COMMON LAW PRINCIPLES APPLICABLE TO LIFTING THE CORPORATE VEIL IN MALAYSIA AND SINGAPORE

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Last year was the one hundredth anniversary of the decision of the House of Lords in *Salomon v Salomon & Co Ltd*[1], the case which more than any other in the common law world has shaped the development of company law. The principle that a company is a legal entity separate from its corporators, and that as a matter of law these parties are divided by a "corporate veil", permeates commerce, the taxation system, corporate structures, and the way in which business is carried on in many jurisdictions. Notwithstanding the durability of this principle — and it continues to be the rule rather than the exception[2] — the courts have also been prepared to admit exceptions to the rule in appropriate circumstances. Defining the appropriate circumstances is, however, easier said than done.

It is with this anniversary of *Salomon v Salomon & Co Ltd* in mind that it seems appropriate to review the circumstances in which courts will "lift the corporate veil" between the company and its controllers. The courts of Malaysia and Singapore have considered this issue regularly in recent years, and it is the purpose of this paper to review Malaysian and Singapore cases, to identify principles applicable to lifting the veil of corporation in these jurisdictions.

Salomon v Salomon & Co Ltd : a Review

Notwithstanding that the principle established by *Salomon v Salomon & Co Ltd*[3] is well known, it is appropriate in the context of this paper to briefly review the facts of this case and the principle for which it stands.

Salomon was a wealthy boot and shoe manufacturer who had successfully traded for over thirty years on his own account in London. He had a wife and family consisting of five sons and a daughter. Four of the sons worked with Salomon, and pressed Salomon for an interest in the business. Consequently, Salomon incorporated a private limited company under the *Companies Act 1862* (UK), with an authorised capital of £40,000 in 40,000 shares of £1 each. The subscribers to the memorandum were Mr Salomon, his wife, and five of his children. The directors were Mr Salomon and his elder sons. The company purchased the business from Mr Salomon at an extravagant price, the mode of payment being in shares rather than cash. The sum of £10,000 was paid in debentures for a similar amount. The debts of the business at the time of transfer were paid out, leaving Mr Salomon with £1,000 in cash, £10,000 in debentures, and half of the nominal capital of the company in fully paid shares. The other shareholders

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1 [1897] AC 22

2 See, for example, the recent cases *Sarrio SA v Kuwait Investment Authority* [1997] 1 LLR 113, *Meridien Biao Bank GmbH v Bank of New York* [1997] 1 LLR 437, and *Hadoplane Pty Ltd v Edward Rushton Pty Ltd* [1996] 1 Qd R 156

3 [1897] AC 22

in the company held only one share each. The company fell into financial difficulties, and Salomon loaned the company funds. Further, his debentures were cancelled and reissued to a third party, Broderip, who loaned money to Salomon, which Salomon then loaned to the company. When interest on Broderip's debentures were not paid on time, Broderip appointed a receiver. The company went into liquidation, and the realised assets of the company were sufficient to pay Broderip, but not the unsecured creditors.

The liquidator brought an action against Broderip, to which Salomon was also a defendant. The liquidator disputed the validity of the debentures on the ground of fraud, and claimed rescission of the agreement for the transfer of the business, cancellation of the debentures, and repayment by Salomon of the balance of the purchase money.

Vaughan Williams J at first instance held that to allow a man who carries on business under another name to set up a debenture in priority to the claims of the creditors of the company would have the effect of defeating and delaying creditors.[4] The Court held, *inter alia*, that the business was Salomon's business, that the company was his agent, and that accordingly the creditors of the company could have sued Salomon personally.[5] His judgment was affirmed on appeal by the Court of Appeal.

Salomon appealed to the House of Lords, which allowed his appeal. Lord Halsbury LC observed :

> I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence — quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it would be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.
> I will for the sake of argument assume the proposition that the Court of Appeal lays down — that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.[6]

Accordingly, in the view of the Court the fact that the secured creditor had originally been the major shareholder in the company did not prevent enforcement of the security to the detriment of the unsecured creditors.

Lifting the Corporate Veil : Common Law Jurisdictions

Since the decision in *Salomon's* case, the fundamental common law principle applicable to corporate identity has been that the company is separate from its members.[7] Within a relatively short time after the *Salomon*

4 [1895] 2 Ch 323 at 331
5 *Ibid*
6 [1897] AC 22 at 29-30; cf Lord Macnaghten at 50
7 See, for example, cases in England (e.g. *Macaura v Northern Assurance Co Ltd* [1925] AC 619), Australia (e.g. *Walker v Wimborne* (1976) 137 CLR 1) and New Zealand (e.g. *Lee v Lee's Air Farming* [1961] AC 12 (Privy Council))

case was decided, however, the Courts were recognising exceptions to the application of the rule, where the corporate veil would be "lifted", "raised" or "pierced" to attribute liability of the company to its controllers,[8] or vice versa.[9] Primarily, circumstances where the Courts have been prepared to lift the corporate veil have involved the use of the company as a sham or fraud, however, situations where the veil has been disregarded do not necessarily satisfy this criterion. In addition, legislation has intruded to permit the corporate veil to be raised in circumstances prescribed by Parliament, an analysis of which is beyond the scope of this paper.[10]

Malaysia and Singapore Law : The Corporate Veil Remains in Place

Cases emerging from the courts in Malaysia and Singapore within the last twenty years firmly establish that the corporate veil between the company and its controllers continues in place in those jurisdictions. This so-called "primary principle"[11] was recognised again as recently as 1996 by the Federal Court of Malaysia in *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd*[12] where the court observed:

> We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, i.e. that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies — a principle firmly established since *Aron Salomon v A Salomon & Co Ltd* [1897] AC 22.[13]

Similarly in "*The Andres Bonifacio; Far East Oil Tanker SA v Owners of the Ship or Vessel "Andres Bonifacio" and other appeals*",[14] the Court of Appeal of Singapore said

> We accept counsel's submission that there must be special circumstances to exist before lifting the corporate veil, such as the presence of a facade or sham set up to deceive the applicants ... .[15]

Like equivalent courts in other jurisdictions, the courts in Malaysia and Singapore are prepared to lift the corporate veil in a general range of circumstances, without adhering to strict guidelines in so doing. The difficulty arises in determining whether the facts of an individual case justify the recognition of the controllers of the company, where the liability of the company itself is in question. Zakaria OCJ in *Bumiputra Bank*

8 For example *Re Darby; ex parte Brougham* [1911] 1 KB 95, where a company was formed by two promoters to cloak fraudulent financial operations they wished to carry out. The court in this case allowed the liquidator of the company to prove in the bankruptcy of Darby, one of the directors of the company, on the basis that the fraud perpetrated through the vehicle of the company was in reality perpetrated by Darby and his associate Gyde themselves, and the company was a sham.

9 For example *Gilford Motor Co Ltd v Horne* [1933] All ER Rep 109, where Horne had incorporated a company to act as the vehicle for his business dealings in breach of a restraint of trade clause to which he was bound in a contract with his former employer. The court found in this case that the directors of the company in reality either took no part in the management of the business or were subordinate to Horne, and granted an injunction against the company essentially to restrain Horne's activities.

10 Examples of legislative provisions in Malaysia and Singapore whereby the corporate veil is raised by statute are set out in an Appendix to this paper. For further discussion, see *Guide to Company Law in Malaysia & Singapore* (3rd edition) (CCH Asia Ltd, Singapore, 1995) at 64 and K Arjunan & CK Low *Lipton & Herzberg's Understanding Company Law in Malaysia* (LBC Information Services, Sydney, 1995) at 17

11 *Yap Sing Hock v Public Prosecutor* (1992) 2 MLJ 714

12 [1996] 3 MLJ 533. Cf *Zizi Press Sdn Bhd v Sriba Hotels Sdn Bhd* (1989) 1 MSCLC 90,282 at 90,284 per Siti Norma Yaakob J

13 *Ibid* at 543

14 [1993] 3 SLR 521

15 *Ibid* per Lai Kew Chai J (delivering the judgment of the court) at 531

Malaysia BHD v Lorrain Osman[16] noted that the views of Professor Gower appeared consistent with decisions in that country, namely that

> the most that can be said is that the court's policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority.[17]

The categories of purposes for which the court may lift the corporate veil are never closed, although the courts of Malaysia have recognised purposes warranting the corporate veil being pierced as including detection of tax evasion, detecting trading with the enemy, ascertaining illegal or improper purpose, and on account of equitable considerations.[18] Review of cases dealing with this issue decided in Malaysia and Singapore, however, establishes certain broad principles and it is appropriate to consider these principles in turn.

I. THE COURT WILL NOT LIFT THE CORPORATE VEIL WHERE THE RELIEF SOUGHT DOES NOT REQUIRE THE VEIL TO BE LIFTED

In *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd*,[19] First Profile entered into an agreement with Sunrise to sell all of the shares in Saga Prestige Sdn Bhd, a wholly owned subsidiary of First Profile. The underlying purpose of the sale was the acquisition by Sunrise of four parcels of land owned by Saga. First Profile purported to terminate the agreement prior to settlement, and Sunrise sought an injunction to restrain First Profile from disposing of the shares in Saga, and an interlocutory injunction to restrain First Profile from disposing of the lands registered in the name of Saga. Sunrise did not seek similar injunctions in respect of Saga. The judge at first instance refused to grant the interlocutory injunction, on the grounds that, *inter alia*, the holding company had no right to dispose of or deal with lands of the subsidiary company, and the injunction, even if granted, would not prevent the subsidiary from selling off the lands.

The Federal Court allowed the appeal of Sunrise, and granted the interlocutory injunction. Interestingly, on the facts of the case the Court did not consider it essential to lift the corporate veil, however, it seems likely that had this been necessary the court would have done so. Chong Siew Fai CJ, delivering the judgment of the court, observed that Saga was a company wholly owned, managed and controlled by First Profile,[20] and the fear of Sunrise that First Profile would dispose of the lands held by Saga to a third party was not without foundation.[21] His Lordship observed, however, that authorities, including *Hadley v London Bank of Scotland Ltd*[22] and *Preston v Luck*,[23] established that it is clearly permissible in law to grant an interlocutory injunction restraining the actual controller and manager behind a company (as opposed to the company itself) from evading the contractual obligations or duties undertaken by the company.[24] In the view of his Lordship, "it was an undisputed fact that the subsidiary was

16 Unreported, 26 April 1995 at page 38-39 of the judgment
17 LCB Gower *Modern Company Law*, 4th edition at 138
18 *Yap Sing Hock v Public Prosecutor* (1992) 2 MLJ 714
19 [1996] 3 MLJ 533
20 The directors of Saga were nominees of the holding company, and Saga was 100% owned by First Profile
21 [1996] 3 MLJ 533 at 542
22 (1865) 46 ER 565
23 (1884) 27 Ch D 497
24 *Ibid* at 545

wholly-owned by the holding company, and it had not been challenged that the holding company, by proxy — through its nominees — managed the subsidiary. Thus, the composition, type, shareholding and control of the subsidiary stood in front of the veil, and there was no need to lift the veil to unveil them."[25]

This is an interesting case in that although strictly speaking the court did not need to lift the corporate veil because of a legal technicality pertaining to injunctions and the clear ownership and control of the subsidiary, in fact it seems that the corporate veil was pierced.

As a matter of law, the subsidiary was a separate entity as was noted by the trial judge, and on the strict *Salomon* principle there would be no reason to assume that the directors of the company would not act purely in the interests of the subsidiary rather than acquiescing to the demands of the parent company. On the other hand, the decision of the Court of Appeal would appear to accord with the commercial realities of the situation. It is however surely no coincidence that cases cited by Chong Siew Fai CJ to support the proposition that it is permissible in law to grant an interlocutory injunction included *Gilford Motor Co Ltd v Horne*[26] and *Jones v Lipman*,[27] leading cases where the court lifted the corporate veil.

II. THE PASSING OF TIME MAY MAKE THE COURT RELUCTANT TO LIFT THE CORPORATE VEIL

The passing of time may make the court reluctant to lift the corporate veil, particularly where the controllers of the company have changed over a period of time.

In *Lim Sung Huak v Sykt Pemaju Tanah Tikam Batu Sdn Bhd*[28] sixteen years had passed since the events occurred for which the plaintiff sought the corporate veil lifted. The High Court of Malaysia held that it was not appropriate to lift the corporate veil of the defendant company, as the founding subscribers, who had signed the relevant contract on behalf of the company, no longer appeared in control.

III. WHERE THE COMPANY IS THE VICTIM OF FRAUD AND THE PERPETRATOR OF THE FRAUD IS THE CONTROLLING PERSON/ENTITY, THE COURT WILL BE RELUCTANT TO LIFT THE CORPORATE VEIL TO ABSOLVE THE CONTROLLING PERSON/ENTITY FROM LIABILITY

Whether a person who owns all the shares in a company, and controls that company, can, as a matter of law, perpetrate a fraud on that company, has been the subject of some conjecture. The English position is exemplified by *Attorney-General's Reference (No 2 of 1982)*,[29] where two men in total control of a limited liability company, and acting in concert, were charged with theft of money from the company. At the conclusion of the trial the trial judge directed the jury that they had no case to answer, and the Attorney General referred the issue to the Queen's Bench. The court, comprising Watkins and Kerr LJJ, disagreed with the trial judge, and held that the

25 *Ibid* at 542-543
26 [1933] Ch 935
27 [1962] 1 All ER 442
28 (1993) 3 MLJ 527
29 [1984] QB 624

accused did have a case to answer. In contrast, the Court of Criminal Appeal in Victoria came to the opposite conclusion in *R v Roffel*,[30] where the conviction of an accused was overturned, where the accused had been convicted of stealing a cheque, being property of a company of which he and his wife were the sole shareholders and directors. The Court of Criminal Appeal held that the transaction was consensual, and consent was foreign to the notion of usurpation which was the element of theft; further it was wrong that a man who was the directing mind and will of a company could be found to have stolen from that company.

Although the Singapore courts do not appear to have considered this issue, the Supreme Court in Kuala Lumpur preferred to follow the English approach in *Yap Sing Hock v Public Prosecutor*,[31] and declined to lift the corporate veil to recognise an identity between the company and its controllers, where the company had been the victim of an alleged breach of trust by those same controllers.

In *Yap Sing*, directors of a company were prosecuted under the Malaysian *Companies Act 1965* section 67 (3) in relation to breach of the financial assistance provisions of that legislation and criminal breach of trust, in relation to two sums of money. The two accused were directors of the company, and one of the accused was the beneficial owner of all the shares in the company. The accused were convicted, and appealed on the grounds that, *inter alia*, a person who is the sole beneficial shareholder could not be liable for breach of trust. Peh Swee Chin SCJ delivering the judgment of the court held :

> All the cases for which the courts have lifted the veil to do justice seem to be civil cases or due to illegal and improper purposes directed against third parties or outsiders to the companies in question who have or would have suffered damage but for the lifting of such veil. In each of those cases, it would seem that the company in question has been used as an engine of fraud or wrongful deprivation, etc. In our instant case, both appellants cannot be in the shoes of such persons and they were charged in a criminal case for offences against the property of the company in question. The lifting of the veil in such criminal cases will not be supported by the decided cases but it will be patently irrational if one considers the real reason for lifting the corporate veil.[32]
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> ....
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> The consent or knowledge of a sole shareholder and director of even a one-man company can not be treated as the knowledge and consent of the company itself when the company is a victim of fraud or of any illegal deprivation of its assets. The concept of a person, eg a director of a company being the company's directing mind cannot apply when the company is such a victim of offences against the company, but only when the company is prosecuted for an offence where the prosecution cannot rely on any statute or statutorily vicarious criminal liability. We are prepared to say without hesitation that the said primary principle applies inviolably in cases in which a company is a victim of fraud or wrongful deprivation and in criminal offences against the property of the company.[33]

IV. WHERE ILLEGALITY OR CRIMINAL PURPOSE IS ALLEGED, THE COURT WILL BE PREPARED TO LIFT THE CORPORATE VEIL, TO THE BENEFIT OR DETRIMENT OF THE CONTROLLERS

In a situation where the issue of illegality is raised, the Courts have been prepared to lift the corporate veil when necessary, on the basis that

30 [1985] VR 511
31 (1992) 2 MLJ 714
32 (1992) 2 MLJ 714 at 726-727
33 (1992) 2 MLJ 714 at 729

the Courts have a discretion to lift the veil for the purpose of discovering any illegal or improper purpose.[34]

Three Malaysian cases and a Singaporean case illustrate this point: *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd*,[35] *Tan Lai v Mohamed Bin Mahmud*,[36] *Tiu Shi Kian v Red Rose Restaurant Sdn Bhd*[37] and *Trade Facilities Pte Ltd v Public Prosecutor*.[38]

In *Lim Kar Bee's* case, Lim Kar Bee was a wealthy landowner who was party to an elaborate scheme to avoid payment of estate duty in respect of the land in the event of his death. A company, Duofortis, was incorporated to purchase the relevant land, the consideration for which was fundamentally shares in the company. The directors and shareholders of the company were the wife and children of Lim Kar Bee. When Duofortis sought to enforce the contract for the purchase of the land against Lim Kar Bee, Lim Kar Bee claimed, *inter alia*, that the consideration for the transfer was illusory, and that the scheme was a deception on public administration and illegal. The Supreme Court of Malaysia noted that courts have always set their face against illegality in any contract,[39] and were prepared to lift the corporate veil of companies for the purpose of discovering any illegal or improper purpose.[40] In this case, the court lifted the corporate veil of Duofortis in order to recognise that the controllers of the company were the wife and children of Lim Kar Bee who would otherwise have to pay estate duty on the land in the event of his death, and held that the agreement for the sale and purchase of the land and related documentation were unenforceable.

Although applying the same principles, the court in *Tan Lai v Mohamed Bin Mahmud*[41] was prepared to lift the corporate veil for the purpose of validating — as distinct from avoiding — an instrument. In this case a sawmill licence was granted to A and B to operate a sawmill. The licence was not transferable, however a company was incorporated to work the licence, of which 25 percent of the shares were owned by A and B, and the remainder owned by C. The court observed that the licence was non-transferable, and technically should not have been worked by the company. However, so long as the company was owned and managed by A and B, by lifting the veil of incorporation it could be held that A and B operated the sawmill and the company's operation was within the terms of the licence. Where however the company was virtually wholly owned by C and completely managed by him, A and B could not be held to have operated within the terms of the licence, and the transfer of the licence to the company was unlawful.

Thirdly, in *Tiu Shi Kian v Red Rose Restaurant Sdn Bhd*,[42] individuals were convicted of civil contempt of court, and unsuccessfully sought to hide behind the corporate veil of a company under their control. The

34 *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* (1993) 3 MSCLC 90,953
35 (1993) 3 MSCLC 90,953
36 (1982) 1 MLJ 338
37 (1984) 2 MLJ 313. See also *Australia & New Zealand Banking Group Ltd v Rama Devi Pillai* (1991) 1 MSCLC 90,676, where the court was prepared to lift the corporate veil to allow scrutiny of a loan transaction, in order to ascertain whether any provision of the *Exchange Control Act 1953* had been contravened.
38 (1995) 2 SLR 475
39 (1993) 3 MSCLC 90,953 at 90,959
40 *Ibid* at 90,961
41 (1982) 1 MLJ 338
42 (1984) 2 MLJ 313

plaintiffs operated a nightclub and restaurant in licensed premises in Hotel Shangrila, and were the subject of disturbance by the defendants — the proprietors of Red Rose Restaurant and the company which owned the Red Rose Restaurant. The parties entered an agreement whereby the defendants agreed to permit the plaintiffs continued operation of the premises, however three days later the plaintiffs were locked out of the premises. The plaintiffs were granted an interim injunction restraining the defendants from further action on the basis of their agreement, however the plaintiffs remained locked out, and advertisements were placed advising the public of the closure of the premises. The proprietors of the restaurant were also controllers of Hotel Berjaya Sdn Bhd, the company which owned the Hotel Shangrila.

At first instance, Wan Mohammed J rejected the plea that Hotel Berjaya Sdn Bhd was instrumental in breaching the order as owner of the hotel which had instituted the lock-out, rather than the individuals who controlled Hotel Berjaya Sdn Bhd and Red Rose Restaurant. His Lordship was of the view that the two entities were in fact one single authority, and the device proposed by the defendants ought not be allowed to defeat justice. Interestingly, however, on appeal, the Federal Court did not find it necessary to lift the corporate veil between the personal defendants and the two companies, on the basis that the individuals knew of the injunction and performed acts to cause it to be disobeyed.[43]

Finally in *Trade Facilities Pte Ltd v Public Prosecutor*,[44] Looi and the company he controlled, Trade Facilities Pte Ltd, were prosecuted for selling and importing goods into Singapore, to which a trade mark had been falsely applied. Looi owned all but one share in Trade Facilities, and was the directing mind and will of the company. The magistrate convicted both Looi and the company, and both parties appealed against the convictions. Yong Pung How CJ in the High Court in Singapore rejected the argument that the company was criminally liable and not Looi:

> If the evidence shows that Looi's mind and will were behind Trade Facilities, then Looi cannot hide behind the corporate veil of Trade Facilities. Otherwise, the Act can be evaded with impunity by the simple device of incorporating a $2 company to carry on the trading. In this case, the evidence does show that Trade Facilities was nothing more than the alter ego of Looi. It was nothing more than a vehicle that Looi employed as and when it suited him. All but one of Trade Facilities' shares were held by Looi and the single directing mind behind Trade Facilities belonged to Looi. This was an appropriate case to lift the corporate veil and the magistrate was correct when he did so.[45]

V. WHERE THE COMPANY IS UNDER THE TOTAL CONTROL OF A THIRD PARTY, OR THERE IS "FUNCTIONAL INTEGRALITY" BETWEEN ENTITIES, THE COURT MAY BE PREPARED TO LIFT THE CORPORATE VEIL WHERE THE JUSTICE OF THE SITUATION SO DEMANDS

This is arguably the most controversial aspect of the principle whereby courts lift the corporate veil, in the sense that it is not uncommon nor unlawful for companies to trade as parts of corporate groups, but with the intention of the limiting the liability for their debts within each separate entity. While there has been cautious approval in England for lifting the

43 The appeal was reported as *Datuk Hong Kim Sui v Tui Shi Kian* (1985) 1 MLJ 145 at 147
44 (1995) 2 SLR 475
45 (1995) 2 SLR 475 at 497

corporate veil in circumstances where, for example, a wholly-owned subsidiary is completely under the managerial and financial control of its parent,[46] in Australia the principle has been generally disapproved.[47]

The Malaysian cases have tended to follow English authority on this point, with the Singapore courts being somewhat more conservative on the facts of cases decided in that jurisdiction.

Notwithstanding that the case primarily involved industrial law issues, the leading Malaysian authority for this principle is *Hotel Jaya Puri Bhd v National Union of Hotel, Bar and Restaurant Workers*.[48] The case involved an industrial dispute, following the retrenchment of a number of workers employed by Jaya Puri Chinese Garden Restaurant Sdn Bhd when the restaurant operated by the company closed. The restaurant was carried on in premises belonging to Hotel Jaya Puri Berhad, and employees claimed that in reality they were employees of the Hotel, and had been dismissed rather than retrenched. The President of the Industrial Court found :

a. the hotel and the restaurant were inter-dependent;
b. there was functional integrality and unity of establishment between the Hotel and the restaurant. In other words, functionally the Hotel and the restaurant were in fact one integral whole and in terms of management they also constituted a single unit; and
c. a number of senior officers including the secretary, personnel manager and assistant manager were common to both the Hotel and the restaurant.

Accordingly the President of the Industrial Court found that the Hotel was the employer of the relevant employees.

On appeal, Salleh Abas FJ upheld the decision of the President. His Lordship observed:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift the "veil of incorporation" (so the expression goes) when the justice of the case so demands. The facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or vice versa as was decided in *Smith, Stone and Knight v Birmingham Corporation* [1938] 4 All ER 115; *Re FG (Films) Limited* [1955] 1 WLR 483; and *Firestone Tyre & Rubber Co v Llewelyn* [1957] 1 WLR 464...
> In my judgment, by giving reason to [the fact that the employees in question were in fact working in one group enterprise], the President did not cause any violence to the sanctity of the principle of separate entity established in *Salomon v Salomon*... But rather gave effect to the reality of the Hotel and the Restaurant as being in one enterprise.... In my view, the finding by the President is in no way against the principle of separate entity and I am therefore not prepared to interfere with the award on this account...[49]

The principle in *Hotel Jaya Puri* was subsequently applied *in Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd*,[50] *Bumiputra*

46 For example, *Smith, Stone and Knight v Birmingham Corporation* [1938] 4 All ER 115
47 For example, *Walker v Wimborne* (1976) 137 CLR 1 and *Industrial Equity v Blackburn* (1977) 137 CLR 567, although note some relaxation of this approach in circumstances where the action is brought against a subsidiary company in tort : *Briggs v James Hardie & Co Pty Ltd* (1989) 15 NSWLR 549
48 (1980) 1 MLJ 109
49 *Ibid* at 112
50 (1996) 2 MLJ 265 (Court of Appeal (Kuala Lumpur)) at 318-319

Bank Malaysia BHD v Lorrain Osman,[51] and at first instance in *Tiu Shi Kian v Red Rose Restaurant Sdn Bhd*.[52]

Precisely what is meant by "functional integrality" sufficient to lift the corporate veil is a matter of some speculation. Aspects of the relationship between the parties which seem necessary to establish this environment include primarily control, and common directorships and shareholdings. However it seems likely that the demands of justice will be a factor influencing the court in deciding to lift the veil, irrespective of the relationship between a corporate entity and its controller.

In *Tengku* for example, the first and second appellants, and others from the Philippines, planned to incorporate a proprietary club in Malaysia. They acquired all of the shares of a company called Raintree Development Sdn Bhd, which owned land which was the proposed site of the club house. In 1980 a new company, Allied Capital Sdn Bhd, was incorporated to build the club's premises, the shareholders of which were the first and second appellants, and the fourth appellant. Together, these parties controlled the board of the two companies. In 1981 a *"pro tem"* committee of the club was elected, with the first and second appellants being appointed president and vice-president respectively. The *"pro tem"* committee passed a resolution to grant provisional membership to about 300 members (including the appellants), then later authorised the first and second appellants to enter into a sale and purchase agreement on behalf of the club whereby the entire issued and paid up capital of Raintree Development was to be purchased by the club from Allied for RM 47 million. The shares were to be resold to applicants who applied for membership. An extraordinary general meeting of the club was held approving this share acquisition agreement, however the provisional members of the club (other than the appellants) were not invited to attend, and the club members were then informed that the cost of acquiring club premises from Allied would be much more than $47 million due to additional costs.

The members of the club brought an action against the appellants in the High Court claiming, *inter alia*, damages for breach of fiduciary duty as promoters of the Club in respect of the share acquisition agreement. Allied brought a separate action against the members of the club to recover the amount owing under the share acquisition agreement. At first instance, the trial judge found in favour in favour of the members of the club in relation to the fiduciary claim. Further, the trial judge found in favour of the members of the club and against Allied on the contractual claim, on the basis that the agreement was procured by the undue influence of the personal appellants, who were major shareholders of both Allied and Raintree Development.

Allied appealed on the ground that, *inter alia*, the existence of a fiduciary relationship between the members of the club and the respondents did not extent to Allied, as Allied was a separate corporate personality.

The Court of Appeal in Kuala Lumpur found that the personal appellants were the de facto controllers of Allied : the "puppet-masters of the puppet".[53] Accordingly in the view of the Court, the knowledge of the personal appellants was the knowledge of Allied, and they could be regarded as the

51 Unreported, OCJ (Zakaria Yatim J) 26 April 1985 at 38
52 (1984) 2 MLJ 313 (Wan Mohamed) at 329
53 Per Gopal Sri Ram JCA at (1996) 2 MLJ 265 at 316.

alter ego of the company "so that the corporate facade, upon which counsel has relied in argument, may be pierced to reveal the true picture".[54]

Clearly in order to establish this basis for piercing the corporate veil, the extent of control is critical. The *Tengku* case is interesting because the simple control in this case seemed sufficient to justify the raising of the corporate veil, which sits uneasily with the primary principle that separate corporate entities have separate personalities. It may be contrasted with, for example, *Chang Lee Swee v Public Prosecutor*[55] where Gunn Chit Tuan declined to lift the corporate veil, where the evidence did not show that the companies in question were wholly-owned subsidiaries, or that 90 percent of the shares were held by parties to the litigation. It is significant however that in the *Tengku* case the court specifically noted that the findings of the trial judge could be supported by the facts and *the justice of the case*[56] suggesting that the justice of the case was the primary rationale for the decision to permit the veil to be pierced.

VI. THE COURT WILL NOT LIFT THE CORPORATE VEIL WHERE THE JUSTICE OF THE CASE DOES NOT WARRANT THAT ACTION

Where the justice of the case does not warrant the lifting the corporate veil, the courts have shown a reluctance to do so, irrespective of the degree of control exerted over the company by a third party. The Singaporean cases *Uni-France Offshore Engineering Pte Ltd v The Owners of the Ship or Vessel "Interippu"*[57], *"The Skaw Prince"; ST Shipping and Transport Inc v Owners of and other Persons interested in the Ship or Vessel "Skaw Prince"*,[58] and *"The Andres Bonifacio"; Far East Oil Tanker SA v Owners of the Ship of Vessel "Andres Bonifacio"*[59] illustrate this point.[60]

The facts of these cases were similar, involving the arrest of "sister" ships of vessels owned by one-ship companies. In *"The Skaw Prince"* for example, ST Shipping were time charterers of The Skaw Princess, the owners of which were Corsair Holdings Inc. The plaintiffs had a claim against Corsair for approximately US$240,000. The plaintiffs arrested The Skaw Princess, but the value of the claim exceeded the value of the ship. ST Shipping subsequently arrested The Skaw Prince, owned by Filey International Inc. Both Corsair and Filey were 100 percent owned by Pontina, which was in turn 100 percent owned by Skaw Shipping. The plaintiffs claimed that Skaw Shipping were liable to them *in personam* as the beneficial owners of the Skaw Prince and the Skaw Princess at all relevant times.

Amarjeet JC observed that when arresting a ship, the plaintiff had to establish, *inter alia*, that the defendant beneficially owned the ship.[61] The court also noted that it is well known that businesses engaged in shipping set up and utilize one-ship companies for the purposes of limiting

54 *Ibid* at 316
55 (1985) 1 MLJ 75
56 *Ibid* at 316
57 (1991) 1 MSCLC 95,494
58 [1994] 3 SLR 379
59 [1993] 3 SLR 521
60 Note also *SSAB Oxelosund AB v Xendral Trading Pte Ltd* [1992] 1 SLR 600, where as an incidental issue the court observed that the corporate veil should not be lifted in the face of a legitimate commercial arrangement
61 [1994] 3 SLR 379 at 384

liabilities.[62] Although the court has a duty to look behind the register in order to determine the beneficial owner of the ship,[63] the main issue in this case was whether it was permissible for the court to pierce the corporate veil to examine the "one ship" shipping company structure to identify the beneficial owner of the company/companies, and to equate that person as the beneficial owner of the ship/ships.[64] As Amarjeet JC observed, the exercise entailed the lifting of several veils, namely over Corsair, Filey, and Pontina which owned all the shares in Corsair and Filey.[65] The plaintiff urged the court to lift the corporate veil on the basis of functional integrality, as evidenced by facts including that :

1. the ships were mortgaged and shares of the owning companies pledged to secure the indebtedness of Skaw Shipping;
2. Corsair and Filey did not keep separate accounts;
3. Skaw Shipping made decisions regarding the utilisation and sale of ships for the purpose of alleviating the financial difficulties of the group; and
4. the companies had common directors.

In essence, the plaintiff argued that the two ship-owning companies, Corsair and Filey, had no separate or independent existence apart from their parent, Skaw Shipping, and were nominees or a sham.[66]

On the facts of this case, Amarjeet JC declined to lift the corporate veil as requested. His Lordship pointed out :

1. it is possible for ship-owners to run a series of genuine one-ship ship-owning companies as a group, without a sham;[67]
2. the relevant corporate structure was already in place when the claim arose;
3. the subsidiary companies in question were entirely legitimate;
4. the Skaw Group was entitled to make operational and management decisions in respect of the one-ship companies, and the assets of those companies could legitimately be utilised for the benefit of the group; and
5. there was no evidence that Corsair and Filey did not keep separate accounts. In any event, the accounts of subsidiary companies were often consolidated into a holding company's account.[68]

His Lordship said :

> .... the corporate veil should only be lifted if the ship or ships the subject of the claim have been transferred to a new ownership and with a view to ascertaining whether the beneficial owners remain the same or where a facade or situation is shown where deliberate fraud has been perpetrated through fictitious transactions or through the vehicle of non-existent companies. None of these situations arose in the present case on the evidence adduced by the plaintiffs... The law is plain. A parent company or a shareholder has no property in the assets of its subsidiary or of the company itself.[69]

62 *Ibid* at 386
63 *Ibid* at 384
64 *Ibid* at 386
65 *Ibid* at 386
66 *Ibid* at 386
67 *Ibid* at 385-386, following Lord Donaldson MR in *The Evpo Agnic* [1988] 2 LLR 412
68 *Ibid* at 389
69 *Ibid* at 389. Cf *Uni-France Offshore Engineering Pte Ltd v the Owners of the Ship or Vessel "Interippu"* (1991) 1 MSCLC 95,494 at 95,499 and *"The Andres Bonifacio"; Far East Oil Tanker SA v Owners of the Ship or Vessel "Andres Bonifacio"* [1993] 3 SLR 521 at 531

VII. THE COURTS WILL BE PREPARED TO LIFT THE CORPORATE VEIL WHERE FRAUD OR IMPROPER PURPOSE IS ALLEGED

To some extent this point has already been addressed, as generally where the court is prepared to lift the corporate veil to do justice, an element of fraud is involved. Nonetheless, it is appropriate to analyse this issue separately, as the courts in both Malaysia and Singapore have recognised use of a corporate vehicle for fraudulent purposes as justification to raise the corporate veil.[70]

An illustration of this point is the Malaysian case *Aspatra Sdn Bhd v Bank Bumiputra Malaysia Berhad*.[71]

The case involved applications for an Anton Piller order and a Mareva injunction to prevent removal from the jurisdiction of assets owned by Lorrain Esme Osman, who was at all times a director of Bank Bumiputra Malaysia Berhad and its wholly owned Hong Kong subsidiary, Bumiputra Malaysia Finance Ltd. The bank had a claim against Lorrain for the return of moneys which the bank claimed were secret profits made by Lorrain without their knowledge and approval, arising from transactions with Hong Kong companies. The trial judge Zakaria J had granted the Mareva injunction against Lorrain and 5 companies, on the basis that the assets of those five companies (including Aspatra Sdn Bhd) were the assets of Lorrain.

The Supreme Court of Malaysia noted that the only purpose of proceeding against the appellant companies was to lift the corporate veil, so that the assets of the companies could be held or deemed to be the assets of Lorrain. Further, the court noted that only 32 out of 21,796,395 shares in the relevant companies did not belong to Lorrain, and he was a director in 15 of the 22 companies.[72]

The Court held that the trial judge had been correct to lift the corporate veil between the companies and Lorrain. Their Lordships observed :

> The Court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequences of lifting the veil would vary according to the circumstances of each case. Sometimes the consequences may be in favour of the companies and yet at another time they may be against them.... On the evidence before him, we do not think that the learned Judge was wrong in law in piercing the corporate veil of the appellants. The secret profits received by Lorrain were not denied on affidavit evidence; only the legal capacity under which Lorrain had received them was being contested. There was admittedly an element of fraud in the receipt of the secret profits whatever might be the capacity in which Lorrain had received them. In our view, this is sufficient for the Court to lift the corporate veil for the purpose of determining whether the assets of the companies are really owned by them as envisaged in Salomon v Salomon [1897] AC 22 and sec 16(5) of the *Companies Act*, and not merely an abuse of the statutory principle of the companies being separate legal entities from their shareholders and directors... Although the learned Judge did not say so expressly in his judgment, he in fact found the existence of such an abuse from the very structure of the companies after lifting the corporate veil.... In short, the learned Judge found that Lorrain was the alter ego of the companies, and the assets of the appellant companies are in fact and in law Lorrain's assets.[73]

70 This may be distinguished from circumstances where the company itself is the victim of fraud, as was discussed earlier in this paper in relation to *Yap Sing Hock v Public Prosecutor* [1992] 2 MLJ 714

71 (1988) 1 MSCLC 90,076

72 *Ibid* at 90,081

73 *Ibid* at 90,082

Clearly in this case the possibility that Lorrain had hidden funds fraudulently acquired in corporate entities was sufficient to persuade the court to raise the corporate veil, particularly in view of the almost absolute control he maintained over the companies in question.

Similarly the Singaporean cases view fraud as a significant justification for lifting the corporate veil — in *Uni-France Offshore Engineering Pte Ltd v The Owners of the Ship or Vessel "Interippu"*[74] for example, one of the reasons given by the court for declining to lift the corporate veil was the fact that there was no evidence that the formation of the companies in question had been fraudulent.[75]

CONCLUSION

The common law of lifting the corporate veil in Malaysia and Singapore appears to be developing in similar patterns to elsewhere in the common law world. The primary principle in relation to the status of corporate entities is that they are separate from their corporators and other controllers, and as a general rule the corporate veil will be maintained. More frequently, however, the courts recognise that this rule can lead to injustice where the principle of separation is abused, and accordingly where justice demands the courts will permit the veil to be raised. The issues discussed in this paper are an indication of circumstances when the court will be prepared to lift the veil. On the other hand, the courts have also recognised that it is not every case involving a claim against a company that the lifting of the corporate veil is warranted, and accordingly it is appropriate to consider the facts of each case on its merits.

APPENDIX

STATUTORY LIFTING OF THE CORPORATE VEIL IN MALAYSIA AND SINGAPORE

The following legislative provisions are examples of where the corporate veil has been raised by statute.

MALAYSIA

Companies Act 1965

Section 36 Prohibition of carrying on business with fewer than statutory minimum of members
If at any time the number of members of a company (other than a company the whole of the issued shares of which are held by a holding company) is reduced below two and it carries on business for more than six months while the number is so reduced, a person who is a member of the company during the time that is so carries on business after those six months and is cognizant of the fact that it is carrying on business with fewer than two members shall be liable for the payment of all the debts of the company contracted during the time that it so carries on business after those six months and may be sued therefor, and the company and that member shall be guilty of an offence against this Act if the company so carries on business after those six months.

Section 121 Publication of name
121 (2) If an officer of a company or any person on its behalf —
(a) uses or authorizes the use of any seal purporting to be a seal of the company whereon its name does not so appear;

74 (1991) 1 MSCLC 95,494
75 cf *"The Andres Bonifacio", Far East Oil Tanker SA v Owners of the Ship or Vessel "Andres Bonifacio"* [1993] 3 SLR 521 at 531

(b) issues or authorizes the issue of any business letter statement of account invoice or official notice of publication of the company wherein its name and former name (if applicable) is not so mentioned; or
(c) signs issues or authorizes to be signed or issued on behalf of the company any bill of exchange promissory note cheque or other negotiable instrument or any indorsement order receipt or letter wherein its name and former name (if applicable) is not so mentioned;

he shall be guilty of an offence against this Act, and where he has signed issued or authorized to be signed or issued on behalf of the company any bill of exchange promissory note or other negotiable instrument or any indorsement thereon or order wherein that name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company.

Section 169 Profit and loss account, balance sheet and directors' report

...
...
...
...

(5) The directors of a company shall cause to be attached to every balance sheet made out under subsection (3) a report made in accordance with a resolution of the directors and signed by not less than two of the directors with respect to the profit or loss of the company for the financial year and the state of the company's affairs as at the end of the financial year and if the company is a holding company also a report with respect to the state of affairs of the holding company and all its subsidiaries

Section 303 Liability where proper accounts not kept

...
...

(3) If in the course of the winding up of a company or in any proceedings against a company it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time, of the company being able to pay the debt, the officer shall be guilty of an offence against this Act.

Section 304 (1) Responsibility for fraudulent trading

(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.
(2) Where a person has been convicted of an offence under section 303 (3) in relation to the contracting of such a debt as is referred to in that section the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.

Section 365 Dividends payable from profits only

...
(2) Every director or manager of a company who wilfully pays or permits to be paid any dividend out of what he knows is no profits except pursuant to section 60 -
(a) shall without prejudice to any other liability be guilty of an offence against this Act; and
(b) shall also be liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits and that amount may be recovered by the creditors or the liquidator suing on behalf of the creditors.

Penalty : Imprisonment for ten years or two hundred and fifty thousand ringgit or both

Income Tax Act 1967

Section 140 (1) Power to disregard certain transactions

(1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of -

(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;

(b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;

(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or

(d) hindering or preventing the operation of this Act in any respect,

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counter-acting the whole or any part of any such direct or indirect effect of the transaction.

SINGAPORE

Companies Act (Chapter 50)

Section 42 Prohibition of carrying on business with fewer than statutory minimum of members

If at any time the number of members of a company (other than a company the whole of the issued shares of which are held by a holding company) is reduced below two and it carries on business for more than 6 months while the number is so reduced, a person who is a member of the company during that time that it so carries on business after those 6 months and is cognizant of the fact that it is carrying on business with fewer than two members shall be liable for the payment of all the debts of the company contracted during the time that it so carries on business after those 6 months and may be sued therefor, and if the company so carries on business after those 6 months, the company and such member shall be guilty of an offence and shall each be liable on conviction to a fine not exceeding $2,000 and also to a default penalty.

Section 144 Publication of name

(2) If an officer of a company or any person on its behalf -

(b) uses or authorises the use of any seal purporting to be a seal of the company whereon its name does not so appear;

(c) issues or authorises the issue of any business letter, statement of account, invoice or official notice or publication of the company wherein its name is not so mentioned; or

(d) signs, issues or authorises to be signed or issued on behalf of the company any bill of exchange, promissory note, cheque or other negotiable instrument or any indorsement, order, receipt or letter of credit wherein its name is not so mentioned,

he shall be guilty of an offence, and where he has signed, issued or authorised to be signed or issued on behalf of the company any bill of exchange, promissory note or other negotiable instrument or any indorsement thereon or order wherein that name is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company.

Section 201 Accounts, consolidated accounts and directors' reports

...
...
...

(3A) Where, at the end of its financial year, a company is a holding company, the directors of the company shall also cause to be made out and laid before the company at its annual general meeting, consolidated accounts dealing with -

(a) the profit or loss of the company and its subsidiaries for their respective last financial years; and

(b) the state of affairs of the company and its subsidiaries as at the end of their respective last financial years,

and giving a true and fair view of the profit or loss and state of affairs so far as they concern members of the holding company.

Section 339 Liability where proper accounts not kept

(3) If, in the course of the winding up of a company or in any proceedings against a company, it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time of the company being able to pay the debt, the officer shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 3 months.

Section 340 Responsibility for fraudulent trading

(1) If, in the course of the winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

(2) Where a person has been convicted of an offence under section 339 (3) in relation to the contracting of such a debt as is referred to in that subsection, the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt

Section 403 Dividends payable from profits only

...

(2) Every director or manager of a company who wilfully pays or permits to be paid any dividend out of what he knows is not profits except pursuant to section 69

(b) ....

(c) shall also be liable to the creditors of the company for the amount of the debts due by the company to them respectively to the extent by which the dividends so paid have exceeded the profits and such amount may be recovered by the creditors or the liquidator suing on behalf of the creditors.

Income Tax Act (Chapter 134)

Section 33 Comptroller may disregard certain transactions and dispositions

(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly

(a) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;

(b) to relieve any person from any liability to pay tax or to make a return under this Act; or

(c) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,

he may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.