

Piercing the corporate veil in confiscation proceedings

Even though POCA is weighted in favour of the prosecution, the scales of justice are beginning to tilt in the direction of the defendant, explains **David Bloom**

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The Proceeds of Crime Act 2002 (POCA), which underpins the confiscation process in England and Wales, is weighted against the defendant. The stated purpose of confiscation proceedings is to deprive the convicted defendant of the financial benefit obtained from his criminal conduct. The burden is invariably on the imprisoned defendant, without easy practical recourse to his financial records, to establish on the balance of probabilities the legitimacy of his assets over the preceding six years in the face of prosecution assertions and statutory assumptions.

Matters are more complicated but not necessarily more unfavourable where the defendant is a director or shareholder of a company and the prosecution is trying to recover the company's assets by piercing the 'veil' of incorporation. While POCA is detailed in many respects, the law surrounding this subject has been defined by case law and remains stubbornly obscure.

Lord Palmerstone, when considering the geographical conundrum in respect of Schleswig-Holstein, famously opined that 'the question is so complicated, only three men in Europe have ever understood it. One was Prince Albert, who is dead. The second was a German professor who became mad. I am the third and I have forgotten all about it'. Such sentiment would not be out of place if applied to any discussion of piercing the veil of incorporation in criminal confiscation proceedings.

It is a well-accepted principle of English law that a duly formed and registered limited company is a separate legal entity from those who are its shareholders and directors. It has rights and liabilities that are separate from its shareholders and directors and the assets of the company

belong neither to the directors nor to the shareholders individually (*Salomon v A Salomon & Co Ltd* [1897] AC 22; confirmed by *Boyle Transport (Northern Ireland) Ltd v R* [2016] EWCA Crim 19). In the normal course of events, a company's assets would not constitute the realisable property of the individual defendant.

Lord Bingham succinctly explained the confiscation regime by way of a three-stage test in *May* [2008] UKHL 28: (1) Has the defendant benefited from relevant criminal conduct? (2) If so, what is the value of the benefit so obtained? (3) What sum is recoverable from the defendant? All three stages are problematic for defendants involved in companies.

In the context of criminal cases, the court has identified at least three situations involving 'impropriety and dishonesty' when a benefit obtained by a company is also treated in law by POCA as a benefit obtained by the individual criminal; and so where a court can pierce the 'carapace' of the corporate entity and look at what lies behind (*Seager and Blatch* [2009] EWCA Crim 1303; as revised by *Sale* [2013] EWCA Crim 1306 and further revised by *Boyle*):

- Where a defendant attempts to shelter behind a corporate façade, or veil to hide his crime and his benefits from it;
- Where a defendant does acts in the name of a company which (with the necessary mens rea) constitute a criminal offence which leads to the defendant's conviction; and
- Where the transaction or business structures constitute a 'device', 'cloak', or 'sham'. In other words represent an attempt to disguise the true nature of the transaction or structure so as to deceive third parties or the courts.

In the Supreme Court case of *Prest v Petrodel Resources Ltd and Others* [2013] UKSC 34, Lord Sumption considered that the terms 'façade' and 'sham' caused confusion and failed to identify the relevant wrongdoing. His lordship proposed that two distinct principles lie behind these malleable terms and reflect the reality that embroiled companies operate within either the 'concealment principle' or 'evasion principle'.

The 'concealment principle' involves an attempt to use the company to conceal the identity of the real actors involved in the transaction. The court can lift the corporate veil to reveal the true picture beneath but not pierce the veil as other remedies, like an equitable claim against both the company and the defendant, will be more appropriate.

By contrast, the 'evasion principle' is different in that it is an attempt to interpose the company to defeat a legal right against the person in control of it by relying on the separate legal personality of the company to defeat a legal right against the person or frustrate its enforcement. Lord Sumption concluded that the court could only pierce the corporate veil as a measure of last resort in carefully defined 'evasion' circumstances for the limited purpose of depriving the company or its controller of the advantage that would otherwise have been deliberately evaded through the interposing of the company's separate legal personality.

Lord Sumption's *obiter* remarks were approved by the Court of Appeal in *Boyle*. It is perhaps not surprising that David LJ, a former chancery silk, emphasised the sanctity of company law and in many practical senses raised the threshold for piercing the corporate veil. The court provided seven non-exhaustive relevant considerations or general propositions for crown courts considering piercing the corporate veil:

- The test when considering piercing the corporate veil is not one of 'justice', as such a loose concept would give rise to uncertainty and inconsistency;
- While the crown court is required to assess the 'reality of the circumstances', that is not a licence to depart from the established principles of company law;
- The POCA scheme is not to punish but to recover the benefits of crime that the defendant has obtained;
- The actual principles relating to lifting or piercing the corporate veil are the same in the civil and criminal courts. Proper adherence to company law principles is required in confiscation proceedings. It follows that, however tempting, invitations to adopt a 'broad brush', 'robust' approach, or to 'avoid being distracted by the niceties' should not detract from the proper application of the correct legal principles;

- Regard should be had to the nature and extent of the criminality involved as to whether it merits that the corporate veil be lifted;
- Even where a company, mixed up in criminal conduct, is solely owned or controlled by the defendant, that does not of itself always necessitate a conclusion that the defendant is the alter ego of the company, whose turnover and assets are to be equated with being property of the defendant himself; and
- All decisions must be geared to the facts and circumstances of the particular case.

Following *Boyle* the corporate veil will now only be exceptionally pierced. It sets an exacting standard for crown court judges ordering the confiscation of a company's assets. Prosecution assertions that the defendant was the company's 'directing mind' or 'alter ego' (even if factually correct) will no longer suffice without vigorous scrutiny of all the surrounding factors and accurate reference to the case authorities. Prosecution arguments that the court looks to the 'the realities of the case' and 'not be diverted by labels' or the 'niceties of company law' will inevitably receive short shrift.

The defendant whose company assets are confiscated following the piercing of the corporate veil will almost certainly find fertile grounds of appeal given the opaqueness of the subject matter: one need look no further than the divergent opinion expressed by the seven Supreme Court justices in *Prest*. It does seem likely that an application of the law, as stated by Lord Sumption in his two principles, to any given facts will lead to protracted discussions concerning their mutual exclusivity.

The consequence of *Boyle* may be, as Davis LJ suggested, that prosecutors will avoid the need to pierce the corporate veil by charging solvent companies. This may not prove a panacea unless the offence is one that applies specifically to the company. To secure the company's conviction means identifying the 'directing mind and will' of the company and proving he committed the *actus reus* of the relevant offence with the requisite *mens rea* to the exacting criminal standard of proof. Prosecutors may avoid any attempt at piercing the corporate veil and instead focus on persuading courts to confiscate defendant's shareholdings where the value of the shareholding has been augmented by the criminal conduct.

For prosecutions that continue to be brought with a view to piercing the corporate veil, the defendant's ability, usually through the assistance of a forensic accountant, to prove the company's legitimate trading history and limitations of the pecuniary advantage obtained will remain of central importance. The scales in this niche area at least are tilting in the direction of the defendant. **SJ**



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