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Employment Law: Working For A Group Of Companies

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REIMAGINING LEGAL SOLUTIONS

The willingness of the Malaysian courts to pierce the corporate veil by adopting the principle enunciated in the *Hotel Jaya Puri* case, particularly in industrial disputes, is not new. In *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109, the Industrial Court ordered Hotel Jaya Puri Berhad to pay compensation of 2 months salaries plus fixed allowances in favour of workmen employed in the business of Jaya Puri Chinese Garden Restaurant Sdn Bhd. The interesting point to note here is that, although the restaurant was a wholly owned hotel subsidiary, the workmen were employed by the restaurant and not the hotel. The Industrial Court had disregarded the corporate veil between the restaurant and the hotel.

The Industrial Court's primary basis was functional integrity and unity of establishment between the hotel and the restaurant. In other words, the corporate veil was pierced by applying the single economic unit test. The High Court disagreed with the Industrial Court's conclusion but held that the Industrial Court was entitled to invoke the single economic test. This is a particularly important decision because it means that the court is entitled to determine who is the actual employer and that the affected employee is entitled to have recourse against the parent company of his employer.

Then comes the case of *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* in 2021, where the Federal Court stated that the single economic unit test is not sufficient to justify the lifting of the corporate veil. The Federal Court did not stop there but went on to state that this is the position not just in civil cases but also in industrial law claims in the Industrial Court.

Does this spell the end of the single economic unit test in industrial and employment law claims? To appreciate the

extent of the Federal Court's pronouncement in *Keller*, we should first understand the facts of the case.

Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors

The case involved the Melawati Mall project and a series of subcontracting, starting from the main contractor (Bina Puri Holdings Bhd) to Perfect Solution Sdn Bhd to PS Bina Sdn Bhd and finally to Keller (M) Sdn Bhd, the last of which would carry out the actual work. For this discussion, the focus will be on Perfect Solution, PS Bina and Tony Ong, who was the managing director of both of the companies.

On 13.9.2013, Keller was invited to submit a quote for the piling works for the project. Following that, Keller received two blank bills of quantities. The second page of the second bill was missing, but it is crucial because it stated that the earth bore works will not be paid for. The fact that Bina Puri will not pay for the earth bore works, while unknown to Keller, was known to Tony Ong.

On 21.10.2013, PS Bina issued a letter of award to Keller, which represented that earth bore works would be paid for. On 4.11.2013, Tony Ong represented to Keller's managing director that he would procure Bina Puri's guarantee for the costs of the earthworks incurred by Keller. Keller had proceeded to carry out, amongst others, the earth bore works for the project and had incurred around RM 7 million to that end. Unsurprisingly, neither did Perfect Solution nor did PS Bina pay for the earth bore works, which culminated in the suit by Keller to recover the sum.

The Decisions Of The Courts

The High Court lifted the corporate veils of PS Bina and Perfect Solutions and held Perfect Solution, PS Bina and Tony Ong to be jointly and severally liable for Keller's claim. This was affirmed and endorsed by the Court of Appeal.

Before the Federal Court, Perfect Solution and Tony Ong argued vigorously that the single economic unit principle is not part of the corporate veil lifting principle in commercial cases and invited the Federal Court to hold that it is only applicable in the Industrial Court. On that premise, they

contended, amongst others, that the courts below were wrong to have pierced the corporate veil based on the single economic unit test.

The Federal Court dismissed the appeal of Perfect Solution and Tony Ong. In essence, the Federal Court held that the courts below had lifted the corporate veil based on a finding of fraud practised by Tony Ong against Keller and not by the application of the single economic unit test. As such, the Federal Court remarked that the argument advanced by Perfect Solution and Tony Ong on the single economic unit point was academic.

Having said that, the Federal Court went on to say that the single economic unit test is not sufficient to justify the lifting of the corporate veil and held that such is the position "whether in the High Court in civil cases or in the Industrial Court in relation to industrial law claims".

Commentary: The Effect Of *Keller* In Industrial Law Claims

Reading in its proper context, it can hardly be said that the Federal Court's statement relating to the single economic unit test was necessary for reaching the decision to dismiss the appeal. In fact, this was expressly acknowledged by the Federal Court that:

> *"As stated at the outset, the second question, particularly in relation to the application of the single economic unit test being relegated solely to the Industrial Court does not, therefore, fall for specific consideration in the instant appeal."*

In the circumstances, the Federal Court's statements relating to the single economic unit test seem to be merely obiter and are not binding as a precedent. Further, industrial law claims as a class should be distinguished from the general civil cases. In industrial law claims, an employee's continuity of employment is vital to determine the extent of the employee's entitlement and dismissal protection. However, it is a commercial reality that companies would transfer their employees to other companies in the same group for various

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reasons. Injustice will result if the corporate veil is allowed to artificially break the continuity of an employee's employment.

In *Ahmad Zahri Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 6 CLJ 557, the appellant was employed by AIMS Data Centre 2 Sdn Bhd (AIMS Data) as a consultant since 2009. In 2012, he was renewed as a consultant in AIMS Cyberjaya Sdn Bhd (AIMS Cyberjaya) due to the phasing out of AIMS Data, which was subsequently consolidated into AIMS Cyberjaya. In 2013, AIMS Cyberjaya served a notice of expiry to dismiss the appellant.

AIMS Cyberjaya submitted that it was entitled not to renew the appellant's employment because the appellant was only employed in 2012 and was not a permanent employee. This argument was rejected by the Federal Court, which found that the appellant's contract of employment was a continuous one from AIMS Data to AIMS Cyberjaya. In the process, the Federal Court applied the single economic unit test and pierced the corporate veils between AIMS Data and AIMS Cyberjaya. The Federal Court recognised that the single economic unit test "*is particularly significant in ascertaining the continuity of employment for the scope of dismissal protection*..." and that the corporate veil "... *should not be an obstacle to defeat the legitimate entitlements of wrongfully dismissed employees. This approach has its root on the general notions of fairness, equality and proportionality in the treatment of vulnerable employees*".

Indeed, the single economic unit test is a necessary tool for the Industrial Court to carry out its duty to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form. Taking into account the context of *Keller* and the jurisprudence of industrial and employment law as discussed above, the author takes the view that the single economic unit test remains applicable and a vital feature in industrial law claims.

Authored by Hayden Tan Chee Khoon, an associate from the firm's Dispute Resolution practice.

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