

CIPAA 2012 : CIPAA Claims Against A Sole Proprietor

HONGLER ENTERPRISE SDN BHD V CHAI HON SANG (TRADING AS HOCK SENG TRADING & CONSTRUCTION) [WA-24C-130-08/2023]

23rd October 2024

ISSUES

There is no prohibition to initiate adjudication proceedings against a sole proprietor under the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA 2012**”).

Sole proprietor often trades in the name and style of their business name. For the purposes of adjudication under CIPAA 2012, who would be the proper respondent? Would it be the sole proprietor himself / herself or the business name that they trade under?

If the “*wrong*” entity is named as the respondent in the adjudication proceedings, would it be too late to raise this issue during the enforcement / setting aside?

These questions were answered in the recent Construction High Court case of **Hongler Enterprise Sdn Bhd v Chai Hon Sang (trading as Hock Seng Trading & Construction)** [WA-24C-130-08/2023].

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) Hock Seng Trading & Construction (“**Hock Seng**”) appointed Hongler Enterprise Sdn Bhd (“**Hongler**”) as the subcontractor for supply of labour for RC Works (“**Project**”).
- (b) The appointment was made pursuant to Hongler’s Quotation dated 30.04.2021 and Hock Seng’s amended Bills of Quantities sent to Hongler on 03.05.2021.
- (c) Following dispute on payment, Hongler commenced adjudication proceeding against Hock Seng (and not the owner of Hock Seng, in his individual capacity).
- (d) Thereafter, Hongler obtained an adjudication decision in its favour against Hock Seng (“**Adjudication Decision**”).

- (e) Hock Seng did not make payment pursuant to the Adjudication Decision and Hongler initiated the current proceedings to enforce the Adjudication Decision.

ISSUES BEFORE THE HIGH COURT

The main issue before the High Court is whether the proper party has been named as the respondent in the adjudication proceedings and the consequent Adjudication Decision.

Proper Party

The High Court noted that business known as Hock Seng Trading & Construction, which is the Respondent in the adjudication proceedings, is a sole proprietorship owned by an individual. However, the sole proprietor of the business, i.e. the individual who owned the business, was not named in the Adjudication Decision or the adjudication proceedings.

The High Court also noted that Hock Seng Trading & Construction had applied to set aside the Adjudication Decision but the application was dismissed on the ground that the business known as Hock Seng Trading & Construction is a sole proprietorship and the business itself does not have the locus to initiate the setting aside application.

Based on the earlier decided authorities on whether a business name can initiate adjudication proceedings as the claimant, [**China 1st Metallurgical Construction (M) Sdn Bhd v Galaxy Plumbing & Construction (Didakwa Sebagai Firma / Pemilik Tunggal)** and **Another Case** [2023] MLJU 217 and **Global Built Sdn Bhd v LKL Ceiling Enterprise & Anor and Another Case** [2022] MLJU 1535], the Court found that the owner, in his individual capacity, should have been named as a party in the adjudication, instead of the business:-

*“[7] It is trite that the law is that the correct and proper parties should be named in the Adjudication Proceedings. **Thus, in the matter before me Chai Hock Seng in his individual capacity should have been named in the Adjudication proceedings as the Respondent therein as he is the sole proprietor of the business known as Hock Seng Trading & Construction.**”*

Timing of Jurisdictional Challenge

The Court also reiterated that a jurisdictional challenge of such nature can be raised at any time:-



“[9] Such a jurisdictional challenge can be raised at any time and on this I rely on Sun Plaza Development Sdn Bhd v Heijinkang Sdn Bhd [2020] 1 LNS 1255 where the Court therein has held as follows:

“[29] First and foremost on jurisdiction, it has been held by the Court of Appeal in Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Appeal [2018] 2 CLJ 163 that jurisdictional challenges have always been allowed by the courts at any stage. I have held in Giatreka Sdn Bhd v SGW Engineering Construction Sdn Bhd [2019] 1 LNS 1876; [2020] 1 AMR 193 that an adjudicator’s finding on jurisdiction is neither binding nor conclusive and the High Court may re-visit the same afresh and unfettered in a challenge made under s. 15 (d) of the CIPAA.”

In addition, I am aware that this legal requirement may seem unfair to parties who are self-represented or represented by non-legally qualified representatives in statutory adjudication proceedings as permitted by the CIPAA but I wish to reiterate my following views in Giatreka Sdn Bhd v SGW Engineering Construction Sdn Bhd [2020] 1 AMR 193:

“[36] In my opinion, albeit the CIPAA is permissive on the right of party representation whether by advocates and solicitors, claims consultants or even the disputant party itself, the prescribed requirements of the statute, particularly those pursuant to ss. 5(2), 6(2), 9(1), 10(1) and 11(1) of the CIPAA, must however be strictly met. There should be no relaxation based on the quality of the representation.”

DECISION OF THE HIGH COURT

In view of the above, the Court had accordingly dismissed the enforcement application:-

“[10] Accordingly, I am bound to dismiss the matter herein filed against the Defendant herein with costs on the ground that the AD itself is unenforceable due to the fact that the individual sole proprietor herein being Chai Hock Seng was not named as a party to the Adjudication proceedings thereby rendering the AD against Hock Seng Trading &

Construction as being invalid as the latter has no legal capacity in law to be sued.”

KEY TAKEAWAY

Following the decision, it is important to note that:-

- (a) Whilst the construction contract may be executed by the business name of a sole proprietor, it is imperative that the sole proprietor, in his or her individual capacity, be named as the party in the adjudication.
- (b) By the naming business name instead of the sole proprietor (in his / her individual capacity), the resulting adjudication decision would not be enforceable as the business name has no legal capacity in law to be sued.
- (c) A jurisdictional challenge on this ground can be raised at any time.

If you have any questions or comments on this article, please contact:-

CONTACT



ANDREW HENG YENG HOE
Senior Partner

☎ +603 6207 9331

📠 +6016 222 8412

✉ andrew@zainmegatmurad.com

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ZAIN MEGAT & MURAD

D2-5-1 to D2-5-3A, Block D
Solaris Dutamas No.1, Jalan Dutamas 1,
50480 Kuala Lumpur, Malaysia

☎ +6 03 6207 9331

📠 +6 03 6207 9332

✉ zmm@zainmegatmurad.com