



AL-HIKMAH JOURNAL OF EDUCATION

VOLUME 2 No. 1 JUNE, 2015

REFLECTIONS ON LORD DENNING'S SINGLE ECONOMIC ENTITY THEORY.

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Abstract

There has been a significant increase in the growth of corporations globally in the past few decades. In fact, corporations have become important actors on the global stage closely influencing the economic development of nations. Multinational corporations now dominate the global economic scene, some with economic powers comparable to some nation States. Therefore having a robust legal regime on corporations and corporate activities should be a core objective of any nation desirous of competing on the global stage. The doctrine of corporate personality made famous by the locus classicus case of *Salomon v. Salomon & Co* set the pace for effectively regulating the activities of corporations. However, a lot of changes have occurred since 1887 when *Salomon's* case was decided and the reality of modern times has seen an adaptation of the doctrine laid down in *Salomon's* case to meet the challenges of a growing world. The aim of this paper is to attempt an analysis of the single economic entity doctrine laid down by Lord Denning in the famed English case of *DHN Food Distributors Ltd v Tower Hamlets London Borough of Tower* which is an exception to the corporate personality principle of *Salomon v. Salomon & Co*. The Nigerian company law is essentially statutory, thus, provisions of the Companies and Allied Matters Act of Nigeria were also examined to determine the position in Nigeria. This is apposite because corporations continue to be a powerful force globally and an effective legal regime regulating its activities is a catalyst for peace and prosperity for any nation.

Introduction

Business corporations represent a distinct and powerful force at global, national and regional levels and they wield enormous economic power. In fact, the growth of corporations has been phenomenal in the past couple of decades with some having resources more than that of some nation states. (Akanbi, 2007-2008). The legal solution to regulating the affairs of corporations has been largely due to the phenomenal principle of corporate personality laid down in the classic 1887 case of *Salomon v. Salomon & Co Ltd*. (1887). It is this case that clothed the corporation with legal personality making it a person under the law. Therefore, making it a distinct person from its owners and members. In this case, Salomon, a leather merchant, converted his business to a limited liability company. He thus formed *Salomon & Co Ltd* with himself, his wife and children as the shareholders. He held the majority share of 20,001 out of the 20,007 shares while his wife and children held a share each. The newly formed company bought the business as a going concern for the sum of £39,000 which was paid by 10,000 in debentures, £9,000 in cash and £20,000 in fully paid shares. Subsequently, the company ran into difficulties and the debenture holder appointed a receiver and the company went into liquidation. However, the assets of the company were sufficient to discharge the debentures but nothing was left for the unsecured creditors. It was held at the Court of Appeal that the company was a sham and contrary to the intentions of the Companies Act 1862 and that Salomon remained the real owner of the business. On appeal to the House of Lords, the decision was reversed as the House unanimously held that the company had been validly formed since the Act required seven members holding at least one share each and that the Act did not say there should be a balance of power in their constitution. It held further that since Salomon had complied with the statutory requirements

for forming a company, the business therefore belonged to the company and not to Salomon because the company is at law a different person from the subscribers to the memorandum.

This principle laid down in Salomon has no doubt revolutionised the company law and practice in the history of English law and by extension the whole of the Commonwealth (Akanbi, 2012). The challenge however is that in 1887 when Salomon's case was decided and the principle of corporate personality established, large multinational companies were relatively uncommon. What was common were the single one man companies like that of Salomon & Co Ltd. However, the reality of today is that corporations are emerging clearly beyond the one man type company. Thus, as a result of globalisation, transnational and multinational corporations are now in the radar because it helps to facilitate trade across continents. At present, modern business enterprises are carried on through the medium of group of companies.

Generally, the principle laid down in Salomon has overtime become a fundamental principle of company law in the commonwealth and beyond. This is seen by a long line of cases decided after Salomon. (Macaura v. Northern Assurance Co 1925), (Lee v. Lee's Air Farming Ltd 1961).

Objectives of the Study

The objectives of this study is basically to examine how the principle laid down in Salomon has revolutionised the company law and practice in the history of English law and by extension the whole of the Commonwealth and to determine whether there is general principle to the effect that companies in a group of company should be treated as a single company, thereby reflecting on the relationship between single economic entity and Salomon

Literature Review

Conceptual Clarifications

I. Group of Companies

A group of companies is a collection of a holding and subsidiary companies that exists as a single economic entity with a common source of control and usually owned by the holding company. In the same vein, a holding company is the parent company that has the power of control over a subsidiary in a group, while a subsidiary is a company that is owned by another company.

II. The Single Economic Entity Theory

Adopting a straight-jacket interpretation of the principle laid down in Salomon's case will mean that each company in a group is treated as a separate person in law, with its own rights and liabilities independent of other companies in the group. (Sealy, 2001) However the reality of modern business practice with respect of group and holding companies has led to the argument whether the separate personalities of companies in a group of companies should continue.

Lord Denning probably influenced by the reality of group enterprise took the initiative in the case of *DHN Food Distributors Ltd v Tower Hamlets London Borough of Tower* (1976) and propounded the single economic entity theory. He looked at the business realities of the times instead of limiting himself to the narrow precedent set in Salomon. It should be noted however that this assertion is not a critique of the Salomon principle; rather the idea is that in

appropriate circumstance, there may be the need to stretch the Salomon principle.

In that case, DHN Food Distributors Ltd, a wholesale cash and carry business was the holding company in a group of three companies. Also, the two subsidiaries were fully owned by the holding company. One of its subsidiaries, Bronze owned the land that was being used by DHN, while the second subsidiary owned the vehicles used by DHN. Essentially, the three companies had the same directors. Subsequently, the Tower Hamlets London Borough Council acquired the premises of Bronze, and because DHN was doing its business on the land, it had to close down. Essentially, the three companies went into liquidation. Compensation was paid to Bronze but none to DHN because technically, it was only a licensee on the land. DHN could only get compensation if it had more than a license interest. Nevertheless, DHN sought compensation. It was held by the Land Tribunal that based on the principle in Salomon's case; the three companies were different persons under the law. Also, that DHN was not entitled to any compensation as it could only get compensation if it had more than a license interest and that DHN's interest on the land does not entitle it to compensation beyond what was provided in section 20 of 1965 Act which was insignificant. On appeal to the Court of Appeal, one of the grounds for the appeal was that the corporate veil should be lifted and DHN should be treated as the owners of Bronze in order to enable it claim compensation. At the Court of Appeal, it was held that the corporate veil should be pierced and the three companies treated as one. DHN was thus held entitled to the claim. Lord Denning said:

"These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says... This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should be justly payable for disturbances. The three companies should for present purposes, be treated as one."

Thus, Lord Denning propounded the single economic entity theory and held that the three companies in this case should be treated as one because of the economic realities of the companies since the parent company held all the shares in the two subsidiaries and thus actually owned them. By this decision, the single economic entity doctrine was applied. The corporate veil was lifted and the distinct personality of the subsidiary companies was jettisoned to link them with the holding company.

As stated earlier, traditionally, relying on the principle of corporate personality as laid down in Salomon will mean that a holding company and its subsidiaries are different legal persons and enjoy distinct personality because upon incorporation, each company is clothed with the legal cloak. Therefore, the single economic entity doctrine can be referred to as an exception to the principle of corporate personality. (Beckett Investment Management Group v. Hall 2007)

It may be questioned that should the fact of single economic entity automatically mean that such group of companies should be treated as a single legal entity? In other words, should single economic entity justify single legal entity?

It may also be argued that the approach in DHN will only suffice for instances where the subsidiaries are wholly owned and serve no purpose other than to own the holding company's assets. This is because in DHN's case, the holding company absolutely controls

the two subsidiaries. In addition, the two subsidiaries were closed down because the holding company was closed down.

Dissecting the dictum of Lord Denning in the above case answers the question in the negative. Thus, single economic entity will not automatically justify single legal entity. This is because Lord Denning referred to the subsidiary companies in the instant case as being bound hand and foot to the holding company. This term suggests that the holding company has substantial control over the subsidiary companies. Thus, relying on the position of *Food Distributors Ltd*, the single economic entity will only be treated as a single legal entity if the holding company has substantial control over the subsidiary (ies). It is further submitted that based on the position in *DHN's* case, the subsidiary need not be wholly owned by the holding company, but it must exercise substantial control over it to qualify it as being bound hand and foot. Thus, control need not be absolute but substantial. Therefore, the argument that the subsidiary must be wholly owned is rebutted.

Curiously, the single economic entity doctrine has not received an overwhelming support by the English Courts. This is because there have been inconsistencies in the approach of English Courts with some following the decision in *DHN* while some others sticking to the orthodox and rigid approach in *Salomon*. In fact, the single economic entity principle was rejected two years after *DHN* in the case of *Woolfson v. Strathclyde Regional Council* (1978). In this case, *Campbell Ltd*, a bridal clothing company carried on business on a premise comprising five shops. Two of the shops were owned by *Solfred Holdings* with the remaining three owned by *Mr. Woolfson*. *Mr. Woolfson* was also a shareholder of *Solfred Holdings*. In addition, *Woolfson* and his wife owned *Campbell Ltd*. Subsequently, the bridal shop was compulsorily purchased by *Glasgow Corporation*. *Woolfson* and *Solfred Holdings* jointly claimed compensation from the *Lands Tribunal* for the loss of business. It was held that they were not entitled to compensation. The *Scottish Court of Appeal* affirmed the decision of the *Land Tribunal*.

On appeal to the *House of Lords*, this case was distinguished from *DHN* on the grounds that unlike *DHN* which owned and controlled the two subsidiaries, *Campbell Ltd* had no control over *Mr. Woolfson* and *Solfred Holdings*. It went further that in this case; the only ground for disregarding *Salomon* will be the proof that the company was a mere sham or façade. Thus, despite the fact that *Mr. Woolfson* owned *Solfred* and *Campbell*, the *House of Lords* refused to apply the single economic entity theory.

It is submitted that this case is clearly distinguishable from *DHN* as *Campbell Ltd* and *Solfred Holdings* could not be treated as a group enterprise despite the fact that the same person (*Mr. Woolfson*) fully owned one and partly owned the other company. *Campbell* was not the holding company of *Solfred* and neither was *Solfred* the subsidiary of *Campbell*. Thus, the *House of Lord* was right in refusing to follow *DHN*. Curiously, the court went further to criticise *DHN* when it held that it had doubts whether *DHN* properly applied the principle that the corporate veil be pierced only if special circumstances exist which show that the company was a mere sham concealing true facts. (Farat and Michon, 2008/9)

It is submitted that the criticism of *DHN* by the *House of Lords* is not justifiable.

One of the important cases after *DHN* is the case of *Adams & v. Cape Industries Plc* (1990) which also reviewed the single economic entity doctrine. Here, the Court held that the corporate veil should not be pierced simply because a group of companies operated as a

single economic entity. This is unlike *Woolfsan* supra where the companies could not be regarded as a single economic entity.

In this case, Cape a company in the United Kingdom had many wholly owned subsidiaries. Its subsidiaries were mainly engaged in mining and marketing asbestos. One of the subsidiaries mined asbestos in South Africa and shipped it to Texas, United States where another subsidiary marketed it. Subsequently, the employees of the Texas subsidiary became sick as a result of the asbestos and thus sued Cape, the holding company and its subsidiaries in a Texas Court. It was argued by Cape that the Texas Court lacked jurisdiction to hear the case. However, the Texas Court went ahead and gave judgment against Cape for breach of a duty of care in negligence. The employees then sought to enforce the judgment in the United Kingdom. In order to enforce the judgment, the question arose whether Cape had a presence in Texas which made it subject to its jurisdiction. Could it be said that Cape through its subsidiary in Texas was present in Texas? The Court rejected the argument by the employees that Cape and its subsidiary should be treated as a single economic entity. Although, the employees did not argue that the parent /subsidiary relationship between Cape and its subsidiary (NAAC) made Cape present in the United States. Rather, it was argued that the Court will in appropriate circumstances ignore the separate legal personality of companies and treat them as one.

Thus, the appeal by the employees was rejected. Slade LJ held that the mere fact that a holding and subsidiary are a single economic entity does not mean that they should in the same vein be treated as a single legal entity. The Court emphasized that each company in a group of companies is an independent entity and that the Court is not free to disregard *Salomon* simply because it considers it in the interest of justice to do so. Therefore, the Court chose to affirm the separate legal personality principle of *Salomon*. The Court of Appeal examined three justifications for lifting the corporate veil. These are the agency principle, the use of company as a façade and the single economic entity theory.

On the agency principle, it held that there must be the existence of an express agency agreement between the holding and subsidiary company, otherwise, the plaintiff should prove that the existence of an agency relationship. In the instant case, the facts only showed that the US subsidiary acted as Cape's agent in respect of specific transaction but held that this is not sufficient evidence of a general agency agreement.

On the issue of façade, the Court agreed that where the group structure was a mere sham or façade, the principle in *Salomon* will be disregarded. This was however not the case here.

Finally, on the issue of single economic entity, the Court refused to apply this principle on the ground that the fact of single economic entity does not justify disregarding *Salomon*. It went further that there was no general principle to the effect that companies in a group of company should be treated as a single company. It held that the Court is not free to disregard *Salomon* merely because the justice of the case requires it. It decided that a company has the powers under the law to arrange its affairs in such a way that the business carried on in a foreign country is the business of its subsidiary and not its own business. (*Millam v. The Print Factory* (London), 1991)

It must be stated however that the Court found on a review of evidence that Cape had overall control over NAAC (its subsidiary); but the control did not extend to the day to day running of NAAC. (Sealy, 2001) It is submitted that this fact is irrelevant. This is because based on the decision in *DHN*; a holding company need not have control of the day to day running of a

subsidiary. All that is needed is substantial control and not absolute control.

In addition, it must be noted that the employees through their counsel could not establish that Cape as a result of the parent/subsidiary relationship between it and the Texas subsidiary was present in the United States. It is submitted that if this fact had been proved, the decision might have been decided otherwise.

In the case of *Ord. & Anor v Belhaven Pubs Ltd*, (1998) the Court rejected the single economic entity theory. It held that a holding company as a shareholder has a limited liability and thus not liable for the debts of its subsidiary. It held further that the corporate veil will be pierced where the company was a façade concealing the true facts. Thus, based on the decisions in *Adams v. Cape* and *Ord & Anor v. Belhaven Pubs Ltd*, significant control is not sufficient to warrant the application of the single economic entity theory. In addition, there must be proof that the subsidiary is a mere façade or that the one company is an agent of the other.

This implies that there are still strong voices in favor of the orthodox interpretation of personality distinctions within groups as opposed to the single economic entity doctrine canvassed by Lord Denning in *DHN*. English law has stuck to *Salomon* and there are no clear cut rules and principles to guide as to when to apply the single economic entity theory. (Sealy and Worthington, 2008)

Therefore, the words of Lord Templeman still aptly capture the position of the English law today. (*Re Southard & Co Ltd*, 1979)

"English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies... turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary"

Nevertheless, it is submitted that it is inappropriate to continue to rely rigidly on *Salomon* in view of the modern realities where commercial activities are carried on within a group. The rigid application of *Salomon* would aid companies to deliberately evade liability as subsidiary companies can be incorporated deliberately to evade future liability. It is conceded that the principle in *Salomon* forms the cornerstone of company law. However, it should not be encouraged to be used as a tool to perpetuate wrong. This is because, rigidly applying *Salomon* can lead to injustice as evidenced by the case of *Adams v. Cape*. Therefore, in appropriate instances, like it happened in *DHN*, the principle should be jettisoned and the companies treated as a single economic entity.

III. The Single Economic Entity Doctrine: The Nigerian Perspective

Although, the Nigerian company law draws a lot of influence from the English common law. (Akanbi, 2012), it is nonetheless essentially statutory. The principal enactment is the Corporate and Allied Matters Act. (C20, L.F.N 2004) It recognises the principle of corporate personality laid down in *Salomon*. Section 37 provides:

"As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the"

memorandum capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in case of its being wound up"

Furthermore, in section 38 (1), the company is equated to the status of a natural person. It provides:

"Except to the extent that the company's memorandum and article otherwise provides, every company shall for the furtherance of its authorised objectives have all the powers of a natural person of full capacity."

Case law in Nigeria also shows that the principle is well entrenched in the Nigerian company jurisprudence. (Union Bank Nig Ltd v. Penny-Mart Ltd, 1992) Aguda J in *Nigerian Civil Service Union (Western State) v. Allen* (1972) held:

"Legal personality relates basically to a human being but over the years, the English common law faced with problems of property law and commerce and business transactions evolved a system of corporate personality. Today it is well recognised that the state may grant legal personality to any group of persons and it may deny it to natural persons."

Therefore, upon incorporation, a company in Nigeria becomes a body corporate, a legal person who can own property in his own name, can sue and be sued and have perpetual succession. (Marina Nominees Ltd v. F.B.I.R 1986)

In addition, the Companies and Allied Matters Act (CAMA) recognise that corporate activities are carried out within the context of group enterprise. Section 338 defines holding and subsidiary companies. It provides that a company is a subsidiary of another company if it is a member of that other company and that other company controls the composition of its board of directors or if the other company owns more than half of nominal value of its share capital or it is a subsidiary of a company which is the other company's subsidiary. It went further in section 338 (5) that a company is a holding company of another if the other company is its subsidiary. It also states that a body corporate is a wholly owned subsidiary of another company if it has no member except that other company.

Also, section 334(1) provides that directors of a holding company should prepare the group's financial statement. (Section 336, CAMA 2004) It also provides in section 334 (5) that the directors of a holding company should ensure that the year of each of its subsidiaries coincide with the year of the holding company except there are reasons to do otherwise.

From the above, it is obvious that CAMA recognises the doctrine of corporate personality laid down in *Salomon* and the concept of group enterprise through the medium of holding and subsidiary companies. The question now is whether there are provisions in the Act which allows companies in a group to be treated as a single economic entity in appropriate cases.

Generally, CAMA provides instances when the separate legal personality of a company will be disregarded. It includes section 38 which allows the corporate veil to be lifted when a donation is made to a political party, section 303 which empowers a member of a company to intervene in an action or to bring an action on behalf of a company and section 506 which provides that if in the course of winding up, it is discovered that the business of the company was carried on recklessly or with intent to defraud, the corporate veil will be pierced in order to ground personal liability of parties to the fraud (Akanbi, 2012)

It also includes section 316 which provides that:

"If an inspector appointed under Section 314 or 315 of this Act to investigate the affairs of a company thinks it necessary for the purposes of his investigation to investigate also the affairs of another body corporate which is or at any relevant time has been the company's subsidiary or holding company or a subsidiary of its holding company or a holding company of its subsidiary, he shall report on the affairs of the other body corporate so far as he thinks that the results of his investigation of its affairs are relevant to the investigation of the affairs of the company first mentioned above."

From the above provisions, it is submitted that the Companies and Allied Matters Act does not recognise the single economic entity doctrine. This is because the instances when the corporate veil will be disregarded do not include when companies in a group are a single economic entity. Section 316 only allows an investigator to investigate a holding or subsidiary company if such investigation is relevant to his ongoing investigation of a company. This is a blanket provision which is different from the position laid down by Lord Denning in DHN. This is because Lord Denning's position is based on the companies being a single economic entity and in addition, a holding company must exercise substantial control over the subsidiary.

It is conceded that section 316 is also a medium of lifting the corporate veil; it differs from the single economic entity theory which allows an otherwise limited liability company to share in the liability of another company.

Apart from the provisions of CAMA, case law in Nigeria does not offer much guide. It seems the concept is yet to be well tested by the Courts in Nigeria. However, it is safe to conclude that based on the provisions of CAMA, the Nigerian company jurisprudence aligns with the rigid position in *Adams v. Cape*.

However, as stated in the course of this paper, the better approach is the decision in DHN which allows some flexibility as the justice of the case required. It is hoped that in the course of events, the Nigerian Courts will not be afraid to take the radical progressive approach and look deeper in order to adapt the Salomon principle in a way that ultimately serve the end of justice.

In addition, since Nigerian company law is basically statutory, it is recommended that the Companies and Allied Matters Act should be amended to allow the single economic entity as one of the exceptions to the principle of corporate personality. Apart from the companies being a single economic entity, it should also include substantial control in a subsidiary as ground for applying the single economic entity theory. In addition, the amendment should also include giving discretionary powers to the Courts to order in appropriate circumstances that a company in a group of companies contributes to the assets of a company in liquidation. (Sealy and Worthington, 2008)

Conclusion and Recommendations

Behind the simplicity of the corporate personality principle laid down in *Salomon* is the complex reality that most large businesses are carried on through the medium of group of companies. This may be for a number of legitimate reasons such as opening a new business in a foreign country which may be more easily conducted through a subsidiary in order to comply more easily with the requirements of the foreign country. Also, if the business is

risky it may be commercially prudent to limit the exposure of the parent company. In reality, these companies within a group are usually a single economic entity having ultimately the same source of finance and control.

However, the medium of group enterprise or group of companies can be subject to abuse. It is recommended that the proper position to take is that in appropriate circumstances where the justice of the case requires, the Salomon principle of corporate personality should be disregarded and companies in a group which are in reality a single economic entity, should be treated as a single legal entity too.

Thus, the dictum of Lord Denning in DHN is the proper cause to take. It is recommended that common law Courts will have course to review itself instead of the rigid application of Salomon. It is also hoped and recommended that the Nigerian Courts will follow Lord Denning in the appropriate instance because in reality the separate corporate personality of companies in a group may be absent where there is substantial domination of a subsidiary by a holding company. Rigidly applying Salomon in this instance will imply deliberately shutting our eyes to the truth.

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