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CONTENTS

Legal Scribes is an online publication that aims to include case notes, commentaries, legislative updates and succinct articles on contemporary issues relating to the law and legal community.

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Editor's Foreword

1. This issue of Legal Scribes features two commentaries on cases of interest by our students at the School of Law, Singapore University of Social Sciences.

2. Mr Kester Tan Yuan Ran (who is a student on the JD Programme) has written an article on the "oversupply defence" in criminal law, *viz*, where persons accused of drug trafficking raise the defence that they were mistakenly supplied with more drugs than they had ordered.

3. Mr Oh Jin Han (who is a student on the JD Programme) has written an article on whether the law of incorporation or the governing law of the contract ought to apply to determine whether a company's corporate veil can be pierced.

4. Additionally, Mr Alexander Woon (who is a Lecturer at the School of Law) offers his insight into why some types of wrongdoing are probed by the police, whereas other types of wrongdoing lead instead to a civil claim.

5. We are most grateful to our Dean, Professor Leslie Chew, SC, for his review of and comments on this edition of Legal Scribes. We are also grateful to the Faculty Advisors, Mr Paul Cheong Yuen and Mr Lance Ang, for their insightful comments on the student articles in this edition.

6. We hope you enjoy reading this latest issue of Legal Scribes.

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Editor, Legal Scribes
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Article

Given More Than I Ordered: The Oversupply Defence

Lee Zheng Da Eddie v Public Prosecutor and another appeal

[2023] SGCA 36

I. Introduction

1 A possible defence for persons accused of drug trafficking is that they were mistakenly supplied with more drugs than they had ordered. The Singapore Court of Appeal in *Lee Zheng Da Eddie v Public Prosecutor and another appeal* [2023] SGCA 36 ("***Eddie Lee***") recently dealt with this defence, which they termed the "Oversupply Defence".[1] The Court of Appeal held that the burden of proof for the defence lay with the accused, Lee Zheng Da Eddie ("**Lee**"), who had not made out the Oversupply Defence on the balance of probabilities.

2 Lee's Oversupply Defence was plagued by the fact that it was made belatedly, almost three years after the cautioned statement was made. The Court of Appeal held that the real reason for Lee's switch and subsequent reliance on the Oversupply Defence was that his original lie "became untenable".[2] It flatly rejected Lee's claim that he was switching to the Oversupply Defence because he "came clean and admitted to the truth".[3]

II. Background Facts

3 It is undisputed that Lee consumed and trafficked drugs around the time of the offence and he would purchase drugs from his Malaysian suppliers both for his own consumption and for sale to his customers in Singapore.[4] His co-accused, Yap Peng Keong, Darren ("**Yap**"), was his customer and worked as a private hire driver.

[1] *Eddie Lee* at [37].
[2] *Eddie Lee* at [43].
[3] *Eddie Lee* at [41].
[4] *Eddie Lee* at [3].

4 On 4 July 2018, Lee arranged over Telegram for Yap to collect drugs that evening and bring it to his hotel room in the Pan Pacific Singapore. Prior to the collection of drugs, Lee passed Yap $16,000 in cash for the drugs he was to collect later that night.[5]

5 Yap collected three bundles of heroin wrapped in newspaper and two blocks of cannabis wrapped in transparent packaging and proceeded towards the hotel. Yap then placed one block of cannabis under the front passenger seat before heading up to the room with the remaining drugs. According to the Statement of Agreed Fact dated 19 July 2021,[6] Lee then weighed the three bundles of heroin using a weighing scale on the table.

6 Shortly afterwards, officers from the Central Narcotics Bureau ("**CNB**") entered the room and arrested them. The CNB officers seized the three bundles and a block of cannabis, along with drug-related paraphernalia. The three one-pound bundles of heroin were later analysed by the Health Sciences Authority and were found to collectively contain not less than 24.21g of diamorphine, which attracts the mandatory death penalty.[7]

III. The Applicable Law

7 The law on the operation of the presumptions in ss 17 and 18 of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("**MDA**") framed the arguments made in Lee's appeal.[8] While the evidentiary burden remains with the Prosecution in proving its case, the use of a presumption shifts the burden of proof to the Accused regarding the specific facts which can be presumed; in such a case, the burden of proof lies with the Accused to disprove those facts. Here, the burden of proof shifted to Lee in answering the case against him, since the presumption of trafficking in s 17(c) of the MDA was relied on.[9] In other words, Lee bore the burden of establishing the evidence to prove his Oversupply Defence, on a balance of probabilities, to rebut the presumption under s 17(c) of the MDA.[10]

[5] *Eddie Lee* at [8].
[6] *Eddie Lee* at [10].
[7] *Eddie Lee* at [9].
[8] *Eddie Lee* at [34].
[9] *Eddie Lee* at [35] and [36].
[10] *Eddie Lee* at [38].

IV. The High Court Decision

8 The trial judge ("**the Judge**") imposed the mandatory death penalty on Lee pursuant to s 33(1) read with the First Schedule to the MDA. Relying on the presumption in s 17(c) of the MDA, the Judge found that the elements of possession and knowledge of the trafficking charge under s 5(1)(a) read with s 5(2) of the MDA were not contested and were thus proven beyond a reasonable doubt against Lee.[11] Second and more importantly, the Judge further held that Lee did not prove the Oversupply Defence on a balance of probabilities[12] because: (a) Lee's account lacked credibility;[13] (b) Lee's evidence could not be believed;[14] and (c) Yap's evidence did not support the Oversupply Defence.[15] Therefore, Lee was unable to rebut the presumption under s 17(c) of the MDA. This formed the crux of Lee's arguments on appeal, which goes toward the credibility of the Oversupply Defence.[16]

V. Lee's appeal and the issues in contention

9 Lee's arguments on appeal thus focused on the Oversupply Defence. He argued that the Judge erred in dismissing the Oversupply Defence on the basis that:

(a) Lee lacked credibility; and

(b) the Judge wrongly rejected certain points and thus failed to consider key portions of Lee's evidence.[17]

10 The main issues in contention before the Court of Appeal were as follows:[18]

(a) Whether the Judge was correct in finding that Lee did not prove the Oversupply Defence;

(b) Whether the Judge erred in his assessment of Lee's credibility;

[11] *Eddie Lee* at [16].
[12] *Eddie Lee* at [17].
[13] *Eddie Lee* at [18].
[14] *Eddie Lee* at [19].
[15] *Eddie Lee* at [20].
[16] *Eddie Lee* at [37].
[17] *Eddie Lee* at [24].
[18] *Eddie Lee* at [32].

(c) Whether the Judge was justified in drawing an adverse inference against Lee for not mentioning the Oversupply Defence in the cautioned statement; and

(d) Whether the Judge placed too much weight on the fact that Yap's evidence did not support the Oversupply Defence.

A. Lee did not prove the Oversupply Defence

11 The Court of Appeal held that the Judge was correct in finding that Lee did not prove the Oversupply Defence on a balance of probabilities,[19] not only because his testamentary evidence could not be believed, but also because the objective evidence did not support it.

12 First, the Court of Appeal dealt with the characterisation of Lee's Oversupply Defence. Viewing the timing of the switch from his initial account in light of the additional evidence extended to the Defence, the Court held that the real reason for Lee's switch and subsequent reliance on the Oversupply Defence was that his original lie "became untenable".[20] The Court rejected the narrative presented by Lee's counsel that the switch occurred because Lee "came clean and admitted to the truth".[21] Therefore, little weight was given to his testamentary evidence.

13 Next, the Court of Appeal considered the objective evidence relied on by Lee. Essentially, the nature and quality of the phone records, taken together with the fact that he did not unlock Phone A9 (which could have been used to prove his defence), did not corroborate Lee's Oversupply Defence.[22] In other words, the burden of proof was on Lee to prove his own defence. Lee was unable to establish the content of the calls and messages due to his failure to disclose the password to Phone A9. It followed that Lee's submission that the phone records, on their own, proved his version of events must necessarily fail.

14 Additionally, the Court of Appeal also considered Yap's evidence in view of Lee's assertion that his dealer was going to take back the excess diamorphine.[23] However, the Court

[19] *Eddie Lee* at [39].
[20] *Eddie Lee* at [43].
[21] *Eddie Lee* at [41].
[22] *Eddie Lee* at [48].
[23] *Eddie Lee* at [49].

of Appeal eventually found that Yap's evidence also did not support Lee's Oversupply Defence, given Yap's admission at trial that his earlier evidence was a lie.[24]

15 The Court of Appeal also considered Lee's other contentions. First, they found that Lee did not prove the truth of his contention, which was raised only at trial, that he had ordered three half-pound bundles of heroin for his customers (as opposed to the one-pound bundles that were seized).[25] Next, the Court of Appeal found that Lee's argument that he would not have trafficked in the quantity of drugs supplied as he was intending to plead guilty to another drug consumption charge was wholly independent – it did not support or corroborate the Oversupply Defence.[26]

16 In contrast, the Court of Appeal found a key strand of evidence[27] that undermined Lee's Oversupply Defence, *viz*, that the amount of cash Lee passed to Yap for the purpose of paying for the drugs was consistent with the amount of drugs seized.[28] The Court of Appeal thus held that Lee's inability to offer any reasonable explanation for this, along with the shifting stance he took in his explanations, was indicative of the defence being made up.[29]

B. The Judge did not err in his assessment of Lee's credibility

17 The Court of Appeal held that based on the inconsistencies in the various versions provided by Lee on the events that transpired on 4 July 2018, they agreed with the Judge's assessment of his credibility.[30] The arguments that were made by Lee on appeal, *viz*, that his credibility should be redeemed because he faced inner turmoil and came clean eventually,[31] were not persuasive because they were premised on the Oversupply Defence first being established on a balance of probabilities.[32] Additionally, even if the fact of his delayed disclosure was not taken into account, the facts in his amended case for the defence do not prove his Oversupply Defence.[33]

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[24] *Eddie Lee* at [51].
[25] *Eddie Lee* at [52].
[26] *Eddie Lee* at [53].
[27] *Eddie Lee* at [54].
[28] *Eddie Lee* at [55].
[29] *Eddie Lee* at [56].
[30] *Eddie Lee* at [59].
[31] *Eddie Lee* at [58].
[32] *Eddie Lee* at [59].
[33] *Eddie Lee* at [61].

C. The Judge was justified in drawing an adverse inference against Lee for his omission of the Oversupply Defence from the cautioned statement

18 The credibility of the Oversupply Defence was called into question because it was conspicuously absent from his cautioned statement and only raised belatedly.[34] The Court of Appeal held that pursuant to s 261 of the Criminal Procedure Code 2010 ("**CPC**"), it is trite that adverse inferences may be drawn from the accused person's failure to mention any fact or matter relevant to his defence in his cautioned statement,[35] especially since he would have been served with a notice (pursuant to s 23(1) of the CPC) informing him that the failure to do so might result in a negative effect on his case later on.[36]

19 The Court of Appeal was also unable to accept both of Lee's explanations for the delay. Firstly, his alleged mistake that he believed he would have faced a capital charge regardless of whether he had ordered less drugs was not believable because he was given multiple opportunities to present the Oversupply Defence earlier but failed to do so.[37]

20 Since Lee's explanations for the delay in furnishing the Oversupply Defence were rejected, the Court of Appeal found no countervailing considerations that would weigh against drawing an adverse inference against Lee for his omission of the Oversupply Defence in his cautioned statement. The Court of Appeal thus concluded that the Judge was justified in doing so.[38]

D. The Judge did not place too much weight on the fact that Yap's evidence did not support the Oversupply Defence

21 The Court of Appeal also briefly dealt with and dismissed Lee's submission that that the Judge placed too much weight on the fact that Yap's evidence did not support the Oversupply Defence. The Court of Appeal highlighted that the reason why Yap's evidence was addressed in that manner by the Judge was because Lee himself relied on it to buttress his case on the Oversupply Defence in his closing submissions at trial.[39]

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[34] *Eddie Lee* at [62].
[35] *Eddie Lee* at [69].
[36] *Eddie Lee* at [69].
[37] *Eddie Lee* at [64].
[38] *Eddie Lee* at [69].
[39] *Eddie Lee* at [69].

VI. Conclusion

22 This case highlights the importance of the cautioned statement in criminal proceedings since the Court of Appeal reiterated that a failure to mention any fact or matter relevant to one's defence might lead to an adverse inference being drawn.[40] The inconsistencies in Lee's various versions of the events that transpired on 4 July 2018, along with the fact that he raised the Oversupply Defence belatedly, led to his credibility being undermined. This resulted in the Court of Appeal coming to the conclusion that it was more likely than not that the Oversupply Defence was made up.

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[40] *Eddie Lee* at [69].

Article

Piercing the Corporate Veil: *Lex contractus* or *lex incorporationis*?

Nicholas Eng Teng Cheng v Government of the City of Buenos Aires

[2024] SGCA 15

I. Introduction

1 Companies are separate legal entities,[1] and its members are shielded from personal liability save for a few common law and statutory exceptions. This doctrine of separate legal personality creates what is frequently described as a corporate veil between the company and its controllers. The exceptions serve to "lift" the corporate veil to hold the company's controllers personally accountable for the company's liabilities. A separate legal identity promotes "commerce and industrial growth",[2] and has been described as the "bedrock of company law not just in Singapore but also throughout the common law world".[3] Courts, therefore, are not minded to exercise their discretion to lift the veil unless they deem it truly necessary to do so.

2 The existence of a company's separate legal personality is largely justified by policy considerations.[4] Indeed, a decision to disregard separate legal personality and hold a member personally liable also flows from the same.[5] Given that policy considerations vary from one jurisdiction to the next, the tests for lifting the veil are also necessarily different across jurisdictions. Until recently, there was some uncertainty as to what law should apply to determine whether a company's veil should be lifted, particularly where the law of the forum differs from the company's place of incorporation.

[1] *Salomon v. A. Salomon & Co. Ltd*., [1897] A.C. 22 (H.L.) 38.
[2] Glazer v. Comm'n on Ethics for Public Employees, 431 So. 2d 752, 754 (La. 1983).
[3] *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [75].
[4] The doctrine of separate legal personality ensures controllers are not ordinarily liable for the company's conduct, distributing commercial risk and in turn facilitating investment and economic growth. See Tan Cheng Han SC, "Company Law" (2004) 5 SAL Ann Rev 125 at 125–126, paras 7.1–7.3, discussing *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162.
[5] Tan, Wang, Hofmann, *Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives*, NUS Law Working Paper 2018/025, September 2018, <www.law.nus.edu.sg/wps/>, at pp 10–17.

3 The recent Court of Appeal ("**CA**") case of *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] SGCA 15 ("***Eng v Buenos Aires***") addressed this issue. The main issue considered by the court was whether the law of incorporation or the governing law of the contract should apply to determine whether a company's corporate veil could be pierced to hold a controller personally liable for breach of a contract entered into by the company.

4 In this case, the contract was governed by Argentine law. The company, however, was incorporated in Singapore. In other words, the question before the court was whether Argentine law, which was the governing law of the contract (*lex contractus*), or Singapore law, the law of the jurisdiction in which the company was incorporated (*lex incorporationis*), applied to determine the lifting of the corporate veil.

II. Background

5 This case involves a transaction between the Government of the City of Buenos Aires (the "**Respondent**") and a Singapore-incorporated company named HN Singapore Pte Ltd ("**HN Singapore**") for the supply of Covid-19 test kits. Mr Nicholas Eng Teng Cheng (the "**Appellant**") was the sole director and shareholder of HN Singapore. At the time of incorporation, HN Singapore had a paid-up capital of S$1.

6 The Respondent entered into a contract with HN Singapore on 2 April 2020 for the purchase of 300,000 COVID-19 test kits for US$1,770,000 (the "**Purchase Price**"). On 6 April 2020, the Respondent paid the Purchase Price in full. There was a contractual variation on 12 April 2020 (the "**Varied SPA**") that reduced the number of test kits to 182,475, but the Purchase Price remained the same. HN Singapore eventually failed to deliver the test kits to the Respondent by the agreed delivery date of 26 April 2020. Consequently, the Respondent terminated the Varied SPA on 27 May 2020 on the basis that the non-delivery amounted to a repudiatory breach of the Varied SPA.

7 HN Singapore transferred US$1,532,380.65 back to the Respondent in June 2020, which amounted to roughly 86.6% of the Purchase Price. The Respondent later received a letter dated 20 July 2020 from the former solicitors of the Appellant, which stated that HN Singapore could not refund the balance sum of US$237,619.35 (the "**Balance Sum**") to the Respondent as it had been spent on "non-refundable charges, expenses and fees".

8 Following this, the Respondent commenced court proceedings for breach of contract and misrepresentation.[6] In tandem, the Respondent sought to lift HN Singapore's corporate veil to hold the Appellant personally liable. HN Singapore, in turn, counterclaimed for wrongful termination of the Varied SPA.

III. High Court's Decision

9 The Judge allowed the Respondent's claim for breach of contract but dismissed its claim in misrepresentation. In relation to the former, HN Singapore was found liable in damages for the Balance Sum. The Judge further ordered HN Singapore's corporate veil to be lifted and the Appellant was made personally liable to the Respondent for the Balance Sum. HN Singapore's counterclaim in unlawful termination was dismissed.

10 The Judge was persuaded that the Varied SPA was governed by Argentine law. Applying the three-stage test in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491, the Judge found that, on the second and third stage, the parties intended for Argentine law to govern the contract. Additionally, Argentine law had the closest and most real connection with the contract.[7]

11 This being so, the Judge relied on and accepted the evidence by the Respondent's expert witness, Dr Ezequiel Cassagne, that the Respondent was entitled to terminate the Varied SPA under Argentine law, owing to HN Singapore's failure to deliver the test kits.[8]

12 In deciding to lift the corporate veil, the Judge similarly applied Argentine law. This was done on the basis that the Varied SPA was governed by Argentine law. It thus followed that the law of the contract also applied to the issue of veil lifting. The Judge then considered Dr Cassagne's evidence that under Argentine law, a company's corporate veil could be lifted if it was undercapitalised relative to the transaction that it entered into.[9] It stood to reason that HN

[6] *Government of the City of Buenos Aires v HN Singapore Pte Ltd and another* [2023] SGHC 139 ("*Buenos Aires v HN Singapore*").
[7] *Buenos Aires v HN Singapore* at [64]–[72].
[8] *Buenos Aires v HN Singapore* at [84].
[9] Dr Cassagne's expert opinion was not challenged by the Appellant.

Singapore was undercapitalised as it only had a paid-up capital of S$1.[10] The Judge thus found that the corporate veil could be lifted under Argentine law.[11]

13 The Judge also observed that if the law of the contract was Singapore law, the corporate veil would *not* have been lifted.[12] On the *alter ego* ground, the Judge found that HN Singapore was not incorporated only to trade with the respondent, and there was no further evidence that the Appellant operated HN Singapore's bank account as if it was his own. There was also no evidence that the company was a sham, or that it was set up with the intention to commit fraud.[13]

IV. The Court of Appeal's Decision

A. Parties' arguments on appeal

14 In the appeal, the Appellants canvassed a new argument, proposing that the law of incorporation (*i.e.*, Singapore law) should have been applied to determine the issue of veil lifting instead of the law of the contract.[14] The Appellant's main argument was that Singapore law, as the law of incorporation, was inextricably linked to HN Singapore's corporate personality.[15] It thus followed that since the law of incorporation was already determinative of some matters related to veil lifting, applying the law of incorporation to the question of veil lifting itself would ensure a consistent result, independent of the different contracts entered into by a company. Further, the Appellant argued that applying the law of incorporation to the question of corporate veil lifting would be consonant with the approach in other jurisdictions.[16]

15 Conversely, the Appellant submitted that the law of contract should *not* be applied as the question of corporate veil lifting was related to the compact between the company and its members, and *not* the company's agreements with third parties.[17] In this connection, it would

[10] *Buenos Aires v HN Singapore* at [141].
[11] *Buenos Aires v HN Singapore* at [142].
[12] *Buenos Aires v HN* Singapore at [147]–[161].
[13] *Buenos Aires v HN* Singapore at [147]–[161].
[14] The argument before the High Court centred around determining whether Argentine law or Singapore law was the *lex contractus*. It was undisputed by both parties that the *lex contractus* applied to the issue of veil piercing: *id* at [140] and [142]. This point was also conceded in *Eng v Buenos Aires* at [22] by the appellant.
[15] *Eng v Buenos Aires* at [20].
[16] *Eng v Buenos Aires* at [20].
[17] *Eng v Buenos Aires* at [20].

be contrary to policy to apply the law of the contract as it risks exposing its members to a potentially wide ambit of scenarios where the company's veil might be lifted.[18]

16 The Respondent contended that the Appellant's liability stemmed from the Varied SPA, which was governed by Argentine law. Accordingly, the law of the contract should be applied as the lifting of the corporate veil was an issue that fell under the "consequences and reliefs" from the breach of contract.[19] The Respondent also submitted that the issue of corporate veil lifting was not concerned with the internal management of the company but instead involved the rights of external parties.[20]

B. Court of Appeal's decision

17 The CA held that as a general rule, the law of incorporation should be the first port of call when the issue of lifting the corporate veil is engaged.[21] However, the CA noted that it was possible to have exceptions to the general rule where the interests of justice demand, and in such cases the court may decide to apply the law of the forum or "some other more appropriate law".[22]

18 In commercial transactions, the law of incorporation was the constant. Applying the law of the contract (which can be varied) would result in much uncertainty and would lead to "governing law shopping".[23] Additionally, as the law of incorporation accords the company its separate legal personality, it must be that same law that creates the exceptions. This jurisdiction has a "paramount interest" in maintaining this distinction and in regulating the situations where the piercing of the corporate veil is allowed.[24]

19 The "consequences and reliefs"[25] that the Respondent alluded to in their argument referred to the right to terminate the contract and other appropriate remedies. This does *not* include lifting the corporate veil, as the foregoing is related to the status of the company as a separate legal entity and its relationship with its members.

[18] *Eng v Buenos Aires* at [20].
[19] *Eng v Buenos Aires* at [23].
[20] *Eng v Buenos Aires* at [25].
[21] *Eng v Buenos Aires* at [41].
[22] *Eng v Buenos Aires* at [41].
[23] *Eng v Buenos Aires* at [36].
[24] *Eng v Buenos Aires* at [40]
[25] *Eng v Buenos Aires* at [35].

20 The CA found that the case of *Akhmedova v Akhmedov* [2019] EWHC 1705 (Fam), which the Respondent relied heavily on, was not germane.[26] The lifting of the corporate veil was merely an incidental question in that case, and there was no contractual dispute to speak of. Ultimately, the CA was of the view that the law of the contract was unsuitable to be the governing law in the present case, and "probably" for other cross-border commercial cases as well.[27]

21 The CA held at [42] of the judgment[28] that on an exceptional basis, the corporate veil may be lifted in the following situations:

> (a) The law of its incorporation is the appropriate governing law, and that law allows the exception to be made; or
>
> (b) Where the court decides to invoke the exception but it is not available under the law of incorporation, but the court nonetheless wishes to do so as a matter of its policy:
>
> > (i) If the law of incorporation is the same as the law of the forum, then the court cannot create exceptions to separate corporate personality that are not already recognised by the law of incorporation.
> >
> > (ii) However, where the law of incorporation is some other law and the court considers that a liability has been shielded by using a company that is subject to that law which does not permit the lifting of the corporate veil, the court may nonetheless lift the corporate veil in such situations by applying the law of the forum.

22 Applying the above principles, the CA held that the law of Singapore, the jurisdiction in which HN Singapore was incorporated, should be applied in the present case. In doing so, the CA agreed with the Judge's finding that the *alter ego* ground was not made out, and the Appellants sole control of HN Singapore's account does not, *ipso facto*, render the company an *alter ego*.[29] In the final analysis, the corporate veil could not be lifted, and the Appellant was not personally liable for the company's breach.[30]

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[26] *Eng v Buenos Aires* at [38].
[27] *Eng v Buenos Aires* at [34] and [40].
[28] *Eng v Buenos Aires* at [34] and [40].
[29] *Eng v Buenos Aires* at [49]. See also *NEC Asia Pte Ltd v Picket & Rail Asia Pacific Pte Ltd* [2011] 2 SLR 565 at [36].
[30] *Eng v Buenos Aires* at [47]–[50].

V. Conclusion

23 In *Eng v Buenos Aires*, the CA set out the applicable framework[31] on the issue of veil piercing where there is a conflict of laws. In reaching its decision, policy considerations appear to undergird much of the court's rationale. Given the lacuna in the law prior to *Eng v Buenos Aires*, this development is very much welcomed and will be instructive for future cross-border commercial disputes.

24 It is the author's view that the CA was right to apply the law of incorporation as a starting point, as it is in line with the established principle that "all matters relating to the *status* of the corporation, such as issues of internal management and its capacity to enter legal relations, are governed by the law of incorporation".[32] This approach is also congruous with previous pronouncements by local courts.[33]

25 On the one hand, Singapore-incorporated companies have greater commercial certainty that questions of veil lifting before the Singapore courts will be determined in accordance with Singapore law even if the relevant contract is governed by foreign law (especially since in such instances the law of the forum and the law of incorporation are the same). On the other hand, controllers of foreign-incorporated companies should not assume that the Singapore courts will invariably apply the law of incorporation to determine whether the corporate veil should be lifted, since the court has the discretion to apply "some other more appropriate law", especially where the "interests of justice" demands (*e.g.*, where liability has been shielded).[34]

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[31] *Eng v Buenos Aires* at [42].
[32] *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, Rev 3rd Ed, 2009) at para 1.88.
[33] *JX Holdings Inc and another v Singapore Airlines Ltd* [2016] 5 SLR 988 at [21].
[34] *Eng v Buenos Aires*, at [41]–[42].

Explainer

Explainer: Why some wrongdoing is probed by the police but other instances can lead to a civil claim

Recently, a police report was filed against Kwon Do Hyeong, the co-founder of Terraform Labs, in relation to the crash of cryptocurrencies TerraUSD and Luna. However, it appears that the police are not investigating the matter.

This might be because there is no offence disclosed. Not all kinds of wrongdoing are necessarily criminal.

There is a distinction in Singapore's legal system between civil and criminal law: Civil cases are disputes between private parties, whereas criminal cases generally relate to wrongs against society that are enforced by the state.

For example, breach of contract is a common form of civil wrong and the correct legal procedure is to sue the person in breach.

This was what happened to blogger Ang Chiew Ting, known as Bong Qiu Qiu, who was sued in 2016 by social media advertising network ChurpChurp for allegedly breaching her contract and denying it of fees from what it said were commercial deals with more than 30 brands including cosmetic brands such as Laneige, Yves Saint Laurent and Etude House.

In contrast, for example, cheating is an offence — a criminal wrong — and the correct legal remedy is to prosecute the offender.

This is what happened to dentist Andy Joshua Warren, who in 2015 tried to circumvent Medisave claim limits by authorising the submission of false claims, cheating the Central Provident Fund (CPF) Board into disbursing S$11,250.

He was prosecuted and recently fined S$45,000 after pleading guilty to cheating charges.

Criminal cases are generally more serious. Unlike civil cases, if convicted, the offender can be deprived of his liberty or, for certain offences such as murder, even his life.

Parliament decides what constitutes criminal conduct. Offences are usually defined in Acts of Parliament, also known as statutes, such as the Penal Code.

POLICE INVESTIGATORY POWERS

The police are given special powers to investigate offences by law, for example, by the Criminal Procedure Code, which is a statute. These powers include, for example, the ability to compel the production of evidence, confiscate evidence, and take statements from any person necessary to the investigation.

However, the police must exercise these powers according to law. This is to prevent abuse of power and to preserve the civil rights of ordinary citizens. Powers of investigation are intrusive and should therefore be exercised only when strictly necessary.

The police exist to prevent and investigate crime. They are a public force dedicated to serving the public, and do not serve private interests.

Therefore, they are generally not involved in the investigation of civil wrongs – that would be an unjustified use of taxpayers' money.

In such cases, if no criminal wrong is disclosed in a report, the police will not exercise their powers of investigation.

WHO DECIDES IF AN OFFENCE IS DISCLOSED?

First, if it is obvious that no offence has been committed, the police may simply decline to investigate.

In Singapore, people are sometimes overzealous with reporting to the police: Anything from lost items to annoyance with neighbours' conduct to breach of business agreements.

The police need to prioritise scarce resources and not waste time on things that are just not criminal.

Second, the matter may be considered by the Attorney-General's Chambers (AGC).

The Attorney-General is the Public Prosecutor and, under the Constitution, has the power to start or stop any criminal proceedings.

If AGC determines that no offence has been disclosed, it may direct the police or any other investigating agency to take no further action.

For example, after reviewing the evidence, AGC directed that no further action be taken by the Ministry of Manpower against the family of former Changi Airport Group chairman Liew Mun Leong after it was alleged by his former domestic worker Parti Liyani that they had illegally deployed her at his son's home and office.

Third, any person may make a Magistrate's Complaint to the State Courts. A magistrate is a judicial officer — a judge — and, if there is sufficient cause, may look into the complaint or direct the police to carry out investigations.

WHAT CONSTITUTES A CIVIL WRONG?

Not all wrongs are civil wrongs. Civil wrongs require a legally recognised basis for beginning legal proceedings, known as a "cause of action", for example, breach of contract or negligence.

Generally, the complainant (known as the plaintiff) will have to gather his own evidence and start the case. Unlike the police, plaintiffs do not have any special powers of investigation, so sometimes it is difficult to do so.

However, the standard of proof in civil cases is lower. To win, the plaintiff needs to prove his case only on the balance of probabilities, meaning more likely true than not.

In criminal cases, in contrast, the prosecution needs to prove the case beyond reasonable doubt to obtain a conviction.

For simple cases, it is possible for a plaintiff to conduct the legal proceedings by himself. For example, the Small Claims Tribunal is designed specifically for simple civil cases in which lawyers are not required.

However, for more complex cases, usually a civil lawyer will be engaged to advise on an appropriate cause of action and represent the plaintiff in the legal proceedings.

Cases are either civil or criminal, never both. The law governing civil and criminal cases differs and it is therefore important to keep them distinct.

However, the same set of facts may give rise to two separate cases, one criminal and one civil, that proceed in parallel.

For example, a traffic accident might result in the offender being both prosecuted by the state for reckless driving and being separately sued by the victim for personal injury and property damage.

HOW DOES THIS APPLY TO RECENT CRYPTO CRASH?

In the recent cryptocurrency crash, first, it is not clear whether any offence has been committed. The fact that Luna and TerraUSD collapsed is not, without more, evidence of criminal activity.

Cryptocurrencies are inherently risky investments.

For the police to investigate, there would have to be some indication of criminal conduct such as cheating.

However, cheating requires dishonesty and deception, such as in the case of serial fraudster Kalimahton Samsuri who, between 2012 and 2015, deliberately deceived her victims into believing that she had various investment opportunities for them, which did not in fact exist.

In contrast, a genuine business that collapses out of bad luck or bad business conditions is not a criminal matter.

Second, it is also not clear that any civil wrong has been committed. There is no such thing as a completely risk-free investment and the fact that money has been lost is not necessarily reason for the law to intervene.

Affected investors would probably have to engage lawyers to determine whether they have any cause of action and whether they have sufficient evidence to prove it in court.

The law protects people from wrongdoing, not from risk or loss. If someone suffers loss because of their own decisions, misunderstandings, or plain bad luck, then sometimes, there is simply nothing the law can do.

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