PIERCING THE CORPORATE VEIL IN VARIOUS JURISDICTIONS – PRINCIPLED OR UNPRINCIPLED?

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Abstract

The principle of limited liability of a company has been uniformly adopted by developed countries. In order to ensure a fair balance, the courts agree on occasion to 'pierce' or 'lift' the corporate veil, which involves imposing liability on the mother company for actions of its subsidiary or individual shareholders, directors, and other involved persons for actions of the company. In this regard, there have been several studies arguing the legal issues associated with the limited liability of a company and piercing the corporate veil such as Schall (2016) and Michoud (2019). This paper compares current veil-piercing practices in three jurisdictions: the UK, the US, and Australia in order to outline the advantages and limitations of the approaches taken by the courts in each country as well as to identify best practices in terms of veil piercing. For that purpose, an analytical approach to the examination of the relevant legal rules, principles, and court cases has been adopted in undertaking the present paper. The paper comes up with a number of specific suggestions and recommendations for improving the regulatory role in regard to the subject of piercing of the corporate veil.

Keywords: Corporate Personality, Veil Lifting, United Kingdom, Australia, United States

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1. INTRODUCTION

The invention of the legal concept of the corporate veil was seen by many as one of the greatest achievements in the history of the economy The principle of limited liability of a company has been uniformly adopted by developed countries, with major multinational companies consisting of several subsidiaries in different states rising in power (Spotorno, 2018; Mujih, 2017). In order to ensure a fair balance, the courts agree on occasion to 'pierce' or 'lift' the corporate veil, which involves imposing liability on the mother company for actions of its subsidiary or individual shareholders, directors, and other involved persons for actions of the company. Yet, the approaches to piercing the veil in both cases are not uniform across jurisdictions. For instance, the courts in the UK take a rather unprincipled approach to lift the veil, which contributes to an ever-expanding list of circumstances that constitute exceptions to the principle of separate corporate legal personality (Schall, 2016; Michoud, 2019). Similarly, the approach of Australian courts was famously summarised by Rogers AJA from the New South Wales Court of Appeal as having "no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil" (*Briggs v. James Hardie & Co Pty Ltd,* 1989). On the other hand, the US is one of few jurisdictions which follow a set of uniform theories when deciding

whether the veil should be lifted, including the instrumentality theory, the alter ego theory, and the recently formed business enterprise theory (Tsang, 2014). The approaches in those three jurisdictions will be compared in the current paper with the aim of extrapolating useful lessons and best practices for future decisions of the courts in each of them. Hence, the structure of this paper as follows. Section 2 elaborates on the approach of the UK jurisdiction by assessing court cases on lifting the corporate veil. Section 3 investigates the Australian approach regarding piercing the corporate veil. Section 4 converses about the situation in the US. Section 5 provides lessons for the future and best practices from the three jurisdictions in relation to piercing the corporate veil. Section 6 presents a summary and conclusions.

2. CASE BY CASE ASSESSMENT – LIFTING THE VEIL IN THE UK

The approach taken by UK courts to lifting the corporate veil can be described as a largely unprincipled assessment of the individual circumstances of each case (Hannigan, 2013). Guidance on the situations in which the courts will decide to lift the veil can be drawn from previous cases (*Lee v. Lee's Air Farming Ltd,* 1961; *Chandler v. Cape plc,* 2011; *Ord v. Belhaven Pubs Ltd,* 1998; *Creasey v. Breachwood Motors Ltd,* 1992; *Re FG (Films) Ltd,* 1953). However, such guidance should by no means be perceived as an exhaustive list of conditions leading to the lifting of the veil. In the past, the courts agreed to impose liability on company shareholders due to a statutory provision, such as s. 213 of the Insolvency Act of 1986 which refers to fraudulent trading conducted within the company (Insolvency Act of 1986). The veil was also lifted in *Daimler Co. Ltd v. Continental Tyre and Rubber Co. (Great Britain) Ltd* (1916) to recognise the German citizenship of company shareholders in times of war when s. 1 of the Trading with the Enemy Act of 1914 prevented "enemy trading" (Trading with the Enemy Act of 1914; *Tunstall v. Steigmann,* 1962). Similarly, the UK courts were in the past prepared to lift the veil where the company was clearly set up as a sham or a façade used to commit fraud. In *Gilford Motor Co. Ltd v. Horne* (*Gilford Motor Co. Ltd v. Horne,* 1933) this was done where a former employee sought to avoid the non-solicitation clause in his contract of employment by operating through the vehicle of a company (*Jones v. Lipman,* 1962; *Re Darby, ex parte Brougham,* 1911).

The approach of the courts in the above cases was not based on any principles. When reaching their decisions the courts reviewed the circumstances of each case individually and proposed justifications for their decisions which were based largely on the judges' analysis of the nature of the vehicle of a company embedded in the previous case law. For instance, in Daimler Lord Parker justified the lifting of the veil in the "enemy trading" case by stating that "the acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts" (*Daimler Co. Ltd v. Continental Tyre and Rubber Co. (Great Britain) Ltd,* 1916). Similarly, in Gilford Lord Hanworth MR based his decision to lift the veil on the justification that "the purpose of it was to enable [Mr. Gilford], under what [was] a cloak or sham, to engage in business which, on consideration of the agreement (…) was a business in respect of which he had a fear that the plaintiffs might intervene and object" (*Gilford Motor Co. Ltd v. Horne,* 1933). In both cases, the judgements appear to have been taken somehow ad hoc, bearing in mind the fairness of the potential outcomes for both parties. In particular, the courts in Daimler and Gilford appear to have been at a loss for a unified rule which would be sufficiently broad in scope to apply to both situations.

The obvious advantage of this unprincipled approach applied by the courts in Daimler and Gilford is that it allows the judges to carefully consider the potential consequences of each individual decision for future cases, as well as to contemplate the impact of the decision they are about to take on the economy. This flexible approach further enables judges to ensure that justice is achieved in each individual case, similarly to the manner in which the law of equity enables them to avoid rigid common law principles in other areas of the UK law, where following such principles would lead to an unfair outcome of the case. However, the absence of unified principles or theories on lifting the veil contributes to a significant lack of clarity of the law in this area, which makes it impossible for companies, shareholders, directors, creditors, and other interested parties to predict the likely outcome of a decision.

The complexity of the law in this area resulting from the lack of a principled approach can be especially observed in cases involving the liability of a parent company for actions of its subsidiaries. At one point, the courts shed doubt on whether a group of companies can be considered as a single business unit in the case of *Adams v. Cape Industries plc* (1990), only to take that decision back over twenty years later in *Prest v. Petrodel Resources Ltd* (2013). In *Chandler v. Cape plc* (2012) the court even went as far as to impose liability on a parent company for the negligence of a subsidiary which was no longer in existence, and which lead to its employees developing asbestosis; only to subsequently claim in *His Royal Highness Okpabi v. Royal Dutch Shell Plc* (2018) that claimants were not able to demonstrate that a parent oil company owned a duty of care to the victims of leaks from the pipes owned by its subsidiary as part of a joint venture with certain Nigerian companies. The regular changes of the law in this area significantly lower its predictability, to the extent that some began to question whether the previously accepted grounds for lifting the veil, such as the promotion of justice, are still applicable (Spotorno, 2018). Because of those limitations, it is not hard to doubt whether the current unprincipled approach to lifting the corporate veil in the UK should be changed.

3. INDIVIDUAL RULES OR UNIFIED PRINCIPLES? – PIERCING THE VEIL IN AUSTRALIA

The approach to piercing the corporate veil in Australia has been criticised by many for lacking a principled basis (Anderson, 2009). As in case of the UK, it is possible to point out circumstances in

which Australian courts have in the past decided to lift the veil. But in Australia, at least some of the rules in this area were codified, therefore increasing the predictability of the law. For instance, company directors might be required to pay a penalty determined by the court if they contravened the civil penalty provisions specified in Part 9.4B of the Corporations Act of 2001 (Corporations Act of 2001). Similarly, several other statutes impose on company directors civil and/or criminal liability for actions related to taxation (Income Tax Assessment Act of 1936), health and safety (Occupational Health and Safety Act of 2000; Workplace Health and Safety Act of 1995; Occupational Health, Safety and Welfare Act of 1986; Occupational Health and Safety Act of 2004), trade practices (Trade Practices Act of 1974) and environmental protection (Environment Protection and Biodiversity Conservation Act of 1999; Hazardous Waste (Regulation of Exports and Imports) Act of 1989; Environment Protection Act of 1997; Protection of the Environment Operations Act of 1997; Waste Management and Pollution Control Act of 1998; Environmental Protection Act of 1994; Environmental Management and Pollution Control Act of 1994). Prior to the codification, the piercing of the veil to impose liability on company directors was determined by the so-called organic theory and the principle of agency (*Lennard's Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd,* 1915). According to the theory, the actions of a director are perceived as actions of the company, since a company cannot act or think by itself (*Tesco Supermarkets Ltd v. Nattrass,* 1971; *H L Bolton (Engineering) Co. Ltd v. T J Graham & Sons Ltd,* 1957). However, the agency principle typically protects directors from liability for the company's actions based on the assumption that they act as agents of the company which acts as the principal (*Meridian Global Funds Management Asia Ltd v. Securities Commission,* 1995). The question for the courts when deciding whether to pierce the veil is, therefore, whether the director as an agent committed any wrongful acts when acting on behalf of the company (*Standard Chartered Bank v. Pakistan National Shipping Co.,* 2002).

The above distinction between the organic theory and the agency principle was a tool used by the courts prior to codification in order to introduce a set of principles to this complex area of law. However, the use of those 'tools' was never uniformly accepted by all courts, which is why the law in this area prior to codification remained unclear. For example, in *Standard Chartered Bank v. Pakistan National Shipping Co.* (2002) Lord Hoffman proposed that "just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another (…) without assuming personal responsibility" (*Standard Chartered Bank v. Pakistan National Shipping Co.,* 2002). Due to this dispute between the courts on the nature of the agency principle and the role of the organic theory in assessing liability in veil-lifting cases, this area of law was not exactly based on clear principles. As such, it was not until the law was codified that company directors, legal professionals, and the courts found the law more predictable and the rules clearer. In that sense, despite the attempt of the Australian courts to provide a more principled basis to the cases involving the lifting of the corporate veil, the common law rules prior to codification resembled an extent the randomness of the current legal rules in this area in the UK. Despite this, the availability of the organic theory as well as the agency principle granted the courts an opportunity to recourse to set guidelines when assessing whether the corporate veil should be lifted in particular cases – even if such guidelines where not always clear.

The organic theory and the agency principle were the only attempts of Australian courts to provide a more principled basis to their decisions. Those attempts related strictly to situations involving lifting of the veil to impose liability on directors. In other types of veil-lifting cases, no principles were used in judges' decisions, although – similarly to the UK – it is possible to identify certain situations in which the courts in the past decided to impose liability for the company's actions on individuals. For instance, Australian courts are eager to pierce the veil in cases involving closely held companies that is companies with one or two individuals who are both shareholders and directors (Freedman, 2000). The justification for such piercing is that in closely held companies shareholders typically do not require limited liability in order to encourage them to invest in the company (Freedman, 2000). The courts were also prepared to lift the veil where the company committed fraud, in order to enable the involuntary tort creditor to obtain justice (Freedman, 2000). However, none of the decisions in relation to closely held companies or corporate tort were based on any specific principles. Rather, the judges focused on their reasoning on providing justice to the victims in the specific cases and, at best, considering policy consequences.

Finally, Australian law on lifting the veil between parent companies and subsidiaries is significantly clearer than the UK law in this area. The courts are only prepared to pierce the veil if the vehicle of a corporate group was used for fraud or as a façade (i.e. to protect the parent company from a legal obligation), or where the control of the parent company over the subsidiary's actions is sufficiently strong to conclude that the parent company is directly liable for actions of the subsidiary (Kluver, 2005). Lack of any specific principles applicable in such cases enables judges to consider the circumstances of each case individually, whereas the presence of those loose guidelines on the previous situations which justified veil-lifting ensures a certain degree of predictability of the law. Yet, the presence of specific legal principles would empower the judges to make decisions in such circumstances faster and more efficiently.

4. STRICT THEORIES AND CONSISTENT APPROACHES – THE CASE OF THE US

Contrary to the approaches taken by the courts in the UK and Australia, the US courts approach the problem of veil piercing from a more principled perspective. There are two key theories applied by the US courts in cases involving lifting of the corporate veil: 1) agency theory and 2) instrumentality/alter ego theory. The advantage for the judges of using such theories is that each theory contains a clear test composed of several conditions which serve as guidance, allowing the judges – at least to an extent – to standardise

decisions in all cases involving veil piercing. This, in turn, significantly increases the predictability of the law, although perhaps not quite to the extent that such predictability is achieved through codification. For example, the instrumentality/alter ego doctrine proposes that corporate veil can be pierced where the factual circumstances indicate that a company is a mere instrumentality, i.e. an alter ego of an individual (*People v. Clauson,* 1964; *Giblin v. Murphy,* 1983; *United States v. Elgin Joliet & E. Ry. Co.,* 1936; *United States v. South Buffalo Ry. Co.,* 1948; *United States v. Milwaukee Refrigeration Transit Co.,* 1905). The doctrine includes the following three conditions which must be met in order for the veil to be lifted: 1) there is a unity of the interests of the shareholder and the company, 2) there was a wrongful or inequitable action taken by the company, and 3) the harm suffered by the party seeking to pierce the veil is a reasonably foreseeable result of the company's action (*Zaist v. Olson,* 1967; *Wholesale and Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc.,* 1993). The first condition is satisfied where there is "such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist" (*Dietel v. Day,* 1972; *Employer's Liability Assurance Corp., Ltd. v. John H. Barr, John H. Barr Marketing Company, and Tom Barr, Appellants v. Heaton LUNT and Virgil Lunt, copartners dba Heaton Lunt & Son, Appellees,* 1957; *Gatecliff v. Great Republic Life Ins. Co.,* 1991; *Walker v. Southwest Mines Dev. Co.,* 1938; *Great Am. Duck Races, Inc. v. Intellectual Solutions, Inc.,* 2013), whereas the second condition is met where "upholding the corporate entity and allowing for the shareholders to dodge personal liability for its debts would sanction a fraud or promote an injustice" (*Automotriz del Golfo de California v. Resnick,* 1957).

The application of the above rules provides the courts with a structure for their decision-making that unifies and standardises the reasoning of the courts behind their decisions related to lifting the corporate veil. Equally, it enables judges to consider the individual circumstances of each case when applying the conditions in the test. Yet, the presence of a standardised common law test posits certain challenges that are typically addressed by the law of equity, i.e. the potential that in some situations the strict application of the rules might render an unjust decision. Still, the application of equitable principles is not always available and, given that litigations involving the lifting of the corporate veil are the most popular commercial litigations in the US, this exposes many parties to potential injustice. Nevertheless, in cases where the application of the instrumentality/alter ego theory is not sufficient to ensure a fair outcome of the case, recourse to the agency theory might fulfil that purpose. In particular, the agency theory formulated in the case of *Berkey v. Third Avenue Railway Company* (1926) proposes that the veil should be lifted in circumstances where "the dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent" (*Berkey v. Third Avenue Railway Company,* 1926). Although this formulation of the agency theory appears to be clear, the courts have over the years disputed its application in cases where control is less obtrusive, instead of encouraging the application of the tests on "honesty and justice (*Berkey v. Third Avenue Railway Company,* 1926)".

Despite the appeal of relying on one of the above doctrines when deciding in veil-lifting cases the US courts on occasion depart from those set principles, which could perhaps be seen as evidence that even the principled approach to piercing the veil requires a certain level of flexibility in order to ensure justice. For instance, in *Kinney Shoe Corp. v. Polan* (1991) the sole owner of a company was personally sued for the money outstanding on a sub-lease taken by that company. Although in theory, the existence of the corporate veil should have sheltered the owner from the debts of the company, the judges decided to lift the veil due to the fact that the company never held any corporate meetings or appointed any elected officers. The court decided that the company was merely a 'shell' for the owner's actions, which could be deduced from the fact that simple standard corporate formalities were not preserved. In particular, Chapman J. opined that separate legal personality of a company should be ignored "when it is urged with an intent not within its reason and purpose, and in such a way that its retention would produce injustices or inequitable consequences" (*Kinney Shoe Corp. v. Polan,* 1991). The reasoning of Chapman J. in Kinney strongly resembles the reasoning of the UK courts in cases involving the use of a company as a fraud, including Gilford. The fact that Chapman J. considered it necessary to step away from the agency and the instrumentality/alter ego theories highlights the importance of allowing the courts to follow a more flexible approach to veil-piercing, particularly in cases where following a traditional doctrine would lead to injustice. Therefore, perhaps a combination of the 'laissez-faire' approach used by the courts in the UK and Australia as well as the principled approach of the US courts would ensure that veil-piercing cases are always decided both efficiently and fairly.

5. LESSONS FOR THE FUTURE – BEST PRACTICES FROM THE THREE JURISDICTIONS

The subject of piercing of the corporate veil has in the past attracted significant attention from the academic world in different countries due to the overall lack of clear rules which would prescribe when this remedy should be granted by the courts. Lifting of the veil is an equitable remedy that is used at the courts' discretion. However, the lack of clear rules on when the courts can do so in the three jurisdictions discussed earlier in this paper constitutes a major setback of the commercial legal justice system. The existence of a separate legal personality of a company has significant "overall benefits to society and constitutes a justifiable and desirable feature of corporate and tort law" (Bergkamp & Pak, 2001). As such, the decision of the courts to lift the veil should be based on well-formulated rules which would provide the judges with clear guidance on when the veil should be lifted as well as a certain level of flexibility to depart from the rules where they would clearly produce injustice. It is difficult to imagine that this effect can be achieved through the common law, regardless of whether the courts would rely on pre-existing doctrines or principles in making their decisions.

The existence of such doctrines or principles provides the courts with a uniform test which they can apply in veil-piercing cases, which significantly increases the predictability of the law in this area. This is clearly required in order to ensure a stable and prosperous business environment within the state. However, the doctrines established in the US might not be easily replicated in the UK or Australia, neither are they completely effective in ensuring the smooth operation of the law, given the need of the courts to depart from them in cases such as Kinney.

Perhaps the most effective way to achieve this aim in the three jurisdictions would be through the codification of the law, in the same manner, that the Australian parliament codified the rules on piercing the veil to impose liability on company directors. Such an approach would undoubtedly be significantly easier to implement in the US where the courts have already set out the veil-piercing theories. The standardisation of this area of law in all three countries should be considered of high importance given the number of cases considered by the courts in commercial disputes every year. Moreover, leaving this area without codification poses the risk that it will become even more complex if the courts continue changing their approaches to veil-lifting in the future. The setting out in the legislation of even the most basic rules on veil piercing would prevent that process by encouraging the courts to work within the prescribed boundaries of the statutory provisions. Equally, it could prevent veil-lifting cases from arising in the first place by clearly informing company shareholders and directors of the consequences of certain wrongful actions that they could potentially commit on behalf of the company for their personal finances. In other words, putting relevant legislation in place would act as a deterrent for the individuals or corporate entities behind the company, therefore increasing the security of any creditors in cases involving lifting of the veil to impose financial liability on an individual or a parent company. Codification is particularly important with regards to cases involving lifting the veil to impose liability on parent companies in order to emphasise the importance of corporate groups taking responsibility for their subsidiaries. Due to the increasing growth of multi-national corporate groups with significant powers, the position of corporate employees is progressively worsening. Codification is particularly necessary in order to avoid the confusion in tort cases involving employees, such as that present in the UK cases of Adams and Chandler.

6. CONCLUSION

Piercing the corporate veil continues to be a protective measure against the abuse of separate legal personality. In other words, it can be considered as one of the legal responses to the potential abuse(s) of limited liability. This paper compared the reasoning of the judges in veil lifting cases in three jurisdictions: the UK, Australia, and the US. The above discussion revealed that the UK and Australian courts use a similar approach to piercing the corporate veil, whereby the circumstances of each individual case are reviewed by the judges with the aim of identifying whether it would be fair and just to lift the veil in that particular case. In addition, the Australian parliament codified several key provisions with regards to lifting the veil to impose liability on company directors, which significantly increased the predictability of the law in this area. However, the largely unprincipled approach used by the courts in both jurisdictions contributes to significant complexity and confusion in this area of law. The approach adopted by the US courts involves reliance on two key doctrines: the agency doctrine and the instrumentality/alter ego doctrine which provides the judges with tests applicable to various types of cases involving piercing of the corporate veil. Such an approach is more efficient and predictable than the unprincipled approach applied in the UK and Australia, but it is not without limitations. Decisions such as that in the case of Kinney demonstrate that the application of even the most advanced theories in this area cannot guarantee a just result of the case due to the complexity of some of the cases involving limited liability. It is recommended that the codification of the law in this area would constitute a significant improvement of commercial law in all three jurisdictions. However, the codified rules would have to be formulated in a manner that would allow the courts for certain departures from the set rules where the interests of justice would require it.

It is clear from cases and academic studies that the law relating to piercing the veil is insufficient and disoriented. As well, corporate lawyers have exercised much effort in trying to figure out the instances in which a court can pierce the corporate veil (*Prest v. Petrodel Resources Ltd,* 2013). It is undoubtedly said that a regulatory reform needs to consider the effectiveness of the current liability imposed on the limited liability of a company. However, having an accountability mechanism for misconduct or malpractice of separate legal personality is imperative for the maintenance of public confidence and prosperity in the business. For that reason, it is important to hold the persons entrusted with market regulation accountable and be able to discipline them if the need arises. It recommended that academic researchers have an important role to support regulators in order to implement effective enforcement strategies (Tomasic, 2001) Hence, the law should strongly interfere in the corporate veil of the company's limited liability to provide protection for all involved parties from unfair practices. Equally important, the need for on-going research and studies is significant in order to find out the best applicable approach that can be applied in corporate veil-piercing and develop laws in this area.

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