IN THE SUPREME COURT OF ZAMBIA **Appeal No. 010/2016**
HOLDEN AT NDOLA
(Civil Jurisdiction)

B E T W E E N :

MADISON INVESTMENT, PROPERTY AND ADVISORY COMPANY LIMITED **APPELLANT**

AND

PETER KANYINJI **RESPONDENT**

Coram: **Mambilima CJ, Malila and Musonda, JJS on 4th September, 2018 and 20th November, 2018**

For the Appellant: Mr. M. Chiteba of Mulenga Mundashi, Kasonde Legal Practitioners

For the Respondent: Mr. P. Songolo of Messrs Philsong and Partners

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J U D G M E N T

Malila JS, delivered the judgment of the court.

Cases referred to:

1. *Salomon v. Salomon & Co. Ltd (1897) AC 22, (1895-9) ALL ER Rep 33*
2. *Dimpleby & Sons v. National Union of Journalists (1984) 1WLR 427 at 435, HL*
3. *Swallow Freight Services (Zambia) Limited v. Kapiri Transport Company Limited, Appeal No. 81 of (2006)*
4. *Redrilza Limited v. Abuid Nkazi & Others [SCZ judgment No. 7 of 2011]*

5. *Kingfarm Products v. Dipiti Rani Sen (2008) ZR 72*
6. *ZCCM v. Richard Kangwa & Others [SCZ judgment No. 25 of 2000]*
7. *Adams v. Cape Industries Plc (1991) 1 ALL ER 929*
8. *Yukong Lune Limited of Korea v. Rendsburg Investments Corporation of Liberia (1998) 1 ALL ER*
9. *Adams v. Cape Industries Plc (1990) 1Ch. 433*
10. *Woolfson v. Strathclyde Regional Council (1978) SLT 159*
11. *Merchandise Transport Limited v. British Transport Commission (1962) 2 QB 173*
12. *Ben Hashem v. Ali Shayif (2008) EWHC 238*
13. *Prest v. Petrodel Resources Ltd (2013) UK SC 34*
14. *Lazarus Estates Ltd v. Beasley (1956) 1 QB 702*
15. *Gilford Motor Company v. Horne (1933) Ch 935*
16. *Jones v. Lipman (1962) 1 WLR 832*
17. *Littlewoods Mail Order Stores v. IRC (1969) 1 WLR 1241*
18. *DHN Food Distributors v. Tower Hamlets LBC (1976) 1 WLR 852*
19. *Re a Company (1985) 1 BBC 99, 421*
20. *Creasy v. Breachwood Motors Ltd (1999) 2 BBC 638*
21. *Re Polly Peck International Plc (No.3) (1996) BCC 486*
22. *Ord v. Belhaven Pubs (1998) 2 BCLC 447*
23. *Ebbau Vale Urban District Council v. South Water Traffic Licencing Authority (1951) 2K 366*
24. *Bank of Tokyo v. Karoon (1987) PC*
25. *Ethiopian Airlines Ltd. v. Sunbird Safaris Ltd. [SCZ judgment No. 26 of 2007]*
26. *Shosma's Investment Holding Limited v. Vijay Babula Sharma (2007) ZR 235*
27. *Southern Cross Company Ltd. v. Nonc Systems Technology Ltd (2011)*
28. *Kitwe Super Market Ltd. v. Southern African Trade (2007/HK/243)*
29. *Re Southard Ltd. (1979) 1 WLR 1189*
30. *Kleinwort Benson Ltd. v. Malaysian Mining Corporation (1989) 1 WLR 379*

Legislations and other works referred to:

1. *Companies Act No. 10 of 2017*
2. *Insolvency Act No. 9 of 2017*
3. *Cases and Materials Company Law, 4th ed. by Andrew Hicks and SH Goo*

4. *Halsbury's Laws of England 4th ed. Vol. 9*
5. *Rules of the Supreme Court (White Book) (1999) ed.*
6. *The Principles of Modern Company Law (3rd ed. Stevens & Sons) p. 216*

At the centre of the present appeal is perhaps the most pervading of all fundamental principles of company law – corporate personality, the bedrock concept under which an incorporated entity is regarded as distinct from its shareholders. It is a principle that has been uncompromisingly applied since the House of Lords decision in *Salomon v. Salomon & Co.*[1]. More pertinently, this appeal is about a notion that has defied any bright line test – lifting the veil of incorporation of a limited liability company.

We must state at once that there are nuances in meaning in the metaphors 'piercing', 'lifting', 'removing', 'unmasking', 'setting aside', 'ignoring' and 'piercing through' the corporate veil. We are for the present purpose not concerned with that trivia. Suffice it to state that the general sense adopted here is that the concept entails overlooking the veil of incorporation and facing the persons (natural or judicial) who own the corporate entity.

It is vitally important that we preface our judgment with a general but pertinent observation. It is this, that with its distinctive

features of separate corporate personality and limited liability, the company is the most dominant legal vehicle, the world over, employed by commercial men and women in conducting business. It, therefore, forms the foundation of the market economy as it offers business persons, especially those operating across borders, a way of not only increasing competitiveness, but also of managing the risk that comes with venturing into precarious enterprises, especially in unfamiliar territories.

However, although the veil of incorporation of limited liability companies offers enormous commercial and legal benefits to the owners of corporate entities, it also gives even bigger worries to persons dealing with those corporate entities when the veil of incorporation is used fraudulently or improperly to shield wrong doing. It is in the context of these conflicting positions that we view the present appeal.

The respondent was, according to his statement of claim, employed as Managing Director of Perfect Milling Company Limited (Perfect Milling), which was the first defendant in the proceedings in

the lower court. Perfect Milling was owned by the appellant, Madison Investment, Property and Advisory Company Limited (Madison), both of which companies were in turn part of the Madison group of companies.

The respondent served a three-year contract with Perfect Milling. At the end of it, he was entitled to some end of contract benefits. He calculated those benefits at K312,693,470 (unrebased) following which he requested Perfect Milling to pay. He received a response instead from the appellant, on behalf of Perfect Milling, acknowledging and admitting indebtedness to the respondent in the lesser sum of K207,859,683 (unrebased) as end of contract payments due to him. No explanation was given as to how that sum was arrived at. The appellant also assured the respondent that he would be paid that amount upon funds being available, subject to what was described as 'seniority of claim'. This communication was contained in a letter, dated 7th June, 2011 authored by the appellant's Managing Director, a Mr. Don Maila. It read in part as follows:

"Dear Mr. Kanyinji,

RE: GRATUITY – PETER KANYINJI ON PERFECT MILLING COMPANY LTD

We refer to your letter dated 4th May, 2011 regarding the above matter.

We wish to advise that we are aware of the amount of gratuity due to you from Perfect Milling Limited of K207,859,683.00. The amount has been included on the company's list of outstanding creditors and shall be paid to you once funds from Perfect Milling Company are available.

We however wish to advise that payment of all creditors shall be in accordance with the seniority of claim."

Despite the numerous assurances made by the appellant that it would pay the respondent his terminal dues, no payment was forthcoming. This prompted the respondent to commence proceedings in the lower court against Perfect Milling as first defendant and the appellant as second defendant.

In those proceedings, the respondent claimed payment of the said sum of K312,693,470 (unrebased) and other benefits plus interest. Although his claim was primarily against Perfect Milling, he joined the appellant to the proceedings as second defendant principally because it had acknowledged the debt and had undertaken to have it paid. Additionally, the appellant was,

according to the respondent, part of the same group of companies as Perfect Milling and was involved in the routine management of Perfect Milling.

At the trial of the action, the respondent adduced evidence seeking to show that Perfect Milling was not only owned by the appellant but was also managed by it closely. The respondent alleged serious overlapping roles in the management of Perfect Milling with those of shareholders and directors of Madison. He cited as an example, an instance when one of the appellant's directors by the name of Rhoydie Chisanga, relocated to the premises of Perfect Milling for purposes of running it.

The respondent also adduced evidence in the lower court to the effect that former employees of Perfect Milling, including a Mr. Sydney Mateyo, who left employment, were paid their terminal benefits by the appellant - not Perfect Milling. The payment voucher relating to Mr. Mateyo's terminal benefits, which was produced in the record of appeal, was raised by the appellant.

Furthermore, the respondent testified in the lower court that whenever, as General Manager, he raised an issue regarding the affairs of Perfect Milling with the Board Chairman, the answer would come from the appellant.

According to the respondent it was clear that the appellant had taken charge of Perfect Milling's financial distress in such a manner as to leave no illusion whatsoever that the appellant was in absolute control of Perfect Milling.

He cited as another example of control, a letter written to him as General Manager of Perfect Milling and dated 12th May, 2009 regarding the report on creditors' position and other matters internal to Perfect Milling. The letter was on the letterhead of Madison Investment Company Limited and copied to the LSA Group Chairman, the LSA Group Legal Counsel and the LSA Group Finance Director. In that letter, there was an intimation that Madison Investment Company Limited was seeking advice from its Group Legal Counsel on how to deal with Perfect Milling's creditors.

We pause here to state that in its defence in the court below, the appellant had denied belonging to the Madison group of companies, stating instead that it was a subsidiary of Lawrence Sikutwa and Associates (which we believe the acronym LSA stands for). The LSA group is also associated or related to the Madison group.

Some correspondence in the record of appeal show that it was Madison Investments Limited, which is related to the appellant, that was actively involved in the negotiation for the sale of Perfect Milling, and not the appellant as shareholder of Perfect Milling.

A similar situation extended to the Evaluation Report for Perfect Milling dated 15th February, 2008 submitted by the Managing Director of Madison Investment Company Limited to the Board of Directors of Madison Investments Company Limited. This, according to the respondent, showed that Perfect Milling was in truth answerable to the appellant and/or other group entities financially and commercially; that they were all being run as a single economic unit for the same economic goal.

As regards board membership of Perfect Milling, the respondent demonstrated in the lower court that there were four or five members on the board who represented the shareholders and it was one of those board members, in that capacity, who assumed management of Perfect Milling at its premises for 15 days. This evidence by the respondent in the lower court stood largely uncontroverted.

The appellant, however, maintained throughout the proceedings in the lower court that though the appellant and Perfect Milling as well as other entities allegedly belonged to the Madison group of companies it remained, at all material times, legally distinct and separate from the other companies.

Following the trial of the matter, the learned High Court judge was satisfied that this was a proper case in which the corporate veil could be lifted as the respondent and Perfect Milling were in fact run as a single economic unit. She was particularly persuaded by the fact that the appellant had undertaken to assume responsibility in the general affairs of Perfect Milling, including the latter's

indebtedness. She accordingly entered judgment in favour of the respondent as prayed against the appellant.

Unsurprisingly, the appellant took umbrage at that judgment and hence the present appeal premised on two grounds, namely that:

1. *The learned trial judge erred in law and in fact when she held the appellant liable to pay the terminal benefits of the respondent owed by a third-party entity, in which the 2nd Appellant was a shareholder, without lifting the veil of incorporation of the said entity.*

2. *The learned trial judge erred in law and in fact when she held the 2nd Appellant liable to pay a debt owed by another entity in the absence of evidence that the 2nd Appellant as a shareholder, run the said entity for a fraudulent purpose (sic!).*

Both parties filed their heads of argument in which the two grounds were argued together.

It was submitted by Mr. Chiteba, learned counsel for the appellant, that the concept of corporate personality is well established and has long been treated as sacrosanct, subject to some specified exceptions. A passage was quoted from the case of *Dimpleby & Sons v. National Union of Journalists*[2] where the court stated *inter-alia* as follows:

"... the reason why English statutory law, and that of all other trading countries, has long permitted the creation of corporations as artificial persons distinct from their individual shareholders and from that of any other corporation even though the shareholders of both corporations are identical is to enable business to be undertaken with limited financial liability in the event of the business proving to be a failure. The 'corporate veil' in the case of companies incorporated under the Companies Act 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 consistent recognition by the court since Salomon v. Salomon & Co. Ltd[1], *one would expect that any parliamentary intention to pierce the corporate veil would be expressed in clear and unequivocal language. I do not wholly exclude the possibility that even in the absence of express words stating that in specific circumstances one company, although separately incorporated, is to be treated as sharing the same legal personality of another, a purposive construction of the statute may nevertheless lead inexorably to the conclusion that such must have been the intention of parliament."*

Counsel also referred us to section 383 of the Companies Act, chapter 388 which provides that:

"(1) In the course of the winding-up of a company or any proceedings against a company, the court may, on the application of the liquidator or any creditor or member of the company, if it is satisfied that a person was knowingly a party to the carrying on of any business of the company for fraudulent purposes, make an order that the person shall be personally responsible without any limitation of liability, for the debts or other liabilities of the company as for such of those debts or other liabilities as the court directs."

We must point out that at the time of the proceedings in the lower court, the Companies Act, chapter 388 of the laws of Zambia, applied. It has since been repealed and replaced by the Companies Act No. 10 of 2017. The new Companies Act has no provision equivalent to section 383 of the repealed Act. However, section 175 of the Corporate Insolvency Act No. 9 of 2017 contains a reformulated version of section 383 of the repealed Companies Act.

The learned counsel for the appellant cited the case of *Swallow Freight Services (Zambia) Limited v. Kapiri Transport Company Limited*[3] as an instance where the provisions of section 383 of the repealed Companies Act was applied. The point he made was that the lifting of the corporate veil must be by specific application to court showing that the party sought to be held liable for the company's debt had been running the company for a fraudulent purpose.

To an intent not very clear to us, the learned counsel for the appellant cited the labour law case of *Redrilza Limited v. Abuid Nkazi & Others*[4] where we held that is an appropriate case a court may go

behind a termination notice in the quest to find out the real reason for the termination of an employee's employment.

Counsel for the appellant also quoted a passage from *Cases and Materials in Company Law,* 4th ed. by Andrew Hicks and SH Goo, the substance of which quotation is that courts have lifted the corporate veil in instances where shareholders deliberately or otherwise use the device to achieve certain benefits, or where they seek to avoid some obligations. In the present case, counsel submitted that the evidence adduced in the lower court did not prove that the appellant ran Perfect Milling for a fraudulent purpose or in a manner intended to avoid certain obligations. The evidence did not, furthermore, show that there was any malice in the manner in which the respondent's employment was terminated.

Counsel for the appellant then focussed his submission around the issue of fraud. Relying on *Halsbury's Laws of England* (4th ed. Vol. 9), he submitted that a party relying on misrepresentation, fraud breach of trust, wilful default or undue influence by another party must supply the necessary particulars of the allegations in his

pleading. Order 18/8/10 of the English *Rules of the Supreme Court* (1999) (White Book) was also cited to reinforce the same argument.

The learned counsel posited that a perusal of the statement of claim does not show that the respondent pleaded any fraud. He further submitted that the cases of *Kingfarm Products v. Dipiti Rani Sen*[5] and *ZCCM v. Richard Kangwa & Others*[6] upon which the lower court found support for its conclusion that the appellant and Perfect Milling operated as a single economic unit, were inapplicable. According to counsel, the two cases do not deal specifically with the issue of lifting the corporate veil. Furthermore, they do not supersede the statutory position regarding lifting the corporate veil.

Without discounting any specific aspects of the respondent's evidence in the lower court, Mr. Chiteba bravely submitted that there was no business relationship between the appellant and Perfect Milling as the appellant was merely a shareholder and an investment company whose core business was unrelated to that of Perfect Milling.

The learned counsel recited a passage from the judgment of Slade LJ in *Adams v. Cape Industries Plc*[7] the thrust of which was that there was no general principle that all companies in a group of companies are to be regarded as one. We shall, later in this judgment, reproduce that passage.

Counsel further submitted that to the extent that the corporate veil is created by statute, it can only be pierced if the statute provides so in clear and unambiguous terms. It was Mr. Chiteba's position that the only basis upon which the corporate veil can be pierced in this jurisdiction is section 383 of the Companies Act.

We were urged to uphold the appeal.

In his heads of argument in response, Mr. Songolo, learned counsel for the respondent, supported the holding by the lower court all the way through. He also argued grounds one and two together.

Ground one was specifically opposed on the basis that the lower court did in fact lift the corporate veil when it stated in its judgment, *inter alia*, that:

"Having found that the 2nd Defendant was not overly scrupulous in observing the legalistic lines of demarcation in the names of separate corporate identities, I deem that this is a case in which they should be responsible for the debts incurred by the 1st Defendant to the Plaintiff."

It was submitted that in the circumstances such as prevailed in the present case, there was no requirement for a formal application to be made to lift the veil of incorporation, neither was it necessary for the court to move itself to lift the veil because by their own conduct, the affected companies in the group had, to use the learned counsel's words, "already undressed themselves at law." There was in that instance no veil to lift as they were treated as a single economic unit.

Counsel argued that the respondent presented evidence in the lower court proving that the appellant and Perfect Milling were operating as one economic unit as opposed to applying to court to lift the corporate veil. Furthermore, the appellant never in the lower court, raised the issue contemplated in section 383 of the Companies Act (repealed) but invested its energies in arguing that it was a mere shareholder in Perfect Milling and that the veil could only be lifted where there was malice. Fraud, according to counsel for the respondent, was not raised in the lower court.

In apparent self-contradiction, the learned counsel for the respondent contended that the court below lifted the corporate veil on account of the respondent having proved that the appellant and Perfect Milling operated as a single economic unit; not on the basis of malice or fraud as envisaged in section 383 of the Companies Act (repealed), and indeed, the respondent was not alleging any fraud or malice. For this reason, it was submitted that the appellant has either misapprehended the respondent's case or deliberately advanced stray arguments.

Mr. Songolo also submitted that corporate personality has been consistently recognised since the case of *Salomon v. Salomon & Co.*[1] and reiterated in later cases including that of *Yukong Lune Limited of Korea v. Rendsburg Investments Corporation of Liberia*[8]. In the latter case, the Supreme Court of England and Wales recognised the "gnawing away at the edges of the doctrine" through the process of lifting the corporate veil.

Citing the cases of *Adams v. Cape Industries Plc*[9] and *Woolfson v. Strathclyde Regional Council*[10], counsel contended that lifting the veil is only permissible where:

> *"Special circumstances exist indicating that [the company] is a mere façade concealing the true facts."*

We were referred to the case of *Kingfarm Products Limited & Another v. Dipiti Rani Sen*[5] where we stated as follows:

> *"We note that what really led to the application against the 2nd appellant was as a result of how the two companies related with each other in their operations in general and in the manner they handled the late Mr. Sen's disciplinary proceedings in particular."*

Counsel pointed out that in the *Kingfarm Products*[5] case, there was no formal application to lift or ignore the corporate veil, nor was there reference whatsoever to section 383 of the Companies Act, nor was indeed any fraud alleged. Yet, this court stated that the removal of the veil of incorporation was on account of the conduct of the appellant companies themselves.

Mr. Songolo submitted that in this jurisdiction the behaviour of group companies has a significant bearing on whether or not their corporate veil would be lifted. He claimed that case law on this point

can, in terms of its force, be equated to statutory provisions under the Companies Act.

Counsel also pointed to evidence in the record of appeal to confirm that the respondent's contract of employment with Perfect Milling was executed at the premises of the Madison group of companies, and also that the letter confirming the respondent in his position was on the letterhead of another Madison group of companies.

In his further effort to convince us that the appellant and Perfect Milling were run as one economic unit, the learned counsel referred to numerous instances of the appellant's apparent management and control of Perfect Milling which was revealed in the evidence tendered in the lower court. We have already captured the substance of this evidence in the earlier part of this judgment.

To further buttress his submission on lifting the veil where companies are run as a single economic unit, counsel cited the case of *Merchandise Transport Limited v. British Transport Commission*[11]

and reproduced a passage from the judgment of Dankwarts LJ as follows:

> *"Where the character of a company, or the nature of the person who control it, is a relevant feature, the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance."*

Our decision in *ZCCM v. Richard Kangwa & Others*[6] was also cited as authority for the proposition that companies which are operated as one economic entity risk having the corporate veil lifted.

We were urged to dismiss the appeal.

We are grateful to counsel for both parties for their lucid submissions from which we have immensely benefited. Like counsel for the parties we shall address the two grounds of appeal together.

We think with respect to counsel for both parties, that the argument whether or not the veil was lifted, or whether an application to lift the veil ought to be formally made, are peripheral to the central issue determinative of the present appeal.

There is perhaps no better starting point than to stress the obvious point that when business persons incorporate companies, as they normally do, for purposes of separating their business affairs from their personal ones, or indeed the affairs of one business from those of another, the law ought to respect such arrangement. This should be so even if it is to the detriment of the very persons behind the corporate entities.

Indeed, the basic notion of a corporate entity being distinct and separate from its owners provides the basis of the whole fabric of company law. And instances are not few when the courts, for very good cause, have successfully resisted the temptation to pierce the veil of incorporation, that is to say, to disregard the corporate personality of a company and look behind the real actors or persons in control of it.

The importance of maintaining the separate existence of corporate entities should not be difficult to appreciate. In fact, in his submissions, Mr. Chiteba referred us to the case of *Dimpleby & Sons National Union of Journalists*[2] where part of the reasons were

explained in a quotation we have reproduced early on in this judgment. To that we can add, that a free market economy heavily relies upon the role of limited liability companies, which as we pointed out at the outset, allow individuals to assume economic risks that they would otherwise be reluctant to assume. Munbly J in *Ben Hashem v. Ali Shayif*[12] aptly summed up the case for observing the separate corporate existence of companies in the following passage.

> *"There has always been a judicial concern not to create commercial uncertainty and undermine the benefits of incorporation. Having incorporated, the shareholders have a legitimate expectation, as do those who deal with the incorporated entity, that the courts will respect the status of the entity and apply the principle in Salomon v. Salomon & Co.*[2] *in the ordinary way."*

One needs only to think of the large mining companies in this country and the amount of confusion, as well as what would happen to the level of investment confidence, were the veil of incorporation to be lifted lightly at every conceivable application.

In discussing the notion of piercing the corporate veil, the case of *Prest v. Petrodel Resources Ltd*[13] is instructive. In that case, the UK Supreme Court reviewed English law in the area of lifting the

corporate veil. Its conclusion was that the court has a distinct but limited power to ignore separate corporate personality. We shall revert to the details of this case shortly. For now, the point must be made that courts in general, and this court is no exception, are bound to respect the concept of separate corporate personality, subject to the observations we shall shortly make.

Notwithstanding the significance of observing the distinction between the corporation and its owners, courts ought to be careful to ensure that there is some limit to the protection given by the notion of separate corporate personality so that business dealings remain honest.

In this jurisdiction, as in England and Wales, the circumstances in which the corporate veil may be lifted can be classified into two categories; first under the common law through judicial interpretation, and second, under statute.

The learned author, LC Gower in *The Principles of Modern Company Law* (3rd ed. Stevens & Sons) p. 216, gives four examples of situations when it will be justified for a court to pierce the corporate

veil. These are: (a) where the veil of incorporation is being used for some fraudulent or improper purpose; (b) where it becomes necessary to determine the character of the company; (c) where a trust and agency relationship is involved; and (d) where the interests of third parties are at stake. The statutory instances are of course discernible from various pieces of legislation, section 175 of the Corporate Insolvency Act to which we have early alluded, being one of them.

It is inappropriate and in any case unnecessary for us to engage in an extended discourse on each and every one of these instances. All we can say at this stage is that available authorities do expose the fallacy of the argument advanced by the appellant's learned counsel that the common law has no place in lifting the corporate veil. We do not agree with Mr. Chiteba's submission that because corporate personality is given by statute, it follows that the veil of incorporation can only be lifted under statute.

We, however, can briefly reflect on the issue of lifting the corporate veil on account of improper conduct and fraud which Mr. Chiteba raised in his submission in relation to the statutory lifting of the veil of incorporation. In agreeing with him, as we do, that fraud and improper conduct do indeed provide a basis for lifting the corporate veil, we must clarify that such fraud and improper conduct as to justify the lifting of the corporate veil need not only arise in the context of a statutory prescription as Mr. Chiteba suggested. As Denning LJ observed in *Lazarus Estates Ltd v. Beasley*[14]:

> *"No court in this land will allow a person to keep an advantage which he had obtained by fraud. No judgment of a court, no order of a minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever..."*

That fraud or improper conduct will justify the lifting of the corporate veil even outside the context of statutory provisions is exemplified by the cases of *Gilford Motor Company v. Horne*[15] and *Jones v. Lipman*[16]. In the former case, the English Court of Appeal held that a company formed for the purpose of circumventing a restraint of trade provision was a sham. In the latter case, a company

formed for purposes of holding land so as to avoid the obligation to specifically perform a contract was equally held to be a cloak. In both cases, the veil of incorporation was lifted. And in both of these, the lifting of the veil was not based on a statutory provision.

In the present case, the corporate veil was ignored or lifted by the lower court on the basis of the single economic unit argument; that the appellant, Perfect Milling and other companies in the Madison group of companies were operated in such a way as to suggest that they were a single economic unit.

The substance of that argument, as we understand it, is that in spite of the separate legal personality of the appellant and Perfect Milling, they are companies within a group and they, in fact, constitute a single economic unit. Liability should therefore be attached to the whole group as the companies aim to reach a single economic goal.

The law takes the position that companies in a group are separate entities and are not agents of each other. At a general level, therefore, the effect of the rule in *Salomon v. Salomon & Co.*[1] as it

relates to individual subsidiaries within a conglomerate or group of companies is that they will be treated as separate entities and the parent company cannot be made liable for their legal obligations.

It was Lord Denning, more than any other judge, who appeared to have taken the effort to overturn the rigid application of the principle in *Salomon v. Salomon & Co.*[1] as it applies to companies in a conglomerate or group. In *Littlewoods Mail Order Stores v. IRC*[17] he made the following statement:

> *"[t]he doctrine laid down in* Salomon's *case has to be watched very carefully. It has often been supported to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit."*

In *DHN Food Distributors v. Tower Hamlets*[18], the veil of incorporation was lifted for the benefit of the parent company in a group setting. DHN was treated as owning the land of its subsidiary and therefore entitled to compensation for the corporate torts committed against the subsidiary.

This approach found support in some cases that followed including the notable one of in *Re a Company*[19]. There, Cumming Bruce LJ stated, among other things, that the court's power to pierce the corporate veil is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. Likewise, in *Creasy v. Breachwood Motors Ltd*[20] the company had been used for an illegitimate or improper purpose. The court pierced the corporate veil as the business of a defendant company in litigation was transferred to an associated company so as to leave the company without assets.

We are also mindful of many unsuccessful attempts under English law to disregard the veil of incorporation on the premise that companies operate as a single economic unit. In *Re Polly Peck International Plc*[21] treating companies as a single economic unit was declined on the basis that doing so would create a new exception to the *Salomon*[1] principle. Likewise, in *Ord v. Belhaven Pubs*[22] the English Court of Appeal declined to lift the veil on the ground that there was no evidence of improper motive in restructuring or

transforming the group's assets. There, the plaintiff had sought to replace the parent company for the subsidiary company on the basis that following a restructuring of the company, the original defendant did not own any substantial assets.

One exception to this has to do with agency. Where there is an express agency relationship between a parent and a subsidiary – the veil of incorporation could be pierced. In *Ebbau Vale Urban District Council v. South Water Traffic Licencing Authority*[23], the English Court of Appeal considered the relationship between the parent and a wholly owned subsidiary company. Cohen LJ pertinently observed that under:

> *"the ordinary rules of law a parent company and a subsidiary company, even a hundred percent subsidiary company, are distinct legal entities, and in the absence of a contract of agency between the two companies one cannot be said to be the agent of the other."*

Likewise, in *Bank of Tokyo v. Karoon*[24] it was held that the legal conception of the corporate structure was entirely distinct from the economic realities.

In *Adam v. Cape Industries Plc*[7] Slade LJ, in rejecting the approach taken in *DHN Food Distributors*[18], was emphatic that the veil should not be pierced merely because there is a group structure. He stated in a passage that Mr. Chiteba referred to in his submissions, as follows:

> *"...the court is not free to disregard the principle of* Salomon v. A Salomon & Co. Ltd[1] *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 creature 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. There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary the fundamental principle is that each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities."*

In *Woolfson v. Strathclyde*[10], the House of Lords held that the decision in *DHN Food Distributors*[18] was confined to its facts. The court took the opportunity to confirm that the courts should only pierce the corporate veil where *'special circumstances exist indicating that it was a mere façade concealing the true facts'* (para 161 per Lord Keith).

It seems from a review of available case law that the decision in the *DHN Food Distributors*[18] case has not received much judicial enthusiasm and has not been applied even in the clearest of cases where its logic would appear relevant.

The principle that should underpin any attempt to pierce the corporate veil is therefore this; the courts will not allow the corporate personality to be used to protect individuals from wrong doing. Fraudulent actions will not be protected, nor will those where the limited company is simply being used as a façade, as a sham. However, the power to intervene and lift the veil must be exercised charily. There ought to be a hidden untoward intent.

In *Prest v. Petrodel Resources Ltd.*[13] to which we had earlier made reference, two principles that should weigh upon the court's decision to pierce the corporate veil in general were postulated. In his leading judgment given after outlining the developments in the law, Sumption JSC stated that:

> *"there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he*

deliberately frustrated by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil...But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy. "

Lord Clarke in the same case put the point more directly that:

"The court only has power to pierce the veil when one of the more conventional remedies have proved to be of no assistance."

There is a briefer dictum to the same effect by Lord Neuberger.

The two principles outlined in that case were the concealment principle and the evasion principle. The first of these will apply where the corporate personality is used to hide the true state of affairs. It does not rest on a finding of impropriety; it is the fact of concealment, simple and pure. The court will be entitled to look into the legal relationship between the company and the individuals behind it.

The evasion principle is premised on an individual or entity being under an existing legal obligation which he or it seeks to avoid by using the corporate personality which is under the control of the individual or entity.

While it will always be necessary for the victim of fraud to consider whether a case may be an appropriate one for piercing the corporate veil, in light of the *Prest*[13] decision, it is most likely that a remedy will have to be sought on a different basis than through lifting the corporate veil.

We have had occasion to examine some of the cases in which courts in this country have considered the issue of piercing the corporate veil. In *Ethiopian Airlines Ltd. v. Sunbird Safaris Ltd*[25], *Shosma's Investment Holding Limited and Vijay Babula Sharma*[26] we held that the third respondent who was the Managing Director of the first respondent and was responsible for the day to day running of the company, was personally liable in terms of section 383 of the Companies Act for the first respondent's debts because he

fraudulently allowed the first respondent to continue trading in the circumstances it was in.

The case of *Kingfarm Products Limited & Another v. Dipiti Rani Sen*[5] which Mr. Songolo cited, had to do with joinder of a party to proceedings and did not focus on veil lifting. The case of *ZCCM v. Richard Kangwa & Others*[6] on the other hand related to the sale of ZCCM houses to employees of a ZCCM subsidiary. Lifting the corporate veil was likewise not the thrust of the decision.

In two High Court judgments, the courts lifted the corporate veil on account of what it perceived as fraudulent conduct. In *Southern Cross Company Ltd. v. Nonc Systems Technology Ltd*[27], the corporate veil was lifted because of fraudulent conduct on the part of a third party. There, a money judgment had been entered against the defendant, being the balance on the purchase price of a motor vehicle. It turned out that enforcement of that judgment through a writ of *fifa* failed as the defendant had no established business premises and no goods worth seizing. An application to lift the

corporate veil was granted so that the person behind the company, i.e. the Managing Director was made personally liable.

In *Kitwe Super Market Ltd. v. Southern African Trade*[28], the directors of a debtor company disposed of the assets of the company in a manner designed to circumvent the company's obligation to settle a sum of money arising from a contract for the supply of assorted wines and spirits. The High Court lifted the corporate veil partly on the basis of section 383(1) of the Companies Act (repealed).

Two things are clear to us. First, the courts have been inclined to lift the veil where fraud or improper conduct is established. Second, all these cases were anchored in section 383 of the repealed Companies Act.

What emerges from all this is that each new action brings a different set of facts and circumstances into the equation and a separate determination must be made based on individual facts as to whether an applicant for lifting the veil has deployed sufficient evidence of control, domination, improper purpose or use, and above

all absence of another means of achieving the same object than through lifting of the veil.

In the case before us, there indeed appeared to have been a considerable level of involvement by the appellant in the management of Perfect Milling, particularly when the latter started experiencing financial distress. And why not. Ownership and control of a company are not, of themselves, sufficient to justify the piercing of the corporate veil. We believe that the turning point in lifting the corporate veil was the House of Lords decision in *Prest v. Petrodel Resources Ltd,*[13] which is notable for its extended dictum. We have already quoted freely from this valuable and characteristically trenchant judgment, particularly in regard to the two vital elements to lifting the veil which were there so eloquently elaborated, namely, concealment and evasion of an existing legal restriction or obligation, coupled with the absence of other conventional remedies. These, ought to be clearly shown before a court can be invited to consider overlooking the corporate veil.

Although, indeed, the appellant in the present appeal may have given every indication of assuming Perfect Milling's obligation to the respondent and being involved in its management, there was not much done in the nature of creating a legal relationship between the appellant and the respondent.

We are unable on the facts to satisfy ourselves that the corporate veil was used by the appellant in this case to conceal the true state of affairs or to evade an existing obligation or for any improper or fraudulent purpose, nor are we convinced that other methods of recovering from Perfect Milling were unavailable. In *Re Southard Ltd.*[29] Templeman LJ put the position thus:

> *"A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies to change the metaphor, turns out to be the runt of the tiller and declines into insolvency to the dismay of its creditors, the parent company and other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary."*

Applying the principles that we have set out in this judgment to the facts of this case and to the lower court's judgment, we can do no

better than adopt the passage in *Re Southard*[29] which we have lately quoted.

The appeal, has merit and it is allowed accordingly. Costs shall follow the event to be taxed if not agreed.

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I. C. Mambilima
CHIEF JUSTICE

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M. Malila
SUPREME COURT JUDGE

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M. Musonda SC
SUPREME COURT JUDGE