CURRENT APPROACHES TO SEPARATE LEGAL PERSONALITY OF A COMPANY IN IRELAND, THE STATE OF DELAWARE IN THE UNITED STATES OF AMERICA AND NIGERIA

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‘Current Approaches to ‘Separate Legal Personality’ of a Company in Ireland, the State of Delaware in the United States of America and Nigeria’.

Franco Jombo, Dip. Bus. Comp, BBL & T [BLGLM]

I hereby attest that this thesis, which I now submit for appraisement on the programme of research for the award of LL.M, is unreservedly my personal work. I have taken justifiable diligence to make certain that the work is entirely original. This thesis does not to the most excellent of my comprehension violate any copyright law. The thesis has not been extracted from the work of others save and to the extent that such work has been referenced and recognised at the footnotes of my thesis.

Signed:
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APPRECIATION FOR THE DEGREE OF LL.M BY RESEARCH

I, in every respect, wish to express my genuinely gratitude to Barrister Sinead Eaton, Lecturer in Law, School of Law at University of Limerick for her invaluable help, guidance and advice over the past two years. As this LL.M degree would not have been feasible without her expertise supervision work and dedication to the research. Barrister Sinead Eaton went extra miles and gave me her personal Law Book to ensure that I would excel in this LL.M research.

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Conclusively, I would like to dedicate this LL.M Thesis to my late parents - Eteh Iroamachi Jombo & Nmma Grace Chijiago Jombo who brought me into this world and directed me towards the path of Education. “Education begins, like charity, at home” a quote by Susan Ferraro, New York Times/Hers, March 26, 1987.
ABSTRACT:

This my Postgraduate LL.M studies by research focusing on the concept ‘Separate Legal Personality’ of a company’. It is a Company Law topic. The Thesis explores and analyses the creation of ‘Separate Legal Personality’ of companies and the ‘Disregarding’ of same in Ireland, United States of America (Delaware) and Nigeria in the 21st Century.

The researcher was motivated to research on ‘Separate Legal Personality’ of a company when he realised the inconsistencies and controversies surrounding the topic since 1897 when the topic’s pioneer case Salomon v Salmon & Co. Ltd 1897 AC 22 was overturned by the United Kingdom House of Lords (HL). Also, the Researcher realised that there are comparative exceptions in the Disregarding of ‘Separate Legal Personality’ of a Company still exist in Ireland, United States of America and Nigeria.

The researcher utilised the Qualitative Research Approach Method and Case Studies which were researched from multiple sources, including Law Books and Legal Journal Articles. The ‘Separate Legal Personality’ of a Company is a significant and household concept in Company Law, therefore figuring out the comparative exceptions which still exist in the aforesaid jurisdictions seems to be a worthwhile research. This, I believe would enable the legislators to harmonise and update laws for ‘Separate Legal Personality’ of a Company in the 21st Century as there has been no proactive measures to abolish these inconsistencies and controversies.

Keywords: Law; Company Law; Corporate Law; Separate Legal Personality; Limited Liability; Disregarding the Corporate Veil; Legal Entity, Salomon v Salomon & Co Ltd
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CHAPTER 1

INTRODUCTION

“At first glance, there seems to be an unbridgeable gulf between the corporate veil doctrines on the two sides of the Atlantic”\(^1\)

Digesting and paraphrasing this quote from my thesis perspective, I would say “At first glance, there seems to be an unbridgeable gulf between the Separate Legal Personality doctrine (Corporate veil doctrine) across Ireland, United States of America and Nigeria”

In view of this, my research on ‘Current Approaches to the Separate Legal Personality of a Company’ in Ireland, United States of America and Nigeria would analyse the ‘Separate Legal Personality Doctrine’ in Ireland, United States of America and Nigeria in the contemporary period in focus.

Irrefutably, there is the gulf between the circumstances in which the courts disregard the ‘Separate Legal Personality’ of a Company in the three jurisdictions since the inception of the doctrine in Salomon v Salomon & Co Ltd\(^2\) case. Therefore, this thesis would analyse the comparative exceptions that still exist in the ‘Separate Legal Personality Doctrine’ (‘Corporate Veil Doctrines’) between these jurisdictions and compare same.

Disregarding the ‘Separate Legal Personality’ of a Company is the stripping off the ‘Separate Legal Personality’ of a ‘limited liability’ Company and imposing personal obligations on the Shareholders, Directors, Executives or Officers of the ‘Limited Liability’ Company beyond the amount they invested in the Company. It is the stripping off the ‘limited liability’ status the Shareholders, Directors, Executives or Officers of the ‘Limited Liability’ Company enjoy. In other words, it is the stripping out the ‘limited liability’ status of the Company and treating the as ‘unlimited’ Company.

The ‘Separate Legal Personality Doctrine’ of a Company was established in the pioneer case - Salomon v Salomon & Co Ltd\(^3\) where the House of Lords overturned the High Court and Court of Appeal judgements.

Since the House of Lords judgement in Salomon’s case\(^4\) and nowadays, there are lacunae in Company Law as far as the ‘Separate Legal Personality Doctrine’ is concerned. And there are comparative exceptions that need to be expounded in the Current Approaches to the ‘Separate Legal Personality’ of a ‘limited liability’ Company.

“The subject of ‘Lifting the veil’ is well known in the literature on company law. The problem which authors face is how to explain the judgments which deviate from the strict rule of the ‘Separate Legal Entity’ of the company”\(^5\)

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\(^2\) (1897) AC 22(HL)

\(^3\) Ibid

\(^4\) Salomon v Salomon & Co Ltd (1897) AC 22(HL)

This second quote is stressing the significance of ‘disregarding Separate Legal Personality of a company in the literature on company law. Hence, suggesting the imperativeness of my thesis which would factually analyse the comparative exceptions to the ‘Separate Legal Personality Doctrine’ in Ireland, United States of America and Nigeria through a re-examination as per Salomon v Salomon & Co Ltd.

In B v. B, it was held that a discovery order obtained by a wife against her husband was not effective against the husband's company as the company was not named in the order and was separate and distinct from him. And in Macaura v. Northern Assurance Co Ltd, a claim under an insurance policy failed where the insured had transferred timber from his name into the name of a company wholly owned by him, and it was subsequently destroyed in a fire; as the property now belonged to the company and not to him, he no longer had an "insurable interest" in it and his claim failed. This is because an incorporated company (a corporation) as an artificial person is separate and distinct from its shareholders (owners or members).

The ‘Separate Legal Personality Doctrine’ of a Company and the relevant laws of ‘Separate Legal Personality’ and ‘Limited Liability’ has been a household and exhaustless topic in company law since the early days of the twentieth century.

An incessant ongoing challenge facing the ‘Doctrine of Separate Legal Personality’ of a Company has been an attempt to increase the predictability of ‘Separate Legal Personality’ being disregarded. The ‘Doctrine of Separate Legal Personality’ being an exception to conventional rule of ‘Limited Liability’, was created to preclude inequity. And this is facilitated through the ‘disregarding’ of ‘Separate Legal Personality’ of a company (Veil of Incorporation).

OVERVIEW

The United Kingdom House of Lords (HL) in the renowned pioneer case of ‘Disregarding the Separate Legal Personality’ of a Company (otherwise known as Lifting the Corporate Veil of a Company), Salomon v Salomon & Co Ltd (1897) AC 22 (HL), constituted a doctrine that a Company is an artificial legal person different from its shareholders.

Through the case, the HL firmly established the route of contemporary Company law and the distinctive feature of potential private limited Companies, established ‘Separate Legal Personality’ even for a 'one man' Company. Identical rules are included in the statutory clauses of Continental countries.

A Separate Legal Personality and Limited Liability Doctrine has attempted to lure potential business venture owners, motivate commercial enterprise and make commercial intercourse attractive for investors to set up new enterprise notwithstanding if it potentially involves mercantile vulnerability.

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6 (1897) AC 22 (HL)
7 (1978) CA
8 [1925] AC 619
10 Ibid
At the commencement of the 21st century, the wheel of the ‘doctrine of Separate Legal Personality’ constituted by the House of Lords (HL) had revolved entirely on a full circle. During the eighteenth and nineteenth centuries, joint stock companies had forced into the activity of the legitimate types of partnership. The official recommendation had been returned and these types of Joint Stock Company had come to add the acceptable uses of the law of partnership.  

The newest Irish Companies Acts 2014 has 1448 sections and 17 schedules. This Irish Companies Acts 2014 is the largest piece of legislation to ever be enacted in the legal history of Ireland. Distinctive to the Companies Act 2006 that consolidated English Company law, the Irish Companies Acts 2014 goes a step beyond and consolidates Irish law.  

Section 6 of the Irish Companies Acts 2014 - Construction of references in other Acts to companies registered under Companies (Consolidation) Act 1908 and Act of 1963. Section 6(1) stipulates “References in any Act, other than this Act, to a company formed and registered, or registered, under the Companies (Consolidation) Act 1908 or the Act of 1963 shall, unless the contrary intention appears, be read as references to a company formed and registered, or registered, under whichever of those Acts is appropriate or this Act”.  

Section 6(2)(1) applies despite section 26(2)(f) of the Interpretation Act 2005 (which provides that where an Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be read as references to the provisions of the new Act relating to the same subject-matter as that of the former Act).  

Section 250 of the new Companies (Consolidation) Act 1908 defines a joint stock company saying:

“For the purposes of this Part of this Act, as far as relates to registration of companies as companies limited by shares, a joint stock company means a company having a permanent paid-up or nominal share capital of fixed amount divided into shares. Also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons; and such a company when registered with limited liability under this Act shall be deemed to be a company limited by shares”.

Away from the disillusion of this progress, the legislative body pushed ahead to emancipate the incorporated partnership from some of the usual prerequisites of the Companies Acts.

13 The Overview of Irish Companies Act 2014 by Paul Egan  
14 Irish Companies Act 2014  
15 Interpretation Act 2005
The Companies Act of 1900 relieved from the incorporated partnership some of the usual prerequisites of the Companies Acts in interposing manifold novel conventionalities. An example is ‘a privately limited company which does not issue any invitation to the public for the sale of its shares’. On the contrary, it was by the 1907 Act, included in section 1 of the new Companies (Consolidation) Act 1908, that private companies were for the first time granted a statutory expressed meaning and distinctively disparate from other types of Companies.\textsuperscript{16}

Section 1 of the said new Companies (Consolidation) Act 1908 as well prohibited partnerships exceeding certain number. Section 1(1) of the new Companies (Consolidation) Act 1908 thus stipulates “No company, association, or partnership consisting of more than ten persons shall be formed on the basis of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament.

Under the subtitle ‘Act structured to facilitate its use in relation to most common type of company’, the Irish Companies Acts 2014, section 9(1) Subject to subsections (3) and (4), all the law in this Act in relation to private companies limited by shares is to be found in Parts 1 to 14 (or instruments under them) and Schedules 1 to 6\textsuperscript{17}.

Section 10 of the Irish Companies Acts 2014 - Reference in Parts 2 to 14 to company to mean private company limited by shares stipulates what a private Company limited by shares is\textsuperscript{18}.

Part 2 of the Irish Companies Acts 2014, under Incorporation and Registration in Chapter 1, section 15 of the Acts stipulate ‘Definitions (Part 2)\textsuperscript{19}.

Section 17 of the Irish Companies Acts 2014 - Incorporation and consequential matters with subtitle Way of forming private company limited by shares in s17(1), 17(2) and 17(3) stipulates - 17(1) “A company may be formed for any lawful purpose by any person or persons subscribing to a constitution and complying with the requirements of this Part as to registration of a company”; 17(2) “The liability of a member of a company at any time shall be limited to the amount, if any, unpaid on the shares registered in the member's name at that time”; 17(3) “Subsection (2) is without prejudice to any other liability to which a member may be subject as provided by this Act”. Section 17(2) of the Irish Companies Acts 2014 implies ‘Limited liability Doctrine’ which goes hand in hand with ‘Doctrine of ‘Separate Legal Personality’ as established in Salomon v Salomon & Co Ltd (1897) AC 22 (HL), by the United Kingdom House of Lords (HL)\textsuperscript{20}.

In accordance with section 17(1) of the Irish Companies Acts 2014, ‘Separate Legal Personality’ of a Company is legislatively created, hence, the disregarding of same is either statutorily or judicially brought about.

\textsuperscript{16} Section 1(2) New Companies (Consolidation) Act 1908
\textsuperscript{17} Irish Companies Acts 2014, section 9(1).
\textsuperscript{18} Section 10 of the Irish Companies Acts 2014
\textsuperscript{19} Section 15 of the Irish Companies Acts 2014
\textsuperscript{20} Section 17(2) of the Irish Companies Acts 2014
The disregarding of the ‘Separate Legal Personality’ of a Company statutorily involves invoking the relevant legislation of the Country. In the case of Ireland, disregarding of the ‘Separate Legal Personality’ of a Company statutorily, section 610[1(a) & (b)] of the Irish Companies Acts 2014 would be invoked at the related and appropriate circumstances. This is on the grounds of Fraudulent or reckless trading as per the Irish Companies Acts 2014. Again, if the director or officer of the company alleged of fraudulent or reckless trading has acted honestly and responsibly regarding the conduct of the business of the company, the court would perhaps relieve the individual totally or partly from personal obligation. The disregarding of the ‘Separate Legal Personality’ of a Company judicially implies using the related and appropriate case law to disregard the ‘Separate Legal Personality’ of a Company\(^\text{21}\). The courts would disregard the ‘Separate Legal Personality’ of a Company judicially if they saw injustice.

The House of Lords (HL) in Salomon v Salomon & Co Ltd (1897) AC 22 (HL) constituted a doctrine that a Company is an artificial legal person different from its shareholders (Separate Legal Personality of a Company Doctrine)\(^\text{22}\). The United Kingdom House of Lords (HL) constituted this Doctrine thereby upholding ‘Limited Liability Doctrine as enshrined in section 17(2) of the Irish Companies Acts 2014\(^\text{23}\).

A Company as an artificial legal person different from its shareholders implies that a Company is not regarded to be entitled to rights or liable for obligations of its shareholders, and the other way around\(^\text{24}\).

In the eyes of law, it has ongoing been established that natural or artificial persons are as a rule free to undertake the rights and liabilities of others through accepted laws of contract, tort, agency or trusts. Accordingly, a person can be obligated for the debts of another by acknowledging responsibility. A person can be obligated in tort to another in a situation both parties have individually undertaken a duty of care. A principal will be liable to another for the conducts of his agent. And a legatee under a trust will be privileged to a property held by the trustee. The law as well establishes that this kind of connections can emerge unintentionally, in which case, the parties to an agency or trust do not have to know that they are forming this kind of connection, regardless, they as a rule do\(^\text{25}\).

‘Separate Legal Personality’ of a Company is subject to simple setting aside by common acceptance. There is no legitimate rejection to a common consent in which a shareholder acknowledges to be bound in law in reference of the company’s liabilities-subject to the conventional rules of conduct for the drawing of these kinds of indentures are abided by.

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\(^{21}\) \text{Section 17(1) of the Irish Companies Acts 2014}


\(^{23}\) \text{Section 17(2) of the Irish Companies Acts 2014}

\(^{24}\) Courtney, TB. The Law of Private Companies 2 Ed. Lexis Nexis Butterworths Dublin, Pg.207, 2002

\(^{25}\) \text{Ibid}
Majority of the investment companies would for instance insist on the boss of smaller private companies bargaining around the separate corporate company by getting them to comply with private insurances or other bonds, so that they undertake private obligation for the liabilities of the company.

Similarly, perhaps a company accepts to be obligated for the liabilities of its shareholders if the normal rules of conducts are abided by. This is conditional, notwithstanding, that the commerce is intra vires (not above the legal authority of the directors and that of the company). The commerce does not constitute a fraudulent priority and does not violate the statutory codifications regulating commerce among directors and companies.

The doctrine of ‘Separate Legal Personality’ is implored whenever owners break the difference between the corporation and the owners. It should be noted that, regardless, a Separate Legal entity, a company or corporation can only operate through human agents that incorporate it.

Hence, there are two noteworthy ways through which a company becomes obligated in company or corporate law namely: through direct liability (for direct infringement) and through secondary liability (for conducts of its human agents operating during their employment).

The doctrine of disregarding the ‘Separate Legal Personality’ varies from country to country. It has been opined by two corporate law scholars, based on the overall poll that the whole area of limited liability, and interchangeably of disregarding the ‘Separate Legal Personality’, is among the most ambiguous in corporate law.

The doctrine of ‘Separate Legal Personality’ and the affiliated laws of ‘Separate Corporate Personality’ and ‘limited liability’ has been a much studied topic in Corporation Law since the first part of the twentieth century.

The application of disregarding the ‘Separate Legal Personality’ up-to-date remains one of the most contestable topics in corporate law, and it would continue to remain same, even for the years to come. A prolonged contention confronting the doctrine of ‘Separate Legal Personality’ has been the effort to step-up its foreseeability. The doctrine of disregarding the ‘Separate Legal Personality’ remains only an extraordinary application constructed by courts of law.

As we go from jurisdiction to jurisdiction across the globe, it's application pins down to how that system of the law understands the topic. Common law jurisdictions are instances equal to efficiency where the disregarding of the ‘Separate Legal Personality’ has attained conspicuousness, and as the diverse cases reveal, courts under this system of the law conventionally understand every case by its merits.

In United States of America, the concept “disregarding the ‘Separate Legal Personality’ of a company” is known as “Piercing the corporate veil”.

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28 Ibid.
29 Ibid.
31 Amin George Forji The Veil Doctrine in Company Law, 29 Sep 2007, Vol.1
32 Ibid
The Doctrine of ‘Separate Legal Personality’ was constituted in the United States of America even earlier than in the United Kingdom in the case of Bank of Augusta v. Earle. Attempts to disregard the ‘Separate Legal Personality’ maintain a close linkage to equity. Perhaps, therefore, in the United States, the disregarding of the ‘Separate Legal Personality’ has been deemed to be very quick. It’s not frequent, acute and unprincipled. It could be said that all is possible as each State develops its own set of elements that should be premeditated. Acceptable controls aim to avoid fraud and achieve justice.

Under Nigerian Company Law, the Legal Personality Doctrine is a prevalent legal concept, which posits that an incorporated company is in the eyes of law a ‘Separate Legal Entity’ disparate from the Company’s shareholders and directors who manage the business of the Company. The dealings, the debts and other obligations of the Company are the Company’s dealings, debts and other obligations and not that of the shareholders or directors. This concept was constituted by the House of Lords in the renowned case of Salomon v. Salomon and Co Ltd (1897) AC 22 (HL).

In Nigeria the ‘Separate Legal Personality’ of a Company is known as the ‘Corporate Veil’ and ‘disregarding the Separate Legal Personality’ of a Company is ‘Lifting the Corporate Veil’.

Unlike Ireland and Nigeria, United States of America has possessed and benefited steady judicial acceptance for disregarding the ‘Separate Legal Personality’ of a Company throughout the years.

The Doctrine of ‘Separate Legal Personality’ of a Company was constituted by the House of Lords in Salomon v Salomon case since over one hundred years ago, and it is a household concept in Company law. However, there are comparative exceptions that still exist in the disregarding the ‘Separate legal Personality’ of a Company across the jurisdictions.

EARLIER FORMS OF COMPANY OR CORPORATION

Prior to the time the English dominated the idea of company, there were organisations that undertook dealings or carried on socio-cultural affairs that were the contents of legal entitlements in ancient Rome and the Maurya Empire in ancient India. Based on Roman law, there were four kinds of these organisations as follows: 1. Municipal, the citizens organisation, initially consisted of the overpowered cities and thereafter other local communities that acquired a ‘Corporate body’ that was allowed in similar entities as having the authority to possess property and make contracts. In reigning periods, monarchs were assigned the authority to emancipate salves, acquire bequeaths, and conclusively to be initiated as a legatee.

33 (1839) 38 U.S. (13 Pet.) 519
36 S.37CAMA
37 The Principle of Legal Personality and the Protection of Minority members and other non-members constituents by Rotimi Kodaolu, 2008 Vol. 1
39 Ibid
2. The Populus Romanus, otherwise known as "People of Rome," is the second type of such organisation that as a group could possess assets, draw contracts and be designated successor. Assets of the exchequer are among the public assets.

3. Collegia, the third type of organisation consisting of personal affiliations with professional roles, like ‘craft or trade guilds’, ‘burial societies’ and associations devoted to distinctive religious worship. Collegia appear to have conducted their activities and to have possessed assets inclusively in ‘republican’ periods. The monarchs started disbelieving the Collegia, hence, legitimated from the inception that no collegium could be established without government permission, and that Collegia’s entitlements of emancipating slaves and acquiring bequests be strictly controlled.

4. Humanitarians’ assets developed the attention of ‘Post-Graeco-Roman’ (postclassical) law. Assets could perhaps be bequeathed or devised to a church for some humanitarian services.

The church would thereafter, if it so seems from the proof, that it has the function of managing the capital, transfers the capitals. Sovereign legislation regulated the transferring of similar capitals to ensure that the capitals could not be utilised unlawfully. In similar instances, possessor-ship is believed to have been transitorily endued in the management.

In primeval Europe, religious organisations developed to be incorporated, equally did the pope, the churches, chapters and monasteries. As well as public organisations were incorporated same as the City of London Corporation and Boroughs, which were incorporated by the authority of certificate from the majesty or were regarded by law to have accepted incorporation.

It is justifiable to remark that the purported earliest mercantile organisation in the world is the ‘Stora Kopparberg Mining Company’ in Falun, Sweden; it acquired a certificate from King Magnus Eriksson within this 1347 era. Notwithstanding, the predominant mercantile organisation throughout the period in contemplation were the guilds of merchant. Most of them acquired certificates from the majesty as ways of acquiring oligopoly for their members for any specific product or department of business. Incorporation was avoidable since every member transacted on his own behalf, only conditional to the adherence to the bylaws of the Guilds. If there is a necessity for transacting on collective interest, partnerships were created.

The partnerships recognised by primeval traders were subdivided into two: ‘Commenda’, which was in fact the type intersecting between partnerships and loan agreement, this is same as our ‘sleeping partnership’. And ‘Societas’ in which every partner was an agent of another and obligated to the entire range of his individual possession if there is partnership indebtedness. The initial form of English enterprise to which the name “company” was substantially used was the one assumed by opportunist trader for abroad business.
Royal Charters granting immunities on similar companies was originally apparent in the fourteenth century. In the common-law jurisdiction, the majesty has invariably had the authority of conferring charter of incorporation. Non-business companies like the Law Society and the Institute of Chartered Accountants are the type of company being formed by charter, whereas business companies have been created through the same procedure in the previous. The original form of this company was recognised as periodic companies. Every affiliate transacted with his shares and on his own behalf, only conditional to the adherence to the bylaws of the company. Incorporation was not necessary as the transacting obligation of every affiliate could be totally different from that of the company and the remaining affiliates. Notwithstanding, certificates were acquired mainly for the desire to obtain a monopoly of business for affiliates of the company and governmental authority over the region for the company’s operation.

Thereafter, partnership doctrine of transacting on collective reckoning was assumed by the periodic companies, which emerged to collective corporations. The distinctive characteristic of these was that for the initial time the periodic companies commenced to transact on collective reckoning with a joint stock.

This method can be trailed to the formation of the distinguished British East India Company, which obtained its initial charter in 1600 conferring on it a monopoly of business with the Indies. Queen Elizabeth I conferred on it, the exclusionary authority to transact with all countries to the East of the Cape of Good Hope. Incorporated companies at this period would basically operate on government's interest, generating in revenue from its misuses overseas. Thereafter, the corporation became greater conjoint with British military and colonial principles. This explains the reason why the composition of the company until 1692 exhibits a middle ground between a systematic corporation/company. A systematic corporation/company is created eminently for government of a distinctive business and the more current company (corporation), modelled to do business for the gains of its stockholders.

Ab initio, this joint stock and the gains generated from it were shared up between all the undersigned thereafter every voyage. Since 1614 forward, notwithstanding, the joint stock was subscribed for an interval of years and method existed up-to 1653 a time irrevocable joint stock was interposed. It was not up-to 1692 that individual business was lastly proscribed for investors.

In the half of the seventeenth century, influential monopolistic companies were being deemed as obsolete. It was grasped that their civic sovereignties were rightfully the roles of the Nation itself and the companies’ monopolies were an excessive restraint on freedom of business. Many of them declined, except few subsisted for a period by modifying from joint stock to periodic corporations and the remaining by abandoning their monopolies.

At the final period of the seventeenth century, few notions had been gathered about one of the fundamental roles of the corporation idea.

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46 Maduka, C. ‘History of Company Law in Nigeria’ 22/08/2016 Vol.1
48 Ibid
49 Ibid
50 Ibid
51 Ibid
52 Ibid
53 Ibid
That is, the feasibility of facilitating the investor to merge with the administrator. Share business was accustomed and Stock-brokering was an allowed career.

The parliament strived to prescribe the misappropriations of Share business and Stock-brokering as far back as 1696\textsuperscript{54}. Notwithstanding, in 1696 it could not be remarked that there was company law, most believably, there was an initial law of partnership.

The Bubble Act:

An approximately unsettled boost in incorporations of companies, which introduced the ‘South Sea Bubble’ manifested in the earliest and subsequent decades of the eighteenth century. Many company (corporation) organisers were not specifically meticulous about if they acquired certificates. Those who deemed it eligible to bestow on their businesses this certification of reputation procured the certificates straightforwardly and inexpensively from corrupted companies, that were conducting expeditious transaction therein.

Gladstone’s Legislations of 1844 and 1845:

The Joint Stock Companies Act 1844 centred on the era of constituting report of Parliamentary committee on Joint Stock Companies presided by Gladstone, who was at that time the president of the Board of Trade was enacted in the year 1844. The Act promulgated the under-listed three paramount laws which enacted the fundamentals of company law from then.

1. It stipulated for registration of all new companies with more than 25 members or with shares transferable without the consent of all the members and registration of private Partnerships, through which, the difference between Private partnership and Joint Stock Companies was described.
2. It stated that for ‘incorporation’, it could be by only registration as contrary to a special Act or certificate, however, this was done by way of provisional registration.
3. It stipulated for full publicity of any kind that has been deemed as the best active security against fraud\textsuperscript{55}.

The Joint Stock Companies Act 1844 brought in for the initial period the Registrar of Companies including details of companies’ constitutions and amendments in the companies’ constitutions. The amendments in the constitutions and the yearly returns are put into the file\textsuperscript{56}. Notwithstanding, un-incorporation was precluded.

The Parliamentary committee on Joint Stock Companies presided over by Gladstone also prearranged and propounded the projected law. The projected law was legislated under Gladstone next in line/successor as the Companies Clauses Consolidation Act 1845. This Act prescribed the level of excellence clauses usually included in private laws of incorporation\textsuperscript{57}.

\textsuperscript{54} Maduka, C. ‘History of Company Law in Nigeria’ 22/08/2016 Vol.1
\textsuperscript{55} Ibid
\textsuperscript{56} Ibid
\textsuperscript{57} Ibid
Gladstone, hence, accomplished putting joint stock companies on a credible lawful status for the initial time in the intervening period of his term as the president of the Board of Trade. Gladstone, thus, is perhaps deemed as the father of modern company law\(^{58}\). Gladstone’s enactment clarified the lawful and not the business complexity, that is exemption from individual obligation\(^{59}\) or limited liability as it is now known.

The Joint Stock Act of 1856:

Due to criticisms of 1844 Act and the consensual about non-presence of limited liability, a powerful Royal Commission, consisting of envoys from England, Scotland and Ireland was in 1854 inaugurated to scrutinise the issue. Notwithstanding, the plurality of 6 from 8 voted against limited liability, the parliament in 1855 legislated the Limited Liability Act stipulating for limited liability of members on thorough registration where:

a. The company had minimum members possessing £10 shares, up to 20% of it paid up.
b. Not less than \(\frac{3}{4}\) of the minimal capital was subscribed,
c. The word ‘limited’ (Ltd) must be included to the company’s last name, and
d. the Board of trade accredited the auditors\(^{60}\).

The Limited Liability Act 1855 exclusively continued been operative for a couple of months since it was repealed and updated in the Joint Stock Companies Act 1856. The Joint Stock Companies Act 1856 comprised of 116 sections and a schedule of tables and forms, was the initial of the modern Company Acts\(^{61}\). The Joint Stock Companies Act 1856 repealed interim registration, outdated deed of settlement by the contemporary memorandum articles of association and conjoint lawsuits for liquidation\(^{62}\). The Act permitted the formation of a limited liability company to be acquired with independence to the extent of approximately to certification. All that was requisite was for seven or more individuals to endorse and registered a memorandum of association. Basically, all the provisions of the 1855 Act were repealed except it continued the prerequisites of the word ‘limited’ (Ltd) being included to the company’s last name, and the clause for registration and promulgation\(^{63}\).

This update was centred on the proposal of Lord Bramwell who believed that those who transacted with companies with the comprehension that the companies are to be ‘limited’ had only themselves to be blamed if they loss in their dealings. The covert word ‘limited’ was aforethought to pose ‘a red flag’ admonishing the populace of the risk the public would endure if they had transaction with the risky new formation.

1.1 LITERATURE REVIEW OF ‘SEPARATE LEGAL PERSONALITY’

The term ‘Separate Legal Personality’ is a term unequivocally used to describe an imaginary ‘Separate Legal Personality’ of a ‘limited liability’ Company.

\(^{58}\) Maduka, C. ‘History of Company Law in Nigeria’ 22/08/2016 Vol.1
\(^{59}\) Ibid
\(^{60}\) Ibid
\(^{61}\) Ibid
\(^{62}\) Judge B.N Cardozo’s statement of opinion in Berkey v Third Ave. Railway Co. case
It is used to emphasise the ‘Separate Legal Personality’ of a ‘limited liability’ company. ‘Veil’, ‘Shell’, ‘Mirror of identity’, ‘Stratagem’, ‘Mask’, ‘Cloak’, Alter ego’, ‘Instrumentality’, ‘Sham’, are some of the metaphorical words used for ‘Separate Legal Personality’ of a Company. These metaphorical words (terms) are not helpful because the terms create ambiguity in disregarding the ‘Separate Legal Personality’ of a Company and make foreseeable predictability of the ‘Separate Legal Personality’ of a Company being disregarded impossible. ‘Separate Legal Personality’ is a prominent legal rule in Company Law worldwide.

Although this research will be analysing some of the general comparative exceptions between Ireland, United States of America and Nigeria in ‘Disregarding the Separate Legal Personality’ (Piercing or lifting the ‘Separate Legal Personality’) of a Company in the aforesaid jurisdictions, however, the research will first undertake to write a brief literature review of the ‘Disregarding Separate Legal Personality’.

The Irish and Nigerian legal systems on ‘disregarding the ‘Separate Legal Personality’ Company have its’ evolutions from the late eighteenth century when the ‘Separate Legal Personality’ doctrine was established by House of Lords, in the case of Salomon v. Salomon & Co Ltd (1897) AC 22, the doctrine that holds up to the contemporary days.

The said doctrine and case provides background for the U.S. reader specifically and the globe at large. Part II of the United State of American law on ‘Separate Legal Personality’ furnishes detailed comparisons between the Irish, the Nigerian and the U.S. ‘Separate Legal Personality’ rules.

It is exactly one hundred and twenty years ago, when the concept of ‘Separate Legal Personality Doctrine’ was established by the United Kingdom House of Lords in a renowned case Salomon v. Salomon & Co Ltd (1897) AC 22 (HL). A scenario Per Vaughan Williams J said in Salomon v Salomon Ltd (1897) AC 22 (HL) that “the Corporation has a Separate existence from the shareholders”. This age long decision of House of Lords in in Salomon v. Salomon & Co Ltd (1897) AC 22 (HL) case has become applicable in all the jurisdictions globally including Ireland, United States of America and Nigeria.

Therefore, it is evident from the historical perspective that ‘Separate Legal Personality doctrine’ started being in existence since the nineteenth Century. In the pioneer and renowned ‘Separate Legal Personality’ case of Salomon v. Salomon & Co Ltd (1897) AC 22, Mr. Aaron Salomon the leather merchant and a boot manufacturer successfully managed his business as a sole proprietor for about thirty years. In this establishing case of Salomon v. Salomon, Mr. Aaron Salomon formed a company with 20,007 shares. And Mr. Aaron Salomon’s company had seven shareholders with number of shares each shareholder subscribed in the following proportion. - Mr. Aaron Salomon held 20,001 shares, whereas each of the six members of his family held one share as his nominee.

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66 [1897] A.C. 22, (HL)
He sold his existing business to the company for almost 39,000.00 British Pounds of which (10,000.00 British Pounds) ten thousand pounds were debentures and the remaining in return for the shares were issued to him, which made him a secured creditor for the face value of the said amount of loan (the Debentures) 68.

When the company encountered some financial difficulties, the company obtained a loan of 5,000.00 British Pounds from one Mr. Edmund Broderip. After a while, still the company encountered more financial difficulties and was unable to pay its debt, this situation led to an action for the liquidation of the company.

As Mr. Edmund was unsuccessful to recover his unsecured loans he instituted an action against Mr. Salomon's personal assets. The High Court and Court of Appeal ruled in favor of Mr. Edmund Broderip. But upon appeal to the House of Lords, the House of Lords overturned the ruling arguing that a company had been duly incorporated and could not be denied of its ‘Separate Legal Personality’ status 69.

Though, Francis Rose, J has contended that the decision in Salomon’s case is still a good law, there are number of situations in which the ‘Separate Legal Personality’ of a Company may be disregarded to enable the court to reveal the identity of the company’s members or officers 70. On the one hand, it may be said that the number of exceptions has become so numerous that Salomon case has been shrank to a shadow.

On the other hand, it is feasible to find some consistencies between those comparative exceptions and Salomon’s case. Though, these comparative exceptions are found more in Irish law and United States of America law than in Nigerian Company Law. The company has quickly gone into liquidation and the company’s unsecured creditors, whose claims could not be met in full, attempted to press their claims against Salomon himself on the basis that the company was his agent. Those claims failed. The requirements of the legislation for setting up the company had been complied with and it was immaterial that Salomon held all the shares beneficially. The company had been established as a ‘Separate Legal Personality’ 71.

In the United States of America disregarding the ‘Separate Legal Personality’ of a company is usually known as ‘Piercing ‘Separate Legal Personality’ of a company. Disregarding the ‘Separate Legal Personality’ of a company has its accurate inception and role in the States of American law and, in distinction to Europe. There in the United States of America, it is deemed to be a normal part of their legal system 72, and this is due to how companies are created in the United States of America.

68 [1897] A.C. 22, (HL)
69 The USA Model Business Corporation Act; the American Bar Association Section of Business Law, Committee on Corporate Laws.
71 Ibid
72 Praphrut Chatprapachai, ‘Piercing the Corporate Veil Doctrine in Comparative View’ Thai, Japan & America, lecturer, Graduate School of Law, Assumption University of Thailand, Law Journal, April 17, 2014, Vol.1.
The belief that a company is a ‘Separate Legal Personality’ recognisably different from its members and officers’ was established in the United States of America even earlier than in the United Kingdom in the case of Bank of Augusta v. Earle (1839). Efforts to disregard the Separate Legal Personality of a company maintain a close connection to equity. This may be attributed to the justification of the fact that in the United States, the disregarding of the ‘Separate Legal Personality’ has been deemed to be very quick: it’s not often, intense and unethical. It could be said that all possible concerned state evolves its own set of elements that should be considered. Conventional checks aim to avoid fraud and accomplish justice.\(^{73}\)

For coherence purposes, some authors have endeavored to furnish a feasible possibility to the rather variable amalgamation of facts and propounded using the appellation ‘the totality of circumstances rule’.\(^{74}\)

The Evolution of ‘Piercing the ‘Corporate Veil’ of a company as it is known (‘disregarding the ‘Separate Legal Personality’ of a company) was initially propounded in the United States of American in 1912. The term ‘Piercing the ‘Corporate Veil’ of a company in the United States of America was first expressed by Professor Maurice Wormser since 1912. Whereas the doctrine of limited liability commenced to formalise itself in the United States long before the early part of the Nineteenth century though with no specific starting date. Massachusetts parliament launched an enactment of five variant statutes from 1809 until 1830, legislating liability of shareholders which seems to be the initial significant stage in the development of limited liability doctrine in the United States of America. The judicial decision in case of Wood v. Dummer conferred an approval for the principle of limited liability.\(^{75}\)

Unlike Ireland and Nigeria, United States of America has possessed and benefited steady judicial acceptance throughout the years.\(^{76}\) Although a United Kingdom first case in ‘disregarding the veil of Incorporation of a company’ Salomon v. Salomon & Co Ltd (1897) AC 22 (HL) has its influence in the United States of America courts in ‘piercing the ‘Separate Legal Personality’ of a company, however, in Berkey v. Third Ave. Railway Co., one of the earliest ‘Piercing ‘Separate Legal Personality’ cases in the United States of America, United States of America courts seems to be reluctant in ‘disregarding Separate Legal Personality’ of a company and moreover the removal of ‘Separate Legal Personality’ of a company was scarcely expected in United States of America.\(^{77}\)

Part II furnishes the United States readers with a detailed comparison between the Irish, Nigerian and United States ‘Separate Legal Personality’ rules, focusing on the disparities in their jurisprudential approaches, dealing with specific case types, and related issues. Inferring from this comparison, Part II examines the Irish, Nigerian and United States of America methods of judicial reasoning in the Disregarding ‘Separate Legal Personality’ (Piercing ‘Separate Legal Personality’) scenario. Part III contends that despite the very great number of disparities between the two rules, they in fact share some critical exceptions. Remarkably, evidence of the United States instrumentality rule can be found in several important Irish and Nigerian Disregarding ‘Separate Legal Personality’ (Piercing ‘Separate Legal Personality’) cases.


\(^{74}\) Praphrut Chatprapachai, ‘Piercing the Corporate Veil Doctrine in Comparative View’ Thai, Japan & America, lecturer, Graduate School of Law, Assumption University of Thailand, Law Journal, April 17, 2014, Vol.1.


\(^{76}\) Praphrut Chatprapachai, ‘Piercing the Corporate Veil Doctrine in Comparative View’ Thai, Japan & America, lecturer, Graduate School of Law, Assumption University of Thailand, Law Journal, April 17, 2014, Vol.1.

\(^{77}\) Ibid
Therefore, it is should be noted that it is possible to create an Irish and Nigerian version of the instrumentality rule that conveys coherence and framework to the Irish and Nigerian rule. Part IV posits an improvement of the single economic unit theory first posited by Lord Denning. Inferring on economic analysis and contemporary cases in Irish, Nigerian company law and European Union (EU) competition law, Part IV transmits a definite pattern approach to the theory. This approach will enable Irish and Nigerian courts to research on ‘Disregarding ‘Separate Legal Personality’ (Piercing ‘Separate Legal Personality’) cases involving corporate groups in a methodical manner.

The cases of New York taxi-cab are other cases which can illustrate cases where the ‘Separate Legal Personality’ of a Company was disregarded under ‘Single Economic Entities’ provision (exception). Many cabs were paired and separately incorporated by each of their owners. Their intentions were to enjoy the limitation of tortious liability arisen from the use of one cab and prevent the other ‘cab entities’ from the strong criticism of liability that may spread to them by incorporating in pairs. Therefore, only the lowest amount of third party insurance was the responsibility of the individual cabs, which often could not be enough for obligations incurred.

It could be sensed from the United States of America judicial decisions in the first in time history of the United States of America Corporate law that United States of America courts have been reluctant to grant damages award against Corporation, hence, it could be inferred that the removal of ‘Separate Legal Personality’ was scarcely expected. And this is in accordance with enormity and desirability of Corporate being which devoted to financial and economic advantages. In Chief Justice Marshall’s remarkable phrase quote, he in addition defined the Corporation as ‘an artificial being, invisible, intangible and existing only in contemplation of law’.

It is remarkable that a way of dealing with the problematic issue of individual shareholder is mostly based on tracing through development of decisions that the courts made because there are no uniform binding rules. Furthermore, unadulterated nature of state-law domination was a legal nature of corporate establishment in the United States of America. This excessively indulgent variety urged Judge Cardozo to make a statement of opinion in Berkey v. Third Ave. Railway Co. that "the whole problem of the relationships between parent and subsidiary corporations is one that is still enveloped in the obscured of metaphor." Furthermore, Professor Elvin R. Latty from Duke Law School pointed out that

"what the formula amounts to, once cut of verbiage about control, instrumentality, agency and Corporate entity, that liability is imposed to reach an equitable result."

Although development of theories has been admissible, the summary accepted by Judge Sanborn modified the access in United States v. Milwaukee Refrigerator Transit Co. and stipulated circumstantial procedure to the problem.

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80 Ibid
81 Ibid
82 Ibid
"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity in general, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

In the United States of America, it is imperative for people to be acquainted that one of the significant issues that could be regarded as the difference between ‘disregarding (‘piercing’) the ‘Separate Legal Personality’ and other matters of contention is a scenario in which owners of a corporate entity shall be personally held liable for whatsoever reason without necessarily applying the ‘disregarding (‘piercing’) strategy. A further theoretical evolution of disregarding (‘piercing’) the ‘Separate Legal Personality’ doctrine was also commented by Professor Adolf A. Berle of Columbia Law School, as a method of dealing with an "enterprise entity theory." Professor Berle observed that when a business is divided into various entities under supervision of the parent corporation, there would be an inconsistency between economic reality and the legal organisation. Hence, he pointed out that the subsidiary's debt is not the only liability which the parent corporation should bear, however, the parent corporation should also be liable for "all of the comprised assets available to a creditor of any of the enterprise's corporations.

The objection on Berle's enterprise entity theory was made by the court in the case of Berkey v Third Ave. Railway Co. One of the earliest ‘Disregarding (‘piercing’) ‘Separate Legal Personality’ cases in United States of America involved a parent corporation which was an owner of many subsidiary companies. The parent corporation controlled the operation of a railway transportation system in Manhattan. The court declined from granting compensation damages to the plaintiff, who caught one of the subsidiaries' street cars and suffered from injury by negligence, by refusing to impose shareholder liability. In an alternate taxi-cab case, Walkovszky v. Carlton, a reference to Berle's conception was made by the court. The conclusion was that extension of liability to the enterprise was presumable but not to the individual shareholders. However, it can be sensed from the conclusion of the court, that other factors such as insufficient capitalisation and mixing of funds from different sources for the corporation's affairs had been focused on. Instead of focusing only on the corporation been masked as a disparate enterprise by incorporating its own divisions.

In the United States of America, there are other doctrinal methods which, instead of concentrating on Professor Berle's ‘enterprise entity theory’, have more in sight at creditor's view point. For instance, Professor Wormser stressed that the lawful fictional status of a corporate separation is a right of existence granted by a state and it can be used only to an acceptable limit and administratively serve lawful purposes. Thus, accomplishment of justice and deterrent of shareholders from evading their legal liability should be the aims of the ‘disregarding (‘piercing’). Furthermore, it is Professor Wormser’s point of view that because of an involvement of the complex relationships, bringing common law matters of all outstanding issues in relation to disregarding to the status of statutory law for these ‘disregarding (‘piercing’) regulations could not be attainable.

83 Praphrut Chatprapachai, ‘Piercing the Corporate Veil Doctrine in Comparative View’ Thai, Japan & America, lecturer, Graduate School of Law, Assumption University of Thailand, Law Journal, April 17, 2014, Vol. 1.
84 Ibid
85 Ibid
86 Ibid
A comparable method to Professor Wormer's can be seen in California where the State's courts have more readiness than other States to 'Disregard' ('Pierce') the 'Separate Legal Personality' of the entity. The Californian courts focused on an application of a two-criterion test, generally known as the "alter ego" doctrine.

'A unity of interest between the shareholders and their entity so that a separation of them no longer exists and an inequitable result would follow if the acts objected to by the creditors were only treated as those of the corporation'\textsuperscript{87}, are compulsory for this test.

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\textsuperscript{87} Praphrut Chatprapachai, 'Piercing the Corporate Veil Doctrine in Comparative View' Thai, Japan & America, lecturer, Graduate School of Law, Assumption University of Thailand, Law Journal, April17, 2014, Vol.1.
\textsuperscript{88} Ibid
\textsuperscript{89} Ibid
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‘A unity of interest between the shareholders and their entity so that a separation of them no longer exists and an inequitable result would follow if the acts objected to by the creditors were only treated as those of the corporation,’ are compulsory for this test.

An additional similar method is a theory propounded by Professor Powel who suggested the application of ‘a three-criterion test’ in the United States of America Supreme Courts, extensively known as the "instrumentality rule."

Acceptance of this rule first occurred in Lowendahl v. Baltimore; & Ohio R.R. His test depends upon on the following:

“Firstly, complete domination of an entity, secondly, fraud committed using this domination, And Thirdly, loss suffered by the plaintiff caused by the aforementioned act.” The original purpose of development of the test was for parent-subsidiary cases, but enforcement of the test to other cases, which were related to the domination of an entity, were also seen in various jurisdictions.

In the United States of America, courts disregard the company’s impunity in several situations. The term of art ‘Disregarding’ (‘piercing’) ‘Separate Legal Personality’ does not come from the laws of the states or federal government instead it is a judicial creation which differs from state to state. The extent of misuses connecting with groups of companies is to the greatest degree the popular justification for which the courts ‘Disregard’ the veil of incorporation. If a subsidiary company (detached company) is structured as nothing but an insignificant instrument (tool) in the hands of a holding company (parent enterprise). And the detachment (distinctness) of the two companies has discontinued (terminated), it is ‘instrumentality rule’. It could be presumed that making only the subsidiary company to be responsible for any damages ensuing from deception or dishonesty of the holding company would result in injustice. Comparably, the same inference can be construed under the alter ego/instrumentality rule doctrine. The alter ego doctrine is as well illustrated by disclosing an integration of individualities between two companies. Hence, in practical applications, it is complicated to draw a distinction between them.

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90 Praphrut Chatprapachai, ‘Piercing the Corporate Veil Doctrine in Comparative View’ Thai, Japan & America, lecturer, Graduate School of Law, Assumption University of Thailand, Law Journal, April 17, 2014, Vol. 1
91 Ibid
92 Ibid
94 Ibid
The history of Nigerian Company Law as per his Lordship Hon Justice Dr. Olakunle Orojo (Rtd) could be discovered from the Joint Stock Companies Act 1855 which established the principle of limited liability of Companies and the role of Deed of Settlement which was vastly practiced in the Republic of Ireland.  

Nigeria is a common-law jurisdiction country and was colonised by the British, hence, it is notably and significant from the historical point of view that Nigerian company law is part of Nigerian birth-right from the amalgamated Irish and English legal system inherited since colonial days, from 1884 till 1st October 1960. And the history of Company Law in Nigeria should conducive be divided into two periods: Pre1912 and Post 1912. 

Prior to 1912, there was no local company’s law statue functional in Nigeria. However, only foreign companies operated in Nigeria and such companies were regulated by the laws of their various countries. 

The adoption of the amalgamated Irish/English laws by Nigeria was due to Colonialism. The earliest legislative pursuit was made in 1912. It was a replica of the Companies (Consolidation) Act 1908 in England. The Company’s Ordinance of 1912 in Nigeria proscribed the form for incorporating a company by registration. 

The objects and basis for the said ordinance were stated as follows: 
“To provide for the formation of limited companies within the colony and protectorate; It is hoped thereby to foster the principles of co-operative trading and effort in the country.”

The Nigerian company legislation known as the Companies Ordinance 1912 was derived from the amalgamated Irish/English the Companies (Consolidation) Act 1908 (United Kingdom the Companies (Consolidation) Act 1908). This Companies Ordinance 1912 was then the functioning statute in England that was passed in 1912. 

This Ordinance only governed the whole colony of Lagos as far as 1917 when it was amended and extended to govern the entire Nigeria because of the amalgamation of Southern and Northern Nigeria in 1914. In1922, the two pieces of Ordinances were repealed and replaced with the Companies Ordinance 1922 which was again derived from the amalgamated Irish/English Companies Act 1929 (United Kingdom Companies Act 1929) which was afterward updated in 1929, 1941 and 1954. The Company’s Act Cap 37 of 1958 Laws was repealed and replaced with the Companies Act 1968 in the 10th year of the Act. In 1968, a new Companies Decree was passed to replace the “1922 Companies Ordinance”. This 1968 Act was to a considerable degree derived from the amalgamated Irish/English Companies Act 1948 (United Kingdom Companies Act 1948) as part of the recommendations of the Jenkins Committee. The 1968 Companies Act being a federal law was listed in the Exclusive Legislative list of the Nigerian 1979 Constitution with an update of the previous law.
An example of such update was a boost on the innovations of the Companies Act 1968. The Companies Act 1968 included compulsory stipulations for company’s accounts and encouraged greater accountability of directors and more compelling participation of shareholders in the affairs of the company. The greatest fundamental change made by the said Act was the introduction of Part X, which made it officially compulsory for foreign companies planning to carry on business in Nigeria to be incorporated locally. However, this Companies Act 1968 was replaced by the Companies and Allied Matters Act 1990 now and has been given a different official name “Companies and Allied Matters Act 1990”. It was updated in 2004 and now, it is known as “Companies and Allied Matters Act 2004”.\(^{101}\)

In the 21st century, the Companies and Allied Matters Act, 2004; The Nigerian Investment Promotion Commission Decree 1995; Industrial Inspectorate Act; The Nigerian Enterprises Promotion (Issue of Non-voting Equity Shares) Act 1987; Investment and Securities Decree; The Immigration Act 1963; The Industrial Development (Income Tax) Relief Act; and Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree etc. are among the principal laws on companies in Nigeria.\(^{102}\)

The Corporate Affairs Commission (CAC), Securities and Exchange Commission (SEC), and Nigerian Investment Promotion Commission (NIPC), just to mention but a few, are the three main institutions for the enforcement of corporate law rules in Nigeria and the three mentioned institutions are statutorily vested with the regulatory, the supervisory and the controlling authority over companies and the companies’ activities in Nigeria. The Corporate Affairs Commission is the apex regulatory body for companies in Nigeria. And it was established under section 1 of the Companies and Allied Matters Act (CAMA) as a body with full legal capacity on its own status.\(^{103}\)

The Corporate Affairs Commission (CAC) was established as an independent body. The establishment of Corporate Affairs Commission (CAC) was imperative when the inefficiencies and ineffectiveness of the erstwhile Company Registry was detected. The erstwhile Company Registry was a department within the Federal Ministry of Commerce and Tourism which was then charged with the legal duty to regulate the formation and management of companies and as well as to administer the repealed Companies Act of 1968.\(^{104}\)

The lacuna in the 1968 Act was created by the commencement of the Law Reform Commission set up in 1987 under the leadership of his Lordship Hon Justice Dr. Olakunle Orojo (Rtd). His Lordship, Hon. Justice Dr. Olakunle Orojo (Rtd) in collaboration with his colleagues on the Commission reviewed the then Companies and Allied Matters Act 1990, afterward, referred it to as CAMA with other amendments which included constituting the Investment and Securities Act 2007.\(^{105}\)


\(^{102}\) Ibid

\(^{103}\) Ibid


As soon as a company is incorporated, the company obtains the status of a separate legal personality, distinctively recognisable from the shareholders and directors of the company who are in control of the company’s operations. The business, the debts and other obligations of the company are the company’s business, debts and obligations and are not by any means that of the shareholders or the directors. This principle was laid down under the common law in the renowned case of Salomon v. Salomon & Co Ltd AC 22\textsuperscript{106}.

Marina Nominees Ltd v Federal Board of Inland Revenue, Iyke medical Merchandise v Pfizer Inc., A.C.B v Emostrade Ltd, Habib Nig. Bank Ltd v Ochete, Philips v Abou Diwan, and Kitchen Equip W.A. Ltd v Staines Catering Equip Int’l Ltd, are just to mention, but a few of Nigerian cases where the ‘Doctrine’ of ‘Separate Legal Personality’ was enforced\textsuperscript{107}. Trendtex Trading Corporation v Central Bank of Nigeria CA 1977 remains one of the Nigerian’s earliest cases of ‘Disregarding the ‘Separate Legal Personality’ of a company\textsuperscript{108}.

‘Disregarding the Separate Legal Personality’ of a company is an application to disregard the ‘Separate Legal Personality’ of a company. It is a situation in which courts put aside the limited liability of a company and hold the company's shareholders or directors personally liable for the company’s actions, debts or obligations\textsuperscript{109}.

The concept disregarding the ‘Separate Legal Personality’ of a company is used to give detailed account of the action of the court to hold company’s shareholders or officers personally liable for the debts and liabilities of the company\textsuperscript{110}. Hence, courts may disregard the ‘‘Separate Legal Personality’’ that the law uses to distinguish the company its liabilities and assets from the owners and directors of the company. As it has been established, ‘Separate Legal Personality’ of a company creates a ‘separate legal personality of a company’ as it is recognised as a ‘corporate entity’. It protects the directors, officers, and shareholders of a company from personal liability\textsuperscript{111}. Nevertheless, under certain scenarios, the ‘Separate Legal Personality’ may be disregarded. The disregarding of ‘Separate Legal Personality’ is also known as ‘Lifting’ the ‘Separate Legal Personality’ and it is very often the method for holding the shareholders, the directors and the officers of a company personally liable for the actions of the company instead of holding the corporate entity liable for its actions and that of a separate related entity\textsuperscript{112}.

However, the human being common sense apparently and ascertainable started using the ‘Separate Legal Personality’ identity as a cloak for fraud, a sham, a facade or for improper conduct. Therefore, it became necessary for the Courts to disregard the ‘Separate Legal Personality’ and look at the persons behind the company who are the real beneficiaries of the corporate falsification.

‘Separate Legal Personality’. In such a scenario, the court will disregard the façade corporate

\textsuperscript{106} Orojo O. J, Company law and practice in Nigeria, 4\textsuperscript{th} edition, Lexis Nexis, Durban, 2008 at p 15; Maduka. C, History of Company Law in Nigeria, 22/08/2016 Vol.1


\textsuperscript{108} Orojo O. J, Company law and practice in Nigeria, 4\textsuperscript{th} edition, Lexis Nexis, Durban, 2008 at p 15.

\textsuperscript{109} Praphrut Chatprapachai, ‘Piercing the Corporate Veil Doctrine in Comparative View’ Thai, Japan & America, lecturer, Graduate School of Law, Assumption University of Thailand, Law Journal, April 17, 2014, Vol.1

\textsuperscript{110} Ibid

\textsuperscript{111} Ibid

\textsuperscript{112} Ibid
and apply the principle of ‘Disregarding the Separate Legal Personality’\textsuperscript{113}.

Disregarding the ‘Separate Legal Personality’ is a procedure where the corporate identity is disregarded and the Court looks instead at the real persons who are in the control of the company. Therefore, where, there is a fraudulent and dishonest use of the ‘Separate Legal Personality’, the persons concerned will not be allowed to be protected by the ‘Separate Legal Personality’. The motive for disregarding the ‘Separate Legal Personality’ is not invariably to punish or disadvantage the company or the company’s shareholders. As well, occasionally, its result is in the company’s and the company’s directors’ benefits. It has been noted that in disregarding the ‘Separate Legal Personality’, that a four-criterion method and attitudes towards the company should be identified, each one is used in different contexts and for different reasons.

The term of art ‘four-criterion method’ disregarding ‘Separate Legal Personality’ is such a long-established term of art. This term of art is incorporated in the names of methods which reflect the distinctions of attitudes towards the company. The two of these are: ‘Extending the ‘Separate Legal Personality’’ and ‘Ignoring’ or ‘Lifting’ the ‘Separate Legal Personality’\textsuperscript{114}.

The ‘Separate Legal Personality’ is disregarded every now and then only to get information about the shareholders or the directors who thoughtlessly and ill-advisedly control the company. What is the percentage of their shareholdings, and what is their inter-relationship concerning the management of the company? After collecting all these pieces of the required information, the ‘Separate Legal Personality’ is thereafter disregarded and immediately afterwards, the company repossesses its ‘Separate Legal Personality’ status to which unique characteristics are now ascribed\textsuperscript{115}.

The definitions of a ‘parent company’, is a ‘wholly owned subsidiary’ or an ‘affiliated company’. A ‘parent company’ provides adequate instances for a statutory looking behind the ‘Separate Legal Personality’. It implies that statutory looking behind the ‘Separate Legal Personality’ is common in a ‘parent company’, that is a wholly owned subsidiary’ or an affiliated company\textsuperscript{116}.

The ‘Separate Legal Personality’ is disregarded and the shareholders and their connections are probed. This enables the courts to be able to ascertain how to categorise the company and to what group it belongs to\textsuperscript{117}. The same act of ‘looking behind the ‘Separate Legal Personality’ takes place whenever a statute refers that there should be ‘looking behind the ‘Separate Legal Personality’ to the management of a company\textsuperscript{118}.

Furthermore, the courts look behind the ‘Separate Legal Personality’ to figure out from the shareholders, or from the people in the management of the company, facts about the nature of the company\textsuperscript{119}. See Dummer’s case.

Looking behind the ‘Separate Legal Personality’ and at the members of the company, however, allows the Court to convince itself as to the true legal situation of the company\textsuperscript{120} and perhaps

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{114}] Ibid
\item[\textsuperscript{115}] Ibid
\item[\textsuperscript{116}] Ibid
\item[\textsuperscript{117}] Ibid
\item[\textsuperscript{118}] Ibid
\item[\textsuperscript{119}] Ibid
\item[\textsuperscript{120}] Ibid
\end{enumerate}
\end{footnotesize}
to make an order against the company itself\textsuperscript{121},

The courts disregard the ‘Separate Legal Personality’ to grab and hold the managing directors/shareholders personally obligated.

The motive for disregarding the ‘Separate Legal Personality’ is to saddle the managing director or shareholders with the responsibility for the Company’s actions\textsuperscript{122} or to establish their consistent interest in the company’s assets.

The Extending & Ignoring out of Four-criterion Method:

‘Extending the ‘Separate Legal Personality’,\textsuperscript{123} - This method of disregarding the ‘Separate Legal Personality’ is enforced by the extension of the ‘Separate Legal Personality’ so that the ‘Separate Legal Personality’ encompasses a ‘bunch of companies’. In this instance, the ‘Separate Legal Personality’ of each one of the affiliated companies is disregarded only to restore it again over a large ‘bunch of companies’\textsuperscript{124}.

This is applicable in a case where a group of legal entities is managing a conventional activity. In such a circumstance, instead of referring to each one separately, the large ‘bunch of companies’ are all identified as a single going concern, under one extended ‘Separate Legal Personality’. Each corporate entity is no longer of interest to the court any more rather, the court would be interested in a ‘bunch of companies’ entity’ or the extended ‘Separate Legal Personality’ on which the court pays attention to\textsuperscript{125}.

‘Ignoring’ the ‘Separate Legal Personality’ is the utmost enlarged method of disregarding the ‘Separate Legal Personality’, whereby; the courts ignore the ‘Separate Legal Personality’ entirely\textsuperscript{126}. This method is enforced as a penal measure and the courts resort to it when the courts think that the company was not incorporated for commercial or other genuine activities, but only as a channel to defraud or defeat creditors or to circumvent laws. The courts have many names to describe a company which is not a genuine company. Names like ‘disguise’, ‘camouflage’, ‘façade’, sham”, ‘scheme’, ‘puppet’ or ‘bubble company’ are but a few\textsuperscript{127}.

Notwithstanding, even if the conduct of the dominant director/shareholder of the company is discrepable; it is proposed that this method of disregarding the company’s Separate Legal Personality is very severe.

It is not only, is the method contiguous to the legal system. If it is taken strictly, it disentitles the courts themselves of the chances of issuing orders against the company per se when, if they consider applicable. Hence, for instance, when the court declares that the company was not more than a ‘mechanism’ and a ‘sham’, a mask which the company

\textsuperscript{122} Ibid
\textsuperscript{123} Ibid
\textsuperscript{124} Ibid
\textsuperscript{125} Ibid
\textsuperscript{126} Ibid
\textsuperscript{127} DHN Food Distributors Ltd v London Borough of Tower Hamlets; Re Southard & Co. Ltd. [1979] I WLR 1198, 1208
holds before its face in a strive to avoid recognition by the eye of equity.” Disregarding the ‘Separate Legal Personality’ entirely (Ignoring) by the Court counteracts the Courts’ own order issued thereafter against the same Company. The wish of the court to ignore the company’s Separate Legal Personality does not always do justice, particularly when other parties are affected. In this kind of situations, a redress can be found in a more accustomed way, hereupon to nullify the hurtful action. Therefore, for example, a transfer of land to a controlled company by its owner to enable the owner to elude enforcement of a personal contract of sale when its price has increased can be repudiated, without condemning or disregarding the company’s separate legal personality.

The term of art ‘Disregarding’ the ‘Separate Legal Personality’ is also known as ‘Piercing, the ‘Separate Legal Personality’ in the United States of America, and it is much more advanced in the United States of America than in Ireland and Nigeria. In Sanborn J’s comment, which has been cited since then as the law, Sanborn J stated:

“when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons”

The widespread term of art of the subject in Ireland is ‘Disregarding’/‘lifting the Separate Legal Personality of a company’. However, lifting the ‘Separate Legal Personality’ is but one of the nomenclatures preferred by the court. Other terms of art include ‘piercing ‘Separate Legal Personality’, ‘peeping behind ‘Separate Legal Personality’, ‘ignoring ‘Separate Legal Personality’, ‘penetrating ‘Separate Legal Personality’, ‘extending the ‘Separate Legal Personality’, - just to mention but a few, Can such terms of art help? or do these terms of art distract contemplation from the real substance? Cardozo, J. at some time in the past said:

“Metaphors in Law are to be narrowly watched, for starting as devices to liberate thought; they end often by enslaving it”.

The courts use ‘Separate Legal Personality’ as a term of art in various contexts, although distinctive in their approach to the ‘Separate Legal Personality’ in each law suit. One of the dangers in this area is since the courts do not discern the differences between the various attitudes with which they address the company when disregarding its ‘Separate Legal Personality’.

Hence, the court can in the same law suit both ignore the ‘Separate Legal Personality’ completely and issue injunctions against the company as a ‘Separate Legal Personality’. Furthermore, two variance terms of art for the company may be used parallel in a judgment. a ‘puppet’ and ‘an agent’, the first completely invalidating the possibility of an independent legal personality, the second recognising its existence as a ‘Separate Legal Personality’ and ascribing to it the power to negotiate and complete a contract on behalf of its principal. Which of these two should overcome the other?

Problems with ‘Piercing’, ‘Peeping’, ‘Lifting or Ignoring’,

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129 Ibid
130 Ibid
131 Ibid
132 Ibid
133 Ibid
134 Ibid
‘Extending’ etc.:

It is evident that in disregarding ‘Separate Legal Personality’ of the company through a term of art ‘lifting or ignoring’ is very severe. Consequently, enforcing disregarding of the company’s ‘Separate Legal Personality’ by the ‘lifting or ignoring’ method is as well a punitive measure by the courts. Therefore, the courts are disinclined to enforce such method of disregarding ‘Separate Legal Personality’ of the company.

Another problem with the court disregarding ‘Separate Legal Personality’ through various terms of art like ‘Extending Method’, ‘Ignoring Method’ etc. is that the courts do not apprehend clearly the differences between the various points of view with which they deem the company when disregarding its ‘Separate Legal Personality’. Thus, the Courts can in the same case both ignore the ‘Separate Legal Personality’ of a company completely and at the same time issue enjoinders against the company as a ‘Separate Legal Personality’.

Comparing Cases i.e. Comparative Exceptions:

Catching a glimpse of ‘disregarding Separate Legal Personality’ of a Company, there appears to be an insuperable gap between the ‘Separate Legal Personality Doctrines’ on the three countries - Ireland, United States of America and Nigeria. Regardless of the fact that, Courts in the three countries have stressed the task of the judiciary in stopping misuses of the ‘Separate Legal Personality Doctrine’ and ‘limited liability Doctrine’. The discourse about the ‘Separate Legal Personality Doctrine’ and ‘limited liability Doctrine’ in the three countries invariably commences with Salomon v. Salomon & Co Ltd case. The platform of the Irish and Nigerian judiciaries is particularly more orthodox. In comparison, the United States of American Courts have shown paramount inclination to intercede when the circumstance so necessitates.

Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd [1998] 2 IR 519 is the most influential Irish case in ‘Disregarding Separate Legal Personality’ of a Company. The Plaintiff duly filed litigation against the actual defendant.

Sooner after filing the litigation, the plaintiff realised that the defendant was insolvent. Hence, decided to join the parent company that was financially sound on the basis that both the subsidiary and the parent companies should be regarded as a ‘Single Economic Entity’. Mary Laffoy. J of the High Court expressed:

‘this was so fundamentally at variance with the Salomon principles that it was wholly unstateable’ and afterwards, she did not disregard the ‘Separate Legal Personality’ of either the subsidiary or the parent Company. This decision was upheld by the Supreme Court. Notwithstanding, both Courts did not in its entirety snub the ‘Single Economic Entity theory’ which had been laid down in the case of Powers Supermarkets Ltd v Crumlin Investments Ltd.

Conceiving and thinking through the above judgement in Allied Irish Coal Supplies Ltd case, the following may be construed in connection to whether the Irish Courts will disregard the ‘Separate Legal Personality’:


136 [1998]2 IR 519
(a) The Courts will not disregard the ‘Separate Legal Personality’ only because of who owns the company. It will be imperative to show control, but evidence of this kind alone will not be enough reason for disregarding ‘Separate Legal Personality’.

(b) The Courts cannot disregard ‘Separate Legal Personality’ simply because to disregard ‘Separate Legal Personality’ would be in the interests of justice.

(c) The Courts may merely disregard the ‘Separate Legal Personality’ if there is any type of inappropriateness involved.

Conclusively, it is necessary to become aware that this kind of inappropriateness independently is not enough but must be related to the practical management.

However, uncertainty of meaning exists in connection to the idea of ‘Single Economic Entity’ in Ireland. In an Irish case Fyffes Plc v DCC Plc\textsuperscript{137}, Fyffes Plc is a fruit importer and DCC Plc an industrial holding group that had shareholding in Fyffes. The chief executive of DCC plc Jim Flavin was a director of Fyffes Plc. Fyffes instituted a lawsuit against DCC over the sale of its 10 per cent shareholding in the fruit group in February 2000.

Fyffes Plc in the said lawsuit requested for the following four specific reliefs against the defendants:

1. A declaration that the sale by the First and Second Named defendants (two out the three companies of DCC industrial holding group) of ordinary shares amounting to more than 31 million in the Claimant on the 3rd February and 15th February 2000 constituted an illicit ‘insider trade dealing’ within the meaning of P V of the companies Act, 1990;

2. An Order in pursuant to section 109(1)(b) of the Act of 1990 requiring the Respondents and each of them to account to the Claimant for any gains accruing to the Respondents from those sales.

3. An account in equity of all gains accruing to the Respondents or each or either of them from those sales; and

4. Damages or compensation for breach of fiduciary duty on behalf the chief executive and director Jim Flavin.

If the above stated claimed reliefs are granted, it would imply disregarding the ‘Separate Legal Personality’ of DCC Group Plc under ‘Single Economic Entity’.

In a defence in the High Court, DCC Plc had claimed that Jim Flavin, the chief executive of DCC Plc and director Fyffes had not dealt in the shares directly because a subsidiary of DCC group Lotus Green had handled the sale of the shares.

In the Mammoth High Court, Ms. Justice Mary Laffoy ruled in the original lawsuit that DCC chief executive Jim Flavin did not obtain any price sensitive information as a director in Fyffes about Fyffes shares value at the time of the share sales. The High Court trial learned Judge Laffoy dismissed Fyffes Plc v DCC Plc [2007] IESC 36 (2007) Record No.144 case.

\textsuperscript{137}[2007] IESC36 (2007) RecordNo.144]
Fyffes Plc appealed the judgement. The Supreme Court upheld the appeal and overturned the High Court judgement, which implied that Ms. Justice Mary Laffoy had erred in her ruling. Ms. Justice Susan Denham presided over the five-judge Supreme Court which ruled unanimously in favor of Fyffes Plc. The ‘Separate Legal Personality’ of DCC Group Plc was disregarded, DCC, S & L and Lotus Green were treated as one ‘Single Economic Entity’ and Jim Flavin held for breach of ‘fiduciary duty’.

Regardless of the fact, that Minnie Berkey v. Third Avenue Railway Company\(^{138}\) was a lawsuit for a claim under ‘Tort’ it was as well an informative and leading case for ‘disregarding Separate Legal Personality’ in New York, United States of America. Ms. Minnie Berkey, the plaintiff had an accident on a tram line operated by the Street-Car/Forty-Second Street, etc., Railway Company. Street-Car/Forty-Second Street Railway Company is a subsidiary Company to Third Avenue Railway Company. She sustained personal injury. She filed a lawsuit against the parent Company - Third Avenue Railway Company for compensation. This implied that the ‘Separate Legal Personality’ of Street-Car or Forty-Second Street Company should be disregarded and the Company been treated as a ‘Single Economic Entity’ with its parent Company - Third Avenue Railway Company.

This case is so informative because the Court construed that if it found the parent Company - Third Avenue Railway Company obligated for the torts of its subsidiary, it would have the legal impact of treating the two companies as a ‘Single Economic Entity’. That, afterwards, would mean that the parent Company was operating a railroad without the permission to operate a railroad. Accordingly, New York law needed any operator of a railway licence to acquire the antecedent franchise from the Public Service Commission. In addition, to operate without permission was a culpable offence. And the subsidiary Company solely had the required permission to operate the line on which the plaintiff had an accident. However, not having the permission was not in dispute.

Cardozo B.N J dealt with the case as if it were, for a certainty, inferring that disregarding ‘Separate Legal Personality’ cannot be implemented merely because of the claim in contemplation. Preferably, Justice B.N Cardozo’s judicial decision insinuates that a court should disregard a Company’s ‘Separate Legal Personality’ for reasons of compensating a tort claim only if it would disregard that ‘Separate Legal Personality’ for all reasons. This more detailed procedure to disregarding Separate Legal Personality’ is informative. It entails a court to think about what a conclusion to disregard ‘Separate Legal Personality’ says pertaining to the disregarded Company and the person being found obligated under a ‘disregarding Separate Legal Personality doctrine’. Despite Berkey’s case been invariably referenced for its binding language. The magnitude of legal proceeding of Berkey’s case has been enshrouded by a more legitimatised procedure to ‘disregarding Separate Legal Personality’. Conventionally, Courts have applied the concept of “abusing the corporate privilege” with criteria or tests. Courts do this to ascertain, in a more desirable memorisation way if the “corporate privilege” has been misused.

\(^{138}\) 155 N.E. 58, 61 (N.Y. 1926)
Regardless, there is certain difference from state to state and from opinion to opinion, generally, this procedure makes use of two criteria:

1) If the predominant shareholder and the Company are ‘alter egos’ of one another (Instrumentality or Alter Ego Test). To put it differently, if the predominant shareholder controlled the Company to the extent it had no ‘Separate Legal Personality’ of its own (Real Agency Relationship or Single Economic Entity).

2) If equity necessitates disregarding the ‘Separate Legal Personality’ of the façade Company because it is used to commit a dupery or inequity.

Certain Courts annex a third test; 3) - If an unprejudiced outcome will be accomplished by disregarding the ‘Separate Legal Personality’. None the less, it would be a unique case where the first two criteria are fulfilled but the third criterion is not fulfilled. Also, the unprejudiced part of the ‘Disregarding Separate Legal Personality theory’ has the result of enabling a logical fallacy justification for the seemingly determined by chance procedure in which the ‘Disregarding Separate Legal Personality theory’ is put into practice.

The Nigerian Courts approve the theory of ‘Separate Legal Personality’ as it pertains to corporate administration governance and control. Marina Nominees Ltd v Federal Board of Inland Revenue was the most influential renowned Nigerian case in the ‘Separate Legal Personality theory’.

The plaintiff or the appellant in this case, Marina Nominees Ltd was a subsidiary Company of Peat Marwick Casselton and Co. a firm of accountants that acted as secretary to several of its client Companies. In Marina Nominees Ltd, (subsidiary Company) the plaintiff or the appellant performed secretarial duties. The subsidiary Company (Marina Nominees Ltd) had other objects. In any event, the subsidiary Company (Marina Nominees Ltd) had no members of staff of its own. All the members of staff who performed the secretarial duties were employees of the Peat Marwick Casselton and Co., the holding company. A controversy sprang up between the plaintiff or the appellant, - Marina Nominees Ltd and the Federal Board of Inland Revenue, - the defendant or respondent as to whether the subsidiary Company should be obligated to pay tax on income it earned. Aniagolu J of the Supreme Court held inter-alia that an incorporated Company must be regarded as a ‘Separate Entity’ from anyone of its shareholders and subject to all affairs under the Companies Act of a Company so registered.

The then Judge of the Supreme Court, Aniagolu J, in this case, stated as follows:

“….. the truth however is that it is a company registered under the Companies Act having its full legal status on the principles enunciated in Salomon v Salomon and Co Ltd and must be subject to all incidents of incorporation’’.

The aforestated Irish, United States of American and Nigerian cases I made the comparisons with are unique and interesting. The cases are unique and interesting in the sense that the cases involved ‘Groups of Companies’, i.e. ‘Parent Companies’ and ‘Subsidiary Companies’. This uniqueness and interestingness makes the cases in fact comparative.
The comparativeness of these three cases from the three countries revealed that Ireland enforces the ‘disregarding of Separate Legal Personality’ on the ground of ‘Single Economic Entity theory’. United States of America enforces the ‘disregarding of Separate Legal Personality’ on the ground of ‘Instrumentality or Alter Ego theory’. Whereas Nigeria enforces the ‘disregarding of Separate Legal Personality’ on the ground of ‘Separate Entity theory’.

Although Salomon v Salomon & Co Ltd (1897) AC 22 (HL), a United Kingdom renowned case seems to be a pioneer case on ‘Disregarding the ‘Separate Legal Personality’ of a company’, however, a brief literature review of ‘Disregarding the ‘Separate Legal Personality’ of a company’ evidently and authoritatively revealed that ‘Disregarding the Separate Legal Personality’ or ‘Piercing the Veil of Incorporation’ as it is known in the United States of America was established in the United States of America even earlier than in the United Kingdom in the case of Bank of Augusta v. Earle (1839) in United States of America.

It seems that United States of American Courts apply a two-criterion test, generally known as the ‘alter ego’ doctrine in California Courts and a three-criterion test in the United States of American Supreme Courts, extensively known as the ‘instrumentality or alter ego rule’ whereas Irish Courts apply a four-criterion method for the ‘Separate Legal Personality rule’ on one hand and the ‘Single Economic Entity theory’ on the other hand. Beside ‘instrumentality/alter ego rule’ in the United States of America and ‘Single Economic Entity theory’ in Ireland, Irish Courts have the power to ‘disregard ‘Separate Legal Personality’ of a Company when there is a transaction of fraudulent dealing. Allied Coal Supplies Ltd v Powell Duffryn International Fuels Ltd, Powers Supermarkets Ltd v Crumlin Investments Ltd, Fyffes plc v DCC plc are few Irish cases where Irish Courts applied ‘Separate Legal Personality rule’ and ‘Single Economic Entity theory’. Berkey v. Third Ave. Railway Co and Walkovszky v. Carlton, Kaycee Land & Livestock v. Flahive, 46 P.3d 323 (Wyo. 2002), Lowendahl v. Baltimore;& Ohio R.R. are among the United States of America cases where the United States of America Courts applied a ‘Single Economic Entity Theory’ on a different perspective from Irish grounds and ‘Instrumentality rule’.

As has been enumerated above the history of Nigerian Company Law as per his Lordship Hon Justice Dr. Olakunle Orojo (Rtd) emanated from the Joint Stock Companies Act 1855 (1855 Act) which established the principle of limited liability of Companies and the role of Deed of Settlement.

The Joint Stock Companies Act 1855 (1855 Act) was the amalgamated Irish/English Companies Act 1855 (United Kingdom Joint Stock Companies Act 1855) which was tremendously practiced in the United Kingdom. This points to the fact that Nigerian legal system as far as ‘Disregarding the Separate Legal Personality of a Company is concerned, is same to the Irish legal system.

The United Kingdom age long, renowned, celebrated and pioneer case on ‘Disregarding the Separate Legal Personality of a Company, Salomon V Salomon & Co Ltd (1897) AC 22 (HL)


140 Praphrut Chatprapachai, ‘Piercing the Corporate Veil Doctrine in Comparative View’ Thai, Japan & America, lecturer, Graduate School of Law, Assumption University of Thailand, Law Journal, April 17, 2014, Vol.1

141 Ibid

142 Ibid
remains the most renowned and significant case for ‘Disregarding the Separate Legal Personality’ of a Company in Nigeria.

This, therefore concludes that Nigerian Courts are still adopting Irish approach when disregarding the Separate Legal Personality’ of a Company. The Corporate Affairs Commission (CAC) is the apex regulatory body for companies in Nigeria. when it comes to ‘Disregarding the Separate Legal Personality’ of a Company’ in Nigeria, Trendtex Trading Corporation -v- Central Bank of Nigeria; CA 1977, was one of the earliest Nigerian cases on ‘Disregarding the Separate Legal Personality’ of a Company, however, the court so much considered the sovereign immunity.

As I undertake this research, effort would be geared towards figuring out the comparative exceptions which still exist in ‘Disregarding Separate Legal Personality’ of a Company in the aforestated jurisdictions (Ireland, United States of America and Nigeria) under the jurisdictions’ Statute, under the jurisdictions’ Judiciary and under the jurisdictions’ Common law.

1.2 CREATION OF A COMPANY AS A SEPARATE PERSONALITY IN IRELAND

Limited Liability Company in Ireland: The private company limited by share is one type of private company in the Irish business sector. As Per the Companies Report 2001, 89% of 146,331 companies registered with the Companies Registration Office in Dublin at the end of the year 2001 were private company limited by shares. Notwithstanding, there is no statistical breakdown for the other two types of companies namely, the private company limited by guarantee and the unlimited company. It is reasonably assumed that the total percentage of private companies is within sight of 94%. A private company is statutorily confined to have not more than 149 members - S17(4) of the Companies Act 2014 and restricted from inviting the public to become members., when the Companies Acts refer to ‘a company’ there is a hand full of differences existing between private and public companies.

Section 9 subsections 1,3 & 4 of the Companies Act 2014 stipulates that: 9. (1) Subject to subsections (3) and(4), all of the law in this Act in relation to private companies limited by shares is to be found in Parts 1 to 14 (or instruments under them) and Schedules 1 to 6. Appropriately, the Companies Act 2014, now recognises the private company limited by share as the default form and includes provisions which regard it as the rule and not the exception.

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144 Ibid
145 Irish Companies Act 2014
The greatest number of registered companies utilise the benefits of Limited liability. Limited liability sets a limit or cap on the responsibility of the shareholders to pay for the liability of the company if the company becomes insolvent. Hence, if a company becomes impecunious, the shareholders/directors will not be held liable for the debts of the company. Therefore, the shareholders/directors do not have to pay an amount equal to the full liability of the company. Their liability is limited to any amount unpaid on their shares. In every company, the limit is the liability which the shareholders would have agreed to pay when setting up the company or purchasing shares in the company. For instance, if Franco subscribes one hundred €2 fully paid-up shares in FBV Ltd and the company goes into liquidation, its creditors cannot demand against him for any of the company’s unpaid debts.

On the contrary, if only €1.50 was paid up on each of those €2 shares, afterwards, Franco’s debt to the company, and through it, to the company’s creditors is the 50 cents outstanding on everyone share he possesses.

Thus, it allows potential investors to enter business with a limited risk of loss if it happens that the business becomes insolvent. Unequivocally, limited liability stipulates that where a company becomes insolvent, the shareholders’ personal assets are not used to pay debts off the company’s creditors. It implies that a liquidator of a Company or a Court of competent jurisdiction would not demand or confiscate the shareholders’/directors’ personal assets for liquidating the Company’s creditors.

CHAPTER 2
DISREGARDING SEPARATE LEGAL PERSONALITY IN IRELAND

Disregarding Separate Legal Personality of a Company in Ireland:
Disregarding ‘Separate Legal Personality’ of a Company is a doctrine in which the ‘Separate Legal Personality of a Company’ is being disregarded. It will be retraced that in a ‘Separate Legal Personality’ pioneer case Salomon v Salomon & Co ltd 1897, it was not only stated that an incorporated company is a legal person, however, that it is a ‘separate and distinguished legal person from its shareholders.

Hence, companies should be considered as agents or trustees of their shareholders (or the other way around), and the rationale behind forming a company should not be consequential to its legal separate corporate existence.

Many lawyers have interpreted the maxim of ‘Separate Legal Personality’ of a Company using terminologies such as ‘façade; sham; disguise, false; ‘mask; ‘cloak; etc. and, predominantly known ‘Veil’ of incorporation. The phrase ‘lifting the veil’ or ‘piercing the veil’ are conventionally used to explain the circumstance in which the ‘Separate Legal Personality’ of a Company is disregarded.

Similarly, the Courts have exhibited affinity for such doctrine. In any event, the problem is that the use of such inexplicit terminological language frequently conceals exactly which area of the doctrine of ‘Separate Legal Personality (if any) is in contention. In an American case Berkey v. Third Ave. Ry\(^{147}\), Justice B.N Cardozo opined that terms in law are to be precisely observed, for beginning as strategies to let out thought; they frequently conclude by compelling it. Hence, Justice B.N Cardozo wrote:

> ‘The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought; they end often by enslaving it.’

For instance, the ‘Separate Legal Personality’ concept has been delineated as ‘a singularly unhelpful and confusing terminology’ in which case, it conveys the notion that consideration is perhaps never been given to the individuality and ethos of those who manage a company at no time, even when the company’s activities are in matter of contention - a distinctive notion which is unfoundedly supported. The use of such terminologies will be avoided in this thesis.

What has sometime been ignored is the actual reality that Salomon’s case itself recognises the likelihood of deviation from the principle of ‘Separate Legal Personality’.

In a comment, Lord Halsbury stated that the principle was to be complied with on the condition that ‘… no fraud and no agency and if the company was a real one and not a fiction or myth’

A company, in accordance therefore, is a legal person which should not simply as such be considered as an agent or trustee of its shareholders (or the other way around), and the prospects of those who incorporated it should not in itself have influence to its separate legal personality existence. Where supplementary grounds exist, the incorporation veil of the company may be ignored. This chapter of my thesis is primarily interested in ascertaining those supplementary grounds.

As it was discovered in the earlier stage of this thesis, it was the law in the past that; The courts had refused to uphold a systematic procedure and the more grounds for implementing the ‘disregarding’ of the separate legal personality of a company. The Court’s refusal created an indefinite and baseless structure of Corpus Juris. Corpus Juris is a structure where every case is handled to a far-reaching extent on its own rights and in accordance with expedience instead of the judicial doctrine. This situation was explained by an Australian judge AS Rogers AJA, who remarked in Briggs v James Hardie as follows:

\(^{147}\) (1926) 244 N.Y.84, 155 N.E. 58; 244 N.Y. 602, 155 N.E. 914 (1927), Id at 94-95, 155 N.E. at 61
‘The threshold problem arises from the fact that there is no common, unifying principle which underlies the occasional decision of courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities’\textsuperscript{148}

Ruled cases consist of substantial ascription to terminologies such as ‘veil’ ‘façade,’ ‘cloak’ ‘alias’, ‘alter ego,’ ‘agent’, ‘fiction’, ‘instrumentality’, ‘puppet’, and ‘sham’ which do help to elucidate the ‘Doctrine of Separate Legal Entity of a company’. Efforts by commentators to categorise and construe the cases to enable them to find a basic doctrine have been badly received. It seems that the courts will ignore the doctrines of Separate Legal Entity of a company’ if several inequities are premeditated or would result consequence to a party undertaking transaction with the company or its members. Consequently, the English Court of Appeal in a case Re, A Company (1985), stated that:

‘In our view the cases ... show that the court will use its power to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure ...’

1970s and 1980s had specifically be noted as an era the courts disregarded the ‘Separate Legal Personality’ of companies by giving recognition to the economic actualities of the circumstance instead of the legal prescribed form on the rationale that the ‘justice’ of the case so required. Regardless, the courts were judicious in the enforcement of this approach; it created the notion that the importance of Salomon’s case was undermined.\textsuperscript{149}

Notwithstanding, the interceding years have noticed a coincidental assiduity on the section of the English and Irish courts and some commentators to construe the importance of Salomon’s case in the bid for reconstituting the scope of this doctrine. Lord Cooke of Thorndon in his 1997 Hamlyn Lecture on Salomon’s case explained this trend, saying:

‘In the main, the concept that a duly incorporated limited liability company, if not real thing, is at least not to be identified with its shareholders, has been faithfully followed by British and other Commonwealth courts ever since Salomon’s case. But there has been some gnawing away at the edges of the doctrine, a process commonly described as piercing or lifting the corporate veil.

I believe that there is only one broad class of cases where this is truly consistent with the Salomon reasoning. They are all cases where, under enactments such as those against fraudulent or wrongful trading, or on the permissible interpretation of an enactment or contract, or for the purposes of the common law or equitable principles against fraud or oppression or relating to agency, it is necessary to look at what has happened in fact, rather than in form.’

\textsuperscript{148} (1989) 16 NSWLR 549 (at 567) (NSWCA, Hope and Meagher JJA, Rogers AJA

Notwithstanding, by 1990, proof of facts of a cutting down was convincingly evident. In a case of Adams v Cape Industries, the Court of Appeal adjudged that the courts were as a rule, not inclined to ‘disregard’ separate legal personality on the ambiguous and hard to grasp ‘justice of the case’ ground rules. In a summarised decision, Gower J put forward a\textsuperscript{150} conclusion that the courts possibly only ‘disregard the separate legal personality of a company’ under the following instances:

(a) In an instance where the court is interpreting a statute, contract or another document;
(b) In an instance where the court is fully convinced that a company is ‘mere mask’ masking the true facts;
(c) In an instance where it can be ascertained that the company is an approved agent of its management or its shareholders, institution or person.

The judgement of Walker J in Re Polly Peck International Plc (In Administration) (No 4) came after Adams v Cape Industries. Walker J at a further point stated that the courts are bound to scrutinise the legal substance of any dealing and not its economic substance while determining if the company is a mere mask, notwithstanding of any apprehended injustice that came in view when the company became impecunious. Once more, in a case of Ord v Belhaven Pubs Ltd, the Court of Appeal assumed that the disregarding the Separate Legal Personality of companies by the courts of should be done\textsuperscript{151} with caution, and in most cases, should exclusively happen if some illegality is detected.

In a case of Allied Coal Supplies Ltd v Powell Duffryn International Fuels Ltd, the Irish Supreme Court demonstrated identical caution, deciding that the principles communicated by the House of Lords in Salomon’s case continue to be the core of company Law. For that reason, the court considered it wrong that the assets of a holding company should in most cases be at hand to pay the debts of a trading subsidiary, as this was in total disagreement with those principles and so ‘wholly not stateable’.

It was conceded by Mary Laffoy J in the case of Fyffes plc v DCC plc that:

\begin{quote}
‘It has been a fundamental principle of Irish company Law since the decision of the House of Lords in Salomon & C [1897] ACC 22 that a company registered under the companies Acts is an artificial legal entity separate and distinct from the members, whether natural or corporate persons, of which it is composed’
\end{quote}

She proceeded to quote with recognition Keane’s summary of the principles of Law in this region as follows:

\textsuperscript{150} Courtney, TB. The Law of Private Companies 2 Ed. Pg.203 . Lexis Nexis Butterworths Dublin, 2002
\textsuperscript{151} Ibid
(1) The rule in Salomon’s case is still the law, ‘the company and its shareholders are separate legal entities and the courts normally cannot infer from the degree of control exercised by a shareholder, a relationship of principal and agent or beneficiary and trustee between the shareholders and the company.

(2) The courts, however, will not permit the statutory privilege of incorporation to be used for a fraudulent, illegal or impropriate purpose. Where it is so misused, the court may treat the company thus incorporated as identical with its promoters\textsuperscript{152}.

(3) In certain cases, where no actual misuse of the privilege of incorporation is involved, the courts may nonetheless infer the existence of an agency or trust if to do otherwise would lead to injustice or facilitate the avoidance of tax liability.

(4) In the case of a group of companies, the court may sometimes treat the group as one entity, particularly where to do otherwise would have unjust consequences for outsiders dealing with companies in the group.

(5) The rule in Salomon’s case does not prevent the court from looking at the individual members of the company in order to determine its character and status and where it legal resides.”

This synopsis remains to be accepted as a judicial delineation of the contemporary legal landscape, and it can be foreseeable that it will have a prominent impact on future judicial verdicts.

It is posited that, for the foreseeable, the true principles of Salomon’s case will better be contemplated by the discontinuance of the ‘justice of the case’ point of comparison, as there is not one iota in Salomon’s case to connote such a special rule. It is in addition posited that the true principle of Salomon’s case is that, if the corporate form has not in fact been abused and in a circumstance statute dose not uniquely authorise the disregarding of Separate Legal Personality, a customary principles of contract, agency or the law of trusts, etc. should be enforced at the time of construing the actuality of an affiliating interconnection between the shareholders of a company and the company itself. It is not adequate to state that a company can be deemed as the agent of its shareholders only because injustice might otherwise be done\textsuperscript{153} - injustice would as well be done to the company, its shareholders, and its creditors if the courts ignore the established legal principle of Separate Legal personality.

Several legists have proposed that the legislature should enact specific rules in this aspect of law. Notwithstanding, as shall be grasped, the legislature has not given an answer to this kind of proposals. Regardless of the fact, that the legislature has made rules for separate legal personality\textsuperscript{154}.

\textsuperscript{152} Courtney, TB. The Law of Private Companies 2 Ed. Pg.204 Lexis Nexis Butterworths Dublin, 2002
\textsuperscript{153} Courtney, TB. The Law of Private Companies 2 Ed. Pg.204 Lexis Nexis Butterworths Dublin, 2002
\textsuperscript{154} Courtney, TB. The Law of Private Companies 2 Ed. Pg.205 Lexis Nexis Butterworths Dublin, 2002
2.1 GROUNDS WHERE THE STRUCTURE, OR COMPANY, IS DISREGARDED ACROSS THE COUNTRIES

- Exceptions to separateness
- H of Ls even acknowledged the possibility in Salomon’s case
- If disregard the legal person, the natural persons become relevant again
- Some class as Peeping/Piercing the Veil
- Cumbersome and Confusing terminology

A company from the legal perspective is a legal artificial person discrete from its shareholders as it is seen in a case of Salomon v. Salomon & Co. Ltd\textsuperscript{155}. In most circumstances, the courts presume themselves constrained by this doctrine. The impact of this doctrine is that there is a fabricated veil between the company and its shareholders. Hence, the company has a corporate personality which is discrete from its shareholders. See the following cases Adams v Cape Industries Plc [1990] Ch 433 (CA) 536, Cummings v. Stewart [1911] 1 IR 236, The State v. District Justice Donnelly (1977), Allied Irish Coal Supplies Limited v Powell Duffryn International Fuels. Prest v. Petrodel Resources Limited & Others [2013] and Woolfson v. Strathclyde Regional Council (1978) SC (HL) 90\textsuperscript{156}.

It should be noted that the theory of disregarding the corporate veil of a company is surrounded by inconsistency and perplexity. On the one hand, courts perceive the fact that the corporate form is presumed to be a separate legal entity with the characteristic of legal “personhood.”

Inherently courts concur that their power to disregard the corporate veil of a company is to be administered “reluctantly” and “cautiously.” On the other hand, courts similarly concede that it is as a matter of right legitimate to constitute a corporation or other type of limited liability company, business organization like an LLC “for the very aim of avoiding personal obligation” for the liabilities incurred by the company As well see the following cases DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976), Bartle v. Home Owners Co-op, 127 N.E. 2d 832 (N.Y. 1995) and Baatz v. Arrow Bar, 452 N.W.2d 138 (S.D. 1990)\textsuperscript{157}.

There are several instances, the Court will disregard the corporate veil or will lift the corporate veil of a company to extend to the person behind the veil or to unshroud the authentic structure and notability of the involved company. The motive for this is presumptive that the law will not authorise the corporate structure to be deprived of legal rights or swindled\textsuperscript{158}.

\textsuperscript{155} (1897) A.C 22, (HL)
\textsuperscript{156} Jonathan R. Macey (Yale Law School) and Joshua Mitts (Sullivan & Cromwell LLP; Yale Law School- J.D, Legal Article ‘The three justifications for Piercing the Veil’, 2013)
\textsuperscript{157} Ibid
\textsuperscript{158} Ibid
The grounds for disregarding the corporate veil of a company are astonishing and perplexing. The extent of its ambiguity is less than desirable to financers and other partakers in the company concerned in apprehending with absoluteness what the boundary are on the extent of owners’ personal obligations for Company Acts. This is due to the cumbersome and confusing terminology use in disregarding the ‘Separate Legal Personality’ of a company.

Perhaps, other grounds where veil could be disregarded is if the company is the sheer “alter ego” of its owners; if there is a failure to comply with company’s law; if the company structure is utilized to facilitate fraud, injustice or illegitimates\textsuperscript{159}.

Globally, the Statutory and Judicial exceptions in which ‘Separate Legal Personality’ of a Company would be disregarded are under listed as:

Statutory Exceptions -

\begin{itemize}
  \item<1-> Reduction of number of members, Part 16 section 985 of Companies Act 2014;
  \item<2-> Pre-incorporation contracts/Premature trading, section 45 of Companies Act 2014;
  \item<3-> Fraudulent or Reckless trading (Mismanagement) section 610 of Companies Act 2014;
  \item<4-> Wrong-description/Incorrect use of the company’s name, sections 47(1), 43 & 1009 of Companies Act 2014;
  \item<5-> Failure to obtain Certificate of Incorporation before commencing trading; section 1010 of Companies Act 2014.
  \item<6-> Failure to pay dividends, sections 124(3)(a) & 186(C)(i) of Companies Act 2014;
  \item<7-> Failure to use the company’s name, sections 47(2)(b) & 1009 of Companies Act 2014;
  \item<8-> Wrongful/Illcit/Ultra Vires trading, PT.17 section 1006(c) [No. 38.] & section 722 of Companies Act 2014;
\end{itemize}

\textsuperscript{159} Jonathan R. Macey (Yale Law School) and Joshua Mitts (Sullivan & Cromwell LLP; Yale Law School- J.D, Legal Article The three justifications for Piercing the Veil’, 2013).
(9). Phoenix/reincarnation companies, sections 122 & 252 of Companies Act 2014.

Judicial Exceptions –

(1). Fraud or improper conduct (Concealment of impropriety); See Gilford Motor company ltd v. Horne and Jones v. Lipman.

(2). For benefit of Revenue (Tax evasion or circumvent tax obligation);

(3). A Façade or a Sham Company;

(4). Agency or Trust;

(5). A Company assuming Adversary Character;

(6). Avoidance of contractual or other legal obligations;

(7). Single Economic Entity;

(8). For Justice/Public Interest;

(9). Commingle of Company’s business with Personal business;

(10). Alter ego/Instrumentality.

2.2 THE METHOD IN WHICH SEPARATE LEGAL PERSONALITY MAY BE DISREGARDED IN IRELAND

The Separate Legal Personality of a company is perhaps being disregarded in various distinct ways, and to distinctive magnitude. It would perhaps, and invariably be ignored without disregarding the fact that the company notwithstanding remains a legal person - rather than, the separateness of its entity been endangered by the earmark of the company with its shareholders, or by beholding it as an agent or trustee for them. There are four-criterion methods of disregarding the Separate Legal Personality of a company have been in view, and it is to these four-criterion methods, this thesis now briefly turns.

In the first instance, perhaps the ‘Separate Legal Personality’ of the company will be disregarded only by sighting at its predominant shareholders ready to designate it, i.e. to ascribe to it some identity, like the residence, the negligence, or mens rea, which cannot successfully be affiliated with a barely metaphysical existence that possesses no physical emergence.

In similar cases, the Legal entity of the company is not disregarded; on the contrary the Separateness of its entity is being endangered to the magnitude that the entity of its management is ascribed to it.
In the second instance, perhaps the ‘Separate Legal Personality’ of the company will be disregarded by mandating additional persons, especially its shareholders, further to the company itself, liable for the debts and additional liabilities of the company. It should be noted that similar ‘disregard’ is not restricted only to mandating shareholders privately liable for the company’s obligations; more persons who are not shareholders perhaps as well be called into being liable. In addition, in similar cases, the Legal entity of the company is remembered, notwithstanding, the separateness of its entity is endangered to the magnitude that its liabilities are divided either collectively or separately, with additional persons. Similar ‘disregard’ of ‘Separate Legal Personality’ is maximum generally pardonable by the provision of the legislature; however, a similar impact can be reached via contract or agency, and via the courts’ power to decree execution of its decrees abutting whoever in respect of another’s liability.

In the third instance, the ‘Separate Legal Personality’ of the company is perhaps disregarded by apprehending it as a nothing but member of a larger ‘legal entity’, like a group of companies. In similar cases, the ‘Legal entity’ of the company is not disregarded; on the contrary, its individuality is irredeemable by a larger existence.

This type of disregarding the ‘Separate Legal Personality of a company is occasionally engaged by the courts in circumstances group of corporate existences is disregarded as a single economic unit. Specific legislative statutes authorise such disregard. In similar cases, the disregard instantly impresses the included shareholders of the bigger existence, eminently, exclusive prominent shareholders of the company - its ‘parent’ or holding company.

The Conclusive type of disregarding of the Separate Legal Personality of the company entails disregarding the entity of the company in its entirety, so that several more persons will be liable for the obligation - frequently a shareholder. The courts have as a rule expressed that they will disregard the Separate Legal Personality of a company in this method in a circumstance the company is fabricated only as a ‘sham’, ‘device’, or ‘façade’ willful as a channel to delude or to elude a person’s current Legal liabilities. Regrettably, the courts have been incapable to figure out same rules for describing if a company is like a ‘sham’, ‘device’, or ‘façade’, etc.

Similarly, in manifold cases, in a situation these conditions have been ascertained by the courts, the courts have thereafter gone ahead to furnish an adjudication of the case that could be endorsed devoid ‘disregarding’ the Separate Legal Personality of the company.

Disregard of the entity of the company has the determent of banning a court from mandating decrees contiguous to the company itself, and it has been proposed that, as a system of prohibiting or relieving injustice, as it goes to the extreme.

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161 Courtney, TB. The Law of Private Companies 2 Ed. Pg.205, Lexis Nexis Butterworths Dublin, 2002
162 Courtney, TB. The Law of Private Companies 2 Ed. Pg.206, Lexis Nexis Butterworths Dublin, 2002
163 Ibid.
164 Ibid.
2.3 WITH WHOM WILL THE COMPANY BE IDENTIFIED IN IRELAND

While the Separate Legal Personality of a company is disregarded, the question that arises is: ‘with whom will it be identified’? An answer to this question would be inconsistent and conditional on the method of ‘disregard’, on the contrary, in maximum circumstances the point of concentration digresses to the management of the company.

The person or existences probably to be recognised with a company in a situation the company’s the ‘Separate Legal Personality’ is disregarded are its day- to- day management regardless if they are directors of the company or not. This determinant should be of specific solicitude to the multifold Irish private companies that are advantageously possessed and managed by exclusively one person, and is of proportionate best notability to the only owner of a single-owner private limited company\(^\text{165}\).

It is fundamental to perceive, notwithstanding, that management is not the determinant in the judgement to disregard the Separate Legal Personality of a company. Several further situations need be apparent to prevail which would contend for the management being recognised with the company. The critique of these situations is where my thesis now turns to.

2.4 THE SITUATIONS IN WHICH SEPARATE LEGAL PERSONALITY MAY BE DISREGARDED IN IRELAND

The situations in which the Separate Legal Personality of a company may be disregarded are analysed in this thesis under the following captions:

- [1] Contract, Tort, Agency and Trusts,
- [2] Misuse of the Corporate Form,
- [3] Single Economic Entities,
- [4] Injunctions and Orders
- [5] Characterisation,

\(^\text{165}\) Courtney, TB. The Law of Private Companies 2 Ed. Pg.207 Lexis Nexis Butterworths Dublin, 2002
A Contract, Tort, Agency and Trusts:

The case of Salomon v Salomon & Co Ltd 1897 substantiated that a company is to be ignored as a Separate Legal Person, and that a company is not inherently to be considered as authorised to or obliged for the entitlements and commitments of its shareholders and the other way around.

The law has protracted identified notwithstanding, that natural or artificial persons are in most cases at liberty to shoulder the entitlements and legal liabilities of others through normal doctrines of contract, tort, agency or trusts. Accordingly, a case in point is, a person can ensue obligated for the liabilities of another by concerting to a security; a person can ensue obligated in tort to another where they have personally assumed a duty of care; a principal will be responsible to another for the conducts of his agent; and a legatee under a trust will be authorised to property retained by trustee in trust.

The law besides concedes that such linkages can transpire inadvertently - for instance, the parties to an agency or a trust do not have to perceive that they are penetrating such a linkage, regardless, they generally do. At this point, we would be analysing the situations where such linkages perhaps transpire under the following captions:

i. Contracts;

ii. Torts;

iii. Agency;

iv. Trusts

Contracts:

The Separate Legal Personality of a company is contingent to lenient device by obligation. There is no legal challenge to an obligation in which a shareholder acknowledges to be bound in law in reference of the company’s liabilities-subject to the conventional rules of conduct for the drawing of such indentures are abided by. Majority of the investment companies would for instance insist on the boss-shareholders of smaller private companies bargaining around the separate corporate company by getting them to comply with private insurances or other bonds so that they undertake private obligation for the liabilities of the company.

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166 Courtney, TB. The Law of Private Companies 2 Ed. Pg.207 Lexis Nexis Butterworths Dublin, 2002
167 Ibid.
Similarly, perhaps a company accepts to be obliged for the liabilities of its shareholders if the normal rules of conduct are abided by - subject to, notwithstanding, that the commerce is intra vires; not above the legal authority of the directors and that of the company; does not constitute a fraudulent priority and does not violate the statutory codifications regulating commerce among directors and companies.

The courts will be hesitant to infer these kind contracts however, as both the High Court and Supreme Court remarked in the case of Sweeney v Duggan. The plaintiff in that case was purely aggrieved during the time he was employed by a quarrying company. His lawsuit in negligence disinclined during the proceedings and was incapable hereafter to comply with the judgement disinclined it.

The plaintiff thereafter initiate proceedings disinclined the defendant, who was a predominant member in the company a quarry manager within the meaning of the Mines and Quarries Act 1965\textsuperscript{168}. The bi-facial large issues of the claimant’s lawsuit against the respondent were that in truth the respondent was the company or the company’s counterpart (alter ego). And that as the quarry manager, he is obligated to the claimant, duties in contract and tort, to exercise proper care to make certain that the company had suitable insurance cover for employees’ injuries, i.e. to meet any Claims in respect of injuries to employees. Justice Barron in the High Court inadmissibly did not find the respondent liable, saying:

‘Neither of these matters is a ground for imposing liability on the defendant personally. He is in law a different person from the company and there are no circumstances from which it could be inferred that the company was a sham or should be treated as an instrument of fraud: Undoubtedly, as quarry manager the defendant was personally liable for breach of any of the statutory duties imposed upon the holder of that office. But such duties relate only to safety. There is no statutory duty of the type which the plaintiff seeks to establish ….. The reality of the plaintiff’s claim is that the defendant was the person in control of the company. He can certainly have no greater liability than that of the company itself. However, it does seem to me that perhaps this claim should be answered by saying that to allow it as against the defendant would in effect be depriving the defendant of his protection under company law and to nullify all the essential principles of that law.’

Every lawsuit will, notwithstanding, recriminate its own facts, just like in a case of Shinkwin v Quin-Con Ltd and Quinlan", a lawsuit Justice Fennelly said to bear a frivolous similarity to Sweeney v Duggan’s case where a manager was found to be obligated in tort for an employee’s injuries.

\textsuperscript{168} Courtney, TB. The Law of Private Companies 2 Ed. Pg.208 Lexis Nexis Butterworths Dublin, 2002
The under-listed types of agreement cause the separate legal personality of a company to be disregarded by agreement:

(1) Personal guarantees;

(2) Indemnities;

(3) Comfort letters;

(1) Personal guarantees:

It is conventional for the institutional lenders to demand personal guarantees from third parties. As a rule, it would be directors-owners in a situation company requests for furnish funds. A guarantee is a contract through which a person concedes to become liable himself to the institutional lenders if a company defaults to defray its liabilities. In majority of the Irish private companies the directors will be owners, and the contract of guarantee is perhaps being deemed by the institutional lenders as a means of avoiding the separate legal personality of a company and the limited liability of an owner. An exhaustive analysis of the law pertinent to guarantees is not within the area of this thesis; notwithstanding, the following characteristics is perhaps summarily obvious:

(i) A guarantee must be in writing,
(ii) A guarantee is a supplementary obligation, i.e. no obligation arises under it until the company has failed to meet its liability. Furthermore, anything which annuls the company’s liability, for instance, release, notices of death, bankruptcy, insanity\textsuperscript{169}, misrepresentation and etcetera similarly annuls the guarantor’s liabilities. Notwithstanding, prototype form letters of guarantee tendered by institutional lenders invariably amend this basic law\textsuperscript{170}.

(iii) Prototype letters of guarantee tendered by institutional lenders perhaps stipulate that the guarantee is not one-off security rather a ‘standing security’. It is implied that the guarantor concedes to guarantee not exclusively the company’s obligation just for the first advance, on the contrary, as well as in any subsequent advances disbursed to the company. In contractual appellations, a standing guarantee is a continuing offer which is acknowledged by the institutional lender every time a new advance is disbursed. The offer could perhaps be\textsuperscript{171} invalidated by the guarantor in subsequent advances prior to acknowledgement by disclosing to the institutional lender in compliance with the provisions of the guarantee. In the case of Bank of Ireland v McCabe, the Supreme Court ruled that a persistent protection phrase in a prototype letter of guarantee could be deposed by verbal agreement between the parties while contracting.

\textsuperscript{169} Courtney, TB. The Law of Private Companies 2 Ed. Pg.210 Lexis Nexis Butterworths Dublin, 2002
\textsuperscript{170} Ibid
\textsuperscript{171} Ibid
(iv.) Being an agreement, a guarantee is perhaps unauthenticated by want of competence, or by erroneous, misrepresentation, pressure, coercion, etc. The situations in which guarantees are furnished perhaps construe them penetrable to abrogation on basis of misrepresentation or coercion. Institutional Lenders will invariably demand a guarantor to sign an affirmation that he has been availed a suitable time to consult autonomous legal advice to alleviate the possibilities of such abrogation. Guarantees are perhaps as well circumvented by statute.

Prototype form letters of guarantee as a rule comprise contractual obligations by the guarantor authorising the institutional lender to implement the guarantee by exerting a lien over any monies retained by it in the guarantor’s account; by off-setting the amount claimable under the guarantee set aside for those monies; or by undertaking any further form of collateral right (e.g. mortgage of the family house). It perhaps has unfavorable effect to the guarantor.

In a situation, the guarantor is obviously a lender to the company, the institutional lender perhaps further need him to accede to collateralise any stock he possesses in the company’s assets as an additional bond retained by the lending institution.

In such a circumstance where subordination agreement is drawn, the guarantor accedes not to crystallise his stock until any bonds retained by the institutional lender in the company’s assets have been fully crystallised.

(2) Indemnities
Institutional lenders perhaps demand further collateral from the predominant stockholders of a company requesting for the loans. Literally speaking, an indemnity is distinct from a guarantee as it is a fundamental liability, private to the person and not dependent of the company’s liability. Majority prototype form letters of guarantee comprise grounds causing similar outcome as an indemnity -consequently interpreting the difference between guarantees and indemnities to a certain extent academic. Above all, the prevailing procedure is for banks to make vivid their prototype surety-ship agreement as a ‘guarantee and indemnity’. Notwithstanding, an indemnity is not necessarily to be displayed in writing.

(3) Comfort letters:
In a situation loan assistance is requested for by a subordinate of a parent company, an institutional lender perhaps seeks a comfort letter from the parent company instead of a full guarantee. The comfort letter will invariably express that the parent company will not cut down its assets ownership participation in the subordinate company throughout the duration of the loan.

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172 Courtney, TB. The Law of Private Companies 2 Ed. Pg.209
173 Ibid
174 Ibid
The parent company will make certain that the subordinate company continue to be in an excellent net worth/equity situation to reimburse the loan. Again, the parent company will not perpetuate anything that would consequential for the subordinate company defaulting in its reimbursements to the loan. The phrases of the said comfort letters differ from a specific circumstance to another, just as the legal consequences are different.

Relying on its phrases, a comfort letter perhaps has the consequence of constituting a compelling contractual duty on the parent company to inquire into any phrases making it obligated for the breach of the agreement of the subordinate company. As a rule, in seemly instances, a proctor of a company perhaps notwithstanding begins to be privately obligated for the undertaking furnished in a comfort letter. As a channel to abstain from this specified obligation, the comfort letter should not substantiate an objective to generate juristic dealings. In a case of Kleinwort Benson Ltd v Malaysia Mining Corporation Berhad [1989] 1 All ER 78, among other things the comfort letter aforesaid was that, it is the policy of the parent company that was issuing the comfort letter to make certain that the business of the subordinate company is always be solvent and can be able to pay its debt to the institutional lender. On prima facie, Hirst J ruled that the comfort letter substantiated an objective to be juristically bound, and thus, was litigable. The court of Appeal, notwithstanding, quashed Hirst J’s judicial verdict on the rationale that the comfort letter restricted itself to an assertion of current fact, that is, ‘it is their policy’. It would appear, prior, that cautious wording of concessions embodied in the comfort letter, and utilise of the present tense, perhaps extinguishes the constituting of a ‘contractual obligation. The judgement has been objected to, notwithstanding, as a ‘meaning and literal analysis’ in the courts in Australia.

(4) Torts

A person like the director, the shareholder/owner or the executive of the company who is not a party to an incident (third part), but has an involvement would possibly be prima facie obligated for torts of a company. At the point, it is established that the company is to owe an ‘independent duty’ to the sufferer. If this kind of an ‘independent duty’ subsists, depends on the essential parts of the tort in dispute. Also, it will entail an investigation into the central position of the person who is not a party to the incident (third party) but is involved in the circumstances causing corporate liability. If the person who is not a party to the incident (third party) but is involved and has wittingly approved, instructed or caused the tort in dispute, individual legal obligation would perhaps be enforced. In the case of Fair-line Shipping Corporation v Adamson, the complainant advocated compensations for breach of duty of care due to ships’ merchandise which were not properly refrigerated. The respondent, the managing director of the company providing the cold storage services, rejected legal obligation contesting that only the company owe the complainant/claimant any duty of care.

Kerr J remarked that consequent to the truth that the respondent was the managing director of the company, and that the company was independently the contracting party, did not purport that the director’s private legal obligation to the complainant/claimant was inadmissible. Indisputably, it was evident that the second respondent was exclusively the director to be involved in his personal capacity with

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173 Courtney, TB. The Law of Private Companies 2 Ed. Pg.211 Lexis Nexis Butterworths Dublin, 2002
176 Courtney, TB. The Law of Private Companies 2 Ed. Pg.210 Lexis Nexis Butterworths Dublin, 2002
the goods following delivery to the cold store, and this was in his private possessors-ship. Communication by letters denoted that the director was obligated for the storage, instead of the company being obligated for the storage.

Therefore, Kerr J decided that the director was privately obligated to the complainant/claimant saying:

‘... the defendant ... assumed and owed a duty of care to the plaintiff in respect of storage of their goods in his premises and was in breach of that duty with the result that the plaintiff’s goods were damaged’.

A paramount part in the ruling is that the managing director or the second respondent had de facto, privately and willfully posited a duty to the claimant, which was not extinguished.

The same strategy was applied by the Supreme Court in a case of Shinkwin v Quin-Con Ltd and Quinlan. In the said case, the complainant or the employee lost his three fingers with a portion of his thumb as his hand erroneously slipped into the circular saw that he had been operating.

The claimant won in the High Court against both the first defendant -- his employer, the company and the second defendant - the factory manager. In the High Court judgement, it was ruled that the second respondent who was both the factory manager and the only shareholder of the company had breached his official duty as he did not give proper training or caution pertinent to the usage of the circular saw.

This ruling of the High Court was appealed to the Supreme Court. Fennelly J mitigated the issue of obligation to having doubt that the manager had concerned himself ‘so intimately in the supervision of the factory, especially in the overseeing of the complainant/employee to ensure that he the manager transferred to the complainant/employee private obligation for any conducts of negligence that hurt the complainant/employee’.

\[177\] [1975]1QB 180
Furthermore, Fennelly J remarked, the essentiality of the manager/second respondent being in uncontested supervision of the factory. Hence, Fennelly J found the manager obligated in negligence and said

‘……. the second respondent Imagery. In his supervision and instruction to the plaintiff, he failed to do these things and was consequently negligent’

Fennelly J unequivocally and unerringly expressed that this case did not involve ‘Lifting of the veil of incorporation’. He explicitly stated that the bill of complaint was brought forth straightaway in negligence, ‘not as chief or as investor’ but as a person who had situated himself by his own conducts in a specific relationship to the complainant as to convene unto himself the liability to exert care’\textsuperscript{178}.

In a case of Williams v Natural Life Health Foods Ltd\textsuperscript{179}, the complainants went to a one-man company that engaged in franchises in the singly health food department, with an idea to acquiring a franchise. The respondent managing director, Mr. Mistlin, acquainted them of his speciality and skill in operating franchises in the singly health food department. He presented manifold budgetary plan pre-indicating their turnover and gains for them. In this case, turnover and gains came short and did not match expectations. The claimants litigated against the company claiming damages for pecuniary loss emanating from careless misrepresentation. The company was thereafter liquidated; Mistlin was included as the second respondent.

The Court of Appeal held Mistlin obligated on the proposed measure of the conventional principles of negligent misrepresentation in tort, assumed his significant assistance in the occasion. The House of Lords, notwithstanding, overturned that judgement, ruling that a freelance obligation on the side of Mistlin could only emerged if Mistlin had explicitly and uncompelled insinuated a duty in order that a unique relationship of caution could be stated to be in effect to among Mistlin and the claimants. The underlying centrality in that\textsuperscript{180} aspect had to be on private deals among him and the claimants. The House of Lords in its judgement ruled that the period the claimants had been supplied a booklet elevating the company’s speciality as being acquired from Mistlin’s speciality was not adequate to result in a presumption of duty on Mistlin’s side. Exploiting ‘objective test’ their Lordships ruled that the claimants could not judiciously have depended on the booklet as inhering an uncompelled presumption of private obligation by Mistlin\textsuperscript{181}.

\textsuperscript{178}[2000] IESC 27
\textsuperscript{179}[1998] UKHL 17
\textsuperscript{180}Ibid
(5) Agency

Although a company is not in itself to be regarded as the Agent or the Trustee of its shareholders, there is no objection in a basic doctrine to a company agreeing to act and be dealt with as an Agent or a Trustee of its shareholders.

The derived principle through which shareholders who are directors or other executives of the company accede to act as Agents, in specific situations, of the company, is an inherent characteristic of all companies. An Agent is a person invested with the authority to undertake dealings that bind another person, called the principal. As an Agent undertakes dealing for his principal’s benefits, the law regards the dealings as being that of the principal himself, and the principal is bound by it.

All-embracing analysis of the law of Agency is and to posit that Agents invariably acquire the authority to amend their Principal’s legal point of view from an Agency agreement, that is, binding both the Agent and Principal as parties. It bound the Agent and the principal because there was an Agency agreement between the two parties. An Agent being a person invested with the principal’s authority to undertake dealings that come upon the legal role the principal. The Agent and the principal are not legally distinct as far as business is concerned - they are but one party. In a circumstance, the Agent is a company and the Principal is a shareholder, the Agency agreement has the consequence of bypassing the company’s separate legal personality to the magnitude that the shareholder being the Principal will be obligated for the conducts of the company or the Principal’s authorised Agent. That is just a mechanism which has been used by the courts especially in tax cases.

A slight contention can be stated to emerge in a circumstance there is in effect an explicit Agency agreement in which a company accedes to operate as a shareholder’s Agent, because the Principal’s obligation for the conducts of the Agent must apparently have been in the consideration of both the Principal and the Agent to the agreement when both initially got involved to it. Paramount contention emerges, notwithstanding, regarding which the courts are inclined to deduce, in the nonexistence of an explicit Agency agreement that stipulates that a company is in substantiality the Agent of its shareholder who is its Principal.

There exists, notwithstanding, additional circumstance where the shareholder of a company is perhaps being held privately obligated for the company’s liabilities using the process of the law of Agency. This is applicable in a situation the shareholder is operating as an Agent of the company, and he neglects to notify that he is operating on the company’s account - Smith, Stone and Knight v Birmingham Corporation.

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183 Ibid
184 Ibid
185 Ibid
186 [1939]4 All ER 116
Certain parts of the law of Agency to the extent that it pertains to the ‘Separate Legal Personality (SLP)’ of companies are analysed as follows under these headings:

i) Implied Agency;
ii) Undisclosed Agency.

i) Implied agency

Notwithstanding, a company is not to be deemed the Agent of its shareholders, there is no law to proscribe the constituting of an Agency association between a company and its shareholders. Some contention has emerged about the ambit the courts are inclined to allude that a company is an Agent of its shareholders.

In a case of Smith, Stone and Knight v Birmingham Corporation\(^{188}\), an affiliate of the claimant company acquired a waste business. The waste business was operated on the claimant’s land. The affiliate company was gainfully owned by Claimant Company, and it was altered in a daily running as a simple department of the claimant’s business. The understanding between the affiliate companies was in a way that the claimant company was designated to all the gains of the affiliate as declaring dividend would not be a requirement\(^{189}\). At the time, the lands of the holding company were compulsorily acquired by the respondent holding company; the claimant was awarded compensation for the displacement the affiliate company experienced. Atkinson J acknowledged that the affiliate company was operating a business as the Agent of the claimant company. The learned judge articulated as follows:

\[\text{‘The corporation rest their contention on Salomon’s case and their argument is that the waste company was a distinct legal entity. It was in ................. It is also well settled that there may be such an arrangement between the shareholders and a company as will constitute the company the shareholders’ Agent for the purpose of carrying on the business and make the business the business of the shareholders’}\]

Justices Atkinson analysed that six components identified below should be assessed in construing if a kind of Agency is perhaps presumed to be in effect.

i. Whether the gains of the affiliate company were corrected as the gains of the parent Company

\(^{188}\) [1939]4 All ER 116
\(^{190}\)[1939]4 All ER 116
ii. If the individuals who were operating the business of the affiliate company were selected by the parent company?

iii. Was the parent company ‘the-overseer and intelligence’ of the business enterprise?

iv. Did the parent company dominate the enterprise?

v. Were the gains generated by the affiliate company generated by the proficiency and governorship of the parent company?

vi. Was the parent company an efficient and incessant domination of the affiliate company?

Learned judge Atkinson conclusively advised that all the afore-stated six queries should be judicially responded in the claimant’s benignity. He persisted and said:

‘Indeed, -if ever one company must be said to be the agent or employee or tool or simulacrum of Another, I think the waste company was in this case a legal entity because that is all that it was. There was nothing to prevent the claimants at any moment saying, "we will carry on the business in our own name." They had but to paint out the waste company's name on the premises, change their business paper and the form the thing would have been done. I am satisfied that the business belonged to the claimants; they, (were, in my view, the real occupiers of the premises.'

Remarkably, majority of Justice Atkinson’s standards for the ascertainment of an Agency-relationship between an affiliate company and its parent company focuses on the question of management of the affiliate’s company daily enterprises. As far as, this kind of standard is to be exercised to every case in which, the daily activates of the company are managed by a shareholder. Furthermore, a remarkable number of companies would possibly be deemed to be Agents of their shareholders. And the doctrine of a separate legal personality would be the unconventionality instead of the conventionality. Even so, the courts seem to be cautious to insinuate to this type of Agency in which the company is managed by a human and greater number of cases where Agency has been inferred and have been involved with affiliates companies and parent companies.

Several explanations for this type of Agency is perhaps being found in a case of Munton Bros Ltd V Secretary of State191, in which the circumstances were not unrelated to the case of Smith, Stone & Knight. A holding company begot a lawsuit for pecuniary remedy in consideration of criminal damage perpetrated to the property of its affiliate company, claiming that the damage was fundamentally its own based on the intimate association between the two companies. The affiliate company business was to structure cloth stocked by the holding company and sends back the cloth to the holding company.

191 [Northern Ireland CA 1983] NI 369
The Corporation’s finances were classified in such a manner that it never generated a profit or sustained a loss in any year. Learned J Gibson decided in favor of the holding company, ruling that the affiliate company was truthfully its Agent: It is more likely that one company been regarded as the Agent of another company. It is unusual for company to be regarded as agent of shareholder/members. Gibson J articulated that though the courts are unduly disinclined to decide that a company is its member’s Agent or conducts as trustee for the members, regardless the member is perhaps a sole proprietor:

`... the same objections do not apply where it is sought to demonstrate that a subsidiary company is in fact the agent of its parent company because the conception of incorporation remains intact'  

As Justice Gibson’s words are perhaps being construed as clue of the courts' disinclination to deem companies as Agents of their natural shareholders, and of the courts' propensity to deem companies as Agents of their corporate shareholders. Gibson J’s analytical is not persuasive, whereas the notion of incorporation exists in its original form in which a company is being dealt with as an Agent of its shareholder, notwithstanding the shareholder's personality. This crack takes away the ascertainment about the disinclination of the courts to deem companies as Agents of their inartificial shareholders to much magnitude.

Then again, in a case Re FG (Films) Ltd\textsuperscript{192}, a company was affiliated in England to facilitate films made in the company’s name to be acceptable as British films under the Cinematograph Films Act 1938 (UK). The affiliate company was sponsored by an American company.

Two of the affiliate company three directors were English, one of whom was as well the president of the American company. The third director, an American, retained 90% of the company’s issued shares. The English affiliated company indentured with its American parent company to produce the prospective film, but the business of producing the film was to be financed by the parent American company, whereas all dealings and activities for producing the film were actualised by the American parent company in the name of the English affiliated company. It was apparent, thereafter, that the English affiliated company was underfinanced for the venture that it carried out under the camouflage of a separate legal entity. The court decided that the film was not acceptable as British, hence it had not been produced by the English affiliated company whatsoever. Every combined aggregated the English affiliated company did, it did it as ' just an appointee of the American parent company.

\textsuperscript{192} [1953] 1 All ER 615
In further up-date, in a case of Redfern v O'Mahony\(^\text{193}\), Justice Mc Govern admitted the alluded Agency principle, positing that it perhaps would be open to the claimants in that case to contend that the court should allude the entity of an Agency or trust on the side of a company formed to possess the shares in the other company. The learned judge quoted the segment from Justice Laffoy’s decision in a case of Fyffes plc v DCC plc\(^\text{194}\) afore-cited.

Even so, Justice Mc Govern decided on the evidences that the contract requested to be carried into effect by the claimant had been revoked, notwithstanding, any of this type of agency or trust.

ii) Undisclosed Agency

If the Agents of a company neglect to notify that they are standing in the place of the company, they will, under conventional principles of Agency, be held liable for their conducts. Regardless, legally speaking, the conducts are carried out by the company\(^\text{195}\). In as much as the third party is affiliated, the Agent is fundamentally a principal, acting in his own name, representing himself, and the third party is not obligated to investigate if there is an undisclosed principal. From common law perspective, as soon as it is discovered, the Agent, as well as the undisclosed principal, is perhaps being sued for contracts finalised in such instances, - *Short v Spackman (1831)* 2 B. & Ad 962; *Hersorn v Bernett*\(^\text{196}\).

Such principles operate, notwithstanding, exclusively if the reality of the principal has whatsoever not been disclosed when the contract would be finalised. Where the Agent indicates that he is dealing as Agent of a principal, yet distorts or misnames the principal; the principal will not be concealed, and the Agent will not be obligated - *Finzel, Berry & Co v Eastcheap Dried Fruit Co* [1962] 1 Lloyd's Rep 370\(^\text{197}\). The Companies Acts broaden upon these common-law maxims, by providing for the liability of the company's Agents in specified instances if the Agents have distorted or misnamed their principal. These instances are analysed in detail to a considerable degree at a paragraph below with a subheading ‘Failure to state correctly the company’s name’.

(6) Trusts

There is no legal prohibition to a company customarily consenting to dealing as a trustee for all or some of its owners, on the condition that all the necessary requirements are adhered to: *(Bayworld Investments v McMahon)*\(^\text{198}\). Besides, comparably, if there is not this kind of confirmed trust perhaps be ascertained, the Courts will, now and then, ignore the separate legal personality of a company to enable allude that it conducts as a trustee for the owners.

\(^{193}\) [2010] 1EHC 253

\(^{194}\) [2009] 1 IR 417


\(^{196}\) (1831) 2 B. & Ad 962; [1955] 1 QB 98

\(^{197}\) [1962] 1 Lloyd's Rep 370

\(^{198}\) [2004] 2 IR 199
This line of legal action is maximally apparently discernible in those-cases pertinent to incorporated social clubs.

In a case Re Parnell GAA Club Ltd\textsuperscript{199}, the learned judge McWilliam decided that the club kept its securities and assets on trust for its owners. Consequently, the time it sold drink to the owners, the 'sale' was fundamentally an apportionment of the owners' public actual property. This kind of an apportionment would not necessitate an intoxicating liquor licence. McWilliam J cited from Lord Hewart’s judgement in cases of Trebanog Working Men’s Club v MacDonald; Newell v Hemmingway\textsuperscript{200} in a place it was said that:

`... once it is conceded that a members' club does not necessarily require a licence to serve its members with intoxicating liquor because the legal property in the liquor is not in the members themselves, it is difficult to draw any legal distinction between the various legal entities which may be entrusted with the duty of holding the property on behalf of the members, be it an individual, or a body of trustees, or a company formed for the purpose, so long as the real interest in the liquor remains, as it clearly does, in the members of the club. In this connection, there is no magic in the expression 'trustee' or 'agent'. What is essential is that a holding of property by the agent or the trustee must be a holding for and on behalf of and not a holding antagonistic to the members of the club.'

2.5 MISUSE/ABUSE/IMPROPER USE OF THE CORPORATE FORM

Misuse/Abuse or Improper Use of the corporate form do happen in a diversity of conducts. We analyse here below the caption under the following headings:

i. Concealment of impropriety.

ii. Mismanagement.

iii. Evasion of existing legal obligations.


i. Concealment of impropriety:

In many of circumstances, the courts have intimidated to disregard the separate legal personality of a company if to do contrarily would cause the misuse of the corporate personality as a mask to cover up incorrectness.

\textsuperscript{199} [1984] ILRM 246

\textsuperscript{200} [1940] 1 KB 576;[1888] 60 LT 544
In a case Re Darby; ex parte Brougharn\textsuperscript{201} works, as a case in point for judicial disregarding of the separate legal personality of a company if the company was being utilised to cover up crooked profits. Darby as well as Gyde, of who were unliquidated bankrupts, incorporated a company in Guernsey in the Channel Islands. That very company then sponsored and incorporated a second company in England. Capitals were provided by the English company through the issuance of debentures. And these monies were paid to the Guernsey Company, a place from where the monies were apportioned straightway to Darby and Gyde. At the time, the English company became insolvent, the company's receiver legally demanded for Darby's bankruptcy for the secret profits Darby and Gyde had begotten through the Guernsey Company. The court accepted the receiver's legal demand, dismissing the contention that the profits had been begotten by the Guernsey old company and not by Darby himself.

Similarly, in a case of Re Bugle Press Ltd\textsuperscript{202}, the use of a company as a stratagem to dispossess a minority was rejected by the courts as an 'empty guise', however, in that case the impropriety charged of comprised of an effort to misuse a fundamental principle of company law, in other words., that most shareholders should not, except justifiable by the Articles, be admitted to dispossessing a minority. Section 209(1) of the English Companies Act 1948 and their similar of section 204(1) of the CA 1963\textsuperscript{203} allowed a Company that had purchased a 90% shareholding in an acquisition of the other company to compellingly purchase the remaining 10%, except the court, in its discriminatory powers, viewed it pertinent to decree contrary. Two bulk shareholders of Bugle Press Ltd, who were in possession of 90% of the company’s subscribed share capital, registered a company, which subsequently acquired bid for all the shares of Bugle Press Ltd. The basis for this was to facilitate the company to compellingly takeover the shareholding of a third minority shareholder under section 209: The third shareholder solicited to the court for remedy. Harman P disregarded the separate legal personality of the new company, characterising it as void and an 'inconsiderable shack' constructed around the two shareholders and 'an unveil appearance aiming to elude that constitutional rule of company law that prohibits the bulk of shareholders expect the articles of association specifically accommodate to dispossess the minority\textsuperscript{204}.

An asymmetrical case in point is where there was a disregard of the separate legal personality of a company created for a deceitful purpose is the case Re Shrinkpak Ltd\textsuperscript{205}. In the said case, a company, Shrinkpak Ltd, was formed with monies which had been deceitfully misappropriated from a company which had voluntarily winded up, Contract Packaging Ltd.

\textsuperscript{201}[1911] I. KB 95; [1980]71 Ch 270
\textsuperscript{202} Re Bugle Press Ltd [1961] Ch 270;also in Ch 9, Share Transfer, at p [9.101] et seq
\textsuperscript{204} Ibid
The two companies were managed by the same person, in the person of Mr. Waldner. Justice Barron ascertained that the winding up of Contract Packaging Ltd and the sequential creation of Shrinkpak Ltd had been orchestrated by Waldner to enable him, purposefully to dupe the creditors of Contract Packaging Ltd. The learned judge conceded an order for winding up Shrinkpak Ltd on the motion of the liquidator of Contract Packaging Ltd.

In a case Re (H) (Restraint Order: Realisable Property)\(^206\), the Court of Appeal approved the Separate Legal Personality of a company to be disregarded if the company’s shareholders had utilised the company as a stratagem or disguise to cloak criminal activities, additionally, dupery on the Commissioners of Customs and Excise. A receptor appointed to the resources of the management under s 77 of the English Criminal Justice Act 1988 was authorised to deal with the company's resources as the 'cognisable possessions' of the management.

Similarly, in a case of Trustor AB v Smallbone (No 3)\(^207\) acceptance of resources by a company was treated unjustly as acceptance of those resources by the company’s shareholder-director. The pecuniary resources were actioned in court to be stipend to the company by the company’s shareholder-director who was utilising the company as a device to suck off large pecuniary resources from the other company, wherein he was as well the managing director.

ii. Mismanagement:

If the management of a company has been at fault merely of mismanagement, it seems that the courts will not disregard the separate legal personality of the company to enable the court to hold them personally liable for the company's liabilities. In a case of Dublin County Council v Elton Homes Ltd\(^208\), a company which had been allowed planning permission for a housing development went into winding up, prior to the winding up, it was able to abide with the qualifying factors of the planning ‘permission. The claimant - County Council requested an injunction under s 27 of the Local Government (Planning and Development) Act 1976 constraining the company and the company’s directors in the persons of Messiers Keogh and English, to undertake the required works. Barrington J rejected the claimant's request, saying:

> ‘What is suggested is that because they were directors of the company at the time when the company obtained planning permission that they should be ordered to complete the development at their own expense. I am not saying that there might not be a case where the court would be justified in making such an order.

> If the case were one of fraud, or if the directors had siphoned off large sums of Money 'out of the company, so as to leave it unable to fulfil its obligations, the court might be justified in lifting the veil of incorporation and fixing the directors with personal responsibility.

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\(^{206}\) [1996] 2 All ER 391.e
\(^{207}\) [2001] 3 All ER 987
\(^{208}\) [1984] ILRM 297
But that is not this case. The second and third named respondents appear to be fairly small men who having failed in this particular enterprise are now back working for others. The worst that can be imputed against them is mismanagement.

They gave personal guarantees to the insurance company which supplied the bond for £10,000 and to the company's bankers. They therefore stand to lose heavily arising out of the transaction. Moreover, the liquidator and his officials entertain no suspicion that there has been any impropriety on the part of the directors in dealing with the assets of the company.

It appears to me that Mr. Keogh and Mr. English traded with the benefit of limited liability in this case and that in the absence of any evidence of impropriety on their part, I would not be justified in attempting to make them liable for the default of the company.

Once more, in a case of Dublin County Council v O’Riordan, however, the activities of the company had been completed with ‘negligible snub for the preconditions of the Companies Acts,’ Justice Murphy rejected to permit an injunction compelling the company's directors to privately perform the planning obligations of the company in as much as there was no proof of ‘dupery or the improper use of funds’ had been prevalent.

That case was depended upon by Hamilton P in Dunlaoghaire Corporation V Park Hill Developments, a case the learned judge rejected to permit an injunction against a director of the defendant company. It was alleged by the claimant in that case that the company and Mr. Parkinson Hill, the director was indiscernible in law consequently, in contradiction of s 131 of the CA 1963, there was no annual general meeting held at all, also, there was no official directors' meeting called for at all and, there was no director's fees or dividends on his shares been paid to Mr. Kearns, the extra director. Again, in contravention of s 148 of the CA 1963 there were no balance sheets transmitted to the shareholders. Mr. Parkinson Hill was the singly person with intelligence of the monetary activities of the company. Mr. Parkinson Hill was as well in absolute authority of the company and controlled the company without mindfulness for the precondition of the Companies Acts. Hamilton P remarked:

‘I have no doubt, having heard the evidence of [Mr. Parkinson Hill], that he was in effective control of the first respondent and he failed to comply with the, requirement of the Companies Act 1963, but I have found no evidence of any fraud or misrepresentation on his part; any siphoning off or misapplication of the funds of the said company; nor of negligence in the carrying out of the affairs of the said company........ As I have found no evidence of any impropriety by the second respondent in the conduct of the affairs of the first respondent, I am satisfied that he traded with the benefit of limited liability in this case and I would not be justified in attempting to make him personally responsible for the admitted default of the first respondent.’

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209 [1986] ILRM 104
211 [1989] IR 447 at 450-452
It should be obvious that, notwithstanding the disinclination of the courts to disregard the Separate Legal Personality of a company if the management is erring of mismanagement.

The legislature has as well set up arrangements to secure creditors of the company from improper use of the corporate veil by means of perhaps crooked or neglectful trading. These are analysed in more details in a later paragraph below\(^\text{212}\).

2.6 EVASION OF EXISTING LEGAL OBLIGATIONS IN IRELAND

The courts have indicated a reluctance to disregard the Separate Legal Personality of a company, if to do contrary would enable a director to avoid a current liability. An example of such is a case of Cummings v Stewart\(^\text{213}\), an instance Cummings made a patent licensing agreement through which he contracted to license his patent for ‘strong concrete’ to Stewart. Phrase 2 of the contract bound Stewart to pay Cummings a least amount per annum in recognition of the patent rights. Phrase 5 of the contract prohibited Stewart from leasing the licence, alienating, or passing on the licence without Cummings’s consent.

Nevertheless, the phrase in addition included a stipulation consenting Stewart to pass on the licence to any incorporated company he perhaps forms to continue his venture or the venture related with the licence. Stewart was inefficient to realise a gain from his use of the royalty rights, and, in the bid to abstain from his obligation to Cummings for usage-based payments on the patents. He passed on the licence to an incorporated company formed by him. It was not aspired that this new company should toil with the licence invention rights. Cummings effectively requested that Stewart should be deemed as being obligated for all debts of patent payments, in addition, the arrears outstanding as at the time the licence was retained by the company. Meredith MR stated thus:

‘In my opinion, the Companies (Consolidation) Act 1908 embodies a code framed (inter alia) for the purposes of preserving and enforcing commercial morality and it would be strange indeed, if that code could be ‘turned into-an engine for the destruction of legal obligations and the overthrow of legitimate and enforceable claims. The most casual reader of the speeches of the House of Lords-in the case of Salomon v Salomon & Co cannot fail to observe that there is nothing in any of those speeches contrary to the view that I have just expressed...

\[\text{The defendant says he has formed the company within the meaning of [clause 5 of the licensing agreement] and that the intention with which the 'company was formed and with which the two holders of £1 shares come into this concern is not for me, and I have no right to comment on it. I have no right at all except for the fact that it is demonstrated that the company was formed not to carry on the business of the}\]

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\(^{213}\) [1911] 1 IR 236
Plaintiff
—not, in the words of the proviso, to carry on the business 'connected with and arising out of said patents and this licence', but for the purpose of extinguishing the patent rights or at all events — and this is sufficient to justify the plaintiff in persisting in his claim. in this case — for the purpose of refraining from carrying on any Work connected with the reinforced concrete, patents of the plaintiff.'

In actual reality, it seems that the company have not been issued with an against Order, in addition to the preliminary emotions stated in the passage as referred, propounding that the learned Master of the Rolls was inclined to disregard in its entirety the entity of the company. Otherwise, it was implied that this case was not a case of disregarding separate legal personality whatsoever, however, it was preferably, a case of nothing but ‘contractual interpretation'. Notwithstanding, there are more cases associated with the setting aside of current liabilities which exemplify number of lifting the veil of the separate legal personality of a company by the Courts.\textsuperscript{214}

The Court judgement in a case of Mastertrade (Exports) Ltd et al v Phelan et al\textsuperscript{215} illustrates that it is requisite that there were several facts that a company is been utilised as a device to void liabilities or to nullify lawful or valid requests. There were evidences that substantiated that P transferred for a consideration 50% of his ownership in the Master Meat Group of companies to T, thereafter violated their incorporation contract. T as well assigned his own stocks to G, whereas P was not acquainted that T had assigned his stocks to G. P and T commenced haggling ensuing the Group becoming insolvent.

In fact, T’s-agents internationally became G’s advocate. P proposed to purchase the Group at the price of £2.5m, however, £2.75m counterbid was made and in the clause of the merged investment common consent, the counterbid of £2.7m ensued to be subsequent coercive. Thereafter, P instituted lawsuit against T, G and the Master Meat Group of Companies. These Group of Companies contended the lawsuit against P, pleading 32 claims of embezzlements by P. P caused them to go to the Court to counter the lawsuit Master Meat Group of Companies instituted against him pertaining to G’s claimed misconducts. Specifically, P claimed that the impact of the lawsuit was to make certain that a totally illicitly and objectionable reward would be grabbed by G, as financial securities owner of the companies, consequently, refuting the companies’ allegations against P ante-dated G’s engagement, G would notwithstanding gain from any decision Court made. P as well pleaded that G’s claimed malfeasant included fraud, an aspect compulsory for the Court to consider in disregarding the corporate veil. Justice Murphy was disinclined to disregard the separate legal personality of the company on the basis that the defendant companies

‘have not been in breach of any agreement, have not induced a breach of an agreement nor are in any way tainted with illegality, deceit or fraud. They are the proper plaintiffs in relation to the allegations that they make in these proceedings.’

With reference to ascertain that the companies were not used as a device for collapsing the legal obligations or overthrowing the licit or valid legal demands as connoted in a case of Cummings v Stewart. Justice Murphy additionally, ruled and stated that

“Whilst there may have been concealment, which did mislead the public, ‘there is no evidence before the Court that the sole object of the concealment was to "cheat and mislead the public"’\textsuperscript{216}

After adequately considering the written facts submitted to the honorable Court, the learned judge decided that it was improper to disregard the Separate Legal Personality of the


\textsuperscript{215} [2001] IEHC 172

\textsuperscript{216}(1892) 2 QB 724
company. Hence, he declined to dismiss the lawsuit. A case of Jones v Lipman\textsuperscript{217} is a case in which the courts have disregarded the Separate Legal Personality of a company. In the said case, the respondent Lipman drew up a lawfully valid agreement to sell his house to Jones. Thereafter, Lipman changed his mind and he sought to revoke the contract to assign his house to Jones. He purchased a pre-formed company that was bought by him mainly to enable him to possess the land; Lipman being the gainful holder of all the shares of the company conveyed the house to the company. Justice Russell in his judgement granted ‘specific performance’ injunction to Jones as a consequence in coercing Lipman to sell the house, the learned judge stated that the company was\textsuperscript{218}

\begin{quote}
'the Creature of first defendant, a device-and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.'
\end{quote}

The company was also issued with an order for ‘specific performance’ injunction. The nearby reality suggests that Russell J was disinclined to disregard outright the entity of the company he had in truth currently characterised as a disguise.

On the contrary, it seems to have disregarded the Separate Legal Personality to the degree he analysed the company to be obligated to the liabilities of a shareholder. Lamentably, the appellations like ‘device’, ‘sham’, and ‘mask’ are only used to obscure the authentic judgement in the case. And it has been proposed that the decision in the case could have possibly been accomplished by putting to use more acceptable lawful procedure\textsuperscript{219}.

In Jones v Lipman, rulings were issued against the company as well as the company’s predominant shareholder. In the case of Gilford Motor Co Ltd v Horne\textsuperscript{220}, the adherence of a company to abstain from current juristic liabilities prompted the court to issue a rule against the company as well as an individual who was not one of the company’s shareholders. In the case in focus, the respondent’s (Horne's) contract of employment included a restraint of trade clause, in accordance with which Horne contracted ‘that should he leave their employment he would not compete with the claimant’s employers for a specific period (6 years) from the 1st day of September 1928. The period of six years specified in restraint of trade clause had not elapsed when Horne quit the claimant’s employment. Thereafter, Horne's wife and son formed a company that was to carry on business in competition with claimant’s employers. Although Horne was not an enrolled stockholder or a director of the company, contrarily, the company operated under Horne's authorities\textsuperscript{221}. The claimant victoriously received a court injunction order prohibiting Horne and the new company from operating business in rivalry with the claimant’s (Gilford Motor Co Ltd) employers. Hanworth L stated that the new company\textsuperscript{222}:

\begin{footnotes}
\item[217] [1962] 1 All ER 442
\item[218] [1962] 1 All ER 442 'at 445
\item[219] Ussher, Company Law in Ireland (1986) at p 28
\item[220] [1933] Ch 939
\item[221] Ch 13, Corporate Governance.' Management by the Directors, at para [13.0551]
\item[222] [1933] Ch 939 at 956
\end{footnotes}
‘was formed as device, a stratagem in order to mask the effective carrying on of the business of Mr. Horne. The purpose of it was to try to enable him under what is a cloak or a sham to engage in business in respect of which he had a fear that the plaintiffs might intervene and object ...’

There was an identical judicial conclusion in Creasey v Breachwood Motors Ltd\(^\text{223}\) case. In the case, a company Breachwood Welwyn Ltd illegally terminated Creasey’s employment as the company’s general manager. Creasey subsequently initiated a lawsuit for illegal termination against Breachwood Welwyn Ltd. Breachwood Welwyn Ltd shut down its business and defrayed all its creditors except Creasey. Again, Breachwood Welwyn Ltd assigned its resources to Breachwood Motors Ltd, the newly formed company. Thereafter, Creasey received a ruling in his favor and against Breachwood Welwyn Ltd that had as at that time assigned all its resources to the new company, Breachwood Motors Ltd.

Queens Counsel Richard Southwell presiding over as the deputy High Court judge in the Queen’s Bench Division, ruled and stated that ‘the takeover of Breachwood Welwyn Ltd.’s assets by the new company was carried out by the directors in total disregard of their duties as such, and in an attempt to ensure that Creasey would not recover anything if successful in his claim’. Thus, Richard Southwell QC disregarded the separate personality of Breachwood Motors Ltd, thereby authorising Creasey to progress in compelling the decision for his illegal termination against the company.

The judgement may be berated\(^\text{224}\). Though, because the proof did not support a judicial conclusion that the contract between Breachwood Welwyn Ltd and Breachwood Motors Ltd was a disguise camouflaging the factual proof. As per the common-law rule duty to act bona fide in the superlative interests of the company entirely, the directors were morally duty-bound to act in good faith. The assignment of Breachwood Welwyn Ltd enterprise to Breachwood Motors Ltd and defrayed all the company’s past outstanding creditors enabled them to draw up balance sheet in the owners’ benefit.

Richard Southwell, a QC, in his contemplation did not depend on if there was proof of a crooked intent or ambition on the side of the promoters (owners) of the new company to avoid current liability; neither was it proposed to the learned judge that the new company was incorporated as a disguise camouflaging the authentic circumstances. Breachwood Motors Ltd, the newly incorporated company regretfully determined not to argue the case, hence, the judgement was not appealed. It is additionally esteemed to acknowledge that the court concluded exclusively that the newly incorporated company, Breachwood Motors Ltd could be replaced as a respondent to Creasey’s lawsuit against his past employer as there was no obligation on the directors. In a case of Ord v Belhaven Pubs Ltd\(^\text{225}\), Creasey’s lawsuit was inadmissible by the Court of Appeal as deliberated below.

\(^{223}\) [1993] BCLC 480


\(^{225}\) [1998] 2 BCLC 447
Notwithstanding, the judgement of Justice Costello in the case of Power Supermarkets Ltd v Crumlin Investments Ltd and Dunnes Stores (Crumlin) Ltd226 was not conventionally beheld per se, the case is perhaps being viewed as an Irish case in point which exemplified that Courts are inclined to disregard the Separate Legal Personality of a company if the company’s considerable intention and accomplishment is to circumvent current liability. The judgement of the case of Power Supermarkets Ltd v Crumlin Investments Ltd and Dunnes Stores (Crumlin) Ltd was delivered simultaneously when the ‘single economic entity’ theory was a custom. And a substantial chunk of the decision is adhered to the usage as at, that time prevalent perception that the separate distinctness of companies in an association could be disregarded if the ‘justice. of the case’ so necessitated. An apparent inference from the lettered judge’s decision in the case is that the righteousness of the case bound the association to be deemed as a ‘single entity’ in that case hence to do contrary would lead to the circumvention of current liabilities to comply with the clauses of a ‘commercial lease’. Further details of the said case are analysed at a later paragraph.

In fact, a crucial factor in the determination of whether to disregard the separate personality of a company for circumvention of liabilities is if the company was formed for that reason, and if the authentic circumstances were camouflaged.

In the case of Ord v Belhaven Pubs Ltd227; the circumstances of which are perhaps compared to the aforesaid case of Creasey. In the case of Ord v Belhaven Pubs Ltd, the claimants procured a public house under a 20-year lease from Belhaven Pubs Ltd and thereafter contended that the chapman had asserted incorrectly the amount of business transacted during a given period and the lucrativeness of the pub.

The claimants embarked on lawsuit against the company in 1991. In 1992, notwithstanding, consequently, a broad decline in real estate market worth, the respondent’s holding company determined to reorganise division activities with the conclusive accomplishment that in the year 1995, the resources of Belhaven Pubs Ltd had been acquired by purchase by the other shareholders of the division at a premium cost in an exorbitant of the actual cash value and the company’s ‘creditors’ had been complacent, in order that the company ensued to nonentity other than an inactive company, retained no resources and no obligations. The Court of Appeal admitted an appeal against a mandate of the English High Court that the holding company be replaced as respondent in the claimant’s lawsuit against Belhaven Pubs Ltd.

226 (22 June 1981, unreported) HC
227 [1998] 2 BCLC 447
The Court of Appeal decided that there was nothing inappropriate been done by directors and there was no fact to propose that the company was nothing but a disguise or that the authentic circumstances were camouflaged.

Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd\textsuperscript{228} is to be seen to be a further Irish complementary case to that of Ord v Belhaven Pubs Ltd. In Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd case, the claimant contended that the respondent, an affiliate company owned totally by its holding company, Powell Duffryn plc was in contravention of a business agreement to supply coal. At the time, the claimant subsequently realised that Powell Duffryn plc, the holding company was prepared to vend the affiliate company, it motioned for a mandate adding the holding company as co respondent. Justice Laffoy in the High Court dismissed the motion, acknowledging that the claimant had transacted with the respondent comprehending that it was an affiliate company, and that there was no proposal of any contractual bond between the claimant and the holding company (Powell Duffryn plc). The lettered judge decided that the only simple absolute reality that the respondent affiliate company was monetarily conditional on its holding company was inconsiderable to convey holding company obligated for the binding liabilities of the affiliate company.

\textit{The proposition advanced by the plaintiff seems to me to be so fundamentally at variance with the principle of separate corporate legal personality laid down in Salomon v. Salomon & Co [1897] AC 22, and the concept of limited liability, that it is wholly unstateable.}'

The Supreme Court affirmed Laffoy J’s decision. Justice Murphy differentiating the case of Power Supermarkets Ltd v. Crumlin Investments Ltd and Dunnes Stores (Crumlin) Ltd, reasoned on the absolute reality that the respondent affiliate company was superfluous a sheer frame; the affiliate company operated on an absolute abundant enterprise and the employees related straight to the board of the affiliate company instead of straightly to the board of the holding company.

The courts have indicated inclination to ignore the Separate Legal Personality of a company, if the company has been utilised to circumvent lawful liabilities or if it would on the other hand thwart the function of the law.

In the case of Merchandise Transport Ltd V British Transport Commission\textsuperscript{229} a parent company tried to utilise its subordinate company\textsuperscript{230} as a device to circumvent a lawful clause designed to protect the public from unjust competition.

\textsuperscript{228} [1998] 2 IR S19
\textsuperscript{229} 11962] 2 QB 173
\textsuperscript{230} On holding and subsidiary companies see Ch 12, Groups of Companies, at. para [112.008] et; -.".,req.
The clause proscribed licensed public carriers from utilising their motor trucks to transport their personal merchandise; and personal carriers were also proscribed from utilising overage tonnage to transport the merchandise of others.

The parent company wanted to convey merchandise which the parent company possessed and utilised the subordinate company that was involved in the public motor truck-age venture. The subordinate company was to utilise carriers to transport the parent company’s merchandise, and to utilise overage tonnage to transport merchandise of others. A request by the subordinate company for a public carriers’ permission was rejected by the licensing authority and the rejection was concurred by the Court of Appeal, consequently to approve the permission would place the parent company in the status of a manufacturer who could utilise his possess carriers to transport his merchandise and thereafter request retribution put goods in from the public. Now, the Court disregarded the separate legal personality of the subordinate company in view of the intention of its management.

The same procedure seems to have been assumed by the Supreme Court in the case of The State V District Justice Donnelly, a situation the possessor of a wine permission formed a company where they assigned the buildings to. The possessors of the wine permission were the company’s exclusive directors and stockholders, and they had established the company with the intention that they could assign the permission to it which had been approved two times heretofore, of which if they continued to be the possessors, it would be subjected to a third approval wherein it would be annulled. The assignement of the permission necessitated a certificate of approval from the District Justice, however, the Justice objected to give a ‘certificate of no objection’. The Supreme Court concurred to the objection, remarking that the broad authority granted to the Justice by the Revenue Act 1862 endorsed him in disregarding the separate legal personality of the company by investigating the instigations of the owners and shareholders who had established it.

2.7 CASES & AVOIDANCE OF FORTHCOMING LIABILITIES IN IRELAND

The courts will not, regardless, disregard the separate legal personality of a company if the company is utilised only to manage anticipated or foreseeable liabilities. This procedure is revealed in the decision of the House of Lords in the case of Adams v Cape Industries. In this specific case, Cape Industries, a substantial international company operating in England, was involved in the asbestos industry.

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232 L Section 15 of the Revenue Act 1862
233 [1990] Ch 43
At a specific point, Cape had a subordinate company (deliver) named the North American Asbestos Corporation in America, contrary to expectation, thereafter that affiliate company was involved in a $20 million payment for impairments endured by the subordinate company’s employees, the subordinate company underwent a winding-up and the activities of the subordinate company were acquired through acquisition by CPC.

CPC was an American company which was formed with monetary help from Cape.

Regardless, CPC was not an affiliate company of Cape, CPC was on daily basis directed by AMC, and a Liechtenstein incorporated company, which was Cape's agent.

In a subsequent tort lawsuit, employees of the CPC asbestos plant who had become ill due to unmasking to asbestos grabbed an insufficient judgement against Cape in the American courts to the amount of $15.64 million, and requested to have the decision implemented in the English courts. To ensure to be victorious in their requisition, the employees of the CPC asbestos plant had to prove either that Cape had fixed and accustomed at its own overhead, a permanent location of enterprise in America and for additional above a least period engaged in enterprise at the permanent location. Using its personnel and agents or that Cape had using its agency engaged in enterprise at any other permanent location in America. The claimants alleged that Cape had engaged in enterprise in America using CPC, which the claimants mentioned earlier, regardless not difficult to understand that CPC is not an affiliate of Cape, CPC was formed and managed allusively by Cape in the bid to circumvent foreseeable tortious obligation.

The Court of Appeal ascertained that CPC had in fact been formed with intent to curtailing the occurrence of Cape's engagement in the trade of asbestos in America and as well with intent to licitly minimising the likelihood of Cape being obligated for United States of America taxes or for foreseeable tort lawsuit. Besides, the court was in all fully convinced that CPC was an autonomous corporation, completely owned by its chief executive and operating its own enterprise in America. Lord Justice Slade stated\textsuperscript{234}:

\begin{quote}
\textquote{We do not accept as a matter of law-that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on-another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law...}
\end{quote}

\textsuperscript{234} [1990] Ch.433 at 544
[Counsellor the plaintiffs urged on us]; that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States...without the risks of tortious liability. This may be so. However, in our judgment Cape was in law entitled to organise the group's affairs in that manner and (save in the case of AMC to which special considerations apply) to expect that the court would apply the principle of [separate legal personality].

A preceding Irish similar decision can be seen in the case of Roundabout Ltd v Beirne[^235], where the High Court decided that a limited liability company which was formed with intent to circumventing possible forthcoming avoidances was in law a distinct entity not to be known with its precursor. This case is contemplated thoroughly in the previous paragraph.[^236]

### 2.8 THE SINGLE ECONOMIC ENTITY UNDER IRISH JURISDICTION

Throughout 1970s and 1980s, the courts alleged an exceptional conspicuous legal defense in disregarding the separate legal personalities of subordinate companies. In several cases the courts disregarded separate legal personality of the company if equity compels[^237] by deeming it as nothing but subdivision of a bigger legal existence or ‘single economic entity’.

This type of disregarding is the correct term is perhaps being distinctive from the constructive Agency cases deliberated heretofore, for if several companies are deemed as a ‘single legal entity’, only one legal person is identified, when in fact Agency identifies the entity of two persons. This method of disregarding separate legal personality has been operative by the Irish courts previously. And has acquired acceptance in conventional cases from the Supreme Court[^238], notwithstanding, its extent has been limited by the English Court of Appeal[^239], and additionally, no longer past by the Irish Supreme Court[^240]. The not long past direction of the courts explains a major disinclination to present formally any prevalent law of ignore separate legal personality of companies in groups further than those intone with Solomon’s case. The single economic entity’ strategy has at no period received derivation strictly in Ireland. Regardless, it was preferred in its period as facts of an incipient to Solomon’s case; it seems now that the courts will merely exercise it to ascertain who should be recognised with a company at any time the company’s separate legal personality is being ignored in compliance with the Solomon law.

The ‘Single Economic Entity' strategy has its derivations in Gower's expression of opinion that there was ‘an accepted propensity to disregard the separate legal entities of companies within a group, and to scrutinise rather the economic entity of the whole group’[^241]. This expression was undisputed devoid asking by Lord Denning in DHN Food Distributors Ltd v Tower Hamlet London Borough Council[^242], this case of DHN Food Distributors Ltd v Tower Hamlet London Borough Council emerged out of an imperative takeover of real estate.

[^235]: [1959] IR 423; also Ch 4 Incorporation and its Consequences, at par [4.079]
[^236]: Ch 4, Incorporation and its Consequences, at para [4.079]
[^237]: (22 June 1981, unreported) 11 Costello J, discussed at pars [5.053]
[^238]: (13 July 1981) SC, discussed at para [5.053].
[^239]: [1990] Ch 433
[^240]: [1998] 2 IR 519
[^241]: Gower; Principles of Modern Company Law (3rd edn, Stevens & Son, 1969) at p 216
[^242]: [1976] 3 All ER 462.
A parent company operated ventures on property possessed by its completely possessed subordinates. During the time, the Council imperatively took-over the land, the parent company filed a lawsuit for damages in consideration of the disorder prompted to it. The Court of Appeal affirmed the legal demand damages. Lord Denning MR ruled that the court could scrutinise the economic entity of the whole group and deal with the ventures as being operated by that group. He said:

'We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within-a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control-every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says ... This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point ... They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one and the parent company; DHN, should be treated as that one.'

Lord Denning MR also stated that the parent company was permitted to an award of damages on additional basis, now to be stated as: (a) that the affiliate company had conveyed an inextinguishable permission (licence) to the parent company to operate ventures (business) on the property (land); (b) that this permission (licence) bestowed unchallengeable ownership in the property (land) on the parent company.

Lord Justice Goff and Justice Shaw believed the case should be ruled on the rationale that the parent company was the possessor in fairness of the land under an ensuing confidence. Notwithstanding, it was Lord Denning's ascertainments pertinent to the ignoring of separate legal personality which motivated subsequent observation to the case.

Lord Denning MR’s opinions on the disregard of Separate Legal Personality were preferred in Ireland by Costello J in Power Supermarkets Ltd v Crumlin Investments Ltd and Dunnes Stores (Crumlin) Ltd. In the case, Crumlin Investments Ltd were lessors (owners) of a substantial shopping mall. Power Supermarkets Ltd, management of the Quinnsworth chain of supermarkets, was lessor of one of the units in the shopping mall. Thereafter, it was crucial to Power Supermarkets Ltd that no additional substantial supermarket should be permitted to establish in the shopping mall in competition with them, Crumlin Investments Ltd agreed among other things that:

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243 [1976] 3 All ER 462 at 467
244 (221 1981, unreported)-HC; also in Hannigan’s ‘Piercing the Corporate Veil’ (1983) D (ns) 111
not during the term to grant a lease for onto sell or permit or suffer the sale by any of its tenants or so far as within [Crumlin Investments Ltd.’s] control any sub or under tenants of groceries or food products in or over an area exceeding 3000 square feet in any one unit forming part of the shopping centre ...'

The shopping mall lost money for Crumlin Investments Ltd, and the company chose to sell it. A sale was conceded with Cornelscourt Shopping Mall Ltd, and the sale was thereafter agreed upon by method of assignment of all shares in Crumlin Investments Ltd to Cornelscourt Shopping Mall Ltd. Cornelscourt Shopping Mall Ltd, was one of the Dunnes Stores group of companies, operators of a competitor of series of shops. An approximately 150 private companies constituting the Dunnes Stores group were, in more than one aspect, merely fictitiously separate companies. All the activities of the group were controlled by constituents the Dunne family. It was fundamental from the Dunne family’s perspective that a Dunnes Stores retail shop be opened in the Shopping Mall. The Dunne family principles was that a novel company should carry on one specific by the piece (retail) branch, a novel company, thus, Dunnes Stores (Crumlin) Ltd was affiliated with the main intent of obtaining grant of use and permission (lease) in the Shopping Mall and beginning a by the piece (retail) store (outlet) there in straightaway rivalry with Power Supermarkets Ltd.

On affiliation of this novel company, Cornelscourt Shopping Mall Ltd induced Crumlin Investments Ltd to assign the freehold of a substantial branch in the Shopping Mall to Dunnes Stores (Crumlin) Ltd for a low-priced payment, and lacking any of the acknowledged binding agreements which would coexist an assignment of this type when perpetrated amongst unknown persons, i.e. two parties freely and independently of each other, and without some special relationship, (at arm's length). During the interval when Dunnes Stores (Crumlin). Ltd commenced trading in the Shopping centre, Power Supermarkets Ltd applied for a judicial order refraining Dunnes Stores (Crumlin) Ltd from doing business in the Shopping Mall. Justice Costello ruled for claimant’s parent company, that that Dunnes Stores (Crumlin) Ltd were obliged by binding agreement (covenant) included in the claimant’s lease, regardless, they were not a party to that lease.

Costello J ascertained that the binding agreement (covenant) was a preclusive binding agreement, the encumbrance of it, concession to legitimate conventional doctrines, had legal validity with the property (land). Crucially, the learned judge as well ruled that Dunnes Stores (Crumlin) Ltd were obligated by the clauses of the lease which they were not officially a party thus Dunnes Stores (Crumlin) Ltd, Crumlin Investments Ltd, and Cornelscourt Shopping Mall Ltd were all constituent of a ‘single economic entity’. Reflecting, he referenced the opinions of Lord Denning MR and Shaw LJ in DHN Ltd v Tower Hamlets London Borough Council, Justice Costello further stated:
It seems to me to be well established …… that a court may, if the justice of the case so requires, treat two or more related companies as a single entity so that the business notionally carried on by one will be regarded as the business of the group or another member of the group if this conforms to the economic and commercial realities of the situation. It would, in my view, be very hard to find a clearer case than the present one for the application of this principle. I appreciate that Crumlin Investments is a property owning not a trading company but it is clear that the creation of the new company and the conveyance to it of the freehold interest in a unit in the shopping centre were means for carrying out the commercial plans of the Dunne family in the centre. The enterprise had a two-fold aspect (a) the creation of a new retail outlet for the Dunnes Stores Group in the shopping centre and (b) the enhancement of the rents in the centre as a whole which the creation of such an outlet would hopefully produce. To treat the two-companies as a single economic entity seems to me to accord fully with the realities of the situation. Not to do so could involve considerable injustice to the plaintiffs as their rights under the covenant might be defeated by the mere technical device of the creation of a company with a £2 issued capital which had no real independent life of its own. If it is established that the covenant is breached there should in my opinion be an injunction against both defendants."

This procedure of treating two or more related companies as a ‘Single Economic Entity’ and granting injunction against both or more defendants in a ‘Single Economic Entity Theory’ was coupled with Lord Denning's ascertainments in the DHN case, thereafter affirmed by the Supreme Court in Re Bray Travel and Bray Travel (Holdings) Ltd, and perhaps consequently continues to be deemed as an actual dictum of law in Irish jurisdiction. In the case, the court approved an enjoinder to the liquidator of Bray Travel Ltd placing embargo on the resources of its subordinates. Justice Henchy and Justice Kenny with whom Hederman J assented, both remarked that the enjoinder was equitably justifiable on accepted equitable remedy doctrines without the absolute requisite for disregarding the Separate legal personality of the company, at that point, being proof that the company had assigned assets to its affiliates at an underestimated total.

There is a customary characteristic of all the cases analysed in the two previous subheadings, and that is, in one by one case, the disregard of the separate legal personality of the companies was justifiable on accepted basis in compliance with the doctrine in Salomon’s case. Consequently, in the case of ‘Rex Pet Foods Ltd V Lamb Bros (Dublin) Ltd at a1, Justice Costello rejected to disregard the separate legal personalities of a group of companies under common possession.

The case emerged on a claim by the accepter (receiver) and the administrative-head of Rex Pet Foods Ltd, that its resources and the assets of the respondent companies should be aggregated and that the dealings of all the companies should be dealt with as an entity. Lamb Bros (Dublin) had obtained a 52% shareholding in Rex Pet Foods Ltd.


\[246\] Courtney’s Mareva Injunctions and Related Interlocutory Orders (1998, Butterworths) "at Pp 9-19

\[247\] (5 December 1985, unreported), High Court (Costello J).
Several Lamb Bros (Dublin)'s members of management (directors) were added to the members of Board of Directors of Rex Pet. Foods Ltd, however, the controllers of Rex Pet Foods Ltd continued to be unchanged. Some agreements were drawn up by Rex Pet Foods and Lamb Bros (Dublin) in accordance with which the respondent group of companies was singular wholesalers for Rex Pet Foods' goods and in the circumstances where the respondents would render administration functions to Rex Pet Foods. Different books of financial statement were kept by the companies. At the time, Rex Pet Foods became insolvent Lamb Bros (Dublin) took-over the net shares in Rex Pet Foods. At this point, there were several administration innovations to Rex Pet Foods in accordance with which management from the respondent section became members of its board. At the time, Rex Pet Foods proceeded into receivership, the (receiver) requested to have the resources of all the companies be dealt with as indivisible. Justice Costello rejecting the motion stated:

'It is alleged that the plaintiff company should be regarded merely as a branch of the defendant group as its manufacturing arm because, firstly, the defendants discharged the creditors of the plaintiff company from time to time. The evidence establishes that this in fact occurred ... but this to my mind did not in any way affect the separate legal entity of the plaintiff company and was a normal enough arrangement for companies trading in a group such as these companies were trading. Secondly, it is suggested that the claim is supported by the fact that invoices from suppliers of the plaintiff company were sent direct to the defendant company. Factually this is so. From time to time creditors of the plaintiff company, in particular suppliers of goods and raw materials to the plaintiff company, sent invoices to one or other of the defendant companies but this does not raise any claim or -sustain any claim that the two companies should be treated as one legal entity. It does perhaps, reflect some confusion but not to the extent which would justify the claim now being made on the plaintiff's behalf. Thirdly, it is suggested that the management of the plaintiff company was such that the claim being made is justified. The management changed in the way I have indicated. The explanation for the change is a reasonable one and in my view, does not of itself justify the claim that has been made. Fourthly, it was suggested that there were no regular meetings of the board of directors of the plaintiff company. There were meetings of the board of directors and meetings were held up to March 1982. Thereafter it seems that no inference such as is being sought to be drawn arises from the fact that the board of directors comprised members of the parent company for this is a situation which is normal and is to be found where a group of companies is controlled by a parent company'.

When all is said, and done, the issue was brought up that the respondent company was only a wholesaler for the claimant company. However, this was a circumstance which in no way distinctive or which brings up the allusion the claimants try to bring up.
The issue that emerged was if all these factors taken into consideration, raise the illusion sued for, on the contrary, I cannot concede that this is true. Lawyer have directed to me situations the courts have dealt with companies as being one legal entity, however, these have been cases where the circumstances are complete distinctive to those which the facts ascertains in the accompanying events of this case.

‘So, in my view the plaintiffs have failed to make out a case which would justify me in making the declaration which is sought. I should add that even if the situation were different and there were circumstances in which the court should regard these companies as being one for some reason or other, this would not justify the court making another order which, indeed, is a separate order in relation to the aggregation of assets because it seems to me there has been no evidence to suggest that any funds of the plaintiff company were siphoned off into any of the defendant companies in such circumstances as would raise an equitable claim to the assets of any of the defendant companies ....

A lot appears to have been drawn up by Justice Costello of the fact that no unprejudiced legal demand made to the resources of any of the respondent companies arose, and he refused to disregard the Separate Legal Personality of the claimant company on that rationale. Whether a distributing justice legal demand had been ascertained authorising this kind of ignore of the company's separate legal personality, thereafter, definite it would have been litigable in justice in the absence of a requirement to ignore separate legal personality.

Similarly, in the case of The State (McInerney & Co Ltd) v Dublin County Council249, Justice Carroll refused to deem two affiliates companies of one parent company as subdivision of a single economic entity in order that one affiliate company could, at the time the planning permission was not granted, coerce the respondent (Dublin County Council) to buy acres possessed by another affiliate company. There was not any identified juristic connection between the affiliate companies which potentially created an ownership connection in the first affiliate company. If there had been an ownership entitlement ascertained, it there would have been basis different to ‘the single economic entity principle upon which to bestow the claimant compensation. The learned Judge stated

‘In my opinion the corporate veil is not a device to be raised and lowered at the option of the parent or group. The arm which lifts the corporate veil must always be that of justice. If justice requires (as it did in the DHN ease) the courts will not be slow to treat a group of subsidiary companies as one. But can it be said that justice requires it in this case? We have here a parent company with 30 subsidiary companies forming the McInerney Group. According to Mr. Cody, the finance director of the parent company it is group policy, depending on circumstances to operate in the name of one of these companies on various sites throughout the country. He says that McInerney Construction Ltd (the registered owner) has no resources other than those supplied by another subsidiary. The purchase moneys were provided by the applicant, it being the intention that such moneys be repaid in due course out of the proceeds of realisation’.

248 Justice Carroll of High Court [Italics added] McInerney & Co Ltd v Dublin County Council.
249 (12 December 19/34, unreported), High Court (Carroll J)
When those averments are considered, it appears to me that here is a group of companies operated so as to maximise the benefits to be gained from the individual corporate identity of each subsidiary. If the purchase money was to be repaid out of the proceeds of realisation, it follows that the profits or losses remained with the registered owner.

If the development was not profitable the loss would be confined within the assets of that one company ... In my opinion, this is not a case where justice demands that the corporate veil be lifted ... It is not for a corporate group to claim that the veil should be lifted to illuminate one aspect of its business while it should be left in a situation to isolate the individual actions of its subsidiaries in other respects.'

CHAPTER 3

IRISH CASES, STATUTORY REQUIREMENTS VIA THE COMPANIES ACT 2014

In the same way, Justice Carroll declared in the case of The State (McInerney & Co), a director must not be authorised to disregard the separate legal personality of a company only when it pleases him. In a case of Gresham Industries Ltd v Cannon\textsuperscript{250}, Finlay P rejected to consider a company and its director as a ‘single economic entity’. Finlay P rejected to grant permission to a debtor to reimburse a debt owed to a creditor, as that same debt was owed by that creditor to Paulcar Ltd, a company in a group companies, these group companies were gainfully possessed by the debtor.

He Stated:

'It seems to me ... a fundamental principle of the law that if a person decides to obtain and use the benefit of trading through limited liability companies and if for any purposes whether the limitation of his liability, tax purposes or otherwise he transfers assets from one company to another or makes drawings from one company and invests them in his own name in another company that he cannot subsequently be heard to ignore the existence of the legal entities consisting of the different companies and to look upon the entire transaction as a personal one ... All these claims were put forward by the defendant upon the basis that he was the effective beneficial owner of Paulcar Ltd which he asserted was a solvent company and that therefore he was entitled to these as an off-set or credit against the amounts due by him to the plaintiff company in liquidation ... I am satisfied that as a matter of law even a 100% beneficial shareholder in a company cannot for the purposes of the settling of an account between him and another individual or company be identified with the company\textsuperscript{251}.'

\textsuperscript{250} (2 July 1980, unreported) HC, Finlay Pat, p 19 of the transcript.
\textsuperscript{251} (2 July 1980, unreported) HC, Finlay Pat, p 19 of the transcript. Contrast Mauston Bros Ltd v Secretary of State [1983] NI 369 where Gibson LJ
English officeholders propound that the up-righteousness of the case will only allow a company to be considered as sector of a ‘single economic entity’ if the company is created only as a ‘disguise’ to camouflage inappropriateness, or in a situation the court is interpreting a status or binding agreement. Skepticism around the bounds of Lord Denning's judicial remarks in the case of DHN was verbalised in the English House of Lords by Lord Keith of Kinkel in Woolfson v Strathclyde Regional Council, in a situation he stated:

'I have some doubts whether ... the Court of Appeal properly applied the principle that is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts:'

In the case of Adams v Cape Industries, considered foregoing, the Court of Appeal decided that:

'the relevant parts of the judgments in the DHN case ... must, we, think, likewise be regarded as decisions on the relevant statutory provisions for compensation even though these parts were somewhat broadly expressed and the correctness of the decision was doubted by the House of Lords in Woolfson v Strathclyde Regional Council ...'

The Court of Appeal decided that:

'Save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the case of Salomon v Salomon merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to such legal entities.'

Adam’s case preceded the case Re Polly Peck International plc (In Administration) (No 4) presided over by Justice Walker, a case, the learned judge included that the courts must pay attention to the legal actuality of any accomplishment and not its cost-effective actuality in determining if the company is only a disguise, notwithstanding of any construed inequitableness that emerged at the time the company was insolvent.

In this case, the court was bound to decide the legal situation of a totally possessed subordinate company which had been set up within the Polly Peck group, as a distinctive-intention monetary device, to increase finances through flowing out bonds from the group. The subordinate company had a stark nominal paid up capital (which would not have been enough to defray activity costs); the subordinate company had no autonomous controllers (management); and had no bank account or discrete balance sheet or statement of financial position.

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252 (1978) SC 90
253 [1990] Ch. 433 at 536; See para [5.0491
254 [1996] 2 All ER 433
Immediately the subordinate company obtained finances as per the prescribed method of flowing out bonds, the subordinate company floated a loan (lent a loan) to the parent company and finances the parent company. The parent company fully secured the subordinate company’s liabilities, so it got a loan and as per a prescribed method applicable to contracts, the parent company was the predominant borrower in respect of the bonds. The parent company was being wound up or liquidated and in the ensuing arrangement of method for winding up or liquidation, it was on condition that no creditor should authenticate more than one single time in regard of any scheme legal demand. The subordinate company itself later went into winding up and thereafter requested for legal demand from scheme controllers for all the amount of loan to the parent company. Banks which had undertaken the bonds as well filed for legal demands against the parent company in accordance with the prescribed method to its security. The controllers, ensuing admitting as satisfactory majority of these legal demands by the Banks, solicited for court’s advice as to if the affiliate company was authorised to pursue a legal demand in the scheme different to those of the Banks in regard of which it was fundamentally similar money owed.

Justice Walker ruled that the claims of the subordinate company and that of the Banks were not substantially exactly inseparably as to be in essential nature claims in relation to the same money owed. The learned judge commented that it was not penetrable by the court to pay no attention to the principle of separate corporate personality and deal with a closely conjoint group of companies as a single economic unit on the ground only of apperceived inequity, specifically in instances in which the separate legal entity of the companies adopted larger significance instantly the companies evolved bankrupt. One company in the group could not as a matter of right be deemed to be an appointee or Agent of the other, thereafter, not Agency or appointee-ship could be alluded only why a subordinate company has a nominal paid up capital and has a board of directors all or majority of the board members are as well the directors or chief executives of its parent company.

The court ruled that pressure had to be conceded to the legal interpretation of the legal meaning in question, because to deem contrary would be to disentitle them of any legal interpretation and that would be at disparity with the aims of the parties. Neither of the subordinate company was a disguise. Justice Walker reasoned that there was a substantial distinction between the formation performance of an exclusive-goal monetary device, and the formation of a disguise or fake just to camouflage the authentic aspects of specific dealings.

In the Republic of Ireland, as has been aforestated the courts have reconfirmed the concernment of Salomon’s case in instances in which ‘the single economic entity’ procedure has been contended. In the case of Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd, deliberated prior, the High Court as well as the Supreme Court refused any feasibility of a conventional rule that the just reality of an adjoining affiliation between companies in a coalition (group) could prompt as such to the companies’ separate legal personalities being disregarded.

What is eminently moving in the decision of Justice Murphy in the Supreme Court in the aforesaid case is Murphy J’s contemplation of Justice Costello’s judgement in the case of Power Supermarkets Ltd v Crumlin Investments Ltd and Dunnes Stores (Crumlin) Ltd. Justice Murphy stated:

`... apart from the distinctions which may be drawn between this and other cases, the crucial feature of Power Supermarkets Ltd v Crumlin Investments Ltd is that Costello J did not purport to question the authority of Salomon v Salomon & Co [1897] AC 22. Indeed, no reference was made to that case in the course of his judgment nor, as far as I am aware, the argument on which it was based: Again, it is clear from the judgment in Rex Pet Foods Ltd V Lamb Brothers (Ireland) Ltd ... that Costello J had not intended in Power Supermarkets Ltd v Crumlin Investments Ltd to lay down any revolutionary principle of law. While it would be impossible to say that there are no circumstances in which the members of a company, whether corporate or individual, could not conduct, or purport to conduct the business of a company in such a way as to render their assets liable to meet claims in respect of the business normally carried out by the company, I believe that this would be an altogether exceptional state of affairs and difficult to reconcile with the seminal lodgment in Salomon v Salomon & Co ....’

This judgement confirms that the Supreme Court is inclined to degrade the ‘single economic entity’ procedure to bases in which the exclusions identified in Salomon’s case are shown to go on. It is concluded that, that is the place it properly pertains.

Notwithstanding, the door of ‘Single Economic Entity’ in Separate Legal Personality of Companies in Ireland has not been resolutely closed. In the case of Fyffes plc v DCC plc, Justice Laffoy delivered meticulous judgement to the Judiciaries in Ireland and England.

The fundamental disputed point of law in that case was if DCC plc was obligated to Fyffes plc for ‘insider trading’ under Part V of the CA 1990 in connection to the vending of its Shareholding in Fyffes plc, understood that the CEO of DCC plc was as well a non-executive director of Fyffes plc and had ingress to innermost management accounts predicting a decline in profits. For tax purposes, DCC plc vended its shares in Fyffes plc at no profit to an affiliated company, Lotus Greent Ltd, which then develop to be an addressee in the Netherlands prior to vending on the shares. The High Court was requested to ascertain that Lotus Green Ltd and DCC were subdivision of the exactly like ‘single economic entity’; subsequently that Lotus Green Ltd could be obligated to Fyffes under Part V of the CA 1990. Thereafter an elongated contemplation of the executives, Justice Laffoy expressed as follows:

'On the basis of the foregoing analysis of the pleadings, the submissions 'Made by the parties, the authorities and commentary on the authorities, I have come to the following conclusions': -

(1) As a matter of law, Lotus Green Maybe regarded as having acted as the agent of DCC in relation to the holding and disposal of the shares in Fyffes, if to do otherwise would lead to an injustice. Whether it should be, depends on whether the inference is factually-justified.
This is to be determined having regard to all of the facts, including the nature of its interest in the shares, and the relationship between Lotus Green and DCC. The views of the human agents of the companies are not in any way determinative of the question.

(2) As a matter of law, Lotus Green and DCC may be treated as a single entity as regards the sale of the shares in Fyffes and the generation of the profit therefrom for the purpose of preventing the avoidance of the availability of an effective remedy under s 109 and thus preventing an injustice to parties with a remedy under s 109, if DCC is liable to account. It should be so treated if the plaintiff has established that:

(a) an evidential basis exists for finding that as regards the holding and disposal of the shares, to borrow the terminology used by Murphy J in Lac Minerals Ltd v Chevron Mineral [1995] 1 ILR1VI 161; there was a factual identification of the acts of Lotus Green, and DCC; and

(b) not to so treat the companies would allow the DCC Group to evade its obligations under Part V.

In relation to the point at (a) the plaintiff argued that the companies in the DCC Group could have, but did not in fact, arrange their affairs so as to ensure that factual identification did not take place. In relation to the point at (b) the plaintiff did not and, on the evidence could not; assert that the purpose of the incorporation of Lotus Green and the hiving off of the shares to it was to avoid liability under Part V. The sole objective was to mitigate the tax liability of the DCC Group. However, the reality of the situation is that by defending the plaintiff's statutory claim on the basis that DCC made no profit from the sale of the shares, if DCC was precluded from dealing by virtue of s 108(6) and Lotus Green was not, the DCC Group would effectively evade liability under s 209, if the profit generated by Lotus Green on the Share Sales were not treated as the profit of DCC. To recognise this reality is to give a purposive meaning, to Part V in the light of the Directive.

Regardless, the inequity idea appears in Justice Laffoy’s decision; the move toward it is in fact very much measured. It is of eminence that Justice Laffoy did not admit a customary authority to disregard the separate legal personality of the shareholders of the economic group; instead, she requested that an inequity must be earlier irrefutable. In the case in view, it would need evidence of authentic ascertainment of the conducts of the shareholders of the group as being the exactly like conducts, and evidence that there would on the other hand be a circumvention of prevailing legal obligation

258 [2009]2 IR 417 at 495
There is nothing novel in that judgement and regardless, Justice Cooke in the case of Goode Concrete CRH plc\textsuperscript{259} posited the feasibility of piercing the veil on the 'justice of the case' basis in the motion for bond for fees and charges against an unlimited company with limited liability members\textsuperscript{260}, he did not do that based on the circumstances that the limited companies in contemplation were alien companies\textsuperscript{261}.

The European courts, notwithstanding, have ruled on several occasions that the EU Commission possesses a magnitude of prerogative in the decision of which company in the group is supposed to have a fine prescribed on it for contravention of EU competition law. In the case of BPB Industries and British Gypsum\textsuperscript{262}, the Court of First Instance assented to the Commission's judgement to prescribe fines on a subordinate, though; it is conclusively factual that the Commission could have prescribed those fines on the holding company\textsuperscript{263}. And in merchandising financially sound\textsuperscript{264}, The Court of justice accustomed that the Commission can prefer to prescribe the fine commonly and respectively on the holding company and its subordinate. Though this kind of conclusions on the look of them seem to signify a conventional ignore of the principles of Salomon’s case, it must be memorized that EU competition law concentrates on cost effective personality instead of legal personality by leading its preparations to ‘undertakings’ instead of to individuals or companies\textsuperscript{265}.

### 3.1 INJUNCTIONS AND ORDERS IN IRELAND

The courts reserve an implicit legal authority to direct implementation of their decisions or decrees against any person whom the courts would be of the opinion should be named into that place to guarantee compliance of the decree. In this kind of cases the courts perhaps disregard the separate legal personality of the company and serve a decree or enjoinder against the company’s management or influential shareholders, furthermore to the company itself, with the specific aim of guaranteeing that the company abides by its liabilities. This notion is satisfactorily elucidated in cases of interrelating enjoinders under section 160 of the Planning and Development Act 2000\textsuperscript{266}. Regardless, the fundamental rule is the same for innumerable additional type of decree. In a case of Dublin County Council v Elton Homes Ltd\textsuperscript{267}, Justice Barrington remarked:

> 'Let me say at once that I think it may be quite proper, in certain circumstances to join the directors of a company as respondents when an application is made by a planning authority against a company pursuant to the provisions of s 27 .... There may be many cases particularly in the case of small companies where the most effective way of ensuring that the company complies with its obligations is to make an order against the directors as well as against the company itself. But in such a case the order against the directors would be a way of ensuring that the company carried out its obligations. A body corporate

\textsuperscript{259} [2012] IEHC 116
\textsuperscript{260} Ch. 6, Corporate Civil Litigation, at Pg. ... Courtney, TB. The Law of Companies 3Ed. Pg. 281
\textsuperscript{261} Ibid
\textsuperscript{262} T- 65/89 [1993] ECR 11-442
\textsuperscript{263} Ibid
\textsuperscript{264} Commercial Solvents Joined Cases 6 and 7/73 119741 ECR 254
\textsuperscript{265} Wits, 'the Undertaking as Subject of Ed Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 EL Rev 99
\textsuperscript{266} Formerly s 27 of the Local Government (Planning and Development) Act 1976.
can only act through its agents and the most effective way of ensuring that it
does in fact carry out its obligations might be-to make an order against the
persons in control of it.'

It has lately been irrevocable. Regardless, that the jurisdiction to lengthen enjoinders and
decrees to incorporators in this way does not lengthen to creating 'fallback' decrees against
shareholders and directors of polluting companies. Under the Waste Management Acts, it is
only if the directors or shareholders are not themselves polluters. In a case of Environmental
Protection Agency v Neiphin Trading Ltd\textsuperscript{268}, Justice Edwards of the High Court ruled that the
‘polluter pays’ principle behind the Waste Framework Directive\textsuperscript{269} had not been completely
enforced in Ireland. At any rate, it did not straightaway put into effect the controllers of
polluting companies individually obligated for the pollution caused by their companies. Justice
Edwards remarked:

'The Court cannot disregard the fundamental nature of the separate legal personality
principle and in the absence of an express statutory abridgment of that principle; the
Court should lean against an interpretation permitting the corporate veil to be pierced.
This is in the interests of legal certainty, a very important principle underpinning our
law although a jurisdiction does already exist to lift the veil of incorporation in the case
of a company being used for a fraudulent or other-improper purpose that jurisdiction,
which is of long standing, is intended to ensure (a) that a statutory privilege is not
abused, and (b) that the Court's own process is not abused. Every Court is entitled as
a matter of inherent jurisdiction to seek to protect its own process and may in an
appropriate case lift the corporate veil to ensure that its orders are not frustrated by a
cynical and strategic reliance on the principle of separate corporate personality by the
directors (or shareholders) of a company.

Whenever, under the planning code, a Court has seen fit to lift the corporate veil in the
case of s 27 Orders formerly, and now s 160 Orders, it has invariably done so to that
end. If the polluter pays principle only required, the lifting of the veil in similar
circumstances s 57 and s 58 could be harmoniously interpreted on the basis that the
necessary jurisdiction already exists' and is of long standing. However, it demands
more than that It demands that the polluter 'should pay in all circumstances which may
require the veil to be lifted in any case where a company cannot comply, even in cases
where the shareholders/directors are not fraudulently or improperly attempting to hide
behind the company. The jurisprudence of the Irish Courts has long set its face against
such an incursion. Absent the existence of a fraudulent or improper purpose the Courts
will not lift the corporate veil unless authorised to do so by statute.'

The judgement challenged and in innumerable aspects overturned\textsuperscript{270} the procedure of granting
‘fallback’ decrees against the management of bankrupt corporate polluters, commenced ten
years prior by Justice O'Sullivan in the case of Wicklow County Council v Fenton\textsuperscript{271}. In the
case at issue, O'Sullivan J had said:

'The domestic law in relation to limited liability of companies would, in my opinion,

\textsuperscript{268}[2011] IEHC 67
\textsuperscript{270}At para 6.50 et seq of the judgment
\textsuperscript{271}The High Court decision is of equal jurisdiction with earlier decisions establishing the fall
back order jurisdiction. The decision arguably may carry more authority as it arose as a
preliminary question of law. Though the last word rests with the Supreme Court, no appeal
was made in this case. Wicklow County Council v Fenton [2002] 4 IR 44; See also Minister
for the Environment v Irish ISPAT Ltd [2005] 2IR 338; Cork County Council v O'Regan
[2009] 3 IR 39; Laois County Council v Scully [2006] 2 IR 292; Wicklow County Council v
O'Reilly [2006] IEHC 265, [2007] IEHC 71
frustrate or at least fail fully to implement the objectives of the relevant directives if it precluded the making of an order against directors in circumstances where the company in question, having first been directed by the court to comply with such orders, was not in a position for financial or other reasons so to do.

In my View, in order to ensure the full application of the 'polluter pays' principle, where by those responsible even indirectly for causing environmental pollution should pay for it rather than leave it to an innocent party or the community to do: so, the court must be in a position to make orders directly against directors in such circumstances, and the domestic company law of limited liability should be suspended and the veil of incorporation lifted in order to ensure the full application of this principle and other objectives of the European waste directives. To hold otherwise would, in my opinion, mean that innocent parties (local authorities or the public) would have to 'pay' (if only by accepting pollution of their environment without remedy), whereas those individuals who are at least indirectly responsible for it would be beyond the reach of Irish domestic law. That is not, in my opinion, a transposition into the Irish law of the European Directives. Accordingly, a ‘fallback’ order may be made against individual directors and/or shareholders where a company cannot comply with a primary order.\(^{272}\)

Notwithstanding, the decision of the Environmental Protection Agency v Nelphin Trading Ltd has not fundamentally named the borderline of ‘fallback’ decrees. After thorough scrutiny of the executives in the case of John Ronan and Sons v Clean Build Ltd (in winding-up) and Others,\(^ {273}\) Justice Clarke ruled that ‘polluter pays’ legal obligation could still be statutory on management and members who were individually abettor in polluting. He said:

'Insofar as the polluter pays principle forms part of the landscape of environmental law in this jurisdiction, the tenor of Edwards J's decision is that its scope does not extend to the provision of a jurisdiction on the courts to make 'fall back' orders against individuals who have no connection with environmental pollution other than their position as either director or shareholder of a company found liable under the 1996 Act. In short, the 'polluter pays' principle cannot, in the view of Edwards J, be used to infer provisions into the law which simply are not there. This finding, however, does not suggest that the 'polluter pays' principle should not be given any consideration at all by the court nor does it address circumstances where a director or shareholder is found to be independently liable under the 1996 Act. Accordingly, the principles set out in 0 'Regan in my view, represent the present state of the law on the question of 'independent' as opposed to 'fall back' liability for those actively involved in a company.\(^ {274}\)'

Justice Clark decided on the facts before him that two members (directors) of the management team were on site and all performed individual administrative tasks during the time the polluting actions were been perpetrated. Clarke J decided that the directors were consequently straightway and individually engaged in the continuous waste performance and merited to be obligated for the violation which happened at the time of their supervision. A third member (director) of the management team, notwithstanding, performed as a rule a non-executive function and had no functional engagement in the waste actions; no decree (order) was granted against him.

\(^{272}\) [2002] 4 IR 44 at 68

\(^{273}\) [2011] IEHC-350

\(^{274}\) [2011] IEHC 350 at para 618
The address digest in accordance with which the court issues a decree or enjoinder against company in regard of the liabilities of its influential shareholders, is as well feasible. TSB Private Bank International SA v Chabra and Another\textsuperscript{275}, a Mareva enjoinder was granted against a company regardless the basis of the lawsuit was not against it; on the contrary the lawsuit preferably was against its influential members. Justice Mummery decided that the court had legal authority so to decree, saying:

'In the present case there are two defendants. There is one defendant, Mr. Chabra, against whom the plaintiff undoubtedly has a good arguable cause of action: the claim on the guarantee. That is justiciable in the English court; Mr. Chabra is amenable to the jurisdiction of the English court to make a final judgment against him on the guarantee. The claim for an injunction to restrain disposal of assets by Mr. Chabra is ancillary and incidental to that cause of action. In my judgment, the claim for a similar injunction against the company is also ancillary and incidental to the claim against Mr. Chabra and the court has power to grant such an injunction in an appropriate case. It does not follow that, because the court has no jurisdiction to grant a Mareva injunction against the company, if it were the sole defendant, the court has no jurisdiction to grant an injunction against the company as ancillary, or incidental, to the cause of action against Mr. Chabra ...; I agree that such course of action is an exceptional one, but I do not accept that it is one that the court has no jurisdiction to take.'

The concession of the enjoinder against the company was, pursuant to the judge, the majority all-purpose way of legal decision in the situations\textsuperscript{276}.

3.1b CHARACTERISATION IN IRELAND & ACROSS JURISDICTIONS

The courts invariably peep or sight at the Backside of the separate legal identity of a company to enable the court to accredit with the company a physical legal personal nature binding by law. It must be emphasised that in this kind of instances, the courts do not disregard the separate legal entity of the corporation.

Preferably, the courts should probe the company’s foundation to enable the courts to be able to speak clearly further about the company’s separate personality. Several of these kinds of circumstances are perhaps being probed under these headings:

A. Residence;
B. Culpability and mens rea;
C. Character for licensing purposes.

\textsuperscript{275} [1992] 2 All ER 245
Residence

The issues of residence emerge completely often, particularly about taxation during the time interval, for instance, a company is incorporated in one country and generates profits in another\(^{277}\). The real residence of companies registered in Ireland is presently immaterial for the applications of the Tax Acts and the Capital Gains Tax Acts. Accordingly, s 82(2) of the Finance Act 1999 stipulates that dependent on specific provisional exemptions, ‘… as company which is incorporated in the State shall be regarded ... as resident in the State’\(^{278}\). Real residence, notwithstanding, bides to be important, for instance, to companies not registered in Ireland and for companies that arise within the exemptions to s 82(2). The predominant criterion for ascertaining the real residence (as contrary to regarded residence) of a company is the place where the company is centrally managed and controlled i.e. where it resides\(^{279}\). Besides, in each scenario, it is a matter of fact as to who in fact oversees the company; the court will disregard the separate legal personality of the company to enable it to figure out the answer to that question.

The criterion for ascertaining real residence was found in the case of De Beers Consolidated Mines Ltd v Howe\(^{280}\). The matter in dispute in that case was if a South African incorporated company was resident for tax uses in England.

Lord Loreburn, in the House of Lords, did not admit the pleading that a company abides in a place it is incorporated and no other place. Lord Loreburn stated:

‘Now, it is easy to ascertain where an individual resides; but when the inquiry relates to a company, which in a natural sense does not reside anywhere, some artificial test must be applied ... In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company ...A regard that as the true rule; and the real business is carried on where the central, management and control actually abides\(^{281}\).’

The company’s Headquarters were in Kimberly, South Africa, and there in the company’s Headquarters the Annual General Meetings (AGMs) and Extraordinary General Meetings (EGMs) of the company were held. Several the directors as well resided in Kimberly and Board of Directors’ meetings were casually or irregularly held in Kimberly.

On the contrary, it was apparently known that the greater number of the directors and the lifetime serving executives of the company lived in England. The central predominant

\(^{277}\) Goldstein’s, ‘The Residence and Domicile of Corporations with’ Special; Reference to ‘Income Tax’ (1935) 51 LQR 684; Corrigan, ‘Place of Abode Test in Establishing Tax Residence’ (1988) 6 ILT, I06

\(^{278}\) Ch. 2, Incorporation by Registration, at para [2.045], Courtney, TB The Law of Companies 3Ed

\(^{279}\) The residence- of a company is less easy to establish than its nationality or domicile, both of which are determined simply by reference to the place of incorporation. Domicile may be determined by reference to other criteria for the purposes of certain legislation; see, for example, s 13(2) of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 which provides that for the purposes of that legislation the domicile of each company is determined by where the corporation has its seat. See also Gill, 'The Seat of a Company and the EEC Judgments Convention' (1988) ILT 30

\(^{280}\) [1906] AC 455; Also in Young, 'The Legal Personality of-a Foreign Corporation' (1906) 22 LQR 178

\(^{281}\) [1906] AC 455 at 458
governing directors’ meetings were held in England. The central predominant governing directors’ meetings were meetings where all the crucial business of the company like negotiation of contracts, determination of policies of disposal of assets and the working of the mines, the application of profits, and the appointment of directors, were decided.

Constructively the company was centrally controlled and managed from England. Consequently, insomuch as the company was centrally controlled and managed from England, it was ruled that the company lived in England. In the case of John Hood & Co Ltd v Magee, a company was decided to be controlled by its members in General Meeting which includes Annual General Meetings (AGMs), Extraordinary General Meetings (EGMs) and Board of Director’s Meetings. Thus, it was decided that the company lived in Belfast, a place where all the general meetings took place, instead of in New York, the place its Managing Director abode. Justice Madden mentioned Lord Loreburn’s criterion for residence in the De Beers case, and further stated:

'Applying the test supplied by Lord Loreburn I ask in the first instance where does this company keep house? Assuredly in Belfast, for here the registered office must be, under the provisions of the memorandum of association, and here the general meetings of the company are in fact held. Where does it do business? Some of the business transactions are carried on in Ireland and some in New York, and this divided business leaves unsolved the-question which Lord Loreburn regards as the true test as where the real business is carried on. This, he says, is where the central management and control actually abides. In my opinion, the central management and control of this company abides with the general meeting of shareholders in Belfast, where the registered office of the company is situated and where the general meetings of the company are held ... If the shareholders in general meeting were to consider it more in the interests of the company that the managing director should reside where the goods in which they deal are manufactured and bought, they might refuse to re-elect him, except on the terms of his residing in Belfast. Adopting the analogy suggested by Lord Loreburn, the movement would proceed from the heart and brain of the organisation in Belfast by which the action of its organs is controlled.'

The members’ authority to dismiss and change Managing Director particularly was evidence of the place the control of the company in fact lived.

The significance of such control was as well confirmed in the remarkable First World War case of Daimler v Continental Tyre Co. A lawsuit, the issue of residence was deliberated for other uses different to taxation. The matter in dispute in that lawsuit was if the respondent, a company incorporated in Britain should pay its indebtedness to the claimant, another company incorporated in Britain. Regardless, the directors and members of the respondent company all abode in Germany.

The Proclamation against Trading with the Enemy Act 1914 (UK) prohibited trade with foes and prescribed dealings with the foe invalid. On the contrary, in respect of companies, the Act stipulates that 'in the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country'. The courts of first instance decided that the respondents should reimburse the claimant the debt owed the claimant, because the Act arguably provides authoritative feature in deciding the status of the claimant company.

\[282\] [1918] 2 IR 34
\[283\] [1918] 21R 34 at 49-50
\[284\] [1916] 2 AC 307
On appeal, notwithstanding, the House of Lords decided the respondent company to be a foe\(^ {285}\). The four judges namely Lord Parker, with whom Lords Paramoor and Kinnear, and Viscount Mersey all assented and stated:

‘The acts of a company's organs, its directors, managers, secretary and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitively with enemy character. It seems to me that similarly the character of those, who can make and unmake those officers, dictate mediate or immediately, prescribe their duties and call them to account, may also be material in a question of the company character of the company. If not definite and conclusive, it must at least be prima facie relevant, as raising a presumption that those who are purporting to act in the name of the company are in fact, under the control of those whom it is their interest to satisfy … [A] company may assume an enemy character. This will be the case if its agents or the persons in de facto control of its affairs ... are resident in an enemy country... The character of individual shareholders cannot of itself affect the character of the company ... [it] may, however, be very material on the question of whether the company's agents, or the persons in de facto control of its affairs, are in fact adhering to taking instructions from or acting under the control of enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holding\(^ {286}\),

Accordingly, the residence of the Company's chief management will be of prima facie significance in deciding the residence of the company, besides the scope to which they are disciplined, dismissible, and changeable, by the additional shareholders of the company perhaps make the centre of attention move to the persons effecting this kind of supervision.

Since the antecedent test of the method in which the courts ignore the separate legal personality of a company with the aim of ascertaining the company’s correct residence. And it should be shown that a company has the power at specific and exactly like time to reside in more extents of authorities (jurisdictions). This will be seen in a situation the company’s administration is performed from more than one states\(^ {287}\). It should as well be well-known that in a case of Unit Construction Ltd v Bullock\(^ {288}\), it was decided that a provision in the company’s constitution that it was to be administered only from a specific extent of authority was not settled as relates to the company’s abode.

Culpability and mens rea (Wrongdoing and Guilty Mind):

The situations in which the courts will focus on the aspects of a company’s management with the aim of charging the company with wrongdoing or ‘guilty mind’ has been coherently expounded as per the Constitution of Ireland (BUNREACHT NA hEIREANN) and illustrated by Lord Hoffmann in a case of Meridian Global Funds Management Asia Ltd v Securities Commission [1994] 2 NZLR 291 in Chapter 3.3 under other legislations below in this thesis.

\(^{285}\) The finding on this matter, admittedly, was obiter, since the court's main ground for allowing the appeal was its finding that the secretary of the plaintiff company had no authority to commence litigation in the company name

\(^{286}\) [1916] 2 AC 307 at 345

\(^{287}\) [1925] AC 495; [1929] AC 1

\(^{288}\) [1960] AC 351
Article 40 of the Irish Constitution fully secured citizens other individual rights which includes the *unenumerated rights judicially* identified as originating from Article 40.3.1. They are bestowed simply on ‘citizens’ without requiring that the citizens be human persons.

The bone of contention is; are these rights bestowed on companies? It was reasoned that if this were so it would be to make real contradictory and unreasoned a difference between those rights and other rights protected by the Irish Constitution. None the less, the courts have recognised that companies may invoke the *unenumerated rights*.

Character for licensing purposes:

Specific licensing statutes demand the applicant to be of 'good character'. If a company is the applicant the courts will focus on that character in the character of the company's representatives or management. This kind of Specific licensing statutes was the instance in the case of The (Cottingham) v The Justices of County Cork, a lawsuit the matter in dispute was if a distributor dealer's licence could be allowed to Beamish and Crawford Ltd, a brewing company. Whereas one of the requirements for approving this kind of a licence was that the applicant should be of ‘good character’. The licence was approved for the company by the judges of the Petty Session District of Macroom. The licence was declaring that, the magistrates held the company to be of ‘good character’, and that the company’s house in the main Street, Macroom … has been behaved in an amiable and normal behavior in the previous year …’ The plaintiff Mr. Cottingham disputed the licence, the District and he acquired a provisional order of certiorari to quash the licence. Pales CB decided no trouble in dissenting to make the order unconditional.

He said:

"the only difficulty which presents itself... [is] the alleged impossibility of an incorporated company being able to have a good character; or a character at all. But I cannot appreciate the difficulty. I cannot see why a public Company cannot have a character. No doubt it has no soul; but it can act by others, and through others do acts which in the case of a natural person would affect conscience; and be the foundation of that reputation which the law knows as 'character', be it good or bad. It can be guilty of fraud, of malice, and of various criminal offences, some of commission, others of omission; some punishable summarily, others by indictment. 'Character' as used in the section means 'reputation.' Reputation is acquired by conduct. The conduct of the authorised agents of a company is its conduct. Why should not that conduct give rise to a, reputation as to its character, good or indifferent?"

Accordingly, in a situation 'good character' is looked for to be proved, the courts perhaps ignore the separate legal personality of the company by considering the behavior of the company’s representatives.

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290  [1906] 2 IR 415; Also in R v LCC, parte London and Provincial Electric Theatres Ltd [1915] 2 KB 466 where a local author' was held justified in its decision not to renew a cinematograph licence held by an English company because most of its shares were held by, Germans and three of its six directors Germans.
291  [1906] 2 IR 415 at 422-423 (italic added). Also in ‘The State (Hennessy and Chariot Inns Ltd) v Commons [1976] IR 238; McMahon v Murtagh Properties Ltd (20 October 1981, unreported) HC, Barrington J, who this passage was cited with approval.
3.2 STATUTES IN IRELAND & EU

Accordingly, statute begets Private companies; the laws which are connected to these private companies are entitled to be amended by statute, on the condition that the amendment is effected within the ambit allowed by the Constitution. The law-making branch of government has inducted several clauses which made the principle of separate personality to be ignored in specific instances.

Several of this kind of clauses emerges in the Companies Acts and, also in the secondary legislation enforcing EU company law Directives. Additional provisions are included in taxation legislation. The main legislative clauses needing ignore of the separate legal personality of companies are discussed here as follows:

1. The Companies Acts;
2. Other legislation.

The Companies Acts

The Companies Acts stipulate several circumstances in which the separate legal personality of a private company is perhaps disregarded. Several of these clauses necessitate a company to be recognised with other companies in a group. For a case in point, groups of companies will be bound to exhibit accounts which show the financial statement of the group as a single entity. Additionally, the court nominating a receiver to a company is entitled to nominate a receiver to additional subordinate companies.

Additional clauses stipulate several circumstances where members, directors or other management are perhaps caused to be privately responsible for the indebtedness or additional liabilities of the company. A great number of these clauses are not pointed particularly at shareholders; however, the clauses are particularly pointed at directors or other management. The mandating of individuals besides shareholders to be individually responsible for incorporated company’s indebtedness and liabilities is one of the maximum drastic types of ignore of the principle of separate legal personality.

Several of the additional important clauses of the Companies Acts which make individual responsibility will be deliberated below under the following headings, although is not comprehensive:

(i) Lessening number of shareholders lesser than the legal minimum;
(ii) Omission to inscribe correctly the company's name;

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293 Ch. 22, Examinerships, at Para [22.051] et seq: Courtney, TB. The Law of Companies 3Ed.
(iii) Violation of restriction or disqualification order;
(iv) Operating with lesser capital requirements;
(v) Unable to keep accurate records;
(vi) Unjustifiable and purported declaration of solvency;
(vii) Winding up of affiliated companies;
(viii) Fraudulent' or reckless 'trading.

(i) Lessening number of shareholders fewer than the legal minimum:

Part 16 section 985 of Companies Act 2014 stipulates legal minimum number of directors.

Part 1 Section 6 of the Companies Acts 2014: Construction of References in other Acts to Companies Registration under Companies (Consolidation) Act 1908 and S36 Act 1963 -

`If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of a public company, below seven, and it carries on business for more than 6 months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those 6 months and knows that it is carrying on business with fewer than two members, or seven members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.'

The usage of this section to private companies limited by shares has been stopped by the EC(SMPLC)R.1994295 regulation 7(1) which stipulates that s 36 of the Companies Acts 1963 shall not be used to a private limited by shares or by guarantee, it should be known that s 36 persists to be used to unlimited private companies. Regulation 7 (2) additionally stipulates that:

`Without prejudice to paragraph (1), a person who, before the coming into force of these regulations, is liable by virtue of s 36 of the CA 1963 (Members severally liable for debts where business carried on with fewer than, in the case of private company, two members) for the payment of the debts of a private company limited by shares or by guarantee, shall not be so liable for the payment of the company's debts contracted on or after the date on which these regulations come into force.'

Regulation 7(2) is, accordingly, a provisional clause, persisting the usage of s 36 of the Companies Acts 1963 to conducts carried out before 1st October 1994 by a company with lesser than two shareholders.

It must be emphasised at the beginning that a company persists to go on as a legal person, irrespective of any decrease in its shareholder-ship less than the legal minimum requirement, notwithstanding if shareholders continue296. Thereafter, s 36 provides that exclusive continuing shareholders and not the discontinuing shareholders are obligated. The section has no usage in a situation where there are no continuing shareholders remaining.

295 SI 275/1994
In this kind of situation, notwithstanding, it seems that an individual current shareholder will be snared by the section of CA 1963 for the indebtedness of the company entered up-to the time another shareholder becomes a shareholder to make up the number of shareholders up to the legal minimum requirement. It should as well be known that the persistent (lasting) shareholder must be aware that the company is operating business with lesser than two shareholders.

The private responsibility prescribed by the section of the CA 2014 is independent. Consequently, those owed by the company (the company’s creditors) perhaps pursue straightway against obligated shareholder. However, this kind of obligation emerges regarding those liabilities of the company which have been agreed for, next to the termination of six months from the date of the diminution in shareholder-ship.

This appears to include exclusively financial liabilities of a collectively agreed type. It would not encompass additional obligations similar as legal demand for compensations in tort or legal demand emerging under legislation. An instance is a legal demand for wrongful termination of employment.

Furthermore, in a situation a shareholder does enters obligation under the section, he will be authorised to request for a security against damage from the company. Subsequently, the company as a separate legal person continues to be above all obligated for the indebtedness.

There is a lot to be expressed in support of the disuse of Part 1 s 6 of the CA 2014 to all private limited companies. In the case of Nisbet v Shepherd, Moulton, one of the shareholders of a two-shareholder company Moulton & Co Ltd, assigned his shares to another shareholder-Shepherd, and quitted as director. This assignment was as required and was entered the company’s register of shareholders. There was no other assignment of shares transacted as far as 1990, a time Shepherd assigned one share to his wife in order that a determination for the liquidation of the company could be reached. The liquidator blossoming requested that obligation be imposed on Shepherd under the UK equivalent of s 36 of the CA 1963. The Court of Appeal objected Shepherd’s contention that the assignment of Moulton’s shares to him was faulty. Lord Justice Hoffmann remarked:

‘I have considerable sympathy with the appellant, who has fallen into a trap created by an ancient and obsolete rule. Section [36 of the CA 1963] requires that a company should have at least two members. In default of compliance it strips the remaining member of the protection of limited liability.

297 [1937] 1 KB 534
299 [1994] 1 BCLC 300 at 305
The rule goes back to s48 of the Companies Act 1862 when the minimum number of members was seven. This reflects the evolution of company law from partnership, but there a son why it has survived through successive Companies Acts is obscure. It seems to serve no purpose in protecting the public or anyone else.

Part 1 Section 6 of the Companies Acts remains to be utilised to unlimited private companies and to Public companies. It is to be expected that subsequent legislation authority would eliminate the section from the statute books altogether or repeal it.

(ii) Omission to inscribe correctly the company's name:

Part 2 s 26 of the Companies Act 2014 is Provision as to names of companies. In accordance with Part 2 s 47 of the Companies Act 2014 that is Civil Liability for incorrect use of company’s name, which stipulates that if an executive of a company or any individual on company’s authority:

'Signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement cheque or order for money or wherein its name is not mentioned [in legible- characters] ... he shall be liable to a fine ... and shall further be personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount thereof unless it is duly paid by the company'.

Furthermore, Part 2 s 27 of the Companies Act 2014 goes on to state that:

'The use of the abbreviation 'Ltd' for 'Limited' or 'Teo' for 'Teoranta' or 'plc' for 'public limited company' or 'cpt' for 'cuideachta phoibli theoranta' shall not be a breach of the provisions of this section.'

Part 14 s 875 of Companies Act 2014 is civil enforcement of prohibition on trading under misleading name.

The consequence of these clauses is that if the errorless and comprehensive registered name of the company does not manifest itself on a bill of exchange, promissory note, cheque or order for money or goods, the undersigned will be privately obligated to pay the payee if the Company breaches in payment, regardless the payee has not been defrauded by the false description.

Accordingly, in the case of Atkins & Co v Wardle; a case a company’s registered name was 'South Shield Salt Water Baths Co Ltd' was spelt out in a bill of exchange as 'Salt Water Baths Co Ltd', the directors who were the signatories on the company’s bill of exchange were deemed to be privately obligated to the payee of the bill. Equivalent doctrines were utilised in Nassau Steam 'Press v Tyler, situations 'The Bastille' Syndicate Ltd' was spelt out as 'Old Paris and Bastille Syndicate Ltd'. Two instances of the severity of the principle are Barber & Nicholls ltd v R & G Associates (London) Ltd and

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301 Irish Companies Act 2014
302 But not an order for the supply of Services; as Gower, Principles of Modern Company Law (3rd Stevens & Son, 1969) notes at p 116
303 The holder is the person to whom the document is addressed and who is to benefit by it Civil Service Co-Operative 'Society Ltd v Chapman (1914) TLR 376
304 (1889) 61 LT 23
305 (1894) 70 LT 376
306 (1981) 132 NLJ 1076
307 (1973) 117 JJ 631
Hendon v Adelman

In the foregoing case, obligation was enforced where ` (London)' was omitted from the company name on a cheque; in the subsequent case obligation was enforced on a cheque where `&' was omitted from the company name, ‘L & R Agencies Ltd’. The approval of the symbol ‘Co’ for 'Company' has been decided legally not to violate the clauses. However, a default to signalise by the utilisation of the proper term at the edge of the company’s name that the obligation of the shareholders is restricted will decrease debase of these statutory preconditions.

The executive or representative will be obligated under Part 14 s 875 of Companies Act 2014. Notwithstanding, if the company's name on the instrument is false description caused by the payee of the instrument. Accordingly, it is the responsibility of the executive officer or the representative to make sure that the name of the company is correctly written on the instrument before he endorses or approves it to be endorsed. By reference, in a case of Lindholst & Co A/S v Fowler, a case, bills of exchange arranged by the claimants indicated a company named 'Corby Chicken Co Ltd' only as 'Corby Chicken Co'. The respondent who had endorsed the bills on the authority of the company in the absence of removing the false description was held obligated on the bills. In a distinctive case of Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd, an instance, a bill of exchange was unsettled by the claimants on the respondent company. The bill and the method of acknowledgement had together been arranged by the claimants. The claimants were found to be precluded from asking solemnly for the private obligation of the undersigned for a false description of the company as 'M Jackson (Fancy Goods) Ltd'.

In the case of Lindholst, Donaldson MR differentiated the ruling in the case of Durham Fancy Goods on the basis that in that case, the arrangement of words for the acknowledgement had been mandated by the claimants and they were precluded by what they had mandated when in fact in the case at hand the arrangement of words for the acknowledgement had not been mandated by the claimants.

Apparently afterwards, the executive officers and the representatives of a company must excise huge concern to make certain that the company name is correctly written before endorsing or approving the allograph (signature) of bill of exchange, promissory note, Cheque or order for money or goods. An error of the most insignificant type perhaps imperils them to private obligation, regardless if they knew or not of the false description. The courts have apparently expressed that the courts will give slight help ensuing allograph (signature). To this end, correction will not be allowed if the reason is to abstain from private obligation under Part 14 s 875 of Companies Act 2014.

The obligation of the executive officer or representative is subject to his being the undersigned to the instrument in dispute or his having approved the endorsement of the instrument. Where there is no endorsement of the company's authority, there can be no obligation. In a situation, there is this kind of endorsement and it is requested to enforce private obligation not the real undersigned, on the contrary on the individual who approved the endorsing of the instrument.
It must be proved that the individual not solely approved the endorsing of the instrument, however, as well approved that the instrument be endorsed in a specific manner that the name of the company was not correctly written on it\textsuperscript{315}. The granting of this kind of approval is perhaps, notwithstanding, be construed by the courts in applicable instances. In instance like when the individual who approved, the endorsement was aware at the period of an error of the company’s name on the instrument\textsuperscript{316}.

Where the undersigned is approved to represent the company, the company will continue to be accordingly obligated on the instrument, regardless of the false description, since it can be recognised\textsuperscript{317}. The executive officer’s or representative’s obligation under S114 (4), afterwards, is subsequent or related to that of the company. It is not in the characteristic of an endorser’s or a signatory’s obligation. Accordingly, the protection which is approachable to endorsers and signatories are not accessible under S114(4)\textsuperscript{318}. And, it would emerge, the undersigned or the endorser is possibly authorised to reclaim damages from the company on its right in regard of any private obligation, fallen into\textsuperscript{319}.

(iii) Violation of restriction or disqualification order

Part 4 s 132 of Companies Act 2014 is Prohibition of undischarged bankrupt being a director or a secretary or otherwise involved in company. Whereas Part 4 s 132(2) of Companies Act 2014 is for a disqualification order for a disqualified director; Part 4 s 132(2) stipulates that:

“Where a person is convicted of an offence under subsection (1) the person shall be deemed to be subject to a disqualification order from the date of such conviction for such period as the court specifies if he or she was not, or was not deemed to be, subject to such an order on that date”.

Part 4 s 132 of the Companies Acts 2014 is targeted to prohibit the directors of a company which is in a bankrupt winding up from creating a new company and continuing business as theretofore.

For this reason, Part 4 s 133(1, 2, 3, 4, 5\textsuperscript{320} and 6)\textsuperscript{321} of the Companies Act 2014 stipulate for the enforcement of a prohibition mandate and an ineligibility mandate against directors, shadow directors, and additional executive officers of the company, in applicable situations. These are considered in more details in Chapter 28 of ‘The Law of Private Companies, Third Edition by Courtney, TB’. Violation of one or the other mandate perhaps construes an individual obligated for the indebtedness and obligations of the company. This kind of obligation meets standard as exclusion to the doctrine that more persons, especially shareholders, are not as a rule compelled to be obligated for the indebtedness and additional liabilities of the company.

\textsuperscript{315} [1985] BCLC 444
\textsuperscript{316} Ibid
\textsuperscript{317} [1970] 'Ch 85
\textsuperscript{318} [1979] 2 Lloyd's Rep 361
\textsuperscript{319} [1973] 1 KB 534; Such a right will, more often than not, prove worthless, since the company will (if the holders are choosing to move against the officers of the company itself) probably be insolvent
\textsuperscript{320} Irish Companies Act 2014
\textsuperscript{321} Ibid
Private obligation for violation of these mandates possibly emerges in these two approaches:

(a) If the prohibited or ineligible individual violates the mandate personally; or
(b) If other individual conducts on the instructions of a prohibited individual.

(a) Restricted or disqualified person acting in person

Part 4 s 132[1(a) & (b)], subsections 2 & 3 of the Companies Act 2014 stipulates that if any individual who is conditionally on these prohibitions or ineligibilities behaves in violation of them. And the company with which he afterwards came to be interested embarks on a bankrupt liquidation, possibly during the time interval he was engaged or inside 12 months of his purported being engaged, after:

‘the court may on the application of the liquidator or any creditor of the company, declare that such person shall be personally liable, without any limitation on liability, for all or any part of the debts or other liabilities of the company incurred in the period during which he was acting in such a manner or capacity.’

(b) Acting on the directions of a disqualified person

If a director, an executive officer, a member of a committee of Management, or trustee of any company behaves in compliance with the orders of a prohibited or ineligible individual irrespective of been aware that they are already Prohibited or ineligible. Such a person will be at fault for the violation under section Part 4 s 132[1(a) & (b)], subsections 2 & 3 of the Companies Act 2014. Furthermore, section 132 subsection 1 paragraph b of the Companies Acts 2014 stipulates that any individual found guilty under Part 4 s 132[1(a) & (b)], subsections 2 & 3 of the Companies Act 2014 are for not adhering in compliance with the instructions of prohibited or ineligible. The individual will at once spontaneously come into being privately obligated for the indebtedness of the company involved entered in the time interval which he was purportedly representing. Notwithstanding, he, request for this kind of compensation from this private obligation as the court, having view of the situation of the case, deems to be in accordance with the law and upright.

Extraordinarily, the obligation of individuals working on the instructions of ineligible individual appears to emerge separately if the company is bankrupt. However, ineligible individuals themselves would be exclusively privately obligated where the company goes into bankrupt or winding up. If the bankruptcy of the company is an element which will cause the courts to award compensation from the severe of section 132 subsection 1 paragraph would be continues to be conceived.

322 Notably, conviction for acting on the instructions of a restricted person does not attract operation of s 132.
323 Part 4 s 132[1(a) & (b)], subsections 2 & 3 of the Companies Act 2014
(iv.) Operating with lesser capital requirements:

If an individual comes into being the victim of prohibitions under Part 3 section 84(4) of the Companies Act 2014 which stipulates that ‘A company shall not purport to reduce its company capital otherwise than as provided for by this section’, he will perhaps not concur to the designation to an office or officiate in any way either personally or through another person as director or secretary or participate in the sponsorship or establishment of any company except if the company fulfills the determined capital mandates. In addition, he must in the days instantaneously prior to this kind of designation to an office or purported representing, convey to the registered office of the company a message notifying that he is conditional to this kind of prohibitions. If, having admitted this kind of notice and the company transacts business unless complying with the capital prerequisites in a justifiable time interval. And thereafter, undertakes ‘any transaction in contravention of this section shall be voidable at the instance of the company against any person (whether a party to the transaction or not) who had actual notice of the facts which constitute such contravention’, subsequently, by the integrity of Part 3, section 84 subsections 5 of the Companies Act 2014:

‘the court may, declare that any person who was an officer of the company while the company so carried on business and who knew or, ought to have known that the company had been so notified shall be personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct.’

Part 3 s 84 (6) of the Companies Act 2014 stipulates that:

‘If a company contravenes this section, the company and any officer of it who is in default shall be guilty of a category 3 offence.

This private obligation is distinctive from the obligation of a prohibited or ineligible individual under Part 4 s 132[1(a) & (b)], subsections 2 & 3 of the Companies Act 2014 which is not limited to the indebtedness or more obligations of the company emerging throughout any definite time interval. The individuals caused to be privately obligated perhaps, notwithstanding, request to the court for this kind of compensation in total or to a certain extent from private obligation, as far as the court deeming the situations of the case to seem proper.

Obligation to keep adequate accounting records (Failure to keep accurate records):

Part 6 s 281 of the Companies Act 2014 under obligation to keep adequate accounting records stipulates that: ‘A company shall keep or cause to be kept adequate accounting records’.

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325 See para [5.084], Courtney, TB. ‘The Law of Companies’ Bloomsbury Professional; 3rd Revised
326 Part 4 s 132[1(a) & (b)], subsections 2 & 3 of the Companies Act 2014
Whereas Part 6 s 282 of the Companies Act 2014 provides basic requirements for accounting records - The adequate or accurate accounting records could be either in the form of documents or otherwise, like on computer, electronically etc.

This Act also creates an obligation to keep adequate accounting records [Failure to keep accurate records]. This is also given in the Act as grounds for disregarding ‘Separate Legal Personality of Companies’ and make individual liable. Section 281 of the Companies Act 2014 imposes an obligation for Companies to keep adequate accounting records. Section 281 of the Companies Act 2014 prescribes all the companies to maintain accurate books of accounts, either in the pattern of documents electronically. These mandates are detailed exhaustively in the Companies Act 2014.  

If a company is in breach of section 281, 282, 283, 284 or 285 of the Companies Act 2014, and the court is fully convinced that the breach has:

(a). contributed to the company’s inability to pay all of its debts, or;
(b). resulted in substantial uncertainty as to the assets and liabilities of the company, or
(c). substantially impeded the orderly winding up of the company.

Thereafter, under section 286 of the Companies Act 2014 [i.e. (Accounting records: offences)], the court will perhaps, on the motion by the insolvency practitioner or any creditor or investor of the company, enforce private obligation for the indebtedness and additional responsibilities of the company without restriction on any individual or additional executive officers and preceding executive officers of the company who are in breach. The doctrine regulating this type of liability is the ‘Doctrine of Separate Legal Personality’

(ix) Unjustifiable and purported declaration of solvency (members’ voluntary winding up):

Part 4 s 210 under civil sanctions where opinion as to solvency stated in declaration without reasonable grounds stipulates that:

(1) Where a director of a company makes a declaration without having reasonable grounds for the opinion referred to in section 203(1)(f), 204(1)(f), 205(1)(c), 206(1)(b) or 207(1)(b), as the case may be, the court, on the application of— (a) a liquidator, creditor, member or contributory of the company or, in the case of the opinion referred to in section 206(1)(b), of the successor company (within the meaning of Chapter 3 of Part 9), or

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327 Irish Companies Act 2014
328 Ibid
(b) The Director of Corporate Enforcement may declare that the director shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company or Successor Company, as the case may be.

(2) If a company or, as the case may be, a successor company (within the foregoing meaning) is wound up within 12 months after the date of the making of a declaration and its debts are not paid or provided for in full within 12 months after the commencement of the winding up, it shall be presumed, until the contrary is shown, that each director is of appropriate to

(a). the company, or

(b). the merging companies –

who made the declaration did not have reasonable grounds for the opinion referred to in section 203(1)(f), 204(1)(f), 205(1)(c), 206(1)(b) or 207(1)(b), as the case may be.

(3) If the court makes a declaration under subsection (1), it may give such further directions as it thinks proper for the purpose of giving effect to the declaration.

For a, solvent members winding up of a company, section 580(2) Companies Act 2014, requires a statutory declaration of solvency, sworn by the company’s directors in the mandatory form as per section 580 of Companies Act 2014. The details of the claim needed to be specified in this kind of declarations are as per Part 4 s 207 under Declaration to be made in the case of members’ winding up of solvent company which provides that:

(1) Where the restricted activity is to wind up a company in a members’ voluntary winding up under section 579, the declaration shall state

(a) the total amount of the company’s assets and liabilities as at the latest practicable date before the date of making of the declaration and in any event at a date not more than 3 months before the date of that making; and

(b) that the declarants have made a full inquiry into the affairs of the company and that, having done so, they have formed the opinion that the company will be able to pay or discharge its debts and other liabilities in full within such period not exceeding 12 months after the commencement of the winding up as may be specified in the declaration.

(2) A copy of the declaration under this section shall be delivered to the Registrar not later than 21 days after the date on which the carrying on of the restricted activity concerned is commenced; if a failure to comply with this subsection occurs, a like power to that under section 203(4) is available to the court to declare valid for all purposes the carrying on of the activity.
If this kind of declaration has been sworn, and it is thereafter ascertained to the satisfaction of the court that the company is insolvent, section 580 Companies Act 2014 stipulates that:

"the court on the application of the liquidator or any creditor or contributory of the company may, if it thinks it proper to do so, declare that any director who was a party to the declaration without reasonable grounds for the opinion that the company would be able to pay its debts in full within the period specified in the declaration shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

The only excuse available to the director against this kind of private obligation is to prove that he had justifiable rationale for swearing the declaration. And it is to be construed up to the time the reverse is proved that there were this kind of justifiable rationale for the belief. What becomes justifiable rationale is not outright apparent, as there seem to be no legal judgements on this matter. Furthermore, one thing is apparent; directors should exercise maximum caution and should look for independent expert admonition prior to swearing a declaration of solvency. This is remarkably, hence, considering that in a situation in which the debts are not defrayed or disbursed totally within the time interval specified in the declaration.

The court may as well bring it to accomplishment, such additional orders as the court deems justifiable to uphold the declaration of private obligation. This could, as it has been proposed, include imposing total or portion of the company's debts and additional obligations on the belongings of the directors who breached.

(vii) Winding up of affiliated companies:

The doctrines put forward by Justice Costello in the case of Power Supermarkets Ltd v Crumlin Investments Ltd are to a great magnitude shown in section 599 Companies Act 2014 (sections 140 and 141 of the Companies Acts of 1990). Section 599 subsection 2 of the Companies Act 2014 gives the court the authority to order that any company that is or has been affiliated to the company being liquidated should pay a sum equal to the total or portion of all or any of the debts verifiable in that liquidation. Section 600(1 & 2) of the Companies Act 2014 empowers the court to direct, if two or more affiliated companies are being liquidated; That the companies are being liquidated conjointly as if the companies are one company.

331 Section 580 of the Companies Act 2014
332 Section 208 Companies Act 2014
333 Keane’s Company Law (4th edn, Bloomsbury Professional, 2007) par 40.7
334 Section 208(a &b) Companies Act 2014
335 Section 208 Companies Act 2014
337 (22 June 1981, unreported) HC; Also in par [5.052]
338 Section 600 subsections 1 & 2 of the Companies Act 2014
(viii) Fraudulent or reckless trading:

In Disregarding the separate legal personality of a company based on ‘Fraudulent or reckless trading’, the Companies Acts, as interposed by section 610 Companies Act 2014 stipulates that if, in the course of a liquidation or receivership, an individual is detected to have been culpable of ‘fraudulent’ or ‘reckless’ trading, the court could perhaps pronounce this type of individual privately liable, without specific curtailment of obligation for total or portion of the debts or additional obligations of the company as the court possibly order.

In section 610 of the Companies Act 2014, under civil liability for fraudulent or reckless trading of company, the court is empowered to disregard the Separate Legal Personality of a company and hold the defrauder individually privately liable. This applies in situations where in the process of liquidating a company or in the process of proceedings under Part 10 in connection to a company, it seems like, that:

(1) Any person was, while an officer of the company, knowingly a party to the carrying on of any business of the company in a reckless manner, or

(2) Any person was knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose.

3.3 OTHER LEGISLATION

The entire numbers of more legislative rules which engage the ‘disregard of the principle of Separate Legal Personality’ are the Capital Gains Tax Act 1975, the Taxes Consolidation Act 1997, and the Capital Acquisitions Tax Consolidation Act 2003, as updated. An exhaustive judicial reconsideration of these involved legislative rules is beyond the ambit of this thesis.

Notwithstanding, it will perhaps be remarked that the rules attempt to stop individuals from utilising companies to camouflage taxable private income and gains. The rules lay great emphasis on the extent of authority an individual applies through a company.

A distinctive aspect of the legislation is the idea of a ‘close company’, which, normally speaking is a company under the management of five or lesser individuals, or under the management of the ‘close company’s directors’. A huge number of Irish private companies are inside the definition of a ‘close company’. The taxation regulations guide rule of rewards or credits for a ‘close company’ to the ‘close company’s management is cumbersome

339 Section: 430 of the Taxes Consolidation Act 1997
A direction in innumerable regulatory statutes is the insertion of clauses that, if company directors, secretaries, managers and more this type of officers would be privately criminally obligated if the company is known to have violated the law. Clauses of this nature conform to an accustomed method:

‘Where an offence committed by a body corporate ... is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or a person who, was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly’.

For instance, this type of clauses are to be seen in section 80 of the Safety, Health and Welfare at Work Act 2005, and section 26 subsection 6 of the Competition Act 2002. The same types of clauses are to be seen in statutes spreading only as far behind as the Customs Consolidation Act 1876. These clauses have been characterised by the English courts as 'parasitic'. Therefore, the clauses create significant invasions into the principle of the ‘Separate Legal Personality’. And it appears, these clauses have been promulgated by the legislature with inappreciable concern for the principles of Salomon’s case, a case completely valuable to the courts.

It should be known, notwithstanding, that the clauses do not impel automatic or severe obligation on the directors, etc. The burden on the prosecution is to substantiate first that the company violated the law. There does not have to be a conjoint legal entity charge. Notwithstanding, that in a situation the company is disjointed or liquidated so that there is no security left to be charged, private obligation is probably still being enforced where the prosecution substantiates that law was violated or breached by the company during the company’s being.

Thus, there is no privilege in instantly liquidating a company with the intention that private obligation would probably thereby be circumvented.

The prosecution must as well substantiate that the person conceded or colluded at the conjoint legal entity (corporate) violation of law, or that the violation of law was ascribable to their breach. Manifold explanations of concede and collusion in the extended meaning of rules of this kind have been assumed by the courts through the years, and the ensuing suggestions arise:

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340 Hutchinson’s ‘Criminal Liability of Directors, Managers and Other -Similar Officers Under the Competition Amendment Act, 1996’ (1997) 4 CLP-47
341 Customs Consolidation Act 1876, 39 & 40 Vict c 36, ss 191 & 259; also the Merchandise Marks Act 1877, -50 & 51 Vict c 28, ss 2(2) and S as amended; and-the Stamp Act 1891, 54 & 55 Vict c 39, s 13. More recent examples from the Irish Statute Books include the Redundancy Payments Act 1966, s 52; the Protection of Employment Act 1977, s 21(3); the Factories Act 1955, s 100(5); and the Office Premises Act 1958, s 31(4).
342 [1997] 1 All ER 119
343 [1970] 1 All ER 189
345 And, perhaps, transferring its business to another company
- Concede and collusion, one and the other call for both to take into consideration, and understanding connivance in the conducts making up the violation of law;  
- An individual concedes to the carrying out a violation of law by his company if during the interval, the person is ‘aware of it and he agrees to it’;  
- Concede needs only that you concede to the performance; you do not have to understand that the conducts were unlawful;  
- ‘connivance … suggests to my mind some form of knowledge by the defendant that something was wrong, because you cannot connive at something unless you have mental knowledge that something is going wrong’.  

The outcome of these assertions of basic doctrine is that, with the specific purpose to concede or collude at conducts making up a violation of law, the person must understand of those conducts. In more extended meanings, in the criminal law the phrase collusion has been deemed to mean ‘willful shutting of the eyes’, ‘willful blindness’, ‘purposefully abstaining from ascertaining’; ‘willfully abstaining from knowing’; ‘deliberately refraining from making enquiries the results of which he might not care to have’ and ‘shutting his eyes to, the obvious’.  

With the specific purpose to collude, thus, there must have been evidences for which a person internationally overlooked, which would bring up doubt or would place a person on investigation.  

Default, which is perhaps substantiated in the substitute needs establishment of a violation of obligation. That an obligation continues relies on the person’s role in the company and the person’s skillful obligations. This type of obligations is perhaps as matter of right is assigned to the other person. In the case of Huckerby v Elliott, the Court of Appeal accepted an appeal against the unfavorable verdict of a director. It was decided that the director had, as a matter of right given up issues of formal permission to the other director of the company. Lord Parker CJ stated:  

‘…… I know of no authority for the proposition that it is the duty of a director to, as it were; supervise his co-directors or to acquaint himself with all the details of the running of the company.’  

It is not all this type of assignment of duty will exonerate the person of default. Notwithstanding, where the person understood of the specific events of the conjoint legal entity (corporate) violation of law, or had justifiably basis to deem that it was perhaps be perpetrated.  

He would be bound to proceed to obstruct it. In the case of Hirschler v Birch, consequently, the respondent director was found liable for breach for inability to ask advice from an authentic authority prior to a conclusive buy of high level brake lights. The legitimacy of the high-level brake lights was obvious to be questionable in the UK.

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346 (1991) 156 JP 463  
347 [1970] 1 All ER 189  
348 (4 June 1981) Crown Court, Kingston upon Thames, per Reuben J; also Secretary of State for Trade v Markus [1976] AC 35  
350 [19707 1 All ER 189 at 194  
351 [1970] I All ER 189  
352 [1987] RIR 13  
353 Ibid
A person will consequently be exonerated from obligation only possibly by granting of enjoiner at directorate level restricting illicit task\textsuperscript{354}.

The magnitude of the company will be of importance. In the case of Lewis v Bland\textsuperscript{355}, a Chief Executive Officer (CEO) was vindicated on an unfavorable verdict of breach that prompted the conjoint legal entity (corporate) violation of giving misleading details of car servicing conflicting with the Trade Descriptions Act 1968. The company involved was a big company, and the court perceived that the Chief Executive/CEO was empowered to assign a duty to his principal staff and could anticipate that the duty would be carried out in compliance with his directives.

Regardless several additional legislative rules do not very apparently allow the ‘disregard of the Separate Legal Personality of a company’. It has been remarked by Lord Diplock, in the House of Lords in a case of Dimbleby & Sons v National Union of Journalists\textsuperscript{356} that a ‘purposive interpretation’ of the rules of a statute probably because the interpretation that parliament premeditated the rule to allow this kind of ‘disregard’. Lord Diplock stated:

> 'My Lords, the reason why English statutory law, and that of all other trading countries, has long permitted the creation of corporations as artificial persons distinct from their individual shareholders and from that of any other corporation even though the shareholders of both corporations are identical, is to enable business to be undertaken with limited financial liability in the event of the business proving to be a failure. The 'corporate veil' in the case of companies incorporated under the Companies Acts is drawn by statute and it can be pierced by some other statute if such other statute so provides: but in view of its raison d'être and its consistent recognition by the courts since Salomon v Salomon and Co Ltd [1897] AC 22, one would expect that any parliamentary intention to pierce the corporate veil would be expressed in clear and unequivocal language. I do not wholly exclude the possibility that even in the absence of express words stating that in specified circumstances one company, although separately incorporated, is to be treated as sharing the same legal personality of another, a purposive construction of the statute may nevertheless lead inexorably to the conclusion that such must have been the intention of Parliament'.

In fact, Lord Diplock’s remarks disclose an understanding which has earlier-on appeared glaring from the preceding analysis in this thesis, that is, that the courts could possibly, at the time of interpreting rules of a statute deem it compelling to ‘disregard the separate legal personality of a company’ for the desired result of enforcing the statutory rules\textsuperscript{357}.

In *Meridian Global Funds Management Asia Ltd v Securities Commission*\textsuperscript{358}, the British supreme legislative body (the highest Court of Appeal for some Commonwealth states) held that:

\textsuperscript{354} (1991) 156 JP 436
\textsuperscript{355} [1985] RIR 171
\textsuperscript{356} [1984] 1 WLR 427 at 435; ([1984] 1 WLR 427) HL
\textsuperscript{357} Ibid
\textsuperscript{358} [1994] 2 NZLR 29; 1994) 7 NZCLC 260,473
‘the knowledge of the employees of the company who acquired shares for the company could be counted as the company’s knowledge for the purpose of determining the application of a disclosure obligation under New Zealand securities law. The employees in Meridian were two senior investment managers who were not even members of the company’s board. They could not be regarded as the ‘directing mind and will’ of the company as that term was understood prior to Meridian.’

Notwithstanding, Lord Hoffmann stated that:

‘the purpose of the statute in question was rapid disclosure of shareholdings and it was therefore appropriate to treat those in charge of the company’s dealings in the market on its behalf as its controllers for this purpose. A focus on ‘construction rather than metaphysics’ therefore also solves the first problem identified in relation to the directing mind and will test’.

The Meridian Global Funds Management Asia Ltd v Securities Commission [1994] 2 NZLR 291 case was one of the cases where there are various bases on which acts and states of mind could be attributed to a company, i.e. the attribution of Culpability and mens rea (Wrongdoing and Guilty Mind) to a company.

The Meridian Company was in breach of a requirement under New Zealand securities law to disclose its shareholding in another company; Meridian was held of the statutory provision.

And the two investment managers on Meridian fraudulently used the Company’s funds for their private businesses (Commingling). Therefore, the ‘Separate Legal Personality’ of the company was disregarded.

CHAPTER 4

SEPARATE LEGAL PERSONALITY OF A COMPANY (CORPORATION) IN THE STATE OF DELAWARE, UNITED STATES OF AMERICA.

What are Corporations in the United States of America?

‘Corporations’ are legal entities that are formed by States and Federal statutes. These types of Companies are regarded as much like persons in the eyes of the law. ‘Incorporated Companies’ possess legally enforceable entitlements, the capacity to take over debts and to disburse gains, the capacity to possess and convey property, the capacity to sign contracts, the obligation to pay taxes, the capacity to sue and be sued.359

359 § 3.02 Model Business Corporation Act 2010
The entitlements and obligations of a ‘corporation’ are autonomous and different from the persons who own or invest in the ‘corporations’ and normally known as shareholders. A company only paves the way for persons to manage the enterprise and shareholders partake in gains and deficits.

4.1 ORIGIN OF INCORPORATED COMPANIES (CORPORATIONS) IN USA

The idea of a ‘corporate personality’ trails its origins to between 753 B.C and A.D 1453 during the law of ancient Rome and moved ahead its way to the American jurisdiction through the British domains. After America became independent, the American States, not the Federal government, accepted authority over corporations.

Regardless, ‘corporations’ firstly worked for exclusively restricted uses, the Industrial Revolution hasten the development of ‘corporations’. The ‘corporations’ came to be the best method to manage a huge business establishment, combining a centralised supervision and management with average investments by an anticipated infinite number of persons.

The ‘corporations’ now remain normal type of enterprise establishment because, in theory, a ‘corporation’ can continue to be perpetually. Consequently, ‘corporations’, and not the ‘corporation’ shareholders or backers, is obligated for the ‘corporation’s’ contract. However, these benefits are not begotten without cost or expenses. An ‘incorporated company’ must comply with many formalities. A ‘corporation’ is accountable to the public, and is ruled by States and Federal Regulations.

Several States in the United States of America have drawn up their Statutes ruling ‘corporations’ centred upon the Model Business Corporation Act. This instrument was prepared by the American Bar Association Section of Business Law, Committee on Corporate Laws, and authenticated by the AMERICAN LAW INSTITUTE. The said instrument makes ready a framework for all features of corporate governance in addition to other features of corporations. Similar to other Model Acts, the Model Business Corporation Act 2010 is not under the circumstances intended to be assumed generally by the different States of the United States of America, but instead is intended as a guidance/directive to States of the United States of America when the States assume their own Acts.

4.2 TYPES OF COMPANIES (CORPORATIONS) IN USA

The types of Companies in the United States of America include: ‘Private Incorporated Company’, ‘Non-profit Company’, ‘Municipal Corporations’, or ‘Quasi-Public Corporations’. ‘Private Incorporated Companies’ are in business for profit, on the contrary, ‘Non-profit companies’ as a rule are intended to be benefit to the public. ‘Municipal corporations usually are cities and towns that aid the State to operate at the local level.

360 § 2.01 Model Business Corporation Act 2010
361 American Bar Association Section of Business Law
362 § 2.02 (b)(ii) Model Business Corporation Act 2010
363 § 1.28 (2)(i) Model Business Corporation Act 2010
364 The Model Business Corporation Act 2010
365 American Bar Association Section of Business Law, Committee on Corporate Laws
366 § 1.40(14c) Model Business Corporation Act 2010; [Model Non-profit Corporation Act]
‘Quasi-Public Corporations’\textsuperscript{368} would be deemed private companies. On the contrary, ‘Quasi-Public Corporations’ business assists the public’s needs, for example by offering utilities or telephone service.

Private ‘Incorporated Companies’ are two types, namely: Publicly ‘incorporated company’ and closely ‘held incorporated company’. Publicly ‘incorporated company’ has a large, number of financial backers known as shareholders. Characteristically, publicly held ‘incorporated companies’ are companies that market their shares through Securities and Exchanges Commission (SEC) to potential investors from the Public or that generally publish share prices that are as per routine publicly held\textsuperscript{369}.

The second type of Private ‘Incorporated Company’ is the closely ‘held incorporated company’. The closely ‘held incorporated companies’ have comparatively a small number of shareholders, normally between 15 and 35 or even smaller. Closely ‘held incorporated companies’ in most cases have their shareholders all in a single family, and few or no open market is available for the sale of their shares. One and all or majority of the shareholders assist in managing the enterprise. It should be noted that the sale or transfer of closely ‘held incorporated companies’ shares is restricted\textsuperscript{370}.

4.3 CREATING AN INCORPORATED COMPANY (CORPORATION) IN USA

A greater number of ‘incorporated companies’ are created by the endeavors of an individual named a ‘promoter’. A ‘promoter’ goes registering, incorporating and filing a company venture. A ‘promoter’s endeavors usually include planning for the required capital or investment. The ‘promoter’ uses loans, funds from financial backers, or the promoter’s own money. The ‘promoter’ gathers together the individuals and funds in the form of land, buildings, and leases required in managing the ‘incorporated company’ to accomplish the lawful prerequisite for the incorporation of a company\textsuperscript{371}.

The initial issue confronting the investors of a company is the State in which to incorporate the company. The solution to this issue frequently relies on the type of company. According, to the assumed facts, the two types of Private ‘Incorporated Companies’, i.e. ‘closely held’ and ‘large Public’ companies possibly can incorporate in one State. Small enterprises functioning in a specific State as a rule incorporate in that very State\textsuperscript{372}. Majority of the big companies choose State of Delaware as their State for incorporating their companies based on Delaware’s experience in managing corporation law.

Those forming a company (investors and shareholders) afterwards are required to conform to the procedures in the specific States’ Statutes.

\textsuperscript{368} § 1.40(9) & (11) Model Business Corporation Act 2010
\textsuperscript{369} § 1.40(18A) Model Business Corporation Act 2010
\textsuperscript{370} Model Business Corporation Act 2010
\textsuperscript{371} § 2.04 Model Business Corporation Act 2010
\textsuperscript{372} Model Business Corporation Act 2010
Company statutes differ from one State to another State; however, majority of the States need fundamental uniform basic facts in incorporating a company. Each Statute compels those incorporating a company to register an instrument generally named ‘the articles of incorporation’ or ‘articles of association’ and there is a payment for the filing fee to the Secretary of State's office. The Secretary of State's office scrutinises the filing. If the filing is authorised, the company is deemed to have been incorporated and have come into existence on the date of the first filing.

The ‘articles of incorporation’ or articles of association conventionally must consist of (i) The name of the company, which frequently must contain a word like ‘Company’, ‘Corporation’, ‘Incorporated’, or ‘Limited’, and possibly not seem likely too closely to the names of other companies in the State; (ii) The length of time the company will be in operation, which can be undying or renewable; (iii) The company's purpose, normally explained as ‘any lawful business purpose’ (‘Purpose Clause’); (iv) The share capital and types of shares that the company may issue and the rights and preferences of such shares (Capital Clause); (v) The address of the company's registered office, which need not be the company's business office, and the registered agent at that office who can accept legal Service of Process, ‘legal Service of Process’ is the delivery of a writ, summons, or other legal papers to the person required to respond to them; (vi) The number of directors and the names and addresses of the first directors; and (vii) Each investor's/shareholder’s name and address.

4.4 STATE OF DELAWARE IN USA, A SMALL STATE BUT A TREMENDOUS HUB OF COMPANIES

State of Delaware is probably the second smallest States in the United States of America. On the contrary, State of Delaware is the biggest in terms of Incorporating Companies as more than one third of Companies listed by the New York Stock and Exchange Commission is incorporated in the State of Delaware.

State of Delaware’s amenity for incorporating companies is explained by a coalition of history and law. However, today, State of Delaware’s Corporations law is not consequently less prescriptive and less strict than other State’s Corporation laws in the United States of America. State of Delaware could flaunt more corporations harmonious Statutes theretofore to Model Corporation Laws came into being practiced. In accordance therefore, Corporate Lawyers country-wide (in all the States in the United States of America) are more accustomed with the State of Delaware’s Corporation Law. The State of Delaware’s Statutes and case law provide certitude and easy accessibility.

Delaware, more other than any other State in the United States of America depends on franchise tax revenues. Hence, Delaware, more other than any other State in the United States of America

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\(^{373}\) § 1.22(a) Model Business Corporation Act 2010
\(^{374}\) § 1.25(d) Model Business Corporation Act 2010
\(^{375}\) § 2.03(a) Model Business Corporation Act 2010
\(^{376}\) § 2.02 Model Business Corporation Act 2010
\(^{377}\) § 4.01(a)(1) Model Business Corporation Act 2010
\(^{378}\) § 1.28(2)(i) Model Business Corporation Act 2010
\(^{379}\) § 2.02(2)(i) Model Business Corporation Act 2010
\(^{380}\) § 1.20(4)(iv) Model Business Corporation Act 2010
\(^{381}\) § 1.20(4)(ii) Model Business Corporation Act 2010
\(^{382}\) § 1.20(4)(iii) Model Business Corporation Act 2010
\(^{383}\) § 2.02(b)(1) Model Business Corporation Act 2010
\(^{384}\) American Bar Association, Section of Business Law, Committee on Corporate Law
\(^{385}\) Ibid
is impelled to continuing to be an accessible and pleasurable Incorporation site. Furthermore, Delaware proposes a standard of reliability and indestructibility. Delaware’s constitution prescribes a two-thirds vote of both legislative houses to amend its Corporation’s Statutes.\(^{386}\)

Delaware also has a competent court that is resourced by lawyers from the Corporate Bar. And Delaware’s highest court has same expertise in Corporation Law. Lawyers in Delaware work persistently to maintain Delaware’s corporate law up to date, efficient and formable. All these attributes conjoin to make Delaware the first State for incorporating companies.\(^{387}\)

4.5 KEY PLAYERS BEHIND AN ‘INCORPORATED COMPANY’ (CORPORATION) IN USA.

The key players in an ‘incorporated company’ are the shareholders\(^{388}\), directors\(^{389}\) and executives\(^{390}\). Shareholders are the financial backers, and members of, a company. The shareholders through voting choose the directors and at times vote out the directors through ordinary resolution. The shareholders sometimes must vote on critical corporate dealings or transactions in special resolution. The board of directors is the leading influential body.\(^{391}\) The directors are responsible for applying corporate fundamental principles and employing executives. The directors normally assign their responsibilities to conduct and supervise the company’s activities to the employed executives. The employed executives manage the daily routine of the commercial enterprise and give effect to the fundamental goals and strategies decided on by the directors.\(^{392}\)

I consciously skipped the shareholders at this stage of my thesis because the shareholders are only protected when the ‘Separate Legal Personality’ of a company is disregarded. In any circumstances, the shareholders are not all that involved when the ‘disregarding’ is been enforced.

DIRECTORS: Federal and States Statutes consider that a company’s enterprise and activities will be controlled by the board of directors or through the board's authority or leadership. The directors frequently delegate to corporate management their authority to draw up policy and to control the commercial enterprise. In closely ‘held incorporated’ companies, directors usually engage themselves more in administration than their colleagues do in large ‘incorporated companies’.

Federal and States Statutes authorise directors to decide whether to declare dividends.\(^{393}\) The directors are also authorised to put forward significant corporate amendments, for example mergers or changes to the ‘articles of incorporation’ and to refer proposed changes to shareholders.

Majority of the boards set up committees to deal with highly specialised business on hand, like litigation, however, the board itself must deal with significant business on hand. The directors as a rule receive fees and frequently get motivation plans that can complement that wages.\(^{394}\)

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386 American Bar Association, Section of Business Law, Committee on Corporate Law
387 Ibid
388 § 1.40(21) Model Business Corporation Act 2010
389 § 1.40 (18B) § 1.43 Model Business Corporation Act 2010
390 § 1.40(20) Model Business Corporation Act 2010
391 The Model Business Corporation Act 2010
392 Ibid
393 The Model Business Corporation Act 2010
394 The Model Business Corporation Act 2010
Either the ‘articles of Incorporation,’\textsuperscript{395} or ‘bylaws’ conventionally restrict the number of directors and the contractual duties of the directors. The articles or bylaws also restrict the directors' chances to amend both their numbers and contracts. The shareholders’ power of dismissal operates as a control on directors who possibly desire to perform in a manner that is contradictory to the desire of many shareholders. The directors owe fiduciary legal duties to operate for the success of the company. As well, the fiduciary legal obligations function as controls on directors\textsuperscript{396}.

The directors’ fiduciary legal duties are classified into three paramount categories namely: the legal obligation of care, the legal obligation of loyalty, and legal obligations imposed by the three common law duties. Statutes add to these three common law duties. Customarily, a fiduciary legal obligation is the duty to conduct in the interest of the other - in this instance, the company, whereas, the individual benefits are of less important. A fiduciary takes up an official capacity of confidence for another and obligates to the other a top-level degree of Good Faith and obedience\textsuperscript{397}.

A director owes the company the legal obligation to handle the company’s dealings with merited caution\textsuperscript{398}. Federal and State Statutes normally interpret exercising ‘due care’ as working in ‘Good Faith’. It is exercising the caution that a generally advertent individual would exercise in a same official capacity and circumstance. Due care is officiating in a manner that the director rationally believes is in the company’s best interests. United States of American Courts occasionally outguesses directors; however, the Courts normally adjudicate individual legal obligation for corporate damages if there is wrongful conduct or ‘Negligence’\textsuperscript{399}.

Conflict of interest (wrongful conduct) dealings evoke queries about directors’ ‘duty of loyalty’. A director owes the company the duty to avoid conflict of interest. A conflict of interest is when a director is on the two sides of the same dealing. The director acts for self-interest or as another individual on one side and the other side, acts on behalf of the company, i.e. as a company’s representative in the same dealing. Conflict of interest or wrongful conduct perhaps jeopardises a company because the company is probably handled fraudulently. If a transaction is queried, the burden of proof that such a transaction was in fact unobjectionable lies on the director\textsuperscript{400}.

Wrongful conduct normally happens in one of these four instances: (i) Transactions involving a director and the company. (ii) Transactions involving companies if the one and the same director is working for both companies’ boards of directors. (iii) Transactions by a director who capitalises on the privilege of an opportunity for transactions that if contested perhaps would have been for the company. (iv.) Transactions by a director who competes with the company\textsuperscript{401}.

\textsuperscript{395} Ibid
\textsuperscript{396} § 2.02(5) Model Business Corporation Act 2010
\textsuperscript{397} § 2.02(5) Model Business Corporation Act 2010.
\textsuperscript{399} see §§ 7.04, 7.28, 10.22 Model Business Corporation Act 2010
\textsuperscript{400} The Model Business Corporation Act 2010
4.6 SHAREHOLDERS AND DIRECTORS FIDUCIARY OBLIGATION IN USA

States Laws frequently enforce more duties and obligations on directors as fiduciaries to a company. These Statutes regulate actions like:

(a) Disbursing dividends when a law or articles of the law forbid disbursing dividends. (b) Purchasing shares when a law or articles of the law forbid purchasing shares. (c) Assigning tangible assets to owners when winding-up without settling a company's indebtedness, obligations or liabilities. (d) Disbursing a forbidden loan to the other director, an employee or an owner.

When a court discovers that a director has breached an obligation, the director regardless, could perhaps not be individually legally responsible. Several laws in Delaware oblige or authorise companies to recompense a director who breached an obligation but operated in good faith. Several laws oblige or authorise companies to recompense a director who obtained no forbidden individual profit. Finally, several laws need or authorise companies to recompense a director who rationally believed, and that the conduct was legitimate and in the company's most interests. Indemnification in this context connotes that the company repays the director for expenditures made for justifying himself or herself and for costs he or she defrayed thereafter been defeated or paying compensation.

The courts interpret the above situation from a contractual point of view under Agency Relationship, which implies that Agency Contract exists between the director and the company. Section 18-303 of the Delaware Limited Liability Company Act i.e. a Hybrid Company Act, DEL. CODE ANN. tit. 6, §§ 18-10118-1109 (2003) states that "except as otherwise provided by the Act, the "debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the LLC/Hybrid Company". Additionally, section 18-303 of the Act provides that "no member or manager shall be "obligated personally for any such debt, obligation or liability .... solely by reason of being a member or acting as a manager" of the "LLC/Hybrid Company".

Accordingly, as per the Act, a limited liability company is bound for its debts and liabilities. The shareholders and the directors should not be personally responsible for their transactions connecting with the limited liability company. Concerning subsequent sections of the Act, the Act unambiguously considers in advance that the shareholders and the directors will have Agency Powers, whereby the Doctrine of Vicarious liability applies.

In conformity to the requirements of the Act, except conversely stated in the operating contract. Every one of the shareholders and the executives, if any, has the legal power to oblige the limited liability company "LLC/Hybrid Company". Assumed the Act's comprehensive limited liability clauses, the use of agency powers does not evoke individual legal obligation.

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402 (2009) JMLC 12(1), 7-18 at 8 by Benton E. Gup Accessed on September 22, 2016 @8.00pm from Lexis
403 William J. Carney, James Howard Candler, Limited Liability, 1999, 5620, Professor, Emory University, School of Law
404 State of Illinois (2004), Providence Bank, "The FDIC considers banks chartered as LLCs to be "incorporated" for purposes of being eligible for insurance (FDIC, Limited Liability Companies, 2003)"
Officers (Executives): The responsibilities and authorities of corporate executives can be seen in statutes, articles of incorporation, bylaws, or corporate resolutions. Several Statutes need a company to have exact executives. More Statutes only demand that the bylaws include details of the executives. Executives normally officiate at the desire of those who selected them. The executives usually can be dismissed with or without reason. (Election by Executives or directors)\textsuperscript{405}, regardless, several executives endorse employment contracts.

Directors function as a company's agents and can bind the company and agreements. Innumerable parties who transact with Companies demand that the board adopt a resolution consenting any contract bargained by an executive as an irrefutable manner to obligate the company to the contract. Without a defined resolution, the company notwithstanding could perhaps be obligated if it allowed the contract by consenting to its profits. In the same way, if the executive seemed to have the power to obligate the company. Courts deal with companies as having recognition of facts if a corporate executive or worker has that recognition.

Comparable to directors, executives owe three types of fiduciary duties notably ‘good faith’, ‘diligence’ and ‘a high degree of honesty’ to the company. All the same, majority of the lawsuits concerning fiduciary duties connects the directors, not executives\textsuperscript{406}.

The courts interpret the above from a contractual point of view under Agency Relationship. Accordingly, as per Section 18-303 of the Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6, §§ 18-10118-1109 (2003), a limited liability company is bound by its debts and liabilities. The shareholders and the directors should not be personally responsible for their dealings on behalf of the limited liability company. Concerning subsequent sections of the Act, the Act unambiguously considers in advance that the shareholders and the directors will have Agency Powers, whereby the Doctrine of Vicarious liability applies. In accordance with the Act, except contrarily stipulated in the operating contract, every one of the shareholders and the directors has the entitlement to oblige the limited liability company. Assumed the Act's comprehensive limited liability clauses, the use of agency powers does not evoke individual legal obligation\textsuperscript{407}.

4.7 SEPARATE LEGAL PERSONALITY OF A COMPANY IN THE STATE OF DELAWARE UNITED STATES OF AMERICA.

Commencement, identities and purposes of limited liability companies (LLCs) in USA:

In the State of Delaware, United States of America, a limited liability company (LLC) is a type of business that provides its "proprietors" who are referred to as "members," limited liability status from the company's debts and legal responsibilities to pass-through taxation.

\textsuperscript{405} Financial Crimes Enforcement Network (2006, p. 7) and The US Government Accountability Office (2006), list California, Delaware, Florida, New York and Texas as the top five states with LLCs.

\textsuperscript{406} US Government Accountability Office, 2006 This source provides also information about state requirements for LLCs.

\textsuperscript{407} Crimes Enforcement Network -- FinCEN, 2006
The proprietors or members of LLCs can be individuals, corporations, other LLCs, or foreign entities\(^{408}\). In addition to the advantage of being a ‘limited liability company’, limited liability companies (LLCs) as well have more advantages. For instance, Delaware asks for merely restricted information when a limited liability company (LLC) is established. The limited liability companies (LLCs) can be established and managed by representatives or appointee incorporation services. A search from Google search engine of "Delaware company establishment," disclosed ‘240,000 Ç hits’. Several of the patronised links proposed to establish a limited liability company (LLC) on line for a fee as minimal as $75 within a day.

Limited Liability Companies (LLCs) originated in the United States of America as far back as the eighteenth and nineteenth centuries almost at the same era when ‘Separate Legal Personality’ Doctrine was established in Salomon v Salomon & Co. Ltd (1897). A period when commercial entities were more interested and involved in business costs instead of the liability of the Company’s members. The disputed point centered on competences of externalizing the costs of commercial enterprise transactions instead of on agent-ship costs.

It was between the 1960s and 1970s that the significance of the ‘contract obligation’ and thereafter, ‘tort obligation’ of the company’s shareholders began to take the extraordinary significance with the doctrine of ‘Separate Legal Personality’ as the focal matter of concern\(^{409}\). At this point, it became significant for business owners to choose either to carry out business in their private legal right or in ‘Separate Legal Personality (legally incorporated entity) capacity. If it is in ‘Separate Legal Personality’ capacity, it would have a different ‘legal personality separate’ from the business owner.

‘Separate Legal Personality’ is the fundamental characteristics of a corporation being the detachment of debts of the incorporated business from the private estate of the business owner. This has an important effect as it separated the private assets of the business owner from those of the incorporated business with the impact that the private estate cannot be used to reimburse the debts of the incorporated business. (SBDLG) The American Bar Association Legal Guide for Small Business Paperback - October 24, 2000 by American Bar Association (Author), ABA (Author)

The earliest State in 1977 and the 50\(^{th}\) State in 1997 authorising the establishment of Limited Liability Companies (LLCs) were Wyoming and Hawaii respectively. The formation of Limited Liability Companies (LLCs) has been tremendous. There were approximately 8.9 million corporations recorded in the United States of America, and approximately 3.8 million Limited Liability Companies (LLCs) were formed in the year 2004. One million, and sixty-eight thousand, nine hundred and eighty-nine (1,068,989) Limited Liability Companies (LLCs) were established whereas eight hundred and sixty-nine thousand, six hundred and ninety-three corporations were registered. This implies that more Limited Liability Companies (LLCs) were formed in the year 2004 [(SBDLG) Small Business Development, A Legal Guide].

Excitingly, Provident Bank LLC was the earliest Limited Liability Company (LLC) commercial bank established in 2004 in South Holland Illinois as an FDIC insured state non-shareholder bank\(^{410}\).

\(^{408}\) Fundamental to the opposition of management and the shareholder's position, Berle and Means, The Modern Corporation and Private Property (New York: Macmillan 1933).


It is important to note that like Provident Bank LLC, the enormous greater numbers of Limited Liability Companies (LLCs) are legal ventures. In the year 2005, the total of Limited Liability Companies (LLCs) had increased to 4.9 million. The following States - Delaware, California, Florida, New York, and Michigan have the most number of functioning Limited Liability Companies (LLCs). Based on critical evaluation carried out by the International Association of Commercial Administrators (FDIC, Limited Liability Companies, 2003), Delaware has the least creation and publishing prerequisites for apparentness among the 47 States in the United States of America that were re-examined by the International Association of Commercial Administrators (FDIC, Limited Liability Companies, 2003).

Three States, namely New York, Michigan, and Colorado were not far behind in the ranking. Notwithstanding, barely a minimal number of Liability Companies (LLCs) are utilised for illegitimate uses, such Limited Liability Companies (LLCs) would have its ‘Separate Legal Personality’ been disregarded, and this is the point of concentration of this thesis.

However, the substantial contribution of legal channels through which a broad diversity of business activities is conducted is the evolvement of ‘market-based economies’. These legal instruments can also offer catchy opportunities for illicit dealings such as tax evasion, drug trafficking, human trafficking, evasion of regulation and money laundering and the financing of terrorism (ML/FT). Limited Liability Companies (LLCs) make up one of the dominant kind of corporate tools used by the defrauders. Concealment and adjustable laws of incorporation are the two dominant features of Limited Liability Companies (LLCs). These two dominant features accelerate the use of Limited Liability Companies (LLCs) for illegitimate objectives. The elusion or non-revealing of available facts concerning the ownership of this type of companies makes it hard, perhaps impracticable for law officers to hunt the legality of such companies’ activities.

In addition to being elementary and expeditious to establish, Limited Liability Companies (LLCs) can have complicated terms with many levels of ownership that are devised to conceal the authentic individuality of the shareholders. In the state of Delaware, for instance, each corporation must have a recorded office in the State. The registered office is not required to be the place the corporation carry on its dealings, (US General Accounting Office, 2000). As majority of the states need the Limited Liability Companies (LLCs) to place on record sporadic Limited Liability Company’s annual report appending the names of the managers; A handful of the states need the Limited Liability Companies (LLCs) to reveal its shareholders. None of the states need the Limited Liability Company reporting available facts concerning beneficial ownership. Beneficial owners are the persons who own or carry out fundamental active management over a...
Limited Liability Company (legal entity), activity, dealing or structure. The beneficial owners are perhaps to be shown on the company’s document as the owners.

Thus, Limited Liability Companies (LLCs) can camouflage the authentic individualities of the Limited Liability Companies’ (LLCs) shareholders thereby making ‘disregarding the Separate Legal Personality’ completely useless.

4.8 LIMITED LIABILITY IN THE UNITED STATES OF AMERICA CORPORATE LAW

i. The law of corporations

The disputed point on the significance of limited liability in United States of America corporate law received novel sudden forces by contemporary doctrines. The contemporary doctrine is "nexus of contracts theory/doctrine", a doctrine that is seeing the corporation as ‘a nexus of contracts’. Thereafter 1980, "nexus of contracts theory/doctrine" relaxed the foregone fixed idea on the duplicity between company controllers and the shareholders by reinstate themes of the foregone debate on the legitimate characteristic of a corporation. The accustomed contention aroused within the framework of the corporation as a ‘separate legal entity’ which is apparently distinct from the corporation’s owners.

Again, there has been the impression that the ‘separate entity’ has been allowed by the authorisation of the state. The prescribed owner obligation appeared to be a normal aftereffect of the proportion of the ‘company's separate identity’ when in fact, the legitimate status of such corporation was literally interrelated to its (statutory) intentions (the "ultra vires doctrine"). [EBOR (2000) 2: 317-352 at 323] In the year 1937, Coase put forward the query if and under which situations the operation of ‘added value transfer (with positive transaction costs)’ should be completed through ‘market mechanisms or within the enterprise’. In the year 1980, on the rationale of Coase's thoughts and thereafter, economists had explored the contractual dealings among the parties concerned in a corporation. The deliberation focused on the inside composition of a business establishment and its ‘contractual’ essentials. The

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414 From the economics literature considered in the US legal debate see for example:

415 Jensen and Meckling, ibid., at p. 311; Hansmann, "Ownership of the Firm", 4 J. L. & Econ. (1988) 267-304 (269-272); in legal literature see Fischel, supra n. 15, 1261f.

416 Easterbrook and Fischel in their fundamental work "The Economic Structure of Corporate Law" (1991) 8, equally refer to the connection between the contractual foundations of a corporation and the mechanisms of competition in Adam Smith, The Wealth of Nations (London 1776).


418 Easterbrook and Fischel, 52 U. Chi. L. Rev. (1985) 89-117 (94f)

419 Easterbrook and Fischel, 52 U. Chi. L. Rev. (1985) 89-117 (95)

420 Easterbrook and Fischel, 52 U. Chi. L. Rev. (1985) 89-117 (95f); Manne, "Mergers and
belief that the ‘separate identity of a corporation’ is a ‘legal fiction’ arising in the main meaning of ‘contractual’ dealings among ‘separate production factors’, especially the shareholders of the ‘share capital’\(^\text{421}\)' is of a major significance to the United States of America ‘corporate’ doctrines. By adding of the ‘contractual element’ in the corporate abstract idea, the United States of America law-abiding literature and jurisprudence could be able to think about ‘market mechanisms’ as added decisive factors of a corporation.\(^\text{322}\) What is the importance of limited liability in this extended meaning?

ii Shareholder Limited liability from a contractual point of view:

The commercial law genius partaking in the aforestated contention asserts that limited shareholder liability is a major contributing force for acquiring the ‘contractual mechanism’ within the corporation\(^\text{423}\).

The discontinuance of limited liability would jeopardise the operative of the capital market, which subsequently, makes up the fundamentals for the ‘share-holders’ agreements’. Frank Easterbrook and Daniel R Fischel are of the view that limited shareholder obligation reduces the dealings costs. And in consequence facilitates the effective operative of the ‘capital markets’ which subsequently, by reducing the ‘capital costs’, raises output and civil benefit. These authors contend saying that because of the shareholders’ limited liability, the shareholders abstain from persisting on a thorough superintendence of the company’s management. Whereby, the advantages of specialisation may be completely used\(^\text{424}\).

Alternatively, multifariousness and sloth seem to be the greatest basis approaches for corporation owners (‘Shareholders’). Then again, owners perhaps refrain from thorough expense check mechanisms pertaining to the financial status of their co-owners. In the light of an unlimited liability, the company owners would feel the continual absolute requisite to persistently make certain that the financial status of their co-owners are enterprising to save the common liability assets of the company. In addition to that, the owners ensure that their own vulnerability is at justifiable extent.\(^\text{325}\) Thus the limitation of liability expedites the assignment of company shares. Thereafter, it strengthens the supervision of the company’s management using the help of the market\(^\text{426}\) to transfer shares into identical resources not depending on the financial status of the share-holders. The shares monetary

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\(^{424}\) United States v. Bestfoods, 118 S. Ct. 1876 (1998); 42 U.S.C. 9607(a): "... (1) the owner and operator of a vessel or a facility.


worth being evaluated only using the help of the capital markets.\footnote{427}

Furthermore, limited liability empowers more effective innovation\footnote{428} to assist businesses to hold capital costs at minimal and empowers the company controllers to make the best of its business ventures resolutions. Accordingly, equal vulnerable tasks are probably undertaken with justifiable chances for achievement without placing the company shareholders at vulnerability of Bankruptcy.\footnote{25} In the absence of ‘limited liability’, multiple favorable yet vulnerable tasks would at no time be available, and citizenry would be subjected to a decline of benefit.

4.8a DISREGARDING SEPARATE LEGAL PERSONALITY IN THE UNITED STATES OF AMERICA LAW IN PRODUCT ENVIRONMENTAL LIABILITY:

In the pursuit of ‘product and environmental’ accountability, the legal defence for limited owners’ liability has been contended in words with readmitted passion in the United States of America.

In the year 1995, an Appellate Court imposed product liability duties on Dow Chemical, an institutional investor company possessing 50\% of the shares of the respondent for silicone breast implant patients\footnote{429} A Supreme Court judgement\footnote{430} in June 1998 in a case of United States of America v. Bestfoods expressed and made known the bases for the liability of major shareholders for ‘environmental damage’ spurred by their subordinate companies as provides by § 107 (a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

\footnote{427} For example: Bundesgerichtshof (BGH, Federal Supreme Court): BGHZ 54, 222; BGH NJW (1979) 2104; BGH IM (Lindmaier-Mohring) Nr. 124 zu § 276; Bundessozialgericht (BSG, Federal Social Court) NJW (1984) 2117
\footnote{428} Thus, Bundesverfassungsgericht (BVerfG, Federal Constitutional Court) BVerfGE 18, 224, 235; BGHZ\textsuperscript{54}, 222, 224; equal-ly similar BGHZ 20, 4, 11; BGHZ\textsuperscript{61}, 380, 383f.; BGHZ\textsuperscript{6S}, 312, 314f.; BGHZ 78, 318, 333. Latest rejection of disregarding limited liability in BSG ZIP (1996) 1134; Bundesarbeitsgericht (BAG, Federal Labor Court) BAG ZIP (1999) 24; BAG ZIP (1999) 878
\footnote{430} BGHZ\textsuperscript{95}, 330 (Autokran); BGHZ\textsuperscript{107}, 7 (Tiefbau); BGHZ\textsuperscript{115}, 187 (Video); deviating therefrom BGHZ\textsuperscript{122}, 123 (TBB)
It is hard to ascertain the liability of a holding company for its subsidiary companies within European on product liability, which in this regard disclose a substantial insufficient legitimate safeguard. In the European Union, ‘Product Liability Directive’, exclusively manufacturers Articles 1, 3; importers or suppliers Articles 3 paragraph 4 are held liable. The liability of a holding company existence is restricted to issues in which the subsequent returns to the public by inserting its trademark on the product as Articles 3 paragraph 4 stipulates. In any event, the holding company must have been participating in the supply of the faulty goods and this kind of participation must have been apparent to the public.

In the circumstances of German law, multiple efforts have been made to clarify the aforesaid legal problems of direct obligation. With regards to the German law of GmbH, that is, the legal form for close Corporations, which its shares are not sold publicly. The concept of a direct owner obligation has been carefully considered with the greatest caution. Ensuing multiple efforts to set up a doctrinal perspective for the direct obligation of GmbH owners, the courts up to now allow at the very least for very infrequent examples of this kind of disregarding of the separate legal personality in a way that harms the owners of a company.

Often, the courts stress that the distinctive feature of a legitimate existence (the Separate Legal Personality) should not be readily disregarded. Accordingly, the separate legal personality would probably be disregarded if the "reality of life", "the power of the facts" or thrifty restraints compulsorily compel the Separate Legal Personality to be disregarded. In the law of corporation groups, creditor safeguard is obtained by compelling the dominant company to protect the deficit of the allied business establishments. This liability pertains to the cases in which a domination of contractual agreement or a profit transfer agreement is perfected among the controlling business establishment and the subordinate in accordance with § 302 Aktiengesetz (AktG) German Law on Stock Corporations (i.e. the Law of marketable share companies) European Union Council Directive transposed into German Law.

This Directive is also transposable into Irish Law since Ireland is a Member State of European Union. In this instance, a person talks of a competent genuine group of companies, where the legislative mandates, under the liability to compensate, cannot be separated in the understanding of §311 Aktiengesetz (AktG) German Law on Stock Corporations (i.e. the Law

\[431\] As to the interdependence between the provision of liability and corporate as well as group law in Germany: Bri-iggemeier, "Unternehmenshaftung für 'Umweltschäden' im deutschen Recht und nach EG-Recht" [Liability of Enter-prises for "Environmental Damages"; The Overlapping between Public Law and Organizational Requirements; Influences of Corporate and Civil Law]


\[434\] Hereto see Adams, supra n. 19, 53-70; Lehmann, supra n. 4, 357-370.


At the very least, if group features and Tort obligation features are thought about jointly, it is feasible to as a matter of right, summarise the requisites of the group corporations.\footnote{Posner, "The rights of creditors of affiliated corporations", 43 U. Chi. L. Rev. (1976) 499-526. This effect equates with an insurance against losses for the benefit of the shareholders.}

In most cases of review, these doctrines most frequently utilise the requisite of a distributed administrative functions of the Group Corporation and administration as a channel to acquire information that the lawful division between the holding corporation and the subordinate corporation will as well be regarded in the aspect of not involving a contract obligation.

Thus, in the conclusion, the authoritative points of view for the formation of holding company obligation will not be those of ‘Tort Law’ other than those pertaining to the structural boundary circumstances of the organisation.

In the United States of America, ‘the law of environmental and product liability’ has been practiced on novel basis proving the obligation of the holding company as a dominant stockholder of the obligated corporation. In comparison with German procedure, in United States of America Courts, the disregarding the veil of the Separate Legal Personality of an incorporated company is a part of the mainly often argued points and concluded points in dispute pertaining to Corporate law.\footnote{Fletcher, § 41, 602-724; Rands; For a consideration of more recent types of companies in US corporate law see Matheson and Eby, "The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: codified the Test for Waiving Owners' Limited-Liability Protection", 75 Wash. L. Rev. (2000) 147-193; Nacke, Die Durchgriffschaftung in der U.S. amerikanischen Corporation [Piercing the Corporate Veil in the U.S.] (Mi-inchen: VVF 1988)}

In the background of the present environmental and product liability law, the specific discussions are of the greatest substance and concern. Novel cases transacting with the environmental and product liability need a critical examination of the circumstances for the limitless liability of the dominant stockholder. This is particular to the corporation controlling an association of a company in the United States of American corporate law.\footnote{Sic. Judge Cardozo in one of the earliest decisions on Piercing the Corporate Veil: Berkey v. Third Ave. Ry., 155 N.E. 58, 60 (N.Y. 1926).}

To realise the preceding goals, we will primarily summarise the deliberations in the United States of American corporate law relating to the significance of limited stockholder liability, - (under section 2 of our analysis) See §102(b)(6) and §106 A of The Delaware General Corporation Law (Title 8, Chapter 1 of the Delaware Code) which is the statute governing corporate law in state of Delaware assimilating the basic significance of limited liability, as required, we will be able to ascertain the ground rules for disregarding it, - (under section 3 of our analysis) See §102(b)(6) and §106 A of The Delaware General Corporation Law (Title 8, Chapter 1 of the Delaware Code) which is the statute governing corporate law in the United States of America state of Delaware. On this ground, we shall conclusively be able to introduce the most recent determinations on the environmental and product liability of dominant stockholders in a corporation association into point of view - (under section 4 of our analysis) See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). A review of the influences for European and German law will finalise our analysis under section 5 of our analysis.
Notwithstanding, the prevalent benefit of limited liability is arguable. In a situation the latter empowers the company to charge the expenses of the company’s doings on the third parties without the third parties’ assent.\(^{440}\) And it is only by introduction of the benefit and the allied expenses into the hands of same company. Then the law will allow an actionable and unbiased point of view in all areas of financially prudent interrelated operation, by ensuring that ‘market competition’ is a managing device.\(^{441}\) In the area of corporate law, this kind of mandatory factor is clearly stated in the request for a focalisation on managing and legal obligation\(^{442}\). Whether expenses are to be externalised or not, it is carefully weighed against the probability of the company creditors consenting or not consenting to the related aftermaths.

Thus, we must differentiate between negotiated creditors who resolve to keep on a connection with the pertaining corporation and creditors who purport none negotiated obligations, not having preferred to have any connection with the company. The critics of the United States of America ‘limited liability’ are perhaps divided into two groups, on one hand, the first group that strives at better security for negotiated creditors. On the other hand, the second group that aims to disfavor ‘limited liability’ in high favor of none negotiated creditors. Lenders for instance, infer that ‘limited liability’ passes on the potential danger of financially unsoundness from the stockholders to the creditors.\(^{443}\)

Notwithstanding, negotiated creditors are entitled to have security only if they have been indentured with the company without knowing the monetary status of the company. On the other hand, as duly inserted by Posner, this kind of creditors would be rewarded for their raised potential danger by exorbitant prices or additional negotiated favors.\(^{444}\)

iii. Disregarding shareholders' limited liability by disregarding the Separate Legal Personality in the United States of America. The most significant area where the shareholder limited liability has been disregarded in the United States of America is disregarding the ‘Separate Legal Personality’ of company or "disregard doctrine" in legal responsibility cases.\(^{445}\) The fundamentals of this kind of a theory is the notion that ‘limited liability’ is a ‘state-granted privilege’, that perhaps is being perverse by deception.\(^{446}\) Notwithstanding, as for the instances of this kind of perversion deception, the courts were accosted with "mists of metaphor".\(^{447}\) Even the originator of the phrase "veil piercing" ("disregarding Separate Legal Personality"), Maurice Wormser who was as well centered his conception on the concept of a ‘state-granted’ limitation of liability. He was not able to propound a helpful doctrine; hence, he left the courts with an extensive

\(^{440}\) Berkey v. Third Ave. Ry., ibid., 61
\(^{441}\) Wormser, "Piercing the Veil of Corporate Entity", 12 Colum; L. Rev. (1912) 496-518
\(^{442}\) Powell, Parent and subsidiary Corporations (Chicago: Callaghan 1931) 4-6
\(^{443}\) Powell, ibid., 8-34, 54-81; on these factors in detail see Fletcher, § 41.30-41.60, 661-706.
\(^{445}\) A classic decision is Minifie v. Rowley, 202 P. 673, 676 (Cal. 1921); for German literature on the Californian practice: Nacke, supra n. 34, 159-209.
\(^{446}\) See for example Easterbrook and Fischel 54f; with a view to the limited liability types of companies in US corporate law see Matheson and Eby, supra n. 34,149-151.
\(^{447}\) On the legal practice in detail see Alting; Thompson, 76 Cornell L. Rev. (1991) 1036-1074; for the recent German literature see Meier, supra n. 34, 372-427; Merkt, supra n. 34, 216-226
power of choosing in this regard.\textsuperscript{448}

Ultimately, Powell evolved three prerequisites for disregarding the limited liability of a holding company\textsuperscript{449}. The initial prerequisite is that the subordinate company must be wholly supervised and influenced by the holding company ("mere instrumentality test"). The next prerequisite is that; this kind of supervision must have been misused for deception or any other illegal or crooked conduct. The last and third prerequisite is that, the plaintiff must have sustained a tangible forfeiture because of the aforesaid conduct. For the purposes of preparing advisory limitations for the courts, Powell suggested prerequisites which, notwithstanding, did not have to be fulfilled consecutively.\textsuperscript{450}

This kind of ‘item by item enumeration’ consists of diverse factors like

(i) the business status of the holding company as a predominant shareholder.
(ii) the distinct peculiarity of the administration of the two companies.
(iii) the investment of the subordinate company by the holding company.
(iv) the absolute reality that it was the holding company that started the formation of the subordinate company.
(v) forfeiture of remedy by the holding company.
(vii) the business status of the subordinate company as only an Agency of the holding company.
(viii) the absolute reality that the holding company is utilising the resources of the subordinate company in a certain sense that the resources were owned by the holding company.
(ix) the accepted observance of the subordinate company administration with the directions of the holding company or ignore of legal clauses by the subordinate company. These factors were enormously preferred by lawful conventionality.\textsuperscript{451} In addition to Powell’s critique, the courts additionally utilise the ‘instrumentality rule’ ("alter ego test") evolved by Californian lawful conventionality. The stockholder is to be found obligated if right and possessorship are conjoint to so much degree that a person cannot say of ‘the separate legal’ distinctness of the company and the company’s stockholder. This kind of disassociation would have inequitable aftereffect.\textsuperscript{452}

\textbf{4.8b APPLICABILITY OF THE "DISREGARD DOCTRINE" IN FAVOUR OF CONTRACTUAL CREDITORS IN USA}

The absence of clear and certain prerequisites for the disregarding of the separate legal personality has been invariably decried\textsuperscript{453}. We shall refrain from a strive to extract full details of segments of clarification from United States of America jurisprudence. Rather, we should restrict


\textsuperscript{449} On the element of control see Alting 200; Blumberg, "The Increasing Recognition of Enterprise Principles in Deter-mining Parent and Subsidiary Corporation Liabilities", 28 Conn. L. Rev. (1996) 295-346 (331f); Fletcher, § 41.35, 691-695; Rands 433-443.

\textsuperscript{450} In detail hereto see Alting 201-206; Fletcher, § 41.55, 703-705; Thompson, 76 Cornell L. Rev. (1991) 1036-1074 (1048, 1064-1067).

\textsuperscript{451} With a view to particular settings: Alting 211-213; Fletcher, § 41.50, 700-703.

\textsuperscript{452} In this sense also Drobnig, supra n. 4, 27f.; Nacke, supra n. 34, 94f.

\textsuperscript{453} On the connection between the disregard of formal requirements and the deceit of contractual creditors see Thompson, 76 Cornell L. Rev. (1991) 1036-1074 (1067f.).
ourselves to deciding the mileposts of the stockholders’ liability in the United States of America corporate law. These mileposts are centered on the basis that the limited liability of the stockholders is objectionable where it directs to an externalization of expenses. In that event, if it would make a prominent risk to creditors to keep on being distinctive. An attribution of expenditures to the outsiders (an externalisation of expenses) is generally cognisable if the company falls short of resources and this kind of restriction cannot be legitimately lost from the creditors’ account by use of disregarding the separate legal personality.

Impairment of a company's capitalization:
Jurisprudence on disregarding the separate legal personality explains the usage of the aforesaid prerequisites. It is remarkable that the respondent is at no time the shareholder of a company listed and dealt with on the share market. Rather, the court decisions pertains to corporate shareholders, specifically, the holding company of the respondent. If the respondent is a natural human being, he or she is generally the shareholder of a “close corporation” which is not listed on the security market.

In both circumstances, the corporation’s right of entry into the ‘capital market’ is restricted, since the corporation’s securities are not sold to the public.

Another prerequisite is the possessions restriction of the supply of funds to the company by the predominant shareholder or the shareholder of the ‘close corporation’. This ground rules are perhaps noticeable in distinctive instances:

Disregarding the separate legal personality generally occurs when the predominant shareholder is engaged in the management of the company. This kind of engagement probably provides the difference between the shareholder as the managing director of the company and the company being theoretic. It probably facilitates the control of the company’s resources by the shareholder. As a result, also the phrase of "undercapitalisation" is commonly used. The amount of the required resources is being ascertained in a case by case basis in compliance with the personal situations.

Additionally, integrating the corporation’s dealings and possessions with those of the obligated shareholder is as well regularly utilised as a basis for disregarding the separate legal personality. This kind of commotion regularly points out the influence and control of the company which the shareholder has. On the contrary, this subsequent basis probably, implicitly, does not give rise to the disregard of limited liability. It is infrequently pointed out the shareholder’s influence over the company and, in addition to that, his or her control over the company’s financial resources.

455 Adams, supra n. 19,56-58
458 See paragraphs 8,9,10 & 11 under Piercing Corporate Veil under European and German law in Product Environmental Liability above.
459 History of Company Law in Nigeria by Maduka, C. 22/08/2016 Vol.1
4.8c ASYMMETRY OF INFORMATION:

The discrepancy in information goes along with the controlling of the company’s resources provision by the defendant. It is generally fundamental that the contractual creditor does not meditate about the resources provision restrictions in his pricing. For instance, by demanding exorbitant interest rate, the motive for this kind of dearth careful thought is normally an unsymmetrical circulation of acquired facts. The contractual creditor is dispossessed of the chances of carefully thinking about the individual and the creditworthy of his debtor.

Such discrepancies are threatening harm in the cases of possessions disarray or those of disrespect of official prerequisites. These asymmetries are both prone to give the notion of an infeasible capital provision or to deny the creditors information about the debtors. In the remaining cases of shareholder’s involvement in the resources provision, disregarding the separate legal personality is exclusively permitted where more pieces of false or misleading information are gathered. This kind of pieces of false or misleading information is like fraud or misrepresentation about the creditworthiness of the company. These types of grounds for disregarding the ‘Separate Legal Personality’ are often.

The requisite of information discrepancies brings about the vital distinction between disregarding the Separate Legal Personality of a company for the security of contractual creditor on one hand, and on the other hand, for the benefit of none-contractual creditor. The tort sufferer misses any market connection with the company. Accordingly, information is needless as a deciding determinant. The tort sufferer has not particularly selected his role as a creditor. Hence, the tort sufferer is frequently deemed as specifically entitled to security.

Considering the foregoing, some authors hold an opinion that ‘shareholder’s limited liability’ cases would usually be unjustified in most circumstances in tort cases. These abstract ideas which incidentally have not been allowed by court procedure, alternatively propose an apportioned liability on the part of the shareholders.

In all the same, in disregarding the Separate Legal Personality of a company in a strive to secure a non-negotiated creditor; the jurisprudence has rarely exempt the fundamental rules of false representation or false statement. Despite that, as enumerated earlier, in tort liability of a company, we should not be automatic to presuppose an exteriorisation of the insecurity involved at the detriment of the tort sufferer. Alternatively, because of liability, the company will require extra resources. This will subsequently turn out reduced share value if presuppose the operative of the ‘capital markets’.

In this circumstance, the shareholders of the obligated company would suffer the aftereffects of the tort although the company’s liability is limited. Excepting that, if the corporation is financially unsound or defaulting, we possibly enquire if and at which time the creditor will possibly turn back to the shareholders. Only thereafter, we do have to dread of an exteriorisation expenditures.

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460 History of Company Law in Nigeria by Maduka, C. 22/08/2016 Vol.1
461 Ibid
462 Ibid
463 [1897] AC 22; [1906] 1 Ch 131,134
464 History of Company Law in Nigeria by Maduka, C. 22/08/2016 Vol.1
465 Ibid
CHAPTER 5

THE SEPARATE LEGAL PERSONALITY OF A COMPANY IN NIGERIA

The Inception and Evolution of Company Law in Nigeria:

Before the time and the intervention of the Westerners, particularly by the British into the activities of a country called Nigerian, a company law and the body of laws, both the common law and the statutory controlling a company were not known to the laws of Nigeria.\(^\text{466}\).

Earlier to that unpredicted intervention, the Nigerian populaces were satisfied with sole trader. However, with the arrival of the Westerners and furtherance in technologies, establishing a significant enterprise needed enormous resources which are not generally affordable by the sole trader.

Thus, the necessity for association amidst businessperson in a type of partnership and company arose. Because the legal invention known as company was imparted to Nigeria by the Westerners, therefore, any discussion on the epic of company law in Nigeria must, as a matter of fact, be entirely trailed to the Westerners.

Meaning of Company:

I believe for an acceptable perception of this discussion; it is appropriate to explain the word ‘Company’. Originally, the term has its derivation in the old French military word ‘compaignie’ meaning a ‘body of soldiers’.\(^\text{467}\) This in sequence was initially taken from the Latin word ‘companion’ meaning ‘association of persons who took bread together’\(^\text{468}\) Lord Justice Lindley described a company as follows:

"By a company is meant an association of many persons who contribute money or money's worth to a common stock and employ it for a common purpose. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it or to whom it belongs are members. The proportion of capital to which each member is entitled is his share." Salomon v Salomon & Co; Stanley Re\(^\text{469}\)

There is no doubt that the above said definition no longer seems to be reasonable or be in accordance with the facts because of current ideational divert regarding the number of individuals required to create a company, particularly in other jurisdictions.\(^\text{370}\) Regrettably, the Nigerian Companies and Allied Matters Act, 1990\(^\text{471}\) did not facilitate issues in this regard. As a matter of fact, the Companies and Allied Matters Act, 1990 stated that a company would be created and registered under the Act or brought within its terms those companies formed before and registered in Nigeria earlier on the inception of the Act. For the sake of this discussion, we will be contented with the definition by Lord Justice Lindley as that definition remains authentic under Nigeria corporate jurisprudence.

\(^{466}\) History of Company Law in Nigeria by Maduka, C. 22/08/2016 Vol.1
\(^{467}\) Ibid
\(^{468}\) Ibid
\(^{469}\) Ibid
\(^{370}\) Ibid
\(^{471}\) Ibid
5.1 DEVELOPMENT OF COMPANY LAW IN NIGERIA:

The Company Law in Nigeria consists of the acquired English law bonded into the Nigeria legal system. The history of Company Law in Nigeria would possibly properly be segregated into two eras namely ‘Pre-1912’ and ‘Post 1912’.

PRE-1912

Throughout this period, the companies functioning in Nigeria were all affiliated in England. Prior to 1876, there was no indigenous Statutes governing company practice, hence, the companies in Nigeria were nevertheless regulated by Companies Act of England.\(^{472}\) The companies were corporations that obtained those charters and incorporations as were obtainable in England.\(^{473}\)

In the year 1876, the Supreme Court Ordinance was issued for the district of Lagos which was surrendered to the British Crown in 1861. This ordinance stipulated for the formation of a lawful procedure and the acceptance of the common-law doctrines of equity. Also, the applicable legislation that was operative in England on the 24\(^{th}\) July 1874 was accepted into the Nigerian legal procedure.

Accompanied by the announcement of the coalition of States of Southern and Northern Nigeria in 1900, the Supreme Court announcement of 1900 and 1902 independently were initiated to establish a Supreme Court for one of the coalited States. These announcements created the applicable common law doctrines of equity and adopted legislation applicable in England on the 1\(^{st}\) January 1900 in the coalited States\(^{474}\).

The acceptance of those English Statutes into Nigerian law, the common law of England and the doctrines of equity to the extent they were applicable to companies were all-embracing in the created application in Nigeria. These Statutes have since constituted Nigerian company law subject to any subsequent pertinent National laws. An instance is the theory of separate and autonomous Legal Personality of the incorporated company as decided in Salomon v. Salomon,\(^{475}\) hence, was accepted and has thereafter evolved into segment of Nigerian jurisprudence.\(^{476}\)

Among the laws adopted were the English Companies Act, 1862, which Allied and updated the preceding Acts and subsequently constituted the inception of contemporary English company law. The Act consolidated the Joint Stock Companies Act 1856, the resulting updates, and provided for obtaining limited liability by subscription. The said 1856 Act initiated the contemporary form of memorandum and articles of association instead of the deeds of settlement. The Act also provided for winding up or liquidation of companies\(^{477}\).

While the Act was usable prior to 1900 English law applicable, it could not be enforced under domestic conditions, because skills for similar enforcement were not available in Nigeria. The alien companies were accordingly dependent on the related common law and doctrines of equity.\(^{478}\)

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\(^{472}\) History of Company Law in Nigeria by Maduka, C. 22/08/2016 Vol.1

\(^{473}\) Ibid

\(^{474}\) The Companies and Allied Matters Act, 1990

\(^{475}\) History of Company Law in Nigeria by Maduka, C. 22/08/2016 Vol.1

\(^{476}\) Ibid

\(^{477}\) (1989) 7 ACLC 510

\(^{478}\) Investments and Securities Act 2004
Post 1912 to Date

The four main Acts legislated throughout this era are:

a. The Companies Ordinance, 1912
b. The Companies Ordinance, 1922
c. Companies Act, 1968
d. The Companies and Allied Matters Act, 1990

The Companies Ordinance, 1912

This was the earliest company law in Nigeria. It was initially functional in the old district of Lagos and subsequently in 1917; it was applied to all districts in Nigeria by Companies Ordinance (Amendment and Extension) Ordinance 1917⁴⁷⁹, which commenced on 1st January 1918.

It was a replica of the Company’s (Consolidation) Act 1908 in England. The Company’s Ordinance of 1912 stipulated for the first time in Nigeria a system for creating a corporation by subscription. The purpose and rationale for the ordinance were stated as follows:

“To provide for the formation of limited companies within the colony and protectorate; It is hoped thereby to foster the principles of co-operative trading and effort in the country”

The Companies Ordinance of 1922

Because of the anticipation of expeditious commercial growth at the end of the World War I in 1918, the Company’s Ordinance of 1922 was legislated. The ordinance, which commenced on 7 December 1922 was initially functional in the district of Lagos and thereafter expanded to the whole country. It became to be chapter 38 of the ordinances of Nigeria 1948 publication and chapter 37 of the ordinances of Nigeria 1958 publication.

The Company law of 1922 was thereafter reformed in 1941 and in 1954 by the Company’s (Amendment) law 1941 and the Company’s (Amendment) law 1954. In 1963, this law was named Companies Act and it persisted to control companies’ dealings up-to its abrogation in 1968.

The Companies Act, 1968

After-independence, Nigeria experienced increment in commercial dealings. There were many critiques of the 1922 Companies Act and to resolve some of these critiques, and to provide for booming commercial dealings in Nigeria, the 1968 Company’s Act was legislated.

It was previously Companies Decree No. 51 of 1968 as it commenced functioning throughout the military period. Notwithstanding, in 1980, during the political rule, it was renamed Companies Act, 1968. The tremendous amendments and updates which were brought by the 1968 Act contained mandatory domestic registration of foreign companies, thorough clauses for proclaiming the activities of the company in the benefit of the shareholders and the populace, particularly about account, auditing, meetings, annual returns and directors.

⁴⁷⁹ Chukwuemeka, H. Types of Business and Non-Business Organizations in Nigeria, Legal Services Professional Publisher, 22, June 2015 Vol.1
Notwithstanding, the Act was criticised severely for not resolving huge problems in the evolution of company law in Nigeria. Because of these severe criticisms, the Nigeria Law Reform Commission in 1987 commenced the amendment of the Nigerian Company Law. This was preceded by contemplation on the report of the commission by the Consultative Assembly on Company Law in 1988. The effect of this was the abrogation of the Companies Act 1968 and its substitution by the Companies and Allied Matters, 1990.

The Companies and Allied Matters Act, 1990

This Act for the initial era constituted provisions not just for Companies, but for the issuance of certificate for business names, and for the chartering of trustees. The 3 main parts in the Act are:

1. Part A: Companies
2. Part B: Business names
3. Part C: Incorporated trustees

The Act introduced not only the current ordinances controlling Companies, issuing certificates for business names and for the chartering of trustees, but also the pertinent common law doctrines and the maxims of equity suitable to company law in Nigeria. It portrays the accepted opinions and consensus of company law customers in Nigeria.

One huge modification of the new Companies and Allied Matters Act was the creation of the Corporate Affairs Commission. Prior to the creation of the Corporate Affairs Commission, the management and governing of Companies in Nigeria was under the Companies Registry in the Corporate Affairs Division of the Ministry of Trade.

Additional modifications advocated by the Act encompass inter alia the following:

a. Abrogation of the common-law enactments on pre-incorporation dealings and the clause for ratification of similar dealings
b. Proscription of preferred stock and weighted votes (adjusted/added votes).
c. Amendment and legislation of the common-law Statute in Royal British Bank v. Turquand and the proscription of the common-law Statute of inferred notice of filed documents.
d. Clauses for utmost commitment by directors.
e. Clauses for the employment, tasks and duration of office of secretaries of public companies.

The clauses of the Act that handled Unit investment trust, insider dealing, acquisition and mergers, the populace bid and sale of shares were removed and legislated as Investments and Securities Act in 2004.

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480 Chukwuemeka, H. *Types of Business and Non-Business Organizations in Nigeria*, Legal Services Professional Publisher, 22, June 2015 Vol.1
481 Ibid
482 Ibid
483 Ibid
484 Ibid
So far, it is in view of the above synopsis diversion from the main topic to the history of Nigerian company law, which regardless, courts fully participated in structuring the layout of company law. Majority of the work was done by using the help of businessmen and lawyers; all the same, considerably praise must go to the lawmakers. The Nigerian company law as we have it contemporaneously is fundamentally legislated and much reflections of the English law contents.

5.2 CREATION OF COMPANIES - BUSINESS AND NON-BUSINESS ORGANISATIONS IN NIGERIA.

Types of Companies in Nigeria - Business and Non-Business

There are five types of companies operating as either business or non-business entities in Nigeria. These five types of companies, business or non-business are distinctive from the unregistered single individual ownership in the form Firms or Partnerships. Firms or Partnerships are types of business associations which also operate in Nigeria. Companies possess separate legal identities from their owners and are, as a rule, larger and its make-up is preferred. Companies are categorised based on the obligations of their owners, in principle, there are.\textsuperscript{485}

1. Company Limited by Shares: It is a company where the liability of the shareholders is limited to the amount unpaid by them on the shares each shareholder possesses. Companies limited by shares are subdivided into private (Ltd) or public (PLC). Guinness Nigeria PLC and Nigerian Breweries PLC are examples.\textsuperscript{486}

A private company limited (Ltd) by shares consists of two to fifty shareholders and it is prohibited from selling its shares to the public. A public company (PLC) limited by shares consists of seven to unlimited number of shareholders and it is not prohibited from selling its shares to the public.\textsuperscript{487}

2. Unlimited Company (Un-ltd): The liability of owners of Unlimited Company (Un-ltd) is unlimited; notwithstanding, the company has a separate legal identity from that of its owners. It is normally made-up by partnerships, but more than the greatest legal number of ownership of partnerships (twenty).\textsuperscript{488}

3. Company Limited by Guarantee (Ltd/Gte): It is a type of company that has no share capital; instead, the liabilities of its owners are limited to the amount the owners individually guarantee to pay in the event of its being liquidated. Its intention is not for profit-making; however, it is for the advancement of holdings such as commerce, art, sports, education (schools), religion, etc.\textsuperscript{489}

\textsuperscript{485} Chukwuemeka, H. Types of Business and Non-Business Organizations in Nigeria, Legal Services Professional Publisher, 22, June 2015 Vol.1
\textsuperscript{486} (1897) AC 22
\textsuperscript{487} Ibid, p. 51
\textsuperscript{488} (1960) 3 ALL E.R 420
\textsuperscript{489} (1976) 3 ALL E.R 462
4. Incorporated Trustees: Incorporated Trustees are constituted by any group of individuals in a community interrelated by custom, religion, kinship organization/institutions, or nationality or by a body or group of individuals formed for any religious, educational, literary, scientific, social, or charitable objective and absolutely are non-business and are not profit organizations.  

5. Co-operative Societies: Co-operative societies in Nigeria are fundamentally groups of individuals who freely collaborate using their membership fees for their collaborated social and economic welfare. Co-operative societies are formed with the intention of “providing services on a non-profit basis to their members or shareholders who own and control it”.

They are established and controlled to conform to the applicable jurisdiction laws where the co-operative society functions.

5.3 SEPARATE LEGAL PERSONALITY PRINCIPLE UNDER THE NIGERIAN COMPANY LAW

i. Background:

For the scope of this thesis, I am focusing on companies limited by shares either ‘Privately’ or ‘Publicly’. Companies limited by shares either ‘Privately’ or ‘Publicly’ is under which the doctrine of ‘Separate legal personality’ under the Nigerian Company Law and the concept of ‘disregarding’ the ‘Separate legal personality’ would be analysed.

ii. General view of the Legal Personality Principle under Nigerian Company Law:

The ‘Separate legal personality’ doctrine is a prevalent legal tenet which posits that an incorporated company is in point of law a ‘Separate Legal Entity’ different from the persons who are the company’s owners, and directors who manage the company’s activities. The dealings, including the indebtedness and other liabilities of the company are the company’s dealings, indebtedness and other liabilities, not that of the owners or directors. This tenet was established under the common law in the renowned case of Salomon v. Salomon and Co Ltd.

In this case, Aaron Salomon, a leather merchandiser and boots producer incorporated his sole proprietorship company as Limited company that acquired his industry in 1892. Salomon and six other members of his family subscribed to its memorandum for one share each, then two of his sons were appointed directors.

\[490\] Chukwuemeka, H. Types of Business and Non-Business Organizations in Nigeria, Legal Services Professional Publisher, 22, June 2015 Vol.1

\[491\] Ibid

\[492\] Ibid
The incorporated Company paid £39,000 to Salomon for his industry. The method of payment to Salomon was £10,000 through debentures secured by a floating charge on the Company’s asset, £20,000 shares of £1 each and the balance of £9,000 by cash. All the same, the incorporated Company did not flourish and when the company was liquidated after one year, the company’s liabilities plus debentures indebtedness outbalanced its resource by £8,000. The liquidator standing in for the unsecured creditors advocated that the incorporated Company’s dealings remain Salomon’s liability for indebtedness acquired for managing the company and, consequently, Salomon should be mandated to reimburse the Company’s indebtedness. Also, payment of the debenture indebtedness to Salomon should be deferred pending when the Company’s other creditors are paid. The learned High judge conceded with the liquidator’s contention and further ruled that all the subscribers of the memorandum excluding Salomon, owned their shares as only appointees. And Salomon’s intent in incorporating the company was to use the company as agent to control his industry for him. The Court of Appeal upheld this judgement and Salomon proceeded forward to challenge the rulings of the Court of Appeal at the United Kingdom House of Lords and Lord McNaughton expressed thus:

“\textquote{When the memorandum is duly signed, and registered, though there be only seven shares taken, the subscribers are a body corporate ‘‘capable forthwith, of exercising all the functions of incorporated company’’. Those are strong words; there is no period of minority on its birth, no interval of incapacity.}

\textquote{I cannot understand how a body corporate such as this made capable by statute can lose individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The Company is at law a different person altogether from the subscriber... Nor are the members (subscribers) liable...”}

It is conceded that this reasoning by the learned Lord has the doctrine of ‘Separate Legal Personality’, which bestows ‘Separate Legal Personality’ on an incorporated company. Instantly, a company is incorporated, the company has legal rights to possess property and enjoys continual succession. In upholding this concept, the court in the cases of Lee v Lee’s Air Farming Ltd\textsuperscript{494}; DHN Food Distributors Ltd v Tower Hamlets Lbc\textsuperscript{495} ruled that the shareholders of these Companies are ‘Separate Legal Personalities’ legitimately.

The lawful outcome of this doctrine is that an incorporated company subscribes to the memorandum of an additional company as a shareholder, same as a natural person does.

\textsuperscript{493} (1960) 3 ALL E.R 420
\textsuperscript{494} (1976) 3 ALL E.R 462
Also, it can be a partner in a partnership and partakes in the management of partnership dealings. It can similarly be an agent or a principal. In the ensuing position, it can hire individuals, even any of its shareholders and sign contracts of service with them. Additionally, regarding the corporate personality, as per Gower, the tenet of Corporate Personality was inter alia propounded to care for situations which strive to gather all the indebtedness and liabilities on a person. The principle hence functions as a protection and armor to those persons who possesses all or large number of shares in a company.

The outcomes and resultant of the incorporation of a company as contained in section 37 of CAMA stipulates as follows—

“As from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other person as may, from time to time, becomes members of the company, shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the asset of the company in the event of its being wound up as is been mentioned in this Act.”

The Nigerian court additionally endorsed the doctrine of ‘Separate Legal Personality’ in the Nigerian case of Emenite Ltd v. Oleka, it was ruled that the ‘Separate Legal Personality’ of incorporated company can be substantiated lawfully by submitting the certificate of Incorporation as a proof; However, if it is by the State responsive allegations, the ‘Separate Legal Personality’ of incorporated company is not disputable. There will be no mandate to substantiate the status and the ‘Separate Legal Personality’ of an incorporated company by the State.

Further area where ‘Separate Legal Personality’ is disregarded in Nigeria is the Environmental Pollution area. Section 37 of the Federal Environmental Protection Act Cap 131 1990 stipulates that if any violation against the Federal Environmental Protection Act (FEPA) Act or any regulations made thereunder has been perpetrated by an incorporated company or by an owner or a partnership or other firm or business, any director or executive of that incorporated company or every owner of the partnership or every individual involved in the management of that business or firm shall, on determination, be liable to a fine not exceeding N500,000.00 for such violation. Furthermore, the incorporated company, firm or partnership shall be ordered to pay reparation for any harm emanating from such violation thereon or to fix and repair the polluted environmental area to an acceptable standard as may be approved by the Federal Environmental Protection Agency.

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496 Kodaolu, R. “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008 Vol.1
497 Section 37 of CAMA Cap C20 LFN, 2004
498 2005) 6 NWLR (Pt. 921) 350
499 Cap F 10 L.F.N. 2004 (as amended); AKINOLA BUKOLA, NLII Working Paper Series
500 [(1992) 4 NWLR (PT 248) 1]
Current evolutions have indicated that the then “Failed Bank Tribunal” was too authorised to disregard the ‘Separate Legal Personality’ a company. In the Nigerian case of Macebuh v National Deposit Insurance Corporation, the authority for the tribunal to disregard the ‘Separate Legal Personality’ a company was stipulated in the “Failed Banks Tribunal Decree” which stated thus;

“By virtue of Section 3 (3) (6) (ii) of the Failed Banks Decree, the power to lift (was vested in the tribunal) the Corporate veil of a corporate body indebted to a failed Bank to determine the liability of its members who may be liable jointly or severally for the debts owed by the corporate body to the Failed Bank......”

Notwithstanding on the legislative sledgehammer, which penetrates the ‘Separate Legal Personality’, the Courts will not be reluctant to unmask the cloak of incorporation (disregard the Separate Legal Personality) if it ascertains that there is reckless or fraudulent trading. In the Nigerian case of Nathaniel Adeniji v State 501 the Lagos State High Court trial judge, His Lordship, Justice Desalu stated that:

“any business which appears to have been handled recklessly or with intent to defraud, the court may declare that any person who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally liable for all or any of the debts or other liabilities of the Company” 502.

The said Nathaniel Adeniji case was appealed under 4 NWLR (PT 234) and His Lordship, Justice Ibrahim Kolago Sulu Gambari of the Supreme Court delivered a judgement that upheld Justice Desalu’s judgement.

It is concluded that the work of the Court has been made uncomplicated by Section 506(1) of the CAMA which stipulates that if during the liquidation of a company, the conduct has been exercised in a neglectful way or with motive to dupe, the creditors of the Company or creditors of any individual for any additional intention. The liquidator of the company may, if it deems tenable to do so, assert that any individual who were purposely parties to the aforesaid be made individually liable.

The doctrine of ‘Separate Legal Personality’ of a company, which is a basic aspect or outcome of incorporation, has fortified the privileges of incorporation which consist of these: 503

a. Ability to sue and be sued:

An incorporated company can sue and be sued in its corporate name.

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501 SC 93 of CAMA Cap 59 LFN 1990
502 Kodaolu, R. “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008 Vol.I
503 Section 154 of CAMA
As an incorporated company with the right of a legal person, it can initiate a lawsuit to implement its legal powers in its corporate name without the requirement of suing through or including any of the directors or shareholders as parties.

b. Perpetual Succession:

Instantly, a company has been incorporated, it has obtained the characteristic of perpetual succession. Putting it differently, the company survives till it is dissolved as per the provision of the law. Shareholders’ retirement, insolvency or insanity does not cause the company to cease existence. If a Shareholder passes away, his shares in the company are transferred to his next-of-kin through an administrator/executor who shall be the sole individual known by the company as having an equitable title to his interest in the shares. Passing away of a Shareholder will perhaps be a basis for dissolving the company, however, does not itself connote the cease of the company.

c. The Right to Possess Property:

An Incorporated company has the entitlement to possess its assets distinct from the assets of the shareholders. The company’s assets become the company’s assets and do not become personal shareholders’ assets, regardless; the owners or shareholders are the owners of the company. Therefore, the assets of the company are the company’s and not the owners’, the owners or the shareholders do not have ownership right to the company’s assets. This characteristic differentiates an incorporated company from partnership, a situation the partners own the assets of the partnership. In a Nigerian case Phillips v. Abou-Diwan, it was decided that the members of a company were not the persons to assign the company’s property.

d. Liability of the Company different from Liability of members:

The liability of the company is separate and distinct from that of the shareholders per se, owners or shareholders as persons cannot be compelled to assume the liability. Vice versa, the indebtedness of the shareholders is not the indebtedness of the company. As a rule, there is no individual liability on the side of the shareholders for whatever indebtedness undertaken by a company. If the funds of a company while dissolving it, are not sufficient to defray its indebtedness, a shareholder whose liability is limited by shares is liable to subscribe to the funds up to the amount, if any unpaid on his shares. In partnership, conversely, the partnership’s indebtedness is the indebtedness of the partners. Therefore, the partners are liable for the partnership’s indebtedness.

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504 Re Ebrahim (1971) 1 Ch.799
505 Macaura v. Northern Assurance Co. Ltd (1925) A.C. 619
506 (1976) 2 F.R.C.R. 24
507 Banque De L’afriqueOccidentale v. Habu (1964) N. N. L. R. 30
508 Section 20 (3) of CAMA
e. Creation of a Company - CAMA:

An incorporated company is eligible to entwine with another individual or corporate body to create and incorporate a company, if it is in conformity with the registration of CAMA. Example, this type of registered company must not be a corporate body undergoing winding-up.  

f. Transfer of Shares:

Notwithstanding, incorporated companies are entitled to assign their shares depending upon the company’s Memorandum and Articles of Association. The assignment of shares is restricted to public companies; private company is bound to include a provision in its Article of Association limiting assignment of shares to the public.

g. Liability in Contracts and Torts:

Once a company is incorporated, it is liable in tort and in agreement regarding the conducts undertaken by its shareholders/directors or executives/functionaries for the benefaction of the company and their powers are evident or visible. Therefore, if a director of a company goes into an agreement on behalf or intending to obligate the company, it is the company (the employer) that is liable for it, not the executive/functionary. The executive/functionary is not privately liable except if he has indicated that he does not have the power of the company to obligate the company. The aforesaid happened wherefore a company being an artificial individual, operates using its management and executives or functionaries who are the advisory intellect and desire of the company. The company must be ready to be liable for the conducts of its executives/functionaries in tort or agreement entered for the company’s benefit.

h. Borrowing Powers:

An apparent privilege of incorporation is the authorities of an incorporated company to obtain loans to operate its dealings. A registered company can flow bonds and backed it with an unfixed charge.

5.4 THE CONCEPT OF DISREGARDING SEPARATE LEGAL PERSONALITY ACROSS THE JURISDICTIONS

There are many limits to the English ‘Separate Legal Personality’ doctrine. In that event, the courts are inclined to disregard the ‘Separate Legal Personality’ and peep at whatever has fundamentally been happening at the back of the eyeshot in the company. As stated in the dictum of

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509 Section 22 (2) of CAMA
510 (1953) 1 Q.B 248 at 278
Devlin J, in Bank Handel v Slatford\(^{511}\) who commented saying-

“… The legislature can forge a sledge hammer capable of cracking open the corporate shell…” and Gower complements this by further opining that: “… The courts have sometimes been prepared to have a crack…”\(^{512}\)

Notwithstanding, it could be construed from the foregoing thought that the ‘Separate Legal Personality’ can be disregarded possibly by statutes or by the courts to prevent swindling and fraud by using the entity of the company. In response to the statutory satisfaction of ‘disregarding’ the ‘Separate Legal Personality’ using the English law, section 165\(^{513}\) was conceded in the judicial holding of the Master of the Rolls. Denning M. R, a situation he gave acceptance to this by declaring in Norwest Holst v Secretary of State for Trade\(^{514}\) saying:

“The whole management and control is in the hands of the directors. They are self-perpetuating oligarchy; and are virtually unaccountable…. The question is asked: Quis custodiet ipsos custodies? Who will guard the guards themselves”?

The response to this brain twister was posited by the Learned Lord Himself\(^{515}\) in the case of Waller Steiner v Moir\(^{516}\), he stated:

“It is because these legislations are beyond the reach of ordinary individuals that this legislation has been passed so as to enable the Department of Trade appoint inspectors to investigate the affairs of the Company”

Hence, the ‘Separate Legal Personality’ is the dichotomy between a company and its shareholders. The peculiar expression insinuates that the activities of the company are cloaked or camouflaged from public glance. The lawmakers have invariably made it a mandatory required condition that it be accompanied by far reaching promulgation.\(^{517}\)

The ‘Separate Legal Personality’ has been explained as being obscure and impenetrable as a curtain barrier. Notwithstanding, at times the lawmakers and the courts have ‘disregarded’ the ‘Separate Legal Personality’ of the company by lifting the ‘Veil’, in that event, introducing ingress to the doctrine of ‘Separate Legal Personality’.\(^{518}\)

Notwithstanding, the courts are continually disinclined to ‘disregard’ the ‘Separate Legal Personality’ in specific circumstances regardless of its aftereffects. This appears to suggest that besides its disciplinary role, the ‘Separate Legal Personality’ is highly regarded for its moral soundness\(^{519}\). It has been thought that the ‘limited liability’ of the shareholders is invariably the rationale for the courts or the laws to stipulate for this ‘Disregarding’. Thereby overlooking the entity of the company as a distinct individual and peeping behind it to know who is liable.

\(^{511}\) (1953) 1 Q.B 248 at 278
\(^{512}\) Section 165 of the UK Companies Act 1948
\(^{513}\) (1978) Ch 201, or 3 ALL ER 280; Denning L.J Master of the Rolls
\(^{514}\) Kodaolu, R “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008
\(^{515}\) (1978) 3 ALL E.R 217 @ 292
\(^{517}\) Ibid
\(^{518}\) Kodaolu, R. “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008
\(^{519}\) Ibid
for any misconduct.

As per Gower, the Courts would ‘disregard’ the ‘Separate Legal Personality’ once Legal Personality is being obviously abused as a ‘camouflage’ to shield the shareholders from liability. The ‘Separate Legal Personality’ will only be ‘disregarded’ once the company is merely being utilised as a ‘mask’ or a ‘disguise’ and not whenever it is a genuine company.

The English courts will also ‘disregard’ the ‘Separate Legal Personality’ merely once the company structure is only a ‘disguise’ camouflaging the genuine circumstances.520

It is not completely within the jurisdiction of the Court to ‘disregard Separate Legal Personality’ as the courts appear to obey established procedures. Indeed, the Courts are not at liberty to disregard the doctrine of ‘Separate Legal Personality’ for simply reasons the court deems that equity indeed compels. As per Gower, the courts should be inclined in certain situations to permit the ‘disregarding’ of the ‘Separate Legal Personality’ particularly once a company is being utilised to perpetrate misdeed and camouflage fraud.521

Gower stated -

“However, nowadays only two situations are recognized as justifying such piercing that of lifting the veil to impose personal liability on shareholders and secondly to view a group of companies as one single body.”522

Regarding the ‘disregarding’ of the ‘Separate Legal Personality’, it could be enforced under either Statutory or judicial Provisions.523

The later mainly adheres to the procedure that:

“Good faith is an overriding principle prevailing even over the fundamental principle of the separate juridical personality of companies.”524

Judicial ‘disregarding’ of ‘Separate Legal Personality’ normally arises when the company is being utilised as a ‘disguise’ and the disregarding of the ‘Separate Legal Personality’ is to guard the public interest. Statutory ‘disregarding’ of ‘Separate Legal Personality’ has been enforced particularly under these grounds - (a) Liability of an individual shareholder for the company’s indebtedness. (b) Liability for the use of incorrect company name or proscribed name. (c) Liability for fraudulent business and illegal dealings. (d) The prerequisite of collective accounts and in specific tax issues.525

Accordingly, one can see that, regardless, it is globally well-established that a company has itself, ‘Separate Legal Personality’ with all the entitlements and liabilities. This brings in about specific cases, viz, so that to guard third parties’ entitlements and to shun fraud, methods have

520 Kodaolu, R. “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008
521 Ibid
522 Ibid
524 Ibid
525 Ibid
been ingrained to allow this to be reversed.\textsuperscript{526}

Consequently, our lawmakers and the courts have invariably been inclined to ‘disregard’ the ‘Separate Legal Personality’ of a company, if to do conversely would prompt inequity. If the court declines to enforce the ‘doctrine of ‘Separate Legal Personality’ to stop the company from being utilised to accomplish fraud; In such circumstances, the company would be named “a mask”, or “a cloak” or “a stratagem” or “an alias”, or “a pretended association”, or “a sham”, or “bogus”, or “a simulacrum” or “a screen” and the forthcoming business would be impermissible.\textsuperscript{527} Accordingly, in the Littlewoods Stores Ltd. v. I.R.C’s case,\textsuperscript{528} Lord Denning, M.R voiced caution in the following words:

\begin{quote}
“the doctrine laid down in Salomon’s case has to be watched very carefully, it has often been supposed to cast a veil over the personality of a limited company through which the court cannot see. But that is not true. The courts can, and often do, draw aside the veil. They can, and often do, pull off the mask. They look to see what really, lies behind. The legislature has shown the way with group accounts and the rest. And the court should follow suit”.\textsuperscript{529}
\end{quote}

Regrettably, courts have not exhibited at all conventional criterion or method in ‘disregarding’ the ‘Separate Legal Personality’\textsuperscript{530} from decided cases. It would seem, that the situation for deviating from the stringent usage of the ‘Separate Legal Personality’ doctrine changes from case to case as the equity of the case requires. This may be suitably classified as follows:

\section*{5.5 DISREGARDING THE ‘SEPARATE LEGAL PERSONALITY BY THE COURT ACROSS THE JURISDICTIONS}

\subsection*{i. Public Policy}

The courts are always inclined to ‘disregard’ the ‘Separate Legal Personality’ if the ‘Separate Legal Personality’ has a propensity to be utilised as a shelter antagonistic to public policy. Therefore, in Daimler Co. Ltd. v Continental Tyre and Rubber Co. Ltd\textsuperscript{531} the House of Lords ‘disregarded’ the ‘Separate Legal Personality’ after bringing to light, the fact that all except one of the directors were Germans who possess an adversary character when having regard to the adversary status of the majority shareholders. Similarly in Part Cargo Ex M v. Glenroy\textsuperscript{532}. A German subordinate Company was dealt with as a ‘violation’ of its Parent Company to tarnish with adversary possessorship of merchandise, to tarnish with adversary possessorship of merchandise in shipment from the Parent Company to the subordinate Company.

\begin{footnotes}
\item[526] Kodaolu, R. “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008
\item[527] (1897) AC 22 (HL) (supra)
\item[528] (1969)1. W.L. R241
\item[529] Ibid., p. 1254
\item[530] Kodaolu, R. “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008
\item[531] (1916) A.C 307
\item[532] (1945) A.C. 124
\end{footnotes}
ii. Evasion of Taxes:

The ‘Separate Legal Personality’ will also be ‘disregarded’ if a company utilises its ‘Separate Legal Personality’ to elude tax. As Gower stated533 “each case where they have regarded the subsidiary as agent of the parent can be matched with another in which they have refused to do”.

He additionally postulated that the cases revealed no regular fundamental doctrine besides a refusal by the lawmakers and courts to utilise the rationale of the doctrine constituted in Salomon v Salomon & Co Ltd534, where it is too glaringly averse to equity, expediency or interests of the revenue (tax evasion).

In a Nigerian case Marina Nominees Ltd v. Federal Board of Inland Revenue535 the Supreme Court declined to ‘disregard’ the ‘Separate Legal Personality’ and deal with the tax paid by the incorporation of the company as that of the company’s Fraud and inappropriate actions. When a company is created and utilised as a way of committing fraud, with the intention of doing unlawful or illegal conducts. Following its creation, its management through utilising the company instruct for unlawful action to be effected. Consequently, the ‘Separate Legal Personality’ will be ‘disregarded’ to grab the shareholders personally liable and also the company liable.

The court will not authorise a company to utilise the principle of ‘Separate Legal Personality’ to be used for frauds or inappropriate intentions. Therefore, in Jones v. Lipmann536 the respondent drew an agreement for the sale of his land to the claimant. To evade finalising the sale, he assigned the land to a company he created for the said intention. The claimant instituted a lawsuit for specific injunction. The court ‘disregarded’ the ‘Separate Legal Personality’ and mandated the respondent and his company to specifically enforce the agreement with the claimant, identifying the company as unreal of the respondent, a ‘stratagem (instrumentality)’ and ‘façade’, a ‘camouflage’ which he possesses in an effort, to elude identification.537

Likewise, in Gilford Motor Company v. Horne538 Mr. Horne, a one-time worker to the claimant had contracted not to canvass for the company’s customers (restraint of trade). He endeavored to avoid this liability by establishing his company, which canvassed. The ‘Separate Legal Personality’ was ‘disregarded’ and an enjoinder was imposed against him and his company regardless, the company was not actually a party to the agreement. The company was identified as an ‘instrumentality’, a ‘device’ and only a ‘mask’ or ‘façade’539

533 Supra
534 Supra
535 (1986) 2 N.W.L.R (Pt. 20) 48
536 (1962) 1 W.L.R 832
537 Ibid, 836 (per Russell, J)
538 (1933) Ch. 935
539 Ibid, 956, 961, 969
In Re Burgle Press Ltd, two bulk shareholders who possessed 90% of the shares of a company sought to purchase the remaining 10% shares and oust the third minority shareholder of the shares, however, the minority shareholder resisted. Section 209 of the Companies Act 1948 empowers interest accomplishment pre-emptor who is herein this section and has possessed the required allotment of shares to possess the minority shares imperatively.

Being aware that they could not satisfy the requirement of this section ordinarily, they created a company to make an offer for all the shares of the company to oust the minority shareholder. Harman, L.J. adjudged that they could not thrive, identifying the novel company created for this motive as

“nothing but a little hut built around” the minority shareholders and the whole scheme as “a hallow sham”.

iii. Agency

It is seemly to add that the courts have been cautious in the interpretation of inferred agency relationship to look for several characteristics of legitimate agency relationship. It is the legitimate agency relationship through which the parent company takes over the management and funding of the subsidiary’s activities. It is posited that inside the corporate phraseology, agency is a way of evading ‘Separate Legal Personality’ doctrine where the equity and situation of the case so requires. In Re F.G (Films) Ltd, an American Film Company, pursuing to acquire the privilege allowed to British made films, which motivated the company to be incorporated in England. The Film Company had a registered office but no business establishment and no workers except three directors, one of whom was the president of the American company. The company’s funds were just 100 pounds. The resources and expertise for producing the film were supplied by the American Company.

The court ruled that insofar as the English company had participated to any extent in producing of films, it had done that as agent of the American company that was the real producer of the film. Consequently, the company was in principle, an American business and could not get any tax exemption as a British business.

iv. Trust

Conventionally, under similar manner, if a company is keeping shares in trust for third parties and the management of the company is controlled by the trustees. The court would possibly ‘disregard’ the ‘Separate Legal Personality’ to facilitate the court to assign the company’s assets as per the provisions of the trust. Therefore, in The Abbey, Malvern Wells ltd v Ministry of Local Government and Planning. Dankwerts J. acknowledged the reality that a company possessed all its assets on charitable trust once all the shares in it were to any extent possessed and its article of association stipulated that the trustees were to be its management.

540 (1961) Ch. 270
541 Ibid., 288
542 (1953)1 W L R 483
543 (1951) Ch. 728
Additionally, in Littlewoods Stores v. I.R.C\textsuperscript{544} the court depended on the trust idea to ‘disregard’ the ‘Separate Legal Personality’ in a tax case inter-relating the holding company and the subordinate.

v. Illegality
The ‘Separate Legal Personality’ will be ‘disregarded’ if the ambition for which it is created is prohibited by law. If for instance, the shareholders of the company are citizens of an adversary nationality. The court will not be reluctant to ‘disregard’ the ‘Separate Legal Personality’ and unravel the personality of the true citizen. If the ‘Separate Legal Personality’ was obtained to succeed in accomplishing the unlawful ambition, the ‘Separate Legal Personality’ will be ‘disregarded’. This was the fundamentals for the judgment in the case of Merchandise Transport Ltd v. British Transport Commission\textsuperscript{545}. A case the court disregarded the ‘Separate Legal Personality’ of a company, and uncloaked persons who utilised the ‘Separate Legal Personality’ to effect illegitimate activity.

5.6 DISREGARDING THE ‘SEPARATE LEGAL PERSONALITY’ UNDER STATUTE IN NIGERIA

The legislation has created Acts for several grounds when the ‘Separate Legal Personality’ will be ‘disregarded’. Few of these grounds are\textsuperscript{546}:

i. Legal minimum Number of Shareholders,
ii. Liability for fraudulent trading,
iii. Reduction in the Number of Directors,
iv. Liability of Directors and Officers,
v. Holding and Subsidiary Companies (Single Economic Entity),
vi. Company limited by Guarantee carrying on business for profit (Ultra vires trading),
vii. Illegal or unauthorized use of a company seal.

i. Legal minimum Number of Shareholders:

The least number of shareholder requisite to create a company and conduct the activities of the company is two\textsuperscript{547}.

\textsuperscript{544}(1969) 1 W.L.R 124
\textsuperscript{545}(1962) 2 QB 173
\textsuperscript{546}Kodaolu, R. “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008
\textsuperscript{547}Section 18, CAMA
Where a company conducts dealings without the requisite number of shareholders and it conducts dealings for a duration over 6 months, each chief or functionary of the company throughout the period of the breach who knew of the breach will be respectively and collaboratively liable for whatsoever indebtedness the company perhaps assumed for throughout the duration. The ‘Separate Legal Personality’ has been statutorily disregarded.

ii. Liability for fraudulent trading:

Section 506 of CAMA provides, where during liquidation of a company, it seems that any dealings of the company have been conducted in a careless behavior or with the aim to dupe the creditors of the company or any other individual, the court may disregard the legal personality of the company and pronounce such individuals who were parties to such dealings individually liable for all or any of the company’s debt and other liabilities as the court may order.

iii. Reduction in the Number of Directors:

Section 246(1) of CAMA provides, any company incorporated either before or after the commencement of the CAMA shall have a minimum of two directors. If the numbers of directors are below two, the company is required to appoint another Director within one month. If a company conducts dealings and been aware that the number of directors are below two, a director or a shareholder having that awareness shall be liable for all the liabilities and debt assumed by the company within one month the company so conducted dealings.

iv. Liability of Directors and Officers:

Under provisions of section 290 CAMA, directors and executives/functionaries of a company are individually liable if they were unsuccessful to use funds or other resources gotten for what it was meant for with the aim to dupe. The duping directors or executives/functionaries shall be individually liable to the third party from whom the fund was gotten.

v. Holding and Subsidiary Companies (Single Economic Entity):

A subordinate company is owned and supervised by the parent company, however, legally, they are two separate companies. There are several situations when the Separate Legal Personalities of the companies will be disregarded and deem the subsidiary company as the parent company. Section 336 of the CAMA requires a parent company to prepare group financial statements that show the state of activities and profit or loss of the company and the subsidiaries.

vi. Company limited by Guarantee carrying on business for profit (Ultra vires trading):

\[\text{Section 93, ibid}\]
Under Section 26(4) of the CAMA provision, a company limited by Guarantee shall not be incorporated with the object clause of conducting activities to make profit and apportioning same to its owners. If this is done with the proper awareness of the owners, they shall be individually liable for the discharge of all debts and liabilities assumed by the company during the period of the dealings.

vii. Illegal or unauthorized use of a company seal:

Section 631 (4) of the CAMA stipulates that if an executive/functionary of a company utilises or approve the use of the Company’s seal illegitimately or dupery or endorses or approves to be endorse a bill of exchange or promissory note on behalf of the company, such executive or functionary shall be erring of a wrongdoing and shall in addition be individually liable to the holder of any such bill for the amount thereon.

In Nigeria, section 37 of the Companies and Allied Matters Act (CAMA) Chapter 59 Laws of the Federal Republic of Nigeria 1990 as amended stipulates as follows-

“As from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other person as may, from time to time, becomes members of the company, shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the powers and Functions of an incorporated company including the power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the asset of the company in the event of its being wound up as is been mentioned in this Act.”

As aforesaid in this thesis, Nigerian company law been derived from British legal system, therefore, Nigerian company law is derived and fashioned from Irish/English legal system. However, there are lots of exclusions to the Irish/English ‘Separate Legal Personality’ doctrine. In that event, the courts are inclined to disregard the ‘Separate Legal Personality’ and peep at whatever has fundamentally been happening in the company. As stated in the dictum of Devlin J, in Bank Handel v Slatford who commented saying:

“... The legislature can forge a sledge hammer capable of cracking open the corporate shell...” and Gower complements this by further opining that: “... The courts have sometimes been prepared to have a crack...”

The Court of Appeal, in a Nigerian case, Public Finance Securities Ltd v. Jafia unequivocally illustrated several circumstances at which the ‘Separate Legal Personality’ will be ‘disregarded’ when it ruled as follows:

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549 Section 37 of CAMA Chapter 59 1990
550 (1953) 1 Q.B 248 at 278
551 Kodaolu, R. “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008
552 1998) 3 NWLR (pt.543) 602
The court can ‘disregard’ the ‘Separate Legal Personality’. It can pull down the cloak. The courts will ‘disregard’ the ‘Separate Legal Personality’ to discover who was reprehensible for the dupery and in appropriate dealings of the company.

The ‘disregard’ will be unavoidable if the ‘Separate Legal Personality’ of the legal entity is utilised to circumvent public expediency, defending iniquity, carry on fraud or dupe and commit crime… or interested in heedless or dupery business dealings, blemished with dupe.553

(f) Declaration of Shares by Substantive Shareholders of a Company - section 95 of CAMA.

(g) Failure to Comply with Established Business Ethics under CAMA - Sections 548, 548(1) and 631(4).

(h) Fraudulent Transactions by the Company after Winding Up - section 506 of CAMA.

(i) Failure to keep up to Date Financial Statement of Account - section 336 of CAMA.

(j) Consequences for failure to comply with section 336 of CAMA - subsection 2 of the section 336 of CAMA.

(k) Improper or Dubious Control and Management of the Company -section 234 of CAMA.

(l) Investigation of the Affairs of Companies under the Statutes.

Nigeria may disregard the ‘Separate Legal Personality’ under the following judicial exceptions: (1). If a company is used for illegal or improper purpose - see Dunlop Nigerian Industries Ltd v Forward Nigerian Enterprises Ltd & Farore. (2). If there has been fraud or improper conduct. (3). If a company is used as a mask for fraud or illegality. (4). If a company is being misused by its directors to perpetrate a fraud or other dishonest or improper purpose. (5). Only the company can sue to remedy that wrong; can ratify the irregular conduct - See Abubakar v. Smith, a Nigerian case. (6). Status of a Company as a distinct personality to the Shareholders and Directors - see Adeyemi v. Baker (Nig) Ltd. (7). Liability for Fraud and Doing Justice to Victims - see Alade v. Alice (Nig) Ltd. (8). Misappropriation of Company’s Fund - see again Alade v. Alice (Nig) Ltd.

Other judicial exceptions for disregarding ‘Separate Legal Personality’ in Nigeria include ratifying corporate acts, Determination of Company’s Residence, Single Economic Entity, between Agency and Instrumentality (Alter Ego) etc.

There is an analytical inference that will be drawn from the next chapter of this thesis. Chapter six (6) of this thesis would reveal that comparative exceptions exist in the circumstances or prerequisites for ‘disregarding’ the ‘Separate Legal Personality’ of company across Ireland, United States of America and Nigeria.

553 Shittu A. B and Ogwezzy C. M, ‘Piercing the Veil of Business Incorporation’
CHAPTER 6

COMPARISON OF THE ‘DISREGARDING’ OF SEPARATE LEGAL PERSONALITY IN IRELAND, USA & NIGERIA

It is a well-established fact from this thesis that, though ‘Separate legal Personality Doctrine’ is a household concept in company law globally, the ‘disregarding’ of this doctrine is not uniformly enforced globally. Its enforcement is at variance and differs from one country or jurisdiction to another. Therefore, there are comparative exceptions to ‘Separate Legal Personality’ of a company across Ireland, United States of America and Nigeria. Furthermore, the doctrine of ‘Separate Legal Personality’ of a company is one hundred and twenty years old when it was cemented by the House of Lords in Salomon v Salomon & Co Ltd\(^\text{554}\).

Ordinarily, the doctrine on its own is not updated with the contemporary company law legislation. The variances are about when the ‘disregarding’ of the ‘Doctrine’ occurs statutorily or judicially\(^\text{555}\). Hence, Ireland, United States of America and Nigeria ‘disregard’ ‘Separate legal Personality’ of a company statutorily or judicially in different manners. It should be noted that Statute bestows ‘Separate legal Personality’ status on a company. The instances of similar ‘disregarding the Separate Legal Personality’ in Ireland, United States of America and Nigeria under Statutory exceptions includes Pre-incorporation contracts or Premature trading, Reduction of number of members, Fraudulent trading, Wrong description or Incorrect use of the company’s name, Failure to obtain Certificate of Incorporation before trading or trading without Certificate of Incorporation, Failure to pay dividends; Failure to use the company’s name, Wrongful trading, Phoenix or reincarnation companies etc.\(^\text{556}\). Statutory ‘disregarding’ Separate legal Personality of a company means that the Acts create exceptions or grounds for which the ‘Separate Legal Personality’ is being disregarded\(^\text{557}\). This type of ‘disregarding’ the ‘Separate Legal Personality’ of a company focuses on laws guiding the company, from its creation, to its status, to operations and perhaps to the company’s liquidation.

\(^{554}\)(1897) AC 22 (HL)


\(^{556}\)Chrispas Nyombi, Lifting the veil of incorporation under common law and statute, March 16\textsuperscript{th}, 2013

\(^{557}\)Ibid
As has been stated, judicial exceptions or grounds for ‘disregarding the Separate Legal Personality’ include

Fraud or improper conduct\(^558\) - Ireland, United States of America and Nigeria disregard the ‘Separate Legal Personality’ on the ground of fraudulent or improper conduct by the director, the executive or the officer of the company. Fraudulent or improper conduct must do with individuals involved in handling the company’s activities or transactions. In Ireland, fraudulent or improper conduct is usually in the form of reckless trading, misappropriation of company’s funds, inside-trading etc. In the United States of America, fraudulent or improper conduct is in the form commingling of company’s finances with personal finances. In Nigeria, fraudulent or improper conduct is in the same form as that of Irish as Ireland and Nigeria practise the same legal system.

For benefit of Revenue (Tax evasion or circumvent tax obligation)\(^559\) - Evasion or circumvention of tax obligation means a person or corporate entity unlawfully pays less tax than the law mandates. This is a criminal offence, therefore, if a corporate entity evades or circumvent tax obligation, it amounts to illegality activity. This is a type of fraud by using a company. Ireland, United States of America and Nigeria disregard the ‘Separate Legal Personality’ on the ground of tax evasion or circumvent tax obligation depending on what is the country’s corporation tax rate. In Ireland and Nigeria corporation tax evasion or corporation circumventing tax obligation is very straightforward to detect due to their corporation tax system. However, this situation is different in the United States of America due to American corporation tax law system and the type of companies in that country. For instance, a Limited Liability Company (LLC), a hybrid type of company in the United States of America can never be caught for tax evasion or circumvention of tax obligation. It implies that United States of America does not disregard the ‘Separate Legal Personality’ of a Limited Liability Company (LLC) on the ground of tax evasion or circumvention of tax obligation. Again, corporation tax payment is based on the corporation’s country of residence/abode. United States of America has different criteria of determining a corporation country of residence or abode unlike Ireland and Nigeria.

As a façade or a sham\(^560\) - This is where a corporate entity is not a genuine corporate entity. All the three countries in focus in this research disregard the ‘Separate Legal Personality’ if the company is a façade or a sham. Whereas, United States of America determines if a group of subsidiaries companies and its holding company should be deemed a ‘Single Economic Entity’ based on if the subsidiary is undercapitalised by the parent company. Therefore, disregarding the ‘Separate Legal Personality’ on the ground of ‘Single Economic Entity’ is very much unpronounced in the United States of America.

Agency or Trust\(^561\) - This is when the ‘Separate Legal Personality’ is disregarded on the ground of … been an agent or a trustee of … Ireland and Nigeria disregard ‘Separate Legal Personality’ on the ground of ‘Agency or Trust’. The United States of American Courts do not disregard the ‘Separate Legal Personality’ of Limited Liability Companies (LLCs) based on ‘Agency or Trust’. See Section 18-303 of the Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6,§§ 18-10118-1109 (2003).

\(^{558}\) Chrispas Nyombi, Lifting the veil of incorporation under common law and statute, March 16\(^{th}\), 2013

\(^{559}\) Ibid

\(^{560}\) Ibid

\(^{561}\) Chrispas Nyombi, Lifting the veil of incorporation under common law and statute, March 16\(^{th}\), 2013
Instrumentality or Alter ego doctrine - It is mainly the United States of America that disregard the ‘Separate Legal Personality’ based on the ‘Instrumentality or Alter ego’ ground.

Commingle of company’s business with personal business - Ireland, United States of America and Nigeria disregard the ‘Separate Legal Personality’ based on this ground.

Justice or Public Interest - Ireland, United States of America and Nigeria disregard the ‘Separate Legal Personality’ on the ground of Justice or Public Interest.

As has been noted, this Thesis explores how the British were the brains behind company law in Nigeria. Ireland is a ‘Common Law Jurisdiction or country’ and operates the same ‘Common Law System’ with Nigeria as far as company law is concerned. Therefore Irish legal approach in disregarding the ‘Separate Legal Personality’ seems to be the same with that of Nigerian.

In Nigeria, the Nigerian Companies and Allied Matters Act, 1990 (CAMA) as amended is equivalent to Irish Companies Act 2014. The Nigerian Companies and Allied Matters Act, 1990 (CAMA) as amended and the Irish Companies Act 2014 are exclusively the Laws that governs creation of a Company, the Company businesses, including Limited Liability Company and all the entirety of Company Law throughout the Nigeria and Ireland.

Judicial ‘disregard’ of the ‘Separate Legal Personality’ is pertinent to the dispensation of justice on judicial grounds by the courts. It seems, the comparative exceptions or grounds under judicial provisions are not all that pronounced or expressed. Ireland, United States of America and Nigeria disregard the ‘Separate Legal Personality’ of a company by means of judicial analysis. Under Judicial exceptions or grounds, an American case, Irish case or Nigerian case could be interchangeably cited by these countries. The implied comparative exceptions or grounds in each circumstance is due to the hosting country’s National Laws, as the judicial exceptions or grounds are interpreted in accordance with the National law of each hosting country where the case occurred. For example, Adams v Cape Industries PLC [1990] CH433, a case on subsidiaries and parent company liability was an English case, but it was interpreted in accordance with United States of America national law and judgement held accordingly.

This thesis reviews the manners in which Ireland, United States of America and Nigeria ‘disregard’ Separate Legal Personality’ of a company under the Statutory grounds. Since under Judicial grounds, the comparative exceptions or grounds are unpronounced. Statutory grounds are subject to the National laws; its interpretations and applications differ from Nation or jurisdiction to Nation (jurisdiction).


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562 Chrispas Nyombi, Lifting the veil of incorporation under common law and statute, March 16th, 2013
563 Ibid
564 [1962] 1 WLR 832 (ChD)
565 [1933] Ch 939
566 [1911] 1 IR 236
567 [1933] Ch 935 (CA); [1962] 1 WLR 832 (ChD
6.1 SEPARATE LEGAL PERSONALITY (SPL), CAMA, IRISH COMPANIES ACT 2014 AND TYPES OF LIMITED LIABILITY COMPANIES:

As has been expounded in the history stage of this thesis, the establishment of ‘Separate Legal Personality’ Doctrine was in the eighteen and nineteen centuries respectively.

In between these centuries, companies were not concerned with the shareholders liabilities but instead, were more concerned with running costs. However, 1960s and 1970s witnessed a change of trend in this regard; hence, the doctrine of ‘Separate Legal Personality’ became the focal matter of importance. At this change, business owners broaden their interests to choose either to carry out business in their private legal right or in ‘Separate Legal Personality’ (legally incorporated entity) capacity. The benefits of ‘Separate Legal Personality (legally incorporated entity) can never be over emphasised.

Part II of the Nigerian Companies and Allied Matters Act, 1990 (CAMA) stipulates provisions for the Incorporation of Companies and incidental matters. Part II Chapter 1 sections 18 to 49 and Part II Chapter 2 sections 50 to 53 of the Nigerian Companies and Allied Matters Act, 1990 (CAMA) are step by step guides for formation of a company in Nigeria. Part II Chapter 3 of the Companies and Allied Matters Act, 1990 (CAMA) is for foreign companies. Part II Chapter 1(18) of the Companies and Allied Matters Act, 1990 (CAMA) specifically provides number of persons and requirements for incorporating a company. Part II Chapter 4 of the Companies and Allied Matters Act, 1990 (CAMA) is for promoters of a company.

As already explained in the earlier Chapter of this thesis there are five types of Companies in Nigeria, both Business and Non-Business. However, this thesis focuses on companies limited by shares, because such companies are prone to the ‘disregarding’ of its ‘Separate Legal Personality’. There are private Companies limited (Ltd) by shares and public Companies limited (PLC) by shares in both Nigeria and Ireland.

As has been mentioned earlier in this thesis, analysing the creation of companies and the types of companies being created in the three jurisdictions (Ireland, United States of America and Nigeria) is necessary. It is because fundamentally, disregarding ‘Separate Legal Personality’ could be enforced based the types of companies being created.

There seems to be no colossal difference in the creation of companies in Ireland and Nigeria but there are in the types of companies being created in Ireland and United States of America, however, Ireland and Nigeria create companies in the same way and have the same types of companies. There are also comparative exceptions in ‘disregarding’ the Separate Legal Personality in Ireland and in United States of America.

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569 [1993] B.C.L.C. 480 QBD at 491
570 Chrispas Nyombi, Lifting the veil of incorporation under common law and statute, March 16th, 2013
571 Ibid.
572 Ibid
573 Hargley, C. ‘Types of Business and Non-Business Organizations in Nigeria’, Published on 22 June 2015
574 William J. C, James H. C, Limited Liability, 1999, 5620, Professor, Emory University, School of Law
575 Maduka, C. ‘History of Company Law in Nigeria’ 22/08/2016
576 Nigerian Companies and Allied Matters Act, 1990 (CAMA)
6.2 USEFULNESS OF DISREGARDING ‘SEPARATE LEGAL PERSONALITY’ OF AN INCORPORATED COMPANY AND DISREGARDING ‘SEPARATE LEGAL PERSONALITY’ UNDER ‘SINGLE ECONOMIC ENTITY’

The ‘Separate Legal Personality’ of a company will be retraced to a pioneer case Salomon v Salomon & Co ltd 1897. Globally, financial resources of every nation depend hugely on the commercial enterprises of the nation. Commercial enterprise does not exist or take place in a vacuum but in a company. Therefore, the legal soundness of a company’s management and its viability is paramount. When a limited liability company as an artificial person is distinguished from its shareholders, the natural persons, the shareholders are protected and motivated to invest more. These prevalent favorable chances are made available by the ‘Separate Legal Personality’ Doctrine and by enforcing the disregarding of the ‘Separate Legal Personality’ of a Company. The ‘Separate Legal Personality’ Doctrine is a watch dog. It is crucial that the purposes of those who incorporated a company should not inherently militate against its Legal Separate Corporate existence unless it is for a fraudulent purpose or to avoid legal obligations.

The Court of Appeal decided in English case Adams v Cape Industries PLC that as a rule, the courts were not unrestrained to disregard ‘Separate Legal Personality’ of a company based on the undefined and lack of clarity of ‘justice of the case’s premise rules. Succinctly the courts perhaps only disregard the ‘Separate Legal Personality’ of a company for the interest of the shareholders and the company.

The decision in Cape’s case facilitated the Irish case of Allied Irish Coal Supplies Ltd. v. Powell Duffryn. Allied Irish Coal Supplies Ltd. v. Powell Duffryn is the most influential Irish case in ‘disregarding’ Separate Legal Personality.

The facts of the case:

Powell Duffryn, the actual respondent had been litigated against, however, the claimant shortly ascertained that the respondent had no money, thereafter, attempted to include a subsidiary, a solvent company to the lawsuit on the premise that they were a single economic entity. Laffoy J expressed

“that this was so fundamentally at variance with the Salomon principles that it was wholly unstateable”.

This judgement was allowed by the Supreme Court. Notwithstanding, the Supreme Court did not totally dismiss the Single Economic Entity Doctrine which had been expressed in Powers Supermarkets case.

In Allied Irish Coal Supplies, Ltd v Powell Duffryn International Fuels Ltd, the Supreme Court conclusively ruled that the disregarding of the ‘Separate Legal Personality’ is not juridical if only based on financial dependence between a subsidiary and its Holding company.

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578 [1998] 2 IR 519
579 Ibid
580 Ibid
I purposely chose the case of Adams v Cape Industries PLC\(^{581}\).

And under Irish jurisdiction I chose Allied Irish Coal Supplies, Ltd v Powell Duffryn International Fuels Ltd\(^{582}\) because Cape is an English most influential case in ‘disregarding’ ‘Separate Legal Personality’ and it involved United States of America. Allied Irish Coal Supplies Ltd is as well the most influential Irish case in ‘disregarding’ ‘Separate Legal Personality’.

Again, Adams v Cape Industries PLC\(^{583}\) is a case on ‘Separate Legal Personality’ and ‘Limited Liability’ of shareholders. The case as well dealt with lingering contentions under the English clash of laws as to when a company would be deemed resident in a foreign jurisdiction so that the English courts would acknowledge the foreign court's jurisdiction over the company.

ENGLAND - Facts of the case:

Cape Industries PLC was an English company, a parent company. Cape’s subsidiary company extracted asbestos in South Africa and consigned it to Texas where a marketing subsidiary company, NAAC, delivered the asbestos to another company in Texas. The employees of NAAC Company in Texas developed ill, with asbestosis. They litigated against Cape and its subsidiaries in a New York Court. Cape, the co-defendant contended that the court had no jurisdiction to try the case. Notwithstanding, the court ruled in favor of the employees because Cape breached its duty of care in negligence.

6.3 DISREGARDING ‘SEPARATE LEGAL PERSONALITY’ UNDER JUDICIAL GROUNDS ACROSS THE JURISDICTIONS

The judicial grounds in which the Separate Legal Personality of a company may be disregarded considered in this thesis are under the following captions:

[1] Fraud or Improper conduct;
[2] For benefit of Revenue (Tax evasion or circumvent tax obligation);
[3] A Façade or a Sham Company;
[4] Agency or Trust;
[6] Avoidance of contractual or other legal obligations;

\(^{581}\) (1990)CH 33
\(^{582}\) [1998] 2 IR 519
\(^{583}\) 1990)CH 33
7] Single Economic Entity;
[8] For Justice/Public Interest,

[9] Commingle of Company’s business with Personal business;

[10] Alter ego/Instrumentality;

In the United States of America, liability cases are the hugely important area where the shareholder limited liability has been unheeded to in the disregarding of ‘Separate Legal Personality’. The fundamentals of this kind of a theory is the notion that ‘limited liability’ is a ‘state-granted privilege’, which perhaps, is abused. Notwithstanding, in the instances of this kind of abuse, the courts were faced with "mists of metaphor". Maurice Wormser, the author of the terminology "disregarding Separate Legal Personality ", who also focused his view on the concept of a ‘state-granted’ restriction of liability, was not able to propose a favorable law. Therefore, he allowed the courts with a broad optionality in this aspect.

Ultimately, Powell evolved three prerequisites for ‘disregarding’ the limited liability of a Holding company (Alter ego/Instrumentality). The initial prerequisite is that the subsidiary company must be wholly supervised and influenced by the Holding company (“mere instrumentality test”). The next prerequisite is that; this kind of supervision must have been misused for deception or any other illegal or fraudulent conduct. The last and third prerequisite is that the plaintiff must have sustained a tangible forfeiture because of the aforestated conduct.

For the purposes of getting ready advisory limitations for the courts, Powell authenticated the aforestated prerequisites with a case-by-case citation of more rules, which, notwithstanding, did not have to be fulfilled consecutively.

The test consists of diverse factors like
(i) The business status of the holding company as a predominant shareholder.
(ii) The distinct peculiarity of the administration of the two companies.
(iii) The investment of the subsidiary company by the holding company.
(iv) The absolute reality that it was the holding company that formed the subsidiary company.
(v) Forfeiture of remedy by the holding company.
(vi) The enterprise reliance of the subsidiary company on the holding company.
(vii) The business status of the subsidiary company as only an Agency of the holding company.
(viii) The absolute reality that the holding company is utilising the resources of the subsidiary

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584 Fletcher, § 41, 602-724; Also in Matheson’s and Eby’s "The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: codified the Test for Waiving Owners' Limited-Liability Protection", 75 Wash. L. Rev. (2000) 147-193; [Piercing the Corporate Veil in the U.S.] (Mi-inchen: VVF 1988)
585 Sic. Judge Cardozo in one of the earliest decisions on Piercing the Corporate Veil: Berkey v. Third Ave. Ry., 155 N.E. 58, 60 (N.Y. 1926)
586 Berkey v. Third Ave. Ry., ibid, 61
588 Powell, Parent and subsidiary Corporations (Chicago: Callaghan 1931) 4-6
589 Powell, ibid, 8-34, 54-81; on these factors in detail see Fletcher, § 41.30-41.60, 661-706.
company in a certain sense that the resources were owned by the holding company.

(ix) The accepted observance of the subsidiary company’s administration with the directions of the holding company or the overlooking of legal clauses by the subsidiary company.

These factors above were enormously preferred by lawful custom. In addition to Powell’s critique, the courts additionally utilise the ‘instrumentality rule’ (‘alter ego test’) evolved on Californian lawful custom. The shareholder is to be found liable if right and ownership are allied to so much degree that a person cannot show ‘the separate legal’ distinctness of the company and the company’s shareholder. This kind of disassociation would have inequitable aftereffect.

In the United States of American Case, Berkey v. Third Ave. Railway. The New York Court of Appeals decided that the Third Avenue Railway Co was not liable for the debts of the subsidiary company.

Delaware Separate Legal Personality cases:

The under-listed Delaware ‘Separate Legal Personality’ cases are cases involving ‘Parents Companies’ and ‘Subsidiaries Companies’ where ‘Instrumentality rule’ (‘Alter ego test’) was applied - ANDERSON v. ABBOTT et al. (1944) 321 U.S. 349 (64 S.Ct. 531, 88 L.Ed. 793); Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281; United States v. Lehigh Valley Railroad, 220 U.S. 257, 31 S.Ct. 387, 55 L. Ed. 458; United States v. Reading Co., 253 U.S. 26, 40 S.Ct. 425, 64 L. Ed. 760 and Linn & Lane Timber Co. v. United States, 236 U.S. 574, 35 S.Ct. 440, 59 L. Ed. 725, are Delaware cases equivalent to Berkey v. Third Ave. Railway case.

The judgements of the above Delaware ‘Separate Legal Personality’ cases involved parents and subsidiaries companies where the courts considered the ‘Instrumentality rule’ (‘Alter ego test’) as criteria.

Facts of the Berkey v. Third Ave. Railway case:

Minnie Berkey was injured in an accident on a tram line managed by the Forty-Second Street, etc., Railway Company. The Third Avenue Railway was jointly owned with the other two corporations with street railways on different routes. Third Avenue not only owned almost all the shares, the directorate and executive officers were too almost the same. MS Berkey litigated against the parent company, Third Avenue Railway Co, to pay damages for her personal injury.

It was contradictory to New York law at that time for one street railway company to transfer its franchise to the other without the Railway Commission’s authorisation. Therefore, it was contended that an assignment of any liabilities from one to another was a proscribed agreement, and so assignment of tort liability for MS Berkley’s personal injury was also illegal.

591 A classic decision is Minifie v. Rowley, 202 P. 673, 676 (Cal. 1921); for German literature on the Californian practice: Nacke, supra n. 34, 159-209.
592 (1927) 244 N.Y 602
Judgment of Berkey v. Third Ave. Railway case:

The New York Court of Appeals decided that the Third Avenue Railway Co was not liable for the debts of the subsidiary. It was imperative that the predominance of the parent company over the subsidiary company was to be established, for the parent company to be deemed liable for the debts of the subsidiary. It was required that the subsidiary company would be only the Instrumentality (Alter ego) of the parent company, or that the subsidiary was be thinly financed/capitalised to commit a swindling on the creditors.

This New York case (Berkey v. Third Ave. Railway case) was decided on the Instrumentality (Alter ego) criterion and all the above aforementioned Delaware cases were all cases where Instrumentality (Alter ego) Doctrine was applied. It is based on this fact that this thesis draws a conclusion that disregarding the ‘Separate Legal Personality’ of a company or piercing the corporate veil as it is known in the United States of America is predominantly disregarded or pierced based on Instrumentality (Alter ego) grounds or criteria in America.

In a Nigerian case of Emenite Ltd v. Oleka, it was ruled that the ‘Separate Legal Personality’ of an incorporated company can be substantiated by submitting the certificate of incorporation as a proof. However, if it is a State incorporated company, the ‘Separate Legal Personality’ of such incorporated company is not disputable. And as such, there will be no mandate to substantiate the category and ‘Separate Legal Personality’ of such incorporated company. A further area, where ‘Separate Legal Personality’ is disregarded in Nigeria is the Environmental Pollution area.

Section 37 of the Federal Environmental Protection Act Cap 131 1990 stipulates that if any violation against the FEPA Act or any regulations made thereunder has been perpetrated by an incorporated company or by an owner or a partnership or other firm or business, any director or executive of that incorporated company or every owner of the partnership or every individual involved in the management of that business or firm shall, on determination, would be liable to a fine not exceeding N500,000.00 for such violation. Furthermore, the incorporated company, firm or partnership shall be ordered to pay reparation for any harm emanating from such violation thereon or to fix and repair the polluted environmental area to an acceptable standard as may be approved by the Federal Environmental Protection Agency.

Current evolutions have indicated that the then “Failed Bank Tribunal” was too authorised to disregard the ‘Separate Legal Personality’ of a company. In the Nigerian case of Macebuh v National Deposit Insurance Corporation, the authority of the tribunal to disregard the ‘Separate Legal Personality’ was stipulated in the “Failed Banks Tribunal Decree” which stated thus;

“By virtue of Section 3 (3) (6) (ii) of the Failed Banks Decree, the power to lift (was vested in the tribunal) the Corporate veil of a corporate body indebted to a failed Bank to determine the liability of its members who may be liable jointly or severally for the debts owed by the corporate body to the Failed Bank……”

593 (2005) 6 NWLR (Pt. 921)350
594 Cap F 10 L.F.N. 2004 (as amended); AKINOLA BUKOLA, NLII Working Paper Series 002.
Notwithstanding on the legislative sledgehammer, which penetrates the ‘Separate Legal Personality’, the Courts will not be reluctant to unmask the cloak of incorporation if it ascertains that there is reckless or fraudulent trading. In the Nigerian case of Nathaniel Adeniji v State\(^{595}\), the Lagos State High Court trial judge, His Lordship, Justice Desalu stated that:

“any business which appears to have been handled recklessly or with intent to defraud, the court may declare that any person who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally liable for all or any of the debts or other liabilities of the Company”\(^{596}\).

The said Nathaniel Adeniji case was appealed under 4 NWLR (PT 234) and His Lordship, Justice Ibrahim Kolago Sulu Gambari of the Supreme Court delivered a judgement that upheld Justice Desalu’s judgement.

It is concluded that the work of the Court has been made uncomplicated by Section 506(1) of the CAMA which stipulates that if during the liquidation of a company, the conduct of the company has been exercised in a neglectful way or with motive to dupe the creditors of the Company or creditors of any individual for any additional intention. The liquidator of the company may, if he deems tenable to do so, assert that any individual who were purposely parties to the aforesaid be made individually liable.

As said earlier in this chapter, Nigerian company law been derived from British legal system, therefore, Nigerian company law is derived and fashioned from Irish/English legal system. However, there are lots of exclusions to the Irish/English ‘Separate Legal Personality’ doctrine. In that event, the courts are inclined to disregard the ‘Separate Legal Personality’ and peep at whatever has fundamentally been happening in the company.

As stated in the dictum of Devlin J, in Bank Handel v Slatford\(^{597}\) who commented as follows, saying

“... The legislature can forge a sledge hammer capable of cracking open the corporate shell...” and Gower complements this by further opining that: “... The courts have sometimes been prepared to have a crack...”\(^{598}\)

The court of Appeal, in Public Finance Securities Ltd v. Jafia\(^{599}\) a Nigerian case, unequivocally illustrated several circumstances at which the ‘Separate Legal Personality’ will be ‘disregarded’ when it ruled as follows: The court can ‘disregard’ the ‘Separate Legal Personality’. It can pull down the cloak. The courts will ‘disregard’ the ‘Separate Legal Personality’ to discover who was reprehensible for the fraudulent and inappropriate dealings of the company. The ‘disregard’ will be unavoidable if the ‘Separate Legal Personality’ is utilised to circumvent public expedience, defending iniquity, carry on and shade fraud and crime… or interested in heedless or fraudulent business dealings, blemished with fraud\(^{600}\).

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\(^{595}\) [(1992) 4 NWLR (PT 248) 1]
\(^{596}\) SC 93 of CAMA Cap 59 LFN 1990
\(^{597}\) (1953) 1 Q.B 248 at 278
\(^{598}\) Kodaolu, R “The principle Legal Personality and the protection of Minority Members and Other Non-members Constituents” 2008
\(^{599}\) 1998) 3 NWLR (pt.543) 602
\(^{600}\) Shittu A. B and Ogwezzy C. M, ‘Piercing the Veil of Business Incorporation’
In Nigeria, the ‘Separate Legal Personality’ may be ‘disregarded’ under the under listed statutory exceptions/grounds:

(a) The true ownership of any company securities such as shares or debentures under sections 325 to 328 of Companies and Allied Matters Act.
(b) Reduction in the Number of Directors - under section 93 of CAMA.
(c) A minimum requirement of the Number of Directors - Under section 246(1) of CAMA.
(d) A company with less than two directors must within a month appoint an additional new one - section 246(2) of CAMA.
(e) The consequence of failure to have minimum required number of directors - 246(3) of CAMA.
(f) Declaration of Shares by Substantive Shareholders of a Company - section 95 of CAMA.
(g) Failure to Comply with Established Business Ethics under CAMA - Sections 548, 548(1) and 631(4).
(h) Fraudulent Transactions by the Company after Winding Up - section 506 of CAMA.
(i) Failure to keep up to Date Financial Statement of Account - section 336 of CAMA.
(j) Consequences for failure to comply with section 336 of CAMA - subsection 2 of the section 336 of CAMA.
(k) Improper or Dubious Control and Management of the Company -section 234 of CAMA.

(l) Investigation of the Affairs of Companies under the Statutes.
Nigeria may ‘disregard’ the ‘separate legal personality’ under the following judicial exceptions/grounds: (1). If a company is used for illegal or improper purpose - see Dunlop Nigerian Industries Ltd v Forward Nigerian Enterprises Ltd & Farore. (2). If there has been fraud or improper conduct - see Nathaniel Adeniji v State. (3). If a company is used as a mask for fraud or illegality - See Ewerami v A.C.B. Nig Ltd (1978} 4 S.C. 99; Central Bank of Nigeria v Mrs. Agnes M. Igwillo (substituted for Dr. Victor Igwillo (Deceased)); Katto v. CBN (1999) 6 NWLR (Pt. 607) 390; (4). If a company is being misused by its directors to perpetrate a fraud or other dishonest or improper purpose - See Nigerian cases Public Finance Securities Ltd v. Jafia; Yesufu v Kupper International N.V.; Also see Otkritie International Investment Management Ltd v Urumov (“Otkritie”) (5). Only the company can sue to remedy that wrong; can ratify the irregular conduct - See Ramachand v Ekpeyong; Government of Midwestern State v Mid Motors Nig. Co. Ltd 39; Abubakar v. Smith, Nigerian cases. (6). Status of a Company as a distinct personality to the Shareholders and Directors - see Adeyemi v. Baker (Nig) Ltd. (7). Liability for Fraud and Doing Justice to the victims - see Alade v. Alice (Nig) Ltd. (8). Misappropriation of Company’s Fund - see again Alade v. Alice (Nig) Ltd.

Other judicial exceptions or grounds for disregard ‘Separate Legal Personality’ in Nigeria include Ratifying Corporate Acts, Determination of Company’s Residence, Single Economic Entity, Between Agency and Instrumentality (Alter Ego) etc.
An analytical inference drawn from this thesis so far, reveals that comparative exceptions or grounds still exist in the circumstances and the criteria for the ‘Separate Legal Personality’ of company to be ‘disregarded’ across Ireland, United States of America and Nigeria.

On a closer exploring, it would be discovered from each country’s circumstances or criteria for ‘disregarding’ the ‘Separate Legal Personality’ of company that the ‘Single Economic Entity Theory’ is very much prominent in Irish jurisdiction. Whereas, the ‘Instrumentality rules’ (‘Alter ego tests’) is very much prominent in the United States of America jurisdiction.

The prominence of ‘Instrumentality rules’ (‘Alter ego tests’) in the United States of America is seen in Adams v Cape Industries PLC judgement stated earlier in this thesis, which is a case that involved England and United States of America. And the United States of American case Berkey v. Third Ave. Railway judgement was ruled without enforcing the ‘Single Economic Entity Theory’ as it is applicable in Irish/English jurisprudence instead the ‘Instrumentality rule’ (‘Alter ego test’) was enforced as applicable in the United States of America jurisprudence. ‘Single Economic Entity Theory’ is not as prominent as ‘Instrumentality rule’ (‘Alter ego test’) in the United States of America jurisprudence and criteria for enforcing ‘Single Economic Entity Theory’ in Ireland/England vary with criteria for enforcing the ‘Single Economic Entity Theory’ in the United States of America. Minnie Berkey’s case was decided without enforcing the ‘Single Economic Entity Theory’.

Nigeria, though a different jurisdiction, operates the same legal system as Ireland and as such, Nigerian stand in Adams v Cape Industries’ judgement would be same. From the analysis of situations under which Nigeria could disregard ‘Separate Legal Personality’, it seems, Nigeria focuses on Statute i.e. (CAMA).

The Economic Entity Theory as it is known in Irish/English jurisprudence seems to be the equivalent to the ‘Instrumentality rule’ (‘Alter ego test’) in the United States of America jurisprudence. The ‘Single Economic Entity Theory’ is not as prominent as the ‘Instrumentality rule’ (‘Alter ego test’) in the United States of America jurisprudence and criteria for enforcing ‘Single Economic Entity Theory’/‘Instrumentality rule’ (‘Alter ego test’) in Ireland/England vary with the criteria for enforcing ‘Single Economic Entity Theory’ in the United States of America. The judgement of this case was decided without applying the ‘Single Economic Entity Theory’.

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601 [1990] Ch. 433 (A.C.) at 544 (Eng.), The English Court of Appeal reviewed various grounds for veil piercing, including fraud, agency, and the single economic entity, and rejected them all. Also see id. at 494, 545-47, 532-39.
602 (1927) 244 N.Y 602
603 [1990] Ch. 433 (A.C.) at 544 (Eng.), The English Court of Appeal reviewed various grounds for veil piercing, including fraud, agency, and the single economic entity, and rejected them all. Also see id. at 494, 545-47, 532-39.
604 (1927) 244 N.Y 602
Nigeria, though a different jurisdiction, operates the same legal system as Ireland and as such, Nigerian stand in Adams v Cape Industries’ judgement would be same. From the analysis of situations under which Nigeria could disregard ‘Separate Legal Personality’, it seems, Nigeria focuses on Statute i.e. (CAMA).

Other discernible comparative exceptions or grounds exist in creation of companies that are easily affected by the disregarding of ‘Separate Legal Personality’. In Ireland, it is the Designated Activities Companies (DAC) with status of ‘Privately or Publicly Limited’ by shares. In Nigeria, it is either ‘Privately Limited’ or ‘Publicly Limited’ by shares. However, in the United States of America, a hybrid type of company- LLC is among the type of companies that could be affected by the disregarding of ‘Separate Legal Personality’. Ireland and Nigeria do not have a hybrid type of company i.e. a Limited Liability Company (LLC). All these facts have been expounded earlier in this thesis for creating companies in the respective specific countries concerned.

6.4 SUMMARY

The creation of a company and its type seems to be of hugely important in the ‘Doctrine of Separate Legal Personality’. Countries or jurisdictions create a company differently and have different types of companies. In any circumstance, in creation of a company across the globe, one thing is common, and that is, a company must be created by Statutes. Ireland, United States of America and Nigeria are in no way exceptional to this fact.

Again, globally, only companies limited by shares are vulnerable to the Doctrine Separate Legal Personality’. Ireland and Nigeria practise common law systems; however, United States of America as well as practise common-law system except State of Louisiana where a mixed of common law and civil law is been practised.

As this thesis discerns, Irish Companies Act 2014 as amended is the only Statue that guides and governs the creation and operations of companies in Ireland. In the United States of America, it is the other way around because States’ Statues as well as Federal statues are governing the creation and operations of companies. A hybrid type of company - ‘Limited Liability Company’ (LLC) is universally known in the United States of America to the extent that it dominates every other type of companies.

This thesis confirms that Nigerian Companies and Allied Matters Act 1990/2004 (CAMA) as amended is the equivalent to the Irish Companies Act 2014 because it is the only Statue that guides and governs the creation and operations of companies in Nigeria. Nigerian company law is an offshoot from British legal system. ‘Disregarding the Separate Legal Personality’ of a company

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605 Lau, T. and Johnson, L.; The Legal and Ethical Environment of Business, v. 1.0, Saylor Academy Publisher, Published January 2012.
606 Irish Companies Act 2014
607 American Bar Association Section of Business Law
608 Lau, T. and Johnson, L.; The Legal and Ethical Environment of Business, v. 1.0, Saylor Academy Publisher, Published January 2012
609 Nigerian Companies and Allied Matters Act, 1990 (CAMA)
610 Maduka, C.; ‘History of Company Law in Nigeria’ 22/08/2016
though by implications seems to be for the shareholders’ advantages. However, the legal stripping off the ‘Separate Legal Personality’ of a company on one and imposing liability on the other hand is not witch-hunting but serves as a watch-dog.

At this juncture, the analysis of creating companies in Ireland, United States of America and Nigeria has revealed that there are colossal comparative exceptions still exist in the creations of companies and the types of companies being created in the jurisdictions in focus.

It is construed from the decision of the Court of Appeal in the case of Adams v Cape Industries PLC that, as a rule, the courts were not free to disregard the ‘Separate Legal Personality’ of a company based on the undefined and lack of clarity of ‘justice of the case’s assumption rules. Gower J in a summarised decision remarked a verdict and stated thereon three instances courts could disregard ‘Separate Legal Personality’.

The tort victims (the employees) attempted to implement the decision in the United Kingdom court but the English Court of Appeal overturned the decision on the grounds of ‘Single Economic Entity Theory Doctrine test’. The English Court of Appeal construed that Cape and its subsidiaries were not the same ‘Single Economic Entity’ and moreover, Cape’s subsidiary was not resident in England. A criterion for companies’ residency is one of the unpronounced comparative exceptions or grounds I mentioned earlier. In the United Kingdom/Ireland, criteria for companies’ residency are different from United States of America criteria for companies’ residency.

There are several situations in which Ireland could disregard ‘Separate Legal Personality’ of a company.

As has been noted earlier, in the United States of America, the disregard of the shareholder limited liability (‘Separate Legal Personality’) has been hugely significant in liability cases. This is consequently to the notion that ‘limited liability’ is a ‘state-granted privilege’ that is possibly being corrupted by deception.

Powell evolved three prerequisites which include the “mere instrumentality test” for ‘disregarding’ the limited liability of a Holding company in the United States of America as enumerated on the earlier chapter of this thesis (chapter 6 paragraph 46).

There are nine authenticated rules by Powell enumerated thereon under which the United States of America Courts disregard the limited liability of a Holding company. In addition to the nine authenticated rules by Powell enumerated on the earlier chapter (chapter 6 paragraph 47 of this Thesis, Courts additionally utilise the ‘instrumentality rule’ (‘alter ego test’) evolved by Californian law of conventionality.

In Minnie Berkey’s case, the United States of American Case

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611 Shittu A. B, and Ogwezzy C. M, Piercing the Veil of Business Incorporation, June 2014
612 Courtney, TB. The Law of Private Companies 2 Ed. Pg.203 Lexis Nexis Butterworths Dublin, 2002
613 Chapter 6 para 44, Pages 141-155 of this thesis
614 Fletcher, § 41, 602-724; Also in Matheson’s and Eby’s "The Doctrine of Piercing the Veil in an Era of Multiple Limited Liability Entities: codified the Test for Waiving Owners’ Limited-Liability Protection", [Piercing the Corporate Veil in the U.S.] (Mi-inchen: VVF 1988)
615 Sic. Judge Cardozo in one of the earliest decisions on Piercing the Corporate Veil: Berkey v. Third Ave. Ry., 155 N.E. 58, 60 (N.Y. 1926)
616 Powell, Parent and subsidiary Corporations (Chicago: Callaghan 1931) 4-6
617 Chapter 6 para 47 of this thesis
618 Powell, ibid., 8-34, 54-81; on these factors in detail see Fletcher, § 41.30-41.60, 661-706 (1927)244 N.Y 602
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the claimant encountered an accident on a tram line managed by the Forty-Second Street and other Railway Companies. She sustained personal injury. The Third Avenue Railway was jointly owned with the other two corporations with Street Railways on different routes. Third Avenue not only owned almost all the shares, the management and executive officers were as well almost the same. Ms. Berkey litigated the parent company, Third Avenue Railway Co, to pay damages for her personal injury. The New York Court of Appeals decided that the Third Avenue Railway Co was not liable for the debts of the subsidiary company on grounds of ‘instrumentality rule test’ (‘alter ego test’).

Section 37 of the Nigerian Companies and Allied Matters Act (CAMA) Chapter 59 Laws of the Federal Republic of Nigeria 1990/2004 stipulates vividly when a company commences to be in existence. The Nigerian court additionally endorsed the doctrine of ‘Separate Legal Personality’ in the Nigerian case of Emenite Ltd v. Oleka. However, if it is by the state of defence, the ‘Separate Legal Personality’ of such an incorporated company is not disputable, therefore, there will be no mandate to substantiate the category and the ‘Separate Legal Personality’ of an incorporated company in such circumstance.

HL Bolton (Engineering) Co. Ltd. V Graham and Sons is the case that buttresses the view of this Thesis that Nigeria and Ireland are on the same level ground and fashion on legal system particularly in company law; HL Bolton (Engineering) Co. Ltd. V Graham and Sons is an English/Irish case. Thence, comparative exceptions or grounds still exist across Ireland and Nigeria on one hand and United States of America on the other hand.

6.5 CONCLUSION

It is evident that having researched from the literature review of the ‘Doctrine of Separate Legal Personality’ and up to the ‘Disregarding of Separate Legal Personality’ of a company, there are comparative exceptions that still exist across Ireland, United States of America and Nigeria in the current approaches to ‘Separate Legal Personality’ of a company (in the 21st Century).

It is universally known that the Doctrine of ‘Separate Legal Personality’ was constituted by the House of Lords in a pioneer case Salomon v. Salomon & Co Ltd, (1897) AC 22 (HL). This ‘Doctrine of Separate Legal Personality’ did not only bestow artificial personality status and limits the liabilities of the shareholders, in addition, it creates the curtain of distinctiveness between the company on one hand and the shareholders, the directors, the executives/officers and the employees on the other hand. The elimination of the artificial personality status, non-limiting of the shareholders’ liabilities and the stripping off or pulling aside the curtain of distinctiveness is the ‘disregarding’ of Separate Legal Personality’ of a company.

It is incontestable and apparent that the Doctrine of ‘Separate Legal Personality’ was established on various dates across the aforestated countries, thence comparative exceptions or grounds still exist as the law moves with the trend of contemporary developments and events.

This thesis initially enumerated certain terminologies and metaphorical names associated with the ‘Doctrine of Separate Legal Personality’ to get the readers of this thesis acquainted.

620 Section 37 of CAMA Chapter 59 1990
621(2005) 6 NWLR (Pt. 921) 350
622(1957) 1 QB 159; [1956] 3 All ER 624
Evidently, each country in focus uses different terminologies and metaphorical names in ‘Disregarding of ‘Separate Legal Personality’ of a company across the countries in the current approaches to disregarding the ‘Separate Legal Personality’ of a company (in the 21st Century). Again, the thesis analysed the creation and types of companies, cases involving the ‘disregarding of Separate Legal Personality’ and the presumed variations.

Thirdly, it enumerated the relevant Statutes of each country involved in this research that, governs the creation and operations of companies. Fourthly, the thesis figured out the comparative exceptions or grounds for ‘disregarding of Separate Legal Personality’ in the countries in focus.

Finally, it pinpointed the Statutory and judicial exceptions or grounds for ‘disregarding of Separate Legal Personality’ and the specific areas where the comparative exceptions or grounds still exist across Ireland, United States of America and Nigeria in the current approaches to the disregarding of the ‘Separate Legal Personality’ of a company (in the 21st Century).

It is obvious that there are both statutory and judicial exceptions/grounds in ‘disregarding of Separate Legal Personality’. As well, there are comparative exceptions or grounds and variance in procedures in which Ireland, United States of America and Nigeria ‘disregard’ the Separate Legal Personality’ of a company.

As it has been substantiated in this thesis, Ireland and Nigeria seem have the same pattern of legal systems; therefore, the comparative exceptions or grounds existing in the ‘disregarding of Separate Legal Personality’ of a company in both countries are unpronounced. That being the case, this thesis had critically analysed the comparative exceptions or grounds existing in the ‘disregarding of Separate Legal Personality’ of a company in Ireland and Nigeria on one hand and in the United States of America on the other hand.

In an Irish most influential case on ‘Separate Legal Personality’ of a company - Allied Irish Coal Supplies Ltd v Powell Duffryn International Fuels Ltd [1998] 2 IR 519. A case that was based on Single Economic Entity Theory, the Supreme Court ruled that the ‘disregarding of the Separate Legal Personality’ is prejudiced if only based on financial dependence between a subsidiary and its Holding company whereas in the United States of America it is not.

In the United Kingdom, most influential case on ‘Separate Legal Personality’ of a company - Adams v Cape Industries PLC [1990] CH 433, a case that involved United States of America, and was based on Single Economic Entity Theory. The New York Court held judgement against Cape, the Holding company for breach of a duty of care in negligence to the employees of Cape’s subsidiary company in Texas - NAAC. The claimants could not enforce the judgement since they had not proved in the English Court of Appeal that the ‘Separate Legal Personality’ of a company could be ‘disregarded’ and both companies be handled as one. The same could have been applicable if it were in the Irish Court of Appeal. The United States of American Courts is very much inclined to disregard ‘Separate Legal Personality’ of a company based the ‘Instrumentality Rule’ (Alter Ego Test). Berkey v. Third Avenue Railway Co 244 N.Y. 602 (1927) is a standard conventional case of ‘Disregarding Separate Legal Personality’ of a company in the United States of American Corporate Law. The New York Court of Appeals ruled that the Third Avenue Railway Co was not liable for the liabilities of the subsidiary company. It is imperative that the predominance of the Holding company over the subsidiary was necessary to be complete, for the Holding company to be held liable for the liabilities of the subsidiary company. This is an ‘Instrumentality Rule’ (Alter Ego Test) exception or ground.

(1) “An action cannot be maintained in the name of the Company without the authority of that Company.

(2) Section 63(3) of the Companies and Allied Matters Act allows directors of a Company to authorize that action be taken to protect the business of the Company”.

It is apparent from this thesis, that the act of disregarding ‘Separate Legal Personality’ of a limited liability Company until now remains being enforced ‘Statutorily’ and ‘Judicially’ across the globe, Ireland, United States of America and Nigeria included.

Going back to fundamentals in this thesis and to ask what are the grounds for disregarding ‘Separate Legal Personality’ of a limited liability Company. This thesis answers and reveals that disregarding ‘Separate Legal Personality of a Company is enforced on both ‘Statutory’ grounds/provisions and ‘Judicial’ grounds or provisions.

Disregarding the ‘Separate Legal Personality’ of a limited liability Company ‘Statutorily’ is the act of stripping off the ‘Separate Legal Personality’ of a limited liability Company based on statutory grounds and not on judicial grounds. Statute creates a limited liability Company, therefore, if a limited liability Company violates the legislated Company Statutes, its ‘Separate Legal Personality’ will be stripped off because a limited liability Company exists and operates according to the legislated Company Statutes. Company Statute is the watchdog that watches over limited liability Companies and the companies’ operations.

As evidenced in this thesis, disregarding ‘Separate Legal Personality’ of a limited liability Company on Judicial grounds implies that the ‘Separate Legal Personality’ of a limited liability Company is stripped off by applying cases and common laws. In contrast to Statutes, cases and common laws are dynamic and invariably developing body of laws from Courts judgements or decisions. Whereas, Statutes are legislative enactments that prohibit certain actions by requiring or proscribing something or the enactments that declare the legality of specific conducts.

As has been stated by the analysis of the aforesaid cases from Ireland, United States of America and Nigeria in this thesis, it is apparent that, there are comparative exceptions or grounds still exist in the current approaches to ‘disregarding of ‘Separate Legal personality’ of a company across Ireland, United States of America and Nigeria in the current approaches to disregarding the ‘Separate Legal Personality’ of a company (in the 21st Century).

This LL.M Thesis contributes thus: It brings together the comparative exceptions that still exist in the circumstances in which Ireland, United States of America and Nigeria disregard ‘Separate Legal Personality’ of a company. The Thesis reveals that from the doctrinal point of view, the United Kingdom House of Lords judgement in Salomon v Salomon (1897) AC 22 case is narrow-minded, antiquated and extremely ambiguous.
The Thesis educes the relevancy and usefulness of disregarding the ‘Separate Legal Personality’ of a Company to the Country’s economy in addition to the shareholders and the Company. Companies and businesses affect hugely the economy of every Country by boosting the Country’s income. Therefore, the sound management of the Company, the Company’s compliance to the laws and the excellent behavior of the Company’s directors and officers in the course of discharging their duties are imperative. Disregarding the ‘Separate Legal Personality’ of a Company is the watch-dog that checks and controls these (companies and companies’ operations).

Finally, the Thesis adds value by comparing different legal positions of disregarding the ‘Separate Legal Personality’ of a Company in different jurisdictions.
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