The 'agency argument'

We now proceed to consider the agency argument in relation to NAAC on the footing, which we consider to be the correct one, that NAAC must for all relevant purposes be regarded as a legal entity separate from Cape.

[His Lordship reviewed the evidence and concluded:] Having regard to the legal principles stated earlier in this judgment, and looking at the facts of the case overall, our conclusion is that the judge was right to hold that the business carried on by NAAC was exclusively its own business, not the business of Cape … We see no sufficient grounds for disturbing this finding of fact.

➤ Notes

1. In *Yukong Lines Ltd of Korea v Rendsburg Investments Corpn of Liberia* [1998] 1 WLR 294, Toulson J adopted a very similar line of reasoning where the question was whether the *Salomon* principle should be disregarded so as to make Mr Ramvrias, the sole shareholder of the defendant company (Rendsburg), personally liable for damages for breach of a contract to charter a ship which had ostensibly been entered into by that company. He rejected an argument that the charterparty had in reality been entered into by Rendsburg as Ramvrias's agent (in fact, the document had been signed by Ramvrias as Rendsburg's agent), and also further arguments that the company was a 'sham' or, alternatively, that the corporate veil should be pierced in the interests of justice. (The real complaint was that Ramvrias had caused Rendsburg to transfer most of its funds to another of his companies so that it would not be in a position to meet any award of damages that might be made against it. It is plain (as the judge observed) that there were other ways in which these funds might be recouped—for **(p. 73)** example, in an action by Rendsburg's liquidator for breach of Ramvrias's duty as a director: see 'The functions, powers and duties of the liquidator', pp 804ff; but *Salomon* stood in the way of giving the plaintiff any direct remedy against Ramvrias.)

2. Also see *Re Polly Peck International plc* [1996] 2 All ER 433, where PPI, a holding company at the head of a large group, set up a specially incorporated overseas subsidiary, PPIF, in order to raise funds by a bond issue. All the funds received were on-loaned to PPI, and PPI guaranteed the subsidiary's repayment obligations. PPIF had no separate management or bank account. The court refused to pierce the veil on 'group trading', 'agency' or 'sham' grounds so as to treat PPI as being in reality the borrower of the funds.

3. These and similar cases decided since *Adams v Cape Industries* **[2.19]** indicate that it is now very unlikely that a plea that the corporate veil should be pierced in a group context will be successful. On the other hand, piercing the veil is not always necessary to deliver the desired outcome. In *Newton-Sealy v Armorgroup Services Ltd* [2008] EWHC 233 (QB), the court held that an employee's contract was with only one company in a corporate group (and that contract excluded liability for personal injury), but that day-to-day dealings with other companies in the group gave rise to a duty of care, allowing the employee to sue in tort for negligence.

4. There is increasing interest—although perhaps more in other parts of the world than in the UK—in whether a holding company should be made liable for the debts of an insolvent subsidiary, or the 'enterprise' as a whole for the obligations of one of its members.

The problem is well summarised in the following extract from the judgment of Templeman LJ in *Re Southard & Co Ltd* [1979] 1 WLR 1198 at 1208, CA:

> English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary. It is not surprising that, when a subsidiary company collapses, the

unsecured creditors wish the finances of the company and its relationship with other members of the group to be narrowly examined, to ensure that no assets of the subsidiary company have leaked away, that no liabilities of the subsidiary company ought to be laid at the door of other members of the group, and that no indemnity from or right of action against any other company, or against any individual, is by some mischance overlooked.

The anxiety of the creditors will be increased where, as in the present case, all the assets of the subsidiary company are claimed by another member of the group in right of a debenture.

Generally speaking, English case law has adhered to the *Salomon* principle in situations such as this and, as the *Multinational Gas* case **[7.39]** illustrates, has not developed principles which would allow a court to pierce the veil of incorporation.[45] This contrasts with attitudes abroad, where factors such as 'domination' and 'under-capitalisation' (or 'thin incorporation') have been relied on to build up a body of rules under which other companies in a group have been held liable to back the obligations of the 'runt of the litter'. In New Zealand and Ireland, the Companies Acts have been amended so as to give the court a discretion to **(p. 74)** order that one company in a group should make a contribution to the assets of another which is in insolvent liquidation, or to order that the liquidations of two associated companies should proceed jointly, so that their assets and liabilities are pooled.[46] The Cork Committee on Insolvency in its report (Cmnd 8558, 1982) did not suggest that this precedent should be followed in the UK, but did urge that the question be studied further. The Company Law Review (CLR) could have taken this opportunity in its *Review*, but instead it simply stated that it did not propose any reforms in this area.

In the EU, too, there are signs that the veil of incorporation may not be sacrosanct in a group situation. ICI was made to pay fines, even before the UK was a member of the Union, for the breach of EU competition laws by an overseas subsidiary.[47] The Draft Ninth Directive on the Conduct of Groups of Companies would have taken this further, and would in certain circumstances have made a dominant company in a group liable for losses incurred by a dependent company. But this proposal has now been withdrawn.[48]

Remedies: when the 'corporate veil' is pierced, the courts may order remedies against the parties 'behind' the company, but those remedies could never, merely by virtue of the veil-piercing, amount to an order that the implicated parties are themselves bound by the contract they caused the company to enter into.

[2.20] VTB Capital plc v Nutritek International Corp [2013] UKSC 5 (Supreme Court)

The claimant (VTB) entered into a loan facility agreement with Russagroprom LLC (RAP) to fund the latter's acquisition of six Russian dairy plants and three associated companies from the first defendant (Nutritek). Following RAP's subsequent default on the loan, VTB alleged that it entered into the facility agreement in reliance on fraudulent misrepresentations made by Nutritek for which the other defendants are jointly liable. In short, it claimed that RAP was in fact under the control of the defendants; thus, once the veil was pierced, the defendants could be seen always to have been parties to the two agreements jointly with RAP and the guarantors. The Supreme Court, like the trial judge and the Court of Appeal, held that the claimant's contract claim was unsustainable as a matter of law.

LORD NEUBERGER: [After declining to answer counsel's first argument, that there are *no* circumstances in which the court should pierce, or lift, the corporate veil (and preferring to use 'pierce', as counsel had done), continued:]

131. I therefore approach this question in the same way as the Court of Appeal, namely by considering whether, assuming in VTB's favour that the court can pierce the veil of incorporation on appropriate facts, the basis on which VTB seeks to pierce the veil can be justified in the present **(p. 75)** case. I do so on the basis that this issue is to be resolved by reference to English law. It seems to me, however, that there may be a choice of law question to be addressed in cases which concern the piercing of the veil of a foreign incorporated company. …

132. In so far as VTB invokes the principle of piercing the veil of incorporation, its case involves what, at best for its point of view, may be characterised as an extension to the circumstances where it has traditionally been held that the corporate veil can be pierced. It is an extension because it would lead to the person controlling the company being held liable as if he had been a co-contracting party with the company concerned to a contract where the company was a party and he was not. In other words, unlike virtually all the cases where the court has pierced the corporate veil, VTB is claiming that Mr Malofeev should be treated as if he were, or had been, a co-contracting party with RAP under the two agreements, even though neither Mr Malofeev nor any of the contracting parties (including VTB) intended Mr Malofeev to be a party.

133. The notion that the principle can be extended to such a case receives no support from any case save for a very recent decision of Burton J, *Antonio Gramsci Shipping Corporation v Stepanovs* [2011] EWHC 333 (Comm), [2011] 1 Lloyd's Rep 647 (which he followed in his later decision in *Alliance Bank JSC v Aquanta Corporation* [2011] EWHC 3281 (Comm) [2012] 1 Lloyd's Rep 181 …

[After examining *Gilford Motor Co Ltd v Horne* **[2.17]**, *Yukong Line*, *Jones v Lipman*, *Gencor* and *Trustor*, all noted in the decisions noted previously, he continued:] … far from there being a strong case for the proposed extension, there is an overwhelming case against it.

138. First, it is not suggested by VTB that any of the other contracting parties under the two agreements is not liable. Indeed, as mentioned above, VTB's proposed pleaded case is that Mr Malofeev is 'jointly and severally liable with RAP'. Even accepting that the court can pierce the corporate veil in some circumstances, the notion of such joint and several liability is inconsistent with the reasoning and decision in *Salomon* **[2.01]**. A company should be treated as being a person by the law in the same way as a human being. The fact that a company can only act or think through humans does not call that point into question: it just means that the law of agency will always potentially be in play, but, it will, at least normally, be the company which is the principal, not an agent. On VTB's case, if the agency analogy is relevant, the company, as the contracting party, is the quasi-agent, not the quasi-principal.

139. Subject to some other rule (such as that of undisclosed principal), where B and C are the contracting parties and A is not, there is simply no justification for holding A responsible for B's contractual liabilities to C simply because A controls B and has made misrepresentations about B to induce C to enter into the contract. This could not be said to result in unfairness to C: the law provides redress for C against A, in the form of a cause of action in negligent or fraudulent misrepresentation.

140. In any event, it would be wrong to hold that Mr Malofeev should be treated as if he was a party to an agreement, in circumstances where (i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with him, and he did not intend to contract with them, and (ii) thereafter, Mr Malofeev never conducted himself as if, or led any other party to believe, he was liable under the agreement. That that is the right approach seems to me to follow from one of the most fundamental principles on which contractual liabilities and rights are based, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context—see e.g. *Smith v Hughes* (1871) LR 6 QB 597, 607.

141. In his argument, Mr Howard QC relied by analogy with the law relating to undisclosed principals. In my view, the analogy tells against VTB's argument. The existence of the undisclosed principal rule has long been regarded as an anomaly, as discussed in *Bowstead & Reynolds on Agency*, 19th ed (2010), para 8-070, and as observed by Dillon LJ in *Welsh Development Agency v Export Finance Co Ltd* [1992] BCLC 148, 173. As the Court of Appeal said in this case at para 89, it would be inappropriate to extend an anomaly—save where it would be unjust and unprincipled not to do so. To adapt what Lord Hoffmann said in *OBG Ltd v Allan* [2007] UKHL 21, [2008] AC 1, paras 103 and 106, 'an anomaly created by the judges to solve a particular problem' is 'an insecure **(p. 76)** base' on which to justify an extension to a principle, especially when that principle can itself be said to be anomalous.

142. Quite apart from this, it seems to me that the facts relied on by VTB to justify piercing the veil of incorporation in this case do not involve RAP being used as 'a façade concealing the true facts'. In my view,

if the corporate veil is to be pierced, 'the true facts' must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be). Here, on VTB's case, 'the true facts' relate to the control, trading performance, and value of the Dairy Companies (if one considers the specific allegations against Mr Malofeev), or to the genuineness of the nature of the underlying arrangement (which involves a transfer of assets between companies in common ownership). Neither of these features can be said to involve RAP being used as a 'façade to conceal the true facts'.

143. It was suggested, however, by Mr Howard QC that the case against Mr Malofeev involves him 'abusing the corporate structure', and that that is sufficient to justify piercing the corporate veil. However, in my view, abuse of the corporate structure (whatever that expression means) adds nothing to the debate, at least in this case. It may be another way of describing use of the company as a façade to conceal the true facts (in which case it adds nothing to Lord Keith's characterisation in*Woolfson*), or it may be an additional requirement before the corporate veil will be pierced: otherwise, it seems to me that it would be an illegitimate extension of the circumstances in which the veil can be pierced.

144. It is true that in many civil law systems, abuse of rights is a well recognised concept, and it may be appropriate for a domestic court to apply such a principle in relation to some areas of EU law. However, it was not suggested to us that it should be applied as a new or separate ground in domestic law for treating Mr Malofeev as contractually liable to VTB, or that it would assist VTB in this case.

145. Accordingly, in agreement with the Court of Appeal and for substantially the same reasons, I consider that VTB's contention represents an extension to the circumstances in which the court will pierce the corporate veil, and on analysis it is an extension which is contrary to authority and contrary to principle.

146. The proposed extension is all the more difficult to justify given that it is not needed to enable VTB to seek redress from Mr Malofeev. It is clear that, if VTB establishes that it was induced to enter into the agreements by the fraudulent statements which he is alleged to have made, then Mr Malofeev will be liable to compensate VTB. The measure of damages may be different, but that is not a particularly attractive reason for extending the principle in a new and unprincipled way. And I am not at all attracted by the notion that the principle should be invoked simply to enable VTB to justify the proceedings being heard in this jurisdiction, if they otherwise could not be. That would be precious close to its application being permitted to pull itself up by its own bootstraps.

147. It follows from this analysis that I doubt that the decision in *Gramsci* can be justified, at least on the basis of piercing the corporate veil. In agreement with the Court of Appeal and Arnold J, I think that the reasoning in that case involved a misinterpretation of the basis of the decisions in *Gilford* and *Jones*. It seems to me that the conclusion in *Gramsci* was driven by an understandable desire to ensure that an individual who appears to have been the moving spirit behind a dishonourable (or worse) transaction, action, or receipt, should not be able to avoid liability by relying on the fact that the transaction, action, or receipt was effected through the medium (but not the agency) of a company. But that is not, on any view, enough to justify piercing the corporate veil for the purpose of holding the individual liable for the transaction, action, or receipt, especially where the action is entering into a contract …

➢ Notes

1. In this decision, Lord Neuberger expressly disapproves the judgment of Burton J in *Antonio Gramsci Shipping Corp v Stepanova* [2011] EWHC 333 (Comm) (whereas Lord Clarke, dissenting, preferred to defer consideration until an appropriate case). There it was held arguable that the veil should be pierced to allow the claimants to enforce the sham charterparties (contracts **(p. 77)** for the hire of ships) as against the 'directing mind and will', ie despite there being no direct authority, the judge reasoned that the victim would be entitled to enforce a contract entered into by a puppet company against both the puppet company and the puppeteer [60].

2. In *Linsen International Ltd and Others v Humpuss Transportasi Kimia* [2011] EWCA Civ 1042, CA, Lord

Neuberger MR also denied the *Gramsci* approach:

> 12 But that does not mean that one can simply pierce the corporate veil … piercing the corporate veil would effectively involve treating the third defendant as if it was a contractual party to the arrangements between the first defendant and the claimants. I can see no reason why the mere fact that the third defendant, as I am prepared to assume for present purposes, knowingly received assets from the first defendant, for the purpose of avoiding the first defendant's liability under a contract already entered into and breached by the first defendant, should render the third defendant liable under the contract. It may well enable the claimants to follow the assets but that is an entirely different matter.

3. In order better to appreciate the arguments against piercing the veil, it is also useful to read Arnold J's first instance judgment, at paragraphs 69–102: *VTB Capital plc v Nutritek International Corp* [2011] EWHC 3017 (Ch).

4. The same principles are equally applicable where the claim is for restitutionary remedies. In *MacDonald v Costello* [2011] EWCA Civ 930, [2012] QB 244, the claimant builders entered into a contract with the defendant company for the construction of houses on land which was owned by the company's directors and shareholders (the first and second defendants). When the company failed to meet its liabilities, the claimants sued the directors and shareholders in unjust enrichment. The claim failed. Although these parties had been enriched, the enrichment was not unjust—it was the result of a perfectly proper contractual arrangement between the claimant and the company, and to hold otherwise would undermine the law of contract.

➢ Questions

1. If, in *FG (Films) Ltd* **[2.14]**, FG (Films) Ltd had incurred debts of £80,000 in making the film *Monsoon* and had gone into liquidation leaving its creditors unpaid, should Film Group Inc have been held liable to the creditors?

2. The plaintiffs in *Adams* were tort victims. Some commentators argue that there is a stronger case for piercing the veil in such cases because the victims, unlike creditors with claims based in contract, were never in a position to negotiate or to take the risk of the company's potential insolvency into account in settling the terms of their bargain. However, it is observed by others that all tort victims face this risk that their tortfeasor may be impecunious. *Should* the law adopt a different approach in dealing with contract and tort claimants?

Limits to the idea of a company as a 'person'?

The cases noted previously confirm that the central theoretical and practical feature of company law is that incorporation creates a new and separate legal entity, a 'being' capable of enjoying rights, exercising powers, and incurring duties and obligations. It is traditional to describe any subject of rights and duties as a legal 'person'. But it is one thing to attribute *legal* capacities to a company, and quite another to treat it as having *human* characteristics and qualities.[49] It is unnecessary and, indeed, illogical to suppose that the latter step follows from the former. Yet, **(p. 78)** despite the initial hesitation in finding that companies were separate persons, the courts have now pursued the analogy with a physical person almost as far as it is possible to go, ascribing to companies human attributes such as reputation or intention to defraud which would previously have been regarded as unthinkable. These extensions are not necessarily obvious *or* necessary, and it is instructive to ask whether as a matter of policy they are desirable.

➢ Question

A company is sometimes described as:

(i) a ‘real person’;
(ii) an ‘artificial person’;
(iii) a ‘fictitious person’.

Consider the appropriateness of these expressions.

Blackstone, ‘Commentaries on the Laws of England’ (1768) Volume 1, p 476

Footnotes in the original are omitted.

‘Of Corporations’

There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing and of course the law. It must always appear by attorney; for it cannot appear in person, being, as Sir Edward Coke says, invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat, nor be beaten, in it’s body politic. A corporation cannot commit treason, or felony, or other crime, in it’s corporate capacity: though it’s members may, in their distinct individual capacities. Neither is it capable of suffering a traitor’s or felon’s punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another; for such kind of confidence is foreign to the end of it’s institution. Neither can it be committed to prison;[50] for it’s existence being ideal, no man can apprehend or arrest it. And therefore also it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which has been defeated by the parties absconding, and that also a corporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods. Neither can a corporation be excommunicated; for it has no soul, as is gravely observed by Sir Edward Coke: and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only pro salute animae, and their sentences can only be enforced by spiritual censures: a consideration, which, carried to it’s full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

➢ Notes

1. Where corporate personality is ascribed to a *group* of persons, such as a limited liability company, a chartered body such as a university, or a municipality such as a city or borough, **(p. 79)** it is referred to as a ‘corporation aggregate’. Where the law personifies an *office* occupied by a single person (eg the Crown, the Bishop of Ely), it is customarily called a ‘corporation sole’. The single member company seems to be an anomalous institution which does not fit the criteria for either of these traditional classifications.

2. Blackstone’s remarks (which, as he acknowledges, are based on views expressed by Coke more than a century and a half earlier) are best understood if we think of a local body such as the City of Birmingham or an institution such as the University of Cambridge as a typical ‘corporation’—as Coke or Blackstone themselves would have done. At the time when they were writing, the modern company was, of course, unknown, and such commercial corporations as did exist—for example, the Hudson’s Bay Company—usually had wide governmental powers as well as trading privileges.

Particular illustrations of a company’s separate personality

Since the separate personality of companies is fundamental to the structure of company law, there are a wide variety of illustrations of the impact of the doctrine. The cases noted previously are primarily directed at detecting

exceptions to the rule, and identifying cases where the company's members may be liable for the company's failings. But it is important not to leave this area without appreciating that the normal rule is that the company is its own person, and this feature has a fundamental impact on engagements between the company and third parties.

By way of illustration, later in this book we consider the company and its engagements with its promoters (those who set up the company), its directors and its auditors. All these parties owe their duties to the *company*, not to the individuals concerned with the company. For example, promoters are fiduciaries in relation to the *company*, and, like directors, owe their duties to the *company*, and not to individual *members* (or not, with directors, unless there are special circumstances giving rise to separate duties): see 'Promoters and their dealings with the company', pp 481ff and 'Directors' duties are owed to the company', pp 319ff. Similarly, auditors owe duties to the *company*, not to the company's individual *members*: see 'Auditors and their relationship with the company', pp 463ff. In the field of directors' duties, it is important to discern who it is that owes these duties. Hence, where someone is the director of a sole corporate director of Company X, one must ask whether that person is also the *de facto* director of Company X so as to attract liability: see *Holland* **[7.02]**. Similarly, with employees, see *Ranson v Customer Systems plc* **[7.04]**.

Equally, when the *company* acts, the procedures it must adopt so that the actions of human agents (directors, members, employees, etc) count as the actions of the company are determined by the company's constitution (assisted by certain statutory and common law rules designed to protect third parties in their dealings with the company): see 'Authority of the company's agents', pp 84ff. But these rules also raise the problem of 'pre-incorporation contracts', that is, contracts negotiated, and sometimes concluded, while the company is in contemplation, but before it is formally created by registration. Although the human actors may be the same as those who would be entitled to act for the company once it is formally constituted, can their acts count in that capacity before the event? (See 'Pre-incorporation contracts', pp 131ff.)

All these matters are dealt with later, but mentioned here by way of reinforcing the key point of this chapter, which is that companies are separate legal entities.

(p. 80) Further Reading

ARMOUR, J, 'Corporate Personality and Assumption of Responsibility' [1999] LMCLQ 246.
Find This Resource

LORD COOKE OF THORNDON, 'A Real Thing' in *Turning Points of the Common Law* (1996 Hamlyn Lectures, 1997).
Find This Resource

EASTERBROOK, FH and FISCHEL, DR, *The Economic Structure of Corporate Law* (1991), ch 2 'Limited Liability'.
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FLANNIGAN, R, 'The Economic Structure of the Firm' (1995) 33 *Osgoode Hall Law Journal* 105.
Find This Resource

FREEDMAN, J, 'Limited Liability: Large Company Theory and Small Firms' (2000) 63 MLR 317.
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GALLAGHER, L and ZIEGLER, P, 'Lifting the Corporate Veil in the Pursuit of Justice' (1990) JBL 292.
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HANSMANN, H and KRAAKMAN, RH, 'The Essential Role of Organizational Law' (2000) 110 *Yale Law Journal* 387 at 387–404.
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HICKS, A, 'Corporate Form: Questioning the Unsung Hero' [1997] JBL 306.
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IRELAND, P, 'Triumph of the Company Legal Form 1856–1914' in J Adams (ed), *Essays for Clive Schmitthoff* (1983), p 29.
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MOORE, M, '"A Temple Built on Faulty Foundations": Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*' [2006] JBL 180.
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Find This Resource

WITTING, C, 'Liability for Corporate Wrongs' (2009) 28 *University of Queensland Law Journal* 113.
Find This Resource

WOLFF, W, 'On the Nature of Legal Persons' (1938) 54 LQR 494.
Find This Resource

Notes:

[1] There is a considerable body of writing on the theory, or theories, of corporate personality. No attempt has been made to select material representing the various schools of thought for inclusion in this book. For the interested reader, the following are amongst the best-known writings in English on the subject: FW Maitland, *Introduction to Gierke's Political Theories of the Middle Age* (1900); F Hallis, *Corporate Personality* (1930); A Nekam, *The Personal Conception of the Legal Entity* (1938); LC Webb (ed),*Legal Personality and Political Pluralism* (1958); SJ Stoljar, *Groups and Entities* (1973); WM Geldart, 'Legal Personality?' (1911) 27 LQR 90; HJ Laski, 'The Personality of Associations?' (1916) 29 *Harvard Law Review* 404; M Radin, 'The Endless Problem of Corporate Personality?' (1932) 32 *Columbia Law Review* 643, and 'A Restatement of Hohfeld' (1938) 51 *Harvard Law Review* 1141; M Wolff, 'On the Nature of Legal Persons?' (1938) 54 LQR 494; HLA Hart, 'Definition and Theory in Jurisprudence' (1954) 70 LQR 37, 45ff; M Stokes, 'Company Law and Legal Theory' in W Twining (ed), *Legal Theory and Common Law* (1986). There is also a discussion of the topic in some general textbooks of jurisprudence.

A quite different theoretical basis for the study of companies, and of company law, is associated with the law and economics movement originating in the United States more than half a century ago. Economists usually speak of 'the firm', rather than the company as such, because their concern is primarily with the organisation of the different

actors in the process of production of goods and services and not with the legal form which that organisation takes; however, they also see the company as a subject of study in its own right as one of the paradigm forms of business structure. There is an immense amount of literature in this area. Students could begin by readingRH Coase, 'The Nature of the Firm?' (1937) 4 *Economica NS* 386; FH Easterbrook and DR Fischel, 'The Corporate Contract?' (1989) 89 *Columbia Law Review* 1416 and the various articles by Hart, Butler and others also collected in that number of the *Columbia Law Review*. The leading work dealing with the position in England is BR Cheffins,*Company Law: Theory, Structure and Operation* (1997). Reference may be made also to DD Prentice, 'The Theory of the Firm: Minority Shareholder Oppression: Sections 459–461 of the Companies Act 1985?' (1988) 8 OJLS 55; CA Riley, 'Contracting Out of Company Law: Section 459 of the Companies Act 1985?' (1992) 55 MLR 782.

[2] In this sense 'person' can, eg, include such inanimate entities as a fund (*Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, [1991] BCLC 180, HL), or a Hindu temple (*Bumper Development Corpn Ltd v Metropolitan Police Comr* [1991] 1 WLR 1362, CA). Note that neither a fund nor a temple is regarded as a corporation under English law, where typically corporate personality is recognised only in a group, a municipality or an office (such as the Crown). In the two cases referred to, the court was applying the accepted rule of the conflict of laws which states that the question whether or not a group or entity should be accorded corporate status is to be decided by the law of the jurisdiction in which it is situated or domiciled.

[3] The centenary of *Salomon*'s case was marked by a number of conferences and publications. See, eg, CEF Rickett and RB Grantham (eds), *Corporate Personality in the Twentieth Century* (1998), and a series of articles in (1998) 16 C & SLJ.

[4] This expression is used descriptively. The 'private company' was first made the subject of separate statutory provision in the Companies Act 1907.

[5] The report reads '£30,000', but this is plainly an error. The figure of £20,000 appears in other reports of the case, eg 66 LJ Ch 35 at 49.

[6] This means that the sum of £10,000 was advanced by Salomon to the company as a loan, secured by a charge over the assets of the company.

[7] *Broderip v Salomon* [1895] 2 Ch 323. [Part of the judgment of Vaughan Williams J is cited at **[2.02]**.]

[8] *Broderip v Salomon* [1895] 2 Ch 323 at p 333. [Parts of the judgments given in the Court of Appeal are cited at j**[2.02]**.]

[9] In *Re Baglan Hall Colliery Co* (1870) LR 5 Ch App 346, Giffard LJ states that it 'is the policy of the Companies Act to enable business people to incorporate their businesses and so avoid incurring further personal liability'.

[10] See now *R v Registrar of Companies, ex p AG* **[1.08]**.

[11] An ordinary resolution is now sufficient in all cases: CA 2006 s 168.

[12] [1978] Fam 181, [1979] 1 All ER 801.

[13] See also *Re Lindsay Bowman Ltd* [1969] 1 WLR 1443 at 1448, where Megarry J, referring to s 353(6) of the Act of 1948, said: 'In obedience to Parliament, I must assume that the artificial and impersonal entity that we know as a limited company has been endowed with the capacity not merely of having feelings but also of feeling aggrieved even though it has ceased to exist.'

[14] This is the rule in English law and most other legal systems, but in others domicile may be determined by reference to some other factor such as the company's principal place of business. In some jurisdictions a corporate body is not recognised as having a domicile at all. Under the rules of private international law, the law of the domicile regulates questions relating to the validity of the company's incorporation, its dissolution, the effect of a merger, its capacity and the rights and liabilities of its members (including limited liability). It is not possible under UK law for a company to transfer its incorporation and domicile to another jurisdiction, as is the case in many other countries.

[15] Regulation (EC) 2157/2001 allows registration by the companies registrar of any member state of a European public limited-liability company. The Regulation is also known as the Statute for a European Company.

[16] The concept of a company's 'residence' is primarily of importance in revenue law, but it may also be relevant in other contexts, eg in regard to the place where documents may be served on it. A company which is resident in the UK may not change its residence without the consent of the Treasury (Income and Corporation Taxes Act 1988 s 765(1)). This provision has been held not to be incompatible with the 'freedom of establishment' principle contained in Art 43 of the Treaty of Rome: *R v HM Treasury, ex p Daily Mail and General Trust plc* [1989] QB 446, [1989] 1 All ER 328, CJEU.

[17] Other cases show that the 'central management and control' of a company may in fact be divided, so that its residence is in more than one country: see, eg, *Union Corpn Ltd v IRC* [1952] 1 All ER 646, CA; (affd on other grounds [1953] AC 482, HL).

[18] 'Neither can it be a television entertainer or author'; per Viscount Dilhorne in *Newstead v Frost* [1980] 1 All ER 363 at 368, [1980] 1 WLR 135 at 139, HL. Nor a lorry driver: *Richmond upon Thames London Borough Council v Pinn & Wheeler Ltd* [1989] RTR 354.

[19] (1876) 1 Ex D 428.

[20] (1876) 1 Ex D 428.

[21] Where these are not relevant, there are also statutory and common law rules: see (Insolvency Act 1986) IA 1986 s 426 and *Cambridge Gas Transport Corpn v The Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508, PC.

[22] G McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' [2009] CLJ 169.

[23] Article 6 of the Convention was invoked in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295.

[24] *R (North Cyprus Tourism Centre Ltd) v Transport for London* [2005] EWHC 1698 (Admin).

[25] Of course, the doctrine was recognised much earlier—see, eg, *Edmunds v Brown and Tillard* (1668) 1 Lev 237, where members were held not liable on the bond of a corporation after its dissolution, and *Foss v Harbottle* **[13.01]**. The true significance of *Salomon*'s case in its more immediate context is that it confirmed the legitimacy of the 'private' (very small) company and paved the way for its recognition by statute in 1907.

[26] It is noteworthy that an appeal to the 'realities' of the situation is often made both in the argument *for* lifting the veil and in the argument *against* it (see, eg, *Tunstall v Steigmann* [1962] 2 QB 593 (CA)).

[27] The quoted phrases are taken from the judgment of Staughton LJ in *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 4 All ER 769 at 779.

[28] For further reading, see A Samuels, 'Lifting the Veil' [1964] JBL 107; MA Pickering, 'The Company as a Separate Legal Entity?' (1968) 31 MLR 481; CM Schmitthoff, '*Salomon* in the Shadow' [1976] JBL 305; S Ottolenghi, 'From Peeping behind the Corporate Veil to Ignoring it Completely?' (1990) 53 MLR 338; Lord Cooke of Thorndon, 'A Real Thing' in *Turning Points of the Common Law* (1996 Hamlyn Lectures, 1997), and 'Corporate Identity' (1998) 16 C & SLJ 160; CH Tham, 'Piercing the Corporate Veil: Searching for Appropriate Choice of Law Rules' [2007] LMCLQ 22.

[29] See the notes by Lord Wedderburn [1958] CLJ 152 at 155, (1960) 23 MLR 663 at 666.

[30] See, eg, *Re Darby* **[2.16]**; *Re Bugle Press Ltd* **[15.12]**; *Gilford Motor Co Ltd v Horne* **[2.17]**. There is, of course, an element of question-begging in determining whether there *has* been such misuse of the privilege of incorporation, as is revealed in the attitudes of the different courts in *Salomon*'s case itself.

[31] See *Re FG (Films) Ltd* **[2.14]**, p 61, and compare the cases in which a small company has been treated as a quasi-partnership for the purpose of winding up (see*Ebrahimi v Westbourne Galleries Ltd* **[16.13]**, and Notes

following, p 802).

[32] But note, eg, *Conway v Ratiu* [2005] EWCA Civ 1302, [2006] 1 All ER 571, where the corporate veil was lifted, and *Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612 where that was considered.

[33] A second appeal concerned a charge based upon similar facts against the Monkwearmouth Conservative Club Ltd, which was incorporated under the Companies Acts. The cases were treated as indistinguishable and disposed of together.

[34] (1882) 8 QBD 373.

[35] This principle was applied to penetrate an elaborate network of some 80 interlocking trusts and companies in *Re a Company* [1985] BCLC 333, CA, and strikingly illustrated by diagrams which are reproduced in the report of the case.

[36] Contrast this with a finding that a particular *transaction* is a sham: see the discussion in *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld*[2009] EWCA Civ 280, [2009] BCC 687, noted in the Note following *Lee*'s case **[2.04]**, p 43.

[37] An alternative ground for the decision of the court was that DHN did have a sufficient interest in the land, on the basis of either an irrevocable licence or a resulting trust, to claim compensation for disturbance in its own right.

[38] This was not strictly a 'group enterprise' case. The occupier of the shop premises which were compulsorily acquired was a company of which W held 999 shares and his wife the remaining one. Part of the land was owned by W personally and the rest by a second company in which, again, W and his wife held all the shares. The judgments leave little doubt, however, that *DHN* would not have been followed even if the facts had been identical.

[39] The case went to the House of Lords on grounds which did not involve this point.

[40] See also *The Maritime Trader* [1981] 2 Lloyd's Rep 153, [1981] Com LR 27, in which the court refused to order the arrest of a ship owned by the defendant company's subsidiary.

[41] [1977] AC 774 at 807.

[42] *Revlon Inc v Cripps and Lee Ltd* [1980] FSR 85.

[43] *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corpn v EC Commission* (Cases 6 and 7/73) [1974] ECR 223.

[44] 1978 SLT 159.

[45] Of course, in an appropriate case a parent may be held liable on the basis of a contractual promise or a representation that it would support its subsidiary: a plea which failed in *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785, [1989] 1 WLR 379, CA, where the 'comfort letter' given by the parent company was construed as excluding an intention to create legal relations. If the subsidiary has gone into insolvent liquidation, the parent may be liable as a party to fraudulent trading under IA 1986 s 213, or (as a 'shadow director') liable for 'wrongful trading' under IA 1986 s 214. See 'The functions, powers and duties of the liquidator', pp 804ff.

[46] At present, this can be done in England only with the approval of the prescribed statutory majorities of the creditors concerned, by a scheme of arrangement under CA 2006 ss 895ff, or, in special circumstances, under the 'power to compromise' conferred on liquidators and the court by IA 1986 s 167(1) and Sch 4. For an example of the latter, see *Re Bank of Credit and Commerce International SA (No 3)* [1993] BCLC 1490.

[47] *ICI v EC Commission* (Cases 48, 49, 51–57/69) (the *Dyestuffs* case): [1972] ECR 619, where the CJEU held that anti-competitive behaviour of a subsidiary company within the EU, acting on the instructions of its parent company outside the EU, was attributable to the parent so as to enforce successfully EU competition rules. In *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm), [2003] 2 All ER 683 it was held that because a group does not have legal personality, the Commission must select a specific company within the latter as an