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**THE CONCEPT OF REVERSE VEIL PIERCING:
ITS APPLICATION IN ENGLAND AND PROSPECTS FOR
IMPLEMENTATION IN UKRAINE**

The doctrine of piercing the corporate veil is a fairly new phenomenon for legal science in Ukraine and requires careful consideration to implement the selected provisions into the national legal system. We have an opportunity to study the progressive practice of English courts applying the most advanced legal mechanisms and, based on the achievements of foreign legal practice and science, to increase the investment attractiveness of Ukraine in the international arena by implementing innovative legal structures to create the most favourable and understandable conditions for the foreign investor.

Traditional corporate entity theory does not measure up to the economic reality of the modern marketplace. On a global historical scale, Ukraine has very recently made the transition from planned economy to market relations. The legislation formed under the command-administrative system of governance and based on the fiction of separate corporate personality has provided a fruitful foundation for its abuse by non-bona fide members and officers of the company. Therefore the doctrine of absolute separate entity does not stand up to contemporary legal analysis.

In Ukraine certain aspects of the doctrine of piercing the veil of incorporation were highlighted in the works of Y. Akimenko, N. Blazhivska, E. Dyadyuk, I. Grishina, T. Karnauh, O. Kibenko, O. Kologoida, I. Lukach, R. Maidanik, V. Makhinchuk, B. Shuba, Y. Sokolovskaya, I. Spasibo-Fateeva, Y. Zhornokuy.

This article explores the concept of reverse veil piercing, the practice of its application by English courts and its theoretical justification. The author aims to evaluate different facets of the notion and, after weighing its pros and cons, draw a conclusion about the need or lack thereof in the implementation of certain provisions of this concept in the domestic legal system.

Although the fiction theory and the principle of separate legal personality are fundamentals of English company law and the starting point in any judicial analysis, the courts have pierced the corporate veil when the interests of justice required so.

In a standard piercing of the corporate veil claim a voluntary or involuntary creditor of the company attempts to disregard the separate corporate personality of the legal entity in order to hold the member or officer of the company personally liable for a prima facie debt of the company. It is a third party to the corporate governance relationship who asks the court to pierce the corporate veil, whereas the company tries to defend its separate legal personality for the veil not to be lifted. Whereas in a reverse veil piercing case a creditor of the controller of the company

seeks to hold the company liable for the debts of the controller. Reverse veil piercing aims to shift the responsibility from an individual shareholder to a legal entity. It is often a third party, an outsider, who sues against the controller and attempts to backward-pierce the corporate veil in order to seize the company's assets in satisfaction of the controller's debts. Therefore, if reverse piercing in such case is allowed the debt of a shareholder is imputed onto the company.

Additionally, the situations occur where it is the company who seeks to pierce the corporate veil. It is a controller, an insider, who wants the separate legal personality of a company to be disregarded in order to obtain financial benefits, "to avail the insider of corporate claims against third parties" or to protect company's assets "from third party claims under the shelter of protection that are available only for assets owned by the insider". Thus, the controller can claim to set aside the corporate form of which they are a part of. The former type of situations is called "outsider reverse piercing", whereas the latter type of claims is referred to as "insider reverse piercing". This classification was introduced by Gregory Crespi and carried out on the basis of the identity of the persons seeking to disregard company's separate legal personality [1]. Because it is the company itself or its controller as a part of the company who voluntarily asks for the corporate veil to be drawn away the second type of claims was also characterized as "voluntary piercing" by Karen Vandekerckhove [2].

The distinction between two types of claims of reverse piercing brings much needed clarity and predictability to the doctrine. It is submitted that the identity of the piercing party makes a difference for the courts to decide whether to maintain or disregard the company's separate legal personality. When reaching a decision in regards to the reverse piercing, the court should expressly determine the identity of the party seeking to pierce the corporate veil.

The author admits that application of reverse veil piercing relies heavily on the factual determination. To the detriment of the concept, the English courts have never expressed clearly their views on backward piercing. Edwin C. Mujih argues that the Supreme Court missed the opportunity to draw the line between forward and reverse piercing in *Petrodel Resources Ltd v Prest* [3]. Lady Hale recognized the distinction between seeking a remedy in respect of a company's liability against someone other than the company (standard forward piercing) and seeking "to convert the personal liability of the owner or controller into a liability of the company" (outsider reverse piercing) [4]. However, the court chose not to develop the distinction between them and never used "forward" or "reverse piercing" terms.

Prest is unique since it was the first case in which the Supreme Court identified the two directions of veil piercing. But it is most certainly not the first reverse piercing case. In this author's considerate opinion several cases can be attributed to a reverse piercing practice in spite of lack of the "reverse" or "backward piercing" terms being used by the courts. For example, cases such as *Gilford Motor Co Ltd v Horne* [5] and *Jones v Lipman* [6] are reverse piercing cases because, as in *Prest*, the claimants were seeking

a remedy against the company for wrongful acts committed by the defendants.

The reverse piercing cases were not identified as such and the alternative legal mechanisms were used to derogate from the strict principle of separate legal personality of company. Several claims, including *Prest*, were resolved utilizing a long established concept of resulting or constructive trust. For example, in recent *FM Capital Partners Ltd v Marino* [7] the court chose to decide the case on the basis of ordinary trust law principles, rather than basing the decision on a debatable doctrine of reverse veil piercing. The concept of resulting trust has no parallel in Ukraine. This underlines the relevance and pressing need to introduce separate aspects of the legal construct of outsider reverse piercing due to the lack of an alternative legal structure in the domestic legal system that allows achieving fair and just result in the case.

Jeff H.Y. Chan invites the courts to “adopt a hostile approach towards companies seeking to pierce their own corporate veils” [8]. It seems reasonable not to allow the company or its controller to benefit financially through piercing the veil of incorporation. The controlling shareholders of a company must bear all the consequences of its separateness. They shouldn’t have it both ways [9]. In the case of insider reverse veil piercing separate legal personality should be upheld. This proposition is in line with the decision in *Adams v Cape Industries* [10] on strict adherence to the principle of separate legal personality. However, it means that *DHN Food Distributors Ltd v Tower Hamlets LBC* [11] and *Beckett Investment Management Group Ltd v Hall* [12] should not be followed on the similar facts.

The author supports the idea that the separate personality of legal entity may be respected for certain purposes and disregarded for the others. The court may be asked to pierce the veil of incorporation by the creditors of a controlling shareholder in order to make the company liable for an obligation of the controller or, in the alternative, by the company itself in order to obtain certain financial benefits. This is referred to as “reverse” or «backward piercing». It must be acknowledged that this term is used loosely resulting in some confusion. The distinction between outsider and insider reverse piercing was adopted in order to clarify the concept.

Reverse piercing of the veil of incorporation is not a universal practice, however the closer examination of the cases demonstrates its potential to become a useful tool in deciding a range of legal issues. The outsider reverse piercing has received more favourable treatment by the judges and scholars than the insider one. Since it achieves more unanimity, it seems rational to use outsider reverse piercing provisions to start introducing the doctrine of piercing of corporate veil, its basic principles and conceptual system in the national legal system of Ukraine.

The author concludes that a company’s separate legal personality should be disregarded by the means of outsider reverse piercing in order to hold the unscrupulous controllers, that are hiding behind the separate personality of the company, accountable making the company’s assets subject to the claims for their personal debts.

References:

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9. Tate Access Floors Inc v Boswell [1991] Ch. 512 at 531.
10. Adams v Cape Industries [1990] Ch. 433 CA (Civ Div).
11. DHN Food Distributors Ltd v Tower Hamlets LBC [1976] 1 W.L.R. 852 CA (Civ Div).
12. Beckett Investment Management Group Ltd v Hall [2007] I.C.R. 1539 CA (Civ Div).

Ключові слова: «корпоративна вуаль», корпоративне право, юридична особа.

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Відповідно до цивільного законодавства, однією із найголовніших і найпоширеніших підстав виникнення цивільних прав та обов'язків є укладення договорів та інші правочини. Так, у ч. 1 ст. 202 ЦК України зазначено, що правочином є дія особи, спрямована на набуття, зміну або припинення цивільних прав та обов'язків. Тобто правочин – це правомірна дія учасника цивільних правовідносин, який має для цього достатню дієздатність і має на меті – набуття, зміну чи припинення цивільних прав й обов'язків. Правочин можна вважати основною підставою виникнення цивільних прав та обов'язків. Саме це поняття настільки поширене в практиці, що особа, вчиняючи певні дії, не