rather complicated to administer. The UK courts are seen to take a more expansive approach (see *Re Daisytek-ISA Ltd* [2003] BCC 562) than the Court of Justice of the European Union (CJEU) (*Re Eurofood IFSC Ltd* [2006] ECR I-03813).[22]See 'Country of incorporation, "seat" and "COMI"', p 13.

2. Many countries have a constitution or charter by which certain fundamental rights and freedoms are guaranteed, such as freedom of speech and religion, freedom to trade and do business, the privilege against self-incrimination and the right not to have property expropriated without compensation. Whether a company should enjoy such constitutional guarantees is often a question of great difficulty, and it is not surprising that courts in different jurisdictions have given conflicting rulings on what would appear to be much the same issue. The most obvious reason for such a discrepancy is likely to be the language of the relevant legislation: a charter of *human*rights, for example, is less likely to be construed so as to embrace corporate bodies than is a statement of *constitutional* freedoms. Differences in cultural or historical background may also play a part. But even where it is accepted that the freedoms and rights are to be accorded only to human beings, that is not necessarily the end of the matter. A court may be persuaded in some circumstances to 'pierce or lift the veil' (holding, eg, that interference with the right of a company to publish a newspaper is an infringement of the right to freedom of expression of the individuals concerned). Alternatively, it may accord standing to a company to challenge legislation as unconstitutional even though the company itself is not directly affected by it: thus, in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, the Supreme Court of Canada allowed such a challenge by a company, on the ground that the statute in question infringed the guarantee of freedom of religion and conscience in s 2(a) of the Canadian Charter of Rights and Freedoms, irrespective of any question whether a corporation can enjoy or exercise freedom of religion.

3. The enactment of the Human Rights Act 1998 (HRA 1998), which incorporated the European Convention on Human Rights into UK domestic law, stimulated interest in issues of this kind in this country. Although the title of the Convention refers to 'human' rights, some of its articles expressly confer rights and freedoms on 'legal' (as distinct from 'natural') persons—for example, the right to property, the right to a fair trial in the determination of civil rights and the right to peaceful enjoyment of possessions. The European Court of Human **(p. 51)** Rights (ECtHR) has held in a number of cases that a body corporate has *standing* to institute proceedings complaining of a violation of the Convention. As a result of the principle of separate corporate personality, if a company's Convention rights are infringed, no individual member of the entity is a victim of that breach. This means that no member has standing to apply to the ECtHR or bring proceedings under the HRA 1998. The ECtHR has, however, held that a form of derivative claim on behalf of the company would be available where it is not possible for those responsible for the company's litigation to make the application (*Credit and Industrial Bank v Czech Republic* [2003] ECHR 2003-XI).

4. While it is plain that some parts of the Convention cannot apply to companies (eg the right to life, the prohibition of torture and the right to marry), others can quite readily do so (the right to a fair trial,[23] no retrospective punishment for crimes, the right to freedom of expression[24]). One feature of the decisions of the ECtHR which is rather at odds with the current attitude of the domestic courts in the UK is a much greater willingness to pierce the corporate veil—for example, treating shareholders as the 'victims' of an act aimed at their company.

5. Finally, note that the *De Beers* **[2.10]** formulation for determining residence can have important tax consequences. In a recent decision of the Supreme Court of Canada, a trustee company was incorporated in Barbados, but the 'trust' was held to be resident, and taxable, in Canada where the main business of the trust was actually conducted by the principal beneficiaries: *Fundy Settlement v Canada* 2012 SCC 14.

Limited liability of members and 'piercing the corporate veil'

Recall the general rule that if (as is usual) the liability of a company's members is limited 'by shares' or 'by guarantee', then the company's creditors cannot seek satisfaction from the members, even if the company has insufficient funds to pay its own liabilities in full: see 'Companies limited by shares and companies limited by guarantee', p 21. Many of the cases cited previously can be used to illustrate this. Notice in particular that members are *not* made liable to outsiders simply because (as members or shareholders) they controlled the

company's activities and thus caused liability to be incurred (see, eg, *Salomon* **[2.01]** and *Lee's Air Farming* **[2.04]**). This general point is crucial to understanding this area of the law.

But are there exceptions to this general rule? Are there times where the company's members *can* be called upon, by outsiders, to meet the company's unpaid liabilities? It is not difficult to imagine situations where outsiders might wish to do this. If a profitable holding company has an underfunded subsidiary that cannot meet tort liabilities to hundreds of victims of the subsidiary's negligence, then the victims may want payment from the parent company (ie from the subsidiary's shareholder—see, eg, *Adams v Cape Industries* **[2.19]**). Can they successfully seek this? The general rule says no, but are there ever any exceptions? Similarly, if a 'one man company' is completely under-resourced and unable to meet its trading debts, but its 'one man owner' is personally wealthy, can the company's creditors ever claim against the owner-shareholder?*Salomon* **[2.01]** was just such a case, so the general answer is clearly no, but, again, are there exceptions?

This section looks at the exceptions, and at the arguments that have been advanced both successfully and unsuccessfully by outsiders (ie third parties) wishing to pursue such claims.

(p. 52) The meaning of 'piercing the corporate veil'

One issue of clarification may be helpful. 'Piercing (or lifting) the corporate veil' refers to the possibility of looking behind the company framework (or behind the company's separate personality) to make the *members* liable, as an exception to the rule that they are normally shielded by the corporate shell (ie they are normally not liable to outsiders at all, either as principals or as agents or in any other guise, *and* are only normally liable to pay the *company* what they agreed to pay by way of share purchase price or guarantee, nothing more). Various arguments can be run: for example, the members are liable because, exceptionally, their acts are such as to constitute them 'principals' (and the company is merely an agent), or 'beneficiaries' (and the company is merely the trustee of the corporate assets for their benefit), or constructive trustees or 'knowing assistants' in a wrong committed by the company (see *Re FG (Films) Ltd* **[2.14]** and the cases following, pp 61ff). These and other possibilities are examined later.

This is not to be confused with the possibility of making a company's *directors* liable. It is equally difficult for outsiders to sue the company's *directors* to make them carry liability for the company's unfulfilled obligations. Third parties must generally sue the company, not its directors. They can sue directors only when one of the agency or trust arguments aired earlier can be advanced (but this time in the context of the directors, not the members). *But*, unlike the members, the directors' liability is by no means limited. The *company* can sue the directors for any wrongs they have committed against the company. These recoveries will accrue to the company, and so increase the chance that third parties will be paid. The directors' liability is not strict liability for losses (ie directors do not guarantee that the company will be a success), but liability for wrongs committed against the company, such as negligence and other breaches of duty to the company (see Chapter 7).

The process of 'piercing the corporate veil'

As already noted, the principle of separate corporate personality as confirmed[25] by *Salomon*'s case and reasserted in later cases, some of which are cited previously, forms the cornerstone of company law. The authority of these cases is unshakeable; and yet exceptionally in some instances the law *is* prepared to disregard or look behind the corporate personality and (it is claimed) have regard to the 'realities'[26] of the situation. To do so may involve, on the one hand, 'treating the rights or liabilities or activities of a company as the rights or activities or liabilities of its shareholders'—for example, treating the business of a company as that of its principal shareholder —or, on the other hand, '[having] regard to the shareholding of the company for some legal purpose'[27]—for example, looking to the nationality of the shareholders to determine whether a company is under enemy control in wartime (see the *Daimler* case **[2.12]**). This approach, known as 'piercing the veil' of incorporation, is sometimes expressly authorised by statute and sometimes adopted by the court of its own accord.

It would, perhaps, give a better perspective to the discussion if *Salomon*'s case and the other cases quoted earlier were regarded not simply as restatements of an elementary and obvious principle, but as instances when a plea that the veil should be pierced, though **(p. 53)** perhaps initially successful, ultimately failed. (It is particularly instructive to re-examine, as examples of 'piercing the veil', the judgments of the lower courts in *Salomon's* case

itself **[2.02]**, bearing in mind that the judges concerned were outstanding company lawyers of considerable experience. The judgments and speeches in this case may be contrasted with those in the *Daimler* case **[2.12]**, where a greatly enlarged Court of Appeal was almost unanimous in adhering to the orthodox line, which the Lords this time rejected.)

Some examples of 'piercing the veil' follow. But the topic cannot really be considered on its own as a phenomenon separable from the rest of company law. Again and again in the succeeding chapters, the issue before the court—or the problem faced by the legislature—is, in essence, whether the separate personality of the company is to be respected or disregarded.

By contrast with the limited and careful statutory directions to 'pierce the veil' (see later), *judicial* inroads into the principle of separate personality are more numerous, and were quite often made unconsciously. Any assessment must now begin with *Prest v Petrodel Resources Ltd* (see 'Note on *Prest v Petrodel Resources Ltd*', p xvii). By contrast, early commentators were generally unable to discern any set pattern in the decided cases—indeed, in many instances the cases seemed to contradict each other in the most baffling way.[28] The plea was sometimes made for 'some principles to be injected into this area of the law' from which 'litigants can predict when the courts will, and will not, lift the veil of the corporate entity'.[29] Others, however, noted that perhaps there was something to be said for retaining flexibility, especially where it enabled the court to counter fraud, oppression or sharp practice[30] or to condone informality in the affairs of small companies.[31] In *Conway v Ratiu* [2006] 1 All ER 571, Auld LJ spoke of the 'readiness of the courts, regardless of the precise issue involved, to draw back the corporate veil to do justice when common sense and reality demand it'. His Lordship went on, 'there is … a powerful argument of principle … for lifting the corporate veil where the facts require it'. Laws LJ expressed 'emphatic agreement' with these statements.

The contrary argument is strong, however. Most of the relevant cases concern property and contract, and the courts should surely be hesitant to pierce the veil in response to superficial considerations of 'common sense' or 'reality' or 'fairness'. Instead, those who adopt the corporate form should be expected to take the rough with the smooth. This was emphasised by Browne-Wilkinson V-C in *Tate Access Floors Inc v Boswell* [1991] Ch 512 at 531, where he said:

> If people choose to conduct their affairs through the medium of corporations, they are taking advantage of the fact that in law those corporations are separate legal entities, whose property and actions are in law not the property or actions of their incorporators or controlling shareholders. In my judgment controlling shareholders cannot, for all purposes beneficial to them, insist on the separate identity of such corporations but then be heard to say the contrary when discovery [disclosure] is sought against such corporations.[32]

(p. 54) Statutory piercing of the corporate veil

Many of the *statutory* directions to 'pierce the veil' occur in revenue law (see *Gasque v IRC* **[2.10]**); Landlord and Tenant Act 1954 s 30(3) (see *Tunstall v Steigmann* [1962] 2 QB 593 (CA)), or the Trading with the Enemy Act 1939 s 2 (see *Kuenigl v Donnersmarck* **[2.08]**, and *Daimler Co Ltd v Continental Tyre and Rubber* **[2.12]** and **[2.13]**). Provisions with similar effect in other statutes will occasionally be noticed. However, in *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 WLR 427 at 435, HL, Lord Diplock noted that this should be exceptional:

> The 'corporate veil' in the case of companies incorporated under the Companies Acts is drawn by statute and it can be pierced by some other statute if such other statute so provides; but, in view of its raison d'être and its constant recognition by the courts since *Salomon v A Salomon & Co Ltd* **[2.01]**, one would expect that any parliamentary intention to pierce the corporate veil would be expressed in clear and unequivocal language.

CA 2006 does not provide for piercing the veil. It focuses instead on making directors and other officers liable for

company wrongs (see Chapter 7), rather than allowing the 'veil' to be penetrated to make members liable.

Similarly, the insolvency legislation contains a number of sections providing for directors (and others) to be personally liable for the debts of a limited company, or to make a contribution to its assets in a liquidation, for example where there has been fraudulent or wrongful trading (IA 1986 ss 213–215) or the improper re-use of an insolvent company's name (ss 216–217). Finally, the Company Directors Disqualification Act 1986 (CDDA 1986) s 15 similarly penalises a person who acts as a director in breach of a disqualification order.

None of these statutory examples involve *ignoring* the company's separate personality. Instead, they impose on defaulting directors (and perhaps other individuals) a liability*additional* to that of the company.

A note of caution

Now that the groundwork has been laid, it is appropriate to introduce a note of caution. The topic of 'piercing the veil' persists in company law textbooks (as in this one), yet, after a brief flurry of interest some decades ago, there now seems little potential for it to develop into a doctrine of any substance, and probably good reason why it should not. The early writers include Kahn-Freund in (1944) 7 MLR 54 and Gower in the first edition of his *Modern Company Law*, published in 1954. In the 1960s and early 1970s, the subject attracted a good deal of judicial attention (and, in the case of Lord Denning, positive enthusiasm). In the *DHN* case **[2.18]** the readiness of judges to use their interventionist powers and disregard the *Salomon* principle probably reached its peak. Since then, however, the trend has been almost entirely towards reasserting the orthodoxy of the *Salomon* principle—not only in the UK (most notably in *Adams v Cape Industries plc* **[2.19]**), but also in Australia, Canada, New Zealand and South Africa. To take just one example, in *Creasey v Breachwood Motors Ltd* [1993] BCLC 480, where assets had been removed from company A to company B leaving a former employee with a worthless judgment against company A, the judge thought it in the interests of justice and also found good practical reasons to pierce the veil by substituting company B as defendant. But any hopes that this might be the first sign of a revival of judicial willingness to pierce the veil were soon dashed: in *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447, CA, *Creasey* was peremptorily overruled.

Now it is rather rare to see the expression 'piercing (or lifting) the corporate veil' called in aid in legal analysis. The reasons for going behind the company shell need clear articulation. As Toulson J said in *Yukong Line Ltd v Rendsburg Investments Corpn of Liberia (No 2)* **(p. 55)** [1998] 1 WLR 294 at 305, 'metaphor can be used to illustrate a principle; it may also be used as a substitute for analysis and may therefore obscure reasoning'. *Jennings v Crown Prosecution Service* [2008] UKHL 29, [2008] AC 1046 may illustrate the point. There the court pierced the veil to convict an employee of conspiracy to defraud and prevent him from disposing of property obtained by fraud. The fraud consisted of persuading people to pay fees to a company for the arrangement of loans, knowing that no loans would ever be made. But was piercing the veil necessary? The employee was the company's agent. Where an agent's acts constitute a crime, it is no defence for the agent to say the acts were committed on behalf of someone else. It does not matter whether the agent acts for a human or a corporate principal.

This more modern and direct approach is seen to good effect in *Chandler v Cape plc* [2012] EWCA Civ 525, CA (part of the ongoing Cape litigation encountered again in**[2.19]**). Here the court applied orthodox negligence principles to hold that a parent company owed a duty of care to the employee of a now-dissolved subsidiary company. In delivering the judgment of the court, Arden LJ 'emphatically reject[ed] any suggestion that this court is in any way concerned with what is usually referred to as lifting the corporate veil' [69]. Instead, she approached the question purely from the tortious angle of 'assumption of responsibility'.

The modern approach to 'piercing the veil' clearly recognises that ownership and control of a company are not of themselves sufficient to justify piercing the veil; it is necessary to show both control of the company by the wrongdoer(s) and impropriety, being the (mis)use of the company as a device or façade to conceal wrongdoing.

[2.11] Ben Hashem v Ali Shayif [2008] EWHC 2380 (Family Division)

The issue before the court was the post-separation division of marital property between a husband and a wife. The

wife argued, in part, that the corporate veil should be pierced because the company in question was merely the husband's alter ego: he had overall control of it, the other shareholders being simply his nominees. The ultimate aim was to establish that the husband alone was the beneficial owner of the properties, not the husband and his children in accordance with their shareholdings in the company. The claim failed.

MUNBY J:

159. In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the veil. This is, of course, the very essence of the principle in *Salomon v A Salomon & Co Ltd* **[2.01]**, but clear statements to this effect are to be found in *Mubarak* [*Mubarak v Mubarak* [2001] 1 FLR 673] at page 682 per Bodey J and *Dadourian* [*Dadourian Groupinternational Inc v Simms* [2006] EWHC 2973 (Ch)] at para [679] per Warren J. Control may be a necessary but it is not a sufficient condition (see below). As Bodey J said in *Mubarak* at page 682 (and, dare I say it, this reference requires emphasis, particularly, perhaps, in this Division): 'it is quite certain that company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control.'

160 Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice. In common with both Toulson J in *Yukong Line Ltd of Korea v Rendsberg Investments Corporation of Liberia (No 2)* [1998] 1 WLR 294 at page 305 and Sir Andrew Morritt VC in *Trustor* [*Trustor AB v Smallbone (No 2)* [2001] 1 WLR 1177] at para [21], I take the view that the dicta to that effect of Cumming-Bruce LJ in *In re a Company* [1985] BCLC 333 at pages 337-338, have not survived what the Court of Appeal said in *Cape* [*Adams v Cape Industries plc* [1990] Ch 433] at page 536:

> '[Counsel for Adams] described the theme of all these cases as being that where legal technicalities would produce injustice in cases involving members of a group of companies, such **(p. 56)** technicalities should not be allowed to prevail. We do not think that the cases relied on go nearly so far as this. As [counsel for Cape] submitted, save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon & Co Ltd* **[2.01]** merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.'

161 Thirdly, the corporate veil can be pierced only if there is some 'impropriety': see *Cape* at page 544 and, more particularly, *Ord* [*Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447] at page 457 where Hobhouse LJ said:

> 'it is clear … that there must be some impropriety before the corporate veil can be pierced.'

162 Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability. As Sir Andrew Morritt VC said in *Trustor* at para [22]:

> 'Companies are often involved in improprieties. Indeed there was some suggestion to that effect in *Salomon v A Salomon & Co Ltd* **[2.01]**. But it would make undue inroads into the principle of Salomon's case if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.'

163 Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show both control of

the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing. As the Vice Chancellor said in *Trustor* at para [23]:

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

And in this connection, as the Court of Appeal pointed out in *Cape* at page 542, the motive of the wrongdoer may be highly relevant.

164 Finally, and flowing from all this, a company can be a façade even though it was not originally incorporated with any deceptive intent. The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes.

165 In *Trustor*, the defendant's plea (see para [16]) that Introcom had been formed in connection with an earlier scheme, having no connection with *Trustor*, and that it was a genuine company having its own separate existence, cut no ice with the Vice Chancellor, who nonetheless held that the corporate veil could be pierced. And as Warren J said in *Dadourian* at paras [682]–[683]:

> '[682] In all of the cases where the court has been willing to pierce the corporate veil, it has been necessary or convenient to do so to provide the claimant with an effective remedy to deal with the wrong which has been done to him and where the interposition of a company would, if effective, deprive him of that remedy against him. It seems to me that the veil, if it is to be lifted at all, is to be lifted for the purposes of the relevant transaction. It must surely be doubtful at least that the ex-employee in *Gilford Motor Co v Horne* **[2.17]** would have been liable for the company's electricity bill simply because he was using the company as device and sham to avoid a covenant binding on him personally; and the same goes for the vendor of the property in *Jones v Lipman* [[1962] 1 WLR 832].
>
> **(p. 57)** [683] It is not permissible to lift the veil simply because a company has been involved in wrong-doing, in particular simply because it is in breach of contract. And whilst it is clear that the veil can be lifted where the company is a sham or façade or, to use different language, where it is a mask to conceal the true facts, it is, in my judgement, correct to do so only in order to provide a remedy for the wrong which those controlling the company have done.'

[The judge then referred to further cases and considered the facts of this case, before coming to the following conclusion:]

199 The common theme running through all the cases in which the court has been willing to pierce the 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 dehors the company. It is therefore necessary to identify the relevant wrongdoing—in *Gilford* **[2.17]** and *Jones v Lipman* it was a breach of contract which, itself, had nothing to do with the company, in *Gencor* [*Gencor ACP Ltd v Dalby*[2000] 2 BCLC 734] and *Trustor* it was a misappropriation of someone else's money which again, in itself, had nothing to do with the company—before proceeding to demonstrate the wrongful misuse or involvement of the corporate structure. But in the present case there is no anterior or independent wrongdoing. All that the husband is doing, in the circumstances with which he is now faced—the wife's claim for ancillary relief—is to take advantage, in my judgment legitimately to take advantage, of the existing corporate structure and, if one chooses to put it this way, to take advantage of the principle in *Salomon*.

By way of perhaps predictable exception, the court may go behind the veil of incorporation in order to determine whether a company is to be characterised as an 'enemy' in time of war.

[2.12] Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd [1916] 2 AC 307 (House of Lords)

The Continental Tyre company was incorporated in England, but all except one of its shares were held by persons resident in Germany, and all the directors resided in Germany. The secretary, who held the remaining share, resided in England and was a British subject. The issue was whether the company had standing in an English court to sue and recover a debt when a state of war existed between England and Germany. The company was allowed by the Master to sign summary judgment without proceeding to trial. His decision was affirmed by Scrutton J in chambers and by a greatly enlarged Court of Appeal (Buckley LJ dissenting). [Extracts from the judgments delivered in the Court of Appeal appear at **[2.13]**.] The House of Lords unanimously reversed the order of the Court of Appeal, and directed that the action be struck out as irregular, on the ground that the secretary was not authorised to commence the action; and it held further (by a majority, Lords Shaw of Dunfermline and Parmoor dissenting) that the company, though incorporated in England, was capable of acquiring an enemy character, so that leave to sign summary judgment should not have been given.

LORD PARKER OF WADDINGTON: No one can question that a corporation is a legal person distinct from its corporators; that the relation of a shareholder to a company, which is limited by shares, is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it and the acts of its servants and agents are its acts, while its shareholders, as such, have no property in the assets and no personal responsibility for those acts. The law on the subject is clearly laid down in … *Salomon v A Salomon & Co Ltd* **[2.01]** … I do not think, however, that it is a necessary corollary of this reasoning to say that the character of its corporators must be irrelevant to the character of the company; and this is crucial, for the rule against trading with the enemy depends upon enemy character.

(p. 58) A natural person, though an English-born subject of His Majesty, may bear an enemy character and be under liability and disability as such by adhering to His Majesty's enemies. If he gives them active aid, he is a traitor; but he may fall far short of that and still be invested with enemy character. If he has what is known in prize law as a commercial domicil among the King's enemies, his merchandise is good prize at sea, just as if it belonged to a subject of the enemy power. Not only actively, but passively, he may bring himself under the same disability. Voluntary residence among the enemy, however passive or pacific he may be, identifies an English subject with His Majesty's foes. I do not think it necessary to cite authority for these well-known propositions, nor do I doubt that, if they had seemed material to the Court of Appeal, they would have been accepted.

How are such rules to be applied to an artificial person, incorporated by forms of law? As far as active adherence to the enemy goes, there can be no difference, except such as arises from the fact that a company's acts are those of its servants and agents acting within the scope of their authority …

In the case of an artificial person what is the analogue to voluntary residence among the King's enemies? Its impersonality can hardly put it in a better position than a natural person and lead to its being unaffected by anything equivalent to residence. It is only by a figure of speech that a company can be said to have a nationality or residence at all. If the place of its incorporation under municipal law fixes its residence, then its residence cannot be changed, which is almost a contradiction in terms, and in the case of a company residence must correspond to the birthplace and country of natural allegiance in the case of a living person, and not to residence or commercial domicil. Nevertheless, enemy character depends on these last. It would seem, therefore, logically to follow that, in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at.

My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the

company's acts and may invest it definitively with enemy character. It seems to me that similarly the character of those who can make and unmake those officers, dictate their conduct mediately or immediately, prescribe their duties and call them to account, may also be material in a question of the enemy character of the company. If not definite and conclusive, it must at least be prima facie relevant, as raising a presumption that those who are purporting to act in the name of the company are, in fact, under the control of those whom it is their interest to satisfy. Certainly I have found no authority to the contrary. Such a view reconciles the positions of natural and artificial persons in this regard, and the opposite view leads to the paradoxical result that the King's enemies, who chance during war to constitute the entire body of corporators in a company registered in England, thereby pass out of the range of legal vision, and, instead, the corporation, which in itself is incapable of loyalty, or enmity, or residence, or of anything but bare existence in contemplation of law and registration under some system of law, takes their place for almost the most important of all purposes, that of being classed among the King's friends or among his foes in time of war.

What is involved in the decision of the Court of Appeal is that, for all purposes to which the character and not merely the rights and powers of an artificial person are material, the personalities of the natural persons, who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it. In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which property is held, and the character in which the capacity to act is enjoyed and acts are done, are not in pari materia. The latter character is a quality of the company itself, and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable not from the circumstances of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from what human **(p. 59)** beings that character should be derived, in cases where the active conduct of the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators. …

THE EARL OF HALSBURY LC and LORD ATKINSON delivered concurring opinions.

VISCOUNT MERSEY and LORDS KINNEAR and SUMNER concurred.

LORDS SHAW OF DUNFERMLINE and PARMOOR delivered opinions concurring in the result, but dissenting on this point.

Part of the majority judgment in the Court of Appeal is set out in the following extract. The arguments in favour of recognising or disregarding the corporate entity could hardly be contrasted more sharply. No doubt the factor which most influenced the House of Lords was the paramountcy of the public interest in wartime.

[2.13] Continental Tyre and Rubber Co (Great Britain) Ltd v Daimler Co Ltd [1915] 1 KB 893 (Court of Appeal)

LORD READING CJ read the judgment of the majority of the court (LORD READING CJ, LORD COZENS-HARDY MR, KENNEDY, PHILLIMORE and PICKFORD LJJ): It cannot be disputed that the plaintiff company is an entity created by statute. It is a company incorporated under the Companies Acts and therefore is a thing brought into existence by virtue of statutory enactment. At the outbreak of war it was carrying on business in the United Kingdom; it had contracted to supply goods, it delivered them, and until the outbreak of the war it was admittedly entitled to receive payment at the due dates. Has the character of the company changed because on the outbreak of war all the shareholders and directors resided in an enemy country and therefore became alien enemies? Admittedly it was an English company before the war. An English company cannot by reason of these facts cease to be an English company. It remains an English company regardless of the residence of its shareholders or directors either before or after the declaration of war. Indeed it was not argued by Mr Gore-Browne that the company ceased to be an entity

created under English law, but it was argued that the law in time of war and in reference to trading with the enemy should sweep aside this 'technicality' as the entity was described and should treat the company not as an English company but as a German company and therefore as an alien enemy. If the creation and existence of the company could be treated as a mere technicality, there would be considerable force in this argument. It is undoubtedly the policy of the law as administered in our courts of justice to regard substance and to disregard form. Justice should not be hindered by mere technicality, but substance must not be treated as form or swept aside as technicality because that course might appear convenient in a particular case. The fallacy of the appellants' contention lies in the suggestion that the entity created by statute is or can be treated during the war as a mere form or technicality by reason of the enemy character of its shareholders and directors. A company formed and registered under the Companies Acts has a real existence with rights and liabilities as a separate legal entity. It is a different person altogether from the subscribers to the memorandum or the shareholders on the register (per Lord Macnaghten in *Salomon v A Salomon & Co Ltd* **[2.01]**). It cannot be technically an English company and substantially a German company except by the use of inaccurate and misleading language. Once it is validly constituted as an English company it is an artificial creation of the legislature and it retains its existence for all intents and purposes. It is a living thing with a separate existence which cannot be swept aside as a technicality. It is not a mere name or mask or cloak or device to conceal the identity of persons and it is not suggested that the company was formed for any dishonest or fraudulent purpose. It is a legal body clothed with the form prescribed by the legislature …

For the appellants' contention to succeed, payment to the company must be treated as payment to the shareholders of the company, but a debt due to a company is not a debt due to all or any of its shareholders: *Salomon v Salomon & Co*. The company and the company alone is the creditor entitled to enforce payment of the debt and empowered to give to the debtor a good and valid **(p. 60)** discharge. Once this conclusion is reached it follows that payment to the plaintiff company is not payment to the alien enemy shareholders or for their benefit …

BUCKLEY LJ delivered a dissenting judgment.

➢ Notes

1. The view of the majority of the Court of Appeal was rejected by the House of Lords, as we have seen **[2.12]**. The Trading with the Enemy Act 1939 adopts the view of the House of Lords in the *Daimler* case:

Trading with the Enemy Act 1939

2 Definition of enemy

(1) Subject to the provisions of this section, the expression 'enemy' for the purposes of this Act means—

(a) any State, or Sovereign of a State, at war with His Majesty,

(b) any individual resident in enemy territory,

(c) any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who, under this section, is an enemy,

(d) any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty; and

(e) as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business; but does not include any individual by reason only that he is an enemy subject.

(2) The Board of Trade may by order direct that any person specified in the order shall, for the purposes of this Act, be deemed to be, while so specified, an enemy.

2. There are many contexts in company law in which the question of 'control' arises, but there is no single definition which meets all cases. In *Bermuda Cablevision Ltd v Colica Trust Co Ltd* [1998] 1 BCLC 1 at 9, PC Lord Steyn said: 'Expressions such as "control" and "controlling interest" take their colour from the context in which they appear. There is no general rule as to what the word "controlled" means … The expression must be given the meaning which the context requires.' The elaborate definitions of 'subsidiary' and 'holding company' in CA 2006 s 1159, and the equally elaborate, but different, definitions of 'parent undertaking' and 'subsidiary undertaking' in s 1162 show the legislative draftsman wrestling with the problem. For other illustrations, see *Lonrho Ltd v Shell Petroleum Ltd* **[2.06]**, and, historically, the discussion of the 'fraud on the minority' exception to the 'rule in *Foss v Harbottle*', at 'Exceptions to the rule in *Foss v Harbottle*', pp 640ff.

3. The consequences of these rules can be far reaching. For example, under the Merchant Shipping Act 1988 and regulations made thereunder only fishing vessels registered as 'British' were eligible to fish under the quota for the UK fixed by the EU. Vessels owned by a company could be so registered only if 75% of their shareholders fulfilled requirements as to British nationality, residence and domicile. The CJEU in *R v Secretary of State for Transport, ex p Factortame Ltd (No 3)* [1992] QB 680 held that such a restriction was contrary to Art 52 of the EC Treaty, which guarantees freedom of establishment to the nationals of all member states. Consequently, most sections of the Act have now been repealed.

➢ Question

Could a landlord be guilty of an offence under the Race Relations Act 1976 if he refused to lease premises to a company incorporated in England which was owned and controlled by three Nigerian businessmen?

(p. 61) ***An agency relationship between a company and its shareholders or controllers may, exceptionally, be found to exist as a matter of fact.***

[2.14] Re FG (Films) Ltd [1953] 1 WLR 483 (Chancery Division)

The applicant company sought to have the film *Monsoon* registered as a British film under the Cinematograph Films Acts 1938–1948. The Board of Trade refused the application on the ground that the film had in reality been made by a large American company, Film Group Incorporated. By the terms of an agreement between the two companies, the American company had undertaken to provide finance and all the facilities required by the applicant to make the film. The applicant company sought a declaration that it was the 'maker' within the meaning of the Act.

> VAISEY J: The applicants have a capital of £100, divided into 100 shares of £1 each, 90 of which are held by the American director and the remaining 10 by a British one. The third director has no shareholding. I now understand that they have no place of business apart from their registered office, and they did not employ any staff. It seems to me to be contrary, not only to all sense and reason, but to the proved and admitted facts of the case, to say or to believe that this insignificant company undertook in any real sense of that word the arrangements for the making of this film. I think that their participation in any such undertaking was so small as to be practically negligible, and that they acted, in so far as they acted at all in the matter, merely as the nominee of and agent for an American company called Film Group Incorporated, which seems (among other things) to have financed the making of the film to the extent of at least £80,000 under the auspices and direction of the said American director, who happened to be its president. The suggestion that this American company and that director were merely agents for the applicants is, to my mind, inconsistent with and contradicted by the evidence, and a mere travesty of the facts, as I understand and hold them to be.
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> The applicants' 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.

➢ Question

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

➢ Notes

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

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

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

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

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

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