Contents

TOPIC 2- REGISTRATION AND ITS EFFECTS

Piercing the corporate veil test (at common law & statute)

1. **<u>Separate legal entity principles create the 'corporate veil'</u>**
    a. Separate legal entity means that legal capacity and powers are given to the company when it is registered and it is separate from its shareholders (**s.124; *Saloman v Saloman***)
    b. The veil hides members from legal view so there is potential for the company form to be misused

2. **<u>The corporate veil can be pierced in exceptional circumstances</u>**
    a. <u>Where the company is an agent of the shareholder (***Smith, Stone & Knight v Birmingham)***</u>
        i. If the company is simply an agent then ultimate responsibility for liabilities falls on the members as principals
        ii. Test from Atkinson J as to whether the subsidiary is an agent of the holding company, must make out all 6:
            1. Were the profits of the business treated as profits of the holding company?
            2. Were the persons conducting the business appointed by the holding company?
            3. Was the holding company the head and the brain of the trading venture?
            4. Did the holding company govern the adventure, decide what should be done and determine what capital should be embarked on the venture?
            5. Did the holding company make the profits by its skill and direction?
            6. Was the parent in effectual and constant control?

    b. <u>Where the company is being used as a sham to avoid an existing legal obligation (***Gilford Motor Co; Jones v Lipman; Re Darby)***</u>
        i. The company cannot be a device the mask the carrying on of a business by a person, or a device to commit fraud

c. <u>Pierced by statute **(s.588V-588X; 588G-588H)**</u>

   i. Courts may pierce the veil as a matter of statutory interpretation, in order to give effect to the purpose of the statute **(*Re Bugle Press Ltd; Burswood Catering and Entertainment v ALHMWU; Briggs v James Hardie & Co*)**

   ii. Applicable for insolvent trading: generally once a company becomes insolvent/nears insolvency, the company's directors and any holding company are to prevent, as far within their powers, the company from incurring further debts

   iii. In case of a breach of this duty, the corporate veil is pierced

      1. DIRECTOR LIABILITY

         a. **s.588G** applies if all elements in **s.588G(1)** are met

         b. Director will be liable if they fail to prevent the company from incurring the debt **(s.588G(2));** and they are aware of reasonable grounds for suspecting insolvency or a reasonable person in a like position in the company in similar circumstances would be so aware **(s.588G(2)**

            i. **S.588G(1A)** lists actions which are deemed incurring a debt

            ii. A company is insolvent if it is not solvent **(s.95A(2))**

            iii. Common indicators of insolvency were listed in ***ASIC v Plymin per Mandie J***

            iv. **S.588E(9)** provides the rebuttable presumption of insolvency if the company fails to keep financial records

            v. To establish reasonable grounds for suspecting insolvency, consider whether a reasonable person in the same position as the D and looking at what was apparent, have suspected the company's solvency? **(*Plymin)***

            vi. There are 4 defences and D can rely on more than 1 **(s.588H(2)-(5))**

      2. HOLDING COMPANY LIABILITY