DOES SALOMON V. SALOMON STILL REIGN? A DISQUISITION ON RECENT CASE LAW ON CORPORATE LEGAL PERSONALITY AND LIFTING THE VEIL

Abstract

The principle established in the UK House of Lords` case of Salomon v Salomon (1897) AC 22 is universally known as the concept of Corporate Legal Personality. The implications of the concept include that the liability of members of a company is limited to the amount of their unpaid shares. While the principle is placed on a broad foundation, useful and convenient, it ought to, like many other rules, be received with some qualifications, especially in view of the fact that it has sometimes been relied upon to defraud creditors, to evade existing obligations, to circumvent statutes, or to protect knavery or crime. Occasional piercing of the veil of incorporation is thus considered both desirable and necessary with a view to ensuring that the concept is not used successfully for such negative ends. This paper discusses the concept of Corporate Legal Personality, its implications and continued usefulness in the light of the negative ends to which it is sometimes deployed. Doctrinal method was adopted and analytical approach used in examining the sources of data collection. The writers' suggestion that the concept remains indispensable for the overall preservation of the sanctity of the corporate world is followed by a dispassionate discussion of current case law on Corporate Legal Personality and Lifting of Corporate Veil. Then follow a brief analysis of the circumstances that may justify lifting of the veil, and the writers' conclusion and recommendations..

Keywords: Corporate Legal Personality, Lifting the Veil, Piercing the Veil, Incorporation, Company Law, Corporate Liability.

Introduction

The principal legislation for corporate law practice in Nigeria, *the Companies and Allied Matters Act, 2020,*[138] captures the concept of separate legal personality of a duly company when it declares that "as from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all

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[138] TNL, "{Download} Companies & Allied Matters Act, 2020" (The Nigeria lawyer august 21, 2020) <Https://Thenigerialawyer.Com/Download-Companies-Allied-Matters-Act-2020/>accessed November 13, 2020

the powers and performing all functions of an incorporated company including the power to hold land, and having perpetual succession, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act"[139] The substance of this provision which encapsulates the separate legal personality of a company as articulated in the English case of *Salomon v. Salomon*[140] has been part of the English company law since 1844.[141]

The judgment of the House of Lords in *Salomon v Salomon*[142] has many legal implications, including that the liability of members of a company is limited to only the amount outstanding on their unpaid shares. The doctrine is placed on a broad foundation, useful and convenient; but like many other rules, the doctrine requires to be received with qualifications. This is because the corporate device has been used to defraud creditors, to evade existing obligations, to circumvent statutes, to protect knavery or crime. It then becomes both desirable and necessary for the veil of companies to be pierced with a view to ensuring that the corporate device is not used successfully for such negative ends. Indeed, as Chianu suggested, no jurisdiction in the English-speaking world shows any inhibition to piercing the corporate veil where it is intended to use the veil for the protection of interests which are unworthy of such protection.[143] This raises the question as to whether the concept of separate legal personality is still desirable. Does Salomon v Salomon still reign?

The Concept of Corporate Legal Personality

The principle established in the case of *Salomon v. Salomon (1897)* is universally known as the concept of corporate legal personality.

Effects of the Cconcept; Incidents of Incorporation of a Company[144]

As stated above, registration of a company comes with it certain consequences. The following have been identified as the specific consequences of incorporation or registration of a company.

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[139] *Op Cit,* S.42
[140] (1897) AC 2
[141] Chianu, E., *Company Law* (1st Ed., Panaf Press, Bedford, 2012) 189
[142] *Op Cit. P. 189.*
[143] Chianu, E., *Company Law* (1st Ed., Panaf Press, Bedford, 2012) 303
[144] CAMA, 2020, Op Cit, S. 42,

i) Limited Liability

Shareholders cannot be liable for the obligations or liabilities of the company (except where the law takes exception to this rule in order to prevent fraudulent or unfair practice by those in charges).[145]

ii) Separate Personality

A registered Company possesses a legal personality distinct from the people who formed it, from the date of its incorporation.[146] It becomes an artificial person, operating through its organs and agents,[147] and possessing all the powers of a human being of full age.[148]

iii) Vesting of Property

A company may own property, distinct from the property of its members.[149] In Nigeria, an incorporated company has all the powers of a natural person of full capacity, including the power to own, hold or dispose of property.[150] The position in Nigeria is as follows:

> Except to the extent that the company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of its business or objects, have all the powers of a natural person of full capacity.[151]

iv) **Perpetual Succession**

A company on incorporation, possesses perpetual succession;[152] it does not die nor cease to exist, even if all the directors die or retire or are removed and even if it has no members, employees, business, et cetera, unless or until its name is struck off or it is dissolved through a legal; process known as liquidation or winding up.[153]

v) Capacity to Contract

When incorporated, the company acquires contractual capacity that is, having powers to enter into contract in its own name, to acquire or dispose of property in its own name, to sue or be sued in its own name.[154]

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[145] Wigwe, C.C., Introduction To Company Law And Practice (1st Ed., Mountcrest University Press, 2016) 115

[146] Garner, B, In: Black's Law Dictionary (9th Ed., West/Thomson Reuters, 2009) 1259

[147] Bolton Engineering Co Ltd V. Graham & Sons (1957) 1 QB 159

[148] Paton, G.W., Derham, D.P., A Textbook Of Jurisprudence (4th Ed., Oxford Clarenden Press, 1972) 393

[149] *Macaura V. Northern Assurance Co. Limited* (1925) 619

[150]CAMA, 2020, s. 42

[151]*Op Cit. s*. 43(1)

[152] R*e Noel Tedman Holdings Ptroperty Ltd*

[153] Re Noel Tedman Holdings Property Ltd (1967) QD R 561

[154] Wigwe (n 8) 116

vi) Common Seal

Once incorporated, a company may have a common seal. Under English law,[155] a company may, if it desires, possess a common seal. In Nigeria, the Companies and Allied Matters Act, 2020, unlike its predecessor,[156] has abolished the mandatory possession and use of a company seal, making such possession and use simply optional, just as is the case in the United Kingdom. The 2020 Act[157] provides:

> A company may have a common seal but need not have one, and where a company has a common seal, the design and use of that seal shall be regulated by the company's articles and it shall have its name engraved in legible characters on the seal.

vii) Suing and being Sued

A registered company may sue or be sued in its own corporate name. And the company is required to enforce its rights. Members cannot do this on the company's behalf although a company may sue or be sued by its own members.[158]

Facts and Decision in Salomon v. Salomon

The case was about claims of certain loose creditors in the liquidation process of Salomon Limited, a limited liability company having Mr. Salomon as the major stakeholder. Mr. Salomon was sought to be held personally accountable for the indebtedness of Salomon Limited. The House of Lords held that, since the company was duly registered, it was a legal person having its own rights and obligations, distinct from those of its members.[159] In his judgment, Lord MacNaghten explained the concept of corporate legal personality as follows:

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate, 'capable forthwith' to use the words of the enactment, 'of exercising all the functions of an incorporated company.' Those are strong words. The company attains maturity on its birth. There is no period of minority – no interval of incapacity. I cannot understand how a body corporate thus made 'capable' by statute can lose individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the

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[155]Companies Act 2006, Chapter 46, (UK) Http://Www.Legislation.Gov.Uk/Ukpga/2006/46/Pdfs/Ukpga_20060046_En.Pdf. Accessed March 1, 2019

[156].The Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004.

[157]Section 98.

[158] See: *Foss V Harbottle* (1843) 2 Hare; 67 ER 189

[159] All Answers Ltd, *'Salomon V Salomon* – Case Summary' (Lawteacher.Net, March 2019) <Https://Www.Lawteacher.Net/Cases/Salomon-V-Salomon.Php?Vref=1> Accessed 13 November 2020.

memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, although it may be that after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members, liable, in any shape or form, except to the extent and in the manner provided by the Act.

The Concept of Lifting of Corporate Veil

The concept of separate personality of a company contributes to the foundation of world-wide economy and constitutes an important impetus for many corporate frauds and sometimes a shied for the proceeds of frauds, in that convincing a court of law to identify a fraudster with a company he controls and in which he holds the profit of the frauds, may form a crucial contributor in any efforts to secure reliefs for the aggrieved, the sufferer of the fraud. There are therefore some exceptional circumstances in which the law would disregard the corporate entity and would pay regard instead to the economic realities behind the legal façade.[160] These exceptions are what are often referred to as cases of piercing the veil. In *Oyebanji v. The State*,[161] the Supreme Court of Nigeria stated that lifting the "veil of incorporation" or "piercing the corporate veil" is, as defined in Black's Law Dictionary 9th edition, "The judicial act of imposing personal liability on otherwise immune corporate officers, directors or shareholders for the corporation's wrongful acts."

This notwithstanding, it would not do justice to the purpose of forming companies if one were to overlook that the principles relating to corporate legal entity are intended to render it clear to the public at large that company capital and private must be distinguished. According to Chianu (2012),[162] separate corporate personality is necessary in order to preserve and protect, on the one hand, the capital of the shareholders from being attacked in respect of debts of the company, and, on the other hand, the capital of the company from being attacked in respect of the debt of the shareholders. The concept of corporate personality is a major aspect of the substratum upon which global economy is built. Hence, English

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[160]. P.L. Davies, Et Al., *Principles Of Modern Company Law* (8th Ed., Sweet & Maxwell, 2008) 112

[161] (2015) LPELR-24751 (SC), Per Kekere-Ekun, J.S.C (P. 41, Paras. C-D)

[162] Chianu (N 4) 255

court has been reluctant to pierce the veil of incorporation, except in deserving situations.[163].

When the Veil may be pierced

Speaking generally on some of the instances in which the veil of incorporation of a company may be lifted, Hon Justice Kekere-Ekun of the Supreme Court of Nigeria[164] had this to say**:**

> The circumstance in which the "veil of incorporation" of a company may be lifted was succinctly stated in the case of: Alade V. ALIC (Nig.) Ltd. & Anor. (2010) 19 NWLR (Pt.1226) 111 @ 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. V. 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 V. 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.

Supporting the position above, the Court of Appeal, observed:[165]

> There is no doubt that the law as established since the case of Salomon v Salomon & Company Ltd (1987) AC 22 is that an incorporated Company

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[163].Biswas, L.C., "Approach Of The UK Court To Piercing The Veil" (DOI: 10.21.139/Ssrn.2438217edn, SSRN Electronic Journal,) Https://Www.Researchgate.Net/Publication/272526625_Approach_Of_The_UK_Court_In_Piercing_Corporate_Veil Accessed 13 November 2020. See Also Re Company (1985) BCLC 333; [1986] 2 BCC Ch. D 99

[164]*Oyebanji v. The State, supra* (N 20) Pp. 41-42, Para. D

[165]*Jubril v. FRN* (2018) LPELR-43993(CA**),** Per Ekanem, J.C.A (pp. 187-189, Paras. E-F)

has a direct and separate legal personality from its members and officials. The consequence of recognizing the separate personality of a company is to draw a veil of incorporation over the company. One is generally not entitled to go behind or lift the veil for the purpose of attaching liability to its officers. This doctrine of the law has been codified in Sections 37 and 65 of the Companies and Allied Matters Act. 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 may have a look behind or pierce the veil of incorporation to see those behind the veil. One of the instances where the veil of incorporation may be lifted is where the company is liable for fraud. See Alade v Alic (Nig) Ltd (2010) 19 NWLR (Pt. 1226) 111 and Oyebanji v State (2015) LPELR-24751. Section 10(1) of the Advance Fee Fraud and Other Fraud Related Offences Act provides an occasion for the lifting of the veil of incorporation of a company to see and hold criminally liable the natural person who instigated an offence by a company under the said Act along with the company. See Nwude v FRN (2016) 5 NWLR (Pt 1506) 471…. By the doctrine of alter ego the Court disregards corporate entity and holds individual responsible for acts knowingly and intentionally done in the name of the corporation. This is done where the individual disregarded the entity of the corporation and made it a mere conduit pipe for the transaction of his own private business. Liability springs from fraud perpetrated not on the corporation but on third persons dealing with the corporation. See Oyebanji v State supra. As has been demonstrated in the lead judgment, the appellant and his company forged and uttered documents to mislead the PPPRA into paying it the sum of N963,796,119.85 as fuel subsidy for PMS purportedly purchased from Brazil and shipped on board the vessel MT Overseas Limar where no such importation took place. This case therefore presented a classical instance for the application of the doctrine of alter ego and the lifting of the veil of incorporation.

1) By Provisions of Statutes

Provisions in some statutes could be relied upon to ignore the legal concept of separate personality by ascribing liability for the company's commitments to its shareholders or in some instances the managers. Law teacher (2018)[166] identifies some of such instances where provisions of statutes may be relied upon to pierce the veil, to include personal liability for tax offences; personal liability over reduction in the number of members below the legal minimum; personal liability

[166] All Answers (N 18)

for fraudulent trading;[167] personal liability for reckless trading and in cases of recognition of existence of group of companies to identify the holding or subsidiary companies. The veil of incorporation may also be pierced to impose personal liabilities in relation to companies not mentioned in a bill of exchange[168] or for purposes of investigation into related companies,[169] or personal liability where number of directors falls below two.[170]

2) **Piercing the Veil Under Case Law**

A lot of discordant tunes exist in case law as to defining the specific situations in which the courts may pierce the corporate veil.[171] It appears however that the UK Supreme Court cashed in on the exceptional opportunity offered in the case of case of *Prest v. Petrodel* **(**2013)[172] to try to resolve the controversy. The case involved a couple in divorces. The wife had contended that properties held by companies owned and controlled by her husband were in reality owned by the husband. The wife made a large claim for financial assistance based partly on the value of the properties owned by the husband's chain of companies. She joined the affected companies as parties and asked for an order that the companies should transfer the properties to her. At the family Court, Moylan, LJ held that piercing of corporate veil "was possible under section 24(1)(a) of the Matrimonial Causes Act,"[173] which gave power to the court to consider the properties of the companies as though they were the husband's properties and so the companies could be ordered to transfer them to Mrs. Prest. On appeal to the Supreme Court, it was unanimously[174] decided that "the companies should be ordered to transfer the properties but that the first instance judge had reached his decision in the wrong way; the Court could only order transfer of assets actually owned by the husband and not those owned by the companies. However, since the assets were held by the companies on resulting trust for the husband and the equitable interest under that resulting trust was actually owned by the husband."

The issue for determination in Prest v. Petrodel was how to ensure that company law could not be used as an instrument to hide properties and evade accountability

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[167] See *Re Hunting Lodges Limited* [1985] ILRM 75

[168] *Penrose v. Martyn* (1853) EB And E 499

[169] Under Nigerian Company Law, See For Example Op Cit. (n 1) S. 359

[170] *Ibid,* S. 271 (3)

[171] See The Article By Linklater, L., "'Piercing The Corporate Veil:' The Never-Ending Story?" (2006) 27, Company Lawyer 65, Quoted In All Answers Ibid (n 18)

[172] (2013) UK SC 34

[173] All Answers (N 18)

[174] Locke Lord LLP, "Peering Through The Veil: What's The Real Impact Of Prest V Petrodel?" (Lexologyjuly 9, 2013) <Https://Www.Lexology.Com/Library/Detail.Aspx?G=56576dfe-F85d-4929-8504-5e69ef8bf80c> Accessed 13 November 2020.

in relation to those properties, whilst upholding the veracity of the Salomon principle. It appears from the Prest case that courts are ever willing to respect the sanctity of the principle in ***Salomon v. Salomon*** and any attempt to widen the scope of instances in which the veil could be pierced may prove difficult. As stressed by Lord Sumption in that case, "if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course."[175]The Prest case appears to have pointed out two major restrictions on the power of the court to lift the veil.[176]

Some of the instances in which the courts have indicated their willingness to pierce or lift the veil of incorporation are discussed.

(a) Company acting as Agent for shareholders or as a sham

Where the shareholders of a company use the company as an agent, they will be liable for the debts of the company. Whether or not the shareholders or a shareholder has used the company as an agent is a question of fact.[177] Where a company is merely an agent of a controlling comparator, it may be said that the company is just a sham, a cloak or alter ego.[178] The bottom lime therefore is that where the courts have found fraud or some improper conduct, they have pierced the veil in the interest of justice.[179] The court may also disregard the corporate personality principle where agency can be established especially with regards to one company being the agent of another, as happened in ***Firestone Tyre & Rubber Co v. Llewellin,[180]***

(b) Group of Companies: The Theory of Single Enterprise or Single Economic Unit

The courts have recently been prepared to pierce the corporate veil between entities which are in reality one economic unit. This is because the increasing sophisticated use of group structures whereby a parent holding company creates a number of subsidiaries could facilitate skilful avoidance of liabilities. The

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[175] "Lifting the Veil on Piercing the Veil" (Informa UK Limited (I-Law.Com) <Https://Www.I-Law.Com/Ilaw/Doc/View.Htm?Id=333154> Accessed 13 November 2020.

[176]*Op Cit*

[177] *DHN Food Distributors Ltd v. London Borough Corporation* (1939) 4 All ER 116,*Ebbw v. Vale UDC V. S. Wales Traffic Area Licensing Authority* (1951) 2 KB 36

[178] Orojo, J.O., Company Law And Practice In Nigeria (5th Ed., Lexisnexis Butterworts, 2008) 92. Besides, *Wallersteiner V. Moir* (1974) 1 WLR 991; *Marina Nominees Ltd v. FBIR*(1986) LPELR-1839(SC), per Kazeem, J.S.C (P. 16, paras. D-G)

[179] Gilford Motor Co V. Horne (1933) Ch D 935; Gilford Motors Co Ltd V. Horne(1933) Ch 935. See Also Jones V. Lipman (1962) 1 WLR 832

[180] (1957) 1 WLR 464

enterprise theory found expression in the case of ***DHN Food Distributors Ltd v. Tower Harmlet LBC***[181]

(c) Company Incorporated to Evade Debt or Other obligation

The courts would, as a matter of state policy, not insist on corporate personality where to do so will result in evasion of tax or other revenue obligations to the state.[182]

(d) To ascertain the company's residence, since it is an artificial person

The courts are willing to pierce the veil in order to ascertain the company's residence, since it is an artificial person, for this purpose, the courts usually apply the "test of the pace of its central management and control" which is usually the place where the Board of Directors function. This is what happened in ***Pan Asian African Co Ltd v.*** *National Insurance Corp. (Nig) Ltd*,[183]where the Nigerian Supreme Court held that a company as a legal person can occupy residential premises.

3) Piercing the Veil in Criminal Cases

It appears, as seen from decision of courts, that in criminal cases, the issue of piercing the veil and the yardstick for applying same differ from those in civil case. The Nigerian case of *Adeniji v. The State*[184] provides an example of the attitude of the courts in this respect. In that case, Mr A (managing director of a company) received money on behalf of the company for purposes of placing an insurance for a commission. The company did not place the insurance. As a result, Mr A was arrested and later prosecuted for stealing the money he had received on the grounds that he was the proprietor of the company and the person who negotiated the insurance deal and who was also the sole signatory to the account of the company. He was convicted on the assumption that the veil should be pierced to see the operator who, in this case, was Mr A. On appeal, the Nigerian Court of Appeal, relying on a number of English cases,[185] held that it would be absurd and dangerous to make the director criminally liable for the acts apparently done by him for and on behalf of the company without express provisions of statute rendering him so criminally liable. It is for this same reason the case of

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[181] (1976) 1 WLR 852; *Harold Holdsworth & Co (Wakefield) Ltd V. Caddies* (1955) 1 WLR 352. See Also *Adams V. Cape Industries* Plc (1990) Ch D. 433

[182] *Re F.G. Films Ltd* (1953) 1 WLR 483

183 (1982) 9 SC 1; (Lawpavilion Electronic Law Report (LPELR) - *PAN ASIAN AFRICAN COMPANY LTD V. NATIONAL INSURANCE CORPORATION NIGERIA LTD*) <Http://Www.Lawpavilionpersonal.Com/Lawreportsummary.Jsp?Suite=Olabisi@9thfloor&Pk=SC.12/1982&Apk=683> Accessed 13 November 2020.

[184] (1992) 4 NWLR (Pt 234) 248

[185] *Including Ebrahim v. Westbourne Galleries Ltd* (1973) AC 360.

State v. Osler,[186] the court refused to convict the accused person who had collected money from the complainant without performing the contract she promised. It may be that the accused escaped because she had collected the money on behalf of the company and also paid it into the company's account and later withdrew it in her capacity as a director, the court refused to lift the veil.

Conclusion

The decision in *Salomon v. Salomon* appears to be the provenance of the distinctness of an incorporated company from its incorporators, directors and officers. The concept of separate corporate personality was introduced to foster and encourage enterprise and adventure, and therefore is still jealously guarded by the English and Nigerian Courts as a relevant, desirable and indeed necessary means to preserve the sanctity of the corporate world. Unless there is a cogent reason, the corporate personality should and would usually not be disregarded. The corporate veil may only be lifted/pierced in civil cases in the general interest of equity, justice and sometimes convenience.[187] With regard to criminal cases, the courts are usually reluctant to tamper with the corporate veil where it is clear that the agents of the company acted for and on behalf of the company. All in all, one could safely conclude that the principle in ***Salomon v. Salomon*** still reigns!

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