

NEW TRENDS IN PIERCING THE CORPORATE VEIL – THE CONSERVATIVE VERSUS THE LIBERAL APPROACHES

Dr Aleka Mandaraka-Sheppard©

ABSTRACT¹

The ‘unyielding rock’ of corporate law, *Salomon v A Salomon*,² established a century-old principle, that is, the separate juristic personality of a corporation, out of which ‘the legal structure of modern business’ was born; and, the so called corporate veil remains unchallenged. This unyielding rock protects shareholders’ private assets and provides a method of limitation of liability which is acceptable by company law in order to facilitate business development and international trade. A rigid application of the principle, however, may sometimes cause damage to the rights of parties who deal with the corporate because its controllers may be using the corporate structure as a façade to perpetrate wrongdoing. Fraud apart, how far does the law go to protect such parties by applying the doctrine of piercing the corporate veil? Would the doctrine be applicable when justice would demand it? What type of wrongdoing would suffice? Would wrongdoing alone be sufficient? Would the doctrine apply if there are other remedies available in law? Would the controllers be made parties to the corporate’s contract of which the corporate is in breach? These questions have preoccupied the English Courts and, in particular recently, in two very important non-shipping cases, which reached the Supreme Court; in the one the Court left the rock untouched, while in the other, it reached the desired result by choosing a different route.

A powerful statement by Lord Sumption in *Petrodel Resources Ltd v Prest*³ speaks for itself: ‘The recognition of a limited power to pierce the corporate veil, in carefully defined circumstances, is necessary if the law is not to be disarmed in the face of abuse’.

Internationally, there are no uniform principles, and the doctrine’s application in various jurisdictions produces polarised results.

© Practising as Arbitrator and Mediator, Founder/Chairman: the London Shipping Law Centre, formerly solicitor, Professor of Maritime Law, University College London, and Head of the Shipping Law Unit; alex@alekashppard.com.

¹ This paper contains extracts from my book ‘Modern Maritime Law’ 3rd edition, 2013, Informa Law from Routledge, but it expands on the subject, since the recent decisions of the Supreme Court were published at the stage of reviewing the proofs and there was no sufficient space to include comments about how such cases might have affected the law. This paper was delivered at the 8th International Conference in maritime law organised by the Piraeus Bar Association and Athens University in October 2013, and it will appear in the book to be published in memory of Professor Antabassis, which will contain all contributions. It is also due to be published in the Business Law Review, January/February issue, 2014.

² [1897] AC 22 (HL).

³ [2013] UKSC 34, at para 27.

INTRODUCTION

1. The issue of corporate veil and the circumstances in which it could be pierced has, in recent years, been before the English courts for alleged fraudulent conduct, or misrepresentation by the controllers of the corporate defendant to induce the claimant to a contract with the corporate defendant, and in cases where the facts seemed to indicate that a particular corporate personality might have been used to conceal the true position of the parties involved in a transaction.
2. Applications to the courts (not just English courts) by claimants seeking the piercing of a corporate veil are made in the context of freezing injunctions, arrest of ships, and the USA Rule B attachment, to obtain security for claims, as well as in other circumstances, when claimants wish to recover money due to them by the company, or the major shareholder/controller of the company.
3. I approach the matter, mainly, from an English law perspective, but I am also comparing English law with the approach of: (i) USA courts in 'alter ego' cases with regard to Rule B attachments, (ii) South African courts in associated ship arrest cases, and (iii) the SC of Greece in piercing the corporate veil of shipping companies, in view of recent developments. This comparison is important to show the contrast between English law (a restrictive application of the doctrine) and the law of the other three jurisdictions (an approach of extensive justice and fairness requirements). Thus, I refer to them in this paper as 'the liberal jurisdictions'. My research material are drawn from the 3rd edition of my book, *Modern Maritime law*, 2013, in which Alan Van Praag, NY lawyer, has contributed the chapter on Rule B attachments.⁴
4. The law is still developing in other jurisdictions, but the purpose of this paper is not to do a comparative study. I have selected, only, recent examples of cases, which were decided in the jurisdictions referred to above, in order to show the recent trends.

CORPORATE VEIL – THE UNYIELDING ROCK

5. It is generally accepted by the law of most advanced legal systems that the concept of legal personality given to a corporation means that, no matter who the shareholders are, the company is a legal person separate from its controllers, with its own separate rights and liabilities, and its own assets.

⁴ I acknowledge my gratitude to Alan Van Praag, partner, Eaton & Van Winkle, law offices New York, for his contribution; any reference to USA law in this paper is based on his research and on my interpretation of the *Blue Whale* case, which he kindly sent me.

6. A 'one-man company' is a legal entity, distinct from its owner and controller; that individual is not liable on the company's obligations or liabilities. Thus, creditors of the company cannot go behind the corporate veil to pursue the shareholders and persons controlling the company, or its subsidiaries, for liabilities of the company. Equally, creditors of the controller of a company cannot pursue the company for his own personal debts. In the words of Lord Halsbury LC in *Salomon v A Salomon*⁵:

'A legally incorporated company must be treated like any other independent person with its rights and liabilities appropriate to itself..., whatever may have been the ideas or schemes of those who brought it into existence.'

THE DOCTRINE OF PIERCING THE CORPORATE VEIL

Overview

7. The decision in *Salomon v A Salomon* (1897) represents a substantial obstacle in the way of an argument that the veil of incorporation can be pierced because the result of piercing the veil is drastic, in that it disregards the corporate personality and identifies the owner/controller of the company, in law, with the company by virtue of that ownership and control.
8. From 1897 to 1966, as the House of Lords could not overrule itself, the classic application of *Salomon* was applied. In 1966, the rules changed and the House of Lords could change its mind. By 1969, Lord Denning MR seemed to pursue a crusade to encourage lifting of the veil⁶ for the interests of justice, but his decisions⁷, which regarded the companies of a corporate structure as one economic unity, brought uncertainty to the safety of corporations and were overruled. In 1978, Lord Keith in *Woolfsen v Strathclyde* (see later at para 9) disapproved of the 'Denning decisions' and set the parameters of the doctrine of piercing the veil. His decision had a strong and persuasive influence. In 1988, there was the celebrated decision of the Court of Appeal (Lord Donaldson MR) in *Evpo Agnic* (see at para 77, below), which crystallised the legitimacy of one-ship companies and non-interventionism with legitimate corporate structures. In 1989, the pendulum swung

⁵ *Salomon v A Salomon and Co Ltd* (1897) AC 22 (HL), at pp 30-31. In this case a sole trader decided to set up a limited liability company with his family members as shareholders to conduct his leather and boot-making business. Upon the insolvency of the company, unsecured creditors sought to get payment from Mr Salomon and applied to the court for an order to pierce the corporate veil. It was held that Mr Salomon could not be made liable for his company's debts, which were legally the debts of the company, and there was no fraud involved simply in using a limited liability company as a vehicle for conducting legitimate business.

⁶ See historical overview by C. Mitchell in 'Lifting the corporate veil in the English Courts: An Empirical Study' [1999] 3 Company Financial and Insolvency Law Review 15, Blackwell pdf file.

⁷ *Littlewoods Mail Order Stores v IRC* [1969] 1 WLR 1214; *DHN Food Distributors Ltd v Tower Hamlets* [1976] 1 WLR 852.

further to non-interventionism by the decision of the Court of Appeal in *Adams v Cape* (see fn 10), which established that the companies of the corporate structure could not be taken as one economic unity and that the veil could not be pierced on the basis of ‘what justice would require’. In 2013, this principle is confirmed by the Supreme Court in *Petrodel v Prest* (see later at paras 16-32), which limits the doctrine further. It is stated that: if the doctrine of piercing is to exist, the circumstances in which it can apply must be limited and be as clear as possible.⁸

9. Until *Petrodel v Prest* and *VTB Capital v Nutritek* (paras 40-45), there existed a strong consensus, as derived from previous authorities, referred to in this paper, that for the corporate veil to be pierced there must be evidence of either fraud, or use of the company as a sham or a façade to evade or conceal liabilities.⁹ The generally accepted scope of the doctrine as expounded by Lord Keith (albeit obiter) in *Wolfson v Strathclyde*¹⁰ was that: ‘it was appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts’ (meaning a deliberate dishonest purpose). There have also been English court decisions¹¹ - not

⁸ Per Lord Neuberger in *Petrodel Resources Ltd v Prest* [2013] UKSC 34, at para 67.

⁹ E.g. *Gilford Motor Co Ltd v Horne* [1933] Ch 935 and *Jones v Lipman* [1962] 1 WLR 832 are examples of the controller having had pre-existing legal obligations which he was attempting to evade by setting up a company. In both cases, the court allowed equitable remedies, but these cases, according to Arnold J in *VTB Capital*, are not regarded as decisions by which the corporate veil was pierced.

¹⁰ *Wolfson v Strathclyde* [1978] SLT 159 (HL); the principle stated by Lord Keith had a strong and persuasive influence in subsequent cases and was used by the courts as a yardstick in the examination of whether or not to pierce the corporate veil: e.g. see *Adams v Cape Industries* [1991] 1 All ER 929, which was regarded as having settled the general law on the subject; the criterion of ‘what justice would require’ was rejected. This case established that the corporate veil should not be pierced just because a group of companies operated as a single economic entity. They may be one entity for economic purposes but not one unit for legal purposes. Cape had used the corporate form legitimately. [In the family division of the English court, the judges have followed a less rigid approach on the basis of ‘what is just and necessary’ to protect families after divorce, and the corporate veil would be pierced if the relevant company was one-man company and the alter ego of the husband, e.g. see *Nicholas v Nicholas* [1984] FLR 285 (CA), *Mubarak v Mubarak* [2001] 1FLR 673. However, in 2007 Munby J. said firmly in *A v A* [2007] 2 FLR 467, at paras 18-19: “There is not one law of ‘sham’ in the Chancery Division and another law of ‘sham’ in the Family Division. There is only one law of ‘sham’ to be applied equally in all three Divisions of the High Court, just as there is but one set of principles, again equally to be applicable in all three divisions, determining whether or not it is appropriate to ‘pierce the corporate veil’.”.]

¹¹ See a few examples: *Re A Company* [1985] 1 BCC 99 (see also fn 21) The controller has established a network of corporate structures and trusts to which he was diverting assets to avoid liabilities; *Kensington International v Congo* [2005] EWHC 2684 (Comm) (relating to freezing injunctions and orders for disclosure against third parties, Vitol and main controllers): there was strong evidence that the Vitol group had collaborated with the Congo to enable it to export oil in ways that ensured as far as possible that it had no assets abroad that might be amenable to execution. The methods employed for that purpose included the use of front companies by both the Congo and the Vitol group to disguise

referred to at the hearing of *Petrodel* – in which the courts, in the special circumstances of these cases, pierced the veil. It should be noted, however, that in other cases (see fn 28), the corporate veil was not pierced particularly when there was another suitable remedy in law. The courts approached the issue on case by case basis.

10. The meaning of a ‘sham’ was defined by Diplock LJ in *Snook v London and West Riding Investments Ltd*¹², thus:

‘...it means acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligation (if any) which the parties intend to create....but ... for acts or documents to be a ‘sham’, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating...’

11. ‘Façade’ has been understood to mean ‘a mask to conceal the true facts’.¹³ However, Lord Sumption considered in *Petrodel* that the words ‘sham’ or ‘façade’ beg too many questions and do not give satisfactory answers to finding what is a relevant wrongdoing (see para 26, below).

12. In civil law jurisdictions, the juridical basis of piercing the corporate veil is generally the concept of abuse of rights, to which the International Court of Justice (ICJ) referred in *Re Barcelona Traction, Light and Power Co Ltd*¹⁴. The ICJ derived from municipal law a limited principle permitting the piercing of the corporate veil in case of misuse, fraud, malfeasance or evasion of legal obligations. English law has no general doctrine of this kind, but it has a variety of specific principles which achieve the same result in some cases.¹⁵

the true identity of the parties to the transactions and the structuring of contractual arrangements in ways designed to ensure that no debts or other financial benefits accrued to the Congo (see paras 24 and 25) CA [2008] 1 Lloyd’s Rep 161.

¹² [1967] 2 QB 786, at 802.

¹³ *Dadourian Group International v Simms* [2006] EWHC 2973 (Ch) at paras 682-3. The controllers of the company (Charlton) were held jointly liable for the costs and expenses of arbitration and litigation incurred by the claimant (DGL) on the basis of misrepresentation and the tort of deceit; but the controllers were not held liable for the sum awarded by the arbitrators against the company for breach of contract (which remained unsatisfied), because they were not parties to the arbitration agreement. There was no need, Warren J held, in order to give the claimant redress for misrepresentation, to lift the veil at all: the judge’s decision was approved by the Court of Appeal in most parts [2009] EWCA Civ 169.

¹⁴ [1970] ICJ 3, referred to by Lord Sumption in *Petrodel Resources Ltd v Prest*, *ibid*, (at para 17) (see later).

¹⁵ Per Lord Sumption in *Petrodel v Prest*, *ibid*, at para 18 of his judgment.

13. The courts of the jurisdictions referred to earlier apply some distinct criteria to ascertain the required control by the shareholders of companies, or the alter ego of the relevant company, for the piercing of the corporate veil for certain purposes.

Lifting is distinguished from piercing the corporate veil

14. Before an order for the piercing of the corporate veil could be made, if it were appropriate in a particular case, English courts are prepared to look behind the veil by ordering evidence to be adduced in order to ascertain whether or not piercing the veil would be required; this is known as 'lifting the veil' i.e. 'peeping behind it'. The court may not order evidence to be adduced unless there is an arguable case of a sham¹⁶. Staughton LJ, in *The Coral Rose*¹⁷, which concerned an application for a Mareva injunction, said:

'To pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To lift the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose'.

15. Thus, piercing the veil is the ultimate result, the sanction or remedy, whereupon the company is identified with its controllers in certain circumstances, but its scope now is less than the ambit given to it by Staughton LJ, above. In many cases, judges have treated the two steps, lifting and piercing, as indistinguishable.

As will be seen at paras 26-29, Lord Sumption in *Petrodel* treated the 'concealment' cases as cases of lifting the veil.

THE CURRENT ENGLISH CONSERVATIVE APPROACH

Petrodel v Prest

16. *Petrodel v Prest* is a case of significant commercial importance but, apart from general observations made by the seven SC Justices, the decision may be limited to the specific facts of this case. Mrs Prest (YP) sought payment of £17.5 million from her ex-husband Mr Prest (MP), being the sum ordered by the court with regard to the divorce settlement. MP (an oil-tycoon) was claiming that he did not have the money and the residential homes were the property of various companies he had established for his oil business. The judge at first instance, by way of partial satisfaction of that payment, directed MP to procure that certain companies in the Petrodel group transfer seven UK

¹⁶ Examples of cases in which an order was made to peep behind the veil were: *The Kommunar (No 2)* [1997] 1 Lloyd's Rep 8; *The Aventicum* [1978] 1 Lloyd's Rep 184; *The Glastnos* [1991] 1 Lloyd's Rep 482.

¹⁷ *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 1 Lloyd's Rep 563, at 571; see also *Adams v Cape Industries* [1991] 1 All ER 929.

properties to YM, on the basis that the companies were wholly-owned and controlled by MP. He relied on the statutory provision, s 24(1)(a) of the Matrimonial Causes Act 1973 (MCA), which he considered conferred a special jurisdiction on the court in matrimonial cases to 'pierce the corporate veil'. The judge further held that there was no general power on the court entitling him to 'pierce the corporate veil' to access the companies' properties, in this case, because there was no impropriety by MP that would justify the disregard of the companies' separate legal personalities. MP appealed, and the Court of Appeal, by majority, reversed the judgment and held the court had no jurisdiction to order the companies to convey the properties to YP in satisfaction of the judgment debt against MP. YM appealed to the Supreme Court (SC).

17. The SC (Lord Sumption delivering leading judgment) explained that the court could access the properties to satisfy the order against MP on three possible bases: (i) the court's general power to pierce the corporate veil; (ii) s 24(1)(a) of MCA 1973; (iii) by virtue of the beneficial ownership of the properties by MP.
18. Allowing the appeal of YP, the court ordered the transfer of the relevant properties to her on the basis of MP's beneficial ownership¹⁸ (considering particularly the obstructions by MP to disclose evidence). The properties held within the corporate structure were held on bare trust for the benefit of MP, who had provided the purchase money and the properties were then gratuitously transferred to the companies; in such circumstances, they should be transferred to YP in satisfaction of the financial settlement. The SC held that this was not a case based on any general power of the court to pierce the corporate veil. While MP used the companies' assets as his own, he was not –by doing this - concealing or evading any legal obligations owed to his wife because the properties were vested in the companies long before the break-up of the marriage.
19. The SC Justices agreed broadly that the doctrine (or metaphor, or label per Lords Mance and Walker) of piercing the corporate veil was incoherent and unclear. Lord Sumption said (at para 16) that the expression '*piercing the corporate veil, properly speaking, means disregarding the separate personality of the company.*' He referred to a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality: for example when:
 - (i) The controller may be personally liable, in addition to the company, if he acts as its agent, or as a joint actor;

¹⁸ But Lady Hale and Lord Wilson held that s 24(1)(a) of MCA 1973 also applied in the circumstances of this case.

- (ii) Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose¹⁹;
- (iii) Specific statutory provisions exist (e.g. the Companies Acts) under which a company's legal responsibility may be engaged by the acts or business of an associated company.

20. In such cases, equitable remedies, such as an injunction or specific performance may be available to compel the controller whose personal legal responsibility is engaged to exercise his control in a particular way. He further stated:

'but when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in Salomon v Salomon,.. i.e where a person who owns and controls a company is said, in certain circumstances, to be identified with it in law by virtue of that ownership and control'.

21. Although it was noted that the doctrine has been criticised as being unprincipled, Lord Neuberger reached the conclusion not to discard it because it represented a *'potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available'* (at paras 75-80). He and Lord Sumption agreed that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive, Lord Sumption said, and he was not willing to undo it, because, he stated (at para 27):

'the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse'.

The limits imposed to the doctrine by Petrodel

22. Since on the facts of this case there was no need to pierce the veil, it is arguable that the following limits to the doctrine are just obiter. Even so, it appears that such limits were not agreed upon even by the majority of the seven SC Justices.

(i) Evasion of existing liabilities

23. Lord Sumption concluded (at para 35) that :

¹⁹ This category touches upon those shipping companies, which do not involve sophisticated corporate structures to distance the real beneficial owner and controller from the registered owner who is a legal owner acting as a trustee for the person behind the trust.

'there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.....the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy.

(ii) No public policy imperative to do justice

24. Lords Sumption, Neuberger, and Clarke, each expressly endorsed the judgment of Munby J. in *Ben Hashem v Shayif*,²⁰ and, in particular, his holding that: if the court had the power to pierce the veil, it could only do so when all other, more conventional, remedies had proved to be of no assistance. Therefore, according to the three SC Justices (no express view was stated by the other SC Justices, but no disagreement either), if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course, as there are other remedies available in law.

(iii) The circumstances for piercing - Adoption of the Munby J five rules

25. Save for any reference by Munby J to *concealment* (which is here omitted from his exposition of the summary of the six rules for piercing the veil), the following five rules were accepted as being correct:

- (a) Ownership and control of a company are not of themselves sufficient to justify piercing the corporate veil;
- (b) The court cannot pierce the corporate veil merely because it is thought to be necessary in the interests of justice, but only in so far as it is necessary to provide a remedy for the particular wrong and not for all purposes;
- (c) The corporate veil can be pierced if there is some impropriety, but not just if the company's wrongdoing is breach of contract;
- (d) The impropriety must be linked to the use of the company structure to avoid liability. It follows that, if the court is going to pierce the veil, it is necessary to show both control of the company by the wrongdoer(s) and impropriety;

²⁰ [2008] EWHC 2380 at paras 160 -166.

- (e) A company can be a façade, even though it was not originally incorporated with any deceptive intent; the question is whether it was so used at the time of the relevant transaction.

(iv) Distinction between ‘concealment’ and ‘evasion’

26. The issue of ‘concealment’ was regarded by Lords Sumption and Neuberger as not involving piercing the veil. In particular, Lord Sumption said (at para 28): *‘the difficulty is to identify what is a relevant wrongdoing. References to a ‘façade’ or ‘sham’ beg too many questions to provide satisfactory answer’*. But behind these two terms, he said, there are two distinct principles: the ‘concealment principle cases’ and the ‘evasion principle cases’. As to ‘concealment’, he explained that:

‘... the interposition of a companyto conceal the identity of the real actors will not deter the courts from identifying them, assuming their identity is legally relevant. In these cases the court is not disregarding the façade, but only is looking behind it to discover the facts which the corporate structure is concealing’.

27. In this sense, it seems, he equated the exercise of discovering what is concealed behind the veil (‘concealment cases’) with ‘lifting the corporate veil to peep behind it’, as Staughton LJ had pondered in the *Coral Rose* (at para 14, above).

28. The evasion principle, on the other hand, is different, Lord Sumption said (at para 28): *‘It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company’s involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical.’*

29. He and Lord Neuberger preferred to limit the doctrine of piercing the corporate veil to the ‘evasion’ cases. Lord Neuberger said (at para 61):

‘I also agree that cases concerned with concealment do not involve piercing the corporate veil at all. They simply involve the application of conventional legal principles to an arrangement which happens to include a company being interposed to disguise the true nature of that arrangement. Accordingly, if piercing the corporate veil has any role to play, it is in connection with evasion’.

30. By contrast, Lords Mance (with whom Lord Clarke agreed) and Lady Hale (with whom Lord Wilson agreed) expressed more flexible views:

Lord Mance stated (at para 100):

'It is ...often dangerous to seek to foreclose all possible future situations which may arise and I would not wish to do that. What can be said with confidence is that the strength of the principle in Salomon's case and the number of other tools which the law has available mean that, if there are other situations in which piercing the veil may be relevant as a final fall-back, they are likely to be novel and very rare.'

Lord Clarke said (at para 103):

'Lord Sumption may be right to say that it will only be done in a case of evasion, as opposed to concealment, where it is not necessary. However, this was not a distinction that was discussed in the course of the argument and, to my mind, should not be definitively adopted unless and until the court has heard detailed submissions upon it....I expressed the same view in VTB Capital v Nutritek And I adhere to it now. However, I also agree with Lord Mance and others that the situations in which piercing the corporate veil may be available as a fall-back are likely to be very rare and that no-one should be encouraged to think that any further exception, in addition to the evasion principle, will be easy to establish. It will not'.

31. Lady Hale expressed her concerns about the division between evasion and concealment (at para 92):

'I am not sure whether it is possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion. They may simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business. But what the cases do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (if it existed at all). In the converse case, where it is sought to convert the personal liability of the owner or controller onto a liability of the company, it is usually more appropriate to rely upon the concepts of agency and of the 'directing mind'.

32. Although the 'evasion principle' does limit the scope of the doctrine considerably, it provides, as it seems, more certainty and clarity about the criteria to be applied. It appears to me, however, that, since the public policy requirement 'to do justice'²¹ is not an imperative, if there are other remedies available, the 'concealment' type of cases

²¹ The case in which the Court of Appeal was prepared to pierce the veil if it was necessary to do justice was in *Re A Company* [1985] 1 BCC 99. However, in *Adams v Cape* [1990] Ch 433, the Court of Appeal was reluctant to go that far by applying just this criterion. In both *VTB v Nutritek* and *Petrodel v Prest*, it was clarified that only if there were no other remedies there would be no public policy imperative because it would not be necessary.

should be given a chance for further consideration and analysis; and that was the view of Lord Clarke. In practice, there can be cases in which there is a blurring between concealment (which may amount to a dishonest ploy to avoid liabilities) and evasion. Drawing a line, by way of imposing a general definitive principle, will disable judges from looking at instances of concealment in particular cases.

The scope of piercing the veil and its effect on contractual transactions

33. The English courts were swamped in the last 10 years by foreign litigants seeking justice in cases in which it was alleged they had been defrauded or misled by those hiding behind the corporate veil of their contractual partners. Except of Burton J in the *Gramsci* and the *Alliance* cases (see below), in which he held there was an arguable case, on the facts, to pierce the corporate veil in order to make the controllers of the company parties to the contract entered into between the company and the claimant, no other judge was prepared to go that far; there had been no other authority on this issue and the other judges distinguished the decisions of Burton J from the one they had to decide.
34. The claimants in *VTB Capital* (below) were sent back to where they came from (Russia) to find justice because the alleged, or actual, deceit was committed there, and the English court (as it was held) was not the most appropriate forum.

The main question

35. The critical question in such cases has been this: what would be the effect and consequence of a finding that the circumstances of the particular case did justify the piercing of the corporate veil. In other words, how far the scope of the doctrine of piercing the corporate veil could be extended. If the purpose of disregarding the corporate veil by applying the exception to the *Salomon* rule is to identify those behind that veil, the controllers, with the company, should they not, by law, be bound to the particular contract in question, as if that contract had been made between them and the claimant?

The Burton J decisions

36. Burton J. in *Antonio Gramsci Shipping Corp. v Stepanovs*²² and his subsequent decision in *Alliance Bank LSC v Aquanta Corp.*²³ reached that conclusion. He said in the *Gramsci* case (at par 26):

²² [2011] EWHC 333; 1 Lloyd's Rep 647.

²³ [2012] 1 Lloyd's Rep 181; also CA [2013] 1 Lloyd's Rep 1.

'There is in my judgment no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppeteer who, all the time, was pulling the strings. The claimants seek to enforce the contract against both puppeteer and the puppet company.'

37. In *Gramsci v Stepanovs*, the claimants (30 one-ship companies, all in the ultimate beneficial ownership of Latvian Shipping Co (LSC)), brought proceedings against five corporate defendants alleging that between 2003 and 2005 there were victims of massive fraud. As the corporate defendants failed to comply with a court order by which they had been ordered to make a payment into court of US\$40 million, as a condition to be able to defend the case, a judgment was issued in default, which remained unsatisfied. The claimants, therefore, brought proceedings against Mr Stepanovs, who with four other persons were the beneficial owners of the corporate defendants. It was alleged that the corporate defendants (by a fraudulent scheme of its controllers) were interposed by becoming the charterers for the 63 ships of the claimants (at less than the market rate), so that the defendants could siphon, dishonestly, the profits by sub-chartering to third parties at market rate, instead of the claimant companies chartering out their vessels to arm's length commercial charterers. So the claimants commenced this action seeking to pierce the corporate veil in order to hold Stepanovs jointly and severally liable with each of the corporate defendants in respect of the claimants' losses. In order to establish jurisdiction against the defendant, the claimant relied, primarily, on the jurisdiction clause of the charter parties. On the claimants' case, the defendant, by virtue of piercing the corporate veil, was a party to the charter parties and the jurisdiction agreement contained in them.

38. The judge held that there was a good arguable case that the veil should be pierced in order to permit the claimants to seek to enforce the charter parties as against the defendant, who was not, originally, a party to them, and there was no principle or jurisprudence against such finding.

39. In *Alliance Bank v Aquanta*, Burton J. also held that by the application of the alter ego principle, there was an arguable case that the off-shore companies were the puppets of the defendants; there was a serious issue to be tried by piercing the corporate veil to determine whether three of the defendants were to be treated as parties to the loan agreements.

Reaction to and disapproval of the decisions of Burton J – VTB Capital

40. His decisions caused heated debates and were disapproved of by the Court of Appeal in *VTB Capital v Nutritek*,²⁴ which held that there was no such principle extending the scope of the doctrine to pierce the veil, and this was confirmed by the Supreme Court in this case²⁵.

41. Arnold J commented in *VTB Capital* (at para 101):

'...It seems to me that the decision in Gramsci v Stepanovs is not so much a decision to pierce the corporate veil as a decision to ignore privity of contract²⁶. Burton J accepted the argument he set out at [23] that there was no difference in principle between making the puppet liable under the puppeteer's contract, as in Gilford v Horne and Jones v Lipman²⁷, and making the puppeteer liable under the puppet's contract. For the reasons I have explained, however, I consider that this argument starts from a false premise. Neither in Gilford v Horne nor in Jones v Lipman were damages awarded against the puppet for breach of the puppeteer's contract. Rather, equitable relief was granted against the puppet to stop the puppeteer evading his own contractual liability. Thus the puppet was not treated as being party to the puppeteer's contract.'

42. The facts of *VTB Capital* are not uncommon.²⁸ VTB, an English bank, being a subsidiary of a Russian State-owned bank, lent money under a facility agreement to a Russian

²⁴ [2012] EWCA Civ 808, and the Court of Appeal in *A Gramsci v Lembergis* [2013] 2 Lloyd's Rep 295, which mainly deals with the application of Art 23 of the Brussels I Regulation.

²⁵ [2013] UKSC 5.

²⁶ Arnold J said, in this connection (at para 101), that the Contracts (Third Parties' Rights) Act 1999 is a limited statutory incursion into the doctrine of privity of contract which otherwise left it intact.

²⁷ *Op. cit* at fn 9.

²⁸ Other claimants also came before the English courts seeking to pierce the corporate veil: e.g. *Lindsay v O'Loughnane* [2010] EWHC 529 (QB), in which Mr Lindsay contended that Mr O'Loughnane had misrepresented his company's activities, which induced Mr Lindsay to enter into contracts with the company. His claim was in deceit and he sought to pierce the veil in order to hold Mr O'Loughnane liable under the contracts. Flaux J. concluded that the claim in deceit succeeded, but rejected the claim to pierce the corporate veil;

In *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch), at paras 684 and 685, Warren J. held that where a claim in deceit succeeded against the person controlling the company, it would be inappropriate to permit the veil to be lifted to enable the claimant to pursue a contractual claim against that person. As he put it, the claimant *'recovers all his loss arising as a result of the misrepresentation by his tortious claim in deceit'*;

In *Linsen International Ltd v Humpuss Sea Transport PTE Ltd* [2011] EWHC 2339 (Comm), the claimants entered into charterparties with the Humpuss group. The first vessel was chartered to the first defendant but the market collapsed and the first defendant refused to pay; he transferred assets to the other defendants as part of a restructuring within the group. The claimants obtained an arbitral award against the first defendant and then sought to pierce the veil and hold the third to thirteenth defendants liable under the charterparties. They first obtained a freezing injunction ex-parte. On the return date, the claimants applied to continue the injunction which was resisted by the defendants. Flaux J. held: the first evidence, which might be described as abuse of the corporate structure was when the restructuring of the Humpuss companies commenced in 2009. As to that, the claimant could

company RAP to fund the purchase of dairy business from Nutritek. The agreement provided for English law and Jurisdiction; RAP defaulted on the loan. VTB brought an action for fraudulent misrepresentation alleging that it was induced to enter into the contract by Nutritek, who allegedly colluded with RAP, and the controller of Nutritek, Mr Malofeev. The two alleged misrepresentations were that RAP and Nutritek were not under common control and the value of the dairy business was stated to be much higher than it was. VTB later sought to amend its pleaded case to content that Mr Malofeev (the controller) and another should be treated as being jointly and severally liable with RAP for breaches of the agreements, seeking to pierce the corporate veil.

43. Arnold J. at 1st instance²⁹ rejected the bank's claim for damages in contract against the non-party to the contract; his reasoning was accepted by the higher courts and was much quoted in subsequent cases. Having analysed relevant authorities, he said that the true basis upon which the courts have pierced the corporate veil is that the company was being used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely *independently* from the company. That is an anterior and independent wrongdoing by the controller.

44. The Court of Appeal agreed; on appeal to the Supreme Court by VTB, Lord Neuberger, delivering the main judgment, with whom the other Lords agreed, held that there could not be an extension to the scope of piercing the corporate veil to the extent that the controller of the company in question becomes contractually liable to the claimant bank for the debt of the company under the facility agreements. Lord Clarke, although he agreed that it was not appropriate to pierce the veil on the facts of this case, expressed the wish to reserve for future decision the question as to what is the true scope of the

show a good arguable case that the purported sales of vessels and transfers of assets to the 3rd defendant were shams or façades designed to render enforcement against the 1st defendant more difficult and that the corporate structure of Humpuss group was misused from July 2009 until sometime in 2010 to that end, so that, at least, as between the 1st and 3rd defendant, (but not beyond) there was an arguable case for piercing the corporate veil. However, whether or not the corporate veil could be pierced as against, or between one or more of, the 3rd to 13th defendants, the effect of piercing did not make those defendants liable under the underlying contracts, the basis on which the freezing injunction had been obtained. Accordingly, there was no basis for its continuation. He further said at paras 18-19: *'it is not enough to show that a company or a group of companies is closely controlled by an individual or a family or by a holding company. If the element of control were sufficient in itself, the English courts would have accepted the concept of the 'single economic unit' which has been consistently rejected by our courts. The claimant who wishes to pierce the corporate veil must show not only control but also impropriety, in the sense of misuse of the company or the corporate structure to conceal wrongdoing'*. As to the action against the guarantor, 2nd defendant, he held there was no basis for piercing the corporate veil; there was no suggestion that he tried to evade his liability under the guarantee by transferring his assets.

²⁹ [2011] EWHC 3107 (Ch), the judge helpfully reviewed relevant authorities.

circumstances in which it is permissible to pierce the veil; that included the question whether *Antonio Gramsci v Stepanov* (on its facts) was correctly decided³⁰.

45. The fundamental objection to the case of VTB Capital was that the doctrine was being invoked so as to create a new liability, which would not otherwise exist, namely, to make the controllers of the company jointly and severally liable on the company's contract. It was emphasised, in this case, that even if the criteria for piercing the veil are met, such as control coupled with impropriety by the controller of the company, the court will decline to pierce the veil if there are other remedies available and, in most cases, there are. For example, equitable remedies could be granted against a company in respect of legal or equitable wrongdoing committed by an individual, the controller of the company, but it does not follow that the individual can be held liable for breach of contract entered into by the company. VTB had an arguable case based on the tort of deceit which would be tried in the Russian courts, which had jurisdiction.

LIBERAL JURISDICTIONS – THE 'ALTER EGO' CASES - INDICATORS FOR PIERCING THE VEIL

46. In USA and South Africa, the indicators applicable for piercing the veil are similar and are, broadly, based on who controls, or dominates, the company in question.

USA approach in the context of the Rule B attachments

47. It should be noted that different jurisdictions in the United States apply Rule B differently, in that, there is a significant variance in the veil piercing standards applied by the various Circuits. For example, courts within the Second Circuit in New York and Connecticut apply Rule B differently from courts within the Eleventh Circuit in Florida, Georgia and other Southern States. In the Fifth Circuit, the rule is applied when the person or parent company exercised complete domination over the corporation with respect to the transaction at issue, and such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil. In the Second Circuit, it seems, that committing a 'wrong' alone is sufficient. Ultimately, in all jurisdictions the corporate veil will be pierced if upholding the corporate separateness would work out injustice and produce inequitable results.³¹ The 2nd Circuit Court of Appeals enumerated ten factors that are considered as indicators of domination of the defendant (corporation) by its alter ego³²:

³⁰ This question was not directly answered by the subsequent Supreme Court decision in *Petrodel v Prest* because such issues did not arise in that decision as seen earlier in this paper.

³¹ As advised by George Gaitas of Chalos & Co, International law firm, Houston, and Alan Van Praag, referred to in fn 4, above.

³² *Tide Line Inc v Eastrade Commodities* 2006 WL 4459297, 2007 A.M.C. 252, 265.

1. The absence of corporate formalities;
2. Inadequate capitalisation;
3. Personal use of corporate funds;
4. Overlapping personnel and ownership;
5. Common office space, address, telephone numbers;
6. The amount of business discretion displayed by the allegedly dominated corporation;
7. Whether the related corporations deal with the dominated corporation at arms' length;
8. Whether the corporations are treated as independent profit centres;
9. The payment of or guarantee for debts of the dominated corporation by other corporations in the group;
10. Whether the corporation in question had property that was used by the other corporations, as if it were its own.

48. However, there is no set rule as to how many of these factors must be present to warrant piercing the corporate veil, and the courts have considered additional factors as well.

49. In *Milestone Shipping SA v Estech trading LLC*³³, the court summarised the standard for evaluating alter ego claims by observing that a primary consideration is whether affiliated defendants operated as a single economic entity.

50. In a recent decision of the 2nd Circuit Court of Appeals, *The Blue Whale*³⁴, the Appellate court re-examined the 'alter ego' claim of Blue Whale in the context of Rule B attachment and, by conducting a choice of law analysis, decided that Federal common law applied, overruling the decision of the US district court (Southern District of NY). The district court had concluded that, pursuant to the charter party choice of law provision, English law applied and, on the basis of that law, there was no adequate prima facie claim to pierce the corporate veil.

- (i) Blue Whale (shipowners) contracted with Grand China Shipping Development (charterers) to transport goods from Brazil to China. A dispute arose as to unpaid freight, which was referred to London arbitration, pursuant to the charter party. In anticipation of an arbitration award, Blue Whale sought to obtain security for their claim by applying for a Rule B attachment against the assets of the charterers' alter ego, HNA Group Co Ltd, another Chinese company, which owned property in the Southern District of NY (providing the connection with the jurisdiction). Blue Whale alleged that the charterer and HNA were in fact a single business enterprise and sought to pierce the corporate veil to reach the assets of HNA.

³³ 2011 A.M.C. 968 (S.D.N.Y).

³⁴ 2013, July 16, No 13-0192- cv.

- (ii) There was no dispute that Blue Whale had a valid prima facie admiralty claim against the defendant in order to seek the attachment (procedural issue). The dispute was about which law applied to the court's assessment of the validity of the claimant's prima facie claim (substantive issue). It was noted by the 2nd Circuit Court of Appeal that there had been a split of authority in the Southern District of NY on this issue. Some district courts within the Circuit presumed that federal law governs all questions concerning the validity of Rule B attachment, while others regarded that the existence of a valid prima facie claim turns on the substantive law of the relevant contract. The 2nd Circuit held that neither of these presumptions were correct.
- (iii) It held that while admiralty law provides the remedy, the substantive law defines the right to the remedy. However, it considered that the more difficult question was which substantive law controlled the validity of Blue Whale's alter ego claim?
- (iv) On this point, the "2nd Circuit confirmed that Federal maritime law cannot automatically apply to assess 'alter ego' claims. Since the alter ego claim is collateral to the contract, in all such cases district courts within the Circuit must always conduct a choice of law analysis in determining what law applies to evaluate Rule B alter ego claims. Such analysis led the court to the application of Federal common law, rather than the application of the charter party choice of law provision. It ruled that the choice of law clauses in underlying contracts are irrelevant to assessing alter ego claims;³⁵ the issue here was about the legal status of HNA as an alter ego of the charterer and not about the obligations or violations of the charter party between Blue Whale and the charterer.

South African law approach in the context of associated ship arrest

- 51. Under the law of South Africa, the indicators (seen under para 46, above) are relevant in the context of associated ship arrest. The conditions for an associated ship arrest are set in the Admiralty Jurisdiction Regulation Act No 105 of 1983, as amended in 1992 (the Act). In effect, the associated ship arrest allows the claimant to go behind the veil of a company and circumvent the protection afforded to ship-owners by one-ship companies.
- 52. Section 3(7) defines a sister ship as the one owned by the same person or company who owns the guilty ship, and it defines 'associated ship' and 'control' under (e) and (f):

³⁵ It is interesting to note that Lord Neuberger in *VTB Capital v Nutritek* applied English law as being the law appropriate to determine the question of piercing the veil, as there was no single choice of law rule to govern the issue (at paras 131- 132).

- (a) An associated ship means a ship, other than the ship in respect of which the maritime claim arose, that is:
- i. Owned, at the time when the action is commenced, by a person who controlled the company which owned the ship concerned when the maritime claim arose, or
 - ii. Owned, at the time when the action is commenced, by a company which is controlled by a person who
 - a. owned the ship concerned, or
 - b. controlled the company which owned the ship concerned, when the maritime claim arose.
- (b) For the above purpose, a person shall be deemed to control a company if he has power, directly or indirectly, to control the company.

53. The provision requires proof of control (at the relevant times). A person may control a company without controlling all the shares in the company, and even without majority shareholding³⁶.

54. The Supreme Court of Appeals of South Africa interpreted the above provision in *Belfry Marine Ltd v Palm Base Maritime (the M/V Heavy Metal)*.³⁷ The claimant sought to obtain security for his claim in damages for the defective condition of the ship *MV Sea Sonnet*, which he bought under an MOA. He arrested the *Heavy Metal* (not belonging to the same company as the one which sold to him the *Sea Sonnet*) pursuant to the above provisions of the SA Act; the owner of the *Heavy Metal* applied to set the arrest aside.

55. With regard to the meaning of 'control' under the statute, the Supreme Court held that control is expressed in terms of power of: either (a) to manage the operations of the company, or (b) to determine its direction and fate. Where these two functions happen to vest in different hands, it is the latter that the legislator had in mind when referring to 'power' and hence 'control'. 'Indirect power' in the Act was thought to refer to the person who, de facto, wields power (that is, the beneficial owner) through someone else. That 'someone-else' is the person who wields direct power vis-a-vis the company and the outside world (the legal owner) and who, in the eyes of the law (that is, de jure), controls the shareholding and determines the direction and fate of the company. The same person may exercise both de facto and de jure control. If, for example, the person having de jure power happens to control, at the relevant time, the companies concerned, that is, the company that owns the guilty ship and the one that owns the targeted ship, the statutory requirements of a nexus between the two companies will have been satisfied.

³⁶ *Dole Fresh fruit International Ltd v MV Kapetan Leonidas* 1995 (3) SA 112, at 119.

³⁷ 1999 (3) All SA 337 (A).

56. Mr Lemonaris, a Cypriot lawyer, was holding the position of de jure controller because, when he registered the companies and the ships in Cyprus pursuant to the law of Cyprus, he had to hold the position of the nominee shareholder of the two different beneficial owners of the ships. Thus, pursuant to the SA Act, the *Heavy Metal* was an associated ship with the *Sea Sonnet*.

57. The *Heavy Metal* decision is controversial but it is the current status of the law.³⁸ The principles and purpose of the associated ship arrest were confirmed by a relatively recent decision of the Supreme Court of SA, *The Cape Courage*,³⁹ which gave the final blow to ship owning legitimate corporate structures. The court confirmed that the SA legislation goes beyond a sister ship arrest by widening the net and providing for a statutory piercing of the veil to combat the practice frequently adopted by ship-owners seeking to evade the sister ship provision by setting up a series of one-ship companies.⁴⁰

58. The SA Act cuts through what is not allowed under English law, for example, what has been seen in the cases of *Evpo Agnic* (two sister companies), the *Maritime Trader* (a parent and a subsidiary) and the *Aventicum* (a parent with various subsidiaries, all of which were controlled by one person sitting over and above all companies).

Greek law approach - recent Supreme Court decision

59. In February 2013, piercing of the corporate veil was clarified by the highest court of Greece (Αρειος Πάγος) constituted of 12 members (ΑΠ Ολ 2/2013),⁴¹ which overruled the Court of Appeal decision. The general principles applicable to corporate veil and the exceptions to its protection are set clearly by this decision, thus:

- (i) The corporate personality, which is a creature of the law, is separate from those individuals who are the owners or shareholders of the company (separability principle).
- (ii) It is legitimate to have one person or a shareholder of the company to manage the company and other sister companies [επιχειρηματίας], or to provide finance by way of loans, or guarantees, for its operations, and to identify its interests with the interests of the company in a legitimate way.

³⁸ See Hare, J: Shipping Law and Admiralty Jurisdiction in South Africa, Part I, at paras 2-2.6.2 – 2-2.6.3, 2nd edn (2009) JUTA & Co Ltd.

³⁹ 2009 ZASCA 74.

⁴⁰ The reaction to the *Heavy Metal* by shipping businessmen led to the reorganisation of their affairs by creating the most complex corporate structures; for example, see *China National Chartering v MT GC Guangzhou*,⁴⁰ where the Chinese claimant was not successful on the associated ship arrest.

⁴¹No names of cases are given in the reported cases.

- (iii) The establishment of one-ship companies in the shipping business is legitimate for the protection of the property of the beneficial owner from the risks or dangers to which the ships are exposed.
- (iv) Abuse or misuse will occur when the legal personality of the corporate is used by the shareholder/controller to present the activities of the corporate, or of himself, as legitimate in cases in which:
 - a. there is a breach of the rules of law,
 - b. there is breach of good faith principles, or
 - c. there is deliberate intention to harm third parties, or to avoid legal obligations of the corporate or of himself which were created with knowledge of corporate or personal inability to perform.

60. The sanction for such conduct is the piercing of the legal personality to extend the particular liabilities or consequences from the company to the shareholder/controller or vice versa. Such a consequence is temporary and limited to the particular transaction concerned. But the liability of the company and of the controller is joint and several.

61. The Greek Supreme Court set the following indicators which will, normally, be considered as relevant, when a court examines cases in which piercing the corporate veil is sought:

- Inadequate finance or capitalisation in the company;
- Conflation between the company's property with the controller's personal property;
- The conduct of the dominant shareholder in his dealings with persons of the company is taken into account:
 - i. When the company does not have its own business organisation;
 - ii. When the formalities are not kept and it is the controller, in fact, who enters into contracts and deals with outsiders for its own benefit;
 - iii. when, under the guise of the corporate personality, third parties were led by the controller to enter into a particular contract with the corporate body due to the presentation to them of misleading facts.

62. The case was not unusual and concerned a debt owed to a bunker supplier. A fleet of a number of ships, each owned by one-ship companies, was controlled by X, who was also the main shareholder of the Holding company in the group of the subsidiaries; the Holding company, in turn, was owned by another (the parent company) of which X was the main shareholder. Some of the subsidiary ship-owning companies were registered in Liberia and others in Panama (typical structure). X became a personal guarantor for loans provided by banks to the parent company, the purpose of which was to finance the subsidiaries. X also mortgaged his personal property as additional security for the

loans. The drop in the freight market and difficulties in finding employment for all the ships caused financial problems to the group.

63. The fleet was managed by another Liberian company, A, based in Greece. A was functioning independently from the ship owning companies. On behalf of subsidiaries, A entered into a contract with M (bunker supplier) for the supply of bunkers, which were supplied. During the negotiations, the head of supplies of A sought extension of time for payment by instalments and M was reassured that payment would be regular; in particular, M was persuaded to agree on the basis that there was no need for concern, since the head of the fleet was X (the implication being that X was a well-known figure in shipping!). X confirmed personally on the telephone to M his leading position in the fleet and indicated that he would be personally responsible for the payment. (It should be noted that it is not reported in the decision what was said precisely during this telephone conversation). The amount of the invoice of US\$138,883 remained unpaid. There was default on the loan repayments and the bank took possession of some ships; consequently, the fleet collapsed.
64. M sued X and the relevant subsidiary which purchased the bunkers seeking from the court to pierce the corporate veil so that the debt was paid by X, since the purchasing subsidiary had collapsed.
65. The Supreme Court of Greece, reversing the decision of the CA,⁴² ordered the piercing of the corporate veil. It agreed with the CA only to the extent that, despite X being a guarantor for the loans and the controller of all subsidiaries in the group for their commercial operation, these factors alone were not indicative of an excessive use of power by X, nor was there conflation of the company's finances with X's personal ones. However, taking all the circumstances into consideration and, in particular, the fact that, at the time the contract was made on behalf of the debtor company, the company and the other subsidiary companies in the group were undergoing severe financial difficulties, the Court held that X transferred, in effect, the risk of financial default arising from his own business activities to the claimant, M. M had been persuaded to enter into the contract as he had been led to believe by X himself that the money would be paid as agreed, since X was the decision maker about matters of the fleet.⁴³
66. In the circumstances, and with regard to the particular transaction, it was held that there was abuse of the legal personality of the company which constituted breach of principles

⁴² The CA had reversed the 1st instance decision, and did not identify X with the corporate personality of the subsidiary companies.

⁴³ The view of the CA on this point was that, since M was an experienced supplier of bunkers to shipping companies, he should have known that the ship of one-ship Company is the only asset against which he could enforce his claim.

of good faith under the Greek Civil Code and an abuse by X of his own position and rights, so as to justify the piercing of the corporate veil and render X liable to pay this particular debt. The piercing was limited and temporary for the purpose of rendering both the company and the main shareholder jointly and severally liable to the bunker supplier under the particular contract between M and the company.

67. This case is distinct from other cases decided in other jurisdictions because the Greek Supreme Court introduced an additional criterion to piercing the corporate veil based on the Civil Code of Greek private law. In particular, it held that there was breach by the controller of Art 281 of the Code, which imposes an obligation that, when a person exercises a right (namely here the right to control the company), he must do so in compliance with good faith principles and the socioeconomic purpose of his right. For the purpose of this paper, there is no need to refer to the other Articles upon which the Court relied, other than to mention that the decision has serious implications for shipping companies operating in Greece.

HOW THE OTHER JURISDICTIONS WOULD DEAL WITH SUCH A CASE?

68. Under English law, pursuant to the analysis of the doctrine of piercing the corporate veil by *VTB v Nutritek*, the facts of this case would not lead to piercing the veil in order to make the shareholder/controller liable to the contract entered into on behalf of the company.

69. Nevertheless, the same result, as that reached by the Greek Supreme Court, might have been reached through different routes.

- (i) Arguably, depending on what exactly was said during the telephone conversations between X and M, when X was giving assurances, promises, that payment of the price would be made, which led M to deliver the bunkers, an implied collateral contract might have sprung up binding X to pay the price, if the company could not pay. In this sense, he might have been regarded as a personal guarantor.
- (ii) Alternatively, the court might have concluded that X had assumed personal responsibility by the way he conducted himself towards M. Thus, X might have been held liable in tort. That was the route recently adopted by the Court of Appeal in *Chandler v Cape Plc*.⁴⁴
- (iii) Depending on what was said during the negotiations to persuade M to enter into the contract, if there was evidence of dishonesty, a cause of action against X could,

⁴⁴ [2012] EWCA Civ 525.

arguably, be based on the tort of deceit, if it could be shown that the representations made by X were false and dishonest intending to lead M to rely on them and enter into the contract with the company, on which M did rely and suffered loss.⁴⁵ Whether or not an English court would hold X liable on these bases, it would depend on skilful cross examination of X in court.

70. Under USA law, but in the context discussed in this paper, if there was an application for a Rule B attachment on funds of X, based in a USA district, the facts of this case would lead the court to apply 'alter ego' principles, because: (i) X was controlling the dominated companies; (ii) the company in question lacked sufficient finance to perform its corporate responsibilities; (iii) the debts of the dominated corporation were guaranteed by X; (iv) there was no discretion displayed by the dominated corporation; and (v) the companies were one economic entity.
71. Under the SA law, if X owned a ship which visited a port in SA, it would be arrested on the basis of the associated ship arrest, because the court would consider that X had control (meaning the power), when the cause of action arose, over the company which owned the ship concerned.

WHAT IS THE EFFECT OF THESE DEVELOPMENTS UPON SHIPPING COMPANIES?

72. Under English law, the legitimate corporate structures of one-ship companies are safe, as the unyielding rock principle of *Salomon v A Salomon* has been strengthened. Contractual transactions of the company and liabilities arising from them remain those of the company, and vice versa. An extension of the doctrine of piercing the corporate veil is unwarranted, when there are other remedies available in law for the claimant (*VTB Capital v Nutritek*).
73. The Supreme Court in *TVB Capital* reiterated that the doctrine cannot be invoked merely where there has been impropriety (Lord Neuberger at para 128), quoting the much approved decision of Munby J in *Ben Hashem*,⁴⁶ that '*it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, misuse of the company by them as a device to conceal their wrongdoing ... at the time of the relevant transaction*'.
74. It may seem that the Supreme Court by its subsequent decision in *Petrodel v Prest* excluded cases of 'concealment' from the doctrine and limited it only to cases of '*evasion of existing liabilities*' (but Lords Sumption and Neuberger were in the minority). Considering the comments of Lord Clarke, referred to earlier at para 30, it is likely that

⁴⁵ *Eco 3 Capital Ltd and others v Ludsin Overseas Ltd* [2013] EWCA Civ 413, the Court of Appeal reviewed the authorities and considered the requirements for making a case in the tort of deceit.

⁴⁶ *Ben Hashem v Shayif* [2008] EWHC 2380 at para 160.

future cases concerning concealment of true facts will be looked at, and such cases may be shipping related.

75. In this connection, the decision of Eder J in *Caterpillar v Saenz*⁴⁷ should still be, even after *Petrodel*, good law on the facts of that case. Caterpillar had advanced finance to the 1st and 2nd defendant companies for the acquisition of two yachts. The borrowers defaulted on the loan. The third defendant was one of the loan guarantors and the controlling mind of all companies. Caterpillar obtained a judgment against the guarantor/controller by piercing the corporate veil for the limited purpose of enforcing the judgment against one of the properties. Prior to the advancement of the loan, the guarantor had declared that the relevant property was his own property. During the hearing, however, he asserted that the property belonged to the 14th defendant and that he had no beneficial interest. Eder J. allowed Caterpillar to pierce the veil and said:

‘the court will only pierce the veil so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. Here it seems to me that the particular wrong which [the Guarantor] has done, is that he has mis-used the company as a device, in effect, or is now seeking to do that’.

The most important factor taken into account by the judge in this case was, as the evidence showed, that the guarantor owned certain valuable properties, in which the Company had a shareholding interest, and he asserted in court that he did not own them.

76. Only in a few shipping cases was the corporate veil pierced: e.g. the *Saudi Prince*,⁴⁸ where the controller of the one-ship company transferred the ship to another company (especially created for the benefit of his children), without obtaining payment for the sale, to avoid existing liabilities; the *Tjaskemolen*,⁴⁹ in which the ship was transferred to another company after a claim had arisen and without payment of the price. It was found on evidence that the whole arrangement was a sham to ensure that the ship was not made subject to arrest by the claimant to obtain security for the existing claim.

77. On the other hand, the veil was protected in the *Evpo Agnic*,⁵⁰ in which Lord Donaldson MR refused to pierce the corporate veil of one-ship companies and held that it is legitimate for ship-owners to arrange their affairs by running a series of one-ship companies as a group, and cause them to use their individual assets to their mutual benefit. Mr Pothitos' companies, each owning one ship, were legitimate and he was not regarded as the beneficial owner of the ships owned by the separate corporate

⁴⁷ [2012] EWHC 2888 (Comm).

⁴⁸ [1982] 2 Lloyd's Rep 255.

⁴⁹ [1997] 2 Lloyd's Rep 465.

⁵⁰ [1988] 2 Lloyd's Rep 411.

structures, even if he was the controlling shareholder of the sister companies. There was no impropriety done by Mr Pothitos. The claimant sought to arrest the ship of the sister company which was not the ship in connection with which the claim had arisen. Each company's ships were not sister ships with each other.

78. However, as seen in this paper, the approach of the courts in South Africa causes great concern. The *Heavy Metal* decision has gone too far to cut across the traditional corporate arrangement when a nominee lawyer, usually, appears in the register of the incorporation as a representative of the company and has nothing to do with actual control.

79. Similarly, the approach of courts in USA (particularly in the 2nd Circuit), in relation to Rule B attachments, is in sharp contrast to English law by applying the concept of 'a single economic entity', which is foreign to English law, as Flaux J. said in *Linsen v Humpuss*.⁵¹

'it is not enough to show that a company or a group of companies is closely controlled by an individual or a family or by a holding company. If the element of control were sufficient in itself, the English courts would have accepted the concept of the 'single economic unit' whichhas been consistently rejected by our courts'.

80. Now the Greek jurisdiction has become one of the liberal ones, and a new element is taken into account, that is, breach of good faith principles. Being an open-ended concept, it poses a serious threat to traditional shipping business.

CONCLUSIONS

81. In a snapshot, two general rules derive from the recent English SC decisions for the application of the doctrine:

(i) '*piercing the corporate veil is a potentially valuable judicial tool to undo wrongdoing in some cases, where no other remedy is available*'⁵² (the narrow rule), and

(ii) '*the recognition of a limited power to pierce the corporate veil, in carefully defined circumstances, is necessary if the law is not to be disarmed in the face of abuse*'⁵³ (the broader rule).

82. The SC emphasised that the doctrine, or metaphor of piercing the corporate veil has its place only in limited circumstances, when there is both impropriety and control by the controller to evade existing liabilities, with the further limitations: (i) the doctrine will

⁵¹ Op. cit. at fn 28.

⁵² Per Lord Neuberger in *Petrodel* and *VTB Capital*.

⁵³ Per Lord Sumption in *Petrodel*.

not apply if there are other remedies available; and (ii) the exception to the *Salomon* rule should not be extended so as to render the controller liable under the contractual transactions of the company.

83. It is important to remember, however, that, on the facts of *Salomon v A Salomon*, the evidence about the legitimacy of Salomon's business was very clear. By contrast, nowadays, there are examples of cases in which the controllers have used the vehicle of the company to hide serious improprieties, causing damage to innocent third parties for whom other legal remedies may be cumbersome, and even difficult to obtain through other routes of the law and in jurisdictions where the outcome may be unpredictable. In this regard, it is submitted, judges should be allowed to exercise their discretion rather than look for evasion cases only.
84. It seems, however, that the effect of the dicta of both *Petrodel* and *VTB Capital* is to restrict such discretion. But since, on the particular facts of these cases, the doctrine could not be expanded because the claimants could obtain a remedy via other legal routes, the dicta that might have the effect of limitation of the doctrine are fact specific. There should be prospects, in future cases, for further exploration of the scope of the doctrine, even if a further exception to the rule, other than in the 'evasion' cases, may be difficult to establish.⁵⁴
85. The comments of Lords Mance and Clarke that it would be dangerous to foreclose all possible future situations, and Lady Hale's view⁵⁵ that it was not possible to classify all cases neatly into cases of either 'concealment' or 'evasion', should be borne in mind. In particular, as Lady Hale pointed out, people who operate limited companies should not be allowed to take unconscionable advantage of those with whom they do business. In this connection, the reasoning of the Court of Appeal in *Re A Company*,⁵⁶ allowing the piercing of the corporate veil because it considered it necessary to do justice for unconscionable conduct by the controller of the company, has been misunderstood by commentators after the *Adams v Cape* case. The reasoning, of course, in *Re A Company* could have been dressed up in different words, such as: 'it was necessary to prevent the controller from evading his liabilities to creditors, or to prevent disarming the law in the face of abuse'. It seems that semantics played a great part in the judgment of Lord Sumption in the *Petrodel* case.
86. By limiting the piercing of the corporate veil only to cases of clear 'evasion' of an antecedent and independent liability of the controller is to designate too narrow a scope

⁵⁴ Per Lord Clarke (at para 103).

⁵⁵ At para 92 in *Petrodel*.

⁵⁶ [1985] 1 BCC 99; the controller had established a network of corporate structures and trusts to which he was diverting assets to avoid liabilities.

to the doctrine, to the extent that the law will be rendered powerless in the face of abuse. The additional limitation that the doctrine will be applicable only in cases where there is no other remedy in law may have the effect of increasing the risk of abuse, particularly, as other remedies may not in practice be easy to obtain.

87. Speaking of the other jurisdictions, seen earlier, by contrast, the trends are that the ambit of the scope of the doctrine is expanded to the extent that it can be unruly, disregarding legal certainty principles and rules of corporate law. These trends show a tendency of the courts for an over-extensive justice and fairness by the application of open-ended concepts of 'control', 'power', 'single economic entity' and 'good faith principles.' Unless the limits of such concepts are clearly defined, their application can be indiscriminate.
88. In my view, for the rules of the doctrine to be consistently applied, at an international level, and for the avoidance of polarising the results of the doctrine's application, an International Convention is needed for the purpose of uniformity, certainty and delineation of the scope of the doctrine by international rules.
89. However, whether or not States will be prepared to sign up to such a Convention will depend on their respective legal, political and economic considerations. On the one hand, a non-interventionist approach to corporate structures, (as English law has adopted), encourages business and economic development in the particular State, as shareholders' assets are protected. That means that creditors should take their own protection, because the risk of a limited liability company with which they do business is, in effect, transferred to them.
90. On the other hand, over protectionism of corporations carries the risk of erosion of the rule of law; although morality with regard to how corporations organise their affairs is not the concern of corporate law, taking unconscionable advantage over the people the corporates do business with should be an important consideration for both the legislator and the courts. The *Salomon* principle of the unyielding rock of a corporate personality was about 'one-man' company, and it may no longer be appropriate with regard to the sophisticated corporate structures of today, which operate in a globalised world.

Dr Aleka Mandaraka Sheppard

Maritime Arbitrator

LSLC – Maritime Business Forum

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