

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

them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'facade', but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil. [His Lordship then proceeded to examine these cases, including *Gilford Motor Co Ltd v Home* [2.17], and several of the cases considered in the Notes following [2.17].] ...

34 These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about. Thus in a case like *VTB Capital* [2.20], where the argument was that the corporate veil should be pierced so as to make the controllers of a company jointly and severally liable on the company's contract, the fundamental objection to the argument was that the principle was being invoked so as to create a new liability that would not otherwise exist. The objection to that argument is obvious in the case of a consensual liability under a contract, where the ostensible contracting parties never intended that any one else should be party to it. But the objection would have been just as strong if the liability in question had not been consensual.

35 I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in *Ben Hashem* [2.11], I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in *VTB Capital* who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy.

36 In the present case, Moylan J held that he could not pierce the corporate veil under the general law without some relevant impropriety, and declined to find that there was any. In my view he was right about this. The husband has acted improperly in many ways. In the first place, he has misapplied the assets of his companies for his own benefit, but in doing that he was neither concealing nor evading any legal obligation owed to his wife. Nor, more generally, was he concealing or evading the law relating to the distribution of assets of a marriage upon its dissolution. It cannot follow that the court should disregard the legal personality of the companies with the same insouciance as he (p. xx) did. Secondly, the husband has made use of the opacity of the Petrodel Group's corporate structure to deny being its owner. But that, as the judge pointed out at para 219 'is simply [the] husband giving false evidence.' It may engage what I have called the concealment principle, but that simply means that the court must ascertain the truth that he has concealed, as it has done. The problem in the present case is that the legal interest in the properties is vested in the companies and not in the husband. They were vested in the companies long

before the marriage broke up. Whatever the husband's reasons for organising things in that way, there is no evidence that he was seeking to avoid any obligation which is relevant in these proceedings. The judge found that his purpose was 'wealth protection and the avoidance of tax'. It follows that the piercing of the corporate veil cannot be justified in this case by reference to any general principle of law.

LORD NEUBERGER:

59 I wish ... to add a little to what Lord Sumption says on the question of whether, and if so, in what circumstances, the court has power to pierce the corporate veil in the absence of specific statutory authority to do so. [His Lordship then proceeded, agreeing with much of the analysis of Lord Sumption, and also considering the US and academic criticisms of 'piercing the corporate veil', before continuing:]

79 In these circumstances, I was initially strongly attracted by the argument that we should decide that a supposed doctrine, which is controversial and uncertain, and which, on analysis, appears never to have been invoked successfully and appropriately in its 80 years of supposed existence, should be given its quietus. Such a decision would render the law much clearer than it is now, and in a number of cases it would reduce complications and costs: whenever the doctrine is really needed, it never seems to apply.

80 However, I have reached the conclusion that it would be wrong to discard a doctrine which, while it has been criticised by judges and academics, has been generally assumed to exist in all common law jurisdictions, and represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available. Accordingly, provided that it is possible to discern or identify an approach to piercing the corporate veil, which accords with normal legal principles, reflects previous judicial reasoning (so far as it can be discerned and reconciled), and represents a practical solution (which hopefully will avoid the problems summarised in para 75 above), I believe that it would be right to adopt it as a definition of the doctrine. [He then accepted Lord Sumption's formulation.] ...

83 It is only right to acknowledge that this limited doctrine may not, on analysis, be limited to piercing the corporate veil. However, there are three points to be made about that formulation. In so far as it is based on 'fraud unravels everything', as discussed by Lord Sumption in para 18, the formulation simply involves the invocation of a well-established principle, which exists independently of the doctrine. In any event, the formulation is not, on analysis, a statement about piercing the corporate veil at all. Thus, it would presumably apply equally to a person who transfers assets to a spouse or civil partner, rather than to a company. Further, at least in some cases where it may be relied on, it could probably be analysed as being based on agency or trusteeship especially in the light of the words 'under his control'. However, if either or both those points were correct, it would not undermine Lord Sumption's characterisation of the doctrine: it would, if anything, serve to confirm the existence of the doctrine, albeit as an aspect of a more conventional principle. And if the formulation is intended to go wider than the application of 'fraud unravels everything', it seems to me questionable whether it would be right for the court to take the course of arrogating to itself the right to step in and undo transactions, save where there is a well-established and principled ground for doing so. Such a course is, I would have thought, at least normally, a matter for the legislature. Indeed Parliament has decided to legislate to this effect in specified and limited circumstances with protection for third parties, in provisions such as section 37 of the Matrimonial Causes Act 1973 and section 423 of the Insolvency Act 1986.

(p. xxi) LORD WALKER

106 I am reluctant to add to the discussion but for my part I consider that 'piercing the corporate veil' is not a doctrine at all, in the sense of a coherent principle or rule of law. It is simply a label—often, as Lord Sumption observes, used indiscriminately—to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate

reaffirmed by the House of Lords in *Salomon v A Salomon and Co Ltd* [2.01]. These may result from a statutory provision, or from joint liability in tort, or from the law of unjust enrichment, or from principles of equity and the law of trusts. ... They may result simply from the potency of an injunction or other court order in binding third parties who are aware of its terms. If there is a small residual category in which the metaphor operates independently no clear example has yet been identified, but *Stone & Rolls Ltd v Moore Stephens (a firm)* [3.32] ... is arguably an example.

LADY HALE (with whom LORD WILSON agreed) and LORDS MANCE AND CLARKE agreed, adding further comments of their own.

List of abbreviations

Abbreviation

Detail

APPCGG

All Party Parliamentary Corporate Governance Group

BERR

Department for Business, Enterprise and Regulatory Reform*

BIS

Department for Business, Innovation and Skills*

CA 1985

Companies Act 1985

CA 1989

Companies Act 1989

CA 2006

Companies Act 2006

C(AICE)A 2004

Companies (Audit, Investigations and Community Enterprise) Act 2004

CDDA 1986

Company Directors Disqualification Act 1986

CEO

Chief executive officer

CIC

Community interest company

CJEU

Court of Justice of the European Union

CLR

The collective publications of the DTI's Company Law Review

COMI

Centre of main interest

CPR

Civil Procedure Rules

CVA

Company voluntary arrangement

DTI

Department of Trade and Industry*

EA 2002

Enterprise Act 2002

ECtHR

European Court of Human Rights

EEIG

European Economic Interest Grouping

FCA

Financial Conduct Authority**

FPC

Financial Policy Committee

FRC

Financial Reporting Council

FSA

Financial Services Authority**

FSA 1986

Financial Services Act 1986
FSA 2012
Financial Services Act 2012
FSMA 2000
Financial Services and Markets Act 2000
IA 1986
Insolvency Act 1986
IR 1986
Insolvency Rules 1986
LLP
Limited liability partnership
MiFID
Markets in Financial Instruments Directive (2004/39/EC)
NED
Non-executive director
PIE
Public-Interest Entities
PRA
Prudential Regulation Authority**
RIE
Recognised investment exchange
SE
Societas Europaea
UKLA
United Kingdom Listing Authority
UNCITRAL
United Nations Commission on International Trade Law

* These are recent successor government departments (always including responsibility for companies, although other responsibilities have been added and subtracted with each change). The DTI ceased to exist in 2007, replaced by BERR, which itself was replaced by BIS in June 2009.

** The FSA 2012 abolished the FSA with effect from 1 April 2013, and its responsibilities were then split between two new agencies, the FCA and the PRA, and the Bank of England.

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