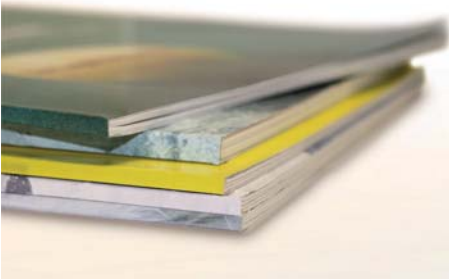


Piercing the Corporate Veil

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BY KATIE BROWN

Given the widespread use of Cayman companies in international business, it is important that those using such companies are assured that the corporate structures they set up will be effective. This article examines the principles which the Grand Court has applied when asked to ‘pierce the corporate veil’.

Cayman company law is based on English company law. The English cases on piercing the veil are therefore highly persuasive, and have been followed. The basic rule, as set out in the case of *Salomon v Salomon & Co* [1897] AC 22, is that a company has separate legal personality, and the courts will be reluctant to treat a shareholder as liable for the debts of the company by piercing the veil. A shareholder may be liable for company debts by contract or statute, or where the company is acting as his agent. There is however no presumption that a company is acting as agent for its parent and absent an express agreement this will be difficult to establish.

Legitimate corporate structures

Both the English and Cayman courts are reluctant to undermine a legitimate corporate structure by piercing the veil between subsidiary and parent. In the leading case of *Adams v Cape Industries* [1990] Ch 433, the English Court of Appeal declined to pierce the veil simply because the corporate structure had been used

to ensure that liability fell on one group company rather than another. The group was entitled to organise its affairs in that way and to expect the structure to be upheld.

This principle was applied in the Cayman case of *Walker International Holdings and another v Olearius Limited and others* [2003] CILR 457, where the plaintiffs asked the Grand Court to pierce the veil between the Republic of Congo and two entities. The first was a public company whose capital was held entirely by the Republic, and the second a Cayman SPV set up by the Republic for the purpose of oil-financing arrangements. The Court declined to pierce the veil in either case. The close supervisory relationship between the Republic and the first entity was not sufficient to declare it to be a sham or façade. The arrangement with the SPV was a legitimate structured finance arrangement and was upheld.

Sham or façade

The courts have seen fit to pierce the corporate veil when a company is used by a defendant as a means of evading his obligations. For example: In *Gilford Motor Co Ltd v Horne* [1933] Ch 935, a company through which Mr Horne conducted business which, if he had conducted it himself, would have been a breach of restrictive covenants which he had entered into with

the plaintiff company – of which he was the former managing director – was held to be “a device, a stratagem”. In *Jones and another v Lipman and another* [1962] 1 WLR 832, the defendant agreed to sell land to the plaintiff, then transferred it to a company, to defeat the plaintiff’s right to specific performance. The company was held to be “the creature of the first defendant, a mask to avoid recognition by the eye of equity.”

Impropriety or “the interests of justice”

It is sometimes said that the corporate veil can be pierced where “the interests of justice require” or where there has been impropriety. An example is the Cayman case of *Bonotto and others v Boccaletti and others* [2001] CILR 120. The defendant had transferred properties from his and his wife’s name into the names of companies under his control, to make himself judgment proof. The Judge held “the cases... show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice

irrespective of the legal efficacy of the corporate structure under consideration”.

The English Court of Appeal rejected arguments based on the “interests of justice” in *Adams v Cape Industries and Ord v Bellhaven Pubs Ltd* [1998] BCC 607. In *Trustor v Smallbone* [2001] 1 WLR 1177, the Judge also doubted whether impropriety of itself constituted sufficient grounds for piercing the veil. We therefore suggest that arguments based on vague notions of “the interests of justice” or impropriety should not succeed unless accompanied by evidence that the company in question is a sham or a façade. It would have been open to the Court in *Bonotto v Boccaletti* to conclude that the corporate veil should be pierced on that basis.

The Cayman court, like the English court, is reluctant to interfere with legitimate commercial structures. Arguments based on piercing the corporate veil have only succeeded in very limited circumstances, namely where the company in question is a sham or façade and has been used for improper purposes.

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