

“Personal @ Business” Businesses’/Companies’ Assets as Matrimonial Property; the Legal Policy.

Zuhairah Ariff Abd Ghadas (Dr.)

Associate Professor,. The Department of Private Law, Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia. E-mail: zuhairah@iium.edu.my;

Norliah Ibrahim

Assistant Professor. The Department of Islamic Law, Ahmad Ibrahim Kulliyah of Laws.
International Islamic University Malaysia. E-mail: norliah@iium.edu.my

ABSTRACT

Matrimonial property disputes are one area of law, which is highly litigated before the registrars and judges. Under the Malaysian law, the court shall have power to order the division of any assets acquired by the divorced parties during the marriage including those attained by the sole efforts of one part to the marriage. Reference to personal property normally did not raise contentious issue as the court would apply the general rule / method in dividing or concluding the matrimonial property.

However, when it comes to distribution of business assets or interest in business, particularly those which are under the business's name, many legal issues may arise, such as rights or entitlement of the ex-spouse to claim, proportion and division of the assets as a matrimonial property and rights to future interest/benefits of the business assets/profits.

This paper intends to look into policies/ approached of both the civil and Shariah courts in determining claims against the business's or company's assets as a matrimonial property. Research methodology which is adopted in this paper is statutory and doctrinal analysis.

Keywords: Matrimonial Property, Lifting of Corporate Veil, Derivative Action

INTRODUCTION

According to the web dictionary, policy refers to a plan of action adopted by an individual/social group or a line of argument rationalizing the course of action of a government; a deliberate plan of action to guide decisions and achieve rational outcome(s); a course of action thought to be prudent or tactically advantageous; hence prudence or sagacity.¹ In Malaysia, the general policy of the court in distribution of matrimonial property is by differentiating the matrimonial under two categories: the joint effort and the sole effort property. For the matrimonial property which was jointly acquired, the court is inclined towards equal distribution, subject to certain factors.² However, if the property is solely acquired by one party, the court normally order the divisions between the parties or the sale of any such assets and the proceeds of sale in such proportions as the courts think reasonable.

¹ Retrieved from <http://www.google.com.my/search> on 20 February 2010.

² The factors include the extent of contributions made by each party in money, property or works towards the acquiring of the assets, any debts owing by either party which were contracted for their joint benefit and the needs of minor children, if any, of the marriage.

However, in any case, the party by whose effort the assets were acquired will get a greater proportion.³

However, an issue would arise if the property or assets which are claimed are under the name of a person or persons who is/are not the divorced party, for example when the claimed matrimonial property has been transferred by one of the divorced parties to a company which either belong to him/her or to another company in which he/she holds certain percentage of ownership (shares). Under the company law, once a company is incorporated it shall be a body corporate which is distinct from its incorporators. The company has its own legal entity and has rights as provided under the Companies act 1965; separate legal entity, rights to take legal action, rights to acquire and own property, rights to limit liability of its members and a perpetual succession. This means, once the incorporators or members of the company transfer /sold a property to the company, it legally belong to the company and not to its owner or members. In the circumstances, where an asset which is claimed to be a matrimonial property had been transferred to a company, a legal question arises as to the *locus standi* of the divorced party/ies to claim for distribution of such property as matrimonial property. It is perceived that this issue could be resolve with the application of doctrine of lifting of the corporate veil.

This paper shall discuss the definition of matrimonial property under the Malaysian law, the method of distribution and the court policies in dealing with claim of matrimonial property/assets which are under a company's name. Main objective of this paper is to evaluate the court's policies relating to claims of matrimonial property which has been transferred to a company which is owned by both or one of the divorced parties.

DEFINITION OF MATRIMONIAL PROPERTY (*HARTA SEPENCARIAN*)

The statutes in Malaysia are silent as regards to the definition of the matrimonial property. Even though the Married Women Act (Revised 1990) is the main statute which deals with the married women's property, no reference is made to the term matrimonial property. The Law Reform (marriage and Divorce) Act 1976 (hereinafter referred to as the LRA) also leaves the term undefined and this failure has led to uncertainty in deciding what should and should not be included in the division. However, generally matrimonial property has been refers to any property, which is acquired during the marriage either by the joint effort or the sole effort of the party. It also includes property, which is owned before the marriage provided that it has been substantially improved by the other parties or by both parties during the marriage.⁴

In the case of *Ching Seng Woah v. Lim Shook Lin*,⁵ Shankar J said that:

³ Refer to section 76 (1) (2) (3) (4) of the LRA. There are certain factors that the court has to take into account including the extent of contributions made by the other party who did not acquire the assets to the welfare of the family as well as the needs of the minor children, if any, of the marriage.

⁴ Refer to section 76 (5) of the LRA.

⁵ [1997] 1 MLJ 109.

The Act does not define what matrimonial assets are. We think that during the subsistence of a marriage, the expressions refer to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole. It matters not in this context whether the asset is acquired solely by the one party or the other or by their joint efforts. Whilst the marriage subsists, these assets are matrimonial assets. Such assets could be capital assets. The earning power of each spouse is also an asset.⁶

The above judgment corresponds to the decision of Lord Denning in the case of *Wachtel v. Wachtel*⁷ where matrimonial assets should refer to those things, which are acquired by one or the other or both of the parties. This must be coupled with the intention that it should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The judge divides the matrimonial assets into two parts; assets of a capital nature such as the matrimonial home and its furniture and revenue producing nature which include the earning power of husband and wife. The finding of Lord Denning conforms with the decision of Lord Diplock in the case of *Pettit v. Pettit*⁸ where matrimonial property or family assets means property whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children.⁹ The above cases show that the English courts by using the word family assets, describe matrimonial property as property in which both spouses should have some interest either because of the way in which it was acquired or because of the manner in which it was used.¹⁰

For the Muslim, the definition section of the Islamic Family Law (Federal Territories) Act 1984 (hereinafter referred to as the IFLA) defines it as property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syara.¹¹ The judges in the decided cases also give a definition of *harta sepencarian* which basically refers to any property acquired during the marriage in which both parties contributed to its acquisition. In the old case of *Hujah Lijah binti Jamal v. Fatimah binti Mad Diah*¹² Briggs J. defined harta sepencarian as property acquired during the subsistence of their marriage by a husband and wife out of their resources or by their joint efforts. The acquisition referred to may be extended to cover enhancement of value by reason

⁶ Ibid, at p. 122.

⁷ [1973] Fam. 72, at p.90.

⁸ [1970] AC 777.

⁹ Ibid, at p. 819.

¹⁰ See the English Law Commission (Family Property Law), the Law Commission Published Working Paper, No. 42, para 0.24 at p. 15.

¹¹ Section 2 of IFLA.

¹² [1930] 16 MLJ 63

of cultivation or development.¹³ In pursuant to that, there was no reason for the wife, being a lawful widow, not to get one-half of the property bought originally from savings which accumulated from a piece of land inherited from her parents, even though it was registered in the name of the deceased husband.

In the case of *Yang Chik v Abdul Jamal*,¹⁴ the learned Kadhi said to the effect: the concept of harta sepencarian is of the property that is acquired during the marriage with both the husband and wife contributing by the joint efforts or money to acquire the property.

Harta sepencarian in actual fact is not only confined to both their efforts in acquiring the property but extends further to cover their contribution whether formal or informal. This principle is best illustrated in the case *Piah binti Said v Che Lah bin Awang*¹⁵ where the Kadhi Besar of Penang defined the term as:

Property acquired jointly during the subsistence of the marriage as result of joint efforts of the parties. This would arise in cases where the parties were either employed in similar occupations or otherwise and whether the contributions by the parties were formalized or not, and irrespective of whether there was a clear division of functions or otherwise.¹⁶

From the above definition, it is clear that harta sepencarian is basically refers to any property which is acquired during the marriage, either by the joint effort or the sole effort of the parties as long as there is a contribution either directly or indirectly by the party who does not acquire the property. It is based upon recognition of the part played by a divorced spouse in the acquisition of the relevant property and improvement done to it (in cases where it was acquired by the sole effort of one spouse). It is due to this joint effort or joint labour that a divorced spouse is entitled to a share in the property acquired (during covertures). As long as the claimant has assisted in the working of it, the law presumes that the property was *harta sepencarian* and it therefore falls on the other spouse who denies the claim to rebut the presumption.¹⁷

Thus, if formerly the claim on *harta sepencarian* usually in the form of land, matrimonial houses and animals used to work the land, it has developed as to include moveable and immovable property like household goods and furnishing, in line with the life style and the purchasing power of society.¹⁸ It might also include joint bank accounts,

¹³ Ibid.

¹⁴ [1985] 6 JH. 146.

¹⁵ (1983) 3 JH 220.

¹⁶ Ibid at p.223.

¹⁷ Ibid.

¹⁸ Mimi Kamariah, *Family Law in Malaysia*, Malayan Law Journal, Kuala Lumpur, 1999, p. 366.

compensation paid for land acquired by the government¹⁹, shares registered in the name of either spouse,²⁰ as well as business assets which has been acquired during the marriage.²¹

MATRIMONIAL PROPERTY LAWS IN MALAYSIA

In Malaysia, the law that governs the division of matrimonial property is the Law Reform (marriage and Divorce) Act 1976 (hereinafter referred to as the LRA). As the preamble of the act provides that it is an Act to provide for monogamous marriages and the solemnization and registration of such marriages and to amend and consolidate the law relating to divorce and to provide for matters incidental thereto, the division of matrimonial property is specifically dealt with in section 76 of the Act. The Act which generally applies not only to all persons dealt in Malaysia but also to those residents outside Malaysia whose domicile is in Malaysia²² was enforced throughout Malaysia since the date of the enforcement of the LRA i.e. first March 1982.²³

While for the Muslims, they are governed by the Islamic Family Law Act and Enactments. However for the purpose of this article, reference is made only to the Malaysian law as codified in the Islamic Family Law (Federal Territories) Act 1984, which is also the model followed by many other states in Malaysia.

(i) Law Reform (Marriage and Divorce) Act 1976

Under section 76 of LRA:

(1)The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties any proceeds of sale.

(2) In exercising the power conferred by sub-section (1) the court shall have regard to-

- (a) the extent of contributions made by each party in money, property or work towards the acquiring the assets;
- (b) any debts owing by either party which were contracted for their joint benefit; and
- (c) the needs of the minor children (if any) of the marriage,

and subject to those considerations, the court shall incline towards equality of division.

¹⁹ *Rokiah bte Haji Abdul Jalil v. Mohammad Idris bin Shamsuddin* (1410) JH 111; [1989] 3 MLJ ix, *Kamariah v. Mansjur* (1986) 6 JH 301.

²⁰ *Noor Jahan bt. Abdul Wahab v. Md Yusuff bin Amanshah* [1994] 1 MLJ 156.

²¹ *Tengku Anun Zaharah v. Dato' Dr. Hussein* [1980] 3 JH 12.

²² See section 3 of the LRA.

²³ See PU (B) 73/1982.

- (3) The court shall have power, when granting a decree of divorce or judicial separation to order the division between the parties of any assets acquired by them during the marriage by the sole efforts of one part to the marriage or the sale of any such assets and the division between the parties any proceeds of sale.
- (4) In exercising the power conferred by sub-section (1) the court shall have regard to-
 - (a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;
 - (b) the needs of the minor children, if any, of the marriage;

and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the courts think reasonable ; but in any case the party by whose effort the assets were acquired will get a greater proportion.

- (5) For the purposes of this section, references to assets acquired during marriage include assets owned before the marriage by one party, which have been substantially improved during the marriage by the other party or by their joint efforts.ö

Referring to the above provision, it is clear that section 76 of the LRA deals with power of the court to order the division of matrimonial assets acquired during the marriage upon granting a decree of divorce or judicial separation. The section is divided into two parts; one is where the assets were acquired by joint effort which is provided for in sub section (1) and the other where they were acquired by the sole effort of one party to the marriage which is dealt with in sub section (3). For the first category, the court shall lean towards equality of division, subject however, to certain factors for consideration such as the extent of the contribution made by each party in money, property or work towards the acquiring of the assets.²⁴ Besides, any debts owing by either party which were contracted for their joint benefit will also be considered without undermining the needs of the minor children, if any, of the marriage.²⁵

Similarly, for assets acquired by the sole effort of one party to the marriage, the court may divide the assets in such proportions as it thinks reasonable.²⁶ However this is also subject to certain factors namely the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family.²⁷ Similarly, if there are minor children from the marriage, their needs shall be taken into account as provided for in section 76(4) (b) of the LRA. Provided, however, that in any case the party by whose efforts were acquired shall receive a greater proportion.²⁸

²⁴ Section 76(2) (a) of the LRA.

²⁵ Section 76(2) (b) and (c) of the LRA.

²⁶ Section 76(4) of the LRA.

²⁷ Section 76(4) (a) of the LRA.

²⁸ Section 76(4) of the LRA.

Hence, section 76(5) of the LRA further elaborates that for the purpose of this section, assets acquired during a marriage includes assets owned before the marriage by one party as well. Nevertheless, it is subject to the condition that the claimed property must be substantially improved during the marriage by the other party or by their joint effort.

For the Muslims parties, The IFLA actually provides an identical provision except for the words *matrimonial property* being substituted by *harta sepencarian* while divorce and judicial separation are replaced with the words *talaaq* and when making the order of divorce.²⁹

ASSETS IN BUSINESS

It is observed that in most of the case law relating to claims of matrimonial property in business assets, the divorced parties claimed for certain interest and/or shares in the business. In *Koay Cheng Eng v. Linda Herawati Santoso*³⁰ the couple married in the United Kingdom before they moved to Malaysia and registered their marriage under the Law Reform (Marriage & Divorce) Act 1976 (the Act). The appellant practiced as an ENT surgeon whilst the respondent, though an architect and qualified to practice in the UK, was unable to practice in Malaysia as she was a non-citizen with no permanent residence. Two companies were set up during the marriage; Swiss Atlantic Sdn Bhd and Eng Hoe Leong Sdn Bhd. The respondent claimed for 1/2 of the value of the appellant's medical practice and clinic owned by Swiss Atlantic Sdn Bhd (a company set up as a vehicle to receive the fees charged by the appellant in his private practice. The appellant holds 90% shares in the company and his mother and sister hold 5% each), including but not limited to all its equipment, assets and goodwill. The respondent also claimed for 40% of the value of two properties registered under Eng Hoe Leong Sdn Bhd to be divided equally between the husband and her. The appellant and respondent own 30 % and 10% of shares in the company, respectively.

The Court of Appeal held that on the facts and considering the combine shareholding in the company between the husband and wife in Eng Hoe Leong Sdn Bhd is 40%, the respondent should be given 20% of the net value of the two properties hold by the company. As regards to Swiss Atlantic Sdn Bhd, the Court of Appeal referred to *Sivanes a/l Rajaratnam v. Usha Rani a/p Subramaniam*³¹ and concluded that the wife was not entitled to a share of the clinic as she had not contributed towards the setting up of the clinic.³²

In *Chaw Anui v Tan Kim Chai*,³³ the wife filed an application against the husband for the ancillary reliefs, *inter alia*, equal division of all the matrimonial properties registered under LPI (M) Sdn Bhd (LPI (M)), Sathyam Holding Sdn Bhd (Sathyam Holding) and also under the husband's name and all the properties and shares held in the name of Lai

²⁹ Please refer to section 58 of the IFLA.

³⁰ [2008] 4 CLJ 105

³¹ [2002] 3 AMR 2729; [2002] 3 MLJ 273

³² Refer to Participation in Business as Part of Matrimonial Property, International Islamic University Malaysia Law Journal, Vol 15, no.1, 2007 for further discussion of *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 CLJ 105.

³³ [2004] 4 MLJ 272

Company Sdn Bhd (Lai Company), Tan Yew Lai & Sons Sdn Bhd (Tan Yew Lai & Sons), Uicolour Printing Ink Manufacturing Sdn Bhd (UPI Manufacturing), and all other companies incorporated during subsistence of the marriage. The wife also claimed for division of all the shares acquired during the marriage including the Margin Account Facility with Arab-Malaysian Securities Sdn Bhd and traded shares in the various counters. The wife had never worked during the marriage, being a full time housewife and had never put in any money in the companies.

The High Court found that there is no doubt that all assets of the husband and the wife and those held in the name of the companies have been acquired by the parties during their marriage by their joint effort. Low Hop Bing J held that the assets held in the name of LPI (M) and Sathyam Holding at the net value as at the date of decree nisi, are to be divided in proportion to their respective shareholdings in the two companies by way of cash payment. The husband was also restrained from charging, selling or otherwise disposing of any of the properties except in compliance with the order of the court.

In *Lee Puey Hwa v Tay Cheow Seng*,³⁴ the respondent was granted a decree nisi on 4 September 1985 and on 23 December 1985 this was made absolute. The appellant asked for an order for the payment of \$ 760,347 by way of a lump sum and, pending payment, that the monthly maintenance should be kept up, and should not be less than \$ 3,000 per month. The High Court (Singapore) held that it was not prepared to exercise its discretion under s 109(1) of the Women's Charter (Cap 353, 1985 Ed) but, being anxious to secure the payment of maintenance to the appellant, used the powers conferred by section 109(2) of the Women's Charter (Cap 353, 1985 Ed) to order the respondent to hold the income of all his shares in the private companies (Tay Miang Huat Pte Ltd, Tay Miang Huat Distillery Pte Ltd, Tay Miang Guan & Co Sdn Bhd and Tong Ah Sdn Bhd) as a trustee upon trust to pay the maintenance or any part thereof.

In *Wong Kim Foong v. Teau Ah Kau*³⁵ the court held that shares are assets within the meaning of s. 76(1) of the 1976 Act and its division must be dependent upon the extent of the contributions made by each party. In this case, both the petitioner and the respondent were actively involved in purchasing shares and at the end of the marriage; they hold 17 lots of Lien Hoe shares. The shares were not registered in either the petitioner or respondent name. The High Court held that as the respondent contributed double that of the petitioner in purchasing the shares, the division of the shares should be in the ratio as proposed by the respondent; i.e. 5 lots to the petitioner and 12 lots to the respondent.

It is apparent that in relation to shares/interest in business, the court applies the two tests of section 76, i.e. (1) whether the property is a matrimonial property by way of existence and/or contribution and (2) the quantum of contribution of the parties in the acquiring the property. This point has been clearly highlighted in the case of *Loke Sow Leng v Yap Eng*

³⁴ [1991] 3 MLJ 1

³⁵ [1998] 1 CLJ 358

*Kee*³⁶ when the judge referred to the case of *Lim Beng Cheng v Christopher Lee Joo Peng*³⁷ where the court emphasizes that:

“When dealing with an application under section 76 of the Act it is essential for this court to make a finding of fact on the question of whether the said property was acquired by the Wife and the Husband during the marriage by their joint effort or if so to apply section 76(1) and (2); or whether the said property was acquire by the Husband during the marriage by his sole effort and if so to apply section 76(3) and (4) of the Act”³⁸

As regards to the interpretation of contribution, the judges seemed to have two views; in *Koay Cheng Eng v. Linda Herawati Santos*,³⁹ the court held that although the business was incorporated during the marriage, the wife was not entitled to any shares as she did not “contribute” to the business. On the other hand, in *Chaw Anui v Tan Kim Chai*⁴⁰, the court held that even though the wife did not contribute any capital to the business, she is still entitled to some interest in the business as the businesses existed during the marriage.

Discussion on the issue of “contribution” is very tempting at this juncture but unfortunately shall not be dealt further as this paper intend to focus on property which are claimed to be matrimonial property but had been transferred to a company which one of the divorced party owns or has interest in.

THE DOCTRINE OF SEPARATE LEGAL ENTITY

Under the company law, a company is a legal entity which is distinct from its incorporator. Although a person owns 99.999% of shares in the company, he is still distinct from the company; the company has its own entity⁴¹ and rights as prescribed by the Companies Act 1965.⁴² Among its statutory right is the power to acquire and own property under its name. In *Macaura v Northern Assurance Ltd*,⁴³ the plaintiff was an owner of a land which produced timber. He sold all the timber to a company incorporated by him. He took up insurance for the timber in his own name. Later the timber was destroyed by fire and Macaura claimed under the insurance policy. House of Lords held that Macaura had no insurable interest in the timber for it belonged to the company and not to him. In *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd*,⁴⁴ main assets of the company consisted of land. All the shareholders of the company had transferred their entire shares to a certain buyer. A question arises as to whether assets of the company were also transferred to the buyer by virtue of sale of all the shares. The court held that it is trite law that an incorporated

³⁶ [2005] 1 CLJ 247.

³⁷ [1996] 2 CLJ 697

³⁸ Ibid at p.700.

³⁹ [2008] 4 CLJ 105

⁴⁰ [2004] 4 MLJ 272

⁴¹ *Solomon v Solomon Co.Ltd* [1897] AC 22

⁴² Refer to section 16(5) of Companies Act 1965

⁴³ [1925] AC 619

⁴⁴ [1985] 2 MLJ 165

company is a legal person separate and distinct from the shareholders. As the company did not change its identity or personality, it continued to own all its assets.

In *Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor*,⁴⁵ the appellant and the first respondent were divorced in 1990. In 1992 the appellant commenced an action in the Syariah Court for *harta sepencarian* orders (the Syariah action). The appellant and the first respondent were both directors and shareholders in the second respondent. The first respondent was the majority shareholder whereas the appellant was the minority shareholder. The appellant alleged that the first respondent was the trustee under a written trust deed dated 21 January 1986 in respect of some land (the lands) registered in the name of the trustee and held in trust for the second respondent. The purchase price for the lands was paid for by the second respondent. The government subsequently acquired these lands and compensation monies were paid to the first respondent in 1997 and 1999. On 16 February 2001, the appellant added the lands as assets to her Syariah action. On 30 September 2002, the appellant filed a civil derivative action in the High Court to inter alia declare the first respondent a trustee for the compensation monies received and to compel the first respondent to pay these monies to the second respondent. She also sought and obtained an ex parte injunction to restrain the first respondent from using and/or utilizing the compensation monies.

The husband claimed that by virtue of art. 121(1A) of the Federal Constitution, the wife cannot apply for the injunction before a civil court because it involves the distribution of assets of a Muslim marriage which is within the jurisdiction of the Syariah Court. Alternatively, the wife must elect whether to proceed in the Syariah Court or the civil courts. She cannot apply for injunctions in both courts. The husband also claimed that since there are only two shareholders in the company, whatever the wife does on behalf of the company is in fact to protect her personal interest.

Zaki Tun Azmi CJ held that:

It is not denied that any jurisdiction that is lawfully vested in the Syariah Court is exclusively within the jurisdiction of the Syariah Court. It is also admitted that the civil court cannot overstep its jurisdiction to decide on matters which strictly fall within the Syariah Court jurisdiction.⁵ But in this case that is not so. The wife is seeking to exercise her right as a minority shareholder and not as a wife. Her motive may be to protect her rights as a wife but that is irrelevant. One must view her application as one by a shareholder. It does not prevent her from doing so.

The Federal Court held that, a derivative action is one taken by a shareholder to protect his or her interest in the company. Since the action cannot be taken as a shareholder, he/she has to name the company as a party. The wife was thus protecting her interest in the company as a shareholder and not as a wife. Her motive may be to protect her rights as a wife but that is irrelevant. One must view her application as one by a shareholder. In a divorced wife's claim for *harta sepencarian*, at the end of the day, she may be entitled to more than just her registered portion in the company. The fact remained that the husband held the lands in trust for the beneficiary and the derivative action was an action for the benefit of the

⁴⁵ [2008] 1 MLJ 164

company. Therefore, the injunction was granted to prevent the husband from dissipating all the monies held by him in trust for the company.

This case marked an important development in the case of matrimonial property relating to business interest/assets. A divorced party who hold interest in the business could protect their interest in the business via derivative action other than claiming their rights as a husband or wife. The Federal Court judgment highlighted the willingness of the court to separate the issues of claim of the business interest/assets into two different agenda; claim as part of matrimonial property and claim as a shareholder.

Other than establishing appropriate cause of action and *locus standi*, another approach/policy invoked by the court in deciding entitlement in company's assets/interest is via application of lifting of corporate veil.

DOCTRINE OF LIFTING OF CORPORATE VEIL

The doctrine of piercing or lifting the corporate veil refers to a legal decision where a shareholder or director of a corporation could be held personally liable for the debts or liabilities of the corporation. Since the conception of Salomon's case, a separate corporate legal entity is seen as an enviable foundation for company law.⁴⁶ In *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors*,⁴⁷ Anuar J explained that because a company has a legal personality and distinct from its members or directors, there have been and will be instances where its members or controllers hide behind its corporate entity and that in such an exceptional case, the court, in order to do justice will not hesitate to lift the corporate veil by cutting across the legal boundary of corporate structure in order to see the faces and discover the true identities of these members or controllers who use the company as an extension of themselves and make them personally liable or responsible for the debts and liabilities of the company where the evidence justifies such a remedy.

Similar to the English courts, the courts in Malaysia appear prepared to lift the corporate veil in a general range of circumstances, without adhering to strict guidelines in so doing. The court in *Bank Bumiputra (M) Bhd & Anor v Lorrain Osman & Ors*⁴⁸, held 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. Under certain circumstances, the principle of separate legal entity produces what appear to be unjust and purely technical results. As a result, judges tend to come out under a moral or intellectual pressure to sidestep the principle of separate legal entity and produce a result which seems more just.⁴⁹

There are two exceptions where the court shall ignore the corporate entity and lifted the corporate veil:

⁴⁶ Claire Howell. Salomon under attack. Comp. Law. 2000, 21(10), 312-314.

⁴⁷ [1994] 2 MLJ 180

⁴⁸ [1985] 2 MLJ 236

⁴⁹ Claire Howell. Salomon under attack, Comp. Law. 2000, 21(10), 312-314

(1) Statutory Exceptions

This exception refers to circumstances where the statute clearly provides for the situation for the court to lift the corporate veil. Examples of provisions in the Companies Act 1965 which allows the court to lift the corporate veil are:

- (i) Sec 36 ó when the members below 2 for more than six months, the one member will be personally liable.
- (ii) Sec 67(5) ó officer who is in default would be guilty
- (iii) Sec 169 ó requires directors of a holding company to prepare consolidated accounts of holding and its subsidiaries
- (iv) Sec 121- an officer who signs any cheque or promissory note on behalf of the company would be personally liable when the company's name is not properly written.
- (v) Sec 304- an officer would be personally liable for fraudulent trading

(2) Judicial Exceptions

This exception refers to circumstances where the court applies its discretion to set aside the corporate entity and lifted the corporate veil. Examples of circumstances under this exception are:

- (i) Attribution of some physical or mental state or character

In Daimler Co Ltd v Continental Tyre & Rubber Co Ltd,⁵⁰ the defendant company was incorporated in England. Directors and all its shareholders (except one) were German residents. The secretary resided in England and was a British subject. An issue arises whether the company can recover debts during the state of war between England and German. The court applied the doctrine of lifting of corporate veil and held that the company could not recover the debt because the company though incorporated in England was an enemy during the war.

In Re FG(Films) Ltd,⁵¹ 90 percent of the company's shares were held by an American director and only 10 percent of the shares were held by a British. The company sought to register its film "Monsoon" as a British film. The Board of Trade (BoT) refused to register the film as a British firm because in reality it was made by an American company. The court agreed with the contention of BoT and held that film was not a British film.

(ii) Use of company as a sham or to commit fraud

In Bank of Tokyo Ltd v Karoon,⁵² the question posed to determine whether the veil should be lifted was "Did the defendant act pursuant to some improper or fraudulent motive creating or utilising a corporate façade as a sham or device to achieve something, which it

⁵⁰ [1916] 2 AC 307

⁵¹ (1953) 1 WLR 483

⁵² [1987] A.C. 45; [1986] 3 W.L.R. 414; [1986] 3 All E.R. 468.

could not otherwise lawfully do?ö If the answer is in affirmative, then it would be proper to lift the veil.

In Gilford Motor Co. v Horne,⁵³ the defendant was employed as a managing director in the plaintiff's company. There was a covenant in the defendant's contract of employment that he shall not solicit customers of the company after leaving its employment. After the defendant left the plaintiff company, he set up his own company and in contravention of the covenant, he solicited plaintiff's customers. Plaintiff applied for an injunction against the defendant. The court granted the injunction and held that although the defendant's company is distinct from the defendant, it was incorporated as a device, a stratagem, in order to mask the effective carrying on of a business of the defendant.

In Jones v Lipman,⁵⁴ the defendant agreed to sell his house to the plaintiff. Later, defendant changed his mind and to avoid the transfer, he set up a company and transferred the house to the company. The company was wholly owned and controlled by defendant. J brought an action against the defendant. The court granted a specific performance against the defendant and held that the company was a creature of defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid the eye of equity.

(iii) Company employed as an agent of its controllers

A company may act as an agent of another company. In such situation based on the agency principle, the principal will be liable for the act of the company. *In Smith, Stone & Knight Ltd v Birmingham Corporation*,⁵⁵ Birmingham Waste Co. Ltd (the waste company) carried on business on premises belonging to the plaintiff. The waste company was a subsidiary of the plaintiff. When the defendant acquired the premises, the defendant made the payment to the waste company. Later, plaintiff claimed for compensation for the acquisition. The defendant refused to pay any compensation because in law the plaintiff and the waste company were distinct entities. The court granted the compensation claimed by the plaintiff and held that despite the separate legal entity, business of the waste company belonged to the plaintiff as it is a mere agent of the plaintiff.

In Aspatra Sdn Bhd & Ors v Bank Bumiputra (M) Bhd.,⁵⁶ an Anton Piller order and a Mareva injunction were applied to prevent removal from the jurisdiction of assets owned by Lorraine Esme Osman, who was at all times a director of Bank Bumiputra Malaysia Bhd and its wholly-owned Hong Kong subsidiary, Bumiputra Malaysia Finance Ltd. The bank had a claim against Lorraine for the return of moneys which the bank claimed were secret profits made by Lorraine without their knowledge and approval, arising from transactions with Hong Kong companies. The trial judge Zakaria J had granted the Mareva injunction against Lorraine and five companies, on the basis that the assets of those five companies (including Aspatra

⁵³ [1933] Ch 935

⁵⁴ [1962] 1 All ER 442

⁵⁵ [1938] 4 All ER 115.

⁵⁶ [1988] 1 MLJ 97

Sdn Bhd) were the assets of Lorrain. The Supreme Court 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.

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...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 s 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.

(iv) Where illegality or criminal purpose is alleged

In *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd*,⁵⁷ the plaintiff was a party to a scheme to avoid payment of estate duty in respect of the land in the event of his death. A company (the defendant) 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 the plaintiff. When the defendant sought to enforce the contract for the purchase of the land against the plaintiff, he 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 noted that courts were prepared to lift the corporate veil of companies for the purpose of discovering any illegal or improper purpose. The court lifted the corporate veil of Duofortis in order to recognize 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

⁵⁷ (1993) 3 MSCLC 90,953; [1992] 2 MLJ 281.

of his death, and held that the agreement for the sale and purchase of the land and related documentation were unenforceable.

In *Tiu Shi Kian v Red Rose Restaurant Sdn Bhd*,⁵⁸ the 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.

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 to be allowed to defeat justice. However, upon 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.

OBSERVATION

The court policy in deciding claims of matrimonial property in business or a company tends to focus on the issue of contribution. The case law shows that if the claimants proved to have contributed or participated in the business, then he/she is entitled to a share in the business assets as according to his other contribution. In this sense, the court seemed to have different policies/approaches on direct and indirect contribution. In some case law, the moral contribution; for example the moral support of the wife in taking care of the children and the home, while the husband carried out the business, are considered as a valuable contribution towards the business and therefore give right to the wife to claim some interest in the business. Unfortunately, there are judges who found that moral support of a spouse is not sufficient to give rise to an interest in the other spouse's business.

An interesting observation made from the case law shows that in certain circumstances, the court are prepared to apply the doctrine of lifting the corporate veil in matrimonial property claims which involved assets in a company. In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor*,⁵⁹ the appellant and the first respondent were partners in the business of a restaurant. The appellant is a Japanese citizen. Sometime in 1992, they decided to acquire the building in which the restaurant had its business. Each of them was to contribute towards the purchase price. The first respondent brought an action to establish that she was the beneficial owner of a share in a shop-house of which the second respondent, a private limited

⁵⁸ [1985] 1 MLJ 145.

⁵⁹ [2009] 6 MLJ 751

company is the registered proprietor. The trial judge held that the second respondent was not a bona fide purchaser for value. He found that the second respondent company was in substance the alter ego of the first respondent's common law husband with whom she undoubtedly cohabited. The Court Appeal upheld the judgment of the trial court and observed that for principle, the starting point is no doubt the doctrine of corporate personality.

In *Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprises Sdn Bhd*,⁶⁰ in 1991 a sand mining agreement over an undivided share of Lot 208 was executed between a wound-up company, Jaytra Sdn Bhd and the defendant, Hong Huat. An undischarged bankrupt, Mr. Wu Soo Hwa (Wu) signed for the wound-up company. On 4 December 1992, Wu appointed himself as general manager of the wound-up company. He also appointed himself and his wife Madam Chun (the second third party) as the directors thereof. Although the tribute due to the wound-up company in the sand mining agreement should have been paid to official receiver as the liquidator, it was nevertheless paid to Wu's wife, Madam Chun, as both of them effectively controlled the wound-up company. This sand mining agreement was subsequently held to be invalid and unenforceable. In 1993, Airport Auto (the first third party) as agent of Madam Chun purchased, *inter alia*, Lot 208, from the official receiver as liquidator of the wound-up company. The plaintiff, Golden Vale, was incorporated on 11 September 1993, with Madam Chun as the Managing Director. On 10 June 1993, Airport Auto as beneficial owner of Lot 208 entered into a sale and purchase agreement with Hong Huat (the sale and purchase agreement) whereby Airport Auto sold the undivided share in Lot 208 to Hong Huat for RM200,000. Although Golden Vale was not a party to the sale and purchase agreement, it was the nominee of Airport Auto. In 1994, Madam Chun caused Lot 208 to be transferred to Golden Vale. It was argued for Hong Huat that Madam Chun was using Airport Auto and Golden Vale as extensions and corporate veils of herself, while her husband Wu was using his bankruptcy veil in order to defraud Hong Huat and to achieve their unjust personal gain. The court held that Madam Chun was the alter ego of Airport Auto and Golden Vale, with her husband Wu as the mastermind.

It is fascinating to see that in the Shariah High Court, the judge in *Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor*⁶¹ also invoke the doctrine of separate legal entity and lifting of corporate veil to decide whether money paid by the government for the land (claimed to be the matrimonial property) to a company which is owned by the husband is a matrimonial property. After detail consideration and application of the doctrine, Mohamad Shakir Abdul Hamid J, held that there are sufficient evidence that the land belong to the company and not the husband and as such the money paid to the company for the land could not be claimed as a matrimonial property. Although in Wan Khairani case, the applicant did not succeed in her claim, the case proved that the Shariah court is willing to apply the common law doctrine of lifting of corporate veil in dealing with claims of matrimonial property in a company.

The highest importance of all, is the Federal Court judgment in Wan Khairani case whereby the court held that a divorced who is also a shareholder in a company could initiate a

⁶⁰ [2005] 5 MLJ 64

⁶¹ Case No. 0063/1991T

derivative action against the directors or other shareholders of the company although she/he had also at the same time initiated a legal action against certain property in the company as a matrimonial property. This case established the principle that a divorced party who has certain holding in a company which belongs to the other party has two causes of action; firstly to claim his/her interest in the company as a matrimonial property claim on the *locus standi* of an ex-spouse and secondly taking a derivation action on the *locus standi* of a shareholder.

CONCLUSION

The court policies in deciding claims of matrimonial property cases which involved property in a company has developed and linked with the principles of company law. From the normal "contribution" rule, the court has moved to include the application of doctrine of lifting of corporate and derivative action. The Shariah court had also shown a fascinating development when it applies the common law doctrine of lifting of corporate veil to look into transactions involving property in a company. These new approaches/policies are seen to be a positive development in the legal milieu in ensuring justice prevails and the best interest rule preserved.