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STILL “THE UNYIELDING ROCK?” A CRITICAL ASSESSMENT OF THE ONGOING  
IMPORTANCE OF *SALOMON V SALOMON & CO LTD* [1897] AC 22 IN THE LIGHT  
OF SELECTED ENGLISH COMPANY LAW CASES

JAMES MENDELSON

A dissertation submitted for the award of the degree of Master of Laws (LLM)

The University of Huddersfield

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## DECLARATION

I, **James Benjamin Mendelsohn**, confirm that the material contained in this dissertation has not been used in any other submission for an academic award and that there is full attribution of the work of any other authors.

The word count for this dissertation (to the nearest 500 words) is 24,500.

**Signed:**

**Dissertation supervisor:** Nic Coidan

## SUMMARY

*Salomon v Salomon & Co Ltd* [1897] AC 22 is known as ‘the unyielding rock’ of English company law. Nevertheless, the courts have at times deviated from *Salomon*. This dissertation examines three major “veil-lifting” cases in order to assess *Salomon’s* ongoing centrality (or otherwise). It also evaluates whether it is presently clear as to when the courts will or will not lift the veil.

In *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, the veil was lifted on the “single economic unit” ground. *DHN* was subsequently doubted, notably in *Adams v Cape Industries plc* [1990] Ch 433. More recent decisions may hint at a “rehabilitation” of *DHN*, but this is currently unclear.

In *Re a Company* [1985] BCLC 333, the veil was lifted on the grounds of “justice”. This proposition was emphatically rejected by the Court of Appeal in *Adams*. The 2006 Court of Appeal decision of *Conway v Ratiu* [2006] 1 All ER 571 restates the principle of *Re a Company*, but it cannot currently be seen as binding precedent for future judges to follow.

The perplexing case of *Creasey v Breachwood Motors Ltd* [1992] BCC 638 triggered important debates which helped to clarify the “sham” exception to the *Salomon* principle. However arguments for a “*Creasey* extension” to the categories when the courts will deviate from *Salomon* have not been accepted.

The dissertation concludes by suggesting that it is currently unclear as to when the courts will or will not disregard the *Salomon* principle. Proposals for reform made by academics are considered. It is still to be hoped, therefore, that either Parliament or the courts will issue clear guidance.

The dissertation states the law as it was thought to be on 2 May 2012. The OSCOLA system of referencing is used throughout.

## CHAPTER 1

### 'IN THE BEGINNING': AN INTRODUCTION TO THE LEGACY OF SALOMON V SALOMON & CO LTD AND THE PRINCIPLE OF LIFTING THE VEIL

#### 1.1 Introduction

As every law student should know, the case of *Salomon v Salomon & Co Ltd*<sup>1</sup> was famously described by Lord Templeman in 1989 as 'the unyielding rock' of English company law.<sup>2</sup> Others have described the case as 'rightly... the key principle of company law,'<sup>3</sup> or have implicitly hailed it as 'making possible the industrial and commercial developments which have occurred throughout the world.'<sup>4</sup> Others, however, have labelled the decision as 'calamitous,'<sup>5</sup> and have raised concerns about its implications for a company's unsecured and tort creditors. 115 years after it was decided, *Salomon* continues to stimulate debate.

*Salomon*, of course, sets out the foundational principles of separate personality and limited liability. A company is a separate legal entity, distinct from its members and directors, and its members have limited liability for its debts. There is therefore a metaphorical 'veil of incorporation' or 'corporate veil' between the company and its members and directors. Yet both Parliament and the courts have on occasion 'lifted' or 'pierced' this veil. This study aims to analyse some key modern examples of the courts doing this, and to assess what they tell us about the ongoing centrality, or otherwise, of the *Salomon* principle. How far is *Salomon* still 'the unyielding rock' in 2012? How close are we to being clear as to when the courts will or will not lift the veil?

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<sup>1</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL)

<sup>2</sup> Lord Templeman, 'Company law lecture – forty years on' (1990) 11(1) Co Law 10. The lecture itself was delivered on 15 November 1989.

<sup>3</sup> Lord Cooke of Thorndon, 'A Real Thing' in *Turning Points of the Common Law* (Sweet & Maxwell, 1997) 8, 17

<sup>4</sup> *Ibid* 11, quoting from LBC Gower, *Principles of Company Law* (5<sup>th</sup> edn 1992) 70

<sup>5</sup> O Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 MLR 54

## **1.2 Salomon – the facts**

*Salomon* was not the first case to rest on the principle of separate personality: this had been established, at the latest, in *Foss v Harbottle*.<sup>6</sup> The principle of limited liability for shareholders, meanwhile, had been set out, and extended to private companies, in the Limited Liability Act 1855, the Joint Stock Companies Acts of 1844 and 1856, and the Companies Act 1862. Nevertheless, *Salomon* was the first case to examine the consequences of these doctrines in detail – in particular, their effects on unsecured creditors, and their application to what was effectively a ‘one-man company’.

A reminder of the facts of *Salomon* follows. Mr Salomon initially operated a business as a sole trader. He formed a limited company under the Companies Act 1862, ostensibly with the goal of ‘extend[ing] the business and mak[ing] provision for his family.’<sup>7</sup> The Act required a limited company to have seven shareholders. Therefore, he, his wife and their five children took one share each. He then transferred his business to the company in exchange for a further 20,000 shares issued to him personally, together with some cash and a debenture. The company was effectively controlled by Mr Salomon alone. When the newly-formed company hit difficulties, Mr Salomon mortgaged the debenture to Mr Broderip. Soon afterwards, the company defaulted on payments to Mr Broderip, who enforced his security. The company was put into liquidation. There were insufficient assets to pay off Mr Broderip, who brought an action, challenging the validity of the arrangements leading to the company’s formation, and seeking to make Mr Salomon personally liable for the company’s debts.

At first instance, Vaughan Williams J held the company to be the ‘mere nominee’<sup>8</sup> of Mr Salomon, and that Mr Salomon must indemnify the company against its outstanding debts. Mr Salomon appealed, first to the Court of Appeal and then to the House of Lords. By the time judgment was given in the Court of Appeal, sufficient funds had in fact been realised in the liquidation to pay off Mr Broderip in full, with about £1,000 remaining. Mr Salomon, now holding the debenture unencumbered, claimed the

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<sup>6</sup> *Foss v Harbottle* (1843) 67 ER 189

<sup>7</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22, 48 (MacNaghten LJ)

<sup>8</sup> *Broderip v Salomon* [1895] 2 Ch 323 (CA), 329

remaining £1,000 ahead of the unsecured creditors.<sup>9</sup> At the point the claim reached the House of Lords, the liquidator, acting on behalf of the creditors in general, took over the litigation from Broderip.

### **1.3 Salomon – the judgments**

A brief survey of some of the key passages in the judgments in the higher courts is instructive, as they illustrate some issues which remain contentious, and which will inform much of this study.

#### **1.3.1 The Court of Appeal**

The Court of Appeal rejected Mr Salomon's appeal, taking a dim view of Mr Salomon's motives in using his family members as 'mere dummies' to enable him to obtain the benefits of limited liability. As Lindley LJ put it:

The object of the whole arrangement is to do the very thing which the legislature intended not to be done... Mr Aron Salomon's scheme is a device to defraud creditors... the formation of the company, the agreement of August 1892, and the issue of debentures to the appellant pursuant to such agreement, were a mere scheme 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 procuring a first charge on the assets of the company by means of such debentures.<sup>10</sup>

Similarly, according to 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 authorizing 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.... 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 legalize such a transaction would be a scandal.<sup>11</sup>

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<sup>9</sup> *Broderip v Salomon* [1895] 2 Ch 323 (CA), 345

<sup>10</sup> *Broderip v Salomon* [1895] 2 Ch 323 (CA), 337-340

<sup>11</sup> *Broderip v Salomon* [1895] 2 Ch 323 (CA), 340-341

### **1.3.2 The House of Lords**

Conversely, the House of Lords found that Mr Salomon's motives were irrelevant, and concentrated on the actual wording of the Companies Act 1862. This approach was typified by Lord Halsbury:

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence - quite apart from the motives or conduct of individual incorporators... it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.<sup>12</sup>

Lord Watson was

unable to comprehend how a company, which [had] been formed contrary to the true intent and meaning of a statute, and (in the language of Lindley L.J.) [did] the very thing which the Legislature intended not to be done, [could] yet be held to have been legally incorporated in terms of the statute.<sup>13</sup>

Lord Herschell, commenting on the decision of the Court of Appeal, said

The Court of Appeal has declared that the formation of the respondent company and the agreement to take over the business of the appellant were a scheme 'contrary to the true intent and meaning of the Companies Act.' I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability... If, then, in the present case all the requirements of the statute were complied with, and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act?<sup>14</sup>

Lord MacNaghten, taking the requirements of the Act to their logical conclusions, famously remarked that

The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the

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<sup>12</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL), 30

<sup>13</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL), 38

<sup>14</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL), 45-46

subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.<sup>15</sup>

Lord Davey, whilst apparently more reluctant, nevertheless took the same literalist approach:

My Lords, it is possible, and (I think) probable, that the conclusion to which I feel constrained to come in this case may not have been contemplated by the Legislature, and may be due to some defect in the machinery of the Act. But, after all, the intention of the Legislature must be collected from the language of its enactments...<sup>16</sup>

Consequently, the House of Lords famously reversed the decision of the Court of Appeal, holding that Mr Salomon should hold no further liability to the company's creditors. For Lord MacNaghten, the unsecured creditors affected by this decision had 'only themselves to blame for their misfortunes.'<sup>17</sup>

The contrast with the approach of the Court of Appeal is clear. The Court of Appeal assessed the morality of Mr Salomon's arrangements, and was evidently uncomfortable with him using the machinery of the Companies Act to limit his liability. Dignam and Lowry note that, if the courts had at that time been able to look at Hansard to establish Parliament's intentions,<sup>18</sup> the Court of Appeal would have been vindicated, since the requirement for seven members had been chosen to *prevent* very small businesses incorporating.<sup>19</sup> The House of Lords, however, simply looked at whether Mr Salomon had complied with the Act's formal requirements. Since, on its findings, he had done so, he was therefore entitled to the benefit of limited liability. This 'battle' between *form* and *substance* has arguably informed the debate about *Salomon*, and when it is appropriate for statute or the court to deviate from it, ever since. If the legal requirements for company formation have been complied with, is there any warrant for the court to 'look behind' the veil of incorporation? Or are wider moral and commercial factors relevant?

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<sup>15</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL), 51

<sup>16</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL), 54

<sup>17</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL), 53

<sup>18</sup> The courts were of course unable to do so until the decision in *Pepper v Hart* [1993] AC 593

<sup>19</sup> Alan Dignam & John Lowry, *Company Law* (6<sup>th</sup> edn, OUP 2010) 22

#### **1.4 Salomon – reception and legacy: criticisms**

Given the influence which the *Salomon* decision has subsequently enjoyed, it is perhaps surprising that it has occasionally been subject to trenchant criticism. Joseph Marryat MP pre-emptively warned of its implications for creditors as early as 1810: 'If a company should at any time become insolvent, the individual members would still remain in affluence and be driven in their coaches by the persons ruined.'<sup>20</sup> When the judgment was handed down on 16 November 1896, Sir Frederick Pollock remarked that such a decision could not have been given 30 or even 20 years previously.<sup>21</sup> In 1944, Otto Kahn-Freund memorably described the decision as 'calamitous',<sup>22</sup> owing to its impact on unsecured creditors, and suggested that Parliament might abrogate *Salomon* by legislation,<sup>23</sup> or even abolish private companies altogether!<sup>24</sup> Alternatively, he suggested that controlling shareholders should be liable for a company's debts, or that company formation should be made harder and costlier, thereby reducing the number of small companies in particular.<sup>25</sup> More recently, Gary Scanlan has echoed Kahn-Freund's concerns, arguing that 'the law needs to go further in providing a means of protection for the unsecured creditor of private limited companies'.<sup>26</sup> Scanlan questions whether the controllers of private limited companies should automatically enjoy limited liability. He suggests that private companies should not be allowed to operate without a minimum issued and paid-up share capital, and that if the company's capital falls below this level, the company should be required to stop trading, or its controllers should face unlimited personal liability.<sup>27</sup>

Other commentators have focussed on the implications of *Salomon* for a company's tort or 'involuntary'<sup>28</sup> creditors. As Ewan McGaughey argues, '[i]t is highly doubtful that the principle in *Salomon* should ever have been thought to have extended to torts. Lord

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<sup>20</sup> Quoted in Ben Pettet, 'Limited Liability – A Principle for the 21<sup>st</sup> Century?' [1995] CLP 124, 146

<sup>21</sup> Lord Cooke of Thorndon (n 3) 8

<sup>22</sup> O. Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 MLR 54

<sup>23</sup> *ibid*, 57

<sup>24</sup> *ibid*, 59

<sup>25</sup> *ibid*, 57

<sup>26</sup> Gary Scanlan, 'The *Salomon* principle' (2004) 25(7) Co Law 196

<sup>27</sup> *ibid*, 196

<sup>28</sup> Ben Pettet, 'Limited Liability – A Principle for the 21<sup>st</sup> Century?' [1995] CLP 124, 152

Macnaghten did not have this in mind, because he said Salomon's unsecured creditors “only had themselves to blame”. Tort claimants do not have themselves to blame.<sup>29</sup> McGaughey argues that controlling shareholders should therefore be liable for a company’s tortious debts.<sup>30</sup> Jonathan Crowe similarly argues that if the company’s own resources are exhausted, liability for corporate torts should fall firstly on holding companies and controlling shareholders, and then on ordinary investors on a *pro rata* basis.<sup>31</sup> Clearly, such proposals represent significant departures from *Salomon*.

### **1.5 Salomon – reception and legacy: affirmation**

Mainstream opinion has nevertheless affirmed *Salomon* as encouraging enterprise. Pettet, though sharing the concerns of Crowe and McGaughey for tort creditors, argued against the abolition of limited liability for tort debts on the grounds that this would discourage enterprise.<sup>32</sup> Gower hailed the limited liability company – and, by implication, the *Salomon* decision – as ‘Unquestionably... a major instrument in making possible the industrial and commercial developments which have occurred throughout the world.’<sup>33</sup> Lord Cooke noted *Salomon*’s ‘global consequences’<sup>34</sup> and enthused that ‘[a]fter a century the principle of *Salomon* has and should have a vigour... undiminished... It rightly remains the key principle of company law.’<sup>35</sup> Lowry and Reisberg, whilst recognising the negative implications of *Salomon* for unsecured and tort creditors, nevertheless affirm that ‘the arguments in favour of limited liability for contract debts have won the day. Limited liability for contract debt is here to stay and there is no great movement for its abolition.’<sup>36</sup>

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<sup>29</sup> Ewan McGaughey, ‘*Donoghue v Salomon* in the High Court’ (2011) 4 JPI Law 249, 253

<sup>30</sup> *ibid*, 258

<sup>31</sup> Jonathan Crowe, ‘Does Control Make a Difference? The Moral Foundations of Shareholder Liability for Corporate Wrongs’ (2012) 75 (2) MLR 159

<sup>32</sup> Pettet (n 28) 157. Pettet argued instead that companies should be compelled to purchase additional insurance to cover the scenario where tort claims exceeded the companies’ available assets.

<sup>33</sup> Lord Cooke of Thorndon (n 3) 11, quoting from LBC Gower, *Principles of Company Law* (5<sup>th</sup> edn 1992)

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<sup>34</sup> *ibid* 11

<sup>35</sup> *ibid* 17

<sup>36</sup> John Lowry & Arad Reisberg, *Pettet’s Company Law: Company and Capital Markets Law* (3<sup>rd</sup> edn, Pearson Longman 2009) 40

The courts, meanwhile, affirmed *Salomon* most clearly in *Lee v Lee's Air Farming Ltd*<sup>37</sup> and *Macaura v Northern Assurance Co.*<sup>38</sup> In *Lee*, a controlling shareholder who was also the company's chief executive was nevertheless held to be a 'worker' for the purposes of New Zealand employment legislation, on the grounds that he and the company were separate and distinct legal persons. For Lord Morris, it was 'a logical consequence of the decision in *Salomon's* case that one person [could] function in dual capacities'<sup>39</sup>... '[A]n application of the principles of *Salomon's* case demonstrate[d] that the company was distinct from [the controlling shareholder].'<sup>40</sup> In *Macaura*, the company's property was insured by policies in the name of Mr Macuara, the sole shareholder. When the property was destroyed by fire, Mr Macaura was unable to claim insurance as he himself had no insurable interest in the company's property. Although *Salomon* was not specifically mentioned in the House of Lords, Lord Wrenbury took the *Salomon* principle to its logical conclusion: 'the corporator, even if he holds all the shares is not the corporation, and... neither he nor any creditor of the company has any property, legal or equitable, in the assets of the corporation.'<sup>41</sup>

## **1.6 Departing from the *Salomon* principle: lifting the veil**

Given the contrasting approaches taken in the Court of Appeal and the House of Lords, and given the contrasting reactions to *Salomon*, it was perhaps inevitable that situations would arise where the 'veil of incorporation' between the company and its members would be lifted. The phrase 'lifting the veil' refers to those situations where Parliament or the courts, departing from *Salomon*, have decided not to maintain the separateness of the company from its members, or (by extension) of parent companies from their subsidiaries, or of companies within the same group from each other. The veil has been lifted for various reasons, though neither Parliament nor the courts have ever drawn up a definitive list of such situations. Whilst veil-lifting has on occasions been beneficial to (some of) those affected, it has also had the effect of creating uncertainty: will the separateness of the company be upheld or disregarded in any given situation?

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<sup>37</sup> [1961] AC 12, PC

<sup>38</sup> [1925] AC 619

<sup>39</sup> [1961] AC 12, 26

<sup>40</sup> [1961] AC 12, 30

<sup>41</sup> [1925] AC 619, 633

## **1.7 Aims and scope of the study**

This study aims to assess how far Lord Templeman's 1989 statement remains true in 2012. Can one still accurately label *Salomon* as 'the unyielding rock' of English company law? Or have the situations where the veil is lifted now proliferated to such an extent that this statement is now inaccurate? How close are we to certainty as to when the veil will or will not be lifted?

Chapter 2 briefly surveys the generally conservative judicial approach to veil-lifting prior to 1966.<sup>42</sup> Chapters 3 to 5 analyse, respectively, three veil-lifting cases which, in their time, marked significant departures from the *Salomon* principle: *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*,<sup>43</sup> *Re a Company*,<sup>44</sup> and *Creasey v Breachwood Motors Ltd*.<sup>45</sup> Each of these three chapters includes a review of the (claimed) precedents for each case; critical analysis of the respective judgments; a survey of subsequent judicial and academic treatment; and an assessment of how each case informs the debate about *Salomon* and lifting the veil. Finally, chapter 6 offers some concluding thoughts, including consideration of some proposals for reform.

## **1.8 A word about terminology**

Some writers, such as Ottolenghi, have divided veil-lifting situations into narrower categories, such as 'peeping behind', 'penetrating', 'extending' and 'ignoring' the veil.<sup>46</sup> For the purposes of this study, all instances of Parliament or the judiciary disregarding the separate personality of the company will be referred to as 'lifting' or 'piercing' the veil – expressions which will be used interchangeably.

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<sup>42</sup> The rationale for choosing this date is explained in chapter 2.2.

<sup>43</sup> [1976] 1 WLR 852

<sup>44</sup> [1985] BCLC 333

<sup>45</sup> [1992] BCC 638

<sup>46</sup> S Ottolenghi, 'From Peeping Behind the Corporate Veil, to Ignoring it Completely' [1990] MLR 338

## CHAPTER 2

### THE BACKDROP: VEIL-LIFTING BY THE COURTS, 1897-1966

#### 2.1 Introduction

In chapter 1, we reviewed the facts and outcome of the *Salomon* decision, and considered how the case has been received – both negatively and positively. We considered how it was affirmed by the courts in *Lee v Lee's Air Farming Ltd* and in *Macaura v Northern Assurance Co*. We also introduced the idea of Parliament or the courts departing from the *Salomon* principle, and explained what is meant by 'lifting' or 'piercing the veil'.

Parliament has departed from the *Salomon* principle by enacting various statutes which lift the veil between companies within the same group, or between a company and its members or directors. Such statutes cover areas such as taxation, accounting, employment and insolvency.<sup>1</sup> The last of these warrants brief comment. Sections 213 and 214 of the Insolvency Act 1986 impose personal liability upon the directors of companies in insolvent liquidation for fraudulent and wrongful trading respectively. Sections 216 and 217 of the same Act impose personal liability in situations involving what is known as "phoenix trading." Technically, these sections impose liability on directors (or, in the case of s. 213, anyone else knowingly party to carrying on the business with intent to defraud the company's creditors), and therefore do not violate the principle of limited liability for shareholders. In practice, however, they are most often applied in situations involving private limited companies, where the directors are also the major shareholders, and therefore effectively remove the benefit of limited liability in insolvency situations.<sup>2</sup> They therefore represent – albeit indirectly - perhaps the most significant *statutory* inroad into the *Salomon* principle. Such statutory examples will not be examined further in this study, which focuses instead on judicial veil-lifting.

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<sup>1</sup> A non-exhaustive list is set out in Alan Dignam & John Lowry, *Company Law* (6<sup>th</sup> edn, OUP 2010) 32-34

<sup>2</sup> See, for example, *Re Produce Marketing Consortium Ltd (No 2)* [1989] BCLC 513 (ChD)

In this chapter, we will outline some of the key cases in which the courts lifted the veil between 1897 and 1966. The courts generally adhered to the *Salomon* principle during this period, and departed from it only in exceptional circumstances. It is against this conservative backdrop that more recent developments must be considered.

## **2.2 Veil-lifting by the courts, 1897-1966**

Dignam and Lowry divide the history of judicial veil-lifting into three periods.<sup>3</sup> They see the period from 1897 to 1966 as one in which *Salomon* dominated and during which judicial veil-lifting was rare and exceptional. They ascribe this to the fact that the House of Lords could not overrule itself during this period. This changed in 1966, triggering a more interventionist period, with Lord Denning leading ‘a crusade to encourage veil-lifting’.<sup>4</sup> (Hicks and Goo also see the rise and fall of Lord Denning’s influence as important markers.<sup>5</sup>) This in turn was followed by a more restrictive approach from 1989 onwards, following the Court of Appeal’s decision in *Adams v Cape Industries plc*,<sup>6</sup> which is considered in more detail in chapters 3.9 and 5.1. A survey of some of the key examples of judicial veil-lifting prior to 1966 follows.

### **2.2.1 Enemy character**

During World War One, *Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd*<sup>7</sup> considered whether to impute an English-registered company whose controlling shareholders were German with ‘enemy character’. On a strict application of *Salomon* – as the Court of Appeal ruled – the shareholders’ nationality was irrelevant.<sup>8</sup> The House of Lords, however, lifted the veil and ruled that the company was indeed ‘enemy’ in nature. This decision owed much to wartime exigency and was clearly exceptional.

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<sup>3</sup> Dignam & Lowry (n 1) 35-43

<sup>4</sup> Dignam & Lowry (n 1) 36

<sup>5</sup> Andrew Hicks & SH Goo, *Cases & Materials on Company Law* (6<sup>th</sup> edn, OUP, 2008) 107-110

<sup>6</sup> [1990] Ch 433 (CA)

<sup>7</sup> *Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 (HL)

<sup>8</sup> *Daimler Co Ltd v Continental Tyre & Rubber Co (Great Britain) Ltd* [1915] 1 K.B. 893 (CA)

### **2.2.2 Agency**

In *Smith Stone & Knight Ltd v Birmingham Corporation*,<sup>9</sup> a company set up a subsidiary company to operate a business. The parent company retained ownership of the business itself, and of the business premises. The parent company held all the shares in subsidiary except for five, which were held by its nominees. The profits of the new company were treated as profits of the parent company. The parent company appointed the persons who conducted the business. The subsidiary kept no books of its own, and its profits were treated as the parent's profits. Effectively, therefore, the subsidiary had no real independent existence. The local authority compulsorily acquired the business premises. The parent company claimed compensation in respect of removal and disturbance. The local authority resisted this claim, contending that the proper claimants were the subsidiary company – which was a separate legal entity. On a strict application of *Salomon*, this was correct. The court, however, disregarded the separate personality of the parent and the subsidiary. It held that the subsidiary company was operating as an agent on behalf of its parent, and therefore the parent company was entitled to claim compensation. Again, this decision was based on very unusual facts.<sup>10</sup> A similar approach was however taken in *Re FG Films Ltd*.<sup>11</sup> In that case, the court lifted the veil to find that an English company was the agent of its American parent company, and therefore not the 'maker' of a film for the purposes of British film legislation.

In *Firestone Tyre & Rubber Co. Ltd v Llewelin*,<sup>12</sup> an English company was wholly owned by an American parent company. The English company's business was to make tyres and sell them to distributors based in Europe. The parent company drew up contracts with the distributors and the English company. If it could be established that the business was not carried on in the United Kingdom, these arrangements would not be subject to United Kingdom tax. The House of Lords ruled, however, that the English company was operating the business of the American company in the United Kingdom

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<sup>9</sup> [1939] 4 All ER 116 (KBD)

<sup>10</sup> In *JH Rayner (Mincing Lane) Ltd v Department of Trade & Industry* [1989] Ch 72 (CA) at 190, Kerr LJ said that the facts of *Smith Stone & Knight* were so unusual that 'no conclusion of principle [could] be derived from that case.'

<sup>11</sup> [1953] 1 WLR 483 (ChD)

<sup>12</sup> [1957] 1 WLR 464 (HL)

as its agent, and therefore any profits made on the contracts *were* subject to the United Kingdom tax regime. In so finding, the court deviated from the *Salomon* principle that a company and its shareholder(s) (in this case, the parent company) are separate entities.

### **2.2.3 “Sham”, “façade” or “fraud”:**

As we shall see in chapter 5, this category of exceptions to the *Salomon* principle remains the most potent, and will therefore be examined more extensively. The terms “sham” and “fraud” will be used interchangeably throughout the study.

In *Gilford Motor Co Ltd v Horne*,<sup>13</sup> Horne was employed by the claimant. He covenanted that, if he resigned, he would not solicit Gilford’s customers. However, he left Gilford, and, having taken legal advice, set up a business which he operated through the means of a limited company which he controlled. The company solicited Gilford’s customers. On a strict application of *Salomon*, Horne had not breached his covenant to Gilford since he and the new company were separate entities. Nevertheless, Gilford successfully sued for breach of covenant and an injunction was awarded against *both* Horne and the new company. In the classic words of Lord Hanworth MR:

[T]his company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr EB Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business which, on contemplation 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.<sup>14</sup>

In *Jones v Lipman*,<sup>15</sup> Lipman had agreed to sell land to Jones. Before completion, however, he transferred and sold the land to a company which he had formed, and of which he and a clerk of his solicitors were sole directors and shareholders. He argued that he could not honour the agreement with Jones and transfer the land, because he no longer had title to it. Russell J however held that the company was ‘the creature of [Lipman], a device and a sham, a mask which he [was holding] before his face in an

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<sup>13</sup> [1933] Ch 935 (CA)

<sup>14</sup> [1933] Ch 935 (CA) 956

<sup>15</sup> [1962] 1 WLR 832 (ChD)

attempt to avoid recognition by the eye of equity.<sup>16</sup> He ordered specific performance against both Lipman and the company.

Although both *Gifford* and *Jones* remain classic cases illustrating the “sham” or “fraud” exception to the *Salomon* principle, neither case explicitly mentioned *Salomon*. As Marc Moore astutely points out, the court’s reasoning in *Gifford* was based on the case of *Smith v Hancock*<sup>17</sup> – a case about a sole trader which preceded *Salomon* by three years! On this basis, Moore argues that the “sham” exception is ‘the product of a piecemeal and doctrinally tenuous process of judicial reasoning.’<sup>18</sup> We will return to his arguments in chapter 6.

### **2.3 Commentary**

Two issues from this brief survey bear highlighting. The first is that there were no clear guidelines as to when the courts would, or would not, lift the veil. For instance, in *Macaura v Northern Assurance Co* (considered in chapter 1.5), the court declined to lift the veil between the company and its sole shareholder. In similar situations in *Gifford* and *Jones*, however, the courts *did* lift the veil. In 1944, Kahn-Freund had complained that ‘in many cases it [was] a matter of guesswork whether the Court [would] allow the parties to ‘draw the veil’ or force them to lift it.’<sup>19</sup> In 1960, Wedderburn called for Parliament to formulate a non-exhaustive statutory list of circumstances in which the court might lift the veil, for example where a company was undercapitalised, or where it was being used to evade legal obligations.<sup>20</sup> Twenty-four years later, following the decision of the Court of Appeal in *Multinational Gas and Petroleum Co v Multinational Gas & Petrochemical Services Ltd*,<sup>21</sup> Lord Wedderburn (as he had then become) would still be calling for reform.<sup>22</sup>

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<sup>16</sup> [1962] 1 WLR 832, 836

<sup>17</sup> [1894] Ch 377 (CA)

<sup>18</sup> Marc Moore, “A temple built on faulty foundations’: piercing the corporate veil and the legacy of *Salomon v Salomon*’ [2006] JBL 180, 196

<sup>19</sup> O Kahn-Freund, ‘Some Reflections on Company Law Reform’ (1944) 7 MLR 54, 56

<sup>20</sup> KW Wedderburn, ‘A Corporations Ombudsman?’ (1960) 23 MLR 663, 664

<sup>21</sup> [1983] Ch 258 (CA)

<sup>22</sup> KW Wedderburn, ‘Multinationals and the Antiquities of Company Law’ (1984) 47 MLR 87, 90-92. This is considered further in chapter 3.8.1.

Secondly, when the courts did lift the veil, they did so only in exceptional circumstances. The decisions above were all made in cases with unusual sets of facts. Elsewhere, the courts took a conservative approach. This is perhaps best illustrated by the case of *Tunstall v Steigman*.<sup>23</sup> In *Tunstall*, a tenant was granted a lease of business premises. The landlady then formed a company in order to operate her own business. She held all the shares in the company except for two, which were held by nominees. She was also effectively the sole director. She later resisted the tenant's application for a renewal of the lease, arguing that she needed the premises for her own business. The court, applying *Salomon* strictly, declined to lift the veil. It was held that she did not intend to occupy the premises in order to operate her own business, but for the purposes of a business operated by the company. Therefore, she was not entitled to resist the tenant's application for renewal.

This conservative approach is clear from the respective judgments. For Ormerod LJ, 'any departure [from the *Salomon* principle laid down in *Salomon*] [dealt] with special circumstances when a limited company might well be a facade concealing the real facts.'<sup>24</sup> Willmer LJ remarked that,

There is no escape from the fact that a company is a legal entity entirely separate from its incorporators - see *Salomon v. Salomon & Co.* Here the landlord and her company are entirely separate entities. This is no matter of form; it is a matter of substance and reality... Even the holder of 100 per cent. of the shares in a company does not by such holding become so identified with the company that he or she can be said to carry on the business of the company.<sup>25</sup>

Finally, in language echoing that of Lord MacNaghten in *Salomon* itself, Danckwerts LJ stated that

the personality of those in control of the company was only to be regarded as material in special circumstances, such as a state of war, and only as indicating the nature of the company without really departing from the principle that a limited company incorporated under the Companies Acts is a distinct legal entity, differing from the individuals who hold the shares in the company or control it.<sup>26</sup>

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<sup>23</sup> [1962] 2 QB 593 (CA)

<sup>24</sup> [1962] 2 QB 593 (CA) 602

<sup>25</sup> [1962] 2 QB 593 (CA) 605

<sup>26</sup> [1962] 2 QB 593 (CA) 607

## **2.4 Conclusions**

In 1966, it would have been easy to assess whether or not *Salomon* was ‘the unyielding rock’. The judgments in *Tunstall v Steigmann* are instructive. The court would only depart from *Salomon* and lift the veil in ‘special circumstances’, such as where a company was ‘a façade concealing the real facts’ or in ‘a state of war’ (or, one might add, in extremely narrow circumstances where a company was an agent of its incorporator, or, more cynically, where the interests of the Revenue were threatened). Yet a decade later, following the decision in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* (“*DHN*”),<sup>27</sup> some would claim that *Salomon*’s ‘centrality in company law theory’ had been ‘put into question.’<sup>28</sup> *DHN*, and the subsequent debate about the “single economic unit” argument, are considered in chapter 3.

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<sup>27</sup> [1976] 1 WLR 852 (CA)

<sup>28</sup> D Sugarman & F Webb, ‘Three-in-One: Trusts, Licences and Veils’ (1977) 93 LQR 170, 175

## CHAPTER 3

### *DHN FOOD DISTRIBUTORS LTD V TOWER HAMLETS LONDON BOROUGH COUNCIL : A FROLIC OF DENNING'S OWN, OR A GUIDING PRINCIPLE FOR TODAY?*

#### **3.1 Introduction**

In this chapter, we examine the 1976 Court of Appeal case of *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*<sup>1</sup> (“*DHN*”) which, for a time, appeared to extend the boundaries of judicial veil-lifting – at least in relation to corporate groups. Shortly after *DHN* was heard, David Hayton described it as a ‘very sensible’ decision in which the court had ‘looked at the business realities of the situation rather than confining itself to a narrow legalistic view.’<sup>2</sup> Sugarman and Webb, meanwhile, claimed that the decision ‘undermine[d] the rigid rule of *Salomon’s* case’ - indeed, that it ‘put into question [*Salomon’s*] centrality in company law theory.’<sup>3</sup> Ten years later, however, Graham Rixon labelled the decision as ‘an aberration,’<sup>4</sup> and fourteen years later, following the landmark case of *Adams v Cape Industries plc*<sup>5</sup> (“*Adams*”), there appeared to be ‘little [remaining] scope’<sup>6</sup> to rely on the arguments used in *DHN*.

We will first examine the (claimed) judicial antecedents to *DHN*, and then the facts and judgments of the case itself, before making some initial comments. We will review the positive early academic and judicial reaction to the decision. We will then consider the doubt cast upon *DHN* by subsequent rulings, notably those in *Woolfson v Strathclyde Regional Council*<sup>7</sup> and in *Adams*, where *DHN* was cited as an example of veil-lifting on the basis of the “single economic unit” argument. We will also consider whether some more recent Court of Appeal and first instance decisions point towards a “revival” of that argument. Finally, we will summarise how *DHN* and subsequent cases fit in with the

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<sup>1</sup> [1976] 1 WLR 852 (CA)

<sup>2</sup> D Hayton, ‘Contractual licences and corporate veils’ [1977] CLJ 12, 13

<sup>3</sup> D Sugarman, & F Webb, ‘Three-in-One: Trusts, Licences and Veils’ (1977) 93 LQR 170, 175

<sup>4</sup> FG Rixon, ‘Lifting the veil between holding and subsidiary companies’ (1986) 102 LQR 415, 422

<sup>5</sup> [1990] Ch 433 (CA)

<sup>6</sup> David Kershaw, *Company Law in Context: Text and Materials* (OUP 2009) 69

<sup>7</sup> [1978] SC 90 (HL)

*Salomon* principle, and what they tell us about when the courts deviate from it – particularly in the context of corporate groups.

### **3.2 Background**

In chapter 2, we saw that the courts took a conservative approach to veil-lifting up until 1966, as typified by *Tunstall v Steigmann*. In a handful of cases in the 1950s and 1960s, however, the courts relaxed this approach in relation to corporate groups. Three such cases are explained below; their relevance to *DHN* will become apparent later.

#### **3.2.1 Harold Holdsworth & Co (Wakefield) Ltd v Caddies<sup>8</sup>**

Mr Caddies had a service contract with a parent company. The parent company, however, restricted his duties to the management of a subsidiary company. Caddies sued for breach of contract, arguing that he could not be employed by the subsidiary, since his contract was with the parent – a strict application of *Salomon*. The House of Lords rejected his claim, holding that the service contract allowed the employer parent company to assign Caddies duties within the group. Since the subsidiaries were controlled by the parent, the court viewed them as divisions of the parent. Lord Reid's remarks are pertinent:

It was argued that the subsidiary companies were separate legal entities each under the control of its own board of directors, that in law the board of the appellant company could not assign any duties to anyone in relation to the management of the subsidiary companies and that therefore the agreement cannot be construed as entitling them to assign any such duties to the respondent.

My Lords, in my judgment this is too technical an argument. This is an agreement *in re mercatoria* and it must be construed in light of the facts and realities of the situation. The appellant company owned the whole share capital of British Textile Manufacturing Co. Ltd. and under the agreement of 1947 the directors of this company were to be the nominees of the appellants. So, in fact, the appellants could control the internal management of their subsidiary companies, and, in the unlikely event of there being any difficulty, it was only necessary to go through formal procedure in order to make the decision of the appellants' board fully effective.<sup>9</sup>

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<sup>8</sup> [1955] 1 WLR 352 (HL)

<sup>9</sup> [1955] 1 WLR 352, 367

### **3.2.2 Scottish Co-Operative Wholesale Society Ltd v Meyer<sup>10</sup>**

Mr Meyer was a minority shareholder of the Scottish Textile and Manufacturing Co Ltd (“Textile”). The majority of the shares were held by the Scottish Co-operative Wholesale Society Ltd (“Wholesale”), which also appointed a majority of Textile’s directors. When Textile’s business declined, Meyer alleged that Wholesale had mismanaged Textile’s business, and claimed he had suffered “oppression” under s. 210 Companies Act 1948 (now abolished). He sought an order that Wholesale should purchase his shares in Textile. For his claim to succeed, Textile’s corporate veil had to be pierced, ‘so that the oppressive conduct of [Wholesale] could also be interpreted as oppressive conduct in relation to [Textile], that is, the holding company and subsidiary had to be merged into one single economic entity.’<sup>11</sup> Meyer’s claim was upheld by the House of Lords. Viscount Simonds said,

I do not think that my own views could be stated better than in the late Lord President Cooper's words on the first hearing in this case. ‘In my view,’ he said, ‘the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view.’<sup>12</sup>

As in *Harold Holdsworth*, the court focused on the ‘business realities’ of the group situation, rather than the ‘narrow legalistic view’ that the parent and subsidiary were separate entities.

### **3.2.3 Littlewoods Mail Order Stores Ltd v McGregor<sup>13</sup>**

Littlewoods Mail Order Stores Ltd (“Littlewoods”) rented its premises from a commercial landlord. The landlord assigned the freehold in the property to a subsidiary of Littlewoods, which resulted in Littlewoods effectively paying rent to its own subsidiary. Littlewoods claimed tax relief on these payments; the Inland Revenue objected. The court rejected Littlewoods’ claim, holding that the freehold effectively belonged to Littlewoods itself. Lord Denning’s comment indicates the clear deviation from *Salomon*:

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<sup>10</sup> [1959] AC 324 (HL)

<sup>11</sup> Stephen Griffin, *Company Law: Fundamental Principles* (4<sup>th</sup> edn, Pearson 2006) 17-18

<sup>12</sup> [1959] AC 324, 343

<sup>13</sup> [1969] 3 All ER 855 (CA)

The doctrine laid down in *Salomon v. Salomon & Co.* [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit.<sup>14</sup>

These three cases (ostensibly) set the scene for *DHN*.

### **3.3 DHN: the facts**

DHN Food Distributors Ltd (“DHN”), Bronze Investment Ltd (“Bronze”) and DHN Food Transport Ltd (“Transport”) constituted a group of three companies associated in a grocery business. DHN, the parent company, owned all the shares in the other two. The directors of all three companies were identical. Bronze and Transport had no independent operations. Bronze’s only asset was the freehold in the premises from which DHN operated the business. Importantly, DHN occupied the premises as a licensee, not as a tenant, and therefore held no interest in the land. Transport’s only assets were the vehicles used in the business.

In 1969, the local council acquired the premises by compulsory purchase. Bronze, as the legal owner of the premises, received compensation for the value of the land pursuant to the Land Compensation Act 1961. However, no suitable alternative premises could be found and therefore the business ceased.

DHN and Transport applied to the Lands Tribunal for a ruling that they too were entitled to compensation for the disturbance of the business.<sup>15</sup> For this claim to succeed, they had to demonstrate that they (as opposed to Bronze) held an interest in the land. This would involve lifting the veil since, on a strict application of *Salomon*, Bronze’s interest in the land in no way belonged to DHN, even though DHN owned all of the shares in Bronze. Interestingly, counsel for the companies argued that Bronze held the land as an agent for DHN, and therefore the veil should be lifted as in *Smith*,

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<sup>14</sup> [1969] 3 All ER 855, 860

<sup>15</sup> *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* (1975) 30 P & CR 251 (Lands Tribunal)

*Stone & Knight Ltd v Birmingham Corporation*. The tribunal rejected this argument, stating that the mere fact that the parent completely controlled the subsidiary did not constitute an “agency” relationship.<sup>16</sup> Indeed, the tribunal found that Bronze had been intentionally operated as a separate company in order to gain certain tax advantages. The tribunal therefore ruled that DHN held no interest in the land and was therefore not entitled to compensation for disturbance of the business.

The three companies appealed to the Court of Appeal.

### **3.4 DHN: the judgments**

In the Court of Appeal, Lord Denning, Goff LJ and Shaw LJ all agreed that the veil between the companies should be lifted so that DHN and Transport could claim compensation for disturbance of the business. We need of course only consider those parts of their judgments which deal with the corporate veil argument. For ease of future reference, quotations from the judgments are indented and numbered.

#### **3.4.1 Lord Denning’s judgment**

Lord Denning began by saying that

This case might be called the “Three in one.” Three companies in one. Alternatively, the “One in three.” One group of three companies. For the moment I will speak of it as “the firm.”<sup>17</sup> **(1)**

Having rehearsed the facts, he referred to section 5 of the Land Compensation Act 1961, under which compensation could be paid for the value of the land and for disturbance of the business. He then set out the problem:

If the firm and its property had all been in one ownership, it would have been entitled to compensation under those two heads: first, the value of the land, which has been assessed in excess of £360,000. Second, compensation for disturbance in having its business closed down.<sup>18</sup> **(2)**

However,

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<sup>16</sup> (1975) 30 P & CR 251, 255

<sup>17</sup> [1976] 1 WLR 852, 857

<sup>18</sup> [1976] 1 WLR 852, 857

the firm and its property were not in one ownership. It was owned by three companies. The business was owned by the parent company, D.H.N. Food Distributors Ltd. The land was owned at the time of acquisition by a subsidiary, called Bronze Investments Ltd. The vehicles were owned by another subsidiary, D.H.N. Food Transport Ltd. The parent company D.H.N. held all the shares both in the Bronze company and in the Transport company.<sup>19</sup> **(3)**

Consequently, there were obstacles to the companies claiming compensation:

The acquiring authority say that the owners of the land were Bronze Investments Ltd., and that company are entitled to the value of the land £360,000. They have actually been paid it. But the acquiring authority say that that company are not entitled to compensation for disturbance because they were not disturbed at all. The authority admit that D.H.N. (who ran the business) and the Transport subsidiary (who owned the vehicles) were greatly disturbed in their business. But the acquiring authority say that those two companies are not entitled to any compensation at all, not even for disturbance, because they had no interest in the land, legal or equitable.<sup>20</sup> **(4)**

Lord Denning observed that the three companies 'could have put their house in order' by taking 'a very simple step':

Being in control of all three companies, they could have arranged for Bronze to convey the land to D.H.N.... D.H.N., being the owners, could also claim compensation for disturbance. So at any time up to October 30, 1970, this group of three companies could have put themselves in an unassailable position to claim not only the value of the land but also compensation for disturbance.<sup>21</sup> **(5)**

However, since that had not been done,

The acquiring authority say that, by failing to do it, the group have missed the boat. They are left behind on the quay because of *the technical provisions of our company law whereby each of the three companies is in law a separate person*. Each of its interests must be considered separately. D.H.N. had no interest in the land. It was only a licensee. So it cannot claim compensation for disturbance.<sup>22</sup> **(6)**

Lord Denning then rehearsed the arguments of counsel for DHN as to why the veil should be lifted. Lord Denning's own observations on the point were as follows.

We all know that in many respects a group of companies are treated together for

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<sup>19</sup> [1976] 1 WLR 852, 857-8

<sup>20</sup> [1976] 1 WLR 852, 858

<sup>21</sup> [1976] 1 WLR 852, 858

<sup>22</sup> [1976] 1 WLR 852, 858 (emphasis added)

the purpose of general accounts, balance sheet, and profit and loss account. They are treated as one concern. Professor Gower in *Modern Company Law*, 3rd ed. (1969), p. 216 says: "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group."<sup>23</sup> **(7)**

For Lord Denning, this was

especially the case when a parent company owns all the shares of the subsidiaries — so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says.<sup>24</sup> **(8)**

He referred to the decision of the House of Lords in *Harold Holdsworth*<sup>25</sup> as

A striking incidence<sup>26</sup> **(9)**

of this.

So too in the current case:

This group is virtually the same as a partnership in which all the three companies are partners.<sup>27</sup> **(10)**

Indeed,

They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance.<sup>28</sup> **(11)**

Therefore,

The three companies should, for present purposes, be treated as one, and the parent company D.H.N. should be treated as that one. So D.H.N. are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.... These companies as a group are entitled to compensation not only for the value of the land, but also compensation for disturbance.<sup>29</sup> **(12)**

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<sup>23</sup> [1976] 1 WLR 852, 860

<sup>24</sup> [1976] 1 WLR 852, 860

<sup>25</sup> See chapter 3.2.1 above

<sup>26</sup> [1976] 1 WLR 852, 860

<sup>27</sup> [1976] 1 WLR 852, 860

<sup>28</sup> [1976] 1 WLR 852, 860

<sup>29</sup> [1976] 1 WLR 852, 860

### **3.4.2 Goff LJ's judgment**

Goff LJ also saw the case as one in which the court was

entitled to look at the realities of the situation and to pierce the corporate veil.<sup>30</sup>  
**(13)**

Goff LJ said that he wished to safeguard himself by restricting his judgment to the particular facts of the case only; he did not accept that it would be appropriate to pierce the veil in *every* group situation. Here, however,

the two subsidiaries were both wholly owned; further, they had no separate business operations whatsoever; thirdly, in my judgment, the nature of the question involved is highly relevant, namely, whether the owners of this business have been disturbed in their possession and enjoyment of it.<sup>31</sup> **(14)**

In support for his view, Goff LJ cited three cases. The first was *Harold Holdsworth*; Goff LJ read the comments from Lord Reid which are reproduced at 3.2.1 above. He felt that this case was pertinent since

D.H.N. could, as it were, by moving the pieces on their chess board, have put themselves in a position in which the question would have been wholly unarguable.<sup>32</sup> **(15)**

The second case was the *Scottish Co-Operative* case; Shaw LJ quoted the words of Viscount Simonds which have been reproduced in chapter 3.2.2 above. Finally, he quoted from the judgment of Danckwerts L.J. in *Merchandise Transport Ltd. v. British Transport Commission*,<sup>33</sup> a licensing case which had concerned a parent and subsidiary company:

“[the cases] show that where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.”<sup>34</sup> **(16)**

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<sup>30</sup> [1976] 1 WLR 852, 861

<sup>31</sup> [1976] 1 WLR 852, 861

<sup>32</sup> [1976] 1 WLR 852, 862

<sup>33</sup> [1962] 2 QB 173 (CA)

<sup>34</sup> [1976] 1 WLR 852, 862 quoting from *Merchandise Transport Ltd v British Transport Commission* [1962] 2 QB 173, 206-207

### **3.4.3 Shaw LJ's judgment**

Shaw LJ highlighted the fact 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 D.H.N. were the same as the directors of Bronze; the shareholders of Bronze were the same as in D.H.N., the parent company, and they had a common interest in maintaining on the property concerned the business of the group.<sup>35</sup>  
**(17)**

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; D.H.N. would have had the business but no interest in the land.<sup>36</sup> **(18)**

In this utter identity and community of interest between D.H.N. 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, D.H.N.<sup>37</sup> **(19)**

Like both Lord Denning (see extract 5 above) and Goff LJ (see extract 15), Shaw LJ noted that

The directors of [DHN] could at any time they chose have procured the transfer of the legal title from Bronze to itself... if they had gone through that formal operation the day before the notice to treat was served... 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... 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.<sup>38</sup> **(20)**

According to Shaw LJ,

no abuse [was] precluded by disregarding the bonds which bundled D.H.N. and Bronze together in a close and, so far as Bronze was concerned, indissoluble relationship.

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<sup>35</sup> [1976] 1 WLR 852, 867

<sup>36</sup> [1976] 1 WLR 852, 867

<sup>37</sup> [1976] 1 WLR 852, 867

<sup>38</sup> [1976] 1 WLR 852, 867

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?<sup>39</sup> **(21)**

He emphasised the degree of control that DHN exercised over Bronze:

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 D.H.N. would and could never be determined without the consent of D.H.N. itself. If it was a licence at will, it was at the will of the licensee, D.H.N., that the licence subsisted. Accordingly, it could have gone on for an indeterminate time; that is to say, so long as the relationship of parent and subsidiary continued, which means for practical purposes for as long as D.H.N. wished to remain in the property for the purposes of its business.<sup>40</sup> **(22)**

Shaw LJ concluded by saying,

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.<sup>41</sup> **(23)**

### **3.5** **Commentary**

#### **3.5.1** **The judges' reasoning**

David Kershaw points out that, although all three judges' agree that the veil between the parent and subsidiary companies should be lifted, they express different reasons for their decision.<sup>42</sup> For Lord Denning, the key issue was the complete control exercised by the parent over the subsidiary (extract 8 above). He was also - as so often - clearly concerned that strict legal technicalities should not prevent justice being done on the facts (extracts 11 and 12).

Goff LJ also alluded to the fact that Bronze had no independent business operations of its own, and the fact that the two subsidiaries were wholly owned by DHN (extract

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<sup>39</sup> [1976] 1 WLR 852, 867

<sup>40</sup> [1976] 1 WLR 852, 867

<sup>41</sup> [1976] 1 WLR 852, 868

<sup>42</sup> Kershaw (n 6) 63

14). Control was clearly also a pertinent factor (extract 16).

For Shaw LJ, control was also relevant: it was because of DHN's control of Bronze that DHN occupied the premises (extracts 20 and 22). Like Goff LJ, he also referred to the fact that Bronze had no independent business operations of its own, and the 'utter identity' of the interests of the three companies (extract 19). Like Lord Denning, he too was seemingly motivated by a desire to do justice on the facts (extract 21) in a case which 'plainly call[ed]' for compensation to be paid (extract 18).

Kershaw draws out three themes which underlie the judges' decisions to lift the veil: the complete control exercised by the parent over the subsidiary; the complete identity of interests of the three companies and the absence of any independent business operations by the subsidiary; and a desire to do justice to the facts of the case.<sup>43</sup> One might add a fourth, perhaps unifying theme: a desire to look at the 'realities' presented by the 'economic entity of the whole group', such that it should be regarded as a 'single entity', notwithstanding the 'technical provisions of our company law' (see extracts 13 and 23, 7, 17 and 6 respectively). Echoes of the tension between "form" and "substance," which underpinned the respective decisions of the Court of Appeal and the House of Lords in *Salomon* itself, are apparent. It is surely self-evident as to why *DHN* later became the cornerstone of the "single economic unit" argument used in *Adams*.

### **3.5.2 Criticisms**

*DHN* has been subject to trenchant academic criticism, notably from Graham Rixon.<sup>44</sup> Firstly, Rixon refers to Lord Denning's quote from Professor Gower (see extract 7 above), and accuses him of taking him out of context:

When read in context, the statement of Gower quoted by Lord Denning M.R. is found to have been made merely by way of an aside to what Gower himself described as a "tentative" conclusion which might "perhaps, be drawn". Elsewhere in his *Principles of Modern Company Law*, in a passage presumably overlooked by the Master of the Rolls, Gower stated that "the rule that a company is distinct from its members applies equally to the separate companies of a group".<sup>45</sup>

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<sup>43</sup> *ibid* 64

<sup>44</sup> Rixon (n 4), 'Lifting the veil between holding and subsidiary companies' (1986) 102 LQR 415

<sup>45</sup> *ibid* 417

He also criticises Lord Denning for his reading of *Harold Holdsworth*. Far from seeing this case as a ‘striking instance’ of the ‘tendency to ignore the separate legal entities of various companies within a group’ (as per Lord Denning at extracts 9 and 7 respectively), Rixon describes *Harold Holdsworth* as ‘a most unsure foundation’ for the *DHN* decision:

Viscount Kilmuir L.C., Lord Morton of Henryton and Lord Reid merely took cognizance of the fact that the appellant company owned all the shares in its subsidiary and might, by the exercise of its controlling interest and going through formal procedure, procure the appointment of the respondent as managing director of the subsidiary company; nowhere in the speeches of those judges is there any suggestion that the separate personae of the parent and subsidiary companies might be disregarded. On the contrary, Lord Morton said ([1955] 1 WLR 352, 363: “It is true that each company in the group is in law a separate entity, the business whereof is to be carried on by its own directors and managing director, if any...”<sup>46</sup>

Finally, Rixon is critical of the court’s attempts to ‘do justice’, since lifting the veil ‘in fact allowed the parent company to evade a disadvantage of an arrangement the advantages of which - one being the avoidance of stamp duties - the parent company had sought and enjoyed and that the Court of Appeal earlier had held a corporator might not do.’<sup>47</sup>

Rixon is thus critical of the court for allowing the parent company to ‘blow hot and cold and have the best of both worlds,’<sup>48</sup> i.e. allowing *DHN* to enjoy the advantages of separate personality but not the disadvantages. For Rixon, therefore, *DHN* is quite simply ‘an aberration.’<sup>49</sup>

As we shall see later, some of Rixon’s criticisms are echoed in some subsequent cases. Initially, however, *DHN* was received positively both by academics and in the courts. It seemingly promised drastically to reshape the landscape concerning *Salomon* and veil-lifting in the group context.

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<sup>46</sup> *ibid* 419

<sup>47</sup> Rixon (n 4) 420

<sup>48</sup> *ibid*, 420

<sup>49</sup> *ibid*, 422

### **3.6 DHN: the early reaction**

#### **3.6.1 Academic reaction**

As alluded to in chapter 3.1, the *DHN* decision initially prompted excited reactions from academics. Some writers genuinely – almost triumphantly - believed that the ruling would unseat *Salomon* from its place of pre-eminence. Schmitthoff declared that in the light of the *DHN* decision, ‘*Salomon* is in the shadow. It... no longer occupies the centre of the company stage... it has been dethroned from the position of the most important case in company law and now occupies the position of one of the ordinary cases on which the structure of company law rests.’<sup>50</sup> Powles similarly remarked that the *DHN* decision ‘clearly weakens further the importance of [*Salomon*] where companies are organised as a group,’<sup>51</sup> and commented that it ‘would appear to give the corporate veil a gossamer-like quality.’<sup>52</sup> As noted at 3.1 above, Sugarman and Webb argued that the case had the potential to ‘undermine the rigid rule interpretation of *Salomon’s* case; and, thereby, put into question its centrality in company law theory.’<sup>53</sup> They further argued that it was ‘but a short step’ from the considerations in the *DHN* to ‘the proposition that the courts may disregard *Salomon’s* case whenever it is just to do so.’<sup>54</sup> Given that *Salomon* was not mentioned by any of the three judges, nor even pleaded in argument by counsel for either side,<sup>55</sup> such a reaction is surely understandable – even if, as we shall see, they were proved wrong in the long run.

Two strands in these early academic reactions are notable. Firstly, there is recognition that the grounds for lifting the veil in *DHN* were distinct from the “agency” argument used in cases such as *Smith Stone Knight v Birmingham Corporation*. Powles, for example, noted that the agency principle at least ‘regard[s] the corporate entity doctrine as being fully in force, in that a subsidiary cannot be an agent of the parent if it were not

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<sup>50</sup> CM Schmitthoff, ‘*Salomon* in the Shadow’ [1976] JBL 305, 311-312

<sup>51</sup> D Powles, ‘The “See-through” Corporate Veil’ (1977) 40(3) MLR 339

<sup>52</sup> *ibid* 342

<sup>53</sup> Sugarman & Webb (n 3) 175

<sup>54</sup> *ibid* 174

<sup>55</sup> See the *DHN* headnote: *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, 854. A cynic might draw adverse inferences about the level of knowledge of the commercial bar.

a separate legal person.<sup>56</sup> On the other hand, he put *DHN* into the same category as cases such as *Harold Holdsworth* and *Littlewoods Mail Order Stores Ltd v McGregor*, as decisions in which the courts had 'been prepared to adjust the legal position of companies within groups without reference to the agency principle at all, which [had] involved nothing less than ignoring the concept of corporate personality and treating all the companies in the group as synonymous with the parent company.'<sup>57</sup> Whilst praising the decision as 'a victory for common sense over technicality', Powles nevertheless criticised the Court of Appeal for the 'casual manner' in which it had 'swept aside' the *Salomon* doctrine, leading to a lack of clarity about 'the legal status of a subsidiary in a group.'<sup>58</sup> He also believed that the reasoning behind the decision had been superfluous: 'With the well-tried doctrine of agency with which to effect justice, the court appears to have embarked on an unnecessary and unconstructive measure of judicial legislation.'<sup>59</sup> Sugarman and Webb similarly noted the readiness of the court to 'discard the crutch of "agency."<sup>60</sup> These writers apparently overlook the fact that the "agency" argument was rejected by the Lands Tribunal at first instance.<sup>61</sup> Moreover, whilst *Smith Stone & Knight* was cited in argument in the Court of Appeal,<sup>62</sup> the "agency" argument does not seem to have been emphasised by counsel for *DHN*, since it is not mentioned by any of the three judges. Nevertheless, these writers are clearly correct to see *DHN* as a decision in which the veil was lifted on an altogether different basis.

Secondly, there is a recognition that *DHN* purported to change the landscape only in relation to corporate groups, rather than in relation to companies wholly owned by individuals. Powles, for example, noted that the agency argument had been successfully used in group situations, rather than in situations where the shareholders had been natural persons; his treatment of *DHN* likewise fits into a wider discussion

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<sup>56</sup> Powles (n 51) 340

<sup>57</sup> *ibid* 340

<sup>58</sup> *ibid* 342

<sup>59</sup> *ibid* 342

<sup>60</sup> Sugarman & Webb (n 3) 173

<sup>61</sup> See chapter 3.3 above.

<sup>62</sup> See the *DHN* headnote: *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852, 854

about groups.<sup>63</sup> More recently, Kershaw too has noted that *DHN* (like *Smith Stone & Knight* beforehand and like *Woolfson* and *Adams* subsequently) deals with veil-piercing within the context of a group relationship rather than that of a one-man company. Kershaw therefore distinguishes *DHN* from *Salomon* and limits its application to corporate groups only.<sup>64</sup> Initially, at least, the courts also applied *DHN* approvingly in group situations.

### **3.6.2 Judicial reaction**

The *DHN* judgment was given on 4 March 1976. The first judicial consideration of *DHN* came on 23 March 1976, when the Court of Appeal gave judgment in the case of *Canada Enterprises Corporation Ltd v MacNab Distilleries Ltd*.<sup>65</sup> In a commercial dispute involving two companies making claims and cross-claims against each other and their respective parent companies, the issue arose as to whether the veil between the parents and subsidiaries on each side could be lifted. The court held that it had sufficiently wide discretion under the Rules of the Supreme Court to look behind the companies involved in the dispute, and to ascertain who controlled them. Cairns LJ acknowledged that piercing the veil would be ‘contrary to the well-known principle of *Salomon*’ but also referred to ‘the very recent case’ of *DHN* as an authority for the proposition that the veil could be pierced in certain situations.<sup>66</sup>

In *Littlewoods Organisation Ltd v Harris*,<sup>67</sup> Harris was employed by Littlewoods. He covenanted not to work for Great Universal Stores Ltd (“GUS”, one of Littlewoods’ competitors) or any of its subsidiaries within twelve months of determining his contract with Littlewoods. GUS had both UK-based and overseas subsidiaries. In 1977, Harris resigned, informing Littlewoods that he had accepted an offer of employment from the GUS group. Littlewoods sought assurances from Harris that he would honour the restrictive covenant. When he refused to give that assurance, Littlewoods applied,

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<sup>63</sup> Powles (n 51) 342 & *passim*.

<sup>64</sup> Kershaw (n 6) 64.

<sup>65</sup> *Canada Enterprises Corporation Ltd v MacNab Distilleries Ltd* [1981] Com LR 167; [1987] 1 WLR 813 (Note (CA)). No explanation is given for the delay between judgment being given and the case being reported.

<sup>66</sup> *Canada Enterprises Corporation Ltd v MacNab Distilleries Ltd* [1987] 1 WLR 813, 817

<sup>67</sup> *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472 (CA)

initially unsuccessfully, for an injunction. For the Court of Appeal, the issue was whether the restrictive covenant – in particular, the restraint on Harris working for subsidiaries of GUS - was reasonable in its scope. The Court of Appeal construed it as referring only to GUS's UK-based subsidiaries, and therefore upheld it (Browne LJ dissenting). The following extract from the judgment of Lord Denning, in which (unsurprisingly) he refers to the *DHN* decision, warrants repeating in full:

[The restraint of trade clause] is said to be too wide in that it prevents Mr Harris being concerned or interested in the businesses of Great Universal Stores and its subsidiaries — and those businesses are infinitely varied and are worldwide: whereas Littlewoods are Confined to the United Kingdom and operate in the two fields only of a mail order business and a chain of retail stores.

I would first consider the phrase “Great Universal Stores or any company subsidiary thereto.” It appears that Great Universal Stores have 200 or more subsidiaries all over the world, carrying an all sorts of businesses. An instance given in argument was a restaurant in Alice Springs in the centre of Australia. Does that invalidate the clause? Is the introduction of “subsidiaries” a ground for not enforcing it? *This is an important point in these days when so many companies are multinational in their operations. The answer is, I think, the law to-day has regard to the realities of big business. It takes the group as being one concern under one supreme control. It does not regard each subsidiary as being a separate and independent entity...*

A recent illustration of this tendency is *D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council* [1976] 1 W.L.R. 852 where the group was regarded virtually as a partnership in which all the subsidiaries were partners. Likewise in the present case the phrase “Great Universal Stores or any company subsidiary thereto” denotes in reality one group in which the individual subsidiaries cannot usefully be distinguished one from the other. The group is under one unified control. Those in charge of the group are able to switch a servant from one subsidiary to another without any difficulty whatever. They can lend his services or transmit his information and knowledge, as they please, within the group. If the clause is to afford any protection to Littlewoods at all, it must cover the whole GUS group, that is, not only the parent company but also its subsidiaries.<sup>68</sup>

The parallels between Lord Denning's words here, and extracts 7 to 13, 17 and 23 in the *DHN* judgments quoted above, are clear.

Initially, then, it seemed that the courts would vindicate the academic predictions that *Salomon's* demise was at hand in group situations. However, this judicial trend did not

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<sup>68</sup> [1977] 1 WLR 1472, 1482-3 (emphasis added)

last long: a year before judgment in *Littlewoods Organisation Ltd v Harris* had been given in August 1977, the tide had already started to turn.

### **3.7 The tide turns: *The Albazero* and *Woolfson***

#### **3.7.1 *The Albazero* (July 1976)<sup>69</sup>**

The subject matter of this shipping case did not directly concern issues relating to corporate personality. Neither *Salomon* nor *DHN* were mentioned in the judgment or cited in argument. In the House of Lords, however, Roskill LJ (as he then was) remarked that it was a ‘fundamental principle of English law long established and now unchallengeable by judicial decision,’ that

each company in a group of companies... 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 ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law.<sup>70</sup>

Even though expressed *obiter*, this statement strongly affirms the primacy of *Salomon* in group situations, over and against the approach taken in *DHN*. Indeed, *The Albazero* has subsequently become (literally) a textbook case on the point.<sup>71</sup> Clearly, this statement did not bode well for the future of *DHN*.

#### **3.7.2 *Woolfson v Strathclyde Regional Council* (February 1978)<sup>72</sup>**

A stronger statement against *DHN* was made in *Woolfson*, a Scottish case concerning similar (albeit not identical) facts.

Campbell (Glasgow) Ltd (“Campbell”) operated a shop from five adjoining premises. 999 of the 1,000 issued shares of Campbell were owned by Mr Woolfson. The other one was owned by his wife. Mr Woolfson was the sole director. Three of the premises were owned by Woolfson and the other two by Solfred Holdings Limited (“Solfred”). Woolfson

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<sup>69</sup> [1977] AC 774 (QBD)

<sup>70</sup> [1977] AC 774, 807

<sup>71</sup> See, for example, Nicholas Bourne, *Bourne on Company Law* (5<sup>th</sup> edn, OUP, 2011) 26; Kershaw (n 6)

<sup>67</sup>

<sup>72</sup> [1978] SC (HL) 90

held two-thirds of the shares in Solfred; the remainder were held by his wife. Campbell paid rent to Solfred and Woolfson for the premises owned by each of them respectively. Campbell kept its own accounts. Its profits were subject to (what was) Schedule D tax. Campbell had been treated as occupier in respect of (what were) Schedule A tax returns. Campbell was shown in the valuation roll as occupier of the premises. The premises were compulsorily acquired by the local authority. Woolfson and Solfred jointly sought compensation for disturbance in respect of all the premises. For the claim to succeed, they needed to demonstrate that they both *owned* and *occupied* the premises. The problem, of course, was that the premises were occupied by Campbell.

Relying upon *DHN*, Woolfson and Solfred argued, that (in Lord Keith's words in the House of Lords) the 'the court should set aside the legalistic view that Woolfson, Solfred and Campbell were each a separate legal *persona*, and concentrate attention upon the "realities" of the situation, to the effect of finding that Woolfson was the occupier as well as the owner of the whole premises.'<sup>73</sup> The Lands Tribunal for Scotland and, on appeal, the Second Division of the Court of Session refused to award such compensation, on the ground that Campbell was the occupier of the premises and was separate from Woolfson and Solfred. The Second Division of the Court of Session also affirmed that the *Salomon* principle 'must normally receive full effect in relations between the company and persons dealing with it,'<sup>74</sup> and cited Ormerod LJ's judgment in *Tunstall v Steigmann*, to the effect that 'any departure from a strict observance of the principle laid down in *Salomon* has been made to deal with special circumstances, such as when a limited company might well be a façade concealing the real facts.'<sup>75</sup> Woolfson appealed to the House of Lords.

The House of Lords distinguished the case from *DHN* on factual grounds. In *DHN*, Bronze (which owned the land) was the wholly-owned subsidiary of DHN (which operated the business). DHN had complete control over the operation of the business and no other person had any interest in the assets of the subsidiary. In *Woolfson*,

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<sup>73</sup> [1978] SC (HL) 90, 95

<sup>74</sup> As summarised by Lord Keith in the House of Lords: [1978] SC (HL) 90, 95

<sup>75</sup> [1962] 2 QB 593 (CA) 602 (see chapter 2.3)

however, Campbell (which operated the business) had no control over Solfred and Woolfson (who owned the land). Mr Woolfson held only two-thirds of the shares in Solfred; Solfred had no interest in Campbell; and Mr Woolfson could not be treated as the outright owner of the shares in Campbell since his wife held her one share outright and not as his nominee.

More importantly, the House of Lords also cast significant doubt upon the *DHN* decision. Lord Keith 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 is a mere façade concealing the true facts. Further, the decisions of this House in *Caddies v. Harold Holdsworth & Co. (Wakefield) Ltd.* 1955 S.C. (H.L.) 27 and *Meyer v. Scottish Co-operative Wholesale Society Ltd.* 1958 S.C. (H.L.) 40, which were founded on by Goff L.J. in support of this ground of judgment and, as to the first of them, to some extent also by Lord Denning, M.R., do not, with respect, appear to me to be concerned with that principle.<sup>76</sup>

For Lord Keith, the “facade” situation was the *only* instance where the veil should be pierced. He doubted both the judges’ rationale for lifting the veil in *DHN*, and their reading of the cases upon which they had based their decision. Kershaw notes that, for the House of Lords in *Woolfson*, the basis of the *DHN* decision was the fact that the subsidiary was controlled by the holding company ‘in every respect’. The Lords did not consider or comment on the other issues mentioned by the court in *DHN*, namely the lack of independent operations on the parts of the subsidiaries, and the desire to do justice on the facts of the case (see extracts 11, 14, 19 and 21 of the *DHN* judgment above). Nevertheless, if *The Albazero* had sounded a warning, *Woolfson* ‘clearly [left] *DHN* in an unhealthy condition’(!)<sup>77</sup>

### **3.7.3 Attempting to stem the tide: Amalgamated Investment and Lewis Trusts**

*DHN* nevertheless briefly continued to influence the English courts - presumably because, as a Scottish case, *Woolfson* was merely persuasive and not binding. In

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<sup>76</sup> *Woolfson v Strathclyde Regional Council* [1978] SC (HL) 90, 96

<sup>77</sup> Kershaw (n 6) 66

*Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*,<sup>78</sup> Lord Denning (again, unsurprisingly) cited *DHN* as authority for the proposition that a guarantee could be construed as a pledge to pay both the lender bank and the wholly-owned subsidiary that it had formed to channel the loan. In *Lewis Trusts v Bamber Stores Ltd*, *DHN* was referred to, *obiter*, by Dillon LJ in the Court of Appeal, as authority for the proposition that the veil between companies in a group could be pierced in certain situations; *Woolfson* was not mentioned.<sup>79</sup> However, it would not be long before the English courts, too, would retreat from the “single economic unit” argument espoused in *DHN*.

### **3.8 The screw tightens: *Multinational, Dimbleby, Pinn & Wheeler***

#### **3.8.1 *Multinational Gas and Petroleum Co v Multinational Gas & Petrochemical Services Ltd*<sup>80</sup>**

Three multinational oil companies, incorporated in Japan, the US and France, promoted and registered a company in Liberia, named Multinational Gas and Petrochemical Co. (“Multinational”), to deal in oil products. For tax reasons, the three oil companies then registered Multinational Gas and Petrochemical Services Ltd. (“Services”) in England. Services was wholly owned by the three oil companies, and operated as Multinational’s agent and adviser. The business failed and Multinational entered liquidation. The liquidator received reports that Services had acted negligently in drawing up financial information for Multinational. He was also believed that Multinational’s directors - who, it was alleged, had acted ‘in accordance with the directions and at the behest of’<sup>81</sup> the three oil companies - had also acted negligently. He therefore initiated an action in tort against Services. He also applied for leave to commence concurrent proceedings against the three oil companies (i.e. Services’ shareholders) and serve them outside the jurisdiction. As Lawton LJ said in his judgment in the Court of Appeal:

Some of [Multinational’s] creditors... wanted to make the oil companies discharge at least some of [Multinational’s] liabilities, [Multinational] being their creature. The oil companies... had enough assets to do so. [Multinational’s creditors] were not

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<sup>78</sup> [1982] QB 84 (CA)

<sup>79</sup> [1983] FSR 453, 470-471 (CA)

<sup>80</sup> [1983] Ch 258 (CA)

<sup>81</sup> [1983] Ch 258, 265

interested in Services, who were just as much a creature of the oil companies as [Multinational] was, save perhaps as a route by which they could reach the oil companies.<sup>82</sup>

If those actions were ultimately successful, the parent oil companies would be liable for the debts of Services, their subsidiary. This, clearly, would contravene the principles of *Salomon* and *The Albazero*.

The Court of Appeal refused to grant leave to serve the oil companies outside the jurisdiction.

Lawton LJ (Dillon LJ agreeing with him) was clear that Multinational was 'at law a different legal person from the subscribing oil company shareholders and was not their agent: see the *Salomon* case.'<sup>83</sup> He also affirmed that 'the oil companies as shareholders were not liable to anyone except to the extent and the manner provided by the Companies Act 1948', again citing *Salomon* as authority.<sup>84</sup> Similarly, he emphasised that the oil companies 'as shareholders were [not] under any duty of care to the plaintiff.' Although May L.J. dissented on the "company law point", he 'nowhere suggested that Multinational might properly be treated as one with its parent companies so as to render those companies liable for Multinational's debts.'<sup>85</sup>

Significantly, *DHN* was not cited by any of the judges, nor was it mentioned in argument by counsel. Overall, *Multinational* clearly affirmed the primacy of *Salomon* in a group context. This was not to everybody's liking. Lord Wedderburn lamented that the case showed up

the geriatric deficiencies in various principles of company law... How can poor old *Salomon* be expected to cope with *Multinational Gas*... predominant reality is not today *the* company. It is the corporate group.... Those who trumpet the "rule of law" cannot be taken seriously if they have nothing to say about that. Let us test the next Companies Bill by that measure.<sup>86</sup>

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<sup>82</sup> [1983] Ch 258, 267 as cited in Rixon (n 4) 422

<sup>83</sup> [1983] Ch 258, 269 as cited in Rixon (n 4) 422

<sup>84</sup> [1983] Ch 258, 269 as cited in Rixon (n 4) 422

<sup>85</sup> Rixon (n 4) 422

<sup>86</sup> KW Wedderburn, 'Multinationals and the Antiquities of Company Law' (1984) 47 MLR 87, 90-92 (emphasis in original)

Lord Wedderburn doubtless died<sup>87</sup> disappointed that neither the 1985 nor the 2006 Companies Acts had changed the position regarding the separate liabilities of companies in groups.

### **3.8.2 *Dimbleby & Sons Ltd v National Union of Journalists*<sup>88</sup>**

In this case, workers were employed by one company, but picketed another company within the same group. The House of Lords ruled that this was unlawful secondary picketing, as the companies within the group were separate entities. Once again, *DHN* was not mentioned at all, either in argument or in the judgment. Lord Diplock specifically referred to *Salomon*:

The “corporate veil” in the case of companies incorporated under the Companies Act is drawn by statute and it can be pierced by some other statute if such other statute so provides; but in view of its *raison d’être* and its consistent recognition by the courts since *Salomon*... one would expect that any parliamentary intention to pierce the corporate veil would be expressed in clear and unequivocal language.<sup>89</sup>

### **3.8.3 *National Dock Labour Board v Pinn & Wheeler Ltd*<sup>90</sup>**

This case concerned three related companies: Pinn & Wheeler Ltd (“Pinn”), K & B Forest Products Ltd (“K & B”), and The Sabah Timber Co Ltd (“Sabah”). Pinn and K & B were both wholly-owned subsidiaries of Sabah. Cargo belonging to Sabah was unloaded by employees of Pinn, at Pinn’s wharf. Pinn’s employees were not registered dock workers. The cargo was then processed at K & B’s mill, which did not have any waterside frontage. Within the context of a labour dispute, it was necessary to ascertain whether this work carried out by “waterside manufacturers,” i.e. a manufacturer with a facility at the water’s edge. According to this definition, Pinn *would* be a “waterside manufacturer” but the other two companies would not, unless the veils within the group were pierced.

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<sup>87</sup> Lord Wedderburn died on 12 March 2012. See Bill McCarthy, ‘Lord Wedderburn of Charlton obituary’ (*The Guardian*, 12 March 2012) <<http://www.guardian.co.uk/law/2012/mar/12/lord-wedderburn-of-charlton>> accessed 28 March 2012

<sup>88</sup> [1984] 1 W.L.R. 427 (HL)

<sup>89</sup> [1984] 1 W.L.R. 427, 435

<sup>90</sup> 1989 WL 651289; *The Times*, 5 April 1989 (CA)

The industrial tribunal held that all three companies constituted a “waterside manufacturer,” on the basis that between them they had a “waterside facility”, i.e. Pinn’s wharf, which was where Sabah’s cargoes were loaded and unloaded, and from whence they were taken to K & B’s mill. This was a clear instance of veil-piercing. The tribunal considered it ‘unrealistic’ to view the three companies as ‘separate unrelated entities.’<sup>91</sup>

The National Dock Labour Board appealed. In the Queen’s Bench Division, Macpherson J rejected the tribunal’s position. He repeated Lord Keith’s assertion, in *Woolfson*, that it was only appropriate to pierce the veil ‘in special circumstances which indicate that there ‘is a mere façade concealing the true facts.’<sup>92</sup> He also noted that whilst the connections between the companies were closer and tighter than those in *Woolfson*, they nevertheless ‘did not approach that set out in *DHN*. (On the one hand, Pinn and K & B were wholly owned by Sabah. This resembled the position in *DHN*, and differed from the position in *Woolfson*. On the other hand, Pinn and K&B had independent operations of their own, in contrast to the subsidiaries in *DHN*.) More importantly, he remarked that Lord Keith had both distinguished *DHN* and ‘doubted [its] deciding force’. Again repeating Lord Keith, he said that in the case before him there was ‘no basis consonant with principle upon which on the facts of this case the corporate veil [could] be pierced...’ For him, it was

unseemly that the three companies should be allowed to unveil themselves in order to try to avoid the effect of the dock labour scheme. Sometimes, where an injustice may result, as in *D.H.N. Food Distributors Ltd. v. Tower Hamlets London Borough Council*, and where the factual circumstances as to control and so on are very strong, different considerations may of course arise.

But where the companies are kept alive as separate legal entities for good commercial or historical reasons in order to keep the company’s name fully alive and in order to maintain the loyalty of employees for example, and also probably to avoid redundancy and other problems, I see no reason why the veil should be pierced.<sup>93</sup>

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<sup>91</sup> Per Macpherson J in *National Dock Labour Board v Pinn & Wheeler Ltd & Others* (1989) 5 BCC 75, 77 (QBD)

<sup>92</sup> All quotations in this paragraph are from *National Dock Labour Board v Pinn & Wheeler Ltd & Others* (1989) 5 BCC 75, 78

<sup>93</sup> *National Dock Labour Board v Pinn & Wheeler Ltd & Others* (1989) 5 BCC 75, 78

The three companies appealed to the Court of Appeal. Before the hearing, they re-organised their affairs such that K & B acquired the business and premises of the other two companies. In his lead judgment, May LJ said, 'Were this matter therefore now to come before the Industrial Tribunal, there would be no need to part any corporate veil.'<sup>94</sup> The Court of Appeal did not comment further on the point and therefore – presumably – implicitly accepted Macpherson J's comments about *DHN*.

Although Macpherson J repeated Lord Keith's doubts about *DHN*, he still apparently conceded that there might be cases when it could apply, 'where an injustice may result.' Nevertheless, the general tenor of *Multinational*, *Dimbleby* and *Pinn and Wheeler* is clear. If *DHN* had been left 'in an unhealthy condition' following *Woolfson*, its condition was now even worse. In *Adams v Cape Industries plc*, *DHN* received a further, almost fatal blow.

### **3.9 The door slams (nearly) shut – Adams v Cape Industries plc**

#### **3.9.1 Adams: the facts**

The exceptionally complex facts of *Adams* may be summarised as follows. Cape Industries plc ("Cape"), the holding company, was registered in England. It had a wholly-owned subsidiary, NAAC, operating in Texas. Some of NAAC's employees suffered injuries (in some cases, fatal), following exposure to asbestos. They initiated litigation against various parties including Cape, the holding company. Proceedings were initiated in New York. Cape refused to participate in these proceedings, arguing that it was not subject to the jurisdiction of the New York courts. Nevertheless, the New York courts awarded damages against Cape. Since Cape's assets were largely situated in England, the claimants attempted to enforce the New York judgement in England. In order to succeed, the claimants needed to prove that Cape, *as opposed to its subsidiary*, had been "present", i.e. carrying on operations, in Texas.

On a strict application of *Salomon*, the claimants' case would fail, since Cape and NAAC were separate legal entities. The claimants ran three arguments as to why the

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<sup>94</sup> 1989 WL 651289

veil between the parent company and the subsidiary should be pierced. The first was the “agency” argument, namely that NAAC was the agent of Cape, the principal, and therefore Cape should be held liable for the judgment against NAAC. The second was the “single economic unit” argument, namely that Cape and NAAC should be treated as a single economic entity. The third was the “corporate veil” argument, under which the claimants maintained that two of Cape’s other subsidiaries (i.e. not NAAC) had been set up as a façade to cover improprieties.

### **3.9.2 Adams: the judgment**

Whilst noting that both the “agency” and “corporate veil” arguments failed on the facts, we will here focus primarily on how the court dealt with the “single economic unit” argument.<sup>95</sup> Extracts from the judgment of Slade LJ are indented and separately numbered (i), (ii), (iii) etc.

Firstly, for Slade LJ, there was

no general principle that all companies in a group of companies [were] to be regarded as one. On the contrary, the fundamental principle [was] 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* [1977] AC 774, 807<sup>96</sup> **(i)**

It was therefore

indisputable<sup>97</sup> **(ii)**

that Cape and NAAC were

in law separate legal entities<sup>98</sup>. **(iii)**

Slade LJ noted that Mr Morison (“Morison”) (counsel for Adams) had argued that the court would, where appropriate,

ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it [would] do so whenever it consider[ed] that justice so demands.<sup>99</sup> **(iv)**

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<sup>95</sup> Slade LJ’s treatment of the “corporate veil” argument is considered in more detail in chapter 5.1.

<sup>96</sup> *Adams v Cape Industries* [1990] Ch 433, 532

<sup>97</sup> [1990] Ch 433, 532

<sup>98</sup> [1990] Ch 433, 532

<sup>99</sup> [1990] Ch 433, 532

He quoted at length from various cases cited by Morison, including *DHN*. He also noted that Morison had stressed the importance of looking at the

commercial reality<sup>100</sup> **(v)**

Slade LJ stated that in cases such as *Holdsworth* and *Scottish Co-Operative*, and likewise in *DHN*, the decisions to lift the veil had turned on

the relevant statutory provisions for compensation<sup>101</sup> **(vi)**

Moreover,

the correctness of the [*DHN*] decision was doubted by the House of Lords in *Woolfson*<sup>102</sup> **(vii)**

He then made an extremely important statement:

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... *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. [1897] A.C. 22 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<sup>103</sup> **(viii, emphasis added)**

Again, Slade LJ was adamant that

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. [1897] A.C. 22* merely because it considers it just so to do.<sup>104</sup> **(ix)**

Slade LJ rehearsed Morison's arguments as to why Cape and NAAC should be treated as a single economic unit. For example, NAAC had been created as a medium for the sale of Cape's goods; Cape had taken all major policy decisions concerning NAAC;

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<sup>100</sup> [1990] Ch 433, 535

<sup>101</sup> [1990] Ch 433, 536

<sup>102</sup> [1990] Ch 433, 536

<sup>103</sup> [1990] Ch 433, 536

<sup>104</sup> [1990] Ch 433, 537

NAAC's directors had formal functions only. Indeed, Slade LJ broadly accepted the submission that Cape

ran a single integrated mining division with little regard to corporate formalities as between members of the group in the way in which it carried on its business<sup>105</sup>. **(x)**

Nevertheless, there had been

no challenge to the judge's finding that the corporate forms applicable to NAAC as a separate legal entity were observed<sup>106</sup> **(xi)**

Slade LJ addressed Morison's submission that

Cape's control extended to the day-to-day running of N.A.A.C<sup>107</sup> **(xii)**

However, according to Slade LJ

A degree of overall supervision, and to some extent control, was exercised by Cape over N.A.A.C. as is common in the case of any parent-subsidary relationship - to a large extent through Dr. Gaze [an executive director of Cape]. In particular, Cape would indicate to N.A.A.C. the maximum level of expenditure which it should incur and would supervise the level of expenses incurred by Mr Morgan [NAAC's president]. Mr Morgan knew that he had to defer in carrying out the business activities of N.A.A.C. to the policy requirements of Cape as the controlling shareholders of N.A.A.C. Within these policy limits... the day-to-day running of N.A.A.C. was left to [Mr Morgan]. There is no challenge to the judge's findings that (a) the corporate financial control exercised by Cape over N.A.A.C. in respect of the level of dividends and the level of permitted borrowing was no more and no less than was to be expected in a group of companies such as the Cape group; (b) the annual accounts of N.A.A.C. were drawn on the footing that N.A.A.C.'s business was its own business and there was nothing to suggest that the accounts were drawn on a false footing.<sup>108</sup> **(xiii)**

Finally, he remarked that

In the light of the set up and operations of the Cape group and of the relationship between Cape/Capasco and N.A.A.C. we see the attraction of the approach adopted by Lord Denning M.R. in the *D.H.N.* case [1976] 1 W.L.R. 852, 860c, which Mr Morison urged us to adopt: "This group is virtually the same as a partnership in which all the three companies are partners." In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J. that the observations of Robert Goff L.J. in *Bank of Tokyo Ltd. v. Karoon (Note)* [1987] A.C. 45, 64, are apposite: "[Counsel] suggested beguilingly that it would be technical for us to

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<sup>105</sup> [1990] Ch 433, 537

<sup>106</sup> [1990] Ch 433, 537

<sup>107</sup> [1990] Ch 433, 538

<sup>108</sup> [1990] Ch 433, 538

distinguish between parent and subsidiary company 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 bridged.”<sup>109</sup> (xiv)

### **3.9.3 Adams: commentary**

*Adams* clearly deals a further blow to the “single economic unit argument” as expressed in *DHN*. Extracts (i) to (iii), (viii) and (ix) above strongly affirm the principles of *Salomon* and *The Albazero*. Extracts (v) and (xiv) show that, in contrast to the approach in *DHN*, the court was *not* prepared to consider ‘economic realities’ over and above the technical legal distinctions between a parent and a subsidiary company. Furthermore, according to Slade LJ, the *DHN* decision had in fact turned on the wording of the statute in question (extracts (vi) and (viii)). Moreover, like Macpherson J in *Pinn and Wheeler* (see chapter 3.8.3), Slade LJ noted that *DHN* had been doubted in *Woolfson* (extract (vii)).

Just as *Multinational* left Lord Wedderburn disappointed, so too *Adams* created discontent. Following the litigation involving Cape Industries plc, Peter Muchlinski argued stridently in favour of reform in relation to corporate groups, particularly multinationals; yet he also noted, with disappointment, that the 2001 Final Report of the Company Law Review Steering Group said nothing about corporate groups.<sup>110</sup>

Nevertheless, Slade LJ does leave open the possibility that in certain cases, the wording of a particular statute may allow the court to lift the veil between companies in the same group. More interestingly – as Kershaw astutely observes – extracts (xii) to (xiv) above *do*, on a close reading, leave some limited mileage in the “single economic unit” argument. Kershaw highlights the discussion about whether Cape had been involved in the ‘day to day running’ of NAAC’s business. He suggests that, ‘had Cape in fact been running NAAC then the Court may have treated the two entities as one’. For Kershaw, this ‘would appear consistent’ with the phrases, ‘utter identity of community and interest’ and the ‘absence of real activity in the subsidiary’, both of which were used in *DHN*. By implication, therefore, ‘had the level of Cape’s financial control over NAAC

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<sup>109</sup> [1990] Ch 433, 538

<sup>110</sup> PT Muchlinski, ‘Holding multinationals to account: recent developments in English litigation and the Company Law Review’ (2002) 23(6) Co Law 168

exceeded what is typical in a parent-subsidary relationship then this may have made the single economic unit argument available.’ As such, it remains (just about) possible that the argument *could* work in cases where ‘the parent completely ignores the separate existence of the subsidiary.’<sup>111</sup>

### **3.10 Beyond Adams: door slammed tight shut, or left slightly ajar?**

Theoretically, as Kershaw argues, there appeared to remain some very limited life in *DHN* following *Adams*. Yet this limited life surely amounted to but the faintest breath. For good measure, the Court of Appeal again doubted *DHN* in the 1998 case of *Ord v Belhaven Pubs Ltd*,<sup>112</sup> which is considered further in chapter 5. Such scepticism filtered down to the lower courts. In *Buckinghamshire CC v Secretary of State for the Environment, Transport and the Regions and Brown*, for example, Robin Purchas QC, sitting as a Deputy High Court Judge, stated that it was erroneous to apply ‘*DHN* in preference to the other authorities’.<sup>113</sup> However, two 2007 Court of Appeal judgments appear to have changed the picture.

#### **3.10.1 Beckett Investment Management Group Ltd v Hall**<sup>114</sup>

The claimant (“Beckett”) was a parent company within a group of companies offering financial services. It provided no direct financial advice and had no direct contact with clients. Hall was the director of two subsidiaries and also one of Beckett’s directors. His employment contract included a clause whereby he covenanted, for a period of twelve months following termination of his employment with Beckett, not to supply ‘advice of a type provided by [Beckett] in the ordinary course of its business’ to ‘any person, firm, company or organisation whom or which was at any time during the period of 12 months immediately prior to the termination of [his] employment a client of [Beckett or one its subsidiaries].’ Hall left Beckett for a competitor company, and some of Beckett’s customers transferred their business to that company. Beckett sued Hall for breach of contract. Hall argued that the restraint of trade provision was meaningless since

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<sup>111</sup> All quotations in this paragraph are taken from Kershaw (n 6) 70.

<sup>112</sup> [1998] 2 BCLC 447 (CA)

<sup>113</sup> (2001) 81 P & CR 25 (QBD)

<sup>114</sup> [2007] EWCA Civ 613 (CA)

Beckett, as a holding company, did not provide direct advice; ‘the individual personality of a company was not to be disregarded [merely because] the company in question was a member of a group of companies.’<sup>115</sup> He further argued that Beckett had no clients of its own and therefore no interest which would be safeguarded by the provision and that, even though one of its subsidiaries had clients, it had not been party to the covenant in question. At first instance, the court agreed with him, upheld the separateness of the companies within the group, and ruled that he had not breached the restraint of trade covenant. In the Court of Appeal, however, Kay LJ took an opposite approach. Declining to take ‘a purist approach to corporate personality,’<sup>116</sup> he construed the clause more widely, so as to apply to advice of the kind provided by one of the subsidiary companies. Significantly, he directly quoted,<sup>117</sup> with approval, Lord Denning’s words in *Littlewoods Organisation Ltd v Harris* (quoted above in chapter 3.6.2):

The answer is, I think, the law today has regard to the realities of big business. It takes the group as being once concern under supreme control.

Whilst Kay LJ made no direct reference to *DHN*, the fact that he referred to a case which itself drew on the *DHN* principle, hints at a rehabilitation of the “single economic unit” argument.

### **3.10.2 *Adelson v Associated Newspapers Ltd*<sup>118</sup>**

In this case, ‘a company sought to amend its libel claim by adding a claim for damage to the reputations of two of its subsidiaries, which were not parties to the claim.’<sup>119</sup> If successful, this would clearly represent a departure from the principle of separate personality. During the course of argument in a related application, the Court of Appeal apparently suggested that it

might wish to explain or develop the law in some way which would enable a non-trading holding company to recover in defamation proceedings for injury done to the group as a whole... or for damage to the reputation of trading subsidiaries.<sup>120</sup>

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<sup>115</sup> *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613 [13]

<sup>116</sup> *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613 [18]

<sup>117</sup> *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613 [18]

<sup>118</sup> [2007] EWHC 3028 (QBD)

<sup>119</sup> Derek French, Stephen Mayson, & Christopher Ryan, *Mayson, French & Ryan on Company Law*, (28<sup>th</sup> edn, OUP 2011) 148

<sup>120</sup> *Adelson v Associated Newspapers Ltd* [2007] EWHC 3028 [8] (Eady J)

However, Eady J felt bound to ‘apply the law as it [was], and not as it might develop in the future.’<sup>121</sup> He therefore refused the application, on the basis that companies are separate entities, and one company cannot recover losses incurred by another – a strict application of *Salomon* (and, indeed, of *Foss v Harbottle*). Nevertheless, *Adelson* and *Beckett* together suggest that, in some situations at least, the current Court of Appeal leans towards disregarding *Salomon* in group situations more than it had done in *Adams*.

### **3.10.3 *Gripple Ltd v Revenue and Customers Commissioners and Linsen International Ltd v Humpuss Sea Transport Pte Ltd***

If, however, *Adelson* and *Beckett* do point towards a “rehabilitation” of *DHN*, the message has apparently yet to reach the lower courts. In the 2010 case of *Gripple Ltd v Revenue and Customers Commissioners*,<sup>122</sup> *DHN* was cited in argument in an attempt to persuade the court to lift the veil between associated companies in relation to taxation issues. Henderson J rejected this as an ‘adventurous submission,’ affirming that, ‘it is a commonplace of United Kingdom tax law that companies in a group, however closely related, are normally to be treated as separate entities.’<sup>123</sup> More recently, in *Linsen International Ltd v Humpuss Sea Transport Pte Ltd*,<sup>124</sup> Flaux J ‘repeatedly rejected the single economic entity approach by indicating that the close association between companies within a group without more does not justify lifting the veil.’<sup>125</sup> The contrast between these cases, and *Beckett* and *Adelson*, is marked, and leaves the picture unclear. One further case has the potential to change the landscape altogether.

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<sup>121</sup> Derek French, Stephen Mayson, & Christopher Ryan, *Mayson, French & Ryan on Company Law*, (28<sup>th</sup> edn, OUP 2011) 149

<sup>122</sup> [2010] EWHC 1609 (Ch)

<sup>123</sup> [2010] EWHC 1609 [23]-[24].

<sup>124</sup> *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2011] EWHC 2339 (Comm) [19], [39], [58], [126]

<sup>125</sup> D Milman, ‘Entity status issues in the UK law of business organisations and related entities: recurrent uncertainty’, (2011) 306 Co LN 1, 3

### **3.10.4 Chandler v Cape Plc**

This case involved litigation arising from the same set of circumstances as *Adams*. Chandler, an employee of Cape Building Products Ltd (“Products”), developed asbestosis. By the time Chandler claimed, Products was no longer in existence. Chandler therefore sued Products’ parent company, Cape plc. On a strict application of *Salomon*, the claim would fail. In the High Court, however, Wyn Williams J took an alternative approach which bypassed *Salomon* altogether.<sup>126</sup> He found that the parent company owed a duty of care to the employees of the subsidiary under the tort law principles of foreseeability, proximity and it being fair, just and reasonable to impose a duty.<sup>127</sup> The Court of Appeal has recently upheld this decision.<sup>128</sup>

Importantly, Wyn Williams J upheld *Adams* (and so, by implication, *Salomon*) as good law – ‘This is not a case in which it would be appropriate to pierce the corporate veil.’<sup>129</sup> Neither *DHN* nor any other “single economic unit” case was cited in the judgment. Similarly, the Court of Appeal decision rests *solely* on the tort law principle of ‘whether what the parent company did amounted to taking on a direct duty to the subsidiary’s employees.’<sup>130</sup> Indeed, Arden LJ said

I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.<sup>131</sup>

Technically, therefore, *Chandler* cannot be categorized as a “veil-lifting” case. Nevertheless, its effect is the same as if the veil *had* been lifted, and it provides a possible alternative route for *involuntary* or tort creditors to follow. The implications should be clear. If this approach becomes commonplace, the *Salomon* principle will no longer automatically protect parent companies from liability for the torts of their

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<sup>126</sup> *Chandler v Cape Plc* [2011] EWHC 951 (QBD)

<sup>127</sup> *Caparo v Dickman* [1992] 2 AC 605 (HL)

<sup>128</sup> *Chandler v Cape plc* [2012] EWCA Civ 525 (CA). Judgment was delivered on 25 April 2012.

<sup>129</sup> *Chandler v Cape plc* [2011] EWHC 951 (QBD) [66]

<sup>130</sup> *Chandler v Cape plc* [2012] EWCA Civ 525 (CA) [70]

<sup>131</sup> [2012] EWCA Civ 525 (CA) [69]

subsidiaries. In his aptly titled article '*Donoghue v Salomon* in the High Court',<sup>132</sup> reviewing the first-instance decision, Ewan McGaughey explores the implications further. He considers the liability of controlling parties for any torts, the potential liability of all directors and shareholders, and the liability of UK multinational parent companies to overseas tort claimants. As McGaughey writes, 'the conflict of *Salomon v Donoghue* was one in which *Salomon* appeared for a century to have gained the upper hand. But that may well have changed.'<sup>133</sup> The fact that the Court of Appeal has upheld the first-instance decision will no doubt be welcome to those, such as McGaughey and Crowe,<sup>134</sup> who are concerned about the implications of *Salomon* for tort creditors.

On the other hand, the fact that the Court of Appeal declined to make even *obiter* comments about wider issues relating to veil-lifting is disappointing, particularly given the uncertainty left by the same court following the decisions in *Adelson* and *Beckett*. If anything, the *Chandler* decision merely increases the uncertainty. After all, the above extract from Arden LJ's judgment clearly *affirms* the principles of *Salomon* and *Adams*, whereas *Adelson* and *Beckett* clearly hint at a departure from those principles. The Court of Appeal therefore appears to be giving conflicting messages, which is palpably unhelpful.

### **3.11 DHN and beyond: summary and conclusions**

Before 2007, it would have been easy to assess the legacy of *DHN*. It had been doubted by the House of Lords in *Woolfson*, and by the Court of Appeal in *Pinn & Wheeler*, *Adams* and *Ord*. It had not been mentioned at all in the Court of Appeal in *Multinational*, nor in the House of Lords in *The Albazero* and *Dimbleby*. *DHN* had also subjected to trenchant academic criticism, particularly by Rixon. Therefore, far from *Salomon* being placed 'in the shadow' by *DHN*, as Schmitthoff had suggested in 1976, it was actually *DHN* which had been all but eclipsed. The primacy of *Salomon*, on the other hand, had been clearly affirmed in *Adams*. The early academic and judicial

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<sup>132</sup> (2011) 4 JPI Law, 249-263. See also S Griffin, 'Establishing a holding company's duty of care to an employee of a subsidiary without the need to lift the corporate veil' (2011) 300 Co LN 1

<sup>133</sup> McGaughey (n 132) 249

<sup>134</sup> See chapter 1.4

excitement over *DHN* had been all but forgotten. Although *DHN* had never been formally overruled, and although, as Kershaw argues, it theoretically retained some very limited life, this surely amounted to the faintest breath. In short, *DHN* seemed to be one of many of Lord Denning's idiosyncratic attempts to change the law which, although potentially dynamic at the time, had since withered. In contrast, within the context of corporate groups, *Salomon* had indeed remained 'the unyielding rock'.

Since 2007, *Adelson* and *Beckett* have suggested that some members of the Court of Appeal may after all wish to "resurrect" the "single economic unit" argument. Yet this has not filtered down to the lower courts, as is clear from the judgments in *Gripple* and *Linsen*. As so often in the past, the current position is therefore unclear. Following the judgment in *Beckett*, and the first-instance decisions in *Chandler* and *Linsen*, Professor Milman lamented that 'the theme of unpredictability looms large when we look at veil lifting, whether in the context of groups or more generally. There is a real need for guidance from the Supreme Court on what is a fundamental feature of our system of corporate law.'<sup>135</sup> His comments echo those of Powles in the light of *DHN* (see chapter 3.6.1), Lord Wedderburn in the light of *Multinational* (3.8.1) and Muchlinski in the light of *Adams* (3.9.3). Again, therefore, it is disappointing that the Court of Appeal did not take the opportunity to give even *obiter* guidance in *Chandler*.

We will return to the issue of clarity and reform in chapter 6. Beforehand, however, we will consider two cases which, like *DHN*, threatened to redefine the landscape in relation to *Salomon* and veil-lifting. *Re a Company*<sup>136</sup> and *Creasey v Breachwood Motors Ltd*<sup>137</sup> are covered, respectively, in chapters 4 and 5.

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<sup>135</sup> D Milman (n 125) 4

<sup>136</sup> [1985] BCLC 333 (CA)

<sup>137</sup> [1992] BCC 638 (QBD)

## **CHAPTER 4**

### **JUSTICE AND ONLY JUSTICE? FROM *RE A COMPANY* TO *CONWAY V RATIU***

#### **4.1 Introduction**

As we saw in chapter 3, the *DHN* decision initially threatened to widen drastically the categories where the courts would lift the veil. The “single economic unit” principle might have seriously challenged the hegemony of *Salomon*. Nevertheless, the decisions in *Woolfson, Pinn & Wheeler, Adams* and *Ord* reaffirmed *Salomon*’s dominance. Whilst recent decisions such as *Adelson* and *Beckett* hint at a “rehabilitation” of *DHN*, this is as yet unclear.

In spite of the retreat away from *DHN*, the Court of Appeal in 1985 justified piercing the veil where this was ‘necessary to achieve justice.’<sup>1</sup> This is clearly the widest possible basis for departing from the *Salomon* principle. In this chapter, we look first of all at the background to *Re a Company* [1985] BCLC 333, namely the decision in *Wallersteiner v Moir*.<sup>2</sup> We will then look at the facts and judgment of *Re a Company* itself, and offer some commentary. We will then look at the subsequent judicial reaction, and also at the 2006 case of *Conway v Ratiu*.<sup>3</sup> We will then conclude by considering whether any scope now remains for the court to deviate from *Salomon* on the grounds that ‘justice so requires’.

#### **4.2 Background: *Wallersteiner v Moir***

As we saw in chapter 3.2, the *DHN* decision echoed three cases in the 1950s and 1960s in which the courts had relaxed their previously conservative approach to veil-lifting. Similarly, the decision in *Re a Company* purported to follow a comparable case in the 1970s, namely *Wallersteiner v Moir*.<sup>4</sup> It is unsurprising that Lord Denning, once again, played a significant role.

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<sup>1</sup> *Re a Company* [1985] BCLC 333, 337-8

<sup>2</sup> [1974] 1 WLR 991

<sup>3</sup> [2006] 1 All ER 571

<sup>4</sup> [1974] 1 WLR 991

Mr Moir was a minority shareholder in Hartley Baird Ltd. Dr Wallersteiner was the majority shareholder and the managing director. In March 1967, Mr Moir had sent the company's members a circular in which he accused Dr Wallersteiner of fraud, misfeasance and breach of duty. Dr Wallersteiner sued him for libel. During the course of the ensuing litigation, Mr Moir brought a counterclaim against Dr Wallersteiner on behalf of the company. One of the many issues that arose in the ensuing litigation was whether the veil between Mr Wallersteiner and Hartley Baird Ltd (and various other companies in which he held shares) should be lifted. In the Court of Appeal, Lord Denning said that Dr Wallersteiner had

used many companies, trusts, or other legal entities as if they belonged to him. He was in control of them as much as any "one-man company" is under the control of the one man who owns all the shares and is the chairman and managing director. He made contracts of enormous magnitude on their behalf on a sheet of notepaper without reference to anyone else.<sup>5</sup>

On this basis, counsel for Mr Moir argued that the companies were used by Dr Wallersteiner as a façade and therefore the veil should be lifted, whilst counsel for Dr Wallersteiner argued that the principle in *Salomon* should be held 'sacrosanct.' In a typically colourful judgment, Lord Denning held that the various companies were

just the puppets of Dr. Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures — for whose doings he should be, and is, responsible. At any rate, it was up to him to show that anyone else had a say in their affairs and he never did so: cf. *Gilford Motor Co Ltd. v. Horne* [1933] Ch. 935 , 943, 957<sup>6</sup>.

The reference to *Gilford Motor Co Ltd v Horne* suggests that Lord Denning was lifting the veil on the grounds that the corporate structure was being used as a façade or sham for misdemeanours of the individual. His judgment is significant because it was the only case expressly referred to in *Re a Company* – to which we now turn. For ease of future reference, direct quotations from the judgment are indented and numbered.

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<sup>5</sup> [1974] 1 WLR 991, 1013

<sup>6</sup> [1974] 1 WLR 991, 1013

### **4.3 Re a Company: the facts**

The case concerned an action by the liquidator of insolvent companies against a former director for breach of trust and deceit. There was evidence that the defendant, upon discovering that the companies were insolvent, had set up a network of English and foreign companies to hold his personal assets. It appeared that his aim was to put these assets beyond the reach of the liquidator.

In the High Court, the liquidator successfully applied for Mareva injunctions restraining the defendant from disposing of shares in foreign companies, or of shares in English or foreign companies entitled to assets within England, and also restraining him from procuring the disposition of English assets by such companies.<sup>7</sup> On the basis of *Salomon and Macaura*, the companies were legally separate from the defendant. Their assets were not his and were therefore, strictly speaking, beyond the claims of the liquidator. As such, the second and third orders effectively pierced the veil between the companies and the defendant. The trial judge justified this decision on the basis that

the whole structure [was] but a façade behind which the... defendant was able to control and manipulate the operations of the company directors and trustees who purported to exercise independent powers.<sup>8</sup> **(1)**

The defendant appealed against the order. He argued that the mere fact that he held shares in foreign companies did not mean he had any interest in the foreign companies' assets. In other words, he argued that there was a veil between himself and the companies in which he held shares, and the assets of those companies should not be construed as his own assets to which the liquidator might be entitled. In response, counsel for the liquidator requested that the court make orders more restrictive than those made at first instance.

Ultimately, then, the dispute boiled down to a question of whether the corporate veil between the defendant and the companies should be pierced. The defendant argued that this should only be done if

the legal structure of the companies in which the first defendant had an interest... was a complete sham<sup>9</sup> **(2)**

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<sup>7</sup> [1985] BCLC 333 (headnote)

<sup>8</sup> [1985] BCLC 333, 336

<sup>9</sup> [1985] BCLC 333, 337

The claimant, on the other hand, argued that the veil should be lifted if

the court was satisfied that the legal structure had some reality but none the less was a vehicle over which the defendant exercised substantial or effective control.<sup>10</sup>  
**(3)**

#### **4.4 Re a Company: the judgment**

In the Court of Appeal, the appeal was dismissed by Cumming-Bruce LJ. According to him, the network of companies was

an elaborate and most ingenious scheme brought into operation at the instance of the first defendant, whereby his personal assets were organised in such a way that they were held by foreign and English corporations and trusts in a manner that effectively conceal[ed] his true beneficial interest in English assets.<sup>11</sup> **(4)**

Moreover, there was

strong primary evidence that at the date when the first defendant realised that the affairs of the plaintiff companies were insolvent the first defendant was procuring his agents and associates to ensure that all his interests in real property in England and other English assets were transferred out of his apparent legal and beneficial ownership. The network of interlocking companies and trusts had already been created; after the alleged fraud pleaded in the statement of claim the network appears to have been used as a device to prevent the plaintiffs from realising the fruits of the proceedings now brought... the defendant arranged his affairs so that his English assets should be put outside the reach of his creditors.<sup>12</sup>  
**(5)**

In similar terms, the judge stated that there was

a strong prima facie case that the whole structure [was] but a facade behind which the first defendant was able to control and manipulate the operations of the company directors and trustees.<sup>13</sup> **(6)**

Following the observation of the trial judge that

all the companies and bodies were vehicles for the first defendant, and... the trusts were devices to conceal the assets of the first defendant and his relatives<sup>14</sup> **(7)**

Cumming-Bruce LJ summarised the evidence as follows:

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<sup>10</sup> [1985] BCLC 333, 337

<sup>11</sup> [1985] BCLC 333, 335

<sup>12</sup> [1985] BCLC 333, 335-336

<sup>13</sup> [1985] BCLC 333, 336

<sup>14</sup> [1985] BCLC 333, 336

the whole construction is but a facade used to place the English assets outside the reach of the first defendant's creditors, including the plaintiffs<sup>15</sup> **(8)**

He then summarised the legal issue in dispute. For the defendant,

it was only if the evidence disclosed that the legal structure of the companies in which the first defendant had an interest... was a complete sham that the court... would pierce the corporate veil and look beyond the legal entitlement to the English asset in question.<sup>16</sup> **(9)**

Counsel for the liquidator, by contrast, had

contended that if, in the case of any corporation or trust, the court was satisfied that the legal structure had some reality but none the less was a vehicle over which the defendant exercised substantial or effective control, the Mareva injunction was appropriate in order to prevent disposal of English assets; and discovery by interrogatories was appropriate in order to ascertain the nature and extent of the first defendant's interest once it was demonstrated (as it was) that the vehicles were directly or indirectly entitled to English assets.<sup>17</sup> **(10)**

Awarding the more restrictive orders sought by the claimants, Cumming-Bruce LJ ruled as follows:

In our view the cases before and after *Wallersteiner v Moir* [1974] 3 All ER 217, [1974] 1 WLR 991 show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. As Lord Denning MR said ([1974] 3 All ER 217 at 238, [1974] 1 WLR 991 at 1013) the companies there identified were distinct legal entities and the principles of *Salomon v Salomon & Co Ltd* [1897] AC 22 prima facie applied. But only prima facie. On the facts of the *Wallersteiner* case, the companies danced to Dr Wallersteiner's bidding. Buckley LJ disagreed on the facts about the position of IFT, but Scarman LJ held that the evidence disclosed liability in Wallersteiner on the ground that he instigated the loan of £50,000.<sup>18</sup> **(11)**

In his view, the defendant had

brought into existence the sophisticated and intricate network of interrelated English and foreign companies and foreign trusts as a mechanism through which [he] could at will dispose of his English assets<sup>19</sup> **(12)**

and had then later

arranged that his English assets should disappear into the network of interrelated English and foreign legal structures of such complexity that only he and/or his

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<sup>15</sup> [1985] BCLC 333, 336

<sup>16</sup> [1985] BCLC 333, 337

<sup>17</sup> [1985] BCLC 333, 337

<sup>18</sup> [1985] BCLC 333, 337-8

<sup>19</sup> [1985] BCLC 333, 338

agents could disentangle his personal interest, or in the case of some English assets, he had already achieved this confusion against the contingency of a future judgment.<sup>20</sup> (13)

For Cumming-Bruce, this was sufficient to justify lifting the veil and granting the revised orders sought by the claimants.

#### **4.5 Re a Company: commentary**

The part of the judgment dealing with the issue of lifting the veil is notable both for its brevity and its scope. Extract 11 above is the only paragraph in which Cumming-Bruce LJ set out his legal reasoning for lifting the veil, namely ‘to achieve justice irrespective of the legal efficacy of the corporate structure.’ This is surely the broadest possible justification, and seems to go beyond even Lord Denning’s opinion, in *Littlewoods Mail Order Stores Ltd v McGregor*, that ‘the doctrine in *Salomon*’ should be ‘watched very carefully.’<sup>21</sup> Given that the same court had, not long previously, rejected veil-lifting in the *Multinational Gas* case,<sup>22</sup> and given that the House of Lords had done the same in *Dimbleby & Sons Ltd v NUJ*,<sup>23</sup> the breadth of Cumming-Bruce LJ’s statement seems suspect, to say the least. It is also remarkable that he specifically adduced only one judgment, that of Lord Denning in *Wallersteiner*, to support it. (Presumably he also had *DHN* in mind – in particular, Shaw LJ’s desire to avoid ‘a denial of justice.’<sup>24</sup>) This seems even more remarkable when one considers Lord Denning’s own idiosyncratic tendency to ignore precedent when (in his view) it ran contrary to his desire to achieve justice, and the tendency of the House of Lords to overrule his decisions. One can even question whether Cumming-Bruce LJ rightly applied *Wallersteiner*. After all, Lord Denning’s reference to *Gilford Motor Co Ltd v Horne* suggests that – at least in *Wallersteiner* - he lifted the veil on the grounds that the corporate structure was a “sham” or “facade”, rather than on the catch-all grounds of “achieving justice.” We will return to this point in the conclusion to this chapter.

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<sup>20</sup> [1985] BCLC 333, 338

<sup>21</sup> [1969] 3 All ER 855, 860 (see chapter 3.2.3)

<sup>22</sup> See chapter 3.8.1

<sup>23</sup> See chapter 3.8.2

<sup>24</sup> [1976] 1 WLR 852, 867 (see chapter 3.4.3)

## **4.6 Re a Company: reactions**

### **4.6.1 Academic reactions**

Given the scope of Cumming-Bruce LJ's judgement, and given that it was made in the Court of Appeal, there seems to have been remarkably little contemporary or subsequent academic or judicial reaction to the case.<sup>25</sup> (Perhaps this was a result of the brevity of his reasoning!) Writing before the judgment in *Adams*, Ziegler & Gallagher argued that 'justice' was the ultimate ground for all examples of veil-lifting in English (and US and Australian) cases: 'it is suggested that the categories traditionally proposed for lifting the veil can be subsumed into the one category, viz. the prevention of injustice.'<sup>26</sup> This language clearly resembles Cumming-Bruce LJ's statement at extract 11, that 'the court will use its powers to pierce the corporate veil if it is necessary to achieve justice'. However, Ziegler and Gallagher do not mention *Re a Company*. This may suggest that they were unaware of the case, even though it would have clearly supported their argument. Alternatively, it may be that they were aware of it, but chose not to refer to it on the grounds that the legal reasoning in the case was too brief and/or flimsy for their purposes.

### **4.6.2 Judicial reactions**

#### **4.6.2.1 Adams v Cape Industries plc<sup>27</sup>**

If academic reaction to the case has been virtually non-existent, the judicial reaction, whilst more extensive, has generally been negative. Again, this is perhaps unsurprising in light of Cumming-Bruce's narrow, tenuous reasoning.

The first major company law case in which *Re a Company* was mentioned was *Adams*.<sup>28</sup> It was mentioned by Slade LJ under the name of *X Bank v G*,<sup>29</sup> but only very briefly: 'the report of *X Bank Ltd. v. G.* is so brief that we think it would not be safe to

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<sup>25</sup> Neither Westlaw nor Lexis Library point to any journal articles written specifically about the case.

<sup>26</sup> P Ziegler & L Gallagher, 'Lifting the corporate veil in the pursuit of justice' [1990] JBL 292

<sup>27</sup> [1990] Ch 433

<sup>28</sup> Prior to *Adams*, *Re a Company* was mentioned in connection with Mareva injunctions in *Republic of Haiti v Duvalier* [1989] 1 All ER 456.

<sup>29</sup> (1985) 82 LSG 2016; *The Times* 13 April 1985)

rely on it for present purposes.<sup>30</sup> More importantly, Slade LJ's key statement about "justice" clearly stated the diametric opposite to *Re a Company*: '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.* [1897] A.C. 22 merely because it considers that justice so requires.'<sup>31</sup>

Subsequent judges were therefore left with two conflicting Court of Appeal judgments – one very wide in its scope about veil-lifting, and one very narrow. As we shall see, it was the approach in *Adams* which – at least in the lower courts - would ultimately prevail.

#### **4.6.2.2      Beyond Adams**

Following *Adams*, *Re a Company* was first mentioned in a case concerning Mareva injunctions – namely, *Atlas Maritime Co SA v Avalon Maritime Ltd; The Coral Rose (No 1)*.<sup>32</sup> Staughton LJ briefly referred to it as 'an exceptional case involving allegations of fraud and the manipulation of corporate structures'. He did not consider it relevant to the case at hand. *Re a Company* was alluded to, but not discussed, in *TSB Private Bank International SA v Chabra*,<sup>33</sup> another case involving Mareva injunctions. As we shall see in chapter 5, it was alluded to, and seemingly followed in principle, in *Creasey v Breachwood Motors*.<sup>34</sup> However, *Creasey* is now so discredited that the reference therein to *Re a Company* surely reveals little. *Re a Company* was again briefly mentioned, but not discussed, in *Re H (Restraint Order: Realisable Property)*<sup>35</sup> and in *International Credit and Investment Company (Overseas) Ltd v Adham*.<sup>36</sup> Not until *Yukong Line Ltd. of Korea v Rendsburg Investments Corporation of Liberia and Others (No. 2)*<sup>37</sup> (examined in more detail in chapter 5.6.2), did a judge evaluate the judgment in *Re a Company* - and that evaluation was brief and negative. Toulson J said:

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<sup>30</sup> [1990] Ch 433, 452

<sup>31</sup> [1990] Ch 433, 536

<sup>32</sup> [1991] 4 All ER 769

<sup>33</sup> [1992] 2 All ER 245

<sup>34</sup> [1992] BCC 638

<sup>35</sup> [1996] 2 BCLC 500

<sup>36</sup> [1998] BCC 134

<sup>37</sup> [1998] 1 WLR 294

Some authorities have suggested that the court will use its powers to pierce the corporate veil whenever it thinks it necessary to achieve justice (see *Re a Company* [1985] BCLC 333 at 337–338), but such a broad approach was disapproved by the Court of Appeal in *Adams v Cape Industries plc* [1990] BCLC 479 at 513, [1990] Ch 433 at 536...<sup>38</sup>

The same approach was taken by Sir Andrew Morritt V-C *Trustor AB v Smallbone* (No. 2)<sup>39</sup> (considered in more detail in chapter 5.6.2.1):

[In] *Re a Company* [1985] BCLC 333... a complicated structure of foreign companies and trusts was used to place the individual's assets beyond the reach of his creditors. Cumming-Bruce LJ described (at 336) the structure as a facade but (at 337–338) expressed the principle to be that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. The latter statement is not consistent with the views of the Court of Appeal in *Adams's* case...<sup>40</sup>

On this basis, the court in *Trustor* also declined to follow lift the veil on the grounds of “justice”. The 2006 case of *Conway v Ratiu*,<sup>41</sup> however, has made the picture less clear.

#### **4.6.3 Conway v Ratiu**

Conway was a solicitor who advised Ratiu in relation to a property transaction. Ratiu had purchased an off-the-shelf company as a vehicle for the transaction, and had instructed Conway in his capacity as the company’s director. Conway later competed against Ratiu in bidding for another piece of land. In a letter to his estate agents, Ratiu alleged that Conway had breached his duty to avoid a conflict between his personal interest and his duty to Ratiu as his client. Conway sued Ratiu for defamation. He argued that he had never owed duties to Ratiu, since he had not been instructed by Ratiu but by the company. In the Court of Appeal, it was held, on a question of fact, that the solicitor had a relationship of trust and confidence with Ratiu and therefore owed

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<sup>38</sup> [1998] 1 WLR 294, 305

<sup>39</sup> [2001] 1 WLR 1177

<sup>40</sup> [2001] 1 WLR 1177, 1185. Sir Andrew Morritt V-C incorrectly went on to say that *Re a Company* had not been cited in *Adams*; in fact it had, but under the name of *X Bank Ltd v G* (1985) 82 LSG 2016; *The Times* 13 April 1985

<sup>41</sup> [2006] 1 All ER 571

him (as well as the company) a fiduciary duty. A number of statements made by the judges are worth repeating in full.<sup>42</sup>

Auld LJ referred, at [75], to

the readiness of the courts, regardless of the precise issue involved, to draw back the corporate veil to do justice when common-sense and reality demand it.

At [78], he said:

There is, it seems to me, a powerful argument of principle, in this intensely personal context of considerations of trust, confidence and loyalty, for lifting the corporate veil where the facts require it to include those in or behind the company who are in reality the persons whose trust in and reliance upon the fiduciary may be confounded.

At [81], he said:

It is also important to remember that the issue of fiduciary relationship is usually tried by a chancery judge in direct claims of breach of trust or other fiduciary duty as a mixed question of law and fact. In the context of defamation it is in this instance transposed into a supposed issue of objective fact for a jury as to whether a defendant can justify not only his understanding of his relationship with the other party, but also the validity of the complaint of a violation of that relationship. In such a context there may well be a greater imperative... for *allowing reality to prevail over technical aspects of corporate law*. (emphasis added)<sup>43</sup>

At [186], Laws LJ stressed his 'emphatic agreement' with Auld LJ's approach. At [188], Sedley LJ said:

I recognise that there is an asymmetry between the law's longstanding insistence on the discrete legal personality of limited liability companies and its willingness to lift the veil, as the expression is, in a case like the present. *But it is the latter, not the former, which accords with common sense and justice when the issue is who a solicitor owes his professional duties to.*

The difference between these statements and the judgment in Adams is immediately obvious. The first statement of Auld LJ, and the statement of Sedley LJ, in particular,

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<sup>42</sup> The following summary is based on that in Derek French, Stephen Mayson & Christopher Ryan, *Mayson, French & Ryan on Company Law* (27<sup>th</sup> edn, OUP 2010-2011) 150-151

<sup>43</sup> This would appear to be an example of conflict between the Chancery Division and the common law, with the Chancery Division prevailing.

clearly echo Cumming-Bruce LJ's statement in *Re a Company*, rather than Slade LJ's judgment in *Adams*.

How significant are these statements? As Mayson, French and Ryan observe, the court did not refer to *Adams* in their judgments - nor indeed to *Salomon*, *Re a Company* or any other case on lifting the veil. Rather, the judgments (and, seemingly, the arguments put forward by counsel) were based on the law relating to solicitors' fiduciary duties, rather than on company law. As such, 'their remarks may be regarded as per incuriam and so not authoritative.'<sup>44</sup> After all, the assertion by Auld LJ that the courts show 'readiness' to 'draw back the corporate veil to do justice when common-sense and reality demand it' is clearly *not* borne out by *Adams* or by subsequent cases.

Nevertheless, for three Court of Appeal judges to make such strong remarks is clearly significant. Whilst the ruling in *Conway* does not expressly challenge *Salomon* or *Adams*, it raises a pertinent question. If a case genuinely concerned with corporate personality came before the Court of Appeal (or Supreme Court) today, how would the judges react? Put differently – if *Adams* was to come before the Court of Appeal or the Supreme Court today, would *Salomon* be followed as closely as it was in 1989?<sup>45</sup> Based on the comments in *Conway*, it seems that at least some Court of Appeal judges are keen to (re)widen the categories where the veil should be lifted, perhaps even to state, *contra Adams*, that 'the court is indeed free to disregard the principle of *Salomon v Salomon Co Ltd* [1897] AC 22 where it considers that justice so requires'.

#### **4.6.4 Beyond Conway v Ratiu**

Unless or until the Court of Appeal or Supreme Court makes a definitive statement on the issue, however, the position in *Adams* must be seen as authoritative: the court is 'not free to disregard the principle of *Salomon v Salomon Co Ltd* [1897] AC 22, merely because it considers that justice so requires'. This is certainly the approach taken by first-instance judges. In *Ben Hashem v Ali Shayif* (a divorce case in which the court

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<sup>44</sup> Derek French, Stephen Mayson & Christopher Ryan, *Mayson, French & Ryan on Company Law* (27<sup>th</sup> edn, OUP 2010-2011). 151

<sup>45</sup> Judgement in *Adams* was given on 27 July 1989.

declined to pierce the veil where the husband had allegedly used a company as an *alter ego*), Munby J stated that:

the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice. In common with both Toulson J in *Yukong Line Ltd of Korea v Rendsberg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294 at page 305 and Sir Andrew Morritt VC in *Trustor* at para [21], I take the view that the dicta to that effect of Cumming-Bruce LJ in *In re a Company* [1985] BCLC 333 at pages 337-338, have not survived what the Court of Appeal said in *Cape* at page 536...<sup>46</sup>

Munby J made no reference to the Court of Appeal's approach in *Conway v Ratiu*, suggesting that first-instance judges do not see that case as authority that the veil can be lifted where this is "necessary to achieve justice."

#### **4.7 Re a Company: conclusions**

The judgment in *Re a Company* must therefore be seen as one that was unsound at the time, and that has been disapproved by *Adams*: the court is *not* able to pierce the corporate veil on the catch-all grounds of "justice". With the benefit of hindsight, though, one can speculate whether there was any need to do so in the first place. We have already noted that, in *Wallersteiner*, Lord Denning referred to *Gilford*, and that *Wallersteiner* was the only case expressly referred to by Cumming-Bruce LJ in *Re a Company*.<sup>47</sup> Moreover, the frequent use by both the trial judge and by Cumming-Bruce LJ of terms such as "device", "sham", "façade" and "vehicles" (see extracts 1, 2, 3, 5, 6, 7, 8, 9 and 10 above from the judgment in *Re a Company*) begs the following question. Why, in both *Re a Company* and in *Wallersteiner* before it, was the veil not lifted for the same reason as in *Gilford Motor Co Ltd* and in *Jones v Lipman* – namely, on the grounds that the corporate structure was being used as a "sham" or "façade" to conceal the "fraud" of a shareholder? If Cumming-Bruce had taken such an approach, *Re a Company* might still be good law. The answer to the question is, perhaps, because the rationale for lifting the veil on the grounds of "fraud" was at that point relatively undeveloped. The catalyst for its development would be a 1992 case which continues to

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<sup>46</sup> [2008] EWHC 2380 (Fam) at [160]

<sup>47</sup> See chapters 4.2 and 4.4 above.

perplex. The case of *Creasey v Breachwood Motors Ltd*,<sup>48</sup> and subsequent cases examining the “fraud” exception, will be considered in chapter 5.

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<sup>48</sup> [1992] BCC 638

## CHAPTER 5

### THE JOKER IN THE PACK: THE CURIOUS CASE OF CREASEY V BREACHWOOD MOTORS LTD

#### 5.1 The legacy of *Adams v Cape Industries plc*

Following the decision in *Adams*, the description of *Salomon* as ‘the unyielding rock’<sup>1</sup> was apt indeed. Slade LJ’s crucial statement bears repeating:

[S]ave 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.* [1897] A.C. 22 merely because it considers that justice so requires.<sup>2</sup>

As seen in chapter 3, the retreat from the “single economic unit” argument of *DHN* had been all but total. Moreover, the court had rejected the proposition that that NAAC was the agent of Cape, the principal, and that Cape should therefore be held liable for the judgment against NAAC. As seen in chapter 4, the catch-all “justice” rationale of *Re a Company* had been expressly contradicted. Other than in cases which rested on ‘the wording of particular statutes or contracts’, it seemed that the court recognised only one ground for departure from the *Salomon* principle:

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 rule prohibiting the piercing of “the corporate veil.” Lord Keith of Kinkel referred to this principle in *Woolfson v. Strathclyde Regional Council*, 1978 S.L.T. 159 in the course of a speech with which Lord Wilberforce, Lord Fraser of Tullybelton and Lord Russell of Killowen agreed. With reference to the *D.H.N.* decision [1976] 1 W.L.R. 852, he said, at p.161: “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.*”<sup>3</sup>

The court saw *Jones v Lipman*<sup>4</sup> (examined in chapter 2.3.3) as an example of the veil being lifted on such grounds.<sup>5</sup> However, Slade LJ declined to set down any firmer guidelines as to when this “façade”, “sham” or “fraud” category might arise:

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<sup>1</sup> Judgement in *Adams* was given on 27 July 1989. Lord Templeman’s famous lecture was given on 15 November 1989.

<sup>2</sup> [1990] Ch 433, 536

<sup>3</sup> [1990] Ch 433, 540 (emphasis added)

<sup>4</sup> [1962] 1 WLR 832 (ChD)

From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade within the meaning of that word as used by the House of Lords in *Woolfson*, 1978 S.L.T. 159 . We will not attempt a comprehensive definition of those principles.<sup>6</sup>

He did, however, emphatically reject any argument that the veil should be lifted on moral grounds simply because the principles of separate personality and limited liability had disadvantaged the tort creditors:<sup>7</sup>

[Counsel for Adams] 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... 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. [Counsel for Mr Adams] 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 (save in the case of A.M.C. to which special considerations apply) to expect that the court would apply the principle of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 in the ordinary way.<sup>8</sup>

In short, *Salomon* had seemingly regained the hegemony which it had enjoyed following prior to 1966,<sup>9</sup> and the scope for departing from *Salomon* had been greatly restricted.

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<sup>5</sup> [1990] Ch 433, 542

<sup>6</sup> *Adams v Cape Industries plc* [1990] Ch 433, 543

<sup>7</sup> *Adams v Cape Industries plc* [1990] Ch 433, 543. McGaughey and Crowe reject this position: see chapter 1.4.

<sup>8</sup> [1990] Ch 433, 545

<sup>9</sup> See chapter 2.3 and 2.4.

## **5.2 An introduction to *Creasey v Breachwood Motors Ltd***

In 1992, however, the case of *Creasey v Breachwood Motors Ltd*<sup>10</sup> threatened to widen once again the situations where the courts would depart from the *Salomon* principle. In the remainder of this chapter, we examine that case in detail. Although overruled by the Court of Appeal in *Ord v Belhaven Pubs Ltd*,<sup>11</sup> *Creasey* has generated considerable discussion and diverse opinions. Some have described the decision as ‘maverick’ and ‘confused’,<sup>12</sup> or as ‘rather eclectic’<sup>13</sup> and ‘simply irresolvable in accordance with established common law principles.’<sup>14</sup> Others, however, have labelled it as a ‘correct’ decision in spite of ‘wrong’ reasoning;<sup>15</sup> as a ‘sensible and appropriate’ decision;<sup>16</sup> and as an ‘equitable and commonsense conclusion’ to a ‘just and reasonable exercise of the court’s discretion’<sup>17</sup> to lift the veil. Whilst some have ‘commended’<sup>18</sup> the Court of Appeal for overruling *Creasey* in *Ord*, others have described that decision as ‘a pity.’<sup>19</sup>

We will first examine the facts and the judgment, which was given by Richard Southwell QC (“Southwell”). We will then consider the subsequent academic and judicial reactions, noting the difficulties in categorising *Creasey*, and its ultimate overruling by the Court of Appeal in *Ord*. We will then consider further how *Creasey* stimulated fresh debate about when the court might depart from *Salomon* and lift the veil. In particular, we will assess the arguments for a “*Creasey* extension” to the “fraud” category, and the way in which *Creasey* and subsequent cases have clarified exactly when the “traditional” “fraud” exception will apply. Finally, we will review some recent

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<sup>10</sup> [1992] BCC 638

<sup>11</sup> [1998] 2 BCLC 447, [1998] BCC 607

<sup>12</sup> Alan Dignam & John Lowry, *Company Law* (6<sup>th</sup> edn, OUP 2010) 41.

<sup>13</sup> Marc Moore, “A temple built on faulty foundations”: piercing the corporate veil and the legacy of *Salomon v Salomon* [2006] JBL 180, 184

<sup>14</sup> *ibid* 202

<sup>15</sup> Cheong Ann Png, ‘Lifting the veil of Incorporation: *Creasey v Breachwood Motors*: a right decision with the wrong reasons’ (1999) 20(4) *Co Law* 122, 124

<sup>16</sup> Daniel Bromilow, ‘*Creasey v Breachwood Motors*: mistaken identity leads to untimely death’ (1998) *Co Law* 19(7) 198

<sup>17</sup> Stephen Griffin, *Company Law: Fundamental Principles* (4<sup>th</sup> edn, Pearson 2006), 26-27

<sup>18</sup> Bill Maughan & Stephen Copp, ‘Piercing the Corporate Veil’ (1998) 148(6846) *NLJ* 938, 940

<sup>19</sup> Bromilow (n 16) 201

developments, before concluding with an assessment of *Creasey's* overall legacy on the debate about *Salomon* and judicial veil-lifting.

### **5.3 Creasey: the facts**

The facts of *Creasey* were as follows. Breachwood Welwyn Ltd (“Welwyn”) operated a garage, and employed Mr Creasey as a general manager. The garage operated from premises owned by Breachwood Motors Ltd (“Motors”). Welwyn and Motors had the same two directors and shareholders, Mr Ford and Mr Seaman. Motors operated similar businesses elsewhere.

In March 1988, Creasey was dismissed by Welwyn. In June 1988, he sued Welwyn for wrongful dismissal. In November 1988, Welwyn ceased trading. The following day, Motors took over Welwyn’s business. Motors took over all of Welwyn’s assets (free of any consideration) and paid all of Welwyn’s then creditors, but left no funds available to meet Creasey’s claim, should it succeed. Motors continued to operate the business, at the same premises and under the same business name. In March 1991, Creasey obtained judgment for damages of £61,910.27 in default against Welwyn. Meanwhile, the registrar had given notice to Welwyn that it would be struck off the register and dissolved, which took effect on 11 June 1991. Creasey successfully sought an order that Motors be substituted as defendants, and therefore made liable for the judgment debt. Motors appealed. The appeal was heard by Southwell, sitting as a deputy High Court judge. Creasey argued that Ford and Seaman had deliberately transferred all of Welwyn’s assets to Motors, leaving him with a worthless claim against a defendant with no assets. He argued that the court should therefore lift the veil and hold Motors liable for Welwyn’s debt to Creasey. This argument was accepted by Southwell, to whose judgment we now turn.

### **5.4 Creasey: the judgment**

In rejecting the appeal, Southwell confirmed that Motors should be substituted as defendant to Creasey’s action. One might note, at this stage, that Creasey did not press for Ford and Seaman to be held personally liable for the judgment debt against Welwyn,

nor did Southwell countenance this step. Strictly speaking, therefore, Southwell's ruling deviates from the principle in *The Albazero*, that companies in the same group are not liable for each other's debts. Indeed, Southwell specifically referred to a need to prevent the 'Breachwood group' from evading its contingent liabilities to Creasey.<sup>20</sup> Having said that, the principle in *The Albazero* itself derives from *Salomon*, and therefore Southwell's judgment can in turn be considered as a deviation from *Salomon*. We need of course only consider those parts which deal with the corporate veil argument. Direct quotations from the judgment are indented and numbered.

Southwell noted that counsel for Creasey, Mr Behar ("Behar") had argued that the veil should be lifted because the corporate structure was being used as a sham to evade legal obligations – more precisely, that Motors was being used as a vehicle to evade Welwyn's (contingent) legal obligations to Mr Creasey. Behar had cited the cases of *Gilford* and *Jones* in support. Southwell noted that the facts in *Creasey* were different, since

Motors was already in existence and carrying on its own business, and the "stratagem", if there was one, involved the transfer of the relevant business to Motors.<sup>21</sup> **(1)**

Southwell also noted that Behar had cited *Re a Company* [1985] BCLC 333 in which, as seen in chapter 4, the Court of Appeal had

pierced the corporate veil in order to achieve justice.<sup>22</sup> **(2)**

Southwell quoted from Cumming-Bruce LJ's judgment in that case:

"In our view the cases before and after *Wallersteiner v Moir* [1974] 1 WLR 991 show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. As Lord Denning MR said at p. 1013 in the *Wallersteiner* case, the companies there identified were distinct legal entities and the principles of *Salomon v Salomon & Co Ltd* [1897] AC 22 prima facie applied. But only prima facie..."<sup>23</sup> **(3)**

Southwell's next statement, as shall be seen, has stimulated some debate:

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<sup>20</sup> [1992] BCC 638, 647

<sup>21</sup> [1992] BCC 638, 646

<sup>22</sup> [1992] BCC 638, 646

<sup>23</sup> [1992] BCC 638, 646; quoting from *Re a Company* [1985] BCLC 333, 337-8

The power of the court to lift the corporate veil exists. The problem for a judge of first instance is to decide whether the particular case before the court is one in which that power should be exercised, recognising that this is a strong power which can be exercised to achieve justice where its exercise is necessary for that purpose, but which, misused, would be likely to cause not inconsiderable injustice.<sup>24</sup> **(4)**

He then considered two cases which Behar had not cited. The first was *Woolfson*: Southwell observed that, in that case, (as seen in chapter 3), Lord Keith had cast doubt upon *DHN*. The second was *Adams*. Southwell noted that the court had declined to give a 'comprehensive definition' of the principles the court should follow when ascertaining whether or not the arrangements of a group constitute a "facade".<sup>25</sup> He also remarked that, in *Adams*, the Court of Appeal had

rejected the submission that the veil could be pierced where a defendant by the device of a corporate structure attempts to evade "such rights of relief as third parties may in the future acquire... the veil could [only] be pierced where the defendant by the device of a corporate structure attempts to evade, "(1) limitations imposed on his conduct by law; (2) such rights of relief against him as third parties already possess ..."<sup>26</sup> **(5)**

However, Southwell maintained that the facts in *Creasey* were very different from those in *Woolfson* and *Adams*.<sup>27</sup> **(6)**

The rulings in those cases should therefore *not* bar the piercing of the veil in *Creasey*, in which the transfer of assets from Welwyn of Motors would otherwise enable the Breachwood group owned by Mr Ford and Mr Seaman to evade responsibility for the contingent liabilities to Mr Creasey for breach of his contract of employment.<sup>28</sup> **(7)**

For Southwell,

The most important factor [was] that Mr Ford and Mr Seaman, and through them Motors, themselves deliberately ignored the separate corporate personalities of Welwyn and Motors, and did so with the benefit of the advice of the solicitors acting for Welwyn and Motors. Nothing [...] could justify their conduct in deliberately shifting Welwyn's assets and business into Motors in total disregard

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<sup>24</sup> [1992] BCC 638, 646-7

<sup>25</sup> [1992] BCC 638, 647, quoting from *Adams v Cape Industries plc* [1990] Ch 433, 543 (see chapter 5.1 above)

<sup>26</sup> [1992] BCC 638, 647, quoting from *Adams v Cape Industries plc* [1990] Ch 433, 544 (see chapter 5.1 above)

<sup>27</sup> [1992] BCC 638, 647

<sup>28</sup> [1992] BCC 638, 647

of their duties as directors and shareholders, not least the duties created by Parliament as a protection to all creditors of a company.<sup>29</sup> **(8)**

He was critical of the fact that Welwyn

was not put into liquidation. As a subsisting company it was entitled to retain its business and assets, so that they might be available to pay a dividend however small to such of Welwyn's creditors as Motors decided not to pay. Mr Ford and Mr Seaman decided instead to remove the business and assets of Welwyn to Motors, and, realising that the business could not be carried on satisfactorily unless Welwyn's trade creditors were paid, paid all their then actual creditors, but left Mr Creasey facing a defendant without assets. They did so in full knowledge of Mr Creasey's claim<sup>30</sup>. **(9)**

Southwell commented that, on the evidence before him,

the inference could readily be drawn that [...] Mr Ford and Mr Seaman acted in the way they did [...] in order to ensure that Mr Creasey if he succeeded in his claim would not be able to recover anything.<sup>31</sup> **(10)**

However, he considered it

wrong to draw so strongly adverse an inference at this stage on only the affidavit evidence.<sup>32</sup> **(11)**

Nevertheless, he maintained that it was appropriate for the court to lift the veil and hold Motors liable for Welwyn's outstanding liability to Creasey. Notwithstanding objections from Motors,

the central point [was] that the business and assets should have remained with Welwyn unless and until Motors bought them by paying a proper price for them.<sup>33</sup> **(12)**

Southwell then went on to consider three specific reasons which Motors had advanced as to why the veil should *not* be lifted. Firstly, Motors had argued that it was not a sham company like those in *Gilford* and *Jones*, but a solid company with its own businesses; and the assets were not transferred to defeat a contractual liability which Welwyn would otherwise have paid, but because Welwyn was genuinely insolvent before the transfer took place. According to Southwell, though,

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<sup>29</sup> [1992] BCC 638, 647-8

<sup>30</sup> [1992] BCC 638, 648

<sup>31</sup> [1992] BCC 638, 648

<sup>32</sup> [1992] BCC 638, 648

<sup>33</sup> [1992] BCC 638, 648

the facts remain[ed] that Welwyn had assets of over £70,000 and a subsisting business, that Mr Creasey [was] the only unpaid creditor, and that he [was] now faced with a dissolved company having no assets at all.<sup>34</sup> **(13)**

Motors' second argument was that, if Welwyn had been wound up, Creasey would have had a disputed claim against a company in liquidation. To permit him to enforce the entire judgment against a solvent company, Motors, was inequitable, since that would put him in a better position. Southwell found this argument persuasive, and therefore set aside the original judgment and damages assessment, noting that there

was and is an arguable defence to the [initial] action for wrongful dismissal<sup>35</sup> **(14)**

Thirdly, Motors argued that to substitute Motors as defendant was wrong and unjust, since Creasey was already entitled to restore Welwyn to the register and then petition for its winding up, or seek an action in tort against Motors, Ford and Seaman. In response, Southwell asked whether it was

right to use this route [i.e. substituting Motors as defendant] so as to achieve justice between the parties<sup>36</sup>. **(15)**

However, since Creasey was legally aided, and in view of the costs of the actions referred to by Motors, Southwell

doubt[ed] very much whether in view of the sums in issue justice [could] be done for Mr Creasey if Motors were not substituted<sup>37</sup> **(16)**

Having dealt with these submissions by Motors, Southwell closed by considering whether he should simply allow Motors' appeal and leave Creasey to pursue his rights against Ford, Seaman and Motors. He closed as follows:<sup>38</sup>

Because of the conduct of Motors as directed by Mr Ford and Mr Seaman, justice would not be done if Motors were not to be held to be directly liable to Mr Creasey for breach of his employment contract, if there was a breach, which has yet to be decided. **(17)**

To put the parties to all the expense probably of two sets of proceedings (one by Mr Creasey against Motors and the two directors, and the other by the liquidator of

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<sup>34</sup> [1992] BCC 638, 648

<sup>35</sup> [1992] BCC 638, 651

<sup>36</sup> [1992] BCC 638, 649

<sup>37</sup> [1992] BCC 638, 649

<sup>38</sup> These three closing statements are all from [1992] BCC 638, 652

Welwyn against the same persons) would be unjust to Mr Creasey and would involve substantial unnecessary expense for the defendants. **(18)**

I cannot ignore the fact that Mr Creasey is funded by the legal aid board. This is an additional factor pointing to the need to lift the corporate veil, and to ensure that the remaining issues are decided in the present action, and against the party or parties with primary responsibilities. **(19)**

## **5.5 Creasey: academic reactions**

Writing in 1992, Lowry commented that the *Creasey* decision ‘does not appear to fit neatly into any of the established categories where the courts have been prepared to pierce the veil.’<sup>39</sup> This comment is surely correct. Some of Southwell’s language is that of the “sham” exception to the *Salomon* principle. Elsewhere, he uses the language of the “justice” approach, which was taken in *Re a Company* but then categorically rejected in *Adams*. At still other points, his decision seems to be driven by a desire to remedy or penalise a breach of duty on the part of Ford and Seaman, the directors of Welwyn, in transferring assets to Motors free of consideration. Unsurprisingly, therefore academics are divided about how to categorise the case.

### **5.5.1 Should Creasey be categorised as a “fraud” case?**

Some writers place *Creasey* into the same category as *Gilford* and *Jones*. They maintain that, in *Creasey*, Southwell lifted the veil on the basis that Motors was being used as a “facade” or “sham”, in order to evade a legal obligation. Such writers include Farrar and Hannington (writing in 1998, seemingly before *Ord v Belhaven Pubs Ltd* was decided),<sup>40</sup> Maughan and Copp (writing in 1998, following the *Ord* decision),<sup>41</sup> Pennington (2001),<sup>42</sup> and Talbot (2008).<sup>43</sup>

These writers do not generally elaborate on why they categorise *Creasey* in this way. It is possible that they do so based on the allusion to a ‘stratagem’ in extract 1 above, or

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<sup>39</sup> John Lowry, ‘Lifting the Corporate Veil’ [1990] JBL 41

<sup>40</sup> John Farrar & Brenda Hannigan, *Farrar’s Company Law* (4<sup>th</sup> edn, Butterworths 1998) 72-73

<sup>41</sup> Maughan & Copp (n 18)

<sup>42</sup> Robert Pennington, *Pennington’s Company Law* (8<sup>th</sup> edn, Butterworths 2001) 55

<sup>43</sup> Lorraine Talbot, *Critical Company Law* (Routledge 2008) 34

because counsel for Creasey had pleaded the case in these terms. If the case *is* to be considered a “fraud” case, then it is clearly different from both *Gilford* and *Jones*. In those cases, the defendants set up new companies in order to evade their obligations. In *Creasey*, by contrast, and as Southwell noted (see extract 1), Motors already existed as a trading company, and any “sham” involved the transfer of Welwyn’s business to Motors. (Talbot incorrectly states that Motors was a ‘newly formed company... set up specifically to hold the assets [of Welwyn]’.<sup>44</sup>) However, as Daniel Bromilow observes,<sup>45</sup> there is a more fundamental reason why the case should *not* be considered as a “fraud” case along the lines of *Gilford* and *Jones*. Southwell himself declined, on the basis of affidavit evidence alone, to infer that Ford and Seaman had acted as they did in a deliberate attempt to deprive Creasey of the chance to recover any money, should his claim succeed (see extract 11). In other words, Ford and Seaman lacked the necessary fraudulent or improper *intention* required for the fraud exception to apply. This weighs against those who interpret *Creasey* as a “fraud” case. Payne and Png nevertheless use *Creasey* to build important arguments about the “fraud” exception to the rule in *Salomon*, to which we return in chapter 5.7.2 below.

### **5.5.2 Should Creasey be categorised as a “justice” case?**

The majority of commentators categorise *Creasey* as a case in which the veil was lifted “in the interests of justice”, in order to remedy the apparent injustice done to Mr Creasey by the transfer of assets from Welwyn to Motors, which left him with a worthless claim. This view is taken by Payne (1997),<sup>46</sup> Grier (1998),<sup>47</sup> Griffin (2006),<sup>48</sup> Moore (2006),<sup>49</sup> Lowry and Reisberg (2009),<sup>50</sup> Girvin *et al* (2010),<sup>51</sup> and Sealy and Worthington (2010).<sup>52</sup> Such a view is eminently understandable. There are references to piercing the veil to

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<sup>44</sup> *ibid* 37

<sup>45</sup> Bromilow (n 16) 199.

<sup>46</sup> Jennifer Payne, ‘Lifting the Corporate Veil: A Reassessment of the Fraud Exception’ CLJ 1997, 56(2), 284-290

<sup>47</sup> Nicholas Grier, *UK Company Law* (Wiley 1998) 28

<sup>48</sup> Griffin (n 17) 24

<sup>49</sup> Moore (n 13) 184

<sup>50</sup> John Lowry & Arad Reisberg, *Pettet’s Company Law: Company and Capital Markets Law* (3<sup>rd</sup> edn, Pearson Longman 2009) 33

<sup>51</sup> Stephen Girvin, Sandra Frisby, & Alastair Hudson, *Charlesworth’s Company Law* (18<sup>th</sup> edn, Sweet & Maxwell 2010) 34

<sup>52</sup> Len Sealy & Sarah Worthington, *Sealy’s Cases and Materials in Company Law* (9<sup>th</sup> edn, OUP 2010) 56

achieve “justice” in extracts 2, 4, 15, 16, 17 and 18 above. The references to “justice” in extracts 17 and 18, which were closing, summary statements, seem particularly significant when deciding how to categorise the case. In extract 19, moreover, Southwell said that the fact that Creasey was funded by the Legal Aid Board was an additional reason to lift the veil - presumably because this was the best means of ensuring justice for someone with limited funds, in contrast to forcing him to restore Welwyn to the register and then initiate fresh proceedings under the insolvency legislation. It also seems significant that, although Southwell discussed *Adams* of his own volition (it had not been cited to him by Behar), he did not mention Slade LJ’s clear statement that the court should not disregard *Salomon* simply because ‘it considers that justice so requires.’

If Southwell did indeed lift the veil on the basis that ‘justice so required’, then he was quite clearly out of step with *Adams*. Bromilow, however, argues that those who interpret the decision in “justice” terms do so incorrectly, apparently based on the headnote to the report of the case, and on Southwell’s statement (at extract 4 above), that

The power of the court to lift the corporate veil exists... this is a strong power which can be exercised to achieve justice where its exercise is necessary for that purpose but which, misused, would be likely to cause not inconsiderable injustice.

Bromilow argues that, when read in its immediate context, this statement

is not intended to be a statement of general principle as to when the court should exercise the power to lift the veil, but merely a commentary on the existence of the power to do so, and an observation that there is no general principle as to when this power should be exercised.<sup>53</sup>

Whilst Bromilow’s argument about the immediate context of the extract may have some force, it does not seem adequately to take into account the other references to “justice” in Southwell’s judgment, particularly those in his concluding statements. It is submitted, therefore, there are good grounds for categorising *Creasey* as a decision in which, *contra Adams*, the veil was lifted ‘in the interests of justice’.

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<sup>53</sup> Bromilow (n 16) 198

### **5.5.3 Should Creasey be categorised differently?**

Whilst Bromilow appears to be misguided in rejecting the “justice” label outright, he nevertheless makes an important point about how else *Creasey* might be categorised. He draws particular attention to extracts 7, 8 and 12 above. In these extracts, Southwell stated that ‘the most important factor’, indeed ‘the central point’, was that Welwyn’s directors transferred the company’s assets to Motors without consideration, in breach of their duties as directors. In doing so, they themselves deliberately ignored the separate personalities of the two companies. As Bromilow puts it:

Welwyn's corporate veil was pierced, therefore, not because its assets had been transferred to Breachwood Motors in a deliberate attempt to defraud Mr Creasey, but because the transfer was a breach of the directors' fiduciary duties to Welwyn and was itself inconsistent with the existence of Welwyn's corporate veil. Mr Ford and Mr Seaman had acted in breach of their fiduciary duties to Welwyn since they had caused it to divest itself of all its assets. As directors, they were under a duty to use their powers for the benefit of the company, and there are no occasions on which it can be in the best interests of a company to give away all its assets for no consideration.<sup>54</sup>

Bromilow therefore places *Creasey* into a new category of exceptions to the *Salomon* principle, which he dubs as “the *Creasey* extension” to the fraud category. For the veil to be lifted, a claimant need only prove that directors have shifted assets from the company in breach of their duties, in a manner tantamount to ignoring the corporate veil. The claimant need not prove *intention* to defraud.

We assess the merits of “the *Creasey* extension” in chapter 5.7.1 below. For now, we may note that Bromilow’s categorisation of the case takes seriously what Southwell himself stated to be ‘the central point’ and ‘the most important factor’. On the other hand, as noted earlier, numerous extracts of the judgment appear to place the case into the “justice” category.

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<sup>54</sup> *ibid* 199

#### **5.5.4 Creasey: academic reactions: summary**

We have seen that *Creasey* does not fit into the category of the “fraud” exception to the *Salomon* principle, as understood in the classic cases of *Gilford* and *Jones*. Rather, there are good grounds for categorising it *either* as a case in which the veil was lifted in the interests of justice, *or* as a new kind of case where the veil was lifted in order to remedy a transfer of assets made by directors in breach of their duties. There are extracts in the judgment which place it into *either* of those categories. In short, those academics who describe the judgment as ‘confused’ and ‘eclectic’ are surely right to do so. This has not prevented *Creasey* triggering important discussions about judicial veil-lifting. We will now survey how *Creasey* has been treated by the courts.

#### **5.6 Creasey: subsequent judicial treatment**

##### **5.6.1 *The Tjaskemolen (No.1)* (August 1996)<sup>55</sup>**

*Creasey* was first mentioned in the courts in this shipping case. A ship was owned by the Bayland group of companies. Another company, Profer, leased the ship. When Bayland failed to provide documentation relating to the lease, Profer commenced proceedings, and attempted to seize the ship as security for their action. Bayland purported to provide security to release the ship and to transfer it to another group company, such that it could no longer provide the ship as security to Profer. Profer argued that this purported transfer was not a genuine transaction for valuable consideration made in good faith, but a device to avoid providing security to Profer for their claim, and to avoid having to satisfy any damages which might be awarded. The similarities to *Creasey* are clear. Profer argued that the transaction was a sham or a façade, and therefore asked the court to rule that Bayland itself retained the beneficial ownership of the ship.

It was held that the alleged transfer of the ship had indeed been a sham to prevent the seizure of the ship by Profer. The court therefore ruled that Bayland, rather than the alleged transferee group company, remained the ship’s beneficial owners. Clarke J cited *Creasey* (in particular, the wording in extracts 8 to 12 above) as a precedent for

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<sup>55</sup> *The Tjaskemolen (No. 1)* [1997] CLC. 521 (QBD)

lifting the veil where one company was stripped of its assets in order to defeat a potential claim. He described *Creasey* as ‘an example of piercing the veil, where assets are deliberately, transferred from A to B in the knowledge that to do so, will defeat a creditor's claim or potential claim, even if that is not proved to be the purpose of doing so.’<sup>56</sup> He also noted that Southwell ‘would have regarded the case as even stronger if the purpose of the transaction was to defeat the creditor’s claim,’ thus acknowledging Southwell’s reluctance to ascribe dishonest intentions to Ford and Seaman on the basis of the affidavit evidence alone. Clarke J therefore interpreted *Creasey* along the same lines as *Bromilow*.<sup>57</sup>

### **5.6.2 Yukong Line Ltd. of Korea v Rendsburg Investments Corporation of Liberia and Others (No. 2) (September 1997)**<sup>58</sup>

The claimant (“Yukong”) brought an action against the defendant (“Rendsburg”) for breach of contract. Rendsburg transferred funds to another company, Ladidi, on the day the contract was repudiated. Those funds might have been used to meet any liability to the claimant. Subsequently, Rendsburg’s own bank account was closed. Yukong discovered that the shares in both Rendsburg and Ladidi were effectively owned by the same individual and members of his family. Yukong sought to join both that individual, and Ladidi, as parties to the action. The court was therefore asked to pierce the veil both between Rendsburg and its shareholder, and between Rendsburg and another company in the same group. Counsel for Yukong relied upon both *Creasey* and *The Tjaskemolen* to argue that, where it can be proven that assets have been deliberately transferred out of a company by a shareholder-director in order to defeat potential claims against the company, the court may pierce the veil and hold him personally liable for that company’s liabilities.

Toulson J noted that counsel for Rendsburg criticised Southwell’s reasoning in *Creasey*, yet he himself did not comment on this, as he felt that the facts before him were materially different. In the case before him, there had been merely a transfer of funds,

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<sup>56</sup> *The Tjaskemolen (No. 1)* [1997] CLC. 521, 529

<sup>57</sup> See chapter 5.5.3 above.

<sup>58</sup> [1998] 1 WLR 294

whereas in *Creasey*, there had been a transfer of an entire undertaking from Welwyn to Motors. In his summary of Southwell's decision, however, he quoted verbatim from extract 8 above – as had Clarke J in *The Tjaskemolen*, and as does Bromilow (see above). In both of these cases, therefore, *Creasey* was characterised as a case in which the veil was lifted in order to remedy or penalise the conduct of directors who transferred the assets of one company to another, with the effect, intentional or otherwise, of defeating the claims of (potential) creditors. However, *Creasey*'s judicial influence was short-lived, since it would shortly be overruled in *Ord*.

### **5.6.3 *Ord v Belhaven Pubs Ltd* (February 1998)**<sup>59</sup>

In 1991, Mr and Mrs Ord sued Belhaven Pubs Ltd (“Belhaven”) for misrepresentation and breach of warranty arising out of the purchase of a lease of a pub. Belhaven counterclaimed for unpaid rent. Belhaven was a wholly owned subsidiary of Ascot Holdings plc (“Holdings”), as was Ascot Estates Ltd (“Estates”). In 1992, the group was restructured in response to economic recession. As part of this restructuring, the hotels in Belhaven's name were transferred to Holdings, whilst Estates took over Belhaven's trading operations. Belhaven then effectively ceased trading but remained the legal owner of the pub leased to the Ords. In 1997, the Ords applied for leave to substitute Holdings and Estates as defendants in the action, on the grounds that Belhaven itself had become a mere shell with insufficient assets to pay any damages which might be awarded to the Ords.

At first instance the application was granted by Alton J. She accepted that the inter-group transfers were made for bona fide commercial reasons and without any devious motives. However, she also stated that the reorganisation was made ‘without any regard as to where profits or losses arose or fell’ and that ‘the boundaries between the companies were not simply blurred but disregarded altogether.’<sup>60</sup> She then went on to consider whether, in the circumstances, it would be appropriate to lift the veil.

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<sup>59</sup> [1998] 2 BCC 607

<sup>60</sup> *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 612

In order for this to happen, she said, the court needed to be satisfied that the corporate structure was being fraudulently used as a facade for actions which were otherwise unlawful.

In this context, she referred to Southwell's decision in *Creasey*. However, she distinguished the actions of the Ascot group from those of the Breachwood group. In the scenario before her, there was no 'blatant asset stripping of one subsidiary in favour of another for no consideration whatsoever'; rather, the transfers were, at least on paper, for valuable consideration.<sup>61</sup> Nevertheless, she concluded that the directors of Holdings had

deliberately ignored the separate corporate identity, acted solely in the interests of the group and at the behest of the Holdings in so doing and thus deliberately and totally disregarded their duties to creditors in general and the Plaintiffs in particular.<sup>62</sup>

Accordingly, she held that the court was

justified in lifting the veil and treating Holdings who appear to be the controlling mind for both these subsidiaries as liable for this contingent debt [to the Ords].<sup>63</sup>

She found it

unjust to permit the Defendant and/or those who control it to take advantage of it to avoid a contingent liability which (assuming the claim is proved) the Defendant company would appear to have been capable of meeting but for the [...] transfers. To permit such a potential windfall as a consequence of taking of action by the group for the purposes of its own commercial interests would in my view be unjust.<sup>64</sup>

Her reasoning bears clear similarities to that of Southwell in *Creasey*, who found it unjust for Ford and Seaman to take the benefit of the transfer of assets from Welwyn to Motors, whilst at the same time leaving no assets to meet the contingent claim of Mr Creasey (see extracts 7, 8, 9, 12, 13 and 17 above).

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<sup>61</sup> *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 612

<sup>62</sup> *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 612-3

<sup>63</sup> *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 613

<sup>64</sup> *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 613

Accordingly, just as Southwell had lifted the veil and had allowed Motors to be substituted as defendant in the action against Welwyn, so Alton J allowed Holdings to be substituted as defendant in the current action.

Upon appeal, the Court of Appeal overturned Alton J's decision, ruling that the Ords should bring their claim against the original defendant, Belhaven. Hobhouse LJ, giving the leading judgment, said that Alton J had been wrong to lift the veil. He said that nothing improper had been done in the restructuring of the Belhaven group, nor was there any evidence that the directors had breached their duties to the creditors. Nor was there any case for saying that the corporate veil had been used as a sham or facade for any such improper behaviour. Rather, the restructuring was

just the ordinary trading of a group of companies under circumstances where... the company is in law entitled to organise the group's affairs in the manner that it does; and to expect that the court should apply the principles of *Salomon v Salomon* in the ordinary way.<sup>65</sup>

Hobhouse LJ then commented on *Creasey*. He suggested that Southwell had adopted reasoning similar to that of Alton J, and therefore specifically overruled it as 'a wrong adoption of the principle of piercing the corporate veil'.<sup>66</sup> Brooke J and Sir John Balcombe agreed with him. The latter added that, if the group restructuring had been handled in an improper or fraudulent manner, there were adequate provisions within insolvency legislation to deal with this, notably s. 423 Insolvency Act 1986 (transactions defrauding creditors).<sup>67</sup>

### **5.6.3.1      Ord v Belhaven Pubs Ltd: criticism**

Hobhouse LJ's decision to overrule *Creasey* has been criticised by several commentators.<sup>68</sup> It has been pointed out that he overlooked the significant factual differences between *Creasey* and *Ord*. In *Creasey*, there was no consideration given for the transfer of assets from Welwyn to Motors. In *Ord*, however, Hobhouse LJ himself confirmed that valuable consideration was given for the transfer of assets from

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<sup>65</sup> *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 615

<sup>66</sup> *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 616

<sup>67</sup> *Ord v Belhaven Pubs Ltd* [1998] BCC 607, 616

<sup>68</sup> Bromilow (n 16) 201; Png (n 15) 123-124; Griffin (n 17) 27

Belhaven to Holdings and Estates.<sup>69</sup> He also clearly stated that ‘nothing improper’ had been done by the ‘group or the companies in the group or their directors.’<sup>70</sup> In *Creasey*, however, Southwell charged Ford and Seaman with breaching their duties as directors in allowing the gratuitous transfer of assets from Welwyn to Motors (see extract 8 above). Whilst there were justifiable commercial reasons for the inter-group transfers in *Ord*, this was not the case in *Creasey*. The facts two cases were therefore different, and so the Court of Appeal should arguably have distinguished *Creasey*, rather than overruling it. On the other hand, the Court of Appeal was perhaps reluctant to distinguish it, since this would have given implicit judicial recognition to what was undoubtedly a confused decision.

Given the brevity of Hobhouse LJ’s comments on *Creasey*, it is unclear how he categorised the case. Clearly, he did not consider it to be a “fraud” case along the lines of *Gilford* or *Jones*, for otherwise he would not have overruled it. It also seems clear that he did not view, and certainly did not approve, *Creasey* as a case where the veil had been pierced in order to remedy or penalise a transfer of assets made without consideration which breached the directors’ duties. (Indeed, Hobhouse LJ did not consider there to have been any asset-stripping in *Creasey*.<sup>71</sup> This assessment is surprising, to say the least, in the light of extracts 8, 9, 12 and 13 of Southwell’s judgment.) Bromilow, in particular, laments the fact that the court did not properly consider “the *Creasey* extension”, the merits of which we will consider in chapter 5.7.1 below. It seems most likely, then, that Hobhouse LJ viewed *Creasey* as a case in which the veil had been lifted in order to achieve justice – and, following *Adams*, overruled it accordingly.

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<sup>69</sup> [1998] BCC 607, 610 & 612

<sup>70</sup> [1998] BCC 607, 614

<sup>71</sup> [1998] BCC 607, 616

#### **5.6.4 *Kensington International Limited v Republic of the Congo (formerly the People's Republic of the Congo) (November 2005)***<sup>72</sup>

The Republic of Congo conducted sales of oil through companies set up to conceal the identity of the Congo as the real seller and the real recipient of the sale proceeds. The corporate structures were used to ‘avoid... attachment of the oil or of the proceeds of sale by existing creditors of the Congo in circumstances where it was known that the creditors were taking aggressive action with a view to enforcing the Congo’s debts.’<sup>73</sup> The court lifted the veil so as to make the Congolese government directly liable for such attachments. Cooke J briefly alluded to *Creasey* as an example of a case where the court went ‘beyond the bounds of proper application of the principles, by ignoring the need for dishonesty where assets are disposed of which defeat the claims of creditors.’<sup>74</sup> This suggests that he saw *Creasey* as a misconstrued “sham” case, in which the veil had been lifted to penalise the disposal of assets to defeat creditors’ claims, but without finding the necessary dishonest motive. This has implications for Bromilow’s arguments for “the *Creasey* extension”, which we consider below.

#### **5.6.5 *Creasey: subsequent judicial treatment: summary***

In *The Tjaskemolen* and in *Yukong*, *Creasey* was seen as authority for the proposition that the veil could be lifted to remedy the deliberate transfer of assets from one company to another, where such a transfer had the effect, intentional or otherwise, of defeating a creditor’s claim or potential claim. It is unclear how Hobhouse LJ categorised *Creasey* in *Ord*, though it seems most likely that he viewed it as a “justice” case. In *Kensington International*, the court seemingly viewed *Creasey* as a misconstrued “sham” case. Altogether, the courts have seemingly found *Creasey* as difficult to classify as the academics.

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<sup>72</sup> [2006] 2 BCLC 296 (QBD)

<sup>73</sup> Farrar & Hannigan (n 40) 62-3

<sup>74</sup> [2006] 2 BCLC 296 [187]

## **5.7 Creasey and the exceptions to the rule in *Salomon v Salomon*: further debate**

Given the confused nature of Southwell's judgment, it is perhaps unsurprising that there is no direct reference to *Salomon* itself; the only reference to it is in the allusion to the *Wallersteiner* case (extract 3). We have already noted that, technically, the decision in *Creasey* was a deviation from the principle in *The Albazero* and, by extension, from *Salomon* itself. We have also established that it remains unclear as to exactly why the veil was lifted, whether 'in the interests of justice', or to remedy the gratuitous transfer of assets made in breach of directors' duties. Despite of this lack of clarity, and notwithstanding its ultimate overruling in *Ord*, *Creasey* has stimulated various arguments about when the courts might or should lift the veil. We shall now consider some of these arguments.

### **5.7.1 Daniel Bromilow: the *Creasey* extension to the "fraud" category**

As noted earlier, Bromilow places *Creasey* into a new category of exceptions to the *Salomon* principle, which he dubs as "the *Creasey* extension" to the fraud category. In order for the veil to be lifted, a claimant need only prove that directors have shifted assets from the company in breach of their duties, in a manner tantamount to ignoring the corporate veil. The claimant need not prove an *intention* to defraud the creditor.<sup>75</sup> Since intention is difficult to prove, this would clearly benefit claimants such as Mr *Creasey*.

Bromilow advances powerful arguments for "the *Creasey* extension". If a claimant has a prior claim on the company's assets, and those assets are transferred to another company free of consideration, the directors' motivations for making this transfer are irrelevant. Where the transferor and transferee company are owned and controlled by the same people, the transferee company is imputed with their knowledge of the details of the transfer which render it a breach of their fiduciary duties. This operates to reduce the claims of the transferee company to the assets, as against the claims of the claimant. Moreover, under equitable principles, a benefit cannot pass without a

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<sup>75</sup> Bromilow (n 16) 199

corresponding burden. If Ford and Seaman transferred assets from Welwyn to Motors free of consideration, and therefore rejected the burden of separate corporate identities, it was inequitable for them to benefit from those separate entities and hide assets from Creasey. As Bromilow writes, 'If the director-shareholders have themselves pierced the corporate veil by making the gratuitous transaction, why should the court not follow them through the existing breach in the veil?'<sup>76</sup>

Bromilow considers various objections to "the *Creasey* extension" - principally, that a claimant has an existing remedy, namely to proceed with the action against the transferor company, obtain judgment against it, and then place it into liquidation. The liquidator can then use, say, s. 238 Insolvency Act 1986 (transactions at an undervalue) to recover the value of the assets transferred to the transferee company, following which the claimant could recover the value of the claim against the transferor company. Sir John Balcombe's judgment, in *Ord*, expressed precisely this view – that insolvency legislation should be used to remedy conduct of the kind complained of in *Creasey* and *Ord*. Bromilow's rejoinder, following Southwell's words in extract 18, is that existing remedies under the insolvency legislation are costly and elaborate. If Creasey himself had been forced to rely on insolvency legislation, he would have had to bring an action to place Welwyn into liquidation, and then persuade the liquidator to sue Ford and Seaman for breach of duty and to sue Motors for the value of the assets it had received free of consideration.<sup>77</sup> By contrast, "the *Creasey* extension", as inferred by Bromilow from Southwell's judgment, was a much quicker and cheaper route to the same end. Bromilow therefore laments the demise of *Creasey* in *Ord*, and the fact that "the *Creasey* extension" was not properly considered by Hobhouse LJ. On the grounds of equity and pragmatism alone, it is difficult to disagree with Bromilow.

However, equity and pragmatism alone do not determine when the veil should be lifted. Sir John Balcombe's judgment in *Ord* (which Bromilow does *not* consider) stipulates, albeit briefly, that insolvency legislation should indeed be used to remedy conduct of the

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<sup>76</sup> Ibid 199

<sup>77</sup> [1992] BCC 638, 642

kind complained of in *Creasey* and *Ord*. We have already noted that in *Kensington International*,<sup>78</sup> *Creasey* was criticised as an example of a case where the court went ‘beyond the bounds of proper application of the principles, by *ignoring the need for dishonesty* where assets are disposed of which defeat the claims of creditors.’<sup>79</sup> The combined effect of these judgments is to nullify Bromilow’s arguments. On the one hand, the veil should *not* be lifted as an alternative to a claimant pursuing existing remedies via the insolvency legislation. On the other hand, for the fraud exception to apply, it *is* necessary for dishonest motives to be present, however difficult these may be to ascertain. *Creasey* cannot therefore be used as a basis for creating a new category of exceptions to the rule in *Salomon*. It has, however, stimulated discussion as to when the traditional “fraud” exception will apply, as we will now consider

### **5.7.2 Jennifer Payne and Cheong Ann Png: clarifying the “fraud” exception**

Jennifer Payne categorises *Creasey* as a ‘rather suspect’ decision in which the veil was lifted to achieve justice.<sup>80</sup> She argues that Southwell should have lifted the veil on the basis of “fraud”, but did not do so because he misunderstood the category. Extracts 10 and 11 of Southwell’s judgment suggest otherwise, namely that Southwell did not apply the fraud exception because he refused to infer dishonest intentions on the part of Ford and Seaman. Nevertheless, Payne’s comments on the “fraud” exception are worth examining.

Having analysed *Jones* and *Gilford* – ‘classic examples of the fraud exception’<sup>81</sup> – Payne discusses three aspects of the fraud exception. First, she asserts that an element of deception must be present. Secondly, the nature of the legal duty being evaded may be relevant. In *Jones* and *Gilford*, the legal obligation which the defendants tried to evade existed before the respective “sham” companies were set up. In *Adams*, by contrast, the court had affirmed the right to use the corporate structure as a means of protection from *future* or *potential* liabilities. In order for the fraud exception to apply,

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<sup>78</sup> *Kensington International Limited v Republic of the Congo (formerly the People's Republic of the Congo)* [2006] 2 BCLC 296 (see chapter 5.6.4)

<sup>79</sup> [2006] 2 BCLC 296, 344 (emphasis added)

<sup>80</sup> Payne (n 46) 285

<sup>81</sup> *ibid* 286

therefore, ‘the defendant must intend to deny the [claimant] a pre-existing legal right’.<sup>82</sup> Finally, Payne considers the timing of the incorporation of the “sham” company. She argues that, in *Creasey*, the “fraud” argument failed because Motors had been incorporated prior to the transfer of assets from Welwyn. As seen in extract 1 above, Southwell did indeed distinguish *Creasey* from *Jones* and *Gilford* in these terms. (Again, though, he did not, for this reason alone, rule out the presence of a ‘stratagem’; rather, he did so because he did not have sufficient evidence of dishonest intention.) However, Payne points out that neither *Jones* nor *Gilford* make any reference to the timing of incorporation. The ratio of both cases was simply that the veil will be pierced where the corporate form has been used to evade existing legal obligations. As Payne puts it: ‘To try to stretch the cases to say more than that [i.e. that the “sham” company should be incorporated after the genesis of the legal obligation] is to distort them. It should be irrelevant that the device company is an existing, solid company with its own business, as long as it has been used as a tool to effect the fraud.’<sup>83</sup> It is the fraudulent use of the corporate vehicle, rather than its formation, that should follow the existence of the legal duty being evaded.

Png makes a similar point: ‘What counts is whether [the company] was used as a façade at the time of the relevant transactions’ not whether it was ‘originally incorporated with any deceptive intent.’<sup>84</sup> Unlike Payne, Png argues that Southwell’s decision is authority for this proposition,<sup>85</sup> whereas Payne argues that *Creasey* was not decided on this basis, but should have been. The differing assessments of two prominent academics confirm, yet again, the perplexing nature of Southwell’s judgment! Nevertheless, they are both surely correct to say that it is the use of the corporate vehicle to perpetrate fraud which counts, not the timing of incorporation. In the 2001 case of *Trustor AB v Smallbone (No. 2)*,<sup>86</sup> this view was given implicit judicial recognition.

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<sup>82</sup> *ibid* 288

<sup>83</sup> *ibid* 289

<sup>84</sup> Png (n 15) 123 & 125

<sup>85</sup> *ibid* 123.

<sup>86</sup> [2001] 1 WLR 1177

### **5.7.2.1      Trustor AB v Smallbone and others (No. 2)**

#### **(i)      Facts**

Mr Smallbone was the managing director of Trustor AB (“Trustor”). In 1997, £39 million was paid out of Trustor’s accounts on the signatures of Smallbone and one other director, without obtaining the requisite authority from the other directors. £20 million of this money was paid to Introcom (International) Ltd (“Introcom”). Introcom, in turn, paid about £400,000 on to Smallbone. Trustor commenced proceedings against Introcom and obtained summary judgment. Introcom was ordered to repay money to Trustor, on the grounds that it knew that the initial payment was unauthorised. Introcom appealed. On appeal, the initial judgment was upheld. It was also found that Introcom was controlled by a trust of which Smallbone was the beneficiary, and that the directors were nominees acting on Smallbone’s instructions – and therefore effectively under Smallbone’s control. The judge also found that the payments from Trustor to Introcom had been ‘dishonestly’ effected by Smallbone, without authority, in ‘inexcusable breach of his duty as managing director of Trustor.’<sup>87</sup> According to the judge, Introcom was merely a “vehicle” which Smallbone used for receiving money from Trustor.<sup>88</sup> Trustor then applied for Smallbone to be held jointly and severally liable with Introcom on the grounds that receipt by Introcom was to be treated as receipt by Smallbone. This would of course amount to a piercing of the veil between Introcom (the company) and Smallbone (who controlled it). The court was therefore required to determine the circumstances in which it could pierce the veil and treat a company’s receipt as that of an individual.

#### **(ii)      Judgment**

Counsel for Trustor argued that the case law justified piercing the veil in three (potentially overlapping) situations. The first was where the company had been used as a façade or sham. The second was there the company had been involved in some

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<sup>87</sup> [2001] 1 WLR 1177, 1180

<sup>88</sup> [2001] 1 WLR 1177, 1180

impropriety. The third, which Trustor based upon *Re a Company* [1985] BCLC 333, was where it was necessary to do so in the interests of justice. (*Creasey* was mentioned in Trustor's skeleton argument but – probably wisely – was not cited in oral submissions.<sup>89</sup>)

Sir Andrew Morritt V-C rejected the second and third propositions. The second proposition was 'too widely stated unless used in conjunction with the first.' Companies were 'often involved in improprieties.... But it would make undue inroads into the principle of *Salomon's* case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.'<sup>90</sup> He correctly pointed out that the third proposition was inconsistent with Slade LJ's statement, in *Adams*, that *Salomon* was not to be ignored by the court 'merely because... justice so requires'.<sup>91</sup>

He did, however, recognise the first proposition:

In my judgment the court is entitled to "pierce the corporate veil" and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s).<sup>92</sup>

He therefore ruled that

Introcom was a device or facade in that it was used as the vehicle for the receipt of the money of Trustor. Its use was improper as it was the means by which Mr Smallbone committed unauthorised and inexcusable breaches of his duty as a director of Trustor.<sup>93</sup>

Accordingly, it was appropriate to pierce the veil and hold that the receipt of Trustor's money by Introcom was also the receipt by Smallbone, who should therefore be held jointly and severally liable for Introcom's initial judgment debt.

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<sup>89</sup> [2001] 1 WLR 1177, 1178 (headnote)

<sup>90</sup> [2001] 1 WLR 1177, 1185

<sup>91</sup> [2001] 1 WLR 1177, 1185

<sup>92</sup> [2001] 1 WLR 1177, 1185

<sup>93</sup> [2001] 1 WLR 1177, 1186

### (iii) Commentary

It is useful to analyse *Trustor* in the light of the three aspects of the fraud exception discussed by Payne.<sup>94</sup> Firstly, an element of deception was present – the court found that Smallbone had not merely breached his duties as Trustor’s director, but had also acted dishonestly. (By contrast, in *Creasey*, Southwell held that Ford and Seaman had breached their duties, but declined to infer dishonest motives.) Secondly, the fact that the payments made to Introcom were unauthorised meant that the liability to repay Trustor was real and extant, not merely potential or speculative. Finally, the timing of the incorporation of Introcom was irrelevant. Introcom had existed prior to the unauthorised payments. This contrasted with the situations in *Gilford* and *Jones*, where the “sham” companies were formed after the respective undesired legal obligations had arisen. This “timing” point did not deter Sir Andrew Morritt V-C from lifting the veil; indeed, he did not even mention it. *Trustor* therefore confirms the arguments of Payne and Png: the veil will be pierced on the grounds of “sham” or “fraud” whenever the company is used as a façade to evade legal obligations, regardless of whether the company was formed before or after those obligations arose.

### **5.8** Recent developments

More recently, this has been confirmed by Munby J in *Ben Hashem v Ali Shayif*<sup>95</sup> (alluded to in chapter 4.6.4). In a review of the circumstances where the court will pierce the veil, he observed that

if the court is to pierce the veil it is necessary to show *both* control of the company by the wrongdoer(s) *and* impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing... a company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transaction(s).<sup>96</sup>

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<sup>94</sup> See chapter 5.7.2 above.

<sup>95</sup> [2008] EWHC 2380 (Fam); [2009] 1 FLR 115

<sup>96</sup> [2008] EWHC Fam [163-164]

Munby J’s exposition has been quoted in several recent first instance decisions, including by Flaux J in *Linsen International Ltd v Humpuss Sea Transport Pte Ltd*.<sup>97</sup> Flaux J declined to pierce the veil so as to enable the claimants to bring freezing injunctions against both the first defendant, and other defendants to whom the first defendant had transferred assets. For good measure, he noted that *Creasey* – which had been cited by the claimants in argument – had been wrongly decided and disapproved of in *Ord*. As at the date of writing,<sup>98</sup> this remains the most recent mention of *Creasey* in an English court.

### **5.9 Creasey and beyond: summary and conclusions**

Following the emphatic affirmation of *Salomon* in *Adams*, *Creasey* injected fresh life into the debate about judicial veil-lifting. Both academics and subsequent judges have disagreed about how the case should be categorised. *Creasey* has stimulated important arguments, later given implicit judicial recognition, about when the “fraud” exception to the *Salomon* principle should apply: namely, when the corporate structure is dishonestly used to evade existing legal obligations, regardless of whether the company was formed before or after those obligations arose. Yet the debate has also clarified when the veil will *not* be lifted. The position in *Adams* has been confirmed: the veil should not be lifted simply to achieve “justice”; it is submitted that the decision in *Conway v Ratiu* (examined in chapter 4.6.3) cannot yet be seen as an authoritative challenge to that proposition. Meanwhile, Bromilow’s arguments for a new “*Creasey* extension” have not been accepted: the veil will not be lifted merely to penalise or remedy a breach of directors’ duties, where no dishonest motives are present, however pragmatic or fair such a step might seem. In conclusion, the debate about *Creasey* has confirmed that there are, after all, limitations on when the courts will deviate from the *Salomon* principle. Whilst recent Court of Appeal decisions have hinted at a “rehabilitation” of the principles of *DHN* and *Re a Company*,<sup>99</sup> there have been no such hints in relation to *Creasey*. We are now in a position to assess the overall impact of these three cases.

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<sup>97</sup> [2011] EWHC 2339

<sup>98</sup> 1 May 2012

<sup>99</sup> See chapters 3.10 and 4.6 respectively.

## CHAPTER 6

### CONCLUSIONS

#### 6.1 The legacy of *DHN, Re a Company* and *Creasey*: how far is *Salomon v Salomon & Co Ltd* still “the unyielding rock”?

If this study had been written following the decision in *Adams v Cape Industries plc*, it would have been relatively easy to answer the above question. It seemed clear as to when the courts would or would not lift the veil. The “single economic unit” argument employed in *DHN* had all but disintegrated. The court had also emphatically rejected the notion, advanced in *Re a Company*, that the veil should be lifted where this was ‘necessary to achieve justice’. Nor should the veil be lifted on moral grounds simply because of *Salomon*’s implications for a company’s tort creditors. It seemed that the court would *only* lift the veil where the company was being used as a “façade” or “sham” to conceal improprieties. The only “grey area” was precisely when a “façade”, “sham” or “fraud” situation would arise, since the court had not attempted ‘a comprehensive definition of those principles.’<sup>1</sup>

If this study had been written after *Adams* but before 2007, it would still have been relatively easy (perhaps even easier) to answer the question. The Court of Appeal’s decision in *Ord v Belhaven Pubs Ltd* had cleared up the confusion created by the decision in *Creasey*. The “single economic unit” argument and the “justice” argument still remained dead in the water. Arguments in favour of a new “*Creasey* extension” had not gained currency: the veil would not be lifted to penalise or remedy a breach of directors’ duties, where no dishonest motives were present, regardless of how pragmatic or fair this might be. Moreover, the decision in *Trustor* had, perhaps for the first time, clarified when the “fraud” situation would arise – namely, when the corporate structure was dishonestly used to evade existing legal obligations, regardless of whether the company had been formed before or after those obligations arose. Otherwise, as Slade LJ had stated in *Adams*, ‘save in cases which turn[ed] on the wording of particular statutes or contracts, the court [was] not free to disregard the

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<sup>1</sup> *Adams v Cape Industries plc* [1990] Ch 433, 543

principle of *Salomon v. A. Salomon & Co. Ltd.* [1897] A.C. 22 merely because it consider[ed] that justice so require[d].’ In short, *Salomon v Salomon & Co Ltd* did indeed remain “the unyielding rock”.

Since 2007, however, the picture has become less clear. The Court of Appeal’s decision in *Beckett* explicitly approved of the “single economic unit” argument,<sup>2</sup> whilst *Adelson*<sup>3</sup> likewise hinted at a rehabilitation of this argument. Meanwhile, *Conway v Ratiu* suggests that the current Court of Appeal favours, as Auld LJ put it, ‘draw[ing] back the corporate veil to do justice when common-sense and reality demand it.’<sup>4</sup> Yet this new flexibility has yet to filter down to the lower courts, as seen by the decisions in *Gripple*<sup>5</sup>, *Linsen*<sup>6</sup> and *Ben Hashem*<sup>7</sup>. Perhaps the most definitive statement that can be made is that for first-instance judges, *Salomon* does indeed remain ‘the unyielding rock’; but their colleagues in the Court of Appeal seem eager – at least in some instances - for the opportunity to assail it. It is disappointing that the recent Court of Appeal decision in *Cape plc v Chandler* has done little to clear up the confusion.<sup>8</sup>

## **6.2 The call for certainty and reform**

As so often in the past, therefore, it is currently unclear as to when the courts will or will not deviate from the *Salomon* principle. In 2011, David Milman commented that ‘the theme of unpredictability looms large when we look at veil-lifting... There is a real need for guidance from the Supreme Court.’<sup>9</sup> These sentiments echo those of Kahn-Freund in 1944,<sup>10</sup> Wedderburn in 1960<sup>11</sup> and 1984,<sup>12</sup> Powles in 1977<sup>13</sup> and Muchlinski in

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<sup>2</sup> See chapter 3.10.1

<sup>3</sup> See chapter 3.10.2

<sup>4</sup> *Conway v Ratiu* [2006] All ER 571 [75]. See chapter 4.6.3.

<sup>5</sup> See chapter 3.10.3

<sup>6</sup> See chapter 3.10.3

<sup>7</sup> See chapter 4.6.4

<sup>8</sup> See chapter 3.10.4

<sup>9</sup> D Milman, ‘Entity status issues in the UK law of business organisations and related entities: recurrent uncertainty’ (2011) 306 Co LN 1, 4

<sup>10</sup> See chapter 2.3

<sup>11</sup> See chapter 2.3

<sup>12</sup> See chapter 3.8.1

<sup>13</sup> See chapter 3.6.1

2002.<sup>14</sup> If *Adams* had reached the House of Lords, such guidance might have emanated. Yet this did not happen, and no comparable case has reached the House of Lords or the Supreme Court since.

Nor has Parliament taken the opportunity to issue such guidance. The Company Law Reform Steering Group (“CLRSG”), set up in 1998, recognised the problems caused by the *Salomon* principle to tort creditors within the context of corporate groups in particular:

There is a strong case for allowing companies, like individuals, to take advantage of the principle of limited liability in relation to creditors by forming subsidiaries, the creditor being able to exact a price for the credit to reflect the level of risk. But the arguments are less strong in relation to tort liability, particularly in relation to parent companies, where uncompensated externalisation of risk is possible by the use of a thinly capitalised subsidiary protecting the main business assets, even though a subsidiary will be closely held, permitting tight management of risks to third parties by the parent...<sup>15</sup>

Nevertheless, the CLRSG, mirroring the conservative approach of the Court of Appeal in *Adams*, declined to recommend any reforms in this area:

However, there are circumstances in which we regard it as entirely proper for a holding company to segregate an activity in a subsidiary with the risks of liability, including tortious or delictual liability, in mind. Many torts are closely linked with contractual liabilities, for example liability for professional services and misrepresentation and product liability. We are also not aware of any jurisdiction providing for parent companies to be automatically liable for the torts or delicts of their subsidiaries. Defining the circumstances in which use of limited liability in this way should be regarded as abusive would be difficult. Nor are we aware of cases where parent companies have engaged in such abuse. The under-capitalisation of subsidiaries, and their operation in a way which creates undue risks of insolvency, are matters best dealt with by insolvency law. *We do not therefore propose any reforms in this regard.*<sup>16</sup>

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<sup>14</sup> See chapter 3.9.3

<sup>15</sup> Company Law Reform Steering Group, *Modern Company Law for a Competitive Economy: Completing the Structure* (Consultation Document, 2000) 198

<sup>16</sup> *ibid*, 198-199 (emphasis added)

The CSLRG's *Final Report*<sup>17</sup> was silent on the matter, much to the disappointment of Muchlinski<sup>18</sup> and also of Dignam and Lowry.<sup>19</sup>

It has therefore fallen to academics to make proposals for reform. As noted in chapter 2.3, Wedderburn in 1960 called for a non-exhaustive statutory list of situations in which the court might lift the veil.<sup>20</sup> His hope that '[t]he next Companies Act [w]ould be the foundation-stone of a new structure of rules allowing for the penetration of the corporate veil'<sup>21</sup> proved to be in vain.

More recently, Marc Moore has made perhaps the most extensive suggestion for reform. Arguing that the "sham" argument is 'the only *general* basis upon which a court will be justified in disregarding a company's separate legal personality,'<sup>22</sup> Moore nevertheless points out that the classic "sham" cases of *Gilford Motor Co Ltd v Horne* and *Jones v Lipman* do not actually refer to *Salomon* itself. He therefore describes the "sham" exception to the *Salomon* principle as 'the product of a piecemeal and doctrinally tenuous process of judicial reasoning.'<sup>23</sup> He goes on to develop a 'genuine ultimate purpose' rule,<sup>24</sup> adherence to which would determine whether or not the veil should be lifted in any given case. According to this rule, the veil would not be lifted 'merely on the ground that the formation of [a] company was motivated by the desire of its incorporator to shield themselves from personal liability that they would or might otherwise find themselves under.'<sup>25</sup> It would, however, be lifted where the desire to avoid personal liability, rather than any 'genuine end or goal of its incorporator's business,'<sup>26</sup> was the '*ultimate*'<sup>27</sup> reason for incorporation.

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<sup>17</sup> Company Law Reform Steering Group, *Modern Company Law for a Competitive Economy: Final Report* (2001)

<sup>18</sup> See chapter 3.9.3

<sup>19</sup> Alan Dignam & John Lowry, *Company Law* (6<sup>th</sup> edn, OUP 2010) 47

<sup>20</sup> KW Wedderburn, 'A Corporations Ombudsman?' (1960) 23 MLR 663, 666

<sup>21</sup> *ibid*, 667

<sup>22</sup> Marc Moore, "A temple built on faulty foundations": piercing the corporate veil and the legacy of *Salomon v Salomon* [2006] JBL 180, 184 (emphasis in original)

<sup>23</sup> *ibid* 196 (as noted in chapter 2.2.3 above)

<sup>24</sup> *ibid* 198f.

<sup>25</sup> *ibid* 200

<sup>26</sup> *ibid* 200

<sup>27</sup> *ibid* 200 (emphasis in original)

On this basis, Moore argues that the *Salomon* decision was correct since, ‘as Lord Macnaghten expressly acknowledged... the ultimate motivation behind the incorporation of A. Salomon & Co. was the desire of Mr Salomon to increase the size of his business and facilitate the future involvement in it of his family members,’<sup>28</sup> whereas ‘the limitation of his personal liability for business debts was shown on the facts to be only a *preliminary* motivation behind Mr Salomon’s decision to incorporate his business.’<sup>29</sup> By contrast, Moore contends that the veil *should* have been lifted in *Adams*, on the grounds that ‘the incorporation of NAAC was clearly, on the facts, motivated *primarily (if not wholly)* by the desire of Cape Industries to protect itself from potential personal liability.’<sup>30</sup> As Moore puts it:

One can, therefore, distinguish the facts of *Salomon* from those of *Adams* on the ground that, in *Salomon*, the relevant company's incorporation was motivated ultimately by factors other than the limitation of the defendant's potential liabilities, so that the defendant company could be said to be serving a genuine end or goal of its incorporator's business. In *Adams*, on the other hand, the relevant company's incorporation was motivated ultimately by nothing more admirable or sophisticated than the mere desire of its incorporator to limit their personal liability. Accordingly, whilst the relevant subsidiary in *Adams*, NAAC, was not a “fraud or sham” within the meaning established in *Gilford*, it was neither actively contributing towards the “head and brains” of the overall business enterprise... Rather, NAAC (unlike A. Salomon & Co.) was ultimately subservient to the specific desire of its incorporator to mitigate the avenues of legal reproach available to the potential victims of Cape Industries' activities. Accordingly, Cape Industries would fail to satisfy a court that NAAC existed to promote a “genuine *ultimate* purpose” of its business, thereby justifying a court in disregarding the formally separate legal personality of NAAC relative to Cape.<sup>31</sup>

If the veil *had* been lifted on this basis in *Adams*, this would have given some relief to tort creditors. This factor appears, at least partly, to inform Moore’s thinking.<sup>32</sup>

Applying this ‘genuine ultimate purpose’ test, Moore suggests that the Court of Appeal was correct to refuse to lift the veil in *Ord v Belhaven Pubs*. He argues that the subsidiary to which assets had been transferred as part of the restructuring *did* serve a

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<sup>28</sup> *ibid* 200, referring to *Salomon v Salomon & Co Ltd* [1897] AC 22, 48 (MacNaghten LJ); cf chapter 1.2

<sup>29</sup> *ibid* 200

<sup>30</sup> *ibid* 200 (emphasis added)

<sup>31</sup> *ibid* 201-202 (emphasis in original)

<sup>32</sup> Marc Moore, unpublished email to the writer, 30 April 2012 (referenced with permission)

'genuine ultimate purpose': 'Belhaven was clearly actively involved in the carrying on of the business of the general enterprise of which it was part, thereby justifying a court in maintaining its autonomous legal existence.'<sup>33</sup> By contrast, he argues that in *Creasey*, Breachwood Motors Ltd served no 'genuine ultimate purpose' and therefore Richard Southwell QC's decision to lift the veil was justifiable, even it was not expressed in such terms:

[T]he established facts of *Creasey* suggest that the defendant company, Breachwood Motors, did not exist to promote any identifiable strategy or goal of the motor business of which it was part. Rather, the motor business was carried on wholly by Welwyn Motors, the other company within the arrangement. The only "real" role that Breachwood fulfilled within the business was that of owning the premises from which Welwyn carried on the business. However, given that both Breachwood *and* Welwyn were under the ownership and control of the same two traders (Mr Ford and Mr Seaman), then there would seem to be no valid reason as to why Breachwood, and not Welwyn, should have owned the premises of the latter's business. Breachwood's independent legal existence therefore cannot be justified in accordance with any identifiable strategy or goal of the motor business, other than, of course, the *a priori* opportunism of its founders, Mr Ford and Mr Seaman, in foresight of Welwyn's potential legal liability. Consequently... [Breachwood Motors'] autonomous legal existence could not have been justified by reference to any genuine, independent purpose of the business enterprise of which it was part. The Court of Appeal (*sic*) was, accordingly, correct in disregarding the formally separate personality of Breachwood Motors in *Creasey*, albeit for reasons other than the one forwarded here.<sup>34</sup>

Moore appears to overlook the fact that Breachwood Motors operated similar motor businesses elsewhere.<sup>35</sup> Nevertheless, it is difficult to resist his contention that there was no valid *business* reason for Breachwood Motors to own the premises from which Welwyn operated. For Moore, this 'genuine ultimate purpose rule' would constitute 'a concrete, workable and doctrinally legitimate test for determining the legality of opportunist usages of the corporate veil,'<sup>36</sup> and, by extension, a clear guide as to when the veil should or should not be lifted on the grounds of "sham."

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<sup>33</sup> Moore (n 22) 200

<sup>34</sup> *ibid* 202-203.

<sup>35</sup> *Creasey v Breachwood Motors Ltd* [1992] BCC 638 (QBD) (headnote)

<sup>36</sup> Moore (n 22) 203

Moore's proposed rule appears to "work" in relation to some of the other major "sham" cases. In *Gifford*, as Moore himself observes, the company was not involved in the 'carrying on' of Mr Horne's business, but was instead 'being carried on' by Horne for his own (nefarious) purposes 'making it an object *being deployed in*, rather than itself deploying, the affairs of Mr Horne's business'.<sup>37</sup> The same could clearly be said of the company in *Jones v Lipman*. It is unclear, however, whether the rule as formulated by Moore would "work" in situations such as those in the following scenarios.

Scenario 1: an English-based plc sets up a subsidiary to operate a factory in a different jurisdiction. The subsidiary is registered in that jurisdiction, partly to take advantage of that jurisdiction's tax regime. Its corporate form therefore serves, in Moore's terms, a 'genuine ultimate purpose.' Years later, the factory explodes, injuring thousands, who become tort creditors of the subsidiary. The parent company has had little involvement in the business of the subsidiary, and therefore has no "duty of care" to the subsidiary's creditors in tort (*pace Chandler*). It has, however, allowed the subsidiary to become under-capitalised, such that it cannot meet all of the tort claims. Would Moore's argument allow the courts (*contra Adams*) to lift the veil between the parent company and its subsidiary? One suspects that his concerns for the subsidiary's tort creditors would lead him to say "Yes", but it is unclear whether his 'genuine ultimate purpose' rule would necessarily produce the same outcome.

Scenario 2: a company is set up by an individual in order to promote a legitimate business. The company form is chosen so that a floating charge can be created in order to secure borrowing. The corporate form therefore again serves a 'genuine ultimate purpose.' Several years later, the individual uses the company's bank account to launder money. Criminal proceedings commence against the individual. An application is made to join the company in the proceedings, which, if successful, have the effect of lifting the veil. In such a situation, the company, *as formed*, would serve a 'genuine ultimate purpose.' Yet the court would surely lift the veil in such circumstances. As seen in chapter 5, cases such as *Trustor* have confirmed that the veil will be pierced

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<sup>37</sup> *ibid* 198 (emphasis in original)

whenever the company is used as a façade to evade legal obligations, regardless of whether the company was formed before or after those legal obligations arose.

It is submitted that Moore's argument needs to be nuanced slightly, in order to take such circumstances into account.

### **6.3 Conclusions**

Moore's proposed rule, if adopted, would nevertheless provide a measure of certainty as to when the veil might be lifted on the "sham" ground, particularly if nuanced along the lines suggested above. His formulation is therefore to be commended. As noted in chapter 2.2.3, his arguments have, surprisingly, received little critical attention.<sup>38</sup> The currently unclear judicial position may stimulate academics to consider his proposals afresh.

What Moore does not set out to do is to give guidance on whether the veil should ever be lifted on the grounds of the "single economic unit" argument or on the grounds of "justice". This study has sought to assess whether *Salomon* remains the "unyielding rock" in 2012, in the light of *DHN*, *Re a Company* and *Creasey*. Prior to 2007, the decisions in *Adams*, *Ord v Belhaven* and *Trustor* had generated a clear answer to the question: *Salomon did* indeed remain the unyielding rock. Since then, the decisions of the Court of Appeal in *Beckett*, *Adelson*, *Conway* and *Chandler* have made the picture less clear. It is still to be hoped, perhaps vainly, that clear judicial or statutory guidance on when the courts will lift the veil will yet emerge.

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<sup>38</sup> David Kershaw briefly considers Moore's arguments in D Kershaw, *Company Law in Context: Text and Materials* (OUP 2009) 77

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