It makes no difference to the rule in *Salomon* that one member owns all or substantially all of the shares. Until 1992, when the Twelfth EU Directive on Single-Member Companies was implemented in the UK, it was necessary for a company to have at least two members. (The number in 1844 was originally set at 25, but this number was reduced to seven by the Companies Act 1862—the Act under which Mr Salomon's company was registered—and later to two.) However, even under the former law it was possible for one person to own all the shares in a company *beneficially* and at the same time comply with the legislation by the simple expedient of vesting one or more shares in nominees who held the shares on his behalf and acted at his direction. In many other jurisdictions, the one person company has been recognised for a long time.

The judgments in the lower courts in *Salomon*'s case (reported as *Broderip v Salomon* **[2.02]**) deserve study in their own right as examples of 'piercing or lifting the veil'. (For this topic, see 'Limited liability of members and "Lifting the corporate veil"', p 51.)

[2.02] Broderip v Salomon [1895] 2 Ch 323 (Chancery Division and Court of Appeal)

> VAUGHAN WILLIAMS J: No charge of fraud … is involved in the amended claim; but to allow a man who carries on business under another name to set up a debenture in priority to the claims of the creditors of the company would have the effect of defeating and delaying his creditors. There must be an implied agreement by him to indemnify the company. Under the Companies Act of 1862 a man may become what is called a private company so as to obtain the benefits of limited liability. I have already held, in a case where the founder of such a company had become bankrupt and the company claimed his assets, that the company was a mere fraud, and the Court of Appeal supported that decision. In this case I propose to hold the same thing—that this business was Mr Salomon's business and no one else's; that he chose to employ as agent a limited company; that he is bound to indemnify that agent, the company; and that his agent, the company, has a lien on the assets which overrides his claims. The creditors of the company could, in my opinion, have sued Mr Salomon. Their right to do so would depend on the circumstances of the case, whether the company was a mere alias of the founder or not. In this case it is clear that the relationship of principal and agent existed between Mr Salomon and the company …
>
> [His Lordship accordingly ordered that Salomon was bound to indemnify the company for the debts which, as his agent, it had incurred.
>
> Salomon appealed to the Court of Appeal, which affirmed this decision on different grounds:] LINDLEY LJ: The incorporation of the company cannot be disputed. (See s 18 of the Companies Act 1862 [Companies Act 2006 (CA 2006), ss 15 and 16].) Whether by any proceedings in the nature of a scire facias the court could set aside the certificate of incorporation is a question which has never been considered, and on which I express no opinion;[10] but, be that as it may, in such an action as this the validity of the certificate cannot be impeached. The company must, therefore, be regarded as a corporation, but as a corporation created for an illegitimate purpose. Moreover, there having always been seven members, although six of them hold only one £1 share each, **(p. 40)** Mr Aron Salomon cannot be reached under s 48 [CA 2006, ss 437 and 438] to which I have already alluded. As the company must be recognised as a corporation, I feel a difficulty in saying that the company did not carry on business as a principal, and that the debts and liabilities contracted in its name are not enforceable against it in its corporate capacity. But it does not follow that the order made by Vaughan Williams J is wrong. A person may carry on business as a principal and incur debts and liabilities as such, and yet be entitled to be indemnified against those debts and liabilities by the person for whose benefit he carries on the business. The company in this case has been regarded by Vaughan Williams J as the agent of Aron Salomon. I should rather liken the company to a trustee for him—a trustee improperly brought into existence by him to enable him to do what the statute prohibits. It is manifest that the other members of the company have practically no interest in it, and their names have merely been used by Mr Aron Salomon to enable him to form a company, and to use its name in order to screen himself from liability … In a strict legal sense the business may have to be regarded as the business of the company; but if any jury were asked, Whose business was it? they would say Aron Salomon's, and they would be right, if they meant that the beneficial interest in the business was his. I do not go so far as to say that the creditors of the company could sue him. In my opinion, they can only reach him through the company. Moreover, Mr Aron Salomon's liability to indemnify the company in this case is,

in my view, the legal consequence of the formation of the company in order to attain a result not permitted by law. The liability does not arise simply from the fact that he holds nearly all the shares in the company. A man may do that and yet be under no such liability as Mr Aron Salomon has come under. His liability rests on the purpose for which he formed the company, on the way he formed it, and on the use which he made of it. There are many small companies which will be quite unaffected by this decision. But there may possibly be some which, like this, are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been incautious enough to trade with the company without perceiving the trap which he has laid for them …

LOPES LJ: It would be lamentable if a scheme like this could not be defeated. If we were to permit it to succeed, we should be authorising a perversion of the Joint Stock Companies Acts. We should be giving vitality to that which is a myth and a fiction. The transaction is a device to apply the machinery of the Joint Stock Companies Act to a state of things never contemplated by that Act—an ingenious device to obtain the protection of that Act in a way and for objects not authorised by that Act, and in my judgment in a way inconsistent with and opposed to its policy and provisions. It never was intended that the company to be constituted should consist of one substantial person and six mere dummies, the nominees of that person, without any real interest in the company. The Act contemplated the incorporation of seven independent bona fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader. To legalise such a transaction would be a scandal.

But to what relief is the liquidator entitled? In the circumstances of this case it is, in my opinion, competent for the court to set aside the sale as being a sale from Aron Salomon to himself—a sale which had none of the incidents of a sale, was a fiction, and therefore invalid; or to declare the company to be a trustee for Aron Salomon, whom Aron Salomon, the cestui que trust, was bound to indemnify; or to declare the formation of the company, the agreement of August 1892, and the issue of the debentures to Aron Salomon pursuant to such agreement, to be merely devices to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act 1862, and further, to enable him to obtain a preference over other creditors of the company by obtaining a first charge on the assets of the company by means of such debentures. …

KAY LJ delivered a concurring judgment.

(p. 41) The company as a separate legal person

The property of a company belongs to it and not to its members. Neither a member nor a creditor of a company (unless a secured creditor) has an insurable interest in the assets of the company.

[2.03] Macaura v Northern Assurance Co [1925] AC 619 (House of Lords)

Macaura, the owner of the Killymoon estate in County Tyrone, sold the whole of the timber on the estate to a company, Irish Canadian Sawmills Ltd, in consideration of the allotment to him of 42,000 fully paid £1 shares. All the company's shares were held by Macaura and his nominees, and he was also an unsecured creditor of the company for an amount of £19,000. Following the sale, he effected insurance policies in his own name with the respondent insurance company and others, covering the timber against fire. Two weeks later, almost all of the timber was destroyed in a fire. A claim brought by Macaura on the policies was disallowed on the ground that he had no insurable interest in the timber.

LORD SUMNER: My Lords, this appeal relates to an insurance on goods against loss by fire. It is clear that the appellant had no insurable interest in the timber described. It was not his. It belonged to the Irish Canadian Sawmills Ltd, of Skibbereen, co Cork. He had no lien or security over it and, though it lay on his land by his permission, he had no responsibility to its owner for its safety, nor was it there under any contract that enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire nor were the shares, and the fact that he was virtually the company's only creditor, while the timber was its only asset, seems to me to make no difference. He stood in no 'legal or equitable relation to' the timber at all. He had no 'concern in' the subject insured. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire. …

My Lords, I think this appeal fails.

LORDS BUCKMASTER and WRENBURY delivered concurring opinions.

LORDS ATKINSON and PHILLIMORE concurred.

➢ Notes

1. Similarly in *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] 1 BCLC 162, the court stated that there is no rule of company law which constitutes a company the trustee of its property and its members or shareholders as beneficiaries of that trust.

2. And in *Petrodel Resources Ltd v Prest* [2012] EWCA Civ 1395 (appeal pending), where divorcing parties were litigating over the division of an estate worth more than £50 million, but held by nominee companies, a majority of the Court of Appeal held that an order in respect of a company's property (houses in London and overseas) could not be made in favour of the wife under the Matrimonial Causes Act 1973 s 24(1)(a), even though the husband owned 100% of the shares and had complete control of the companies, unless there were legitimate grounds for piercing the corporate veil (see 'Limited liability of members and "Lifting the corporate veil"', p 51). Mere ownership and control of the shares was not of itself grounds for piercing the corporate veil.

(p. 42) ***A company may make a valid and effective contract with one of its members. It is possible for a person to be at the same time wholly in control of a company (as its principal shareholder or member and its sole director) and an employee of that company.***

[2.04] Lee v Lee's Air Farming Ltd [1961] AC 12 (Privy Council)

Lee, the appellant's late husband, had formed the respondent company to carry on his business of spreading fertilisers on farmland ('top-dressing') from the air. He held 2,999 of its 3,000 shares, and was by its articles of association appointed sole governing director and (also pursuant to the articles) employed at a salary as its chief pilot. He was killed in an aircraft crash while flying for the company. If he was a 'worker' (defined as 'any person who has entered into or works under a contract of service … with an employer … whether remunerated by wages, salary, or otherwise') then his widow was entitled to be paid compensation by his employer under the Workers' Compensation Act 1922 (NZ). The company, as required by statute, was insured against liability to pay its workers such compensation. Mrs Lee appealed successfully against the ruling of the Court of Appeal of New Zealand that Lee could not be a 'worker' when he was in effect also the employer.

The opinion of their Lordships was delivered by LORD MORRIS OF BORTH-Y-GEST: The Court of Appeal recognised that a director of a company may properly enter into a service agreement with his company, but they considered that, in the present case, inasmuch as the deceased was the governing director in whom was vested the full government and control of the company he could not also be a servant of the company. … [After discussing the facts of the case:] Their Lordships find it impossible to resist the conclusion that the active aerial operations were performed because the deceased was in some contractual relationship with the company. That relationship came about because the deceased as one legal person was willing to work for and to make a contract with the company which was another legal entity. A contractual relationship could only exist on the basis that there was consensus between two contracting parties. It was never suggested (nor in their Lordships' view could it reasonably have been suggested) that the company was a sham or a mere simulacrum. It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company. If, then, it be accepted that the respondent company was a legal entity their Lordships see no reason to challenge the validity of any contractual obligations which were created between the company and the deceased …

Nor in their Lordships' view were any contractual obligations invalidated by the circumstance that the deceased was sole governing director in whom was vested the full government and control of the company. Always assuming that the company was not a sham then the capacity of the company to make a contract with the deceased could not be impugned merely because the deceased was the agent of the company in its negotiation. … In their Lordships' view it is a logical consequence of the decision in *Salomon's* case **[2.01]** that one person may function in dual capacities. There is no reason, therefore, to deny the possibility of a contractual relationship being created as between the deceased and the company. If this stage is reached then their Lordships see no reason why the range of possible contractual relationships should not include a contract for services, and if the deceased as agent for the company could negotiate a contract for services as between the company and himself there is no reason why a contract of service could not also be negotiated. It is said that therein lies the difficulty, because it is said that the deceased could not both be under the duty of giving orders and also be under the duty of obeying them. But this approach does not give effect to the circumstance that it would be the company and not the deceased that would be giving the orders. Control would remain with the company whoever might be the agent of the company to exercise it. The fact that so long as the deceased continued to be governing director, with amplitude of powers, it would be for him to act as the agent of the company to give the orders does not alter the fact that the company and the deceased were two separate and distinct legal persons. If **(p. 43)** the deceased had a contract of service with the company then the company had a right of control. The manner of its exercise would not affect or diminish the right to its exercise. But the existence of a right to control cannot be denied if once the reality of the legal existence of the company is recognised. Just as the company and the deceased were separate legal entities so as to permit of contractual relations being established between them, so also were they separate legal entities so as to enable the company to give an order to the deceased …

➢ Note

Although *Lee*'s case is undoubtedly correct as a ruling in company law, and in particular as authority for the propositions stated in the headnote, the question whether a person should be regarded as an 'employee' of a company which he can control as a director or major shareholder may not always be so clear-cut. For instance, in the context of the legislation relating to redundancy payments, the court may consider that such a person is not to be treated as an 'employee' entitled to compensation for unfair or wrongful dismissal: *Buchan v Secretary of State for Trade and Industry* [1997] IRLR 80. See this issue discussed in *Secretary of State for Trade and Industry v Bottrill* [1999] ICR 592, CA. In *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] EWCA Civ 280, [2009] BCC 687, the Court of Appeal confirmed *Lee*'s case, but noted the potential difficulties in determining whether the putative employment contract was a sham where the employee was at the same time the controlling director and shareholder (although in that case the contract was upheld).

The fact that one person holds all, or substantially all, of the shares in a company does not, without more, make the company's business that person's business in the eyes of the law.

[2.05] Gramophone and Typewriter Co Ltd v Stanley [1908] 2 KB 89 (Court of Appeal)

All the shares in a German company (Deutsche Grammophon Aktiengesellschaft) were held by the appellant company, which was resident for tax purposes in England. The appellant was assessed for income tax not only upon the profits of the German company actually remitted to it in England, but also on a sum of £15,000 retained by the German company and transferred by it to a depreciation fund. The unremitted profits were taxable in England only if (as the Commissioners of Inland Revenue had held) they were the profits or gains of a business 'carried on' by the *English* company. The Court of Appeal rejected this view.

BUCKLEY LJ: The question is, I think, one of fact … The question of fact is whether the business in Germany is carried on by the appellant company. If it is, the [appellants] do not dispute that the Attorney-General is right. If, on the contrary, the German business is not carried on by the English company, then equally the Attorney-General cannot dispute but that the English company is assessable only upon the dividends which it may receive upon its shares in the German company.

In order to succeed the Attorney-General must, I think, make out either, first, that the German company is a fiction, a sham, a simulacrum, and that in reality the English company, and not the German company, is carrying on the business; or, secondly, that the German company, if it is a real thing, is the agent of the English company. As regards the former of these, there are no facts at all to show that the German company is a pretence. It was formed in January 1900 by the union of three other companies, each of which brought in substantial properties, and of two individuals. It is duly constituted and governed according to German law, and there is no ground whatever for saying that it is other than a real German corporation carrying on business in Germany under circumstances in which the company and its officers are amenable to German law and with a view to the acquisition **(p. 44)** of profit. The only remaining question, therefore, is whether the German company is agent of the English company, whether the English company is really carrying on the business and is employing the German company to do so on its behalf. Upon this point the Attorney-General relies principally upon the fact that, as stated in para 17 of the case, the appellant company now holds all the shares of the German company. In my opinion this fact does not establish the relation of principal and agent between the English company and the German company. It is so familiar that it would be a waste of time to dwell upon the difference between the corporation and the aggregate of all the corporators. But I may point out the following considerations as bearing upon the question whether the possession of all the shares is evidence of agency. Suppose that during the year whose accounts are under review the appellant company had held no shares at all in the first six months and had held all the shares in the last six months, or suppose that, having held all the shares but ten today, it became the holder of all tomorrow and again parted with ten the next day, it cannot seriously be suggested that each time one person becomes the holder of all the shares an agency comes into existence which dies again when he parts with some of them.

Further it is urged that the English company, as owning all the shares, can control the German company in the sense that the German company must do all that the English company directs. In my opinion this again is a misapprehension. This court decided not long since, in *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* **[4.05]** that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions, which would generally be special resolutions,[11] to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business of the corporation. In my opinion they are not. To say that they are involves a complete confusion of ideas …

COZENS-HARDY MR and FLETCHER MOULTON LJ delivered concurring judgments.

[2.06] Lonrho Ltd v Shell Petroleum Co Ltd [1980] QB 358 (Court of Appeal); affd [1980] 1 WLR 627 (House of Lords)

Lonrho sought an order for discovery [disclosure] of certain documents which it claimed were in the 'power' of two multinational oil companies, Shell and BP. These documents were held in Rhodesia (now Zimbabwe) and South Africa by local subsidiaries of Shell and BP, the subsidiaries being in each case wholly owned and controlled by those companies between them. The application was refused.

> SHAW LJ: This appeal poses as its principal issue a compact question as to the application and scope of RSC, Ord 24. When is a document in the power (as distinct from the possession or control) of a party to litigation so as to require him to disclose it if it relates to matters in question in that litigation?
>
> The question seems elementary, but it poses for me at any rate a difficult philosophical problem as to what constitutes power, and I must confess to some vacillation as the arguments on either side proceeded. In the end I have come to the view that a document can be said to be in the power **(p. 45)** of a party for the purpose of disclosure only if, at the time and in the situation which obtains at the date of discovery, that party is, on the factual realities of the case virtually in possession (as with a one man company in relation to documents of the company) or otherwise has a present indefeasible legal right to demand possession from the person in whose possession or control it is at that time.
>
> In the present case no such sure or direct route to acquiring possession existed or exists. The relationship between Shell and BP, on the one hand, and, on the other hand, the various subsidiaries, including those which are wholly owned by the two parent companies, may afford an ultimate but not an immediate or certain prospect of acquiring possession of documents which belong to and are in the possession and control for the time being of a subsidiary. The realisation of that prospect might involve the alteration of the articles of an unwilling or recalcitrant subsidiary followed by the removal of its then directors and their substitution by others more compliant. This would involve a radical transformation of the local scene within the subsidiary company. It would involve not merely raising the corporate veil, but committing an affront on the persona of the company itself. Even then, the directors who are substituted for the recalcitrant ones may find that there exists a conflict of duty so that they have no right to comply with the requirement. It would follow that the outcome of such a procedure would be at the best dubious …
>
> There are no doubt situations, such as existed in *B v B (Matrimonial Proceedings: Discovery)*[12] where on the established facts a company is so utterly subservient or subordinated to the will and the wishes of some other person (whether an individual or a parent company) that compliance with that other person's demands can be regarded as assured. Each case must depend upon its own facts and also upon the nature, degree and context of the control …
>
> LORD DENNING MR and BRANDON LJ delivered concurring judgments.
>
> [An appeal to the House of Lords was dismissed: [1980] 1 WLR 627.]

There is a presumption that the word 'person' be construed as including a company, although the final analysis depends on the context.

[2.07] Pharmaceutical Society v London and Provincial Supply Association Ltd (1880) 5 App Cas 857 (House of Lords)

The Pharmacy Act 1868 prohibited 'any person' from selling or keeping an open shop for retailing poisons unless such person was qualified and registered as a pharmaceutical chemist. The respondent company was prosecuted for an infringement of the Act. The sale of chemicals by the company was superintended by a registered chemist, who was a salaried employee and also a minority shareholder in the company. The House of Lords held that the company had not infringed the statute.

LORD BLACKBURN: I own I have no great doubt myself … that the word 'person' may very well include both a natural person, a human being, and an artificial person, a corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (but that I should not like to pledge myself to) it ought to be held to include both. I have equally no doubt that in common talk, the language of men not speaking technically, a 'person' does not include an artificial person, that is to say, a corporation. Nobody in common talk if he were asked, Who is the richest person in London, would answer, The London and North-Western Railway Co. The thing is absurd. It is plain that in common conversation and ordinary speech, 'a person' would mean a natural person: in technical language it may mean the artificial person: in which way it is used in any particular Act, must depend upon the context and the subject-matter. I do not think that the presumption that it does include an artificial person, a corporation, if that is the presumption, is at all a strong one. Circumstances, and **(p. 46)** indeed circumstances of a slight nature in the context, might shew in which way the word is to be construed in an Act of Parliament, whether it is to have the one meaning or the other …

But, my Lords, my conclusion, looking at this Act, is that it is clear to my mind that the word 'person' here is so used to show that it does not include a corporation, and that there is no object or intention of the statute which shows that it is requisite to extend the word to a sense which probably those who used it in legislation, were not thinking of at all. I do not think that the legislature was thinking of bodies corporate at all. Beginning with the preamble the Act says, 'Whereas it is expedient for the safety of the public that persons keeping open shop for the retailing, dispensing, or compounding of poisons, and persons known as chemists and druggists, should possess a competent practical knowledge of their business'. Stopping there it is quite plain that those who used that language were not thinking of corporations. A corporation may in one sense, for all substantial purposes of protecting the public, possess a competent knowledge of its business, if it employs competent directors, managers, and so forth. But it cannot possibly have a competent knowledge in itself. The metaphysical entity, the legal 'person', the corporation, cannot possibly have a competent knowledge. Nor, I think, can a corporation be supposed to be a 'person known as a chemist and druggist' … A body corporate may keep an open shop, and no mischief is done, if … qualified persons perform or superintend the sale …

➢ Notes

1. This case concerned the interpretation of a statute; but the views of Lord Blackburn have also served as a guide in the construction of other documents, for example in *Re Jeffcock's Trust* (1882) 51 LJ Ch 507, where a limited company was held to be a 'person' within the terms of a power to lease conferred by will. The courts have gone so far as to hold that a company is a 'person of full age' within the meaning of the Law of Property Act 1925 (*Re Earl of Carnarvon's Chesterfield Settled Estates*[1927] 1 Ch 138)[13] but have stopped short of holding that a company is capable of 'exercising itself in the duties of piety and true religion' (*Rolloswin Investments Ltd v Chromolit Portugal Cutelarias e Produtos Metálicos SARL* [1970] 1 WLR 912), or of being deemed a rogue and a vagabond (*AG v Walkergate Press Ltd* (1930) 142 LT 408: compare *R v Registrar of Joint Stock Companies, ex p More* **[1.05]**). In *Winkworth v Edward Baron Development Co Ltd* **[7.09]**, Lord Templeman found no difficulty in ascribing to a limited company a 'conscience'. The Scottish courts have ruled that a company is incapable of shame, and so cannot be guilty of 'shameless conduct': *Dean v John Menzies (Holdings) Ltd* 1981 SLT 50. But it has been held that a company has a reputation and so can sue in defamation: *D and L Caterers Ltd and Jackson v D'Ajou* [1945] KB 364, CA (allegation that company had procured supplies on the black market). It is entitled to protection from invasion of its privacy (*R v Broadcasting Standards Commission, ex p BBC* [2001] 1 BCLC 244, CA (secret filming of transactions in Dixons' shops), but not to compensation for wrongful conviction on a criminal charge (*R v Secretary of State for the Home Department, ex p Atlantic Commercial (UK) Ltd* [1997] BCLC 692).

2. The Interpretation Act 1978 s 5 and Sch 1, confirms the ruling in the *Pharmaceutical Society* case by providing that in any Act, unless the contrary intention appears, 'person' includes a body of persons corporate

or unincorporate; and those who draft legislation regularly make distinction between the term ‘person’ (which includes a corporate body) and ‘individual’ (which does not). The use of these terms in (respectively) the Company Directors Disqualification Act 1986 and the Criminal Justice Act 1993 Pt V, means that a company can be the subject of a disqualification order prohibiting it from acting as a director, but not convicted of insider dealing.

(p. 47) ***A company’s nationality is determined by the place of its registration, and it retains that nationality throughout its existence.***

[2.08] Kuenigl v Donnersmarck [1955] 1 QB 515 (Queen’s Bench Division)

The facts are immaterial.

> [MCNAIR J referred to *Daimler Co Ltd v Continental Tyre & Rubber Co Ltd* **[2.12]** and continued:] Neither of these passages in Lord Simon’s or Lord Wright’s speeches is dealing with the question which I have to deal with, namely, whether an English company found to have enemy character by reason of enemy control ceases to be in the eye of the English law an English company and subject to the prohibition which English law imposes on persons subject to that law. On this question there is, so far as I know, no direct authority, but such authority as there is in my judgment strongly suggests a negative answer. [His Lordship discussed the cases and continued:] Enemy character is not substituted for the original character, but is something added to it. An English company which has acquired enemy character continues to owe its very existence to English law (under which it was incorporated) and remains subject to all its obligations towards the Crown under the Companies Acts as an English company. It would, in my judgment, be absurd that the acquisition of enemy character should release it from the obligations attaching to an English company and enable it to do lawfully things which an English company not possessing enemy character was lawfully unable to do …
>
> I think that it is … clear that, in so far as nationality can by analogy be applied to a juristic person, its nationality is determined in an inalienable manner by the laws of the country from which it derives its personality …

A company is capable of having a domicile. Its domicile is the place of its registration, and it retains the domicile throughout its existence.[14]

[2.09] Gasque v IRC [1940] 2 KB 80 (King’s Bench Division)

The facts are immaterial.

> MACNAGHTEN J: The only question at issue on this appeal is whether the MD Company Ltd is a ‘person resident or domiciled out of the United Kingdom’ within the meaning of that section.
>
> It was suggested by Mr Needham on behalf of the appellant that by the law of England a body corporate has no domicil. It is quite true that a body corporate cannot have a domicil in the same sense as an individual any more than it can have a residence in the same sense as an individual. But by analogy with a natural person the attributes of residence, domicil and nationality can be given, and are, I think, given by the law of England to a body corporate. It is not disputed that a company formed under the Companies Acts has British nationality, though, unlike a natural person, it cannot change its nationality. So, too, I think, such a company has a domicil—an English domicil if registered in England, and a Scottish domicil if registered in Scotland. The domicil of origin, or the domicil of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence …

(p. 48) ➢ Note

An SE (*Societas Europaea*)[15] is able to move freely within the EU changing its domicile at will. The Commission's plan for a Fourteenth Company Law Directive would enable all EU companies to move within the Union in the same manner.

A company may have an enemy or neutral character in time of war. This is determined not by any formal test but by reference to the character of the natural person or persons really in control.

See **[2.12]** *Daimler Co Ltd v Continental Tyre and Rubber Co Ltd*.

A company's residence[16] ***is where it 'really keeps house and does its real business'; its 'real business' is carried on where the central management and control actually abides.***[17]

[2.10] De Beers Consolidated Mines Ltd v Howe [1906] AC 455 (House of Lords)

The facts appear from the judgment.

> LORD LOREBURN LC: Now, it is easy to ascertain where an individual resides, but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied.
>
> Mr Cohen propounded a test which had the merits of simplicity and certitude. He maintained that a company resides where it is registered, and nowhere else. If that be so, the appellant company must succeed, for it is registered in South Africa.
>
> I cannot adopt Mr Cohen's contention. In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep,[[18]] but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly CB and Huddleston B in the *Calcutta Jute Mills Co Ltd v Nicholson*[19] and the *Cesena Sulphur Co v Nicholson*,[20] now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides.
>
> **(p. 49)** It remains to he [sic] considered whether the present case fails within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or by-law, but upon a scrutiny of the course of business and trading.
>
> The case stated by the commissioners gives an elaborate explanation of the way in which this company carried on its business. The head office is formally at Kimberley, and the general meetings have always been held there. Also the profits have been made out of diamonds raised in South Africa and sold under annual contracts to a syndicate for delivery in South Africa upon terms of division of profits realised on resale between the company and the syndicate. And the annual contracts contain provisions for regulating the market in order to realise the best profits on resale. Further, some of the directors and life governors live in South Africa, and there are directors' meetings at Kimberley as well as in London. But it is clearly established that the majority of directors and life governors live in England, that the directors' meetings in London are the meetings where the real control is always exercised in practically all the important business of the company except the mining operations. London has always controlled the negotiation of the contracts with the diamond syndicates, has determined policy in the disposal of diamonds and other assets, the working and development of mines, the application of profits, and the appointment of directors.

London has also always controlled matters that require to be determined by the majority of all the directors, which include all questions of expenditure except wages, materials, and such-like at the mines, and a limited sum which may he spent by the directors at Kimberley.

The commissioners, after sifting the evidence, arrived at the two following conclusions, viz: (1) That the trade or business of the appellant company constituted one trade or business, and was carried on and exercised by the appellant company within the United Kingdom at their London office. (2) That the head and seat and directing power of the affairs of the appellant company were at the office in London, from whence the chief operations of the company, both in the United Kingdom and elsewhere, were in fact controlled, managed and directed.

These conclusions of fact cannot be impugned, and it follows that this company was resident within the United Kingdom for purposes of income tax, and must be assessed on that footing. I think, therefore, that this appeal fails. …

LORD JAMES OF HEREFORD delivered a concurring opinion.

LORDS MACNAGHTEN, ROBERTSON and ATKINSON concurred.

➢ Notes

1. These cases show that, in English law, a company may be incorporated under the law of one jurisdiction (and be domiciled there) but have its residence (its 'head and seat and directing power', to quote Lord Loreburn) in another. This is also true of other countries that have derived their company laws from England, and of the US state jurisdictions and the Netherlands. But in the rest of continental Europe there is a strict rule that a company may only be incorporated in the jurisdiction where it will have its principal place of business (*siège réel*, or *Sitz*, usually translated 'seat'), and if it moves its seat out of that jurisdiction it must be wound up. This difference in approach has been a source of considerable political difficulty and disagreement in EU negotiations in matters of company law. The concern is that if the 'English' approach were adopted everywhere, companies would incorporate in jurisdictions with the least strict regimes, but could carry on business wherever they wanted. The risk, then, is that member states would compete with each other by enacting very liberal companies legislation with minimal regulatory requirements in order to attract incorporations, and the revenues which they would bring, and that commercial standards would fall to unacceptable levels. For this reason, EU member states with very prescriptive companies legislation, such as Germany, have striven to ensure that the rule of the 'seat' is maintained—for instance, in the EU Statute for a European Company (see 'European public limited-liability companies (SEs)', p 22). In the United States, by contrast, there has been keen competition between the various state jurisdictions to attract incorporations from companies whose operations are **(p. 50)** based elsewhere. Delaware (one of the smallest states) has emerged as the outright winner. This phenomenon has been condemned by some commentators as a 'race to the bottom' or 'race of laxity', but others consider that the 'market' for incorporations, within which businessmen may shop around, brings with it the merits of free competition, seen especially in administrative simplicity, efficiency and responsiveness. Such empirical studies as have been undertaken do not demonstrate that commercial standards are any less high in Delaware than elsewhere. Indeed, the contrary argument is that, because so much company law expertise has come to be concentrated in the one area, Delaware has become uniquely placed to give a lead in this respect.

These notions of 'place of incorporation' and 'seat' must be distinguished from the notion of 'centre of main interest' (COMI), which can be crucial in cross-border insolvencies. Depending on the context, the applicable rules are the European Insolvency Regulation (EC) 1346/2000 or the Cross-Border Insolvency Regulations 2006 (SI 2006/1030, which implement the UNCITRAL Model Law in Great Britain).[21] Both rely on the notion of COMI. Although the place of registration is presumed to be the COMI in the absence of proof to the contrary, there is a substantial body of case law on claims for alternative locations. The result is that the COMI can be different for different members of corporate groups, for example, making insolvencies of corporate groups rather complicated to administer. The UK courts are seen to take a more expansive approach (see *Re Daisytek-ISA Ltd* [2003] BCC 562) than the Court of Justice of the European Union (CJEU) (*Re Eurofood IFSC Ltd* [2006] ECR I-03813).[22] See 'Country of incorporation, "seat" and "COMI"', p 13.

2. Many countries have a constitution or charter by which certain fundamental rights and freedoms are guaranteed, such as freedom of speech and religion, freedom to trade and do business, the privilege against self-incrimination and the right not to have property expropriated without compensation. Whether a company should enjoy such constitutional guarantees is often a question of great difficulty, and it is not surprising that courts in different jurisdictions have given conflicting rulings on what would appear to be much the same issue. The most obvious reason for such a discrepancy is likely to be the language of the relevant legislation: a charter of *human* rights, for example, is less likely to be construed so as to embrace corporate bodies than is a statement of *constitutional* freedoms. Differences in cultural or historical background may also play a part. But even where it is accepted that the freedoms and rights are to be accorded only to human beings, that is not necessarily the end of the matter. A court may be persuaded in some circumstances to 'pierce or lift the veil' (holding, eg, that interference with the right of a company to publish a newspaper is an infringement of the right to freedom of expression of the individuals concerned). Alternatively, it may accord standing to a company to challenge legislation as unconstitutional even though the company itself is not directly affected by it: thus, in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, the Supreme Court of Canada allowed such a challenge by a company, on the ground that the statute in question infringed the guarantee of freedom of religion and conscience in s 2(a) of the Canadian Charter of Rights and Freedoms, irrespective of any question whether a corporation can enjoy or exercise freedom of religion.

3. The enactment of the Human Rights Act 1998 (HRA 1998), which incorporated the European Convention on Human Rights into UK domestic law, stimulated interest in issues of this kind in this country. Although the title of the Convention refers to 'human' rights, some of its articles expressly confer rights and freedoms on 'legal' (as distinct from 'natural') persons—for example, the right to property, the right to a fair trial in the determination of civil rights and the right to peaceful enjoyment of possessions. The European Court of Human **(p. 51)** Rights (ECtHR) has held in a number of cases that a body corporate has *standing* to institute proceedings complaining of a violation of the Convention. As a result of the principle of separate corporate personality, if a company's Convention rights are infringed, no individual member of the entity is a victim of that breach. This means that no member has standing to apply to the ECtHR or bring proceedings under the HRA 1998. The ECtHR has, however, held that a form of derivative claim on behalf of the company would be available where it is not possible for those responsible for the company's litigation to make the application (*Credit and Industrial Bank v Czech Republic* [2003] ECHR 2003-XI).

4. While it is plain that some parts of the Convention cannot apply to companies (eg the right to life, the prohibition of torture and the right to marry), others can quite readily do so (the right to a fair trial,[23] no retrospective punishment for crimes, the right to freedom of expression[24]). One feature of the decisions of the ECtHR which is rather at odds with the current attitude of the domestic courts in the UK is a much greater willingness to pierce the corporate veil—for example, treating shareholders as the 'victims' of an act aimed at their company.

5. Finally, note that the *De Beers* **[2.10]** formulation for determining residence can have important tax consequences. In a recent decision of the Supreme Court of Canada, a trustee company was incorporated in Barbados, but the 'trust' was held to be resident, and taxable, in Canada where the main business of the trust was actually conducted by the principal beneficiaries: *Fundy Settlement v Canada* 2012 SCC 14.

Limited liability of members and 'piercing the corporate veil'

Recall the general rule that if (as is usual) the liability of a company's members is limited 'by shares' or 'by guarantee', then the company's creditors cannot seek satisfaction from the members, even if the company has insufficient funds to pay its own liabilities in full: see 'Companies limited by shares and companies limited by guarantee', p 21. Many of the cases cited previously can be used to illustrate this. Notice in particular that members are *not* made liable to outsiders simply because (as members or shareholders) they controlled the