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TOPIC 3 – CORPORATE PERSONALITY

SEPARATE LEGAL ENTITY/LIMITED LIABILITY

When incorporated, a company is a distinct legal entity from its incorporators – *Salomon v Salomon & Co* [therefore, the incorporators are not personally liable for the corporation's debts when liquidated]. This principle is identified in the *Corporations Act*.

1. Recognised by *s124(1) Corporations Act* – a company has the legal capacity and powers of an individual, and of a body corporate

This has been further clarified by various common law cases.

1. A company will remain separate from its controllers – *Lee's Air Farming*
   a. Additionally, a person may have multiple legal capacities in relation to a company – in *Lee's Air Farming*, held they could be both a director, employer, employee and shareholder
2. A company's property remains separate from property of their members – *Macaura*
3. Members will enjoy limited liability – refer to above, what protections they have from the relevant form of limited liability

LIMITED LIABILITY IN CORPORATE GROUPS?

Prima facie, in corporate groups, each company is a separate and independent legal entity – *Walker v Winborne*. However, the *Corporations Act* identifies when a body corporate may be a subsidiary of another.

1. *s46 Corporations Act* – a body corporate is a subsidiary of another body corporate if, and only if: -
   a. (a) the other body: -
      i. (i) controls the composition of the first body's board; or
      ii. (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be case at a general meeting of the first body; or
      iii. (iii) holds more than one-half of the issued capital of the first body
   b. (b) the first body is a subsidiary of a subsidiary of the other body

NOTE – per *Adams v Cape Industries*, it is not an improper purpose necessarily if a company is set up such that a liability is incurred by that particular company, and not the other companies within their group

PIERCING THE CORPORATE VEIL

However, there are various circumstances where Courts may consider piercing the corporate veil [that is, the Court will ignore the separate legal entity of the corporation, and hold the owner/s accountable] – *Salomon v Salomon & Co* [although in this case, the veil was not pierced]. There are various considerations which must be applied when piercing the corporate veil.

STEP ONE – IS A STATUTE INVOLVED?

Where statute is involved, typically, a breach of statutory provision, and hence, statutory relief is sought.

STEP TWO – CAN LIABILITY BE SHIFTED?

There are various mechanisms by which liability may be shifted to the parent.

1. Duty of Care in Negligence
    a. General Rule – where a subsidiary has been negligent in causing tortious damage to the plaintiff, it may be possible to establish that the Parent owed a duty, if: -
        i. The parent was significantly involved in the operations of the subsidiary – *CSR Ltd v Wren*
            1. [in *CSR Ltd v Wren*, parent company directed the subsidiary company, and the employees of the subsidiary company -> this subsequently created a duty of care]
        ii. The parent had knowledge of the risk of the injury, but was negligent in mitigating it – more likely to find a duty – *CSR v Wren*
2. Explicit Agency
    a. General Rule – where the principal gives express authority to the agent to act on their behalf, and the subsidiary undertakes these actions, a relationship of explicit agency exists – *Reynell v Lewis*; there mere fact, however, that one has control over the other party does not create an agency relationship – *Reynell v Lewis*
3. Implied Agency

a. General Rule – where the corporation is not explicitly the principal's agent, the principal itself may be liable if an implicit relationship of agency is found – *Smith Stone & Knight v Birmingham Corporation*
    i. Reluctance to Infer Agency – per *Briggs v James Hardie*, an inference of agency is relatively difficult

b. Factors to Consider for Agency – per Atkinson J in *Smith Stone & Knight*: -
    i. Are the profits of the subsidiary treated as those of the parent?
        1. Where there is a separate bank account, strong indicator that they are not treated as the profits of the parent – *Bird Cameron* [converse is true]
    ii. Are the person/s conducting the business appointed by the parent?
        1. In *Smith Stone & Knight [SSK]*, the subsidiary did not have their own employees, and the directors were that of the parent company – hence, subsidiary
        2. In *Bird Cameron*, it was merely a licence arrangement – hence, the company did have ownership of their own business, as they were able to keep all their own proceeds, and were simply required to pay the licensing fees back
    iii. [PURCHASE FOR FULL LIST]

STEP THREE – IS AN EQUITABLE FORM OF RELIEF AVAILABLE?

Consider whether there are equitable forms of relief available – if so, there is NO need to pierce the corporate veil.

STEP FOUR – CONSIDER PIERCING THE VEIL?

Relevantly, there is no common unifying principle per Roger AJA in *Briggs v James Hardie*. It arises where there has been an abuse of corporate legal personality – *Prest v Petrodel* where the whole purpose was to perpetuate fraud or avoid an existing legal obligation – *Gilford, Lipman*.

1. Fraud/Improper Conduct
    a. General Rule – where the purpose of the corporation was to avoid an existing (not future) legal duty that would otherwise fall upon the owner/s personally; that is, to '*prevent the abuse of corporate legal personality*' per Lord Sumpton in *Prest v Petrodel Resources*

i. Where there was a pre-existing company [with a non-fraudulent purpose], they may arguably be no piercing, as exception to below cases – *Electric Light & Power Supply v Cormac*
ii. High Threshold – per Lord Neuberger in *Prest v Petrodel Resources*, '*jurisdiction to pierce for evasion of a legal obligation only available where no other remedy*'

b. Examples: -
    i. In *Gilford Motor Co v Horne*, Horne attempted to use a corporation to avoid liability/restrictive covenant from a non-compete clause; ruled as a '*device, stratagem, mask, cloak, sham*'
    ii. **[PURCHASE FOR FULL LIST]**

PIERCING THE CORPORATE VEIL IN CORPORATE GROUPS

1. General Rule – distinct from the liberal approach in the UK, companies in corporate groups are to be treated as separate entities, with their own separate debts to creditors – *Industrial Equity v Blackburn, Walker v Winborne*
2. Examples: -
    a. In *Industrial Equity v Blackburn*, former could not use funds from other entities within the group to satisfy their own debts
    b. In *Quintex Australia Finance v Schroders*, the affairs of the Quintex group were so intertwined, such that Schroders did not know which entity was indebted to it; however, Schroders could not pierce the veil
3. Contested Position? – however, this has been contested by *Briggs v James Hardie*
    a. Piercing for Tort Victims/Employees – they are more likely to pierce the veil for vulnerable persons, such as tort victims or employees [incapable of undertaking due diligence themselves]
    b. Undercapitalisation – where undercapitalised, and where subsidiary was formed will ill-intent (e.g. to unfairly shift risk), this may be relevant

TOPIC 7 – CORPORATE ATTRIBUTION AND LIABILITY

LIABILITY IN TORT

Assuming that a person is liable for the tort, the issue is whether the Company, which otherwise has the legal capacity and powers of a distinct natural person, is liable for their conduct.

STEP 1 – CONSIDER IF PERSON 'DIRECTING MIND AND WILL'

If the negligent individual is '**DIRECTING MIND AND WILL**' of the company, the individual's acts are taken to be the acts of the company, and the company itself will be found to be **negligent**, and thus, directly liable for the individual's negligence –***Tesco Supermarkets v Nattrass***, affirmed by **Edelman J** in ***Productivity Partners v ACCC***.

The following roles will 'DIRECT MIND AND WILL': -

1. **Sole Director** – knowledge and intention of a sole director is attributable to company – ***Bernard Elsey v FCT***
    a. NOTE – in ***Bernard Elsey***, there were two directors, but Bernard had 95% of shares, and conducted the business of the company within his own name
2. **Director** – when acting in scope of their actual or apparent authority, may be imputed – ***Beach Petroleum***
3. **Senior Officer/s** – ***Tesco*** expanded the concept in ***Lennard's*** to other senior officers who remain IN CONTROL OF THE MANAGEMENT OR OPERATIONS of the company, or a part of then, and are NOT RESPONSIBLE to another person in relation to their company; affirmed in ***El Ajou v Dollar Land Holdings***
    i. **[PURCHASE FOR FULL MORE]**
4. **Multiple Directors** – a state of mind can be possessed from the combined knowledge and belief of multiple officers – ***Brambles Holdings v Carey***, approved in ***Karkowski v Eurolynx***

IF YES – liability has been attributed, avoid further considerations.

IF NO – consider ***Meridian*** attribution rules.

Lennard's Carrying Co v Asiatic Petroleum – director

Facts – Lennard was the Director of two companies; one owned a ship, and another managed the ship. Lennard knew the ship had defects but allowed the ship to be used to transport cargo owned by Asiatic Petroleum. The cargo was destroyed by fire that could have been avoided, had the defects been remedied. A British law provided no loss was recoverable from a person, unless they were at fault

Issue – was knowledge of Lennard to be attributed to the company?

Ruling – it could be attributed; Lennard as the Director, was the '*active and directing will'* of the Corporation, and hence was the '*ego and centre of the personality of the Corporation'*

Nationwide News v Naidu – senior executive

Facts – Naidu was employed as a security guard; he was under the direct supervision of their 'Fire and Safety Officer', Mr Chaloner (not a Director, but a Senior Executive). Naidu claimed he was subject to racial abuse, humiliation and aggressive behaviour at the hands of Mr Chaloner (including threats, throwing things).

Issue – was the behaviour of Chaloner a '*directing mind and will*'?

Ruling [Beazley JA] – their role and authority over Naidu made conduct the '*directing mind and will*' of Nationwide News; especially as they had '*total control'* over Naidu and additionally, their contract and salary; hence, although several levels of management more senior than himself, was '*directing mind and will'*

Tesco Supermarkets v Nattress – store manager

Facts – washing powder had been generally advertised at the sale price. A shop assistant at a Tesco branch, restocking this sale item, inadvertently restocked them at full price, to which the shop manager was not aware. It was an offence to sell products at a higher price than advertised. The legislation made an exception if it was due to the act or omission of '*another person'*.

Issue – were the assistant and/or manager '*another person'*?

Ruling – held the manager was not part of the '*directing mind'*; relevantly, Tesco **had done all it could** to enforce rules regarding advertising, and exercised relevant due diligence (such as providing clear instructions about the pricing of goods, and the need to update prices during promotions)

Lifestyle Equities v Ahmed – directors personally liable

Facts – Lifestyle Equities, the owner of the Beverly Hills Polo Club trademarks, sued two companies for selling clothing and footwear with similar branding, claiming this infringed their registered trademarks. At trial, the companies were found liable; the question, however, was whether the directors were jointly liable [claimed had no knowledge]

Issue – was there liability from the Directors?

Ruling – Directors may be personally liable for their company's torts when they intentionally participate in wrongful acts; however, they are only accountable for their own profits, not the company's profits

Presidential Security Services v Brilley – MD and sole employee

Facts – civil proceeding where security guard (Bingle) shot a thief who broke into a club to rob the poker machines, and the thief sued the guard's company in tort for injuries.

Issue – was this attributable to the company?

Ruling – yes, Bingle was MD and sole employee of Presidential, hence the directing mind and will of the Company.

STEP 2 – CONSIDER PRIMARY RULES ['MERIDIAN ATTRIBUTION']

There are three rules of attribution, per ***Meridian***, which may relevantly mould attribution. First, consider 'primary rules'.

1. **Primary Rules** [e.g. Constitution of the company]
   a. **EXAMPLES OF PRIMARY RULES**: - [in statute, company constitution, common law]
      i. Resolutions of the Board of Directors – ***Corporations Act***
      ii. Resolutions of Shareholders at General Meeting – ***Corporations Act***
      iii. Company Constitution – e.g. if the Constitution says that it's powers can be exercised by an MD, and an MD does an act intentionally, company is taken to have done, and intended that act
      iv. Unanimous Assent of Members (if decision-making organ had power to make that decision) – found in common law
2. **General Rules** [e.g. vicarious liability, agency] [refer below]

IF NOT SATISFIED – consider vicarious liability, and/or agency ['general rules']

STEP 3 – CONSIDER GENERAL RULES ['MERIDIAN ATTRIBUTION']

Liability may be determined through the '*general rules*' per ***Meridian***. A company may be vicariously liable for the **ACTS OF ITS EMPLOYEES** committed within the course of their employment, or **ACTS OF ITS AGENTS** committed within the scope of their authority – ***Nationwide News***.

STEP 3.1 – ARE THEY AN EMPLOYEE?

1. **IF YES** – did they commit the tortious act in the course of their employment, or was it a '*frolic of his own*'
    a. If they did, even if they are **EXPRESSLY UNAUTHORISED**, as they are sufficiently connected to their role and authorised acts, the company <u>will be</u> vicariously liable
        i. E.g. in ***Nationwide News***, although the Fire and Safety Officer had chosen to perform their tasks in an improper manner (violence, harassment, discrimination), as it was in the course of their employment, although the company expressly banned this conduct, was vicariously liable
        ii. Consider the example of a speeding courier for a delivery company who negligently hits a person whilst delivering goods – although an improper method, in course of employment
2. **IF NO** – consider whether they are an agent of the company (as it was a 'frolic on their own')
    a. E.g. in ***Nationwide News***, had they harassed a person who was not in their department, this may have been a 'frolic of their own' as their role was concerned with supervising employees in their department

STEP 3.2 – IS THE INDIVIDUAL AN AGENT?

1. **IF YES** – consider whether the agent was authorised to perform that act
    a. **AGENT AUTHORISED** – the company <u>would</u> be vicariously liable
        i. E.g. [tutorial] if a childcare manager said they wanted everyone to do anything necessary to find a lost child, someone taking a van to find the child would be an authorised act, and the company would be vicariously liable for negligence while driving the vehicle

b. **AGENT NOT AUTHORISED** – if the company has expressly banned the agent from that action, it would be a '*frolic of his own*' for which the company is not vicariously liable – ***Nationwide News***

c. **AGENT PARTIALLY AUTHORISED** – where the agent is authorised to perform a certain act, but the agent subsequently does a wrongful act in the course of performing the authorised act, if the wrongful act remains sufficiently connected to their authorised acts, it is not a '*frolic of their own*'

IF NOT SATISFIED – consider 'special rules'

STEP 4 – CONSIDER SPECIAL RULES ['MERIDIAN ATTRIBUTION']

However, there are '*exceptional cases*' where primary, and general rules are insufficient. Here, '*the Court must fashion a special rule of attribution for the particular substantive rule*' – ***Meridian***.

1. **Special Rules** [shaped by Statute]
   a. Where the statutory provision was intended to apply to companies, but has excluded attribution on the basis of general rules of vicarious liability and agency, and primary rules would not find a company liable, special attribution rules must be fashioned for that substantive rule – ***Meridian***
      i. Determined through **statutory interpretation**, considering the language, content and policy of the statute/rule (e.g. in ***Meridian***, purpose of statute was to tackle '*white collar crime*')

STEP 5 – CONCLUSION

IF SATISFIED – the person is '*so closely and relevantly connected*' such that the state of their mind is treated as that of the company – ***Brambles***; hence, the corporation is directly liable for the tort either as a sole, joint or concurrent tortfeasor. However, this does <u>NOT</u> immunise the director from personal liability, provided they had the required knowledge and intention – ***Lifestyle Equities***.

IF NOT SATISFIED – company will not be liable for the action of the individuals.

Meridian Global Funds Management v Securities Commission

Facts – Koo, the Chief Investment Manager of Meridian, a fund manager, sought to gain control of a NZ-listed company, ENC. He acquired ENC shares in the name of Meridian, but for the benefit of his private group. Koo failed to notify Meridian of his interest and accumulated a

'substantial shareholding' that was required to be disclosed, but had not been. Meridian was prosecuted.

Issue – could the actions of a 'lower level manager' be attributed to the company, where their actions were concealed from the Board and the Senior Management?

Ruling – as the purpose of the policy would be defeated otherwise, as a corporate security holder, held that the knowledge of the person who acquired the relevant interest would be imputed as that of the Company

CRIMINAL LIABILITY – STARTING STEPS

First, consider whether the statute attributes actions of individuals to the corporation.

STEP ONE – DOES THE STATUTE ATTRIBUTE ACTIONS OF INDIVIDUALS TO THE CORPORATION?

Consider whether the statute makes it clear, such that corporations have statutory liability for the actions of individuals – ***Mousell Brothers***. Where the statute adopts the wording: -

1. **Person** – this includes a body corporate (***s2C Acts Interpretation Act 1901***)
   a. This may include other words that denote persons generally (e.g. 'party', 'someone', 'anyone', 'whoever')
2. **Individual/Natural Person** – applies only to a natural person, does NOT include a body corporate
3. **Owner** – if a sole director company, included

Additionally, consider the purpose of the act, and whether it is undermined if it excludes corporations.

1. In ***Meridian***, held that the act intended to tackle 'white collar crime' which implied it applied to companies; given the breach was for a failure to notify after acquiring 5% of a publicly-listed business, and the trading of securities is predominantly done by corporations, they were not excluded

IF YES – move to Step Two;

IF NO – move to below [whether Commonwealth, State crime]

STEP TWO – HOW CAN THE COMPANY BE CRIMINALLY LIABLE?

If they may be liable, consider how the company may be liable.

1. **Vicarious Liability** – unless provided by statute, there exists a **PRESUMPTION** a company cannot be vicariously liable where the criminal offence has a *mens rea* component – ***Mousell***; consider, thus, the language: -
    a. **IF CLEAR** – a phrase such as '*it is automatically attributed'* would indicate the statute contemplates vicarious liability; additionally, consider the construction of the statute, and the purpose, including: -
        i. The objects of the statute;
        ii. The words used (e.g. 'must', or 'must not')
        iii. **[PURCHASE FOR FULL LIST]**
    b. **IF UNCLEAR** – without explicit language, difficult to establish – ***Mousell***
    c. **IF NO** – consider the rules for attributing knowledge, intention and conduct, with reference to the relevant legislation (consider whether State, or Commonwealth)

If vicarious liability is not available/presumption remains, consider additionally: -

1. **Primary Liability** – if the statute **DIRECTLY ADDRESSES THE COMPANY**, and holds that the company may be liable, it will be the primary offender, and the actor may be liable as an accessory – this includes: -
    a. Strict Liability Offence
    b. Absolute Liability
    c. Negligence or Recklessness
2. **Accessorial Liability** – if the statute DIRECTLY ADDRESSES THE ACTOR, but provides that persons involved are liable as an accessory, the company is liable as an accessory for aiding/abetting
    a. E.g. '*any person who is involved in the contravention, also contravenes this provision'*

IF YES – attribute liability of individual to corporation

IF NO – consider whether Criminal, or State-level offence

Mousell Brothers v London & North-Western Railway

Facts – employees of the company deliberately mis-stated the goods consigned in order to avoid the toll payable otherwise to the railway company. **Issue** – was the company criminally liable for the acts of its servants? **Ruling** – they were; the statute had been constructed to make the liability of the company absolute [Atkin J]

CRIMINAL LIABILITY – COMMONWEALTH OFFENCE

If the statute does not make it clear the actions of the individual make a corporation liable, rely upon the Criminal Code to attribute liability.