Symbiosis

www.symbiosisonlinepublishing.com
ISSN Online: 2577-7815

Research Article International Journal of Family Business and Management Open Access

An Anatomy of the Grounds of Lifting the Corporate Veil: Steps to Codification

Kathleen Okafor[1*]

[1]*LL.B, BL, LL.M, Ph.D, Dean, Faculty of Law, Baze University, Abuja.*

Received: June 3, 2019; Accepted: June 17, 2019; Published: June 20, 2019

***Corresponding author:** Kathleen Okafor, LL.B, BL, LL.M, Ph.D, Dean, Faculty of Law, Baze University, Abuja, Email: ke_okafor@yahoo.com*

Abstract

A universal benefit of incorporation is the separate entity doctrine which shields the shareholders, directors and other operators from liability for corporate omissions. By the doctrine, the company's debts are limited to the amount shareholders have paid or have agreed to pay to the company for its shares, in case of insolvency. Consequently, their other assets, homes, pension funds, cars, yachts, private jets will remain untouched. In response to the doctrine, the law has devised various safety nets to protect creditors through company laws, insolvency laws, general anti-corruption enactments, public policy initiatives and judicial interventions. Inevitably, there has been a vast ocean of controversies as to when and why a court will pierce the veil of incorporation to hold the shareholders and directors liable beyond their unpaid equity obligations. The reasons for the controversies are myriad as values of the society change, and as new business risks emerge in retail businesses, telecommunications, oil and gas, real estate, banking, tax regimes and finance. This paper attempts to stream line the underlining principles adopted by common law, case law and statutes to pierce the veil of incorporation like where the company is a façade, a sham, an alter ego, a puppet for crime as well as issues of public policy, environmental responsibilities and national security. Statutory provisions on lifting the corporate veil have also been provided. Thus, a bold attempt has been made to provide a clear and general compass for all jurisdictions as to when courts will pierce the corporate veil to guide judges, legislatures, corporate managers, law students etc.

Introduction

Legally, a business registered as a company under the Companies and Allied Matters Act is treated as a separate legal entity [1]. This doctrine was anchored on the exigency of encouraging public investment in the infrastructure sectors like the railways, electricity plants and providing greater ease of raising capital [2].

By definition, piercing the veil of incorporation is a legal term used in circumstances where shareholders or directors of companies are made liable for the debt of the company or where the shareholders are treated as one with the company. The seeds of the limitations of this principle germinated from the dictum of Lord Davey in the locus classic us of Salomon v Salomon & Co Ltd [3]. The Lord Justice said that:

"If the company was for an unlawful purpose, or to achieve an object not permitted by the provisions of the Companies Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanour ... he may be proceeded against civilly or criminally".

In Vibelko (Nig) Ltd v Nigerian Deposit Insurance Corporation, the Court of Appeal held that notwithstanding the use of "shall" in the paragraph of the Act, the veil of incorporation would be lifted only where it is proven that the corporator used the company for a fraudulent or illegal end. Adekeye JCA stated that:

"Judges exercise caution in the knowledge that every business has some elements of risk. Where a director takes commercial or financial steps which are in essence recommended by professionals it would be going too far against that background to come to the view that he is dishonest. A court should intervene where there is convincing evidence of embezzlement on the part of employees, a controlling shareholder or director."

Reinforcement of the separate entity principle was recently made in FDB Financial Services Ltd v Adesola [4]. where the respondents sued the appellant company along its directors for breach of contract. The respondents had advanced the sum of N4 million to the company but after the maturity date, the company failed to retire the agreed principal sum or the 45 per cent interest. The Court of Appeal stated that:

"It is not sufficient to say that because the defendant company is acting through the managing director the veil of the company can, for that reason, be lifted. There must be clear evidence of illegality or fraud for the veil to be lifted."

Thus, from the onset, the doctrine was not without conditions. The shareholder may be made personally liable if his conduct is formally valid but is not bona fide in the interest of the company. This is because such conduct violates the expectations of good faith which creditors of a company have a right to expect from company directors. Also, whenever the company enters insolvent liquidation, the question becomes whether in the circumstances, the liquidator acting on behalf of the company, can seek contributions from its members in order to enhance the assets needed to meet the claims of creditors [5].

Since the corporation is inanimate, piercing the veil of incorporation may be considered in order to define the attributes and nature of the company. Thus, in the American case of the

People's Pleasure Park Co v Rohleder [6], a former slave and later Major, commanding the Virginia 'sixth negro regiment, Joseph B Johnson, bought land which was subject to a number of covenants restricting transfer to 'coloured persons'. In order to avoid the covenants, Johnson incorporated a company to hold the title. The company, 'People's Pleasure Park Company, was owned entirely by 'coloured persons' and the company's stated object was to create an amusement park for the enjoyment of coloured persons. The court considered whether the company itself could be said to have a colour and thus be restricted from owning the property.

The court refused to pierce the veil and held that a corporation was incapable of having a colour. The company was legal being distinct and separate from his owners and incorporators. As the company was not coloured, it was not restricted from holding the property because in law the company, and not Johnson, was the owner of the property.

The following cases show that judges have been reluctant or intellectually ill-equipped to deconstruct the boundaries of the doctrine particularly because of their fear in diminishing the corporate entity doctrine as an uncontested strategy for societal progress [7].

Meaning and Grounds for Lifting the veil of Incorporation

a. Evasion of Obligations or Promotion of Fraud

In s a company acquired property and conveyed it to its subsidiary to evade tax. The court lifted the veil and held the parent liable for the tax [8]. Lord Denning MR cautioned as follows:

"The doctrine laid down in Salomon's case has to be watched very carefully. The court can, and often does, draw aside the veil. They can and often do pull down the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit."

In Re FG (Films) Ltd [9], a film was made nominally by a British company, which had been formed for this purpose with £100 share capital of which 90% of the capital was held by the director of an American company. The film was financed and produced by the American company. It was held that the British company was not the maker of the film within the meaning of the law [10]. The court stated that, if a person finds it to his advantage to disregard corporate entity, he may discover to his discomfiture that the courts will refuse to do so, and not permit evasion of obligations.

In the English case of Re Hirth, (1899) 1 QB 612 and alienation was made by a debtor to a company practically identical with himself with intention to defraud his creditors. The court held that the company creditor acquiring the interest must be taken to have full notice of the true nature of the transaction and would not avail itself of the protection of the law, even as the alienation was for valuable consideration. Lord Lindley MR said:

"Salomon's case decided a great deal, and people have not been slow to take advantage of it: it has decided that a company can be legitimately formed under the Companies Act by one person, or one or two persons, with all the rest men of straw, and that there is at present no machinery except winding up by which it can be extinguished.... But the question was never raised whether the creditors of a sole trader who had converted himself into a company, and transferred all his assets to the company, could not impeach the transaction as a fraud upon the creditors".

In Bank of America National Trust & Savings Association v Niger International Dev. Corporation Ltd [11]. An attempt was made to avoid recognition by the defendant company to paya judgement debt. Three shareholders in the defendant company and the company that purchased the car, were the same persons – man, wife and child. The court set the sale aside as a fraud on the bank, the judgement creditor. Dosunmu J concluded that:

"The transaction between the defendant and the claimant was juggled after the later had failed to secure instalment payments of the judgement debt, in order to defeat the judgement creditor in the pursuit of its remedy" [12].

However, in Co-operative Bank Ltd v Obakhare [13], the respondent was the controlling shareholder of the second and third respondent companies. The appellant bank obtained judgement against the third respondent on its bank account. During the process of execution, the third respondent filed an appeal but the first respondent closed down the third respondents business and transferred its stock-in-trade to other premises under the name of a new company which he incorporated. The bank commenced a fresh action against the first respondent and the two companies. Surprisingly, Ige JCA stated that much as one may sympathise with the bank, the rule of separate corporate legal entity renders it impossible for the first respondent to be held liable for a loan granted to his company unless he guaranteed the loan.

The Court further acknowledged that the use of a company as a means of avoiding normal business losses is not unusual, which formed the foundation of the decision in Salomon v Salomon. However, the judge opined that in this case, the corporate garb was not intended for evading the third respondent's obligation to the bank. In actual fact, the court permitted the use of the corporate scheme to take a loan, use it for business and evade his obligation to repay.

Thus, the decision reinforced the reasoning in Salomon v Salomon that one of the corporation's functional values is to enable aggregation of capital.

Company being used as a "Sham" or "Cloak" for Fraud

Where directors, promoters or majority shareholders manipulate the company in order to evade contractual obligations, the courts will pierce the veil of incorporation.

Surprisingly, in Gilford Motor Co Ltd v Horne [14], the Court of Appeal found that the company was merely a device by which the individual defendants breached their restrictive covenants. Lord Hansworth MR noted that "this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr E B Horne."

In Jones v Lipman [15], the defendant attempted to avoid completion of a sale of his house to the plaintiff by conveying it to a company formed for the purpose. Russell J. described the company as "the creature of the first defendant, a "device" a "sham", or a "mask" which he holds in an attempt to avoid recognition by the eyes of equity".

In another case of Re Bugle Press (No. 2) [16], a minority shareholder was forced to give up his shares as a result of a compulsory purchase order. The order had been triggered by an offer made by a second company set up by the majority shareholder. The minority shareholder had objected and the court prevented the transaction as the second company was a mere facade of the majority shareholder.

In TrustorAB v Smallbone (No. 2) [17], money £39 had been misappropriated from the claimant company with a portion thereof ending up in a company, I Ltd owned by the former CEO. The latter company was held to be essentially a front for the former managing director of the claimant company.

Where a Company Is an Agent or where there is Implied Agency

Under the law, a company's acts are necessarily performed by human agents, officers, directors or shareholders [18]. Since the company exists in the figment of the mind. The agency theory was popularised by Milton Friedman. The need for this human agency has been explained by Viscount Haldane in the case of Lennard's Carrying Co v Asiatic Petroleum Co. Ltd [19], where he observed:

A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation…

In AkinwunmiAladev Alic Nigeria Ltd [20], the Supreme Court affirmed that: "the director is not personally liable, unless it appears that he undertook personal liability such as, where he signs the contractual documents without stating that he was signing them on behalf of the company. The director would be held personally liable even though he is in fact acting on the principal's behalf" [21].

In Mezuv Cooperative& Commerce Bank (Nig.) Plc [22], the plaintiff company obtained a loan using one of the adjacent properties of its majority shareholder and chief executive officer as collateral. When the plaintiff defaulted in making payment, the defendant sold all the three properties belonging to the chief executive. This was challenged in court by the plaintiff. The Trial and Appeal courts lifted the veil and gave judgement in favour of the defendant, as the company was the agent of the plaintiff.

Trusteeship

Where a trustee and the beneficiaries are one and the same person and hold land on charitable purposes (trusteeship) to be exempted from certain legal obligations, the courts will pierce the veil.

In the case of Prest v Petrodel Resources Ltd [23], the Supreme Court affirmed the importance of the doctrine of limited liability of shareholders and directors and indicated that the courts may only pierce the corporate veil in exceptionally limited circumstances.

The Supreme Court refused to hold that the Matrimonial Causes Act 1973 permitted the Court to routinely treat an asset of the company as the asset of its sole controlling shareholder, simply because it will further the policy of the Act. The judge held that the husband had immunised himself from liability to take advantage of the principle of Salomon v Salomon [24].

Members Ratification of Corporate Acts

In Parker and Cooper Ltd v Reading [25], an informal ratification by the members was held to bind the company. The company's bank was unwilling to increase the company's overdraft. A director, Mr Reading, advanced£1,750 upon security of a floating debenture. All shareholders assented. On insolvency, the liquidator attempted to set aside the debenture based on defects on appointment of the director who executed the document [26]. It was held that "Individual assents given separately" by all the members entitled to vote are equivalent to the assent of a meeting. An assent may also be no more than passive acquiescence in the result. A resolution of a board meeting binds the company, even if the act concerned was beyond the directors' powers.

Just and Equitable Grounds

In Malyon v Plummer [27], a wife assisted her husband, on part time basis, in the husband's one-man company for which she received a salary. When the husband was killed, she claimed compensation under the Fatal Accidents Act, 1874. The question was whether she was being paid as a wife by the husband or by the company as its employee. The judge pierced the veil and held that:

"While the company is no doubt a separate legal entity, I can see nothing in the principle of Salomon's case which prevents me from finding that the salary which the plaintiff received derived solely from the relationship of husband and wife".

In contrast, Lee v Lee Air Farming Ltd [28], the appellant's husband held 99% of the company's share. He was killed whilst on the job in a plane crash. It was ruled that the shareholder could also be an employee of the same business to qualify the wife for benefits under the Employee Compensation Act. The claim was allowed therefore on just and equitable bases.

In Public Finance Securities Ltd v Jeffia [29], the Company defaulted in repaying funds and the respondent sued the company and joined the controlling shareholder who pleaded that the company alone was the contracting party. The Court of Appeal ordered that the veil of incorporation be lifted so as to hold the controlling shareholder personally liable along with the company. Rowland JCA stated:

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….

It is remarkable that the court extended the definition of fraud to constructive fraud. i.e. a fraudulent, dishonest intent to cheat either the company or its creditors.

Claim of Privileges by Shareholders

In Tunstall v Steigmann [30], a landlord opposed an application for a new lease on the ground that she intended to occupy the premises herself although her intention was that a company in which she owned all but two of the shares (the two others being held by his nominees) should occupy it. Her contention to escape the effect of the distinct legal entity of the company she incorporated went to naught. OrmerodL.J observed that "... the landlord and her company are entirely separate entities. This is not matter of form; it is a matter of substance and reality."

In Marina Nominees Ltd v Fbir [31], two partners in a partnership firm incorporated the appellant company. The respondent sought to impose tax on the company but the firm argued that the company had no income as the other firm appropriated all the payments their clients had made. The Court held that the company was distinct from its incorporators and was liable to pay tax. Aniagolu JSC upheld the distinct legal entity principle viz:

The appellant is, in effect, asking this court to support and sustain its ambivalent posture of its being a registered limited liability company with its full legal persona ... and its claim that it is merely what amounts to a surrogate of Peat Marwick Cassleton Elliot & Co."

Furthermore, in Macaura v Northern Assurance Co Ltd [32], Mr Macaura owned a large majority of shares in the trading company but obtained the insurance in his name. When he claimed on the policy, the House of Lords refused his claim and recognised the separate entity of the company from him.

In Reiss & Co (Nig.) Ltd. v Federal Inland Revenue Board [33], the appellant refused to pay company tax because all its income had been remitted to the parent body in Netherlands. The parent company held 55 per cent of the shares in the appellant company. Karibi-Whyte J,applied the principles from the US formulated "Deep Rock doctrine" and permitted the corporate veil to be lifted whenever to do otherwise would be unfair.

Illegal Associations

In Greenberg v Cooperstein [34], members of an illegal association successfully sued its treasurer and secretary on behalf of all the members for an account of the subscription received by the defendants.

In Ogbodu v Quality Finance Ltd [35], the appellant lodged a princely sum with the respondent company and promised that upon maturity he would be repaid the principal along with a huge interest on it. His claim against the six directors of the company was declared inept as the contract was with the company, not its directors. The appellants' affidavit to the effect that the directors orally assured him that they would personally repay the money on the company's default went to no issue as the law knows nothing as an oral guarantee [36]. Ibiyeye JCA stated thus:

"Since no fraud or any other malpractice had been established against the [other respondent] in their capacity as directors … the veil of incorporation cannot be lifted to make them jointly liable for the misdeeds of the first respondent."

To escape liability, the directors proved that they used their best endeavours to ensure proper utilisation of the funds for the specific purpose for which they were borrowed. Thus, the directors were merely agents of the company in the transactions.

Groups and Subsidiary Relations

Occasionally, the courts have pierced the veil between companies in a group on the basis that, while legally distinct, economically they exist as one single, interdependent unit. Thus, in DHN food distributors' Ltd v Tower Hamlets LBC [37], the veil between the three companies in this group was pierced in order to achieve what the judges considered to be an equitable result. DHN, a firm in East End London, imported groceries and provisions and had a cash and carry business which organised its business into three companies. The business was owned by the parent company, DHN Food Distributors Ltd. The land was owned by a subsidiary called Bronze Investment Ltd, and the Vehicles were owned by another subsidiary, DHN Transport Ltd. DHN Food Distributors Ltd held all the shares in both subsidiaries and the directors were the same in all three companies i.e. ownership and control were consistent throughout all three companies. The dispute began in 1969, when Tower Hamlets London Borough Council made a compulsory purchase order to acquire the company's land. Under the land Compensation Act 1961, compensation was payable for the land compulsorily purchased and for any other relevant losses contingent upon the owners loss of land. DHN Food Distributors Ltd had made business losses as a result of the land purchase, as the three companies were wound up having been unable to find alternative accommodation. However, DHN Food Distributors had no property interest in the land and so Tower Hamlets refused to pay compensation for its loss of business. Bronze Investment was to be compensated for loss of land but not for business, as its only business was holding the title to the land. Compensation for disturbance of business could only be granted within the terms of the Act if the veil between each company was removed and the business was viewed as one single economic unit that possessed both the land that was being compulsorily purchased and the business that was being disturbed.

The Court of Appeal held that the veil would be pierced, stating that the group was virtually the same as a partnership in which all three companies are partners. According to Goff LJ, the veil could be pierced between companies in a group if the companies were wholly owned subsidiaries which had no separate business operations and when the owners of all the businesses in question had been disturbed in their possession and enjoyment of it.

An analysis of this case represents a peculiar radical departure from the Salomon doctrine, which should not be of general application. Instead of the legal principles being applied to all companies per se, it rather suggests that the courts should assess the economic and factual reality of individual companies to decide whether or not they should be treated as companies, or as in this case, a partnership. To suggest that the corporate veil, which has important functions such as protecting investors (when accompanied by limited liability), could be set aside through judicial examination of the factual nature of individual companies, would undermine the very foundation of the corporate entity doctrine. This examination is like just and equitable grounds.

The judiciary resumed its protection of the Salomon doctrine in the Scottish case of Woolfson v Strathclyde Regional Council [38]. Similar to DHN, a compulsory purchase order was made in relation to shop premises in Glasgow by Glasgow Corporation. The veil was not pierced and the case was distinguished on the basis that the ownership of the companies was divided between Mr Woolfson and his wife. The court refused to see ownership as embodied in the one person of Mr Woolfson.

A review of judgements in respect of groups of companies was proffered in the case of Adams v Cape Industries Plc [39]. Here, the plaintiffs were the personal representatives of persons to whom an award was made in a Texan court in respect of claims for damages for personal injuries and consequential loss suffered as a result of exposure to asbestos fibres. The fibres were emitted from an asbestos insulation factory of subsidiaries. The courts pierced the veil of incorporation to hold the parent companies liable.

In Smith, Stone and Knight v Birmingham Corporation [40], a company acquired a business, and registered it as a company and a subsidiary. The parent company held all but five shares in the subsidiary. Ownership and control were effectively by the parent company. The defendant, Birmingham Corporation, compulsorily acquired the premises owned by the subsidiary upon which the parent company's business was carried on. The parent company claimed compensation. The Corporation claimed that the proper recipient was the subsidiary as it owned the land and the parent company was a separate entity. Piercing the veil was allowed and it was held that:

To obtain an advantage for the parent company to claim compensation, it must show that the subsidiary was not a separate entity but was in fact an agent of the parent company.

In Friday Alfred Akpan and others v SPDC [41], a Dutch court at the global headquarters of the parent company ruled that Royal Dutch Shell Nigeria's subsidiary was responsible in negligence for a case of oil pollution of farmlands in the Niger Delta and ordered it to pay damages. However, applying further principles of tort, the parent company avoided liability because the environmental degradation caused by the subsidiary was too remote as a causative factor.

In Cape v Chandler [42], a parent company was made liable for the acts of its foreign subsidiary company. The facts of the case were that, the claimants, Mr Chandler, had been employed by a subsidiary of Cape Plc. for 18 months which exposed him to asbestos (over fifty years later) by which time Cape Products had been wound up. The court awarded damages against the parent company for the act of his subsidiary.

To the court, the question was not one of lifting the veil of incorporation, but one of the defendant parent company assuming responsibility of a direct duty of care in favour of its subsidiary's employees.

In the case of United States v Best Foods [43], the US Supreme Court, succinctly restated the law and provided much needed direction for anticipating parent-subsidiary liability. Accordingly, mere involvement in subsidiary's general affairs will not make a parent company liable under CERCLA for environmental breaches of its subsidiaries subject, to two exceptions.

1. Where the corporate form is misused and there is inadequate capitalization for the debts normally associated with business; (creditor protection);
2. Where the parent corporation is directly liable as an operator, in degree and detail, based on the parent's relationship to the facility (not merely the parent's financial or legal relationship to the subsidiary) but beyond normal parental oversight of a subsidiary i.e. agency.

The cases require active involvement by the Parent Corporation and not merely ownership and control.

The leading case for imposing operator liability on the parent corporations is United States v Kayser-Roth Corporation [44]. In that case, the United States Court specifically ruled that parent corporations could be liable as an operator with no need to first pierce the corporate veil (absolute liability). The court found that Kayser-Roth had exhibited overwhelming pervasive control over the affairs of a defunct subsidiary, Stamina Mills.

Combination of Corporate and Aggregate Enterprise Group/Subsidiary

Sometimes, the corporate personality corresponds merely to a fragment of the company or where a partnership or a holding company owns the controlling interest in one or more other corporations, but has so handled them that they have ceased to represent separate enterprises and have become, as a business matter, more or less indistinguishable from the larger enterprise. Straughton L.J captured this phenomenon in Atlas Maritime Co. Ltd v Avalon Maritime Ltd, the Coral Case where he stated thus:"The creation or purchase of a subsidiary company with minimal liability, which will operate but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere. To find that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine" [45]. Accordingly, the court would consider the following catalogue of factors in piercing the veil in subsidiary and group relationships [46]:

1. The subsidiary is not a party to the contractual or other obligations of the parent,
2. The subsidiary is not undercapitalized,
3. The subsidiary does not operate at a deficit while the parent is showing a profit,
4. The creditors of the companies are not misled as to which company they are dealing with,
5. Creditors are not misled as to the financial strength of the subsidiary,
6. The employees of the parent and subsidiary are separate and the parent does not hire and fire employees of the subsidiary,
7. The payroll of the subsidiary is paid by the subsidiary and the salary level are set by the subsidiary,
8. The labour relations of the two companies are handled separately and independently,
9. The parent and subsidiary maintain separate offices and telephone numbers,
10. Separate directors' meetings are conducted,
11. The subsidiary maintains financial books and records which contains entries related only to this own operations,
12. The subsidiary has its own bank account,
13. The earnings of the subsidiary are not reflected on the financial reports of the parent in determining the parents' income,
14. The companies do not file joint tax returns,
15. The subsidiary negotiates its own loans or other financing,
16. The subsidiary does not borrow money from the parent
17. Loans and other financial transactions between the parent and subsidiary are properly documented and conducted on arm's length basis,
18. The parent does not guarantee the loans of the subsidiary or secure any loans with assets of the parents,
19. The subsidiary's income represents a small percentage of the total income of the parent,
20. The insurance of the two companies is maintained separately and each pays its own premiums,
21. The purchasing activities of the two corporations are handled separately.,
22. the two companies avoid advertising as a joint activity or other public relations which indicates that they are the same organisation,
23. The parent and subsidiary avoid referring to each other as one family, organisation, or as divisions of one another,
24. The equipment and other goods of the parent and subsidiary are separate,
25. The two companies do not exchange assets or liabilities,
26. There are no contracts between the parent and subsidiary with respect to purchasing goods and services from one another,
27. The subsidiary and the parent do not deal exclusively with each other,
28. The ;parent does not review the subsidiary's contracts, bids, or other financial activities in greater detail than would be normal for a shareholder who is merely interested in the profitability of the business,
29. The parent does not supervise the manner to which the subsidiary's job is carried out
30. The parent does not have a substantial veto power over important business decisions of the subsidiary and does not itself make such crucial decisions,
31. The parent and subsidiary are engaged in different lines of business.

Responsibility for Tort & Crime

A corporation is liable on the ordinary principles of vicarious responsibility, which has nothing to do with lifting the veil. In law, the actions of the representatives are sometimes regarded as the 'personal' acts of the corporation. This doctrine is invoked wherever responsibility attaches to a personal or wilful breach of duty, for example, when the duty is statutorily imposed [47]. Viscount Haldane LC in Lennards Carrying Co Ltd v Asiatic petroleum Co Ltd [48], succinctly put it thus:

'The fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself'.

In State v Osler [49], the Court of Appeal refused to convict the accused who had collected money from the complainants without performing the contract. The accused escaped conviction because the money was paid by cheque and she paid the cheque into the company's account and withdrew the funds qua director. The Court refused to lift the veil, as the non-performance was by the company.

Ekwenugo v Federal Republic of Nigeria, (Fabiyi JCA) [50], was a case of fraudulent collection of $108,000 (One hundred and eight thousand dollars), a charge under the Advance Fee Fraud Act of 1995. The defendant argued that his company could not be bound by a covenant, since it had not entered into one; nor could he be personally answerable, since it was not he but the company who committed the breach. The contention was rejected as the director's mensrea inflicted personal criminal liability. This decision could be based on using the company as a vehicle for fraud.

National Security

National security is a concept which holds that a government will protect the state and its citizens against all national crises, through political power, law, military might diplomacy etc. presently; there is abundant justification for protection against terrorism risk of life and property as well as enemy action by the demand of the identity of corporators. Thus, in the interests of national safety and security, courts canunm ask corporators to determine whether a company is to be treated as an enemy company in time of war. In Daimler Co Ltd v Continental Tyre and Rubber Co Ltd (Gt Britain) Ltd [51], the court considered the German nationality of the shareholders during the war and pierced the veil to ascribe enemy status to the company [52].

In Sovracht (v/o) v Gebr Van Udens Sheep vart en Agentuurmaatschappi (NV Gebr [53]), a company in a neutral country became controlled by enemy occupation. The veil of incorporation was pierced to determine the enemy domicile in the company.

Public policy

Public policy is a principle which holds that injury to the public good is a basis for denying legality of a transaction. Consequently, in furtherance of public policy, covenants in restraint of trade are viewed more strictly when imposed on employees than otherwise. In Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co [54], a covenantto restrain trade by the seller was up held and the veil was not pierced as the term was reasonable from the viewpoint of public policy [55]. To carry on business with an alien enemy is contrary to public policy. The Courts will not allow the corporate veil to conceal their identity. The rule which debars an alien enemy from suing is an ancient rule of the common law which is based on public policy [56]. It is immaterial that Emergency Regulations made under the Trading with Enemy Act 1939 would prevent the claimant from transmitting abroad the sum received until the end of the war, however the alien might move easily to raise funds for the enemy country. In Swearngin v Sears Roebuck & Co [57], the Court pierced the veil of a two-tier corporate structure, set up to obstruct liability suits against the manufacturer on grounds of public policy.

Under capitalization (Special Liability Enterprises)

Sometimes, the enterprise itself may be legal and not in violation of any policy or rule of law, but additional liabilities, over the stockholders' contribution to capital are imposed by law [58]. In Anderson v Abbot [59], a group of individuals wished to purchase the shares of certain banks and for this purpose caused Banco Kentucky Corporation to be formed and to invest in the bulk of its capital in majority stock interest in seven banks. Though there were other investments, Banco was plainly formed for the purpose of controlling these banks.

The individual shareholders of the Banco Stockholding Company were liable for the balance of the unpaid liability assessment of the national bank stock in the portfolio of the holding company which Banco itself was unable to satisfy.

The relief of wrongful trading, rather than lifting the veil, is a statutory approach to inadequate capitalisation, to avoid abuse of limited liability by business managers.

Doctrine of Deep Rock Case

In Taylor v Standard Gas Electricity Company [60], a group of companies was formed to take over the legitimate business of another company for better management, without violating any rule of law. The shareholders of the parent company were compelled, on failure of one of the companies which had insufficient capital for the scope of its activities, to contribute more money than they had agreed [61]. The debtor company was found to have been used for fraudulent transfers to its parent corporation. The court formulated the following rule:

"Where a showing can be made that a subsidiary corporation having public preferred stockholders was inadequately capitalised from the outset, and was managed substantially in the interest of its parent, rather than in its own interest, the parent will not, in a bankruptcy or reorganisation proceeding affecting the subsidiary be permitted to assert a claim as a creditor, except in subordination to the claims of preferred stockholders".

Statutory Provisions on Lifting the Veil

Various statutory provisions exist which impose liability on officers and shareholders of companies for derelictions and unethical conduct. These provisions supplement common law and case law. These are:

National Environmental Standards and Regulations Enforcement Agency (NESREA)

1. The NESREA Act abrogated FEPA the Federal Environmental Protection Act

Section 27(1) (4) of the National Environmental Standards and Regulations Enforcement Agency Act, provides that where harmful hazardous substances are discharged without permission by a body corporate and where an offence under subsection (1) of the section is committed by a body corporate, every person who at the time the offence was committed was in charge of the body corporate shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished, accordingly [62]. Section 37 specifically provides liability to hold any director, officer or person, concerned with the management of the business of a body corporate who contravenes the Act.

2. National Agency for Food and Drugs Administration and Control Agency (NAFDAC) Act [63]

Section 4 of NAFDAC Act provides that where an offence has been committed by a corporation with the consent or connivance of, or to be attributable to any neglect on the part of any directors, manager, secretary or other similar officer of the body corporate or any person purporting to act in any of those capacities, he as well as the body corporate shall be guilty of the offence and shall be liable on conviction to a fine of N100, 000.00.

3. Bankruptcy and Insolvency Act: Fraudulent Trading

Section 212 of the Bankruptcy and Insolvency Act, 2015 makes persons including company officers, liquidators, administrative receivers, company promoters and also directors, liable to contribute to the company's assets for breach of fiduciary duty or any other duty owed to the company. Based on application by the official receiver, liquidator, or any creditor, a court can examine the conduct of an officer of a company to see if they have misapplied, retained or become accountable for money or property of the company, or if they have been guilty of a misfeasance or breach of duty to the company. The court can order the persons to repay all or some of the misapplied funds. The successful application of this section is illustrated in West Mercia Safety wear Ltd (in liq) v Dodd [64]. In this case, West Mercia Safetywear Ltd (West Mercia) was a wholly owned subsidiary of AJ Dodd & Co Ltd (Dodd). Mr Dodd was the director of both companies and both companies banked at the same bank. Dodd's overdraft was guaranteed by Mr Dodd. By May 1984, West Mercia owed Dodd Ltd about £30,000.Both companies were in financial difficulties and their accountant advised Mr. Dodd not to operate the company's bank accounts. Contrary to this advice, Mr Dodd transferred £4,000 from West Mercia's account to Dodd Ltd. In June, both companies went into liquidation. The liquidator for West Mercia applied for a declaration that Mr Dodd was guilty of misfeasance and breach of trust and should repay £4,000 to West Mercia.

The court held that once a company was insolvent, the interests of the creditors override the interests of the shareholders. Thus, the transfer was against the interest of the company as the assets effectively belonged to creditors in insolvency.

This section applies to a single transaction with just one creditor as in Re L Todd (Swanscombe) Ltd [65]. In this case, Mr Morez was a company director of a scrap metal business. It dealt with its principal customer, Mayer Newman, for many years without charging VAT. In 1985, the company went into liquidation and the following year Mr Morez was convicted of fraudulent evasion of VAT. In 1988, the Commissioners of Customs and Excise of VAT sought repayment of VAT from Morez. The court held that he was personally liable for VAT debts as he had traded knowing that he was defrauding a creditor in the process.

In Morphitis v Bernasconi and Others [66] the court held that it does not necessarily follow that whenever a fraud on a creditor is perpetrated in the course of carrying on a business that the business was being carried on with intent to defraud creditors. The whole business must be a vehicle for fraudulent trading.

Mr Morphitis was the liquidator. Mr Bernasconi and Mr Monti were former directors who took legal advice to circumvent their insolvency by forming another company. Their failure to fully pay their rent did not constitute fraudulent trading.

4. Wrongful trading

The civil sanction of wrongful trading is set out in S 214 of the Bankruptcy and Insolvency Act [67]. Under this section, the liquidator of a company may apply for an order; in the course of winding up, making a director (including a shadow director) contribute to the company's assets as the court thinks proper. A director will be liable if the company is in insolvent liquidation and it appears that trading continued (before winding up) when the director knew or ought to have known that there was no reasonable prospect that the company would avoid liquidation.

The case of Re Produce Marketing Consortium Ltd (No 2 [68]), provides guidance on the application of this provision. Produce Marketing Consortuim (PMC) carried on business importing fruit as a commission agent. From 1981, PMC traded at a loss with liabilities progressively exceeding its assets and its overdraft increased. An overdraft of £50,000 was guaranteed by one of the directors. By 1986, the company's overdraft was over £90,000. In February 1987, the auditors concluded that the business was only continuing because of its banking facility and advised the directors that they could be personally liable for fraudulent trading. PMC went into creditors' voluntary winding up and the liquidator sought an order that the two directors be made liable under s 214 to the full liability of £107,946.

The court held that PMC had a statutory duty to publish annual accounts and therefore the directors should have reasonably known that the company should cease trading. The court therefore, held the directors' contribution to the company's assets to be the amount by which the company's assets had diminished during the wrongful trading period. i.e. the increase in 'net deficiency' between the hypothetical liquidation date and the actual date of liquidation. It is noteworthy that s 214 does not seem to have much impact on the business world, as only few of such applications, have succeeded.

5. Prohibition on the re-use of company names

Restrictions on company names exist through measures that prevent re-use of a company's name (for five years) by those who were the directors or shadow directors of an insolvent company during the 12 months prior to that company going into insolvent liquidation.

These restrictions are specified in s 216 of the Insolvency Act 1986. The penalty for a contravention of s 216 is that the director will be personally liable for the debts of the company operating in contravention of s 216. Under this section, the veil is pierced as a result of the remedy in s 217 [69].

6. Taxation& Tax Evasions

Where the Federal Board of Inland Revenue (FBIR) is of the opinion that any disposition is in fact given to avoid tax under the Income Tax Act (CITA) 2004, the veil of incorporation will be lifted. Such instances include upon divorce, estate tax [70].

7. Investment and Securities Act

Misleading prospectuses: Section 86(1) of the Investment and Securities Act (ISA) [71] provides that, where a prospectus includes any untrue statement or misstatement, any director or officer who authorized the issue of the prospectus commits an offence and is liable on conviction to a fine of not less than N1, 000,000, or to imprisonment for a term not exceeding three years or both.

Also, section 305(1) of the ISA provides, that "where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, or was responsible to the company to conduct the business of the company as well as the company shall be deemed guilty of the offence and shall be liable for the process.

8. Economic and Financial Crimes Commission Establishment Act

Section 14(1) of the Economic and Financial Crimes Commission Act [72] provides, that "A person who, being an officer of a bank or other financial institution fails or neglects to secure compliance with the provisions of this Act, shall be guilty of an offence.

9. S.7 of the EFCC [73] Act empowers the Commission to conduct investigations on any organisation or person(s), including their properties and lifestyle in respect of economic crimes.

10. Section 14, thereof, also, provides for the penalty to be meted out to officers of financial institutions and non-financial institutions who do not comply with the provisions of the Act.

11. Section 34, empowers the chairman of the Commission to apply to the court ex-parte for power to issue an order addressed to the manager of a bank or any person in control of the financial or non-financial institution where an account is believed to be operated for financial crimes for the purpose of freezing such an account.

12. Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act [74]

Section 3(3) (b) (ii) of the Act [75] provides that the veil of incorporation shall be lifted "where it is necessary for the purpose of revealing members who may be liable for the debts owed by the corporate body to a failed bank".

Section 18(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act provides that "where an offence under this Act has been committed with the connivance of or to be attributed to any neglect on the part of a director, manager, registrar or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate, or any person purporting to act in any such capacity, shall be deemed to be guilty of that offence and shall be liable to be prosecuted against and punished accordingly".

13. Bill of Exchange Acts

section 63 (1) of the Bill of Exchange Act [76] provides that an officer of a company who issues or directs the issuance of any bill of exchange, promissory notes, cheques etc. without properly writing the name of the company is liable.

14. Dishonoured Cheques Act

Section 2 of the Dishonoured Cheques (Offences) Act [77] provides that a director of a body corporate can be charged along with such a corporate entity where such offence was committed with the connivance of a director.

15. Banks and other Financial Institutions Act

Section 2(1) of the Banks and other Financial Institutions Act [78], renders pyramid schemes illegal. The subsection states that no person other than a company duly incorporated in Nigeria and which holds a valid banking licence shall carry on any banking business in Nigeria.

16. Corrupt Practices & Other Related Offences Act (2003)

Section 12 of the Corrupt Practices and other Related Offences Act [79], provides for piercing the veil of incorporation for fraudulent acquisition of property with regards to persons employed under the public service. Section 16, 18, 19, 23 provide for various offences which may warrant piercing the corporate veil.

17. Companies & Allied Matters Act, (CAMA) [80]

Investigation into Companies (CAMA)

Under S. 314, thereof, as corporate creditors' claims are confined to the assets of the company, it is mandatory for the company to display the suffix "ltd" or "plc." to the company's name [81]. Also the public are entitled to know the officers, members, their shareholdings and how they operate the constitution, the level of capitalisation to determine those who ultimately control the company [82].

18. Section 83 provides for lifting the veil where there is default in keeping the register of the members.

19. Section 93 states that, if a company carries on business without having at least two members and does so for more than 6 months, every director or officer of the company during the time that it so carries on business with only one or no member shall be liable jointly and severally with the company for the debts of the company contracted during that period.

20. Sections 94 & 95 of the Act demands that a substantial shareholder in a public company shall give notice to the company stating his name, address and giving full particulars of the shares held by him or his nominee (naming the nominee) by virtue of which he is a substantial shareholder. Failure to comply with this provision attracts a fine of N50 per day of the default [83].

21. Section 112(1) provides that where the net assets of a public company are half or less of its called up share capital, the directors shall, call on extraordinary meeting not later than 30 days from the earliest day on which the fact is known to a director of the company for a date not later than 60 days from that day for the purpose of considering whether any and if so, what steps should be taken to deal with the situation.

22. Section 112(2), states that if there is failure to convene an extraordinary general meeting as required by subsection (1) thereof, each of the directors of the company who

(a)knowingly and wilfully authorised or permits the failure; or

(b) After the expiry of the period during which that meeting should have been convened, knowingly and wilfully authorises or permits the failure to continue, shall be liable to a fine of N500.

23. In Section 246(3), where the number of directors is reduced below two within a period of sixty days, any person within the company who is aware of this will be held liable for the debts of the company.

24. Section 290(a) – (c) of CAMA provides, that where a company-

a. Receives money by way of loan for a specific purpose, or

b. Receives money or other property by way of advance payment for the execution of contract or project; and

c. With intent to defraud, fails to apply the money or other property for the purpose for which it was received, every director or other officer of the company who is in default shall be personally liable. Thus, any fund received on behalf of the company should be appropriated for the purpose for which it was advanced; otherwise, such director will be personally liable. Thus, in PFS LTD v JAFIA the Chief Executive officer of a company received some money from the plaintiff which was diverted. He refused to pay on the excuse that the company experienced huge losses. The court found constructive fraud, and lifted the veil to hold him personally liable.

d. An inspector appointed by the Corporate Affairs Commission can investigate the affairs of a company and also the affairs of any other related companies. Such company may be a body corporate which is or has, at any time, been the company or a holding company of its subsidiary.

25. Under Section 316, the Corporate Affairs Commission is empowered to conduct investigations into subsidiaries of holding companies where necessary.

26. Section 333(1) provides that "if at the end of a year a company has subsidiaries, the directors shall, as well as preparing individual accounts for that year, also prepare group or statements being accounts or statements which deal with the state of affairs and profit or loss of the company and the subsidiaries. Every officer of the company who defaults shall be guilty of an offence unless he acted honestly.

27. Sections 336-338 require the publication of the accounts at the end of every financial year of a company's subsidiary as well as group accounts. A consolidated balance sheet and profit and loss accounts of the company and its subsidiaries are needed.

28. Under Section 505, where the business of the company has been conducted in a reckless manner or with a view to defrauding creditors, the court, on application by an official receiver, a liquidator, or creditor may if it thinks it proper to do so, declare any persons who were parties to such business liable for the debts or other liabilities of the company.

29. Section 506(1) provides, that if in the course of winding up of a company, it appears that any business of the company has been carried on in a reckless manner or with intent to defraud creditors of the company or creditors of any other person or for fraud, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may if it think proper to do so, declare knowingly that parties to the carrying on of the business in manner aforesaid shall be personally liable, without any limitation of liability for all or any of the debts or of other liabilities of the company as the court may direct. Accordingly, a shareholder may be held personally liable for a company's debt even if he nominated or appointed directors who engage in fraud and business. Thus, in Nathaniel Adenijiv State, it was held that for any business which appears to have been handled recklessly or with intent to defraud, the court may declare, that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally liable for any or all of the debts or other liabilities of the company.

30. Under Sections 548(2), where a company's name is not published outside its place of business, the directors(s) will be liable. Also, description of the Company's registration number must be mentioned in legible characters in all business letters of the company, and in all notices and advertisements and other official publications of the company. Failure to do this makes directors and officers liable to the holder of any bill of exchange, or promissory note for the amount thereof, unless it is duly paid by the company [84].

Conclusions

1. The corporation represents the uncontested vehicle for world prosperity and sustenance. A jealous preservation of the corporate entity doctrine warrants continuous updating of astute judicial and statutory initiatives.

The courts do not generally lift the veil so as to remove limited liability in cases involving of public companies and will not do so as a matter of routine in private companies unless there is abuse of the doctrine.

2. Piercing the veil of incorporation does not amount to a refutation of the economic entity precepts but a manifestation of lack of confidence in shareholder barons and their managerial professionals. This is exemplified in the corporate debacles of Enron and Worldcom, Oceanic Bank of Nigeria directors where shareholders/directors were held liable for corporate delictions.

3. Shareholders of parent and subsidiary companies, their directors and other corporate players must be imbibed with discipline, business ethics, and accountability as the foundation of the limited liability principle. Piercing the veil confirms that directors are mere trustees of their powers, and also that shareholders must act ethically or be stripped of the right to limit their liability. This is the trend of national and corporate governance.

4. Piercing the veil of incorporation as elucidated in the above cases has always been in the contemplation of Salomon v Salomon. Current decisions re-enact the principles after a centenary of financial and economic catarrhs is in the world economy by expanding the just and equitable grounds which must be the operational template of companies in the 21st Century.

5. The corporate entity doctrine still remains an important pillar and cornerstone of company law and legal jurisprudence in general. However, a precise definition of when a court will pierce the veil remains difficult but discernable from just and equitable grounds.

6. The corporation must not be allowed to be used for unjust enrichment or for crime or for unethical practices beyond normal business risks. Corporations must disclose and operate ethically or lose their immunity.

References

1. S. 37 CAMA LFN, Cap C20, 2004
2. Paul Davis, Sarah Worthington. Gower, "Principles of Modern Company Law". 10th Ed Sweet & Maxwell. 2016.
3. (1987) AC 22 (HL)
4. (2000) 8 NWLR (pt 668) 170
5. Faiza Ben Hashem v Shayif. Family Law 1179. 2008.
6. (1908) 61 S.E 794
7. Shonowo v Adebiyi. 2ALR 419 at 430 Per Coker JSC. 1969
8. (1969) 1 WLR 1241
9. (1953) 1WLR 483
10. SS25(1)(a) and 44(1), Cinematography Films Acts, 1948
11. (1968) NCLR 268
12. *Lockharts Ltd v Excalibur Holdings Ltd.* (1987) 47 RPR 8(NSTD).
13. (1996) 8NWLR (pt 468) 579
14. (1933) All ER 109
15. (1962) 1 WLR 832
16. (1961) Ch. 270
17. (No. 2) 2001 EWHC 703
18. S. 63 CAMA
19. (1915) AC 705; Bolton Engineering v Graham Sons Ltd (1957) 1 QB 159.
20. 2010 19 NWLR, pt 1226, 1112
21. S. 208 CAMA
22. See Financial Services Limited v Adesola. (2012) 71 Law/Sc 36/2003
23. (2013) UK SC 34
24. Supra.
25. (1926) Ch. 975
26. Carlton Communications Plc Ors v The Football League (2002) All E. R (D) 01 (Aug)
27. (1964) 1QB 330
28. (1960) UK PC 33
29. (1998) 2 Law/ CA/B/7/96
30. (1962) 2 QB 593
31. (1986) NWLR (pt 20) 48
32. (1925) AC 619
33. (1977) NCLR 443
34. (1926) 1Ch. 657, 665
35. (2003) 6NWLR (PT 815) 147
36. Agbonika, J.A.B. Kogi State University Law Review, Piercing the veil of Incorporation (2013).
37. (1976) 1WLR 852
38. (1978) UKHL 5
39. (1990) Ch. 433
40. (1939) 4 All ER 116
41. District Court of the Hague, 30th January, 2013
42. (2012) EWCA CV. 525 CA.
43. 524, F. Supp. 842, 54 USLW 2586.
44. 20 ELR 20349.No. 88 – 0325B. 724 F. Supp. 15/301 ERC 2001
45. (1991) 4 All ER @ 779
46. Krendle Cathy J, Krendle JR. 'Piercing the Corporate Veil: Focusing the Enquiry'.1978.
47. Limpus v London General Omnibus Co. Ltd (1862) 1 H&C 526
48. (1915) AC 705
49. 2011, Ohio 321 p – Edwards J.
50. (2007) 3NWLR (pt 1021) 171
51. (1916) 2 AC 535
52. (1943) AC 203.
53. (1943) AC 203, 212
54. (1894) AC 535
55. National Labour Relations Board v Fullerton Transfer And Storage Ltd Inc. 283 F. 2d 545, 548, 9th Circuit (1960).Walkosvszky v Carlton.223 NE 2d 6 (NY) (1996).
56. Porter v Freudenberg (1915) 1KB, 857, 880.
57. 376 F 2d 637 (10th Cir)
58. Federal Reserve Act, S. 23 and National Bank Act, S. 12
59. 321 US 349 (1944) U.S Supreme Court.
60. (1939) 306 US 307
61. Sprecher R.A., "The Conflicts of Equities under the Deep Rock Doctrine" 42 Col. Law Review 336.
62. The NESREA Act abrogated FEPA the Federal Environmental Protection Act.
63. National Agency for Food Drugs Administration and Control Act, Cap NI, LFN 2004
64. (1988) BCLC 250
65. (1990) BCLC 454
66. (2003) EWCA 289.
67. Insolvency Act, 1986 (UK), Bankruptcy and Insolvency Act, 2015.
68. (1989) 5 BCC 569. s. 214; 1986 Insolvency Act.
69. Thorne v Silverleaf (1994) 1 BCLC 637 on SS 216 and 217.
70. SS. 6 – 8 CGT Cap C1, LFN 2004
71. ISA (2007)
72. EFCC Act, Cap E1, 2004.
73. Economic and Financial Crimes Commission Act Cap EINo.1 of 2004.
74. Cap F2, LFN 2004
75. The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994.
76. Cap B8 Laws of the Federation of Nigeria, 2004.
77. Cap D11 LFN 2004
78. (BOFIA) 1999
79. Act No. 6 of 2003
80. Cap C 20, 2004
81. S. 29 CAMA
82. S. 27 CAMA.
83. See Abbey, Malvern Wells Ltd v Ministry of Local Govt. and Planning (1951) Ch. 728
84. *DPP v Schildekamp*(1971) AC 1.