CORPORATIONS LAW

TABLE OF CONTENTS

Incorporation Process

Sample Q1: *Your neighbour, Sally Superseller, wants to form a proprietary company through which to sell deluxe pink-and-purple rainwater tanks. Advise Sally as to the **information you require** from her in order to complete ASIC Form 201. Are there **any other issues** you would want to discuss with her?*

Step 1: Intro

In:

- determining whether X should incorporate his/her business in [_____];
- advising X on how s/he can incorporate his/her business in [_____]

there are two key sets of considerations. The first set of considerations relates to the procedural steps that must be taken in order to register a company with ASIC in line with Part 2A.2 of the *Corporations Act 2001 (Cth) (CA)* and the decisions that will attend the making of that application. The second set of considerations concerns the consequences of incorporations and whether these are conducive to X's business.

[At the outset, it should be noted that X's son Y cannot be a Director until s/he turns 18: s 201B(1)]

[D can't be disqualified: s 201B]

Step 2: Procedural steps to incorporate

In order to incorporate his/her business X would need to lodge an application for registration with ASIC: s 117(1). S/he can do this by filling out ASIC form 201 and paying the requisite fee.

This application will need to conform to the criteria set out in s 117(2)(a)-(n) by stating the type of company to be registered (a); the name of the company [_____] (b); the name and address of Z and Y as members (c); the names and dates of birth (d) and address of A and B as directors (e); the address of the company's proposed registered office (g); and, if the company was to be limited by shares, the number and nature of the shares to be issued to the members (k)

X would also **need to acquire Y's written consent** before s/he can be appointed as director: s 201D, s 117(2).

2.1 Holding Co?

Because X is wishing to create the co in order to facilitate X Co's business as a holding company, the name and ABN or CAN of X co would also need to be included on the application

2.2 Public Co?

Because X would like his/her business [_____] to be a public company, s/he would also need to lodge a copy of its constitution with ASIC: s 117(3)

1. Must complete and submit Form 201 to ASIC: s 117(1)
2. Application details must include (**s 117(2)**):

- **Type of company (proprietary/public): 112**
- **Proposed name** (unless using allocated ACN as its name)
- **Name and details of members, directors and secretary**
  - i. For directors and secretaries, must include present and former names; date and place of birth, and address: **117(2)**
  - ii. Directors must be at least 18 years of age: **201B(1)**
  - iii. Secretary necessary for public companies per **204A(2)**
  - iv. Secretary unnecessary for proprietary companies **204A(1)**
- **Address of the company's registered office** (and principal place of business)
  - i. All companies must have a registered office: **s 142(1)**
  - ii. Must display name at registered office: **s 133**
  - iii. Must display name on all 'public documents': defined in **88A**

iv. Public companies must be open to public during specified hours: **145**

- **Details of the shares** (or guarantees)
- If the company is in a group of companies, details of the ultimate **holding company**
- **State or territory** in which the company is registered

- The company must have at least **1 member: 114**
- Proprietary companies must have a minimum of **1 director: 201A**
- Public companies a minimum of **3 directors: 201A**
- Public companies with a constitution must lodge that constitution with ASIC: **117(5)**

Step 3: Decisions to be made

Given that X is the sole member of the co (which is permitted by s 114) the registration application will not be particularly burdensome.

Given [*FACTS*], no problems arise with respect to [*THIS STUFF*] as X has expressed his/her desire to [*DO THIS STUFF*], however s/he will need to decide [*THIS OTHER STUFF*]

3.1 Type of company

3.1 Desirable to be proprietary co

On the facts, it would be in X's best interests to incorporate [*COMPANY*] as a proprietary company (pty co). This is because pty cos:

- X's operation is relatively small
- Less than 50 shareholders: s 113(1)
- Control is an advantage (203C allows shareholders to remove directors by resolution; 203E company can add rules in its constitution to allow directors to sack other directors)
- only require one director: s 201A(1) (cf public cos which require three: s201A);
- have less onerous reporting obligations to ASIC: see s 300

However, proprietary companies may not offer shares to raise funds from the public (113(3)). Therefore, if raising funds is a significant concern for [*COMPANY*], a public company would be preferable.

3.2 Desirable to be public co

Although public companies are subject to more onerous fiduciary obligations (195, 208), are subject to more in-depth financial reporting (45A) and have less opportunity for control, the main advantage is their ability to raise funds from the public. Other considerations are:

More than 50 non-employee SHs

Required to be listed on the ASX. The advantages of listing on the ASX are:

- X would have access to wider sources of finance
- Liquidity for interest in the co
- Realisation of value of investment
- Promotes investor confidence
- Benefits in terms of reputation

However X should also consider that listing would:

- expose it to takeover threats
- a comparative lack of privacy
- extra expense and regulation (i.e. ability of SHs to call a meeting in line with [____])
- ASX listing rules *very* onerous

3.2 Name of company

Because the company will be proprietary, it will need to have 'Pty' as part of its name: s 148-9. X should also do an ASIC search to make sure that ["*NAME OF CO*"] is not already taken.

Rules:

- Names must not be identical or unacceptable: s 147
- Name is unacceptable if declared by regulations: s 147(1); Pt 2.B.6.

Step 4: Consequences of Registration (Procedural)

[Company] will become incorporated upon registration by ASIC: s 119. It will thereby become a separate legal entity from that date until it is removed from ASIC's register.

ASIC will issue to X a certificate after an application has been lodged: s 118

Details are recorded on ASCOT, searchable by members of the public

Per s 1274(7A), the certificate of registration is conclusive evidence that:

- all requirements regarding registration have been complied with;
- the company is registered
- the date of De registration

Step 5: Consequences of Incorporation (Substantive)

Assuming no problems arise in the registration process, [*THE BUSINESS*] will be incorporated upon registration, thereby conferring on ["*NAME OF CO*"] the legal capacity and powers of natural person (i.e. to hold property, enter into contracts and to sue and be sued): s 124(1), in addition to the power to issue shares: s 124(1)(a).

In line with the "separate entity doctrine", [*THE COMPANY*] would have a separate legal personality to its members. Assuming the company would be limited by shares, X's (and [B, C and D's) liability would therefore be restricted to the amount (if any) outstanding on the shares they have purchased: s 514-529 (see also *Salomon*), in practice transferring the liability s/he would otherwise be subject to as a sole trader to the creditors of [*THE COMPANY*]

Key difference	**Proprietary companies (Pty Ltd)**	**Public companies (Ltd)**
Number of shareholders	Limit: 50 employees (s 113(1))	No limit on number of shareholders
Fund raising	A proprietary company cannot offer shares to raise money to members of the public (s 113(3))	Can raise funds from the public
Matters of corporate governance (shareholder rights; duties of directors)	**203C** allows shareholders to remove a director from office through resolution (*replaceable rule*) **203E** any rules can be added to the company's constitution to allow directors to sack other directors Directors in proprietary companies decide when to hold meetings (unlike 250N)	**209D** – directors can only be removed through resolution (*not replaceable*) **203E** – A director remains until he retires, resigns or is removed by shareholders. He cannot be removed by other directors **250N** – AGM within 18 months after registration + AGM once a year after that
Fiduciary duties	**194** – self-interested directors can still vote	**195** – a self-interested director cannot vote on a matter in which he has an interest nor attend the board meeting for the duration of that discussion

THE CORPORATE VEIL (T2)

Companies limited by shares have 5 key attributes (516)

1. **Separate legal entity**
2. **Limited liability**
3. **Transferable ownership**
4. **Owners have voting rights**
5. **Delegated management**

1. Separate Personality

P: The ability to shield oneself from personal liability by interposing the company between the owners and managers and third parties who deal with the company

R: A properly registered company was a separate legal entity from its owners and managers, therefore members cannot be held liable for the company's debts (*Salomon*)

- The property of the company is not the property of the owner. Therefore, a property owned by a company is shielded against any claims against the owner of that company (*Macaura*)
- A company can validly contract with an individual because it is a separate legal entity, and can therefore contract with its owner (*Lee*)

Salomon v A Salomon & Co Ltd [1897] AC 22
Separate legal entity **Facts:** • Salomon owned a family shoemaking business whose major customer was the British Government. • 28 July 1892: Company was registered. 20,001 shares to S and 6 to his wife and children • S was appointed **chairman** of the board of directors and as **managing director**. Two of his sons were appointed as directors. • Mr Broderip lent £10,000 to the company. A year later, the company defaulted on its interest payments, B sued the company. The company was insolvent and unable to repay the debts. B sued S to recover the money from him personally
Held: A properly registered company is a separate legal entity from its owners and managers **1. The court should not look at the motives of the persons who set up a company to find that liability could not be denied** • Courts are not interested in what the consequences are for creditors nor in people's motives • In the absence of statutory intervention, it is very hard to undermine Salomon's case **2. The company is a distinct person at law, therefore members cannot be held liable for the company's debts**

Macaura v Northern Assurance Co Ltd [1925] AC 619
Re-affirms Salomon Macaura, a timber farmer, sold the rights to timber on his farm to a company and acquired all of the shares in the company in return. M took out several insurance policies over the timber in his own name. Two weeks later a fire destroyed the timber. M's claim on the insurance policy was rejected because the timber was now owned by the company.
Held: The property of the company is not the property of the owner. Therefore, entity shielding means that a property owned by a company is shielded against any claims against the owner of that company. **1.** Members, even members holding 100% of the shares in a company, have no proprietary rights in the company's assets – *M couldn't enforce the insurance pay-out because the timber was owned by the company* **2.** The company, not the shareholders, owns the company's assets. The shareholders have a bundle of rights against the company, rather than rights in the company's assets

Lee v Lee's Air Farming [1961] AC 12
Case re-affirms Salomon – control by one person will not be enough to equate the company with the individual • Lee is the only shareholder of Lee's Air Farming (with 1 out of 3000 shares being Lee's solicitor's); governing director and also an **employee** • Lee died in an accident while working; his wife sought compensation in respect of the accident but the insurance company rejected the argument that Lee was an employee because he was a shareholder and governing director
Held: A company can validly contract with an individual because it is a separate legal entity, and can therefore contract with its owner • The company is separate from its members and directors; and a person can act in multiple capacities at the same time

2. Limited Liability

P: Limited liability means that the maximum amount a shareholder can lose is what the shareholder has paid to acquire the shares.

R: A claim cannot be brought against owners or managers. This concept of **entity shielding** protects owners against claims against the company; but also shields the company from claims against its owners.

Advantages of limited liability (Easterbrook and Fischel, in Ford):

1. It **decreases the need for shareholders to monitor the managers of companies** in which they invest because the financial consequences of company failure are limited (shareholders may not have the incentive or expertise to monitor managers' actions)
2. Provides **incentives to managers to act efficiently and in the interests of shareholders** by promoting the free transfer of shares – 1. The free transfer of shares is promoted because the wealth of other shareholders is irrelevant; 2. If a company is managed inefficiently, shareholders can be expected to sell their shares at a discount which creates the possibility of a takeover and replacement of managers
3. Assist the **efficient operation of the securities markets** because as above in 2., the prices at which shares trade don't depend upon an evaluation of the wealth of shareholders
4. Efficient **diversification by shareholders** which in turn allows shareholders to reduce their individual risk
5. Facilitates **optimal investment decisions** by managers

Limitations of limited liability:

Director and members whose conduct amounts to a **tort** on their part will **ordinary be liable regardless of whether they are acting on behalf of the company**; particularly if they were acting **fraudulently**.

However, if it was an honest attempt at performing a contract which the company made with the victim, they won't be liable if the victim agreed to look only to the company for redress (*Edginton v Fitzmaurice*).

LIFTING THE CORPORATE VEIL

P: The object of the veil-piercing exercise is usually to shift liability from the company to another entity such as shareholders. Properly speaking, it means disregarding the separate personality of the company

Introduction: [X] may be able to make [Directors] personally liable for [DEBTS] if it can be demonstrated that s/he engaged in insolvent trading contrary to s 588G, or alternatively [*HOLDING COMPANY*] for insolvent trading under s 588V if it can be shown that it is [*SUBSIDIARY*'S] *holding company*. Alternatively, in exceptional circumstances, the court may be willing to pierce the corporate veil as a matter of common law. Although no universal principle has emerged from the case law, courts have produced a variety of grounds for lifting the veil.

1. Statutory exceptions to entity shielding (588G and 588V)

Is there a director involved? → 588G (directors' duty to prevent insolvent trading)

P: 588G prohibits a director from allowing the company to continue trading during a period in which it is insolvent and the director should have suspected that the company was or was likely to be insolvent.

(1) Was this person a director at the time the company incurred a debt? (s 9 def director)

(2) Was it a debt? – A debt is incurred when a company enters into a contract by which it subjects itself to an unavoidable obligation to pay a sum of money at a future time, even if that obligation is conditional (*Hawkins v Bank of China*)

- *The incurring of debts is limited to contract-based claims, things voluntarily agreed to*.

(3) Was the company insolvent at the time the debt was incurred or became insolvent by incurring that debt?

- **S 95A** provides that a company is insolvent where it is unable to pay its debts when they become due and payable
  - This is a question of fact, considering the company's entire financial situation by reference to commercial reality (*Bell Group*). It is not confined to the company's lack of liquidity or cash resources.
  - Look to: ability to convert assets into cash; loans; money the company can generate through sales (*Powell*)

(4) Were there reasonable grounds to suspect the company was insolvent or may become insolvent by incurring the debt? – *separate from the fact of insolvency, there must be some objective indicators as to insolvency.*

Subjective test: was the director actually aware the company was in difficulty? (s 588G(2))

- Difficult to prove
- *Consequences:*
  - Criminal liability – fine + 5 years (s 1311 + Sch 3)
  - Key case: *Asic v Elliott*

Objective test: were there **reasonable grounds** to **suspect** the company was in difficulty? (588G(2)) (*mere likelihood of insolvency is sufficient)*

- This test is easy to satisfy, because nowadays we expect directors to have a good understanding of how the company operates and its financial position.
  - Look at *Plymin* factors below – ex: 'the books don't look good', then a model director would know that; if it is something more obscure, a model director may not know that
- Concerned not with the knowledge of a reasonable person but 'with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue (*RCA Corp*)

Factors to consider (*ASIC v Plymin*):

- **Continuing losses**
- **Overdue taxes**
- **Poor relationship with the bank**
- **No access to alternative finance**
- **Creditors unpaid outside trading terms**
- **Special arrangements with selected creditors**
- **Inability to produce timely and accurate financial information to display the company's trading performance and financial position, and make reliable forecasts**

(5) Penalties which can be imposed

Who can recover debts incurred during insolvency? (Key advantage of 588G over V: creditors can claim directly under M)

- The court can order recovery of unsecured claims (**588J** civil proceedings)
- Proceedings are generally brought by the liquidator. A liquidator has a statutory action to recover against a director who has contravened 588G (**588M**)
- However, a creditor may bring proceedings under **588M** if the liquidator does not act. To do so, they require the liquidator's consent in writing: **S 588R**; or leave of the court
- The amount recoverable, as a debt due to the company, is the amount of the creditors' loss or damage (**588M(2)**)
- Recoveries not available to pay secured debts until the unsecured debts have been paid in full (**588Y**)

CIVIL LIABILTY

- As an alternative to a court making an order under **588J** or **K**, ASIC or the liquidator could seek compensation from the directors (**1317H)**
- **ASIC** can impose penalties: pecuniary penalty (**1317G**); compensation to the company (**1317E**); disqualification (**206C**)

CRIMINAL LIABILITY arises if person had actual knowledge of financial problems and still acted (588G(3))

- The court can in addition to imposing a **criminal penalty**, order recovery of unsecured claims (**588K**)
- 2 limbs: (i) actual knowledge; (ii) incurs obligation

Relief from liability

- Where directors are found to have contravened the insolvent trading prohibition (588G), they may apply to the court for relief from liability under **1317S**. This provision applies to civil penalties.
- ***Hall v Poolman*** and ***Re McLellan***: relief may be granted where the director has 'honestly' and 'reasonably' attempted to rescue the business from financial ruin

(6) Defences to insolvent trading (s 588H)

1. **Reasonable expectation of solvency** (s 588H(2)) – The director had reasonable grounds for believing it was *probable or certain* that the company is solvent (*Metropolitan Fire Systems v Miller*)

(i) *Metropolitan*: no reasonable grounds – they should have known company was insolvent due to **lack of money being paid** and **increasing number of unpaid invoices**. Ratio: expectation requires more than mere hope, and implies confidence in solvency

2. **Reliance on others providing the information on the solvency of the company** (588H(3)) – The director believed on reasonable grounds that a **competent and reliable** subordinate was monitoring the company's solvency and keeping the director informed. 2 limbs:

(i) Expertise and qualifications of person providing the information
(ii) Trustworthiness

3. **Justified non-participation –** Director didn't take part in management at the time, for a **good reason**, such as illness (588H(4))

Not available for token wife-director – a director who relies completely on another director who is their spouse for management of the company due to love, trust or confidence will not have a valid defence against insolvent trading (*Clark)*

4. **Took other steps to mitigate losses** (588H(5))

Ex (*Asic v Plymin*):

(i) persuade other directors not to incur the debt (that alone is not sufficient (*Plymin*))
(ii) individually taking steps to place the company in administration
(iii) resign

(7) Conclusion

If a reasonable person should have known the company was in financial difficulty, civil liability arises. However, if there is evidence the person knew there were financial difficulties, and continued to act, there is a prospect of criminal liability

Is there a holding company involved? → 588V

S 588V – in some circumstances the creditors can claim against the largest owners of a company

Introduction: X might also seek to make [*HOLDING COMPANY*] liable for insolvent trading under s 588V. This section will apply if (1) [*HOLDING COMPANY*] was a ***holding company*** of [*SUBSIDIARY*] at the time the debt was incurred; (2) the company was or became insolvent at the time the debt was incurred; (3) at the time there were grounds for suspecting that the company is was would become insolvent; and that [*HOLDING COMPANY*] or its directors knew, or should have known in the circumstances, that there were grounds for suspecting insolvency. [X] would also need to ensure that no defences apply (s 588X).

(1) Is there a *holding company*?

R: Determining whether [*SUBSIDIARY*] is a *subsidiary* of [*HOLDING COMPANY*] necessitates consideration of the criteria in **s 46(a)**. That is, [*HOLDING COMPANY*] must

(i) control the composition of [*SUBSIDIARY*] board; or (*sourced from the constitution or some other agreement*)

For (i) to be satisfied, [*HOLDING COMPANY*] must legally control [*SUBSIDIARY*] board, with practical or conventional control not sufficing (*Mount Edon*). Here:

- YES: [*HOLDING COMPANY*] has the prerogative to appoint three directors out of a board of five as per its shareholder agreement / constitution. A holding company / subsidiary relationship therefore exists]
- NO: There is nothing to indicate that [*HOLDING COMPANY*] has any such control here

(ii) be in a position to cast, or control the casting, of more than one half of the votes at [*SUBSIDIARY*] GM; or

For (ii) to be satisfied, the courts have accepted that both legal control (i.e. preference shares) or practical control, (such as control exercised through social relations), will suffice (*Bluebird*). Here:

- YES: preference shares giving it effective control over the board
- YES: it is established that [*Y and Z SHs*], who together hold [__% of all shares] are accustomed to acting on instruction of [*HOLDING COMPANY*], effectively giving [*HOLDING COMPANY*] control over 60% of the votes and therefore control over the co's board.
- YES: [*HOLDING COMPANY*] has acquired [*Y and Z SHs*] proxies, thereby allow the former to select [*SUBSIDIARYs*] board
- DON'T KNOW: ask for more facts

(iii) hold more than 50% shares of [*SUBSIDIARY*]

- YES: Here, [*HOLDING COMPANY*] owns more than 50% of [*SUBSIDIARY's*] shares and thereby satisfies (iii). A holding company / subsidiary relationship therefore exists.
- NO: Here, [*HOLDING COMPANY*] owns only [percentage of shares] [*SUBSIDIARY's*] shares and thereby does not satisfy (iii).

Conclusion eg: This is clearly made out as [*HOLDING COMPANY*] held more than 50% of [*SUBSIDIARY*] shares: s 46(a)(iii)

(2) Insolvency

- **S 95A** provides that a company is insolvent where it is <u>unable to pay its debts when they become due and payable</u>
  - This is a question of fact, considering the company's entire financial situation by reference to commercial reality (*Bell Group*). It is not confined to the company's lack of liquidity or cash resources.
  - Look to: ability to convert assets into cash; loans; money the company can generate through sales (*Powell*)

(3) Did [*HOLDING COMPANY*] have actual or constructive knowledge of grounds for suspecting insolvency? – *see above*

[There are not enough facts to determine whether [*HOLDING COMPANY*] or its directors were actually aware of grounds for suspecting that [*SUBSIDIARY*] was insolvent, however s 588H(4)(ii) provides that this standard will be satisfied if it would be reasonable to expect a holding co in the circumstances to be aware] [does not create a 'model' *holding company* like s588G(1)(c) does]

(4) Defences (588X)

1. **Reasonable expectation of solvency** (s 588X(2)) – The director had reasonable grounds for believing it was *probable or certain* that the company is solvent (*Metropolitan Fire Systems v Miller*)

(i) *Metropolitan*: no reasonable grounds – they should have known company was insolvent due to **lack of money being paid** and **increasing number of unpaid invoices**. Ratio: expectation requires more than mere hope, and implies confidence in solvency

2. **Reliance on others providing the information on the solvency of the company** (588X(3)) – The director believed on reasonable grounds that a **competent and reliable** subordinate was monitoring the company's solvency and keeping the director informed. 2 limbs:

(i) Expertise and qualifications of person providing the information
(ii) Trustworthiness

3. **Justified non-participation –** Director didn't take part in management at the time, for a **good reason**, such as illness (588X(4))

Not available for token wife-director – a director who relies completely on another director who is their spouse for management of the company due to love, trust or confidence will not have a valid defence against insolvent trading (*Clark)*

4. **Took other steps to mitigate losses** (588X(5)) –
Ex (*Asic v Plymin*):

(i) persuade other directors not to incur the debt (that alone is not sufficient (*Plymin*))
(ii) individually taking steps to place the company in administration
(iii) resign

(5) Penalties which can be imposed

- Assuming the above is [correct/incorrect], [*HOLDING COMPANY*] will have contravened s 588V and [*SUBSIDIARY's*] liquidator may seek to recover from it an amount to the amount of loss cause by this contravention (588W).

- A creditor cannot recover compensation from [*SUBSIDIARY*] directly in relation to 588V. Therefore, [*X*] will have to wait for a liquidator to be appointed and recover from the corporation. Furthermore, the liquidator acts for the benefit of all unsecured creditors, therefore there is no guarantee that [*X*] will recover all her/his losses.

- Importantly, the debt owed must be wholly or partly unsecured (s 588Y).

2. Common law exceptions to *Salomon's* case

Introduction: Veil-piercing comes into conflict with the *Salomon* principle of separate corporate personality, which means that it is extremely unlikely to occur. However, in exceptional circumstances, the court may be willing to pierce the corporate veil as a matter of **common law**. Although no universal principle has emerged from the case law, courts have produced a variety of grounds for lifting the veil.

1. Sham/fraud – R: The court may pierce the veil where a company is incorporated to avoid an existing legal obligation (*Gilford Motor; Jones v Lipman*)

- A sham refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences (*Equuscorp*)
- To prove a sham you must prove there was an **intention to deceive** (*Lewis v Condon*). The mere fact that a transaction was for an improper purpose does not justify recognition of a sham.
- Where a company has been used to conceal or perpetuate a fraud by its controller, the process of incorporation is a mere sham and the corporate veil may be pierced (*Re Darby*)

2. Agency (*SSK v B Corp*) – **R:** Where the company relies on the resource of the [person/company] that controls it, because the company has not been provided with enough resources for it to function independently, then the court may say that the under-resourced company is an agent for its controller

Likely to occur where:

a. The controller is a parent company of a wholly-owned *subsidiary*, rather than where the controller is a human
b. Under-resourced company

Atkinson J formulated 6 questions to establish an implied agency (***SSK v B Corp***)

1. Were the profits treated as the profits of the company?
2. Were the persons conducing the business appointed by the parent company?

3. Was the company the head and the brain of the trading venture?
4. Did the company govern the adventure, decide what should be done and what capital should be embarked on the venture?
5. Did the company make the profits by its skill and direction?
6. Was the company in effectual and constant control?

BUT note:

- Merely holding **all of the shares** is not enough: *SSK v B Corp*
- Domination or control alone is not enough, otherwise *Salomon* would be overturned
- **S 50AA defines control** – can use as an example for general law piercing the facts seem to support control to support an inference of agency.

3. Ramsay & Noakes also says that courts are more prepared to pierce the corporate veil if 4 factors are present:

(1) Proprietary companies
(2) Contract-based claim (not tort)
(3) 1 shareholder
(4) Individual shareholder (not corporate shareholder)

APPLICATION FOR PIERCING: [Number] of the indicia in *SSK* are satisfied, so there is a strong case to pierce the veil here. There is, however, a huge weight against the director's argument…

APPLICATION AGAINST PIERCING: Based on the principle in *Salomon's* case, the defendant's argument will be that [the *subsidiary* company] was a distinct legal entity. Just because a person holds all the shares in a company does not make the business carried on by that company her agent for the carrying on of the business.

Re Darby; Ex parte Brougham [1911] 1 KB 95	
Material Facts	*Case law exception to Salomon – sham/fraud* • Darby + associate had a company that bought small interest in quarry for small amount • They set up company 2 to buy the license, and sold it to company at premium • Company 2 didn't have enough money • Company 2 floated with prospectus full of lies, used money from shares to pay company 1 for the license • Divided company 1's profits between themselves, wound up company 2
Reasoning	**Held:** Company was just a trading name to conceal Darby's identity (he was well known fraudster) – a sham!

Gilford Motor Co Ltd v Horne [1933] 1 Ch 935	
Material Facts	*Case law exception to Salomon – sham/fraud – equitable remedy (injunction)* • Mr Horne is managing director. He enters in a contract of employment, with a no compete clause. He is subsequently sacked and starts approaching the company's clients despite being prohibited to do so under the employment contract. • After being told by the company that he is prohibited from approaching clients, he persuades his spouse and a friend to set up a company where they become directors. The company starts approaching the clients. • Horne claims it is not him but the company who is approaching the clients; it is a mere coincidence that he is employed by that company.
Reasoning	**Held: If a company is incorporated to avoid an existing obligation, then the courts are likely to disregard the separate personality of the company** • That company was established for avoiding the restraint of trade clause. Therefore, Mr H who although is standing behind the shadow of the company, is treated as indistinct from the company.

Jones v Lipman [1962] 1 All ER 442	
Material Facts	*Case law exception to Salomon – sham/fraud – equitable remedies (specific performance)* • Mr Lipman enters into a contract for the sale of land. He then has 'seller's remorse' and changes his mind about wanting to sell his land • In order to avoid the sale, Lipman quickly transfers the land to a new company with 2 shareholders: him and the clerk at the firm advising him • Jones seeks to enforce the contract for the sale of land.

Reasoning	**Held: The court held that the company could be forced to complete the sale because it was set up as a device for Lipman to hide from his obligation** • The new company was incorporated with the motivation on the part of Mr L with the obligation to sell the land. Therefore, Mr L and the company are treated as being legally indistinct. • The company is a device and a sham, *a mask which the defendant holds before his face in an attempt to avoid recognition by the eye of equity*. Therefore, an equitable remedy is rightly to be granted directly against the creature in such circumstances.

SSK v B Corp – Smith, Stone & Knight Ltd v Birmingham Corp [1939] 4 All ER 116	

Material Facts	*Case law exception to Salomon – agency*
	• Smith, Stone and Knight (SSK) and Birmingham Waste Co Ltd (BW) are two companies
	• Tried to argue that SSK and BW are only one person, owning and occupying the land. If BW was the mere agent of its owner, Salomon's rule wouldn't apply
	• Characteristics of BW:
	  ○ SSK was the main shareholder of BW (497/502 shares)
	  ○ BW has no business assets, it is just a 'shell'.
	  ○ One 'employee' (who is in fact an employee of SSK) – therefore no employee at all in reality
	  ○ No separate accounts/financial records. Any clients of BW are treated as clients of SK.
	  ○ No separate bank accounts

Reasoning	**Main criteria establishing agency:** • **domination** to the extent of having no separate or independent will • **under-resourced** – cannot run a business viably on its own; the assets are owned by the parent company **Atkinson's 6 criteria to identify an implied agency:** 1. Were the profits treated as the profits of the parent company? 2. Were the persons conducting the business appointed by the parent company? 3. Was the company the head and the brain of the trading venture? 4. Did the company govern the adventure, decide what should be done and what capital should be embarked on the venture? 5. Did the company make the profits by its skill and direction? 6. Was the company in effectual and constant control?