

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal under Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read together with Section 6 thereof, and Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC (CHC) Appeal No. 95/2018

Commercial High Court of Colombo

Case No. HC (Civil) 180/2006(1)

Panda Lanka Toy Exports (Pvt) Limited,
No. 30, Sandatenna Mawatha,
Battaramulla.

PLAINTIFF

Vs

C & H Company Limited,
154/8, C & H Building,
Samsung – Dong, Kangnam – GU, Seoul, Korea.

DEFENDANT

And now between

Panda Lanka Toy Exports (Pvt) Limited,
No. 30, Sandatenna Mawatha,
Battaramulla.

PLAINTIFF – APPELLANT

Vs

C & H Company Limited,
154/8, C & H Building,
Samsung – Dong, Kangnam – GU, Seoul, Korea.

DEFENDANT – RESPONDENT

Now carrying on business under the name and style of
Dream International Limited,
6/F, Tower 1, South Seas Centre,
75, Mody Road, Tsim Sha Tsui, Hong Kong.

SUBSTITUTED DEFENDANT – RESPONDENT

Before: Arjuna Obeyesekere, J
Sampath B. Abayakoon, J
K.M.G.H. Kulatunga, J

Counsel: Geethika Mannapperuma for the Plaintiff – Appellant

Argued on: 23rd January 2026

Written Submissions: Tendered on behalf of the Plaintiff – Appellant on 20th February 2026

Decided on: 18th September 2026

Obeyesekere, J

- (1) The Plaintiff – Appellant [**the Plaintiff**], a company incorporated under the Companies Act, No. 17 of 1982, instituted action in the High Court of the Western Province holden in Colombo exercising Civil jurisdiction [the Commercial High Court/High Court] on 23rd August 2006, seeking to recover from the Defendant – Respondent [**the Defendant**] the rupee equivalent of a sum of USD 1,368,640 under three causes of action.
- (2) The Defendant was a company incorporated under the laws of South Korea and was engaged in the manufacture of soft toys, with associate and/or subsidiary companies situated in several countries, including Sri Lanka. The Defendant having filed its answer denying liability, the case proceeded to trial with the Plaintiff leading the evidence of four witnesses. By its judgment delivered on 18th June 2018, the High Court held that the causes of action pleaded against the Defendant are prescribed, in that action has not been filed within three years of the breach alleged by the Plaintiff, and dismissed the action. It is observed that the High Court did not answer the rest of the issues that had been raised by the parties.

- (3) Aggrieved, the Plaintiff filed this appeal on 14th August 2018. While this appeal was pending before this Court, the Plaintiff, by way of an affidavit dated 28th October 2024 affirmed by its Managing Director intimated that the business of the Defendant had been acquired by Dream International Limited, a company having a business address in Hong Kong, and sought permission of this Court to substitute Dream International Limited in place of the Defendant. Permission having been granted and notices having been duly served on the said substituted party, we proceeded with the hearing in the absence of the Defendant.

Agreement P7 and the first cause of action

- (4) On 8th April 1996, the Plaintiff entered into an agreement [**P7**] with C & H Lanka II (Pvt) Limited, [**CHL II**], a company incorporated under the Companies Act, No. 17 of 1982. It is admitted that the majority of the shares in CHL II was held by the Defendant and that some members of the board of directors of the Defendant served on the board of directors of CHL II. P7 had been signed on behalf of CHL II by two of its directors
- (5) According to P7, (a) CHL II was already engaged in the manufacture and/or production of finished soft toys at its factory premises situated within the Biyagama Export Processing Zone for export to international markets at the time P7 was executed, and (b) CHL II had entered into P7 with the Plaintiff since it was desirous of expanding its production volume.
- (6) In terms of P7, the parties had agreed as follows:
- (a) CHL II was required to supply the necessary raw materials to the Plaintiff to enable the Plaintiff to manufacture soft toys in accordance with the sample and other specifications provided by CHL II;
 - (b) CHL II shall make payment for the soft toys manufactured by the Plaintiff at the rates agreed by both parties in USD within a reasonable time of the delivery and provided the goods are to the satisfaction of CHL II;

- (c) The agreement may be terminated for breach of the provisions thereof, or at the option of either party for any reason whatsoever, provided notice of two calendar months is given;
 - (d) Notices shall be served at the local address of CHL II.
- (7) I have examined P7 and find that it does not contain any reference to the Defendant nor does it contemplate the Defendant playing any role in the performance of the obligations of CHL II under P7.
- (8) While it is admitted that the Plaintiff carried out the orders entrusted to it by CHL II, the Plaintiff claims that CHL II suspended the placing of orders from 30th November 2002 without the mandatory period of notice required by P7. The Plaintiff alleges that the directors of the Defendant who were also on the board of directors of CHL II left the country in January 2003 abandoning the factory premises, the workmen and their creditors. Action had thereafter been filed in the District Court of Gampaha by a creditor to wind up CHL II and another company by the name of C & H Lanka (Private) Limited. The latter company too had been incorporated under the laws of Sri Lanka and the majority of its shares were held by the Defendant.
- (9) It is admitted that a liquidator had been appointed in respect of the two companies and that while secured creditors had been settled from the sale of fixed assets, the sale proceeds were not sufficient to settle unsecured creditors including the Plaintiff. It is therefore evident that the said two companies were not shell companies devoid of any assets.
- (10) The first cause of action of the Plaintiff, founded upon P7, is to recover from the Defendant, a sum of USD 590,400 which includes a sum of USD 290,000 being the loss of profits for 2 years, a sum of USD 250,000 for the damage and injury caused to the business reputation of the Plaintiff and a further USD 50,400 as compensation due to the workmen employed in the Plaintiff.

Agreement P10 and the second cause of action

- (11) The Plaintiff states that it entered into an agreement on 8th April 1998 [P10] with C & H Lanka Private Limited [**CHL**] in terms of which the Plaintiff agreed to incorporate another company by the name of Eagle Toys Exports (Private) Limited [**Eagle Toys**] to manufacture soft toys exclusively for “C & H Lanka Group, Korea”.
- (12) In terms of P10:
- (a) The Plaintiff had agreed to install 300 machines and other related infrastructure required for the production of soft toys for a period of 5 years;
 - (b) The Plaintiff was to be paid a management fee of USD 9000 per month, for managing Eagle Toys;
 - (c) The management fee for the first period of two years was to be paid in advance;
 - (d) All operational and day to day maintenance costs were to be borne by CHL.
- (13) It is admitted by the parties that Eagle Toys was established by the Plaintiff at a cost of USD 500,000 and that Eagle Toys supplied the soft toys manufactured by it to CHL.
- (14) The Plaintiff claims that the Korean directors of CHL too had fled the country in January 2003. Together with unpaid management fees of USD 324,000, the Plaintiff is claiming an aggregate sum of USD 778,240 under its second cause of action. This includes a sum of USD 270,000 as damages to its loss of reputation as a result of the said abandonment, a sum of USD 100,000 as damages for the cessation of all orders to Eagle Toys and a further sum of USD 84,240 as payment due to the workmen of Eagle Toys as arrears of salary and compensation.
- (15) I must perhaps state that Eagle Toys instituted Case No. HC (Civil) 81/2003(1) in the High Court against CHL but once it transpired that proceedings have been instituted to liquidate CHL, withdrew the said case and lodged a claim in the winding up action. However, the funds realised by the liquidation of CHL was not sufficient to meet any liabilities of unsecured creditors, including the Plaintiff and Eagle Toys.

- (16) The third cause of action was to obtain injunctive relief preventing the Defendant from transferring shares held by it in another company incorporated by the Defendant in Sri Lanka, namely Jung Yoon Textiles and the sale of assets belonging to the said company.

The basis of liability

- (17) Although it is clear from the aforementioned factual narration that P7 is with CHL II, P10 is with CHL, and that neither P7 nor P10 provide for the direct involvement of the Defendant, the Plaintiff had pleaded in its plaint that all matters and affairs, agreements and contracts relating to the said Sri Lankan companies including the manufacture and export of soft toys were done under the guidance, control and instructions of the Defendant.

- (18) The Plaintiff had accordingly pleaded that:

- (a) CHL and CHL II *“were the agents of the Defendant, and had entered into the agreements and contracts as agents of the Defendant and/or for and on behalf of the Defendant”*;
- (b) P7 was entered into by CHL II on the instructions and with the consent, knowledge and approval of the Defendant, and/or for and on behalf of the Defendant and/or as agents of the Defendant;
- (c) Similarly, P10 was entered into by CHL on the instructions and with the consent, knowledge and approval of the Defendant, and/or for and on behalf of the Defendant and/or as agents of the Defendant;
- (d) The soft toys manufactured by the Plaintiff in terms of P7 were exported to other countries either under the name of the Defendant or in the name of CHL or CHL II;
- (e) By the incorporation of Eagle Toys, the Plaintiff provided a turnkey project to CHL to manufacture toys to be exported to the overseas buyers of the Defendant.

(19) Thus, the position of the Plaintiff, as strenuously argued by the learned Counsel for the Plaintiff during the course of the hearing before this Court was that, (a) the Defendant, **by virtue of being the majority shareholder of CHL and CHL II**, was the principal and that CHL and CHL II were its agents, and (b) all acts on behalf of CHL and CHL II were performed by the Defendant, and hence, the Defendant was liable towards the Plaintiff. In other words, the learned Counsel for the Plaintiff invited this Court to disregard the separate legal personality of CHL and CHL II, pierce and/or go behind their corporate veil and hold the Defendant responsible for the obligations that CHL and CHL II had undertaken under and in terms of P10 and P7, respectively.

Trial before the High Court

(20) With the issues raised by the Plaintiff being based on its pleadings, the core issue to be determined was whether the Defendant is liable for the liabilities incurred by CHL II and CHL in terms of P7 and P10. Among the issues raised by the Defendant was that the plaint does not disclose a cause of action and that the claims of the Plaintiff were prescribed. The latter issue proceeded on the basis that action was instituted in August 2006 for a breach that is said to have occurred in November 2002, and that in the absence of a written agreement between the Plaintiff and the Defendant, what is applicable to determine whether the claim of the Plaintiff is prescribed is Section 7 of the Prescription Ordinance, in terms of which the prescriptive period is 3 years.

(21) The High Court has not discussed the core contention of the Plaintiff that the Defendant was the principal of CHL and CHL II and that P7 and P10 were entered on behalf of the Defendant nor has the High Court answered the issues raised by the Plaintiff. Instead, the High Court accepted the argument of the Defendant that the claim was prescribed since action had not been filed within 3 years and on that ground dismissed the plaint.

(22) I am of the view that prior to considering the issue of prescription, the High Court was required to consider whether the Plaintiff had established the basis on which it was holding the Defendant liable or in other words, that a cause of action had arisen

against the Defendant, and that the High Court erred when it answered the issue of prescription without having made a determination thereon.

- (23) I say so for the reason that the basis for the Plaintiff's case was not that it had an agreement with the Defendant but that CHL II and CHL were *inter alia* acting as agents for the Defendant when they signed the written agreements P7 and P10 and that the affairs of CHL and CHL II were managed by the Defendant. If the Plaintiff was successful in proving its position and that this case came within the principle laid down in **Salomon v Salomon** [1897 AC 22], then, with liability being determined in terms of the two written agreements, the period of prescription would be six years, as set out in Section 6 of the Prescription Ordinance.
- (24) However, if the Plaintiff failed to do so, and in the absence of a written agreement between the Plaintiff and the Defendant, and provided Court was satisfied that a cause of action had arisen against the Defendant independent of P7 and P10, the period of prescription would be three years. It is only in such a scenario that the High Court would be correct in holding that the claim against the Defendant was prescribed.
- (25) I am therefore in agreement with the learned Counsel for the Plaintiff that the High Court erred when it failed to comply with the provisions of Section 187 of the Civil Procedure Code and answer the issues raised by the Plaintiff – vide **Sopinona v Cornelis and others** [SC Appeal No. 49/2003; SC minutes of 3rd February 2010] and **Ariyadasa v Wariyapperuma** [SC Appeal No. 231/2007; SC minutes of 29th July 2025] where Samayawardhena, J emphasised that, *“In order to constitute a valid judgment, it is not sufficient merely to repeat the cases advanced by the contending parties and state the final decision. The court must clearly identify the actual points for determination, record its findings on each such point, and, most importantly, set out the reasons that underpin those findings. A judgment that fails to disclose the reasons for the decision is no judgment in the eyes of the law.”*
- (26) This brings me to the question of whether this case should be referred to the High Court for it to consider the evidence already led, both oral and documentary and answer the issues raised by the Plaintiff and the other issues raised by the Defendant. While that would be the preferred course of action, I am of the view that

I need not automatically resort to such a course of action if I am satisfied, on the evidence, that no substantial prejudice has been caused to the Plaintiff by the failure of the High Court to address all issues.

- (27) I am fortified in my view by the principle laid down in the proviso to Article 138(1), although its application is limited to the Court of Appeal. Referring to the above provision, Samayawardhena, J stated in **Ariyadasa v Wariyapperuma** [supra] that *“This constitutional safeguard ensures that appellate intervention is not grounded on mere technicalities, but only on errors that have materially affected the outcome of the case. Accordingly, unless the error, defect, or irregularity complained of either (a) has prejudiced the substantial rights of the parties, or (b) has occasioned a failure of justice, no judgment or order shall be varied or set aside by the appellate court.”*
- (28) I am also mindful that action was instituted in 2006 and it is important that there be a finality to litigation without putting the Plaintiff through another round of time consuming and expensive litigation.

Separate corporate personality

- (29) The starting point in any discussion whether a non-statutory creditor can lift the corporate veil of a company notwithstanding its separate legal personality and pursue a shareholder of such company to recover the debts due from such company is **Salomon v Salomon** [supra].
- (30) The facts of Salomon are well known and does not require restatement. However, I shall very briefly refer to its facts in order to place in context its findings and the application thereof to the facts of this case. Salomon, who operated a successful leather business as a sole trader converted his business to a private limited company, with 20,000 shares of 1 pound each subscribed by him and his family members. The company faced financial difficulties partly due to a downturn in the economy and found it difficult to pay its creditors. The company went into liquidation and it was sought to make Salomon personally liable for the debts of the company.

- (31) Having considered the aforementioned factual circumstances, Halsbury, J laid down the following proposition:

“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 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.”

- (32) In **Prest v Petrodel Resources Limited and others** [[2013] UKSC 34], Lord Sumption stated that in Salomon, “a unanimous House of Lords reached a clear and principled decision, which has stood unimpeached for over a century. The effect of the decision is encapsulated at pages 30-31, where Lord Halsbury LC said that a “legally incorporated” company “must be treated like any other independent person with its rights and liabilities appropriate to itself ..., whatever may have been the ideas or schemes of those who brought it into existence”. Whether that is characterised as a common law rule or a consequence of the companies legislation (or an amalgam of both), it is a very well established principle of long standing and high authority. Writing extra-judicially, Lord Templeman referred to the principle in Salomon as the “unyielding rock” on which company law is constructed, and on which “complicated arguments” might ultimately become “shipwrecked” – *Forty Years On* (1990) 11 *Co Law* 10.”

- (33) Lord Sumption thereafter proceeded to state as follows:

“The separate personality and property of a company is sometimes described as a fiction, and in a sense it is. But the fiction is the whole foundation of English company and insolvency law. As Robert Goff LJ once observed, in this domain “we are concerned not with economics but with law. The distinction between the two is, in law, fundamental”: Bank of Tokyo Ltd v Karoon (Note) [1987] AC 45, 64. He could justly have added that it is not just legally but economically fundamental, since limited companies have been the principal unit of commercial life for more than a century. Their separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them.”

- (34) The position in Sri Lanka is much the same. In **Company Law in Sri Lanka** by Arittha R. Wikramanayake [1st Edition; 2007], the author states as follows:

“A company is a body corporate and juristic person. It has a distinct legal personality separate from its shareholders subject to the restrictions it may have imposed on itself under its articles. A company has the capacity to carry out or undertake any business or activity and to undertake or engage in, or enter into, any transaction within or outside Sri Lanka. It also has all the rights, powers and privileges that maybe necessary for that purpose, subject to written law.”

- (35) In **Trade Exchange (Ceylon) Limited v Asian Hotels Corporation** [(1981) 1 Sri LR 67], the issue arose whether the respondent, a company where the majority of the issued share capital was drawn from public funds, a majority of the directors were nominated by the Minister of Trade and was designated as a “department or statutory institution” under the purview of the Minister of Trade was amenable to the writ jurisdiction of the Court of Appeal. While this Court affirmed the finding of the Court of Appeal that it was not, and while the same conclusion may not be reached today in view of the development of the jurisprudence in this area of the law, the following view expressed by Sharvananda, J [as he then was; at page 74] captures the essence of separate legal personality and continues to be valid:

“The fundamental attribute of an incorporated company is that the company is a legal entity distinct from its shareholders. The constitution, powers and functions of a company incorporated under the Companies Ordinance are provided for and regulated by its Memorandum and Articles of Association. An incorporated company has a separate existence and the law recognizes it as a juristic person, separate and distinct from its members. This new personality emerges from the moment of its incorporation, and from that date the persons subscribing to its Memorandum of Association and others joining it as members are regarded as a body incorporate or a corporation aggregate when the new person begins to function as an entity [Saloman v Saloman [1897 AC 22]. Its rights and obligations are different from those of its shareholders. Action taken against it does not directly affect its shareholders. The company in holding its property and carrying on its business is not an agent or trustee of its shareholders. It is the beneficial

owner of its own property. A shareholder has no legal or equitable interest in the company's property such as can be insured. Macaura v. Northern Assurance Co. [1925 AC 619] – as the property of the company is not in law the property of its shareholders. The mere fact that 95% of its share-capital was contributed by the Government or the fact that 95% of shares were held by a Government corporation like the Co-operative Wholesale Establishment does not make any difference. The company and its shareholders being as aforesaid, distinct entities, that the fact that the Government or a Government corporation holds all its shares or 95% of its shares does not make the respondent company an agent of the Government.”

- (36) This position was affirmed in **Pan Arch Architecture (Pvt) Limited v Neat Lanka (Pvt) Limited and another** [SC (CHC) Appeal No. 37/2011; SC minutes of 13th October 2023] where this Court stated that:

“I must however state the obvious. A limited liability company is a separate legal entity, has an existence of its own and is organised to do business in its own right. Each such entity has legal rights and liabilities distinct from its shareholders and the corporate veil between them would not be disturbed lightly.”

- (37) While the above would apply in respect of a shareholder of a company whether such shareholder is an individual or a company, the impact of Salomon on the parent of a group of companies arising from liabilities of its subsidiaries was considered in **The Albazero** [(1975) 3 All ER 21], where Roskill, LJ stated that it is “*long established and now unchallengeable by judicial decision, ... that each company in a group of companies ... is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law.*”

- (38) The above position has been reiterated in **Farrar’s Company Law** [4th Edition; 1998] where the authors have pointed out that:

- (a) *“One area where the courts have been particularly reluctant to recognize the concept of group entity is in relation to corporate debts. It is not usually possible in the absence of an agency or trust relationship or wrongful trading to hold one group company liable for the debts of another.”*
- (b) *“**The Salomon case held that a company was not automatically the agent of its shareholders.** It did not exclude the possibility of there being an agent relationship in fact. Occasionally the courts have seemed willing to construe an express or implied agency of the company for its members. It has, however been held that a 98% controlling interest in a company by itself does not create or manifest an agency relationship.”* [emphasis added]
- (39) Thus, the basic principle on which company law is premised is that each company shall have its own legal personality, and it would not be an exaggeration to say that this is recognised as a steady rule of corporate jurisprudence. The legal fiction of a corporate veil declares that a company has a legal personality separate and independent from the identity of its shareholders. Thus, any rights, obligations or liabilities of a company are separate from those of its shareholders, with the latter being responsible only to the extent of their capital contributions. This corporate fiction, known as limited liability, was devised to enable groups of individuals to pursue an economic purpose as a single unit, without exposure to risks or liabilities in one’s personal capacity. A company can therefore own property, enter into contracts, raise debt, make investments and assume other rights and obligations, independent of its members.
- (40) There are however exceptions to the overarching rule of separate legal personality where the courts may look through the corporate veil to reach out to the members or in other words, lift or pierce the corporate veil. As pointed out in **Company Law in Sri Lanka** [supra]:

“Although the rule that a corporate entity has a separate existence is usually sacrosanct, it is subject to certain exceptions. In some compelling situations, courts might “pierce” or “lift” the veil of incorporation where the corporate form is being abused or used as a sham. However, it is difficult to discern a principle of universal application as to when courts will intervene.

Courts have ignored the corporate form when it has been used as a cover for deliberate wrongdoing. Courts have also applied the “agency” and the “alter ego” doctrine on occasions where the circumstances demanded that the corporate entity should be treated as an agent of a holding company or other controlling power. The veil of incorporation has also been lifted by courts to prevent fraud. In certain situations, when companies have been part of a group, courts have looked at the business realities of the situation and treated some or all of the entities in the group as one. Courts might also lift the veil of incorporation in other circumstances, including: to determine a company’s place of residence for the application of specific statutes such as tax laws; to prevent deliberate evasion of contractual obligations; to promote the interests of national security; or to ensure conformity with public policy.

*However, **lifting the veil of incorporation is the rare exception to the rule.** Since the corporate form is a vehicle meant to facilitate commercial activity and investment, undue interference with this principle would result in unpredictability and would stifle the ability to plan business operations, negating the very purpose of the corporate form. It is therefore safe to say that it is settled law that courts will not lift the veil of incorporation without very good reason.”* [emphasis added]

(41) In **Pan Arch Architecture (Pvt) Limited v Neat Lanka (Pvt) Limited and another** [supra], this Court stated that:

*“Of course, there are circumstances where the corporate form will be disregarded and the corporate veil will be pierced to hold individual officers or shareholders personally liable for the acts of the corporate. In ‘**Gower’s Principles of Modern Company Law**’ [by Paul L. Davies and Sarah Worthington, 10th ed., 2016, Sweet & Maxwell; at page 198], the authors, stated ... as follows [at pages 205 and 206]:*

*“The doctrine of lifting the veil plays a small role in British company law, once one moves outside the area of particular contracts or statutes. Even where the case for applying the doctrine may seem strong, as in the under capitalised one-person company, which may or may not be part of a larger corporate group, the courts are unlikely to do so. As Staughton LJ remarked in *Atlas Maritime Co SA v Avalon Maritime Ltd, The Coral Rose* [1991] 4 All ER 769 at 779:*

*“The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent’s funds and on the parent’s directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere. **To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine.**”* [emphasis added]

The above passage from Gower and Davies, albeit from the 8th edition, has been quoted by Saleem Marsoof, PC, J in DFCC Bank v Weliwita Don Kushmitha Mudith Perera [SC Appeal No. 150/2010 – SC minutes of 25th March 2014]. Merely because one company is a parent and another is its subsidiary does not mean that their rights and liabilities – and their fates – are inextricably intertwined in law. And, to introduce a wide and easily accessible route, via which the distinctness in corporate personalities between the parent and the subsidiary can be flouted, would be to shake the very foundations of company law. This does not mean, however, that by virtue of being separate corporate entities, an impassable gulf exists between the parent and the subsidiary. In exceptional circumstances, our Courts are indeed empowered to lift and/or pierce the veil of incorporation, and have done so in the past, though of course cautiously. It bears repeating therefore that it would be a rare occasion indeed for the veil to be lifted and/or pierced.”

- (42) As Lord Keith observed in Woolfson v Strathclyde Regional Council [(1978) SC(HL) 90], *“it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts.”* One such special circumstance where courts are prepared to pierce the corporate veil is in order to combat fraud, since Court will not allow the Salomon principle to be used as an engine of fraud.
- (43) This position was reiterated in Adams v Cape Industries plc [(1990) Ch 433; at pages 539 and 540] where the English Court of Appeal stated that the corporate veil could be disregarded only in cases where it was being used for a deliberately dishonest purpose. The Court of Appeal went on to state as follows:

“the court is not free to disregard the principle of Salomon v A Salomon & Co Ltd [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”.

- (44) Having referred to the above passage, Lord Sumption proceeded to consider [in Prest (supra)] several cases that were decided since **Adams**. I shall refer to three of such cases in order to illustrate the development of the law in this area.
- (45) The first is **Trustor AB v Smallbone (No 2)** [2001] 1 WLR 1177] where it was argued that the authorities justified piercing the corporate veil in the following three, possibly overlapping, cases:
- (i) where the company was a “facade or sham”;
 - (ii) where the company was involved in some form of impropriety; and
 - (iii) where it was necessary to do so in the interests of justice.
- (46) The English High Court concluded that the authorities supported (i), and also in (ii) provided that the impropriety was a relevant one, i.e. *“linked to the use of the company structure to avoid or conceal liability for that impropriety”* but rejected (iii). Sumption, J points out that, *“In summary, the court was “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).”*
- (47) The second case referred to in Prest is **Ben Hashem v Al Shayif** [(2009) 1 FLR 115], where Munby, J carried out a review of the authorities in the area, and in the words of Sumption, J *“formulated six principles which he considered could be derived from them: (i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some*

impropriety; (iv) the impropriety in question must, ... be “linked to the use of the company structure to avoid or conceal liability”; (v) to justify piercing the corporate veil, there must be “both control of the company by the wrongdoer(s) and impropriety, that is (mis)use of the company by them as a device or facade to conceal their wrongdoing”; and (vi) the company may be a “facade” even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions.”

(48) The third case is **VTB Capital plc v Nutritek International Corporation** [(2012) 2 Lloyd’s Rep 313] where the above statement was adopted by the Court of Appeal subject to the qualification that it was not enough to show that there had been wrongdoing but that *“The relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts.”*

(49) Having considered *inter alia* the above authorities, Lord Sumption stated as follows:

“In my view, the principle that the court may be justified in piercing the corporate veil if a company’s separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. ... But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.” [paragraph 27]

“The difficulty is to identify what is a relevant wrongdoing. References to a “facade” or “sham” beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate

veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the “facade”, but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company’s involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.”[paragraph 28]

“These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller’s because it is the company’s.” [paragraph 34]

“I conclude 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 frustrates 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.” [paragraph 35]

- (50) Thus, the circumstances in which the principal laid down in Salomon and developed by Courts over the last 130 years can be applied is extremely narrow, and is almost limited to those cases where a company has been incorporated only to evade liabilities of its shareholders. I must perhaps add that statutory provisions in terms of which directors become liable for the acts of the company are not affected by Salomon.

Does the evidence of the Plaintiff bring its case within Salomon

- (51) In considering whether the failure on the part of the High Court to answer the issues raised by the Plaintiff has resulted in a miscarriage of justice, it is important to bear in mind that the burden of proving the following matters were with the Plaintiff:
- (a) CHL and CHL II entered into P10 and P7 respectively, as agents of the Defendant;
 - (b) It was the Defendant who performed the obligations of CHL and CHL II under P10 and P7, respectively; and
 - (c) CHL and CHL II were incorporated in order to evade any liability that the Defendant would incur towards the Plaintiff.
- (52) In order to discharge this burden, the Plaintiff led the evidence of four witnesses, including its own Managing Director. Two of the witnesses were from the Department of the Registrar of Companies who confirmed that majority of the shares in CHL and CHL II were held by the Defendant and that some of the directors were common to all companies. The witness from Seylan Bank stated that the Defendant had opened a stand-by letter of credit for USD 2m in favour of CHL.
- (53) The principal witness for the Plaintiff was its Managing Director. Although he reiterated the matters set out in the plaint, he did not produce any documentary evidence, contemporaneous or otherwise, to support the position of the Plaintiff that CHL and CHL II acted as the agents of the Defendant or that the real entity behind P7 and P10 was the Defendant. More importantly, the Plaintiff did not lead any evidence to show that CHL and CHL II were incorporated in order to evade the liabilities of the Defendant. Simply put, the Plaintiff failed to make out a case that justified the lifting of the corporate veil of CHL and CHL II.
- (54) With P7 and P10 having existed for several years, it was open for the Plaintiff to have produced material such as who placed the orders with it, who made payment to it for the work performed, in whose name were the invoices issued, to whom were the finished goods delivered to and with whom did the Plaintiff correspond with. Thus, on the face of it, the Plaintiff has failed to establish its position that CHL and/or CHL II were acting as the agents of the Defendant and/or that P7 and P10 were

entered into by CHL and CHL II on behalf of the Defendant, and/or that all obligations under P7 and P10 were carried out by the Defendant.

- (55) In the above circumstances, I am of the view that the Plaintiff has failed to satisfy the evidentiary burden cast on it to bring its case within the narrow confines of the principle laid down in Salomon and has failed to establish that a cause of action has accrued against the Defendant. Thus, no prejudice has been caused to the Plaintiff owing to the failure of the High Court to answer the issues raised by it. That being the position, not only was the claim against the Defendant misconceived in law in that no cause of action had been established but such claim did not in any event arise out of a written agreement independent of P7 or P10. With the breach complained of having arisen in November 2002 and even if a cause of action had been made out against the Defendant, any action against the Defendant should have been filed within three years thereof, which the Plaintiff clearly failed to do. Thus, the conclusion reached by the High Court that the claim of the Plaintiff against the Defendant is prescribed cannot be faulted.

Conclusion

- (56) The judgment of the High Court is accordingly affirmed and this appeal is dismissed, without costs.

JUDGE OF THE SUPREME COURT

Sampath B. Abayakoon, J

I agree.

JUDGE OF THE SUPREME COURT

K.M.G.H. Kulatunga, J

I agree.

JUDGE OF THE SUPREME COURT