MALAYSIAN JUDGMENTS

# IN THE COURT OF APPEAL OF MALAYSIA

**Coram:** Mohd Zawawi Salleh, JCA; Ong Lam Kiat Vernon, JCA; Hasnah Hashim, JCA

# Tradewinds Properties Sdn Bhd v Zulhkiple Bin A Bakar and 2 Others

**Citation:** [2018] MYCA 250 **Suit Number:** Civil Appeal No. W-02(NCVC)(W)-1734-08/2017

**Date of Judgment:** 31 July 2018

*Corporate law – Fraudulent trading under section 304 of the Companies Act 1965 – Scope of section 304 of the Companies Act 1965 – What constitutes an "intent to defraud" – Standard of proof – Whether the business of the second defendant had been carried out with intent to defraud its creditors*

*Corporate law – Lifting of the corporate veil – Test – Whether the facts of the instant case justified the lifting of the corporate veil*

*Damages – Exemplary damages – Whether the plaintiff was entitled to exemplary damages*

## JUDGMENT

**[1]** This is an appeal from a judgment of S. Nantha Balan J, sitting in the High Court of Kuala Lumpur, dismissing the appellant's claim after full trial.

**[2]** We heard the appeal on 11.4.2018. After hearing both counsel for the appellant and the respondent, we accordingly, at the end of the arguments, dismissed the appeal with costs of RM45,000.00 here and below subject to payment of allocator fees. Our reasons for doing so now follow.

**[3]** For the purpose of the judgment, the parties will be referred to as they were in the High Court.

**Brief Facts**

**[4]** The pertinent facts, as culled from the Appeal Records, are as follows-

4.1 On or about 16.2.2009, the plaintiff/ appellant commenced an action against the 1st defendant (1st respondent) and 2nd defendant (2nd respondent) via Kuala Lumpur High Court Civil Summons

No. S-22-93-2009 ("93 Suit"). At the material time, the 1st defendant was one of two directors and held 100% shareholding in the 2nd respondent.

4.2 A Consent Judgment ("CJ") was entered on 9.2.2011. Pursuant to the CJ, the plaintiff together with the 1st defendant and 2nd defendant agreed to settle the 93 Suit. The material terms of CJ are as follows-

(a) The 1st defendant and 2nd defendants shall pay RM1,150,000.00 to the plaintiff as full and final settlement ("Settlement Sum"). The 1st defendant's liability is discharged after the first RM500,000.00 is paid.

(b) The Settlement Sum is to be paid by instalments in accordance with a schedule set out in the CJ.

(c) In the event of a default on the terms of payment, the plaintiff must first issue a notice to the 1st defendant and/or the 2nd defendant (whichever is applicable), giving a five (5) months period to remedy the default ("5-Month Notice").

(d) Should the 1st defendant and/or the 2nd defendant still fail to remedy the default, the plaintiff can execute the CJ for the sum of RM1,450,000.00 ("Full Judgment Sum") together with interest at 5% per annum from the date of default until full realisation, minus the sums already paid under CJ.

4.3 The 1st defendant and/or the 2nd defendant subsequently paid a total of RM654,000.00 in accordance with the CJ and towards satisfaction of the Settlement Sum. At that stage, the obligation to pay the balance of the Settlement Sum, i.e. RM496,000.00 was solely on the 2nd defendant.

4.4 Subsequently, the 2nd defendant breached the CJ when it failed, refused and/or neglected to pay the instalments for the months of March 2013 to June 2013 as prescribed under the CJ. To this end, the plaintiff issued 5-Month Notices in respect of each of these breaches, all of which expired without any of the default being remedied.

4.5 The Full Judgment Sum of RM796,000.00 (RM1,450,000.00 + interest of 5% per annum - the sum already paid by the 1st defendant/ 2nd defendant under the CJ (i.e. RM654,000.00)) remains outstanding and due to the plaintiff.

4.6 The plaintiff became aware three (3) Consultancy Projects that the 2nd defendant was engaged with PLB-KH Bina Sdn. Bhd., Tech-Art Sdn. Bhd and Putrajaya Holdings Sdn. Bhd. ("the 3 Projects"). In 2011, the 2nd defendant passed 3 resolutions to reassign the consultancy fees due to the 2nd defendant for the 3 Projects to the 3rd defendant, a company incorporated on 4.9.2009 (of which the 1st defendant is a director).

4.7 The plaintiff contended that these resolutions were undertaken to defraud the plaintiff of the

balance sum under the terms of the CJ.

4.8 The plaintiff then initiated an action against 1st defendant, 2nd defendant and 3rd defendant in Kuala Lumpur High Court on 3.11.2016, seeking the following principal reliefs-

(a) A declaration that the 1st defendant has carried on the business of the 2nd defendant with intention to defraud the plaintiff, as the 2nd defendant's creditor.

(b) Consequential to prayer (a) above, an order that the 1st defendant be personally liable to pay the plaintiff the sum of RM796,000.00 together with interest thereon of 5% per annum from 8.3.2013 until full realisation ("Outstanding sum"), being the debt owed by the 2nd defendant to the plaintiff under the judgment.

(c) In the alternative to prayer (b) above, an order that the 1st and 3rd defendants be jointly and severally liable to pay to the plaintiff the Outstanding Sum.

(d) Exemplary damages against the 1st and/or 3rd defendants.

4.9 The 2nd defendant contended that it had only received RM362,980.90 in relation to the payment of fees for the 3 Projects despite that defendants have paid a total sum of RM654,000.00 to the plaintiff.

4.10 On 25.7.2017, learned High Court Judge dismissed the appellant's suit against the defendants. Hence, this appeal before us.

**Findings of the High Court**

**[5]** The learned Judge found that the plaintiff had failed to discharge its burden of proving an intention to defraud. The reasoning of the learned Judge in reaching the conclusion that he did, may be summarised as follows-

5.1 In terms of timelines, it was "too incredulous" and/or "too far-fetched" to suggest that the 3rd defendant's incorporation (which took place about 17 months prior to the recording of the CJ) was done to defraud the plaintiff under the CJ.

5.2 The 3rd defendant only received RM362,980.90 from the 2nd defendant's clients under the Consultancy Projects, which is clearly less than the amount which was paid under the CJ, i.e. RM654,000.00 and there is no evidence that the 3rd defendant received anything more.

5.3 The 1st defendant's liability under the CJ was only up to RM500,000.00. The fact that the plaintiff was paid RM654,000.00 (i.e. beyond RM500,000.00) does not suggest that there was an intention to defraud the plaintiff.

5.4 In summary, there was every intention on the part of the 1st defendant/ 2nd defendant to pay what was outstanding under the CJ based on the following-

(a) The fact that payments continued to be made after the resolutions were passed, until February 2013;

(b) The fact that 1st defendant/ 2nd defendant paid RM654,000.00, which was RM154,000.00 above and beyond the RM500,000.00 threshold; and

(c) The absence of any evidence to show that the 3rd defendant received anything more than RM362,980.90.

5.5 The corporate veil should not be lifted due to lack of evidence to show intention of the defendants attempting to defraud the plaintiff, or to prove that the 3rd defendant received more than RM362,980.00 from the 3 assignments.

**The Appeal**

**[6]** In the memorandum of appeal, various grounds are raised assailing the impugned decision but before us, learned counsel for the plaintiff focussed his arguments on the following issues-

(a) whether the business of the 2nd defendant has been carried out with intend to defraud its creditors and satisfied the principles of fraudulent trading under section 304 of **Companies Act 1965 ("CA 1965")**;

(b) whether the facts of this instant case justified lifting of the corporate veil, and

(c) whether the plaintiff is entitled to exemplary damages?

**Parties' Competing Submissions**

**[7]** The main plank of learned counsel's submission is that the learned Judge's inferences and/or conclusion from the evidence were plainly wrong, and that there were insufficient judicial appreciation of the evidence. Learned counsel submitted that the evidence adduced by the plaintiff at the trial are more than sufficient to prove that there was intention to defraud.

**[8]** Learned counsel posited that the plaintiff's intention to defraud was apparent from the following facts-

(a) On 16.2.2009, the plaintiff brought an action against the 1st defendant/ 2nd defendant via the 93 Suit;

(b) In the face of the 93 Suit, the 3rd defendant was incorporated by the 1st defendant on 4.9.2009;

(c) The CJ was entered on 9.2.2011;

(d) In March and May 2011 (i.e. 1 to 3 months after the CJ), the resolutions were passed by the 1st defendant, essentially transferring the 2nd defendant's future income to the 3rd defendant;

(e) By the 1st defendant's own admission, the value of future income that was transformed from the 2nd defendant to the 3rd defendant totalled over RM2.3 million. There was more than sufficient to have satisfied the CJ in full; and

(f) After paying a total of RM654,000.00 under the CJ, the 2nd defendant is now incapable of paying anything more.

**[9]** Learned counsel for the appellant emphasised that the learned Judge had misconstrued the plaintiff's case-it was not the plaintiff's case that the incorporation of the 3rd defendant was in itself done to defeat the CJ. The timing of the 3rd defendant's incorporation cannot be seen in isolation.

**[10]** In conclusion, learned counsel submitted that the crux of the plaintiff's case in that the passing of the resolutions to assign the 2nd defendant's fees to the 3rd defendant (totalling over RM2.3 million) was sufficient evidence to establish intent to defraud.

**[11]** Concerning the issue of separate legal entities, learned counsel submitted that the learned Judge erred in law and in fact in holding that there was no justification to lift the corporate veil. It was the contention of learned counsel for the appellant that the learned Judge failed to appreciate that the defendants are in truth and in fact are single commercial unit and is the alter ago and/or controlling mind of the 2nd defendant and/or the 3rd defendant.

**[12]** In support of his submission, learned counsel took us through the following evidence-

(a) At the material time, the 1st defendant was 1 of 2 directors in the 2nd defendant and held 100% of the shareholding in the 2nd defendant. The 1st defendant admitted that he is in total control of the 2nd defendant.

(b) The 1st defendant is also 1 of 2 directors in the 3rd defendant and holds 85% of the shareholding in the 3rd defendant. The 1st defendant agreed that 3rd defendant's projects to the world that the 1st defendant is the only person behind the ZNA "brand".

(c) Despite the fact that the 2nd defendant and the 3rd defendant are separate entities, the 3rd defendant's website also represents that the business of 3rd defendant is "established since 1992", when this year must in fact refer to the establishment of the 1st defendant's previous sole proprietorship "Perunding ZNA" i.e. a different entity altogether.

(d) The 1st defendant gave evidence that the 3rd defendant was incorporated to receive the reassignments of the 2nd defendant's fees. These were professional fees for work already done by the 2nd defendant before the CJ was entered. If the separate legal entity principle is observed, there is no justification for the 3rd defendant to receive such fees.

(e) The 1st defendant testified that the 2nd defendant's expenses are borne by the 3rd defendant and that the 3rd defendant gave money to 2nd defendant to pay off the 2nd defendant's debts.

(f) The 5-Month Notices, which were served on the 2nd defendant at its business address, were acknowledged by the 3rd defendant with the 3rd defendant's company stamp, despite the fact that the 2nd defendant (and not the 3rd defendant) was the addressee.

**[13]** In the light of above, learned counsel for plaintiff submitted that the corporate veil ought to be lifted against the 1st defendant and/or the 3rd defendant to make them liable to the 2nd defendant's debt under the CJ, as fraud at common law or in equity had been committed against the plaintiff.

**[14]** Concerning exemplary damages, learned counsel submitted that the circumstances of this instant case falls within the 2nd categories of **Rookes v Barnard** [1964] 1 All ER 367, in which the exemplary damages may be awarded.

**[15]** In reply, learned counsel for the defendants submitted that the learned Judge was correct in concluding that the plaintiff's claim of fraudulent trading must fail in the absence of sufficient proof. The plaintiff had merely pleaded fraud under fraudulent trading without showing the particulars of fraud nor giving evidence of instances of fraud taking place.

**[16]** The learned Judge was correct in holding that the corporate veil should not be lifted due to lack of evidence to show intention of the defendants attempting to defraud the plaintiff or to prove that the 3rd defendant received more than RM362,980.90 from the 3 assignments.

**[17]** Concerning exemplary damages, learned counsel contended that there is no legal basis and evidence to support the plaintiff's claim for the same.

**Our Findings**

**[18]** We are not persuaded with the submission advanced by learned counsel for the plaintiff. In our considered view, the learned Judge's findings of fact were thorough, detailed and amply supported by substantial evidence on record. The learned Judge provides legally acceptable articulated reason in concluding that he did. We find no cogent reason to disturb the learned Judge's finding of fact.

**(a) Fraudulent trading under section 304 of CA 1965**

**What constitute an "intent to defraud"**

**[19]** Fraudulent trading is dealt with in subsection 304(1) of **CA 1965**. The subsection provides-

"(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.".

**[20]** In the case of **Chin Chee Keong v Toling Corporation (M) Sdn. Bhd**. [2016] 4 MLRA 180, this Court stated-

"**[16]** The primary object behind subsection 304(1) of the Companies Act 1965 is to statutorily provide for the lifting of the veil of incorporation in the specific circumstances of fraudulent trading with a view to ultimately pinning personal accountability and liability on the directing minds behind such trading of the company. Subsection 304(1) affords the creditor of the company a civil remedy personally against such persons.

**[17]** This court recently had opportunity to consider the operation and ambit of sub-s. 304(1) of the Companies Act 1965 in the case of **Aneka Melor Sdn Bhd v. Seri Sabco (M) Sdn Bhd & Another Appeal** [2016] 2 CLJ 563. His Lordship, Justice Mohd Zawawi Salleh JCA, writing for the court succinctly observed that:

> [37] Section 304 of the Companies Act 1965 is aimed principally at curbing the possibility on the part of the officers of a company to act opportunistically and take advantage of the principle of the separate legal personality of a company and the principle of limited liability. As an exception to these principles, there are circumstances when the law duly acknowledges, and for which it accordingly provides the possibility, in very specific situations, for the corporate veil to be pierced. Once the corporate veil has been pierced the creditors of the company whose veil has been pierced may satisfy their claims from the personal assets of the company's shareholders.

**[18]** In another recent decision of **Lama Tile (Timur) Sdn Bhd v. Lim Meng Kwang & Anor** [2015] 3 CLJ 763, the Court of Appeal said:

> [23] Section 304 is a specific statutory provision which allows the corporate veil to be lifted in the limited situations specified. Earlier in this judgment we have underlined that it is applicable in a situation where in the course of proceedings against a company, it appears that the business of the company has been carried on with intent to defraud creditors, a creditor can make an application to court to request that the court declare that any person who was knowingly a party to such carrying on of the business of the company, to be personally responsible. The evidence in this appeal shows precisely that. The directors and shareholders of LMK Edaran proposedly and knowingly engaged in a course of conduct to mislead the appellant (by adding the 'S' to the signboard), and but by the same token transferred the business of LMK Edaran to SLMK Edaran (previously Southern Taipan Sdn Bhd) to render LMK Edaran a dormant company.".

**[21]** In broad terms, there are two elements to establishing an application under subsection 304(2) of **CA 1965**. These are-

(a) that the business of the company has been carried out "with intent to defraud creditors ..." or for any fraudulent purpose; and

(b) that the defendant who was knowingly a party to the carrying on of the business in that manner.

**[22]** The central element of fraudulent trading is "an intent to defraud" or "fraudulent purpose". The first reported decision to address this issue was **Re William C. Leitch Bros Ltd**., **(No.1)** [1932] Ch 71 (Ch D). The Court of Appeal in **R v Grantham** [1984] BCLC 270 provided clarification by citing Maugham J in **Re Leitch (William C) Bros Ltd** [1932] Ch 71 as saying: "In my opinion I must hold with regard to the meaning of the phrase "carrying on business with intent to defraud creditors" that if a company continues to carry on business to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is in general a proper inference that the company is carrying on business with intent to defraud, ..." . The court also considered **R v Sinclair** [1968] 1 WLR 1246 in which the jury was directed with the following instructions to find "intent to defraud": "It is fraud if it is proved that there was the taking of a risk, which there was no right to take, which would cause detriment or prejudice to another. You have to be sure that it was deliberate dishonesty". The court rejected that the defendant had to prove that he knew at the time when debts were incurred that there was no reasonable prospect of creditors ever receiving payment of their debts. It was enough if the defendant realized at the time when the debts were incurred that there was no reason for thinking that funds would be available to pay the debt when it would become due or shortly thereafter. These words import a criterion that is partly subjective and partly objective. Thus, in order to establish dishonesty under subsection 304(1) of **CA 1965** the court must find that-

(i) According to the ordinary standard of reasonable and honest people what was done was dishonest; and

(ii) That the actor himself must have realised that the act was by those standards dishonest.

**[23]** In the textbook, **Chan & Koh On Malaysia Company Law, Principles & Practice**, second edition, Thomson Sweet & Maxwell Asia, the learned author stated at 102-

"3.099. The expressions "intent to defraud" and "fraudulent purpose" were considered by K.L. Rekhraj J.C. (as he then was) in **H Rosen Engineering BV v Siow Yoon Keong** and the learned Judicial Commissioner applied the "reasonable expectations of an honest business man" test. It was held in **Eng Iron Works Ltd v Ting Lin Kiew & Anor** that section 304(1) could apply even prior to the winding-up of a company. "Fraud" for the purposes of this section is "actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame".".

**[24]** With regard to "knowingly", it appears that the scope of personal liability in subsection 304(1) of **CA 1965** is not restricted just to directors but anyone who is knowingly party to fraudulent trading. (See **Re Gerald Cooper Chemical Ltd** [1978] 2 All ER 49).

**[25]** The standard of proof in subsection 304(1) of **CA 1965** is on balance of probabilities. The term "it appears" is deployed in the subsection. This clearly denotes that a lower standard of proof is

required to establish liability under this provision, i.e. on a balance of probability. (See **Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd** [2015] CLJ 584; **Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd** (supra)).

**[26]** We must emphasise that liability would depend on the facts of each particular case and that the court has not sought to limit or particularise the different ways and means of dishonest conduct which could fall within the ambit of subsection 304(1) of **CA 1965**. Each case would depend on its facts.

**[27]** We agree with the findings of the learned Judge that the plaintiffs' claim of fraudulent trading must fail. We have carefully scrutinised the whole evidence and we are satisfied that the learned Judge's findings were amply supported by evidence on record. In our view, the fact that the incorporation of the 3rd defendant was done due to the 93 Suit cannot be equated to fraudulent trading as defined under subsection 304(2) of **CA 1965**. The documentary evidence clearly show that the 3rd defendant was incorporated prior to CJ, making it impossible that the 1st defendant could have incorporated a company in contemplation of evading payments about one and half year prior to the CJ.

**[28]** We have noted the oral evidence to support such a conclusion. DW2, Raymond Tan, had explained the idea of incorporation of the 3rd defendant was not mooted by the 1st defendant but rather that the 3rd defendant was incorporated in order for the 1st defendant to be able to salvage the 1st defendant's licence which in turn would allow the 1st defendant to collect payment as the 1st defendant would be unable to do without a licence.

**[29]** Looking at the foregoing facts with unprejudiced eye, it clearly showed that the 3rd defendant was not incorporated as part of a sinister plan to defraud the plaintiff vis-a-vis the CJ.

**[30]** It is pertinent to note that the plaintiff had merely pleaded fraud under fraudulent trading without showing the particulars of fraud nor giving evidence of instances of fraud taking place. The learned Judge had come to a correct decision in holding that the plaintiff's claim of fraudulent trading must surely fail in the absence of such proof. The learned Judge said-

> "... In any event, it is admitted that the plaintiff was paid a total of RM654,000.00 between March 2011 and February 2013 and this is more than the sum that was received by D3 from D2's clients. **And clearly there are no documents to show that D2's clients had paid monies to D3 in excess of RM654,000.00 and that these monies were not paid to the plaintiff**. Ultimately, the evidential position that obtains is that there is just no evidence that D3 received any monies beyond the total sum of RM362,980.90 from D2's clients.". (Emphasis added)
>
> (See paragraph 34, page 32, Supplementary ROA).

**[31]** The defendants had expressly pleaded at paragraph 18.1 of the Statement of Defence regarding difficulty in demanding payment of the 2nd defendant's fees and/or problems with the 2nd defendant's license-

> "Defendants further refers to paragraphs 17, 17.1, 17.2, 17.3, 17.4, 17.5, 17.6, 17.7 and 17.8 SOC and assert that the **decision to set up D3 was premised on commercial considerations and internal problems faced by D2 in respect of management of D2**. D2's business and reputation was damaged due to the internal issues which had resulted in the loss of confidence by clients of D2 and not as otherwise contended by the Plaintiff. Defendants shall refer to such evidence during trial.". (Emphasis added)
>
> (See paragraphs 18.1. Statement of Defence (page 66 ROA Part [A])).

**[32]** As we have alluded to earlier in this judgment, in order to attach personal liability to another, the following elements must be fulfilled-

> (a) there is an "intent to defraud" in the manner by which the business of the company is being conducted; and
>
> (b) that the person was "knowingly a party" to the carrying on of the business in the fraudulent manner so described.

**[33]** Therefore, for the plaintiff to be able to successfully sustain a claim for fraud on the part of the respondent, firstly, there must be proof to show that the business of the 2nd defendant had been conducted with intent to defraud its creditors'. Secondly, the 2nd defendant must be proven to be a person who was "knowingly a party" to the carrying on of the business in the fraudulent manner however there is no evidence to support either one of the elements listed above.

**[34]** The basic rule is that he who alleges fraud has the burden of proving them. The court has stressed time and again that allegations must be proven by sufficient evidence because mere allegation is definitely no evidence. Moreover, fraud is not presumed-it must be proved by clear and convincing evidence.

**[35]** In this instant case, the plaintiff's factual allegations failed to convince us that the 3rd defendant was incorporated to defraud the plaintiff vis-a-vis the CJ.

**Lifting of Corporate Veil**

**[36]** Learned counsel for the appellant vehemently argued that the 1st defendant, 2nd defendant and 3rd defendant are in reality a single commercial unit and the 1st defendant is clearly the alter ego or controlling mind of the 2nd and the 3rd defendant.

**[37]** One of the fundamental principles of company law is that a company has a personality that is distinct from that its shareholders. This rule was laid down by the House of Lords in **Salomon v Salomon & Co.** [1897] A.C 22 in which it was held that even if one individual held almost all the shares and debentures in a company, and if the remaining shares were held on trust for him, the company is not to be regarded as mere shadow of that individual. Lord MacNaughten stated at page 51-

> "The company is at law a different person altogether from the subscribers to the Memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.".

**[38]** A rigid application of the principle, however, may sometimes cause damage to the rights of parties who deal with the corporate because its controllers may be using the corporate structure as a facade to perpetrate wrongdoing.

**[39]** Thus, there are certain statutory exceptions to the rule in Salomon which involve a director being made liable for debts of the company because of breach of the companies or insolvency legislation. This is known as lifting the corporate veil.

**[40]** Subsection 304(1) of **CA 1965** is the statutory exception of the common law position that the corporate veil can be lifted in circumstances where dishonest conduct amounting to fraud at common law or in equity is established on the facts of the case. (See **Chin Chee Keong v Toling Corporation (M) Sdn Bhd** (supra)).

**[41]** It would appear that the courts are now increasingly reluctant to lift the veil in the absence of a sham. In particular, it is clear that the veil will not be lifted simply because it would be in the interests of justice. In **Adams v Cape Industries Plc** [1990] Ch 433, the English Court of Appeal was unequivocal on this point. Slade LJ said at page 536-

> "Save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of **Salomon v. Salomon & Co Ltd** [1897] AC 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate entities with all the rights and liabilities which would normally attach to separate legal entities."

**[42]** That the courts are now less willing to lift the corporate veil than was once the case is also indicated by the judgment of the House of Lords in **Williams v Natural Life Health Foods Ltd** [1998] 2 All ER 577. The defendant company was effectively run by one man, a Mr Mistlin, and had given negligent advice to the claimant regarding the profitability of a franchise. On the company being wound up, the claimant joined Mr Mistlin as a defendant on the basis that he had assumed personal responsibility. The House of Lords unanimously rejected the Court of Appeal's finding that Mr Mistlin had assumed responsibility to the Claimant, holding that in order for a director to be personally liable for negligent advice given by the company, it had to be shown both that the director had assumed personal responsibility for that advice and that the claimant had reasonably relied on that assumption of responsibility. As there had been no personal dealings between Mr Mistlin and the claimant, these tests were not met, and the corporate veil should remain intact.

**[43]** The decision in Williams has subsequently been explained by Lord Hoffman in **Standard**

**Chartered Bank v Pakistan National Shipping Corporation** [2002] UKHL 43 as follows-

> "just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility.".

**[44]** In **Faiza Ben Hashem v Shayif** [2008] EWHC 2380 (Fam), Munby J applied the following principles which are a useful summary of the current state of the law-

> (i) Piercing the corporate veil is appropriate only where special circumstances indicated that it is a mere facade.
>
> (ii) Control of a company by the intended defendant is not of itself enough to justify piercing.
>
> (iii) Piercing should not occur merely because it is thought necessary in the interests of justice: there has to be impropriety.
>
> (iv) The impropriety has to be linked to the use of the company structure.

**[45]** Some shams or facades may be obvious, but many others are not. The courts are reluctant to provide precise guidelines so as to define what constitutes a sham preferring the flexibility of a case by case approach. Useful tests to be employed when trying to identify a sham are-

> (i) Are the relevant entities in common ownership?;
>
> (ii) Are the relevant entities in common control?;
>
> (iii) Was the company structure was put in place before or after a particular liability (or serious risk) arose, and if the latter then to what extent was the liability or risk a motivating factor for those who set up the structure?; and
>
> (iv) Was the company structure put in place in an attempt to allow an activity which would be unlawful if carried out personally?

**[46]** Applying the principles above to the factual matrix of this instant case, we agree with the findings of the learned Judge that there is no sufficient proof furnished by the plaintiff despite its allegation that the resolutions were an attempt by the 1st defendant to evade payments.

**[47]** In **Theta Edge Bhd (previously known as Ltyan Holdings Bhd) v Infornential Sdn Bhd** [2017] 7 CLJ 53, the Court of Appeal held-

> "[34] Apart from the subsequent oral evidence of PW1, there was no other cogent evidence to support the application of the doctrine. The evidence either of actual fraud or conduct amounting to fraud in equity is a non-negotiable prerequisite to justify lifting of the corporate veil.".

**[48]** We are satisfied that there is no error committed by the learned Judge in holding that the

corporate veil should not be lifted due to lack of evidence to show intention of the defendants attempting to defraud the plaintiff or to prove that the 3rd defendant received more than RM362,980.90 from the 3 assignments.

**[49]** Further, the plaintiff had also failed to exercise their right to discovery of documents under the **Rules of Court 2012**, make any attempts in procuring any documents from 3rd parties, nor writing letters or subpoena any witnesses from the 3 clients of the 2nd defendant to support the appellant's allegation. This fact was also admitted by PW1 that there is in fact no document that prove the 3rd defendant has not paid the appellant any sum that the 3rd defendant received from the 3 clients in excess of RM362,980.00.

**Exemplary damages**

**[50]** The concept of exemplary damages has been explained by this Court in **Sambaga Valli a/p K R Ponnusamy v Datuk Bandar Kuala Lumpur and Ors, and another appeal** [2018] 1 MLJ 784-

> "**[33]** The exemplary damages or punitive damages-the two terms now regarded as interchangeable-are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a "contumelious disregard" for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff. (See **Rookes v. Barnard** [1964] 1 All ER 347, **AB v. Southwest Water Services** [1993] All ER 609, **Broome v. Cassell & Co** [1971] 2 Q B 354, **Laksamana Realty Sdn. Bhd. v. Goh Eng Hwa and Another Appeal** [2005] 4 CLJ 871; [2006] 1 MLJ 675).".

**[51]** There are two categories provided in the case of **Rookes v Barnard** (supra), for claim of exemplary damages-

> "...The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category-I say this with particular reference to the facts of this case-to oppressive action by private corporations or individuals. Cases in second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff...".

**[52]** In this instant appeal, the plaintiff sought exemplary damages but had merely provided lip service. In claiming exemplary damages under the second category, the plaintiff should at the very least be able to prove that the defendants have made a profit for themselves but no proof of any alleged "profits made by respondents" that exceed the compensation payable to the appellant was adduced for the Court's consideration.

**[53]** In **Yong Kon Fatt & Anor v Hock Seng Construction Sdn Bhd & Anor** [2000] 8 CLJ 696, the Court said-

> "... Accordingly, besides being unsupported by any evidence the submission of counsel also did not identify what tort had been committed by the defendants and therefore could not be acted on at all. It is therefore my finding that the plaintiffs' claim for exemplary damages fails.".

**[54]** The plaintiff utterly failed to present relevant evidence to support its allegation that there was an intention to defraud the plaintiff. Such failure is fatal to the plaintiff's case.

**Conclusion**

**[55]** After given very anxious consideration to the submission advanced by learned counsel of the plaintiff, we have come to the conclusion that the learned Judge had decided the case correctly. The appeal is plainly devoid of merits. We, accordingly, dismiss the appeal by the plaintiff and affirm the decision of the learned Judge with costs of RM45,000.00. So ordered.

Dated: 31st July 2018

sgd.

**MOHD ZAWAWI SALLEH**
Judge
Court of Appeal
Malaysia

**COUNSEL**

For the Appellant: C. K Yeoh (Jeffrey Lee with him), Messrs Ranjit Singh & Yeoh, D3-U5-12, Solaris Dutamas, No. 1, Jalan Dutamas 1, Hartamas Heights, 50480 Kuala Lumpur

For the Respondents: Sandosh Anandan, Sandosh Anandan Advocates & Solicitors, Unit A502, Block A, Kelana Square, No. 17, Jalan SS 7/26, Kelana Jaya, 47301 Petaling Jaya

**LEGISLATION REFERRED TO:**

*Companies Act 1965, Sections 304, 304(1), 304(2)*

*Rules of Court 2012*

**JUDGMENTS REFERRED TO:**

*Adams v Cape Industries Plc [1990] Ch 433*

*Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd & Another Appeal [2016] 2 CLJ 563*

*Chin Chee Keong v Toling Corporation (M) Sdn. Bhd. [2016] 4 MLRA 180*

*Faiza Ben Hashem v Shayif [2008] EWHC 2380 (Fam)*

*R v Grantham [1984] BCLC 270*

*R v Sinclair [1968] 1 WLR 1246*

*Re Gerald Cooper Chemical Ltd [1978] 2 All ER 49*

*Re Leitch (William C) Bros Ltd [1932] Ch 71*

*Rookes v Barnard [1964] 1 All ER 367*

*Salomon v Salomon & Co. [1897] A.C 22*

*Sambaga Valli a/p K R Ponnusamy v Datuk Bandar Kuala Lumpur and Ors, and Another Appeal [2018] 1 MLJ 784*

*Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] CLJ 584*

*Standard Chartered Bank v Pakistan National Shipping Corporation [2002] UKHL 43*

*Theta Edge Bhd (previously known as Ltyan Holdings Bhd) v Infornential Sdn Bhd [2017] 7 CLJ 53*

*Williams v Natural Life Health Foods Ltd [1998] 2 All ER 577*

*Yong Kon Fatt & Anor v Hock Seng Construction Sdn Bhd & Anor [2000] 8 CLJ 696*