Hock Seng Trading & Construction v Hongler Enterprise and another appeal [2025] MLJU 1820

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COURT OF APPEAL (PUTRAJAYA)

AZIZAH NAWAWI, AZIMAH OMAR AND WAN AHMAD FARID WAN SALLEH JJCA

CIVIL APPEAL NOS W-02(C)(A)-980-06 OF 2024 AND W-02(C)(A)-1483-08 OF 2024

25 June 2025

Gan Yi Yang (with Vilasiny a/p Gannasen) (Vilasiny Gan & Co) for Hock Seng Trading.
*Chan Kheng Hoe (with Yang Lee Yuen and Pung Kian Bang) (Kheng Hoe & Lee Yuen) for **Hongler** Enterprise Sdn Bhd.*

Wan Ahmad Farid Wan Salleh JCA:

JUDGMENT

The Appeals

[1] There are two related appeals before us, which, by consent of all parties, are heard together.

[2] For convenience, the parties will be referred to as Hock Seng Trading & Construction ("Hock Seng") and ***Hongler*** Enterprise Sdn Bhd ("***Hongler***").

[3] The 1st appeal, Appeal No. 980, is filed by Hock Seng against the decision of the Kuala Lumpur High Court dated 10.5.2024 in dismissing Hock Seng's application in Originating Summons No. WA-24C-144-09/2023 ("OS No. 144") to set aside an Adjudication Decision ("AD") dated 26.7.2023 under *s 15* of the *Construction Industry Payment and Adjudication Act 2012* ("CIPAA").

[4] The AD dated 26.7.2012 was obtained by ***Hongler*** as a sub- contractor against Hock Seng for work done under a project known as Privatisation of Lebuhraya Persisiran Pantai Barat (Taiping to Banting) *Section 2* -SKVE Interchange to SAE Interchange Bridge S2-3 ("the Project") for the sum of RM187,373.39 including interest.

[5] The 2nd appeal, Appeal No. 1483, is filed by ***Hongler*** against the decision of the Kuala Lumpur High Court dated 16.8.2024 in dismissing ***Hongler***'s application in Originating Summons No. WA- 24C-130-08/2023 ("OS No. 130") to enforce the AD under *s 28* of the *CIPAA*.

The Factual Background

[6] Pursuant to ***Hongler***'s Quotation dated 30.4.2021 and Hock Seng's amended Bill of Quantities, Hock Seng had appointed ***Hongler*** as the sub-contractor for the Project for a contract sum of RM4,579,514.40. Due to Hock Seng's failure to pay ***Hongler*** for work done under the Project, ***Hongler*** served a Payment Claim dated 21.10.2022 to Hock Seng pursuant to *s 5* of the *CIPAA*.

[7] Upon receipt of the Payment Response dated 7.11.2022, ***Hongler*** commenced the Adjudication proceedings against Hock Seng.

[8] As alluded to earlier, on 22.5.2023, the Adjudicator delivered the AD in favour of ***Hongler***.

[9] Despite the demand made by ***Hongler*** through its solicitors, Hock Seng failed to comply with the AD. This led to ***Hongler*** filing OS No. 130 to enforce the AD as if it were a judgment or order of the High Court.

[10] Hock Seng, on the other hand, filed a separate application in OS No. 144 to set aside the AD pursuant to s 15 of the CIPAA.

At the High Court

[11] In OS No. 144, ***Hongler*** had raised a preliminary objection ("PO") on the ground that Hock Seng lacked the necessary *locus standi* to commence the application to set aside the AD. ***Hongler***'s line of argument is this. First, Hock Seng is a sole proprietorship owned by one Chai Hon Sang ("Chai"). Secondly, OS No. 144 should have been initiated by Chai in his own name and not under the name of the business.

[12] The learned Judge referred to the judgment of Abdul Malik Ishak J (later JCA) in *Tan Thoo Yow v Chia Kim San & Anor* [1997] MLJU 142. The case carries the proposition that when a sole proprietor of a firm is suing, he must sue in his own name and add below his name within brackets the name of the firm of that sole proprietor so as to inform the defendant that he is suing as a sole proprietor.

[13] Relying on the said proposition, the learned Judge held that Hock Seng Trading & Construction did not have the necessary locus standi to bring the action in OS No. 144. It was further held that the fact that the AD had named Hock Seng Trading & Construction as the party to the same does not depart from the fact that in order to sue, a party who is a sole proprietorship must sue under his own name trading as the business.

[14] As to OS No. 130, the learned Judge was of the view that Chai, in his individual capacity, should have been named by ***Hongler*** in the Adjudication proceedings as the "Respondent" as he is the sole proprietor of the business known as Hock Seng Trading & Construction. The learned Judge held that the failure to name Chai as the respondent in the Adjudication proceedings would render the AD against Hock Seng invalid, as the latter had no legal capacity to be sued.

Summary of the decisions of the High Court

[15] In summary, the High Court had dismissed Hock Seng's application to set aside that AD in OS No. 144 ("Appeal No. 980").

[16] ***Hongler***'s application to enforce the AD in OS No. 130 ("Appeal No: 1483") was equally dismissed by the High Court on the same grounds.

Appeal No. 980

[17] Before us, learned counsel for Hock Seng submitted that the learned High Court Judge had erred in allowing the ***Hongler***'s PO that Hock Seng does not have the *locus standi* to bring the action in the business name known as "Hock Seng Trading & Construction".

[18] My attention was then drawn to the judgment of the High Court in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and Anor case* [2015] 11 MLJ 499. In that case, there were two separate Originating Summonses, which were heard together. In the second OS, the defendant's solicitors issued a payment claim dated 9.7.2014 on behalf of "Sara Timur-Bauer JV" for the amount of RM4,969,897.83. The plaintiff replied through its solicitors on 25.7.2014, raising a preliminary objection to the payment claim on the basis that "Sara-Timur Bauer JV" was an unincorporated consortium and hence, not a legal entity. Notwithstanding the initial objection, the unincorporated consortium initiated adjudication proceedings under s 9 of the CIPAA for, *inter alia*, non-payment of certified sums.

[19] The High Court declined to entertain the issue of locus standi, holding instead that it was a substantive issue that should be addressed first by the adjudicator rather than by the court.

[20] Learned counsel for Hock Seng, relying on *Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd* [2013] 4 MLJ 545 CA, submitted that the learned Judge should have exercised his discretion to stay the proceedings in the OS and directed Hock Seng to make the necessary amendment to the pleadings' intitulement.

[21] In any event, learned counsel for Hock Seng contended that ***Hongler***'s objection was a mere technical objection that did not cause a miscarriage of justice to ***Hongler***.

[22] For the aforesaid reasons, learned counsel for Hock Seng urged us to allow the appeal.
Appeal No. 1143

[23] In Appeal No. 1143, ***Hongler*** is appealing against the decision of the learned Judge in dismissing ***Hongler***'s application to enforce the AD.

[24] ***Hongler***'s line of argument is straightforward and simple. It is this. Learned counsel for ***Hongler*** submitted that given that OS No. 144 to set aside the AD had already been dismissed by the learned Judge on 26.7.2023, there was therefore no prohibition against enforcing the AD pursuant to *s 28* of the *CIPAA*.

[25] Our attention was then referred to the judgment of this Court in *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 CLJ 229 CA. In that case, the adjudicator gave his decision in the appellant's favour and directed the respondent to pay the adjudicated sum. The respondent, however, failed to make payment. Thus, the appellant filed an application pursuant to *s 28* of the *CIPAA* seeking, *inter alia*, to recognise and enforce the AD. The respondent did not file any application to set aside the AD under *s 15* of the *CIPAA*.

[26] Notwithstanding the failure to apply for the AD to be set aside, the respondent objected to the appellant's application, contending that the adjudicator had acted beyond his jurisdiction in allowing the sum of RM773,484.52.

[27] The appellant submitted in response that since the respondent did not apply to set aside the adjudication decision, the respondent must be taken to have accepted that decision but had 'willingly refused to comply.' The trial judge, in relying on *s 15(d)* of the *CIPAA* and finding that the adjudicator had acted in excess of his jurisdiction, dismissed the appellant's application. Hence the appeal.

[28] The issue before the Court of Appeal was whether it was open to a party, such as the respondent who was resisting or opposing an application for enforcement under *s 28*, to raise any of the grounds under *s 15* without actually filing an application under *s 15* itself. In delivering the judgment of the Court, Mary Lim JCA (later FCJ) held as follows:

> In our view, the answer is clearly in the negative. It is not open to the respondent to invoke any of the grounds set out in *s 15(a) to (d)* in opposition to an application under *s 28* without at the same time, filing an application under *s 15* itself to set aside the adjudication decision on any of those grounds. Unless and until an application under *s 15* has been initiated by the respondent, and an order has been granted setting aside the adjudication decision, the adjudication decision ought to stand unopposed on the grounds found in *s 15(a) to (d)*. To accede to the respondent's submission that the court may avail itself to and dismiss an application for enforcement under *s 28* by reason of any or all of the grounds under *s 15* would, in our view, do violence to the terms of *s 28*.

[29] Learned counsel for ***Hongler*** contended that since Hock Seng's application to set aside the AD had already been dismissed earlier, which was on 26.7.2023, there was therefore no application under *s 15* of the *CIPAA* before the High Court. In the absence of such an application, and relying on *Inai Kiara*, learned counsel for ***Hongler*** submitted that the High Court ought to have allowed the enforcement application in OS No. 130. In short, the AD ought to stand unopposed.

[30] On the failure of ***Hongler*** to name Chai at the adjudication proceedings, learned counsel for ***Hongler*** referred us to O 77 r 9 of the *Rules of Court 2012* ("ROC") and submitted that ***Hongler*** is at liberty to sue Hock Seng in the following fashions:

(i) "Hock Seng Trading & Construction"; or

(ii) "Chai Hong Sang (berniaga dalam nama dan gaya Hock Seng Trading & Construction)".

[31] For convenience, O 77 r 9 of the *ROC* is reproduced here:

> An individual carrying on business within the jurisdiction in a name or style other than his own name may be sued in that name or style as if it were the name of a firm, and rules 2 to 8 shall, so far as applicable, apply as if he were a partner and the name in which he carries on business were the name of his firm.

[32] Learned counsel for ***Hongler*** then referred us to the judgment of the High Court in *Tan Thoo Yow* and submitted that as far as being sued is concerned, Hock Seng may be sued in the name of "Hock Seng Trading & Construction".

Our Analysis

[33] The main issue before us is whether the failure to name the correct party at the adjudication proceedings affects the *locus standi* and, consequently, the jurisdiction of the Adjudicator as the right party was not before him.

[34] First thing first. Let us examine the intitulement at the adjudication proceedings:

IN THE MATTER OF AN ADJUDICATION
CONDUCTED PURSUANT TO THE AIAC RULES AND
CONSTRUCTION INDUSTRY PAYMENT & ADJUDICATION ACT
2012

[Adjudication Reference No: ADJ-4569-2023]

BETWEEN

HONGLER ENTERPRISE SDN BHD ...CLAIMANT

AND

HOCK SENG TRADING & CONSTRUCTION ...RESPONDENT

The question that arises is, could ***Hongler*** initiate the adjudication proceedings without citing Chai as in "*Chai Hong Sang (berniaga dalam nama dan gaya Hock Seng Trading & Construction*" as the respondent? If the answer is in the negative, what would be the status of the proceedings?

[35] In *United Engineers (Malaysia) Bhd v. Yeong Sinn Hoong* *[1990] 1 MLJ 381*, Encik Yeong Sinn Hoong was carrying on business in the name or style of "Syarikat Tropical Baggage" as a sole proprietor. However, in an action against him by United Engineers for breach of bailment, he was sued in his personal capacity without the name "Syarikat Tropical Baggage" (trading as, "t/a Syarikat Tropical Baggage").

[36] Zakaria Yatim J (later FCJ) held that it was only proper for United Engineers to sue him in that name or style as if it were the name of the firm. His Lordship then stated the law as follows:

> In the circumstances, it was proper for the plaintiff to sue Mr Yeong Sinn Hoong in his own name and to add below his name within brackets (trading as, 't/a' Syarikat Tropical Baggage).

[37] We are therefore of the view that ***Hongler*** had failed to name the proper party in the adjudication proceedings. The respondent in the adjudication proceedings should have been named as:

> "Chai Hong Sang (berniaga dalam nama dan gaya Hock Seng Trading & Construction".

[38] At the risk of being repetitive, we hasten to add that "Hock Seng Trading & Construction", without more, has no legal status. In the absence of a proper party being cited as the respondent at the adjudication proceedings, the whole of the proceedings is void *ab initio*. Whatever AD that ensued can neither be set aside nor enforced since there was no valid proceeding (and hence, decision) in the first place.

[39] In *KLIA Associates Sdn Bhd v Mudajaya Corporation Bhd* [2020] 1 LNS 1253, the High Court, after citing a plethora of authorities, held that an action could not be taken against a body that has no legal status. It therefore, follows that the correct and proper parties must be brought in and named in all legal proceedings. Lim Chong Fong J (now JCA) further held as follows:

> This is in my view applicable to all legal proceedings including arbitration proceedings as well as statutory adjudication under the CIPAA.

In short, the failure to name the right party affects the capacity or *locus standi* of the party and, accordingly, the jurisdiction of the adjudicator because the right parties were not before him.

[40] We are of the view that this is the correct proposition of the law and we take this opportunity to affirm it.

[41] Learned counsel for Hock Seng referred us to *Bisraya Construction Sdn Bhd* and submitted that the issue of *locus standi* is a substantive issue that should have been taken up before the adjudicator instead of before the court.

[42] With respect, we are unable to accede to this line of argument. A jurisdictional issue is a live issue, and it can be raised at any stage. If any authority is needed for the aforesaid proposition, it can be seen in the Court of Appeal case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* *[2001] 4 MLJ 346* CA. Both *Chee Pok Choy* and an earlier Federal Court case *of Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* *[1998] 1 MLJ 393* FC referred to the judgment of Privy Council in *Meenakshi Naidoo v Subramaniya Sastri* LR 14 IA 160**,** *Chief Kofi Forfie v Barima Kwabena Seifah* [1958] 1 All ER 289 PC which reiterated the same proposition.

[43] Even if the parties participated in the adjudication proceedings, it did not confer the jurisdiction to the Adjudicator. The Privy Council in *Meenakshi Naidoo* made it clear that consent or waiver by the parties could not cure the absence of jurisdiction. Sir Richard Baggallay, in delivering the advice of the Board, was of the view that "when the judge has no inherent jurisdiction over the subject- matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process".

Decision

[44] For the aforesaid reasons, our decision is as follows:

(a) In a case where a party is a sole proprietorship, he can only be sued in his own name and to add below his name, the business name he is trading as within brackets. In the instant appeal, at the adjudication proceedings, ***Hongler*** should have sued the respondent in the following manner:

> "Chai Hong Sang (berniaga dalam nama dan gaya Hock Seng Trading & Construction)".

(b) Hock Seng Trading & Construction, without more, was wrongly named as the respondent at the adjudication proceedings. The attendant consequence of the failure is that the proceedings are, therefore, void *ab initio*.

(c) In the circumstances, the AD that followed the impugned proceedings has no legs to stand on and therefore, null and void. The proposition applies to all proceedings, including the ones under the CIPAA. The judgment of the High Court in *KLIA Associates* is hereby affirmed.

(d) Unlike in *Inai Kiara*, the AD in this appeal is void *ab initio* since there was no proper proceeding in the first place. There is no valid AD to be enforced. The question of the enforcement of a void AD under *s 28* of the *CIPAA* does not therefore arise. *Inai Kiara* is therefore, distinguished.

(e) The issue of *locus standi* and hence the jurisdiction of the Adjudicator can be raised at any stage, including at the High Court, either to enforce or set aside the AD. A jurisdictional issue is a live issue and it can be raised at any stage.

(f) The fact that the parties participated in the adjudication proceedings does not confer the Adjudicator the requisite jurisdiction, which he otherwise does not possess. In short, consent or waiver by the parties could not cure the absence of jurisdiction.

(g) Unlike in *Solai Realty*, the learned High Court Judge could not have exercised his discretion to amend the intitulement at the *adjudication proceedings* since he did not have the power to do so. But even if the defects in both Originating Summonses in this appeal could be corrected by the learned Judge, they still could not regularise *the adjudication proceeding* which was void *ab initio*.

[45] For the aforesaid reasons, we find no merits in both appeals.

[46] The appeals are hereby dismissed and the decisions of the learned High Court Judge in OS No. 144 and OS No. 130 are hereby affirmed.

[47] In the light of our findings, we order that each party bears its own costs.
