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*Sealy & Worthington's*

CASES AND MATERIALS IN  
**COMPANY LAW**

Tenth Edition

LEN SEALY & SARAH WORTHINGTON

# Sealy & Worthington's Cases and Materials in Company Law (10th edn)

Len Sealy and Sarah Worthington

## Abstract

*Sealy & Worthington's Cases and Materials in Company Law* clearly explains the fundamental structure of company law and provides a concise introduction to each different aspect of the subject. The materials are carefully selected and well supported by commentary so that the logic of the doctrinal or legal argument is unambiguously shown. Notes and questions appear periodically throughout the text to provoke ongoing analysis and debate, and to enable students to test their understanding of the issues as the topics unfold. This text covers a wide range of sources, and provides intelligent and ... More

**Keywords:** case law, corporate governance, UK codes, leading government reviews, best practice, UK Stewardship Code, Kay and Davies, directors' remuneration, company audit, Companies Act 2006

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# Preface

To generations of students and teachers, this book will probably always be known simply as ‘*Sealy*’. Nevertheless, it is a great privilege for me to join Professor Len Sealy in the title of this tenth edition of *Sealy and Worthington’s Cases and Materials in Company Law*. I count Len Sealy as a friend, and owe him an enormous debt in my own academic career. As in previous editions, I have tried to remain true to Len’s original demanding ambitions for this book.

That has not always been easy. Over the past decade or so, the subject of company law has expanded enormously in both bulk and complexity. In the previous edition, the biggest changes were obvious, emerging from the introduction of the Companies Act 2006, an Act which had been almost 15 years in the making, with wide-ranging input from law reform bodies, private parties, and the government. With this tenth edition, the change is no less dramatic. True, there have been only minor changes to the Act, especially in the area of registration of company charges. On the other hand, the principal regulator, the FSA, has now become two separate regulatory authorities (the Financial Conduct Authority and the Prudential Regulation Authority). Corporate governance has remained firmly under the microscope, with further revisions to the UK Corporate Governance Code; a completely new UK Stewardship Code for institutional investors; the Kay Report noting the problems of short-termism; the Davies Report on gender diversity on boards; and various government reviews of board remuneration and its excesses. Indeed, by way of recognising this ever-increasing activity, this edition now has its own chapter on corporate governance.

The courts too have proved a significant source of further change. The Supreme Court has been particularly active. It has delivered major decisions on the separate legal personality of companies (see especially *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, and *Prest v Petrodel Resources Ltd* [2013] UKSC 34, included in this edition by way of late addendum); decisions on when a company is insolvent (*BNY Corporate Trustee Services Ltd v Eurosail UK 2007–3BL plc* [2013] UKSC 28), and on the use of flawed assets to provide insolvency protection (*Belmont Park Investment Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38). The Court of Appeal has also been active, with two of its most newsworthy decisions indicating that we have not yet reached the end of the often heated debate over whether remedies for breach of a director’s fiduciary obligations are personal or proprietary (see *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 and *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17). The list could go on. Indeed, one decision which came too late for any meaningful inclusion in this edition concerns the problems of misuse of a fiduciary’s discretion (*Pitt v Holt* [2013] UKSC 26, a case concerning trustees rather than directors, but nonetheless clearly applicable by analogy).

All this serves as a pointed reminder that companies are not mere abstractions. Everything done by a company and everything done within a company is done by human beings. Every case that comes to court involves real people facing real pressures. It is this that brings the subject alive, fills it with events and characters and makes it fun to study and to teach. The new Act may have introduced some new concepts and changed some of the rules, but its role will only be, as before, to serve the same needs of commerce and the people who engage in it: the same problems and questions will arise, and there will be no better way for students to understand the new law and to test how it will work in practice than by examining how it would apply to the facts of known cases.

In this tenth edition there has been some minor restructuring of the text and regrouping of topics: the chapter on shareholder litigation has been reorganised, with much of the now historical learning on *Foss v Harbottle* discarded; the chapter on corporate contracting has been reconfigured a little; and the directors’ duties chapter expanded slightly. Extracts from (p. vi) the judgments in a good few older cases have again had to be discarded in favour of newer substitutes, particularly in the areas of directors’ duties (corporate opportunities and relief from liability), shareholder remedies, and auditor liability. Apart from statute and cases, other major influences on corporate law and practice continue to grow in importance and need inclusion in order to give a balanced view: the regulation of the financial services industry, the rules of the Stock Exchange, self-regulatory measures such as the UK Corporate Governance Code, new rulings of the European Court, and directives and

reform proposals from the European Commission.

Finally, I must record my thanks to a number of people. Michael Lok has provided superb research assistance on all the areas addressed in this book, and managed to do that while successfully undertaking his BCL in Oxford. Joy Ruskin-Tompkins as copy editor and Gill Clack as proof reader have provided enviably rigorous, prompt, and professional service. And John Carroll and Heather Smyth at Oxford University Press have provided careful and proactive help at all stages of production. Thank you to all of you.

This tenth edition endeavours to state the law as at 31 March 2013, with some minor additions at proofs stage.

Sarah Worthington

June 2013

# New to this edition

## Key revisions in the 10th edition include:

- Complete updating of statutory, regulatory, and case law materials.
- A new chapter consolidating corporate governance materials and providing updated
- and expanded discussion of existing and new Codes of best practice, including the UK Stewardship Code, Kay and Davies Reviews, new rules on directors' remuneration, company audit, and prospectuses.
- Additional coverage of the secondary legislation implementing the Companies Act 2006.
- Notes on recent restructuring of the FSA and role of the FCA.

## Analysis of latest case law developments, including;

- *Assénagon Asset Management S.A. and Irish Bank Resolution Corporation Ltd (Formerly Anglo Irish Bank Corporation Ltd)* [2012] EWHC 2090 (Ch).
- *Borrelli v Ting* [2010] UKPC 21.
- *Chandler v Cape Plc* [2012] EWCA Civ 525 (CA).
- *Jeremy Michael Ranson v Customer Systems Plc* [2012] EWCA Civ 841 (CA).
- *Prest v Petrodel Resources Ltd* [2013] UKSC 34 (SCt).
- *Revenue and Customs Commissioners v Holland* [2010] 1 WLR 2793 (SCt).
- *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472.
- *Schofield v Schofield* [2011] EWCA Civ 103 (CA).
- *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 349, [2012] Ch 453 (CA).
- *Towers v Premier Waste Management Ltd* [2012] BCC 72 (CA).
- *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808.
- Additional coverage of statutory derivative actions, with excerpts from leading recent HCt cases.
- Additional coverage of insolvency and proprietary issues, including notes on
  - *The Matter of Lehman Brothers International (Europe) (in administration)* [2009] EWHC 3228 (Ch).
  - *Re Nortel GmbH; Re Nortel Networks UK Pension Trust Ltd; Re Lehman Brothers International (Europe) (In Administration)* [2011] EWCA Civ 1124.
  - *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2011] EWCA Civ 227.
  - *Belmont Park Investments Pty Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38 (SC)

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# Note on *Prest v Petrodel Resources Ltd*

This important Supreme Court decision on piercing the corporate veil was handed down on 12 June 2013, and so could not be included in Chapter 2, immediately preceding [2.11], where it belongs.

***The court may pierce the corporate veil only where a person under an existing legal obligation or subject to an existing legal restriction deliberately evades or frustrates its enforcement by interposing a company under his control.***

## [2.11A] *Prest v Petrodel Resources Ltd* [2013] UKSC 34 (Supreme Court)

In matrimonial proceedings concerning the division of assets worth approximately £35m, the appellant wife (W) applied to have certain residential properties transferred to her. The properties were not owned by her husband (H), however, but by the respondent group of companies (X), being companies operated and controlled by H. The trial judge concluded that H was entitled to possession or reversion of the properties, within the Matrimonial Causes Act 1973 s 24(1), and this statute therefore entitled the court to pierce the corporate veil and order H to transfer them to W. The Court of Appeal reversed that decision, holding that there were no legitimate grounds for piercing the corporate veil. The Supreme Court agreed, also holding that the Matrimonial Causes Act 1973 s 24(1) did not provide a distinct power to disregard the corporate veil in matrimonial cases. The court nevertheless found unanimously in favour of W on the basis that the most plausible inference from the little-known facts was that each of the properties was held on a resulting trust by X for H (paras 45, 47). There was no reliable evidence to rebut that inference, given the husband's refusal to afford disclosure, and accordingly the seven disputed properties were required to be transferred to W (paras 49–51, 55). The extracts below concentrate exclusively on the general issue of piercing the corporate veil, although the judgments merit reading in full.

LORD SUMPTION:

*The issues*

8 Subject to very limited exceptions, most of which are statutory, a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own which are distinct from those of its shareholders. Its property is its own, and not that of its shareholders. In *Salomon v A Salomon and Co Ltd* [2.01], the House of Lords held that these principles applied as much to a company that was wholly owned and controlled by one man as to any other company. ...

*Piercing the corporate veil*

16 I should first of all draw attention to the limited sense in which this issue arises at all. 'Piercing the corporate veil' is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company. There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor. Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose. For specific statutory purposes, a company's legal responsibility may (p. xviii) be engaged by the acts or business of an associated company. Examples are the provisions of the Companies Acts governing group accounts or the rules governing infringements of competition law by 'firms', which may include groups of companies conducting the relevant business as an economic unit. Equitable remedies, such as an injunction or

specific performance may be available to compel the controller whose personal legal responsibility is engaged to exercise his control in a particular way. But when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in *Salomon v A Salomon and Co Ltd* [2.01], i.e. where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.

17 Most advanced legal systems recognise corporate legal personality while acknowledging some limits to its logical implications. In civil law jurisdictions, the juridical basis of the exceptions is generally the concept of abuse of rights, to which the International Court of Justice was referring in *In re Barcelona Traction, Light and Power Co Ltd* [1970] ICJ 3 when it derived from municipal law a limited principle permitting the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations. These examples illustrate the breadth, at least as a matter of legal theory, of the concept of abuse of rights, which extends not just to the illegal and improper invocation of a right but to its use for some purpose collateral to that for which it exists.

18 English law has no general doctrine of this kind. But it has a variety of specific principles which achieve the same result in some cases. One of these principles is that the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not. The principle was stated in its most absolute form by Denning LJ in a famous dictum in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712:

No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever ...

The principle is mainly familiar in the context of contracts and other consensual arrangements, in which the effect of fraud is to vitiate consent so that the transaction becomes voidable ab initio. But it has been applied altogether more generally, in cases which can be rationalised only on grounds of public policy, for example ... These decisions (and there are others) illustrate a broader principle governing cases in which the benefit of some apparently absolute legal principle has been obtained by dishonesty. The authorities show that there are limited circumstances in which the law treats the use of a company as a means of evading the law as dishonest for this purpose.

19 The question is heavily burdened by authority, much of it characterised by incautious dicta and inadequate reasoning. [His Lordship then examined those cases in detail.] ...

27 In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are obiter, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.

(p. xix) 28 The difficulty is to identify what is a relevant wrongdoing. References to a 'facade' or 'sham' beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between