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How far have the principles articulated by the House of Lords in Salomon V.A. Salomon & sons ltd [1897] ac 22 been developed since the decision? To what extent does the current approach accord with modern business practice?

This essay examines evolution of corporate legal personality and limited liability concepts and their relevance to modern business practice. It will also deal with issues of when a company's legal personality is ignored and when the veil is lifted. It is not merely about disregarding the corporate personality, but also about imposing just and reasonable limitations on the exercise of the privilege of independent capacity.

Key words: corporate law, corporate personality, corporation, legal entity, enterprise, limited liability principles, Solomon principles.

The epoch-making decision of the House of Lords in Salomon v Salomon [1] was the first English case to strongly affirming the principles of separate legal personality and limited liability, causing a far-reaching impact [2]. Perhaps the most important and often cited decision to this day, the significance and reach of Salomon cannot be overstated. These principles form the very foundations of modern business and corporate law [3].

Notwithstanding various attempts by both the legislature and the judiciary to circumvent the principles, the ruling has, with few exceptions, stood the test of time. Since the decision in Salomon's case, the complete separation of the company and its members has never been doubted. However, despite theoretical unanimity on the practical need for the principles, from a practical perspective, the separate legal personality of a corporation causes some difficulties [4].

This essay examines evolution of corporate legal personality and limited liability concepts and their relevance to modern business practice. It will also deal with issues of when a company's legal personality is ignored and when the veil is lifted. It is not merely about disregarding the corporate personality, but also about imposing just and reasonable limitations on the exercise of the privilege of independent capacity.

The starting point is that upon incorporation a company becomes a separate legal entity with the rights, duties, obligations and liabilities that could normally be associated only with a natural person and at law it is distinct from and independent of its shareholders. This is the fundamental attribute of corporate personality, from which all the other practical consequences flow. As a separate legal person, a registered company is capable of suing and being sued [5], it has perpetual succession [6], it can enter into contracts in its own name and it has power to acquire, hold and dispose of property [7], it can contract with its controlling member [8] and can be the debtor, creditor or surety of a member. Moreover, a corporation can enter into flexible financing arrangements by creating a floating charge. Finally, although, not always necessary, the liability of a limited company is limited [1], i.e. a company is exclusively liable for obligations incurred on its behalf.

Salomon was followed in subsequent cases, notably Lee v Lee's Air Farming Ltd, where the wife of the majority shareholder and practically a sole member of the corporation successfully claimed compensation as the wife of an «employee who lost his life in course of employment», and Macaura v Northern Assurance Co which highlight the reality of the separate corporate identity and take it a step further in stressing the distinction between a company's identity and that of its shareholders. Thus the position of law regarding

the separate legal personality of a company has been deeply entrenched in the very roots of the common law tradition.

However, modern practice, with the growth of commercial enterprise, has resulted in principles being abused by shrewd entrepreneurs. Corporate structures have sometimes been used to bend the law and avoid lawful duties and liabilities. The regulatory response to this has been the creation of statutory exceptions ignoring the separate legal personality in certain circumstances [9]. Although judicial invasions have also been made, there is still uncertainty of where the thin line between lifting the veil and disregarding the corporation's existence lies.

The culmination point in this context is Adams v Cape [10], the case that is probably cited just as often as Salomon itself. The core decision was that «the court is not free to disregard the principle of Salomon v Salomon merely because it considers that justice so requires» underlying the separate legal identity of each group member. Although, sometimes the courts give justice primacy over the «legal efficacy of the corporation» and pierce the veil, as on issuing Mareva injunctions [11] or in Re A Company [12], there appears to be a change of attitude and direction by the 1990's, whereby Adams seems to resist further attempts to erode the Salomon principle, promoting certainty at the expense of justice. The judgements in Re Polly Peck International Plc (In Administration) [13] and Yukong v Rendsberg [14] reiterate this position despite scope for perceived injustice. The earlier case of Creasey v Beachwood Motors Ltd [15], where the corporate veil was lifted in order to prevent a company's attempt at avoiding to settle an unfair dismissal claim, was set aside in Ord v Belhaven [16] following Adams. The law now pursuant to Ord is that corporate personality can only be ignored where the corporate form is being used for some «manifestly improper or fraudulent purpose» and the principles on which the veil would be pierced are very inelastic. Thus a bona fide group restructuring lis penden was held to be perfectly legitimate, despite the subsidiary having no assets left to meet its contingent liabilities. The case of Williams v Natural Life Health Foods [17] also serves to reiterate the separate entity and limited liability principles by highlighting the difficulty in lifting the corporate veil in order to sue the Managing Director. The concerns expressed by Moritt V.C. in Trustor AB v Smallbone (No 2) [18] further validates the position that the corporate veil cannot be lifted merely because justice requires it and that the only remedy for a plaintiff is to go under the narrow exception of fraud [1] or evading an existing fully crystallised contractual/legal obligations as in Jones v Lipman [19] or Gilford Motor [20].

In Gilford Motor, in which the defendant attempted to evade his obligations under a contract not to compete with the claimants, but carried on a competing business with a company owned by his wife, it was held that the company was a sham used to try to evade the contractual obligations. In Jones, the defendant company was described as «…a sham…to avoid recognition by the eye of equity». This is possibly one of the vaguest, although often-used exceptions to limited liability. Gower, while noting the difficulties associated with determination of when a facade is used, believes that it is the only true instance of lifting the veil, because unlike agency/group companies/statutory exceptions where the independent existence is not denied but the practical effect on rights and liabilities is as if it had been, here there is an express rejection of the former [21]. Lord Cooke, on the contrary, takes a more conservative view questioning whether «sham» is an exception, since if the company is deemed to not exist, then the concept of piercing its veil is jurisprudentially unimaginable and a «spurious concept» [22]. Thus its use should be very restricted [23] since unhampered usage as in Jones proves that the very act of granting a remedy against the company proves that it was not a sham.

The so-called agency relationship can be identified as the most commonly proposed exception to the separate legal personality principle. As decided in Salomon, if a company is acting as an agent for another party the corporate veil may be lifted. The courts, however, appear reluctant to determine that a principle-agent relationship exists with respect to an individual controlling shareholder, whereas they have demonstrated less reluctance when the alleged agency is between a holding company and its subsidiary. Perhaps, this is because such a situation offers more opportunity for holding company management to unfairly take advantage of limited liability. The vast majority of decisions concerning group companies, however, orbit around the Salomon principles, thus underlying the separate legal identity of each group member.

This has led to a lot of debate with regard to what has become known as the single economic unit. Sometimes, corporate groups with various subsidiaries that are in essence all separate legal entities were not considered as such. This started with DHN Food Distributors [24] where the court «looked at the business realities of the situation rather than confining itself to narrow legalistic views» prompting scholars to suggest that courts may disregard the separate legal identity of all companies involved and to recognise them as one main company whenever it is «just and equitable to do so» [17]. The source of confusion was Lord Den-

ning's reliance on Professor Gower's observation that there was a «general tendency» to ignore the separate legal personality within a group and look at it as a single economic entity which completely contravened the ruling in Adams. Although DHN was approved in Amalgamated Investment v TCIB [25] and in Lewis Trusts v Bambers Stores, the Court of Appeal, in the latter case of Multinational Gas [26] indicated that DHN was an aberration. Indeed, English courts soon returned to the Adams position and further cases have reasserted the importance of the separate entity principle as enunciated in Salomon, notably the decisions in Re Polly Peck, Yukong and Ord.

However, the question whether these principles created 100 years ago are capable of generating and controlling modern corporate groups remains open. Is it appropriate to uphold separation and limited liability in legal entity shareholders, or should this be privilege of natural persons?

From practical prospective, a creditor of a single company can easily identify the shareholders and assets of the company and assess the risk of his loss should the company be unable to pay its debt. However, problems may arise with the corporate group, where the creditor may find himself in a position that while intending to deal with a major company with many assets, he is in fact dealing with a subsidiary with the minimum share capital and assets even though the directors and shareholders remain the same. Due to the concept of a separate legal personality, he will be unable to recover any debt owed by the subsidiary from the group as a whole unless he is able to show an agency relationship [27] or that the subsidiary is a mere façade that allows the courts to pierce the corporate veil. The rationale behind this is that creditors should or would have known about the state of affairs before transacting with the company as the company accounts are public records.

Although voluntary creditors may create protection for themselves by putting a price that reflects the amount of risk they are exposed, or guarantees given by a parent company, or «cross guarantees» whereby each company forming part of the group guarantees not only its own indebtedness but also that of the other companies forming the group, involuntary creditors remain unprotected. The unfortunate effect of limited liability for tort victims is that it enables a corporate group to ensure that a subsidiary that is likely to commit the tort, and hence be liable for damages, has the least assets and its liquidation would have little detrimental effect on the group as a whole [28].

Few writers note that the typical function of the limited company today is substantially different to that for which it was originally intended or anticipated. Muchlinski claims that the idea of the separate legal entity doctrine has no place in a parent-subsidiary relationship, as the parent does not run the subsidiary like a normal shareholder. According to him, a normal shareholder has little or no interest in running the company while a parent turns out to be the actual manager [29]. Hannigan suggests that the strict adherence to the Salomon principle is inappropriate in the modern business world where recognition ought to be given to the group commercial activities that could not have been envisaged in 1897 and that obligations, responsibilities and liabilities should attach to the group as a whole so as to reflect the «economic reality» [30]. Blumberg argues that discussions on corporate personality in vacuum have no relevance in the modern commercial world where group companies are commonplace and consequently, the focal point of legal controversies.

Daehnert, however, made a point by looking at the problem from a position of a risk shifting mechanism from shareholders to creditors [31]. He mentioned two aspects: legitimacy and necessity. As regards legitimacy, it has to be asked why natural persons should be allowed to shield themselves from risks, while legal entities may not. After all, the Salomon principles are consequences of the divorce of investment and entrepreneurship by transferring the risk of management. Is it not legitimate to transfer risks to one or more group members in order to protect the whole group? A single group member's insolvency may bring down the whole group [32]. This illustrates the point that it might be far more beneficial to allow the shifting of risks in order to protect the whole group at the price of a few being sacrificed. On the other hand, creditors of other group members would disagree to carry the insolvency risks of group members they did not contract with. Furthermore, corporate groups would suffer competitive disadvantages compare to single firms, as the costs of operating the business would be greater where the parent was liable for debts arising while shareholders of a sole company were not.

As for necessity, it has to be asked which risks are socially desirable and whether progress would be blocked where they did not exist. Apparently, it cannot be denied that there exists a kind of risk aversion and that limited liability fulfils the function of risk insurance, thus fuelling economic and technical progress. This argument is also valid in the group context and it may be noteworthy that economic actors, whether single ones or groups, rely de facto on this form of risk insurance. Otherwise, managers of corporate groups might be reluctant to embark on risky new activity because they are required to avoid exposing the parent

entity without protection. It appears to be difficult to imagine a complex diversified economy without adequate risk spreading mechanisms. Risks cannot disappear, they can only be shifted.

Solution for this problem has already been in place, particularly in a strict and extensive capital maintenance regime, which ought to prevent unconstrained flow of assets back from the company to its shareholders, mechanisms for prevention of asset deprivation, liability for wrongful and fraudulent trading, disclosure, disqualification, etc. which demonstrate that there is no need to dissolve the borderlines of separation and liability within corporate groups.

Many cases discussed throughout this essay, thus recent case law points to the importance of the Salomon principles where companies will be regarded as separate legal entities with their own liabilities and obligations unless there seem obvious reasons to disregard the corporate veil. Since Salomon v Salomon the courts and the legislature have not stood still, yet rather than eroding this 'cornerstone' they have merely reinforced its importance for modern company law vigorously rejecting group liability. For surely the whole notion of incorporation carries with it notions of risk taking and it would be impossible to protect against all of this. However, these threats cannot and must not be solved by abolishing the fundamental elements of every modern economy.

References

1 *Salomon V.A.* Salomon & Sons Ltd [1897] AC 22.

2 *Kahn-Freund O.* «Some Reflections on Company Law Reform» (1944) 7 Modern Law Review 54.

3 *Mohanty S., Bhandari V.* The evolution of the separate legal personality doctrine and its exceptions: a comparative analysis, Company Lawyer 2011.

4 A Two-Edged Sword: Salomon and the Separate Legal Entity Doctrine', Murdoch University Electronic Journal of Law at http://www.murdoch.edu.au/elaw/issues/v7n3/puig73a.html (last visited 19 August 2011).

5 Foss v Harbottle (1843) 67 ER 189.

6 Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378.

7 Macaura v Northern Assurance Co Ltd [1925] AC 619.

8 Lee v Lee's Air Farming Ltd [1961] AC 12.

9 Company Directors Disqualification Act 1986 ss. 4 and 10, Companies Act 2006 s. 993, and Insolvency Act 1986 p. 213–215 impose personal liability on directors for fraud.

10 Adams and Others v Cape Industries Plc. and Another CA [1990] Ch 433.

11 Mareva Compania Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509.

12 A Company, Re [1985] BCLC 333.

13 Polly Peck International Plc (In Administration), Re [1996] 2 All ER 433.

14 Yukong Line Ltd of Korea v Rendsberg [1998] 1 All ER 929.

15 Creasey v Beachwood Motors Ltd [1993] BCLC 480.

16 Ord v Belhaven [1998] BCLC 447.

17 Williams v Natural Life Health Foods [1998] 1 WLR 830.

18 Trustor AB v Smallbone (No 2) [2001] 2 BCLC 436.

19 Jones v Lipman [1962] 1WLR 832.

20 Gilford Motor Co Ltd v Horne [1933] Ch 935.

21 Gower et al., Principles of Modern Company Law, 1997. — P. 173.

22 Lord Cooke 'A Real Thing: Salomon v. A. Salomon & Co. Ltd'. in *Turning Points of the Common Law,* 1997. — P. 15.

23 Snook v London & W Riding Investments Ltd [1967] 2 QB 786.

24 D.H.N Food Distributors v Tower Hamlets L.B.C [1976] 3 All ER 462.

25 Amalgamated Investment and Property Co. Ltd. v Texas Commercial International Bank Ltd. [1982] Q.B. 84.

26 Multinational Gas and Petroleum Co v Multinational Gas and Petroleum Services Ltd [1983] 3 WLR 492.

27 Smith, Stone & Knight Ltd v Birmingham Corp 84 [1939] 4 All ER 116.

28 Barings Plc (In Liquidation) v Coopers & Lybrand (No. 4) [2002] 2 BCLC 364.

29 Muchlinski P.T. «Holding Multinationals to Account: Recent Developments in English Litigation and the Company Law Review» (2002) 23 Company Lawyer 168.

30 Hannigan Company Law (Butterworths LexisNexis 2003).

31 Daehnert A. 'Lifting the corporate veil: English and German perspectives on group liability', International Company and Commercial Law Review 2007.

32 Facia Foorwear Ltd v Hinchcliffe [1998] 1 BCLC 218.

К.Мехраби

Лордтар палатасымен қалыптастырылған қағидалардың дамуы Salomon V.A. Salomon & sons ltd [1897] ac 22 және оларды қазіргі кездегі іскерлік тәжірибеде қолдану мүмкіндігі

Мақалада корпоративті заңды тұлғалардың эволюциясын, жауапкершілігі шектеулі ұйымдардың тұжырымдамаларын және олардың қазіргі кездегі іскерлік тәжірибе үшін өзектілігі қарастырылды. Компаниялардың құқық субъектілігін елемеушілік мәселелері зерттелді. Корпоративті тұлғаға мән бермеу жағдайы ғана емес, сонымен қатар құқықтарды жүзеге асыруда әділ және орынды шектеулерді қоюға талдау жасалды.

Кулжан Мехраби

Развитие принципов, сформулированных палатой лордов в Salomon V.A. Salomon & sons ltd [1897] ac 22, и возможность их применения в современной деловой практике

В статье показаны эволюция корпоративных юридических лиц, организаций с ограниченной ответственностью и их актуальность для современной деловой практики. Рассмотрены вопросы игнорирования правосубъектности компаний. Проанализированы не просто случаи пренебрежения корпоративной личности, но и случаи наложения справедливых и разумных ограничений в осуществлении прав.

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Порядок разрешения коллективных трудовых споров по законодательству Республик Казахстан и Азербайджан

В статье рассмотрены особенности разрешения коллективных трудовых споров по законодательству Республики Казахстан и Азербайджана. Проанализированы процедуры разрешения коллективных трудовых споров посредством примирительных процедур, среди которых согласительные комиссии, привлечения посредника и трудовые арбитражи. Особенное внимание автором уделено правовым основам подготовки и проведения забастовок, проанализированы особенности законодательства Казахстана и Азербайджана в части возможности использования данного способа при разрешении коллективных трудовых споров.

Ключевые слова: трудовой договор, трудовой спор, конфликт, коллективный договор, работник, работодатель, согласительная комиссия, трудовой арбитраж, суд.

Конституции Республик Азербайджан и Казахстан предусматривают право на коллективные трудовые споры и их разрешение в порядке, установленном Трудовым кодексом, включая право на забастовки (ч. 3 ст.24 Конституции КР и ст. 36 Конституции АР) [1; 2].

Коллективный трудовой спор — это неурегулированные разногласия (несогласия) между группой работников и работодателем по вопросам применения трудового права со стороны работодателя или его представителей — должностных лиц по поводу установления и изменения условий труда (включая заработную плату), заключения, изменения и выполнения коллективных договоров (соглашений) по вопросам социально-трудовых отношений [3; 4].