ONG LEONG CHIOU & ANOR v. KELLER (M) SDN BHD & ORS

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 02(F)-23-03-2019(W)]
25 MARCH 2021

COMPANY LAW: *Corporate personality – Veil of incorporation – Lifting/piercing of veil between company and members – Legal entity of corporate body utilised for fraudulent, dishonest or unlawful purposes – Whether director perpetrating abuse could hide behind separate corporate personality – Whether court could lift/pierce corporate veil – Whether veil of incorporation could be disregarded – Applicability of 'fraud unravels all' principle – Applicability of doctrine where it is alleged that there were joint tortfeasors and joint liability sought to be established – Whether single economic unit test confined to Industrial Court matters*

The dispute in the present appeal stemmed from the construction of the Melawati Mall ('project') by Sime Darby Capitalmalls Asia (Melawati Mall) Sdn Bhd ('Sime Darby'). Sime Darby appointed Bina Puri Holdings Bhd ('Bina Puri'), as the main contractor for the project, which in turn appointed Perfect Selection Sdn Bhd ('Perfect Selection') as the sub-structural works contractor. The directors of Perfect Selection were one Tony Ong Leong Chiou ('Tony') and one Liew. Perfect Selection, in turn, subcontracted the sub-structural works to PS Bina Sdn Bhd ('PS Bina') which had three directors and shareholders, namely Tony, Liew and one Chang. The common nexus between Perfect Selection and PS Bina was Tony and Liew. PS Bina then sub-contracted the works out to Keller (M) Sdn Bhd ('Keller') and Keller was the entity that carried out (i) the contiguous bore pile ('CBP') works; (ii) the foundation bore pile ('FBP') works; and (iii) the ground anchor ('GA') works ('works'). Prior to the incorporation of PS Bina, Keller was invited by Chang, on behalf of CTF Build Sdn Bhd, to quote for the CBP and FBP works for the project. Keller received two blank bills of quantities and the second bill had a missing page, indicating that the empty bore ('EB') works would not be paid for and Keller was unaware of this fact. Further to negotiations, a letter of award ('LOA') for the CBP works was issued by the newly incorporated PS Bina, which was not the company that invited Keller to quote for the works, to Keller for a provisional sum of RM17.6 million. Keller's managing director met up with Tony and the latter made several untrue representations, inducing Keller to sign the LOA for the CBP works with PS Bina. Keller also sent its quotation for the FBP works to PS Bina. A second LOA was issued by PS Bina to Keller for the FBP works for a provisional sum of RM13.12 million. PS Bina issued a third LOA to Keller for the GA works for a provisional sum of RM7.2 million. Works under the

FBP proceeded smoothly and Keller was paid against PS Bina's certification of works done in the form of interim certificates. However, problems began when Keller discovered that PS Bina had reversed out a sum of RM4,520,824.21 for the EB works, which meant the sum was deducted. This was followed by a second reversal for the EB works for works completed under the ninth interim certificate for works completed. The value of works deducted under the ninth certificate, coupled with the value of works under the seventh certificate, which was never certified, amounted to RM7,448,469.67. Such decertification continued until the whole of the EB works in the sum of RM7,462,720.19 was reversed out. Having benefitted from the EB works carried out by Keller, and for which Keller was deliberately not paid, Keller discovered that Tony, Chang and Liew had resigned as directors of PS Bina and replaced their positions with persons who had no knowledge or comprehension of the company's obligations to Keller. At the High Court, the trial judge found that, *inter alia*, (i) in light of fraud or equitable fraud, it was only right that the corporate veils of Perfect Selection and PS Bina be lifted; and (ii) PS Bina, Perfect Selection and Tony were jointly and severally liable to Keller for the debt in relation to the performance of the EB works. The findings of the High Court were affirmed by the Court of Appeal. Hence, the present appeal which sought to challenge the well-accepted principles as to the circumstances in which the veil of incorporation could be disregarded. The questions that arose for determination were (i) the applicability of the doctrine where it is alleged that there are joint tortfeasors and joint liability is sought to be established ('first question'); and (ii) whether the single unit test expounded in *Lam Kam Loy & Anor v Boltex Sdn Bhd & Ors* ('*Lam*'s case) is confined to Industrial Court matters ('second question').

Held (dismissing appeal with costs)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) The evasion principle in *Prest v Prest & Ors* is only applicable if there is a legal right available against the controller of the company, independently of the company's involvement. The company is interposed to frustrate the enforcement of the right or to defeat the legal right. When applicable to a particular wrongdoing, it enables the court to pierce the veil and impose liability against the controller, the company, or both. Imposition of liability follows from the application of the evasion principle. Liability can devolve upon more than just the actor who is the alter ego of the company or series of companies. Liability can devolve on other related parties too. (paras 51 & 52)

(2) As the trial judge found fraud to have been perpetrated, that in itself warranted the allocation of liability to the perpetrators of the fraud, independently of the doctrine of piercing the corporate veil. The finding of fraud encompassed Tony, as well as the two companies which he controlled, Perfect Selection and PS Bina. The companies were 'utilised'

by Tony to enable the debt due to Keller to be evaded by Perfect Selection which enjoyed the profits of the FBP contract paid by Bina Puri, without paying for the EB works carried out by Keller, and which was a pre-requisite for the payment for the rest of the FBP works. PS Bina was utilised as a 'sham' company interposed between Perfect Selection and Keller, to ensure that no effective enforcement could be taken by Keller to recover the debt, which was deliberately contracted by Tony with Keller. The person in control who engineered the fraud was Tony. Perfect Selection was the recipient of the benefit gained from the fraud so perpetrated, because it received payment from Bina Puri while being held insulated from the debt due and owing for the EB works, which comprised a part of the FBP contract. It was in this context that the trial judge ordered that all three of them, Tony and the two companies, as jointly and severally liable. The fraud could not have been perpetrated without any one of the three entities. (para 55)

(3) The law treats the use of a company as a means of evading the law as dishonest. That was precisely the situation here, warranting the court disregarding the corporate personality of: (i) PS Bina, which was created as a 'sham' to defraud Keller; (ii) the use of Perfect Selection to evade payment of a debt and enforcement of the same, by ensuring that this entity was utilised to contract with Bina Puri, such that monies received were placed beyond the reach of Keller; (iii) the perpetration of the scheme by the main controller of the two companies or puppeteer, Tony; and (iv) the companies were utilised as Tony's agents to perpetrate the fraud against Keller and evade liability for the debt. To that extent, the two companies were utilised as engines of fraud. The application of this broad principle founded on the finding of fraud, in itself warranted the corporate personalities of the companies being disregarded. In other words, liability was found against Tony and each of the companies by reason of the fraud alone, without the invocation of the doctrine of the piercing of the corporate veil. (paras 58 & 59)

(4) The key question in applying the evasion principle for the purposes of 'piercing the corporate veil' was this: was there an existing liability or obligation of Tony with which liability or obligation the PS Bina was sought to be identified? The answer was that there was an existing liability or obligation of Tony to Keller based on his misrepresentations which caused them to enter into the contract, followed by his inducements that they complete the works, knowing full well that such payments for the EB works would be reversed as there would be no payment forthcoming from Bina Puri for the EB works. Keller enjoyed a legal right against Tony, who was in control of PS Bina, which existed independently of the company's involvement. Perfect Selection was, at all times, the agent of Tony that enabled Tony to benefit from the

evasion of the debt due and owing to Keller. PS Bina was formed so that its separate legal personality would defeat or frustrate Keller's rights against Tony or frustrate the enforcement of its debt. If so, then the court was entitled to pierce the corporate veil. The High Court, as affirmed by the Court of Appeal, did not err in piercing the corporate veil of PS Bina for the purpose of depriving Tony and its agent, Perfect Selection, of the advantage they would otherwise have obtained by the utilisation of PS Bina's separate legal personality. (paras 63, 64 & 67)

(5) As is the case in the United Kingdom ('UK'), it is an accepted position in law in Malaysia that the court will lift the corporate veil if a company was set up for fraudulent purposes. The 'fraud unravels all' principle expounded in *Lazarus v. Beasley* is applied. That is the primary and relevant principle that is applicable in the instant case. *Law*'s case adopted the position in the UK as set out in *Adams v. Cape Industries Plc* where the wide and somewhat vague test of lifting the corporate veil 'in the interests of justice' was expressly overruled. (paras 91 & 97)

(6) The two questions were not material issues of law that surfaced in the course of the case in the High Court or the Court of Appeal. The first question purported to consider the applicability of the principle of the disregarding of the corporate veil in a situation where there were 'joint tortfeasors' and 'joint liability' sought to be established under what must amount to a 'tort'. Otherwise the parties could not be 'joint tortfeasors'. However, no tort was pleaded nor tortious relief sought as a matter of fact or law in the instant case. It was also submitted that the doctrine of the piercing of the corporate veil and joint tortfeasorship were incompatible because joint tortfeasorship implied that each tortfeasor is a separate legal personality while on piercing the veil of incorporation, the parties are somehow condensed into one true actor. This, in turn, precluded the application or finding of joint tortfeasorship. This was a misapprehension of the entire appeal for two reasons: (i) Keller's claim was not founded in tort. Therefore, no concept of tortfeasorship ever came into play; and (ii) it could not be said that the principle of piercing the corporate veil could never apply in a tortious claim. The conclusion that upon application of the doctrine, all liability devolves on one party who is the 'alter-ego', was an incorrect understanding of the law. On the rare occasions on which the corporate veil is pierced, liability may well devolve on more than one entity, depending on the facts of the case. So a categorical statement that the doctrine could not subsist alongside a finding of joint tortfeasorship was flawed in law. Such a claim did not arise in this appeal. (paras 100, 101, 103 & 104)

(7) The court declined to answer the first question because it miscomprehended, at best, and misstated at worst, the facts and the law in relation to the appeal. The question was also predicated on an incorrect comprehension of the law because it assumed that in a joint tortfeasorship context, the piercing of the corporate veil must result in liability devolving on only one entity or person, and not any other party to the dispute because only one person is the alter-ego. This conflated and misapprehended the position in law when the doctrine is applied. On piercing, liability can devolve on more than one party to the dispute. Further, the proposition that the doctrine is incompatible in law with joint tortfeasorship was erroneous and unsupported in law. Most importantly, this entire argument was theoretical and unfounded on the facts and the law. Any attempt to answer the first question would result in a theoretical response with no bearing to the factual matrix or the claim in law. (paras 110-112)

(8) In answer to the second question, the question misstated the relevant findings of the trial court and sought to obtain an answer relegating *Law*'s case to the confines of the Industrial Court. That, in itself, was an incorrect premise, as it was predicated upon a misunderstanding of the *ratio* in *Law*'s case. However, the further point to be made was that the *Law*'s case was applicable in all courts, and not to be confined to the Industrial Court. To that extent, the second question could not be answered as framed, and the court declined to do so. (paras 124-126)

Bahasa Melayu *Headnotes*

Pertikaian dalam rayuan ini timbul susulan pembinaan Melawati Mall ('projek') oleh Sime Darby Capitalmalls Asia (Melawati Mall) Sdn Bhd ('Sime Darby'). Sime Darby melantik Bina Puri Holdings Bhd ('Bina Puri'), sebagai kontraktor utama projek, yang seterusnya melantik Perfect Selection Sdn Bhd ('Perfect Selection') sebagai kontraktor kerja-kerja sub-struktur. Barisan pengarah Perfect Selection terdiri daripada seorang bernama Tony Ong Leong Chiou ('Tony') dan seorang lagi bernama Liew. Perfect Selection seterusnya melantik PS Bina Sdn Bhd ('PS Bina') sebagai subkontraktor kerja-kerja sub-struktur dan PS Bina mempunyai tiga pengarah dan pemegang saham iaitu Tony, Liew dan seorang bernama Chang. Kaitan bersama antara Perfect Selection dan PS Bina ialah Tony dan Liew. PS Bina kemudian melantik Keller (M) Sdn Bhd ('Keller) sebagai subkontraktor kerja-kerja dan Keller ialah entiti yang menjalankan (i) kerja-kerja *contiguous bore pile* ('CBP'); (ii) kerja-kerja *foundation bore pile* ('FBP'); dan (iii) kerja-kerja *ground anchor* ('GA'). Sebelum pemerbadanan PS Bina, Keller dipelawa oleh Chang, mewakili CTF Build Sdn Bhd, untuk menawarkan kerja-kerja CBP dan FBP projek. Keller menerima dua bil kuantiti yang kosong dan bil kedua kehilangan satu muka surat lantas menunjukkan kerja-kerja *empty bore* ('EB') tidak akan dibayar dan Keller tidak sedar akan fakta ini. Berikutan beberapa

rundingan, satu surat award ('LOA') untuk kerja-kerja CBP dikeluarkan oleh PS Bina yang baru diperbadan, yang juga bukan syarikat yang mempelawa Keller untuk menawarkan kerja-kerja tersebut, untuk jumlah bersyarat sebanyak RM17.6 juta. Pengarah urusan Keller bertemu dengan Tony dan Tony membuat beberapa representasi yang tidak benar, mempengaruhi Keller untuk menandatangani LOA untuk kerja-kerja CBP dengan PS Bina. Keller juga mengemukakan tawaran untuk kerja-kerja FBP kepada PS Bina. LOA kedua dikeluarkan oleh PS Bina kepada Keller untuk kerja-kerja FBP dengan jumlah bersyarat sebanyak RM13.12 juta. PS Bina mengeluarkan LOA ketiga pada Keller untuk kerja-kerja GA dalam jumlah bersyarat RM7.2 juta. Kerja-kerja bawah FBP berjalan lancar dan Keller dibayar PS Bina selaras dengan perakuan kerja-kerja yang dijalankan dalam bentuk perakuan-perakuan interim. Walau bagaimanapun, masalah timbul apabila Keller mendapati PS Bina telah menarik keluar jumlah sebanyak RM4,520,824.21 untuk kerja-kerja EB, yang bermaksud jumlah tersebut telah ditolak. Ini disusuli oleh penarikan kedua untuk kerja-kerja EB untuk kerja-kerja yang disempurnakan bawah perakuan interim kesembilan untuk kerja-kerja yang disempurnakan. Nilai kerja-kerja yang ditolak bawah perakuan kesembilan, serta nilai kerja-kerja bawah perakuan ketujuh, yang tidak diperakui, berjumlah RM7,448,469.67. Ketidakakuan ini berterusan hingga keseluruhan kerja-kerja EB berjumlah RM7,462,720.19 ditarik keluar. Setelah memperoleh manfaat daripada kerja-kerja EB yang dijalankan oleh Keller, yang dengan sengaja Keller tidak dibayar, Keller mendapat tahu bahawa Tony, Chang dan Liew telah meletak jawatan sebagai pengarah PS Bina dan menggantikan kedudukan mereka dengan individu-individu yang tidak mempunyai pengetahuan atau tidak faham akan kewajipan syarikat pada Keller. Di Mahkamah Tinggi, hakim bicara mendapati, antara lain, (i) ekoran penipuan atau penipuan berekuiti, adalah wajar bahawa tirai perbadanan Perfect Selection dan PS Bina disingkap; dan (ii) PS Bina, Perfect Selection dan Tony bertanggungan pada Keller, secara bersama-sama dan berasingan, berkaitan pelaksanaan kerja-kerja EB. Dapatan-dapatan Mahkamah Tinggi disahkan oleh Mahkamah Rayuan. Maka timbul rayuan ini yang cuba mencabar prinsip-prinsip tersedia terima tentang hal-hal keadaan apabila tirai perbadanan boleh ditolak tepi. Soalan-soalan yang timbul untuk diputuskan adalah (i) pemakaian doktrin apabila didalihkan bahawa terdapat pelaku-pelaku tort bersama dan liabiliti bersama hendak dibuktikan ('soalan pertama'); dan (ii) sama ada ujian satu unit dalam *Lam Kam Loy & Anor v. Boltex Sdn Bhd & Ors* ('kes *Lam*') terbatas pada hal-hal Mahkamah Perusahaan ('soalan kedua').

Diputuskan (menolak rayuan dengan kos)
Oleh Nallini Pathmanathan menyampaikan penghakiman mahkamah:

(1) Prinsip pengelakkan dalam *Prest v. Prest & Ors* hanya terpakai jika terdapat hak perundangan tersebut terhadap pengawal syarikat, bebas daripada penglibatan syarikat. Syarikat ditempatkan untuk menggagalkan pelaksanaan hak atau menggagalkan hak perundangan. Apabila terpakai

pada satu-satu salah laku, ini membolehkan mahkamah menembusi tirai dan mengenakan tanggungan terhadap pengawal syarikat, syarikat, atau kedua-duanya. Pengenaan tanggungan adalah berikutan pemakaian prinsip pengelakkan. Tanggungan boleh diturunkan pada lebih daripada pelaku yang menjadi alter ego syarikat atau beberapa siri syarikat. Tanggungan juga boleh diturunkan pada lain-lain pihak berkaitan.

(2) Oleh kerana hakim bicara mendapati penipuan telah dilakukan, ini dengan sendirinya mewajarkan pengenaan tanggungan pada pelaku-pelaku penipuan, bebas daripada doktrin penembusan tirai perbadanan. Dapatan penipuan meliputi Tony, dan juga dua syarikat yang dikawal Tony, Perfect Selection dan PS Bina. Syarikat-syarikat ini diguna oleh Tony demi mengakrukan hutang pada Keller agar dielak oleh Perfect Selection yang menikmati keuntungan kontrak FBP yang dibayar oleh Bina Puri, tanpa membayar kerja-kerja EB yang dilaksanakan oleh Keller, dan yang menjadi pra-syarat bayaran baki kerja-kerja FBP. PS Bina menggunakan syarikat palsu ini yang diletakkan antara Perfect Selection dan Keller, untuk memastikan tiada pelaksanaan berkesan boleh diambil oleh Keller untuk memperoleh hutang, yang sengaja dikontrak oleh Tony dengan Keller. Orang yang mengawal, yang menjalankan penipuan ini, ialah Tony. Perfect Selection ialah penerima manfaat yang diperoleh daripada penipuan yang dilakukan kerana menerima bayaran daripada Bina Puri sementara dipisahkan daripada hutang untuk kerja-kerja EB, yang terdiri daripada sebahagian kontrak FBP. Dalam konteks inilah hakim bicara memerintahkan ketiga-tiga mereka, Tony dan dua syarikat bertanggungan secara bersama dan berasingan. Penipuan ini tidak boleh dilakukan tanpa mana-mana satu daripada tiga entiti ini.

(3) Undang-undang menganggap penggunaan syarikat sebagai cara mengelak undang-undang sebagai tidak jujur. Inilah situasi yang berlaku dalam kes ini, mewajarkan mahkamah menolak tepi personaliti korporat: (i) PS Bina, yang dibentuk sebagai 'palsu' untuk menipu Keller; (ii) penggunaan Perfect Selection untuk mengelak bayaran hutang dan pelaksanaannya, dengan memastikan entiti ini digunakan untuk berkontrak dengan Bina Puri dan wang yang diterima diletakkan jauh daripada gapaian Keller; (iii) pelakuan skima ini oleh pengawal utama dua-dua syarikat atau dalang, Tony: dan (iv) syarikat-syarikat diguna sebagai ejen Tony untuk melakukan penipuan terhadap Keller dan mengelak tanggungan untuk hutang. Setakat itu, dua syarikat tersebut diguna sebagai jentera penipuan. Pemakaian prinsip meluas ini berdasarkan dapatan penipuan, ini dengan sendirinya mewajarkan personaliti korporat kedua-dua syarikat ditolak tepi. Dalam kata lain, tanggungan didapati terhadap Tony dan setiap syarikat atas alasan penipuan sahaja, tanpa bangkitan doktrin penembusan tirai perbadanan.

(4) Soalan utama dalam mengguna pakai prinsip pengelakkan untuk tujuan 'menembus tabir perbadanan' adalah: sama ada wujud tanggungan atau kewajipan oleh Tony yang dengannya tanggungan atau kewajipan PS Bina ingin dikenal pasti. Jawapannya ialah wujud tanggungan atau kewajipan oleh Tony pada Keller berdasarkan respresentasi-representasinya yang menyebabkan mereka memeterai kontrak, diikuti dengan pengaruhnya bahawa mereka menyempurnakan kerja-kerja, dengan penuh pengetahuan bahawa bayaran-bayaran sedemikian untuk kerja-kerja EB akan ditarik kerana tiada bayaran oleh Bina Puri untuk kerja-kerja EB. Dalam kata lain, Keller menikmati hak perundangan terhadap Tony, yang mengawal PS Bina, yang wujud bebas daripada penglibatan syarikat. Perfect Selection adalah, pada setiap masa, ejen Tony yang membolehkan Tony memperoleh manfaat daripada pengelakkan hutang pada Keller. PS Bina dibentuk agar personaliti asingnya bawah undang-undang akan menggagalkan hak-hak Keller terhadap Tony atau menggagalkan pelaksanaan hutangnya. Jika demikian, mahkamah berhak menembusi tirai perbadanan. Mahkamah Tinggi, seperti yang disahkan oleh Mahkamah Rayuan, tidak terkhilaf dalam menembusi tirai perbadanan PS Bina untuk tujuan, menghalang Tony dan ejennya, Perfect Selection, akan kelebihan yang mereka mungkin peroleh dengan menggunakan personaliti asing PS Bina bawah undang-undang.

(5) Seperti dalam situasi di United Kingdom ('UK'), kedudukan yang diterima di Malaysia ialah mahkamah akan menyingkap tabir perbadanan jika syarikat ditubuhkan untuk tujuan penipuan. Prinsip 'penipuan merungkai kesemuanya' dalam *Lazarus v. Beasley* terpakai. Ini adalah prinsip utama dan relevan yang terpakai dalam kes ini. Kes *Law* mengguna pakai kedudukan di UK, seperti yang dinyatakan dalam *Adams v. Cape Industries Pls* yang mana ujian meluas dan samar dalam menyingkap tabir perbadanan 'demi kepentingan keadilan' nyata ditolak.

(6) Dua soalan tersebut bukan isu-isu material bawah undang-undang yang terbit dalam penjalanan kes di Mahkamah Tinggi atau Mahkamah Rayuan. Soalan pertama bertujuan mempertimbangkan pemakaian prinsip pengetepian tirai perbadanan dalam situasi apabila terdapat 'pelaku bersama tort' dan 'tanggungan bersama' yang ingin dibuktikan bawah apa-apa yang semestinya terjumlah sebagai 'tort'. Jika tidak, pihak-pihak tidak boleh menjadi 'pelaku tort bersama'. Walau bagaimanapun, tiada tort diplidkan, mahupun relief-relief tort dipohon sebagai perkara fakta atau undang-undang dalam kes ini. Dihujahkan juga bahawa doktrin penembusan tirai perbadanan dan pelakuan bersama tort tidak sesuai kerana pelakuan bersama tort menyiratkan bahawa setiap pelaku tort ialah personaliti asing bawah undang-undang manakala apabila menembusi tirai perbadanan, pihak dipadatkan

menjadi satu pelaku sebenar. Dihujahkan selanjutnya bahawa ini akan mengecualikan pemakaian atau dapatan pelakuan bersama tort. Ini satu silap faham keseluruhan rayuan atas dua sebab: (i) tuntutan Keller bukan berasaskan tort. Oleh itu, tiada konsep pelakuan tort yang beroperasi; dan (ii) tidak boleh dikatakan bahawa prinsip menembusi tirai perbadanan tidak boleh terpakai dalam tuntutan tort. Kesimpulan bahawa dengan pemakaian doktrin, kesemua tanggungan diturunkan pada satu pihak yang menjadi alter ego adalah salah fahaman undang-undang. Dalam keadaan-keadaan luar biasa apabila tabir perbadanan ditembusi, tanggungan boleh diturunkan pada lebih satu entiti, bergantung pada fakta kes. Kenyataan mutlak bahawa doktrin tersebut tidak boleh wujud selari dengan dapatan pelakuan bersama tort cacat bawah undang-undang. Tuntutan sedemikian tidak timbul dalam rayuan ini.

(7) Mahkamah ini enggan menjawab soalan pertama kerana soalan pertama, paling tidak, tersalah faham dan teruk sekali menyatakan dengan salah, fakta dan undang-undang berkaitan rayuan. Soalan ini juga berdasarkan silap fahaman undang-undang kerana menganggap bahawa dalam konteks pelakuan bersama tort, penembusan tirai perbadanan mestilah menyebabkan tanggungan diturunkan daripada satu entiti atau orang, dan bukan mana-mana pihak yang bertikai kerana satu orang yang menjadi alter-ego. Ini menggabungkan dan satu silap faham kedudukan bawah undang-undang apabila doktrin ini dipakai. Apabila ditembusi, tanggungan boleh diturunkan pada lebih satu pihak yang bertikai. Selanjutnya, cadangan bahawa doktrin ini tidak sesuai, bawah undang-undang, dengan pelaku bersama tort adalah satu kekhilafan dan tidak disokong undang-undang. Lebih penting lagi, hujahan ini cuma satu teori dan tidak berasas berdasarkan fakta dan undang-undang. Apa-apa usaha menjawab soalan pertama adalah satu respon berbentuk teori tanpa kerelevanan dengan rentetan fakta atau tuntutan bawah undang-undang.

(8) Jawapan untuk soalan kedua ialah soalan ini salah dalam menyatakan dapatan-dapatan relevan mahkamah bicara dan bertujuan memperoleh jawapan yang menempatkan kes *Law* dalam batasan Mahkamah Perusahaan. Ini dengan sendirinya satu teori yang tidak benar kerana berdasarkan salah faham *ratio* dalam kes *Law.* Walau bagaimanapun, pendapat lanjut yang harus ditekankan adalah bahawa kes *Law* terpakai pada kesemua mahkamah dan bukan terbatas pada Mahkamah Perusahaan. Setakat itu, soalan kedua, seperti yang dirangkakan, tidak boleh dijawab dan mahkamah enggan menjawabnya.

Case(s) referred to:

A v. A [2007] EWHC 99 ***(refd)***
Adams v. Cape Industries Plc [1990] Ch 433 ***(refd)***
Carlyle v. Royal Bank of Scotland Plc [2015] UKSC 13 ***(refd)***
Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Gencor ACP Ltd v. Dalby [2000] 2 BCLC 734 ***(refd)***
Gilford Motor Company Ltd v. Horne [1933] Ch 935 ***(refd)***
Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***
Henderson v. Foxworth Investments Limited and Another [2014] UKSC 41 ***(refd)***
Jones v. Lipman [1962] 1 All ER 442 ***(refd)***
Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***
Lazarus Estates v. Beasley [1956] 1 All ER 341 ***(refd)***
MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***
Persad v. Singh per Lord Neuberger [2017] UKPC 32 ***(refd)***
Prest v. Prest and others [2013] 4 All ER 673 ***(refd)***
Raphael Pura v. Insas Bhd & Ors [2003] 1 CLJ 61 FC ***(refd)***
Salomon v. A Salomon & Co Ltd [1897] AC 22 ***(refd)***
Solid Investments Ltd v. Alcatel-Lucent (M) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***
Sun Life Assurance Co of Canada v. Jervis [1944] 1 All ER 469 ***(refd)***
Takako Sakao v. Ng Pek Yuan & Anor [2010] 1 CLJ 381 FC ***(refd)***
Trustor AB v. Smallbone [2001] 3 All ER 987 ***(refd)***
VTB Capital Inc v. Nutritek [2013] UKSC 5 ***(refd)***

For the appellants - Malik Imtiaz, Peter Douglas Ling, Chan Wei June & Yip Yiu Junn Ivor; M/s Peter Ling & Co
For the 1st respondent - Richard Kok, Leong Wai Hong, Karen Tan & Tan Ko Xin; M/s Rhiza & Richard
For the 2nd & 3rd respondents - Unrepresented

[Editor's note: For the Court of Appeal judgment, please see Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors And Another Appeal [2019] 1 LNS 26 (affirmed); For the High Court judgment please see [2017] 1 LNS 1302 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] 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 (*Salomon v. A Salomon & Co Ltd* [1897] AC 22 ('*Salomon v. Salomon*')). There subsists a 'veil' between the company and its members that

separates them for purposes of liability, property, capacity, and in relation to acts done or the acquisition of rights. The natural persons who are the incorporators are ignored.

[2] However, the veil of incorporation is not entirely inviolable. One of the well-recognised and accepted exceptions to the principle of the separate personality of a company is where the legal entity of a corporate body is utilised for fraudulent, dishonest or unlawful purposes. Those seeds of limitation were set out in the *locus classicus* of *Saloman v. Saloman* (above) itself by Lord Davey:

> If … the company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the [Companies] Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanour … he may be proceeded against civilly or criminally ...

[3] In such circumstances, the person or persons perpetrating such abuse cannot hide behind the separate corporate personality. The courts will "break" the shell of incorporation, by utilising the doctrine of the "lifting or piercing of the corporate veil". Our law journals are replete with case law on this subject.

[4] The instant appeal seeks to challenge those well-accepted principles as to the circumstances in which the veil of incorporation can be disregarded. The specific issues in respect of which leave was granted in this appeal include:

(i) The applicability of the doctrine where it is alleged that there are joint tortfeasors and joint liability is sought to be established;

(ii) Whether the single economic unit test as expounded in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355; [2005] MLJU 225 ('*Law Kam Loy v. Boltex*') is confined to Industrial Court matters.

[5] At the outset, it should be highlighted that the two questions of law did not feature in any material, substantial or significant manner in the parties' case either in the High Court or the Court of Appeal. In order to appreciate this fact, it is necessary to consider the factual background of the case.

Salient Background Facts

[6] The factual background has been comprehensively set out in the judgement of the trial court as well as the submissions of the appellant and the first respondent, and I summarise the facts salient to this appeal from those sources.

The Parties

[7] The first appellant, Ong Leong Chiou ('Tony Ong') was the first defendant in the trial court and was found to be the 'mastermind' or 'puppeteer' behind the second appellant, Perfect Selection Sdn Bhd ('Perfect Selection') as well as the third respondent company. Perfect Selection was the third defendant in the trial court.

[8] The third respondent, PS Bina Sdn Bhd ('PS Bina') was the company that entered into contracts for the earthworks with the plaintiff. It was the second defendant in the trial court. It did not participate in this appeal, as the judgment granted against it was not disputed by the appellants.

[9] The two appellants and the third respondent above were found to be jointly and severally liable for the monies claimed by the plaintiff in the suit.

[10] The first respondent, Keller (M) Sdn Bhd ('plaintiff') was the plaintiff in the trial court. The second respondent, Bina Puri Holdings Berhad ('Bina Puri') was the fourth defendant in the trial court, and did not participate in this appeal.

The Facts Leading Up To The Dispute

[11] The dispute between the parties centres around the construction of the Melawati Mall project ('the project'), a ten storey shopping mall and business complex. The project was constructed *vide* a joint venture company, Sime Darby Capitalmalls Asia (Melawati Mall) Sdn Bhd ('Sime Darby'). In 2013, Sime Darby appointed Bina Puri as the main contractor for the project.

[12] Bina Puri in turn appointed Perfect Selection (the second appellant here) as the sub-structural works contractor. The directors of Perfect Selection are Tony Ong and one Liew Pok Boon ('Liew') each enjoying a 50% shareholding in the company.

[13] Perfect Selection in turn sub-contracted the sub-structural works to PS Bina. PS Bina is a company which was incorporated on 4 October 2013. At that time, it had three directors and shareholders in the following proportions: one Chang Sin Fei ('Chang') who held 30%; Tony Ong who held 40% and Liew who held 30%.

[14] The plaintiff's involvement with the project is that it carried out the actual works comprising:

(i) Contiguous Bore Pile ('CBP') works;

(ii) Foundation Bore Pile ('FBP') works; and

(iii) Ground Anchor ('GA') works.

[15] The plaintiff was the entity to which PS Bina sub-contracted the said works.

[16] The overall picture is that Bina Puri, the contractor, contracted the works out to Perfect Solution who in turn sub-contracted it out to PS Bina, who in turn sub-contracted the works out to the plaintiff. The plaintiff is the entity that carried out the actual works.

[17] It is of relevance that Perfect Solution deliberately sub-contracted the works out to PS Bina, rather than directly to the plaintiff. The common nexus between Perfect Solution and PS Bina was Tony Ong and secondarily Liew.

[18] On 13 September 2013, prior to the incorporation of PS Bina, the plaintiff was invited by Chang on behalf of another entity, CTF Build Sdn Bhd to quote for the CBP and FBP works for the project. It is important to highlight that the plaintiff received two blank bills of quantities. The second bill had a page missing. This is relevant because that missing page stipulated that empty bore works ('EBW') would NOT be paid for. So the plaintiff was unaware of this fact. This is relevant because the entire claim in this case relates to non-payment of work done by the plaintiff in respect of these empty bore works in the sum of RM7,462,720.19.

[19] Further to negotiations, on 21 October 2013, a letter of award for the CBP works was issued by the newly incorporated PS Bina to the plaintiff for a provisional sum of RM17.6 million. It was not the company that had invited the plaintiff to quote for the works. Up to this time, PS Bina had never been mentioned. The plaintiff was uncomfortable and conducted a company search on PS Bina. The recent date of incorporation, the lack of assets and a track record worried the plaintiff. As such, the plaintiff decided not to return the letter of award for the CBP works until they had met with representatives from PS Bina.

[20] Prior to the meeting, as of 30 October 2013, Perfect Solution which was run by Tony Ong, was aware from the bill of quantities supplied by Bina Puri, the contractor, that earth bore works or EBW would not be paid for. This was in direct conflict with the letter of award sent out to the plaintiff, which represented that EBW would be paid for.

[21] On the same date, 30 October 2013, the plaintiff also wrote to PS Bina to state that the estimated costs of the EBW would be RM4.8 million. Again, the trial court found that Tony Ong was in direct control of PS Bina.

Findings By The Trial Court Of Misrepresentations Made By Tony Ong

[22] On 4 November 2013, Ir Yee Yew Weng ('PW1'), the plaintiff's managing director met up with Tony Ong. The trial court found that Tony Ong made several representations which were untrue, and which I summarise for ease below:

(i) Tony Ong was close to one Tan Sri Tee, a major shareholder of the main contractor, Bina Puri. He implied that he could utilise his friendship to influence Tan Sri Tee for purposes of procuring the sub-contract, and that was how he had procured the job for the project;

(ii) Tan Sri Tee had a vested interest in PS Bina;

(iii) PS Bina was under Tony Ong's control. He was also the managing director;

(iv) Tony would procure a guarantee from the main contractor Bina Puri, for the costs of the earthworks to be carried out by the plaintiff.

CBP Works (Contiguous Bore Pile Works)

[23] Premised on these assurances and representations, the plaintiff signed the letter of award for CBP works with PS Bina on the same day.

FBP Works (Foundation Bore Pile Works)

[24] It also sent its quotation for the FBP works to PS Bina for the attention of Tony Ong whom they understood to determine all matters in relation to PS Bina. On 12 November 2013, a second letter of award was issued by PS Bina to the plaintiff for the FBP works for a provisional sum of RM13.12 million. At all times, the plaintiff had made it clear in its proposal and the letter of award that EBW would be payable despite the fact that the quantities were not captured in the bill of quantities. In keeping with Tony Ong's representation at the 4 November 2013 meeting, the plaintiff inserted a further term namely that the main contractor, Bina Puri would provide a guarantee to the plaintiff for the works done. This guarantee was stated to be a condition precedent to the contract and to be provided within 14 days. However, such a guarantee from Bina Puri was never provided. Nonetheless, the plaintiff proceeded with the works.

GA Works (Ground Anchor Works)

[25] On 7 February 2014, PS Bina issued a third letter of award to the plaintiff for the GA works for a provisional sum of RM7.2 million. As with the FBP contract, cl. 26 provided that the main contractor, Bina Puri would provide a guarantee for the plaintiff's work.

Events After The Plaintiff Commenced Performance Of The Works

[26] Works under the FBP proceeded smoothly and the plaintiff was paid against PS Bina's certification of works done in the form of interim certificates. However, problems began with the sixth interim progress certificate. On receipt of this certificate some 15 days later, on 5 September 2014, the plaintiff found that PS Bina had reversed out a sum of RM4,520,824.21 for EBW. It meant that the stated sum was deducted.

[27] This was the first reversal and it was followed with a second reversal for EBW on 22 September 2014 for works completed under the ninth interim certificate for works completed in July 2014. The value of works deducted under the ninth certificate coupled with the value of works under the seventh certificate which was never certified, amounted to RM7,448,469.67.

[28] Such decertification continued until the whole of the EBW in the sum of RM7,462,720.19 was reversed out on 17 October 2014. The trial court found that such decertification had been so timed as to ensure that the EBW was first completed, otherwise it might have hindered the progress of works, which would have precluded Perfect Solution from claiming and benefiting from works actually undertaken by the plaintiff. The plaintiff subsequently discovered that in the primary contract between Bina Puri and Perfect Solution, it was expressly stipulated that Perfect Solution would not be paid for EBW.

[29] It was a finding of the trial court that Perfect Solution and PS Bina knew that the plaintiff would not be entitled to payment for EBW and Tony Ong was in control of both these companies. He had determined, overseen and issued the letters of award to the plaintiff and was at all times fully aware that EBW would not be paid by Bina Puri, the main contractor, to Perfect Solution.

[30] Despite this, Perfect Solution agreed to enter into a contract with a newly incorporated company with no assets, PS Bina, who in turn contracted with the plaintiff to pay a sum in excess of RM7 million for EBW under the FBP contract. In point of fact, PS Bina was created or interposed by Tony Ong to evade the liability for the EBW or earth bore works, which should have been borne by Perfect Solution. Put another way, D3 evaded the legal obligation to pay for the EBW through the interposition of D2 to evade such liability. This is borne out, *inter alia*, by the evidence and findings of the trial court as set out below.

Post-Reversal Of The Sum Of RM7.46 Million In Respect Of EBW Completed By The Plaintiff

[31] After having benefited from the EBW carried out by the plaintiff, and for which the plaintiff was deliberately not paid, the plaintiff discovered that both the shareholding and directorships of PS Bina were altered irrevocably. The shareholding of PS Bina was transferred to a foreign national who was a construction worker of Bangladeshi origin and a local person of Chinese origin. They were also named as the directors of PS Bina. Tony Ong, Chang and Liew had resigned as directors and replaced the company with these persons, who clearly had no knowledge or comprehension of the companies' obligations to the plaintiff. This was a clear indication of evasion of liability for the debt PS Bina incurred in relation to the EBW.

The Findings Of The High Court

[32] In arriving at the conclusion that PS Bina, Perfect Solution and Tony Ong were jointly and severally liable to the plaintiff for the debt in relation to the performance of the EBW, the trial court made the following relevant findings:

(i) In relation to PS Bina, which had contracted directly with the plaintiff, the trial judge found that PS Bina was liable to the plaintiff for the EBW. However, he allowed a counterclaim for rectification works. This is not in dispute here. Liability for breach of contract was therefore established and is also not in dispute in this appeal. This means that the quantum of the debt is not in issue. The primary basis for the appeal is in law in relation to the finding of a joint and several liability against Tony Ong and Perfect Solution;

(ii) The trial judge found it incredulous that Tony Ong, Perfect Solution and PS Bina could claim ignorance of the terms of the bill of quantities or the contract for the provision of the earthworks, particularly given the size of the contract. He concluded that the defendants, through Tony Ong were aware that the EBW would not be paid for by the main contractor, Bina Puri. This was corroborated by the deliberate failure to provide the plaintiff with the relevant page of the bill of quantities which stipulated clearly that the main contractor would not be making any payment for EBW;

(iii) The trial judge further found that Tony Ong and Perfect Solution knew that PS Bina would not be paid by Perfect Solution for the EBW, and that Perfect Solution would not be paid by Bina Puri for the EBW prior to, and after issuance of the letters of award to the plaintiff. He further found that despite knowing this fundamental fact which would affect the plaintiff adversely, Tony Ong, Perfect Solution and particularly PS Bina made no such disclosure to the plaintiff. None of them disputed, objected to or rebutted the term in the initial proposals or the final letter of award to the effect that the plaintiff would be paid for EBW. On the contrary, Tony Ong gave numerous assurances to the plaintiff that he knew Tan Sri Tee and could secure payment for the EBW;

(iv) Significantly, the trial judge found that Tony Ong's "fingerprints" were all over Perfect Solution and PS Bina being companies and "vehicles" controlled by him for the purposes of the project. He was the Managing Director of both companies and a majority shareholder. He was the one who had met with the plaintiff and made all the representations on behalf of both Perfect Solution and PS Bina, not to mention assurances in relation to the main contractor, Bina Puri;

(v) The trial judge found deceptive conduct on the part of Tony Ong on behalf of PS Bina in that when the plaintiff wrote on 30 October 2013 to advise that there was in the region of RM4.8 million of EBW to be carried out. This was met with complete silence. That silence was not broken even after Perfect Solution executed its contract with the main contractor, Bina Puri on 9 December 2013 where it was expressly stipulated that no monies would be paid by Bina Puri for EBW;

(vi) The trial judge found that such deliberate concealment was undertaken to ensure that the plaintiff would continue with, and complete the works;

(vii) The trial judge rejected the appellants' contention that the plaintiff ought to have stopped work and refused to continue when no guarantee was forthcoming. He found that it would have been extremely difficult for the plaintiff to do so when workers, machineries and piles had all been positioned at the site, ready to undertake the works. Instead, he accepted and found as a fact that Tony Ong had pleaded with, and persuaded the plaintiff to continue with the works giving the assurance that the guarantee would be procured. This meant that any waiver on the part of the plaintiff was irrelevant and that Tony Ong's conduct was material for the purposes of ascertaining liability on the part of Tony Ong himself and Perfect Solution for the debt created in favour of the plaintiff;

(viii) In evaluating the entirety of the evidence, the fact that Tony Ong, Perfect Solution and PS Bina knew that the plaintiff would never be paid for the EBW, that Bina Puri would not guarantee any such payment, that despite this, Tony Ong continued to persuade the plaintiff to complete the works, that the reversals and decertification only took place after the completion of the FBP works, that Tony Ong and the other two directors resigned and transferred their shareholding to wholly unconnected persons all led to a clear finding that Tony Ong, Perfect Solution and PS Bina had defrauded the plaintiff in relation to the EBW;

(ix) PS Bina was a mere façade and sham utilised by Tony Ong to shield Perfect Solution from having to pay out for the EBW. In short, Tony Ong had interposed PS Bina as a corporate entity with a view to ensuring that the plaintiff carried out the EBW and to protect Perfect Solution from a suit in contract for non-payment for the EBW carried out by the plaintiff;

(x) The trial judge found that the semblance of separate sub-contracts being entered into by Perfect Solution with PS Bina and PS Bina with the plaintiff was a "creation" as both entities were operating as a single economic unit under the control of Tony Ong. This is the only context in which the trial judge utilised the term "single economic unit". In finding that both companies were utilised interchangeably by Tony Ong, the trial judge relied on a plethora of evidence including the fact that numerous payments were made by Perfect Solution directly to the plaintiff, rather than PS Bina, if indeed the sub-contracts were genuine. The trial judge found that the entities were utilised by Tony Ong to

practise fraud or equitable fraud on the plaintiff. This is important because the trial judge did not utilise the single economic unit in itself to justify disregarding the corporate veil. Rather, his finding was that the operation of Perfect Solution and PS Bina interchangeably, by Tony Ong to perpetrate a fraud or an equitable fraud, justified the disregarding of the corporate veil;

(xi) The High Court found that in light of fraud or equitable fraud, it was only right that the corporate veils of Perfect Solution and PS Bina be lifted, thereby establishing liability against all three defendants, jointly and severally.

The Decision Of The Court Of Appeal

[33] The Court of Appeal affirmed and endorsed the careful and thorough findings of the High Court in its entirety. It also agreed with the trial judge on the law and that it was an appropriate case for the piercing of the corporate veil.

This Appeal

[34] The appellants, notwithstanding the legal questions put forward at the leave stage, have sought in their submissions to try and have the findings of fact made at the trial stage revisited, but there is clearly no basis for this court to do so. Firstly, the findings of fact made at the trial stage have been made only after a thorough examination and analysis of the evidence on record. It cannot be said that the trial judge was 'plainly wrong'. This phrase was defined by Lord Reed in the English Supreme Court case of *Henderson v. Foxworth Investments Limited and Another* [2014] UKSC 41 to mean "one that no reasonable judge could have reached". The cases discussing principles of appellate intervention have been set out at length in *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665 ('*MMC Oil & Gas*') (paras 5-19). We do not propose to repeat the same here, save to point out the passage from the UK Supreme Court in *Carlyle v. Royal Bank of Scotland Plc* [2015] UKSC 13 cited in para. 9 of *MMC Oil & Gas* (above) which disapproved of re-opening all questions of fact for redetermination on appeal having regard to the advantage and role which the first instance judge has in determining the facts. (see also *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309). In any event, it would be improper and erroneous in law for the appellants to seek to invalidate, annul or undo those well-predicated findings of fact at this appellate stage.

[35] The primary focus at this apex stage is to examine the law with a view to examine a novel point or to clarify the law relating to the doctrine in issue, if required. Having examined the record of evidence, I am of the view that there is no basis to depart from the clear findings of fact. To that extent, the appellants' submissions effectively inviting a reversal of the trial judge's

findings are firmly rejected. Before examining the questions of law before us, I turn first to consider the position in law in relation to the disregarding of the corporate veil.

The Position In Law In Relation To Disregarding The Corporate Veil

[36] It is necessary, in the context of this appeal, to turn to a consideration of the law relating to the disregarding of the corporate veil, often referred to variously and interchangeably as 'lifting' and 'piercing'.

[37] This is both necessary and important because in the present appeal, the appellants have further submitted that the law in this area is confused. It is further contended that the trial judge and the Court of Appeal conflated the various bases on which the corporate veil may be disregarded. It has also been submitted that clarification is warranted on the nomenclature relating to the 'lifting' and 'piercing' of the corporate veil. Are they synonymous terms or is there a difference?

[38] As such, clarification is necessary in relation to the doctrine of piercing the veil of incorporation of a company. This is particularly so in light of the relatively recent decision of the English Supreme Court decision of *Prest v. Prest and others* [2013] 4 All ER 673 ('*Prest*'). What is the extent of its application and ought it to be applied or adopted in this jurisdiction?

The Law On The Disregarding Of The Corporate Veil

[39] In the course of their submissions, the appellants contended the following, which warrants examination and analysis:

(i) The piercing of PS Bina's corporate veil, even if based on a proper finding of fraud, cannot result in a finding of joint and several liability, particularly against both the appellants together;

(ii) The trial court and the Court of Appeal confused joint tortfeasorship and/or single economic unit elements with corporate veil piercing principles in arriving at joint and several liability;

(iii) The appellants here contend that the trial judge in 'piercing' the corporate veil erred in law in that he failed to comprehend the distinction between 'lifting' and 'piercing' the corporate veil. This error, they maintain, if corrected, would result in this court concluding that both the courts below erred because these courts applied the doctrine of lifting the corporate veil to establish joint liability on the basis of joint tortfeasorship, which is wholly incorrect in law. This in turn is because corporate veil piercing is incompatible with joint and several liability.

[40] Accordingly, it is submitted that both judgments are flawed and ought to fall. These contentions are put forward on the basis of the appellants' counsel's reading of when the corporate veil may be lifted along the lines prescribed in *Prest*, a decision of the Supreme Court of the United Kingdom.

[41] The leading judgment in *Prest* was delivered by Lord Sumption where the legal rationale for the doctrine of lifting or piercing the corporate veil was dissected and analysed in considerable detail. It is important to bear in mind that of the seven judges who heard this appeal, Lord Sumption and Lord Neuberger were in agreement, while the other judges had caveats to add to Lord Sumption's legal analysis of the doctrine.

[42] In order to assess the accuracy of the appellants' submissions that even in the face of a finding of fraud, the trial court was not entitled to look behind or pierce the corporate veil, it is necessary to consider the judgment in *Prest* in its entirety, rather than to attempt to comprehend it on the basis of piecemeal passages.

[43] Lord Sumption, while embracing the juridical basis for, and the concept of a separate legal personality, accepted that the strict confines of the corporate personality "will not necessarily apply" if the dealings of persons natural or artificial are not honest or if the corporate personality is abused (see para. 18) He reiterated and affirmed Denning LJ's famous statement in *Lazarus Estates v. Beasley* [1956] 1 All ER 341 ('*Lazarus v. Beasley*') at 345:

> … No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister can be allowed to stand if it has been obtained by fraud. **Fraud unravels everything.** The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever … (emphasis added)

[44] I refer to the foregoing because in the instant appeal, the trial court found clear instances of dishonesty culminating in a finding of fraud, warranting the lifting or piercing of the corporate veil.

[45] Lord Sumption went on to hold that there are limited circumstances in which the use of a company as a means of evading the law is dishonest for this purpose. At para. 27 of the judgment in *Prest*, Lord Sumption expressed his view that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing. In the seminal paragraph of his judgment which is most often quoted, para. 28, he states:

> The difficulty is to identify what is a relevant wrongdoing. References to a 'façade' or 'sham' beg too many questions to provide a satisfactory answer. *It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle.* The *concealment principle* is legally banal and *does not involve piercing the corporate veil at all.* It is the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally

A relevant. In these cases the court is not disregarding the 'façade' but only looking behind it to discover the facts which the corporate structure is concealing. *The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its*
B *enforcement*. Many cases will fall into both categories but in some circumstances the difference between them may be critical …

(emphasis added)

[46] I comprehend this paragraph as stating that:

C (i) The company's veil of incorporation might be lifted if it is being utilised for some relevant wrongdoing;

(ii) The first step is to identify such relevant wrongdoing. In this context, the interchangeable use of 'façade' and 'sham' is too vague and gives rise to confusion;

D (iii) Two distinct principles lie behind the terms 'façade' and 'sham' respectively;

(iv) Where the wrongdoing relates to the abuse of the corporate personality as a 'façade', the principle to be applied is that of concealment. This
E principle does not entail the piercing of the corporate veil. The interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not prevent the courts from identifying the real actors. There is no piercing because the court is not disregarding the façade but looking behind it to discover the facts which the corporate structure is concealing;

F (v) Where the wrongdoing relates to the abuse of the corporate personality as a 'sham', the principle to be utilised is that of evasion. In evasion the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement and a company is interposed so that the separate legal
G personality of the company will defeat the right or frustrate its enforcement; and

(vi) Many cases will fall into both categories.

[47] The judgment in *Prest* then went on to consider a series of cases with
H a view to explaining how many of them did not entail the piercing of the corporate veil but which could be resolved by the utilisation of other traditional concepts of law such as principal and agent or the use of trusts.

[48] These included *Gilford Motor Company Ltd. v. Horne* [1933] Ch 935
I which Lord Sumption decreed was a correct application of the evasion principle, warranting piercing. Less so in *Jones v. Lipman* [1962] 1 All ER 442. Similarly he was of the view that in *Gencor ACP Ltd v. Dalby* [2000] 2 BCLC 734 and *Trustor AB v. Smallbone* [2001] 3 All ER 987 there was

confusion between the two principles as these cases more properly fell within the concealment principle, as the evasion principle was not engaged. This was because neither of the protagonists in these cases had utilised the company's separate legal personality to evade a liability they would otherwise have had.

[49] Their liability to account was more properly explained by the true facts that the companies in question had received monies as their respective agent or nominee. Lord Sumption concluded (at para. 35) by summarising that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court is then entitled to pierce the corporate veil for the purpose of depriving the company or its controller of the advantage they would otherwise have obtained by the company's separate legal personality. But if some other legal relationship may be utilised to resolve the matter, then piercing the corporate veil ought not to be the recourse.

[50] The consequences of applying the concealment and evasion principles in relation to the wrongdoing in issue also gives rise, theoretically at least, to different consequences in law. When the concealment principle is applicable to a particular wrongdoing, it follows that the court may disregard the corporate shell or personality to enable it to look behind the façade and determine the true facts that were being concealed by the use of the corporate personality. The latter does not preclude the court from determining the truth of the matter in issue. However, no piercing of the corporate veil is involved when applying the concealment principle to enable the court to look behind the façade of the corporate personality. The façade is disregarded in order to enable the court to look at the real facts behind the corporate structure. Or which have been hidden behind the corporate structure. Neither does it follow that liability is necessarily visited upon the corporate personality or the controller of the company.

[51] The evasion principle however, is only applicable if there is a legal right available against the controller of the company, independently of the company's involvement. The company is interposed to frustrate the enforcement of the right or to defeat the legal right.

[52] When applicable to a particular wrongdoing, it enables the court to pierce the veil and impose liability against the controller, the company, or both. Imposition of liability follows from the application of the evasion principle. It is therefore apparent that liability can devolve upon more than just the actor who is the *alter-ego* of the company or series of companies. Liability can devolve on other related parties too.

[53] However, in *Prest*, the Supreme Court noted and accepted that there is a body of case law that allows the corporate personality to be disregarded when there is fraud. It must be borne in mind that the present appeal deals with findings of fraud by the trial judge which have not been impeached.

Disregarding The Corporate Personality By Reason Of Fraud – An Entrenched Principle Outside Of The Doctrine Of Piercing Of The Corporate Veil

[54] It is important to note that the case-law in both this jurisdiction and the common law position in the United Kingdom recognises that there subsists a well-established principle that if a company's separate legal personality is being abused for the purpose of wrongdoing, the court is justified in disregarding the corporate personality of the company. The substantial body of case-law in favour of this proposition is considerable and even Lord Sumption in *Prest* stated that he "would not for my part be willing to explain that consensus out of existence." That is evident in the leading case of *Saloman v. Saloman* itself. It is also clear that where there is fraud, that fraud unravels everything as alluded to earlier (see Denning LJ in *Lazarus v. Beasley* (above)).

[55] Therefore, it is readily apparent in the instant case that as the trial judge found fraud to have been perpetrated, that in itself warrants the allocation of liability to the perpetrators of the fraud, independently of the doctrine of piercing the corporate veil as espoused by Lord Sumption. The finding of fraud encompassed Tony Ong as well as the two companies which he controlled, Perfect Solution and PS Bina. The companies were "utilised" by Tony Ong to enable the debt due to the plaintiff to be evaded by Perfect Solution which enjoyed the profits of the FBP contract paid by Bina Puri, without paying for the EBW carried out by the plaintiff, and which was a pre-requisite for the payment for the rest of the FBP works. PS Bina was utilised as a 'sham' company interposed between Perfect Solution and the plaintiff, to ensure that no effective enforcement could be taken by the plaintiff to recover the debt, which was deliberately contracted by Tony Ong with the plaintiff. The person in control who engineered the fraud was Tony Ong. Perfect Solution was the recipient of the benefit gained from the fraud so perpetrated, because it received payment from Bina Puri while being held insulated from the debt due and owing for the EBW, which comprised a part of the FBP contract. It is in this context that the trial judge ordered that all three of them, Tony Ong and the two companies were jointly and severally liable. The fraud could not have been perpetrated without any one of the three entities.

[56] The view that fraud enables the court to disregard the corporate personality of a company is fortified by the judgment of Lord Neuberger in *Prest*, who pointed out (at para. 83) that:

> … this limited doctrine may not, on analysis, be limited to piercing the corporate veil. However, there are three points to be made about that formulation. *In so far as it is based on 'fraud unravels everything', as discussed by Lord Sumption at [18], the formulation simply involves the invocation of a well-established principle which exists independently of the doctrine …*
>
> (emphasis added)

[57] In other words, the ability of a court to unravel transactions by reason of fraud is independent of the doctrine of piercing the veil.

[58] And in Lord Sumption's own speech at para. 18, he dealt with the situation of fraud. He accepted that there subsists a broad principle governing cases in which a benefit has been obtained by dishonesty. In these limited cases the law treats the use of a company as a means of evading the law as dishonest. And that is precisely the situation here, warranting the court disregarding the corporate personality of:

(i) PS Bina, which was created as a 'sham' to defraud the plaintiff;

(ii) The use of Perfect Solution to evade payment of a debt and enforcement of the same, by ensuring that this entity was utilised to contract with Bina Puri, such that monies received were placed beyond the reach of the plaintiff;

(iii) The perpetration of the scheme by the main controller of the two companies or puppeteer, Tony Ong; and

(iv) The companies were utilised as Tony Ong's agents to perpetrate the fraud against the plaintiff and evade liability for the debt. To that extent the two companies were utilised as engines of fraud.

[59] So the application of this broad principle founded on the finding of fraud, in itself warrants the corporate personalities of the companies being disregarded. In other words, liability was found against Tony Ong and each of the companies by reason of the fraud alone, without the invocation of the doctrine of the piercing of the corporate veil.

Application Of The Evasion Principle In Relation To The Wrongdoing In The Context Of The Present Factual Matrix

[60] Learned counsel for the appellants contends that the trial court was wrong to effectively 'pierce' the corporate veil because Lord Sumption's test in *Prest*, predicated on the evasion principle, is inapplicable in the context of the present appeal. It is contended that the plaintiff enjoyed no legal right against Tony Ong, independently of the corporate personality, which justified the piercing of the corporate veil.

[61] Even if the evasion principle is sought to be applied, alternatively to the finding above that fraud allows for the disregarding of the corporate personality, the following consequences would ensue in law:

(i) Tony Ong is the 'controller' of both Perfect Solution and PS Bina. This was a finding of fact by the trial judge;

(ii) Tony Ong procured the contract for the performance of earthworks for the project with Bina Puri, utilising Perfect Solution. Accordingly, Perfect Solution was the company that entered into the contract as sub-contractor with Bina Puri to carry out the earthworks;

(iii) Tony Ong knew that Perfect Solution could not carry out the earth works contract itself and that it would have to be sub-contracted out. The plaintiff had the requisite expertise and reputation to carry out the earthworks;

(iv) Tony Ong was aware from the terms of Perfect Solution's contract with Bina Puri, that the latter would not make any payment for EBW;

(v) Tony Ong and two others incorporated PS Bina, a shelf company with no assets and no track record, to be the entity to enter into a sub-contract with the plaintiff. PS Bina was incorporated, specifically for the purpose of contracting with the plaintiff, and interposed between Perfect Solution and the plaintiff;

(vi) This was a deliberate act of interposing a 'sham' company between Perfect Solution and the plaintiff;

(vii) Perfect Solution agreed to complete the earthworks namely the CBP, FBP and GA. For the FBP contract, Perfect Solution and its controller, Tony Ong, was aware at all times that it would not be paid for EBW;

(viii) Tony Ong personally induced the plaintiff to enter into the sub-contract with the sham company PS Bina. Tony Ong deliberately misrepresented that the EBW would be fully paid for by Bina Puri and thus, PS Bina. A guarantee from the main contractor was also promised as a condition precedent. The plaintiff would not have entered into the contract with PS Bina but for Tony Ong;

(ix) The plaintiff carried out the entirety of the works believing it would be paid for the earthworks under the FBP contract. Initially, it was paid in full by PS Bina, but subsequently the entire sum for the earthworks was reversed out leaving a debt due and owing to it;

(x) The plaintiff suffered the detriment of carrying out works for which Tony Ong, Perfect Solution and PS Bina knew the plaintiff would never be paid. The relevant information was deliberately suppressed from the plaintiff and inducements were made in the form of dishonest misrepresentations from Tony Ong coupled with payments for the EBW, which were subsequently reversed. The payments had been made initially to ensure that the plaintiff carried out the works in their entirety, allowing Perfect Solution to receive payment from Bina Puri;

(xi) PS Bina further served to preclude enforcement by the plaintiff of its debt because it was a shell company with no assets;

(xii) Perfect Solution enjoyed the benefit of monies for earthworks completed, under its contract with Bina Puri, which it could not have enjoyed, unless and until the EBW works were completed by the plaintiff; and

(xiii) It is apparent from the foregoing that Perfect Solution, evaded its legal obligation to pay the debt for the EBW, through the interposition of PS Bina by its controller, Tony Ong.

[62] Given this factual matrix, can the evasion principle be applied to pierce the corporate veil? From *Prest*, it is clear that it is essential to keep in mind the particular purpose for which it is desired to pierce the corporate veil. The evasion principle identifies the company with the shareholder or controller for a particular purpose; that purpose must necessarily relate to an existing liability or obligation of the shareholder or controller, with which liability or obligation the company is sought to be identified. Only then is the veil being pierced to prevent the abuse of the corporate legal personality.

[63] Therefore, the key question in applying Lord Sumption's evasion principle for the purposes of 'piercing the corporate veil' is this: Is there an existing liability or obligation of Tony Ong with which liability or obligation the company PS Bina is sought to be identified? The answer is that there is an existing liability or obligation of Tony Ong to the plaintiff based on his misrepresentations which caused them to enter into the contract, followed by his inducements that they complete the works, knowing full well that such payments for the EBW would be reversed as there would be no payment forthcoming from Bina Puri for the EBW.

[64] Put another way, the plaintiff enjoyed a legal right against Tony Ong, who is in control of PS Bina, which exists independently of the company's involvement. Perfect Solution was at all times the agent of Tony Ong that enabled Tony Ong to benefit from the evasion of the debt due and owing to the plaintiff.

[65] PS Bina was formed so that its separate legal personality would defeat or frustrate the plaintiff's rights against Tony Ong or frustrate the enforcement of its debt. If so, then the court is entitled to pierce the corporate veil.

[66] Finally, it is worth noting that in summarising the test for the piercing of the corporate veil, Lord Sumption held at para. 35 of *Prest* that:

> … The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

[67] Applying the same to the present factual matrix, it follows that the trial court, as affirmed by the Court of Appeal, did not err in piercing the corporate veil of PS Bina for the purpose, and only for the purpose of depriving Tony Ong and its agent, Perfect Solution of the advantage they would otherwise have obtained by the utilisation of PS Bina's separate legal personality. In this context, it is important to note that it is the piercing of PS Bina's veil that is of significance.

[68] The advantage enjoyed by Perfect Solution and its controller Tony Ong, was the evasion of a debt lawfully due and owing to the plaintiff by both Perfect Solution and Tony Ong. Perfect Solution was liable for the debt due to the plaintiff on two bases:

(i) Tony Ong was in control of, or the *alter-ego* or the directing mind of Perfect Solution according to the trial judge, and the court was to that extent entitled to look behind the façade of the corporate personality (under the concealment principle) to ascertain the true facts, and then impose liability on it on the basis of agency principles;

(ii) It was the entity that Tony Ong utilised to benefit from the creation of the 'sham' PS Bina to deflect or avoid liability for the debt. The net result is that Tony Ong and Perfect Solution are also liable for the debt due to the plaintiff.

[69] I am fully aware that the trial judge did not express his legal rationale in this manner. But that cannot be faulted because his conclusion in law for imposing joint and several liability against the three entities was fraud and/or equitable fraud premised on the basis that the three 'actors' participated in a scheme devised by Tony Ong against the plaintiff. The doctrine of piercing the corporate veil in accordance with the test prescribed by Lord Sumption in *Prest* did not come into play by reason of the fraud, which in itself allows for the lifting or disregarding of the corporate veil independently of the doctrine.

[70] The foregoing exercise of applying the doctrine as enunciated was undertaken to apply the evasion principle. It comprises an alternate rationale for imposing liability on the three parties, Tony Ong, PS Bina and Perfect Solution.

[71] Therefore it follows that it was not incorrect for the trial court to pierce the corporate veil of PS Bina and impose liability on Tony Ong, Perfect Solution and PS Bina jointly and severally, because PS Bina was created specifically to evade a debt properly due to the plaintiff from Perfect Solution and its controller, Tony Ong, who had devised the scheme.

[72] It should also be borne in mind that the present factual matrix is complicated by the fact that two corporate entities are involved. The applicability of the doctrine is focused primarily on PS Bina, the 'sham' company that was created to deflect and evade liability for the debt. *Vis a vis* Perfect Solution and Tony Ong, the finding of the trial judge that Tony Ong was the controller of Perfect Solution is more compatible with the concealment principle, in that its corporate facility was used as a façade for the scheme. That did not preclude the court from looking behind the façade to determine the true facts behind the entire series of transactions. Ultimately, liability against Perfect Solution, applying the test in *Prest*, would turn on the application of the substantive law principles of principal and agent.

The Other Members Of The English Supreme Court Bench In *Prest*

[73] It is equally important to appreciate in relation to this relatively recent analysis by Lord Sumption of the characterisation of wrongdoing justifying the piercing of the corporate veil, that not all of the seven-member bench of the Supreme Court accepted the analysis in its entirety. Only Lord Neuberger did, without qualification.

[74] Lady Hale SCJ (later President), with whom Wilson SCJ agreed, held at para. 92 of the judgment that she was "… not sure whether it was possible to classify all of the cases in which the courts have been or should be prepared to disregard the separate legal personality of a company neatly into cases of either concealment or evasion. They may simply be examples of the principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business. But what the cases do have in common is that the separate legal personality is being disregarded in order to obtain a remedy against someone other than the company in respect of a liability which would otherwise be that of the company alone (if it existed at all). In the converse case, where it is sought to convert the personal liability of the owner or controller into a liability of the company it is usually more appropriate to rely upon the concepts of agency and of the 'directing mind'.

[75] Lord Mance, while agreeing in principle with the analysis by Lord Sumption on the doctrine of the piercing of the corporate veil, qualified that agreement by stating that it would be "dangerous to seek to foreclose all possible future situations which may arise…" and that he would not wish to do so.

[76] Similarly Lord Clarke, while agreeing generally with the doctrine, demurred from complete agreement for the reason that the distinction between the concealment and the evasion principles in relation to categorising the type of wrongdoing had not been discussed in the course of argument and therefore ought not to be definitively adopted until full submissions had been heard on the issue.

[77] Lord Walker held that he did not consider the 'piercing of the corporate veil' to be a doctrine at all in the sense of a coherent principle or rule of law. Instead, he viewed it as a label to describe the disparate occasions on which exceptions to the principle of the separate personality of a company come into play. He effectively rejected the doctrine.

[78] The point to be made is that there was no complete consensus on the analysis by Lord Sumption that the doctrine of piercing the corporate veil only arose when the wrongdoing in question fell within the ambit of the 'evasion' principle as defined by him. It would therefore appear that the doctrine has not been definitively accepted as being the last word on the subject in the United Kingdom itself. This is borne out *inter alia* by its consideration in subsequent cases.

[79] Subsequent case law has not resolved the difficulty of utilising the test specified in *Prest.* It is a complex test and confusion/uncertainty can ensue when determining whether the concealment or the evasion principle more properly applies to the wrongdoing in question. The distinction between the two principles can be difficult to discern and as stated by Lord Sumption himself in *Prest*, often both principles may be applicable.

[80] Finally, the end result is often similar, in that liability ensues against the relevant actors, whichever principle is utilised.

VTB Capital Inc v. Nutritek [2013] UKSC 5 ('*VTB Capital*')

[81] Learned counsel for the appellants submitted that *VTB Capital* which was a judgment of the UK Supreme Court, handed down prior to *Prest*, was wholly relevant to the present case. Lord Neuberger delivered the leading judgment there. The facts were that VTB Capital, an English bank entered into a facility agreement with a Russian company ('RAP'), pursuant to which funds were advanced to RAP to enable it to purchase certain dairy companies from Nutritek. RAP defaulted on the loan. VTB Capital considered the security provided for the loan to be worth significantly less than the funds advanced. Subsequently, it was discovered that RAP and Nutritek were under the common control of an individual, Mr Malofeev, through his interests in two intermediary companies. VTB Capital claimed that it was falsely induced to enter into the facility agreement by misrepresentations relating to the fact that RAP and Nutritek were under the common control and about the value of security given for the loan. The defendants named were Nutritek, Mr Malofeev and the two intermediary companies through which Malofeev controlled RAP and Nutritek. The defendants resided in Russia.

[82] VTB obtained permission to serve the defendants out of the jurisdiction in respect of their claim which was founded on tortious misrepresentation and made in England. The defendants subsequently applied to set aside the service. VTB Capital responded by applying for leave to amend its claim to add a contractual claim based on piercing RAP's corporate veil. VTB Capital claimed that Mr Malofeev and the two companies he used to control RAP and Nutritek, though not parties to the agreements ought nevertheless to be held jointly and severally liable with RAP under the facility and related agreements. The application by VTB Capital to amend its particulars of claim so as to include the veil piercing claim was refused at all three tiers of the UK Courts.

[83] In the English Supreme Court, the nub of Lord Neuberger's refusal to allow the amendment of the claim to include the piercing of the veil is encapsulated in para. 142 of the judgment where he stated:

> [142] Quite apart from this, it seems to me that the facts relied on by VTB to justify piercing the veil of incorporation in this case do not involve RAP being used as "a façade concealing the true facts". *In my view, if the corporate veil is to be pierced, "the true facts" must mean that, in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be). Here, on VTB's case, "the true facts" relate to the control, trading performance, and value of the Dairy Companies (if one considers the specific allegations against Mr Malofeev), or to the genuineness of the nature of the underlying arrangement (which involves a transfer of assets between companies in common ownership). Neither of these features can be said to involve RAP being used as a "façade to conceal the true facts".*
>
> (emphasis added)

[84] Unlike VTB Capital, it is evident that in the instant appeal, the findings of fact by the trial judge bear out that the "true facts" in reality are that it is the person behind the company PS Bina, namely Tony Ong, rather than PS Bina itself, who is the relevant actor or recipient.

[85] It is Tony Ong who interposed PS Bina between Perfect Solution and the plaintiff to ensure that the debt to the plaintiff would not be paid. The factual matrix in the instant appeal discloses a deliberate and flagrant attempt to procure the EBW to be performed without any intention of reimbursement for such work, by the interposing of a 'sham' company to evade the debt due to the plaintiff for the EBW.

[86] It is quite different from the *VTB Capital* case where the 'true facts' sought to be relied on to justify the piercing of the corporate veil did not involve the debtor company RAP being utilised as a façade to conceal the true facts.

[87] It should also be borne in mind that *VTB Capital* was a case involving an interlocutory application on amendment of the claim. In our case, there have been sound findings of fact made by the trial judge which comprise the basis for the plaintiff's seeking to pierce or lift the corporate veil for the purpose of recovering a debt which the relevant parties sought to evade by fraud or equitable fraud.

[88] In any event, *VTB Capital* pre-dates *Prest* where the distinction between the nature of the wrongdoing warranting the application of the concealment principle (which does not involve piercing the corporate veil) and the evasion principle (which does) had not been determined. As such, I am not persuaded that the decision in *VTB Capital* alters the legal reasoning and analysis we have adopted.

Other Jurisdictions

[89] The analysis has not been accepted in its entirety in other jurisdictions. Most jurisdictions have preferred not to confine the disregarding or lifting of the corporate veil too rigidly.

The Position In Malaysia

[90] It was also submitted by counsel for the appellants that the law on the piercing of the corporate veil in Malaysia was in somewhat unclear and confused in that the case law utilises a range of criteria for the lifting of the corporate veil. An examination of recent case law on the subject does not bear out such a description.

[91] As is the case in the United Kingdom, it is an accepted position in law in Malaysia that the court will lift the corporate veil if a company was set up for fraudulent purposes. The 'fraud unravels all' principle expounded in *Lazarus v. Beasley* (above) is applied. That is the primary and relevant principle that is applicable in the instant case. This position has been, with respect, correctly set out by this court in *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719; [2015] 1 MLJ 773 ('*Gurbachan Singh*') where Richard Malanjum FCJ (later CJ) stated:

> … [96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality (see: *Prest v. Petrodel Resources Limited and others* [2013] UKSC 34).
>
> …
>
> [97] As to what constitutes fraudulent purposes it has been described so as to include actual fraud or fraud in equity (see *Law Kam Loy & Anor v. Boltex Sdn Bhd and Others*). And fraud in equity occurred in "… Cases where there are signs of separate personalities of companies being used

to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies ..." (see *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 per Chong Siew Fai FCJ (as he then was) …

[92] After setting out the doctrine of the separate corporate personality as prescribed in *Salomon v. Salomon*, this court reiterated and quoted from Lord Halsbury LC's well-known holding on when the veil of incorporation may be lifted, namely when there is fraud or an agency relationship or if the company is a myth or fiction. In such an instance, the doctrine of the corporate personality does not insulate the shareholders or directors from being "assailed directly".

[93] And in *Takako Sakao v. Ng Pek Yuan & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 the court speaking through Gopal Sri Ram JCA held that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere façade concealing the true facts.

[94] Although this concept of the 'façade' is now considered as a basis for looking behind the corporate personality to ascertain the true facts, rather than piercing the corporate veil by virtue of the new definition afforded in *Prest*, it captures the point that the corporate personality is disregarded where it is utilised to conceal the true facts of a matter.

[95] This court went on to consider the principles set out by Lord Sumption relating to the manner of ascertaining whether a particular wrongdoing fell under the concealment principle or the evasion principle. In these circumstances, it is apparent that this court considered *Prest* and did not disapprove it.

[96] The thrust of the decisions of the higher courts of the superior Judiciary in this jurisdiction has tended to seek to restrict the disregarding of the corporate personality and only doing so in the face of actual fraud or fraud in equity as clearly stipulated by Gopal Sri Ram JCA (later FCJ) in *Law Kam Loy v. Boltex* (above). This is clear from the decision of this court in *Solid Investments Ltd v. Alcatel-Lucent (M) Sdn Bhd* [2014] 3 CLJ 73; [2014] 3 MLJ 785.

[97] As discussed earlier, *Law Kam Loy v. Boltex* adopted the position in the UK as set out in *Adams v. Cape Industries Plc* [1990] Ch 433 ('*Adams v. Cape*') where the wide and somewhat vague test of lifting the corporate veil 'in the interests of justice' was expressly overruled. The test became one of "special circumstances which would include actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity …".

[98] The concept of lifting and piercing were and continue to be utilised interchangeably in this jurisdiction. However, in this appeal, I have considered in greater detail the differences in the principles underlying the principle of 'piercing' the corporate veil as enunciated by Lord Sumption. I am of the considered view that it would be appropriate to adopt the analysis put forward by Lord Sumption in *Prest*, but as agreed by the majority of the Bench in *Prest*, the analysis ought not to be applied too rigidly. It would be premature to bar or foreclose the categories of cases in which the corporate personality may be either disregarded or the veil 'pierced'.

[99] The following conclusions may be drawn in relation to the disregarding of the corporate veil:

(i) There subsists a long line of authority over the years in Malaysia which recognises that fraud, whether common law fraud or fraud in equity permits the court disregarding of the corporate personality. This body of law as adopted from the United Kingdom takes its line of reasoning from the 'fraud unravels all' principle as expounded by Denning LJ in *Lazarus v. Beasley* (above). That body of law remains correct and relevant and ought not to be lightly tampered with. It is reflective of the position in law recognised in *Salomon v. Salomon* (above). It is moreover, with respect, entirely legally coherent because the theoretical concept of the separate corporate personality was founded to enable business to be conducted. It is the essence of incorporation that the shareholder/controller of the company limits his liability in respect of the future conduct of the company's affairs. There is nothing wrong with that. Advantage is taken of limited liability to avoid personal liability if things go wrong. (see *Persad v. Singh per Lord Neuberger* [2017] UKPC 32).

However, the limitation of liability envisages that such future conduct of the company's business is to be conducted honestly and with integrity – the law is predicated on that assumption. Once honesty is abandoned and the company is utilised as a vehicle for dishonest conduct, or fraud, or unconscionable conduct, then the basis for the separate corporate personality is jeopardised and undermined. It no longer serves the purpose it was intended for. As such it is only correct that a court investigating the injury or loss suffered by reason of the wrongful utilisation of the corporate personality, or the abuse of the corporate personality, is allowed to both look behind the façade to ascertain the true facts and also impose liability against the persons perpetrating such wrongdoing as is required on the facts of a particular case. This body of law relating to fraud subsists outside of the doctrine of 'piercing' the corporate veil as explained in *Prest*;

(ii) I would respectfully concur 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', the nature of the wrongdoing in issue ought to be analysed to ascertain whether it falls within the purview of the 'concealment' principle or the 'evasion' principle. To this end, the distinction between the two principles of concealment and evasion are of importance and benefit to enable a court to analyse with greater accuracy the basis on which the corporate personality is being disregarded. It also results in different consequences as explained earlier;

Concealment Principle

(iii) The analysis in *Prest*, namely that the concealment principle does not in reality pierce the veil of incorporation, but allows the court to disregard or look behind the corporate personality to ascertain the true facts, ought to be considered for use and application in this jurisdiction. The reason is because after ascertaining the true facts concealed behind the corporate personality, it will enable a court to determine which legal principle of substantive law it will then utilise to determine whether liability subsists, or does not subsist, against a party to the dispute, on a given set of facts. This may involve the utilisation of the principles of agency or trusts or some other area of the law. Such application allows for a greater analysis of the basis on which liability is imposed, rather than simply stating that the corporate veil has been lifted and imposing liability on a party without explaining the legal basis for doing so. It is also important to note that it does not engage the evasion principle such that the corporate veil is not pierced;

Evasion Principle

(iv) If the wrongdoing warrants the application of the evasion principle, the consequence is that the corporate veil is pierced, so as to enable liability to be imposed on a person, seemingly unconnected to the transaction in dispute. First, it is necessary to ascertain if there is a legal right against the person in control of a company which exists independently of the company's involvement, and a company is interposed such that the legal personality of the company defeats the legal right or frustrates its enforcement. This is a considerable obstacle to overcome, and it is only rarely that an appropriate set of facts will allow for such 'piercing'. Ultimately, the narrow and rigid test ensures that the corporate personality is not lightly disregarded.

Even when the facts of a particular case warrant invoking the evasion principle enabling the corporate veil to be pierced, the court may only apply the doctrine to deprive the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

If there subsists a legal relationship between the company and its controller, it might not be necessary to pierce the corporate veil, in which event it ought not to be pierced;

Conclusions

(v) In many instances, the facts will not allow for a clean and clear application of either one of these principles. Both principles might come into play. It has also been demonstrated that the application of these different principles might well give rise to the same result. This is a practical reality that should be borne in mind when analysing the particular factual matrix. It has also been reported that there has been a degree of misunderstanding in the application of these two principles.

It is in this context that the comments of the rest of the Bench in *Prest* are most relevant. Baroness Hale, quite correctly, questioned whether all cases would fall neatly into cases of either concealment or evasion. (see para 92). Her comment that where the doctrine is sought to be utilised to convert the liability of the controller of the company to the company itself, the utilisation of the agency concept and the 'directing mind' would be more appropriate than the doctrine of piercing of the veil. I would respectfully concur with these statements;

(vi) Having reviewed some of the relevant case-law in this jurisdiction, I conclude, with respect, that there has been no confusion in the application of the principles. Firstly all relevant principles in keeping with the law throughout the Commonwealth have been adhered to.

This is marked by the move from the general and somewhat amorphous test of 'in the interests of justice' in earlier case law to the clear boundaries drawn in *Law Kam Loy v. Boltex* (above) where disregarding the corporate veil was stated to be applicable when there was evidence of actual fraud at common law or unconscionable or inequitable conduct amounting to fraud in equity. This position in law was then expanded in *Gurbachan Singh* ('above') where the test and rationale expressed in *Prest* were considered. In the present appeal, I have sought to clarify the position in law further as above.

Having examined the law in this field and the propositions put forward by the parties, I now turn to answer the questions of law before us.

The Questions Of Law

[100] From the recitation and perusal of the factual matrix as well as a consideration of the law on this subject, the unmistakeable conclusion that I reach is that the two questions of law are not material issues of law that surfaced in the course of the case in the High Court or the Court of Appeal.

First Question Of Law

The Applicability Of The Doctrine Where It Is Alleged That There Are Joint Tortfeasors And Joint Liability Is Sought To Be Established

[101] This question purports to consider the applicability of the principle of the disregarding of the corporate veil in a situation where there are "joint tortfeasors" and "joint liability" is sought to be established under what must amount to a "tort". Otherwise, the parties cannot be "joint tortfeasors". However, no tort was pleaded nor tortious relief sought as a matter of fact or law in the instant case.

[102] The nub of the appellants' submissions is that the trial judge apparently lifted the corporate veil of PS Bina premised on the tortious principle of joint liability amongst joint tortfeasors. A reading of the judgment however discloses no such finding in law. The trial judge found joint and several liability but did not find that the actors, namely Tony Ong, PS Bina and Perfect Solution were joint tortfeasors. So the basis for this submission is misconceived. It is further submitted that on 'piercing' the corporate veil, any liability should only be visited on Tony Ong, as all three entities are one and the same. Again, there is no legal basis for such a proposition in law.

[103] It was also submitted that the doctrine of the piercing of the corporate veil and joint tortfeasorship are incompatible because joint tortfeasorship implies that each tortfeasor is a separate legal personality whereas on piercing the veil of incorporation, the parties are somehow condensed into one true actor. This in turn it is submitted precludes the application or finding of joint tortfeasorship.

[104] This is a misapprehension of the entire appeal for two reasons:

(i) The plaintiff's claim is not founded in tort; therefore there is no concept of tortfeasorship that ever came into play;

(ii) Secondly, it cannot be said that the principle of piercing the corporate veil can never apply in a tortious claim. The conclusion that upon application of the doctrine, all liability devolves on one party who is the '*alter-ego*' is an incorrect understanding of the law. As stated earlier, on the rare occasions on which the corporate veil is pierced, liability may well devolve on more than one entity, depending on the facts of the case. So a categorical statement that the doctrine cannot subsist alongside a finding of joint tortfeasorship is flawed in law. Such a claim does not arise before the court in this appeal.

[105] A perusal of the pleadings on which the plaintiff's claim is brought discloses that the claim is premised on fraud and the lifting of the corporate veil in that context. The claim of fraud may be deduced from the entirety of the factual matrix pleaded together with the claim for the lifting of the

corporate veil. More pertinently, nowhere is there any mention of any claim premised on tort. No tort can be deduced from the factual matrix either. Neither does the question of law specify the precise tort that the appellants allege subsists, which warrants the imposition of liability on "joint tortfeasors".

[106] The claim in point of fact seeks to make Perfect Solution and Tony Ong liable for the debt Tony Ong engineered to be created between PS Bina and the plaintiff. To that extent, it is premised entirely on fraud or equitable fraud and unconscionable conduct. As against PS Bina, there is a primary cause of action for breach of contract. But neither of these causes of action gives rise to a tortious claim nor liability visited upon "joint tortfeasors".

[107] The mere use of the term 'jointly and severally liable' does not convert a liability premised on fraud and/or equitable fraud into a claim in tort. In the instant appeal, it appears that the appellants have conflated the findings of joint and several liability by the trial judge against Tony Ong, Perfect Solution and PS Bina with liability under a joint tortfeasor claim.

[108] The appellants also appear to be under the impression, clearly erroneous, that the claim was founded on conspiracy which they submit was found but not pleaded. Again, a perusal of the claim discloses that the corporate personalities of Perfect Solution and PS Bina were utilised by Tony Ong to induce and defraud the plaintiff into carrying out the EBW, knowing full well that there would be no payment forthcoming to it from PS Bina, as Bina Puri had made this clear from the outset. Again the use of the words by the trial judge that Tony Ong, PS Bina and Perfect Solution acted in concert does not alter the claim to one in conspiracy because conspiracy was not pleaded. Instead, fraud and equitable fraud was. The findings were consonant with the pleadings and the evidence adduced.

[109] I would also concur with the submissions of learned counsel for the plaintiff that this court is being asked to consider an issue which was not determined by the High Court and the Court of Appeal. Neither does it relate to the facts of the case or the law either. As such, it is an academic question with no real nexus to the case and therefore does not warrant consideration. (see *Raphael Pura v. Insas Bhd & Ors* [2003] 1 CLJ 61; [2003] 1 MLJ 513 at pp. 545, 547 to 548; *Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 CLJ 325; [1999] 1 MLJ 257 per Edgar Joseph Jr FCJ at p. 264 (MLJ) citing *Sun Life Assurance Co of Canada v. Jervis* [1944] 1 All ER 469 at p. 470). On this basis, it would therefore appear that there is no basis for this question of law.

Conclusion On The First Question Of Law

[110] For the reasons set out above, I decline to answer this question of law because it miscomprehends, at best, and misstates at worst, the facts and the law in relation to the appeal before this court.

[111] The question is also predicated on an incorrect comprehension of the law because it assumes that in a joint tortfeasorship context, the piercing of the corporate veil must result in liability devolving on only one entity or person, and not any other party to the dispute because only one person is the *alter-ego*. This conflates and misapprehends the position in law when the doctrine is applied. On piercing, liability can devolve on more than one party to the dispute. Further, the proposition that the doctrine is incompatible in law with joint tortfeasorship is erroneous and unsupported in law. Most importantly, this entire argument is theoretical and unfounded on the facts and the law.

[112] Finally, it has no effect on the outcome of the appeal in view of its miscomprehension of the law. Any attempt to answer this question would result in a theoretical response with no bearing to the factual matrix or the claim in law.

The Second Question Of Law

Whether The Single Economic Unit Test As Expounded In Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355; [2005] MLJU 225 ('Law Kam Loy') Is Confined To Industrial Court Matters

[113] The appellants argue vigorously that the single economic unit principle is not a part of the corporate veil lifting principle in commercial cases, and invite this court to hold that it is only applicable in the Industrial Court. This would, as the respondent states, be an entirely academic exercise. As set out earlier, the High Court did not utilise the single economic unit test in itself to justify the lifting of the corporate veil. It is clear beyond dispute that the trial court utilised fraud and equitable fraud to do so.

[114] And the operation of Perfect Solution and PS Bina interchangeably as one single unit operated by Tony Ong was a finding of fact which supported the conclusion that he was the *alter ego* of these companies. It further supported the finding that he utilised the corporate entities, particularly PS Bina, to defraud and evade liabilities due to the plaintiff *vide* their corporate personalities. The Court of Appeal similarly made no such finding. The appellants appear to have deviated tangentially in their submissions into topics and fields unsupported by the factual or legal matrix of this matter.

[115] It is true that in their pleadings, the plaintiff did set out, amongst several other pleas, that the two companies operated as a single economic unit. This is a question of fact. A finding that Tony Ong utilised and operated Perfect Solution and PS Bina interchangeably does not in itself warrant the application of the "single economic unit" test. There is a distinction between utilising the single economic unit test to conclude that the corporate veil ought to be disregarded, and making a finding that two companies operate as if they were a single economic unit, and then utilising this finding for the purposes of establishing fraud. It is the latter that prevailed in this case. So

it is incorrect to suggest that the corporate veil in the instant appeal was pierced simply on the basis that PS Bina and Perfect Solution operated as a single economic unit.

[116] This test was, in any event, overruled in *Adams v. Cape* (above) in the United Kingdom and the legal reasoning there adopted in this jurisdiction *vide Law Kam Loy v. Boltex* (above). However, in the instant case, it is reiterated that the finding relating to the operation of the two companies was relevant to the finding of fraud or equitable fraud, rather than the operation of a series of companies as one economic whole, for the purposes of lifting of the corporate veil.

[117] And as stated by learned counsel for the respondent, the Court of Appeal in *Law Kam Loy* did not, in any event, find that the single economic unit test was sufficient to justify the lifting of the corporate veil. On the contrary, Gopal Sri Ram JCA (later FCJ) stated:

> … In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc*, it is not open to the courts *to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.* The former that is to say, actual fraud, was expressly recognised to be an exception to the doctrine of corporate personality by Lord Halsbury in his speech in *Salomon v. A Salomon & Co Ltd* [1897] AC 22, the seminal case on the subject …
>
> (emphasis added)

[118] This pronouncement on the law was expressly approved by this court in both *Solid Investment Ltd v. Alcatel-Lucent (M) Sdn Bhd* [2014] 3 CLJ 73; [2014] 3 MLJ 785 and *Gurbachan Singh* (above).

The Pleadings – Was Fraud Pleaded?

[119] It is true that fraud was not pleaded in the form prescribed in textbooks with a formal plea of fraud followed by the particulars. However, a perusal of the substance of the statement of claim inexorably points to a plea of fraud.

[120] This is evident from para. 37 onwards where under the heading of 'Lifting of the Corporate Veil' the plaintiff pleads *inter alia* of Tony Ong's dishonest and fraudulent conduct and the series of events inducing the plaintiff to enter into a contract with PS Bina. Tony Ong, who utilised PS Bina as a sham and Perfect Solution to devise and carry out the scheme, it is pleaded, was fraudulent in that he knew that the plaintiff would not receive payment for the EBW. The other salient facts pointing to fraud and/or equitable fraud have been set out comprehensively above, and more pertinently, in the judgment of the trial judge. The fact that a claim has not been pleaded in the formally accepted form, does not mean that fraud has not been pleaded. This is just such a case.

[121] As such, it is incorrect and improper for the appellants to maintain that: A

(i) Fraud was not pleaded at all;

(ii) The claim was premised on tort; and

(iii) The judge relied on the single economic unit test to justify lifting the corporate veil when the judge in point of fact made clear findings of fraud and/or equitable fraud, after examining and analysing the evidence in great detail. B

[122] 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. C

[123] However, it is important to emphasise that the relevant legal principles which have to be applied are the same whether in the High Court in civil cases, or in the Industrial Court in relation to industrial law claims. This is because it cannot be said that there is one law of 'sham' for the purposes of evading legal obligations in the High Court for civil matters and another law of 'sham' for the purposes of evading legal obligations in the Industrial Court. There is only one law which is to be applied equally in all courts, because there is only one set of principles in relation to fraud, unconscionable conduct and abuse of corporate personality so as to determine whether or not it is appropriate to look behind or pierce the corporate veil. (see Munby J in *A v. A* [2007] EWHC 99 (Fam)). D E

Answer To Question 2 F

[124] Therefore, in answer to the second question, I state once again that the question misstates the relevant findings of the trial court and seeks to obtain an answer relegating *Law Kam Loy* to the confines of the Industrial Court. That in itself is an incorrect premise, as it is predicated on a misunderstanding of the *ratio* in *Law Kam Loy v. Boltex* (above). G

[125] However, the further point to be made is that *Law Kam Loy v. Boltex* (above) is applicable in all courts, and is not to be confined to the Industrial Court.

[126] To that extent, the question cannot be answered as framed, and I decline to do so. H

[127] Justice Rohana Yusuf, the President of the Court of Appeal and Justice Azahar Mohamed, the Chief Judge of Malaya have read this judgment in draft and concur. For the foregoing reasons, the appeal is dismissed with costs. I