summary of facts

- briefly state case facts

- mention issues at hand

- topics to which question relates

general law

Pursuant to the general principle elucidated in **Saloman v. Saloman**, ***X*** may encounter issues in holding ***Y*** liable as regards the concept of limited liability. Such flows from that of Separate Legal Personality (SLP) established in the seminal case of Saloman which elucidates, in essence, that an incorporated company is a recognized legal person with its own SLP - entirely divorced from its shareholders & employees. In continuation of the principle, the undert-akings of a subsidiary also cannot generally be associated as actions taken by the parent (ABC company). Given that in the aforementioned situation, the XXX activities were undertaken by ***Z*** rather than ***Y*** (the entity in contract with ***X***), the terms of the sale contract appear to remain adhered to. Hence, ***X*** cannot undertake legal actions against ***Y*** or its subsidiary ***Z*** as they are both to be regarded as separate legal persons in the eyes of the law.

In consideration of such, ***X*** may only be able to attain redress by bringing an action against ***Z*** for the liability of ***Y*** via lifting the corporate veil which exist between the two and imposing liability upon its shareholders (members). However, to lift said veil; which distinguishes between a company as a SPL and its members; OG must first succeed in persuading the court to 'lift the corporate veil'. It may be pertinent to note here that as ***Z*** is not currently under any threat of insolvent liquidation, statutory veil lifting is inapplicable. As such the foregoing discussion shall deliberate upon judicial means of veil lifting.

veil lifting

'Lifting' the veil may encompass a wider range of circumstances where liability is imposed on members or directors or the veil is looked through, including occasions where the Salomon principle remains intact.

in an attempt to circumvent situations of fraud, it at time proves necessary to lift the veil of incorporation - which would impose a liability upon the officers and owners of the company

✱ *veil lifting may be observed via statutory or judicial approaches*

statutory veil lifting

ONLY APPLIES WHEN COMPANY IS IN INSOLVENT LIQUIDATION

UNCOMMON & usually impose additional liability rather than ignoring separate personality

FRAUDULENT TRADING

defined u/s. 213, Insolvency Act, 1986 - civil liability for fraudulent trading

‣ at the time of closing/ winding up of company

‣ appears that business carried out with intent to: **(a)** defraud creditors of company, **(b)** creditors in general or **(c)** for any other fraudulent purpose

‣ any person' knowingly party to this act is liable - includes ALL officers & members

Re Todd - D committed fraud to company, had to contribute to debts upon liquidation

Re Patrick & Lyon - fraud involoves proving actual dishonesty, involving real moral blame upon commercial men

! very high threshold

✱ b/c if fraud proven u/s. 213, very likely s.992 of Companies Act, 2006 will also be imposed --- which incurs CRIMINAL LIABILITY

statutory veil lifting (cont)

Morphitis v Bernasconi - issue whether failing to pay instalment to landlord enough to discharge s.213

! Not every fraudulent transaction makes business one carried on with intent to defraud

! must be a causal connection/ nexus between the fraud and the loss

WRONGFUL/NEGLIGENT TRADING

implemented to remedy difficulties of imposing s.213

courts can lift veil if:

1 D knew/ ought to have concluded WHILE CONDUCTING BUINESS BEFORE LIQUIDATION

2 about real prospect of company not avoiding insolvent liquidation (insolvency)

3 only applies upon Ds -- INCLUDES SHADOW Ds

Re Produce Marketing - Ds continued to run business after knowing it had reached the point of no-return - liable to pay company's debts after insolvent liquidation

Re Road Gunner Organization - no proof of wrongdoing but negligence element present

judicial veil lifting

IF STATUTORY VEIL LIFTING IS INAPPL-ICABLE, RELIANCE UPON COMMON LAW RULES

In the given scenario, firstly, I shall assess the 'single economic unit' and 'mere façade' grounds, and then consider the use of agency, tort, or other means to avoid (rather than pierce) veil.

MERE FACADE

initially, common law rules were very uncertain

will only occur due to (1) POLICY REASONS (2) COMPANY WAS OPERATING AS A MERE FACADE (FRAUD)

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judicial veil lifting (cont)

- multiple cases arose before courts but ***Adams v. Cape Industries*** recognised no clear defination was provided

▸ defination since clarified in ***Prest v. Petrodale***

Prest v. Petrodale - exisitng legal obligation delibrately evaded NOT CONCEALED (***Rossendale v Hurstwood (2021)***)

Woolfson v. Strathclyde - requirement of company being used as a mere façade concealing true facts (***VTB v Nurtitek***)

- seems impropriety in company operations required

▸ using SLP to push liability onto another member of a group not impropriety (***Prest***)

Trustor v. Smallbone - must be a connection between impropriety & use of corporate form (***Prest*** - statute not to be used as vehicle for fruad)

- motivation behind INITIAL incorporation importance - if corporate form used to evade existing liability, veil lifted

! HOWEVER, initial formation not important anymore (***Ben Hashem v. Ali Shayif***) (***VTB v. Nutritek***)

Jones v. Lipman - land sold by individual who later transferred title to his incorporated company to avoid sale. veil lifted

▸ acc. to Salomon, company is SLP and cannot be sued but veil was lifted, held it was being used as a vehicle for fraud/ used as a mere facade

Trustor v. Smallbone - use of company to hide misappropriated money

Re Bugle Press - abuse of legislation

SINGLE ECONOMIC UNIT

- where 1 company owns all issued share capital in other companies - such is known as 'wholly owned subsidaries; defined u/s. 1159 CA, 2006

judicial veil lifting (cont)

✱ *strict application of Salomon to this principle would make parent company, in theory, untouchable by law for abused by subsidiary due to limited liability*

- L. Denning in ***DHN v. IRC*** - Consider the group structure as a 'single economic unit'

▸ disapproved by HoL in ***Woolfson v Strathclyde***

Re a Company - veil will be 'pierced' if necessary to achieve justice (also disapproved by HoL)

▸ Lowry disapproved interventionist approach, saying it will lead to uncertainty about safety of incorporation - use of policy to remove legal principles not welcomed

Gallagher - neg. impact of veil lifting on other legal aspects (Director Duties, individual tax principles, Foss v Hartbottle rule)

CURRENT AUTHORITY - ADAMS v.CAPE INDUSTRIES*

Facts: Cape (UK based company) held multiple subsidiaries, some of which operated in US. Cape denied enforcement of ruling by US courts against its subsidiaries (jurisdiction).

UK courts held US judgement to only be enforceable if Cape was present in US or had taken part in US proceedings (neither was true)

Adams sought to lift veil to show that Cape was present in US through its subsidaries

COURTS HELD ----- on what grounds should NOT veil be lifted

▸ Denied Re A Company - lifting to avoid injustice

▸ Denied DHN - 'single economic unit'

ACCEPTED GROUNDS

4. **mere façade concealing true facts** - to avoid pre-existing obligation (***Jones v. Lipman***)

judicial veil lifting (cont)

5. **single economic entity** - where upon proper reading of a CONTRACT or STATUE, appears that multiple companies in a group are being treated as one (***Beckett Investment v Hall***)

▸ however, given the limited scope of this ground, the veil remains largely 'opaque and impassable' (***Adams***)

Raja v Van Hoogstraten - recent shift of courts from narrow approach

6. **agency principle** - an arrangement in which one entity legally appoints another to act on its behalf (principle-agent relation)

▸ express - through agreement or contract

▸ implied - observance of daily transactions

Smith, Stone & Knight - criteria for agency established (profits, director, shareholders , constant control)

Millam v Print Factory - passes where attribution of high level of control by parent

✱ subsidiary must be incapable of independent action (***Re FG (Films)***)

✱ agency can't be presumed from closeness of operations between parent & subsidiary (***Yukong Line v Rendsburg***)

EXCEPTIONS TO ADAMS

Creasey v. Breachwood Motors - veil disregarded where common directorship + membership AND assets transferred b/w 2 w/o Ds considering their duties as such

{fa-asterisk}} overruled in ***Ord v. Bellhaven Pubs*** - reorganization of sister companies for legitimate reason is not mere façade (motive of Ds to be considered)

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judicial veil lifting (cont)

Prest v. Petrodel - where company under existing legal obligations deliberately evades it (Evasion) enforcement of obligation is deliberately frustrated by interposing a company under another company's control (Concealment) ---- VERY LIMITED APPLICATION

✱ ***Raja v Van Hoogstraten*** - shift from narrow approach, veil lifted even if formation of company was genuine

TORT

tortious liability against member (or director) for activities carried out through medium of the company has possibility of negating ***Salomon***

Godwin v Shell - however, courts generally hesitant to impose such on potential of damaging SLP principle (***Thompson v Renwick*** - criteria for establishing tortious liability, following ruling of ***Caparo v. Dickman***)

- parent & subsidiary in the same principle line of business --- NO DUTY IF PARENT NOT DIRECTLY ENGAGED IN SAME ACTIVITY [purely holding company] (***Thompson***)
- parent controlled subsidiary in matters related to commission of tort (proximity)
- parent knew/ought to have known subsidiary's actions risked injury

✱ *if proven, is it fair, just & reasonable to impose duty*

negligence

Chandler v. Cape - specific intervention by parent/// parallel DoC b/w parent & subsidiary employees and subsidiary & its employees ----------assumption of responsibility by the parent over health and safety policy at subsidiary created special relationship b/w employee and parent, giving rise to DoC. Damages payable

judicial veil lifting (cont)

! **Okpabi v Royal Dutch Shell (2021)** - courts seemed to move away from Chandler, now holding parent liable for tort of misfeasance (SUFFICIENT intervention by parent in subsidiary's operations)

- reinforces position set out in ***Vedanta v. Lungowe*** regarding the flexibility of the English courts' jurisdiction over parent company liability claims

Lubbe v. Cape - tortious liability applicable on non-employee victims too (***Lungowe v. Vedanta***)

AAA v. Unilever - complete parent's control over subsidiary not required (like that in agency req.). Even advice given will suffice

economic loss due to negligent misstatement

D or employee of company PERSONALLY be liable only if assumption of responsibility to create special relationship exists (*William v. NLHF

if tort of deceit involved, liability will flow to D or employee (***SCB v. Pakistan NSC***) (***Barclay v. Waypharm***)

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