IN THE SUPREME COURT OF SEYCHELLES

State Assurance Corporation of Seychelles,
Victoria, Mahé **Petitioner/Judgment-Creditor**

Vs

First International Financial Company Ltd of
Revolution Avenue,
Victoria, Mahé
Represented by its Director,
Mr. Paul Chow **Respondent/Judgment-debtor**

Civil Side No: 409 of 1998

.... Mr. K. Shah for the Petitioner
Mrs. F. Antao for the Respondent

D. KARUNAKARAN, J.

RULING

This is an application for execution of a judgment, filed under section 251 read with section 253 of the Seychelles Code of Civil Procedure (CCP). In this matter, the judgment-creditor - hereinafter called the petitioner - has applied to the Court for the arrest and imprisonment of the judgment-debtor - hereinafter called the respondent - for having defaulted to satisfy the judgment in that, the respondent refused or neglected or evaded the payment of the judgment-debt Rs493, 078.60cts plus costs Rs16, 726.00, which sum now remains due and payable to the judgment-creditor.

The Law

Section 251 of the Seychelles Code of Civil Procedure reads thus:

> ***"A judgment creditor may at any time, whether any other form of execution has been issued or not, apply to the court by petition, supported by an affidavit of the facts, for the arrest and imprisonment of his judgment debtor and the judge shall thereupon order a summons to be issued by the Registrar, calling upon the judgment debtor to appear in court and show cause why he should not be committed to civil imprisonment in default of satisfaction of the judgment or order"***

Section 253 of the Seychelles Code of Civil Procedure reads thus:

> ***"If the judgment debtor does not appear at the time fixed by the summons or <u>refuses to make such disclosures as may be required of him by the court</u> or if the court is satisfied that the judgment debtor-***
>
> ***(a) has transferred, concealed or removed any part of his property after the date of commencement of the suit in which the judgment sought to be enforced was given or that after that date he has committed any act of bad faith in relation to his***

property with the object or effect of delaying the judgment creditor in enforcing his judgment or order; or

(b) has given an undue or unreasonable preference to any of his other creditors; or

(c) has refused or neglected to satisfy the judgment or order or any part thereof, when he has or since the date of the judgment has had the means of satisfying it,

the court may order such debtor to be imprisoned civilly unless or until the judgment is satisfied" .

It is evident from the above provision of law, that in execution proceedings the over all burden lies on the judgment-debtor to show cause to the satisfaction of the Court, why he should not be committed to civil imprisonment, in default of satisfaction of the judgment. It is a question of judicial satisfaction. There are no legal issues involved. The test is subjective. It is for the judicial mind to decide whether the reason/s given by the debtor for his default is satisfactory or not. Having said that, it is pertinent to note that a judgment given against a body corporate can be enforced by an order of committal- imprisonment - against any director or other officer of that body *- vide O.45, r.5/5 the Supreme Court Practice Vol. I -Also see, Biba Ltd Vs. Stratford Investment [1973] 1 Ch. 281.*

The History

At all material times, the petitioner was a statutory corporation established in Seychelles carrying on the business of insurance and the

respondent was a company registered in Seychelles carrying on the business of insurance broker. One Mr. Paul Chow was the director and majority shareholder of the respondent-company. His wife was the other director. The couple owned 100% of the shares of the company. In fact, Mr. Paul chow was the natural person behind the corporate veil, had control and personally operating the business of insurance broker. The petitioner and the respondent entered into an agreement on 1st May 1995 in terms of which, inter alia:

(i) *The respondent, acting as agent of policy holders was authorised to transact insurance business with the petitioner.*

(ii) *The respondent was authorised to receive premiums from policyholders after the petitioner had agreed in writing to accept or renew insurances.*

(iii) *The respondent was, as soon as practicable after the end of each month, obliged to render to the petitioner a statement of account showing premiums falling due to be paid during that month and within 14 days of the petitioner rendering the statement of account, the respondent was obliged to remit the balance of the account to the petitioner.*

(iv) *Pending remittance to the petitioner by the respondent, the respondent was obliged to hold such premiums as trustee for the petitioner and not to apply such premiums in making any payment except to the order of the petitioner.*

(v) *Commission as specified rates in terms of the agreement would be payable to the respondent in respect of all premiums received by the petitioner through the respondent.*

(vi) *The petitioner reserved the right to terminate the agreement forthwith without liability to pay any compensation other than arrears of commission due on the date of termination on giving the respondent notice in writing.*

The Breach of Trust

Having thus agreed upon the terms of the agreement, the respondent started transacting the insurance broking business with the petitioner. It collected/received the premiums from the policyholders and insured public. After having received the premiums - for and on behalf of the petitioner - the respondent *in breach of trust,* failed to remit the money to the petitioner which sums the former had held as a trustee of the latter, vide term (*iv)* supra. The respondent's practice of illegal delay in remitting the premiums and of flouting the insurance legislations affected the insurance industry as a whole in the Republic. By a letter dated 31st July 1996 - vide Exhibit P3 (STSC) - the Insurance Authority of the Republic had to write inter alia, the following to the respondent:

> *"… … We are very concerned about the manner your organisation is dealing with the premiums collected from policyholders and more specially the tremendous amounts of money due to SACOS. In this regard, you cannot ignore that you are acting in defiance of the insurance legislation and at the same time conducting insurance broking business in a manner likely to be detrimental to the public interests or the interests of*

policyholders or prejudicial to the interest of the insurers concerned and the insurance industry as a whole.

….. Your organisation practice to systematically delay the payment of premiums or grant credit without any interest to policyholders could burst into public view and cause irreparable damage to the reputation of the Seychelles Insurance Industry both at home and overseas and also tarnish the licensed insurance brokers' reputation."

As a result, the petitioner terminated the agreement on 18th May 1998, in accordance with the terms agreed upon. As at the date of termination, the respondent was indebted to the petitioner in respect of the outstanding premiums in the sum of Rs844, 672.65, which sum then remained in the hands of the respondent, as "trust money", due and payable to the petitioner in terms of the said trust agreement. The petitioner made several requests to the respondent to remit the sum held in trust. However, the respondent failed to make any payment to the petitioner. Eventually, in 1998 the petitioner had no other option but to institute the instant suit, Civil Side No: 409 of 1998, seeking a judgment ordering the respondent to pay the sum Rs844, 672.65 to the petitioner. According to the directors, the respondent-company, ceased its operation on 1st January 2000 vide Exhibit R2 (STSC).

The Delay-tactics

The respondent-company represented by its director Mr. Paul Chow, who had been entrusted with the funds of the insured public and policyholders by virtue of his standing as "Insurance Broker", first put up appearance in Court through its counsel Mr. Serge Rouillon on 9th March 1999 to answer the plaint filed by the petitioner. At the outset of the proceedings, the respondent

contested the petitioner's claim. In its written statement of defence dated 17th May 2001, the respondent not only denied liability but also made a counterclaim against the plaintiff/petitioner in the sum of Rs997, 872.70 Cents. Since the subject matter of the suit involved accounts, the Court on 27th of November 2002 - in terms of section 311 of the CCP - appointed "A. J. Shah and Associates" as the "Commissioner of Accounts" to make an examination of the accounts furnished by the parties, and submit its report to the Court on or before 13th February 2003. The Commissioner began his inquiry into the accounts in accordance with the mandate given by the Court. Obviously, the Commissioner of Accounts had the power in law in terms of section 315 of the CCP to call upon the parties to produce the books of accounts and documents relevant to the subject of the inquiry. Accordingly, the Commissioner sent notices to both parties requiring them to produce the accounts, particulars, and the relevant documents for his examination. The petitioner (SACOS) extended its full co-operation by furnishing the necessary books of accounts and documents to the Commissioner. However, the respondent did not, and was very uncooperative and evasive. The respondent ignored the letters sent by the Commissioner. Despite repeated requests, the respondent failed to submit the books of accounts as requested for, by the Commissioner for reasons best known only to Mr. Paul Chow, the natural person behind the corporate veil. Hence, the Commissioner could not effectively conduct the inquiry. He complained to the Court about the evasive and non-cooperative attitude of the respondent in delaying and defeating the inquiry. Consequently, the Court had to make an order on 27th November 2002 directing the respondent to co-operate with the Commissioner of Accounts and furnish the documents and particulars requested for, to the commissioner on or before 13th February 2003. It is pertinent here to quote the relevant excerpts from the Commissioner's Report dated 10th February 2003 submitted to the Court, which run as follows:

> *"We (the Commissioner) addressed separate letters dated 14th November 2002 to each party to the case requesting for full details of agreement... SACOS responded by furnishing us the copies of agreement... There was no response in writing from First International Financial Co. Ltd (FIFCO). However, Mr. Paul Chow of FIFCO verbally informed us that he was busy with the election to the National Assembly. In our letter dated 10th December 2002... we again requested FIFCO (the respondent) for all the required information.... We once again followed this letter with another letter dated 23rd January 2003. We received a letter dated 21 January 2003 from FIFCO enclosing listing of clients... (But) We did not receive any of the documents we had requested for... We therefore addressed another letter dated 24 January 2003 to FIFCO... To date we have not received any response to our letter dated 24th January 2003..."*

The delay tactics the respondent thus resorted to, did not pay any dividends. The respondent eventually admitted the plaintiff's claim and liability but drew a veil over its counterclaim, though it had been pleaded in the defence against the petitioner. In fact, Mr. Paul Chow personally - having no reference to any representative capacity - signed an agreement dated 23rd June 2004 and submitted to a "Judgment by Consent" agreeing on the following terms in full and final settlement of the petitioner's claim:

1. *The petitioner and the respondent accepted the report of the Commissioner of Accounts appointed by the court.*

2. *The petitioner acknowledged the receipt of Rs350,000.00 from the respondent awarded in the interim judgment dated 2nd October 2002.*

3. *The respondent acknowledged that it owed the petitioner a further sum of R493, 078. 60 and submitted to judgment in the said sum.*

4. *The respondent agreed to pay the plaintiff towards the costs of the said suit at R 10,000/- towards the fees and expenses of the commissioner of accounts.*

5. *That neither party has any other claim against the other.*

Dishonouring a Consent-Judgment

Although the respondent unequivocally admitted liability and submitted to the Judgment by Consent in July 2004, he did not honour the agreement or the Judgment of the Court. Despite several demands, he neglected to pay the judgment-debt and was evading payment. The petitioner again gave the respondent, presumably, a grace period of nearly one year to pay the judgment-debt. However, the respondent continued his evasive attempts and did not pay even a single cent. In the circumstances, the petitioner on 27th June 2005 instituted the present proceedings for execution of the said judgment in the mode first above mentioned.

Intent to defraud

Mr. Paul Chow on behalf of the respondent received the summons on 5th January 2006 that required him to appear before the Court on 7th February

2006, to show cause why he should not be committed to civil imprisonment for default in the payment of the judgment-debt. In the inevitable interval between the date of receipt of the summons and the appointed date for his appearance in court, Mr Paul Chow on 17th January 2006, obviously with intent to defeat the execution, defraud and deprive the petitioner, SACOS, of the fruits of the judgment, filed a petition in the Supreme Court for winding up of the respondent-company. This petition was registered in Civil Side No.09 of 2006. The winding up petition dated 17th January 2006, filed by the respondent was in fact, grounded on a pleading that the company had no funds and was presumably unable to pay its debts. Obviously, "lack of funds" in this respect is a valid ground under section 205 (d) of the Companies Act for seeking a winding up by the Court. However, in the petition for winding up, there was no mention about the "*voluntary winding up*" by a special resolution. There was no mention in the petition about the Extraordinary General Meeting allegedly held on the 15th December 2005, nor about the appointment of Mr. Frederic Savy as liquidator, vide Exhibit R3. Evidently, it is a product of later thought. In fact, the winding up petition did not contain any pleading to satisfy the ground of winding up by the court, based on a special resolution, as required under section 205 (a) of the Company Act, which reads thus:

> ***"A company may be wound up by special resolution resolved that the company be wound up by the court"***

Although, "*voluntary winding up"* was not at all a ground pleaded in the petition, learned counsel for the respondent Mrs. Antao, after a number of adjournments of the winding up petition - on the 16th of February 2006 - has obviously misled the Court (presided by A. R. Perera, J.) stating as follows:

> *"… I was told that they have asked for liquidation. Winding up, and that a liquidator has been appointed, Freddy Savy"*

Subsequently, on the 10th of March 2006, the learned judge, in the absence of Mrs. Antao, in the absence of any pleading in the petition for *"voluntary winding up"* and in the absence of any document evidencing the "special resolution", made an order, *per incuriam,* for "*voluntary winding up"*, which inter alia reads thus:

> "*The petition for* *"voluntary winding up"* (underline mine) *has been filed by the two directors of the company averring that the services as insurance brokers ceased on 1st January 2000 due to lack of funds. …*
> *In those circumstances order is hereby made winding up the company…."*

Indeed, a **"voluntary winding up**" by special resolution is not made by the Court in terms of section 205 (a); but rather, by a general meeting of the company when it so resolves in terms of section 247 (1) of the Company Act. It should be noted that there are two modes of winding up of a company. They are:

(1) *by an order of the court under section 205 of the Companies Act; and*

(2) *by a voluntary act of the shareholders, if the company so resolves by special resolution in a general meeting under section 247 of the Companies Act.* See, Section 202 of the Company Act

A company by *special resolution* may resolve that the company should be wound up by the court. This does not mean that it is a "voluntary winding up". It is still a winding up by the court in terms of section 205 (a) of the

Company Act. In fact, Mr. Paul Chow produced a document dated 15th December 2005, strangely enough, only yesterday, the 13th June 2006, stating that it was the "special resolution" pertaining to the winding up. Again, this resolution does not mention about "lack of funds" nor winding up by the court to attract section 205(a) or (d) of the Company Act.

In any event, if the company had been wound up voluntarily, it should have complied with all the procedural requirements stipulated under section 247 to section 250 of the Companies Act. However, the respondent has not complied with all those requirements, including advertisement of winding up resolution, notification to Registrar, etc.

Besides, the only shareholders of the company Mr and Mrs. Paul Chow had already voluntarily wound up the company by passing a resolution at the so called extraordinary meeting of the company held on 15th December 2005 and appointed by themselves one Mr. Frederic Savy as liquidator, see, Exhibit R3 (STSC). Then, what is the purpose of filing a petition seeking an order for winding up by the court? Is the court a mere rubber stamp to ratify and seal legitimacy to "the secret act of voluntary winding up" - a fait accompli - carried out by the shareholders behind the back of the creditors? Is it not the abuse of the process of the law? What could be the intention behind these devious deeds?

The judgment debtor has thus, misled the court and obtained sneakily an order for winding up of the company without the knowledge of the judgment-creditor, when the execution proceedings were simultaneously pending before the Court. The court did not appoint a liquidator provisional or otherwise nor has granted a stay of execution of the judgment. Incidentally, the mere filing of a petition for winding-up in the Supreme Court by the judgment-debtor or obtaining an order misleading the court can in no way confer any right or protection nor change the legal status of the debtor. With

due respect to learned counsel for the debtor, section 210 (2) of the Company Act, is not applicable to the case on hand, as the court is not proceeding against the company in any action, but enforcing its own judgment against the judgment-debtor. In any event, this section applies to cases of winding up by the court, not those wound up voluntarily by the general meeting of the company. Be that as it may. The fraudulent intention of Mr. Paul Chow in this respect is evident from the following facts and circumstances:-

- Had Mr. Paul Chow been genuine in applying now for winding-up of the company, what prevented him from doing so at the earliest opportunity, that is, before he received the summons to show cause for having defaulted to satisfy the "judgment by consent" entered in June 2004?

- Had the company been truly insolvent and unable to pay its debts, why then, did Mr. Paul Chow, who had known that material fact about three years in advance (see, paragraph 7 of his defence dated 17th May 2001) suppress it and furthermore undertake to pay the debt to the petitioner by entering into an agreement on 23rd June 2004?

- The respondent's delay tactics, non-cooperation, the implied refusal to furnish the accounts to the "Commissioner", the attempt for winding-up *a fortiori* his adamant refusal to disclose the material facts required of him by the court clearly indicate the bad faith and its ulterior intent to defraud the petitioner.

- Had the counterclaim made by the respondent in the sum of about Rupees One Million against the petitioner, SACOS, been genuine and *bona fide*, the respondent in the normal

> circumstances should have pursued its counterclaim against the petitioner in the original suit. However, the respondent did not do so. In fact, no reasonable corporate entity in the position of the respondent would withdraw its claim and forego such a huge amount, unless its directors had acted in bad faith or such a claim had been false and frivolous.

After Mr. Paul Chow filed the application for winding-up, he appeared before the Court on 7th February 2006, in response to the summons to show cause and stated - in verbatim - as follows:

> *"My Lord, there is no money to pay... The company does not have the money"*. He then surprisingly went on to put a rhetorical question to the Court that appears on record thus: ***"How will the judgment be satisfied?"***

In passing, I should mention here that although a rhetorical question expects no answer, the Court must now find one, as the question has metamorphosed into a legal issue, no longer rhetorical. The Court would do so in due course of this ruling.

Motion for substitution

Besides, the respondent again on 29th May 2006, filed a motion stating that the company is in liquidation and so all the claims against the company should be made against the liquidator. Hence, the respondent sought an order for leave to replace the judgment-debtor by its purported liquidator, in the execution proceedings. Moreover, it is the contention of Mr. Paul Chow that the judgment in this matter was given only against the respondent-company, not against him personally. Hence, Mr. Paul Chow claimed that he should be discharged from the execution proceedings.

I meticulously perused the entire evidence on record and carefully analysed the arguments advanced by counsel on both sides for and against this motion. Yesterday, the 13th of June 2006, I dismissed the said motion, reserved *the ratio decidendi,* stating that I would spell out the reasons in detail - later - after hearing the parties on the main application. Now, I will proceed to pronounce the reasons accordingly.

First of all, on a point of law I note, a motion of this nature by the judgment-debtor is unknown to the Seychelles Code of Civil Procedure (CCP). In fact, section 233 of the CCP is couched in the following terms:

> **(1)** *As between the original parties to a judgment or order, execution may issue at any time within six years from the date of the judgment or order.*
>
> **(2)** *(a) In the following cases namely-*
>
> **(i)** *where six years or more ……..*
>
> **(ii)** *where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgement or order*
>
> *the party alleging himself entitled to execution may apply to the court for leave to issue execution accordingly, and the court may, if satisfied that the party so applying is entitled to execution, make an order to that effect"*

Therefore, it is evident from the above that in execution-proceedings, whenever a change has taken place in the capacity or status of the parties to a judgment, only the party that is entitled to execution, namely, the judgment-creditor has the *locus standi* to apply to the Court in terms of

section 233 supra, for leave to amend and issue execution accordingly. Hence, it goes without saying that in the absence of such *locus standi* the judgment-debtor namely, the respondent herein cannot in law apply for leave in this respect. Therefore, I find that the motion is not maintainable in law and liable to be dismissed in limine.

On the merits, I quite agree with the submission of Mr. Shah, the learned counsel for the petitioner, that the motion filed by the respondent in this regard, is misconceived. Whatever be the case, whether the judgment-debtor is in liquidation or not, the fact remains that such liquidation is immaterial and irrelevant to the present execution proceedings, in view of the following reasons:

(a) Insurance premiums collected from policyholders is not an asset belonging to the judgment-debtor but an asset held in trust for the Insurance Corporation, who remains the true owner of the premiums collected;

(b) Such Insurance Premiums do not form part of the judgment-debtor’s assets that would vest in the liquidator in a winding-up;

(c) Such insurance premiums can never form part of any assets for eventual distribution by the liquidator.

(d) The petitioner is under no obligation to add or substitute any liquidator or any other person for that matter, in the execution proceedings to replace the judgment-debtor.

Indeed, the money or property held by a company in trust for a third party, is excluded and does not form part of the company's assets so as to be available for creditors, when the company is frustrated by the advent of winding-up, vide ***Barclays Bank Limited V. Quistclose Investment Limited [1970] A. C; Carreras Rothmans Ltd V. Freeman Mathews Treasure Limited [1985] 1 All. E. R 155.*** I therefore, conclude that the issue of "liquidation" raised by the respondent is extraneous to the case on hand.

For these reasons, I find that the motion filed by the respondent, seeking leave to replace the judgment-debtor by its purported liquidator, is not maintainable either in law or on facts. In any event, having regard to all the circumstances of the case, in my judgment the motion by the debtor at this stage of the proceedings, is not *bona fide*, but a ploy intended to hurdle, delay and defeat the execution proceedings. Therefore, I ruled that the Judgment-debtor, represented by Mr. Paul Chow was answerable to the Summons and should explain to the Court what had happened to the insurance premiums he collected, but not paid over to SACOS.

Refusal to Show cause

Following the said ruling Mr. Paul Chow was called upon to show cause, in his capacity as the director of the respondent company and/or personally why he should not be committed to civil imprisonment for having defaulted to satisfy the judgment in question. In response Mr. Paul Chow refused to answer the questions put by the counsel for the petitioner stating that the liquidator is the best person, who could answer the questions. He categorically refused to explain what happened to the money - the premiums - he collected from the insured public and policyholders. The relevant part of the evidence given by Mr, Paul Chow reads as follows:

Court: *… You have to explain to the court… what happened to the premiums you collected from clients to be remitted to SACOS?*

Mr. Paul Chow*: I cannot answer the question. The person to answer is the liquidator.*

Court: *What happened to the funds?*
Mr. Paul Chow*: I cannot answer that question.*

Mr. Shah*: Can you tell the court why you cannot answer the question, namely whether you had trust fund or not?*
Mr. Paul Chow*: I cannot answer the question.*

As Mr. Paul Chow was thus, repeatedly refusing to answer the questions the court also recorded its observation thus:

> *"I note that Mr. Paul Chow refuses to answer the questions put by the Court as to what happened to the premiums he collected as Insurance broker for and on behalf of the insurance company SACOS. Also I note he is refusing to disclose the funds he held in trust"*

Now, I turn to the main application for execution. To my mind, the following are the two fundamental questions that arise for determination in this matter:-

(1) *Is Mr. Paul Chow, the director of FIFCO, personally liable to pay the judgment-debt the Company owed to the petitioner in this matter? If so, why?*

(2) *Being so, has Mr. Paul Chow either in his personal capacity or as the director of the company shown a good cause to the satisfaction of the Court, why he should not be committed to civil imprisonment for default in the payment of the judgment-debt?*

Lifting or Piercing the Corporate Veil

The corporate law **concept of piercing (lifting) the corporate veil describes a legal decision where a** shareholder **of a** corporation **is held personally liable for the** debts **of the corporation despite the general principle that those persons are immune from suits in contract or tort, that otherwise would only hold the corporation liable. This doctrine is also known as "*disregarding the corporate entity*".**

Undoubtedly, as rightly submitted by the learned counsel for the debtor, Mrs. Antao, it is an axiomatic principle of company law, that a company is a legal entity separate and distinct from its members, who are only liable to the extent that they have contributed to the company's capital. The landmark decision in *Salomon v A. Salomon & Co Ltd [1897]* created two basic legal concepts, namely, (i) *"corporate entity"* and (ii) *"limited liability", the 'Adam' and 'Eve' of the corporate genesis, if I may say so.* It is truism that on principle, the Courts will generally hold the company liable for all actions or debts that are legally the responsibility of the corporation, not its shareholders. The Courts have thus, preserved the dual presumptions of "Corporate entity" and "Limited liability" as laid down by the House of Lords. The Salomon principle certainly will continue to govern the corporate world, from precedent to precedent, as it has done since the 19th century. However, if

shareholders' actions were clearly designed to pass personal liability off to the corporation, the Courts have disregarded the rigid application of the Salomon principle, when such rigidity resulted in corporate calamity and legal absurdity. Historically, the Courts have lifted the corporate veil for good reasons and have silenced Salomon. In a number of circumstances, the Courts have pierced or ignored the corporate veil, to reach the person behind the veil or to reveal the true form and character of the concerned company. The rationale behind this is that the law will not allow the corporate veil to be misused as a masquerade by unscrupulous individuals to swindle and defraud others, and escape from the clutches of law by hiding behind the corporate veil. "Limited liability" is a "mode of swindling," declared Jeffersonian scholar Thomas Cooper in the 1820s. The "Enron" episode of 2001, the largest corporate fraud in U. S history, is a glaring example. The Salomon principle laid down by the law lords in the 19th century - however suited to economic and social conditions of that time - are not suited to that of the 21st century. It should be fine-tuned to meet the changing needs of time and the emerging corporate culture. If *Salomon* allows business owners to escape responsibility for what their businesses do, then the "legal fiction" of corporate personality is a farce and will never serve the purpose for which it was created by the statute. In the circumstances, when the court feels that the corporate form is being misused, it will rip through the corporate veil and expose its true colour, character and nature, disregarding the Salomon principle. On the other hand, if the Courts are too rigid in applying this principle and decline to lift the veil, at times it causes injustice, not only to third parties but also to company owners. The often cited case of *Macaura v Northern Assurance Co Ltd [1925] AC 619* is an example of such a situation. Mr. Macaura was the sole owner of a company he had set up to grow timber. The trees were destroyed by

fire but the insurer refused to pay since the policy was with Mr. Macaura (not the company) and he, personally, was not the owner of the trees. The House of Lords upheld that refusal based on the rigid application of the Salomon principle. Thus, injustice was done to Mr. Macaura. Do we need such a rigid application that causes injustice?

When is the veil lifted?

The courts have been more prepared to pierce the corporate veil when it feels that fraud is or could be perpetrated behind the veil. The courts will not allow the Salomon principal to be used as an engine of fraud. The two classic cases where the courts lifted the corporate veil for reasons of fraud are ***Gilford Motor Company Ltd Vs. Horne (1933) Ch 935;*** and ***Jones Vs. Lipman (1962) 1 WLR 832;***

In *Lipman,* Justice Russell specifically referred to the judgments in *Gilford v. Horne* and held that Mr. Lipman’s company was " a mask which (Mr. Lipman) holds before his face, in an attempt to avoid recognition by the eye of equity". Under no circumstances will the court allow any form of abuse of the corporate form and when such abuse occurs, the court will step in, as it ought to.

Trust and Tort

The court may also pierce the corporate veil to look at the characteristics of the shareholders. In the case of ***The Abbey, Malvern Wells Ltd v. Minister of Town and Country Planning [1951] 2 All ER 154,*** the court lifted the corporate veil, when the shareholders were responsible as trustees

of the assets of the corporate entity. In this case a school was run like a company registered under the Companies Act, but the shares were held by trustees on educational trusts based on a trust agreement. The court pierced the veil in order to look into the terms on which the trustees held the shares. In the said case Judge Danckwerts stated thus:

> *"It seems to me, therefore, that, while nominally the property of the company is held under the provisions of the memorandum and articles of association, in actual fact the property of the company is regulated by the terms of the memorandum and articles of association plus the provisions of the trust deed, and, therefore, the company is restricted in fact in the application of its property and assets and may apply them only for the charitable purposes which are mentioned in the trust deed"*

Likewise, in the case on hand, it seems to me, that, while nominally the property of the respondent-company had been held under the provisions of the memorandum and articles of association, in actual fact the property of the company is regulated by the terms of the memorandum and articles of association plus the provisions of the trust agreement, which Mr. Paul Chow had signed with the petitioner and, therefore, the company is restricted in fact in the application of its property and assets and may apply them only for the purposes which are mentioned in the said trust agreement. Therefore, this Court ought to pierce the veil in order to look into the terms on which the trustee Mr. Paul Chow held the premiums he received and hence I do so accordingly.

Other recent cases suggest that if the tort is deceit rather than negligence, the courts will more readily allow personal liability to flow to a Director or employee. ***(See, Daido Asia Japan Co Ltd Vs Rothen (2002) BCC 589***

and ***Standard Chartered Bank v Pakistan National Shipping Corp (No. 2) (2003) 1 AC 959.***

In most jurisdictions, no hard and fast rule exists calibrating the standard required to be applied by the Court on the question of judicial **"veil lifting".** The rule is rather based on case-by-case decisions. In the US, different theories exist but the most important one is the "alter ego" or "***instrumentality***" rule, which attempted to create a piercing standard. Mostly, they rest upon three basic prongs - namely "*unity of interest and ownership*", "*wrongful conduct*" and "*proximate cause*". However, the theories failed to articulate a real-world approach which the courts could directly apply to their cases. Thus, as the Courts struggle with the proof of each prong, they eventually take a global approach and analyze all given factors in order to decide the question of lifting the corporate veil. This is known as **"*totality of circumstances*"**, which in my view, is the most appropriate and suitable approach this Court should also take in the case on hand. In examining the "*Totality of Circumstances*" peculiar to the case on hand, I take into account the following:

(a) It is evident from the facts marshalled hereinbefore, that Mr. Paul Chow, the "*alter ego*" of the respondent-company has been ***in breach of trust*** since he failed to remit the money held in trust, to the petitioner. In fact, he received the money as a trustee of the Insurance Company - SACOS - but defaulted in remitting the sum to the beneficiary in breach of the agreement - an ***"uberrima fide"*** -the parties had entered into on 1st May 1995.

(b) Despite repeated demands, Mr. Paul Chow obviously, failed or refused to disclose the required particulars and furnish

the accounts for examination by the "Commission of Accounts" appointed by the Supreme Court for that purpose.

(c) Mr. Paul Chow, the natural person behind the corporate veil, had been ***instrumental*** for the collection of the premiums from the insured public and policyholders by virtue of his standing as "Insurance Broker". He received the money for and on behalf of the Insurance Company, held it in trust as custodian, but defrauded by defaulting payment. The respondent-company in these circumstances was simply a façade.

(d) One who holds himself out to the public as an insurance broker is required to have the degree of skill and knowledge requisite to the calling. When retained by Insurance Company or engaged by a member of the public to obtain insurance, the law enjoins the Insurance Broker to the exercise of good faith and reasonable skill, care and diligence in the execution of the commission**.** The broker has a duty of good faith and fair dealings. See, *Ryder v. Lynch, 42 N.J. 465, 476 (1964).* However, Mr. Paul Chow in this matter, as an insurance broker failed in his duty to exercise due diligence and act in good faith. This, ultimately resulted in breach of trust, loss and purported liquidation of the company.

(e) The respondent company and Mr. Paul Chow as an insurance broker had the "***unity of interest"*** in the collection of the premiums from the insured public and the "***unity of* ownership**" over the assets including the money held in trust.

(f) Going by the record, Mr. Paul Chow, the “alter ego” of the respondent applied delay-tactics and abused the due process of law in that:

(i) he neglected or refused to furnish or disclose the accounts for examination by the “Commissioner of Accounts” appointed by the Court;

(ii) he made a frivolous “counterclaim” in the statement of defence suit proceedings to defeat the petitioner’s claim;

(iii) Knowing full well that the respondent had no ability to pay its debts - see, paragraph 7 of the defence - Mr. Paul Chow misled the petitioner in that, he made a payment of Rs350,000.00 and he then signed the agreement and submitted to consent-judgment giving the wrong impression that the company had means to pay the debt.

(iv) After consenting to the judgment, the respondent filed a petition for winding-up of the company with intent to defeat the execution proceedings and defraud the petitioner. All these acts in combination constitute "*wrongful conduct*" on the part of Mr, Paul Chow, while his company was a mere *façade* concealing the facts.

(g) After the date of commencement of the suit Mr. Paul Chow has committed all the said acts - to say the least - in bad faith with the object or effect of delaying the judgment creditor in enforcing the judgment. He has refused or neglected to satisfy the judgment, when

he has or since the date of the judgment, has had the means of satisfying it.

Having given a careful thought to the "*totality of circumstances",* the Court finds and concludes that the corporate veil of the "First International Financial Company Ltd" has been misused by its shareholder/director Mr. Paul Chow. The Court therefore**,** disregards the Salomon principle, pierces or lifts the corporate veil, reaches the natural person behind and holds Mr. Paul Chow personally liable for the judgment-debt the respondent-company owes the petitioner, SACOS, in this matter.

In the final analysis, I find the answers to the two fundamental questions (supra) thus:-

(i) *Yes, Mr. Paul Chow, the director of the Company FIFCO is personally liable to pay the judgment-debt of* ***Rs493, 078.60cts*** *plus costs* ***Rs16, 726.00;*** *the Company owes the petitioner in this matter for reasons stated hereinbefore.*

(ii) *Mr. Paul Chow has not shown any cause - let alone a good cause - to the satisfaction of the Court why he should not be committed to civil imprisonment for having defaulted in the payment of the said judgment-debt. In fact, he was so adamant and refused to make such disclosures as required of him by the court.*

Wherefore, I hereby order Mr. Paul Chow, to satisfy the judgment, by effecting payment of the sum totalling Rs509, 804.60 at the Supreme Court Registry on or before 16th June 2006, or in default thereof, to undergo civil imprisonment for a term of six months. If the debtor effects payment of the

said judgement debt in full, at any time during the said term of imprisonment, he shall be released from prison, thenceforth.

....

D. Karunakaran
Judge

Dated this 14th day of June 2006