

Nature of Company

Thit Oo Hlaing¹

Abstract

The most important type of business association in Myanmar is Company. One of the most important characters of a company is that after a company is legally formed, it possesses a separate legal personality in accordance with the Company Law. This characteristic is quite different from other business association such as a partnership firm. As a result, each and every member of a Company will not be liable to any debts or obligations due to the company. However, in exceptional cases, a member of a company shall be responsible for the debts and obligations of his or her company due to various reasons. These cases are called in legal term as lifting the veil. There are two kinds of lifting the veil, statutory lifting the veil and judiciary lifting the veil. When a company wants of any legal qualification and acts business transactions by a member, such member will be liable to obligations occurred by such actions. It shall be called statutory lifting the veil. On the other hand, a Company is created for some fraudulent purposes and used as a device to hide behind the mask of the Company. In this case, the Court is entitled to lift such veil by showing such fraudulent actions of member or members of such Company. It will be called judiciary lifting the veil. When the Law or a Court lifts a veil of a Company, it does not acquire any separate existence and as a result it is never regarded in law as distinct and separate from its members.

Introduction

The Word "company" ordinarily means an association of a number of individuals formed for some common purposes. It involves two ideas: firstly, the members of the association are so numerous that it cannot be described as a firm or partnership, and secondly, a member may transfer his interest in the association without the consent of the other member. Such an association may be incorporated according to law where upon it becomes a body corporate with perpetual succession and a common seal. It is then regarded as a legal person, separate and distinct from its members. If, however, it is not so incorporated, it does not acquire any separate existence and therefore, it is never regarded in law as distinct and separate from its members.

The member of the corporation will not be liable for the debts or obligations of the corporation itself. They will be liable only to the extent of what they have bought their shares. Again, a member of a corporation can transfer his share to another as he likes without having the need to get consent from the other members.

Definition of Company

Today the most important form of business organization in Myanmar is the corporation. The concept of the corporation is not new. Since the olden days, men had the idea of conducting business in the form of organization, which would not be affected by changes in membership. The organizations would go on although deaths of its members or withdrawal or incoming of new members occurred there. The organization has such a legal personality, it can own, separate from its members. Because of its legal personality, it can own property and enjoy certain privileges indefinitely. In fact, such characteristics of a separate personality and that of a continuous life are essential ingredients of the corporation. The corporation, having a separate legal entity is quite different from that of a partnership firm, there, the partnership dissolves with the death or withdraws of one of its partners.

¹ Doctor, Lecturer, Department of Law, Myitkyina University

In United Kingdom Law, a company is an artificial person with a separate identity from its member. Its directors, stockholders and employees are connected to the company by a network of contracts, but in law, the company is regarded as separate from them.

According to s.2(2) of the "Company" means a company formed and registered under this Act or an existing company.

Separate Legal Entity

A corporation is an artificial person which is recognized in law as a separate legal person. Here it is noted that Company is not a business, it is a business person. A company is a corporate body having legal entity separate from the natural persons connected with it, for example as members. It can be said that a company is a legal person distinct from its owners. The owners of a company are its members or shareholders.

A legal person is being recognized by law as having legal rights and obligations. This arises where a group of persons together form a corporate body of some sort. The corporate body can acquire a personality, separate from that of its members with some of legal powers of a natural person. A corporation, such as a limited company, is distinct from an unincorporated association. An unincorporated association is not a separate legal entity it does not have all legal identity separates from that of its members. A typical example of an unincorporated association is a partnership. As a legal person, a company can own property and make contracts through its managers or directors. It has got the right to sue and to be sued in its own name and seal.

The **Salomon V Salomon & Co Ltd (1987 AC 22)** case demonstrates the separate legal personality of the company. Salomon carried on business as a leather merchant and boot manufacturer. In 1892 he formed a limited company to take over the business. The memorandum of association was signed by Salomon, his wife, his daughter, and four of his sons. Each subscribed for one share. The company paid £ 39,000 to Salomon for the business, and the mode of payment was to give Salomon £ 10,000 in debentures, secured by a floating charge on the company's assets, and 20,000 shares of £ 1 each and the balance in cash. Less than one year later the company fell on hard times and a liquidator was appointed. If Salomon's debenture was valid he was as secured creditor entitled to be paid before the unsecured trade creditors. The assets were sufficient to pay off the debentures but in that event the trade creditors would receive nothing. The unsecured creditors claimed all the remaining assets on the ground that the company was a mere or agent for Salomon.

The Court held that the company was a separate and distinct person. The debentures were perfectly valid, and Salomon was entitled to the remaining assets in the payment of the secured debentures held by him.

Thus in **Macaura v. Northern Assurance (1925 AC 619)**, Macaura was the owner of a timber estate in County Tyrone and he formed an estate company and sold the timber to it for £ 42,000. The purchase money was paid by the issue to Macaura and his nominees of £ 42,000 fully-paid shares of £ 1 each. No other shares were issued. He also financed the company and was an unsecured creditor for £ 19,000 its other debts being trifling. Macaura effected an insurance policy on the timber in his own name and not in that of the company or as agent for the company and on 23 February 1922 most of the timber was destroyed by fire.

Macaura claimed under his policies, but he was held not to have an insurable interest. He could only be insuring either as co creditor or as a shareholder of the

company, and neither a simple creditor nor shareholder has an insurable interest in a particular asset which the company holds, since the company is an independent entity.

In the case of **Lee (Catherine) V. Lee's Air Farming Ltd., (1960, 3 All ER, 420)**, decided that in 1954 the appellant's husband formed the respondent company which carried on the business of crop spraying from the air. In March 1956, Mr Lee was killed while pilot an aircraft during the course of top soil dressing and Mrs. Lee claimed compensation from the company as the employer of her husband, under the New Zealand Worker's Compensation Act 1922. Since, Mr. Lee owned 2,999 of the company's 3000 £ 1 shares and since he was its governing director, the question arose as to whether the relationship of employer and employee could exist between the company and him. One of his first acts as governing director has been to appoint himself the only pilot of the company at a salary arranged by himself. Held that, Mrs. Lee was entitled to compensation because her husband was employed by the company in the sense required by the Act of 1922, and the decision in *Salomon V. Salomon & Co. Ltd* was applied.

Another relating case in **AL Underwood Ltd V. Bank of Liverpool Martins Ltd, (1924, 1 KB, 775)**, facts of the case is that, U was the only director and sole owner of a company (U Ltd.). U had his personal account at the defendant bank (L) and, unknown to that bank, the company bank account was at another bank (X). Cheques payable to the company were endorsed on its behalf, to himself (U Ltd-U) by U as sole director and paid into the L bank to his personal account. The bank did not query this practice since it regarded U and U Ltd as substantially the same person.

It was held that U & Ltd were entitled to recover that amount of the cheques, because the bank was put on notice by the practice of a sole director endorsing company cheques to himself and should have checked it out. It was not entitled to ignore the distinction between a company and its sole director and shareholder. It had been negligent in collecting the cheques which had been misappropriated and the bank must make good the loss of U Ltd.

In Myanmar relating case is **U San Win V. No.1 Special Judge and two, (1966, B.L.R (C.C) 508)**. The Judge held that, at the eye of the law, a company formed under Company Act stands as a living person separately. The shareholders, Directors and other officials of this company and said corporation are different because of the provisions of law. But where there is no human being, the company cannot do any act. So, the company shall proceed every activity together with living persons. However, the law can see that the activities, rights and duties of a company and that of the physical persons are separable. A company is a legal person, thus rights and duties are distinctly existed. So, a company can be sued for omission of any duties by the way of civil or criminal.

In the case of **Union of Myanmar Transportation Administration V. People Agency Co. Ltd, (1967, B.L.R(C.C), 484)**, a company formed under law cannot perform its business itself since it is not a physical person. So, the directors shall be appointed by shareholders for doing company's business. In order to do these businesses, Managing Director shall be also appointed by Directors. So the directors mean the third parties contact and do business with the company.

Therefore, a company is not a physical person, it is an artificial one. The law recognizes that a company is a person. If a corporation of a company exists for legal purpose, it will have separate legal rights and duties conferred and imposed by law.

According to **Section 5 of the Myanmar Companies Act, 1914**, any seven or more person (and in case of a private company, any two or more person) associated for any lawful purpose, may by subscribing their names to a Memorandum of Association,

and otherwise complying with the requirements of the Act in respect of registration, form an incorporated Company, with or without limited liability, that is to say either, a Company limited by shares, or a Company limited by guarantee, or unlimited Company.

In respect of the formation of a company, it should be observed that an association consisting of more than the maximum number of members allowed by law, in an "illegal association", if it is not registered as required by Companies Law.

Doctrine of Lifting the Veil

The Law does, however, provide for some exceptions to the rule that the company has its own separate legal status. These exceptions are sometimes referred to under the heading of "**lifting the veil**".

For example, it should be ignored a certain activity or transaction is carried out by a company and the Court will regard the activity or transaction as that of the shareholders of the company.

So also, the courts will refuse to allow a person to hide behind the veil of the company and remain anonymous or deny that they have any connection with the company.

These are some of the occasions when the veil is lifted. The first occasion is that where the number of shareholders falls to just the one, that shareholder becomes personally liable for debts accruing more than six months after he became the sole shareholder.

It is also called Statutory lifting the veil. The law provides that if at any time the number of members of public company falls below seven and of a private company falls under two and the company carries on business for more than six months thereafter, the following consequences shall ensue.

First consequence is that according to Section 147 of the Myanmar Companies Act, 1914, every person who was a member of the company after those six months with knowledge of the above reduction, shall be severally liable for the whole debts of the company contracted during that time, and he shall be liable to be severally sued therefor.

Secondly, if, when the company is wound up, it appears that the company transacted business with a view to defrauding its customers, shareholders who connived in the fraud assume personal liability.

In **Jones V. Lipman, (1962 1 WLR 832)**, L entered into a contract to convey a parcel of land to J. Subsequently he changed his mind and in an attempt to avoid being compelled to convey the land he formed a company. A Company of which he and a clerk employed by his solicitors were the only shareholders and directors. L then conveyed the land to A Company. The Judge granted an order for specific performance against both L & A Company to convey the land to J for two reasons, both of which amount to lifting the veil on the accepted sense. First, because L, by his absolute ownership and control of A Company, could cause the contract to be completed, the equitable remedy could be granted against him. Secondly, the order could be made against the company because it was a creature of L and a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.

A case where the court would not allow individuals to use a company as cover for improper activities is **Re Darby ex parte Brougham (1911, 1 KB 95)**. Here D & G, two fraudulent persons whose names were well known in the City, formed a company of which they were the sole directors and collectors. This company acquired a license to exploit a quarry and then a new company was formed to which the license

was sold at a grossly inflated sum. The second company's debentures were then offered for sale to the public and when the subscription money was received the debt to the first company was paid. The prospectus issued to the public stated only that the first company was the promoter. But it was held that in reality D & G were the promoters and, as they received the whole of the fraudulently obtained secret profit, the liquidator of the second company could pursue D & G to account for the profit. The judge could have based his decision, and perhaps would today, on a constructive trust because, as the promoting company broke its duties as a promoter of the second company, and D & G as directors of the first company received the profit knowing of the breach, they would be personally liable as constructive trustees because of their knowing receipt.

The most through recent examination of the law were in the Court of Appeal in **Adams V. Cape Industries plc, (1990, 1 Ch, 433)**. Here the Court held that it only permissible for a court to lift the veil where special circumstances exist indicating that the company is a mere façade concealing the true facts.

The third consequence can be appeared in following circumstance. It may be that the company was nothing more than a sham which was formed to promote some fraudulent scheme on the part of the shareholders. In such a case, the court may treat the shareholders and the company as one and the same.

In **Gilford Motor Co. Ltd. V. Home, (1933, Ch 935)**, H had been employed by the plaintiffs as their managing director, His contract of service had included a restrictive covenant to the effect that after his employment had ended he would not solicit the customers of the plaintiff. The case arose because he did precisely that. One point which was raised in the case was that the solicitation was done by H as an employee of a company which had been formed for the purpose and all the shares of which had been issued to his wife and another employee who were the only directors. The Court of Appeal regarded this company as a Cloak or Sham and formed merely as a device or stratagem, in order to mask the solicitation. An injunction was granted against both H and the company from acting in breach of the covenant.

Further the fourth circumstance is that a director who knows, or who should have known, that the company has no reasonable prospect of avoiding liquidation, and who fails to take reasonable steps to minimize the company's losses, is guilty of wrongful trading. In this case this director shall be liable for any loss incurred by the company.

The last one is that a director signing a company cheque is personally liable on it if the company name does not appear in full.

As a result, company is a legal person distinct from its owner of a company, its members and share owners. A legal person is meant that it is recognized by law as having legal rights and obligations. As a legal person, a company can own property and make contracts through its managers or directors. It has got the right to sue and to be sued in its own name and seal. Most companies are formed by registration under the Companies Act 1914.

Conclusion

The most important form of business organization in modern trade is a Company. Although a company shall be established by people according to existing company law, this established company is independent from its founders or members. It is one of the most important characteristic of company given by all company laws. Many leading case in the world affirmed this fact in many time. However, there are some circumstances in which a person shall be personally liable for any debts or losses sustained by a company. These exceptions can be called the doctrine of lifting the veil.

There are two kinds of lifting the veil, statutory and judiciary. In these cases the later kind is more important and controversy.

Acknowledgement

Firstly, I would like to express my great gratitude to Dr. Soe Win, Pro-Rector, Myitkyina University and Dr. Zaw Jat, Pro-Rector, Myitkyina University for allowing this Article to Journal. Then I am indebted to Dr. Wah Wah Tun, Professor and Head, Department of Law, Myitkyina University, who provides me with a more sophisticated and deeper understanding of the Company Laws. I have benefitted a great deal from her advises.

References

Books

Aung Thein, U, Introduction and translation of Company Law, Part I, 1995
Simon Goulding, Principles of Company Law, Cavendish Publish Ltd. 1st Edition, 1996

Laws

The Companies Act of England, 2006
The Myanmar Companies Act, 1914

Cases

Adams V. Cape Industries plc, 1990, 1 Ch, 433
AL Underwood Ltd V. Bank of Liverpool Martins Ltd, 1924, 1 KB, 775
Jones V. Lipman, 1962 1 WLR 832
Lee (Catherine) V. Lee's Air Farming Ltd., 1960, 3 All ER, 420
Macaura V. Northern Assurance, 1925 AC, 619
Re Darby ex parte Brougham, 1911, 1 KB 95
Salomon V. Solomon & Co. Ltd., 1987 AC 22
U San Win V. No.1 Special Judge and two, 1966, BLR (C.C) 508
Union of Myanmar Transportation Administration V. People Agency Co. Ltd, 1967, B.L.R (C.C), 484