

# Apex court considers application of *Prest* in piercing corporate veil

04 May 2021 | Contributed by [Gan Partnership](#)

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## Introduction

A separate legal entity – or rather, a 'corporate veil' – exists to separate a corporate entity from its incorporators upon incorporation. Citing the century-old case *Solomon v A Solomon & Co Ltd*,<sup>(1)</sup> Justice Nallini Pathmanathan stated the following in *Ong Leong Chiou v Keller (M) Sdn Bhd*:<sup>(2)</sup>

*The juristic principle comprising the bedrock of company law is the legal fiction that on incorporation, the corporate entity is clothed with a separate and distinct personality. It is a legal person distinct from its members.*<sup>(3)</sup>

It is also well established that the corporate veil can be lifted or pierced when the corporation is used for fraudulent, dishonest and unlawful purposes.

A century after *Solomon* was decided, the leading judgment by Lord Sumption in the UK Supreme Court case *Prest v Prest*<sup>(4)</sup> brought a new dimension to this fundamental principle. The Malaysian apex court carefully considered the application of *Prest* in its recent decision in *Ong Leong Chiou*.

## Facts

The appeal before the Federal Court arose from the non-payment of work done in respect of empty bore works of a project.

## Parties

The project to which the dispute related was to be constructed by Sime Darby Capitalmalls Asia (Melawati Mall) Sdn Bhd. Sime Darby then appointed Bina Puri Holdings Berhad as the main contractor of the project.

Bina Puri appointed Perfect Selection Sdn Bhd as the substructural works contractor to carry out contiguous bore pile works, foundation bore pile works (which consisted of empty bore works) and ground anchor works. Perfect Selection subsequently subcontracted the works to PS Bina Sdn Bhd, which in turn entered into a contract with Keller (M) Sdn Bhd. Keller was the actual entity that carried out the works. Tony Ong, the first appellant, was the common nexus between Perfect Selection and PS Bina as he was the managing director of the two companies at the material time.

## Dispute

The dispute at issue arose when Keller discovered that PS Bina had deducted the sum for the empty bore works from the interim payment certificates.

The contract for the provision of the earthworks stipulated that Bina Puri would not be making any payment for the empty bore works. However, this was not made known to Keller. On the contrary, Keller's letter of award provided that the empty bore works would be payable.

Prior to the award of works, Keller conducted a search on PS Bina and discovered that it had been incorporated recently, rendering Keller worried as to its assets and track record. Therefore, Keller did not execute its letter of award with PS Bina until its representatives had met with Ong. Ong assured Keller's representatives that the

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empty bore works would be paid for by Bina Puri. Keller wrote to PS Bina and indicated the estimated cost of the empty bore works. Despite the representations, Ong was aware that the empty bore works would not be paid for.

Relying on Ong's assurance, Keller further inserted a term (that was intended to be the condition precedent of the contract) that Bina Puri would provide a guarantee for the work done. Bina Puri never provided such a guarantee, but Keller proceeded with the work regardless. The foundation bore pile works proceeded smoothly and Keller was paid against PS Bina's certification of works done in the form of interim certificates. However, the sum for the empty bore works was later deducted.

After the completion of the empty bore works, the shareholding and directorship of PS Bina changed and the new shareholders and directors had no knowledge of PS Bina's obligation to Keller. Ong and the other directors resigned.

### **High court decision**

Based on all of the evidence and, among other things, the facts outlined above, the high court held that PS Bina, Perfect Solution and Ong had defrauded Keller in relation to the empty bore works and were jointly and severally liable for the sum owed to Keller for said works.

The high court also made the following findings:

- PS Bina was a facade and sham, used by Ong to protect Perfect Solution from paying for the empty bore works.
- Both Perfect Solution and PS Bina had been operated as a single economic unit and used by Ong to perpetrate fraud. Hence, it would be justifiable to disregard the corporate veil. Following that, the corporate veil of both companies should be lifted, thereby establishing joint and several liability against PS Bina, Perfect Solution and Ong.

### **Court of Appeal decision**

Upon appeal, the Court of Appeal affirmed the high court's findings in their entirety and agreed that the piercing of the corporate veil was justified.

### **Federal Court decision**

The Federal Court decision was significant for three reasons:

- it clarified the difference between lifting and piercing the corporate veil by referring to *Prest*;
- it clarified that fraud in itself allows for the lifting or disregarding of the corporate veil independently of the doctrine of piercing the corporate veil; and
- it acknowledged the pleading of fraud in a fashion other than textbook form (ie, a formal plea of fraud followed by the particulars).

The Federal Court considered *Prest* and its principles with regard to the circumstances that warrant the lifting and piercing of the corporate veil. These can be summarised as follows:

- A company's veil may be lifted if it is used for relevant wrongdoings.
- When the wrongdoings relate to an abuse of corporate personality as a facade, the concealment principle applies and no piercing of the corporate veil is necessary. This is because the court is not disregarding the facade but merely looking behind it to discover the facts which the corporate structure is concealing.
- When the wrongdoings relate to an abuse of corporate personality as a sham, the evasion principle applies and the corporate veil will be pierced if:
  - there is a legal right against the person in control of the company independent of the company's involvement; and
  - a company is interposed so that its separate legal personality will defeat the right or frustrate its enforcement.

The Federal Court was of the view that the court's ability to unravel transactions by reason of fraud is independent of the doctrine of piercing the veil as espoused by Lord Sumption in *Prest*. In other words, the application of the broad principle of fraud in itself warrants the corporate personalities of the companies being disregarded.

Against this analysis, the Federal Court concluded that liability was found against Ong and each of the companies by reason of fraud alone, without the invocation of the doctrine of the piercing of the corporate veil.

The Federal Court nonetheless proceeded to consider the application of the evasion principle in *Prest* as an

alternate rationale for imposing liability on Ong, PS Bina and Perfect Solution. Applying the analysis of *Prest* summarised above, the Federal Court found that the evasion principle applied as the interposition of PS Bina was to enable its separate legal personality to defeat Keller's right against Ong in relation to the outstanding debts owed for the empty bore works. Thus, the piercing of the corporate veil was justified. Also, the high court had been justified in piercing the corporate veil to deprive Ong and his agents of the benefits obtained through the use of PS Bina's separate legal entity.

## Comment

In Malaysia, it is an established principle that corporate personality will be disregarded when it is used to perpetrate actual or equitable fraud. However, the principles of lifting and piercing the corporate veil had not been clearly distinguished in the past, save in several occasions where the high court drew a distinction between the piercing and lifting of the corporate veil.<sup>(5)</sup> Now, the Federal Court, speaking through Justice Pathmanathan, has given authoritative guidance in regard to the concepts of lifting and piercing the corporate veil by adopting Lord Sumption's analysis in *Prest*, although it cautioned that the analysis should not be applied too rigidly.

With regard to the principle of fraud, it is significant that the Federal Court made clear that the principle of fraud in itself warrants the corporate personalities of the companies to be disregarded, without invoking the doctrine. It is also noteworthy that the Federal Court acknowledged the pleading of fraud although fraud was not pleaded in the form prescribed – namely, a formal plea of fraud followed by the particulars. This should be confined to circumstances such as those of the present case where the substance of the statement of claim inexorably pointed to a plea of fraud.

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## Endnotes

(1) (1897) AC 22.

(2) Civil Appeal 02(F) – 23-03/2019(W).

(3) *Ong Leong Chiou v Keller (M) Sdn Bhd* [Civil Appeal 02(F) – 23-03/2019(W)], Paragraph 1.

(4) [2013] 4 All ER 673.

(5) *Dr HK Fong BrainBuilder Pte Ltd v SG-Maths Sdn Bhd* [2018] 11 MLJ 701 and *KTL Sdn Bhd v Leong Oow Lai* [2014] 1 LNS 427.

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