

CORPORATIONS LAW NOTES –

I. INTRODUCTION

II. CORPORATE PERSONALITY AND LIMITED LIABILITY

A. The Doctrine of Corporate Personality

s112: Types of Companies that can be registered under the Act

- Proprietary companies
 - Limited by shares
 - Unlimited with share capital
- Public companies
 - Limited by shares
 - Limited by guarantee
 - Unlimited with share capital
 - No liability company

s 119: Characteristics of a body corporate at common law are invoked

- the power to sue or be sued
- power of perpetual succession
- power to hold property
- power to make rules for the internal government of the company
- power to make rules for the internal governance of the Company

s 114: A company needs to have at least 1 member

s 118: ASIC gives the company an ACN, registers the company and issues a certificate

s 119: A company comes into existence as a body corporate at the beginning of the day on which it is registered

s 124: A corporation is a legal person and in that, has the same legal capacity as a natural person. It has the powers of the individual and hence has the attributes of a body corporate

s 125: A company's constitution may limit powers and set out objects, but the exercise of power by the company is not invalid merely because it is contrary to an express restriction and or prohibition or contrary or beyond any objects set out in the constitution

s 201A: Proprietary company must have at least 1 director who resides in Australia and a public company must have at least three, two of whom resides in Australia

B. Concepts of separate corporate personality and limited liability

- The distinction between the company's identity and its members underlies one of the major advantages stemming from incorporating; that is limited liability

- As the debts and obligations of the company are its own, not those of its members unless the corporate veil can be pierced, shareholders' liability is limited to any unpaid amount on their shares or guarantee

Saloman v Saloman & Co

Facts: Saloman needed 7 members to incorporate so he got 6 members of company. He sold his business to the Company which became pty ltd. He sold assets to the company for 1,000 pounds cash, 10,000 pounds in debentures, 20,000 pounds of shares and business debts. The company met financial difficulties. Saloman personally claimed first priority on liquidated funds. There weren't sufficient to pay interest on debentures or unsecured creditors.

Issues: Was Saloman entitled to gain priority over unsecured creditors? Was Saloman personally liable to indemnify the Company?

Held: The company was held not to be an alter ego, agent or trustee for Mr Saloman. The House of Lords asserted that, in the absence of fraud, the company was a separate legal entity, distinct from its members, even though one person may have owned most of its shares and controlled the company. Mr. Saloman was not, therefore, liable for the company's debts

Lee v Lee's Air Farming Limited

Facts: Mr Lee established a company which shares capital consisted of 3000 1 pound shares, 2999 of them allotted to Mr Lee whilst the remaining share was held by his solicitor. He was also employed under a service contract with the company to work as its chief pilot. He died and the widow claimed compensation under the relevant workers compensation legislation. The company's insurer defended the claim by Mrs Lee arguing that Mr Lee could not be a 'worker' as he was also the employer

Held: Privy Council allowed Mr Lee to act in different capacities, as governing director and employee, distinct from the company. That he was the major shareholder and governing director controlling the company did not under mine the validity of the contract between himself, as an employee and employer.

C. Piercing the veil of incorporation

1. At common law

- Generally, the corporate veil cannot be pierced to place the corporation's liability upon the shareholders or directors.
- Nevertheless, there are well defined categories of judicial and legislative triggers for piercing the corporate veil

(a) Fraud or improper conduct

- The corporate veil will not be allowed to be used to avoid an existing legal obligation

Gilford Motor Co Ltd v Horne [1933]

Facts: Horne, while an employee of Gilford Motor Co Ltd, had covenanted not to solicit his previous employer's clients were he to cease employment. To avoid this restrictive covenant Horne established a company to solicit the clients of his former employer.

Held: Court held that the company was formed for the unlawful purpose of assisting Horne to break from his contractual obligation. Hence, the company was restrained from implementing that purpose. The company was a legal device used to avoid an existing legal obligation

Jones v Lipman [1962]

Held: The court would not allow Lipman to avoid completing a contract for the sale of his house by transferring the land to a company formed for this specific purpose. The court held the company was 'a mask which [the defendant held] before his face in an attempt to avoid recognition by the eye of equity'

(b) Agency

- Sometimes the courts will treat a company and its controller as separate entities in law, but because of the extent of the latter's control, determine the company to be an agent of the controller
- An agency relationship will only be implied where the company is a mere 'puppet' to the extent that there is a disregard for the agent company's separate legal identity

Smith Stone and Knight Ltd v Birmingham Corporation [1939]

Facts: SSK, a parent company, acquired Birmingham and rented the factory to the business. SSK was major shareholder of Birmingham and the directors held on trust. Council was going to resume the land argument arose as to who should be paid the compensation. SSK was not exactly running the business whereas Birmingham did not own the land

Held: Atkinson J specified six factors indicating whether an agency relationship exists:

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 parent 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 subsidiary make the profits by the parent company's skill and direction?
6. Was the parent company in effectual and constant control of the subsidiary?

-