precedent sub silentio since this distinction was not argued by counsel.[7] The UK Supreme Court also held that there was no room for a more liberal approach in family law cases.[8]

Compared with this lack of coherence is a richer doctrinal basis in US case law.[9] US cases usually involve the presence of two or more of the following factors:

- intermixture of affairs;
- lack of corporate formalities;
- inadequate capitalisation; and/or
- fraud or evasion.[10]

Use is made of instrumentality, domination and alter ego theories to justify piercing the veil.[11] US courts are not only more willing to pierce the veil in favour of creditors they also apply a doctrine of equitable subordination, which postpones internal creditors to external creditors.[12] There is no equivalent in British Commonwealth jurisdictions.

Where statute has intervened in the British Commonwealth it has differed between jurisdictions. The UK,[13] Australia[14] and New Zealand[15] (but not Canada) adopted

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5 Farrar above n 1.

6 *VTB Capital Plc v Nutritek International Corp and Others* [2013] 2 WLR 398; *Prest v Petrodel Resources Ltd and others* [2013] 2 AC 415.

7 See Farrar above n 1.

8 *Prest v Petrodel Resources Ltd* [2013] 2 AC 415.

9 See Arthur Pinto and Douglas Branson, *Understanding Corporate Law* (LexisNexis, 4th ed, 2013) [3-03]–[3-04].

10 Ibid.

11 Ibid.

12 Ibid 3-04.

13 B Hannigan, *Company Law* (Oxford University Press, 3rd ed, 2012) [25-718].

14 See RP Austin and IM Ramsay (eds), *Ford's Principles of Corporations Law* (LexisNexis, 15th ed, 2013) [20-080].

15 *Companies Act 1993* (NZ), ss 2(3), 271. See J H Farrar and S Watson (eds), *Company and Securities Law in New Zealand* (Thomson Reuters, 2nd ed, 2013) ch 17.

liability for insolvent trading by directors. New Zealand has vested in the courts powers to make contribution and pooling orders,[16] and Ireland has followed suit.[17] The UK did not adopt these reforms. In 1992, Australia introduced liability for a holding company in failing to prevent insolvent trading by a subsidiary.[18] In 2007, it introduced its own version of pooling.[19] The US does not have insolvent trading or pooling, but it does have substantive consolidation in Bankruptcy, which resembles pooling in certain respects.[20]

Salomon predated corporate groups, which have become the new corporate reality.[21] Listed companies in particular trade through multiple entities. These sometimes reflect the haphazard growth of the group.[22] In other cases deliberate planning has been carried out to insulate the parent from liability for risky activities or to provide something like a divisional structure to the group. Added to this is the practice of the Australian Securities and Investments Commission of requiring group guarantees as a condition of granting accounting relief.[23] British Commonwealth corporate laws do not have specialist chapters on groups like Germany.[24] Instead, the law has grown up in a piecemeal fashion. We will first examine the New Zealand and Irish law on contribution and pooling and then compare this with the insolvent trading and pooling provisions in Australia. We will then compare these with substantive consolidation under US Bankruptcy Law.

## II CONTRIBUTION AND POOLING IN RESPECT OF RELATED COMPANIES IN NEW ZEALAND AND IRELAND

New Zealand courts have a wide discretionary power under the Companies Acts to deal with related companies once one of the companies is placed into liquidation. The court can order that a related company contribute to the assets available for winding up or, if there is more than one related company in liquidation, the court can wind

16 Farrar and Watson, above n 15, ch 30.

17 *Companies Act 1990* (Ireland) ss 140–1.

18 RP Austin and IM Ramsay (eds), above n 14.

19 *Corporations Act 2001* (Cth) Pt 5.6 div 8.

20 See eg Mary Kors, 'Altered Egos Deciphering Substantive Consolidation' (1998) 59 *University of Pittsburgh Law Review* 381.

21 JH Farrar and B Hannigan, above n 4, ch 33.

22 See T Hadden, *The Control of Corporate Groups*, (Institute of Advanced Legal Studies, 1983).

23 See D Murphy, 'Holding Company Liability for Debts of its Subsidiaries – Corporate Governance Implications' (1998) 10 *Bond Law Review* 241.

24 See Aktiengesetz, Book 3 (ss 291-337).

them up as if they were one company.[25] Ireland adopted these provisions in the Companies Act 1990, sections 140-1 which are substantially based on the New Zealand provisions adopted in 1980.

It is clear that a pooling order is not merely an administrative or procedural order but is one that affects the substantive rights of those parties interested in the winding up of any company subject to such orders.[26]

The courts, in considering making a pooling order, must determine whether it is 'just and equitable' to make the order. Although the legislature has provided a number of factors for the court to consider, the circumstances that will amount to just and equitable are unclear. The case law involving the pooling sections provides some guidelines, but the extent and circumstances in which an order will be granted are still unclear.

### *A Related companies*

The term 'related' is defined in section 2(3) of the *Companies Act 1993* (NZ) as follows:

A company is related to another if:

1. The other company is its holding company or subsidiary; or
2. More than half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, is held by the other company and companies related to that other company (whether directly or indirectly, but other than in a fiduciary capacity); or
3. More than half of the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or
4. The businesses of the companies have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable; or

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25 Originally added as ss 315A and 315B of the *Companies Act 1955* (NZ) (now ss 245–6 of the *Companies Act 1993* (NZ)) and see also ss 271–2 of the *Companies Act 1993* (NZ). What follows is based on J H Farrar, *Corporate Governance – Theories Principles and Practice* (Oxford University Press, 3rd ed, 2008) 277–287.

26 See *Stewart Timber and Hardware Ltd (in liq.)* (1991) 5 NZCLC 67,137.

5. There is another company to which both companies are related; and 'related company' has a corresponding meaning.

The definition includes reference to the definitions of 'holding' and 'subsidiary' company, and to the holding of majority shares, but also goes wider than section 50 of the *Corporations Act 2001* (Aus) by including the fact-based provision in (d) where the businesses of the companies have been intermingled.

### *B Contribution orders under section 271(1)(a)*

Section 271 of the *Companies Act 1993* (NZ) confers powers on the court in the following terms:

271-Pooling of assets of related companies

a) On the application of the liquidator, or a creditor or shareholders, the court, if satisfied that it is just and equitable to do so, may order that:

   i. A company that is, or has been, related to the company in liquidation must pay to the liquidator the whole or part of any or all of the claims made in the liquidation; and

   ii. Where two or more related companies are in liquidation, the liquidations in respect of each company must proceed together as if they were one company to the extent that the court so orders and subject to such terms and conditions as the court may impose.

b) The Court may make such other order or give such directions to facilitate giving effect to an order under subsection (1) of this section as it thinks fit.

Although the heading to the section now reads 'Pooling of Assets' it covers both contribution orders and pooling.

Section 271(1)(a) confers an extremely wide discretion on the court to make orders requiring a company to contribute towards the assets of the related company that is being wound up. An applicant must first prove that the company, from whom the contribution is sought, is related to the company in liquidation and then adduce evidence that it is just and equitable to make an order.[27] There is no presumption that an order should be made solely on the basis of creditor reliance on the relationship of the companies. Some further evidence is required to justify the order being made.[28]

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27 *Rea v Barker* (1988) 4 NZCLC 64, 312.

28 Section 315C(3) of the *Companies Act 1955.* This has, however, since been deleted but presumably the same principle applies.

It seems that a creditor or shareholder who succeeds in an application under section 271 is limited to benefiting from an increased dividend in the winding up, as the contribution resulting from a successful application is directed to be paid to the liquidator. Although the section allows the court to make the order on such terms and conditions as it thinks fit, it is submitted that this would not allow the court to improve the priority of any creditor or shareholder.

### *C The just and equitable criterion*

In *Re Home Loans Fund (NZ) Ltd* Justice Casey stated, in relation to the *Companies Special Investigation Act 1958*, that there was little authority to guide him on the interpretation of the words 'just' and 'equitable'. He commented that:

> Obviously, it contemplates a departure from the priorities laid down in the Companies Act 1955. I think Parliament intended the Court to have the broadest discretion to effect a result which accords with common notions of fairness in all the circumstances, bearing in mind the cardinal principle of insolvency administration, that there shall be equality among creditors of the same standing.[29]

Justice Casey stated that pooling provisions demonstrated the legislative acceptance of the importance of equality in the distribution of an insolvent company's assets.[30]

The power to intervene is expressed in extremely wide language, but is tempered by the equitable basis of the section and the flexibility to place conditions on the orders to ensure that equity is done. In exercising the broad discretion conferred by the section, the court is directed to take into account the guidelines outlined in section 272(1). These are:

a) The extent to which the related company took part in the management of the company in liquidation.

b) The conduct of the related company towards the creditors of the company in liquidation.

c) The extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company.

d) Such other matters as the court thinks fit.

The presence or absence of any of these factors is not decisive.

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29 *Re Home Loans Fund (NZ) Ltd (in group liq.)* (1983) 1 NZCLC 95,073, 95-583.

30 Ibid 95,583–4.

### *D Such other matters as the court thinks fit*

Two interlocutory decisions discussing the section have made reference to the ability of the related company to contribute to the assets of the company being wound up.[31] In the first case, *Lewis v Poultry Processors,*[32] there was evidence that a contribution might threaten the solvency of the related company. Justice Tipping commented that,

> I doubt very much whether [the section] is intended to prejudice the position of bona fide unsecured creditors of the related company. If the related company is fully solvent then there is no problem. The contrasts between [the contribution and pooling provisions] suggest [a contribution] order will only run against the balance of assets in the related company's hands after it has satisfied its bona fide indebtedness.

The second case, *Re Liardet Holdings Ltd*,[33] confirmed this view. The court considered it doubtful that any order to contribute under the section would be made on the facts, because there was evidence that nothing would be left after that company paid its own creditors.

If the contribution sought from a related company threatens that company's solvency, then the court must consider the equities involved affecting the creditors of that company. These creditors will rely on arguments that they had relied on the separate assets of the company when trading with it and should not be denied a full payout because of that company's relationship with another company.

The comments in *Lewis v Poultry Processors* and *Liardet Holdings* make it clear that such equities will have significant input to the court's decision to make an order but will not necessarily be decisive. The court is faced with balancing the equities of two sets of creditors who have dealt with two separate companies. It is submitted that the expression 'bona fide unsecured creditors' of the company mentioned by Justice Tipping could be limited to those creditors who have clearly dealt with the company as a separate commercial entity and not the combined companies. This may be a difficult decision for a court to make and may mean ascribing to creditors motives that were not clear at the time of the trading.

### *E Pooling orders under section 271(1)(b)*

This subsection deals with pooling and provides:

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31 *Lewis v Poultry Processors* (1988) 4 NZCLC 64,508; *Re Liardet Holdings Ltd* (1983) BCR 604.

32 (1988) 4 NZCLC 64,508.

33 (1983) BCR 604.

> Where two or more related companies are in liquidation, the liquidations in respect of each company must proceed together as if they were one company to the extent that the court so orders and subject to such terms and conditions as the court may impose.

In *Re Pacific Syndicates (NZ) Ltd,* Justice Hardie Boys described this provision as a valuable remedial measure designed to facilitate the task of liquidation and the general interests of all concerned.[34]

### *F Wound up together as if they were one company*

In a decision dealing with the same wording under the *Companies Special Investigation Act 1958* (NZ), Justice Cooke stated that winding the companies up together, as if they were one, caused the assets to form a common pool which was available to meet the claims of all unsecured creditors.[35] In more complex group situations, inter-company debts and liabilities may also be involved in the winding up, in addition to the assets of the companies. The question will be whether the liabilities of the related companies are to be merged as one and whether the inter-company debts will disappear as the assets and liabilities merge.

In *Re Dalhoff & King Ltd,*[36] Justice Gallen indicated that the difficulty in establishing the precise nature of the inter-company debts was a factor to be taken into account in making a pooling order. A creditor of one company submitted that the guarantee obtained for its debt from one of the other related companies should be preserved, despite the pooling order. If no pooling order was made, this creditor was entitled to prove something in the winding up of both the companies, up to a dividend of 100 cents in the dollar. Justice Gallen rejected this submission and stated that the obligations, as well as the assets of the related companies, would merge and that it was inappropriate to allow the creditor to retain a position that involved the retention of the separate identity of two of the companies within the group.

The result is that the creditor that had attempted to secure its trading position by requiring inter-company guarantees was placed with other unsecured creditors in the winding up. It might be argued that this is inequitable, as it deprives a diligent creditor of the additional security gained and places it with other creditors who were not as diligent in arranging their terms of trade.

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34 (1989) 4 NZCLC 64,757.

35 *Re Grazing and Export Meat Company Ltd* (1984) 2 NZCLC 96,021.

36 (1991) 5 NZCLC 66,959.

A different result was reached in *Re Stewart Timber & Hardware Ltd*.[37] The liquidators in that case obtained an *ex parte* order pooling the assets of the related companies. The question of a set-off with a third party arose and the liquidators returned to court and argued that the order made to pool the assets had the consequence of also pooling the liabilities. This was rejected by Justice Doogue, who stated that the order did not relate to liabilities and, therefore, they were excluded. It was clear that the order had been granted in terms of the application made by the liquidators, but it is not certain why mention of the liabilities was omitted.

A more recent case is *Mountfort v Tasman Pacific Airlines of NZ Ltd,*[38] which arose out of the Ansett collapse. Baragwanath J granted a pooling order after a useful analysis of the 1993 Act and fundamental principle. His Honour said that the court was not to use the discretion so as to dilute the principle of separate personality without solid reason grounded in the policies of the Act. Trading while insolvent was a sufficient reason. Mere participation by a holding company in the management of the subsidiary was not sufficient to justify a pooling order, nor was a cash sweep of unneeded funds of the subsidiary.[39]

### *G Factors to be considered*

In deciding whether it is just and equitable to make a pooling order, the court is required to have regard to the guidelines under section 272(2). These are:

1. The extent to which any of the companies took part in the management of any of the other companies.
2. The conduct of any of the companies towards the creditors of any of the other companies.
3. The extent to which circumstances that gave rise to the liquidation of any of the companies are attributable to the actions of any of the other companies.
4. The extent to which the businesses of the companies have been combined.
5. Such other matters as the court thinks fit.

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37 *Re Stewart Timber & Hardware (Whangarei) Ltd (in liq.) and Stewart Timber & Hardware Ltd (in liq.)* (1991) 5 NZLR 67, 137.

38 [2006] 1 NZLR 104. See too *Jordan v First City Trust No 2 Ltd (in liq.)* HC Auckland CIV-2008-404-196, 11 April 2011.

39 See G Gunasekara and A Toy, 'Lifting the Veil on Pooling Orders Under Section 271 *Companies Act 1993'* (2007) 13 NZBLQ 18.

In *Re Dalhoff & King Ltd*,[40] the liquidators of three companies in liquidation sought pooling orders to wind them up as one. A major shareholder of one company opposed the order, as it would have had the effect of reducing the dividend payable to the shareholders in the winding up from 28 cents in the dollar to zero. Justice Gallen considered each of the factors in turn.

### *H Intermingled management*

Evidence was brought that the management operated the interrelated group of companies as one entity, using whichever corporate body was convenient for the business operation in hand. A combined board meeting was held for the companies and one bank account was maintained for all three. This practice was continued by the receivers and the liquidators. This factor was found to be a significant but not decisive consideration by Justice Gallen.[41] It appears to have aided the arguments of creditors who had relied on the group as a whole, without distinguishing the specific entity with which they had been trading.

### *I Conduct towards creditors*

This factor was articulated by Justice Gallen largely in terms of the degree of confusion of the creditors of the companies as to which company they had been dealing with. The creditors included employees who were unsure which company was their employer. The amount of confusion led Justice Gallen to conclude that the fault for the confusion must be due in some part to the conduct of the companies. The shareholders, in opposition, argued that, in comparison with the total amount of debts in the winding up of the three companies, the amounts in confusion were small and determinable. Justice Gallen considered the *number* of people confused, rather than the *amount* involved in the confusion.[42] He held that, while particular instances may not of themselves have been of great significance, taken together they demonstrated a greater degree of responsibility for confusing conduct on the part of the companies. This conduct led to the situation where the conduct of the companies may be said to have given rise to concerns that the section was dealing with. In effect, Justice Gallen held that the creditors were entitled to rely on the group assets, as the

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40 (1991) 5 NZCLC 66 959. See also *Jordan v First City Trust No 2 Ltd* supra at footnote 36 and *Re McCullagh* HC Auckland CIV-2008-404-3417, 14 July 2008.

41 *Re Dalhoff & Ding Ltd* (1991) 5 NZCLC 66 959, 66 964–5. See also *Mountfort v Tasman Pacific Airlines* [2006] 1 NZLR 104.

42 *Re Dalhoff & Ding Ltd* (1991) 5 NZCLC 66 959, 66 967. See also *Mountfort v Tasman Pacific Airlines* [2006] 1 NZLR 104.

legal boundaries of the companies had become blurred, and that the management had encouraged creditors to treat the companies as a single entity.

### *J Actions of one leading to the liquidation of another*

Justice Gallen decided, as a matter of fact, that the three companies stood or fell together and that the liquidity of one must have affected the others.[43] It seems clear that the legislative intent of this subsection is directed towards the intertwining of transactions between the group, with the actions of one pulling the others down into liquidation.

### *K Intermingled business*

Not only were the creditors unaware of the separate identities of the companies, there was evidence that there was even some confusion in the minds of the shareholders of the companies.[44] There was not a great deal of discussion on this point as much of the similar evidential factors were considered in the discussion of the intermingled management of the companies.

### *L Other matters*

The existence and extent of inter-company debts between the companies in the group was an additional factor taken into account by Justice Gallen. He stated that, to resolve the inter-company debts, it would be necessary to initiate legal proceedings and that, therefore, funds available for the creditors would be unjustifiably depleted. In *Re Pacific*, Justice Hardie Boys also considered this to be a relevant factor in justifying the making of a pooling order in that case.

The cancelling out of inter-company debts, by the making of a pooling order, may have the effect of removing any action against a director of one of the companies under section 135, for transactions between the companies constituting reckless trading. Such avoidance may not be seen as equitable and could be taken into account in determining whether an order should be made.

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43 *Re Dalhoff & Ding Ltd* (1991) 5 NZCLC 66 959, 66 968. See also *Mountfort v Tasman Pacific Airlines* [2006] 1 NZLR 104.

44 *Re Dalhoff & King Ltd* (1991) 5 NZCLC 66 959. See also *Mountfort v Tasman Pacific Airlines* [2006] 1 NZLR 104.

### *M Shareholders versus creditors*

In *Re Dalhoff & King Ltd*,[45] Justice Gallen had to consider the rights of the creditors of the companies against those of the opposing shareholders of one of the companies. He held that, generally, the rights of creditors tend to weigh more heavily than those of shareholders when a company is insolvent. It was significant that creditors would be better off if a pooling order were made. It was also significant that, if a pooling order were not made, it would allow shareholders to recover at the expense of the creditors of the rest of the companies.

This finding accords with the general view that, as the insolvency of companies increases, so too does the duty to creditors and the interests of the creditors in the company's assets, to the detriment of the shareholders.[46] The shareholders in *Re Dalhoff & King Ltd* argued that creditors were better able to protect their own position by requiring additional security and altering their conditions of trade, whereas shareholders did not have such controls. Justice Gallen did not accept this, on the basis that shareholders had the advantage of making their own inspection of the company and its management before investing in it, as well as the continuing opportunity to attend annual general meetings; an opportunity denied to creditors.

## III INSOLVENT TRADING AND POOLING IN AUSTRALIA

Sections 588v-x of the *Corporations Act 2001* (Aus) provide for liability of a holding company for a failure to prevent insolvent trading by a subsidiary. This is a civil penalty provision and can give rise to criminal liability in cases of dishonesty or recklessness.[47] Statutory compensation can be claimed by the liquidator of the subsidiary under section 588W.

Prior to 2007 there were seven routes to pooling. These were:

1. under a scheme of arrangement;
2. under a compromise under section 477(1)(c);
3. under an arrangement under section 510;
4. by court order under the general powers in section 447A;
5. under a deed of company arrangement;

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45 *Re Dalhoff & King Ltd* (1991) 5 NZCLC 66 959, 66 971.

46 See eg *Nicholson v Permakraft (NZ) Ltd* [1958] 1 NZLR 242 (CA) which recognised that the directors owe an increasing duty to consider the rights of creditors of the company as it becomes insolvent. See also *Mountfort v Tasman Pacific Airlines* [2006] 1 NZLR 104.

47 See *Murphy* above n 23.

6. under directions by the court under section 479; or

7. by unanimous consent.[48]

The Corporations and Markets Advisory Committee made recommendations in favour of pooling in its Reports of 2000 and 2004.[49] Its recommendations in 2000 were more radical than the reforms that were eventually implemented in 2007, and favoured the adoption of enterprise liability. These 2007 reforms are also more limited than the NZ provisions as they do not deal with contribution orders.

Division 8 of Part 5.6 provides for two types of pooling in the case of liquidation of corporate groups.[50] These are voluntary pooling determinations by a liquidator and court ordered pooling.

### *A Voluntary pooling – pooling determinations*

This is dealt with in Division 8 – Subdivision A. Section 571 provides that in the liquidation of a group of companies the liquidator may by writing make a pooling determination if any of the following conditions are satisfied:

1. Each company in the group is a related body corporate of each other company in the group;

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48 See E Finnane 'Pooling in Corporate Insolvency' (2005) *Commercial Law Quarterly,* September 2005, 30.

49 *Corporate Groups* (May 2000); *Rehabilitating Large and Complex Enterprises in Financial Difficulties* (Oct 2004). For an earlier pooling proposal see Australian Law Reform Commission, *General Insolvency Inquiry, Report* No 45, Vol 1 paras 854-857 (1988); J Dickfos, 'Improving outcomes for creditors: balancing efficiency with creditor protection' (2008) 16 *Insolvency Law Journal* 84; H Anderson, 'Piercing the veil on corporate groups in Australia: the case for reform' (2009) 33 *Melbourne University Law Review* 333; C Witting, 'Modified limited liability' (2009) 27 *Company and Securities Law Journal* 108; H Anderson, 'Veil Piercing and Corporate Groups – An Australian Perspective' (2010) *New Zealand Law Review* 1; A Hargovan and J Harris, 'Together alone: Corporate group structures and their legal status revisited' (2011) 39 *Australian Business Law Review* 85; J Dickfos, 'Enterprise liability for corporate groups: A more efficient outcome for creditors' (2011) 25 *Australian Journal of Corporate Law* 242; T Spencer, 'Finding the wisdom of Salomon' (2012) 40 *Australia Business Law Review* 64.

50 See LexisNexis, *Ford's Principles of Corporations Law* (at Service 102) [online]; Jason Harris 'The Revised Statutory Pooling Provisions' (2007) 19 (3) *Australian Insolvency Journal* 28; Mary Wyburn 'Pooling as a Response to the Competing Interests in Corporate Group Collapse in Australia' (2010) 19 *International Insolvency Review* 65.

2. apart from this section, the companies in the group are jointly liable for one or more debts or claims;

3. the companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;

4. one or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group.

The liquidator must submit that determination to separate meetings of the eligible unsecured creditors of each of the companies proposed to be pooled (s 574). Eligible unsecured creditor is defined in section 579 Q. Section 579Q(i) provides:.

> Subject to subsection (2), for the purposes of the application of this Division to a group of 2 or more companies, a creditor of a company in the group is an eligible unsecured creditor of that company if:
>
> a) both:
>
> (i) the creditor's debt or claim is unsecured; and
>
> (ii) the creditor is not a company in the group; or
>
> b) the creditor is specified in the regulations.

Section 579Q(2) provides that the regulations may provide that a specified creditor is not an eligible unsecured creditor.

The determination can only proceed if the eligible unsecured creditors resolve to approve it. The resolution must be approved by a majority in number present and voting whose debts amount to at least 75% of the total value of the debts (s 577(20).

Section 571(2) sets out the consequences of a determination. It provides:

> If a determination under paragraph (1)(c) comes into force in relation to a group of 2 or more companies:
>
> Each company in the group is taken to be jointly and severally liable for each debt payable by, and each claim against, each other company in the group; and
>
> Each debt payable by a company or companies in the group to any other company or companies in the group is extinguished; and
>
> Each claim that a company or companies in the group has against any other company or companies in the group is extinguished.

The determination takes effect immediately after the resolutions have been passed (s 578(1)). A copy must be lodged with ASIC within 7 days (s 573(1)). Section 571(5) provides that the order of priority under ss 556, 560 and 561 is not altered.

### *B Court-ordered pooling — pooling orders*

Court-ordered pooling is dealt with in Subdivision B. Section 579E(1) provides:

If it appears to the Court that the following conditions are satisfied in relation to a group of 2 or more companies:

(a) Each company in the group is being wound up;

(b) Any of the following subparagraphs applies:

(i) Each company in the group is a related body corporate of each other company in the group;

(ii) Apart from this section, the companies in the group are jointly liable for one or more debts or claims;

(iii) The companies in the group jointly own or operate particular property that is or was used, or for use, in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;

(iv) One or more companies in the group own particular property that is or was used, or for use, by any or all of the companies in the group in connection with a business, a scheme, or an undertaking, carried on jointly by the companies in the group;

The Court may, if the Court is satisfied that it is just and equitable to do so, by order, determine that the group is a pooled group for the purposes of this section.

Section 579E(2) sets out the consequences of such a determination. It provides:

If a pooling order comes into force in relation to a group of 2 or more companies:

(a) Each company in the group is taken to be jointly and severally liable for each debt payable by, and each claim against, each other company in the group; and

(b) Each debt payable by a company or companies in the group to any other company or companies in the group is extinguished; and

(c) Each claim that a company or companies in the group has against any other company or companies in the group is extinguished.

Section 579E(12) states that in determining whether it is just and equitable to make an order the court must have regard to the following matters:

The extent to which:

(i) a company in the group; and

(ii) the officers or employees of a company in the group;

were involved in the management or operations of any of the other companies in the group;

(a) The conduct of:

(i) a company in the group; and

(ii) the officers or employees of a company in the group;

towards the creditors of any of the other companies in the group;

(b) The extent to which the circumstances that gave rise to the winding up of any of the companies in the group are directly or indirectly attributable to the acts or omissions of:

(i) any of the other companies in the group; or

(ii) the officers or employees of any of the other companies in the group;

(c) The extent to which the activities and business of the companies in the group have been intermingled;

(d) The extent to which creditors of any of the companies in the group may be advantaged or disadvantaged by the making of the order;

(e) Any other relevant matters.[51]

Section 579E(10) states that the court must not make an order if

(a) both:

(i) the court is satisfied the order would materially disadvantage an eligible unsecured creditor of a company in the group; and

(ii) the eligible unsecured creditor has not consented to the making of the order; or

(b) All of the following conditions are satisfied:

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[51] For interpretation of section 579E which resembles section 272(2) of the *Companies Act 1993* (NZ) see *Allen v Feather Products Pty Ltd* (2008) 65 ACSR 642 and *Re Lombe* (2011) 87 ACSR 84 which deal with cases where a number of companies contributed to a single business.

(i) a company in the group is being wound up under a members' voluntary winding up;

(ii) the Court is satisfied that the order would materially disadvantage a member of that company;

(iii) The member is not a company in the group;

(iv) The member has not consented to the making of the order.

As with a determination an order does not alter the order of priority (s 579E(5)). The court has power to vary or terminate a determination (s 579A, 579B and 579C). It can also vary an order (s 579F).

As can be seen the Australian style of drafting is much more detailed and denser than the New Zealand and Irish provisions which cover contribution as well as pooling and leave more to judicial discretion. The New Zealand and Irish approach to pooling as we shall see more closely resembles US law where most of the law is case law in any event.

## IV THE UNITED STATES EXPERIENCE

### *A Substantive consolidation*

The power of bankruptcy courts in the United States to make an order for substantive consolidation is not found in any express statutory authority, but is derived from the Bankruptcy Court's general powers in s 105 of the *Bankruptcy Code* 'to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title'.[52] As the jurisdiction is derived from an equitable background, the United States bankruptcy courts, in determining whether to order consolidation, are guided by what is just and equitable in the circumstances.

Substantive consolidation has been recognised since the Supreme Court's decision in *Sampsell v Imperial Paper and Color Corp* in 1941.[53] The effect of an order for substantive

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[52] 11 USC §105, Supplement V (1987); P Blumberg, *The Law of Corporate Groups,* (Aspen Publications, 2nd ed, 2005) [10.06] ('Blumberg'). This is the definitive work on the subject. The following discussion is based on J H Farrar, 'Corporate Group Insolvencies, Reform and the US Experience' (2000) 8 *Insolvency Law Journal* 148. For recent empirical work see William Widen, 'Report to the American Bankruptcy Institute, Prevalence of Substantive Consolidation in Large Public Company Bankruptcies from 2000-5' (2008) 16 *Australian Business Law Review* 1.

[53] 313 US 215 (1941). For law review literature, see J MacKinnon, 'Substantive Consolidation: the Backdoor to Involuntary Bankruptcy' (1986) 23 *San Diego Law Review*

consolidation is that the assets and liabilities of different entities are consolidated and treated as one entity.[54] The consolidated assets create one fund from which all of the claims against the consolidated debtors are satisfied.[55]

> Substantive consolidation usually results in, inter alia, pooling the assets of, and claims against, the two entities; satisfying liabilities from the resulted common fund; eliminating inter-company claims; and combining the creditors of the two companies for the purposes of voting on reorganisation plans.[56]

Although substantive consideration is functionally equivalent to a merger, there is no requirement of a shareholder vote.[57] Likewise, none of the voting procedures that safeguard creditor rights in a scheme of arrangement under Australian Law apply.

The court's power to order substantive consolidation is a flexible equitable jurisdiction. Thus, the Bankruptcy Court may order less than complete consolidation and may place conditions on the consolidation in order to protect the interests of specified creditors, or to effect an equitable remedy.[58]

Case law in the United States stresses the importance of effecting a result that accords with common notions of fairness, while bearing in mind the cardinal rule of insolvency administration — that there should be equality among creditors of the same standing. It is stated that, notwithstanding their significant discretionary authority, courts must adhere to bankruptcy's two fundamental policies, namely fair treatment of creditors and strict observance of the priorities that exist between various creditor classes.[59]

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203; P Sargent, 'Bankruptcy Remote Subsidiaries: the Substantive Consolidation Issue (1989) 44 *The Business Lawyer* 1223; J S Gilbert, 'Substantive Consolidation in Bankruptcy: A Premier' (1990) 43 *Vanderbilt La Review* 207; C W Frost, 'Organisational Form, Misappropriation Risk and Substantive Consolidation and Corporate Groups' (1993) 44 *Hastings Law Journal* 449; C J Predko, 'Substantive Consolidation Involving Nondebtors' (1995) 41 *Wayne Law Rev* 1741; Mary Kors; 'Altered Egos: Deciphering Substantive Consolidation' (1998) 59 *University of Pittsburgh Law Rev* 381.

54 *Chemical Bank New York Trust Co v Kheel* 369 F 2d 834 (2nd Circ, 1966).

55 *Re Augie/Restivo Banking Co* 850 F 2d 515, 518 (2nd Circ, 1988).

56 Ibid.

57 Kors, above n 20.

58 *Re Continental Vending Machine Co* 517 F 2d 997 (2nd Circ, 1975); *Re Parkway Calabasas Ltd* 89 Bankr 832 (BankrCD Cal, 1988).

59 *Re Gulfco Investment Corp* 593 F 2d 921, 925; Berry, 'Consolidation in Bankruptcy' (1976) 50 *American Bankruptcy Law Journal* 343, 371.

This is similar to the attitude expressed concerning the New Zealand legislation on contribution and pooling by Casey J in *Re Home Loans Fund*,[60] where the judge stated that he thought that Parliament intended the court to have the broadest discretion to effect a result that would accord with common notions of fairness in all the circumstances, bearing in mind the cardinal rule of insolvency administration (above).

### *B Consolidation with debtors and non-debtors*

Consolidation can involve the assets and liabilities of an individual debtor and an affiliated partnership as well as an affiliated company.[61] Consolidation is available to merge the assets and liabilities of *individual debtors* with their affiliate companies, as well as merging those of related companies.[62] This goes further than the New Zealand legislation but is a reflection of the way in which the United States bankruptcy law operates. Companies and individuals are dealt with under the single bankruptcy code, rather than separated into two separate regimes as in the Australian and New Zealand legislation.

Consolidation is also available between a debtor and a non-debtor. There is no United States equivalent of contribution orders, but in such situations there will often be other remedies which are available and which are less drastic, including voidable preference provisions.

### *C Factors to be considered*

Numerous factors have been mentioned in United States cases as being relevant to determining whether equitable treatment will result from substantive consolidation. Although there is some diversity of opinion, it is possible to discern six factors in recent cases. These are as follows.[63]

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60 *Re Home Loans Fund (NZ) Ltd (in group liq)* (1983) 1 NZCLC 95 073.

61 E J Wes, 'Substantive Consolidation in Bankruptcy: a Flow of Funds Approach' (1977) 65 *California Law Review* 720 ('Flow of Funds').

62 J S Gilbert, 'Substantive Consolidation in Bankruptcy: A Primer' (1990) 43 *Vanderbilt Law Review* 207 at 215 ('Primer').

63 What follows is based on the analysis by Kors, above n 20 and conversations by the author with United States bankruptcy judges in New York and Connecticut.

***1 Whether the creditors dealt with the entities as a single economic unit and 'did not rely on their separate identity in extending credit'***

In *Flora Mir Candy Corp*,[64] the court discussed consolidation within the context of one parent company and twelve subsidiaries, which had filed for individual reorganisation relief. Debentures had been issued six years prior to the date that the issuer, Meadors, was acquired by Flora Mir Candy Corporation. The debenture holders brought an action against two Flora Mir companies for fraud. The *debtors* moved for consolidation. The court refused to consolidate Meadors or the other debtors, noting that the inequities of consolidation clearly outweighed the benefits. The Meadors debentures had been issued six years prior to Flora Mir's acquisition of Meadors. Clearly, these creditors had not relied on the credit of any consolidated group. Further, consolidation would not only eliminate the Meadors claim against Flora Mir for misappropriation of assets, it would also allow the creditors of Flora Mir and the other companies to share in any recovery awarded in an action involving the debenture issues.

The focus on creditor reliance appears again in *Soveiro v Franklin National Bank*.[65] The court affirmed an order consolidating one parent company and 13 of its affiliates. The determinative factor was that creditors dealt with the parent and its affiliate as a single enterprise and could not demonstrate reliance on any single affiliate. The court did not permit consolidation simply because of a commingling of assets and disregard for corporate formalities. Rather, the court recognized that an injustice to creditors could occur, absent consolidation. The court suggested that, when consolidation is otherwise proper, creditors that knew, or *should* have known, of the unity of the interests and operations within the enterprise, may be precluded from subsequently claiming prejudice from consolidation.

Creditor reliance was considered in *Re Augie/Restivo*[66] where Winter J stated:

> Creditors who make loans on the basis of the financial status of a separate entity expect to be able to look to the assets of the particular borrower for satisfaction of that loan. Such lenders structure their loans according to their expectations regarding that borrower and do not anticipate either having the assets of a more sound company available in the case of insolvency or having the creditors of a less sound debtor compete for the borrower's assets. Such expectations create significant equities. Moreover, the lender's expectations are central to the calculation of interest rates and other terms of loans, and fulfilling those expectations is therefore important to the efficacy of credit

64 432 F 2d (2nd Circ, 1970).

65 323 F 2d 446 (2nd Circ, 1964).

66 860 F 2d 515 (2nd Circ 1988).

> markets. Such efficacy will be undermined by imposing substantive consolidation in circumstances in which creditors believed they were dealing with separate entities.

It is submitted that there will be similar considerations of creditors' respective 'equities' under the New Zealand legislation. Reliance arguments on either the collective assets of the group or individual company assets will have persuasive force in any dispute as to whether or not a pooling order should be granted. In *Soviero* it is suggested that creditors who knew, or *should have known,* of the group inter-relationship, may be precluded from claiming prejudice from consolidation. Clearly, the judgment of what a reasonable creditor would have done in the circumstances will be relevant and constructive knowledge may be imputed if the circumstances justify it.

### *2 Whether the affairs of the debtors are so entangled that consolidation will benefit all creditors*

This consideration was first introduced as a separate factor justifying substantive consolidation in *Chemical Bank New York Trust Bank Co v Kheel*.[67] The court determined that consolidation was warranted because the cost of untangling the 'hopelessly' obscured financial records of the debtors would exceed the benefits that would accrue from the disentangled records. The court set out a rigorous standard that coupled expense and difficulty with the practical impossibility of reconstructing financial records before allowing consolidation.

Subsequent parties urging consolidation have attempted Kheel's entanglement argument, but have fallen short of its strict standards. Even in *Chemical Bank v Kheel*, the judgment of Friendly J states that a court's approach should be to reach a close approximation of company records if that is required to protect the reliance interest of creditors that, without knowledge of the interrelationships within a large enterprise, rely on the credit of a single entity.

In *Re Augie/Restivo Banking Co*,[68] the court stated that entanglement of the debtor's affairs involved cases in which there had been a commingling of two firms' assets and business functions. Substantive consolidation should only be used in such circumstances where it is decided that all creditors will benefit, because untangling is either impossible or so costly as to consume the assets.

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67 369 F 2d 845 (2nd Circ 1966).

68 860 F 2d 515 (2nd Circ 1988).

The case of *Re DRW Property Co* illustrates the difficulty in using this consideration to justify consolidation.[69] Opponents of consolidation argued that the expense of unscrambling the debtor's relationship would consume all of the assets available for creditors. Despite expert testimony that disentangling the books and records of the debtors would require six additional months of audit work costing approximately $2 million, the court held that the problem of accounting difficulties was insufficient to invoke the order for consolidation. Therefore, an argument for consolidation based solely on accounting difficulties would be insufficient to invoke substantive consolidation where the reliance interests of creditors are threatened and it is seen to be inequitable to make such an order.

This factor is one that Australian courts have considered in exercise of their jurisdiction to approve compromises under what is now s 477(2A) of the Corporations Law,[70] and is one of the listed factors that New Zealand courts must consider under the contribution and pooling order provisions of the Company Act 1993.[71]

### *3 Whether there has been misappropriation of one entity's assets for the benefit of another entity*[72]

Recently a commentator in the United States has referred to the following examples:[73]

- paying the debts of another;
- purchasing property for another;
- using the other's property without payment;
- transactions at above or below market value;
- excessive salaries or management charges;
- transfers without consideration;
- incurring debts on less than arms-length terms; and
- fraudulent transfers.

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69 54 Bankr 489 (Bankr ND Tex, 1985).

70 See eg, *Re Charter Travel Co Ltd* (1997) 25 ACSR 337. Compare *Re Austcorp Tiles Pty Ltd* (1992) 10 ACLC 62, 64 and *Mentha v GE Capital Ltd* (1997) 27 ACSR 696, 702.

71 See above n 25.

72 See Kors, above n 20, 420.

73 Ibid 420.

It is argued that substantive consolidation is not well suited to redress misappropriation and that the remedy should focus on recovery of the benefit, not pooling.[74]

***4 Whether one entity had acted as the alter ego of the other[75]***

Although this factor had been used as a justification it is hard to distinguish the reasoning from that used to justify piercing the corporate veil.[76]

Other courts have favoured variations on the theme of a balancing test which weighs up the costs and benefits of substantive consolidation.[77]

In *In re Vecco Construction Industries Inc,*[78] a modern liberal trend developed in favour of a diminished standard for approval of substantive consolidation. This has now been rejected by the Third Circuit in *In re Owens Corning,*[79] which returns to the more conservative approach of *Augie/Restivo.*

The principles identified in *Re Owens Corning* are:

Respect for entity separateness, absent compelling circumstances calling equity into play.

The harms substantive consolidation addresses are nearly always caused by debtors disregarding separateness.

More benefit to the administration of the case is hardly a harm calling it into play.

As rough justice it should be rare and a matter of last resort.

While it may be used defensively to remedy identifiable harms caused by entangled affairs it may not be used offensively to disadvantage a group of creditors or alter creditor rights.

It has been argued that 'while capital markets have evolved sophisticated securitisation and syndication techniques, development of the doctrine of substantive consolidation has failed to keep pace.'[80]

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74 Ibid 421.

75 Ibid 423–4.

76 See the discussion below.

77 Kors, above n 20, 384–5.

78 4 BR 407 (Bankr EdVa, 1980).

79 419 F 3d 195 (3d Cir, 2005).

80 William Widen, 'Corporate Form and Substantive Consolidation' (Working Paper, University of Miami School of Law, 16 March 2006) 3.

### *D Comparison with piercing the corporate veil*

Some commentators in the United States distinguish substantive consolidation from the concept of piercing the corporate veil.[81] It is similar in that it involves the ignoring of artificial structures, which legally define the consolidated entities, but the commentators point out that it does not threaten the corporate law concept of limited liability. Rather, substantive consolidation is more like the concept of enterprise liability. It collapses the corporate entities:

> It is one thing to assert that a corporation is a fragment of a large corporate combine which actually conducts the business … It is quite another to claim that the corporation is a dummy for its individual shareholders who are in reality carrying on business in their personal capacities for purely personal rather than corporate ends.82

Enterprise liability presumes that an artificial division of a single economic enterprise into two or more separate corporations should not be permitted to defeat a plaintiff's recovery merely because the plaintiff dealt with a particular entity with insufficient assets to justify the judgment.

These commentators are keen to distinguish substantive consolidation from piercing the corporate veil, as the latter concept is difficult to maintain.[83] As piercing the veil undermines the concept of limited liability, the courts approach the issue cautiously and will only make such an order where the entity in question has been so dominated and controlled by its related entity that the court can conclude that it is the related entity's 'mere instrumentality' or 'alter ego'. In such cases it can, therefore, be said that it lacks separate legal existence.

The criteria for justifying an order to pierce the corporate veil have been criticised as being metaphorical, rather than as true indications of legal analysis, but they include:

- excessive exercise of control;
- wrongful or inequitable conduct; and
- causal relationship to the plaintiff's loss.[84]

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81 Blumberg, above n 52, [10.6]; Primer, above n 62, 218.

82 *Walkovszky v Carlton* 18 NY 2d 414, 418–9 (1966).

83 Blumberg, above n 52.

84 Blumberg, 'Responsibility of the Corporate Parent for the Activities of a Subsidiary' (Practising Law Institute, 1988) 20.

## V CONCLUSION

The main policies behind Salomon lay in the logic of the original statutory scheme of the companies legislation and a freedom of contract or freedom of transactions approach. This arguably tipped the pendulum too far away from creditor protection and exposed involuntary creditors, at least, to excessive risk. This approach neglected the fundamental principles of the law as stated by Justinian in relation to Roman law nearly two thousand years ago: *'Iuris praecepta sunt haec: Honeste vivere, alterum non laedere, suum cuique tribuere'*[85] (The precepts of the law are to cause people to live honestly, not to harm others and to give to each their due). As a consequence, the strict application of *Salomon* to groups of companies, coupled with limited liability, has led to a system of limited liability within limited liability, which was never countenanced by the early legislation, and has facilitated abuses of the kind specified above. The extremes of this approach were demonstrated in the waterfront dispute in the 1990s.[86]

Of the existing reforms, the New Zealand and Irish reforms have the advantage of boldness, generality, and flexibility. The Australian reforms are more limited in scope although the pooling reforms bring Australian law closer to the other three systems. The advantage of the Australian law over the New Zealand and Irish law is greater certainty. The New Zealand and Irish law is nevertheless closer to the equitable case law on substantive consolidation in US Bankruptcy Law, which has generally been developing in a conservative fashion.[87] Australian and US laws do not provide for contribution orders. No jurisdiction to date has recognised enterprise liability and we are slow to develop enterprise law, a state of affairs that Professor Philip Blumberg regarded as the multinational challenge to Corporation Law in 1993.[88]

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85 *Justinian's Institutes*, Book I-1-3.

86 See generally H Trinca and A Davies, *Waterfront — The Battle that Changed Australia*, (Doubleday, 2000).

87 See J H Farrar, 'Corporate Group Insolvencies, Reform and the US Experience' (2000) 8 *Insolvency Law Journal* 148.

88 Phillip Blumberg, *The Multinational Challenge to Corporation Law: the Search for a New Corporate Personality* (Oxford University Press, 1993). See also J Dickfos, 'Enterprise Liability for Corporate Groups: A More Efficient Outcome for Creditors' (2011) 25 *Australian Journal of Corporate Law* 242; Vanessa Finch, *Corporate Insolvency Law* (Cambridge University Press, 2nd ed, 2009) 581–596. For cross border considerations see Janis Sarra 'Oversight and Financing of Cross-Border Business Enterprise Groups Insolvency Proceedings' (2009) 44 *Texas International Law Journal* 547, 566–572.