

## **Is a Party Naming Defect Fatal Under CIPAA? *Hock Seng*, *Sito Construction* and *China 1<sup>st</sup> Metallurgical* Compared**

This article dissects the Court of Appeal's ruling in *Hock Seng Trading & Construction v Hongler Enterprise* and another appeal [2025] MLJU 1820, where the court took an uncompromising stance: a mere misnaming in an adjudication proceeding was deemed a fatal jurisdictional defect, voiding the entire process.

To highlight the stakes, the discussion contrasts Malaysia's strict approach with the Singapore High Court's more pragmatic reasoning in *Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] SGHC 7, which favoured flexibility over formality.

### **Introduction**

The Construction Industry Payment and Adjudication Act 2012 (CIPAA) was conceived as a statutory mechanism to ensure cash flow in Malaysia's construction industry by providing a fast, interim, and binding dispute resolution process. Its core tenets are speed, cost-effectiveness, and accessibility, often to be utilized by parties without extensive legal representation. A recurring and disruptive technical challenge within this framework concern the naming of the parties to the adjudication.

The recent Court of Appeal decision in ***Hock Seng Trading & Construction v Hongler Enterprise and another appeal* [2025] MLJU 1820** on whether an error in naming a sole proprietor is a fatal jurisdictional defect reflects a strict interpretation and legalistic approach that risks undermining CIPAA's very purpose. This article argues that while *Hock Seng* is binding Malaysian law, its rationale may be at odds with the objectives of CIPAA. In contrast, the approach by the Singapore High Court in ***Sito Construction Pte Ltd v PBT Engineering Pte Ltd* [2019] SGHC 7**, though decided under a different statute, offers a purposive approach that arguably better aligns with the ethos of CIPAA in facilitating speedy resolution to payment disputes. The Malaysian High Court case of ***China 1st Metallurgical Construction v Galaxy Plumbing & Construction* [2023] MLJU 217**, which rejected the *Sito Construction* approach, is now endorsed by *Hock Seng*.

### **I. *Hock Seng v Hongler*: Misonaming a Sole Proprietor as a Jurisdictional Defect Rendering CIPAA Adjudication Void Ab Initio**

In *Hock Seng*, the sub-contractor (Hongler) initiated adjudication against "Hock Seng Trading & Construction," a sole proprietorship owned by Chai Hon Sang. The subsequent adjudication decision was issued against this business name. Hock Seng applied to set aside the adjudication decision, while Hongler applied to enforce it.

The Court of Appeal's analysis:

1. A sole proprietorship has no separate legal identity from its owner. Following **Tan Thoo Yow v Chia Kim San [1997] MLJU 142** and **United Engineers (Malaysia) Bhd v Yeong Sinn Hoong [1990] 1 MLJ 381**, the correct respondent should have been named as "Chai Hon Sang (trading as Hock Seng Trading & Construction)."
2. Naming the business alone was not a mere procedural defect. It meant the adjudicator was ruling on a dispute involving a non-entity (without legal personality). Citing **KLIA Associates Sdn Bhd v Mudajaya Corporation Bhd [2020] 1 LNS 1253**, the court held the entire adjudication proceeding was void *ab initio*. Consequently, there was no valid decision to either set aside or enforce.
3. The court rejected arguments that the issue was a substantive one for the adjudicator (as suggested in **UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and Anor case [2015] 11 MLJ 499**) or that the defect could be cured by amendment in the enforcement/setting-aside proceedings (distinguishing **Solai Realty Sdn Bhd v United Overseas Bank (M) Bhd [2013] 4 MLJ 545**). Relying on Privy Council authority of **Meenakshi Naidoo v Subramaniya Sastri LR 14 IA 160**, **Chief Kofi Forfie v Barima Kwabena Seifah [1958] 1 All ER 289**, it held that jurisdiction cannot be conferred by consent or waiver.

The decision is logically coherent within a strict legal framework. If the respondent did not exist under the law, the adjudicator lacked a party over whom to exercise jurisdiction.

## II. Sito Construction: Business Names and a Purposive SOPA Approach

The Singapore case of *Sito Construction* involved similar facts but a different judicial approach. The claimant, Afone International, was a sole proprietorship whose ownership changed after the contract was signed. The new owner, Sito Construction Pte Ltd, continued trading as "Afone International" and initiated adjudication under the Building and Construction Industry Security of Payment Act (SOPA), naming "Afone International" as the claimant. The respondent later challenged enforcement, arguing Sito Construction had no contractual standing.

The court took the following approach:

1. The court allowed the originating summons for enforcement to be amended to read "Sito Construction Pte Ltd (trading as Afone International)" under Order 20 rule 5 of the Rules of Court. The error was a genuine mistake that caused no prejudice.
2. Crucially, the court held that the Rules of Court (including Order 77 rule 9, which governs suing and being sued in a business name) *do not apply to the adjudication process itself* under SOPA. The adjudication application was governed solely by the SOPA and its regulations, which did not prescribe how a sole proprietorship must name itself.
3. The court delved into the substance of the transaction. It found the respondent's true intention was to contract with the *business* "Afone International", not the individual

owner. The change in ownership was an internal matter, and the respondent had continued to accept performance and make payments, thereby affirming the contractual relationship.

4. Following the Singapore case of **Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd [2018] 1 SLR 317**, the court held that a respondent must raise jurisdictional objections at the earliest opportunity (in the payment response or adjudication response). The respondent's failure to do so, coupled with its conduct acknowledging the contract, amounted to a waiver.

### **III. China First Metallurgical: Sito Construction Distinguished**

In *China 1<sup>st</sup> Metallurgical*, a decision before *Hock Seng*, the High Court faced a nearly identical issue. The defendant, Galaxy Plumbing & Construction, was a sole proprietorship. The plaintiff challenged the adjudicator's jurisdiction on the basis that Galaxy Plumbing & Construction, as a business name, lacked locus standi.

The court, following **Global Built Sdn Bhd v LKL Ceiling Enterprise & Anor and another case [2022] MLJU 1535**, upheld this challenge. The court held that CIPAA does not exempt parties from the general law of legal personality. It explicitly distinguished the Singapore case of *Sito Construction* and the English case of **Durham County Council v Kendall (t/a HLB Architects) [2011] EWHC 780**, finding them non-binding and based on different statutory regimes. The court acknowledged this outcome might seem "unfair" to self-represented parties but stated the law's requirements were inflexible.

### **IV. Comparative Analysis: Why the *Sito Construction* approach aligns with CIPAA**

#### **1. The Legislative Intent of Speed and Accessibility:**

CIPAA's preamble and judicial pronouncements consistently emphasize its role as a "pay now, argue later" mechanism to alleviate cash flow problems. It is designed for use by contractors and/or the consultants, and not just lawyers. The *Hock Seng* approach elevates what can be viewed as a technical naming rule (a nuance not often understood by laypersons), into a complete jurisdictional bar. This imposes legal technicalities that can invalidate an otherwise meritorious adjudication after all time and cost has been invested, defeating the goal of speed and infusion of payment into the construction cycle.

#### **2. The Role of the Adjudicator and Finality:**

*Sito Construction* recognises the adjudicator's role as the frontline decision maker. It allows the adjudicator to determine substantive issues like the existence of a contract and expects parties to raise objections promptly within the adjudication. *Hock Seng*, by contrast, treats the capacity issue as an ongoing live jurisdictional point that can be

raised at any stage, even after a full adjudication, inviting tactical litigation and undermining the interim finality the adjudication decision is meant to provide.

### 3. Substance Over Form:

*Sito Construction* recognises the commercial reality and the parties' understood relationship. If the respondent knew exactly who was claiming against them (the business entity they contracted with), a naming error should not be fatal. *Hock Seng* insists on strict compliance with the form of naming a sole proprietor, even when the identity of the proper party is not in doubt, prioritising legal technicality.

## V. Conclusion and the Way Forward

The *Hock Seng* decision is a binding authority that establishes a clear position in Malaysia: failure to correctly name a party in adjudication notices and documents nullifies the entire process. While legally sound from a black-letter perspective, this rule undermines CIPAA's foundational principles of providing a swift and accessible remedy for contractors in need of cashflow.

The *Sito Construction* rationale, though from a different jurisdiction, demonstrates a possible approach where the legal system can balance the need for naming the correct entity with the imperative of effective statutory adjudication. By permitting amendments and insulating the adjudication process from strict court procedures, and emphasizing waiver and substantive intent, it can safeguard the adjudication system's efficiency without sacrificing fairness.

It is hoped that should there be a future appeal on a similar point to the Federal Court, the courts will consider a more purposive interpretation. The law could develop to allow such naming defects to be curable by amendment at the enforcement stage, provided no real prejudice or confusion as to identity exists. Alternatively, a clearer practice direction or amendment to the CIPAA rules could provide guidance to claimants. Until then, the *Hock Seng* decision stands as a cautionary tale of strict adherence to legal form.

## VI. Frequently Asked Questions (FAQ) following *Hock Seng*

### a) Is a party naming defect fatal under CIPAA?

Yes. Following *Hock Seng*, misnaming a party without legal personality is a jurisdictional defect that renders the adjudication void ab initio.

### b) Can the defect be cured at the enforcement stage?

No. Where the adjudication is void ab initio, there is no valid decision capable of enforcement or setting aside.

### c) Can participation in adjudication waive a party naming defect?

No. Following *Hock Seng*, jurisdiction cannot be conferred by consent, waiver, or participation where the named party lacks legal personality.

**d) Does CIPAA allow amendment of party names at enforcement stage?**

No. Where the adjudication is void ab initio, there is no valid decision capable of amendment or enforcement.

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