

## Group Companies — All for One and One for All?

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A company is a legal entity separate and distinct from its members — this was firmly established in the seminal decision of *Salomon*.<sup>1</sup> This doctrine, also known as the *Salomon* principle, has since been afforded a statutory footing in the Malaysian Companies Act 2016.<sup>2</sup>

In the heart of this doctrine lies the notion of a “veil of incorporation” or “corporate veil”. This frictional veil allows members to have their hands in the management of the company while also operating as a shield to protect them from having to bear the liability of the company.<sup>3</sup> In the same vein, the doctrine of separate legal personality is also applicable between a parent and subsidiary company.<sup>4</sup> That being said, in certain circumstances, the courts can lift the veil of incorporation to see what lies behind.

### Justice of the case

From the outset, the courts are ready to pierce the corporate veil as and when justice of the case demands.<sup>5</sup>

In *DHN*,<sup>6</sup> the parent company urged the court to lift the veil of incorporation to allow a claim vis-à-vis compensation for disturbance of business suffered by its wholly owned subsidiaries following a compulsory purchase order by the local authority. In allowing the compensation and holding that the group of companies should be treated as a single economic entity, the Court of Appeal remarked that a strict application of the *Salomon* principle would amount to a denial of justice, taking into account the wholly owned subsidiaries were in effect “*bound hand and foot to the parent company and must do just what the parent company says*”.

This liberal approach<sup>7</sup> was acknowledged by the Malaysian court in *Hotel Jaya Puri*.<sup>8</sup> In that case, a restaurant was wholly owned by a hotel, where both businesses operated at the same premise and were spearheaded by one managing director. Due to financial losses, the restaurant ceased operations and retrenched its employees. The workers’ union referred the

1 *Salomon v A Salomon & Co Ltd* [1897] AC 22  
2 Companies Act 2016, s 20  
3 *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd* [1985] 2 MLJ 165  
4 *Bank of Tokyo Ltd v Karoon and another* [1986] 3 All ER 468  
5 *Re A Company* [1985] 1 BCC 99  
6 *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852  
7 Professor Gower, *Principles of Modern Company Law* (3rd Ed, 1969) at 216  
8 *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109



dispute to the Industrial Court and argued that the employees were dismissed by the hotel, and not retrenched by the restaurant. The court, in placing emphasis on the essential unity of both businesses, agreed that it was a dismissal as the employees were in fact working in one group enterprise.

### Salutation of *Salomon* principle

In *Adams*,<sup>9</sup> the issue was whether the UK parent companies of an international mining group can be argued to be present in the US in order to enforce a judgment in default of a United States Court in England. As a timely nod of approval to the authoritative principle expounded in *Salomon*, the Court of Appeal remarked:

“... the court is not free to disregard the principle of *Salomon* 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 legal entities with all the rights and liabilities which would normally attach to separate legal entities.”

In recent years, the approach in *Adams* has resonated with the Malaysian courts, which have clarified that a veil of incorporation may only be lifted where there is fraud, either actual or equitable,<sup>10</sup> or when a company is employed as a mere façade to avoid an existing contractual obligation.<sup>11</sup>

The applicability of *Salomon* principle in the context of a corporate group can be gleaned from the following instances, where the courts either lifted or disregarded the corporate veil:

- (a) Where a director, in control of a group of companies, used a shell company as a shield to immunise another company from liability for a fraud engineered by him.<sup>12</sup>
- (b) Where a group of companies, under the control and management of the same director, was used interchangeably as and when convenient, then the director as the controlling persona may be sued together with the vehicles deployed by him.<sup>13</sup>

<sup>9</sup> *Adams and Others v Cape Industries Plc and Another* [1990] Ch 433

<sup>10</sup> *Law Kam Loy v Boltex Sdn Bhd* [2005] 3 CLJ 355 (CA); *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd* (previously known as *Alcatel Network Systems (M) Sdn Bhd* [2014] 3 MLJ 785 (FC)

<sup>11</sup> *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors* [2015] 1 MLJ 773 (FC)

<sup>12</sup> *Keller (M) Sdn Bhd v Ong Leong Chiou & Ors* [2017] MLJU 1313 (HC)

<sup>13</sup> *Mahsurimas Sdn Bhd v Ravinder Singh a/l Shangara Singh & Ors* [2019] 11 MLJ 281 (HC)



- (c) Where the directors of the subsidiary were nominees of the holding company which wholly owned and was in complete control of the subsidiary, the corporate veil was used by the holding company as an instrument to evade its contractual obligations or duties.<sup>14</sup>
- (d) Where, in the course of dealings, the group of companies had deliberately ignored separate corporate personalities of the companies and operated as one group enterprise. Having operated as such, the group of companies was estopped from asserting the notional separateness of corporate personalities to defeat a legitimate claim.<sup>15</sup>

### Authors' comments

Also known as the “unyielding rock” of company law, the principle in *Salomon* has stood the test of time, and the courts are generally slow in disregarding the separate juristic personality of a body corporate. It was also suggested that the courts will only resort to lifting the veil of incorporation when all other conventional remedies have proved to be of no assistance.<sup>16</sup>

Despite the resurgence of the strict principle in *Salomon*, group companies should always bear in mind the possibility of the veil being lifted. Operating by the motto “All for One and One for All” may expose a subsidiary’s liabilities to other companies in the group.

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<sup>14</sup> *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 (FC)  
<sup>15</sup> *Epic Quest Sdn Bhd & Anor v Sheila Eleanor De Costa* [2011] 8 CLJ 518 (CA)  
<sup>16</sup> *Prest v Petrodel Resources Limited and others* [2013] UKSC 34

