LIFTING OF THE CORPORATE VIEL: IMPLICATIONS FOR GROUP COMPANIES

BY

GROUP 6

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ABSTARCT

The concept of a company as a separate entity from its shareholders is well known and recognized in many common law and civil law jurisdictions.

Generally, it is regarded as a fundamental aspect of corporate law and for this reason courts are loath to depart from it.

Nevertheless, the principle of separate personality is not absolute and in both common law and civil law countries the courts have the power to depart from it. Where this occurs, it is often said that the courts "pierce" or "lift" the corporate veil. This will usually, but not inevitably, lead to liability being imposed on another person, perhaps in addition to the corporate vehicle. This paper aims to compare and critically examine the circumstances under which veil piercing takes place against the objectives of incorporation in group situation. The countries examined are England, and the United States (US) which are common law jurisdictions, as well as the civil law countries of China and Germany. The main purpose of this comparison is to offer a reasonably comprehensive and thorough examination of how the principle of veil piercing, which has been formally adopted either through case law or legislation, is doctrinally applied by the courts in these jurisdictions.

The functional method in comparative law is inevitably employed in this paper, but we also consider other aspects. It will be seen that there are many parallels between the countries being compared, whether common law or civil law, in part because the historical circumstances leading to the rise of corporate personality were very similar, and also because the corporations laws in civil law countries referred to in this paper are legal transplants. The paper argues that in almost all the jurisdictions examined, some cases of veil piercing ought not to have been decided as such because doing so gives rise to chequered outcomes. Instead other legal tools should have been used particularly those in the law of torts.` We believe this paper fills a gap in the literature of comparative corporate law as the doctrine of veil piercing in group situation has shall be seen anon, the concept has been frequently misapplied and there is also a paucity of academic commentary in this area.

LIST OF CASES

1. ROWAYE JUBRIL v. FEDERAL REPUBLIC OF NIGERIA (CA/L/658C/2017)
2. Salomon V. A. Salomon and Co Ltd [1897] AC 22
3. OYEBANJI VS. STATE (2015) LPELR - 24751 (SC), PARA C, PAGE 41
4. ALADE VS. ALC (NIG.) LTD & ANOR. (2010) 19 NWLR (PT. 1226) 111 AT 130 E - H& 142 C – E
5. FDB FINANCIAL SERVICES LTD VS. ADESOLA (2002) 8 NWLR (PT. 668) 170 AT 174
6. IVY VS.PLYLER 246 CAL. APP. 2D 648.
7. ADEYEMI VS. LAN & BAKER (NIG.) LTD (2000) 7 NWLR (PT. 663) 33 AT 51
8. GARVIN VS. MATHEWS 193 WASH 152, 74, P. 2D 990, 994
9. TRENCO LTD VS. AFRICAN REAL ESTATE LTD 1976 4 S.C. P. 9.
10. BOLTON ENGINEERING CO. LTD VS.GRAHAM SON (1957) 1 Q.B. 159 AT 172 – 173
11. Littlewoods Stores Ltd. V. I.B.C. (1969)1 WLR1241
12. RE DARBY (1911)1KB95
13. RE BUGLE PRESS LTD (1961)CH.270
14. GILFORD MOTORS CO. LTD V. HORNE (1933)CH.935
15. JONES V. LIPMAN (1962) 1 WLR. 832
16. RE FG. (FILMS) LTD (1953)1 WLR. 484
17. FIRE STONE TYRE&RUBBER CO. LTD V. LLEWLLYN (1957)1 WLR.
18. DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [1976] 3 All ER 462)
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2. The Companies and Allied Matters Act, 1990, 2004 and 2020
3. Royal Exchange and London Assurance Corporation Act, 1719, 6 Geo. 1, c. 18 (Eng.)
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INTRODUCTION

Courts of law in Nigeria do not tolerate any attempt to hinder, delay, or defraud creditors by means of a resort to “the veil of corporate entity”. To allow the doctrine of corporate entity to intervene would be to convert a court of justice into a public laughing stock. Most often the corporate form of organization is adopted in an endeavor to evade a statute or to modify its intent.

Lord Denning MR. [1]aptly dressed down the application of the doctrine of lifting the veil of incorporation as follows:

…***The doctrine laid down in Salomon’s case has to be watchedvery carefully. It has been supposed to cast a veil over the personality of a limited liability company through which the court cannot see. But that is not true. The courts can, and often do pull down the mask. They look to see what really lies behind***…

[1]**In Littlewoods Stores Ltd. V. I.B.C. (1969)1 WLR1241**

In a land mark case of[2]**ROWAYE JUBRIL v. FEDERAL REPUBLIC OF NIGERIA**

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[2]COMPANY LAW - LIFTING THE VEIL OF INCORPORATION - Whether allegation of crime can lift the veil of incorporation of a corporate entity or voluntary associations: “The appellant's first issue questioned whether the Appellant a Managing Director of a Limited Liability Company, the 3rd respondent herein was rightly charged, prosecuted and held criminally liable jointly with the company, for the acts of the company in the execution of a contract of importation of PMS into Nigeria? The Learned Senior Counsel had argued that the Appellant and the 3rd Respondent are separate and distinct legal personalities, while the Appellant is a natural person; the 3rd Respondent is an artificial entity. Also, that the acts of the Appellant as a Managing Director are attributed to the 3rd Respondent while reliance was placed on Sections 64(B) and 65 of the Companies and Allied Matters Act (CAMA) which makes the company liable for acts of the Director/Managing Director. The Learned Senior Counsel stated the correct position of the Law but, failed to state the exceptions to the general rule in some cases. Despite the general principle of a separate corporate legal entity, the Courts in a plethora of legal authorities have held that the Courts have the power to lift the veil of incorporation when necessary, as in the commission of a crime. It is true that a company is an artificial person but, it can only act and operate through human agents and its officers. It has no mind of its own but, would act and direct through a person or persons as the personality of the company. The company cannot think nor do anything for itself. It is trite that the Court would lift the corporate veil of any company to find out who was behind the alleged crime as in the present case. There are circumstances where the veil of incorporation would be lifted. In a similar situation where the Appellant contended that he could not be held personally liable and that it is the company, being a juristic personality that should be held liable, in the Supreme Court decision of OYEBANJI VS. STATE (2015) LPELR - 24751 (SC), PARA C, PAGE 41, his Lordship Kekere-Ekun, JSC highlighted the definition of Lifting the "veil of incorporation" or piercing, "the corporate veil" as defined in Black's Law Dictionary 9th edition as: "The judicial act of imposing personal liability on *otherwise immune corporate officers*, directors or shareholders for the corporation's wrongful acts." His Lordship went further to give the circumstances under which the "veil of incorporation" of a company may be lifted. At PP 41 - 42, paragraph D held that: "The circumstance in which the veil of incorporation" of a company may be lifted was succinctly stated in the case of: ALADE VS. ALC (NIG.) LTD & ANOR. (2010) 19 NWLR (PT. 1226) 111 AT 130 E - H& 142 C - E where this Court held thus: Per Galadima, JSC at 130 E - H. One of the occasions when the veil of incorporation will be lifted is when the company is liable for fraud as in the instant case. In FDB FINANCIAL SERVICES LTD VS. ADESOLA (2002) 8 NWLR (PT. 668) 170 AT 174, the Court considering the power of a Court to lift the veil of incorporation held thus: "The consequence of recognizing the separate personality of a company is to draw a veil of incorporation over the company. One is therefore generally not entitled to go behind or lift this veil. However, *since a statute will not be allowed to be used as an excuse to justify illegality or fraud* it is in the quest to avoid the normal consequences of the statute which may result in grave injustice that the Court as occasion demands have a look behind or pierce the corporate veil." See further ADEYEMI VS. LAN & BAKER (NIG.) LTD (2000) 7 NWLR (PT. 663) 33 AT 51."Per Muntaka-Coomassie, JSC, at 142 C - E. It must be stated unequivocally that this Court, as the last Court of the land, will not allow a party to use his company as a cover to dupe, *cheat and or defraud an innocent citizen who entered into a lawful contract with the company only to be confronted with the defence of the company's legal entity as distinct from its directors."* The allegation of crime lifts the veil of corporate existence and unmasks the face of the suspected criminal to face prosecution. His Lordship Galadima, JSC in the leading judgment above in OYEBANJI VS. STATE (supra) AT P. 21, PARA F, held that: "Where the veil is lifted, the Law will go behind the corporate entity so as to reach out to individual member of the company whose conduct or act is criminally reprehensible." ?In the same judgment, in his contributory judgment, his Lordship Fabiyi, JSC emphasized at p. 25 paras. C - E thus: "Alter ego' is said to mean 'second self'. Under the doctrine of "alter ego", Court merely disregards corporate entity and holds individual responsible for act knowingly and intentionally done in the

name of the corporation. IVY VS.PLYLER 246 CAL. APP. 2D 648. To establish the doctrine, it must be shown that the individual disregarded the entity of the corporation and made it a mere conduct for the transaction for his own private business. The doctrine simply fastens liability on the individual who uses the corporation merely as an instrumentality in conducting his own personal business. Liability springs from fraud perpetrated not on the corporation but on third persons dealing with corporation. GARVIN VS. MATHEWS 193 WASH 152, 74, P. 2D 990, 994 (Black's Law Dictionary Sixth Edition Pages 77 - 78)." In concurring with the above principles guiding the lifting of the veil of incorporation, on fraudulent acts by a top officer of a company his Lordship, Rhodes-Vivour, JSC at pages 27 - 28, paras D - A in the judgment held that: *"The separation of the personality of a company and the members are to be maintained.* That is to say a company is legally different from his subscribers and directors. See, TRENCO LTD VS. AFRICAN REAL ESTATE LTD 1976 4 S.C. P. 9. There comes a time though, when that separateness is *not maintained*. For example when fraud is committed by top officials of the company and these officials want their fraudulent activities to appear as the acts of the company. In such situations the judiciary decides that the separation of the personality of the company and the members is not to be maintained. This is done by lifting the veil of incorporation, or parting the veil of incorporation to see behind the veil who is responsible for the fraudulent acts." ?There is no doubt that the Appellant is the Managing Director of the 3rd Respondent (Brila Energy Limited) while the deceased, AlhajiSaminuRabiu was the Managing Director of the 2nd Respondent (Alminnur Resources Limited). The 2nd Respondent obtained a permit from the Department of Petroleum Resources (DPR) for the importation of 10,000 MT of PMS specifically for Amsterdam, Netherlands; vide Exhibit 'A' which stipulated thus: "The title of this permit resides with the beneficiary company and shall not be assigned to a third party under any circumstance." But, contrary to the terms of the PPPRA permit which prescribed that title to the permit resided with the beneficiary company, the deceased Managing Director of the second respondent and the appellant, the Managing Director of the 3rd respondent entered into a memorandum of understanding (MOU) as per Exhibit 'W', wherein the 2nd respondent agreed with the 3rd respondent to assign its allocation for the importation of the PMS as per the Letter of the PPPRA of 5th April, 2011. The question is: was the lifting of the veil of Brila Energy Limited by the trial Court for the conviction and sentence of the appellant right in the present circumstances of this case? To start with, the appellant qualified as the 'alter ego' of Brila Energy Limited. The appellant started the ball rolling with the deceased Managing Director of the 2nd respondent, which led to the alleged offences for which the appellant, 2nd and 3rd respondents jointly stood trial and were convicted and sentenced by the trial court. The appellant was the directing mind and/or arrow head of Brila Energy Limited. His role kick started the series of events that followed the permit for the importation of PMS granted to the 2nd Respondent, in conjunction with the deceased to the benefit of the 2nd and 3rd Respondents. The appellant was the human personality behind the activities of the company, the 3rd respondent. *See, BOLTON ENGINEERING CO. LTD VS.GRAHAM SON (1957) 1 Q.B. 159 AT 172 - 173, Denning L. J. I am of the humble view that lifting the veil of incorporation of any company to find out who was behind the fraudulent and improper conduct is proper, as done by the learned trial judge.* It is necessary as in this case, where the canopy of legal entity is attempted to be used to perpetuate a wrong and protect individuals from crime, fraud in this case under the guise of shifting responsibility and liability for his wrongful acts to the company, waving the flag of separate legal existence of a company. The Appellant used the 3rd respondent to commit the offences for which he was charged, tried and convicted by the trial Court. See, ALADE VS. ALIC (NIG) LTD and ANOR (2010) 19 NWLR (PT. 1226) 111 AT P. 130, PARAGRAPHS E - H and P. 142 PARAGRAPHS C - E and ADEYEMI VS. LAN & BAKER (NIG) LTD (2007) 7 NWLR (PT. 663) 33 AT 51. From all of the above, I hold that the trial Court was right in lifting the veil of incorporation of the 3rd Respondent and holding the appellant personally liable as the 3rd and 2nd respondents were used by the appellant and the deceased Managing Director of the 2nd Respondent as vehicles or medium for criminal acts. The trial Court was right to have held all the defendants jointly and severally liable."

(CA/L/658C/2017) (On Monday, the 19th day of March, 2018)

Thispaper aims to compare and critically examine the circumstances under which veil piercing takes place in group situation against the objectives of incorporation. Both common law jurisdictions, including England and the United States, and civillaw countries, including China and Germany, are discussed in this paper. The main purpose of this comparison is to offer a reasonably comprehensive and thorough examination of how courts in these jurisdictions apply the principle of veil piercing to group situation, which has been formally adopted either through case law or legislation. This paper employs the secondary method in comparative law, but we also consider other aspects, including the law in context method and the historical method. The countries being compared, whether they use common law or civil law systems, share many parallels in part because the historical circumstances leading to the riseof corporate personality were very similar, and also because the corporate laws in civil law countries referred to in this paper are **legal transplants**. The paper argues that in almost all the jurisdictions examined, some cases of veil piercing ought not to have been decided as such because such decisions give rise to sub-optimal outcomes. Instead, other legal tools should have been used, particularly those in the law of torts. We believe this paper fills a gap in the literature of comparative corporate law, as the doctrine of veil piercing has been frequently misapplied and there is a paucity of academic commentary in this area. This paper proceeds as follows. In the next part, we will outline the historical context that led to the rise of the modern corporation. After this, the paper sets out the conceptual framework behind separatepersonality and veil piercing. Thereafter, it will discuss the approaches to veil piercingin group situation in the jurisdictions mentioned earlier and critically evaluate these approaches in light of the rationale behind separate personality and other relevant objectives in corporate law.

CHAPTER 1

CONCEPTUAL FRAMEWORK OF LIFTING THE VEIL IN GROUP SITUATION

1.1 HISTORY AND MEANING OF VEIL OF INCORPORATION

Certain business arrangements, including forms approximating to the modern partnership, can be traced back to ancient Rome and perhaps even before. Today, we are familiar with the limited partnership as well as the general partnership, both of which haveroots in Roman times. The Roman societas(partnership) allowed the socius (partner) to contribute capital or labor towards any enterprise, ***The main disadvantage of the societas (and the modern partnership) was the absence of limited liability***also did not have perpetual succession and would be terminated upon the withdrawal or death of one of the partners.[3]

From the 16th century in England there were attempts to create business organizations that had the same characteristics as the ecclesiastical and the lay. Of the latter, there were municipal corporations during the time of William the Conqueror. These corporations had the right to use a common seal, make by-laws, plead in the courts of law and hold property in succession. Boroughs, whether they had or didnot have a royal charter, also apparently held these privileges. However, the rights that were not

[3]Id. at 455–56; Ulrike Malmendier, Law and Finance "at the Origin"47J.ECON.LITERATURE 1076, 1088 (2009).

held through a charter were not safe until the Crown recognized them. The authority of the Crown supplemented natural prescriptive right.England Company emerged in the 16th century because of the demands of foreign trade which required capital in large amounts to betide up for lengthy periods. In essence, such 'companies' continued to be partnerships. They differed from a typical partnership because they generally consisted of many members, and this meant thatthe articles of agreement between theparties wereusually very different.[4]As a result of the transferability of shares, speculative activity took place. The British Parliament intervened to curb the gambling mania by enacting the 'Bubble Act' of 1720.[5]*The purpose of the Act was to preventpersons from acting as if they were corporate bodies*, or to have transferable shares without any authority from the British Parliament.The experience of England is mirrored in other jurisdictions that over time adopted liberal corporate laws to facilitate development. In the United States, as in England, a number of alternatives to the corporate form were used from time to time. These included the limited partnership, the business trust, and the joint stock company and it was by no means certain that a corporation was the best way to raise and manage money for enterprise[6].

After the American Revolution, a strong and growing prejudice in favour of equality opposed the English tradition that corporate powers be granted only in rare instances. This led almost immediately to theenactment ofgeneral incorporationacts for ecclesiastical, educational, and literary corporations. It was also easier to obtain corporate charters from the new state legislatures than it was in England, leading to a considerable extension of corporate enterprise in the field of business before the of the eighteenth century. ***The United States was 30 years ahead of English practice, as charters were granted fairly frequently between 1800 and 1830, albeit with conditions and restraints placed on the corporate bodies.*** Special chartering, however, smacked of privilege and set off a reform movement that sought to bring about equal access to corporate chartering. States also began to compete for corporate charters in order to increase taxes paid by corporations.[7]It will be clear from the foregoing that the development of corporate law in **China (and Japan**) was driven significantly by socio-political objectives. As both countries adopted the ***German civil law model***, their corporate laws were at one time heavily modeled after German corporate law, although American law has since become increasingly influential. In many other parts of Asia

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[4]WILLIAM WATSON, ATREATISE OF THE LAW OF PARTNERSHIP 3, 101 (2d ed. 1807); see also NATHANIE L LINDLEY, A TREATISE ON THE LAW OF COMPANIES,CONSIDERED AS A BRANCH OF THE LAW OF PARTNERSHIP608–09 (5th ed. 1889).

[5]Royal Exchange and London Assurance Corporation Act, 1719, 6 Geo. 1, c. 18 (Eng.).
[6]LAWRENCE M.FRIEDMAN, AHISTORY OF AMERICAN LAW176–77 (1973).

[7]JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 7–8 (1917).

that were colonized such as Singapore, colonial governments introduced Western corporate law and naturally mirrored the law in the colonizing country.

The veil of incorporation is one of the chief advantages of incorporation but in reality, the business is carried out by, and for people. As laid out in Salomon case, "in questions of property and capacity, of acts done and rights acquired or, liabilities assumed thereby…the personalities of the natural persons who are the companies corporations is to be ignored". But the veil has its limits and there are situations where the court will lift the veil to see what lays behind Incorporating companies through registration was introduced in 1844 and ***limited liability followed in 1855***.[8] In ***1897, the House of Lords (now the Supreme Court) cemented these doctrines of separate corporate entity and limited liability through the case of Salomon v. Salomon & Company.***[9] In that case the court laid down the principle that a company is a legally separate from its owners. This principle is referred to as the ***'veil of incorporation'***

Early 1809, it was perceived that in many cases the literal application of the notion that a corporation is only a legal entity, and nothing more, would work injustice. ***The United States Supreme Courtdid not regard it as reasonable that the operation of the concept should be permitted to oust the federal courts of their jurisdiction***.Lord **Denning** ***has remarked that 'we know that in many respects a group of companies are treated together for the purpose of accounts, balance sheet, and profit and loss accounts***. **Gower*****too in his book says, "There is evidence of a general tendency to ignore the separate legal group"***. However, whether the Court will pierce the corporate veil depends on the facts of the case. The nature of shareholding and control would be indicators whether the Court would pierce the corporate veil. The Indian Courts have held that a 'single economic unit' argument could work in certain circumstances. These circumstances would depend on the factual control exercised. This view is strengthened by the Supreme Court decision (cited in Novartis v. AdarshPharma[10]) in New Horizons v. Union of India[11]. State of UP v. Renusagar was decided in 1988[12]. Back in the year 1988 also, in Renusagar case, the Court proceeded, on the basis of prior English law which had accepted the 'single economic unit' argument. Thus, Renusagar case seems to support the conclusion that a 'single economic entity' argument would succeed in India for lifting the corporate veil.

[8]Limited Liability Act 1855, 18 & 19 Vict. c 133 (14 August 1855)
[9]Salomon v A Salomon and Co Ltd [1897] AC 22
[10]Novartis v. AdarshPharma
[11]***New Horizons v. Union of India***
[12]***UP v. Renusagar***

Our Apex court in **Aminu Musa Oyebanji V. The State**[13] gave a judicial blow of the insightful meaning of lifting, piercing corporate veil in Nigeria: the issue set out for determination in the instant case was whether the lifting of the veil of Baminco Nigerian Limited by both the trail court and the court of Appeal as the plank for conviction and sentence of the appellant was not right in the circumstances of the case. On meaning of lifting, piercing veil of incorporation, the Supreme Court held at page 275 in the above case to mean:

…***the judicial act of imposing personal liability on otherwise immune corporate officers, directors or shareholders for the corporation's wrongful act***[14]***.***

According to Per Galadima JSC at pages 291-292, the court below rightly disregarded the corporate entity of the Baminco Nig. Limited and paid regard to entities behind the legal façade or veil of incorporation in the interest of justice. He quoted Lord Denning in Bolton Engineering co. Ltd V. Graham and sons[15]he posited inter alia:

…A company may in many ways be likened to human body. It has brain and nerve center which Controls what it does. It also has a hand whichholds tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company andcontrol what it does. The state of mind of the company and is treated by law as such.

According to his lordship, the court will not allow a party to use its company as a cover to dupe, defraud or cheat innocent individuals or a company who entered into lawful contract with it only to be confronted with defence of the company's legal entity as distinct from its directors. As it has been observed elsewhere, most companies in this country are owned and managed solely by an individual, while registering the members of his family as the shareholders. Such companies are nothing more than one man businesses. Hence there is the tendency to enter into contract in such company name and later turn around to claim that he was not a party to the agreement since the company is a legal entity. See[16]in the above case his Lordship disregarded the corporate veil and he paid regard to the entities behind the corporate veil.

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[13] NWLR {2015} pt 1479: the dictum of:
John AfolabiFabiyi JSC
Suleiman GaladimaJSC
Bode Rhodes Vivour JSC
Clara Bata Ogunbiyi JSC
KudiratMotonmoriOlatokunbokekereEkun JSC
[14]At page 305, para B.
[15] {1957}1 QB 159 at 172=173
[16]AkinwunmiAlade V. Alic Nigeria Limited and anor {2010}12 SC {Pt. 1226} 111

Per Rhodes Vivour, JSC[17] in corroboration of the concurrent decision by the trail and Appeal court in the case of **Oyebanji V. State**[18] also had this to say about the exception to entity principle succinctly:

…the separation of the personality of a company and the members are to be maintained. That is to say a company is legally different from its subscribers and director's.[19] ***There comes a time though, when that separateness is not maintained. For example when fraud is committed by top officials of the company and these officials of the company wants their fraudulent activities to appear as the acts of the company. In such situation the judiciary decides that the separation of the personality of the company and the members is not to be maintained. This is done by lifting the veil of incorporation or piercing the veil of incorporation to see behind the veil that is responsible for the fraudulent acts.***

According to his Lordship PerKekereEkun JSC[20], he stated categorically that "the circumstances in which the veil of incorporation of a company may be lifted was succinctly stated in the case **Alade V. Alic Nigeria limited**[21]**…** ***he said further that the court as the last court of the land will not allow a party to use his company as a cover to dupe, cheat and or defraud an innocent citizen who entered into a lawful contract with the company only to be confronted with the defence of the company's legal entity as distinct from its directors…***

The above lays to rest the meaning of lifting the veil of incorporation given judicial flavor by the highest court of our nation Nigeria, our careful elucidation reflects the views of jurists, academicians, and scholars in this fields of legal studies vis-à-vis the vast research by us in the careful jurisprudential curiosity and sojourn thus far.

[17]Oyebanji v. State

[18]**supra**

[19] **See Trenco Limited V. African Real Real Estate Limited. {1978}4 SC p9.**

[20] **At page 305=306 para C**

[21] **supra**

CHAPTER 2

LEGAL, REGULATORY FRAMEWORK OF LIFTING THE VEIL IN GROUP SITUATION IN NIGERIA

According to Sec. 42 of CAMA, 2020:

"…the concept of the legal entity of the company distinct from its members became finally established at common law in the case of Salomon V. Salomon & Co. Ltd. "

According to Orojo at page 85 of his text: … although the legal personality of company distinct from those of the members has for long been recognized together with the consequences, there are certain exceptional circumstances in which the laws disregard the corporate entity and pays regard instead to the economic realities behind the legal façade (Gower, op.cit, P.112)…

When the veil of incorporation is lifted in accordance with statute or by the court in the interest of Justice, in such cases, the law goes behind the corporate personality to the

individual members or ignores the separate personality of each company in favor of the economic entity constituted by a group of associated companies.[22]

The following are examples of circumstances in which the "veil" may be lifted:

1. Number of members below legal minimum
2. Number of Directors less than two
3. Personal liability of directors and officers
4. Reckless or fraudulent trading
5. Company not mentioned on bill of exchange
6. Holing and Subsidiary companies
7. Investigation into related companies
8. Company acting as agent for shareholders or as a sham.

According to Nelson C.S. Ogbuanya:

… at common law, veil of incorporation can be lifted where the device of incorporation of the company has been employed to:

A. Perpetrate fraud
B. Carry out improper conduct/ unfair Act
C. Defeat the aim of the law or
D. Evade legal obligation

He cited the below cases to drive home his point:

1. RE Darby (1911)1KB95
2. RE Bugle Press Ltd (1961)CH.270
3. Gilford Motors Co. Ltd V. Horne (1933)CH.935
4. Jones V. Lipman (1962) 1 WLR. 832
5. RE FG. (Films) Ltd (1953)1 WLR. 484
6. Fire Stone Tyre&Rubber Co. Ltd V. Llewllyn (1957)1 WLR.464

The two authors work cited above elicit the fact that one of the instances when veil can be lifted is a group situation scenario which is the crux of this presentation. According to learned author Orojo:

"… Where at the end of its financial year a company has subsidiaries, must prepare group financial statement dealing with the state of affairs and the profit and loss of the company and the subsidiaries, unless otherwise permitted by the Act. These must be

[22]J.OlakunleOrojo, Company Law and Practice in Nigeria, 3rd edition, printed and published by Mbeyi& Association Nig. Limited (1992).

laid before the company in general meeting when the company's balance sheet and profit and loss account are so laid. Furthermore, the veil of incorporation may be pierced to discover the realities of a situation, for example where a group of companies is virtually a partnership or where one of the companies is a trustee of the other in respect of some property in issue. See DHN Food Distributors V. London Borough of Tower Hamlets (1976)3. All ER.462…."

According to the learned author, the effect of such an account is to detract from the independent legal personality of each of the companies and to show that they are related and are subject to examinations behind the incorporation "veil".[23]

In a celebrated case between DHL Food Distributors Ltd V. Tower Hamlets LBC [24] in this case, DHL imported groceries and provision. Its premises were owned by its subsidiary which was called Bronze. It had a warehouse in Malmesbury Road, in Bow, the east end of London. Bronze's directors were DHN's. Bronze had no business and the only assets were the premises, of which DHN was the licensee. Another wholly owned subsidiary, called DHN Food Transport Ltd owned the vehicles. In 1970 Tower Hamlets London Borough Council compulsorily acquired the premises to build houses. As a result, DHN had to close down. Compensation was already paid to Bronze, one and a half times the land value. DHN could only get compensation too if it had more than a license interest. The lands Tribunal held no further compensation was payable.

The court of Appeal held that DHN and Bronze were part of a single economic entity. Therefore, as if DHN had owned the land itself, it was entitled to compensation for loss of business.[25]

LIFTING THE VEIL OF INCORPORATIONMEANING AND EFFECT:

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[23]Nelson C.S Ogbuanya in his text, Essentials of Corporate Practice in Nigeria, Printed by Novena Publishers ltd at page 197.

[24] {1976} 1WLR 852 – is a UK company law case where on the basis that a company should be compensated for loss of its business under a compulsory acquisition order, a group was recognized as a single economic entity.

[25] According to Lord Denning MR. in his judgment in the instant case, one of point before the court was that we should lift the veil of incorporation and treat DHN as the owners. Lord Denning MR posit in his judgment that: we all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet, and profit and loss account. They are treated as one concern. He relied on Professor Gower in his text in modern company law, 3rd ed. 1969, p. 216 which 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… according to the master of rolls, this is especially the case when a parent company owns all the shares of the subsidiaries, the subsidiaries are bound hand and foot to the parent company. He gave a striking instance in the House of Lords decision in Harold Holdsworth and co. Ltd V. Caddies {1955)1 WLR 352. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of compensation which should justly be payable for disturbance. The three companies should for present purposes, be treated as one, and the parent company DHN are entitled to cliam compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

The principle of corporate personality, which is the bedrock of company law, is to the effect that as from the date of Incorporation, the subscribers to the memorandum together with such other persons as may from time to time, become member of the company, shall be a body corporate, distinct, and separate from its members. The separation of the company from its members exemplified in the corporate personality principle is important to corporate governance. The principle which was established in the case *Salomon v. Salomon'* has been applied in a long-line of cases. The author posit inter alia that the principle of lifting the corporate veil is a qualification to the corporate personality principle as well.

The principle, which is also preserved by Section 42 of CAMA, protects the corporate image of incorporated companies. It is strictly adhered to except where the circumstances are compelling and irresistible for the corporate veil to be removed or pierced so that individual members or officers behind certain actions can be seen and punished as appropriate for whatever wrongdoing they have committed against the company or outsiders.

There are however, exceptions to the corporate personality principle. The exceptions constitute such instances when the courts will be prepared to pierce through the veil of incorporation and do justice to the case at hand. The rationale for the lifting of the veil was captured by Lord Denning, MR, when he said as follows:

The decision in Salomon has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through -which the courts cannot see. But that is not true. The courts can and do often draw aside the veil. They can and often do pull off the mask. They look to see what really lies behind...

The Act has provided for a number of cases when the veil of incorporation will be lifted. There are also a lot of situations when the courts will be willing to disregard the corporate veil and make orders that will meet the justice of the case. Admittedly, the courts have not been very consistent in the application of the rules relating to lifting of the veil of incorporation such that a learned Author has advocated for a consistent and clear cut set of rules to be applied by the courts

Lifting the Veil under Statute (CAMA)

The Act has made provisions for some situations when the veil will be lifted. Some of these situations are as follows:

(i) **Membership falling below the legal minimum**

The minimum number of members required to form a company and carry on the business of the company is two and one as appropriate. If a company carries on business without the required minimum and it does so for a period that is more

than 6 months, every director or officer of the company during the time of the default who were aware of the default shall be severally and jointly responsible for whatever debt the company may incur during the period.

(ii) **Liability for fraudulent trading**

If in the course of winding up of a company, it appears that any business of the company has been carried out in a reckless manner or with the intent to defraud the creditors of the company or any other person, the court may disregard the legal personality of the company and declare that such persons who were parties to such businesses be personally liable for all or any of the company's debt and other liabilities as the court may order.

(iii) **Reduction in the Number of Directors**

Under section 271(1) of the Act, every company registered either before or after the commencement of the Act shall have at least two directors. Where the number of directors falls below two, the company is expected to appoint another Director within one month. Where a company carries on business with the knowledge that the number of directors has fallen below two, a director or a member having that knowledge shall be liable for all the liabilities and debts incurred by the company during the period when the company so carried on business.

(iv) **Liability of Directors and Officers**

By virtue of provisions of Section 276, directors and other officers of a company are personally liable where they have failed to apply money or other property received for the purpose for which it was received with intent to defraud. The defaulting directors or other members shall be personally liable to the third party from whom the money was received.

(v) **Holding and Subsidiary Companies**

If a subsidiary company is owned and controlled by the Holding company, but it must be noted in law, that; they are two separate companies. There are some instances when the separate legal personalities of the companies will be disregarded and treat the subsidiary company as the holding company. Section 336 of the Act requires a holding company to prepare group financial statements that deal with the state of affairs and profit or loss of the company and the subsidiaries.

(vi) **Company limited by Guarantee carrying on business for profit.**

Section 26(3) of the Act provides that a company limited by Guarantee shall not be incorporated with the object of carrying on business to make profit and distributing same to its members. Where this is done with the due knowledge of the members,

they shall be personally liable for the discharge of all debts and liabilities incurred by the company in the course of carrying on the business.

(vi) **Illegal or unauthorized use of a company seal**
Section 631 (4) provides that where an officer of a company uses or authorizes the use of the company's seal illegally or fraudulently or signs or authorizes to be signed a bill of exchange or promissory note on behalf of the company, such officer shall be guilty of an offence and shall be further personally liable to the holder of any such bill for the amount thereof.

(viii) **Taxation purposes.**
Under Section 85 of the Companies Income Tax Act,the veil of incorporation will be lifted where it is used to evade payment of taxation.

Lifting the Veil by the Courts
Circumstances under which the courts will remove the veil of incorporation include the following:

Illegality
The veil of incorporation will be removed where the purpose for which it is used is illegal. Where for example, the members of the company are nationals of an enemy country, the court will not hesitate to lift the veil and discover the identity of the true nationals who are members of the company. In *Dailmer Co. Ltd v. Continental Tyre& Rubber Co. (Great Britain) Ltd* an action was brought by the plaintiff against the defendant company[26]. It was discovered that all members of the company, except one, were Germans even though the company was situated in England. The action was struck out because allowing the action and payment of the indebtedness would have amounted to trading with an enemy.

Also, in *Merchandise Transport Ltd v. British Transport Commission*[27]the parent company attempted to obtain licenses through its subsidiary when it was realized that it would not succeed if the application had been made directly by it. The licensing authorities refused to grant the licenses to the subsidiary to which the parent company had transferred the vehicles because both Companies were one and the same.

Fraud or sham or Sharp Practice
Where the veil is used to perpetrate fraud or as an instrument of a sham or sharp practice, the veil will be dislodged by the courts. In *Guilford Motor Co. Ltd* v. *Horne*[28]employee of the plaintiff company formed a new company to evade a covenant

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[26]**Dailmer Co. Ltd v. Continental Tyre& Rubber Co. (Great Britain) Ltd**
[27]**Merchandise Transport Ltd v. British Transport Commission**
[28]**Guilford Motor Co. Ltd v. Horne**

he had with the company not to establish business within the vicinity of his former employer's business in order not to solicit for her customers. He incorporated a company with his wife and one other person as shareholders and sent out circulars to his former employer's customers. In an action for an injunction against the newly-formed company, it was held that the company was a sham, a device put up by him to evade his obligation under his contract of employment with his employer. In the words of Lord Honewort, the Master of Rolls,

The company is a company which is obviously carried on wholly by it. I am quite satisfied that this company was formed as a device, a medium, in order to mask the effective carrying on of a business. The purpose of it was to try to enable him hide, under what is a cloak or a sham to engage in business which, on consideration of the agreement which had been sent to him just about 7 days when the company was incorporated, was a business in respect of which he had a fear that the plaintiffs might intervene and object.*

In *Jones* v. *Lipman,the* defendant entered into a transaction with the plaintiff for the sale of his house. Before completion of the transaction, he formed a new company and transferred ownership of the house to the new company to enable him avoid his obligation under the contract. The court held that a decree of Specific performance could be issued against the company which was a sham and a device to avoid his obligation to the plaintiff.

Further, in *Wallersteiner*v. *Moir*a loan was made by a company to another company formed for the purpose of violating the provisions of the companies Act which prohibited giving of loan to directors. It was held that the company was the director's puppet and the loan should be treated as having made directly to him.

The court will also not allow the veil of incorporation to be used for an improper purpose or conduct. *In Re Burgle Press Limited*[29]*,* the majority shareholders of a company incorporated another company to enable them buy the shares held by the minority which they were unable to do directly because of the provisions of the Articles of Association. The new company's bid for the purchase of the shares of the minority was rejected holding that the company was incapable of acquiring the shares as the shareholders were the same with the majority shareholders in the other company. In the words of Harman, J,

The company was nothing but a little hut built around the majority shareholders and the whole scheme was a hollow sham. Although the transferee company was in law distinct from its only two shareholders, in substance it was the same as the majority shareholders in the transferor company.[30]

[29]**Re Burgle Press Limited**
[30]**Extracted from a text on company law written by SolagbadeOluwole, Esq. In line with new CAMA 2020.**

CHAPTER 3

A COMPARATIVE OVERVIEW OF THE CONCEPT OF LIFTING THE VIEL IN GROUP SITUATION IN OTHER JURISDICTIONS

The Supreme Court of the UnitedStates, from its inception, had taken over the language of the year books, and proclaiming its allegiance, had agreed with coke that "a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. Subsidiary Companies in a Group and The Agency Principle During the second half of the twentieth century, the English courts flirted also with a different approach to corporate veil piercing where the companies under consideration were part of a corporate group and the ultimate shareholder of those companies was also a corporation.[31]In that context, the courts allowed voluntary veil piercing (i.e. veil piercing sought by the shareholders themselves) on the basis that: (i) the subsidiary

[31] (See generally Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 116; DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [1976] 3 All ER 462)

company was a mere agent of the holding company; or (ii) the companies in the group were a "single," "economic entity" and were in substance a partnership[32]

In Smith, Stone and Knight Limited v. Lord Mayor, Aldermen and Citizens of the City of Birmingham the court pierced the corporate veil to assist shareholders in a company, not to hold them liable for the corporation's debt. This is sometimes referred to as a "reverse piercing of the veil," although voluntary piercing may be a better term.The claimant, Smith, Stone & Knight Limited ("Smith") owned a property in the City of Birmingham. Smith had a subsidiary called the Birmingham Waste Company Limited ("the Waste Company") which carried on business on the premises for the benefit of Smith. The subsidiary company (i.e. the Waste Company) was technically the entity that carried on business on the premises. The City of Birmingham wanted to purchase the property under its compulsory expropriation powers in order to build a technical college.

In an effort to maximize the compensation to which Smith (the ultimate holding company) would be entitled, Smith made a claim for compensation, asserting that the subsidiary (which carried on business on the premises) was merely its agent and that the true owner of the business was Smith. The court upheld Smith's claim on the basis that the Waste Company was a mere agent of Smith with no independent business of its own. In concluding that the Waste Company was the agent of Smith, the Court utilised a series of questions that were usually used in tax cases:

(i) were the profits of the subsidiary reported as the profits of the holding company?
(ii) "were the person[s] conducting the business appointed by the parent company?
(iii) was the holding company the "head and brain of the trading venture?"
(iv) did theholding company "govern the venture, decide what should be done" and what capital should be invested?
(v) did the holding company "make the profits by its skill and direction?"
(vi) was the holding company "in effectual and in constant control?"

Some of the factors that influenced the court in concluding that the Waste Company was an agent of Smith, were that the claimants kept all of the books and accounts of the Waste Company, "[t]here was no tenancy agreement of any sort" between Smith and the Waste Company, no rental payments, and, although the Waste Company was debited a pro rata share of the overheads this amounted to nothing more than a mere book entry.83 It is important to emphasize that Smith resolved the case on the basis that the Waste Company was a mere agent of the claimant, Smith, so that the business that the Waste Company carried on was in substance the business of Smith.

The principles enunciated in Smith are at first blush appealing when a creditor of a subsidiary seeks to impress liability upon a company that is the sole shareholder of that

[32] See Smith, Stone & Knight Ltd. v. Lord Mayor [1939] 4 All ER 116 at 120

subsidiary company. As the purpose of forming a business as a limited liability company is to protect individuals who choose to invest their capital in the company, one may well ask why a corporate holding company should have the same protections. However, in the Smith case, the court was not piercing the corporate veil in order to satisfy the claim of a jilted creditor of the subsidiary. The court was piercing the veil to assist the veryShareholders that had created the corporate structure in the first place presumably because the court thought it seemed unfair to deprive them of fair compensation arising out of the expropriation. This seems to be an unsound basis for coming to the rescue of the shareholders. One might well ask whether the court would have been as quick to pierce the corporate veil of the subsidiary to saddle liability on the holding company for a debt of the subsidiary. Where shareholders choose to hold property through a company, they have the benefit of limited liability; they should also have to suffer whatever disadvantages that may cause.

Nevertheless, the agency principle may be an appropriate way to saddle the holding company with liability to a creditor to the extent that the courts will recognize it again in the future. A similar situation arose in DHN Food Distributors Limited v. London Borough of Tower Hamlets.

That case also addressed a claim for compensation for expropriation by the City of London. The property was owned by a company called Bronze, which was a wholly owned subsidiary of the claimant, DHN. DHN could not obtain compensation for the disruption of its business unless it could lift the corporate veil and treat Bronze as its alter ego. In a fairly robust judgment, Lord Denning, without referring at all to Smith, Stone & Knight, held that the veil should be lifted and that the holding company should be permitted to claim compensation for business disruption. The reverse veil piercing that took place in DHN Food was accomplished with less analysis than in Smith, Stone & Knight. There was no attempt to hold that Bronze was a mere agent of DHN.

First, the court considered the "single economic unit" argument and resoundingly rejected it. The court held that "[there is no general principle that all companies in a group of companies are to be regarded as one. "**<u>On the contrary, the fundamental principle is that 'each company in a group of companies (a relatively modern concept)</u>** is a separate legal entity possessed of separate legal rights and liabilities.'" Next, the court considered whether it was appropriate to pierce the corporate veil. The court held that the authorities afforded little guidance on the principles to be utilized in deciding whether the "arrangements of a corporate group involve[ed] a façade." The court expressly refrained from "attempt[ing] a comprehensive definition of those principles. The court held that AMC, the Lichtenstein company that been interposed between Cape Industries and NAAC, was "clearly a façade [,]" the "creature of Cape" and "no more than a corporate name. Accordingly, it could be ignored and the court could deal with

the matter as if the direct relationship of parent and subsidiary was between Cape Industries and NAAC. It was accordingly irrelevant whether AMC was a façade. The real question was whether NAAC was a façade or "creature of Cape." The court found that NAAC was a separate company conducting its own operations independently in the United States. On its face, NAAC was not a façade. The question was whether the legal position changed because NAAC was incorporated for the specific purpose of insulating Cape Industries' potential claims arisingout of consumers of asbestos in the United States. The court found that this did not change the position. The court reasoned as follows:

(i) there was no suggestion that there was any "actual or potential illegality or…inten[tion] to deprive any one of their existing rights[;]"
(ii) whether or not the course adopted by Cape Industries "deserve[d] moral approval", there was nothing illegal about the way Cape Industries organized its affairs;
(iii) the fact that the company had deliberately organized its affairs so as to minimize its potential tortuous liability did not justify piercing the corporate veil. In short, the fact that Cape Industries was itself a corporation did not prevent it from insulating itself from liability by trading through a subsidiary any more than Salomon was prevented from doing so in Salomon v Salomon & Co. For purpose of piercing the corporate veil, there was no difference in principle between a corporate or individual shareholder.

Having rejected the argument that the corporate veil should be pierced, the court then considered whether NAAC was a mere agent of Cape Industries. If it was, the holding company, Cape Industries, could be liable for debts incurred by its agent on its behalf. In other words, **the court implicitly accepted that a holding company can be held liable for the debts of its subsidiary on an agency principles** and that such liability could arise independently of whether the subsidiary was a fraud, a façade or a sham. The court concluded that NAAC was not a mere agent of Cape Industries. In reaching its conclusion, the court pointed to the following factors:

(i) NAAC was itself the lessee of the premises from which it operated, paid rental to the landlord, owned its own office furniture, employed its own staff and ran its own pension scheme;
(ii) it conducted business "activities as principal on its own account," among other things, buying asbestos from the United States Government and a source in Japan and selling them to United States customers;
(iii) it stored the asbestos that it purchased from US Government stocks in warehousing facilities in its own name which it paid for;
(iv) it earned profits and paid US taxes;
(v) it paid dividends; and

(vi) it observed all corporate formalities.

It is interesting to note ***how closely the factors relied on by the English court*** compare with the "template" of factors often considered by American courts in deciding whether to pierce the corporate veil. The Adams court then noted: There is no doubt that the services rendered by NAAC in acting as intermediary in respect of contracts between the United States customers and Egnep or Casap were active and important services which were of great assistance to Cape/Capasco in arranging the sales of their group's asbestos in the United States.

Nevertheless, for all the closeness of the relationship between Cape/Capasco and NAAC, strictly defined limits were imposed on the functions which NAAC were authorized to carry out or did carry out as their representative. First, NAAC had no general authority to bind Cape/Capasco to any contractual obligation. Second…there is no evidence that NAAC, whether with or without prior authority from Cape/Capasco, ever effected any transaction in such manner that Cape/Capasco thereby became subject to contractual obligations to any person. An interesting feature of the judgment from the perspective of English corporations with subsidiaries doing business in the UnitedStates is that the English court chose to resolve the issue of veil piercing and agency under English law rather than under the law of the U.S. state in which the subsidiary, NAAC, was incorporated.

In coming to this conclusion, the court reasoned that, in deciding whether to enforce a foreign judgment in England, the court had to consider whether English law recognized that Cape Industries had acquired a physical presence of its own in Illinois. In essence, the court appears to have treated the issue as more one of procedure than substance. **<u>The Cape Industries case is a landmark decision in England</u>** and reflects the current state of the law on this issue. The South African courts have also adopted the reasoning of the English Chancery Division in Cape Industries in approaching the liability of a holding company for the acts of its subsidiaries. The reasoning of the court in Cape Industries, while conservative, is consistent with the more recent curbs placed upon the "single economic entity" approach to groups of companies by the House of Lords in Woolfson v. Strathclyde[33]Regional Council. However, reading between the lines, another factor motivating the court in Cape Industries may have been a concern about opening the floodgates to foreign tort claims (especially from the U.S.) against English holding companies. In this connection, the Chancery Division was so critical of the manner in which the Texas judge dealt with the computation of the damages that it held that even if the corporate veil could have been pierced, the Texas judgment could not be enforced in England because there had not been a proper judicial assessment of the

[33]Woolfson v. Strathclyde Reg'l Council (1978) S.L.T. 159. 146 Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1047–50.

damages.[34] This indicates yet again that the courts are frequently influenced in veil piercing cases by what they perceive to be public policy considerations.

Some academic writers maintain that tort claimants should be able to proceed against shareholders because, after all, they did not deal with the subsidiary voluntarily.[35] However, there is a fallacy in this argument; veil piercing occurs because there has been fraud or improper conduct on the part of the shareholder in relation to a known third party, usually a creditor. Many torts do not involve unlawful conduct on behalf of the shareholder. On the other hand, if the shareholder is a party to the tort, the shareholder would be liable with the subsidiary on ordinary principles of tort law.[36] This may be why cases in which tort claimants have been able to pierce the corporate veil are harder to find in any jurisdiction, even the United States.[37] It is also interesting how similar Cape Industries was to the approach of the U.S. Federal Court in Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil[38]***when it rejected a claim arising out of Nigeria against a U.S. holding company for the debt of its Nigerian subsidiary*** engaged in oil exploration in Nigeria.[39] It is important to note that, in reaching its conclusion, the Cape Industries court did not reject the agency theory of holding company liability;[40] it simply imposed tighter restrictions on when it could be applied. There is still scope for the agency principle where, for example, the subsidiary company is itself merely an investment holding company conducting no business activities of its own. Cape Industries was the death knell for the "single economic entity theory" of corporate groups in England. However, many lawyers may well mourn its passing. The purpose of conferring limited liability on companies was to enable individuals to invest in companies without putting their private assets at risk.[41] It is hard to see how this purpose is served by protecting holding companies from the insolvency of their subsidiaries because, even when the holding company is held liable for the debts of the subsidiary, the personal assets of the ultimate shareholders in the holding company (who may be individuals) are not placed at risk.

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[34] Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1047–50.

[35] FRANKLIN A. GEVURTZ, CORPORATION LAW 69–71 (2d ed. 2010).

[36]See generally Lowendahl v. Balt. & Ohio R.R. 241 A.D. 156 (N.Y. App. Div. 1936), aff'd 6 N.E. 2d 56 (N.Y. 1936).

[37]Japan Petroleum Co. v. Ashland Oil, Inc., 456 F. Supp. 931 (D.Del. 1978). 151 See generally Craig v. Lake Asbestos of Quebec Ltd., 843 F.2d 145 (3d Cir. 1988)

[38] See generally Japan Petroleum Co. v. Ashland Oil, Inc., 456 F. Supp. 931 (D.Del. 1978).

[39] See generally Craig v. Lake Asbestos of Quebec Ltd., 843 F.2d 145 (3d Cir. 1988) (refusing to pierce the corporate veil in order to enable asbestos the plaintiffs who had claims against Cape Industries to pierce the corporate veil to hold Cape Industries' New Jersey holding company liable for the debts of Cape Industries). 152 See Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1025–1030.

[40] See Adams v. Cape Indus. PLC [1991] 1 All ER 929 at 1025–1030.

[41] GOWER'S PRINCIPLES, supra note 11, at 191–92. 154

At the same time, the sacrosanct principle that a company is an entity that is separate and distinct from its shareholders is violated when the court fails to apply the law uniformly in the case of both individual and corporate shareholders. Another difficulty with the single economic entity theory is that its application significantly increases the business risk for multi-nationals where a subsidiary is located in a different country from the holding company as was the case in Cape Industries.

All in all, when one weighs up the factors for and against the single economic entity theory, the decision in Cape Industries makes sense from both a legal and a policy perspective because it stresses that a company is an entity separate and distinct from its shareholders. The Company as a Façade or a Sham Another category of cases in which the English courts have pierced or gone behind the veil are those in which the court holds that the company is a mere “façade” or a “sham” calculated to carry out an improper purpose.[42] Many of these are characterized by a robust expression of distaste by the court for the conduct of the defendant and a lack of careful jurisprudential reasoning. The result is a perceived lack of consistency in outcomes and a failure to set out clear cut line in the process of lifting the veil of incorporation in group situation.

CHAPTER 4

FINDINGS, CONCLUSION AND RECOMMENDATIONS

The burning words of late Chancellor of New Jersey should be borne in mind by every corporation lawyer who seeks to use the concept of lifting the veil to defeat the end for which it was invented,” ..It may succeed for a while in baffling persons”. The court will lift the veil of incorporation of any company to find out who was behind the fraudulent and improper conduct. This would be necessary where the canopy of legal entity is used to defeat public convenience, justify wrong, perpetuate and protect fraud and crime as elucidated above. This article has sought to discuss the distinctive features of veil piercing principles as applied to corporate groups in UK company law and to draw out the similarities with veil piercing in the United States. As shown above, there is an

[42] See generally Gilford Motor Co. v. Horn [1933] Ch 935 (CA); Jones v. Lipman [1962] 1 All ER 442 at 445; Wallersteiner v. Moir [1974] 3 All ER 217 at 237; Creasey v. Breach Wood Motors Ltd. [1993] BCLC 480; Gencor ACP Ltd. v. Dalby [2000] 2 BCLC 734 (Ch. D.).

abundance of UK judicial authority that permits the corporate veil to be pierced if it is established that a parent company has exercised complete domination and control over the affairs and activities of a subsidiary.[43] This explicit recognition stands in sharp contrast to the position elsewhere in the common law world.

This illustrates how far UK has moved from its British roots and the influence of United States law on UK corporate law. The use of a variety of terms such as alter ego, instrumentality, puppet together with agency (often in the same sentence) demonstrate that North American veil piercing is focusednot on agency principles, but rather on something altogether different (to adopt Professor Blumberg's term) "quasi-agency". Although the use of quasi-agency has led to greatly higher rates of veil piercing in North America than in the rest of the common law world, the indiscriminate use of the agency concept it has added to the conceptual fog enveloping veil piercing jurisprudence.In Smith, Stone and Knight Ltd v Birmingham Corporation[44] Atkinson J considered that the corporate veil could be pierced to allow a parent company to claim damages for disturbance to a business run by its subsidiary on land that was compulsorily acquired by the local council. Atkinson J agreed to pierce the corporate veil and allow the parent to claim compensation on the basis that the subsidiary had carried on the business as agent of the parent, and thus the loss for disturbance to business was incurred by the parent. Atkinson J considered that the subsidiary was an agent of the parent on the basis of answers to the following six questions:

1. Were the profits treated as the profits of the parent?
2. Were the persons conducting the business appointed by the parent?
3. Was the parent the head and the brain of the trading venture?
4. Did the parent govern the adventure; decide what should be done and what capital should be embarked on the venture?
5. Did the parent make the profits by its skill and direction?
6. Was the parent in effectual and constant control? Atkinson J found that affirmative answers to these questions assisted in identifying an agency relationship between the parent and the subsidiary. Smith, Stone & Knight has, however, received a mixed reception in the Commonwealth countries,despite its sporadic application in the United Kingdom.

U.K. courts appear more hesitant than U.S. Courts to pierce the corporate veil. The greatest volume of veil-piercing litigation appears to take place in the U.S.In United States v. Milwaukee Refrigerator Transit Company[45] The veil-piercing test in U.K. law is phrased similarly to that in the U.S. and at first blush appears nearly identical. Under U.K.

[43] file:///C:/Users/SUPO/Downloads/SSRN-id980366.pdf
[44][1939] 4 All ER 116
[45]United States v. Milwaukee Refrigerator Transit Company (1905) 142 F, edn. 247

law, the corporate veil will be pierced if it is necessary to achieve justice. , Sanborn J of the U.S. Supreme Court held as follows: “Where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporate entity and treat it as an association of persons.”

The veil-piercing test in U.K. law is phrased similarly to that in the U.S. and at first blush appears nearly identical. Under U.K. law, the corporate veil will be pierced if it is necessary to achieve justice. , Sanborn J of the U.S. Supreme Court held as follows: “Where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporate entity and treat it as an association of persons.” Even similar terms such as "alter ego" can be found in some U.K. opinions. As in the U.S., veil-piercing occurs in the U.K. where there is a high degree of control by the shareholder.[46]However, a number of U.K. decisions reflect a general reluctance to pierce the corporate veil[47].

RECOMMENDATION

Lifting the veil in group situation needs clear legislation in Nigeria and entire world because there is no clear cut codification in this regard.

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