



CORPORATE LITIGATION:

DO YOU EVEN LIFT...THE CORPORATE VEIL?

INTRODUCTION Ever wondered how business owners are able to pay off huge sums of their company's debts? Well the simple answer is, they don't. When a company is incorporated, it is deemed to be a **separate legal entity** that is distinct and separate from its members such that a 'corporate veil' is said to be drawn to separate between the company and its members or directors. In other words, the company's rights and liabilities are their own and not that of the individual business owner's. This principle has long been established in the English case of *Salomon v Salomon & Co Ltd*¹ ('Salomon') and has been adopted within the Malaysian jurisdiction as well.

This article discusses the facts, issues and judgment of the recent Federal Court decision in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors.*²

HISTORY In 2006, our Federal Court³ held that the doctrine of separate legal entity and the lifting and/or piercing of the corporate veil can only be done under special circumstances where it can be shown that a company is being used as a façade to conceal the true facts of the matter. In 2015, the Federal Court in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Ponnusamy & Ors*⁴ ('Gurbachan') further expanded the doctrine by including the existence of fraud as one of the circumstances which allows the Court to lift and/or pierce the corporate veil, which brings the effect of holding the party committing fraud liable for their actions even when they are a member of the company.

Recently, our Federal Court revisited this principle in *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* where the Federal Court also had the opportunity to consider the decision of the English Supreme Court in *Prest v Prest and others*⁵ ('Prest'). We will discuss the impact of this recent decision by the Federal Court on Malaysian law in this article.

BRIEF FACTS OF THE CASE The Plaintiff, Keller (M) Sdn Bhd ("Keller") was the sub-contractor in the Melawati Mall project, a project to construct a 10-storey shopping mall and business complex in Pusat Bandar Melawati, Kuala Lumpur ("Project"). Their claim was for monies due and owing to them for works done in the Project.

¹ [1897] AC 22

² [2021] MLJU 393.

³ [2006] 1 MLJ 97

⁴ [2015] 1 MLJ 773

⁵ [2013] 4 All ER 673

The Project was initially awarded by the Project owner to Bina Puri Holdings Berhad (“**Bina Puri**”). Bina Puri then sub-contracted the works to Perfect Selection Sdn Bhd (“**Perfect Selection**”) and it was subsequently sub-contracted to PS Bina Sdn Bhd (“**PS Bina**”). Tony Ong was the majority shareholder of both PS Bina and Perfect Selection.

When Keller was first offered to be a sub-contractor in the Project by PS Bina, relevant searches was conducted on PS Bina which revealed that the company was newly incorporated and had no track record in doing the relevant works. As such, Keller decided against accepting the Project.

However, Tony Ong later convinced and assured Keller that he knew the major shareholder of Bina Puri, Tan Sri Tee (“**TST**”), and represented that TST had a vested interest in PS Bina. It was on this representation that Keller agreed to execute the agreement and was made sub-contractor to PS Bina.

Sometime during the subsistence of the Project, Keller stopped receiving progressive payments for their work. Upon further inquiry, it was discovered that in the contract between Perfect Selection and Bina Puri, it was stated amongst others, that Perfect Selection would not be paid for the works carried out by Keller. Hence, Perfect Selection was unable to pay PS Bina for the works and in turn, the payment was not made to Keller. This was clearly a breach of the agreement between Keller and PS Bina as it was not a “Pay When Paid Contract”⁶.

Keller filed a claim against all the parties on the basis of their fraudulent behavior as well as for the monies owed.

An analysis of the facts of the matter made it clear that the representations were made by Tony Ong to Keller, before the agreement was executed with full knowledge of the arrangement between all parties and was done to defraud Keller.

As such, the High Court held that Tony Ong, PS Bina and Perfect Solutions were liable for fraud against Keller. The Court of Appeal affirmed the High Court’s decision.

DECISION OF THE FEDERAL COURT Tony Ong and Perfect Solutions in their appeal to the Federal Court amongst others, argued that a clarification of the law in relation to the ‘lifting’ and ‘piercing’ of the corporate veil is necessary in Malaysian law especially in light of the relatively recent English Supreme Court decision in *Prest v Prest and others*⁷ (**‘Prest’**).

In essence, the decision in *Prest* highlighted that it is justified to pierce the corporate veil if a company’s separate legal personality is being abused for the purpose of **some relevant wrongdoing**. The real difficulty is to then identify what is a ‘relevant wrongdoing’ since references to using the company as a ‘façade’ and/or ‘sham’ which are commonly used in this regard are too vague.

⁶ In the case of *DEC Elec., Inc. v. Raphael Const. Corp.* 558 So. 2d 427 (Fla. 1990), the “pay when paid” language can be interpreted as establishing a condition precedent in which payment must first be received from the owner before it can be paid out to the service provider, or, on the other hand, as simply fixing a reasonable time frame for when payment is to be made.

⁷ [2013] 4 All ER 673

The Federal Court further held that there are 2 distinct principles that lie behind the terms 'façade' and 'sham', which are the principles of concealment and evasion.

a) **Principle of concealment**

This is applicable when the wrongdoing relates to the abuse of the corporate personality as a 'façade' to conceal the identity of the real actors. Under this principle, there is no piercing of the corporate veil since the Court can look behind the façade to discover the real facts that the actors are concealing.

b) **Principle of evasion**

This relates to circumstances when there is a legal right available against the controller of the company, independently of the company's involvement. Under this principle, the company is intentionally interposed in the circumstance to frustrate the enforcement of the right or to defeat the legal right. In this circumstance, the corporate veil is pierced in order to impose liability on the controller, the company, or both.

While the Federal Court agreed with the points above and their applicability in this jurisdiction, they also concurred with the decision of the High Court and the Court of Appeal, and was of the view that the principles laid out in **Gurbachan** whereby the element of fraud is deemed sufficient to pierce the corporate veil was applicable in the present case, and affirmed that Tony Ong, PS Bina and Perfect Solutions were liable in this case.

RECENT DEVELOPMENTS ON THE DOCTRINE OF PIERCING THE CORPORATE VEIL IN MALAYSIA

The Federal Court's judgment in this case is the first decision by the apex court which considered the concealment and evasion principles in **Prest** and whether the same is applicable in Malaysia.

The effect of the Federal Court's decision on the position in law on the lifting and/or piercing of the corporate veil are as follows:-

- a) It has been a long accepted position of law in Malaysia that the Court will lift and/or pierce the corporate veil if a company was set up for fraudulent purposes and the principle of "*fraud unravels all*" remains as set out by the Federal Court in **Gurbachan**. This position in law remains correct, relevant and ought not to be lightly tampered with and **subsists outside of the doctrine of 'piercing' the corporate veil as explained in Prest**.
- b) In relation to **Prest** and its applicability in Malaysian Law, the Federal Court **agreed with the legal rationale prescribed by Lord Sumption in Prest**, which explains that in order to ascertain whether the veil of incorporation ought to be 'pierced' or 'lifted', the nature of the wrongdoing in issue ought to be analyzed to ascertain whether it falls within the purview of the 'concealment' principle or the 'evasion' principle as discussed above.
- c) Hence, it can be said that the position in law on lifting and piercing of the corporate veil has been expanded to also include the principles set out by Lord Sumption in **Prest** and will hereon subsist alongside the position in law as set out in **Gurbachan**.

CONCLUSION The Federal Court’s judgment clarifies further the law concerning the lifting and/or piercing of the corporate veil in Malaysia and puts it in line with the English position.

As a result of the introduction of the principles in ***Prest***, the Courts will now be able to analyze with greater accuracy on whether the doctrine of “*separate legal personality*” as established in ***Salomon*** should be upheld or can be disregarded.

Authors



[Farah Shuhadah Razali](#)



[Sharanya Visualingam](#)



[Muneeba Ubaidi Hishamudin](#)

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Zul Rafique & partners
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