# 法 學 英 文

# 再論揭穿公司面紗與反向揭穿 公司面紗原則

美國杜克大學法律博士,世新大學法律學系副教授 胡韶雯

### 壹、前言

就關係企業法之英文學習,筆者曾自2010年律師考試關於「揭穿公司面紗」(piercing the corporate veil)原則之法學英文試題出發,為文釐清該原則之基本概念;並以外國契約實務及成文法相關規範為例,說明從屬與控制關係之界定;另就我國公司法第369條之7所採,與揭穿公司面紗原則同為保障債權人之「衡平居次」(equitable subordination)理論(即「深石原則」;Deep Rock doctrine),加以比較分析¹。隨後,我國公司法第154條第2項正式明文引進揭穿公司面紗原則,惟適用上仍有諸多疑義,學者已多有評述²;至於「反向揭穿公司面紗」(reverse piercing the corporate veil/reverse veil piercing)原則,亦有專文探討³,而最高法院102年度台上字第1528號民事裁定雖駁回第一銀行對英商雷曼兄弟國際(歐洲)公司之賠償請求,但似肯認採用反向揭穿公司面紗原則之可能性。

美國知名公司法學者Stephen M Bainbridge教授曾於2013年發表一篇以反向揭穿公司面紗維護公司僱主宗教自由之文章<sup>4</sup>,文中精簡地論述在美國判例法上行之有年的揭穿公司面紗與反向揭穿公司面紗原則,言簡意賅且相當有趣。其後,美國聯邦最高法院在2014年6月30日之Burwell v. Hobby Lobby Stores Inc. (以下簡稱Hobby Lobby) 一

<sup>1</sup> 胡韶雯,從「揭穿公司面紗」到「衡平居次(深石)原則」一談我國關係企業法之英文學習,月旦法學教室,114期,頁75-84,2012年4月。

<sup>2</sup> 參見劉連煜,現代公司法,新學林,頁85-96,2015年9月,11版。郭大維,股東有限責任與否認公司法人格理論之調和一「揭穿公司面紗原則」之探討,中正財經法學,7期,頁49-105,2013年7月;洪令家,從美國法看揭穿公司面紗原則在我國之實踐,中正財經法學,8期,頁71-111,2014年1月;洪秀芬、朱德芳,關係企業債權人保護之發展趨勢:以揭穿公司面紗為核心,臺大法學論叢,43卷3期,頁641-718,2014年9月。

<sup>3</sup> 參見張心悌,反向揭穿公司面紗原則之研究,東吳法律學報,24卷4期,頁65-97,2013年4月。

<sup>4</sup> Stephen M Bainbridge, Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers, 16 GREEN BAG 2D 235 (2013).



案中,以五比四之些微差距,做出極具爭議性之判決,認為由少數人持股、按宗教原則經營之營利公司,亦可主張憲法第一修正案保護宗教自由活動之權利(Free Exercise Rights),並可適用1993年宗教自由回復法(Religious Freedom Restoration Act,簡稱RFRA),而得免依俗稱歐巴馬醫改之「病人保護及可負擔醫療法」(Patient Protection and Affordable Care Act,簡稱ACA,或譯為平價醫療法)相關規定,提供含有避孕服務之員工醫療保險5。雖然最高法院於本案之論理過程似仍未直接援引反向揭穿公司面紗原則,但後續仍有學者再自公司法之角度深論本案6。

事實上,在Hobby Lobby案之審理過程中,Bainbridge教授亦曾為文<sup>7</sup>提出九點理由,以反向揭穿公司面紗原則,力抗44位公司法學者針對本案所提出公司不得主張宗教自由活動權之諮詢意見(amicus brief或brief of amicus curiae),同樣相當精采。本文限於篇幅及法學英文之學習目的,首先簡要說明我國公司法第154條第2項之修法歷程、延伸問題與實務發展,再以導讀前揭Bainbridge教授之二篇文章為主軸,探索揭穿公司面紗原則及反向揭穿公司面紗原則之基本內涵及適用原則,期能就爭議性問題之比較法介紹,提昇學習法學英文之興趣及成效。

# 貳、我國公司法第154條第2項之修法與實務發展

我國於2013年1月增訂公司法第154條第2項:「股東濫用公司之法人地位,致公司 負擔特定債務且清償顯有困難,其情節重大而有必要者,該股東應負清償之責。」此 為立法委員於立法院第8屆第1會期主動提案,正式於我國公司法中將揭穿公司面紗原 則明文化。事實上,原草案本來提供法院於實際案例是否揭穿公司面紗之七款審酌標 準<sup>8</sup>,惟在立法院經濟委員會審查時,司法院代表提出所列七款標準之部分規定具不確

<sup>5</sup> See, Burwell v. Hobby Lobby Stores Inc. 573 U.S. 22 (2014).

<sup>6</sup> Amy Sepinwall, Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA. Rights to the For-Profit Corporation, 5 Harv. Bus. L. Rev. 173 (2014). Brett McDonnell, The Liberal Case for Hobby Lobby, 57 Ariz. L. Rev. 777 (2015).

<sup>7</sup> Stephen M. Bainbridge, A Critique of the Corporate Law Professors' Amicus Brief in Hobby Lobby and Conestoga Wood, 100 VA. L. REV. ONLINE 1 (2014).

<sup>8</sup> 第154條第2項原草案文字為:「公司負擔債務而其清償有顯著困難時,法院經審酌下列情事,認為情節嚴重而有必要者,得令該股東承擔該債務:一、該公司股東之組成型態,股權集中程度與股東人數。二、該公司是否係關係企業中之構成員。三、系爭債務之發生,係源於契約,侵權行為或其它債之關係。四、股東資產與該公司資產兩者問是否混合不清,欠缺明確區分。五、公司資本是否顯著不足承擔其所營事業可能生成之債務。六、公司之組織架構與員額是否遵守本法或相關法規,是否有股東過度控制之情事,或其業務之決策與執行是否符合法規與章程。七、其它足資證明股東有濫用公司獨立法人地位之事由。」參見立法院第8屆第1會期第14次會議議案關係文書,院總第618號,委員提案第13721號,2012年5月30日。

定性,可能造成審理上更多困擾,因此,審查會之結論決定將修正條文送黨團協商<sup>9</sup>,協商後將七款標準全數移除,形成現行第154條第2項之條文文字<sup>10</sup>。

論者認為現行第154條第2項至少包含五個不確定之法律概念,適用上可能產生諸多問題:一、何種情形構成股東「濫用」公司之法人地位?「濫用」之認定標準為何?二、致公司負擔「特定債務」之債務類型為何?三、認定「清償顯有困難」之時點何在?公司之財務須達何種狀況始符合「清償顯有困難」?四、「情節重大」之論斷標準為何?五、法院認為「有必要」之認定標準為何<sup>11</sup>?此外,並指出法院如參考外國法院判決建立適用標準時,究竟應參考美國法院判決,抑或英國法院或其他國家的判決?而美國各州法院所建立之揭穿公司面紗原則之適用標準如有差異時,又應如何取捨?於揭穿公司面紗原則法典化後,是否表示公司法僅採揭穿公司面紗原則,而揚棄或暫不採納反向揭穿公司面紗原則,抑或仍可依民法第1條及公司法第154條第2項,援引美國法少數法院所採之反向揭穿公司面紗原則<sup>12</sup>?

從立法精神而言,公司法第154條第2項之「特定」二字應視為贅文,否則在具體案件中,原告似難舉證而獲適用。一方面雖期待實務判決能依實際情形,審酌各種情狀,適時令「公司面紗」後面之股東,對公司債務負起責任,以防杜詐欺,但另方面基於例外解釋應從嚴之原則,公司法第154條第2項之適用不宜太寬鬆,應堅守「最後手段」或「輔助性」之概念,蓋法律文字已強調須「情節重大而有必要」始得為之,究應如何適用,仍需個案判斷。在母子公司之情形,解釋上似以「從屬公司已屬無清償能力或無資力狀態」,且有不法目的為前提,始有再適用揭穿公司面紗的必要,用以補充公司法第369條之4之不足;於自然人股東之情形,應限於閉鎖性公司才加適用,方符合一般上市(櫃)公司投資人之信賴與期待;而公開發行公司則應多倚賴公司法第8條第3項事實上董事及影子董事規範,以追究經營者之責任,而非浮濫使用公司法第154條第2項<sup>13</sup>。

2014年8月15日最高法院於102年度台上字第1528號民事裁定中,就揭穿公司面紗 與反向揭穿公司面紗原則,為如下之闡述:「…末查揭穿公司面紗之原則,係源於

<sup>9</sup> 立法院第8屆第2會期經濟委員會第19次全體委員會議紀錄,立法院公報,101卷81期委員會紀錄,頁197-206,2012年。

<sup>10</sup> 立法院第8屆第2會期黨團協商會議紀錄,立法院公報,102卷5期黨團協商會議紀錄,頁2509-2511,2013年。

<sup>11</sup> 林仁光,2013年公司法與證券交易法發展回顧:公司治理的強化,臺大法學論叢,43卷特刊,頁1314-1315,2014年11月。

<sup>12</sup> 同前註,頁1315。

<sup>13</sup> 劉連煜, 現代公司法, 新學林, 頁95, 2015年9月, 11版。

英、美等國判例法,其目的在於避免公司股東濫用公司人格獨立原則而有不公平或危害公共利益之情形,以保障債權人權益,乃將公司之控制股東認係公司之分身,而使該控制股東對於公司之債權人負責。此就母子公司言,應以有不法目的為前提,僅在極端例外之情況下,始得揭穿子公司之面紗,否定其獨立自主之法人人格,而將子公司及母公司視為同一法律主體,俾使母公司直接對子公司之債務負責。又法院審查個案是否揭穿公司面紗所應參酌之因素至多,例如母公司之「過度控制」屬之,此項決定性因素非指母公司百分之百持有子公司即可揭穿,尚應考量母公司對子公司有密切且直接之控制層面。我國公司法第154條第2項及第369條之4規定,應可謂均源自揭穿公司面紗原則。至反向揭穿公司面紗原則,要係為使從屬公司為控制公司或持有者之債務負責。…」於採納揭穿公司面紗原則之餘,似未揚棄不採反向揭穿公司面紗原則。

## 參、美國法揭穿公司面紗原則及反向揭穿公司面紗原則

前揭Bainbridge教授Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers一文,探討以反向揭穿公司面紗維護公司僱主宗教自由,用語詼諧且深入淺出,以下將擇要介紹。該篇文章緣起於Tyndale House Publishers, Inc. v. Sebeliu<sup>14</sup>一案法院與政府間分歧之見解。本案與Hobby Lobby案類似,原告公司依據一些評論,挑戰聯邦政府強制要求僱主在所提供醫療保健計劃中,涵蓋包括絕育和墮胎藥等避孕及其他生殖相關服務之規定的有效性<sup>15</sup>。

...the plaintiff is challenging the validity of a federal regulation requiring health-care plans to cover contraceptives and other reproductive-related services, which include sterilizations and abortion-inducing drugs, according to some critics of the mandate.

該篇文章第一部分簡要說明與案件相關之聯邦醫療保險強制規定。Bainbridge教授認為,法院缺乏一致性的理論架構以確定在何種情況下,公司形式的組織應豁免適用該等強制規定;並認為揭穿公司面紗原則的法規範,應可對此提供一套分析架構。文章第二部分乃簡要回顧反向揭穿公司面紗原則之內涵,而第三部分則探討反向揭穿公司面紗原則如何適用於此類案件。

<sup>14</sup> Tyndale House Publishers, Inc. v. Sebelius, 904 F.Supp.2d 106 (D.D.C. 2012).

<sup>15</sup> Bainbridge, Supra note 4.

在Tyndale案中,政府基於公司之獨立法人格,辯稱公司無法維護其所有人之宗教信仰,但Walton法官則援引EEOC v. Townley Eng'g & Mfg. Co.案之判決,拒絕採納政府之論點。在EEOC案中,被告公司主張第七章<sup>16</sup>之條文要求雇主容認受僱人就出席強制性禱告儀式提出宗教上拒絕之理由,侵害該公司宗教自由活動之權利,承審法院拒絕判定公司有無宗教自由權,認為公司是其所有人「信仰之延伸」,被告公司因此得主張股東個人之宗教自由權。然而,法院為此見解並未指出任何適用標準,相反地,此等見解與其說是經分析過程而得的結果,還不如被形容為是一個結論的陳述<sup>17</sup>。

In Tyndale, the government relied on the corporation's separate legal personhood to argue that a corporation could not have standing to vindicate the religious beliefs of its owners. In rejecting that argument, Judge Walton relied on EEOC v. Townley Eng'g & Mfg. Co., in which the defendant corporation claimed its free exercise rights were violated by a provision of Title VII requiring employers to accommodate employees asserting religious objections to attending mandatory devotional services. The court declined to decide whether the corporation had free exercise rights, because the court determined that the corporation was an "extension of the beliefs" of its owners. Accordingly, the company had standing to assert the shareholders' personal free exercise rights. In so holding, however, the court identified no standard to be applied. To the contrary, its holding is best described as a statement of a conclusion rather than the result of an analytical process.

其實在公司法給予股東設立公司之其他好處時,法院也經常允許請求人揭穿公司 面紗或反向揭穿公司面紗。當面紗被揭穿,股東設立公司之利益即被否認,同時當反 向揭穿公司面紗時,也避免某些因設立公司所產生的後果<sup>18</sup>。

In corporate law, however, courts regularly allow claimants to pierce the corporate veil in both forward and reverse directions, while still affording the shareholders the other benefits of incorporation. When the veil is pierced going forward, shareholders are denied the benefit of incorporation, while avoiding some of the consequences of incorporation when the veil is reverse pierced.

<sup>16 1964</sup>年民權法 (Civil Right Act of 1964) 第七章。

<sup>17</sup> Bainbridge, Supra note 4, at 239, 240.

<sup>18</sup> Id. at 241, 242.



有限責任是公司明確之特徵,美國模範公司法第6.22條第(b)項即規定,公司股東除因本身之行為致須負責外,不須為公司的行為或債務承擔個人責任。然而,即便有此成文法之屏障,股東仍可能在「揭穿公司面紗」之衡平法救濟下,被課予個人責任。當法院認為系爭債務並非真的是公司之債務,而依公平原則應視為個人或法人股東之債務時,將視情況揭穿公司面紗或法人格,使個人或法人股東負起個人或公司責任19。

Limited liability is a defining characteristic of the corporation. Model Business Corporation Act (MBCA) § 6.22(b) provides, for example, that "a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." Despite this statutory shield, however, personal liability may be imposed on a shareholder under the equitable remedy known as "piercing the corporate veil" (PCV). "The 'veil' of the 'corporate fiction,' or the 'artificial personality' of the corporation is 'pierced,' and the individual or corporate shareholder exposed to personal or corporate liability, as the case may be, when a court determines that the debt in question is not really a debt of the corporation, but ought, in fairness, to be viewed as a debt of the individual or corporate shareholders."

正如揭穿公司面紗原則允許債權人無視於公司法律上之獨立存在,而將公司視為股東之分身(alter ego),反向揭穿公司面紗原則亦允許股東如法炮製。在Cargill, Inc. v. Hedge案中,法院指出適用反向揭穿公司面紗原則時,應考慮之三項因素。首先,法院須審查「個人和其公司間識別身分之程度,以及在何種程度上公司是股東之分身」;其次,法院須確定「揭穿面紗是否將導致債權人等第三方受損害」;最後,有無「強而有力的政策理由」以正當化反向揭穿公司面紗?<sup>20</sup>

Just as PCV allows a creditor to disregard the corporation's separate legal existence in order to treat the corporation as the shareholders' alter ego, RVP permits a shareholder to do so. In Cargill, Inc. v. Hedge, ... The Cargill court identified three factors to be considered in a RVP case. First, the court must examine "the degree of identity between the individual and his or her corporation [and] the extent to which the corporation is an alter ego" of the shareholder. Second, the court must determine whether piercing the veil

<sup>19</sup> Id. at 242, 243.

<sup>20</sup> Id. at 243.

would injure third parties, such as creditors. Finally, are there "strong policy reasons" to justify a reverse pierce?

反向揭穿公司面紗原則有二種形式,本案爭點所涉者乃所謂「內部人反向揭穿公司面紗」(insider RVP, RVP-I)。而「外部人反向揭穿公司面紗」(outsider RVP, RVP-O)則於股東之個人債權人請求法院無視公司法律上之獨立存在時,始發揮作用。本案股東則是請求法院無視公司獨立之法人格,以維護股東本身憲法上所賦予之權利。<sup>21</sup>

Of the two versions of RVP, only so-called insider RVP (RVP-I) is at issue in mandate cases. The related doctrine known as outsider RVP (RVP-O) comes into play where a personal creditor of the shareholder seeks to disregard the corporation's separate legal existence. Here, however, the shareholder is asking the court to disregard the corporation's separate legal personhood so as to allow the shareholder to vindicate his constitutional rights.

「內部人反向揭穿公司面紗」和「外部人反向揭穿公司面紗」間之差異具有論理上的重要意義。特別是「揭穿公司面紗」與「外部人反向揭穿公司面紗」均使用第一個測試標準,相當程度著重股東是否遵守公司設立應具備之一長串要件。然而,當適用「內部人反向揭穿公司面紗」時,此等因素幾乎無關。「讓公司內部人反向揭穿公司實體將是明顯的例外,因為內部人正是導致公司實體不遵守公司設立應具備之要件,且將公司經營成內部人之分身的始作俑者。」<sup>22</sup>

The difference between RVP-I and RVP-O has critical doctrinal implications. In particular, the first prong of the test used in both PCV and RVP-O focuses to a considerable extent on whether the shareholder complied with a long laundry list of corporate formalities. When RVP-I is in play, however, those factors are largely irrelevant. "It would be clearly aberrant to allow a corporate insider to reverse pierce the corporate entity because the insider caused the entity to fail to observe the requisite corporate formalities and operated it as the insider's alter ego."

在本案採用內部人反向揭穿公司面紗原則並非即決定結果,而僅是提供一致性的 論理框架,以認定公司是否與股東之宗教信仰交織在一起,使公司因此擁有起訴資 格。縱使內部人反向揭穿公司面紗原則或有缺失,但確實提供了比僅以法院裁決來決

<sup>21</sup> Id. at 245.

<sup>22</sup> Id. at 245, 246.



#### 定爭點之現行司法實務更好的解決之道。23

Invoking RVP-I in the mandate cases would not be outcome determinative. Instead, it would simply provide a coherent doctrinal framework for determining whether the corporation is so intertwined with the religious beliefs of its shareholders that the corporation should be allowed standing to bring the case. Whatever demerits RVP-I may have, surely it provides a better solution than the courts' current practice of deciding the issue by mere fiat.

此外,如前所述Bainbridge教授在A Critique of the Corporate Law Professors' Amicus Brief in Hobby Lobby and Conestoga Wood一文中,延續前揭文章,以反向揭穿公司面紗原則為核心,提出九點理由,力抗44位公司法學者針對Hobby Lobby案所提出公司與股東為不同之個體,股東不得依其信仰主張公司宗教自由活動權之諮詢意見(以下簡稱「諮詢意見」)。文中所提九點理由包括:一、諮詢意見扭曲了Hobby Lobby等之主張;二、反向揭穿公司面紗原則是法院已建立之判例法原則;三、法律並未「強烈反對」反向揭穿公司面紗原則;四、諮詢意見的花招(sleight of hand)不應混淆利害攸關的重要政策議題;五、最高法院應援用反向揭穿公司面紗原則以防杜政府繼續其騙局(Shell Game);六、於此類節育相關之強行規定案件中適用內部人反向揭穿公司面紗原則並不會對公司之經營產生顛覆性的影響;七、反向揭穿公司面紗原則不具結果決定性;八、即便假設反向揭穿公司面紗原則將給予Hobby Lobby等公司競爭優勢,此等公司也不會因此所向無敵;九、反向揭穿公司面紗原則不會導致引起混亂的委託書爭奪戰等²⁴。本文限於篇幅,並配合我國公司法於2015年新增閉鎖性股份有限公司專節,以下僅摘錄Bainbridge教授針對反向揭穿公司面紗原則應適用於閉鎖性公司之說明,期能引發讀者進一步探索全文之興趣:

提出諮詢意見之學者認為,家族企業閉鎖性公司之股東往往陷入價值上之爭執,包括派系出現、大股東們聯合起來對抗少數股東、意見不同者失去工作而無法參與決

<sup>23</sup> Id. at 249.

<sup>24</sup> See Bainbridge, Supra note 7, at 7-20.

A. The Brief Misrepresents Hobby Lobby's and Conestoga Wood's Argument.

B. Reverse Veil Piercing is an Established Doctrine.

C. The Law Does Not "Strongly Oppose" Reverse Veil Piercing.

D. The Brief's Sleight of Hand Should Not Obscure the Important Policy Issues at Stake.

E. The Supreme Court Should Invoke RVP-I to Prevent the Government from Continuing its "Shell Game."

F. Applying RVP-I in the Contraception Mandate Cases Would Not Be "Disruptive to Business."

G. RVP is not Outcome Determinative.

H. Even Assuming RVP-I Would Give Hobby Lobby and Conestoga Wood a "Competitive Advantage," They Would Not Be Alone.

I. RVP-I Will Not Lead to "Disruptive Proxy Contests."

策、停付股息等等。於此,少數股東之股權並無任何經濟上的回報,而此等戲劇化的 案例在公司法教科書比比皆是。即使並未摻雜諸如宗教等具分裂性之個人議題,經營 家族企業本身已相當困難,根據價值傳導理論,可以想見大股東勢將驅逐那些不支持 其宗教信仰之家族成員<sup>25</sup>。是故,在此不應援用反向揭穿公司面紗原則。

Shareholders in closely-held and family-owned businesses often find themselves in disputes over values. Factions emerge; majority shareholders gang up on minority shareholders; dissenters lose their jobs and are excluded from decision-making; dividends previously paid and relied upon are discontinued; etc. In such circumstances, minority shareholders find themselves with no economic return on their share ownership. Corporate law casebooks are filled with these dramas. .... Running a family business is difficult enough, even without infusing disruptive and personal issues such as religion into the mix. Under a values pass-through theory, one can imagine majority shareholders "freezing out" family members who do not adhere to the majority's religious beliefs.

Bainbridge教授則認為,首先,反向揭穿公司面紗原則既非創新也非極端例外,法院目前約在八件反向揭穿公司面紗案例中,即會有一件將其「揭穿」,但家族企業仍總是設法得過且過,何以見得允許內部人反向揭穿公司面紗以維護珍貴的憲法權利會突然改變此等企業之動力?<sup>26</sup>

First, as we have seen, RVP is neither novel nor all that unusual. Courts presently pierce in about one out of eight RVP cases, yet family businesses somehow manage to muddle along. Why should allowing RVP-I to vindicate cherished constitutional rights suddenly change the dynamics of such businesses?

其次,不僅在宗教上,公司法本即致力防杜大股東之壓迫行為。其實,公司以少數股東不喜歡之方式從事宗教活動所生之問題,相較於諸如策略性之業務決策、股息分派之決定,大股東之自我交易等等其他引起少數股東不滿之問題而言,相對微不足道;況且大量的判例法原則,從追究受任人責任至解散公司實體,均在在保護少數股東。此外,法律亦允許閉鎖性公司之股東實質的自由以自我保護,並透過私法自治自行安排其決策過程。因此,在有利於Hobby Lobby等之判決中,少數股東並非未受保護。<sup>27</sup>

<sup>25</sup> Id. at 15.

<sup>26</sup> Id. at 15, 16.

<sup>27</sup> Id. at 16.



Second, oppressive conduct by majority shareholders is something corporate law devotes much of its effort to preventing even outside of the context of religion. Indeed, the problem of corporations exercising religion in a way the minority dislikes is trivial compared to the problem of minority discontent with strategic business decisions, deciding what share of profit should be issued as dividends, self-dealing by the majority shareholders, etc., and the law provides numerous doctrines to protect the minority, ranging from fiduciary duties to dissolution of the corporate entity. In addition, the law permits shareholders of close corporations substantial freedom to protect themselves and organize their decision-making processes via private ordering. Minority shareholders are thus not without protection from the parade of horribles the Brief claims a decision favoring Hobby Lobby and Conestoga Wood would visit upon them.

第三,即便部分少數股東不滿控制股東所作之決定又如何?即使是高度保護少數股東權益之美國各州,亦承認大股東享有「自私的所有權」,且在經營公司上「必須擁有高度的裁量權」。事實上,法院向來認為倘若控制股東們能證明合法的經營目的存在,且少數股東無法證明就其行為有危害較輕的替代方案時,控制股東所享有之「自私的所有權」,即不應被少數股東之不滿所妨礙。<sup>28</sup>

Third, even if some minority shareholders are unhappy with the decisions made by controlling shareholders, so what? Even states highly protective of minority shareholder rights recognize that the majority shareholder has rights of "selfish ownership" and "must have a large measure of discretion" in running the corporation. Indeed, courts have gone so far as to hold that the "selfish ownership" rights of controlling shareholders should "not be stymied by a minority stockholder's grievances if the controlling group can demonstrate a legitimate business purpose and the minority stockholder cannot demonstrate a less harmful alternative" for their conduct.

最後也是最根本的一點,諮詢意見並無正當理由即認定股東間潛在衝突之臆測性 考量權衡上應較宗教自由之考量為重。<sup>29</sup>

Finally, and most fundamentally, the Brief assumes, without justification, that speculative considerations of potential friction among shareholders should weigh more heavily than considerations of free exercise of religion.

<sup>28</sup> Id.

<sup>29</sup> Id.

在Wilkes v. Springside Nursing Home, Inc.案,麻薩諸塞州高等法院認為,閉鎖性公司之控制股東「在公司有所謂『自私的所有權』,此等權利應與其對少數股東之受任人義務概念相互平衡。」法院並闡述其測試標準,亦即法院須適當考慮大股東「調度空間」之需求及其於制定公司政策上「高度的裁量權」,審問控制股東們「是否能證明針對系爭行為,具有合法的經營目的」。依此測試標準,如大股東提出此等經營目的,少數股東便須證明系爭行為之目標能以損害少數股東利益較少之方式達成,此時法院即須就合法的經營目的與危害較小替代方案之可行性,加以權衡。30

In Wilkes v. Springside Nursing Home, Inc., the Massachusetts high court held that the controlling shareholders of a close corporation "have certain rights to what has been termed 'selfish ownership' in the corporation which should be balanced against the concept of their fiduciary obligation to the minority." The Wilkes court then elaborated a test by which a court must ask "whether the controlling group can demonstrate a legitimate business purpose" for a challenged action, with due regard for the majority's need for "room to maneuver" and "a large measure of discretion" in setting corporate policy. Under this test, if the majority asserts such a business purpose, the minority must demonstrate that the objectives of the challenged action could have been achieved in a manner less detrimental to the minority's interests. The court will then "weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative."

如就本案爭點適用此測試標準,則即便在諮詢意見裡所有利害關係人均預期客戶流失之高度推測性的情節中,為主張具有宗教特性之公司找一個合理的經營目的似乎並不過份;甚且,即使是最保護少數股東權益的州裡,法院認定控制股東違反對少數股東受任人義務之實例,往往係連結到某些廣泛的事實共同性:大股東之權力係用於以少數股東之損失代價來取得經濟優勢,特別是(儘管並非總是)偷偷摸摸暗中為之、從事並非使全體股東(以股東資格)利益均沾之行為、挫殺少數股東在閉鎖性公司中通常可見或慣例常見之合理期待(例如對於業務之持續參與、透過分配股利或在公司任職而自其投資獲取財富的能力等等)。有誰真正見到潛在的股東紛爭係起因於公司表達特別易受用語解析所影響之宗教特性?31

<sup>30</sup> Id. at 17.

<sup>31</sup> Id. at 17, 18.



In applying this test to the issues at hand, it does not seem too much of a stretch to find a reasonable business purpose for a corporation asserting a religious identity, even in the Brief's highly speculative scenario in which all interested parties anticipate a loss of customers. Moreover, even in the states most protective of minority shareholders, instances where courts have found breaches of fiduciary duty by controlling shareholders toward minority shareholders tend to be linked by certain broad factual commonalities: majority power used to obtain economic advantage at the expense of the minority, especially (though not always) underhandedly; majority power used for actions that do not benefit all the shareholders (qua shareholders) proportionately; majority power used to frustrate reasonable minority expectations that are common or customary in close corporations (such as continued participation in the business, the ability to get money out of their investment through dividends or employment, etc.). Does anyone really see potential shareholder disputes over expressions of corporate religious identity as being particularly susceptible to analysis in these terms?

此外,委託書爭奪戰主要是公開發行公司會有的議題,而正如揭穿公司面紗原則般,內部人反向揭穿公司面紗乃是閉鎖性公司獨有的議題。因此,主張(反向揭穿公司面紗原則會導致引起混亂的委託書爭奪戰),充其量也只是假裝有理。不過,此等主張雖不正確,卻也提供寶貴的機會來提醒讀者:諮詢意見對少數股東不同利益之關注其實是高度不相關。正如Bainbridge教授曾言:股東人數眾多而有多元意見的公開發行公司,並不適合援用反向揭穿公司面紗原則;相反地,即便資產或員工眾多,具有共同宗教信仰之少數股東所持有之閉鎖性公司援用反向揭穿公司面紗原則,卻屬合適。32

Proxy contests are principally an issue for public corporations, while RVP-I – like forward veil piercing – is exclusively an issue for close corporations. The claim is thus disingenuous, at best. Nevertheless, this claim – while false – does provide a valuable opportunity for reminding the reader that the Brief's concern for minority shareholders with diverse interests is largely irrelevant. As this author has noted: "[A] public corporation with many shareholders holding diverse views is a poor candidate for RVP-I. In contrast, a closely held corporation – even if quite large by metrics such as assets or employees – with a small number of shareholders holding common religious beliefs is a good candidate."

#### 肆、結語

美國最高法院五位大法官在2014年之Hobby Lobby案中,認為歐巴馬政府推動之「病人保護及可負擔醫療法」,要求雇主投保涵蓋節育給付之員工保險,違反宗教性家族企業之宗教信仰自由;而其他四位大法官共同具名之不同意見書,則開宗明義指摘這是「一個觸目驚心的判決」(a decision of startling breadth),足見其具有高度爭議性。因此,縱使Bainbridge教授力主本案適用內部人反向揭穿公司面紗原則之可行性,但仍難以想像倘若最高法院果真援引此一同具爭議性之判例法原則,將會產生如何交互激盪之效應?

我國最高法院於102年度台上字第1528號民事裁定中,並未明白揭示在我國法下可否直接援用反向揭穿公司面紗原則,司法實務未來走向亦值得關注。此外,現行公司法雖明文引進揭穿公司面紗原則,但第154條第2項包含數個不確定之法律概念,究應如何適用,仍需透過具體個案解釋判斷。吾人雖一方面期待法院能審酌各種情狀,適時揭穿公司面紗,以防杜詐欺,但另方面基於例外解釋從嚴原則,第154條第2項之適用仍應堅守最後手段或輔助性之概念。以上種種,在在顯示法院於揭穿公司面紗原則之認事用法上,須付出諸多心力,任重道遠。

本文簡要分析我國公司法第154條第2項之規範發展,再以Bainbridge教授二篇文章之論點,導入揭穿公司面紗原則及反向揭穿公司面紗原則之基本內涵及適用原則,期能透過爭議性問題之比較法介紹,使讀者更能領略此等原則個中微妙之處,同時藉此提昇法學英文之學習興趣及成效。