Piercing of Corporate Veil in the Nigerian and English Legal Systems: A Comparative Appraisal

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Abstract

Piercing of corporate veil is on the increase nowadays resulting from the increase in the commission of corporate crimes by corporate managers. Corporate managers now realise that veil of incorporation no longer serves as hiding place for them to avoid consequential personal liability. The corporate legal framework in Nigeria does not only recognise the corporate legal personality of duly incorporated companies but also gives credence to lifting of corporate veil by the court in deserving situation. This study is essentially literature based and, upon the foregoing background, investigates the instances warranting lifting of corporate veil by the court in Nigeria and England with particular emphasis on the relevant legal frameworks in the two countries and draw lessons for Nigeria from English experience. The study argues that Nigeria has a robust legal framework for lifting of corporate veil in deserving situation and recommends adequate enforcement for effectiveness.

Keywords: Corporate Legal Personality, Corporate Veil, Corporate Managers, Nigerian and English

1. Introduction

The doctrine of corporate legal personality enjoys universal recognition in corporate law and practice. It offers statutory protection to the shareholders and human organs of the company involved in corporate management and administration.[1] The statutory protection enjoyed by the corporate managers is usually abused in the course of corporate governance at the expense of the company's creditors. To this end, the law recognises lifting of corporate veil by the court to check the excesses of corporate managers.[2] Thus, the abuse of corporate legal personality by the managers of the company brought to the fore the consequence of lifting of corporate veil by the court. This informs the reason this study examines the instances of lifting of corporate veil by the courts in Nigeria and England with a view to drawing lesson(s) for Nigeria. In doing so, the study begins with explanation of the doctrine of corporate legal personality.

2. Doctrine of Corporate Legal Personality

The doctrine of corporate legal personality is a universal legal concept which postulates that an incorporated company is a separate legal entity distinct from the individuals who are its shareholders and directors.[3] The most significant consequence of incorporation is that the company becomes a body corporate distinct and separate from its individual members.[4] The fundamental effect is that, as from the date of incorporation, the company automatically becomes an artificial person in the eye of the law quite different from the individuals who are its members and controlling organs.[5] The truth is that, the essence of juristic personality does not

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[1] Dada, J.A., *Principles of Nigerian Company Law* (2nd edn, Wusen Publishers, Calabar, 2008) 73-74; see also the case of *Farrar vs. Farrar* (1888) 40 Ch.D 395, Per Lindley L.J 409.

[2] The Companies and Allied Matters Act (CAMA), 2020, amongst other enactments, makes robust provision for lifting of corporate veil by the court. This shall be discussed in detail in the subsequent subheading.

[3] Akinola, B., 'A Critical Appraisal of the Doctrine of Corporate Personality under the Nigerian Company Law', published by Nigerian Legal Information Institute, <http://www.nlii.org/files/NLIIWPSOO2.pdf> accessed 29 March, 2019. (Unpagenated).

[4] Dada, (n. 1), 73.

[5] *Ibid*

lie in the possession of the right but in subjection to liabilities.[6] Thus, the company operates as if it were a natural person capable of rights and subject to liabilities which are not the same as those enjoyed by or borne by its members.

The doctrine of corporate personality was designed to cater for circumstances which tend to accumulate all debts and liabilities upon individuals who own the company.[7] In ***Salomon v. Salomon,***[8] MC Naughten of House of Lords laid down the principle of corporate personality in the following words:

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 … the company is at law a different person altogether from the subscribers …, and, though it may be that after incorporation, the business is perceived the same as it was before, and the same hands receive the profits, the company is not in law the agent or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided by the Act.

Section 42 of the Companies and Allied matters Act (CAMA), 2020 laid to rest the corporate personality of incorporated companies in Nigeria.[9] Thus, all the operations and activities of the company have to be carried out by its organs or agents.[10] Hence, the court in ***Lennard's Carrying Company v. Asiatic Petroleum Co. Ltd***,[11] held that corporation is an abstraction and that it is its human agent who carries out its functions.

In view of the above, a registered company has the capacity and power to carry out activities within its objects and enter into contractual and other relationships for the purpose of such activities. Its property is vested in it and not in the members. Subject to any statutory restriction, it can hold land. Unlike a natural person, it does not die but has perpetual succession subject to its being wound up in accordance with the relevant law in certain extremely begging circumstance. The company can sue and be sued in its corporate name and most importantly, the formality and publicity is required in running its businesses. This is to protecting the shareholders and the third parties who have or may wish to have dealings with the company in its corporate existence. Thus, to transact its business, the company depends solely on its human organs. The primary organs of the company include the members at the general meetings, the board of directors and the managing director.[12]

It is important to note that any act embarked upon by the agent or officer of the company must be within the scope of the object of the company in order for such act to be valid in law. The acts of the agent must also be within the apparent authority of the company.[13] In this circumstance, the company may be civilly or criminally liable for the acts of its organs. To this end, the civil liability of a company may be in tort or in contract.[14]

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[6] Arthur, M., 'Corporate Personality', (1911) 24, *Harvard Law Review*, No. 4 (Part 1) and (Part 2), 5.
[7] Gower and Davies, *Principles of Modern Company Law,* (9th edn, Sweet and Maxwell Ltd, U.K., 2012) 245
[8] See *Salomon vs. Salomon* (1897) AC 22, 51
[9] This was impliedly alluded to by Orojo, J.O. while analyzing the provision of section 37 of the former Companies and Allied Matters Act, 1990 which is on all fours with the recent provision of section 42 of the Companies and Allied Matters Act, 2020. See generally, Orojo, J.O., *Company Law and Practice in Nigeria,* (5th edn, LexisNexis Butterworth Worldwide, 2008), 82.
[10] See *Trenco (Nigeria) Ltd vs. African Real Estate Ltd* (1978) 1 NLR 146, 153, PER Aniagu JSC (As he then was)
[11] (1915) AC 705, 713-714.
[12] CAMA, 2020, s. 90.
[13] By section 44 (1) of CAMA, powers of the company are exercisable only for the furtherance of its authorized business or object.
[14] See section 90 (3) of CAMA which provides that: 'Nothing in this section shall derogate from the vicarious liability of the company for the acts of its servants while acting in the scope of their employment.' See also the case of *Ayodele Jcmes v. Midmotors (Nig) Ltd* (1978), 11-12 SC 31.

Also, where an officer or agent of the company is entering into a contract on behalf of the company, the contract must be reduced into writing and duly executed in its corporate name.[15] Where this is strictly adhered to, the contract or such contract will bind the company. In ***Hyacinth Orji v. Ezeani Anyanso,***[16] the court confirmed that: 'Where a director of a company enters into contract in the name of the company, it is the company, the principal, which is liable on it and not the director. The director is not personally liable unless it appears that he undertook personal liability.'

The criminal liability of a company for the acts of its organ is not far-fetched since the court, in 1944, laid down the modern principles of corporate criminal liability in the celebrated case of ***Director of Public Prosecution v. Kent and Sussex Contractors Ltd,*** [17] when it held succinctly thus:

It is true that a corporation can only have knowledge and form an intention through its human agents, but the circumstances may be such that the knowledge and intention of the human agent must be imputed to the body corporate … if the responsible agent of a company, acting within the scope of its authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that … his knowledge and intention must be imputed to the company ….[18]

In addition, CAMA provides that:

Any act of the company in general meeting, the board of directors, or a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be liable criminally … therefor to the extent as if it were a natural person ….[19]

3. Doctrine of Lifting the Corporate Veil in Nigeria

It is trite that the consequence of recognising the separate personality of a company is to draw a veil of incorporation over the company by way of statutory protection to the human organs of the company.[20] As a general rule, one is not entitled to go behind or lift the corporate veil[21] because the legal personality of a company makes it to be distinct and separate from its members that constituted it. However, there are certain exceptional circumstances where the law disregards the corporate entity and pays regards to the economic realities behind the legal façade resulting from corporate governance failure.[22] Invariably, notwithstanding the concept of separate legal entity of incorporated companies, both the legislature and the courts have found it necessary or desirable to develop the doctrine of lifting the veil as an exception to deal with some companies as if they were not entities, separate from their members.

Thus, Gower and Davies posit that:

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[15] A correct description of the company by its registered name is necessary. Provisions of section 29 of CAMA must be taken into consideration. The descriptive words such as 'Limited', 'Public Limited Company', 'Limited by Guarantee' or 'Unlimited' must be appropriately endorsed, as the case may be, at the end of the name of the company.

[16] (2000) 2 NWLR (Pt. 643) 19.,

[17] (1944) KB 146.

[18] The belief in the past was that a corporation cannot commit criminal acts let alone being liable for criminal acts of its organs. The position was premised on the fact a corporation is a creation of the law, thus, it can only do such acts that it is legally empowered to do, so that any crime done on its behalf is necessarily *ultra vires*. See generally Smith and Hogan, *Criminal Law*, (4th edtn, Sweet and Maxwell, 2002) 149; see also, the commentaries of Sir Williams Blackstone, Commentaries 18, section 12, quoted in Dada, (n. 1), 108; and see the general controversies regarding the criminal liability of a corporation as articulated by Anca I.P., in his 'Criminal Liability of Corporation-Comparative Jurisprudence', published by Michigan State College of Law, <htpp://www.lawmsu-edu/king/2006/2006pop.pdf> accessed 29 March 2019.

[19] Company and Allied Matters Act, 2020, s.89.

[20] Dada, (n. 1), 89.

[21] See *FDB Financial Services vs. Adesola* (2000) 8 NWLR (Pt. 668), 170, 183.

[22] Gower and Davies, (n. 7), 120.

It has been recognised that the legislature can forge a sledge hammer capable of cracking open the corporate veil shell and even without the aid of legislative sledge hammer, the courts have sometimes been prepared to have a crack. In such cases, the law goes behind the corporate personality of individual members ... in favour of the economic entity constituted by a group of associated companies.[23]

Thus, the lifting of corporate veil springs from the incidence of corporate governance failure on the part of the human organs of the company. This arises when the human organs of the company conduct the affairs of the company in a fraudulent and improper manner. It also extends to the situations in which a director or manager of a company commits corporate crime against the interest of a third party. Therefore, there is nothing sacrosanct about the veil of incorporation because the court has power to pierce it in deserving circumstances base on the relevant material placed before it.

3. 1. Preconditions for Lifting the Corporate Veil in Nigeria

The instances under which the court can lift corporate veil have been expressly stipulated by CAMA.[24] The instances are the preconditions for lifting the corporate veil by the court. The preconditions are referred to as express statutory provisions for lifting the veil of incorporation. Some of the preconditions are therefore explained below.

i. Reduction in Number of Corporate Members below the Legal Minimum

By virtue of the provision of CAMA, the minimum number of persons that can come together to form a company is two.[25] This is one of the requirements for incorporation of a company. After incorporation, it is also important for the company to maintain this legal minimum. Thus, where a company after incorporation runs afoul of this requirement of the law, it automatically leads to lifting of corporate veil to punish the offenders. CAMA is very apposite when it provides that:

If a public company or a company limited by guarantee carries on business or its objects, without having at least two members and does so more than six months, every director or officer of the company, during the time it so carries on business with only one or no member shall be liable jointly and severally with the company for the debts of the contract during the period.[26]

The above section 118 of CAMA, enjoys limited application because it can only be invoked after the noncompliance in the numbers below legal minimum has lasted for more than 6 months. This provision of the Act warns the directors and officers of the company of the consequent liability which they are exposed to in the case of default in which case, the liabilities of the company will be treated as the liabilities of the members and other officers of the company.

ii. Number of Directors Less Than Two

It is mandatory for every registered company before or after the commencement of CAMA, 2020 to have at least two directors.[27] As regards the companies that came into existence before the commencement of CAMA, they must, before the expiration of six (6) months from date of commencement of CAMA, have a minimum of two directors.[28] There is serious prohibition for any company which fails to comply with the

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[23] *Ibid*, 120.

[24] See sections 18, 93, 246(1), (3), 504, 505, 506, 631(1)(c), 631(2), 290, 316, 38(2) of Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004 (hereinafter referred to as CAMA).

[25] CAMA, 2020, s. 18.

[26] Ibid, s. 118.

[27] CAMA 2020, s. 271 (2).

[28] This seems to have been overtaken by event having regards to the age of CAMA now. It was the provision of section 246(1) of the former CAMA, 1990.

foregoing requirement from transacting any business.[29] Thus, the law imposes punishment of personal liability on the directors and other members of the company who transact business in contravention of the foregoing provision.

ii. Personal Liabilities of Directors and Officer for Fraud

In relation to liabilities of directors and officer for fraud, CAMA provides thus:

Where a company –

(a) Receives money by way of loan for specific purpose;
(b) Receives money or other property by way of or advance payment for the execution of a contract or project; or
(c) With intent to defraud, fails to apply the money or other property for the purpose for which it was received, every director or other officer of the company who is in default is personally liable to the party from whom the money or property was received for a refund of the money or property so received and not applied for the purpose for which it was received and nothing in this section affects the liability of the company itself.[30]

Thus, for a person to be liable under this section, the intention to divert the money for other purposes must be with a view to defraud.[31] The above provision does not absolve the company of its liabilities but gives the third party (victim) the wider remedy in view of the personal liability of the director or officer of the company involved in the fraudulent act.[32]

iv. Reckless or Fraudulent Trading

CAMA makes provision for personal responsibility for reckless or fraudulent trading by corporate managers. The provision is invoked where the persons responsible for managing the business of the company have been found guilty of dishonesty in the carrying on of the business of the company.[33] Hence, for a manager to incur personal liability in this circumstance, he must have actively participated in the management of the company in a fraudulent manner.[34]

v. Personal Liability of Receiver or Manager on Contracts

CAMA proscribes the receiver or manager from entering into any contract on behalf of the company in the course of winding up of the company. This is geared towards minimizing the debts already on the company resulting to winding up. This is the reason the law provides that the receiver or manager shall be personally liable on any contract entered into by him.[35] The simple reason is that he has been appointed primary to undertake the property of the Company.[36] Thus, receiver or manager of a company in liquidation will be personally liable on any contract entered into by him except he has been so authorized to so.[37]

3.2. Lifting the Corporate Veil under Statutes

Apart from CAMA 2020, the circumstances under which the Nigerian courts can lift the veil of incorporation with a view to make human organs of a company to be personally liable for corporate crimes[38]

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[29] CAMA, 2020, s 271 (3).
[30] CAMA, 2020, s. 316 (a).
[31] Dada, (n. 1), 95.
[32] Orojo. (n. 9), 89-90
[33] Dada, (n. 1), 92; see also the case of *Re Gerald Cooper Chemical Ltd* (1978) All E.R. 49.
[34] CAMA, 2020, s. 672(2) and (3).
[35] CAMA, 2020, s. 557 (1).
[36] *Ibid*
[37] *Ibid*, 557 (2)
[38] These are the crimes committed by any persons who are managers of a corporate body during the course of the governance of the affairs of the corporation which crimes benefits the business of the corporation. The examples of corporate crimes include bribery, false claims, embezzlement, insider dealing, and violation of environment law,

are expressly provided for under other enactments by the National Assembly. Three of them which shall be examined in this part of the study are: the Independent Corrupt Practices and other related offences Commission (ICPC) Act, the Economic and Financial Crimes Commission (EFCC) (Establishment) Act, and the Banks and other Financial Institutions Act (BOFIA).

i. ICPC ACT, 2003

The Independent Corrupt Practices and other related offences Commission (ICPC) Act[39] makes provisions for situations whereby the directors and officers of a company could be personally liable. The ICPC Act makes provisions for different offences that could be committed and attract personal liability for directors or officers of a company. These offences cut across sections 12-29 of the ICPC Act.

Specifically, the ICPC Act defines persons subject to liability to include juristic and natural persons.[40] It makes an express provision to the effect that, without prejudice to any sentence of imprisonment under the ICPC Act, a public officer or other persons found guilty of soliciting, offering or receiving gratification shall forfeit the gratification and shall pay a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature or Ten Thousand Naira, which is the higher.[41] The implication of the foregoing is that, officers of a company will be punished where they run afoul of the provisions of the ICPC Act as the veil of the company will not avail them in view of the personal liability provided for in the ICPC Act.[42]

ii. EFCC Act, 2004

In the same vein, the Economic and Financial Crimes Commission (Establishment) Act[43] makes provision for offences relating to corporate bodies and the officers in the management of the company. It empowers the Commission to investigate any person, corporate body or organisation which has been suspected to have committed an offence under the EFCC Act in relation to economic and financial crimes.[44] Thus, the EFCC Act expressly provides that, persons who are officers of a bank, financial institutions or other non-financial institutions who fail to comply with the provisions of EFCC Act shall be liable on conviction to imprisonment not exceeding 5 years term or to a fine of Five Hundred Thousand Naira (₦500, 000.00) or to both such imprisonment and fine.[45]

iii. BOFIA Act, 2004

The Banks and other Financial Institutions Act (BOFIA)[46] certain provisions[47] under which the veil of incorporation of a body corporate could be lifted and the human organs of the company made personally liable. These provisions for personal liability of the human organs of a body corporate are made with a view to ensure compliance with the provisions of BOFIA. Thus, the organs of a body that may be made personally liable under the BOFIA include directors, managers, secretaries and other similar officer of the company.[48] To this end, BOFIA provides as follows:

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fraudulent transactions, diversion or conversion of company's monies to mention but a few. See generally, 'Corporate Crimes and Examples', available at http://www.studyacademy>corporate-crime-types-example.htm> accessed on 1st March, 2019.

[39] No. 6 of 2003

[40] ICPC Act, 2003, s. 2

[41] ICPC Act, 2003, s. 23

[42] Akinola (n. 3), (Unpagenated).

[43] No. 1 of 2004

[44] Economics and Financial Crimes Commission (Establishment) (EFCC) Act, 2004, s. 7.

[45] EFCC Act, 2004, s. 14.

[46] Cap. B3, Laws of the Federation of Nigeria, 2004 (hereinafter referred to as BOFIA)

[47] BOFIA, 2004, Ss. 49 and 50.

[48] *Ibid*

Where any offence against any provision of this Act has been committed by a body corporate or firm, any person who was a director, managers, secretary or other similar officer of the body corporate or firm purporting to act in such capacity shall, in addition to the body corporate, be deemed to be guilty of the offence unless he proves that the offence was committed without his consent or connivance ....[49]

Therefore, in corporate governance, failure of the human organs of a company saddled with the responsibility of managing and directing the affairs of a company exposes them to personal liability as a result of corporate governance failure occasioned by their acts or omissions to comply with relevant provision of BOFIA. This is evident in BOFIA when it provides thus:

Any person, being a director or manager of a bank, who fails to-

(a) Take all reasonable steps to secure compliance by the bank with the requirement of this Act; or
(b) Take all reasonable steps to secure correctness of any statement submitted under the provision of this Act; is guilty of an offence and liable on conviction to a fine not exceeding N50,000.00 or to imprisonment for a term of three years or both such fine and imprisonment.[50]

3.3. Lifting the Corporate Veil at Common Law

Under the Common law, there are certain instances in which the court can lift the corporate veil of corporate entities. These instances are briefly discussed below.

i. Fraudulent or Improper Conduct

The courts have refused to allow the protection of corporate personality to be used as instrument of fraud in a number of situations. One of such situations is when the shareholders of a company use the company as an agent; they will be personally liable for the debts incurred by the company.[51] As a general rule, if the court discovers element of fraud and improper conduct in corporate governance, the court will lift the corporate veil in the interest of justice.[52] In the case of ***Gilford Motors v. Horne***,[53] a former director of the Plaintiff Company bound himself by a restrictive covenant clause not to solicit. The court held that the former director of the company could not escape the obligations contained in the covenant by hiding the company which the court described as 'a mere cloak or sham for the purpose of enabling him to commit a breach of covenant.'

In the same vein, it was held in the case of ***Akande v. Omisade***[54] that, if a company is formed for the express purpose of doing a wrongful or unlawful act, or after being formed, those in control expressly direct a wrongful thing to be done with the company, the individuals as well as the company are responsible to those to whom liability is legally owed.

Therefore , while a company which is duly incorporated cannot be disregarded on the ground that it is a sham, it may be established by concrete evidence that, in its operation, it does not act on its own as an independent trading unit but simply for and on behalf of the people by whom it has been called to exist.[55]

3. 4. Lifting the Corporate Veil under Criminal Law

At common law, the courts have always considered lifting the corporate veil in appropriate criminal cases to make the perpetrators of the criminal act to be personally liable so as to serve as deterrent to others. This

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[49] *Ibid*, s. 49(1).
[50] BOFIA, 2004, s. 50.
[51] See the case of *Smith, Stone and Knights v. Birminghan Corporation* (1939) 4 All ER 116
[52] Orojo. (n. 9), 92
[53] (1933) Ch. 935.
[54] Suit No. FCA/108/80 of 4/5/1983 (Unreported); see also *PFS Ltd v. Jeifa* (1983) 3 NWLR (Pt. 543) 602, 614; and *Wallersteiner v. Moir* (1974) 1 WLR 991
[55] *Nigerite Ltd v. Dalami* (Nig) Ltd (1992) 7 NWLR (Pt. 253) 288, 304.

comes to play in ***Adeniyi v. The State***[56] in which a managing director of a firm who received money on behalf of the firm for the purpose of placing an insurance for a commission was arrested and subsequently prosecuted for stealing the money he had received which he failed to use for the purpose for which the money was paid to the firm. The reason for his arrest was premised on the ground that he was the sole proprietor of the firm and the person who negotiated the insurance deal and was also the sole signatory to the account of the firm. The managing director was convicted of the criminal act on the assumption that it is appropriate in the circumstance of the case to lift the corporate veil of the firm with a view to see the operator and make personally liable for the criminal act. The Court of Appeal, after convicting the managing director, makes the following remarks:

In all these instances I have given, it appears to me quite clear that the lifting of the veil or piercing of the veil of corporate bodies were invariably done in civil matter where the court would be applying the principles of equity in the appropriate manner. Rendering the managing director of the company as sole proprietor of the company criminally responsible for the act ascribable to the company would amount to applying equitable doctrines to ground conviction in criminal matter.[57]

Niki Tobi,[58] JCA, (as he then was) in the same case observed that, while the acts of an individual could be taken as the act of the company in appropriate cases, for example, where the director represents the directing mind and will of the company and can be regarded as the alter ego of the rendering the company liable for his acts, it will be absurd and dangerous to make the individual criminally liable for the acts apparently done for and on behalf of the company without express provisions of statute rendering him criminally liable.[59]

4. Development of Lifting the Corporate Veil in England

Many years ago, the United Kingdom's House of Lords, in locus classicus case of ***Salomon v. vs. Salomon***, established a principle that a company is a separate legal entity distinct from its members.[60] Since then, the decision of that case has determined the direction of the modern company law and the nature of private limited companies in England.[61] Though, the principle of corporate personality established in *Salomon's* case has never been doubted in U.K. Under certain circumstances, the court may be convinced to disregard this principle and lift the corporate veil.[62]

The development of lifting the veil in U.K. passed through three significant periods.[63] The first period lasted from 1897, when the Salomon's case came to fore, to around the Second World War. The second period started after the war and continued until 1978 when the case of ***Woolfson v. Stratchclyde Regional Council***[64] was decided. This period was the glorious era of lifting of corporate veil in U.K. by virtue of the contribution of Lord Denning, who was the most influential English jurist of the second half of the 20th

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[56] (1992) 4 NWLR (234) 248

[57] *Ibid.*

[58] *Ibid*, 264; see also Orojo. (n. 9), 95

[59] See section 290 of CAMA which provides for personal liability of directors and officers of a company for failure to use the money received for the purpose for which same was paid to the company.

[60] Anna, F. and Denis, M., 'Lifting the Corporate Veil: Limited Liability of the company Decision-Makers Undermined? Analysis of English, U.S., German, Czech and Polish Approach', published by Common Law Review, http://www.commonlawreview.cz/lifting-the-corporate-veil/html accessed 3 March, 2019. (Unpagenated).

[61] *Ibid*

[62] *Ibid*

[63] Thomas, K.C., 'The Corporate Veil Revisited: A Comparative Study of the English and the U.S. Corporate Veil Doctrines', published by Boston College Law School, http:///www.lawdigitalcommonsbc.edu.egi/viewco/article.pdf accessed 3 March, 2019. (Unpagenated).

[64] (1978) S.C. (H.L.) 90

century and an advocate and practitioner of veil piercing.[65] The case of *Woolfson* marked the beginning of the third period which lasted till date. This period experiences the fall of the doctrine of lifting the veil into disfavour by the English courts.[66]

Before the decision in Salomon's case, the English Parliament had granted limited liability status to English companies by virtue of Limited Liability Act of 1855.[67] The Salomon's case merely came to affirm its availability to the so-called one-man companies.[68] It is worthy of note that limited liability status granted the English companies, met strong opposition when it was first proposed in the mid-nineteenth century.[69]

This was discernible from the reaction of the people in U.K. in year 1824 as follows:
Nothing can be so unjust as for a few persons abounding in wealth, to offer a portion of their excess for the formation of company, to play with that excess- to lend the importance of their whole name and credit to the society, and then, should the funds of the incorporated body proved insufficient to answer all demands, to retrieve into security of their unhazarded fortune, and leave the bait to be devoured by the poor deceived fish.[70]

Although the House of Lords affirmed separate legal personality of one-man companies in Salomon's case, it did not however laid the issue rest as English courts began to pierce veil soon after the decision in Salomon.[71] Professor Kahn-Freund, characterised the decision in Salomon's case as a 'calamitous decision' and he advocated for reforms that would narrow down the scope of limited liability of corporations and further contemplated abrogation of Salomon's decision by legislation.[72] To this end, the English courts started lifting the veil of incorporations in a number of cases after the Second World War.[73] Thus, between 1950s and 1970s, Lord Denning actively participated in lifting the corporate veils[74]especially in the case of ***Littlewoods Mail Order Stores v. Inland Revenue Commissioners.***[75]
In the same vein, in unanimous decision of English Court of Appeal in 1976 in the case of ***D.H.N. Food Distributors Ltd v. Tower Hamlets London Borough Council,***[76] a parent company was allowed to claim compensation for the distribution of business under the Land Compensation Act, even though, the business and the land on which it sat were owned by different corporate entities. In this case, Lord Denning

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[65] Thomas, (n. 64), (Unpagenated).
[66] See *Woolfson's* case, 96
[67] Paul, H., Michael, T. and Stuart, T., 'An Economic Analysis of Limited Liability in Corporation Law', *Toronto Law Journal*, 30 U., 118-119, cited in Thomas, (n. 64), (Unpagenated).
[68] See *Salomon's* case, 42-43.
[69] Thomas, (n. 64), (Unpagenated).
[70] Quoted in Thomas, (n. 64), (Unpagenated); curled from Editorials Times (London), May 25, 1824
[71] *Ibid*
[72] Kahn-Freund, O., 'Some Reflections.on Company Law Reforms' (1944) 7 *Model Law Review*, 54, 54-55, cited in Thomas, (n. 64), (Unpagenated).
[73] See *Re FG (Films)* (1953) 1 W.L.R. 483; *Jones v. Lipman* (1962) 1 W.L.R. 832; *Firestone Tyre and Rubber v. Lewellin* (1957) 1 W.L.R. 464 (H.L); and *Merchandise Transport v. British Transport Commission* (1962) 2 Q.B. 173.
[74] See *Scottish Cooperative Wholesale and Society v. Meyer* (1959) A.C. 324 (H.L.), 364; *Littlewoods Mail Order Stores v. Inland Revenue Commissioner* (1969) 1. W.L.R. 1241 (A.C.), 1254; *Wallersteiner v. London Borough Council* (1976) 1 W.L.R. 852 (A.C), 857.
[75] (1976) 1 W.L.R. 857-858, 860-861, 867-868. The decision of His Lordship in this case is worthy of note. Lord held that: 'The doctrine laid down in *Salomon v. Salomon & Co.* (1897) A.C. 22, 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 courts cannot see. But that is not true. The can and often 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.'
[76] (1976) 1 W.L.R. 852 (A.C.), 857

propounded the single economic theory,[77] declaring that 'this group is virtually the same as partnership in which all the three companies are partners. They should not be treated separately so as not to be defeated on a technical point'[78]

Foregoing development of lifting of corporate veil I U.K. made a prominent commentator to declare, in 1976 that: 'Modern English law has abandoned the exaggerated view of Salomon's case ... English law is now prepared to admit qualification of, and exceptions to, this principle, by lifting the veil of corporations.'[79]

This period marked the height of corporate veil lifting in U.K. However, subsequent development proved that this optimism was misplaced and as a result, the English courts were seen turning against the doctrine of lifting the veil.[80] Two years later, the House of Lords openly questioned the reasoning in the case of ***D.H.N. Food Distributors Ltd v. Tower Hamlets London Borough Council (supra)*** while considering the case of ***Woolfson v. Stratchclyde Regional Council.*** Lord Keith expressed doubt as to 'whether in this respect, Court of Appeal properly applied the principle that, it is appropriate to pierce the corporate veil only where special circumstances exist indicating that, it is a mere façade concealing the true facts.'[81] Therefore, the *Woolfson's* case led to the beginning of decline of the corporate veil lifting by English courts. Although, Lord Keith did not expressly overrule the *D.H.S.'s* case, subsequent cases made it clear that economic theory and the corporate veil doctrine did not enjoy favour of the courts.[82]

In ***Adams v. Cape Industries Plc,***[83] the English court reviewed the various grounds for lifting the veil including fraud, agency and single economic entity and rejected them all. The court declared that, the use of corporate structure to limit future liabilities is an inherent feature of English Company Law and ruled out veil piercing in tort cases.[84]

Two years after the decision in *Adams's* case, the English court in ***Creasey v. Breachwood Motors Owners***[85] derailed further and lifted the corporate veil between two companies after their common owners had transferred the assets of the first company to the other with a view to avoiding an impending judgment. Still threading the same path, five years later, the Admiralty Court in U.K., while considering a case[86] of similar fact, invalidated the sale of a vessel by one member of a corporate group to another. The decision of Admiralty Court in this case was based on the reasoning in *Creasey's* case *supra.* However, it is noteworthy that the decision in *Creasey's* case was later overruled in the case of ***Ord Anor v. Belharen Pubs.***[87]

The significant of above development of the doctrine of corporate veil lifting in U.K. is not to demonstrate that lifting of corporate veil has been outlawed in the country but that corporate veil is now rarely lifted by

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[77] In support of his description of single economic theory, Lord Denning quotes Professor Gower (a leading authority on English company law at the time) who noted that the emerging tendency in the English law is to treat group companies as a single economic entity.

[78] It is important to note that Lord Denning did not expressly refer to the three companies D.H.N. as a single economic entity in his judgment. The term 'single economic unit' was coined by commentators and the courts. See for example, *Pierelli Cable Holding NV v. Inland Revenue Commissioners* (2006) 1 W.L.R. 400 (H.L.) 73.

[79] Clive, M.S., 'Salomon in the Shadow', *Journal of Business Law,* (1976) 305, 306.

[80] Thomas, (n. 64), (Unpagenated).

[81] *Woolfson v. Stractclyde Regional Council* (1978) (S.C.) (H.L.) 96

[82] Thomas, (n. 64), (Unpagenated); Rixon, F.G., 'Lifting the Veil Between Holding and Subsidiaries Companies', *Law Quarterly Review,* (1986) 102, 415; and the case of *Bank of Tokyo v. Karoon* (1987) A.C. 45, 64.

[83] (1990) Ch. 433 (A.C.) 532-539 and 544-547

[84] *Ibid*

[85] (1992) B.C.C. 607 (A.C.) 616.

[86] See the *'Tjaskemolen' (Now Nmed 'Visvliet),* (1997) 2 Lloyds's Rep. 465 (Q.B.) 470-471.

[87] Paul, L.D., *et al, Principle of Modern Company Law,* (8th edn. 2008), 208-209.

English courts. Nevertheless, following the recent decision of the English Court in Adams's case, the instances in which the English courts lift the veil of incorporation have been limited to situations whereby a company is set up for fraudulent purposes, or where it is established to avoid existing obligation.[88]

4.1. Preconditions for Lifting the Corporate Veil in England

In United Kingdom, the courts have developed certain exceptional circumstances as preconditions for lifting of corporate veil.[89] In the land mark case of ***Adams v. Cape Industries Plc***, the English Court of Appeal reviewed Salomon's case; though the court shown its reluctant attitude towards lifting of corporate veil by holding that *'the court is not free to disregard the principles in Salomon's case merely because justice so requires.* It laid down possible justifications for lifting the veil of incorporation in: (i) 'single economic unit' (ii) 'agency' and (iii) 'façade'.[90] It must be noted that the foregoing justifications are not all inclusive. Thus, the preconditions upon which the English court will lift the corporate veil are discussed below.

i. Number of Directors Falling Below Legal Minimum

One of the preconditions for piecing corporate veil to make individual members of the company to be personally liable is the reduction in the numbers of company directors below the legal minimum. The United Kingdom's Company Act, 2006 provides:

(1) A private company must have at least one director
(2) A public company must have at least two directors.[91]

From the foregoing quotation, it is discernible that the word 'must' is specifically used to make the compliance with provision a mandatory requirement for all incorporated companies in England. To this end, if a court finds that the provision of the law as to the requirement of the minimum number of the director(s) a company must have is not complied with, the court will lift the veil of incorporation of the company for noncompliance and make every individual member of the company having knowledge of the noncompliance to be personally liable for any debt incurred by the company during the period of the contravention.[92]

ii. Personal Liabilities of Directors

Several instances[93] of personal liability of company's directors are given in the United Kingdom's Company Act, 2006. The Act provides that, for directors to embark on certain act on behalf of a company, the approval of the company's members must be first sought and obtained. Specifically, when the transaction embarked upon by company's directors involved a substantial non-cash asset, failure of the directors to obtain the approval of the company's members in respect of same makes the defaulting directors to be personally

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[88] Charles, P., 'United Kingdom: Piercing the Corporate Veil-Recent Development, published by Mondaq, http://www.mondaq.com/x/17488/Directors%2.html accessed 3 March, 2019. (Unpagenated).

[89] Anna and Denis, (n. 61), (Unpagenated); see also the observation of Lord denning in the case of Littlewoods Mail Order Stores v. Inland Revenue Commissioners (1969) 1. W.L.R. 1241 (A.C.), 1254 thus: 'The doctrine laid down in *Salomon v. Salomon & Co.* (1897) A.C. 22, 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 courts cannot see. But that is not true. The can and often 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.'

[90] Anna, F., and Denis, M., 'Lifting the Corporate Veil: Limited Liability of the company Decision-Makers Undermined?' Common Law Review, 8(1), 2008, 21-35

[91] Company Act, 2006, s. 154.

[92] Although the United Kingdom Company Act of 2006 does not expressly provided for lifting of corporate veil in the case of contravention of the provision of section 154 regarding the minimum numbers of directors a company should have, by necessary inferences of lifting the corporate veil for noncompliance could be made by virtue of the mandatoriness of the provision.

[93] The United Kingdom's Company Act, 2006, Ss. 178, 195(4) 213, 222.

liable for any debt incurred by the company in the circumstance.[94] To this end, the persons so personally liable according to the Act include:

(a) Any director of the company or its holding of the company with whom the company entered into the arrangement in contravention of section 190.
(b) .....
(c) The director of the company or its holding company with whom any such person is connected.
(d) Any other director of the company who authorized the arrangement or any transaction entered into in pursuance of such an arrangement.[95]

iii. Investigation into Related Group of Companies

Sometimes in the case of group of companies, the principle in Salomon's case may not be adhered to and the court may lift the corporate veil in order to look at the economic realities of the group.[96] For instance, in the English popular case of ***D.H.N. Food Distributors Ltd v. Tower Hamlets London Borough Council,***[97] the court held that the corporate veil may be lifted whenever it is just and equitable to do so in the event of investigation into the affairs of related group of companies. Although, in ***Adams v. Cape Industries Plc,*** it was argued that, for a group of companies, the essential principle is that, each company within a group is a separate entity.[98] However, in certain circumstances, the court can ignore this principle and treat several companies as a single one with a view to look at the economic realities of the group.[99]

iv. Fraud, Facade or Sham in the Administration of the Company

Another precondition for lifting of corporate veil in U.K. is where a corporation is a mere cloak, sham or same is principally incorporated for the purpose of carrying out fraudulent transactions.[100] In a number of cases, English courts have accepted one-well recognised situation of lifting of the veil of incorporation.[101] This situation has been described as where the corporate structure is a 'mere façade concealing the true facts.'[102] According to Bowmer J. in ***Adams v. Cape Industries Plc.*** 'admission that separate legal personality could be ignored and the veil pierced on the ground that the group structure was a mere 'facade' is far more interesting ….' Thus, it settled in U.K. that where a company is discovered to have been formed as a mere cloak, façade or sham to deceive the innocent third parties to fall prey of its fraudulent transaction, the courts will be prepared to lift the corporate veil of such company.

5. 1. Lifting the Corporate Veil under Criminal Law

There are cases pursuant to English criminal law where the courts have pierced the veil of incorporation.[103] A case in point is the confiscation proceedings under Proceedings Act of 2002.[104] Under this Act, monies received by a company, depending on the fact of particular case, can be regarded as having been 'obtained' by an individual in the company who may be director or any other officer of the company duly authorised to do so.[105] In consequence, those monies so received may become an element in the individual's benefit

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[94] *Ibid*, s. 190.
[95] *Ibid*, s. 195(4) (a),(b),(c).
[96] Anindita, G., 'Lifting the Corporate Veil', published by Legal Vox, <http://www.lawteacher.ne>tLawTeacher>BusinessLaw>Essays.html> accessed 10 March, 2019. (Unpagenated).
[97] (1976) All ER 462
[98] Anna, and Denis, (n. 61), (Unpagenated).
[99] *Ibid*
[100] Anindita, (n. 96), (Unpagenated).
[101] *Adams v. Cape Industries Plc* (1990) Ch. 433 (A.C.) 532-539 and 544-547
[102] *Ibid*
[103] See 'Piercing the Corporate Veil', published by Wikipedia-Encyclopedia, http://www.en.wikipedia.org.wiki/Piercing_the_Corproate_Veil.htm accessed 3 March, 2019. (Unpagenated).
[104] *Ibid*
[105] *Ibid*

obtained for criminal conduct. Thus, such monies are subject of confiscation from him and not from the company on behalf of which the same was received.

To this end, lifting of veil under criminal enjoys judicial approval in the English Court of Appeal judgment in the case of R v Seager,[106] where the position regarding the lifting of corporate veil under criminal was established by looking for the legal substance of the corporation rather than when the offender attempts to shelter behind corporate façade, where he intentionally does a criminal act on behalf of the company and where the transaction/business structure constitutes a 'device', 'cloak' or 'sham'.[107] These instances are the recognised instances by which English court can pierce the veil of a corporation.[108] It is instructive to note that, generally, English courts are not predictable as to the particular instance that best justifies the lifting of corporate veil. The reason being that in England, courts are reluctant to pierce the corporate veil. Hence, lifting of corporate veil in England is a rarity in view of the attitude of courts to the veil doctrine.[109]

6. Current Trend/Position in England

This brings to fore the popular case of ***Adams v. Cape Industries Plc*** where the English court rejected the single economic unit argument for lifting of corporate veil. The court in that case, noted that 'we are concerned not with the economics but the law … the distinction between the two, in law, is fundamental and cannot here be abridged.'[110] Thus, the current position in U.K. is that it is in rare instances that the courts look at the substance rather than the form to deny benefits of corporate personality. Recently, it is difficult to predict when the court will lift the veil of incorporation. The judge's individual subjective perception of fairness or policy is now being used as a guide.[111] Justice Hick in Adam's case observed that, the general notion that 'judges are increasingly prepared to disregard the autonomous personality of companies to facilitate the legitimate interests and expectations of those who come in contact with them, is clearly overstatement of the position.'[112]

The uncertainty of lifting of corporate veil in U.K. came to the fore in the two contrasting decisions by English courts in the cases of ***Antonio Gramsci Shipping Corp. v. Stepanovs***[113] and ***VTB Capital Plc v. Nutritek International Corp.***[114]

In Gramsci's case, the court held that there was a good arguable case that the Claimant should be able to enforce a contract against Mr. Stepanovs despite the fact that he was not party to the contract being entered into by his puppet company. The court in this case came to the conclusion after considering the Claimant's argument that, corporate veil should be pierced and Mr. Stepanovs be treated as a party to certain agreements entered between the Claimant and five companies registered in the Britsh Virgin Islands and Gilbraltar, one of which was beneficially owned by Mr. Stepanovs.[115]

On the other hand, the court in VTB Capital's case criticised the decision in Gramsci's case and refused to pierce the corporate veil. In the instant case,[116] the Claimant, in order to ensure personal liability, applied to amend his particulars of claims with a view to bring a contractual claim against Mr. Malofeer, Marcap

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[106] *Ibid*
[107] (2009) ECWA Crim. 130
[108] Ibid, para. 76
[109] Anna, and Denis, (n. 61), (Unpagenated).
[110] Thomas, (n. 64), (Unpagenated).
[111] Anna, and Denis (n. 61), (Unpagenated).
[112] See the case of *Adams v. Cape Industries Plc* (1990) Ch. 433 (A.C.) 532-539 and 544-547
[113] (2011) EWHC 33
[114] (2011) EWHC 3107
[115] Charles, P., 'United Kingdom: Piercing the Corporate Veil-Recent Development', published by Mondaq, http://www.mondaq.com/x/17488/Directors%.html accessed 14 March, 2019, (Unpagenated).
[116] i.e. *VTB Capital Plc v. Nutritek International Corp.* (2011) EWHC 3107.

BVI and Marcap Moscow despite the fact that these people were not parties to the loan facility under which the Claimant claimed to have been defrauded. Arnold J., while considering the requirement of law regarding the lifting of corporate veil, declined to follow the decision in Gramsci's case and took the opportunity to criticize the decision.[117]

Thus, the two cases above[118] gave contrasting decisions which point to the fact that lifting of corporate veil in U.K. is uncertain as it is difficult to predict the circumstances in which the court will be prepared to lift corporate veil. It is therefore observed that the English courts is beguiled with over reliance on traditional policy by which they tend to do more in support of the principle of corporate legal personality laid down in Salomon's case even at the expense of interest of justice.[119] It is important to mention that creditors are protected by numerous provisions concerning lifting the veil.[120] The Parliament is always authorised to enact exceptions to the principle in Salomon's case.[121] One of such exceptions enacted by the Parliament is the Insolvency Act.[122] By virtue of the Insolvency Act, the creditors are protected where the business of the company has been carried out to defraud them.[123] The Insolvency Act also empowers the courts in winding-up to look behind the corporate veil in order to see the perpetrators.[124]

6. Lesson for Nigeria

A preview of the concept of lifting the veil in England shows that Nigeria has certain lesson to learn therefrom. Under U.K.'s corporate law and practice, the Parliament is empowered to make a number of exceptions to the principle laid down in the case of *Salomon vs. Salomon.* To this extent, the Parliament usually provides statutory protection to the creditors of the companies who are victims of abuse of corporate personality in corporate governance.[125] The legislative instruments through which the Parliament has provided such statutory protection is the Insolvency Act, 1986 which protects the interest of the creditors in the event the business of the company is being transacted fraudulently.[126] This enactment, amongst others, is aside the U.K. Company Act, 2006 which essentially regulates corporate governance in the country. The foregoing serves as a lesson for Nigeria, especially for the legislative arm of the government to be proactive in enacting laws that would curtail abuse of corporate personality of incorporated companies in Nigerian corporate law and practice.

Over reliance on the traditional policy inherent in the English courts' method of handling corporate piercing cases should be jettisoned. The English courts tend to do more in support of corporate legal personality laid down in Salomon's case even at the expense of interest of justice.[127] This is because the English courts accorded so much sanctity to the principle of corporate legal personality as evidence in most of their cases involving lifting of corporate veil.

7. Conclusion

The doctrine of lifting the corporate veil is global concept which Nigeria and England have recognised as exception to the doctrine of corporate legal personality. Nigeria and England share largely common features because the legal systems of the two countries are common law based. Both Nigerian and England have

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[117] Charles, (n. 116), (Unpagenated).
[118] *Antonio Gramsci Shipping Corp. v. Stepanovs* (2011) EWHC 33 and *VTB Capital Plc vs. Nutritek International Corp.* (2011) EWHC 3107.
[119] See *Adams v. Cape Industries Plc* (1990) Ch. 433 (A.C.) 532-539 and 544-547
[120] Anna, and Denis, (n. 61), (Unpagenated).
[12] *Ibid*
[122] Enacted by the British Parliament in 1986.
[123] Insolvency Act, 1986, s. 213.
[124] *Ibid*
[125] Anna, and Denis, (n. 61), (Unpagenated).
[126] Insolvency Act, 1986, s. 213.
[127] See *Adams v. Cape Industries Plc* (1990) Ch. 433 (A.C.) 532-539 and 544-547

separate principal enactments regulating the affairs of duly incorporated companies. Nigeria and England therefore boast of Companies and Allied Matters Act, 2020 and Company Act, 2006 respectively. The two enactments provided similar preconditions for lifting of corporate veil by the court. Apart from these enactments, the two countries[128] also have other complementary enactments which give courts enough grounds to pierce the veil of incorporation in deserving cases.

The courts in Nigeria seem to be prepared to pierce the corporate shell in the event of corporate governance failure having regards to a number of Nigerian cases cited above. However, in England, reverse seems to be the case. The position in England after the English court's decision in *Adams v. Cape Industries Plc* has shown that English courts are unpredictable in lifting of corporate veil cases. The English courts are reluctant to lift the veil of incorporation due to their over reliance on traditional policy which favours sanctity of the principle of corporate legal personality laid down in *Salomon v. Salomon.*

It is thus recommended that Nigerian courts should run away from the foregoing attitude of English courts to lifting of corporate veil. The reason being that such attitude if emulated by Nigerian courts, which has already been beguiled with atmosphere of corruption, will heighten corporate governance failure in the country. Thus, if a fact of a given case deserves piercing the corporate veil with a view to achieving substantial justice, the Nigerian courts should not hesitate as this will serves as deterrent to other intending corporate offenders.

[128] Nigeria and England

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