INTRODUCTION

When a company is incorporated it is treated as a separate legal entity distinct from its promoters, directors, members, and employees; and hence the concept of the corporate veil, separating those parties from the corporate body, has arisen. The issue of "lifting the corporate veil" has been considered by courts and commentators for many years. However, the topic has not received the attention in the literature that one would expect.[1] No clear set of principles has emerged[2] and it is difficult to predict when the courts will disregard the separate entity principle.[3] The need for English courts to resort to such metaphorical terms as "mere fraud," "sham," "dummy," "alter ego" in their judgments indicates their difficulties. Nor do the English courts have a monopoly on metaphorical judgments. There is equal confusion and uncertainty in the Australian and United States jurisdictions.[4] Some researchers argue that the courts have become increasingly willing to lift the veil[5] whilst others reach the opposite conclusion.

The central purpose of this paper is to investigate the bounds of the principle of limited liability. Part I of this paper will briefly survey the concept of company as a separate entity. Part II deals with law of piercing the veil. Part III analyses the common law grounds of lifting the veil that have been frequently proposed, to determine the underlying reasons for judicial disregard of the separate entity principle. It is suggested in this paper that these common law exceptions, viz. agency, fraud, avoidance of obligations, prevention of injustice, and imputation of members' characteristics to the company, are symptomatic of the courts' attempts to ensure that parties, both shareholders, creditors, and other third parties who may be considered by the court to have a legitimate interest in the affairs of the corporation, are not disadvantaged by actions of company management and shareholders protected by limited liability. Part IV deals with the comparative aspect of the statutory provisions regarding piercing of veil. Part V deals with the comparative analysis of UK, USA, German and Indian veil piercing jurisprudence. Part V reviews some of the more recent cases in which courts have applied their piercing tests. This flexibility extends, in the last resort, to "the view which the judge takes of the justice of the case before him."

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1 Gower, Principles of Modern Company Law, (4th ed., 1979), p. 112.
2 Pickering, "The Company as a Separate Legal Entity" (1968) 31 M.L.R. 481, 483
3 Lipton and Herzberg, Understanding Company Law, (2nd ed., 1985), p. 22.
4 *Swanson v. Levy* 509 F.2d 859 (1975), 862. (U.S. Court of Appeals)
5 Schmitthoff, "Salomon in the Shadow", [1976] J.B.L. 305, 305-312;

COMPANY: A SEPARATE LEGAL ENTITY

The company as a separate entity was firmly established in the landmark decision in ***Salomon v. Salomon & Co. Ltd***.[6] Salomon, a sole trader, sold his manufacturing business to Salomon & Co. Ltd. (a company he incorporated) in consideration for all but six shares in the company, and received debentures worth 10 thousand pounds. The other subscribers to the memorandum were his wife and five children who each took up one share. The business subsequently collapsed, and Salomon made a claim, on the basis of the debentures held, as a secured creditor. The liquidator argued that Salomon could not rank ahead of other creditors because, in fact, the company and Mr. Salomon were one and the same--or alternatively, that the company carried on business on Salomon's behalf.

On appeal, the House of Lords held that Salomon & Co. Ltd. was not a sham; that the debts of the corporation were not the debts of Mr. Salomon because they were two separate legal entities; and that once the artificial person has been created, "it must be treated like any other independent person with its rights and liabilities appropriate to itself."

As Lord Macnaghten observed:[7]

> “The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them.”

Likewise, in ***Macaura v. Northern Assurance Co. Ltd.***[8] the House of Lords decided that insurers were not liable under a contract of insurance on property that was insured by the plaintiff but owned by a company in which the plaintiff held all the fully-paid shares. The House of Lords held that only the company as the separate legal owner of the property, and not the plaintiff, had the required insurable interest. The plaintiff, being a shareholder, did not have any legal or beneficial interest in that property merely because of his shareholding. Support for the doctrine has been exhibited more recently in ***Lee v. Lee's Air Farming***.[9] The Privy Council held that Lee, as a separate and distinct entity from the company which he

[6] *Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22.
[7] Ibid. at p. 51.
[8] *Macaura v. Northern Assurance Co. Ltd***.** [1925] A.C. 619.
[9] *Lee v. Lee's Air Farming* [1961] A.C. 12.

controlled, could be an employee of that company so that Lee's wife could claim workers' compensation following her husband's death.

In Australia, there has been similar judicial support for the separate entity concept. Kitto J. in ***Hobart Bridge Co. Ltd. v. FCT***,[10] relying on the judgment by Lord Sumner in ***Gas Lighting Improvement Co. Ltd. v. IRC***,[11] summarises the position in the following manner:

> "Between the investor, who participates as a shareholder, and the undertaking carried on, the law imposes another person, real though artificial, the company itself, and the business carried on is the business of that company, and the capital employed is its capital and not in either case the business or the capital of the shareholders. Assuming, of course, that the company is duly formed and is not a sham ..."

More recently, the High Court in ***Industrial Equity v. Blackburn***[12] has held that the principle operates to prevent a holding company from treating a wholly-owned subsidiary's profits as its own. Therefore, it can be seen that there has been, and still is, the highest authority for the separate entity concept. In none of these cases, however, did the Court have to consider the limitations of the separate entity principle. Rather, the respective courts upheld the principle in cases where to do otherwise would completely deny the efficacy of the corporate entity as a legal person separate from its founders, shareholders or management.

EXCEPTIONS TO THE SEPARATE ENTITY PRINCIPLE

As early as Salomon, judgments have indicated possible exceptions to the separate entity concept. Lord Halsbury recognised the separate entity providing there was "no fraud and no agency and if the company was a real one and not a fiction or myth."[13] As noted by Lord Denning in ***Littlewoods Mail Order Stores Ltd. v. IRC***,[14] incorporation does not fully:

> "cast a veil over the personality of a limited company through which the courts cannot see. The courts can, and often do, pull off the mask. They look to see what really lies behind."

Likewise, in the United States in the early decision in ***United States v. Milwaukee Refrigeration Transit Company***,[15] the Circuit Court (E.D. Wisconsin) decided:

[10] Hobart Bridge Co. Ltd. v. FCT (1951) 82 C.L.R. 372, 385
[11] Gas Lighting Improvement Co. Ltd. v. IRC [1923] A.C. 723, 741.
[12] Industrial Equity v. Blackburn (1977) 52 A.L.J.R. 89.
[13] Emphasis added.
[14] Littlewoods Mail Order Stores Ltd. v. IRC [1969] 1 W.L.R. 1241, 1254
[15] United States v. Milwaukee Refrigeration Transit Company 142 F.247 (1906).

"A corporation will be looked upon as a legal entity as a general rule 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."

Two general reasons why exceptions to the separate entity principle exist can be identified. First, although a corporation is a legal person, it cannot always "be treated like any other independent person." For example, a corporation is not capable of committing a tort or a crime requiring proof of *mens rea* unless courts disregard the separate entity and determine the intention held by the directors and/or shareholders of the corporation.[16] Secondly, strict recognition of the principle may lead to an unjust or misleading outcome if interested parties can "hide" behind the shield of limited liability. Further analysis suggests that these two reasons can be summed up in the one: that judicial discretion and also legislative action allows the separate entity principle to be disregarded where some injustice is intended, or would result, to a party (either internal or external to the company) with whom the company is dealing.

[16] An investigation of cases where this exception has been relied upon indicates that the decisions made are consistent with the courts' desire to ensure that no injustice results from the existence of the corporate form. *H.L. Bolton (Engineering) v. T.J. Graham & Sons Ltd.* [1956] 3 All E.R. 624, *Whitford Beach Pty. Ltd. v. FCT* (1982) 150 C.L.R. 355, *Re Chisum Services Pty. Ltd.* (1982) 1 A.C.L.C. 292 and *Daimler Company Ltd. v. Continental Rubber and Tyre Co. (Great Britain) Ltd.* [1916] 2 A.C. 307.

PIERCING OF CORPORATE VEIL

Piercing the veil is corporate law's most widely used doctrine to decide when a shareholder or shareholders will be held liable for obligations of the corporation. It continues to be one of the most litigated and most discussed doctrines in all of corporate law. Although there is near unanimity among the commentators that the present rules neither guide good decision-making nor produce consistent or defensible results, and there are many proposals for reform or abolition of the present law, one sees little discernable movement in the case law toward a better approach.

Piercing the veil law exists as a check on the principle that, in general, investor shareholders should not be held liable for the debts of their corporation beyond the value of their investment. The modern rationale for giving individual investors limited liability emphasizes eliminating three types of transaction costs. First are the costs of individual shareholders or creditors monitoring the wealth position of other shareholders, and, second, the costs and other complexities of each shareholder or creditor monitoring the risks of management actions.[17] Third, limited shareholder liability makes it less costly and easier for shareholders to diversify their investments. The result of limiting these transactions costs is that limited liability both encourages investment and facilitates the operation of equities markets. In addition, Hansman and Kraakman have persuasively argued that limited liability is part of a broader phenomenon of asset partitioning which serves important social interests by guaranteeing creditors that business assets will also be protected from investors' creditors.[18] However, a new consensus is emerging in the commentary that limited liability may well not be justified in tort cases and, although with less unanimity, also when the claim is based on statutory duties rather than common law obligations.[19]

While traditional corporate law has not articulated different rules for a parent company in its role as a shareholder than for individual investor shareholders, parent companies in fact present different policy issues and their limited liability should be

[17] Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. CHI. L. REV. 89 (1985) and Larry E. Ribstein, Limited Liability and Theories of the Corporation, 50 MD. L. REV. 80 (1991).
[18] Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 YALE L.J. 387 (2000).
[19] Kyle D. Wuepper, Piercing the Corporate Veil: A Comparison of Contract Versus Tort Claimants Under Oregon Law, 78 OR. L. REV. 347 (1999).

determined by a different analysis. The core idea is that a parent company as a shareholder in its subsidiary companies is in quite a different economic role and performs quite a different management function than individual investor shareholders, including public shareholders in the parent company itself. A parent company creates, operates and dissolves subsidiaries primarily as part of a business strategy in pursuit of the business goals of the larger enterprise, which the parent and all the subsidiaries are pursuing together. The parent is not an independent investor. Whatever the corporate formalities chosen, the parent typically has very real control over the operations and decisions of the subsidiary and the extent to which the parent exercises that control is based on business strategy for the enterprise rather than meaningful separation of the legally independent corporate entities. The various companies in the corporate group are really fragments that collectively conduct the integrated enterprise under the coordination of the parent. Within corporate groups, many of the contemporary economic efficiency justifications for limited liability do not apply, and neither should the rules for applying that liability or determining its outer boundary.

A decision by corporate law to allow shareholders limited liability is a decision to allow them, as investors, to allocate some of the risks of doing business to third parties.[20] Piercing the veil rules are one of the traditional ways that courts have supervised that risk allocation decision.

[20] Robert B. Thompson, Piercing the Corporate Veil: Is the Common Law the Problem? 37 CONN. L. REV. 619, 622 (2005).

GROUNDS UNDER WHICH THE VEIL IS LIFTED

The corporate evil is said to be lifted when the court ignores the company and concerns itself directly with the members or the managers. “It is impossible to ascertain the factors which operate to break down the corporate insulation.”[21] The matter is largely in the discretion of the courts and will depend upon “the underlying social, economic and moral factors as they operate in and through the corporation.”[22] It can be said “that adherence to the Solomon principle will not be doggedly followed where this would cause an unjust result”.[23] But the following grounds have become well-established for lifting of the veil of a corporate entity.

1. FRAUD

The courts have been more that prepared to pierce the corporate veil when it feels that fraud is or could be perpetrated behind the veil. The courts will not allow the Solomon principal to be used as an engine of fraud. The two classic cases of the fraud exception are ***Gilford Motor Company Ltd v. Horne***[24] and ***Jones v. Lipman***.[25]

In the first case, Mr. Horne was an ex-employee of The Gilford motor company and his employment contract provided that he could not solicit the customers of the company. In order to defeat this he incorporated a limited company in his wife's name and solicited the customers of the company. The company brought an action against him. The Court of appeal was of the view that "the company was formed as a device, a stratagem, in order to mask the effective carrying on of business of Mr. Horne. “In this case it was clear that the main purpose of incorporating the new company was to perpetrate fraud.” Thus the court of appeal regarded it as a mere sham to cloak his wrongdoings.

In the second case of *Jones v. Lipman* a man contracted to sell his land and thereafter changed his mind in order to avoid an order of specific performance he transferred his property to a company. Russel J specifically referred to the judgments in *Gilford v. Horne* and held that the company here was "a mask which (Mr. Lipman) holds before his face in an attempt to avoid recognition by the eye of equity" he awarded specific performance both against Mr. Lipman and the company. Under no circumstances will the court allow the any

[21] Warner Fuller, The Incorporated Individual: A Study of One-man Company, (1938) 51 Harv LR 1373, 1377.
[22] *Tata Engineering Locomotive Co v. State of Bihar* AIR 1965 SC 40
[23] *Odyssey (London) Ltd. v. OIC Run Off Ltd.* (2000) TLR 201 CA
[24] *Gilford Motor Co Ltd v Horne* [1933] Ch. 935 (CA)
[25] *Jones v. Lipman* [1962] l WLR 832

form of abuse of the corporate form and when such abuse occurs the courts will step in. The three aspects of fraud, which needs to be looked at before the corporate veil can be, lifted which are:

A) What are the motives of the fraudulent person relevant?

Whether some level of deception is necessary needs to be determined. In the case of ***Hilton v. Plustile Ltd.*** the plaintiff and the defendant agreed to use a medium of a company in a tenancy arrangement in order to evade the application of the Rent Act, 1977. The court of Appeal held that the plaintiff was not entitled to lift the veil since he had full knowledge of the matter at all times. However another interesting question that arises is what is the effect of deception on the other party. The issue came up for discussion in the case of ***Adams v. Cape Industries Plc***.[26] In considering whether the corporate form has been used in such a way as to justify the lifting of the corporate veil, the court stated that the correct test in relation to groups of companies was whether the company had been used as a "mere facade concealing the true facts" applying this test Slade J. said that the "motives of the perpetrator may be highly material" in both the classic cases intention to deceive the plaintiff was very much present how ever it was not so in ***Adams v. Cape Industries***.[27] So the point that needs to be determined is whether motive is necessary for the fraud exemption to exist. However to get any answer it is also important to find out the nature of legal right that is being denied to the plaintiff.

B) Is the character of the legal obligation being evaded relevant?

What the court wants is to prevent limited companies from using the corporate form to evade a contractual or legal obligation. However one needs to question whether the nature of this obligation will affect the ability of the court to lift the corporate veil. In the classic cases the defendants sought to avoid the legal obligations that existed prior to their incorporation, the main motive of incorporation was to avoid the performance of the legal obligation. In *Adams v. Cape* there was some discussion about the need to allow the veil to be lifted in order to prevent Cape avoiding publicity as to its involvement in the sale of asbestos to America and to prevent cape from having any practical benefit of the group's asbestos trade in the states without the attendant risks of tortuous liability. However the tortuous liability was purely speculative. For the fraud exception to exist the defendant must deny the plaintiff some preexisting legal right. In case no legal right is existent the intention on part of the defendant to deceive the plaintiff must be speculative and hence less substantial in nature.

[26] *Adams v Cape Industries Plc* [1990] Ch. 433 (CA (Civ Div)
[27] Ibid

If the legal right crystallizes before the incorporation of the company then the mental element is satisfied if however the reverse then question arises if whether in such circumstances the mental element can be satisfied. A suitable answer to this is if the legal right crystallizes after the incorporation but before the use of the corporate form to evade the legal right, the fraud exception should be satisfied.

C) Is the timing of the incorporation of the device company relevant?

In ***Creasey v. Breachwood Motors Limited***,[28] the reason for the failure of the fraud exception was the timing of incorporation of the sham company. Here Mr. Creasey brought an action against wrongful dismissal against his employers BW. BW served a defence but four months later he was served a notice saying that the company was insolvent. BM took over all the business except the plaintiff's claim. The plaintiff obtained an order for damages and interest however before he received anything. BW was dissolved without going into liquidation. The plaintiff sought an order substituting BM for BW on the grounds of justice. In this case the facts may look similar to *Adams v. Cape Industries* however Richard Southwell sitting as distinguished Judge referred to *Gilford v. Horne* and *Jones v. Lipman* on the basis that in those cases the sham companies are had been formed with the view to carry out the fraud. In the present case the device company BM was already in business and caring on it's own business. This a very controversial case and should have been decided on the basis of the classic cases as it should not matter whether device companies were created to avoid the legal obligation or whether they were in existence. Creasey should have been otherwise decided maybe on the grounds of justice.

2. GROUP ENTERPRISES

Sometimes in the case of group of enterprises the Solomon principal may not be adhered to and the court may lift the veil in order to look at the economic realities of the group itself. In the case of ***D.H.N. Food products Ltd. v. Tower Hamlets London Borough Council***[29] it has been said that the courts may disregard Solomon's case whenever it is just and equitable to do so. In the above-mentioned case the court of appeal thought that the present case where it was one suitable for lifting the corporate veil. Here the three subsidiary companies were treated as a part of the same economic entity or group and were entitled to compensation.

[28] *Creasey v Breachwood Motors Ltd* [1992] B.C.C. 638 (QBD)

[29] *D.H.N. Food products Ltd. v. Tower Hamlets London Borough Council* [1976] 1 WLR 852; *Hackrbridge-Hewittic and Easun Ltd. v. GEC Distribution Transformers Ltd*, (1992) 74 Comp Cas 543 (Mad); *Fatima Tile Works v. Sudarsan Trading Co. Ltd*, (1992) 74 Comp Cas 423 (Mad)

Lord Denning has remarked that we know that in many respects a group of companies are treated together for the purpose of accounts, balance sheet, and profit and loss accounts. Gower too in his book says, "There is evidence of a general tendency to ignore the separate legal group". However whether the court will pierce the corporate veil depends on the facts of the case. The nature of shareholding and control would be indicators whether the court would pierce the corporate veil. In the case of Woolfsan[30] the house of lords held that there was "no basis consonant with the principle upon which on the facts of this case the corporate veil can be pierced to the effect of holding Woolfson to be the true owner of Campbell's business or the assets of Solfred, "the two subsidiary companies that were jointly claiming compensation for the value of the land and disturbance of business. The House of Lords in the above mentioned case had remarked "properly applied the principle that it 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 figurative sense facade denotes outward appearance especially one that is false or deceptive and imports pretence and concealment. That the corporator has complete control of the company is not enough to constitute the company as a mere facade rather that term suggests in the context the deliberate concealment of the identity and activities of the corporator. The separate legal personality of the company, although a "technical point" is no matter of form it is a matter of substance and reality and the corporator ought not, on every occasion, to be relieved of the disadvantageous consequences of an arrangement voluntarily entered into by the corporator for reasons considered by the corporator to be of advantage to him. In particular "the group enterprise" concept must obviously be carefully limited so that companies who seek the advantages of separate corporate personality must generally accept the corresponding burdens and limitations.

In some cases the corporate veil has not been lifted prime examples of that are ***Adams v. Cape Industries***. This was a case involving a foreign judgment against a company. The court in this case held that each company in the group is a separate entity. However one area where the courts have been particularly reluctant to recognize the concept of group entity is with relation with corporate debts. Though it is not possible to in absence of agency or trust to hold one group liable for the debts of another in America equitable doctrines are applied and in New Zealand as well as Ireland there are statutory provisions for pooling of assets.

[30] (1978) SC (HL) 90

3. AGENCY: In the case of ***Solomon v. Solomon*** Justice Vaughan Williams expressed that the company was nothing but an agent of Solomon. "That this business was Mr. Solomon's business and no one else's; that he chose to employ as agent a limited company; that he is bound to indemnify that agent the company and that this agent, the company has lien on the assets………" However on appeal to the house of lords it was held that a company did not automatically become an agent of the shareholder even if it was a one man company and the other shareholders were dummies.

A company having power to act as an agent may do so as an agent for its parent company or indeed for all or any of the individual members if it or they authorize it to do so. If so the parent company or the members will be bound by the acts of its agent so long as those acts are within actual or apparent scope of the authority. But there is no presumption of any such relationship in the absence of an express agreement between the parties it will be difficult to establish one. In Cape case attempt to do so failed. Incases where the agency agreement holds good and the parties concerned have expressly agreed to such an agreement them the corporate veil shall be lifted and the principal shall be liable for the acts of the agent.

4. TRUST: The courts may pierce the corporate veil to look at the characteristics of the shareholders. In the case of Abbey and Planning the court lifted the corporate veil. In this case a school was run like a company but the shares were held by trustees on educational charitable trusts. They pierced the veil in order to look into the terms on which the trustee held the shares.

5. TORT: Usually the English courts have not lifted the veil on the ground of tort it is a phenomenon not witnessed in most common law jurisdictions apart from Canada.

6. ENEMY CHARACTER: In times of war the court is prepared to lift the corporate veil and determine the nature of shareholding as it did in the ***Daimler case***[31] where germen shareholders held the shares of an English company during the time of World War I.

7. TAX: At times tax legislations warrant the lifting of the corporate veil. The courts are prepared to disregard the separate legal personality of companies in case of tax evasions or liberal schemes of tax avoidance without any necessary legislative authority.

[31] *Daimler Co Ltd v. Continental Tyre & Rubber Co (Great Britain) Ltd* [1916] 2 A.C. 307 (HL)

COMPARISON OF STATUTORY PROVISIONS IN SUPPORT OF LIFTING THE VEIL

I. INDIAN LAW

The Act itself provides for circumstances when corporate veil will be lifted and the individual members/directors will be made liable for certain transactions. The statutory provisions are as follows:

1. **Reduction of membership below statutory minimum (Section 45):** This section provides that if the number of member of a company is reduced below 7 in the case of public company or below 2 in the case of private company and the company continues to carry on the business for more than 6 months, while the number is so reduced, every person who knows this fact and is a member of the company is severally liable for the debts of the company contracted during that time.

2. **Improper use of name (Section 147):** Under sub-section (4) of this section, an officer of a company who signs any bill of exchange, hundi, promissory note, cheque wherein the name of the company is not mentioned in the prescribed manner, such officer can be held personally liable to the holder of the bill of exchange, hundi etc. unless it is duly paid by the company.

3. **Liability for fraudulent conduct of business (Section 542):** If in the course of the winding up of a company, it appears that any business of the company has been carried on with intent to defraud the creditors of the company or any other person or for any fraudulent purpose, the persons who were knowingly parties to the carrying on of the business, in the manner aforesaid, shall be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company, as the court may direct.

II. ENGLISH LAWS

1. **Reduction of number of members:** Under section 24 of the companies act if a public company carries on business for more than six months may become liable jointly and severally with the company for the payment of debts the right that this section confers

on creditors is limited. It is only that member who remains after 6 months that can be sued. The anomaly of this section is that the liability attaches to a member and not a director unless the director also happens to be a director as well. This section has very little practical utility because of the limitation.

2. **Fraudulent or wrongful trading:** *a) Criminal liability:* If any business of a company is carried on with the intend to defraud creditors of the company or creditors of any other person or for any fraudulent purpose who was knowingly a party to the carrying on of the business in that manner is liable to imprisonment or fine or both. This applies whether or not the company has been or is in the course of being wound up. The civil liability for the same offence in now a part of the Insolvency Act. *b) Sections 213:* (1) If in the course of winding up of a company it appears that any business of the company has been carried on with the intend to defraud creditors of the company or creditors of any other person or for any fraudulent purpose...then. (2) The court on application of the liquidator may declare that person in who were knowingly parties to the carrying on of business in that manner are liable to make such contributions (if any) as the court thinks proper.

Wrongful trading is dealt with in Section 214 of the insolvency act and has similar provisions to Section 213. However this section operates only in cases of insolvent liquidation and the declaration can be made only against a person who at some time before the commencement of winding up, was a director of the company and knew or ought to have concluded at that time that there was no reasonable prospect that the company would avoid going into liquidation. No such declaration will take place is the court is satisfied that the person took all the possible steps to minimize the losses. These sections have been considered to be opposed to the Solomon principle.

3. **Abuse of company names or employment of disqualified directors**: Section 216 of the Insolvency Act now makes it an offence for anyone who was a director or a shadow director of the original company at any time during the 12 months preceding its going into insolvent liquidation to be in any way concerned (except with leave of court) during the next five years in the formation, management, of a company or business with a name by which the original company was known or one so similar as to suggest an association with that company.

A person acting in violation of 216 is under 217 personally liable, jointly and severally with that company and any other person so liable, for the debts and other liabilities of that company and any other person so liable, for the debts and liabilities of that company incurred while he was concerned in its management and breach of Section 216.

4. **Mis-description of the company:** Section 349(4) of the companies act provides that if any officer of the company or other person acting on its behalf. Signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods in which the companies name is not mentioned in legible letters. He is liable to a fine and he is personally liable to the holder of such as mentioned above.
5. **Premature trading:** Another example of personal liability is section 117(8). Under this section a public limited company newly incorporated as such must not "do business or exercise any borrowing power" until it has obtained from the registrar of companies a certificate that has complied with the provisions of the act relating to the raising of the prescribed share capital or until it has re-registered as a private company. if it enters into any transaction contrary to this provision not only are the company and it's officers in default, liable to pay fines but it the company fails to comply with its obligations in that connection within 21 days of being called upon to do so, the directors of the company are jointly and severally liable to indemnify the other party in respect of any loss or damage suffered by reason of the company's failure.

CURRENT JUDICIAL TRENDS

If there is one overriding principle in all piercing cases, it is that each one must be decided upon its own facts.[32] No two cases are likely to exist that possess the same elements of control or improper purpose, or wherein each of the parties behaved in the identical manner. With this proposition in mind, this part reviews some of the more recent court decisions in order to provide an understanding of the application of the various criteria used to discern whether the corporate form should be ignored.

[32] *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 1 Cal. Rptr. 2d 301, 317 (Cal. Ct. App. 1991); *Sampson v. Hunt*, 665 P.2d 743, 751 (Kan. 1983); *Kansas Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 112 (S.D. 1994); *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1992);

ELEMENTS OF A PIERCING CLAIM

In general, there are three components that the complainant must prove in order to pierce the corporate veil. Those elements are commonly characterized as (1) control and domination, (2) improper purpose or use, and (3) resulting damage or harm.[33] In practice, however, these concepts are sometimes difficult to apply.

1. CONTROL AND DOMINATION

This prong of the three-part test measures the relationship between the shareholder and the corporation.[34] Generally, mere majority stock ownership will be insufficient to satisfy this element. Instead, one must show "complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction has no separate mind, will or existence of its own."

In determining whether "complete domination" exists, courts usually require the plaintiff to produce evidence of one[35] or more[36] factors evincing control. A non-exhaustive list of commonly relied upon circumstances used to establish the requisite degree of control includes:

1. Inadequate capitalization or undercapitalization;

2. Failure to follow corporate formalities;

3. Identity of directors and officers;

4. Sole or majority stock control;

5. Commingling of funds;

6. Sharing of corporate employees;

7. Parent finances subsidiary;

8. Subsidiary has substantially no business except with the parent company or no assets other than those conveyed to it by the parent;

9. Papers of the parent corporation describe the subsidiary as a department of the parent;

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[33] *Morris v. Department of Taxation & Fin.*, 623 N.E.2d 1157, 1160-61 (N.Y. Ct. App. 1993); *Belvedere Condominium Owners' Ass'n v. R. E. Roark Cos.*, 617 N.E.2d 1075, 1086 (Ohio 1993)

[34] *White v. Jorgenson*, 322 N.W.2d 607, 608 (Minn. 1982); *Multimedia Publishing v. Mullins*, 431 S.E.2d 569, 571 (S.C. 1993).

[35] *Fazio v. Brotman*, 371 N.W.2d 842, 846 (Iowa Ct. App. 1985) (holding jury instruction proper which stated veil can be pierced when "any one of the six items is established").

[36] *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 579 N.E.2d 626, 641 (Ind. Ct. App. 1991)

10. The directors or officers of the subsidiary do not act independently in the subsidiary's interest but, rather, take their orders from the parent company in the parent's interest;

11. The parent corporation uses the property of the subsidiary as its own;

12. Diversion of funds or assets for non-corporate purposes;

13. The parent company pays the salaries and other expenses or losses of the subsidiary;

14. The parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation.[37]

Although most of these indicia of control are self-explanatory, two of the factors deserve further elucidation.

Inadequate capitalization or undercapitalization, the first factor above, is frequently cited as evidence used to establish control and domination. In application, however, circumstances of inadequate capitalization will typically be used to support the second element, i.e., fraud, injustice, or improper use of the corporate form. Whether there is sufficient equity in the company involves issues of not only how much capital is adequate but also when the corporation must be adequately capitalized. Two different approaches have been followed by the courts: the initial incorporation analysis and the continuing obligation analysis.

The initial incorporation analysis undertakes to measure the adequacy of capital by the "nature and magnitude of the corporate undertaking at the time of the inception of the corporation." In ***Pierson v. Jones***,[38] the plaintiff claimed that because the corporation was undercapitalized at the time he lent it money, the corporate veil should be pierced. This argument was flatly rejected by the Idaho Supreme Court, theorizing that an adequately capitalized corporation can become undercapitalized at a later time for a variety of reasons. Courts in other jurisdictions have analyzed the adequacy of capital at the time of incorporation as well. Underlying the initial incorporation test is the longstanding principle that the purpose of incorporating is to limit the personal liability of investors to their investment. The veil should not be pierced because of undercapitalization where the investors initially infuse the corporation with adequate capital but subsequent business failures render the initial capital inadequate. The initial investment rule, however, does appear to be

[37] *Uchitel Co. v. Telephone Co.*, 646 P.2d 229, 235 (Alaka 1982); Mid-Century Ins. Co. v. Gardner, 11 Cal. Rptr. 2d 918, 922 n.3 (Cal. Ct. App. 1992); *New Sheridan Hotel & Bar, Ltd. v. Commercial Leasing Corp.*, 645 P.2d 868, 869 (Colo. Ct. App. 1982)
[38] *Pierson v. Jones*, 625 P.2d 1085, 1087 (Idaho 1981)

tempered by a requirement that any subsequent devaluation of capital be caused by legitimate business failures.[39]

The other approach followed by some courts, the continuing obligation theory, extends the time frame for analysis of capitalization beyond the stockholder's initial investment. In ***DeWitt Truck Brokers v. W. Ray Flemming Fruit Co***.,[40] the Fourth Circuit Court of Appeals stated that "the obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter ... during the corporation's operations." Under the continuing obligation analysis, failure to infuse additional capital can render an initial investment inadequate and, thus, provide a means to pierce. The continuing obligation reaches beyond the duty of an investor not to intentionally devalue the initial investment and creates an affirmative duty to act to maintain adequate capital.

The second factor above, failure to follow corporate formalities, also is somewhat unclear. Various items may be described as corporate formalities, including issuing stock, holding director and shareholder meetings, maintaining books of account, maintaining bank accounts, maintaining books for corporate records, printing separate advertisements and separate business cards, using separate stationery, keeping filing systems, and maintaining offices.[41] Significantly, the failure to follow corporate formalities seldom, if ever, causes the plaintiff's injury. However, given that this evidence is used to show the parent stockholder's domination of the corporation, in all likelihood its relevance to the piercing test is simply to show the lack of corporate separateness that normally attaches and would otherwise be presumed.

The control element is certainly the focus of most veil-piercing claims. The inquiry is fact specific, but even if one or more of the factors are present, the court may still find insufficient evidence that the parent corporation (or other insider) exerted the requisite degree of control such that "complete domination" existed. However, when one or more of the considerations is found, the court is likely to continue its analysis of the second element of the claim, improper purpose.

2. IMPROPER PURPOSE OR USE

[39] *Scott v. AZL Resources, Inc.*, 753 P.2d 897, 901 (N.M. 1988). This is obviously a recognition that a corporation cannot transfer its assets in order to defraud creditors

[40] *DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.* 540 F.2d 681 (4th Cir. 1976)

[41] *Dillman v. Nobles*, 351 So. 2d 210, 213 (La. Ct. App. 1977); *Colman v. Colman*, 743 P.2d 782, 786 n.2 (Utah Ct. App. 1987)

The second prong of the piercing test requires the claimant to show that the control exercised by the parent company or dominant stockholder was "used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal right."[42] Thus, this second inquiry focuses on the relationship between the plaintiff and the corporation. It is an explicit recognition that some improper conduct must have occurred beyond establishing that the corporation was controlled and dominated.

While the courts have developed various indicia to assist them in analyzing the control requirement, no similar considerations exist with respect to the improper purpose element. However, the requisite morally culpable conduct has been found in a variety of circumstances where piercing claims have succeeded, including the commission of torts,[43] undercapitalization with the intent to defraud creditors,[44] and violations of state or federal statutes. Actual common law fraud may not be required and one court has recently stated that "injustice alone will support a disregard of the corporate entity."

Although certain conduct undertaken by a corporation may be clearly demonstrated as morally reprehensible, other actions are somewhat more ambiguous and have caused disagreement among the courts. For instance, several courts have held that a breach of contract, without more, will not justify disregard of a corporation. This is because "contract liability arises from an essentially consensual relationship." Thus, the parties are able (or have the opportunity) to protect themselves in the negotiation process. Some statutory violations are also not significant enough to create the requisite morally culpable conduct.[45] Finally, the possibility that the judgment creditor may have difficulty enforcing its judgment, alone, is not the type of injustice to warrant piercing.[46]

[42] *Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. Ct. App. 1986). *Pauley Petroleum, Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. Super. Ct. 1968); *Hickman v. Hyzer*, 401 S.E.2d 738, 739- 40 (Ga. 1991); *Swall v. Custom Automotive Servs., Inc.*, 831 S.W.2d 237, 241 (Mo. Ct. App. 1992); *J. L. Brock Builders, Inc. v. Dahlbeck*, 391 N.W.2d 110, 115 (Neb. 1986)

[43] *Adam v. Mt. Pleasant Bank & Trust Co.*, 355 N.W.2d 868, 872 (Iowa 1984); *Fazio v. Brotman*, 371 N.W.2d 842, 846 (Iowa Ct. App. 1985); *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979); *Kincaid v. Landing Dev. Co.*, 344 S.E.2d 869, 872 (S.C. Ct. App. 1986)

[44] *Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379, 387 (Mo. Ct. App. 1987).

[45] *Barlow's, Inc. v. Bannock Cleaning Corp.*, 647 P.2d 766, 771 (Idaho Ct. App. 1982); *Harlow v. Fibron Corp.* 671 P.2d 40, 45 (N.M. Ct. App. 1983).

[46] *Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1390 (7th Cir. 1994); *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1265 (10th Cir. 1989); *Mid-Century Ins. Co. v. Gardner*, 11 Cal. Rptr. 2d 918, 923 (1992)

The improper purpose element often sits at the heart of the plaintiff's underlying liability claim. Proof of the underlying cause of action, therefore, may help establish the second part of the piercing test. The improper purpose may take the form of statutory violations, commissions of torts, fraud, or, under certain circumstances, a court may find that the conduct was simply "unjust" or "inequitable." However, the plaintiff must still prove causation.

3. RESULTING DAMAGE

The plaintiff, finally, must show that the defendant's control, exerted in a fraudulent, illegal or otherwise unfair manner toward it, caused the harm suffered. Put another way, the plaintiff must prove that, unless the corporate veil is pierced, it will have been treated unjustly by the defendant's exercise of control and improper use of the corporate form and, thereby, suffer damages. This element may easily be met by the corporate creditor who, when it demands payment or attempts to execute on a judgment, learns that previously available assets have been spirited away by the owner in order to avoid collection.

However, when the plaintiff's damage does not result from any conduct by the defendant corporation, the plaintiff has not met its burden. "The fact that the corporate veil could be disregarded for some purposes does not mean that it must be disregarded for all purposes." Not every case justifies disregard of validly existing corporations. Courts should exercise care to balance the competing goals of incorporation and protecting creditors. Finally, the plaintiff must show that the control and acts complained of coalesced at the same time as the harm.[47]

CONCLUSION

The doctrine of piercing the corporate veil is not subject to any bright line tests. Courts have struggled for years to develop and refine their analysis of these claims. However, each new action brings a different set of facts and circumstances into the equation and a separate determination must be made as to whether the plaintiff has adduced sufficient evidence of control and domination, improper purpose, or use and resulting damage.

[47] *J. M. Thompson Co. v. Doral Mfg. Co.*, 324 S.E.2d 909, 915 (N.C. Ct. App. 1985)

The decision whether to pierce the corporate veil may be assisted, at least in part, upon the opinion of qualified experts. In particular, expert testimony would be helpful to the trier of fact in determining whether the corporation has been adequately capitalized for its intended purpose. Ultimately, however, the judgment whether to disregard the corporate entity will be based upon a balancing of various factors all or some of which are necessary but may not be sufficient to pierce the veil. The Judgment of the Court Of Appeal in the Adams case can be said to be the current law, which is nothing more than a reiteration of the law laid down by the House of Lords in Solomon's case. The bottom line being only the court will lift the veil in the face of grave abuse of the corporate form and not otherwise. Also the trend regarding the increase or decrease in the judicial pronouncement regarding lifting of veil of a corporate entity cannot be ascertained as each the courts view on lifting of corporate veil depends on the facts of each case.

A COMPARATIVE ANALYSIS OF U.S., U.K., GERMAN AND INDIAN VEIL-PIERCING JURISPRUDENCE

An overview of U.S., German, and U.K. Veil-piercing law reveals significant differences. Veil-piercing jurisprudence in the U.S., Germany, and the U.K. is largely based on facts and circumstances and defies neat categorizations.[48] However, generalizations are sometimes useful to gain an understanding of the overall trend of the law in each jurisdiction. Therefore, the following is not intended as an iron-clad statement of black-letter law, but rather as a general overview to provide a basic framework for a comparative analysis of international veil-piercing trends. Overall, U.K. courts appear more hesitant than U.S. Courts to pierce the corporate veil. German statutory and case law provide the greatest opportunity for veil-piercing of a subsidiary company. The greatest volume of veil-piercing litigation appears to take place in the U.S.

In the U.S., courts say they will pierce the corporate veil of a subsidiary where the parent exercises control over the subsidiary and the exercise of control is accompanied by fraudulent, illegal, or other improper conduct which creates an injustice. Veil-piercing is frequently associated with intentional acts of fraud, but other conduct of a misleading nature

[48] Carston Alting, Piercing The Corporate Veil in American and German Law-Liability of Individuals and Entities: A Comparative View, 2 TULSA J. COMP. & INT'L L. 187, 199 (1984)

that creates an injustice could trigger veil-piercing.[49] The creation of the reasonable belief that the parent and subsidiary are one company can support veil-piercing, and factors such as nonobservance of formalities, gross undercapitalization, and commingling of assets have been cited as veil-piercing triggers.[50] According to one empirical study on veil-piercing, plaintiffs are successful in forty percent of reported cases.[51]

In ***United States v. Milwaukee Refrigerator Transit Company***[52], Sanborn J of the U.S. Supreme Court held as follows: "Where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will disregard the corporate entity and treat it as an association of persons."

The veil-piercing test in U.K. law is phrased similarly to that in the U.S. and at first blush appears nearly identical. Under U.K. law, the corporate veil will be pierced if it is necessary to achieve justice.[53] Even similar terms such as "alter ego" can be found in some U.K. opinions.[54] As in the U.S., veil-piercing occurs in the U.K. where there is a high degree of control by the shareholder.[55] However, a number of U.K. decisions reflect a general

[49] *Anderson v. Kennebec River Pulp & Paper Co.,* 433 A.2d 752 (Me. 1981) (involving an attempt to hold a parent company liable for salary owed by its subsidiary when the corporate officers allegedly promised plaintiffs that the parent company would stand behind their salaries despite financial difficulties); *African Metals Corp. v. Bullowa,* 41 N.E.2d 466 (N.Y. 1942) (involving the use of an undercapitalized corporation in a scheme to sell nickel cathodes which turned out to be scrap iron); *Bucyrus-Erie Co. v. Gen. Prod. Corp.,* 643 F.2d 413 (Ohio App. 1981) (alleging fraudulent misrepresentation of a machinery contract as well as circumstances justifying veil-piercing); *Truckweld Equip. Co. v. Olson,* 618 P.2d 1017, 1021(Wash. App. 1980) (indicating that typically the injustice triggering veil-piercing is fraud, misrepresentation, or some form of manipulation). *Sprecher v. Weston's Bar,* 253 N.W.2d 493, 498 (Wis. 1977)

[50] *Brunswick Corp. v. Waxman,* 459 F.Supp. 1222 (E.D.N.Y. 1978) (refusing to pierce the corporate veil where the defendant corporation was formed and operated as a no-asset corporation. The plaintiff was not misled into doing business with the no-asset corporation and was not wronged. The opinion underscores the importance of fraudulent or misleading conduct in supporting veil-piercing); *DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.,* 540 F.2d 681 (4th Cir.1976) (indicating that disregarding the corporate shield is justified where the corporation is undercapitalized, formalities are disregarded, there has been nonpayment of dividends, siphoning off of corporation's funds by the dominant sharheholder, and nonfunctioning of corporate officers and directors)

[51] Jeffrey M. Colon, Changing U.S. Tax Jurisdiction: Expatriates, Immigrants, and The Need For A Coherent Tax Policy, 34 SAN DIEGO L. REV. 1 (1997)

[52] *United States v. Milwaukee Refrigerator Transit Company* (1905) 142 F, edn. 247

[53] *Creasy v. Breachwood Motors, Ltd.,* [1993] BCLC 480, [1992] BCC 638 (Q.B.)

[54] *Security Exchange Ltd. v. Gordon, Transcript of Hearing*, Oct. 7, 1988 (C.A.)

[55] *Wallersteiner v. Moir,* 2 All E.R. 217, 1 W.L.R. 991 (C.A. 1974)

reluctance to pierce the corporate veil.[56] Nevertheless, piercing has occurred in some cases involving intentional acts of deception or efforts to avoid a legal duty.[57]

German law takes a significantly different approach from U.K. and U.S. law and seems to be the most liberal of all three jurisdictions regarding the circumstances in which the court will pierce the subsidiary's corporate veil. If a parent dominates a German Stock Corporation (the counterpart to the publicly-owned American or English corporation), the parent may be liable for the subsidiary's obligations through express agreement or where a specific transaction has occurred that is not at arms length and is detrimental to the subsidiary. If a controlling parent dominates a German limited liability company (the equivalent of a privately-owned American or English corporation) the parent may be liable for its subsidiary's debts through case law rather than statutory law. Where the dominated company is a German limited liability company, the corporate veil of a subsidiary may be pierced to hold the shareholder liable where the parent has exercised pervasive control over the subsidiary. The parent's conduct does not have to involve intentional misconduct or wrongdoing. Fraudulent, illegal, or particularly egregious behavior does not appear to be a prerequisite. However, some of the more recent cases suggest that parental liability will be imposed only where the parent exercises its control in a manner that is not in the interest of the dependent companies and is abusive.

So far as the Indian case law is concerned, there are very few cases dealing with the question of lifting the corporate veil as between the holding and the subsidiary company. In ***Life Insurance Corporation of India v. Escorts Ltd.***,[58] Justice O. Chinappa Reddy had emphasised that the corporate veil should be lifted where the associated companies are inextricably connected as to be in reality, part of one concern. He, however, did not find it necessary or desirable to enumerate the classes of cases where lifting the veil is permissible, "since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of public interest and the effect on the parties who may be affected." In that case, in view of certain schemes introduced by the Union of India, 13 NRI companies purchased shares. The

[56] *Littlewoods Mail Order Stores, Ltd. v. I.R.C.*, 1 W.L.R. 1241 (C.A.1969) (involving piercing the corporate veil between a parent and subsidiary in order to deny a tax deduction which was taken in connection with the acquisition of property. The Court interpreted its authority to pierce broadly).
[57] *Wallerstein v. Moir*, 2 All E.R. 217 (1974), 1 W.L.R. 991 (C.A. 1974); *Creasy v. Breachwood Motors, Ltd.* [1993] BCLC 480, [1992] BCC 638 (Q.B. 1993); *Re A Company Ltd. v. Vwagh* [1985] BCLC 333, [1983-5] BCC 99, 421 (C.A. 1985)
[58] *Life Insurance Corporation of India v. Escorts Ltd.*, AIR 1986 SC 1370

argument was that all the 13 companies were a facade and Mr. Swaraj Paul was the real investor. The Supreme Court refused to investigate into this question by observing that when the legislature required lifting of the corporate veil for a particular purpose, the Court would lift the veil only to that extent and no more.

A more direct instance relating to the nexus between the parent and subsidiary companies is to be found in ***State of UP v. Renusagar Power Company***[59]. In that case, the Supreme Court lifted the corporate veil to hold that Hindalco, the holding company and Renusagar Power Company, its subsidiary, should be treated as one concern and the Power Plant of Renusagar must be treated as the own source of generation of Hindalco and on that basis, Hindalco would be liable to pay electricity duty. As the judgement discloses, the conclusion was based on the facts thereof as is clear from the Court's following observations:

> "Here, indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of a power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is a wholly owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has, at no point of time, indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order, the profits of Renusagar have been treated as the profits of Hindalco. In the aforesaid view of the matter, we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern."

Post-Renusagar, the issue of lifting the corporate veil had been considered in a couple of other cases. For this, reference may be made to the Supreme Court Judgements in ***Delhi***

[59] *State of UP v. Renusagar Power Company* (AIR 1988 SC 1737)

Development Authority v. Skipper Construction Co. (P) Ltd.[60], and ***New Horizons Ltd. v. Union of India***[61]. The question in these cases, however, did not relate to the parent-subsidiary relationship. In *Skipper case*, the issue related to the adoption of the device of incorporation by certain individuals for committing illegalities and to defraud people. After referring to the authorities and the case law, the Court reiterated the proposition that where the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. "The fact that Tejwant Singh and members of his family have created several corporate bodies does not prevent this court from treating all of them as one entity belonging to and controlled by Tejwant Singh and family if it is found that these corporate bodies are mere cloaks behind which lurks Tejwant Singh and/or members of his family…….".

The case of ***New Horizons Ltd. (NHL)*** presented very interesting situation. New Horizons was a joint venture company, which had submitted a tender for printing, etc. of telephone directories for the Department of Telecommunications, Telecom District, Hyderabad. The company claimed to possess the requisite experience, which was actually the experience of its promoter companies. The Department rejected the offer on the ground of non-fulfillment of the condition by the applicant company. This rejection was upheld by the High Court. In the view of the High Court, it could not be said that the authorities had failed in their duty to look behind the facade of corporateness of NHL, and it was none of their duty and they rightly examined the experience, etc., of NHL and came to the conclusion that it did not satisfy the eligibility conditions. Disagreeing with the High Court, the Supreme Court found that the facts and the "realities of the situation", required departing from the narrow legalistic view. "Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents, namely, TPI, LMI and WML as well as IIPC, had to be taken into consideration if the tender evaluation committee had adopted the approach of a prudent businessman". According to the Court, the conclusion would not be different even if the matter was approached purely from the legal standpoint.

[60] *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.* (1997) 89 Comp Cas 362 (SC)
[61] *New Horizons Ltd. v. Union of India* (1997) 89 Comp Cas 849 (SC)