sole purpose of being put forward as having undertaken the very elaborate arrangements necessary for the making of this film and of enabling it thereby to qualify as a British film. The attempt has failed, and the respondent's decision not to register 'Monsoon' as a British film was, in my judgment, plainly right.

➢ Question

Can you identify any special feature of this case which might make it distinguishable from *Gramophone & Typewriter Co Ltd v Stanley* **[2.05]** ?

➢ Notes

1. In this case a finding of agency allowed the court to 'pierce the veil'. It is to be observed that a similar finding of agency by the trial judge in *Salomon*'s case **[2.02]** was rejected by the House of Lords. On this point, Kerr LJ in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] Ch 72 at 189 observed:

> The crucial point on which the House of Lords overruled the Court of Appeal in that landmark case was precisely the rejection of the doctrine that agency between a corporation and its members in relation to the corporation's contracts can be inferred from the control exercisable by the members over the corporation or from the fact that the sole objective of the corporation's contracts was to benefit the members. That rejection of the doctrine of agency to impugn the non-liability of the members for the acts of the corporation is the foundation of our modern company law.

2. We must therefore conclude that an actual agency must be shown on the evidence to exist and may not be inferred merely from control of a company or ownership of its shares. Of course, there is nothing in principle to prevent a company from being an agent of its **(p. 62)** controlling shareholders, just as it can be an agent of anyone else. Such an agency can be created by express agreement, as in fact happened in the well-known *Rylands v Fletcher* case of *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, HL. There, the company whose factory blew up had agreed to occupy the land owned by its two shareholders as their agent. The existence of an agency does not violate the *Salomon* principle; on the contrary, it affirms that the company, being capable of acting as an agent, is a separate person. But if a judge were free to *infer* an agency from the mere fact of control, more or less at will, then the result would be that the veil could be pierced as often as he chose, and the law would be unpredictable.

3. One instance of this is, perhaps, *Smith, Stone & Knight Ltd v Birmingham Corpn* [1939] 4 All ER 116, where Atkinson J, on facts very similar to those of *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* **[2.18]**, allowed a holding company to claim compensation as if it were an owner-occupier, on the ground that its subsidiary (which occupied the land in question) was merely its agent for the purpose of carrying on its business. This decision of Atkinson J, which is in marked contrast to*Gramophone and Typewriter Co Ltd v Stanley* **[2.05]**, has been the subject of some criticism, for example by MA Pickering, 'The Company as a Separate Legal Entity' (1968) 31 MLR 481 at 494, and by Toulson J in *Yukong Lines Ltd of Korea v Rendsburg Investments Corpn of Liberia (No 2)* (see Note 1 following *Adams v Cape Industries plc* **[2.19]**, p 72).

4. There was also a finding of agency in the tax case of *Firestone Tyre and Rubber Co Ltd v Lewellin* [1957] 1 WLR 464, HL, where it was held that an English company which manufactured tyres in the UK, and used them to fulfil orders for its American holding company, did so as the agent of the latter. But nothing in this decision was made to turn on the fact that the holding company had control of the English company.

A trust relationship, with the company as trustee and the members as beneficiaries, may, exceptionally, be

found to exist as a matter of fact.

The other argument which found support in the lower courts in *Salomon*'s case, based on a *trust* rather than an agency, will similarly fall to the ground unless a trust can be affirmatively proved. The evidence of such a trust in the case next cited was, to say the least, tenuous; but the court was plainly moved to find that it existed by the close analogy with an unincorporated members' club.

[2.15] Trebanog Working Men's Club and Institute Ltd v MacDonald [1940] 1 KB 576 (King's Bench Divisional Court)

The club was incorporated under the Industrial and Provident Societies Acts 1893–1913.[33] It bought liquor in its own name, paid for it by cheque drawn on its bank account, and served it to members in exchange for a money payment. The society was charged with selling liquor by retail without a licence, and was convicted. It appealed successfully to the Divisional Court.

> LORD HEWART CJ read the judgment of the court (LORD HEWART CJ, HUMPHREYS and HILBERY JJ): The first general Act dealing with unlawful sales by retail of intoxicating liquor without a justices' licence was the Licensing Act 1872, which in s 3 created the offence now **(p. 63)** contained in s 65 of the Licensing (Consolidation) Act 1910 in almost identical terms. Ever since that date it has been a matter of general agreement that the transaction which takes place in a members' club, in which the property in the liquor is in all the members equally, when a member orders and pays for intoxicating liquor, is not a sale at all in the sense in which that word is used in s 3, but is rather to be deemed the transfer of a special property in the goods from all the other members of the club to the consumer in consideration of the price paid. The aspect of the matter is fully explained in the judgments of Field J and Huddleston B in *Graff v Evans*.[34] The club in that case was a bona fide members' club, but, by rule 7 of the club rules 'all property acquired by the club shall be vested in the trustees'—no doubt, as Field J observed in his judgment, for the purpose of enabling them to sue or take other legal proceedings with respect to injuries to the possession of the goods belonging to the club. Field J, in holding that no sale by retail of intoxicating liquor took place when a member ordered and paid for a drink, put the matter in this way: 'I think the true construction of the rules is that the members were the joint owners of the general property in all the goods of the club, and that the trustees were their agents with respect to the general property in the goods.' Huddleston B, in concurring, says: 'It seems to me clear that [the member] had a property or at least an interest in the goods which were transferred to him.' The correctness of that decision has never, so far as we are aware, been doubted …
>
> In our opinion, the decision in *Graff v Evans* applies to and governs the present case. Once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor, because the legal property in the liquor is not in the members themselves, it is difficult to draw any legal distinction between the various legal entities that may be entrusted with the duty of holding the property on behalf of the members, be it an individual, or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquors remains, as in this case it clearly does, in the members of the club. There is no magic in this connection in the expressions 'trustee' or 'agent'. What is essential is that the holding of the property by the agent or trustee must be a holding for and on behalf of, and not a holding antagonistic to, the members of the club. We are dealing here with a quasi-criminal case, where the court seeks to deal with the substance of a transaction rather than the legal form in which it may be clothed …

➢ Notes

1. Three years earlier, Lord Hewart CJ had been one of the members of the Divisional Court which heard *Wurzel v Houghton Main Home Delivery Service Ltd* [1937] 1 KB 380, KBD. In this case, miners had formed two co-operative associations to run lorries for the delivery of coal to their homes, for which a payment based on mileage was made. The one association was unincorporated, and the court ruled that the lorry was

being used by its co-owners, the members, to haul their own coal, and so there was no 'carriage of goods for hire or reward' in breach of the licensing laws. But the other association had been formed as a company, and it was convicted because it (as the owner of the lorry) was an entity separate from its members (who owned the coal). No argument based upon the existence of a trust was addressed to the court.

2. In *Abbey Malvern Wells Ltd v Ministry of Local Government and Planning* [1951] Ch 728, Danckwerts J held that, where all the shares in a company were held on educational trusts and the management of the company was in the hands of the trustees, the court could pierce the veil of incorporation so as to impress the *company's* property with the terms of the trusts. This decision overlooks the possibility that the trustees might (quite properly) have decided to sell the shares, or some of them, and effectively have nullified the court's ruling.

(p. 64) 3. In *Re Schuppan (A Bankrupt) (No 2)* [1997] 1 BCLC 256, a matrimonial property case in which it was said, *obiter dicta*, that if the married partners had acquired property in circumstances which would have given rise to a finding that one of them, who held the legal estate, did so on a constructive trust for the other, the fact that the property was held by a company controlled by the former would not stand in the way of the court making a similar finding.

➢ Question

If the Trebanog Working Men's Club Ltd owned a vehicle which it used to deliver supplies of liquor to its members' homes for consumption there, would it need: (i) a retail liquor licence; (ii) a licence to carry goods for hire or reward? Would it matter how payments for the supplies were reckoned?

The corporate veil may be pierced if the company is used as a means to perpetrate a fraud.[35]

[2.16] Re Darby, ex p Brougham [1911] 1 KB 95 (King's Bench Division)

Darby and Gyde (both undischarged bankrupts, with a number of convictions for fraud) registered in Guernsey a company called City of London Investment Corporation Ltd. It had only seven shareholders and had issued a mere £11 of its nominal capital of £100,000. Darby and Gyde were its only directors and entitled to all of its profits. The corporation so formed then purported to register and float in England a £30,000 company under the name of Welsh Slate Quarries Ltd, and to sell to it a quarrying licence and plant, bought for £3,500, at a price of £18,000. The prospectus inviting the public to take debentures in the Welsh company disclosed the role of the corporation as vendor and promoter, but did not mention the names of Darby and Gyde or the fact that it was they who were to receive the profit on the sale. The Welsh company failed and went into liquidation. The liquidator claimed in the bankruptcy of Darby for the secret profit which it was alleged that he, as a promoter, had made. It was objected on Darby's behalf that it was not he but the corporation who had been promoter; but this argument found no favour with the court.

> PHILLIMORE J: Now this case certainly does seem to me to be an advance upon the previous decisions. Darby and Gyde (who are two fraudulent persons, both of whom have been convicted of fraud in the present case, and of several previous crimes) registered in Guernsey a company called the City of London Investment Corporation, of which they were the proprietors. It was merely an alias for themselves just as much as if they had announced in the *Gazette* that they were in future going to call themselves 'Rothschild & Co'. It was merely a name under which they carried on business, and I am quite clear in my own mind that that was their object, and that, whenever they represented that some business was being done by or through the corporation and concealed the fact that it was being done by or through Darby and Gyde, they were by that mere fact probably perpetrating a fraud. I say this because their names and their persons were so well known generally that the chance of detection and the chances of repudiation were great in connection with any commercial transactions in which they engaged. The fraud here is that what they did

through the corporation they did themselves and represented it to have been done by a corporation of some standing and position, or at any rate a corporation which was more than and different from themselves. Having registered that corporation, and being minded to perpetrate a very great fraud, they, as such corporation, agreed to buy a trivial interest in a Welsh slate quarry for a small sum in cash and **(p. 65)** a consideration in shares, and then as such corporation purported to sell this interest to the Welsh Slate Quarries Limited and thereby they made a very large profit. It is said that they concealed that profit and also that they concealed from the Welsh Slate Quarries Limited the fact that they were themselves the real vendors and promoters, and therefore it is contended that the liquidator is entitled to recover the profit from them … Now they made that profit either directly or through the agency of the corporation, it does not matter which, and they may hold it if they disclosed it at the proper time … [His Lordship then ruled that there had been no effective disclosure, and that Gyde and Darby were bound to account for the profit which the corporation had made.]

➢ Notes

1. See also *Aveling Barford Ltd v Perion Ltd* **[10.14]**, where the veil of incorporation was pierced in order to defeat the claims of an asset-stripper who had defrauded his company.

2. In certain circumstances, the court will exercise a power to order the 'freezing' of a person's assets, in order to prevent them from being moved out of the jurisdiction or otherwise spirited away. Such a freezing order (formerly referred to as a *Mareva* injunction) is commonly made when the owner of the assets in question is likely to have judgment entered against him in a current or pending action and the court is satisfied that there is a risk that there will be no assets available to meet this liability. The court has power, also, to make a 'restraint order' under the Criminal Justice Act 1988 s 77, preventing a person from dealing with assets which are liable to be confiscated as the proceeds of crime. It has been held in a number of cases (eg *International Credit and Investment Co (Overseas) Ltd v Adham* [1998] BCLC 134; *Re H (Restraint Order: Realisable Property)* [1996] 2 BCLC 500) that an order in such cases can extend to cover assets which are not owned by the person concerned but by a company that is controlled by him.

3. In *The Law Society of England and Wales v Habitable Concepts Ltd, Mr Onyekechi Onuiri* [2010] EWHC 1449 (Ch), a case involving fraud and knowing receipt by a solicitors' firm, the court refused to pierce the corporate veil on the basis that the 'ultimate beneficiary of the payments out of the account cannot be established by the Law Society'. While the court accepted that 'on its face the whole arrangement seems deeply suspect: but suspicion is not a substitute for proof' [22].

The veil of incorporation may be pierced to prevent the deliberate evasion of a contractual obligation.

[2.17] Gilford Motor Co Ltd v Horne [1933] Ch 935 (Court of Appeal)

The first defendant, EB Horne, had formerly been employed as managing director of the plaintiff company. He had covenanted in a written agreement not to solicit customers of the company after leaving its employment. When this employment was terminated, he began to set up his own business, undercutting the plaintiff's prices; but after taking legal advice, caused instead the formation of a company, JM Horne & Co Ltd (the second defendant) in which his wife and an employee were sole shareholders and directors. This company took over Horne's business and solicited the plaintiff's customers. Farwell J held that the covenant had been broken, but because in his view it was too wide and therefore against public policy, declined to enforce it against the defendants. The plaintiff appealed successfully against this latter ruling, and was granted an injunction against both defendants.

LORD HANWORTH MR: Farwell J heard the evidence about that company … He says this:

> The defendant company is a company which, on the evidence before me, is obviously carried on wholly by the defendant Horne. Mrs Horne, one of the directors, is not, so far as any evidence **(p. 66)** I have had before me, taking any part in the business or the management of the business. The son, whose initials are 'JM', is engaged in a subordinate position in that company, and the other director, Howard, is an employee of the company. As one of the witnesses said in the witness-box, in all dealings which he had had with the defendant company the 'boss' or the 'guvnor', whichever term is the appropriate one, was the defendant Horne, and I have not any doubt on the evidence I have had before me that the defendant company was the channel through which the defendant Horne was carrying on his business. Of course, in law the defendant company is a separate entity from the defendant Horne, but I cannot help feeling quite convinced that at any rate one of the reasons for the creation of that company was the fear of Mr Horne that he might commit breaches of the covenant in carrying on the business, as for instance, in sending out circulars as he was doing, and that he might possibly avoid that liability if he did it through the defendant company. There is no doubt that the defendant company has sent out circulars to persons who were at the crucial time customers of the plaintiff company.

Now I have recalled that portion of the judgment of Farwell J, and I wish in clear terms to say that I agree with every word of it. I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr E B Horne. The purpose of it was to try to enable him, under what is a cloak or sham, to engage in business which, on consideration of the agreement which had been sent to him just about seven days before the company was incorporated, was a business in respect of which he had a fear that the plaintiffs might intervene and object.

Now this action is brought by the plaintiffs, the Gilford Motor Company Ltd, to enforce the terms of clause 9 of the agreement of 30 May 1929, on the ground that the defendant Horne, and the company, as his agent and under his direction, have committed breaches of the covenant which I have read. [His Lordship held that the breaches were substantiated by the evidence, and rejected the defence that the covenant was too wide to be supportable in law. He accordingly granted an injunction, which he ruled should go against the company as well as Horne.]

LAWRENCE and ROMER LJJ delivered concurring judgments.

➤ Notes

1. This decision was followed in *Jones v Lipman* [1962] 1 WLR 832, where the defendant, who had contracted to sell land to the plaintiff, later endeavoured to put the land beyond the reach of an order for specific performance by conveying it to a company which he had formed for this express purpose, and which he himself effectively owned and controlled. Ignoring the corporate veil, Russell J ordered specific performance against both the defendant and his company.

2. Lord Cooke, in his Hamlyn Lecture (see p 53, fn 28) says of *Jones v Lipman*, at p 17:

> Since the company was in the vendor's control, there was no difficulty in granting a decree of specific performance against him. Describing the company as a creation of the vendor, a device, sham and mask, the judge also decreed specific performance directly against it. Those epithets, however, do not appear to have been needed to justify the remedy. No particular difficulty should arise in holding that a company or any other purchaser acquiring property with actual notice that the transaction is a fraud on a prior purchaser takes subject to the latter's equity.

This makes an important point. Courts often say that they are treating the company itself as a sham (as in the remarks by Russell J in *Jones v Lipman* [1962] 1 WLR 832), with the implication that the company's existence is then ignored.[36] Often, however, this is shorthand for **(p. 67)** finding a reason—and not a special company law reason—for holding that both the company and individual in control should comply with certain obligations. Put another way, the company's *separate* existence is then ignored, and the court orders the company as well as the defendant to comply with the obligations.

3. In both *Gilford Motor Co Ltd v Horne* and *Jones v Lipman*, the company whose separate existence was disregarded had been set up deliberately in an attempt to evade an *existing* obligation. This was a point emphasised in *Adams v Cape Industries plc* **[2.19]**, where it was made clear that the law does not look with similar disfavour on the formation of a limited liability company in order to confine the *future* or *contingent* liabilities of an enterprise within specific limits.

It is common to refer to the company in cases such as these as a 'sham' or 'façade', used to mask the underlying situation. In *Adams v Cape Industries plc* the court expressed the view that 'where a façade is alleged, the motive of the perpetrator may be highly material'.

4. Note also *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, where Dalby, the director of a public company, had dishonestly diverted assets and business opportunities from this company to a Virgin Islands company owned and controlled by Dalby himself. An order that the benefits so obtained should be disgorged was made against the offshore company as well as against Dalby personally.

This judgment was followed in *Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177, where Sir Andrew Morritt V-C held that although it is not appropriate for a court to pierce the corporate veil merely because a company is involved in some impropriety, it is entitled to do so when the latter is used 'as a device or façade to conceal the true facts and the liability of the responsible individuals'.

5. In *Acatos & Hutcheson plc v Watson* [1995] BCLC 446, A Ltd owned nearly 30% of the shares in A & H plc but had no other assets. It would have been unlawful for A & H plc to acquire these shares because the 'rule in *Trevor v Whitworth*' forbids a company to own shares in itself (the rule is not the same now, see 'Redemptions and repurchases of shares', p 520). But Lightman J said that it was permissible for it to purchase all the shares in A Ltd, which of course meant that for all practical purposes it did, indirectly, own 30% of its own shares. He added, however, that he might have thought it appropriate to pierce the veil and declare the transaction unlawful if A Ltd had been *deliberately* set up by A & H plc to acquire the shares as the first of two stages in a single scheme to evade the rule. (For a further example of a 'façade', see *Re Bugle Press Ltd* **[15.12]**.)

6. While this may be so, the court will not pierce the corporate veil in a manner which brings a non-party into contractual relationships on terms to which it has not agreed: *VTB Capital plc v Nutritek International Corp* **[2.20]**.

In exceptional circumstances, the veil of incorporation may be pierced to allow a group of associated companies to be treated as one.

[2.18] DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852 (Court of Appeal)

DHN ran a wholesale cash-and-carry grocery business from premises owned by its wholly owned subsidiary company ('Bronze'). Bronze had the same directors as DHN, but it carried on no business. Its only asset was the freehold properties which DHN occupied as its licensee. A second wholly owned subsidiary owned vehicles used by DHN in its business, but it, too, carried on no operations of its own. The council in 1970 compulsorily acquired the premises, and as a result DHN had to close down its business. Substantial compensation for disturbance (over and above the value of the land itself, which had already been paid to **(p. 68)** Bronze) could be claimed by DHN only if it had an interest in the land greater than that of a bare licensee. The Court of Appeal, reversing a ruling of the Lands Tribunal, held that the group of companies should be treated as a single economic entity, and that in consequence compensation for disturbance should be paid. In effect, DHN was treated as if it had owned the land itself.

SHAW LJ: [There] is the further argument[37] advanced on behalf of the claimants that there was so complete an identity of the different companies comprised in the so-called group that they ought to be regarded for this purpose as a single entity. The completeness of that identity manifested itself in various ways. The directors of DHN were the same as the directors of Bronze; the shareholders of Bronze were the same as in DHN, the parent company, and they had a common interest in maintaining on the property concerned the business of the group.

If each member of the group is regarded as a company in isolation, nobody at all could have claimed compensation in a case which plainly calls for it. Bronze would have had the land but no business to disturb; DHN would have had the business but no interest in the land.

In this utter identity and community of interest between DHN and Bronze there was no flaw at all. As Bronze did not trade and carried on no business, it had no actual or potential creditors other than its own parent, DHN. The directors of that company could at any time they chose have procured the transfer of the legal title from Bronze to itself. Mr Eyre again conceded that if they had gone through that formal operation the day before the notice to treat was served on 12 October 1970, they would have had a secure claim for compensation for disturbance. Accordingly, they could in law have sought and obtained whatever advantages were derived up to that date from a separation of title and interest between the two companies and still quite legitimately have re-disposed matters right up till October 1970 so as to qualify for compensation. They could not have been criticised, still less prevented, if they had chosen to do so. Yet if the decision of the Lands Tribunal be right, it made all the difference that they had not. Thus no abuse is precluded by disregarding the bonds which bundled DHN and Bronze together in a close and, so far as Bronze was concerned, indissoluble relationship.

Why then should this relationship be ignored in a situation in which to do so does not prevent abuse but would on the contrary result in what appears to be a denial of justice? If the strict legal differentiation between the two entities of parent and subsidiary must, even on the special facts of this case, be observed, the common factors in their identities must at the lowest demonstrate that the occupation of DHN would and could never be determined without the consent of DHN itself. If it was a licence at will, it was at the will of the licensee, DHN, that the licence subsisted. Accordingly it could have gone on for an indeterminate time; that is to say, as long as the relationship of parent and subsidiary continued, which means for practical purposes for as long as DHN wished to remain in the property for the purposes of its business.

The President of the Lands Tribunal took a strict legalistic view of the respective positions of the companies concerned. It appears to me that it was too strict in its application to the facts of this case, which are, as I have said, of a very special character, for it ignored the realities of the respective roles which the companies filled. I would allow the appeal.

LORD DENNING MR and GOFF LJ delivered concurring judgments.

➢ Question

Can this decision be reconciled with the reasoning of Browne-Wilkinson V-C in *Tate Access Floors Inc v Boswell* (cited at 'The process of "piercing the corporate veil"', p 52)?

(p. 69) ➢ Note

Lord Denning began his judgment: 'This case might be called the "Three in one". Three companies in one. Alternatively, the "One in three". One group of three companies.' 'Group enterprises' are a common feature of modern commercial life, both in domestic businesses in the UK or in great multinationals. The earlier cases

already illustrate this practice: *Gramophone and Typewriter Co Ltd v Stanley* **[2.05]**; *Re FG (Films) Ltd* **[2.14]**; *Lonrho Ltd v Shell Petroleum Co Ltd* **[2.06]**; *Smith, Stone & Knight Ltd v Birmingham Corpn* (Note 3 following *Re RG (Films) Ltd* **[2.14]**, p 62); and *Firestone Tyre and Rubber Co Ltd v Lewellin* (Note 4 following *Re RG (Films) Ltd* **[2.14]**, p 62).

A 'group' of companies typically consists of a holding company and one or more subsidiaries and sub-subsidiaries, or perhaps a number of companies which have substantially the same shareholders and directors. But it is obviously possible to have an infinite variety of arrangements which closely or loosely connect a number of companies that carry on either associated businesses or different parts of the same business.

There are a variety of statutory provisions governing groups: for instance, the companies legislation has rules requiring the publication of consolidated accounts (CA 2006 ss 399ff); and the tax laws have rules dealing with such matters as the transfer of assets between member companies of a group (see, eg, Income and Corporation Taxes Act 1988 ss 402ff). Employment legislation, for example in regard to redundancy payments, sometimes treats as continuous employment a succession of jobs with a number of associated companies, or, similarly, a succession of employers following a takeover or reorganisation. In all these statutes, the concepts of 'group' and 'associated company' will be formally defined for the purpose of the provision in question.

The case law gives a much more confused picture. The question whether the veil of incorporation should be pierced, so as to destroy the distinct identity of the separate companies within a group and treat the 'enterprise' as being in reality one concern, is one that has come before the courts on many occasions. The willingness of the Court of Appeal in the *DHN* case to treat all the companies as one contrasts sharply with its insistence on applying the *Salomon* principle in *Lonrho* **[2.06]**. Indeed, in *Woolfson v Strathclyde Regional Council* 1978 SLT 159, 38 P & CR 521,[38] the House of Lords upheld a decision of the Scottish courts delivered shortly after the *DHN* case in which the Scottish judges had pointedly declined to follow the English case, although the facts were quite similar.

Later on, we shall see cases where one company in a group has guaranteed the obligations of another (*Charterbridge Corpn Ltd v Lloyds Bank Ltd* **[3.03]**; *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* **[3.04]** and **[3.11]**), paid its debts (*Armour Hick Northern Ltd v Armour Trust Ltd* [1980] 1 WLR 1520), or looked after the pay and pensions of its employees (*Re W & M Roith Ltd* [1967] 1 WLR 432; *Walker v Wimborne* (1976) 137 CLR 1). The attitude of the courts has varied at times from an indulgent blurring of the differentiation between the member companies to a strict insistence that the differentiation be respected. However, all the indications are that the*DHN* case is increasingly a decision that is out of line with current trends. In *The Albazero* [1977] AC 774 at 807, CA,[39] Roskill LJ described it as a fundamental principle of English law 'long established and now unchallengeable by judicial decision … that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the**(p. 70)** ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body'.

The modern approach is well summed up in the remarks of Robert Goff LJ in *Bank of Tokyo Ltd v Karoon* [1987] AC 45n at 64:

> Counsel suggested beguilingly that it would be technical for us to distinguish between parent company and subsidiary in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be abridged.

In Canada, industrial action has been held not to be 'secondary' picketing when directed by employees towards an associated company which belonged to the same group as their employer (*Canada Safeway Ltd v Local 373, Canadian Food and Allied Workers* (1974) 46 DLR (3d) 113), but the House of Lords showed no willingness to accede to a similar argument in *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 751, [1984] 1 WLR 427, HL.[40] There are also movements the other way, however. In *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, the Court of Appeal interpreted a restraint of trade clause in a way that protected the corporate group, not a way that insisted on the technical separateness of members of that group.

The most significant of the more recent cases is *Adams v Cape Industries plc*.

[2.19] Adams v Cape Industries plc [1990] Ch 433 (Court of Appeal)

Cape, an English company, headed a group which included many wholly owned subsidiaries. Some of these mined asbestos in South Africa and others marketed the asbestos in various countries, including the United States. Several hundred plaintiffs had been awarded damages by a Texas court for personal injuries suffered as a result of exposure to asbestos dust. The defendants included one of Cape's subsidiaries, NAAC, which was based in Illinois. The Court of Appeal held that the judgment could not be enforced against the English parent, Cape, rejecting arguments: (i) that Cape and the relevant subsidiaries should be treated as a single economic unit, following *DHN***[2.18]**; (ii) that the subsidiaries were used as a 'façade' concealing the true facts; and (iii) that an agency relationship existed between Cape and NAAC.

> The judgment of the court (SLADE, MUSTILL and RALPH GIBSON LJJ) was given by SLADE LJ: …
>
> *The 'single economic unit' argument*
>
> There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that 'each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities': *The Albazero*,[41] per Roskill LJ.
>
> It is thus indisputable that each of Cape, Capasco, NAAC and CPC were in law separate legal entities. Mr Morison did not go so far as to submit that the very fact of the parent-subsidiary relationship existing between Cape and NAAC rendered Cape or Capasco present in Illinois. Nevertheless, he submitted that the court will, in appropriate circumstances, ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it will do so whenever it considers that justice so demands. In support of this submission, he referred us to a number of authorities.
>
> **(p. 71)** [His Lordship referred to a number of cases, including *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 WLR 352, HL; *Scottish Co-operative Wholesale Society Ltd v Meyer* **[13.24]**; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* **[2.18]**. He continued:] Principally, in reliance on those authorities, Mr Morison submitted that in deciding whether a company had rendered itself subject to the jurisdiction of a foreign court it is entirely reasonable to approach the question by reference to 'commercial reality'. The risk of litigation in a foreign court, in his submission, is part of the price which those who conduct extensive business activities within the territorial jurisdiction of that court properly have to pay …
>
> We have some sympathy with Mr Morison's submissions in this context. To the layman at least the distinction between the case where a company itself trades in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has full power to control, may seem a slender one …
>
> It is not surprising that in many cases such as *Holdsworth, Scottish Cooperative, Revlon*[42] and *Commercial Solvents*,[43] the wording of a particular statute or contract has been held to justify the treatment of parent and subsidiary as one unit, at least for some purposes. The relevant parts of the judgments in the *DHN* case must, we think, likewise be regarded as decisions on the relevant statutory provisions for compensation, even though these parts were somewhat broadly expressed, and the correctness of the decision was doubted by the House of Lords in *Woolfson v Strathclyde Regional Council*.[44]
>
> Mr Morison described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As Sir Godfray [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* **[2.01]** merely because it considers that justice

so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.

In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, on what terms. However, there is no presumption of any such agency. There is no presumption that the subsidiary is the parent company's alter ego. In the court below the judge refused an invitation to infer that there existed an agency agreement between Cape and NAAC comparable to that which had previously existed between Cape and Capasco and that refusal is not challenged on this appeal. If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of *Salomon v A Salomon & Co Ltd* **[2.01]** merely because it considers it just so to do.

[His Lordship reviewed the evidence, and concluded that, although Cape was in a position to exercise overall control over the general policy of NAAC, this control did not extend to the subsidiary's day-to-day running. The contention that the group was a 'single economic unit' was accordingly rejected.]

The 'corporate veil' point

Quite apart from cases where statute or contract permits a broad interpretation to be given to references to members of a group of companies, there is one well-recognised exception to the **(p. 72)** rule prohibiting the piercing of 'the corporate veil'. Lord Keith of Kinkel referred to this principle in *Woolfson v Strathclyde Regional Council*. With reference to the *DHN* decision, he said:

> I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts …

Mr Morison submitted that the court will lift the corporate veil where a defendant by the device of a corporate structure attempts to evade (i) limitations imposed on his conduct by law; (ii) such rights of relief against him as third parties already possess; and (iii) such rights of relief as third parties may in the future acquire. Assuming that the first and second of these three conditions will suffice in law to justify such a course, neither of them apply in the present case. It is not suggested that the arrangements involved any actual or potential illegality or were intended to deprive anyone of their existing rights. Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States of America. As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States of America without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and … to expect that the court would apply the principle of *Salomon v A Salomon & Co Ltd* in the ordinary way. …

We reject the 'corporate veil' argument.

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