

**INDUSTRIAL COURT OF MALAYSIA
[CASE NO: 1/1-1348/22]**

BETWEEN

THOMAS LIM CHEE WOH

AND

RIOMARK (M) SDN. BHD.

AWARD NO. 1665 OF 2024

BEFORE : **YA DATO' WAN JEFFRY BIN KASSIM PRESIDENT**

VENUE : Industrial Court Malaysia, Kuala Lumpur.

FILING OF FORM S : 14.09.2022.

DATES OF MENTION : 11.10.2022, 09.11.2022, 14.12.2022,
17.01.2023, 09.02.2023, 08.05.2023,
20.09.2023, 24.10.2023, 27.05.2024,
24.06.2024, 22.07.2024, 10.09.2024,
19.09.2024.

DATE OF MEDIATION : 23.07.2024.

DATE OF HEARING : 23.04.2024.

REPRESENTATION : *For the complainant - Alfred Iruthiarajoo; Malaysian Trades Union Congress*

For the respondent - Jerry Low Kok Kiang; M/s Josephine, L K Chow & Co

INTERIM AWARD

(In Respect of Joinder Application - *Enclosure 33*)

Non-Compliance Proceedings

[1] The Complainant has filed a complaint of non-compliance via Form S under Section 56 (1) of the Industrial Relations Act 1967 (“IRA 1967”) and Rule 24A of the Industrial Court Rules 1967 on 14.09.2022 in relation to **Award No. 1168 of 2021** dated 15.06.2022 (“Award”) between **Thomas Lim Chee Woh** (“Complainant”) and **Riomark (M) Sdn. Bhd.** (“Respondent Company”).

[2] The complaint was lodged by the Complainant on the ground that Paragraph [30] of the Award has not been complied with by the Respondent Company where the Industrial Court had ordered the Respondent Company to pay the Complainant the sum of **RM107,616.00** less statutory deductions (if any) through his MTUC Representatives within 30 days from the date of the Award.

The Joinder Application

[3] The Complainant later filed a Notice of Application dated 20.03.2023 (*Enclosure 33*) pursuant to Section 29(a) and (g) of the IRA 1967 for an order to join the following individuals:

- (a) **Lum Tse Luen (NRIC Number: 770116-10-5743)** (“Proposed Joinee 1”); and
- (b) Cheong Yoke Ying (NRIC Number: 501115-10-5570) (“Proposed Joinee 2”); (hereinafter referred collectively as “the Proposed Joinees”) as Co-Respondents to this non-compliance proceeding.

[4] This Joinder Application is supported by the Affidavit in Support by the Complainant (*Enclosure 33a*), Affidavit in Reply (to oppose Respondent Company’s Affidavit by Lum Tse Luen) (*Enclosure 77*) and Affidavit in Reply

(to oppose Respondent Company's Affidavit by Cheong Yoke Ying) (*Enclosure 77a*) wherein inter alia the grounds of the Joinder Application are stated as follows:

- (a) The Complainant's representative, had on two separate occasions namely, in emails dated 14.07.2022 and 26.07.2022 requested payment of the Award from the Respondent Company (*Exhibit "K-1" and "K-2"*);
- (b) The Complainant's representative further sent an AR Register letter to Proposed Joinee 1, a director of the Respondent Company according to Jabatan Pendaftaran Negara (JPN) records at No. 19, Jalan TR 9/3, Tropicana Golf and Country Resort, 47410 Petaling Jaya, Selangor. A similar letter was also sent to Proposed Joinee 2, also a director of the Respondent Company at No. 17, Jalan TR 9/3, Tropicana Golf and Country Resort, 47410 Petaling Jaya, Selangor. However, there has been no response from the Respondent Company regarding the payment of the Award;
- (c) The current registered and business address of the Respondent Company, as per Suruhanjaya Syarikat Malaysia (SSM) (*Exhibit "TAB-2"*), is currently vacant. Since the Respondent Company has relocated to an unknown address, the Proposed Joinees are necessary for the expeditious determination of the matter. Their joinder is necessary to make the Award effective and enforceable, as there is clear evidence that the Respondent Company is not responding to the Complainant's requests for payment of the Award sum;
- (d) The current registered directors in the Respondent Company are Proposed Joinee 1, who has served since 31.10.2002, and Proposed Joinee 2, who served since 29.06.1993;
- (e) Since the Respondent Company is refusing to comply with the Award, the director/shareholder is best positioned to compel the Respondent Company to comply with the Award. In the event the

director/shareholder is unable to do so, it is only fair for them to be joined as a party to make the Award effective and enforceable in accordance with industrial jurisprudence; and

- (f) Furthermore, the Proposed Joinees have a legal nexus with the Respondent Company that justifies their inclusion as parties in these proceedings.

[5] However, the Joinder Application was objected by the Proposed Joinee 1 and Proposed Joinee 2 in their Affidavits in Reply (*Enclosure 77 and Enclosure 77a*). The grounds for objection, inter alia, are stated as follows:

- (a) The Proposed Joinee 1 states that the Respondent Company is still in existence and no attempts have been made by the Complainant to enforce the Award against the Respondent Company. Furthermore, no winding up proceedings have been commenced against the Respondent Company by the Complainant;
- (b) There are no circumstances presented by the Complainant to suggest that the Award has been rendered ineffective and unenforceable against the Respondent Company;
- (c) The Proposed Joinee 2 states that she is the shareholder of the Respondent Company in name only. The Respondent Company was initially established as an enterprise by her late husband, Lum Peng Hon, in 1984. When her late husband decided to convert the enterprise into a private limited company in 1993, her name was used as additional director and shareholder, as it was a requirement to have at least two directors and two shareholders to form and incorporate the Respondent Company;
- (d) The Proposed Joinee 2 further states that she has no knowledge about the facts and circumstances of this case and/or the facts and circumstances surrounding the Complainant's employment and/or dismissal. Therefore, she is not and has never been the directing mind and will of the Respondent Company and/or alter ego of the Respondent Company; and

- (e) Based on the Proposed Joinee 2's statements above, the Proposed Joinee 2 asserts that there is no factual or legal nexus between herself and the Respondent Company that would justify her being joined to the present proceedings and/or make her personally liable for any part of the Award handed down in this case.

[6] The learned representative for the Complainant filed the written submissions on 27.08.2024 (*Enclosure A*) and 18.09.2024 (*Enclosure C*), while the learned counsel for the Proposed Joinees filed written submissions on 28.08.2024 (*Enclosure B*) and 29.05.2024 (*Enclosure D*).

Submission by the Complainant

[7] The learned representative for the Complainant submitted that the Proposed Joinees' roles within the Respondent Company appear to meet the reasonable factual and legal nexus test. The Proposed Joinees are considered interested parties or represent the interests of the Respondent Company, since they are the directors of the Respondent Company.

[8] The learned representative for the Complainant further submitted that the Proposed Joinee 1 is the person who sent the SMS message terminating the Complainant's employment with the Respondent Company, which clearly establishes that the Proposed Joinee 1 is the controlling mind and brain behind the Respondent Company's operations. As a director of the Respondent Company, there is a factual nexus between the Proposed Joinees and the Respondent Company concerning the events that led to this Section 20 dispute before the Court. Regarding Proposed Joinee 2, the claim that she is merely a figurehead director is seen as an afterthought. Both Proposed Joinee 1 and Proposed Joinee 2 bear full responsibility for the Complainant's dismissal without just or excuse, as well as the Award sum, which the Respondent Company has failed to settle to date.

[9] Regarding the question of joining the Proposed Joinees to make the adjudication effective and enforceable, the learned representative for the Complainant submitted that joining of the Proposed Joinees is necessary because the Respondent Company has refused or ignored requests to pay the

Award sum, despite several attempts to demand payment. The Respondent Company has failed to provide any reasonable reason for not abiding by the terms of the Award. Furthermore, it has come to the Complainant's attention that the Respondent Company has vacated its previous business premises, leaving the location empty and despite inquiries, the Complainant has been unable to ascertain the new address of the Respondent Company's operations.

[10] Given these circumstances, it is imperative that the directors of the Respondent Company be joined as parties to this proceeding to ensure compliance with the Award. Despite the Respondent Company's status as "Existing" and not having been wound up according to SSM, the Respondent Company's actions suggest an intent to evade payment of the Award sum by relocating without notifying any relevant parties.

[11] Therefore, the learned representative for the Complainant submitted that the Complainant has established a reasonable legal nexus between the Proposed Joinees and the Respondent Company.

[12] The learned representative for the Complainant further submitted that the joinder of the Proposed Joinees is necessary to ensure that the adjudication is effective and enforceable.

Submission by the Proposed Joinees

[13] The learned counsel for the Proposed Joinees submitted that while there is a factual and legal nexus between the Proposed Joinee 1 and the Respondent Company, the Complainant has failed to show that the non-joinder of Proposed Joinee 1 would render the Award ineffective and unenforceable.

[14] The learned counsel for the Proposed Joinees further submitted that the Complainant has not shown any effort to legally enforce the Award against the Respondent Company, except for sending the Award to the Respondent Company with a cover letter demanding for payment. Additionally, no winding up proceedings have been commenced against the Respondent Company by the Complainant.

[15] The Complainant's contention that the Proposed Joinees, as directors and shareholders, could use their positions to force the Respondent Company to comply with the Award does not demonstrate that the Award has been rendered ineffective or unenforceable. In fact, it is an admission that the Award is effective and enforceable and what is needed is for a director to compel the Respondent Company to comply.

[16] It is also submitted by the learned counsel for the Proposed Joinees that the test for joinder requires the Complainant to show that the Award would be rendered ineffective and unenforceable before joinder may be allowed, rather than showing that joinder is necessary to make the Award effective and enforceable. The Complainant has made no averment whatsoever, nor has he shown any proof that the Respondent Company is not an on-going concern or financially incapable of complying with the Award. The learned counsel for the Proposed Joinees cited the case of *Palmgold Management Sdn Bhd v. Philip Yaw Chuek Hoe* [2024] CLJU 993 to support this argument, and the Complainant has failed to satisfy both limbs of the test for joinder concerning Proposed Joinee 1. Therefore, the Complainant's attempt to join him to these proceedings must fail.

[17] Regarding Proposed Joinee 2, the learned counsel for the Proposed Joinees submits that the Complainant has also failed to satisfy both limbs of the joinder test. The Complainant has not shown how the non-joinder of the Proposed Joinee 2 would render the Award ineffective and unenforceable. Additionally, the Complainant also has failed to show that there is a factual or legal nexus between the parties named and the Proposed Joinee 2, who is a director and shareholder of the Respondent Company in name only and had no involvement whatsoever in the operations or management of the Respondent Company. Furthermore, she had absolutely no role in any decisions regarding the Complainant's dismissal.

[18] It is further submitted by the learned counsel for the Proposed Joinees that Proposed Joinee 2 was neither a directing mind nor an alter ego of the Respondent Company and as such there is no factual or legal nexus between the parties named and Proposed Joinee 2. These facts have not been rebutted by the Complainant in his Affidavit in Reply. The learned counsel for the Proposed Joinees cited the case of *Tinus Wilting v. Itasa Asia Sdn. Bhd* [Award No. 212 of

2024] and *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 MLRA 48 to support these arguments.

Issues for Determination

[19] The issues to be determined by this Court in this Joinder Application are as follows:

- (a) Whether there is reasonable factual or legal nexus between the Respondent Company and the Proposed Joinees? and
- (b) Whether the Proposed Joinees are necessary to make the Award effective or enforceable?

The Law Relating to Joinder Application

[20] The powers of the Industrial Court to order joinder of any party to the proceedings are found in sections 29(a) (b), 32(1)(a) and 56(1), (2)(a)(i) of the IRA 1967 which provides as follows:

Section 29(a) (b)

The Court may, in any proceedings before it –

- (a) order that any party be joined, substituted or struck off;
- (b) summon before it the parties to any such proceedings and any other person who in its opinion is connected with the proceedings;

Section 32(1)(a)

- (1) Any award made by the Court under this Act shall be binding on –
 - (a) all parties to the dispute or the reference to the Court under subsection 20(3) appearing or represented before the Court and all parties joined or substituted or summoned to appear or be represented before the Court as parties to the dispute or the reference to the Court under subsection 20(3);

Section 56(1), (2)(a)(i)

(1) Any complaint that any terms of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.

(2) The Court may, upon receipt of the complaint, –

(a) make an order directing any party –

(i) to comply with any term of the award or collective agreement;

[21] Prior to the case of *Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors* [2015] 4 MLJ 613, the test to determine whether a party should be joined as parties to the proceedings was expounded in the Indian Supreme Court case of *Hochtief Gammon v. Industrial Tribunal Orissa & Ors* [1964] AIR SC 1746, which has been applied with approval by our courts. The Court of Appeal in *Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil s/o Pereira & Others* [1996] 4 CLJ 747 approved the tests for joinder of parties as laid down in the case of *Hochtief Gammon (supra)* where His Lordship stated as follows:

“We were also referred to Hochtief Gammon v. Industrial Tribunal AIR [1964] SC 1746, a decision of the Indian Supreme Court that has, on numerous occasions, been applied with approval by our courts. Counsel read to us the following passage (at p. 1750) in the judgment of Gajendragadkar CJ which he said reasonably supported the respondents’ case:

“If it appears to the Tribunal that a party to the industrial dispute named in the order of reference does not completely or adequately represent the interest either on the side of the employer, or on the side of the employee, it may direct that other persons should be joined who would be necessary to represent such interest. If the employer named in a reference does not fully represent the interests of the employer as such, other persons who are interested

in the undertaking of the employer may be joined. Similarly, if the unions specified in the reference do not represent all the employees of the undertaking, it may be open to the Tribunal to add such other unions as it may deem necessary. The test always must be is the addition of the party necessary to make adjudication itself effective and enforceable? In other words, the test may well be, would the non-joinder of the party make the arbitration proceedings ineffective and unenforceable? It is in the light of this test that the implied power of the Tribunal to add parties must be held to be limited.”

(emphasis added)

[22] However, in the case of *Asnah Ahmad (supra)*, the court has given a broader interpretation with regard to the principles of law for joinder application where His Lordship Hamid Sultan Abu Backer JCA at p. 620 said:

“[3] The general jurisprudence from the above sections as well as supportive case laws can be summarised as follows:

- (i) IRA 1967 is a social legislation;*
- (ii) third parties can be made liable to pay the award notwithstanding that they were not the employer;*
- (iii) third parties cannot resist joinder or deny liability on the grounds there is no privity or is a separate legal entity, etc. when there is sufficient nexus between the party to be joined and the party named in the reference;*
- (iv) the threshold test to be employed at the joinder stage appears to be whether the employee can demonstrate by way of prima facie evidence that the party who are requested to be joined have directly and/or indirectly and/or otherwise assumed liability or can be made liable partly or wholly for the payment of the award or for that matter purported award in cases where award has not been delivered. In essence, the*

threshold to satisfy the Industrial Court is low based on the above sections as well as supportive case laws in this area of jurisprudence. As long as the complaint of the employee is not frivolous, vexatious and/or abuse of process of court, there should be no hindrance in permitting the joinder if nexus is shown;”

- (v) *the issue of liability can only be dealt with after the joinder and hearing on merits. The parties to be joined should not at joinder stage be allowed to submit on the merits. Their presence at the joinder stage is only to verify the complaint of the employee to ensure that the facts relied on by the employee are credible.*”

(emphasis added)

[23] The Court of Appeal in *Asnah Ahmah (supra)*, continued to lay down the appropriate test in respect of a joinder application under IRA 1967 as follows:

*“ The more appropriate test to be applied in the Malaysian context was propounded by Justice Gopal Sri Ram in *Co-Operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals* [2004] 1 CLJ 849. The test is ‘reasonable factual or legal nexus’ test a ‘wide net’ to facilitate all maladies of third parties to answer to the Industrial Court for their involvement in the dispute and if appropriate be liable under the award upon hearing the merits.”*

(emphasis added)

[24] In the High Court case of *Transocean Drilling Sdn. Bhd. v. Industrial Court of Malaysia & Anor* [2016] CLJU 1077; [2016] 1 LNS 1077, Azizul Azmi Adnan, JC (as His Lordship then was) considered himself bound by the decision of the case of *Asnah Ahmad (supra)* on the basis that it represents the current state of the law. However, His Lordship further stated that the case of *Asnah Ahmad (supra)* does not preclude the application of the second limb of the test in *Hochtief Gammon (supra)* that it must also be shown that the non-joinder may

render an award ineffective or unenforceable. Accordingly, the court stated as follows:

“[21] Pulling these threads together, it is my considered view that the applicable test for the joinder of the parties in an industrial dispute is as follows. Where it appears to the Industrial Court that a joinder may be necessary for an award in an industrial dispute to be effective or enforceable, the court may join any person as a party to the dispute if the court is satisfied that the person has a reasonable factual or legal nexus with an existing party in the dispute, and that would be just and equitable to do so.”

(emphasis added)

Evaluation and Findings of the Court

[25] Sections 29(a), (b) of the IRA 1967 gives wide powers to the Industrial Court to order any party to be joined in the proceedings before it, including during non-compliance proceeding.

[26] Based on sections 29(a), (b), 32(1)(a) and 56(1), (2)(a)(i) of the IRA 1967, as well as the case laws mentioned above, the tests to be applied whenever there is an application for joinder are:

- (a) whether there exists a reasonable factual or legal nexus between the parties named and the parties to be joined? and
- (b) whether the non-joinder of the party to the proceeding will render the proceeding in the Industrial Court ineffective and unenforceable?

[27] Regarding the issue of whether there exists a reasonable factual or legal nexus between the Proposed Joinees and the Respondent Company, this Court is of the view that there exists a reasonable factual or legal nexus between the Proposed Joinees with the Respondent Company based on following reasons:

- (a) According to the SSM search report dated 16.01.2023 (*Exhibit "TAB-2"*), Proposed Joinee 1 and Proposed Joinee 2 have been the directors of the Respondent Company. Proposed Joinee 1 has served as a director since 31.10.2002, while Proposed Joinee 2 has served as a director since 29.06.1993;
- (b) In addition to being appointed as directors of the Respondent Company, Proposed Joinee 1 and Proposed Joinee 2 are also shareholders of the Respondent Company. Proposed Joinee 1 owns 245,000.00 shares, while Proposed Joinee 2 is owns 255,000,000 shares; and
- (c) the Proposed Joinee 1 is the person who sent the SMS message terminating the Complainant's employment with the Respondent Company.

[28] Applying the principle laid down by the Court of Appeal in the case of *Asnah Ahmad (supra)*, it cannot be denied that there is a sufficient factual or legal nexus between the Proposed Joinee 1, Proposed Joinee 2, and the Respondent Company, given their roles as directors and shareholders. As directors and shareholders, Proposed Joinee 1 and Proposed Joinee 2 are responsible for the business affairs and management of the Respondent Company. Furthermore, the learned counsel for the Proposed Joinees has acknowledged in his written submission that there is indeed a factual and legal nexus between the Proposed Joinee 1 and the Respondent Company.

[29] The Court disagrees with the argument presented by the learned counsel for the Proposed Joinees that there is no factual or legal nexus between Proposed Joinee 2 and the Respondent Company, asserting that her directorship and shareholding are just in name only and that she has had no involvement whatsoever in the operations or management of the Respondent Company. As far as the law is concerned, anyone registered as a director and shareholder carries certain duties and responsibilities associated with that position in the company, regardless whether their role is merely nominal or in name only.

[30] Therefore, it is the Court view that the joinder of the Proposed Joinees are necessary to enable all matters relating to this case be adjudicated and determined effectively. However, the inclusion of the Proposed Joinees in this proceeding does not automatically make the Proposed Joinees jointly and/or severally liable to comply with the said Award. The issue of the Proposed Joinees' liabilities can only be decided after the joinder proceeding and considering the merits of the Complainant's case (See: *Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors* [2015] 4 MLJ 613).

[31] Regarding the issue of whether the non-joinder of Proposed Joinees to the proceedings will render the proceedings in the Industrial Court ineffective and unenforceable, it is undeniable that the Respondent Company has not adhered to the Award granted by the Industrial Court on 15.06.2022 to date. However, it is the Court view that the Complainant has failed to show that the Award would be ineffective and unenforceable against the Respondent Company, as it is still in existence according to the SSM search report. The Complainant's assertion that the Award would be ineffective and unenforceable due to the Respondent Company's relocation to an unknown address does not make the Award ineffective and unenforceable. Based on the facts and evidence presented, the Respondent Company is still operational and has not been wound up. Therefore, this Court agrees with the submission by the learned counsel for the Proposed Joinees that the Complainant's contention that the Proposed Joinees, as directors and shareholders, could use their positions to compel the Respondent Company to comply with the Award does not establish that the Award has been rendered ineffective or unenforceable. The Complainant contention is, in fact, an admission that the Award is effective and enforceable and what is needed for the Respondent Company to comply with the Award is for the directors to compel the Company to do so.

[32] This Court is guided by the decision of *Highline Shipping Sdn Bhd v. Intan Wazlin Ab. Wahab & Ors* [2022] CLJU 94; [2022] LNS 94 where the High Court had this to say at page 11:

"[15] I view that the non-substitution of the Applicant and non-joinder of Highline Shipping will make the Award, if rendered in the 1st to 36th Respondents favour ineffective and could not be enforceable as Hub

Shipping [In Liquidation] is no longer in operation and had been wound up.”

(emphasis added)

[33] Similarly in the recent case of *Palmgold Management Sdn Bhd v. Philip Yaw Chuek Hoe* [2024] CLJU 993, His Lordship Ahmad Kamal Md Shahid stated as follows:

“[37] Unlike the case of Highline Shipping (supra) where the joinder was allowed due to the cessation of operations and winding up of the Appellant/Company. I find that there are no reasons given in the Respondent’s AIS or even his AIR to justify the necessity of joinder for the sake of effectiveness and enforceability. Both affidavits are totally silent on why would it be necessary and there is no assertion or allegation that the Appellant/Company would be incapable of meeting any payment obligations should the Industrial Court ultimately rule in favour of the Respondent.”

(emphasis added)

[34] Given the above, this Court is of the view that the Complainant has failed to prove that the non-joinder of the Proposed Joinees in the proceedings will render the proceedings in the Industrial Court ineffective and unenforceable.

[35] Since the Complainant has failed to fulfill both limbs of the joinder test, the joinder application by the Complainant is therefore without merit and fails. In the case of *Palmgold Management (supra)*, the High Court reaffirmed that both limbs of the joinder tests must be satisfied to succeed in a joinder application. His Lordship Ahmad Kamal Md Shahid stated as follows:

“[34] It is to be noted that any application for joinder needs to fulfil both limbs ie, factual or legal nexus between the parties and substitution is necessary to make the Industrial Court proceedings effective and enforceable or the non- joinder of the parties to the proceedings will render the proceeding in the Industrial Court ineffective and unenforceable. The fulfilment of just one limb is insufficient, both must be

fulfilled at the same time. In other words, if one of the two limbs is not fulfilled, then the joinder application will fail.”

(emphasis added)

Decision

[36] This Court, having considered all the affidavits and written submissions filed by the parties and taking into consideration the principles of law with regard to joinder of parties to the proceeding, decides that the Complainant’s application to join **Lum Tse Luen (NRIC Number: 770116-10-5743)** and **Cheong Yoke Ying (NRIC Number: 501115-10-5570)** as the Second and Third Respondents in the proceedings is hereby dismissed.

[37] In arriving at this decision, the Court has acted with equity and good conscience and the substantial merits of the case without regard to technicalities and legal form as stated under Section 30 (5) of the IRA 1967.

HANDED DOWN AND DATED THIS 22ND DAY OF OCTOBER 2024

(WAN JEFFRY KASSIM)

PRESIDENT

INDUSTRIAL COURT OF MALAYSIA