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ANNOTATIONS AND ARTICLES/ANNOTATIONS ET ARTICLES

CASES REPORTED/DÉCISIONS PUBLIÉES

(CASES REPORTED CONTINUED ON THE BACK COVER)

CARSWELL

antee. Although I make no finding as to that, it sounds reasonable to me as the guarantee was given in respect of premises, part of which were used by Cancilla in his practice.

82 Accordingly, the plaintiff will have judgment against George Cancilla for the balance owing under his personal guarantee, being the principal sum of $7,321 plus prejudgment interest thereon at the statutory rate from June 1, 1994.

Costs

83 The amount of Cancilla's remaining liability on his personal guarantee being so small in comparison to the amounts involved in the main issue in this action I would, without more, have thought that costs would follow the result on the main issue. I am unaware of whether there were any offers to settle. If costs cannot be agreed I may be spoken to, initially by way of a call to my secretary at 327-2107.

Action granted in part.

Circumventing the Corporate Veil To Attack Unscrupulous Directors

Mitchell E. Kowalski*

To suggest that the test for piercing the corporate veil is among the least understood and most confusing areas of law is one of the greatest understatements in the legal profession. Nonetheless, there is a veritable cornucopia of cases — covering a wide spectrum of situations from construction disputes,[1] bankruptcies,[2] income tax avoidance schemes,[3] insurance claims,[4] trespass cases[5] to labour/employment[6] cases — in which corporate veils are pierced. The increasing number of situations in which the veil is pierced has led one commentator to lament that "the courts have lifted the veil often enough to make the whole mat-

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[1] *T.L. Raymond Electric (London) Ltd. v. Idylwild Home Ltd.* (1984), 7 C.L.R. 210 (Ont. H.C.); *Pacific Rim Installations Ltd. v. Tilt-Up Construction Ltd.* (1978), 5 B.C.L.R. 231 (B.C. Co. Ct.).

[2] *Clarkson Co. v. Zhelka*, [1967] 2 O.R. 565 (Ont. H.C.)

[3] *Jodrey Estate v. Nova Scotia (Minister of Finance)*, [1980] 2 S.C.R. 774 (S.C.C.); *Littlewoods Mail Order Store Ltd. v. McGregor*, [1969] 3 All E.R. 855 (Eng. C.A.); Tamaki "Lifting the Corporate Veil in Canadian Income Tax law" (1961- 62) 8 McGill L.J. 159, Mitchell "Taxation and the Corporate Veil" (1966) 14 Ca. Tax J. 534, Drache "Lifting the Corporate Veil: Legislative and Judicial Incursions for Income Tax Purposes" (1977) 29 Tax Conference Report 673, Durnford "The Corporate Veil in Tax Law" (1979) 27 Can. Tax J. 282.

[4] *Big Bend Hotel Ltd. v. Security Mutual Casualty Co.* (1980), 19 B.C.L.R. 102 (B.C. S.C.), *Kosmopoulos v. Consitution Insurance Co.* (1987), 34 D.L.R. (4th) 208 (S.C.C.); *Tony & Jim's Holdings Ltd. v. Silva* (1999), 23 R.P.R. (3d) 1 (Ont. C.A.) and Jacob S. Ziegel, "Shareholder's Insurable Interest — Another Attempt to Scuttle the Macaura v. Northern Assurance Co, Doctrine: Kosmopoulos v. Constitution Insurance co." 62 Can. Bar Rev. 95 (1984).

[5] *Craig v. North Shore Heli Logging Ltd.* (1997), 11 R.P.R. (3d) 106 (B.C. S.C.)

[6] *Nedco Ltd. v. Clark* (1973), 43 D.L.R. (3d) 714 (Sask. C.A.); *Nedco Ltd. v. Nichols* (1973), 38 D.L.R. (3d) 664 (Ont. H.C.); *Truckers Garage Inc. v. Krell* (1993), 3 C.C.E.L. (2d) 157 (Ont. C.A.).

ter unpredictable."[7] Add to this mix statutory liability,[8] criminal liability[9] and special considerations in times of national emergency[10] or where a corporation is used for fraudulent or improper purposes[11] and one has a witch's brew of decisions which follow "no consistent principle"[12] and which continue to fuel articles, lectures, conferences and workshops across the country.[13] In the previous century, Mr. Justice Masten sloshed through the quagmire of decisions in an attempt to create some semblance of order. He suggested that there were five instances around which the sanctity of the corporate veil could be examined.[14] Leaving aside the veracity of his comments, Mr. Justice Masten's *approach* to veil piercing appears to be a sound one. He accepts that it is impossi-

[7]Mervyn Woods "Lifting the Corporate Veil in Canada" [1957] *The Canadian Bar Review* ps. 1176-1194 at page 1193.

[8]See the discussions in Ivan Feltham "Lifting the Corporate Veil" *Law Society of Upper Canada Special Lectures* (1968) pp. 305-332.

[9]See Woods *supra* note 7 at p. 1186.

[10]See Woods *supra* note 7 at p. 1183.

[11]*Lockharts Ltd. v. Excalibur Holdings Ltd.* (1987), 47 R.P.R. 8 (N.S. T.D.); *1224948 Ontario Ltd. v. 448332 Ontario Ltd.* (1998) 22 R.P.R. (3d) (Ont. Gen. Div.).

[12]Madam Justice Wilson in *Kosmopoulos v. Constitution Insurance Co.* (1987), 34 D.L.R. (4th) 208 (S.C.C.) at p. 213.

[13]See for example, the workshop presentations about directors' and officers' liability in the *Canada Business Law Journal*, April 2001, Volume 35, Number 1, and Mr. Justice J. Spence "Lifting the Corporate Veil", *The Advocates Society Journal*, (1998) Volume 17, No. 4 pp. 19-20.

[14]C. A. Masten, "One Man Companies and Their Controlling Shareholders", [1936] *The Canadian Bar Review* pps. 663-671 at page 671:

1. In questions of property and capacity, of acts done and rights acquired or liabilities assumed, the company is always an entity distinct from its corporators. It is not an alias or sham, and the principle of the *Saloman* case stands unimpaired.
2. For the purpose of determining the conditions on which the capacity to act is enjoyed and acts are done by the company, the personalities of the natural persons who are its corporators and the predominant character of its shareholders and corporators are open for consideration.
3. If a company is formed for the express purpose of doing a wrongful act, or if when formed those in control expressly direct a wrongful thing to be done, the individuals as well as the company are responsible. The mere machinery to do an illegal act will not purge its illegality.
4. Whether an individual has constituted the company his agent is a question of fact, but the fact that the controlling corporator holds a majority or even the whole of the shares and is the managing director will not alone suffice to establish the relationship of principal and agent between himself and his company.
5. Where the evidence brings the case within rule 3, or where it establishes that the company is a mere agent of the controlling shareholder (rule 4), it may be appropriate to characterize the company as a paper sham, a simulacrum, cloak, alias or alter ego — but otherwise, the indiscriminate use of these or similar terms is liable to lead to confusion of thought and possible injustice.

ble to create a test which is effective and just in *all* situations; separate circumstances require separate tests such that commentary and concepts used in one case cannot be imported into others. The test for piercing the corporate veil to attack income tax avoidance schemes is a different test from that used to affix liability to directors where a corporation breaches a contract. Unfortunately courts often forget to address each situation differently. Where a third party falls victim to a rogue dressed in corporate clothing, the courts pierce the veil on the basis of the abhorrent conduct of those who control the corporation and use the buzz words[15] of past cases to justify affixing liability on directors.[16] However, these buzz words are merely descriptions of the relationship between the corporation and its shareholders or director(s) rather than juristic reasons for liability, and their continued use leads "to confusion of thought and possible injustice".[17] These cases also provide little in the way of readily applicable precedents and rely as much upon a judge's sympathy as they do on legal reasoning. This practice only bogs the law deeper into an unintelligible mire.

In an effort to make a useful contribution to this area of the law this article will limit its focus to one particular situation, one which is arguably the most vile and repugnant use of a corporation: that of intentionally breaching contracts. Of particular interest to the author is the landlord/tenant scenario, as it appears to be the most notorious backdrop against which the drama of veil piercing cases are currently being played out. It is with these items in mind that the tort of inducing

[15]Such as "alter ego," "agent," "puppet," "directing mind", "actual contracting party," "cloak," "alias," "simulcrum", "screen" and "sham" among others.

[16]See Murray A. Pickering "The Company as a Separate Legal Entity" The Modern Law Review 1968, vol. 31, No. 5, pps. 481 — 511; Mervyn Woods "Lifting the Corporate Veil in Canada" [1957] *The Canadian Bar Review* ps. 1176-1194; C. A. Masten, "One Man Companies and Their Controlling Shareholders", [1936] *The Canadian Bar Review* pps. 663-671, Ivan R. Feltham "Lifting the Corporate Veil" *Law Society of Upper Canada Special Lectures* (1968), pp. 305-332 and the cases cited therein. See also *Jones v. Lipman* (1961), [1962] 1 All E.R. 442 (Eng. Ch. Div.) and *Gilford Motor Co. v. Horne*, [1933] All E.R. Rep. 109 (Eng. C.A.).

[17]Masten *supra* at page 671.

breach of contract and the creation of a clearer, simpler test for director's liability will be discussed.

Lowering the Corporate Veil

As most know, the House of Lords decision in *Saloman v. Saloman & Co.*[18] remains the cornerstone case with respect to the common law position that a corporation is separate and distinct from its shareholders, officers and directors. In that case, Mr. Saloman operated a successful leather business. At the behest of his children, he incorporated a company to carry on the business and was the majority shareholder of the company. The remaining shareholders were members of his family who, it was later determined, held their shares in trust for Mr. Saloman. The company fell upon hard times, defaulted under various of its obligations and was liquidated. The issue before the House of Lords was whether the creditors were able to pursue Mr. Saloman personally for deficiencies owed to them.

The trial judge held in the first instance that the corporation was the "agent" or "alias" of Mr. Saloman and that he was therefore personally liable for the corporation's debts. On appeal, the Court found that the corporation was the trustee of the leather business and Mr. Saloman was the *cestui que trust* and therefore he was personally liable for the corporation's debts. The House of Lords rejected both approaches. Lord Macnaghten stated that:

> Among the principal reasons which induce persons to form private companies . . . . are the desire to avoid the risk of bankruptcy, and the increased facility for borrowing money. By means of a private company, . . . a trade can be carried on with limited liability and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law. . . ., the unsecured creditors of A. Saloman & Co., Ltd. may be entitled to sympathy, but they have only themselves to blame for their misfortunes.[19]

He refused to differentiate between closely held and widely held corporations, stating, "If the shares are fully paid up it cannot matter whether they are in the hands of one or many."[20] This thought was echoed by Lord Herschell who stated that "I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so. . .,"[21] [and later] ". . . it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain what is the capital of the company, and how it is held."[22]

[18](1896), [1895-99] All E.R. Rep. 33 (U.K. H.L.)

[19]*Ibid.*, p. 48.

[20]*Ibid.*, p. 49.

[21]*Ibid.*, p. 44.

Saloman thereby clearly set the law that a limited liability corporation that is properly incorporated under the relevant statute is to be treated as "*ex hypothesi* a distinct legal person."[23] The corporation was not the "agent", "alias", "alter ego" or "trustee" of the shareholder. In other words, the principle of *caveat emptor* is to apply to all those dealing with a limited liability corporation and one cannot seek redress against the shareholders of the corporation for matters done by the corporation. While it has been argued that *Saloman* does not extend the protection afforded shareholders to directors of a corporation, courts continue to do so; but they have shied away from giving directors absolute immunity from liability.[24]

The Evolution of the Tort of Inducing Breach of Contract

Almost 50 years prior to the *Salomon* decision, the English Queen's Bench decided the case of *Lumley v. Gye*.[25] This case is most often cited as the starting point for the proposition that a tort is committed when someone wrongfully causes a contract between two other persons to be breached and damage results. In *Lumley v. Gye*, Miss Johanna Wagner was a popular young singer who was under contract with Mr. Lumley to perform exclusively at his theatre. The defendant, Mr. Gye, was the manager of another theatre. He persuaded Miss Wagner to break her contract with Mr. Lumley and to perform at his theatre. The Court determined that while Miss Wagner was clearly in breach of her contract and therefore liable to Mr. Lumley for damages, Mr. Gye should also be held accountable for his role in her breach. According to Crompton J.:

> . . . it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation

[22]*Ibid.*, p. 45.

[23]*Ibid.*, p. 43.

[24]See discussions in Christopher C. Nicholls "Liability of Corporate Officers and Directors to Third Parties" pp. 1–38; Edward M. Iacobucci "Unfinished Business" An Analysis of Stones Unturned in *ADGA Systems International Ltd. v. Valcom Ltd.* The Canadian Business Law Journal Vo. 35 No. 1 pp. 39-54. Janis Sarra "The Corporate Veil Lifted: Director and Officer Liability to Third Parties" The Canadian Business Law Journal Vo. 35 No. 1 pp. 55–71. All indicate that *Saloman* has no application to directors, only shareholders. Query whether such a narrow interpretation should be given since corporations are deemed to be separate entities by *Saloman* and by statute. Further corporations can only act via their directors. See also Mr. Justice J. Spence *supra* at note 13. This debate is beyond the scope of this article.

[25](1843), [1843-60] All E.R. Rep. 208 (Eng. Q.B.)

> subsisting between master and servant by procuring the servant to depart from the master's service ... whereby the master is injured, commits a wrongful act for which he is responsible at law.[26]

Erle J. was much more definitive in his comments:

> It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to a personal security. He who procures the wrong is a joint wrongdoer and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. . . . .This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery, and both ought on the same ground to be made responsible.[27]

Wightman J. concurred:

> It was undoubtedly *prima facie* an unlawful act on the part of Miss Wagner to break her contract, and therefore, a tortious act of the defendant to maliciously procure her to do so, and so if damage to the plaintiff followed in consequence of the tortious action of the defendant, it would seem upon . . . [prior authority], as well as upon general principle, that an action on the case is maintainable.[28]

The court in *Lumley v. Gye* did not limit the circumstances in which the tort could be applied. In fact Crompton J. seemed to indicate quite the contrary: "I see no reason for confining the case to services or engagements under contracts for services or any particular description."[29] Notwithstanding the lack of restrictions on the application of this test, throughout the remainder of the 19th century this tort appears to have been mainly applied in cases involving employment contracts or trade disputes.

One such trade dispute case, *Quinn v. Leathem*,[30] is of particular importance because it was decided by the House of Lords five years *after Saloman*, thereby giving their Lordships the opportunity to reconcile the impenetrability of the corporate veil with the need to discourage the breaching of contracts. In *Quinn v. Leathem*, Mr. Leathem was a butcher who would not join "The Belfast Journeymen Butchers and Assistants' Association." The Association, which was run

[26] *Ibid.*, p. 214.

[27] *Ibid.*, p. 214.

[28] *Ibid.*, p. 216.

[29] *Ibid.*, p. 212.

[30] (1901), [1900-03] All E.R. Rep. 1 (U.K. H.L.)

by Mr. Quinn and others, insisted that even if Mr. Leathem would not join it, he must hire only members of the Association, failing which the Association would arrange for him to be blacklisted amongst meat purchasers. At that time Mr. Leathem's assistants had refused to join the Association. Mr. Leathem agreed to use only Association members provided that his assistants would now be allowed to join the Association. The Association refused and then induced Mr. Munce, in contravention of his meat purchasing contract with Mr. Leathem, to stop purchasing meat from him. Mr. Leathem then brought an action against Mr. Quinn and others for inducing Mr. Munce's breach of contract.

The House of Lords followed the principles set out in *Lumley v. Gye*. It determined that persons who induced a breach of contract (in this case a contract to purchase meat from Leathem) were liable in tort to the person who suffered damage. As the Earl of Halsbury stated "If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence is that of a civilized community."[31] Lord Macnaghten, who was also part of the panel in *Saloman*, stated ". . . a violation of a legal right committed knowingly is a cause of action, and that it is a violation of right to interfere with contractual relations recognized by law, if there be no justification for the interference."[32]

By the end of the 19th century the tort of inducing breach of contract was clear law and the test for finding liability was a fairly simple one:

1. There must be a valid and enforceable contract between two parties;
2. A third party must knowingly induce one of the parties to breach that contract;
3. The third party must have no justification to breach the contract; and
4. Damages must result as a consequence of the breach.

No limits were placed upon the situations in which this test could be applied and, given the *Leathem* decision, it would seem natural that this tort could be used to affix liability to directors of corporations. However, in order to do so the tort had to reconcile itself not only with the limited liability of directors but also

[31] *Ibid.*, p. 7.

[32] *Ibid.*, p. 9. Most interesting is that the House of Lords was prepared to go behind The Belfast Journeymen Butchers and Assistants' Association and attach personal liability to Mr. Quinn. This was because Mr. Quinn did not act legitimately to further the cause of the Association. At that time members of a trade association routinely escaped liability for actions which were done in furtherance of the legitimate cause of the trade association pursuant to the Trade Disputes Act of 1871, 1876 and later, 1906. In this case, however, the House of Lords were willing to pierce the veil of protection of the Association and affix liability upon Mr. Quinn.

with a director's statutory and common law obligations and duties to the corporation. The first attempt at this reconciliation was made in *Said v. Butt*.[33]

The Application of the Tort to Directors — English Roots

The rather silly facts of *Said v. Butt* indicate the lengths to which the "idle rich" of England at that time would go in personal disputes. In this case, there had been ongoing personal disagreements between the Sir Butt and Mr. Said. Sir Butt was the sole managing director of a corporation which owned a theatre. He advised Mr. Said that he (Mr. Said) would not be allowed into the theatre to view the latest production. Mr. Said then engaged one of his associates to purchase a ticket for him without disclosing to the theatre that he was the ultimate owner of the ticket. Sir Butt, upon seeing Mr. Said in the theatre lobby, directed the theatre staff to refuse entry to him. Mr. Said then sued Sir Butt for inducing the theatre corporation to breach his contract (i.e. his ticket) to enter and view the production.

McCardie J. expressly approved of Lord Macnaghten's views as stated in *Lumley* that "... a violation of a legal right committed knowingly is a cause of action, and that it is a violation of right to interfere with contractual relations recognized by law, if there be no justification for the interference." However, because Mr. Said had engaged one of his associates to purchase the ticket for him without disclosing to the theatre that he was the ultimate owner of the ticket, McCardie J. decided that there was no legal contract between Mr. Said and the theatre and therefore "the plaintiff failed to prove that the defendant caused any breach of a contract."[34]

If McCardie J. had ended his judgment there this decision would have slipped into well deserved obscurity. Unfortunately he did not. In statements that are clearly *obiter dictum* he stated that this theatre ticket dispute raised a point of law that was of such great importance that,

> ... I feel it my duty to deal with it. Let me, therefore, **assume** [emphasis added] that the plaintiff had established a valid contract. I agree that the language [in *Lumley*] is wide in its scope. The proposition is stated with unrestricted diction — that a person who, without just cause, knowingly procures a man to commit a breach of his contract with another, whereby the latter suffers pecuniary damage, is liable to an action in tort. But I conceive that none of the judges was thinking of such a case as the present.[35]

[33][1920] All E.R. Rep. 232 (Eng. K.B.)

[34]*Ibid.*, p. 240.

[35]*Ibid.*, p. 240.

While it is unlikely that the judges in *Lumley v. Gye* envisioned their reasons being used in a case where the plaintiff was barred entry to a theatrical performance, it must be remembered that the House of Lords, and Lord Macnaghten in particular, expressly agreed with *Lumley v. Gye* in *Leathem v. Quinn* without placing any limits as to when the tort might be applied. It was therefore not clear why McCardie J. felt compelled to introduce such limits. More troubling, however, was McCardie J.'s confusing and limited restatement of the tort that would excuse directors from liability. McCardie J. equated, erroneously, the relationship between a director and a corporation with that of the relationship between a master and servant. He then compounded this error by suggesting that a director is the "alter ego" of the corporation.

> I have searched in vain for any decision which indicates that a servant is liable in tort for procuring a breach of his master's contract with another. . .. The explanation . . . probably lies in the fact that in every one of the sets of circumstances . . . the person who procured the breach of contract was, in fact, a stranger, that is a third person, who stood wholly outside the area of the bargain made between the two contracting parties. . .. But a servant who causes a breach of his master's contract with a third party seems to stand in a wholly different position. He is not a stranger. He is the *alter ego* of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he had made, and in my view, an action against the agent under the *Lumley v. Gye* principle must, therefore fail, just as it fails if brought against the master himself for wrongfully procuring a breach of his own contract. . . This, I think, is the true answer . . .

Unfortunately McCardie J.'s "true answer" is incorrect. The nature of a corporation's distinct existence is a fiction created for liability purposes only. For operational purposes, a corporation is controlled by its directors much the same way a puppet is controlled by a puppeteer; the corporation is not an independent mind or entity. A corporation can only make decisions and take actions by way of those who are involved with it.[36] As Lord Reid said in *Tesco Supermarkets Ltd. v. Nattrass*,[37]

> A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. The person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the

[36]See Evershed M.R. in the English Court of Appeal case of *D.C. Thomson & Co. v. Deakin*, [1952] 1 Ch. 646 (Eng. C.A.) at page 681, "A limited liability company, a *persona ficta*, can only act through agents or servants."

[37](1971), [1972] A.C. 153 (U.K. H.L.)

> mind of the company. There is no questions of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate.[38]

McCardie is therefore incorrect to grant immunity to a director because she is a servant who is simply heeding the directions given her by the corporation: she would in fact be giving directions to herself! As a result, a director can no more be a servant of the corporation than a puppeteer can be the servant of the puppet. As Disbery J. said in *Einhorn v. Westmount Investigations Ltd.*:[39]

> Ordinarily, an agent is subject to control of another person, his principal. A company perforce is only able to act through its agents and servants. Consequently while company directors are referred to as "agents" the cold fact is that they control the company. As the directors pull the strings so the company must by necessity jump. Particularly this is true where, as here, the individual defendants were in "complete control" of the company.[40]

Subsequent courts have also determined that, contrary to McCardie J.'s view, it is also incorrect to grant immunity to a director on the basis that she is the *alter ego* of the corporation. According to Callon J. in *McFadden v. 481782 Ontario Ltd.*,[41]

> The fact that the agent is an *alter ego* of the corporation may afford a defence to the corporation (since it makes no sense to sue it for both breaching and inducing itself to breach a contract), but it is not clear why it should relieve the agent. For as a general rule, an agent is always liable personally for his tortious acts, notwithstanding that his acts (and hence his liability) may in law also be those of the corporation: *The Koursk* [1924] P. 140 at 155, [1924] All E.R. Rep. 168 (C.A.); *Weir v. Bell* (1878), 3 Ex. D. 238 at 248 (C.A.). In short, if an officer or director of a corporation is to be relieved, as an agent, of the consequences of his otherwise tortious act of inducement, it is not because he is the company's alter ego.[42]

McCardie J. concluded his *obiter* by introducing the need for a director, because he is the "servant" of the corporation, to act *bona fide* and within the scope of his authority in order to receive the protection of the corporate veil.

> It is well to point out that Sir Alfred Butt possessed the widest powers as the chairman and sole managing director of Palace Theatre, Inc. He clearly acted within those powers when he directed that the plaintiff should be refused admission . . .. I am satisfied, also, that he meant to act, and did act *bona*

[38] *Ibid.*, p. 170.

[39] (1969), 6 D.L.R. (3d) 71 (Sask. Q.B.), affirmed (1970), 11 D.L.R. (3d) 509 (Sask. C.A.).

[40] *Ibid.*, pps. 75-76.

[41] (1984), 27 B.L.R. 173 (Ont. H.C.)

[42] *Ibid.*, p. 188.

> *fide*, for the protection of the interests of his company. . .. I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby, become liable to any action of tort at the suit of the person whose contract has thereby been broken.

It is this part of *Said v. Butt* which has over the years been used by courts as authority for determining a director's liability for inducing breach of contract. However, as the foregoing review of *Said v. Butt* suggests, not only are McCardie J.'s comments *obiter* and therefore not binding upon any court, but his logic is confusing and flawed.[43] In trying to create a legal maxim, McCardie J. missed the mark by erroneously characterizing the relationship between the director and corporation. By doing so the unfortunate legacy of *Said v. Butt* is one of confusion rather than clarity.[44] Nonetheless the following two conclusions can be drawn from *Said v. Butt* and be of use in creating a clear and coherent test to determine a director's liability:

1. Characterising the relationship between directors and corporations is confusing; and

2. It is unfair to make a director liable if he is properly doing his job.

It is with these conclusions in mind that the Canadian case law will be examined and a new test for directors' liability suggested.

The Canadian Position

The tort of inducing breach of contract is accepted law in Canada and was well set out by Gale J. in *Posluns v. Toronto Stock Exchange*:[45]

> While a contract cannot impose the burden of an obligation on one who is not a party to it, a duty is undoubtedly cast upon any person, although extra-

[43] It should also be noted that McCardie J. was sitting alone in *Said v. Butt* whereas, as noted by Disbery J. in the Saskatchewan Queens' Bench case of *Einhorn v. Westmount Investments Ltd.* (1969), 6 D.L.R. (3d) 71 (Sask. Q.B.), affirmed (1970), 11 D.L.R. (3d) 509 (Sask. C.A.), the court in *Lumley v. Gye* was sitting in *banco* on an appeal of the original decision of Lord Chancellor Lord St. Leonards. As such, Disbery J. suggested that much greater weight should be attached to the decision in *Lumley v. Gye* than to the *obiter dictum* of the lone judge in *Said v. Butt*. The comments of Disbery J. are another reason why the decision of McCardie J. should be ignored by Canadian courts.

[44] Sadly, Canadian courts still refer to the "Rule in *Said v. Butt*". See for example *Unisys Canada Inc. v. York Three Associates Inc.* (1999), 39 R.P.R. (3d) 220 (Ont. S.C.J.) and *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (Ont. C.A.).

[45] (1964), 46 D.L.R. (2d) 210 (Ont. H.C.), affirmed (1965), 53 D.L.R. (2d) 193 (Ont. C.A.), affirmed (1968), 67 D.L.R. (2d) 165 (S.C.C.).

> neous to the obligation, to refrain from interfering with its due performance unless he has a duty or a right in law to so act. Thus, if a person without lawful justification knowingly and intentionally procures the breach by a party to a contract, which is valid and enforceable and thereby causes damage to another party to the contract, the person who has induced the breach commits an actionable wrong. That the wrong does not rest upon the fact that the intervenor has acted in order to harm his victim, for a bad motive does not *per se* convert an otherwise lawful act into an unlawful one, but rather because there has been an unlawful invasion of legal relations existing between others. This has been established in our jurisprudence by an ever-developing body of authority, which had its origin in the great case of *Lumley v. Gye* . . . . there can be no doubt that our law recognizes as tortious any unjustifiable and unlawful violation of economic interests which causes harm.[46]

No limits were placed upon the tort; it was to be applicable in cases where "unjustifiable and unlawful violation[s] of economic interests [caused] . . . harm." Subsequent to *Posluns*, courts have accepted that tort liability may be imposed upon persons who improperly or intentionally interfere with another's contractual rights.[47]

The *Posluns* case, however, did not deal with the situation where directors of a corporation were alleged to have induced a breach of contract. Therefore *McFadden v. 481782 Ontario Ltd.*[48] appears to be one of the first cases where an Ontario court utilized the tort of inducing breach of contract to determine a director's liability to a third party for the breach of a contract between the third party and the corporation. In *McFadden*, the plaintiff brought an action for wrongful dismissal against the defendant Practical Management Associates (Canada) Inc. ("PMAC"). The sole directors and officers (Mr. and Mrs. Taylor)

[46] *Ibid.*, p. 261. Gale J. also followed the English position that malicious intent is not a necessary component to the tort in Ontario; all that is necessary is the intention to end the contract see pages 266-67. In this regard he cited with approval *D.C. Thomson & Co. v. Deakin supra* at note 36.

[47] *Colonia Life Holdings Ltd. v. Fargreen Enterprises Ltd.* (1990), 1 O.R. (3d) 703 (Ont. Gen. Div.), *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (Ont. H.C.), *Truckers Garage Inc. v. Thomas Krell* (1993), 3 C.C.E.L. (2d) 157 (Ont. C.A.), *Pace v. Delzotto* (1996), 24 B.L.R. (2d) 263 (Ont. Gen. Div.), *Smith v. UndercoverWear Ltd.* (1993), 51 C.P.R. (3d) 409 (Ont. Gen. Div.), *G.P.I. Greenfield Pioneer Inc. v. Moore* (2000), 32 R.P.R. (3d) 54 (Ont. S.C.J.), *Degelder Construction Co. v. Dancorp Developments Ltd.* (2000), 34 R.P.R. (3d) 214 (B.C. S.C. [In Chambers]), *Unilux Manufacturing Co. v. Prime Boilers Inc.* (1990), 74 O.R. (2d) 270 (Ont. H.C.). See also Klar, Linden, Cherniak and Kryworuk Remedies in Tort Vol. 1 "Chapter 8 — Inducing Breach of Contract" (Toronto: Carswell, Looseleaf Service).

[48] (1984), 27 B.L.R. 173 (Ont. H.C.)

stripped PMAC of all its liquidity by making payments to themselves and rendering the company insolvent. The payments to Mr. and Mrs. Taylor were not properly authorized via by-law or resolution. As a result of the transfer of funds, PMAC was unable to pay the plaintiff the salary owed to him. The transfer of funds also meant that PMAC did not have assets upon which the plaintiff could execute any judgment that he obtained.

Callon J. held that the Taylors were not acting within the scope of their duties as directors and officers. Instead they were "acting to secure the transfer of the greatest possible amount of PMAC's funds to themselves unhindered by any obligations that PMAC might have to the plaintiff."[49] While Callon J. approved of *Quinn v. Leathem* he also felt compelled to deal with *Said v. Butt* and lapsed into a characterization of a director as "agent" of the corporation:

> if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken . . . if an officer or director of a corporation is to be relieved, as an agent, of the consequences of his otherwise tortious act of inducement, it is not because he is the company's alter ego. Rather, it is because in so acting he acts under the compulsion of a duty to the corporation. His act is thus justified. But where he does not act under such a duty, as for example, where he fails to act bona fide within the scope of his authority, his act is not longer justified and he becomes liable.[50]

According to Callon J., directors should be shielded from liability only where they act *bona fide* within the scope of their authority. Similarly, the Newfoundland Court of Appeal in *Imperial Oil Ltd. v. C & G Holdings Ltd.*[51] stated that "A director will be immune from liability for procuring the breach where he or she acts bona fide within the scope of his or her authority in the best interests of the corporation."[52]

Notwithstanding the above decisions, many courts continue to ignore the tort and instead pierce the veil on the grounds of a vague equitable duty to relieve against dishonest, fraudulent or deceitful behaviour on the part of directors and

[49] *Ibid.*, p. 189.

[50] *Ibid.*, p. 186-188.

[51] (1989), 62 D.L.R. (4th) 261 (Nfld. C.A.)

[52] *Ibid.*, p. 266. However, the court went further by saying that "When not so acting, the director does not attract automatic liability unless the circumstances show that his or her dominating concern was focussed upon depriving the complainant of its contractual benefits" This last statement, however, is incorrect in law as it introduces an element of malice which both English and Canadian courts have rejected as being required in order to find liability for this tort.

openly distinguish between closely held and widely held corporations.[53] Cases involving leases appear to be no different.

Canadian Lease Cases

In recent years there have been a number of cases in which courts have been asked to determine a director's liability for the breach of a lease.

In *Torgan Enterprises Ltd. v. Contact Arts Management Inc.*[54] the plaintiff was the landlord of a small office building and Contact Arts Management Inc. ("Contact") was one of its tenants. Contact had in turn subleased the whole of its premises to the other defendant, Mr. Jimmy K. Sun. Mr. Sun was a shareholder, officer and director of Contact and he operated his law practice from the premises. Sometime before the end of the lease with Torgan Enterprises Inc., Mr. Sun moved his law practice to other office premises and thereby caused Contact to fail to pay the rent owing to Torgan.

Mr. Justice Greer found that Contact was controlled by Mr. Sun and his wife "although it is clear that he was the company's *alter ego*, rather than Mrs. Sun." Mr. Justice Greer also found that Mr. Sun was the directing mind of Contact and that he directed Contact not to make rent payments to the landlord. He did not find that there was any independent thinking on the part of Contact and that it was in Mr. Sun's best interest to terminate his sublease (thereby depriving Contact of the monies needed to pay rent to Torgan) and move to office space with lower rental rates. Greer J. found Mr. Sun liable on the basis that he was the *alter ego* of Contact and that Mr. Sun also breached his duties as an officer and director of Contact by creating circumstances under which Contact was forced to breach its lease.

[53] *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.* (2000), 6 B.L.R. (3d) 24 (Alta C.A.), leave to appeal to the Supreme Court of Canada granted in (2000), 261 A.R. 400 (note) (S.C.C.); *1005633 Ontario Inc. v. Winchester Arms Ltd.* (2000), 8 B.L.R. (3d) 176 (Ont. S.C.J.). See also *1224948 Ontario Ltd. v. 448332 Ontario Ltd.* (1998), 22 R.P.R. (3d) 200 (Ont. Gen. Div.) in which Quinn J. stated that "A judge should not pierce the corporate veil merely because it would be in the interest of fairness or justice to do so. Nonetheless, courts have the power, and the duty, to do so if the corporate structure is being used for fraudulent or improper purposes or as a 'puppet' to the detriment of a third party. Fraudulent or flagrantly manipulative misconduct on the part of the key owner of a 'one-man' company (the type of company where one man is the sole operating mind) will almost invariably lead to an attribution of civil liability against those persons where the misconduct produces financial loss to others."

[54] (1997), 35 O.T.C. 339 (Ont. Gen. Div.)

In *Bengro Holdings Inc. v. Tax To Go Inc.*[55] the plaintiff leased commercial space to the defendant. The defendant in turn subleased the whole of its premises to a related corporation. Both corporations were controlled by Mr. Larry Tomlin, who was the sole shareholder, officer and director of both. Before the end of the lease with the plaintiff — much like Mr. Sun in the Torgan case — Mr. Tomlin moved the subtenant corporation to other office premises having a lower rent and caused Tax To Go Inc. to fail to pay the rent owing to the plaintiff. Dyson J.'s distaste for the actions taken by Mr. Tomlin were evident in his decision: "I would define the machinations that Mr. Tomlin practises the corporate shell game. He has several companies which he manipulates in a manner which benefits himself to the detriment of those he does business with."[56] Dyson J. determined that Mr. Tomlin had intentionally caused the defendant to breach its lease with the plaintiff and therefore Mr. Tomlin was personally liable for inducing the breach of the lease to Bengro Holdings Inc. Dyson J. did not cite any test or the basis upon which the defendant Tomlin was held liable and it may have been that the case was decided largely on the equities that Mr. Tomlin should not be allowed to use his corporations to the detriment of others.

In *Novacrete Construction Ltd. v. Profile Building Supplies Inc.*[57] Himel J. reviewed the actions of the sole director and shareholder of the tenant with respect to the abandonment of its premises and the selling of its assets to a related company. The tenant, Profile Building, operated a contracting business which was encountering financial difficulties. The principal of Profile Building was Mr. Valente. Mr. Valente decided to form a new company called Profile Tile which would concentrate on retail business instead of contracting. Profile Tile purchased all the assets of Profile Building at fair market value. Mr. Valente advised the landlord that he would sublet the old premises or use the premises for storage but that he was moving all other materials to a new location. The landlord, after much discussion and many letters, re-entered the premises on the basis that it had been abandoned by Profile Building and brought an action against the tenant for prospective rent and an action against Mr. Valente for inducing the apparent breach of lease.

Himel J. determined that, despite the sale of the assets of the tenant, Mr. Valente still intended to pay rent to the landlord and make some use of the premises. He found that Mr. Valente's actions were in the best interests of the tenant and therefore Mr. Valente was not held liable for breaching the lease by abandoning the premises: "In my view, Mr. Valente was doing what he deemed necessary to

[55] (1996), 7 O.T.C. 283 (Ont. Gen. Div.)

[56] (1996), 7 O.T.C. 283 (Ont. Gen. Div.), paragraph 12

[57] (2000), 7 B.L.R. (3d) 248, 35 R.P.R. (3d) 21 (Ont. S.C.J.)

minimize exposure for Profile Building and himself personally by reducing expenses in a time of economic recession."[58]

In *Unisys Canada Inc. v. York Three Associates Inc.*[59] Sutherland J. also determined that the sole director and shareholder was not liable for inducing the breach of the lease. In this case the plaintiff subleased premises to York Three Associates Inc., the principal of which was Mr. Cancilla. York Three Associates Inc. encountered economic difficulties and the evidence was that Mr. Cancilla tried diligently to find ways for York Three Associates Inc. to honour its sublease by further subletting of the premises. However, the rental prices in the area were severely depressed and well below the amounts needed to pay the plaintiff. Finally York Three Associates abandoned the premises and went out of business. Sutherland J. was impressed by Mr. Cancilla's attempts to pay Unysis prior to abandonment despite the hard times that had befallen his corporation. He also pointed out that,

> The main fact here is that York Three had no resources and no one had a continuing obligation to give it any or pay any of its obligations . . . On the facts, what [other] decision of York Three would have been taken bona fide for it and in its best interests if it was helpless and without redemption?[60]

Sutherland J.'s decision also appears to be based upon the fact that the landlord was aware that York Three Associates Inc. was a shell company without assets at the time it executed the sublease and that in acknowledgment of this risk, the plaintiff obtained a personal guarantee from Mr. Cancilla. Clearly Sutherland J. had the previously noted comments of Lord Macnaghten[61] and Lord Herschell[62] in mind when assessing this case. In the end his decision appears to have been based as much on Mr. Cancilla's acting in the best interests of the corporation as on the landlord's acknowledgement and assumption of the risk in dealing with York Three Associates Inc.[63]

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[58] *Ibid.*, p. 277.

[59] (1999), 39 R.P.R. (3d) 220 (Ont. S.C.J.)

[60] *Ibid.*, paragraphs 49 and 50.

[61] "The unsecured creditors of A. Saloman & Co., Ltd. may be entitled to sympathy, but they have only themselves to blame for their misfortunes," as quoted earlier in this article.

[62] "It must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain what is the capital of the company, and how it is held," as quoted earlier in this article.

[63] The *Unysis* case also suggests that the obtaining of a personal guarantee from a principal of the corporation may adversely affect a landlord's ability to bring an action against a director for inducing breach of contract. It is unclear why this should be correct. The fact that a director provides a guarantee, which in most cases — as in *Unysis* — is a limited one, should not absolve her from the application of the tort. To state otherwise is to give directors carte blanche to intentionally breach contracts once a guarantee, no matter how limited, is given.

In *Polish National Union of Canada Inc. v. Dopke*,[64] a tenant, the Polish Veteran's Society of Niagara (the "Society") breached its lease with Polish National Union of Canada Inc. by, among other things, failing to pay rent and abandoning the premises. The landlord brought an action against the Society, Mr. Dophe (its president) and other Society officers for damages. Quinn J. determined that, while there was no fraud, deceit or dishonesty on the part of the officers, they nonetheless "acted beyond the scope of their corporate authority, thereby rendering themselves . . . liable for their actions".[65]

Towards a Simpler Approach for Directors' Liability

As discussed above, Canadian courts have not yet provided a consistently clear and coherent approach to determining a director's liability for breaches of contract — even within the narrow confines of commercial leasing scenarios. However, it has been suggested that the apparent emphasis by Canadian courts that a director be acting *bona fide* within the scope of his authority means

> that the true rationale for relieving a director or officer of liability for inducing breach of contract lies as much in the realm of justification as it does any principle of agency law. (An act of inducement may, it should be remembered, be excused if there is sufficient "justification" for it; per Lord Macnaghten, *Quinn v. Leathem*) For if the fact of being an alter ego were enough, any discussion of the agent's bona fides would be irrelevant; if the act complained of is in law the act of his master, then its bona fides do not matter; what does matter is whether the act was within the agent's actual (real or implied) or ostensible authority.[66]

The common law and statutory obligations of a director to act in the best interests of the company seem to provide the necessary "justification".[67] Augustus

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[64] (2000), 38 R.P.R. (3d) 64 (Ont. S.C.J.)

[65] *Ibid.*, p. 99.

[66] Augustus Richardson, "Making an End Run Around the Corporate Veil: The Tort of Inducing Breach of Contract", *Advocates Quarterly*, vol. 5, 1984-84 pp. 103-109 at page 105.

[67] See *Cawley & Co., Re* (1889), 42 Ch. D. 209 (Eng. C.A.) at p. 233, per Cotton J.; *Beamish v. Solnick* (1980), 10 B.L.R. 224 (Ont. H.C.) and Section 134 of the *Business Corporations Act* R.S.O. 1990 and Section 122 of the *Canada Business Corporations Act* R.S.C. 1985.

Richardson suggests that living up to these duties provides the "justification"[68] behind a director's actions and thereby entitles her to the protection of the corporate veil.[69] Conversely, failure to do so strips a director of such protection.

> It would not be proper ... to require a director or officer to do an act in compliance with the duty cast upon him by law and then expose him to personal liability when that act is found to amount to an inducement or procurement of a breach of contract. But once the director or officer fails to comply with that duty, then the rationale for relieving him of liability falls away, notwithstanding that his acts may still in law be those of the company. It is accordingly submitted that a director or officer may be personally liable in tort or [sic] procuring a breach of his company's contract where, in so doing, he fails to act *bona fide* within the scope of his authority.[70]

Richardson's comments are compelling as they do not rely upon *Said v. Butt* or upon any characterisation of the relationship between a director and the corporation to affix liability. Nor do they distinguish between closely held and widely held corporations.[71] Instead liability is simply determined by compliance with a director's statutory duties and obligations — a much simpler approach to apply and with which to comply. Richardson's comments may be further refined through a consideration of the dual role of a director.

In a similar fashion to a privately appointed receiver of mortgaged property, a director wears two hats: the hat of the corporation and the hat of his own self-interest. A director dons his corporate hat when he acts in accordance with his duties and obligations as a director; in other words, he acts within his authority and in the best interests of the corporation. When a director is wearing his corporate hat he is metamorphosed or transformed into and becomes the corporation. He is not separate and distinct from the corporation and therefore cannot attract personal liability. This is the same way directors perceive themselves. A director acting in accordance with her obligations would state that she "is" the corporation rather than she is an "agent" or "servant" of the corporation. This dual nature is supported by the comments of Lord Reid in *Tesco Supermarkets*[72]

[68]The reader will remember part 3 of the test for the tort of inducing breach of contract described earlier in this article.

[69]See also *Kepic v. Tecumseh Roader Builders* (1987), 23 O.A.C. 72 (Ont. C.A.).

[70]Richardson *supra* note 66 at page 106.

[71]The reader will remember Lord Herschell's comments in *Saloman* supra at note 19. See also Madame Justice Wilson's comments in Kosmopoulos *supra* at note 12 at page 214 who cautioned against "a very arbitrary and, in my view, indefensible distinction ... between companies with more than one shareholder and companies with only one shareholder".

[72]*supra* at note 37.

as well as those of Osborne J.A. in *Truckers Garage Inc. v. Krell*,[73] who stated "At the very least the evidence must establish, to a degree of probability, that some separate interest from [the corporation's] was involved."[74] This was also alluded to by Finlayson J.A. in *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.*[75] when he stated "officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own."[76] It is suggested, however, that Mr. Justice Finlayson used the wrong conjunction in his statement. The actions of directors must be tortious *and* exhibit a separate identity in order to attract liability. The use of the conjunction "or" denies the dual role played by the director and prevents her from breaching contracts, even if to do so is in the best interests of the corporation and within her authority (the so-called "efficient breach").[77] Such a result is unduly harsh and commercially unacceptable.

In order to be liable for the tort of inducing breach of contract, one must be separate and distinct from the contracting parties. If a director has become one with the corporation then he or she is not separate and distinct from the contracting parties and cannot be liable for inducing breach of contract. Torts committed by a director while she is indistinguishable from the corporation are torts of the corporation alone. In such a case the plaintiff's only cause of action lies against the corporation for the breach. However, once a director removes his corporate hat and exchanges it for the cap of his own personal interest — in

[73](1993), 3 C.C.E.L. (2d) 157 (Ont. C.A.). In this case the defendant director was not held liable because it could not be shown that the breach of contract was done for a purpose other than for the benefit of the corporation.

[74]*Ibid.*, p. 169.

[75](1995), 129 D.L.R. (4th) 711 (Ont. C.A.)

[76]*Ibid.*, p. 720. See also *853402 Ontario Ltd. v. McLeod* (March 28, 1996), Doc. 95-CU-83600CM (Ont. Gen. Div.) and *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.) and *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 OR (3d) 101 (Ont. C.A.) which all approved of this comment.

[77]There are a number of articles which discuss economic theory of law and efficient breach of contract; the following are but a few: R.A. Posner *Economic Analysis of Law* 4th Edition (Boston, Little Brown and Co., 1992) Lionel Smith "Disgorgement of the Profits of Breach of Contract and "Efficient Breach" *Canadian Business Law Journal* Vol 24 1994-95 pp. 121-140; B. Welling "Individual Liability for Corporate Acts: the Defence of Hobson's Choice (2000) 12 *Sup. Ct. L. Rev.* 55, B. Chapman "Corporate Tort Liability and the Problem of Overcompliance" (1996) 69 S. Cal. L. Rev., R. Daniels "Must Boards Go Overboard? An Economic Analysis of Burgeoning Statutory Liability of the Role of Directors in Corporate Governance" (1994) 24 *Canadian Business Law Journal* 229.

other words he acts without proper authority and not in the best interests of the corporation, or he acts in his own or someone else's interest — he is no longer one and the same as the corporation; he stands naked before the world and is subject to liability for his actions.

Conclusion

The Canadian case law surrounding the lifting of the corporate veil in many cases turns upon the indiscriminate distinction between widely held and closely held corporations, the use of "buzz words" and attempts to characterize the relationship of directors and corporations. The result is a legacy of confusion. For breach of contract cases it is time for courts, lawyers and writers to cease the familiar, but erroneous, mantra that the corporation is merely the alter ego/agent/servant/master/puppet/simulacrum of the director(s), or vice versa, and therefore a sham;[78] it is time to treat all corporations, whether they be widely held or closely held, equally. It is time to consider the situation from a different perspective and to use a simpler approach, for if courts cannot agree upon the basis for holding directors liable, then the law becomes unfair to directors. In this regard the legislature, unwittingly or not, has, by stipulating the duties of directors, provided the necessary tools to determine a director's liability; there is no longer any need to dredge up a confusing *obiter dictum* over barred theatre entry.

Where a director is alleged to be liable for inducing breach of contract a court must first determine if the director was, at the relevant time, separate and distinct from the corporation. In order to do so the court must answer the following two questions:

1. Did the director act within the scope of her authority (through proper authorizing resolutions, by-laws or other documents)? and

2. Did the director act in the best interests of the corporation (and not for her own personal benefit and not for the benefits of others)?

If the answer to both these questions is in the affirmative there is no need to proceed further. The director will have then become indistinguishable from the corporation (and thereby protected by its corporate veil) and the tort of inducing breach of contract will have no application. One cannot induce the breach of one's own contract. If the answer to either of these questions is in the negative, then the corporate veil would not have been lowered in the first place, and the director will be seen as separate and distinct from the corporation and thereby

[78]Wolfgang Kaufmann, "Landlord's Overview — Strategies Where the Tenant has No Assets" found in the 1998 CBAO Continuing Legal Education Seminar entitled "Commercial Lease Default Remedies".

liable for the tort of inducing breach of contract. As a result, the title of this article is actually a misnomer! Liability attaches to directors not by circumventing or piercing the corporate veil, but rather by determining whether or not the veil has been lowered at all!

For careful and thoughtful directors the burden of proof should be easy to discharge through proper passing of by-laws and resolutions,[79] the careful preparation of board meeting minutes and personal notes with respect to the rationale behind the breach of contract. The approach described herein also allows corporations to take advantage of efficient breaches of contract without putting their directors at risk of personal liability.

The approach suggested in this article does not differentiate between corporations created to intentionally defeat creditors and *bona fide* operating corporations. The reader will also note the conspicuous absence of "buzz words" in determining a director's liability, and the lack of strenuous mental gymnastics in characterising the relationship between a director and the corporation. It is an easy approach for directors to understand and is broad enough to include cases where the tenant is indirectly prevented, by the actions of directors, from honouring its obligations under a lease or contract.[80]

The propensity of courts to pierce the corporate veil indicates that a director's immunity from liability is a "privilege" — not a "right" — which is "earned" by complying with her duties and obligations. Directors who subordinate the interests of the corporation to those of their own ambition or the ambitions of others will not be shielded from liability for breaches of contract. This, I think (to borrow McCardie J.'s turn of phrase) is the true answer.

[79]In *Spicer v. Volkswagen (Can.) Ltd.* (1978), 91 D.L.R. (3d) 42 (N.S. C.A.) two directors of a corporation where held liable for damages caused by their instructions to the corporation's bank not to honour cheques executed by a franchisee of the corporation unless they had personally countersigned the cheques. A board of directors resolution was required to give the bank such instructions but no such resolution was passed. The court held that the directors acted without authority which in turn caused a breach of the corporation's franchise contract and caused the franchisee damage.

[80](1969), 6 D.L.R. (3d) 71 (Sask. Q.B.), affirmed (1970), 11 D.L.R. (3d) 509 (Sask. C.A.). Disbery J. stated at pps 75–76 "One way in which a third party intending either to wrongfully interfere with the contractual rights of another or to procure a breach of another's contract of which he has knowledge, is to take such action as will render the performance impossible . . .Where, as here, the performance by one of the contracting parties consists of making money payments, I am unable to think of a more effective method of rendering, performance impossible than that of emptying the till by transferring the contracting party's assets to another person's."