The Duty of Good Faith and the Corporate Veil

by Johan Nissen

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The purpose of this paper[1] is to look at the insurance law duty of disclosure and the corporate veil in the context of project finance. The potential conflict between the two is well illustrated if you imagine a scenario where a group of sponsors sets up a limited liability Special Purpose Vehicle (SPV) to carry out a project. The question then arises whether the duty of disclosure will be able to reach behind the corporate veil and catch the people behind the SPV, i.e. the sponsors. I conclude that the duty of disclosure will be able to transcend the corporate veil.

1. Project Finance

I believe project finance is a very useful means of illustrating the subject matter of this paper. I will not attempt to offer any exhaustive definition of project finance, suffices to say that it is a method of financing projects where no single investor is happy to, or able to, shoulder the entire risk and/or capital requirement on its own books.

For the purpose of this paper, project finance is essentially a nexus of contracts pertaining to one specific project and these contracts represent the risks and cash-flows of the project. This allows the sponsor (or group of sponsors) to isolate itself from the project risk, which is made transaction specific. The contracts are customarily entered into and managed by a special purpose vehicle (SPV). The essence of this type of structure is that normally creditors can only look to the cash flow generated by the project.[2]

Consider a situation where an SPV has been set up by a sponsor (or a group of sponsors) to carry out a project and this vehicle in turn takes out political risk insurance against expropriation. Initial negotiations between the sponsor and the host government reveal that the former would expropriate if a certain level of output is not achieved by a certain date. This information is obviously important to the insurer but not necessarily known by any employee of the SPV.

To the extend of my knowledge there has not been any research into this area to date nor are there any court cases dealing with the issue of non-disclosure in project finance. This could be taken as an indication that the issue is not relevant. I do not think that is the case.

Project finance transactions are likely to be complex ones and such transactions rarely

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come before the courts. Moreover, Elias[3] argues that reputable insurers very rarely seek to avoid policies on ground of non-disclosure but they value their right to do so. Hence, any attempt to avoid a policy in the public forum of a court could have a detrimental effect on future business. According to an industry professional, however, insurers are currently taking a much harder line on non-disclosure due to the tougher market conditions post September 11.

2. The Duty of Disclosure and the Corporate Assured

At this stage it would be useful to have a closer look at the duty of disclosure, which is laid down by the Marine Insurance Act 1906 (MIA). This duty is part of the overall duty of good faith (*uberrima fides)* laid down by MIA s. 17. Breach of this duty, which works both ways, allows the innocent party to avoid the insurance contract. Needless to say, the insurer is free to waive its right to disclosure. However, re-insurance issues may prevent the insurer from doing so. Moreover, waiver of the duty of disclosure is likely to prompt a higher premium.

Having had first hand experience of how underwriting is conducted at the Lloyd's market, I accept that there is a clear commercial need for the duty of disclosure. Section 18(1) of MIA outlines three criteria for the duty of disclosure: It only relates to material information (1) and it only applies to the actual (2) and the deemed (3) knowledge of the assured.

Companies are legal fiction and as such incapable of having any knowledge; they can only act and accumulate knowledge through their owners, employees and other stakeholders. Hence, in order to attribute knowledge to a company one must identify the actual people whose knowledge can be attributed to the company.

In *Lennard's Carrying v Asiatic Petroleum*,[4] Viscount Haldane introduced the concept of the Directing Mind and Will (Directing Mind). The case was concerned with whether or not the knowledge of a director of a company tasked with managing a ship could be imputed to the owners of the ship. Viscount Haldane held that the knowledge of the director could be imputed to the owners (partly) because the director took active part in managing the ship on behalf of the owners and hence could be considered the Directing Mind. In *National Oilwell v Davy Offshore*[5] Colman J discussed the concept of the Directing Mind with reference to the test proposed by Viscount Haldane:

> What is involved in each case is the identification of the director or the manager, or group of such persons who, by delegation of authority from the board of directors, had the responsibility of taking decisions without reference back to the board or others in authority… (at p. 620)

It follows that the knowledge of a person can be imputed to the corporate assured where the person in question can be described as the Directing Mind for the relevant purpose. This in turn depends on whether or not said person has the authority to make the relevant decision without referring to a superior. In *PCW Syndicates v PCW Reinsurers*,[6] Staughton LJ elaborated further on this concept, arguing that he saw no reason to restrict the knowledge of a company to what is known by the directors. He went on to include employees at an "appropriate level." As an example, his Lordship pointed to employees tasked with taking out insurance.

In the *Star Sea*,[7] Tuckey J (at first instance) argued that the Directing Mind could be defined as those who had full discretion or autonomy in relation to the acts in question. This test is in line with the one used by Colman J.

However, this was rejected in the Court of Appeal where Leggatt LJ questioned the test of "full discretion or autonomy" proposed by

Tuckey J. Instead Legatt proposed a test of who was involved in the relevant decision making processes. Regrettably, this issue was not discussed further in the House of Lords.

It should be noted that in *Australia & New Zealand Bank v Colonial & Eagle Wharves,*[8] McNair J said that where an employee's duties were clerical and there was an absence of discretion or executive authority, said employee could not be regarded as the Directing Mind.

Based on the above, it is safe to assume that where an employee of the sponsor is actively involved in the management of the SPV, he/she is likely to be caught by MIA s. 18. Moreover, when looking to define the Directing Mind, the courts will not limit themselves to any specific grouping within the corporate hierarchy, rather they will include agents, owners and anyone with real power. The question will always turn on the facts of the case and anyone who fits the description could be named the Directing Mind.[9]

3. Actual and Deemed Knowledge

The duty of disclosure only applies to material facts that are within the actual or deemed knowledge of the persons that can be equated with the corporate assured for a particular purpose.

As far as actual knowledge is concerned, this is simply what the relevant individual actually knows. Deemed knowledge is the knowledge that the relevant individual person ought to have in the ordinary course of business. What is considered "the ordinary course of business" depends on the actual insured.

There is no obligation to be prudent and the insurer runs the risk of the assured not running a tight ship. This was affirmed in *Simner v New India Assurance Co*[10] where Diamond J argued that otherwise insurance would only cover those who conducted their business prudently, which in turn would defeat one of the objectives of insurance: "to obtain cover against the consequences of negligence in the management of the assured's affairs." However, there is a difference between bad management and deliberate ignorance and the underwriter has a right to assume that the assured knows his own business.[11]

What a person is deemed to know in the ordinary course of business will normally turn on the facts of the case and the case of *Mahli v Abbey*[12] demonstrates the complexity of this issue.

Mr Mahli took out life cover making disclosing that he had malaria and was an alcoholic. Due to non payment of premiums, this policy lapsed but was later re-instated without any repeat disclosure of the fact that the assured suffered from malaria and had an alcohol problem. The crux of the case was whether or not a health certificate received when the original policy was taken out could be imputed to the insurers when the policy was reinstated. The clerk who received the health certificate was obviously an agent of the insurers. However, was he an agent for the relevant purpose? Court of Appeal, by a majority of two to one, took the view that the reinstated policy was a separate policy and hence the insurers could rely on nondisclosure and avoid the policy.

The case highlights the difficulties in determining what knowledge can be imputed to the insurers and the two judges who ruled that the original health certificate could not be imputed did reach their conclusions by different routes.

Take the example of a newsletter; can the contents of staff newsletters be imputed to an agent/officer of the corporate assured. Following *Abbey*, this would probably be answered in the negative because the newsletter will not be distributed with reference to any specific transaction (purpose), rather it will be distributed for a more general purpose. However, this must always turn on the facts.[13]

4. The Fraud Exception

According to the *Re Hampshire Land*[14] rule, the assured is not expected to know of the fraud of his employees. The point being that an employee is not supposed to disclose his own fraud in the ordinary course of business as there is not supposed to be any fraud in the ordinary course of business. Contrary to the discussion above, the exception applies even where the fraudulent employee takes out the insurance. In *PWC Syndicates*, Staughton LJ put forward the following argument:

> If the dishonesty of an agent is not something which in the ordinary course of business ought to be known to the principal (s. 18), why should it be held against the principal merely because the agent is an agent to insure (s. 19)? It is equally absurd in either case to suppose that the agent will in fact disclose his dishonesty, whether to his principal or to the proposed reinsurer. (p.255)

In my opinion Staughton LJ has missed the point, namely that the insurer must be allowed to deal on the assumption that the assured is not withholding any information. Staughton LJ's argument is based on the assumption that if the exception applies to s. 18, it should also apply to s. 19. Perhaps the exception should not apply to s. 18. This should be seen in the light of the statement made by Cockburn CJ in *Proudfoot v Montefiore*:[15]

> The insurer is entitled to assume that the [assured] will communicate to him every material fact of which the assured has, or, in the ordinary course of business, ought to have knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject matter of the insurance. (p. 522)

According to this, there is a duty upon the assured to employ competent and honest agents. Is it sufficient that an employee is honest when he is employed or is there a duty to ensure that the employee remains honest? I think the latter is the correct approach. The key is the words "the insurer is entitled to assume." In my opinion, this lays down the rule that the assured (including the persons actually taking out the insurance) must act in good faith. This is consistent with Lord Mansfield's proposition that "the special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only."

This basically boil down to an issue of who should bear the loss[16] of the dishonest agent and I support the proposition enunciated by counsel in *Proudfoot*:

The general rule in such cases undoubtedly is, that the loss must be borne by him who employed and trusted the person from whose act or default it proceeded. (p. 516)

5. Shadow Directors

Company law has its own counterpart to the Directing Mind, namely the Shadow Director, which is defined as a person wielding power over a company without being a formally appointed director.[17] The definition of a Shadow Director can be found in the Companies Act 1985 s. 741:[18]

> (1) In relation to a company, "shadow director" means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity.

The doctrine of Shadow Directors was given its widest interpretation in *Secretary of State for Trade and Industry v Deverell*.[19] In the case, a tour operator went into liquidation and the Department for Trade and Industry sought disqualifying orders against certain people who, although not properly described so, were to all intents and purposes directors of the failed company. Speaking of the purpose of the doctrine, Morritt LJ said:

> The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities… It will, no doubt, be sufficient to show that in the face of "directions or instructions" from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. (para 35)

According to this, a Shadow Director could exist even though the properly appointed directors had a certain measure of autonomy and for example exercised their own discretion when no instructions were forthcoming from the Shadow Director. Moreover, where a board is accustomed to acting on the directions of a Shadow Director it is not necessary to demonstrate that their actions were mechanical rather than considered.

Morritt LJ clearly expanded the ambit of Shadow Directors by paving the way for making owners (in their capacity as shareholders) liable as Shadow Directors. I think the case goes a long way in accepting that a company is not an autonomous entity merely because the owners do not interfere with day-to-day management. This is because the owners have the options of taking over day-to-day management.

Although, I have not come across any insurance case that makes reference to Shadow Directors, it is clear to me that the two approaches share the same objective: To identify those with actual decision making power. It follows from this that I can see no reasons why cases such as *Deverell* should not be used, by way of analogy, to further define the scope of the corporate assured.

6. The Corporate Veil

As discussed above, individuals who take an active part in the management of the SPV, even within narrow limits, are potentially caught by the duty of disclosure. That in turn raises the question of whether or not the participants are caught virtue of being owners and hence ultimately in charge of the SPV. The primary legal principle militating against shareholders being caught by the duty of disclosure is the corporate veil.

Operating through the guise of an SPV provides several benefits to the participants in a project as it allows them to distance themselves from the project. Where the SPV has limited liability, outsiders can only look to the SPV and not to the actual owners who are not liable for the actions of their company. This basically allows the sponsor to use, with impunity, the SPV in any way he sees fit.

The legal principles of incorporation were well illustrated in the case of *Salomon v Salomon*[20] where Lord Halsbury said:

> …[The Companies] Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence. (p. 31)

One of the key features of incorporation is that it is a one-way process. It allows the owners to distance themselves from the company in terms of liability without in any meaningful way restricting their ability to manage the company. Directors are appointed to manage the company according to the memorandum of association, which is drafted by the owners.[21] Directors owe their duties to the company and not to the owners, employees or any other stakeholder.[22] It is worth noting that the duty is to act in the way the director thinks best, not the way the courts think is best, i.e. it is a subjective standard.

As a main rule, English courts will respect the corporate veil but where there is an express agency agreement[23] or the presence of fraud or illegality the courts will pierce the veil.[24] It is important to distinguish between illegality and impropriety. In *Trustor AB v Smallborne,*[25] the Vice-Chancellor pointed out that companies are often involved in improprieties and that it would make undue inroads into the principle of *Salomon v Salomon* if an impropriety not directly linked to the use of the company structure would be enough to pierce the veil (para 22).

In *Trustor*, counsel argued that the corporate veil could be pierced where justice so required. This was clearly dismissed with reference to the case of *Adams v Cape Industries*[26] where Slade LJ made the following statement:[27]

> Save in cases which turn on the wording of particular statues or contracts, the court is not free to disregard the principle of Salomon v. A. Salomon & Co. Ltd. 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.[28]

This clearly shows that the English courts will view a company as autonomous from its owners, a view that will often be contrary to commercial reality. Considering the facts outlined, it is a surprising decision and one that demonstrates that English courts will not disregard the sanctity of the corporate veil save in exceptional circumstances. In some of the previous cases[29] veil piercing was possible where equity so required, however, this position seems to have been overruled by *Cape Industries*, effectively granting owners a *carte blanche* to do exactly as they please with their companies. It is a mystery to me why the English courts are blinded by *Salomon v Salomon* to the extent that they ignore commercial realities and justice.

It is clear that incorporation is a very favourable way of carrying out commercial ventures and this is an important incentive to encourage investors but there is significant scope for abusing a corporate entity. In the words of Jonathan Macey:[30]

> Put simply, limited liability allows investors to pursue extremely risky projects and to profit from the pursuit of a "heads I win; tails you lose" strategy of project finance. The members divide the spoils of risky or dangerous projects that turn out well, while the costs associated with projects that turn out badly are largely borne by creditors and "innocent" tort victims.

It is worth noting that the corporate veil may deprive a shareholder of his/her insurable interest. This was discussed in *Macaura v Northern Assurance*.[31] Here a timber merchant sold all his timber to a company owned by himself. When the timber burned the owner was unable to claim on the policy because he had no insurable interest. The House of Lords held that a shareholder had no legal or equitable interest in the property of the company.[32]

The same issue was discussed in *The Tiburon*.[33] The case was concerned with whether or not the Tiburon was in German ownership or belonged to a subsidiary of a German company. The vessel was owned by a Panamanian company, Seavision, which in turn was owned by a single shareholder; Mr Mehlber, who claimed to be German.[34] Steyn J observed that subsidiaries were companies that were effectively owned and controlled by another company and that this could not be stretched to include a company owned by one individual. Steyn J went on to make the following comment:

> Mr Mehlber said that Tiburon was his ship; that is obviously wrong since Seavision were the owners of the ship.

Both the *Macaura* and the *Tiburon* are based on the principle that not even a sole shareholder stands in any direct relationship to the assets owned by the his company. In my view this creates an artificial separation of legal interest and actual powers. As mention above, there can be little doubt that in reality a sole shareholder can deal with his company's assets in pretty much any way he sees fit and hence should accept responsible for the actions of his creation. This is a logical approach to a this issue; alas it is not an approach favoured by the English courts in general.

However, the courts have developed an alternative to piercing the corporate veil; lifting the corporate veil. This is discussed below but before I turn to that there is the issue of composite insurance.[35]

Take the project of a power plant. The SPV enters into a contract for the delivery of oil with a local supplier and takes out insurance cover against non-delivery. The combination of the supply contract and non-delivery insurance creates a securitised asset which is as much an asset as a ship or any other tangible asset. However, subject to *Macaura*, the participant in the SPV will not have any insurable interest in this asset and hence cannot take out cover.[36]

7. Lifting the Corporate Veil

This alternative to piercing the veil was discussed in *Atlas Maritime v Avalon Maritime*.[37] In October 1987, Avalon Maritime was set up by March Rich-subsidiary Nala Transport for the purpose of buying the ship the Coral Rose. The purchase price was funded by March Richs in the form of loans to Avalon, although no formal documents were drawn up. Avalon promised to sell the vessel to Atlas Maritime but instead it was sold to a third party. Atlas sued for damages and a Mareva Injunction was issued, preventing Avalon from transferring the revenue from the sale. Atlas in turn applied for a variation[38] arguing that March Rich was a trade creditor and entitled to payment in the ordinary course of business. Atlas countered; arguing that Avalon had acted as the agent of Marc Rich.

At first instance Hobhouse J ruled that the relationship between Avalon and Marc Rich was probably one of agent and principal and that Avalon was in reality a mere nominee and had nothing more than the barest legal existence independently of Marc Rich. This decision was overturned by the Court of Appeal, where Neill LJ said that although the evidence of the loan was scanty and not supported by any documents, a relationship of debtor and creditor was more readily inferred than one of agent and principal (at p 567).

This in turn prevented the court form piercing the corporate veil between Marc Rich and Avalon. Instead, however, the court decided to lift the corporate veil. Staughton LJ explained the difference:

> To *pierce* the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind* it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose. (p. 571)

Looking behind the veil allowed the court to determine that the proposed repayment to Marc Rich did not qualify as one being made in the ordinary course of business. However, if Avalon had asked for a variation to make payments under a loan agreement with a bank this would probably have been allowed.

Considering the facts of the case it is surprising that the court was unwilling to view the relationship between March Rich and Avalon as one of principal and agent even though the latter was clearly the instrument of the former. However, as the existence of an agency agreement would distinguish the present case from *Salomon v Salomon*, the decision is perhaps not so surprising in that it is consistent with the approach taken in *Cape Industries*.

Staughton LJ pointed out (at p. 570) that the inference of agency agreement requires the consent of both parties either expressly or by implication from their words and conduct. In keeping with *Cape Industries*, this observation ignores the reality that for all practical purposes a wholly owned subsidiary is nothing but a puppet of its owners and hence incapable of consenting to anything in any meaningful way.

My view is supported by Lord Denning in *DHN Food Distributors v Tower Hamlets*:[39]

> We all know that in many respects a group of companies are treated together... Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. (Just above fn 4)

Lord Denning was referring to groups of companies and his argument applies *a fortiori* to companies owned by individuals as a parent company is lead by a board and an individual is not. However Lord Denning's view seems at odds with *Cape Industries* and hence not necessarily good law today although, unlike *Cape*, it does take into account commercial reality.

8. Can Non-disclosure penetrate the Corporate Veil?

There are situations outside of illegality and fraud where there is an obligation to disclose information across corporate structures. This was the view expressed by Potter J (and cited with approval by Staughton LJ) in *New Hampshire insurance v MGN*:[40]

> [there are situations where] an officer of Company A, as well as exercising functions in Company B, would also have had knowledge of the affairs of Company C and/or the actions or intentions of its officers, of such a kind that he would have been under parallel duties of disclosure and/or obligations of good faith in respect of all three. (issue G)

The Judge was talking about the obligation placed upon directors to perform their duties in good faith. This raises the question of whether or not courts dealing with MIA s. 18 will respect the corporate veil in reality.

There can be little doubt that the duty of disclosure extends to owners in so far as they are represented in the management of the SPV. Similarly, the duty of disclosure applies where the SPV is an agent of the sponsor. Moreover, where a sponsor is the Directing Mind of the corporate assured, he would be caught by s. 18 irrespective of corporate structures.

Whether or not non-disclosure is considered sufficiently worthy to prompt the courts to lift the corporate veil is a difficult question to answer. In the opinion of Lord Mansfield[41] non-disclosure is deception of the insurer and a fraud. If Lord Mansfield's proposition is correct (and I cannot see why it should not be) then non-disclosure would pierce the corporate veil as fraud unravels all.

In the absence of the fraud argument discussed above, would the courts allow the duty of disclosure to pierce the corporate veil? Probably not! It follows from *Cape Industries* that incorporation and limited liability are valuable privileges granted to investors by the state and upheld by the courts. As far as limited liability is concerned, the creditors pay for the privileges enjoyed by the sponsor. Similarly, where the SPV is left without a penny those who have other claims against the SPV (e.g. tort victims) are left without any hope of meaningful compensation. This is what happened in *Cape Industries* and shows that in the absence of fraud or agency the courts will not interfere with limited liability.[42]

One could argue that MIA might act to exclude company law. According to section 3 (4) of the Administration of Justice Act 1956, a ship may be arrested to provide security for debts incurred by its sistership. When determining whether two ships are 'sisters', the courts will look to the beneficial ownership of the vessels in question. In the *Aventicum*[43], Slynn J said:

> I have no doubt that on a motion of this kind it is right to investigate the true beneficial ownership. I reject any suggestion that it is impossible to pierce the corporate veil…it is plain that …the act intends that the court shall not be limited to a consideration of who is theregistered owner or who is the person having legal ownership of the shares of the ship; the direction is to look at the beneficial ownership.

The Administration of Justice Act specifically refers to beneficial ownership and hence the courts are allowed to look beyond *Salomon*. This specific reference to beneficial ownership sets the Administration of Justice Act apart from MIA, which only refers to the assured and his agents. It does not deal with the scenario where the assured himself is the agent; i.e. a scenario where the SPV takes out insurance. Hence, I do not see how insurance can be said to exclude company law. The quote above makes specific reference to the corporate veil. Very few insurance cases make direct reference to the corporate veil and mostly the courts do not seem overly concerned with the separation of companies and their owners when dealing with the duty of disclosure. In the *Star Sea* where Leggatt LJ made the following observation:

> While the doctrines of corporate personality call for a ritual nod in the direction of the owners, nobody in practice pays any attention to these one ship companies registered under flags of convenience (p. 375)

The fact that insurance contracts are *uberrima fides* and that there is a clear commercial need for the duty of disclosure suggests to me that the courts would not allow the assured to hide behind corporate structures. The only way to achieve this without parting with the principle of *Salomon v Salomon*, would be to lift the veil rather than piercing it.

As discussed above, I think that the doctrine of Directing Mind has much in common with the concept of Shadow Directors. It therefore follows that if a shareholder can be made a Shadow Director, I see no reasons why a participant in an SPV could not, by parallel, be named the Directing Mind. The participant who lurks in background and, under the guise of ownership, makes his wishes clear and hence influences the decision making process is, in my opinion, the directing mind disregarding whether or not he has a recognised place in the *prima facie* management of the SPV.

This paper represents my personal views and I take full responsibility for any errors or omissions. I would like to thank Robert Wright, Janet Dine (both at Essex University), Robert Merkin and Henrik Nissen for their contributions and assistance.

Notes

1 This paper is an abridged version of my dissertation completed as part of my LLM at the University of Essex.

2 It need not be a limited liability SPV; it could be a partnership or any other construction. See further Graham Vinter: Project Finance (Sweet & Maxwell 1995) p. 6ff.

3 Elias & Munday: Construction and engineering projects: Some key insurance issues for promoters (INTILR 1995, 3(5), 161-165)

4 [1915] A.C. 705.

5 [1993] 2 Lloyd's Rep. 582

6 [1996] 1 Lloyd's Rep. 241 at p. 253

7 *Manifest Shipping v Uni-Polaris Insurace*. QB: [1995] 1 Lloyd's Rep. 651. CA: [1997] 1 Lloyd's Rep. 360. HL: [2001] 2 WLR 170

[8] [1960] 2 Lloyd's Rep. 241

[9] See the Star Sea. This approach has much in common with the concept of Shadow Directors used in Company Law. See further below 6

[10] [1995] L.R.L.R. 240

[11] See Lord Halsbury's dictum in *Vigor*s cited by Diamond J in *Simner*. See also below 5

[12] [1996] LRLR 237

[13] Where the employee has actually read the news-letter it can be imputed as it forms part of actual knowledge.

[14] (C.A.) [1896] 2 Ch. 743

[15] (1867) LR 2QB 511

[16] The draconian remedy of avoidance laid down by the Marine Insurance Act 1906 s. 17 will sometimes make the loss disproportionate but that an altogether different issue.

[17] According to Peter Fidler: Banks as shadow directors (JIBL 1992), the concept of shadow directors has been recognised since under English law since 1929.

[18] The wording matches the definition of a shadow director in s. 251 of the Insolvency Act 1986

[19] [2000] 2 W.L.R. 907 (CA)

[20] (1897) A.C. 22, H.L.(E.).

[21] Bourne: Principles of Company Law 3rd ed. (Cavendish 1998) p. 47ff

[22] Companies Act 1985, s. 309. See also Janet Dine: Company Law 4th ed. (Palgrave 2001) p. 5 and Paul Davies: Introduction to Company Law (Oxford 2002) chapter 1.

[23] *Atlas Maritime v Avalon Maritime* [1991] 1 Lloyd's Rep. 563

[24] See *Belmont Finance Corporation v Williams Furniture* [1980] 1 All ER 393

[25] CH 1998 T 1492

[26] [1990] BCLC 479

[27] at p. 513, citing counsel for the defendants

[28] Contrast with *Re a Company* [1985] BCLC 333 where Cumming Bruce said that the courts would use its powers to pierce the corporate veil if necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration

[29] See counsel in *Trustor AB*

[30] The limited liability company: lessons for corporate law (73 Wash. U. L. Q. 433)

[31] [1925] AC 619, per Bennet: The Law of Marine Insurance (Oxford, 1996)

[32] The Canadian Supreme Court refused to follow *Marcaura* in *Constitution Insurance of Canada v Kosmopoulos (1987)*. Also note *Sharp v Sphere Drake Insurance [1992]2 Lloyd's Rep 501 (QB)*. Mr Sharp was allowed to use a yacht owned by investment company Roar Investments. Sharp took out insurance cover for the yacht in his own name and it was argued that he had no insurable interest. In this case, deputy judge Coleman QC held that *Macaura* did not apply because Roar Investments had given Mr Sharp wide power to use and manage the yacht and hence he had an interest in its fate (at p. 512).

[33] *Seavision Investment SA v Evenett nand Clarkson Puckle Ltd [1990]2 Lloyd's Rep 418 (QB)*.

[34] Mr Mehlber was actually held to be French but for the pourpose of this paper this is not relevant.

[35] For a good discussion see *Arab Bank Ltd v Zurich [1999] 1 Lloyd's Rep. 262*

[36] Participants can cover their equity stake and also have an insurable interest in so far as they have any contractual relationships with the SPV. Moreover, there is the issue of PPI (policy proof of interest).

[37] [1991] 1 Lloyd's Rep. 563

[38] The variation sought was an 'Angel Bell' variation, which allows the restrained party "to pay their trade creditors in the ordinary course of business

[39] 1976] 3 All ER 462

[40] [1997] LRLR 24

[41] *Carter v. Boehm* (1766) 3 Burr

[42] If non-disclosure is fraud, as suggested by Lord Mansfield, the corporate veil does come down and the knowledge of the sponsor becomes that of the SPV.

[43] The Aventicum, [1978] 1 Lloyd's Rep. 184