A

HUBLINE BHD v. INTAN WAZLIN AB WAHAB & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
LIM CHONG FONG JCA
B NOORIN BADARUDDIN JCA
[CIVIL APPEAL NOS: W-01(A)-128-03-2021 & W-01(A)-142-03-2021]
21 OCTOBER 2025
[2025] CLJ JT(15)

C

Abstract – *Despite its equitable mandate under s. 30(5) of the Industrial Relations Act 1967 ('Act'), the Industrial Court cannot override or ignore the fundamental company law principle of separate legal personality to impose liability on a non-employer company. The Industrial Court's power to add/substitute parties, under s. 29(a) of the*
D *Act, must be exercised in line with the said principle. To allow joinder or substitution of a non-employer corporate entity, there must be a reasonable factual or legal nexus between the proposed joinee and the dispute pending before the Industrial Court. The proposed joinee must also be among the parties who is liable in law for the termination of*
E *employment. Piercing the corporate veil is only justified in special cases, and requires clear and compelling grounds.*

F ***COURTS:*** *Industrial Court – Powers – Power to add/substitute parties – Application to bring in or replace non-employer corporate entity in proceedings – Overlap in directors, registered address, company secretaries or managerial personnel – Whether Industrial Court, guided by equitable mandate, can override/ignore separate legal personality doctrine under company law and impose liability on non-employer company – Industrial Relations Act 1967, ss. 29(a) & 30(5)*

G ***LABOUR LAW:*** *Procedure – Substitution/joinder – Application to bring in or replace non-employer corporate entity in proceedings – Overlap in directors, registered address, company secretaries or managerial personnel – Criterion and required test – Whether proposed additional party played any role in dispute – Whether there was reasonable factual/legal nexus to dispute – Whether proposed*
H *party liable in law for termination –Whether parties to proceedings before Industrial Court may use s. 29(a) of Industrial Relations Act 1967 to bring in/replace non-employer corporate entity in proceedings – Whether more expansive reading of joinder and substitution, adopted in case laws, stretched statutory interpretation and core principles of corporate law beyond statutorily authorised – Industrial Relations Act 1967, s. 29(a)*

I

COMPANY LAW: *Separate legal entity – Piercing of corporate veil – Power of Industrial Court to add or substitute parties – Application to bring in or replace non-employer corporate entity in proceedings – Overlap in directors, registered address, company secretaries or managerial personnel – Whether parties to proceedings before Industrial Court may use s. 29(a) of Industrial Relations Act 1967 to bring in/replace non-employer corporate entity in proceedings – Whether Industrial Court can override/ignore separate legal personality doctrine under company law – Salomon v. A Salomon & Co Ltd*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Appeal – Challenge against awards of Industrial Court – Application to bring in or replace non-employer corporate entity in proceedings – Overlap in directors, registered address, company secretaries or managerial personnel – Industrial Court ordered substitution and joinder – High Court dismissed applications for judicial review – Whether Industrial Court erred in allowing substitution and joinder – Whether awards ought to be quashed*

The respondents ('claimants') were the employees of either Hub Shipping Sdn Bhd ('Hub Shipping') or EM Shipping Sdn Bhd ('EM Shipping') and were retrenched by their respective employers. At the Industrial Court, the claimants applied, pursuant to s. 29(a) of the Industrial Relations Act 1967 ('Act'), to substitute Hub Shipping with Hubline Berhad ('Hubline'), and to join Highline Shipping Sdn Bhd ('Highline') as a party to the proceedings, on the grounds that: (i) the documents and searches carried out at the Companies Commission of Malaysia revealed that: (a) Hub Shipping and EM Shipping were subsidiaries of Hubline; (b) Hub Shipping and Hubline had common registered address and business address; (c) Hubline was the only shareholder of Hub Shipping, EM Shipping and Highline Shipping; and (d) Hub Shipping, Highline Shipping and Hubline had common directors; and (ii) there was a nexus between Hubline, Hub Shipping, EM Shipping and Highline Shipping. The non-substitution of Hubline and non-joinder of Highline Shipping would make the award, if rendered in the claimants' favour, ineffective and could not be enforceable because Hub Shipping was no longer in operation. The Industrial Court, in separate awards, ordered: (i) Hub Shipping to be substituted with Hubline; and (ii) Highline to be joined as a party to the proceedings. Hubline and Highline each filed judicial review applications, at the High Court, to quash the above awards. The High Court dismissed the applications. Hence, the present appeals by Hubline and Highline. The issue that arose for determination was whether the more expansive reading of joinder and substitution, adopted in *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* ('*Hotel Jaya Puri*') and *Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors* ('*Asnah*'), had stretched statutory interpretation and the core principles of corporate law beyond what the Act authorises.

A **Held (allowing appeals)**
Per S Nantha Balan JCA delivering the judgment of the court:

(1) Section 29(a) of the Act gives the Industrial Court power to add or substitute parties in ongoing proceedings. However, the statute is broad and says nothing about clear limits or criteria for doing so. That
B silence seems to have allowed the Industrial Court to stretch the rule and produce results which are at odds with a fundamental company law principle of the company being a separate legal personality (*Salomon v. A Salomon & Co Ltd*). The separate legal personality is trite; once a company is incorporated, it becomes its own legal person
C distinct from its shareholders, directors or parent and subsidiary entities. The company is shielded by its corporate veil which could be pierced only in special cases like fraud, sham or misuse of the corporate structure. However, in several decisions, the Industrial Court has allowed joinder or substitution, under s. 29(a), just because
D there is some 'legal or factual nexus' between an entity and the actual employer – even if the joined party never contracted with the employee or was not even involved in the termination dispute. The current trend in Industrial Court proceedings, risks turning s. 29(a) into a backdoor for ignoring corporate separateness. The Industrial
E Court's reliance on s. 30(5) of the Act, that the court is to act 'according to equity and good conscience', further blurs the line. (paras 19, 20, 22 & 24)

(2a) The test for joinder/substitution is not merely any reasonable factual or legal nexus or connection, as per *Asnah*, but rather, following
F *Co-operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals* ('*CCB*'), there must be a reasonable factual or legal nexus between the proposed joinee and the dispute which is before the Industrial Court. The parties who invoke the Industrial Court's power, under s. 29(a) of the Act, must demonstrate in the affidavit in support
G of their application, the requisite particulars and factual details to show a reasonable factual or legal nexus between the proposed joinee and the dispute which is pending before the Industrial Court and that the proposed joinee is amongst the persons/parties who is/are responsible, *ie*, liable in law, for the termination of employment. In
H light of *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors ('Keller')*, the principles enunciated in *Asnah* must be rejected. (paras 64 & 66)

(2b) If it is an express or implied attempt to lift or pierce the corporate veil, then, depending on the facts and circumstances, the applicant cannot rely on *Hotel Jaya Puri* and must disclose in the application, the
I particulars showing that there exist credible and compelling grounds for the piercing of the corporate veil. In determining whether the corporate veil should be lifted/pierced, the Industrial Court is

enjoined to keep in mind the following principles in *Ben Hashem v. Al Shayif*: (i) ownership and control of a company are not of themselves sufficient to justify piercing the veil; (ii) the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice; (iii) the corporate veil can be pierced only if there is some 'impropriety'; (iv) the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability; and (v) if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company structure by using them as a device or façade to conceal their wrongdoing. (para 65)

(3) Section 29(a) of the Act must be read and applied in light of established company law principles. The parties to be added or substituted must either be an employer, an employee or union. The basis on which the application was made by the claimants, under s. 29(a) of the Act, did not, in law, satisfy the strict legal requirements for the piercing of the corporate veil of Hubline or Highline, as per *Keller*, such that parties may be substituted or joined in the legal proceedings before the Industrial Court. Further, the joinder/substitution application did not, in any event, satisfy the criteria laid down in *CCB*. (paras 67-69)

(4) The averments by the appellants, that they were not the employer and that they had no role nor were they responsible for the retrenchment/termination, were unrebutted. Therefore, the appellants' averments were deemed admitted. As such, the Industrial Court ought to have proceeded on the basis that the appellants were neither the employer nor were they, in any way, responsible for, nor had any role or involvement in the retrenchment/termination of the claimants. If the claimants' application had been analysed on that basis, the Industrial Court ought to have concluded that there was no reasonable factual or legal nexus between the appellants and the dispute which was pending before the Industrial Court and the application under s. 29(a) of the Act ought to have been dismissed. (paras 70-72)

(5) The Industrial Court had committed errors in allowing Hubline to be a substitute for Hub Shipping and in joining Highline. The High Court's decision/order dismissing the judicial review was set aside. *Certiorari* was issued and the Industrial Court awards were quashed. (paras 73-75)

Case(s) referred to:

Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd [2020] 6 CLJ 557 FC ***(refd)***

Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors [2015] 3 CLJ 1053 CA

Ben Hashem v. Al Shayif [2008] EWHC 2380 (Fam) ***(refd)***

Co-operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals [2004] 1 CLJ 849 CA ***(refd)***

Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors [1996] 4 CLJ 747 CA ***(refd)***

Highline Shipping Sdn Bhd v. Intan Wazlin Ab Wahab & Ors [2022] CLJU 94; [2022] 1 LNS 94 ***(refd)***

Hochtief Gammon v. Industrial Tribunal 1964 AIR 1746 ***(refd)***

Hotel Jaya Puri Bhd v. National Union Of Hotel, Bar & Restaurant Workers & Anor [1979] CLJU 32; [1979] 1 LNS 32 HC ***(refd)***

Intan Wazlin Ab Wahab & Ors v. Hub Shipping Sdn Bhd [2019] ILRU 0130; [2019] 2 LNS 0130 (Award No. 130 of 2019) ***(refd)***

Intan Wazlin Ab Wahab & Ors v. Hub Shipping Sdn Bhd [2019] ILRU 0131; [2019] 2 LNS 0131 (Award No. 131 of 2019) ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Merrington Holdings Sdn Bhd & Anor v. Mahkamah Perusahaan Malaysia & Anor [2011] CLJU 222; [2011] 1 LNS 222 HC ***(refd)***

Mohad Fauzi Zakaria v. Sentoria Themeparks And Resort Sdn Bhd [2020] ILRU 0130; [2020] 2 LNS 0130 (Award No. 130 of 2020) ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [2000] 1 CLJ 503 CA ***(refd)***

Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors [2021] 4 CLJ 821 FC ***(refd)***

People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors [1985] CLJU 158; [1985] 1 LNS 158 HC ***(refd)***

Poornima Nesaretnam v. Inti International College Kuala Lumpur Sdn Bhd [2023] ILRU 1141; [2023] 2 LNS 1141 (Award No. 1141 of 2023) ***(refd)***

Prest v. Petrodel Resources Ltd & Ors [2013] 2 AC 415 ***(refd)***

Sai Jayaraj Anthony v. Merrington Holdings Sdn Bhd [2009] ILRU 1418; [2009] 2 LNS 1418 ***(refd)***

Salomon v. A Salomon & Co Ltd [1897] AC 22 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Thein Tham Sang v. The United States Army Medical Research Unit & Anor [1983] 1 CLJ 240; [1983] CLJ Rep 417 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), (3), 29(a), (b), 30(5)

Industrial Disputes Act 1947 [India], s. 18(3)(b)

(Civil Appeal No: W-01(A)-128-03-2021)

For the appellant - Ryan Ng Chin Wern, Khong Mei-Yan & Nathaniel Low Khern-Ming Ming; M/s Robert Low & Ooi

For the respondents no. 2, 3, 6, 8, 10, 11, 12, 13, 14, 16, 17, 18, 22, 24, 25, 26, 28, 31, 32, 34, 35 - Muhendaran Suppiah & Chong Wan Loo; M/s Muhendaran Sri

For the respondents no. 37 & 38 - Malaysia Department of Insolvency, Selangor

For the respondent no. 39 - Alex De Silva & Jessica Chew Harn Hwei; M/s Louis Ambrose & Partners

(Civil Appeal No: W-01(A)-142-03-2021)

For the appellant - Alex De Silva & Jessica Chew Harn Hwei; M/s Louis Ambrose & Partners

For the respondents no. 2, 3, 6, 8, 10, 11, 12, 13, 14, 16, 17, 18, 22, 24, 25, 26, 28, 31, 32, 34, 35 - Muhendaran Suppiah & Chong Wan Loo; M/s Muhendaran Sri

For the respondents no. 37 & 38 - Malaysia Department of Insolvency, Selangor

For the respondent no. 39 - Ryan Ng Chin Wern, Khong Mei-Yan & Nathaniel Low Khern-Ming; M/s Robert Low & Ooi

For the respondents no. 1, 4, 5, 7, 9, 15, 19, 20, 21, 23, 27, 29, 30, 33, 36 - Unrepresented

Reported by Najib Tamby

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] There are two appeals before us, namely Civil Appeal No: W-01(A)-128-03/2021 ("Appeal 128") and Civil Appeal No: W-01(A)-142-03/2021 ("Appeal 142") (collectively, "the appeals").

[2] We shall preface this judgment by stating that at stake in the appeals is the sanctity of the doctrine of separate legal personality which is a firmly embedded and well-entrenched principle of company law since *Salomon v. A Salomon & Co Ltd* [1897] AC 22 ("*Salomon*"), and which remains the cornerstone protecting individual corporate entities from the liabilities of their affiliates. In the context of proceedings before the Industrial Court, it appears that the doctrine is increasingly under strain – especially in cases where the true employer is insolvent, and the employee attempts to enforce remedies against sister or parent companies in the same corporate group. The tension is especially acute under s. 29(a) of the Industrial Relations Act 1967 ("the Act"), which gives the Industrial Court broad powers in procedural matters. Section 29(a) provides: "The court may, in any proceedings before it – (a) order that any party be joined, substituted or struck off".

[3] This judgment examines the limits of that power.

[4] Critically, the question of importance is whether parties to proceedings before the Industrial Court may use s. 29(a) to bring in, or replace a non-employer corporate entity (for instance, a holding company or subsidiary or its directors) in the proceedings, solely because the real employer is insolvent or because there is overlap in directors, registered address, company secretaries or managerial personnel and despite the fact that the proposed additional party played no role in the dispute?

[5] This has given rise to a conflict between the demands of fairness, equity and good conscience in employment disputes (per s. 30(5) of the Act) and the orthodox protection of the corporate veil. In particular, the related

question is whether the Industrial Court, guided by the equitable mandate in s. 30(5) of the Act, can override or ignore the separate legal personality doctrine (per *Salomon*) and impose liability on a non-employer company? Or does such joinder or substitution under s. 29(a) constitute an impermissible encroachment on corporate separateness?

[6] This judgment considers whether the more expansive reading of joinder and substitution adopted in cases like *Hotel Jaya Puri Bhd v. National Union Of Hotel, Bar & Restaurant Workers & Anor* [1979] CLJU 32; [1979] 1 LNS 32; [1980] 1 MLJ 109 ("*Hotel Jaya Puri*") and *Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors* [2015] 3 CLJ 1053; [2015] 4 MLJ 613; [2015] 3 AMR 197 ("*Asnah*") has stretched statutory interpretation and the core principles of corporate law beyond what the Act authorises.

[7] We may turn now to the brief facts.

Brief Facts

[8] The appellant in Appeal 128 is Hubline Berhad ("Hubline"), whilst the appellant in Appeal 142 is Highline Shipping Sdn Bhd ("Highline").

[9] The individuals who are named as the first to 36th respondents in these appeals were employees of either Hub Shipping Sdn Bhd ("Hub shipping") or EM Shipping Sdn Bhd ("EMS"). We shall, for convenience, refer to them collectively as "the claimants". The claimants were all retrenched by their respective employers, *ie*, either Hub Shipping or EMS. The claimants made representations to the Director General of Industrial Relations under s. 20(1) of the Industrial Relations Act 1967 claiming that they had been dismissed without just cause or excuse. The said representations were referred to the Industrial Court pursuant to s. 20(3) of the Act. In the meanwhile, Hub Shipping was wound up, and a liquidator was appointed

Joinder/Substitution

[10] The claimants applied under s. 29(a) of the Industrial Relations Act 1967 to substitute Hub Shipping with Hubline and to join another company, Highline as a party to the proceedings before the Industrial Court. The claimants' grounds for the substitution and joinder per the affidavit of Zarinah binti Ahmad Musa duly affirmed on 17 May 2017, was as follows:

> 10. We have been advised by our Solicitors and verily believe and aver that the documents and searches carried out at the Companies Commission of Malaysia revealed, among others, as follows:
>
> (i) Hub Shipping and EM Shipping are subsidiaries of Hubline;
>
> (ii) Hub Shipping and Hubline have common registered address and business address.
>
> (iii) Hubline is the only shareholder of Hub Shipping, EM Shipping and also Highline Shipping; and

(iv) Hub Shipping, Highline Shipping and Hubline have common director/s.

[11] Based on para. 10(i) to 10(iv) hereinabove, we were advised by our solicitors and verily believe and aver that there are nexus between Hubline, Hub Shipping, EM Shipping and Highline Shipping. The non substitution of Hubline and non joinder of highline shipping will make the award, if rendered in the claimants' favour ineffective and could not be enforceable because Hub Shipping is no longer in operation.

[12] As such, we humbly pray that this application to substitute, Hub Shipping with Hubline and to join Highline Shipping as a party to this proceeding be allowed to ensure that the award of this Honourable Court is effective and enforceable.

The Response By The Proposed Joinees

[11] The joinder/substitution application was opposed by Hubline and Highline. Mr Ling Li Kuang, the Managing Director of Hubline affirmed the affidavit in reply for Hubline, whilst Mr Bernard Ling Ing Tah, the Managing Director affirmed the affidavit in reply for Highline. The contents of both affidavits are similar. For present purposes, it suffices to refer to the following passages from Mr Ling Li Kuang's affidavit in reply dated 6 November 2017, which read as follows:

7. I crave leave to refer to paragraphs 10 to 12 of the Supporting Affidavit whereby the claimants intend to substitute Hubline Berhad in place of Hub Shipping Sdn Bhd on the basis that Hub Shipping Sdn Bhd is a subsidiary of Hubline Berhad, that they have common registered address, common business address and common directors and that Hubline Berhad is the only shareholder of Hub Shipping Sdn Bhd.

8. Whilst the above facts are not disputed, I am advised by my solicitors and verily believe that there is no other nexus between the companies in order to justify the substitution of Hubline Berhad. Hubline Berhad played no part in the claimants' termination of services.

9. Furthermore, I am advised by my solicitors and verily believe that the claimants have failed to show how and in what manner the substitution of Hubline Berhad would ensure that any Award by this Honourable Court will be effective and enforceable.

10. In this regard, I am advised by my solicitors and verily believe that although Hub Shipping is wound up, a Liquidator has been appointed in its place. I am advised that any award can be effectively enforced against a party on record, *ie*, the Liquidator and there would be no need to substitute Hubline Berhad to the proceedings.

11. As such, I am advised and verily state that the Liquidator being the person who is managing and having the interest of the Company at the material time is sufficient and is the rightful party to be joined to this action.

12. I am also advised by my solicitors and verily believe that the mere fact Hubline Berhad shares common directors, common registered address and business address with Hub Shipping Sdn Bhd does not in any way create any factual or legal nexus between the parties. No *prima facie* evidence has been produced by the claimants to show how Hubline Berhad can be held liable partly or wholly for the payment of award claimed against the Company. Hence, I am advised and verily state that without establishing the same, Hubline Berhad cannot be made a party to this proceeding.

Claimants' Submissions

[12] The following submissions were made on behalf of the claimants (and parts of it were adopted by the Industrial Court):

15. In applying all the above case laws to the facts of our case, we humbly submit that there are nexus between Hubline Berhad, Hub Shipping Sdn. Bhd, EM Shipping Sdn. Bhd and Highline Shipping Sdn. Bhd., namely

(i) Hub Shipping Sdn Bhd and EM Shipping Sdn Bhd are subsidiaries of Hubline Berhad. [please see pages 32 and 43 of the Affidavit In Support of the said application];

(ii) Hub Shipping and Hubline Berhad have common registered address and business address. [please see pages 29 and 48 of the Affidavit In Support of the said application];

(iii) Hubline Berhad is the only shareholder of Hub Shipping Sdn Bhd, EM Shipping Sdn. Bhd. and also Highline Shipping Sdn. Bhd. [please see pages 32, 43 and 65 of the Affidavit In Support of the said application]; and

(iv) Hub Shipping Sdn Bhd, Highline Shipping Sdn Bhd and Hubline Berhad have common directors and secretary, namely Ling Li Kuang (Director) and Yeo Puay Huang (Secretary) - [please see pages 31, 50 and 64 of the Affidavit In Support of the said application].

(v) The letterhead of the letter of termination dated 31 May 2015 issued to one of the claimants expressly states the name of the Hubline [please see page 26 of the Affidavit In Support of the said application]

16. We submit that the non substitution of Hubline Berhad and non joinder of Highline Shipping Sdn Bhd will make the Award, if rendered in the claimants' favour ineffective and could not be enforceable as Hub Shipping Sdn Bhd is no longer in operation and had been wound up.

17. Hence, we humbly pray that our application to join Highline Shipping Sdn Bhd and to substitute Hubline Berhad as a parties to this proceeding be allowed to ensure that the Award of this Honourable Court is effective and enforceable.

The Awards

[13] By way of Award No. 130 of 2019 dated 8 January 2019, the Industrial Court ordered Hub Shipping to be substituted with Hubline. See: *Intan Wazlin Ab Wahab & Ors v. Hub Shipping Sdn Bhd* [2019] ILRU 0130; [2019] 2 LNS 0130 (Award No. 130 of 2019). And by way of Award No. 131 of 2019 dated 8 January 2019, the Industrial Court ordered Highline to be joined as a party to the Industrial Court proceedings. See: *Intan Wazlin Ab Wahab & Ors v. Hub Shipping Sdn Bhd* [2019] ILRU 0131; [2019] 2 LNS 0131. The contents of the Industrial Court Award No. 130 of 2019 and Award No. 131 of 2019 are identical.

[14] The Industrial Court's basis for the joinder and substitution may be gathered from the following passages from Award No. 130 of 2019:

> [5] As aforementioned, the claimants have filed in the application in order to substitute Hub Shipping Sdn. Bhd. with Hubline Berhad and to join Highline Shipping Sdn. Bhd. as a party to the proceeding. The crux of the contention as contained in the affidavit in support states, firstly that the 1st Company (Hub Shipping Sdn. Bhd.) and 2nd Company (EM Shipping Sdn. Bhd.) are subsidiaries of Hubline. Secondly, the 1st Company and Hubline have common registered address and business address.
>
> Thirdly, Hubline is the only shareholder of the 1st Company, 2nd Company and also Highline Shipping. Last but not least, the 1st Company, Highline Shipping and Hubline have common director/ directors.
>
> [6] In its reply, the 1st Company and the 2nd Company argues, *inter alia*, that the application by the claimants has not disclosed any ground against Highline Shipping besides the fact that Highline Shipping shares common directors and shareholders with the 1st Company and 2nd Company. The said ground is said to be insufficient to make an order for joinder against Highline Shipping. It is also stated in the Affidavit In Reply that the mere fact that Highline Shipping shares common directors and shareholders with the 1st Company and 2nd Company does not constitute any factual or legal nexus between the parties. Moreover, as the 1st Company has been managed by a Liquidator, if an award can be effectively enforced against a party on record (in this case, the Liquidator), then, it is argued that there would be no need to join another party to the proceeding.
>
> [7] The claimants refer to several decisions to support their crux of contention as stated in the application which includes the case of *Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 in reference to the dictum stated by the Indian Supreme Court in the case of *Hochtief Gammon y. Industrial Tribunal* [1964] AIR S.C 1746 as regards the test for joinder. It is argued that the applications of the *dicta* have been applied on numerous occasions by the Industrial Court in Malaysia. It is argued further that there are nexus between Hubline Berhad, the 1st Company, the 2nd Company and Highline Shipping Sdn. Bhd. as disclosed in various searches conducted in SSM.

[8] It is also the argument of the claimants that in applying the test in *Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors* [2015] 3 CLJ 1053, *inter alia*, that third parties can be made liable to pay the award notwithstanding that they were not the employer. Furthermore, the threshold test to be employed at the joinder stage appears to be whether the employer 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.

THE SUBMISSIONS BY THE 1ST COMPANY AND 2ND COMPANY:

[9] In opposing the application, the Company refers to the same case referred earlier by the claimants *ie*, *Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors*, which propounded the principle of reasonable factual or legal nexus. It is argued further that before the Court can undertake the task of determining whether a reasonable factual or legal nexus exists between the Companies/respondents named and Highline Shipping, it must first determine the effectiveness of the remedy sought. Furthermore, as submitted by the Company, the joinder application should only be allowed if the circumstances of the case deem that it just and equitable to do so. This is in line with the decision in *Transocean Drilling Sdn. Bhd. v. Industrial Court of Malaysia & Anor* [2016] CLJU 1077; [2016] 1 LNS 1077.

[10] It is the argument of the Company that the claimants have not demonstrated any *prima facie* evidence on how Highline Shipping can be held liable jointly or wholly for the payment of the award claimed against the Companies/respondents. The fact that Highline Shipping shares common shareholder and common directors with the Companies/respondents cannot be a reasonable ground to allow the claimants' application herein nor is it good enough a reason for the Court to draw a nexus between Highline Shipping and the Companies/respondents.

THE FINDINGS OF THE COURT:

[11] Having perused the facts and circumstances of the case and following the principle enunciated by the Court of Appeal in *Asnah Ahmad v. Mahkamah Perusahaan Malaysia & Ors* (*supra*), the Court finds that the claimants have presented a *prima facie* evidence that there is a factual and legal nexus between the 1st Company and 2nd Company and Highline Shipping so as to justify the present application. *The Court has also accepted the arguments put forth at page 13 and 14 of the claimants' submission which has provided the premise for the prima facie evidence in order to substitute Hub Shipping Sdn. Bhd. with Hubline Berhad and for the joinder of Highline Shipping Sdn. Bhd. as a party to the proceeding.*

Legally, the Court is not empowered to grant two separate orders in one go. Hence, the order as applied by the claimants will be made separately.

[12] In the upshot, the Court allows the application of the claimants and it is hereby ordered for Hub Shipping Sdn. Bhd. to be substituted with Hubline Berhad.

(emphasis added)

Judicial Review

[15] Hubline filed a judicial review application No: 25-146-04/2019 ("JR 146") for amongst others, an order of *certiorari* to quash the Industrial Court Award No. 130 of 2019 dated 8 January 2019 ordering Hub Shipping Sdn Bhd (Hub Shipping) to be substituted with Hubline in the Industrial Court proceedings. Highline filed a judicial review application No: 25-132-03/2019 ("JR 132") for, amongst others, an order of *certiorari* to quash the Industrial Court Award No. 131 of 2019 dated 8 January 2019 ordering Highline to be joined as a party to the Industrial Court proceedings.

[16] The judicial review applications were dismissed on 8 February 2021. The High Court's decision is reported as *Highline Shipping Sdn Bhd v. Intan Wazlin Ab Wahab & Ors* [2022] CLJU 94; [2022] 1 LNS 94; [2022] MLJU 80; [2022] AMEJ 0032. The appeals are directed at the High Court's decision dated 8 February 2021.

High Court – The Reasons

[17] The High Court's reasons for dismissing the judicial review applications are as follows:

[10] Having perused the judgment of the learned IC, I find that the learned IC had made its finding that the first to 36th respondents have presented a *prima facie* evidence that there is a factual and legal nexus between the Hub Shipping, Hubline and Highline so as to justify their application.

[11] The court has also accepted the arguments put forth by the first to 36th respondents which has provided the premise for the *prima facie* evidence in order to substitute Hub Shipping with Hubline and for the joinder of the applicant as a party to the proceeding.

[12] I am of the view the findings of the learned IC are supported with reference to the relevant facts and law and the learned IC had taken into account all relevant factors and law in arriving at its decision that the applicant should be joined as a party to the proceedings before the Industrial Court.

[13] Based on the facts of the present case, I find that there is nexus between the applicant, Hub Shipping [In Liquidation], EM Shipping and Hubline. The uncontroverted evidence established that:

13.1 Hub Shipping [In Liquidation], EM Shipping and the Applicant are subsidiaries of Hubline.

13.2 Hub Shipping [In Liquidation] and the Applicant have common directors and secretary, namely Ling Li Kuang (Director) and Yeo Puay Huang (Secretary).

13.3 The letter of termination at page 45 of Enclosure 2 was signed by the common Director, Ling Li Kuang as CEO for Hub Shipping and Hubline.

[14] Applying the test as provided in the Court of Appeal case of *Asnah Ahmad* (*supra*) I am of the view that the 1st to 36th respondents had shown that there exists a reasonable factual or legal nexus between the Applicant, Hub Shipping (In Liquidation), EM Shipping and Highline Shipping.

[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.

[16] Further, it is my view that the Liquidators are appointed to perform the statutory duties and responsibilities and to administer the affairs of the company after the Company is wound up. Thus, the appointed Liquidator in the present case cannot be compelled in his personal capacity to assist the Industrial Court for the case relating to the termination of the 1st to 36th respondents or thereafter made liable or assume liability for payment of any award that might be made against the companies.

[17] Hence, I am of the opinion that it would be unjust and inequitable to join the Liquidator in the proceedings before the Industrial Court.

[18] Therefore, based on the above, I am of the considered view that the learned IC had taken into consideration all relevant matters and had not considered irrelevant matters and as such did not commit any error of law in arriving at his decision.

[19] I find that the learned IC in handling down the Impugned Interim Award has indeed kept to the objective and spirit of the provision of section 30(5) of the IRA, which requires the Industrial Court to decide according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

Grounds Of Appeal

[18] In Appeal 128, Hubline had identified the following as being the errors committed by the High Court, namely:

4. The learned Judge erred in fact and/or in law in holding that there exists a reasonable factual or legal nexus between the appellant, the 37th respondent (Hub Shipping), the 38th respondent (EM Shipping Sdn Bhd ["EM Shipping"]), and the 39th respondent (Highline Shipping Sdn Bhd ["Highline"]).

5. In this connection, the learned Judge failed to consider and/or appreciate, either sufficiently or at all, amongst others, the following matters:

5.1. Ling Li Kuang was the only common director in the appellant, the 37th respondent (Hub Shipping), and the 39th respondent (Highline). In this regard, there was 1 other director in the 37th respondent (Hub Shipping), 5 other directors in the appellant, and 2 other directors in the 39th respondent (Highline). Further, Ling Li Kuang was not a director in the 38th respondent (EM Shipping).

5.2. At present, the appellant is not a shareholder of the 38th respondent (EM Shipping). In this regard, the appellant was no longer a shareholder of the 38th respondent (EM Shipping) at the material time of the Subsitution Application.

5.3. In any event, mere commonality or similarity of director, shareholder, address, and/or company secretary are not sufficient to establish nexus and/or ought not to be sufficient to establish nexus. Such commonality or similarity is not unusual. Establishing nexus based on such commonality or similarity would be unjust and/or would lead to absurdity.

5.4. The 1st to 36th respondents did not aver and/or adduce any evidence to prove that the appellant was involved in the 1st to 36th respondents' employment with the 37th respondent (Hub Shipping) and/or the 38th respondent (EM Shipping) and/or that the appellant was involved in the dispute in the Industrial Court Proceedings.

5.5. The letters of contractual employment and accompanying terms and conditions were issued by the management of the 37th respondent (Hub Shipping) and the 38th respondent (EM Shipping) respectively. The appellant is not privy to the said arrangement.

5.6. There is no averment and/or evidence that the 1st to 36th respondents had rendered any service to the appellant.

5.7. The letters of termination were issued by the management of the 37th respondent (Hub Shipping) and the 38th respondent (EM Shipping) respectively. The appellant is not privy to the said arrangement.

5.8. The 1st to 36th respondents acknowledge that the appellant is not their employer. In this regard, the representations for reinstatement were filed by the 1st to 36th respondents against the 37th respondent (Hub Shipping) and the 38th respondent (EM Shipping), as the case may be, and not against the appellant.

5.9. Finding *prima facie* evidence or allowing the Substitution Application by the mere fact of commonality set out in paragraph 5.3 above (amongst others) would be unjust and/or would lead to absurdity and/or would offend the doctrine of separate legal entity.

6. The learned Judge erred in fact in holding at paragraph 13.3 of the learned Judge's grounds of judgment that the relevant letter of termination was signed by the common director Ling Li Kuang for the

37th respondent (Hub Shipping) and the appellant. In this connection, amongst others, the learned Judge failed to consider and/or appreciate, either sufficiently or at all, the following matters:

6.1. The relevant letter of termination was signed off by Ling Li Kuang as the "CEO" of "Hub Shipping Sdn Bhd".

6.2. The relevant letter of termination was issued under the letterhead of "Hub Shipping Sdn Bhd".

A. Appealable Error - Necessity to Substitute

7. The learned Judge erred in fact and/or in law in holding that the non-substitution will make any award of the Industrial Court ineffective and unenforceable.

8. In this connection, the learned Judge failed to consider and/or appreciate, either sufficiently or at all, the submissions advanced and/or issues raised by the appellant in the Court below which are, amongst others, as follows:

8.1. the 1st to 36th respondents claimed for reinstatement with their employer, namely the 37th respondent (Hub Shipping) and the 38th respondent (EM Shipping), as the case may be. Not being their employer, the appellant cannot be made to reinstate the 1st to 36th respondents.

8.2. In the event of an alternate claim for compensation, any award can be effectively enforced against the 37th respondent (Hub Shipping) by the filing of proof of debt with the Liquidator of the 37th respondent (Hub Shipping).

8.3. Likewise, any award can be effectively enforced against the 38th respondent (EM Shipping).

8.4. The Substitution Award renders the Industrial Court Proceedings and adjudication ineffective as the parties thereto (including the appellant) have no access to witnesses and evidence on the part of the 37th respondent (Hub Shipping) in respect of the alleged wrongful termination. In effect, the relevant evidence will be in the custody of a non-party, the 37th respondent (Hub Shipping).

8.5. The adjudication of the claims by the employees of the 37th respondent (Hub Shipping) is rendered ineffective and unenforceable for want of jurisdiction given that the remedy of reinstatement (or compensation *in lieu* of reinstatement) becomes impossible without the 37th respondent (Hub Shipping) as the employer.

B. Appealable Error - Irrelevant Considerations

9. The learned Judge erred in fact and/or in law when he took into account the irrelevant considerations that the appointed Liquidator cannot be compelled in his personal capacity to assist the Industrial Court in the case or be made liable or assume liability for payment of any award

of the Industrial Court and that it would be unjust and inequitable to join the Liquidator in the proceedings in the Industrial Court. In this connection, the learned Judge failed to appreciate the appellant's submission in the Court below as set out in paragraph 8.2 above.

C. Other grounds

10. The learned Judge erred in fact and/or law in failing to appreciate that the arguments put forth by Counsel for the 1st to 36th respondents cannot constitute "a premise for *prima facie* evidence" to justify the Substitution Award.

11. The learned Judge erred in fact and/or law in failing to take into account and/or in applying the legal principles as stated in *Transocean Drilling Sdn Bhd v. Industrial Court of Malaysia & Anor* [2016] 1 LNS 1077 which held that before the Industrial Court can undertake the task of determining whether a reasonable factual or legal nexus exists, the Industrial Court must first determine the effectiveness of the remedy sought and the Substitution Application should only be allowed if the circumstances of the case deem that it to be just and equitable to do so.

12. The learned Judge erred in fact and/or law in failing to hold that in the circumstances of the case, it is not just and equitable to grant the Substitution Award.

13. The learned Judge erred in fact and/or law in failing to consider the proper application and true purpose of the relevant applicable test, as referred to in the Court of Appeal decision in the case of *Asnah Ahmad v. Mahkamah Perusahaan & Ors* [2015] 3 CLJ 1053.

14. The learned Judge failed to consider and/or appreciate, either sufficiently or at all, the submissions advanced and/or issues raised by the appellant in the Court below, which are amongst others, as follows:

14.1. The Substitution Award offends the doctrine of separate legal personality/entity. The circumstances of the case do not warrant a piercing and/or lifting of the corporate veil.

Our Decision

[19] The starting point is that s. 29(a) of the Act gives the Industrial Court power to add or substitute parties in ongoing proceedings. But the statute is broad and says nothing about clear limits or criteria for doing so. That silence seems to have allowed the Industrial Court to stretch the rule and produce results which are at odds with a fundamental company law principle of the company being a separate legal personality (per *Salomon*).

[20] The separate legal personality principle is trite. Once a company is incorporated, it becomes its own legal person distinct from its shareholders, directors, or parent and subsidiary entities.

[21] In law, the position of holding companies and its subsidiaries is stated in *People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors* [1985] CLJU 158; [1985] 1 LNS 158; [1986] 1 MLJ 68 at pp. 69 to 70 per Zakaria Yatim J (as he then was):

> The plaintiff company is a legal entity by itself. Although it is a subsidiary of the first defendant company, the plaintiff company maintains its own separate entity.
>
> In *Ebbw Vale Urban District Council v. South Wales Traffic Area Licensing Authority* [1951] 2 KB 366, Cohen L.J. said:
>
> > "Under the ordinary rules of law, **a parent company and subsidiary company, even a 100 percent subsidiary company, are distinct legal entitles** ...".
>
> (emphasis added)

[22] Thus, the company is shielded by its corporate veil which is to be pierced only in special cases like fraud, sham structures, or misuse of the corporate structure. Yet, we find that in several decisions, the Industrial Court has allowed joinder or substitution under s. 29(a) just because there is some "legal or factual nexus" between an entity and the actual employer – even if the joined party never contracted with the employee, or was not even involved in the termination dispute.

[23] According to the submissions that were made by counsel for the appellants, after the decision of the Court of Appeal in *Asnah*, there appears to be a school of thought that any party that is remotely "connected" to the employer may be joined or even substituted in place of the employer. Continuing with their submissions, it was argued that what has happened is that companies that are in the same group of companies (see: *Poornima Nesaretnam v. Inti International College Kuala Lumpur Sdn Bhd* [2023] ILRU 1141; [2023] 2 LNS 1141 (Award No. 1141 of 2023) or even directors (see: *Merrington Holdings Sdn Bhd & Anor v. Mahkamah Perusahaan Malaysia & Anor* [2011] CLJU 222; [2011] 1 LNS 222; *Sai Jayaraj Anthony v. Merrington Holdings Sdn Bhd* [2009] ILRU 1418; [2009] 2 LNS 1418 (Award No. 1418 of 2009) are joined into the Industrial Court proceedings or substituted in place of the employer in the proceedings. This is done as long as it can be established that there is some nexus or connection between the employer and the party sought to be joined or substituted, regardless of how tenuous or nebulous the nexus or connection is.

[24] There is merit in the contention that the current trend in Industrial Court proceedings risks turning s. 29(a) into a backdoor for ignoring corporate separateness. And the Industrial Court's reliance on s. 30(5) that the court is to act "according to equity and good conscience" further blurs the line.

Hochtief Gammon

[25] One of the earliest cases which had influenced or shaped Malaysian jurisprudence on joinder or substitution of parties in Industrial Court proceedings is the decision of the Supreme Court of India in *Hochtief Gammon v. Industrial Tribunal* [1964] AIR 1746[1964 SCR 596 ("*Hochtief*"). The decision was that of the eminent jurist, Chief Justice PB Gajendragadkar. The case centred on the implied power of an Industrial Tribunal to add parties to an industrial dispute. The case arose when the contractor, Hochtief Gammon tried to add its client, Hindustan Steel Ltd, as a party to a bonus dispute with its own employees. The dispute was between Hochtief, a firm of civil engineers and contractors, and its workmen. Hochtief was working on a construction project for Hindustan Steel Ltd. The dispute was over the payment of a bonus to Hochtief's employees. Hochtief stated that its liability to pay the bonus was dependent on its client, Hindustan Steel Ltd, reimbursing it for the amount. The Government of the State of Orissa referred the dispute to the Industrial Tribunal for adjudication, naming only Hochtief and its workmen as parties. During the proceedings, Hochtief argued that Hindustan Steel Ltd. should be joined as a party. However, the Tribunal refused, and this was upheld by the High Court. Hochtief appealed to the Supreme Court. The Supreme Court held that while the Tribunal does not have an explicit statutory power to summon additional parties, such a power is implicit under s. 18(3)(b) of the Industrial Disputes Act 1947.

[26] The Supreme Court of India posited that this implied power is to be used when a party's presence is essential for the proper and effective adjudication of the dispute. This power, however, is not without limitations. The Supreme Court made it clear that the power cannot be used to enlarge the scope of the dispute that was originally referred to the Tribunal by the appropriate Government. In the context of the *Hochtief* dispute, the court found that the question of who the true employer was, not part of the original reference. The dispute was narrowly framed to determine if the workers were entitled to a bonus from Hochtief, and if so, how much. Therefore, adding Hindustan Steel Ltd would have expanded the scope of the reference, something the Tribunal was not empowered to do. The Supreme Court upheld the Tribunal's decision not to add the new party.

[27] *Hochtief* was adopted by the Court of Appeal case of *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil Pereira & Ors* [1996] 4 CLJ 747 ("*Harris*"). In *Harris*, the Court of Appeal adopted the pronouncement of Salleh Abas FJ (sitting in the High Court) in the *Hotel Jaya Puri*'s case that the court would lift the corporate veil of a company when the justice of the case so demands. The Court of Appeal in *Harris* went further to adopt the Indian Supreme Court's decision in *Hochtief* that the test to add a party is whether "the addition of the party is necessary to make adjudication itself effective and enforceable".

A ***Hotel Jaya Puri***

[28] We turn now to *Hotel Jaya Puri*. But before discussing *Hotel Jaya Puri*, it is necessary to say that hitherto the Industrial Court has dealt with applications for joinder/substitution under s. 29(a) of the Act without regard for the doctrine of corporate separateness. However, we hasten to add that
B the Industrial Courts have no choice in the matter as they were bound by *stare decisis* and had to follow the decision of the former Federal Court in *Hotel Jaya Puri*, and the later decision of the Court of Appeal in *Asnah*.

[29] In *Hotel Jaya Puri*, a number of workers who were employed by the
C Jaya Puri Chinese Garden Restaurant Sdn Bhd ("the restaurant") were retrenched as the business had to be closed due to losses. The workers were members of the National Union of Hotel, Bar and Restaurant ("the union"). The business of the restaurant was carried on in premises belonging to Hotel Jaya Puri Berhad ("the hotel"). The hotel and the restaurant had the same managing director. The restaurant was a wholly owned subsidiary of the
D hotel. The workers, through the union, challenged the retrenchment and claimed that they were dismissed without just cause or excuse. The dispute between the union and the restaurant was referred to the Industrial Court. In its statement of case, the union alleged that the workers were employees of the hotel and that they were dismissed and not retrenched as alleged by the
E restaurant. The union sought to have the hotel joined as a party alleging that the workers were the employees of the hotel and that they were dismissed and not retrenched as alleged by the restaurant.

[30] The Industrial Court in its award found that (i) the workers were
F employees of the hotel and not of the restaurant; (ii) the closure of the business of the restaurant was proper and genuine; and (iii) the termination of service of the employees was a discharge of workers following the closure of business and not retrenchment as understood and accepted in the industry. The court also awarded two months' basic salary and fixed allowances as compensation.

G **[31]** The hotel applied to the High Court to quash the award on the grounds: (i) the award against the hotel was an error of law as under s. 29 of the Act and the Industrial Relation Rules, no claim and no award can be made against the party added, although it may make a claim; and (ii) the hotel was not the employer of the workers in question. Salleh Abas FCJ (sitting
H as the High Court Judge) held as follows:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-
I passed this principle if not made an inroad into it. *The court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the case so demands*. Thus the facts of the case may well justify the court

to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith, Stone and Knight v. Birmingham Corporation* [1938] 4 All ER 116; *Re FG (Films) Limited* [1955] 1 WLR 483; and *Firestone Tyre & Rubber Co v. Llewelyn* [1957] 1 WLR 464. Professor Gower in his *Principles of Modern Company Law*, 3rd Edition, Page 213, said that the courts:

> "are coming to recognise *the essential unity of a group enterprise rather than the separate legal entity of each company within the group*. Other examples of this can be found. In *The Roberta* (1937) 58 Ll LR 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was 'a separate entity ... in name alone and probably for the purposes of taxation'. In another case, *Spittle v. Thames Grit & Aggregates Ltd* [1937] 4 All ER 101, the court found no difficulty in treating a subsidiary as 'to all intents and purposes' the same as the parent company which held 90 per cent of its shares.
>
> A licensing authority in exercise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd v. British Transport Commission* [1962] 2 QB 173, Devlin LJ at page 202) ... A good example of this is *Bird & Co v. Thos Cook & Son* [1937] 2 All ER 227, in which an indorsement of a cheque to 'Thos. Cook & Son Ltd', was treated as an indorsement to the allied but separate company of Thos. Cook & Son (Bankers) Ltd by regarding it as a mere misdescription to be ignored under the principle *falsa demonstrate non nocet*.

It is clear therefore that the approach taken by the President of Industrial Court is not without any legal support when he placed an emphasis on the essential unity of group enterprise which in this case consists of the Hotel and the restaurant, especially when Datuk N.A. Kularajah who is the Managing Director of the Hotel was also the Managing Director and later a Director of the restaurant and had the ultimate authority over the employees. Thus, the practice of treating the employees of the restaurant as being separate from the employees of the Hotel such as the Union having been told that they were so, their salaries, their E.P.F. and SOCSO contributions being paid by the restaurant, does not detract from the fact that the employees in question were in fact working in one group enterprise.

In my judgment, by giving recognition to this fact, the President did not cause any violence to the sanctity of the principle of separate entity established in *Salomon v. Salomon & Co* [1897] AC 22 but rather gave effect to the reality of the Hotel and the restaurant as being in one enterprise. I find nothing unreasonable in the finding of the President by by-passing this principle. He did no more than to comply with the wishes of the Legislature that in the making of an award substantial merits of the case, the public interest and any matters which are necessary or expedient for the purpose of settling the dispute are among the factors which should

A be taken into consideration by the court. In my view, the finding by the President is in no way against the principle of separate entity and I am therefore not prepared to interfere with the award on this account.

(emphasis added)

Law Kam Loy v. Boltex

B **[32]** The next case is *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355; [2005] 4 AMR 525; [2005] MLJU 225 ("*Boltex*"). This was a case involving a claim by the plaintiffs (the appellants in the appeal before the Court of Appeal) against the defendants (the respondents in the appeal) for the transfer of shares owned and held by the first defendant (Boltex) in a C company called Dragonbite Holdings Sdn Bhd. It was not a case in industrial relations/employment. The Court of Appeal held, *inter alia*:

It follows that the plaintiffs and the second to the sixth defendants had no right whatsoever to contract over the property of a third party, namely, Boltex. But, says counsel for the plaintiffs, the matter may be easily D resolved by lifting the veil of incorporation of Boltex. I regret that I find myself unable to accede to this submission. It is true that at one point of time the view held by some academics and judges (including Lord Denning) was that the corporate veil could be cast aside whenever the interests of justice required it.

E In our jurisdiction, the high level watermark favouring this view is *Hotel Jayapuri Bhd v. National Union of Hotel Bar And Restaurant Workers* [1980] 1 MLJ 109, where Salleh Abas FJ (sitting at first instance as a High Court judge) said:

F It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift "the veil of incorporation" (so the expression goes) when the justice of the G case so demands. Thus the facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith, Stone and Knight v. Birmingham Corporation* [1938] 4 All ER 116; *Re FG (Films) Limited* [1955] 1 WLR 483; and *Firestone Tyre & Rubber Co v. Llewelyn* [1957] 1 WLR 464.

H Professor Gower in his *Principles of Modern Company Law*, 3rd Edition, page 213, said that the courts

are coming to recognise the essential unity of a group enterprise rather than the separate legal entity of each company within the group. Other examples of this can be found. In *The Roberta* (1937) I 58 LI LR 159, a parent company was held liable on a bill of lading signed on behalf of its wholly owned subsidiary, the court saying that the subsidiary was "a separate entity ... in name alone and

> probably for the purposes of taxation". In another case, *Spittle v. Thames Grit & Aggregates Ltd* [1937] 4 All ER 101, the court found no difficulty in treating a subsidiary as "to all intents and purposes" the same as the parent company which held 90 per cent of its shares. A licensing authority in exercise of its discretion has been held entitled to have regard to the fact that a parent and subsidiary company, though technically separate legal persons, in fact constituted a single commercial unit (*Merchandise Transport Ltd v. British Transport Commission* [1962] 2 QB 173 Devlin LJ at page 202) ... A good example of this is *Bird & Co v. Thos Cook & Son* [1937] 2 All ER 227, in which an indorsement of a cheque to "Thos Cook & Son Ltd." was treated as an indorsement to the allied but separate company of Thos. Cook & Son (Bankers) Ltd by regarding it as a mere misdescription to be ignored under the principle *falsa demonstratio non nocet*.

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However, a careful look at the contemporary cases shows that, *the view expressed by Salleh Abas FJ in the High Court and by Professor Gower no longer prevails. Indeed, the 7th edition of Gower's work no longer canvasses the earlier opinion quoted by Salleh Abas FJ.* But that is not to say that the court in the *Hotel Jayapuri* case was wrong in lifting the veil of incorporation on the facts of that case. *The Hotel Jayapuri case was concerned with the Industrial Relations Act 1967 which requires the Industrial Court to disregard technicalities and to have regard to equity, good conscience and the substantial merits of a case. Accordingly, in industrial law, where the interests of justice so demand, it may, in particular cases be appropriate for the Industrial Court to pierce or to disregard the doctrine of corporate personality.*

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That is what happened in the Hotel Jayapuri case and no criticism of that case on its facts may be justified.

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A moment ago I mentioned Gower's 7th edition. The relevant passage is at page 184 and reads as follows:

> Challenges to the doctrines of separate legal personality and limited liability at common law tend to raise more fundamental challenges to these doctrines, because they are formulated on the basis of general reasons for not applying them, such as fraud, the company being a "sham" or "facade", that the company is the agent of the shareholder, that the companies are part of a "single economic unit" or even that the "interests of justice" require this result. However, the courts seem, if anything, more reluctant to accept such general arguments against the doctrines than arguments based on particular statutes or the terms of particular contracts.

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The editor of the 7th edition cites *Adams v. Cape Industries Plc* [1990] Ch 433 as the leading case on the subject and says this (referring to the judgment of the Court of Appeal in that case):

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> Moreover, the court declared that it did not accept that:

> as a matter of law the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group, merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.

And in a later passage the learned editor goes on to say this under the heading "Interests of Justice":

> Although the interests of justice may provide the policy impetus for creating exceptions to the doctrines of separate legal personality and limited liability, as an exception in itself it suffers from the defect of being inherently vague and providing to neither courts nor those engaged in business any clear guidance as to when the normal company law rules should be displaced.
>
> Consequently, it is difficult to find cases in which "the interests of justice" have represented more than simply a way of referring to the grounds identified above in which the veil of incorporation has been pierced.

I may add that *the liberal view expressed by Lord Denning MR in such cases as DHN Food Distributors Ltd v. Tower Hamlets London Borough Council (1976) 1 WLR 852 can no longer be sustained*. In that case, the Master of the Rolls said:

> Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group". This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co (Wakefield) Ltd v. Caddies* [1955] 1 All ER 725. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the

> parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

In *Woolfson v. Strathclyde Regional Council* 1978 SLT 159 Lord Keith in whose speech the other members of the House of Lords concurred said of the decision of the English Court of Appeal in the *DHN* case:

> I have some doubts whether in this respect the Court of Appeal properly applied the principle that it is appropriate to pierce the corporate veil only where special circumstances exist indicating that is a mere facade concealing the true facts.

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 either 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. For, this what the Lord Chancellor said:

> I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence – quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.
>
> (emphasis added)

[33] In the appeals before us, it is quite clear that the learned judge of the High Court had applied the principles enunciated by the Court of Appeal in *Asnah* and proceeded to dismiss the judicial review and upheld the Industrial Court's ruling to substitute Hubline for Hub Shipping and to add Highline as a party. The Court of Appeal referred to the decision of the Indian Supreme Court in *Hochtief* and the Court of Appeal's decision in *Co-operative Central Bank Ltd & Ors v. Rashid Cruz Abdullah & Ors And Other Appeals* [2004] 1 CLJ 849; [2004] 1 MLJ 626; [2004] 2 AMR 104 ("*CCB*").

A *Co-operative Central Bank Ltd v. Rashid Cruz*

[34] We turn now to the Court of Appeal's decision in *CCB*. In paras. [31] and [32] of the judgment in that case, Justice Gopal Sri Ram had alluded to the need to add or substitute third parties to enable the Industrial Court to determine the identity of the "real employer" and that "more than one person may be responsible for dismissing an employee without just cause or excuse". This is how the learned judge had put it:

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> [31] In the proceedings before the Industrial Court, it would be necessary for the adjudicating panel to determine as to who was the real employer at the material time. Here we have a case which is not entirely straight forward. In *stricto sensu*, it was not CCB which terminated the contracts of employment. It was the receivers. But they are no longer in the picture. They have been replaced by the appointees of BNM. One cannot help gaining the impression that the receivers on the one hand and the appointees on the other hand are equally keen to wash their hands off the trade dispute now looming in the Industrial Court. It is reasonably plain from the fact pattern that one of the questions that the Industrial Court will have to determine: 'who is the person responsible for the termination of employment?' It is trite law that more than one person may be responsible for dismissing an employee without just cause or excuse.
>
> Therefore, viewing the evidence with utmost objectivity, we cannot escape the conclusion that CCB, the receivers and the appointees of BNM are all necessary parties for the adjudication of the trade dispute before the Industrial Court. It may well be the receivers' argument that they are not and have never been the employers of the respondents. However, industrial adjudication is no respecter of labels. In *Dr A Dutt v. Assunta Hospital* [1981] 1 MLJ 304 refd at p 312, Chang Min Tat FJ cited the judgment of Mukherjee J in *Bharat Bank Limited Delhi v. Employees of Bharat Bank Ltd Delhi* AIR 1950 SC 304 refd where it was said:
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> > In settling disputes between employers and workmen the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace.
>
> [32] For these reasons, we strongly dissent from the argument advanced by Mr Shahul Hameed Amirudin and Mr Jayasingam. In our judgment, the learned judge was entirely correct in holding that the joinder of BNM, the receivers and the BNM appointees are a *sine qua non* for the resolution of this dispute. For reasons given so far both the appeals No. W-02-441 of 97 and W-02-507 of 1999 are dismissed. The appellants must pay the costs of these appeals to the respondents.

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[35] And in so far as the test for the addition or substitution of third parties, it is relevant and we might add, critical to note that at para. [39], Justice Gopal Sri Ram in *CCB* said, "... we are unable to see any reasonable factual or legal nexus between BNM and the dispute presently before the Industrial Court. Even taking the most extreme position on the facts, we are unable to perceive a situation whereby BNM can be held responsible for the termination of the respondents".

Asnah

[36] We turn now to *Asnah*'s case. The brief facts of *Asnah* (per the MLJ case summary) are as follows. The second respondent ('Sime') was the appellant's employer and on finding that she was constructively dismissed from employment, the Industrial Court ordered Sime to pay her RM405,500 in compensation ('the dismissal award'). Subsequent to the making of the award, Sime was wound up but two years earlier, EON Capital Bhd ('EON') had acquired Sime's shares and taken over control of the company. EON, in Sime's name, filed for a judicial review of the dismissal award but the application was dismissed by the High Court and the decision was upheld by the Court of Appeal. The appellant, meanwhile, had filed non-compliance proceedings in the Industrial Court in respect of the dismissal award and she applied to join the third, fourth and fifth respondents to that proceeding on the ground they had a nexus to EON and had involved themselves in the initiation of the judicial review application. The Industrial Court refused to allow the joinder.

[37] The High Court refused to quash that decision holding that at all material times the third, fourth and fifth respondents were not the appellant's employers; that there was no fraud to justify lifting of the corporate veil and that the appellant should have filed a proof of debt in Sime's liquidation. In the instant appeal against that decision, the appellant argued that the parties sought to be joined had assumed liability from one another as a result of merger exercises, and they had an interest in Sime's undertakings.

[38] Accordingly, Court of Appeal took the view that the joinder should have been allowed and the parties so joined should have been directed by the Industrial Court to explain their involvement in the judicial review proceedings and to allow the court to determine whether they had, in fact, assumed liability to satisfy the dismissal award. The Court of Appeal posited that the test to be applied for joinder was whether there was any 'reasonable factual or legal nexus' between the respondents concerned and the matter before the Industrial Court, as to require them to answer to that court for their involvement in the dispute and, if appropriate, be liable under the dismissal award upon the hearing of merits. As such, the Court of Appeal concluded that no reasonable tribunal appraised with the facts of this case would say there was no factual or legal nexus of the third, fourth and fifth respondents in relation to the dismissal award. In amplification, the Court

of Appeal observed that in support of the judicial review proceedings against the dismissal award, one of EON's vice-presidents had deposed an affidavit stating that Sime was prepared to pay the dismissal award into a stakeholder's account.

[39] As such, the Court of Appeal opined that this was *prima facie* indication of assumption of liability by EON and the question as to why EON did it, or whether it would amount to admission of liability in the event the award was sustained, were issues for the Industrial Court to consider after joinder was allowed.

[40] In the opinion of the Court of Appeal, ss. 29(a) and (b) of the Act gave wide powers to the Industrial Court to join or summon any person who, in the court's opinion, was connected with the proceedings.

[41] According to the Court of Appeal, there was no requirement for joinder that the party summoned had to be the appellant's employer. Hence, the Court of Appeal concluded that since the Act was a social legislation, third parties could be made liable to pay an award notwithstanding they were not the employers. Therefore, third parties could not resist joinder or deny liability on the ground there was no privity, or of being a separate legal entity, *etc*, when there was sufficient nexus between the party to be joined and the party named in the reference.

[42] The Court of Appeal in *Asnah* held that the threshold test at the joinder stage was low and it was whether the employee could demonstrate by *prima facie* evidence that the party requested to be joined directly, indirectly or otherwise had assumed liability or could be made partly or wholly liable for payment of the award. The issue of liability could only be dealt with after the joinder was done and the merits were heard. So long as the employee's complaint was not frivolous, vexatious and/or an abuse of process of court, joinder should be permitted if nexus was shown.

[43] In summary, the Court of Appeal in *Asnah*'s case, endorsed a low threshold for joinder: the existence of a legal or factual nexus and has expressly enjoined the Industrial Court to ignore the fact that the proposed joinees (third, fourth and fifth respondents) were not the appellant's employers and that there was no fraud to justify lifting of the corporate veil.

[44] It is inevitable, therefore, that the approach enjoined by the Court of Appeal in *Asnah*'s case invites judicial overreach, and enables the Industrial Court to circumvent the doctrine of separate legal personality which is a firmly embedded and well-entrenched principle of company law, and to impute liability on entities or individuals who were not party or privy to the employment relationship and were not involved with or had anything to do with the dispute.

[45] In our view, the mere fact that the actual employer is wound up or devoid of assets cannot justify the imposition of liability on third parties who are legally distinct and not privy to the employment contract. The law does not, nor should it in our view, allow courts to rewrite the legal identity of the employer *ex post facto* merely to ensure that an award does not become a "paper judgment". To do so is to sacrifice legal principle at the altar of practical convenience.

AIMS Cyberjaya

[46] *Ahmad Zahri Mirza Abdul Hamid v. AIMS Cyberjaya Sdn Bhd* [2020] 6 CLJ 557; [2020] 5 MLJ 58. What happened in this case is that three months after being appointed as a Consultant in AIMS Data Centre 2 Sdn Bhd ("ADC"), the appellant, an expatriate, was given a contract for consultancy services by ADC for a fixed term of one year. The contract entitled him to participate in a performance bonus scheme. Simultaneous with the granting of that contract, ADC appointed the appellant as its vice-president, product development.

[47] Thereafter, without any change in the terms and conditions of his engagement, the appellant's contract was renewed annually over three consecutive years during which time ADC's merger with the respondent saw the appellant being reclassified as consultant of the respondent and as vice-president, product and solutions. When the time came for the appellant's contract to be renewed for the fourth year, the respondent decided to remove the appellant's entitlement to the performance bonus scheme. As this was not agreeable to the appellant, the respondent offered him a three-month work contract which the appellant refused to accept. The three-month contract stated that it would supersede all previous contracts which the appellant had had with ADC and the respondent and that the said contract was determinable by the giving of two months' notice.

[48] In purported exercise of that clause, the respondent gave the appellant two months' notice of termination of the contract. The appellant complained to the Industrial Relations Department that he had been unfairly dismissed from employment. His case was referred by the Minister to the Industrial Court ('IC') for adjudication. The IC found that the appellant had been a permanent employee of the respondent all along and that he had been dismissed without just cause or excuse; that the purported fixed term contracts were shams. The IC lifted the corporate veils of ADC and the respondent and found as a fact that the appellant worked for a group of companies as one enterprise; that his contract of employment had never been for a fixed term but had been a permanent and uninterrupted one which the respondent had renewed annually without the appellant having to apply for its renewal. The IC awarded the appellant backwages and compensation *in lieu* of reinstatement. The High Court upheld the IC's decision and dismissed the respondent's judicial review application to quash the IC's award.

[49] The Court of Appeal ('COA'), however, set aside both the High Court's decision and the IC's award holding, *inter alia*, that: (i) the appellant was appointed under a three-month fixed-term contract (the COA disregarded the earlier contracts the appellant had had with ADC and the respondent) which was determinable by the giving of two months' notice; (ii) the appellant never had continuity of employment because ADC and the respondent were separate legal entities; (iii) in the absence of any allegation of fraud or unconscionable conduct, the IC and the High Court were wrong in lifting the corporate veils of ADC and the respondent to find that they were, in effect, a single unit.

[50] The Federal Court took the view that the appellant's contract of employment was a permanent contract and not a fixed-term contract and this was predicated on the IC's finding of fact that the appellant worked for a group of companies as one enterprise. ADC and the respondent were part and parcel of the same group. There was 'an essential unity of group enterprise'. The Federal Court opined that the Court of Appeal was wrong in treating ADC and the respondent as two separate entities and in failing to treat the appellant's contract of employment as a continuous one from ADC to the respondent. The Court of Appeal's failure to identify the employer-employee relationship ran contrary to the fundamental purpose of the Industrial Relations Act 1967.

[51] The Federal Court held (allowing the appeal):

> [16] A court may lift/pierce the corporate veil where the relationship between companies in the same group is so intertwined that they should be treated as a single entity to reflect the economic and commercial realities of the situation. An argument of 'group enterprise' is that in certain circumstances a corporate group is operating in such a manner as to make each individual entity indistinguishable, and therefore it is proper to lift/pierce the corporate veil to treat the parent company as liable for the acts of the subsidiary. Lifting/piercing the corporate veil is one way to ensure that a corporate group, which seeks the advantages of limited liability, must also accept the corresponding responsibilities.
>
> [17] In the employment law perspective, the application of the 'single economic unit' test or 'functional integrality' test is particularly significant in ascertaining the continuity of employment for the scope of dismissal protection (see *Manley Inc v. Fallis* [1977] 2 BLR 277). It recognises the complexity of modern corporate structures and that the corporate veil must only be pierced in exceptional circumstances. On the other hand, such complexity should not be an obstacle to defeat the legitimate entitlements of wrongfully dismissed employees. This approach has its root on the general notions of fairness, equality and proportionality in the treatment of vulnerable employees. It serves to balance fairness with evolving commercial realities.

[18] One of the seminal cases in Malaysia on lifting/piercing the corporate veil is the *Hotel Jaya Puri* case. It was a decision in respect of judicial review application for *certiorari* against the decision by the Industrial Court ordering Hotel Jaya Puri Berhad ('The Hotel') to pay compensation of two months salaries plus fixed allowances in favour of workmen employed in the business of Jaya Puri Chinese Garden Restaurant Sdn Bhd ('the restaurant'). The restaurant, which was a fully owned subsidiary of the Hotel had 56 workers employed and operated its business at the hotel premises by paying a rental. Subsequently, the restaurant closed its business due to financial losses and the employees were retrenched. It resulted in an industrial dispute and the matter was referred to the Industrial Court.

The employees claimed that they had been dismissed rather than retrenched as they were employees of the hotel. The Industrial Court issued an award directing the hotel to pay compensation.

[19] The Industrial Court found that the hotel was in fact the employer of the workers and reasoned that:

(i) the hotel and the restaurant were inter-dependent;

(ii) there was functional integrality and unity of establishment between the hotel and the restaurant. In other words, functionally the hotel and the restaurant were in fact one integral whole and in terms of management, they also constituted a single unit; and

(iii) a number of senior officers including the secretary, personnel manager and assistant manager were common to both the hotel and the restaurant.

[20] On appeal, Salleh Abas FJ (as he then was) upheld the decision of the Industrial Court. His Lordship observed:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well established in company law, in recent years the court has, in a number of cases, by-passed this principle if not made an inroad into it. The court seems quite willing to lift the 'veil of incorporation' (so the expression goes) when the justice of the case so demands. The facts of the case may well justify the court to hold that despite separate existence a subsidiary company is an agent of the parent company or *vice versa* as was decided in *Smith, Stone and Knight v. Birmingham Corporation* [1938] 4 All ER 115; *Re FG (Films) Limited* [1955] 1 WLR 483; and *Firestone Tyre & Rubber Co v. Llewelyn* [1957] 1 WLR 464.
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> ...
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> In my judgment, by giving recognition to this fact, the President did not cause any violence to the sanctity of the principle of separate entity established in *Salomon v. Salomon* ... but rather gave effect to the reality of the hotel and the restaurant as being in one

A enterprise ... In my view, the finding by the President is in no way against the principle of separate entity and I am therefore not prepared to interfere with the award on this account ...

[21] The willingness of the Malaysian courts to lift/pierce the corporate veil by adopting the principle enunciated in the *Hotel Jaya Puri* case, particularly in the industrial disputes, is not new. In *Rusli Luwi v. RM Top Holdings Sdn Bhd & Ors* [2003] 4 MLRH 352, the High Court found no difficulty in lifting the veil of incorporation, when the respondents, one of which was a subsidiary of the other, were operating as one business enterprise. Another example of this can be found in *Jimsburg Services Sdn Bhd v. Rostam Wahidin* [1999] 2 ILR 324.

[22] In this instant appeal, the Court of Appeal, relying on the case of *Law Kam Loy*, held that the corporate veil of the respondent ought not to be lifted/pierced. Learned counsel for the appellant/claimant submitted that the Court of Appeal failed to properly consider the context in which the decision was made.

[23] We agree with the submission. If the case is properly considered, one would discover that the Court of Appeal in *Law Kam Loy* had endorsed that the Industrial Court may, in special and appreciate circumstances, lift of the corporate veil to reveal who is the proper employer, such as in a situation where there is actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity. Gopal Sri Ram JCA (as he then was) stated as follows:

> ... But that is not to say that the court in the *Hotel Jayapuri* case was wrong in lifting the veil of incorporation of the facts of that case. The *Hotel Jayapuri* case was concerned with the Industrial Relations Act 1967 which requires the Industrial Court to disregard the technicalities and to have regard to equity, good conscience and the substantial merits of a case.
>
> Accordingly, in industrial law, where the interests of justice so demand, it may, in particular cases be appropriate for the Industrial Court to pierce or to disregard the doctrine of corporate personality. That is what happened in the *Hotel Jayapuri* case and no criticism of that case on its facts may be justified.

[24] In our considered opinion, the case of *Law Kam Loy* simply stands for the proposition that whilst the approach of the Supreme Court in the *Hotel Jaya Puri* case may not be suitable in present times (*vis-à-vis* current company law principles), the practice of the courts in lifting/piercing the corporate veil may still be accepted in the realm of industrial relations as the correct approach to reveal who is the employer in the given case in order to achieve social justice so that the workmen are not adversely affected. In addition s. 30(5) of the Industrial Relations Act 1967 provides that the court shall act according to 'equity, good conscience and the substantial merits of the case without regard to technicalities and legal form'.

...

[42] From a short review of cases above, it would appear that although the principle of separate legal entity is at the core of the company law, there are a number of situations in which a corporate group and its members can be treated the same. In other words, while the *dicta* in *Hotel Jaya Puri* case is correct in substance particularly in the context of industrial jurisprudence, the approach of 'Common employer' taken by the Canadian, South African and English courts better explains the rationale in industrial law terms in order to achieve equity and social justice. This is in keeping with the tenor and purpose of the Industrial Relations Act 1967.

[43] In sum, insofar as employment law is concerned, the circumstances which are believed to be most peculiar basis under which the court would lift/pierce the corporate veil and find a group of companies to be common employers include:

(a) where there is 'functional integrality' between entities;

(b) unity of establishment between the entities.

(c) the existence of a fiduciary relationship between the members of the entities and/or the extent of control;

(d) there was essential unity of group enterprise; and

(e) whenever it is just and equitable to do so and/or when the justice of the case so demands.

But these circumstances are just guidelines and are by no means being exhaustive. The circumstances for which the court may lift/pierce the corporate veil are never closed.

[44] Reverting back to the mainstream of the present appeal, we are of the considered opinion that ADC and the respondent were part and parcel of the same group. There was 'an essential unity of group enterprise'.

Ong Leong Chiou v. Keller

[52] We turn now to the Federal Court's decision in *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors* [2021] 4 CLJ 821; [2021] 3 MLJ 622 ("*Keller*"). Briefly the facts were as follows. The dispute arose from subcontracts in the Melawati Mall development project. The project was constructed *vide* a joint venture company, Sime Darby Capital Malls Asia (Melawati Mall) Sdn Bhd ("Sime Darby"). In 2013, Sime Darby appointed the second respondent/fourth defendant, *ie*, Bina Puri Holdings Bhd ("Bina Puri") as the main contractor for the project. Bina Puri subcontracted to Perfect Selection Sdn Bhd (contractor for substructure works).

[53] Perfect Selection, in turn, subcontracted to PS Bina Sdn Bhd, which then subcontracted to Keller (M) Sdn Bhd for works including Empty Bore Works ("EBW") among others. The first appellant, Tony Ong (Ong Leong Chiou), was a director and shareholder in both Perfect Selection and PS Bina.

PS Bina's initial directors included Tony Ong, Liew, and Chang. Tony Ong made various representations to Keller, including that he could secure payment from the main contractor or that PS Bina was under his control, which induced Keller to enter into the contract. Keller proceeded to carry out the EBW works.

[54] Over time, PS Bina reversed (or "de-certified") the sums due for those EBW works, culminating in the reversal of the full amount claimed (RM7,462,720.19). After full performance by Keller, changes were made to PS Bina's shareholding and directorship: Tony, Liew and Chang resigned, replaced by persons lacking knowledge of PS Bina's obligations. The High Court (trial court) held that Tony, PS Bina, and Perfect Selection were jointly and severally liable to Keller for the sums due on EBW.

[55] The High Court found that PS Bina was a sham or facade interposed by Tony Ong to shield Perfect Selection's liability, and that fraud (or equitable fraud) had been perpetrated. The Court of Appeal affirmed the High Court's decision in full, including its findings on the law and the lifting of the corporate veil.

[56] Clearly, the case was not concerned with an industrial relations or employment law dispute. However, a question of law was framed touching upon the *Boltex* case and its applicability beyond Industrial Court. The following paragraphs from the judgment in *Keller* are relevant:

> The second question of law
>
> 'Whether the single economic unit test as expounded in *Law Kam Loy and Anor v. Boltex Sdn Bhd & Ors* [20051] 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.
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> [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 in the United Kingdom and the legal reasoning there adopted in this jurisdiction vide Law Kam Loy v. Boltex. 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...

[118] This pronouncement on the law was expressly approved by this court in both *Solid Investments Ltd v. Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785 and *Gurbachan Singh*.

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) fraud was not pleaded at all;

(b) the claim was premised on tort; and

(c) 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.

[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.

[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)).

Answer to question 2:

[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.*

[125] However, the further point to be made is that *Law Kam Loy v. Boltex 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.

(emphasis added)

[57] In *Keller*'s case, the apex court made it unequivocally clear or at the very least has implied, that there is no bifurcated or diluted company law applicable in the Industrial Court. Thus, following *Keller*, the doctrine of separate legal entity applies uniformly across all fora, and the Industrial Court is not at liberty to override this foundational doctrine under the guise of equitable justice or industrial equity. *Keller* therefore serves as an essential doctrinal reset.

[58] In our view, what *Keller* ultimately restores is the rule of law – the idea that even well-intentioned judicial innovation must operate within the confines of legal principle. The Industrial Court, though tasked with ensuring the fair resolution of employment disputes, must not operate as a court of convenience or equity divorced from corporate realities. The purpose of s. 29(a) is procedural, not substantive. It was never intended as a mechanism to collapse the walls of corporate separateness or to impose liabilities on third parties in the absence of contractual or statutory basis. It was submitted for the claimants that *Keller* (a commercial case) did not refer to *AIMS Cyberjaya* which was an employment case, and that the principle in the latter case, in regards to the single economic entity theory and functional integrity, *etc* (per *Hotel Jaya Puri*) represents the applicable law. We disagree.

[59] In our view, although *Keller* is a commercial case, it was later in time and more significantly, a question of law pertaining to *Boltex* was framed and the Federal Court did render their opinion unequivocally per paras. [113] to [115] of the judgment, *albeit* that they declined to answer the question of law.

[60] In *Keller*, the Federal Court considered and applied the United Kingdom Supreme Court decision in *Prest v. Petrodel Resources Ltd & Ors* [2013] 2 AC 415; [2013] UKSC 34 and accepted that the doctrine of piercing the corporate veil ought to be applied in a circumspect manner and only in limited circumstances. As such, only the employer (as a separate legal entity) may be liable unless the strict and exceptional doctrine of piercing the corporate veil is properly invoked. The recent expansion of joinder and substitution following *Asnah* is plainly contrary to these foundational principles and invites uncertainty and is irreconcilable with *Keller*.

[61] Thus, following the principle that was enunciated by the Court of Appeal in *Asnah*, holding companies, subsidiaries, or directors can be dragged into liability merely by being connected to a corporate employer which is responsible for the dismissal and liable to satisfy any monetary order by the Industrial Court. In the past, the courts have taken the position (wrongly in our view) that a mere legal or factual nexus between the employer and the proposed joinee is sufficient to warrant the addition or substitution of the latter as a party to proceedings – even where such entities were never a party to the original employment contract or employer-

employee relationship and had no involvement in the dispute *vis-à-vis* the termination of employment which led to the matter being referred to the Industrial Court per s. 20 of the Industrial Relations Act 1967.

[62] It was timely therefore that the Federal Court in *Keller* restored clarity. It affirmed that there is no "special" version of company law for the Industrial Court. The doctrine of separate legal identity applies equally in industrial adjudication.

[63] Indeed, the practice hitherto of dragging in and foisting liability on holding companies, subsidiaries, or directors because the real employer has become financially insolvent, and gone into liquidation, inherently violates settled company law principles. In our view, the Industrial Court is not permitted to employ s. 29(a) of the Act as a tool to pierce the corporate veil unless the strict conditions recognised in company law per *Keller* and *Prest v. Petrodel Resources Ltd & Ors* [2013] 2 AC 415; [2013] UKSC 34 are met. It goes without saying that a consistent, principled application of *Keller* is essential if we are to preserve legal certainty, corporate integrity, and predictable outcomes in industrial disputes.

[64] Drawing the threads together, it will be seen that the test for joinder/substitution is not merely any reasonable factual or legal nexus or connection (per *Asnah*), but rather, following *CCB*, there must be a reasonable factual or legal nexus between the proposed joinee and the dispute which is before the Industrial Court. What this entails is that the parties who invoke the Industrial Court's power under s. 29(a) of the Act must demonstrate in their affidavit in support of their application, the requisite particulars and factual details to show a reasonable factual or legal nexus between the proposed joinee and the dispute which is pending before the Industrial Court and that the proposed joinee is amongst the persons/parties who is/are responsible (liable in law) for the termination of employment.

[65] And if it is an express or implied attempt to lift or pierce the corporate veil, then, depending on the facts and circumstances, the applicant cannot rely on *Hotel Jaya Puri* and must disclose in the application, the particulars showing that there exist credible and compelling grounds for the piercing of the corporate veil. In determining whether the corporate veil should be lifted/pierced, the Industrial Court is enjoined to keep in mind the following principles which were distilled by Munby J in *Ben Hashem v. Al Shayif* [2008] EWHC 2380 (Fam); [2008] Fam Law 1179; [2009] 1 FLR 115 (at paras. [159] to [164]):

(i) ownership and control of a company are not of themselves sufficient to justify piercing the veil;

(ii) the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice;

(iii) the corporate veil can be pierced only if there is some "impropriety"; A

(iv) the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability; and B

(v) if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company structure by using them as a device or facade to conceal their wrongdoing.

[66] To summarise, we would go so far as to say that in light of *Keller*, the C principles enunciated in *Asnah* which necessarily entails ignoring the veil of incorporation for purposes of s. 29(a) cannot stand and must therefore be rejected. It is also necessary for us to state that the Court of Appeal's ruling that joinder/substitution may take place under s. 29(a) so long as there is a reasonable legal and factual nexus is an erroneous statement and is D misaligned with *CCB*, and must likewise be rejected. The correct position is that there must be a reasonable factual or legal nexus between the proposed joinee and the dispute which is pending before the Industrial Court and that the proposed joinee is amongst the persons/parties who is/are responsible (liable in law) for the termination of employment. E

[67] Therefore, s. 29(a) of the Act must in our view, be read and applied in light of established company law principles. The parties to be added or substituted must be either an employer or an employee/or union (see: *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* [1983] 1 CLJ 240; [1983] CLJ (Rep) 417; [1983] 2 MLJ 49). F

[68] In so far as the appeals are concerned, we find that the basis on which the application was made by the claimants under s. 29(a) of the Act (per the affidavit of Zarinah binti Ahmad Musa affirmed on 17 May 2017) does not in law, satisfy the strict legal requirements for the piercing of the corporate veil of Hubline or Highline (per *Keller*) such that these parties may be G substituted or joined in the legal proceedings before the Industrial Court.

[69] Further, the joinder/substitution application does not in any event satisfy the criteria laid down in CCB.

[70] In this regard, it may be noted that the averments by the appellants H that they are not the employer and that they had no role nor were they responsible for the retrenchment/termination, was unrebutted.

[71] In law, a material averment on affidavit, if unrebutted, is deemed to be admitted. This principle was lucidly enunciated by the Court of Appeal in *Ng Hee Thoong & Anor v. Public Bank Bhd* [2000] 1 CLJ 503; [1995] 1 MLJ I 281; [1995] 1 AMR 622, where it held that:

A Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332.

B

[72] Hence, based on *Ng Hee Thoong* (*supra*), the appellants' averments in their affidavits in reply, are deemed admitted. As such, the Industrial Court ought to have proceeded on the basis that the appellants are neither the employer, nor were they in any way responsible for, nor had any role or involvement in the retrenchment/termination of the claimants. If the C claimants' application had been analysed on that basis, the Industrial Court ought to have concluded that there was no reasonable factual or legal or any nexus between the appellants and the dispute which was pending before the Industrial Court, and the application under s. 29(a) of the Act ought to have been dismissed.

D

Outcome

[73] In all the circumstances and for the reasons as discussed above, we find that in allowing Hubline to be a substitute for Hub Shipping per Award No. 130 of 2019 and in joining Highline per Award No. 131 of 2019, the E Industrial Court had committed errors of law of the type envisaged by the seminal decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317.

[74] We find that there are merits in the appeals and appellate interference F is therefore warranted. As such, Appeal 128 and Appeal 142 are allowed and the High Court's decision/order dated 8 February 2021 dismissing judicial review (plus the order of costs) is set aside.

Consequential Order

G **[75]** We hereby allow judicial review and make the following consequential orders:

(i) (JR 146) *certiorari* is issued and Industrial Court Award No: 130 of 2019 dated 8 January 2019 which ordered Hub Shipping to be substituted with Hubline is quashed; and

H

(ii) (JR 132) *certiorari* is issued and Industrial Court Award No: 131 of 2019 dated 8 January 2019 which ordered Highline to be joined as a party to the Industrial Court proceedings is quashed.

I

Costs

[76] Counsel for the appellants in the respective appeals, *albeit* victorious in the outcome, were magnanimous and did not press for costs. At any rate, in view of the fact that the claimants have ceased employment due to no fault of their own, we feel that we should, and we hereby exercise our discretion, and make no order as to costs for the appeals.

Acknowledgement

[77] Lastly, we have to place on record that in reaching our decision, we have been immensely assisted by counsel. Hence, we thank and applaud counsel for their remarkable research, erudite submissions and elucidation of the several vexed issues of law which were ventilated before this court. In making their respective oral presentations, counsel displayed the requisite hallmarks of advocacy – "brevity, accuracy, lucidity and keeping to the point".