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## Is piercing the veil contrary to high authority? A footnote to the 'never-ending story'

Corporate personality; Power of the court to pierce the veil; Ratio decidendi; Judicial law-making; Corporate responsibility

A 2006 editorial in *Company Lawyer* suggested that “[a] court faced with a proposal to pierce the corporate veil walks a tightrope.” and added that “...there is still room for claimants to test the boundaries in this area of law.”<sup>1</sup> The boundaries at both extremes of the argument were tested in the Supreme Court in *VTB v Nutritek*<sup>2</sup>. For the appellants, counsel argued that the power to pierce the veil could be used to hold the controllers of a company liable, as if they had been parties to a contract into which the company had entered. For the respondents, opposing counsel argued not only that the veil should not be pierced in this particular case, but also that there were no circumstances in which the court could pierce the veil.

The first argument was rejected by the Court. In relation to the second and third points, Lord Neuberger gave the leading judgement. He decided that this was clearly not a case in which the veil would be pierced, but he declined to reach any conclusion on whether or not such a power existed. He stated that he could “see the force in [the] argument” that piercing the veil is “contrary to high authority”.

This article considers relevant sections of Lord Neuberger’s judgement and whether the argument that piercing the veil is “contrary to high authority” is sustainable. It argues that the Supreme Court should make it clear that such a power does exist and should use the power more pro-actively.

### Background

Given the numerous decisions in which reference has been made to the court’s ability to pierce the veil (commonly accompanied by a presumption that such a power exists)<sup>3</sup> and many opinions to the same effect, which as Lord Neuberger pointed out, have been

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<sup>1</sup> Lisa Linklater, “Piercing the corporate veil” - the never ending story?” 2006 *Company Lawyer*, 27(3), 65-66

<sup>2</sup> *VTB Capital plc v Nutritek International Corp & Others* [2013] UKSC 5.

<sup>3</sup> E.g. *Nicholas v. Nicholas* [1984] FLR 285, *Adams v Cape Industries plc* [1990] Ch 433, *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, *A v A* [2007] EWHC 99 (Fam).

expressed in several leading texts<sup>4</sup>, the argument before the Supreme Court that no such power existed was surprising.

Lord Wilson described it, though not by way of criticism, as an example of blue-sky thinking<sup>5</sup> and ‘a highly ambitious submission’. Lord Clarke, who agreed with Lord Neuberger that this was not a case in which the veil should be pierced, went into no detail on this particular point. The most plausible interpretation of his brief comments however is that he did not agree with the submission. The two other Law Lords both expressed agreement with Lord Neuberger, albeit in subtly different terms. Lord Mance expressed agreement with Lord Neuberger’s judgement; Lord Reed agreed that the veil should not be pierced in this case ‘for the reasons given by Lord Neuberger’.

Although he declined to decide the point, Lord Neuberger apparently regarded the argument that there was no power to pierce the veil as one which was worthy of serious consideration. The tone of his remarks suggested that he might have a degree of sympathy for the view that the jurisprudence in the case law, which is typically relied upon to support the view that (at least in some circumstances) the veil may be pierced, is not as watertight as is often presumed.

Some criticisms of the relevant jurisprudence are undoubtedly justified. It is respectfully submitted that his Lordship must be right to say that, while terms such as “façade” “sham” ‘mask’ and ‘cloak’ may be useful metaphors,<sup>6</sup> the difficulty of establishing the precise meaning of these terms in the corporate context ‘risk[s] causing confusion and uncertainty in the law’.

Similarly, it has been pointed out by many writers that in oft-cited cases, such as *Gilford Motor Company v Horne*<sup>7</sup> and *Jones v Lipman*<sup>8</sup>, the same result could have been, and possibly should have been, achieved by a route which did not involve piercing the veil of

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<sup>4</sup> E.g. *Gore-Browne on Companies*, 45th ed. (Jordans), Chapter 7.

<sup>5</sup> ‘Blue-sky thinking — creative ideas that are not limited by current thinking or beliefs’ *Collins English Dictionary, 10th Edition*, available at [http://dictionary.reference.com/browse/blue-sky thinking](http://dictionary.reference.com/browse/blue-sky%20thinking) [Accessed April 24, 2013].

<sup>6</sup> They are described as ‘colourful epithets’ in Mayson French and Ryan, *Company Law* 27<sup>th</sup> ed. (Oxford University Press, 2010) para. 5.3.7.3.

<sup>7</sup> *Gilford Motor Company Ltd v Horne* [1933] Ch. 935.

<sup>8</sup> *Jones v Lipman* [1962] 1 WLR 832.

incorporation.<sup>9</sup> Indeed it has been argued that the orders made against both the companies and the individuals involved in these cases show that the veil was not pierced at all.<sup>10</sup>

Other parts of the judgement however seem to be more open to debate. One point which seemed to concern his Lordship was a lack of House of Lords or Supreme Court authority for piercing the veil. Very many of the well-known cases which discuss the veil have been heard in the Court of Appeal.<sup>11</sup> *Salomon v Salomon & Co.*<sup>12</sup>, however, was a House of Lords decision. *Salomon*, said Lord Neuberger, could be seen as an early attempt to pierce the veil. That attempt had failed “not on the facts but as a matter of principle”. Lord Halsbury had stated (unequivocally) that a company “must be treated like any other independent person with its rights and liabilities appropriate to itself.” Thus, it might be argued, the highest judicial authority has stated that the veil cannot be pierced.

If, as is clearly the case, numerous judges in subsequent cases have proceeded on the basis that the power to pierce the veil exists, this raises many questions as to the authority on which their decisions were based. Regardless of that however – and crucially - those decisions would not be binding on the Supreme Court. In short, as a matter of strict law, previous Court of Appeal decisions were not relevant. As a matter of precedent, Lord Neuberger required a subsequent House of Lords or Supreme Court authority in order to be able to either disregard, or at least rely on a refinement, of any principle established in *Salomon*.

## **Woolfson**

The only House of Lords decision to which Lord Neuberger referred (in this section of the judgement) was *Woolfson v Strathclyde Regional Council*,<sup>13</sup> but he seemed to attach little weight to it. He dealt with it in two short paragraphs, the second of which concluded:

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<sup>9</sup> E.g. Kershaw, *Company Law in Context* 2<sup>nd</sup> ed., (Oxford University Press, 2012) p.56, citing in support ‘Turning Points in the Common law’, Lord Cooke, Hamlyn Lectures (Sweet and Maxwell, 1997) and *CMS Dolphin v Simonet* [2001] BCLC 704.

<sup>10</sup> Mayson, French and Ryan *Company Law* 27<sup>th</sup> ed. (Oxford University Press, 2010).

<sup>11</sup> E.g. *Adams v Cape Industries plc* [1990] Ch 433, *Trustor AB v Smallbone and others (No 2)* [2001] EWHC 703 (Ch), *DHN Food Distributors Limited v Tower Hamlets LBC* [1976] 1 WLR 852, *Atlas Maritime Company SA v Avalon Maritime Ltd* [1991] 4 All ER 769, *Ord v Bellhaven* [1998] BCC 607 et al.

<sup>12</sup> *Salomon v Salomon & Co* [1897] A.C. 22 HL.

<sup>13</sup> *Woolfson v Strathclyde Regional Council* 1978 SC(HL) 90.

“The brief discussion of the principle in *Woolfson* does not justify the contention that it was somehow affirmed or approved by the House: Lord Keith's remarks were obiter, and the power of the court to pierce the corporate veil does not appear to have been in issue in that case. The most that can be said about *Woolfson* from the perspective of VTB is that the House was prepared to assume that the power existed.”

It is respectfully submitted that this conclusion and the brief rationale provided for it, are open to question.

It is true that the discussion of the principle in *Woolfson* is brief, as is the judgement as a whole. Equally it is true, as Lord Neuberger suggests, that the power of the court to pierce the corporate veil was not specifically an issue in *Woolfson*. On the other hand it is difficult to regard Lord Keith's comments as mere obiter. Similarly it is difficult to agree that “The most that can be said about *Woolfson* ... is that the House was prepared to assume that the power existed.”

### **What is the ratio in Woolfson?**

The distinction between obiter dictum and ratio decidendi is notoriously difficult to draw.<sup>14</sup> In Halsbury's Laws the ratio is described as “The enunciation of the reason or principle upon which a question before a court has been decided ...”<sup>15</sup> Ultimately however what constitutes the ratio of a case is probably a matter of opinion and perception rather than of fact.<sup>16</sup> It is submitted that a careful analysis of *Woolfson* would lead many to the conclusion that Lord Keith's ‘remarks’ were part of the ratio rather than mere obiter

In *Woolfson* the appellants were shareholders seeking compensation under the Land Compensation (Scotland) Act 1963. They had no right to claim compensation unless the corporate veil could be pierced. Their argument was that the corporate veil could be lifted on the basis that the company was part of a single economic entity and that *DHN Food Distributors Ltd. v Tower Hamlets LBC*<sup>17</sup> should be followed. The court rejected the argument.

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<sup>14</sup> Slapper and Kelly, *The English Legal System*, 12<sup>th</sup> ed. (Routledge, 2011) Paras 3.6.4 and 10.4.2.

<sup>15</sup> *Halsbury's Laws of England* Vol. 11 (2009) 5th ed., Part 3, para 91.

<sup>16</sup> See Holland & Webb, *Learning Legal rules*, 4th ed. (Blackstone Press, 1999) p 146.

<sup>17</sup> *DHN Food Distributors Ltd. v Tower Hamlets LBC* [1976] 1 WLR 852.

What was the reason or principle on which the court based its decision? Lord Keith (who delivered the only judgement and with whom all the other judges agreed) said that he agreed with the reasoning of the Lord Justice-Clerk in the Court of Session<sup>18</sup>, which was 'unimpeachable'.

The reasoning of the Lord Justice-Clerk and therefore, it is submitted, the ratio of *Woolfson*, could be summarised thus. The material facts were distinguishable from *DHN*, so the veil could not be pierced. The company was not a façade, so again the veil could not be pierced.

Whilst the specific question of whether the power to pierce the veil existed was apparently not argued in *Woolfson*, it would seem to be clearly implicit in any formulation of the ratio that such a power existed. Indeed the ratio might easily be reframed thus:

The material facts were distinguishable from *DHN*, so the court would not use its power to pierce the veil. The company was not a façade so, again, the court would not use its power to pierce the veil.

The following points in relation to *Woolfson* could also be noted:

- If there were no power to pierce the veil the arguments for the appellants could and presumably would have been summarily dismissed on that basis.
- Lord Keith says of the judgement of the Lord Justice-Clerk: "He approached the matter from the point of view of the principles upon which a court may be entitled to ignore the separate legal status of a limited company and its incorporators, which as held in *Salomon v. Salomon & Co. Ltd.* 1897 A.C. 22 must *normally* receive full effect in relations between the company and persons dealing with it." (Emphasis added.) It is not clear whether Lord Keith is attributing the view that *Salomon* must *normally* receive full effect to Lord Justice-Clerk or is stating that view himself. It is submitted that the latter is more likely. In either case, the use of the word 'normally' clearly implies that there will be cases when corporate personality will not 'receive full effect'

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<sup>18</sup> *Woolfson v Strathclyde Regional Council* 1977 SC 84.

At the end of his consideration of *Woolfson*, Lord Neuberger concludes that “The most that can be said about *Woolfson* from the perspective of VTB is that the House was prepared to assume that the power [to pierce the veil] existed.” With respect, this is slightly misleading. Although the distinction is often ignored in common parlance, an assumption differs from a presumption in that an assumption is neutral about the truth or otherwise of a proposition, whereas a person making a presumption believes the relevant proposition to be correct (although the presumption may be rebutted).<sup>19</sup> The language of Lord Keith’s speech is much more suggestive of a presumption than an assumption. It is submitted that most lawyers reading his judgement would conclude that he believed that the power to pierce the veil existed.

Similarly and again, with respect, to say that the House ‘*was prepared to assume*’ (emphasis added) is linguistically questionable. It is not that the court ‘*was prepared to assume*’ it *did* assume (sic) that the power existed.

### **The ratio in *Salomon***

In his presumption that the power to pierce the veil existed, was Lord Keith ignoring a cardinal principle established by *Salomon*? Lord Neuberger commented that: “There is great force in the argument that [*Salomon*] represented an early attempt to pierce the veil of incorporation, and it failed, pursuant to a unanimous decision of the House of Lords, not on the facts, but as a matter of principle.”<sup>20</sup>

In *Salomon* Lord Halsbury’s well-known judgement begins:

“My Lords, the important question in this case, I am not certain it is not the only question, is whether the respondent company was a company at all - whether in truth that artificial creation of the Legislature had been validly constituted in this instance;”

This question Lord Halsbury seeks to answer is not whether or not the veil should be pierced but rather whether or not what was described as a company was indeed a company or merely ‘the appellant under another name’. Statute was to be the sole guide. Could it be

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<sup>19</sup> The distinction is made, albeit obliquely, in the *Concise Oxford English Dictionary 12<sup>th</sup> ed.*

<sup>20</sup> At paragraph 122.

argued that, at its simplest, the ratio is no more than that a company formed in accordance with the statutory requirements is a separate legal personality?

There is not scope in this article to explore fully the many significant differences between the judgements in *Salomon* and the differing versions of the ratio decidendi which could be constructed. It is submitted however that the element of uncertainty over the exact ratio in *Salomon*, taken together with the decision in *Woolfson* and the overwhelming evidence from case law that judges have presumed that such a power exists, means that the argument that piercing the veil is contrary to high authority is not sustainable.

## Conclusion

One might reasonably question whether the gallons of ink spilled (and, latterly, gigabytes of memory consumed) on the esoteric legal debate about whether or not the corporate veil can be pierced has been worthwhile. Indeed one might say that abstruse academic arguments about the precise wording of judgements represent the nadir of a largely futile exercise. There may be an element of truth in this and yet, at the same time, questions of corporate responsibility and accountability, in their broadest sense, can rarely have been more important.<sup>21</sup> Piercing the veil lies at the very heart of these questions.

The Supreme Court has the opportunity to give further guidance on piercing the veil when it gives judgment on the appeal from *Petrodel Resources Limited v Prest*<sup>22</sup>. At the time of writing, this judgement has not been delivered, but it is expected soon. With Parliament currently rendered largely impotent, partly by its out-dated procedures and partly thanks to widespread corporate manipulation of the 'democratic' process<sup>23</sup>, one could argue that it is

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<sup>21</sup> "The struggle between people and corporations will be the defining battle of the 21st century. If the corporations win, liberal democracy will come to an end." George Monbiot *The Captive State: The Corporate Takeover of Britain*, (Macmillan, 2001).

<sup>22</sup> *Petrodel Resources Limited and others v Prest and others* [2012] EWCA Civ 1395.

<sup>23</sup> "Lobbyists are people who are paid to influence government decisions. It's big business in the UK, where the lobbying industry is worth £2 billion. Most of the money is spent by large corporations, who court politicians and officials and persuade them to delay laws and regulations or award them government business, all to benefit their bottom line and often against the public interest", *Alliance for Lobbying Transparency*, "Bringing transparency to lobbying" Briefing note, February 2012 available at [http://www.lobbyingtransparency.org/images/bringing\\_transparency\\_to\\_lobbying.pdf](http://www.lobbyingtransparency.org/images/bringing_transparency_to_lobbying.pdf) [Accessed June 2nd 2013].



now incumbent on the members of the Supreme Court to use their privileged constitutional position<sup>24</sup> to help to avert the 'Corporate Takeover of Britain'. Any overt attempt to do so seems most unlikely, but in recent years the senior courts have been adept at steadily, arguably surreptitiously, increasing their social influence<sup>25</sup>. At the very least one would hope the Court will use this opportunity to recognise explicitly that the power to pierce the veil exists and to give some clear guidance on the circumstances when that power can be used.

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<sup>24</sup> Noblesse oblige.

<sup>25</sup> "The reality is that today there is not a single important social issue in our society that judges at some point are not asked to adjudicate..." Prof. Cheryl Thomas "Lack of understanding about the judiciary is unacceptable and dangerous", available at <http://www.guardian.co.uk/law/2012/jul/06/understanding-judiciary-dangerous> [Accessed June 2<sup>nd</sup>, 2013].