PIERCING THE CORPORATE VEIL IN CLAIMS ENFORCEMENT
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These notes are derived from a talk by James Sleightholme of Elborne Mitchell LLP, given at Lloyd's Old Library on Wednesday 22 August 2012.

Where specific reference is made to the law it is to English law as at 22 August 2012.

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Good afternoon. Today I am going to talk about the circumstances in which the court will look behind the separate legal personality of a company for the purposes of enforcing claims and will impose legal consequences on its shareholders, owners or controllers. This is often referred to as lifting or piercing the veil of incorporation. I'm also going to talk about the consequence of the veil being lifted, in other words, what remedies the court will give. That particular issue has been brought into focus recently by the Court of Appeal’s decision on 20 June 2012 in *VTB Capital v Nutritek and others*.1

The starting point is the House of Lords’ decision in *Salomon v. A Salomon and Company Limited*2 which established the fundamental principle of company law that a company is a separate legal entity which is distinct from its individual members.

Mr Salomon was a successful leather merchant and boot manufacturer. He arranged for a limited liability company to be formed in compliance with the Companies Act 1862. That Act allowed any seven or more persons associated for any lawful purpose to form an incorporated company with or without limited liability. So he took 20,001 shares himself, while his wife and five adult children subscribed for one share each. The company took over his business and in return he took his shares fully paid and some debentures which he mortgaged, which enabled him to pay off existing creditors. The company’s business failed some time later and it went into liquidation. There was not enough money to meet the claims of unsecured creditors. The High Court and Court of Appeal ordered that Salomon indemnify the company against those claims. Lindley LJ said that the legislature never contemplated an extension of limited liability to sole traders or a fewer number than seven. He said that the object of Salomon's arrangement was to be the very thing which the legislature intended not to be done. The seven were not associated for a lawful purpose, but to attain a result not permitted by the Act. He characterised the arrangement is a device to defraud creditors and treated the company as a trustee to Mr Salomon.

The House of Lords reversed the decision. Lord Macnaghten said:-

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

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1 [2012] EWCA Civ 808  
2 [1897] AC 22
for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think the declared intention of the enactment.”

Lord Halsbury LC said:

“... it seems to me impossible to dispute that once the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the formation of the company are absolutely irrelevant in discussing what those rights and liabilities are.”

When will the veil be lifted?

It is well established that the courts will not allow the separate identity of a company to be used as a vehicle for fraud or to avoid pre-existing legal liabilities.

In *Gilford Motor Company Limited v. Horne*[^3^], Mr Horne was subject to a clause in his service contract which restrained him from competing with his employer. To get round it, he got his wife to set up a company, JM Horne & Co Limited, and started to trade through that company in competition with his former employer. The shareholders and directors were Mr Horne’s wife and an employee.

Gilford sued both Mr Horne and the company, claiming injunctions to restrain breaches of the non-competition covenant. In the Court of Appeal the Master of the Rolls, Lord Hanworth said:

“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 E B Horne. The purpose of it was to try to enable him, under what is a cloak or a sham, to engage in business ... in respect of which he had a fear that the Plaintiffs might intervene and object.”

The court granted an injunction against both Mr Horne and his company to restrain breach of the restrictive covenant.

In *Jones v. Lipman*[^4^], Lipman sold property to Jones, but before completion of the contract, he changed his mind and did not want to go ahead. So he transferred the land to a company of which he and a nominee were the sole shareholders and directors. He offered to pay damages

[^3^]: [1933] Ch 935
[^4^]: [1962] 1 WLR 832
for failing to complete. He obviously thought that if he conveyed the land to the company, it would be impossible for the buyer to obtain an order from the court for specific performance, because he would no longer own the land and the company was not a party to the contract so couldn’t be forced to perform it.

Jones applied for specific performance. Russell J ordered specific performance against both Mr Lipman and his company. The judge made the order against Mr Lipman because he wholly controlled the company and therefore was in a position to have it perform the contract. He made an order against the company in reliance upon *Gilford Motor Co Limited v Horne*. The Judge said:

“*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. [Gilford v Horne] illustrates that an equitable remedy is rightly to be granted directly against the creature in such circumstances.*”

In each of these cases, a company was used in an improper attempt to avoid the consequences of an individual's breach of contract and the court prevented the individual from using the company in that way by giving a remedy also against the company.

In the 1970s piercing of the corporate veil appeared to be extended to certain cases concerning groups of companies in circumstances where there was no question of any impropriety, but where failure to do so was seen to result in injustice.

In *DHN Food Distributors v. Tower Hamlets LBC*, the issue was whether individual corporate personality could be put aside to enable a company to pursue a claim. A group of 3 companies was seeking compensation for loss of business caused by a compulsory purchase order over its premises. On the face of it, only the company which owned the land could claim compensation for disturbance to its business. But the group company which owned the land didn’t trade and so hadn’t lost any business. Its parent company had lost its business but the council rejected its claim. The Court of Appeal upheld the claim. Lord Denning MR said:

“*These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says ... this group is virtually the same as a partnership in which all three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for*”

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5 [1976] 1 WLR 852
present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So DHN are entitled to claim compensation accordingly.”

Goff LJ said:

“... this is a case in which one is entitled to look at the realities of the situation and to pierce the corporate veil. I wish to safeguard myself by saying that so far as this ground is concerned, I am relying on the facts of this particular case. I would not at this juncture accept that in every case where one has a group of companies, one is entitled to pierce the veil, but in this case the two subsidiaries were both wholly owned; further they had no separate business operations whatsoever.”

The House of Lords dealt with another compulsory purchase compensation claim in Woolfson v. Strathclyde Regional Council⁶ a couple of years later. This was the first time since Salomon that the HL had considered piercing of the veil. The facts were distinguishable from DHN because the company carrying on the business, which was claiming compensation for disturbance, had no control over the owners of the land, and the claim failed. In giving judgment, Lord Keith, with whom the other members of the House of Lords agreed, said in relation to DHN:

“I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts.”

So the House of Lords cast doubt on the decision in DHN but did not specifically over-rule it.

However it highlighted the applicable principle, namely that “it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts”. The courts will not lift the veil merely because it would be in the interests of justice. This statement of principle has been repeated through the cases ever since.

In Adams v. Cape Industries Plc⁷, the Court of Appeal reviewed the law, particularly in the context of a group of companies organised in such a way as to insulate the parent company from claims.

Cape was the English parent company of an international group which mined asbestos in South Africa which it sold to various countries. Asbestos mined by one of its subsidiaries was sold by another subsidiary for use in a Texas factory. Workers sued Cape in Texas for damages for disease alleged to have been caused by the asbestos. A default judgment was

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⁶ [1978] SC (HL) 90
⁷ [1990] Ch 433
entered against it which the plaintiffs tried to enforce in England. Whether the judgment would be enforced in England was held to depend upon whether Cape was present in the United States. Presence was held to turn on whether one or other of two successive US companies, which acted as marketing agents for the group but did not make contracts on behalf of Cape, were carrying on the business of Cape.

The court considered cases in which group structures had been treated as being a single economic unit. It found that those cases (including the DHN case) all involved the interpretation of a statute or a document and so did not apply here. The court rejected the argument that Cape Group should be treated as one, and said:

“...save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v. A Salomon & Co Limited [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities. ...”

“If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of Salomon v. A Salomon & Co Limited [1897] AC 22 merely because it considers it just so to do.”

The DHN case was treated as being concerned with the interpretation of the compulsory purchase statute and not therefore as laying down any general principle.

The court went on to deal separately with what it called the “corporate veil” point. The court said that apart from cases where statute or contract permitted a broad interpretation to be given to references to members of a group of companies, there was one well recognised exception to the rule prohibiting the piercing of the corporate veil, which was referred to by Lord Keith in the Woolfson case where he referred to the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts. The court said that the motives of those behind the alleged façade could be very important. The court looked at the motives of Cape in structuring its US business through its various subsidiaries and found that although its motive was to try to minimise its potential liability in the USA for tax and legal liabilities, there was nothing wrong with this.
The court accepted that it would lift the corporate veil where a defendant, by the device of a corporate structure, attempted to evade (i) limitations imposed on his conduct by law or (ii) such rights of relief against it as third parties already possessed. But it rejected the notion that the corporate veil would be lifted where the corporate structure was created to evade rights of relief which third parties might acquire in the future.

The court said:

“Whether or not such a course deserves moral approval, there was nothing illegal as such in Cape arranging its affairs (whether by the use of subsidiaries or otherwise) so as to attract the minimum publicity to its involvement in the sale of Cape asbestos in the United States of America ... We do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.”

To recap then, in the light of Adams v. Cape Industries and Woolfson the veil of incorporation can be lifted:

1. If the court is interpreting a statute or a document and there is some lack of clarity which entitles the court to treat a group as a single entity.

2. Where special circumstances exist indicating that it is a mere façade concealing the true facts, including where a defendant, by the device of a corporate structure, attempts to evade

   i. limitations imposed on his conduct by law or

   ii. such rights of relief against him as third parties already possess.

Subsequent cases have given further guidance on what kind of “special circumstances” are required.

In Trustor AB v Smallbone (No. 2)\(^8\), Mr Smallbone had transferred various sums of money in breach of his duty towards Trustor as its managing director to another company, Introcom, which he owned and controlled. Trustor applied to the court to pierce the corporate veil so as

\(^8\) [2001] I WLR 1177
to treat receipt by Introcom as receipt by Smallbone on the grounds that the company had been a sham created to facilitate the transfer of the money in breach of duty, the company had been involved in the improper acts and the interest of justice demanded such a result. The Vice Chancellor, Sir Andrew Morritt said:

“... companies are often involved in improprieties. Indeed there was some suggestion to that effect in Salomon v. Saloman & Co Limited [1897] AC 92. But it would make undue in-roads into the principle of Salomon v. Saloman & Co Limited if an impropriety not linked to the use of the company structure to avoid or conceal liability for that impropriety was enough.

The court focussed on the requirement that the company should be used by another person to do something improper. The judge said:

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

The court held that Introcom was a device or façade in that it was used as a vehicle for the receipt of the money of Trustor. Its use was improper as it was the means by which Mr Smallbone committed breaches of his duty as a director of Trustor. Introcom was ordered to repay the money.

In *Faiza Ben Hashem v. Abdulhadi Ali Shayyif & Others*, Mr Justice Munby (as he then was) conducted a thorough review of the cases and summarised the principles as follows:

1. "Ownership and control of a company are not themselves sufficient to justify piercing the veil.” That’s the basic Salomon principle.

2. “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.” Some cases had suggested otherwise.

3. “The corporate veil can only be pierced if there is some impropriety...”

4. “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’s structure to avoid or conceal liability ...” This was what Sir Andrew Morritt said in Trustor.

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9 [2008] EWHC 2380
5. “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 wrong-doing ... 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.”

6. “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).”

7. “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.”

In VTB Capital, which I’ll come on to, the Court of Appeal agreed with this summary subject to the qualification that it does not follow that the piercing of the veil will be available only if there is no other remedy available against the wrongdoers for the wrong they have committed.

I'm going to deal next with the issue which has come to the fore very recently in the Court of Appeal's decision in the VTB case, namely,

**What remedies are available to the claimant when the veil is pierced?**

In Antonio Gramsci Shipping Corp v. Stepanovs\(^{10}\), the Claimants were one-ship companies all in the ultimate beneficial ownership of the Latvian Shipping Company ("LSC"). They claimed that the Defendant that had dishonestly siphoned out substantial profits from the chartering business of LSC and the Claimants. Instead of arranging for the Claimants to charter out their vessels to arms-length commercial Charterers, the Defendant and 4 other individuals, who were senior executives of LSC, devised a scheme whereby they interposed puppet companies as charterers which they beneficially owned and which then subchartered the vessels on the market at substantially higher rates than those in the head charters.

Judgment had been entered against the puppet companies. The claimants then brought proceedings against the Defendant Stepanovs and alleged that the puppet companies were

\(^{10}\) [2011] EWHC 333 (Comm)
used by him and others as a device for the purposes of committing fraud on the claimants, entitling the claimants to pierce the corporate veil and hold the Defendant liable as a party to the charterparties which the claimants were caused to enter into with the puppet companies. Beatson J granted a freezing injunction *ex parte* and gave permission to serve the claim form on the Defendant out of the jurisdiction on the basis that there was a good arguable case that, the Defendant being one of the alter egos of the corporate defendants, he should be regarded as stepping into their shoes under the charter parties, including the English jurisdiction clause they contained.

The Defendant applied to challenge the jurisdiction of the court and set aside the freezing injunction.

Burton J cited the following passage from the judgment of Sir Andrew Morritt V-C in *Trustor v. Smallbone*:

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

And went on to say that it was quite clear that that is exactly what (on the claimants’ case) occurred here.

The court then dealt with the claimants’ case that as a result of piercing of the veil, the Defendant was jointly and severally liable under the Charterparties into which the puppet companies entered. The claimants accepted that there was no reported case in which the veil had been pierced so as to place the puppeteer as a party to the puppet’s contract, but submitted that there was nothing in the decided cases to cast doubt upon the proposition. They submitted that the proposition was supported by the result in *Gilford*, in which the injunction was made against the puppet company even though it was not a party to the restrictive covenant and also in *Jones v. Lipman* in which specific performance of the contract of purchase was ordered both against the puppeteer and the puppet. The Judge held:

> “There is in my judgment no good reason of principle or jurisprudence why the victim cannot enforce the agreement against both the puppet company and the puppet who, all the time, was pulling the strings.”

The Judge concluded that there was a good arguable case that the puppeteer was a party to the exclusive jurisdiction clause in the puppet’s charterparties, which thus gave the English
court jurisdiction to hear the claimants’ case of dishonesty against the puppeteers. This was the first time that the English court had granted such a remedy. It gave the claimants the considerable advantage of being able easily to found jurisdiction and maintain the freezing injunction.

**Linsen v Humpuss**

In *Linsen International Ltd & Ors v Humpuss Sea Transport Pte Ltd & Ors*[^11], the claimants were all companies in the Empire Group. In 2007, Empire arranged for construction of 12 chemical tankers and agreed to charter some of them to companies in the Humpuss Group. By the time the vessels were delivered to the First Defendant in early 2009, the freight market had collapsed and the Charterers didn’t pay the hire. The owners claimed damages for repudiation and obtained arbitration awards against the First Defendant and summary judgment against the Second Defendant which had guaranteed the D1’s obligations. They also obtained freezing orders against D1 and D2.

The claimants brought additional proceedings against the Third to Thirteenth Defendants who were mainly other companies within the Humpuss Group. They alleged that pursuant to a restructuring of the Group which took place in 2009 and 2010, the Third Defendant had received assets previously owned by the First Defendant or its subsidiaries worth US$60m, with no evidence that the assets were paid for.

The claimants contended that this restructuring was an abuse of the corporate structure entitling them to pierce the corporate veil and that as a result of piercing the corporate veil, the court should hold that the Third to Thirteenth Defendants were liable under the underlying Charterparties and guarantees to which the First and Second Defendants were parties. Mr Justice Flaux took the opportunity to review the cases as to the effect of piercing the corporate veil.

First of all, he pointed out that at the time when the original contracts were entered into in 2007, there was no question of any abuse of the corporate structure. In that respect, there was a fundamental distinction between that case and *Antonio Gramsci*, in which the rationale for holding the true party, i.e. the puppeteer, liable had been that the purported contract was a sham or façade from the outset. The question was the extent, if at all, a subsequent abuse of

the corporate structure could lead to the parties in the Group who had participated in that abuse becoming liable under the original transactions as if they had been parties to them from the outset. The Judge considered various authorities including *Adams*. Of that case, he said:

“... that case may be taken as authority for the proposition that, in a case such as the present, where there has been an abuse of the corporate structure to make enforcement of the existing causes of action against the relevant Defendant (here the First Defendant) more difficult, the corporate veil may be pierced.

However, the case is not authority for the proposition that the effect of piercing the corporate veil will be to make another company in the Group (which has participated in the relevant wrong-doing) liable in contract or in tort where there would not otherwise have been any liability. Rather it is clear that, had the Court of Appeal been prepared in that case to pierce the corporate veil, the effect of doing so would have been to unravel the relevant arrangements to make Cape Industries (which on this hypothesis would have been the true defendant) liable.”

Mr Justice Flaux said that there was strong authority for the proposition that where an elaborate series of corporate structures had been created, designed to evade existing liabilities of the true Defendant, the court would pierce the corporate veil and in effect demolish the structures, in order to ensure that the true Defendant was found liable. However, there was nothing which supported the proposition that, where an existing and genuine corporate structure was abused, as was the case in Humpuss, the corporate veil could be pierced so as to make individuals or companies in a group liable under the underlying contracts to which they were not parties. The argument for making the Third to Thirteenth Defendants liable failed and the freezing injunction against them was therefore set aside.

**VTB v Nutritek**

The question whether the puppeteer could be made liable under the puppet’s contract came before the courts again, in *VTB Capital Plc v. Nutritek International Corp and Others*[^12]. The claimant, VTB, had lent approximately US$225m to a Russian company RAP, to fund its purchase of Russian dairy companies from Nutritek. Within six months of the sale completing, RAP defaulted on the loan repayments, the loan was called in and less than US$40m were recovered, leaving VTB with a substantial loss.

VTB sued the Seller Nutritek and 3 other defendants, a Mr Malofeev and 2 companies which he was said to control. VTB claimed that the Buyer RAP and the Seller (Nutritek) were under

[^12]: [2011] EWHC 3107 (Ch)
common control of Mr Malofeev via his 2 companies and that the whole transaction was set up as a sham to defraud them.

The 2\textsuperscript{nd} and 4\textsuperscript{th} Defendants challenged the court’s jurisdiction (the 3\textsuperscript{rd} D had not yet been served with the proceedings).

Originally VTB had claimed in tort for deceit and conspiracy to injure by means of fraudulent misrepresentation. So they applied to add an additional claim in contract on the basis that the corporate veil of RAP should be lifted and that as a consequence of the lifting of the corporate veil the Defendants became parties to the original facility agreement, so as to be jointly and severally liable with RAP and in particular, subject to the English law and jurisdiction clause which the facility agreement contained. If they could succeed in establishing a good arguable case that the 2\textsuperscript{nd} to 4\textsuperscript{th} Defendants were parties to the contract and jurisdiction clause then their case in answer to the Defendants’ jurisdiction challenge would be much stronger.

Mr Justice Arnold held that VTB’s contract claim was unsustainable as a matter of law and said that he considered the *Gramsci* case and another similar case decided by Burton J\textsuperscript{13} on the same basis had been wrongly decided.

So, as of November last year, there were two conflicting first instance decisions in the Chancery Division and the Commercial Court on the question of whether, in circumstances where the corporate veil could be pierced, it was possible to make the puppeteer liable on the puppet’s contract.

VTB appealed to the Court of Appeal which delivered its judgment on 20 June 2012.

The critical question was the effect and consequences of a finding that the circumstances of a particular case justified the piercing of the corporate veil and in particular whether in this case the piercing of the corporate veil led to the conclusion that the Second, Third and Fourth Defendants (the alleged fraudsters) were also original parties to the agreements entered into by RAP with the claimant.

VTB argued that in *Gilford v. Horne*, the court could only have granted an injunction against both Mr Horne and his company on the grounds that it considered that the Plaintiff had a

\textsuperscript{13} Alliance Bank JSC v Aquanta Corporation and Others [2011] EWHC 3281 (Comm)
cause of action against the company. The Court of Appeal rejected VTB’s argument, and concluded that the court must have granted the injunction against the company simply on the basis that it was just and convenient to do so and this did not mean that it considered that the company was a party to Mr Horne’s contract.

Similarly, in analysing Jones v. Lipman, the court considered that the basis on which the court had made an order for specific performance, not only against Mr Lipman but also against his company was simply that in a case in which the contracting puppeteer has used his creature company in a bid to escape his contractual obligations, and the circumstances merited the piercing of the company’s veil, it may be appropriate also to grant an equitable remedy directly against the company. The court did not consider that the case helped VTB’s argument.

The court then came to deal with Gramsci and pointed out that the Judge in that case had apparently treated the Gilford and Jones cases as cases where the court was treating the puppet as liable under the puppeteer’s contract and to have favoured the view that there was therefore no reason in principle why, in the reverse situation, the puppeteer should not be held liable under the puppet’s contract. The court said that Burton J has misinterpreted the Gilford and Jones decisions.

The court concluded that Arnold J was correct to hold the contract claim that VTB wished to advance against the three Defendants was not founded on a cause of action known to English law and stated that it could identify no principled basis upon which the law might be incrementally developed so as to recognise such a claim.

VTB argued that the position was analogous to that which applied to undisclosed principals to a contract. An undisclosed principal can be liable on a contract even though the other party is unaware of the principal’s existence. VTB suggested that the position in this case was similar. The court rejected this argument. On the assumed facts of the case, there was no question of a puppeteer having authorised the puppets to enter into the contract on their behalf. Furthermore, there was no arguable factual basis for the assertions that when the facility agreement was concluded, VTB intended to contract with anyone other than the counterparties named in them, or that such counterparties intended to contract with VTB on behalf of anyone but themselves or that any of the Second to Fourth Defendants intended to
contract with VTB or that objectively speaking, any of the three Defendants was a party to the relevant contracts. The court said:

“VTB’s submission amounts to the proposition that there is a principle of English law that a person can be held to be a party to a contract when, assessed objectively, none of the undisputed parties to the contract had any thought that he was, let alone an intention that he should be. In our judgment, to accede to VTB’s submission would be to make a fundamental in-road into the basic principle of law that contracts are the result of a consensual arrangement between, and only between, those intending to be parties to them. It is contrary to that principle, which is applicable save in some exceptional cases, none of which applies here, that a stranger to the contract should be held to be a party to it.”

The court said that whilst the court could in an appropriate case pierce a company’s corporate veil, and in doing so substantially identify the company with those in control of it, there was no authority, apart from the two decisions of Burton J, that supported the proposition that once the veil was pierced, the court could hold either that the puppet company was a party to the puppeteer’s contract or vice versa.

The court questioned whether it would ever be appropriate to develop the law in the direction for which VTB were contending. It said:

“There is no need to do so, Mr Snowden submitted that English law needs the tools to deal with commercial fraud. In principle, we agree. But if VTB’s factual assertions are well founded, English law already provides it with a perfectly good remedy against the Defendants, by way of a claim in the tort of deceit for the wrong which it claims they have inflicted upon it. There is no good policy reason for inventing and giving it an artificial remedy in contract, which VTB does not need, but which it merely invokes in support of its claim that the English courts should assume jurisdiction in its claim.”

The Court of Appeal refused VTB permission to claim against the Second to Fourth Defendants in contract and set aside the permission which had been granted to VTB to serve its proceedings on the Second to Fourth Defendants outside the jurisdiction, which meant that VTB could not pursue the case. The court considered that that VTB’s tort claims were governed by Russian law that the most appropriate forum for them was Russia. Ironically, the effect of this was to deprive VTB of the “perfectly good remedy against the Defendants” under English law which the court had referred to.
The position after *VTB v. Nutritek*

If the court decides to pierce the corporate veil, it may grant a discretionary remedy, such as an injunction or an account, against the puppet or puppeteer, or it may unravel the relevant transaction in order to give effect to the true position; but it will not order that the puppet and puppeteer are to be considered as parties to each other’s contracts at the relevant time.

VTB have obtained permission from the Supreme Court to appeal against the Court of Appeal’s judgment.

At the heart of this case is the question of how far the English courts are prepared to go to provide support to parties seeking remedies against fraud or impropriety where the underlying contract is subject to the jurisdiction of the English court, and how creative they are prepared to be. In a case such as this one, where the allegation is that the deal was fraudulent from the outset, and a number of Commercial Judges appear to have considered the point at least arguable, there does seem to be a case for a more flexible approach than that taken by the Court of Appeal. It remains to be seen what view the Supreme Court will take.