THE VEIL OF INCORPORATION: TO DISLODGE OR NOT TO DISLODGE? *

Abstract
The principle of separate personality provides that in law the company is viewed as a person with distinct personality from its members. Consequently, the creditors of the company are required to sue the company as a person instead of its members. However, to avoid injustice through a consistent application of the separate personality principle, some exceptions have been established and construed into what is known as the doctrine of piercing the veil. This essay concerns a critical examination of the doctrine of lifting the veil and points out the weaknesses of the judicial authorities proposing them. It is concluded that in as much as these case laws remain the existing authorities in this area, their pitfalls notwithstanding, they at least require codification to achieve certainty and precision in applying the law.

Keywords: *corporate veil, separate personality, piercing the veil*

1. Introduction

In the landmark case of *Salomon v Salomon*[1] the law lords reached a decision that the company is considered in law a separate person from its members. The issue on whether the company is a person in law with a separate personality became well-settled as the House of Lords concluded that the company has a separate personality from its members. Thus any action by the creditors must be brought against the company itself rather than the individual members that composed it.[2] Nevertheless, like every general rule in law, some exceptions to the principle of separate personality have been created to avoid occasioning injustice due to consistent application of the principle. The exceptions where the corporate veil will be lifted include where the statute provides for it clearly; where there is the need to protect national interest, particularly in times of war or socio-economic conflict; where a fraudulent abuse is found; where an agency relationship exists; where a trust relationship exists; where a group of company is understood as a single economic unit; or where a party seeks to evade liability. This essay seeks to investigate against this background whether it is justifiable to pierce or not to pierce the corporate veil. It seeks to answer the following questions: is the decision in *Salomon*[3] tenable? Is it justifiable to pierce the corporate veil in some restricted circumstances? To what extent are the exceptions to the separate personality principle proper? The essay concludes that the judicial decisions in this area have their respective pitfalls but nevertheless are the extant judicial authorities. In all, the case laws require codification to avoid confusion.

2. The Separate Personality of the Company: The *Salomon* Principle

On 16 November, 1896, the House of Lords handed down the decision in *Salomon*[4] and consequently laid a fundamental principle of law: the company has a separate personality from its members.[5] The facts of the case were that Aaron Salomon, a leather merchant set up business and had it transferred to a limited company in which him and other six members of his family subscribed to the memorandum of association. The business was purchased at £38, 782 and whilst the six family members took one shares each, Salomon had 20, 001 shares. The limited liability company was later liquidated and the liquidator was of the belief that Salomon still owned the business, the company being a sham by Salomon to limit his liability in contrast to the aims of the English Companies Act 1862.[6] In delivering the judgment, Lord MacNaghten maintained that in law, the company is viewed as a separate person from its individual members. Following incorporation, the business might be the same, having the same people as manager and the same people receiving profits. This notwithstanding the company is neither the agent of the shareholders nor the trustee. The member of the company cannot be liable except as provided in the Act.[7] The separate personality

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[1] *Salomon v Salomon Co. Ltd* [1897] AC 22
[2] Ibid
[3] Ibid
[4] Ibid
[5] Ibid
[6] Ibid
[7] Ibid

theory will be lauded on its face value in that it offers protection to some extent to the individual members of the company. Where a company becomes liquidated, the creditor cannot go after the properties of the individual members but that of the company itself which has a separate personality from its members.[8] Thus the individual members are shielded by virtue of the provisions contained in the principle of separate personhood. Nonetheless, the principle of separate personality when critically viewed meets its waterloo. Looking at the other side of the coin, the content of the principle poses an injustice and unfairness to the creditors of the company. In the case of *Salomon*[9], the creditors were left unpaid of the debts owing to the operation of the separate personality principle. The apt questions are what if Salomon Aaron personally had the financial wherewithal to repay the creditors? What economic implications would the debts owed the creditors have on their respective businesses?

The truth is, the walls of the *Salomon*[10] principle contained in them the seeds of its own cracking and destruction. A trader who seeks to incorporate its business will reap the fruits of limited liability and would through taking debentures in the company ensure that he had a first call on the properties of the company when insolvency occurs. Where a founding corporate member takes debentures, the charges will be on the register to assist a future creditor in checking and discovering the charges of the company. Should a creditor not check the register, a constructive notice of the register charge would be implied. However, it has been noticed that small trade creditors usually do not spend time and money checking the register. In this respect, *Salomon*[11] left unsecured creditors in a dangerous situation position, in particular, when they seek to have the debts repaid by the company.[12] The principle in *Salomon*[13] requires that an entrepreneur like Aaron Salomon is likely not to devote much care and attention in being honest and fair whilst dealing with third parties, in as much as great personal risk of loss would not be incurred but wounded pride and the aspirations of a yielding business. In a similar vein, personal risk of loss will not be suffered by other shareholders of the company when the company fails in so far as the limited liability provision which limits their personal liabilities applies. Looking at the whole scenario, it depicts a situation in which the economy is occupied by companies whose shareholders and management do not attach much concern on direct personal responsibility or loss in the event of corporate failure. This riddles the economic status quo as immensely unethical.[14] By and large, owing to the injustice in which a consistent application of the *Salomon* principle will engender, certain exceptions to the principle has been created. The justifiability of these limited exceptions occupies us next.

3. Statutory Provisions

The possibility of piercing the corporate veil to find members of a company liable for the acts or omissions of the company seems to be statutory ignored. Rather focus was centered on finding the directors and other officers liable for the wrongs of the company in some specified circumstances.[15] Under the aspect of insolvency, it is statutory provided that directors and other individuals would be personally liable for the debts of a limited company or to contribute to its assets in liquidation, perhaps, where fraudulent or wrongful trading is evident or the improper re-use of the name of an insolvent company.[16] Most of the statutory provisions merely impose on defaulting directors and probably other officers, a liability in addition to that of the company and none of the contents require precisely ignoring the separate personality of the company. To appreciate and adequately grasp the core of the doctrine of lifting the veil, we would largely turn our attention to the principles of common law as regards piercing the corporate veil. This is detailed under the following headings: war or socio-economic conflict; agency relationship; single economic unit argument; fraud; trust relationship; and evading liability.

[8] *Macaura v Northern Assurance Co* [1925] AC 619
[9] Ibid (n1)
[10] Ibid
[11] Ibid
[12] Stephen Griffin, *Company Law: Fundamental Principles* (4th edn Pearson 2006) 9
[13] Ibid
[14] Alastair Hudson, *Understanding Company Law* (Routledge 2011) 3
[15] The Companies and Allied Matters Act 2004 s 93, 264(3), 290; The Companies Act 2006 s 761, 767 (3)
[16] The Companies and Allied Matters Act 2004 s 506; Insolvency Act 1986 ss-215 213, 216-217

4. War or Socio Economic Conflict

It has been decided that in times of war or socio-economic conflict the corporate veil may be pierced as was in the case of *Daimler Co Ltd v Continental Tyre and Rubber co*.[17] In that case, the Continental Tyre Company and Rubber co., was a company incorporated in England. However, all the directors and the shareholders except one shareholder reside in Germany. The remaining shareholder was the secretary who resides in England and is a British citizen. The issue concerns whether the company in this circumstance has a *locus standi* before an English court to sue and recover a debt where a state of war exists Germany and England. The House of Lords decided that the action be struck out as irregular in that the company although incorporated in England has an enemy character and should not be given leave to sign summary judgment.[18] It should be noted that the decision by the House of Lords was made at a time when a state of war existed between Germany and England and so was affected by sentiments owing to the socio-economic climate in prevalence. Prior to the outbreak of war, Continental Tyre Co. was recognized as a company incorporated under the English Companies Act with capacity to transact business, sue and be sued in a court of law. Surprisingly, following the outbreak of war, it ceases to be an English company with capacity to transact and sue but a Germany company. It is an acceptable logic that 'out of nothing comes' which has been Latinized as 'Nihilo ex nihil fit.' It is illogical and unjustifiable that before the outbreak of war, Continental Tyre Co., was considered a thing brought into existence, through statutory enactment with capacity to carry on business, sue and be sued. Suddenly following the outbreak of war, it ceases to be an English company. The truth is the House of Lords were filled with sentiments occasioned by the outbreak of war, and thus used the decision in *Daimler Co Ltd v Continental Tyre and Rubber co*[19] as a weapon of war relegating the prime importance of justice to the background.

5. Agency Relationship

It is the judicial authority that the finding of agency relationship may require that the corporate veil be lifted. In *Re FG(Films)Ltd*[20], the applicant company, FG Films sought to register the film 'Monsoon' as a British film under the Cinematograph Films Act 1948. The application was refused by the Board of Trade in that the film was actually made by a large American company, Film Group Incorporated. Following the terms of the agreement between the two companies, the American company had agreed and provided the finance and all the facilities necessary for the applicant to make the film. FG Films sought a declaration that it was the 'maker' of the film under the Act. Vaisey J upheld the refusal of the Board of Trade in registering 'Monsoon' as a British film. He opined as follows:

> The applicant's intervention in the matter was purely colourable. They were brought into existence for the sole purpose of being put forward as having undertaken the very elaborate arrangements necessary for the making of this film and of enabling it thereby to qualify as a British film. The attempt has failed, and the respondent's decision not to register 'Monsoon' as a British film was in my judgment plainly right.[21]

The decision by Vaisey J in *Re FG Film* appears plausible in that it follows the fundamental principle guiding the law of agency. There is no gain saying that where a legal relationship of agency exists between two persons, namely, the principal and the agent, then the principal is considered responsible for the acts and omissions of the agent within the scope of the agency duty.[22]However, it should be noted that the finding of an agency legal relationship must be based on fact or evidence and not inferred from a mere control of the company or ownership of its shares.[23] Agency can be created by express agreement as in the case of *Works Ltd v Belvedere Fish Guano Co. Ltd*[24]. In relation to the case of *Re FG Films*[25], the finding of agency legal relationship seems not to be based on facts but by inference. In *Re*

[17] *Daimler Co Ltd v Continental Tyre and Rubber Co*. [1916] 2 AC 307
[18]Ibid
[19] Ibid
[20] *Re FG(Films)Ltd* [1953] 1 WLR 483
[21] Ibid
[22] *Allen A. Funt Productions, Inc. v. Chemical Bank.Allen A. Funt Productions, Inc. v. Chemical Bank* (1978) 405 N.Y.S.2d 94; Samuel Osigwe v PSPLS Management Consortium Ltd & Ors (2009) 3 NWLR 378 SC
[23] *JH Rayner (Mincing Lane) Ltd v Department of Trade Industry* (1989) Ch 72, 189 per Ker LJ; *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* (1968) AC 1130.
[24] *Works Ltd v Belvedere Fish Guano Co. Ltd* [[1921] 2 AC 465
[25]Ibid (n20)

FG Films[26], there was an express agreement as was shown in evidence that the American company and that director were agents for the applicants. The court instead chose to infer that the applicant company, Re FG Films, acted 'merely as the nominees of and agent for an American company called Film Group Incorporated.' The finding of an agency legal relationship in this context was through inference contrary to the express agreement between the two parties. Of the decision in *Re FG Films*[27], Pickering opined that it was descriptive on the agency relationship between the applicant company and the American company. There was no attempt in defining the relationship in question in any precise manner.[28] Where an agency relationship is frequently inferred by the court, the unintended consequence is that the corporate veil would often be lifted as the court desires making the law unpredictable.[29] A similar case where the corporate veil was lifted by inferring agency was the case of *Smith, Stones & Knight Ltd v Birmingham Corporation*.[30] The facts were that Birmingham Waste was a subsidiary of Smith, Stones & Knight Ltd occupying premises owned by Smith, Stones & Knight Ltd for the operation of the waste paper business. Birmingham Corporation however refused to compensate Smith, Stones & Knight Ltd arguing that the two companies were two separate entities. Atkinson J held that the parent company was entitled to compensation as regards the business carried on by a subsidiary on the ground that the subsidiary was in reality doing the business on behalf of the parent company. The court implied the existence of agency relation between the parent and subsidiary companies, such that the subsidiary company was considered merely the agent of the parent company for the purpose of carrying on its business.[31] Toulson J, critical of the decision by Atkinson J, commented that it would be unacceptable 'as a matter of general approach the court should ask whether the company was carrying on business as its owner's business or its own business, using as guidance the sub-questions posed by Atkinson J…On that approach *Salomon*'s case would surely have been decided differently.'[32] Pickering also noted that the decision by Atkinson J does not capture the accurate analysis of the facts in that case in that the appellant company itself did business in Brazil and its income was not derived from a subsidiary there. He aptly concluded that the decision in *Smith, Stones & Knight Ltd* was inconsistent with requisite authorities in corporate agency law.[33]

6. Single Economic Unit Argument

The court has decided that where a group of associated companies is understood as a single economic unit, the corporate veil may be pierced. In *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*[34], DHN operated a wholesale grocery business in which it occupied premises owned by Bronze, its wholly owned subsidiary company. The same directors were in charge of both Bronze and DHN, but Bronze did not run any business. The only property owned by the subsidiary company was the freehold properties occupied by DHN as its licensee. There was also a second wholly owned subsidiary which also operated no business, but owned the vehicles used by DHN in running its business. The premises occupied by DHN and owned by Bronze was compulsorily acquired by the council in 1970 which culminated to the closure of the grocery business ran by DHN. If only DHN had an interest in the land which is beyond that of a bare licensee, it could claim for substantial compensation with respect to disturbance, over and above the value of the land which Bronze had already claimed. The Court of Appeal allowing the appeal considered the group of companies as a single economic entity, the effect of which required compensation for disturbance to be paid to DHN.[35] The decision in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council*[36] is in contradiction with the judgment of the Court of Appeal in *Adams v Cape Industries Ltd*[37]. In this latter case, an English company known as Cape was a parent company to a group of many wholly subsidiaries. Asbestos was mined in South Africa by some of the subsidiaries whilst the asbestos was marketed by other subsidiaries in

[26] Ibid
[27] Ibid
[28] Murray A Pickering , 'The Company as a Separate Legal Entity' (1968) 31 MLR 481, 498
[29] Len Sealy and Sarah Worthington, Cases and Materials in Company Law (8th edn., OUP 2008) 59
[30] *Smith, Stones & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116
[31] Ibid
[32] *Yukong Lines Ltd of Korea v Rendsburg Investments Corporation of Liberia* [1998] 1 WLR 294
[33] Ibid (n28)
[34] *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852
[35] Ibid
[36] Ibid
[37] *Adams v Cape Industries Ltd* [1990] ch 433

numerous countries including the US. In an action for personal injuries suffered because of the exposure to asbestos dust, a Texas court awarded damages to several hundred plaintiffs. On appeal the Court dismissed the view that Cape and some other relevant subsidiaries should be treated as a single economic unit in line with DHN; that the subsidiaries were mere façade concealing the true facts; and that there existed an agency relationship between Cape and NAAC. The Court of Appeal concluded that the judgment by the Texas Court remains unenforceable against Cape.[38]

In the light of the above, the issue on whether a group of associated companies should be treated as one or not is not well-settled and judicial authorities on this has been inconsistent. The finding of a single economic unit seems to depend on how reasonable it is demonstrated. The rightful question in the face of these is what constitutes the understanding of parent-subsidiary relationship? Under the statute, a company is considered the parent or holding company to a subsidiary where it holds majority of the voting rights in it; or is its member with right in appointing or removing a majority of its board of directors; or is a member of it and has exclusively controls in agreement with other members, a majority of the voting rights in that company.[39] Following this conception, a subsidiary company normally is not what to be considered a separate entity from its parent company in as much as the latter exercises considerable control over the former. However it has already been identified by the court that a mere substantial control does not suffice to establish inseparability.[40]

This essay suggests that the decision on whether the parent and subsidiary company should be treated as a single economic unit ought to depend on the satisfaction of a primarily requirement: whether the subsidiary is separately incorporated as a company in law. The statutory recognition of a separate personality provides that a company gains separate personhood if and only if it is incorporated. Differently put, what follows from incorporation is that a company is considered a person with separate personality. A subsidiary can be incorporated or unincorporated and where it is incorporated, it accordingly gains separate personality which is a corollary to incorporation.[41] The apt ensuing questions are when would an incorporated subsidiary be considered a single economic unit with the unincorporated parent company? When would the separate personality of an incorporated company be disregarded to consider it a single economic unit with the incorporated parent company? The court of law being a court of justice, a fair answer to the question would be that the corporate veil in this circumstance is expected to be pierced when it is considered just to do so. However, the requirement of piercing the veil in the interest of justice has as well been dismissed by the court. In *Adams v Cape*, Slade LJ particularly pointed out that it is not open to the court to 'disregard the principle of *Salomon v A Salomon & Co Ltd* merely because it considers it just to do so.'[42] This decision by Slade LJ leaves a lot to be desired. It goes without saying that justice ought to occupy a pride of place in any judicial decision. Going by its etymology, justice is from the Latin terms 'ius' 'iustus' which means law. In other words, justice is closely inseparable with the law in the same way a means is related to an end or a cause to an effect. The origin and history of law, even in England show that its *raison d' etre* is to engender justice. Then in England, William had to install a central system of government that basically sought to give justice. The extant systems then proved difficult to manage and led to injustice. This prompted the king to set the *Curia Regis* (King's Court) travelling the nook and cranny of the country to ensure that justice was reached and achieved.[43] Hart rightly pointed out that justice and law must be in conformity.[44] The relationship of law and justice is explained in the Latin maxim: *ubi jus ubi remedium* which loosely translates as when the right of a person is infringed, he will have justice and equitable remedy under the law. It is undeniable that the impetus for the exceptions to the *Salomon*[45] principle created so far has been the interest of justice. To relegate the interest of justice in the march towards checkmating the abuse of separate personality principle would imply shutting the door for further exceptions to *Salomon* principle. Where this is allowed, it would invariably do violence to the progress of company law, at large.

[38] Ibid
[39] The Companies Act 2006 s 1159
[40] Ibid (n34)
[41] The Companies Act 2006 s 15(1), 16 (2); The Companies and Allied Matters Act 2004 s 37
[42] Ibid (n37)
[43] Jo Boylan-Kemp, *English Legal System: The Fundamentals* (2nd edn, Sweet & Maxwell 2011) 11
[44] Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd edn, OUP 1994) 184
[45] Ibid (n1)

7. Fraud

Case law authorities tend to show that if the company is used as a means to perpetuate a fraud the corporate veil may be pierced. In *Re Darby, ex Brougham*[46], Darby and Gyde are both undischarged bankrupts who had been convicted severally for fraud. The two registered a company known as City of London Investment Corporation Ltd in Guernsey. The company only had seven shareholders and only a mere £11 of its nominal capital of £100, 000 had been issued. The only directors of the company were Darby and Glyde and they had entitlement to all the profits of the company. The registered company then purported to register and to float a £30, 000 company called Welsh Slate Quarries Ltd in England. It also purported to sell to Welsh Slate Quarries Ltd a quarrying license and plant bought for £3, 500, at a price of £18, 000. The prospectus calling on the public to take debentures in Welsh Slate Quarries Ltd presented the company as vendor and promoter, but failed to disclose the names of Darby and Gyde or to show that actually they were to receive the profit arising from the sale. Welsh Slate Quarries Ltd failed and became liquidated. The secret profit alleged to have been made by Darby as a promoter of the company was claimed by the liquidator. On behalf of Darby, it was objected that the company had been promoter and not Darby. The court did not accede to this argument and instead found that Darby and Gyde perpetrated a fraud in that what they did through the company they did themselves and represented it to have been done by a company.[47]

When the decision in *Salomon*[48] was handed down on the 16th of November, 1896 by the law lords, it was considered impressive in that members of the company seem protected against creditors who are restrained from going after the assets of the individual members but that of the company itself in the event of bankruptcy owing to the separate personality of the company from its members.[49] However, members of the company have appeared to take advantage of separate personality in perpetrating fraud as was in the case of *Re Darby*.[50] The judgment by Phillimore J in *Re Darby* is justifiable in as much as the corporate veil was pierced in a circumstance where fraudsters can be found liable and prevented from taking advantage of separate personality for fraudulent purposes. The principle in *Re Darby* had been applied *mutatis mutandis* in numerous cases.[51]Be that as it may, the pertinent question that follows is can the mind of a party be ascertained in all circumstance to know whether he intends to be fraudulent? In the case of *Salomon*[52] for instance, it was noted that no intention by Salomon in using the company for fraudulent purposes can be found. It would not be meaningful to allege that the intention for fraud can be identified by judges through the application of their legal experience on the facts of the case to ascertain the inherent probabilities. This is supported by the reason that seeming facts might in reality contradict the intention or differs from reality.[53] The intentions and conscious experiences are subjective to man and remain undisclosed to second party in that I might be smiling whilst I am actually sad internally[54]. The polygraph itself has been proven incapable to detect the intention of man[55], let alone judges in their simple mind who but merely apply logical reasoning and legal experiences on the facts devoid of certitude and exactitude. In this respect, the requirement of lifting the veil when fraud exists is bereft of a clear and precise method of determining the existence of fraudulence intention.

8. Trust Relationship

The court has also opined that the corporate veil may be set aside where a trust relationship exists, with the company as trustee and the members as beneficiaries. In *Trebanog Working Men's Club and Institute Ltd v MacDonald*[56] a club was incorporated under the Industrial and Provident Societies Acts 1893-1913. Liquor was bought in the name of the club, which it paid for through a cheque drawn on its bank account. The liquor was served to the club members in exchange for a money payment. A charge was brought against the society for the sale of liquor without a license and was convicted. Upon an appeal, Lord Hewart CJ held that a members' club does not necessarily need a license to serve its members with intoxicating liquor in that the members owned the liquor among themselves and no actual sale occurred. The club was merely a trustee of the liquor for its members and is not a holding antagonistic to the

[46] *Re Darby, ex Brougham* [1911] 1 KB 95
[47] Ibid
[48] Ibid (n1)
[49]Ibid (n8)
[50] Ibid (n46)
[51] *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626; *International Credit and Investment Co [Overseas] Ltd v Adham* [1998] BCLC 134; *Re H* [1996] 2 BCLC 500
[52] Ibid (n1)
[53] Bertrand Russell, *The Problems of Philosophy* (OUP 1912) 1 -10
[54] Thomas Nagel, 'What is it like to be a bat' (1974) 83(4) *The Philosophical Review* 435-450
[55] Caitlin Knox, 'Speaker drops truth about lie detectors' *The Woodlands Villager* (Woodlands, 21 November 2014) < http://www.yourhoustonnews.com/woodlands/news/speaker-drops-truth-about-lie-detectors/article_45ad48fe-5377-5abf-ae4b-b407c3eb32e2.html> accessed 13 March 2019
[56] *Trebanog Working Men's Club and Institute Ltd v MacDonald* [1940] 1 KB 576

members of the club.[57] The view in this case contradicts an earlier decision made in *Wurzel v Houghton Main Home Delivery Services Ltd*.[58] In that case, two co-operative associations were formed by miners for the delivery of coal by lorry to their homes, which would be paid for, based on mileage. With respect to one unincorporated association, the court ruled that the members as co-owners did use the lorry to haul their own coal and so did not breach the licensing laws as regards carriage of goods for hire or reward. The other incorporated association was convicted on the ground that it was an entity separate from its members. The court did not avert its mind to the view based upon the existence of a trust.[59]

From the foregoing, *Trebanog*[60] remains a better authority than *Wurzel*[61] in that the court sought to follow and incorporate in its decision, the fundamental principle of trust law. Be that as it may, the decision in *Trebanog*[62] can be criticized in that the law of trust requires that where a trustee holds a property on trust for the beneficiary, the beneficiary is not required to pay in order to secure a property held on trust for him except that was expressly provided. In *Trebanog*[63] the payment by the members of the club for the liquor which is supposedly held on trust for them riddles the logic of trust law. In a more recent case of *Prest v Petrodel*[64], Mr Prest was the owner and the controller of companies which owned residential properties. The issue concerned whether Mr Prest has entitlement to those properties, with respect to the Matrimonial Causes Act 1973 s 24(1) (a) so that an order can be made by the court for the transfer of the properties to Yasmin. It was held unanimously by the Supreme Court, that lifting the corporate veil could not be a means to make the properties of the company that of Mr Prest. The court found that the companies held the properties on trust for Michael Prest, owing to the circumstance in which the companies acquired the properties. One of the properties was the matrimonial home of the Prests for which they did not pay rent. The other three properties were bought by the company each for £1. The remaining properties seem to have been purchased by the company with money provided by Mr. Prest. The Court concluded that following the fundamental principles of trust law, Mr Prest has entitlement to the properties and the court can make an order in line with s 24(1) (a).[65] It is significant to note that in *Prest v Petrodel*[66], the finding of a resulting trust by the court does not *ipso facto* imply that the corporate veil is considered pierced. The companies were deemed to hold the properties as a trustee for Michael Prest, the beneficiary, but it does not necessary follow that the corporate veil was pierced. The court in *Prest*[67] considered the finding of a trust relationship, a thing separate from the criteria for piercing the veil and did not categorically state that a corollary to finding of a trust relationship is that the veil will be pierced. This questions whether the finding of a trust relationship is an apt requisite for lifting the veil.

9. Evading Liability

Under the common law, the veil of incorporation may be disregarded to prevent the deliberate evasion of contractual liability. In *Gilford Motor Co Ltd v Horne*[68], EB Horne, the first defendant, was formerly an employee and the managing director of the plaintiff company. In a written agreement, EB Horne had covenanted not to solicit the customers of the plaintiff, whilst leaving the company. Upon the termination of his employment, the first defendant set up his own business, formed a company known as JM Horne & Co. Ltd, who was also the second defendant in this suit. In the company, the sole shareholders and directors of the company were the wife of Horne and an employee. The business of Horne was taken over by the company which solicited for the customers of the Plaintiff. Farewell J viewed that although the covenant had broken, it was rather too wide and against public policy, refusing to enforce the covenant against the defendants. A successful appeal against his ruling was made by the plaintiff and the Court gave an order for injunction against the defendants. Lord Hanworth MR expressed:

> I am quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr EB Horne. The purpose of it was to try enable him, under what is a cloak or sham, to engage in business which, on consideration of the agreement which had

[57] Ibid
[58] *Wurzel v Houghton Main Home Delivery Services Ltd* [1937] 1 KB 380
[59] Ibid
[60] Ibid (n56)
[61] Ibid (n58)
[62] Ibid (n56)
[63] Ibid
[64] *Prest v Petrodel* [2013] UKSC; 2 AC 415
[65] Ibid
[66] Ibid
[67] Ibid
[68] *Gilford Motor Co Ltd v Horne* [1933] ch 935

> 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 [claimant] might intervene and object.[69]

The decision in *Gilford Motor Co Ltd v Horne* was followed in *Jones v Lipman*[70]. In this latter case, the defendant had entered into a contract for sale of land with the plaintiff, but later formed a company and conveyed the land to it, so as to escape the enforcement of specific performance. Russell J disregarded the corporate veil and ordered specific performance both against the defendant and his company. Russell J opined: 'The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity'.[71] In the recent case of *Prest v Petrodel*[72] Lord Sumption identified what he described as the 'concealment principle' which seeks to deal with a company used as a device or façade in concealing the true facts and avoid the liability of the individual that controls the company. The operation of the concealment principle:

> …is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'façade', but only looking behind it to discover the fact which the corporate structure is concealing.[73]

The cases that seek to lift the veil where intent to evade liability is evident considered the company in this circumstance as a 'cloak', 'sham', 'mask' or 'façade'. The fitting question is can the company be a sham as so described in the context in which it is being used? When the court refer to the company with such colourful epithets like 'sham', 'cloak', 'mask' or 'façade', it shows that the company that the company so described is a creature of a party devised to avoid liability. However, it cannot be denied that the company referred to in these cases were actually incorporated under the law, hence were artificial persons created by law and not by a party as the courts had suggested. What follow from incorporation is the conclusive evidence that the existence of a company is genuine and not a sham.[74] Nevertheless, this line of criticism can be objected to in that when the court describe a company as a sham, it does not deny its incorporation but considers it as a means used by a party with an intent to evade liability. This is a good riddance! Nevertheless the issue remains on whether the court could ascertain the intention of a party with respect to evading liability. The judicial decisions in this area lack a clear and precise test for ascertaining the intention to evade liability.

10. Conclusion

The principle of separate personality espoused in *Salomon* case requires that the company is in law considered a person separate from its members. By virtue of this provision creditors cannot go after the assets of the corporate member but that of the company itself. However, some exceptions have been created to take care of the injustice which a consistent application of the general principle of separate personality will occasion. These limited exceptions form the core of the doctrine of lifting the veil which provides that in some circumstance, the corporate veil ought to be pierced and separate personality disregarded. There have been both statutory and judicial provisions on lifting the veil, but the contents of statutes did not seek to precisely disregard the corporate veil but merely impose on defaulting directors and perhaps other officers, a liability in addition to that of the company. Under the common law exceptions, the corporate veil will be disregarded where there is war or socio-economic conflict; an agency relationship exists; a trust relationship exists; a group of company is considered a single economic unit; the intent to perpetuate fraud is ascertained; or a party seeks to evade liability. This essay opines that case laws demonstrating the circumstances in which the corporate veil could be lifted are flawed in many respects, but nevertheless they still remain judicial authorities as regards separate personality and its attendant doctrine of piercing the veil. By and large, it is suggested that these principles of common law be codified so as to achieve precision avoiding conflicts and confusion.

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[69] Ibid
[70] *Jones v Lipman* [1962] 1 WLR 832
[71] Ibid
[72] Ibid (n64)
[73] Ibid para 28
[74] Ibid (n39)