IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 07

Originating Summons No 1069 of 2018
(Summons No 4328 of 2018)

In the matter of Section 27 of the Building and Construction Industry Security of Payment Act (Cap 30B 2006 Rev Ed)

And

In the matter of Order 95 Rule 2 of the Rules of Court

And

In the matter of Adjudication No SOP/AA 256 of 2018

Between

Sito Construction Pte Ltd
(trading as Afone International)

… *Applicant*

And

PBT Engineering Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] — [Dispute resolution] — [Jurisdictional objection] — [Waiver] — [Patent errors]

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v
PBT Engineering Pte Ltd

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Tan Siong Thye J
1 November 2018; 12 November 2018

14 January 2019

Tan Siong Thye J:

Introduction

1 The respondent, PBT Engineering Pte Ltd, was a subcontractor for the building and construction project known as the "Proposed Development of Ancillary Building for Changi East to effect 3-Runway Operations at Singapore Changi Airport – Package One – Supply and Installation of RC Building Works and Drainage Works" ("the Project").[1] On 1 April 2016, the respondent entered into a contract with a sole proprietorship, Afone International, to work on the Project ("the Contract"). At that time, Mr Loke Swee Wan ("Mr Loke") was the sole proprietor of Afone International. About a month after the Contract, in May 2016, Mr Loke sold the business of Afone International to the applicant, Sito

[1] Affidavit of Goh Boon Leong dated 28 August 2018 ("Goh's 1st Affidavit") at para 6. See also Affidavit of Phua Boon Kin dated 19 September 2018 ("Phua's 1st Affidavit") at para 8.

Construction Pte Ltd.[2] The applicant retained all the employees of Afone International. Mr Loke became an employee of Afone International after the sale of the business until August 2018.[3] The applicant lodged a change of ownership of Afone International with the Accounting and Corporate Regulatory Authority ("ACRA") only on 16 July 2018 and back-dated it to 1 July 2016, *ie,* more than two years after the change of ownership.[4] It is undisputed that no notice was given to the respondent regarding this change of ownership and neither was there any novation of the Contract.

2 Under the new sole proprietor, Afone International continued to carry out its obligations under the Contract with the respondent. From July 2016 till August 2017, the applicant had done works under the Contract for the respondent and in turn, the respondent had paid the applicant $4,811,246.13.[5]

3 Afone International issued Payment Claim No. 25 ("Payment Claim") on 14 June 2018 and served it on the respondent. This Payment Claim was for the sum of $2,047,712.04 and it was for work done by Afone International pursuant to the Contract up till the date of the Payment Claim.[6] The respondent did not serve any payment response in respect of the Payment Claim.[7]

4 On 17 July 2018, the applicant served on the respondent a Notice of Intention to Apply for Adjudication. On 18 July 2018 an adjudication application ("AA") pursuant to s 13 of the Building and Construction Industry

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2 Affidavit of Goh Boon Leong dated 3 October 2018 ("Goh's 2nd Affidavit") at para 10.

3 Goh's 2nd Affidavit at para 10.

4 Phua's 1st Affidavit at paras 5 to 7.

5 Phua's 1st Affidavit at para 35.

6 Phua's 1st Affidavit at para 13.

7 Phua's 1st Affidavit at para 14.

Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") was lodged by the applicant.[8]

5 On 19 July 2018, the respondent did a business profile search of Afone International and learnt of the change in ownership of Afone International.[9] The respondent lodged its adjudication response on 26 July 2018. The applicant and respondent tendered further submissions on 31 July 2018 and 1 August 2018 respectively. An adjudication conference was held on 2 August 2018 and both parties made oral submissions. It is important to note that the respondent was legally represented at all times during the adjudication process. Throughout the adjudication process, the respondent did not dispute that the Contract was not binding between Afone International and the respondent.[10]

6 On 15 August 2018, the adjudicator issued his determinations ("the AD") and held that the respondent was liable as follows:

(a) That the respondent pays to the applicant the adjudicated amount of $1,752,684.22 (inclusive of GST) ("the Adjudicated Amount");

(b) That the due date of the payment for the Adjudicated Amount is 12 August 2018;

(c) That the respondent pays interest at the rate of 5.33% per annum on the Adjudicated Amount or any part thereof which remains unpaid. The interest is to run from 12 August 2018 up to the date of full payment;

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8 Phua's 1st Affidavit at paras 15–16.

9 Phua's 1st Affidavit at para 20 and Exhibit PBK-1 at p 732.

10 Phua's 1st Affidavit at pp 443 and 638.

(d) That the respondent is to pay the Adjudicated Amount and the interest thereon to the applicant within 7 days from the service of the AD; and

(e) That the respondent bears 70% of the Adjudication Application fee of $642 (inclusive of GST) and the adjudicator fee of $30,694.02 (inclusive of GST) ("Adjudication Costs"). The applicant bears the balance of 30%.[11]

7 However, payment was not forthcoming from the respondent. Thus, the applicant's solicitors wrote a letter dated 17 August 2018 to the respondent's solicitors to demand payment of the Adjudicated Amount, the interest thereon as well as the respondent's share of the Adjudication Costs. As at 28 August 2018, there was no reply from the respondent's solicitors.[12]

8 Consequently, the applicant filed an *ex parte* originating summons HC/OS 1069/2018 ("the OS") to enforce the AD under s 27 of SOPA. Its application was granted. On 4 September 2018, HRC/ORC 5818/2018 was extracted ("the Court Order"). On 19 September 2018 the respondent in turn filed summons HC/SUM 4328/2018 to, *inter alia*, set aside both the Court Order and the AD ("the setting aside application").

9 After hearing the parties on 1 November 2018, I dismissed the setting aside application. On 2 November 2018, the respondent made a request with comprehensive submissions for further arguments, which I granted it. In reply, the applicant filed its further arguments on 5 November 2018. The respondent filed a reply on 7 November 2018.

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11 Goh's 1st Affidavit at pp 238 and 239.

12 Goh's 1st Affidavit at paras 14–15.

10 On 12 November 2018, the parties came before me to make further oral arguments and upon considering their submissions, I maintained my decision to dismiss the setting aside application.

11 On 8 December 2018, about a month after my decision, the respondent appealed. I now give the grounds of my decision.

The parties' cases

12 I shall first set out the respective parties' cases, starting with the respondent who had filed the setting aside application.

The respondent's case

13 First, the respondent argued that the AD was invalid for want of jurisdiction. The respondent submitted that the applicant had no cause of action and locus standi against the respondent under the Contract because it was not a party thereto. The respondent argued that the Contract was entered into between Mr Loke, trading as Afone International, and not the applicant, trading as Afone International. When Mr Loke sold the business to the applicant, the business of Mr Loke, trading as Afone International, ceased to exist. Since there was no novation or assignment agreement between the applicant, trading as Afone International, and the respondent, there was no contractual relationship between them. Therefore, there was no basis for the applicant to bring the AA under SOPA. Thus the resulting AD was invalid for want of jurisdiction.[13] Hence, it follows that the Court Order in the OS was also invalid.

14 Second, the respondent argued that the applicant could not sue in its own name because it was a sole proprietorship and so must sue in the name of the

[13] Respondent's Written Submissions at paras 26 to 34. See also Respondent's Further Arguments at paras 3.2.1 to 4.

sole proprietor. The respondent cited Order 77 rule 9 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court").[14] Therefore, the respondent argued that the OS was invalid and the Court Order made therein should be dismissed. The respondent also argued that similarly, the AA filed by the applicant under SOPA was filed under the name of Afone International and not under the applicant's name, *ie,* Sito Construction Pte Ltd. Thus, the AA was also invalid.[15]

15 Finally, the respondent argued that the AD was also invalid because there had been a patent error in the findings of the adjudicator. In particular, the adjudicator was wrong to find that there was no settlement agreement between the parties.[16]

The applicant's case

16 In reply, the applicant argued that the respondent failed to raise the objection that there was no contractual relationship between the applicant and the respondent at the adjudication. Thus, the respondent could not raise this objection at the setting aside application.[17]

17 In any event, the applicant argued that it was the correct party to commence the AA pursuant to the Payment Claim because the signatories to the Contract was Afone International and the respondent. When the applicant bought over Afone International's business, it continued trading under the business name "Afone International" and the applicant became the contracting party under the Contract. Hence, there was no requirement for the applicant to

14 Respondent's Written Submissions at paras 19 to 25. See also Request for Further Arguments in letter dated 2 November 2018 at paras 3 to 3.1.6.

15 Respondent's Written Submissions at paras 21 and 22.

16 Respondent's Written Submissions at paras 35 to 38.

17 Applicant's Submissions at para 33. See also Applicant's letter dated 5 November 2018 at paras 3.4 to 3.16.

enter into a novation or assignment agreement with the respondent when it took over the business of Afone International.[18]

18 With regard to the respondent's claim that the applicant had improperly brought this OS by not stating the name of the sole proprietor of Afone International, the applicant submitted that this was merely a procedural irregularity which could be remedied by amendment.[19] The applicant also submitted that the Rules of Court did not apply to adjudication applications under SOPA. Hence, Order 77 rule 9 would not have applied in this case. Therefore, the AA was validly brought when it named the claimant as "Afone International" instead of the applicant, *ie,* Sito Construction Pte Ltd, "trading as Afone International".[20]

19 Finally, the applicant submitted that the adjudicator was correct to find that there was no settlement agreement entered into between the parties.[21] In any event, the applicant submitted that the court should not review the merits of an adjudicator's decision. Thus, the respondent was not entitled to raise this argument again at the setting aside application.[22]

My decision

20 At the hearing on 12 November 2018, I considered the following issues:

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18 Applicant's Submissions at paras 27 to 31.

19 Applicant's Further Submissions at paras 5 to 34.

20 Applicant's Further Submissions at paras 35 to 41.

21 Applicant's Submissions at paras 37 to 39.

22 Applicant's Submissions at paras 40 to 46.

(a) Were the parties bound by the Contract *despite* the fact that there was a change in the sole proprietor of Afone International one month after the Contract was executed?

(b) Was the respondent estopped from raising the jurisdictional objection that there was no contract between the parties at this setting aside application after having failed to raise it at the adjudication proceedings?

(c) Was there a patent error when the adjudicator found that there was no settlement agreement between the parties?

21 In my consideration, I also dealt with the preliminary issues as to whether the applicant, then identified only as Afone International, had been properly named in the OS and the AA. The respondent asserted that since Afone International is a sole proprietorship, the proper party for the applicant should have been named in the OS as Sito Construction Pte Ltd (trading as Afone International). The applicant's counsel, upon realising the mistake, made an oral application on the first hearing of the setting aside application to amend the name of the applicant in the OS.

22 I shall first deal with the two preliminary issues before addressing the principal issues in turn.

Whether the applicant should be allowed to amend the name of the applicant in the OS

23 This issue requires the analysis of Order 77 rule 9 of the Rules of Court which states:

> 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.

24 This rule means that a sole proprietor who is carrying on a business as a sole proprietorship under a business name different from his name can be sued under his business but he, in turn, cannot sue under his business name (*Mason & Son v Morgridge* (1892) 8 T.L.R 805 cited in *Singapore Civil Procedure* (Sweet & Maxwell, 2016) at para 77/9/3). Therefore, the OS filed by the applicant which initially named Afone International as the applicant was not proper because, Afone International, being the business name of the applicant could not have been named as the party for the applicant to bring proceedings in court.

25 However, the applicant could nonetheless apply under Order 20 rule 5(3) of the Rules of Court to amend the name of the applicant to reflect the name of the sole proprietor. Order 20 rules 5(2) and 5(3) of the Rules of Court provide:

> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, *the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.*
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> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that *the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person* intending to sue or, as the case may be, intended to be sued.
>
> [emphasis added]

26 In *Thu Aung Zaw v Ku Swee Boon (trading as Norb Creative Studio)* [2018] 4 SLR 1260 ("*Ku Swee Boon*"), I held that the amendment of the name

of an applicant, from the business name of a sole proprietorship to the name of the sole proprietor, was not a substantive amendment and I granted the application to amend the name of the applicant provided that the conditions under Order 20 rules 5(2) and 5(3) of the Rules of Court had been satisfied (at [24] to [30]). In *Ku Swee Boon*, I was satisfied that the error in naming the applicant was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the true applicant and that it was just to grant the leave to amend.

27 Applying the above principles to this case, it was clear that the applicant was under the mistake that the originating summons was filed properly. The applicant also made an oral application at the earliest opportunity when it became aware of this error. Furthermore, it was evident from the affidavits filed in support of this setting aside application that the respondent was aware of the true identity of the applicant *ie.* that it was Sito Construction Pte Ltd (trading as Afone International). Thus, the respondent knew that it was Sito Construction Pte Ltd (trading as Afone International) that provided its services to the respondent under the Contract when the OS was being contested. Therefore, I granted the applicant's application to amend the name of the applicant because it did not prejudice the respondent in the least and it was only just to ensure that the names of the parties in the OS were accurately reflected.

Whether the applicant had correctly stated the name of the claimant in the AA

28 The respondent argued that Afone International, being a sole proprietorship, was not entitled to maintain the AA for the simple reason that it had no legal capacity to do so. Thus, the business name "Afone International" could not have been used to obtain the AD in the first place and so the AD was invalid.[23] The respondent cited Order 77 rule 9 of the Rules of Court to support

this proposition.[24] The respondent argued that the Rules of Court applied to an adjudication application under SOPA and since the AA was brought under the name of Afone International and not Sito Construction Pte Ltd (trading as Afone International), the AA was invalid (see above at [13]).

29 With respect, I disagreed with the respondent. The Rules of Court do not apply to adjudication proceedings under SOPA. First, the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) provides at s 80(1) the purpose of the Rules of Court which is to govern the procedures of the High Court and the Court of Appeal:

> **Rules of Court**
>
> **80.** – (1) The Rules Committee constituted under subsection (3) may make Rules of Court regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court and the Court of Appeal respectively in all causes and matters whatsoever in or with respect to which those courts respectively have for the time being jurisdiction (including the procedure and practice to be followed in the Registry of the Supreme Court) and any matters incidental to or relating to any such procedure or practice.

30 Second, the Rules of Court unambiguously affirmed this position under Order 1 rule 2(1) which states:

> Subject to this Rule, these Rules shall have effect in relation to all proceedings in the Supreme Court and the State Courts, in so far as the matters to which these Rules relate are within the jurisdiction of those Courts and, unless the Court otherwise orders, apply to pending proceedings therein.

However, the only provision in the Rules of Court that makes reference to SOPA is Order 95, which deals with the application for enforcement of

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23 Respondent's letter dated 7 November 2018 at paras 4 to 9.

24 Respondent's Written Submissions at paras 19 to 25 and Respondent's letter dated 7 November 2018 at paras 4 to 9.

adjudication determinations and to set aside the adjudication determinations. Hence, the Rules of Court do not apply to the adjudication proceedings under SOPA.

31 Third, there is no reference in SOPA or its attendant regulations, the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Ed) ("SOPA Regulations") that the Rules of Court apply to a payment claim and to an adjudication application brought under SOPA. The relevant procedures for issuing a payment claim can be found under s 10 of SOPA and reg 5 of SOPA Regulations. The relevant procedures for an adjudication application under SOPA are provided for under s 13 of SOPA and reg 7 of SOPA Regulations. Neither SOPA nor SOPA Regulations states that an adjudication application cannot be brought by a sole proprietorship and neither does SOPA nor SOPA Regulations state that a sole proprietorship cannot issue a payment claim or adjudication application under its business name.

32 Therefore, the Rules of Court do not apply to the procedure under SOPA. The Payment Claim issued by the applicant and the AA filed by the applicant under the name of Afone International was valid as it complied with ss 10 and 13 of SOPA as well as regs 7 and 10 of SOPA Regulations. Hence, the resulting AD was valid.

33 I would like to mention that at the material time, *during the adjudication proceedings*, the respondent was aware that the applicant, Sito Construction Pte Ltd, was trading as Afone International and that it was the applicant that brought the claim. The respondent was represented at all times by the same counsel who argued at the setting aside application and the adjudication proceedings. The respondent had made an ACRA Business Profile search on 19 July 2018 and knew that Afone International was owned by Sito Construction Pte Ltd one day

after the adjudication application was served on the respondent (see above at [1] and [5]). Hence, the respondent was not prejudiced nor was it under a misapprehension as to who brought the Payment Claim and the AA against it. This further explained why the respondent did not raise any objections as to the identity of the claimant in the adjudication proceedings.

34 Having already found that the Payment Claim and the AA were properly filed and having already granted the applicant leave to amend the OS to properly reflect the name of the applicant, I now turn to the substantive issues in dispute between the parties.

Whether there was a contract between the applicant and the respondent

35 On this issue the respondent argued that there was no contract between the parties. Thus, the AD was invalid for want of jurisdiction and it must be set aside along with the Court Order in the OS.

36 It is axiomatic that a sole proprietorship or a firm does not have a distinct and separate legal entity from its sole proprietor. Therefore, when the sole proprietorship enters into a contract, at law, it is the sole proprietor himself who enters into the contract (*Walter Woon on Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 1.8). However, in applying this principle it is necessary to examine the true intention of the parties when they had executed the Contract and on whom the parties intended the contractual burden to fall.

37 In this case, the parties to the Contract were Afone International and the respondent. Mr Loke was merely the "Managing Director" who signed on behalf of Afone International. The respondent argued that this could only mean that the Contract was between Mr Loke personally and the respondent by virtue

of Afone International being a sole proprietorship. From the evidence, the respondent's true intention was to contract with Afone International, as a business, to carry out the works under the Contract. The fact that Afone International was a sole proprietorship and that Mr Loke was the sole proprietor when the Contract was executed was merely a legal technicality which the parties never considered. I found that this was only brought up now at such a late stage with the benefit of hindsight and it was the respondent's attempt to rewrite what was in its mind at the relevant time to defeat the applicant's Payment Claim under the AD. Further, it was clear that the respondent was *not* engaging Mr Loke for his personal goodwill or reputation but rather, the respondent was engaging the entire sole proprietorship of Afone International when the Contract was executed. Hence, the respondent's intention was for Afone International to carry out the works under the Contract and not Mr Loke. If the respondent's intention was to contract with only Mr Loke and not Afone International, the Contract would have clearly indicated this. This was not the case here. Thus, it seemed that it did not matter to the respondent *who* was the sole proprietor or owner of Afone International, provided that the Contract was fulfilled by the business run under the name "Afone International".

38 This is consistent with the findings of this court in *Chiah Huat Foodstuffs and Packaging (a firm) v Ng Bin Hua (formerly trading as Tjun Fong Enterprise)* [1992] 3 SLR(R) 270 ("*Chiah Huat*"). In that case, the plaintiffs supplied ginseng tea leaf to a business known as "Tjun Fong Enterprise" from January 1990 to June 1990. The delivery orders and invoices made out by the plaintiffs stated that the goods were "Sold to Tjun Fong Enterprise". Tjun Fong Enterprise was registered as a sole proprietorship. Tjun Fong Enterprise had three sole proprietors in control of the business at different periods of time. The relevant period was when Ng Bin Hua, the defendant in *Chiah Huat*, was the sole proprietor, which was from 5 December 1989 to 3 April 1990. During that

time, the plaintiffs had supplied $49,198.20 worth of ginseng tea leaf to Tjun Fong Enterprise. G P Selvam JC held that the defendant was clearly liable for the goods supplied during the time the defendant was the sole proprietor. Although it is not clear on the facts of *Chiah Huat* whether the supply agreement was governed by an overarching contract or was on an order and invoice basis, what is clear is that the plaintiffs in that case understood that it was dealing with Tjun Fong Enterprise and continued to supply ginseng tea leaf to Tjun Fong Enterprise despite the change in the sole proprietors of Tjun Fong Enterprise.

39 Likewise, in this case, the respondent contracted with Afone International to carry out the works stipulated under the Contract. Afone International, indeed, honoured its part of the Contract by providing the necessary contractual services to the respondent who failed to make the necessary payment for the services rendered. Notwithstanding the change of ownership in Afone International in the early part of the Contract, the parties had held themselves to be bound by the Contract. When Mr Loke sold Afone International to Sito Construction Pte Ltd one month after the Contract was signed, the consideration must also have included the performance of the Contract with the respondent. The sale of Afone International was an internal matter of Afone International which had nothing to do with the respondent. Given what transpired in this case leading up to the issuance of the Payment Claim, it could hardly be said that the respondent was concerned about the sale of Afone International between different sole proprietors provided that Afone International *as a business* remained in operation and fulfilled the Contract.

40 Furthermore, the fact that the respondent so readily admitted in its adjudication response that the Contract was binding between the applicant and the respondent reinforced my findings. I note that although the applicant only lodged a change in ownership of Afone International with ACRA on 16 July

2018, the respondent did an ACRA search on 19 July 2018 and learnt of the identity of the new sole proprietor of Afone International.[25] Despite this knowledge, it nonetheless filed its adjudication response on 26 July 2018 and *admitted* that the "[applicant] is the sub-sub-contractor engaged by the [respondent] who is the sub-contractor of the Project, pursuant to a written agreement dated 1 April 2016 [*ie.,* the Contract]".[26] It is also important to note that the arguments advanced by the respondent during the adjudication process were premised on the existence of a contractual relationship between the parties.[27]

41 Finally, I would like to mention that cll 6.1 and 6.2 of the Contract state that there shall be no novation or assignment of the Contract without prior written consent of the respondent. These simply mean that for any novation or assignment of the Contract by Afone International to a different party other than Afone International, written consent by the respondent is required. These provisions do not deal with the change of ownership of Afone International. These clauses were not relevant to this case. Therefore, I did not agree with the respondent's argument that the change of ownership of Afone International without prior written consent from the respondent was in breach of cll 6.1 and 6.2.[28] At the hearing, the respondent did not pursue this line of argument although novation and assignment were mentioned in passing in its submissions.

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25 Phua's 1st Affidavit at para 20 and Exhibit PBK-1 at pp 17 and 732.

26 Phua's 1st Affidavit at p 445 para 4.

27 Phua's 1st Affidavit at pp 443 – 615 and 638 – 727.

28 Respondent's Written Submissions at paras 5, 31 and 32.

42 For the reasons above, I found that the Contract continued to bind the applicant and the respondent despite the change of ownership of Afone International. Hence, the AD and subsequent Court Order were valid.

43 Before I deal with the next substantive issue, I would like to address the respondent's submissions that all the monies paid to the applicant in the sum of $4,811,246.13 should be refunded because they were made under the mistaken belief that the Contract was binding between the parties.[29] First, I did not place any weight to this argument because this was outside the scope of the setting aside application. Second, having already found that the Contract bound the parties, this argument is moot. Finally, the respondent's argument on this point was unsustainable. Having already accepted the applicant's works hitherto, without complaint and paid for most of it, it was no longer opened to the respondent to argue that the applicant had been unjustly enriched at the respondent's expense. It was the respondent that had enjoyed the applicant's services and now used legal technicality to unjustly deprive the applicant from being paid. The law cannot be allowed to be unfairly manipulated by the respondent on technical grounds.

Whether the respondent had waived its rights to raise a jurisdictional objection against the AD at the setting aside application

44 Having found that the Contract bound the parties, I shall now consider whether the respondent had, nonetheless, waived its rights to raise a jurisdictional objection against the AD at this setting aside application. To determine this issue, guidance must be had from the Court of Appeal's decision in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*"). First, the court must determine whether the

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[29] Respondent's Written Submissions at paras 41 to 44.

adjudicator has the power to decide on the matters raised in the jurisdictional objection which go towards his jurisdiction. Second, if the court finds that the adjudicator has such power, the court must then determine whether the respondent had waived its rights to raise the jurisdictional objection because it failed to raise it at the earliest possible opportunity during the adjudication.

45 I shall first consider whether the adjudicator in a SOPA adjudication has the power to decide matters which go towards his own jurisdiction. The Court of Appeal in *Audi Construction* held at [45]:

> In brief, we affirm the view expressed in *Grouteam* (at [67]) that *an adjudicator has the power to decide matters which go towards his jurisdiction. Fundamentally, it is [SOPA] which governs the scope of matters which he is entitled to decide, and nothing in [SOPA] takes jurisdictional matters out of that scope.* In fact, s 17(3)(*c*) of [SOPA] expressly gives him the power, in determining an adjudication application, to consider the payment claim which initiated the process leading to the adjudication. *Having regard to the purpose of [SOPA], which is to facilitate the speedy and efficient resolution of disputes in the building and construction industry, s 17(3)(c) must be read as conferring on an adjudicator the power to decide, among other things, whether a payment claim has been validly served. …*
>
> [emphasis added]

46 The respondent contended that the Payment Claim and the AA were invalid because there was no contract between the parties. The issue here is whether the adjudicator had the power to decide whether a contract existed between the applicant and the respondent. This was a critical issue that underpinned the Payment Claim and the subsequent AA. Applying the principle in *Audi Construction* cited above, regard must be had to s 17(3) of SOPA and I found that the relevant provisions are s 17(3)(*a*), (*b*), (*g*) and (*h*) of SOPA which provide:

> Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:

> (*a*) the provisions of this Act;
>
> (*b*) the provisions of the contract to which the adjudication application relates;
>
> …
>
> (*g*) the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication; and
>
> (*h*) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.

47 In light of the above provisions, an adjudicator has the power to decide whether a contract exists between the parties. This is important because it allows the adjudicator to consider whether the payment claim and the subsequent adjudication application brought for his consideration under SOPA should be adjudicated in the first place. Such power to make a finding on the existence of a contract between the claimant and the respondent lies at the very heart of the adjudicator's power to make a determination under an adjudication application brought under SOPA.

48 This finding comports with the legislative intention of SOPA which is to "facilitate the speedy and efficient resolution of disputes in the building and construction industry" (*Audi Construction* at [45]). Therefore, the adjudicator can rule on whether there exists a contract between the parties as this would determine the validity of the adjudicated claim and to summarily dismiss an application when no written contract exists.

49 The next issue was whether the respondent, by not raising the argument during the adjudication that the Payment Claim and the subsequent AA were invalid because of the absence of a contract between the parties, had effectively waived its rights to raise this jurisdictional objection. Here, the Court of Appeal in *Audi Construction* ruled at [65] to [67] as follows:

65 The question then arises as to whether a respondent's failure to object to an adjudicator's jurisdiction or on a breach of a mandatory provision may be regarded as an unequivocal representation for the purpose of waiver by election and equitable estoppel. ***This in turn raises the issue whether he has a duty to speak – that is, to speak by raising such objection – and, if so, by when that duty should be discharged, failing which he may be regarded as having waived his right to make that objection or as being estopped from doing so.***

66 Both questions, in our judgment, may be answered by reference to the legal context of the issue, in particular, to s 15(3)(*a*) of [SOPA]. By that provision, [SOPA] restricts the issues which can be raised before an adjudicator to the issues stated in the payment response provided by the respondent to the claimant. ***It follows that if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response.*** Reading s 15(3)(*a*) as requiring a respondent to raise any jurisdictional objection it has in its payment response is, again, entirely in line with the purpose of [SOPA], which need not be repeated (see [1], [49] and [52] above). ***Section 15(3)(a) and the general regime of expeditious dispute resolution being the relevant legal context of this case, we have no hesitation in holding that a respondent has a duty to raise jurisdictional objections in his payment response.***

67 In this connection, we note that in *Grouteam* ([12] *supra*), we considered (at [64]) that a respondent should raise such objections at the "earliest possible opportunity". While this would be ideal, we acknowledge that silence at literally the earliest possible opportunity (*eg,* the day on which the payment claim is received) may not be sufficiently unequivocal for the purpose of waiver by election or equitable estoppel. ***Accordingly, we are of the view that a failure to object would amount to an unequivocal representation of a decision to forgo one's right to raise that objection only when such a failure subsists at the time a claimant would reasonably expect the respondent to air his objection.*** For the reasons stated at [66] above, that time is the time by which the respondent is to file his payment response. This is consistent with our view in *Grouteam* at [68] that:

> … the appropriate time for the respondent to raise such an objection [*ie,* an objection to the time of service of a payment claim] would generally be the time at which it receives that payment claim or, *at the latest, by the deadline for it to submit its payment response* …

[emphasis in original in italics; emphasis added in bold italics]

50 I pause here to deal with the respondent's arguments that the Court of Appeal intended the principles in *Audi Construction* to only be "limited to the broad meaning of jurisdictional objections pertaining questions of irregularity of procedure or contingent jurisdiction or non-compliance with the statutory condition precedents to the validity of a step in the litigation".[30] The respondent further cites the Court of Appeal decision in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") to say that not every failure to raise a jurisdictional objection at an adjudication would preclude the same jurisdictional objection from subsequently being raised before a reviewing court.

51 I did not agree with the respondent because first, such a narrow reading of *Audi Construction* would go against the grain of the "general regime of expeditious dispute resolution" which undergirds SOPA. At the risk of sounding repetitive, the Court of Appeal in *Audi Construction* ruled that whether the adjudicator is competent to decide matters that go towards his substantive jurisdiction is a matter to be decided based on the governing legislation, which is SOPA in this case. As I had found above, the adjudicator is competent under SOPA to determine whether there exists a contract between the parties. This is crucial because it lies at the very heart of the adjudicator's power to make a determination under an adjudication application brought under SOPA and to summarily dismiss claims which are beyond his jurisdiction.

52 In *Audi Construction,* the respondent failed to raise the jurisdictional issue in the payment response as required under s 15(3)(*a*) of SOPA. This failure meant that the respondent in that case could not raise this issue before the adjudicator as s 15(3)(*a*) is a mandatory provision. Accordingly, the respondent in *Audi Construction* was prohibited from raising the jurisdictional

[30] Respondent's Written Submissions at para 14.

issue before the court for the purpose of setting aside the AD. However, in this case the respondent also did not raise its jurisdictional objection in its payment response. But the situation is different here because when the Payment Claim was served on the respondent on 14 July 2018, the applicant had not lodged a change of sole proprietor of Afone International with ACRA as this was only done on 16 July 2018. Thus, it would not be fair to expect the respondent to raise its jurisdictional objection in its payment response. Notwithstanding the fact that the respondent was not able to raise this issue in the payment response, I found that it had waived its rights to raise the jurisdictional objection. I shall explain this below.

53 Second, I found that *Comfort Management* did not limit the ambit of the principles laid down in *Audi Construction*. In *Comfort Management*, the Court of Appeal ruled that in the absence of a payment or adjudication response, a respondent to an adjudication application can nonetheless argue before the reviewing court that the adjudication determination was invalid by highlighting patent errors in the adjudication determination to the reviewing court (*Comfort Management* at [67]). Patent errors are errors on the face of the documents or evidence before the adjudicator. This ground of challenge is different from a jurisdictional objection. Thus, I did not give any weight to the respondent's arguments on this point which I found was a misunderstanding of *Audi Construction*.

54 Turning now to whether the respondent had waived its rights to raise the jurisdictional objection (*ie,* that there was no contract between the parties), in my view, the respondent ought to have raised the objection in its adjudication response as the respondent had by then learnt of the change in ownership of Afone International on 19 July 2018 and it had filed its adjudication response on 26 July 2018 (see above at [38]). Thus, with due respect, I did not accept the

respondent's argument that it could not be estopped from raising this jurisdictional objection because it "was not possible for the [respondent] here to have known at the material times (*sic*) that there had been a change in sole proprietorship of the business known as Afone International".[31] This is because the respondent was already aware of this change when it filed its adjudication response.

55 Second, having read the respondent's adjudication response, the respondent's reply to the applicant's further submissions and the adjudicator's summary of the respondent's arguments at the adjudication conference, it was clear that the respondent did not raise the jurisdictional objection that there was no contract between the parties.[32] A summary of the arguments raised by the respondent in the adjudication is as follows:

(a) That the adjudicator must reject the applicant's adjudication application pursuant to s 16(2) of SOPA as it was not made in compliance with s 13(3)(*c*) of SOPA read with reg 7(2)(*a*) of SOPA Regulations for not stating the name and service address of the principal and owner of the Project;[33]

(b) That there was a settlement agreement on the applicant's claims arising out of the Contract for the applicant's works done and so the applicant was precluded from making the adjudication application;[34] and

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31 Respondent's Written Submissions at para 17.

32 Phua's 1st Affidavit at pp 443 – 615 and 638 – 727. See also Goh's 1st Affidavit at Exhibit GBL-1 pp 238 – 293.

33 Phua's 1st Affidavit at p 445.

34 Phua's 1st Affidavit at pp 445 – 446.

(c) That the retention sum claimed under the Payment Claim was not due yet under the Contract.[35]

56 Most significantly, the respondent *admitted* that there was a contract between the applicant and the respondent (see above at [38]).

57 Furthermore, upon reading the AD, I found that the respondent was fully apprised of the change in sole proprietorship at that stage and even stated that this change was inconsequential to the prior agreements made between Mr Loke and the respondent *after* the change of ownership of Afone International. This point was in fact amply ventilated at the adjudication conference.[36] What is significant here is that *despite* knowing the change in the sole proprietor of Afone International, the respondent *relied* on it. The respondent *did not* raise any arguments that there was no contract between the applicant and the respondent and that the Contract was not binding on them.

58 Finally, I would like to highlight that the law on raising jurisdictional objections is well laid down in *Audi Construction*. The principles in *Audi Construction* are trite as they preserve the *raison d'être* of SOPA which is to facilitate the speedy and efficient resolution of disputes in the building and construction industry. Therefore, it is imperative on the parties to raise all jurisdictional objections when they can at the earliest possible stage of the adjudication process under SOPA. In light of the admissions made, *ie*, that there was a valid contract between the parties, and the arguments made by the respondent at the adjudication proceedings, the respondent's jurisdictional arguments raised at the setting aside application were afterthoughts. They were made in the hope of having a second bite at the cherry. Allowing such objections

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35 Phua's 1st Affidavit at p 446.

36 Goh's 1st Affidavit at Exhibit GBL-1 at pp 270 – 276.

would defeat the regime of speedy and efficient resolution of disputes under SOPA. For this reason and in light of the foregoing, I found that the respondent had effectively waived its rights to raise these jurisdictional objections. Hence, the respondent was not entitled to raise it at the setting aside application.

Whether there is merit in the respondent's submission that the adjudicator was wrong in finding that there was no settlement agreement

59 The respondent argued that the AD was invalid because there had been a patent error in the finding of the adjudicator. In particular, the adjudicator was mistaken in finding that there was no settlement agreement between the parties.[37]

60 In considering the relevance of patent errors for a reviewing court, guidance must be had to the principles laid down by the Court of Appeal in *Comfort Management*. As mentioned above at [51], the Court of Appeal in *Comfort Management* ruled that in the absence of a payment or adjudication response, a respondent to an adjudication application can nonetheless argue before the reviewing court that the adjudication determination was invalid by highlighting patent errors in the adjudication determination to the reviewing court (*Comfort Management* at [67]). This is because where there are patent errors, the court will find that the adjudicator had breached his duty under SOPA to adjudicate because he had failed to properly consider the documents before him (*Comfort Management* at [81] – [84]).

61 In *Comfort Management*, the Court of Appeal agreed with the adjudicator that "even in the absence of a payment response or an adjudication response, [the adjudicator] must not merely rubber stamp a claim. [The adjudicator] must consider the material properly before [him] *and* consider if

37 Respondent's Written Submissions at paras 35 to 38.

there are patent errors" [emphasis in original] (*Comfort Management* at [86]). However, the Court of Appeal also emphasised that the adjudicator must not merely look for patent errors but must also be independently persuaded that there was a positive basis for granting the adjudication award (*Comfort Management* at [86]).

62 Applying the above principles, I found that there were no patent errors in the adjudicator's decision. First, the adjudicator had considered the submissions the respondent made in the respondent's adjudication response, the respondent's reply to the claimant's further submissions and the respondent's oral submissions at the adjudication conference in his AD.[38] I also note that the parties had amply ventilated before the adjudicator on the existence of a settlement agreement which, the respondent argued, would preclude the applicant from issuing the Payment Claim.[39]

63 Second, I was fully satisfied that the adjudicator had independently considered all the evidence before him regarding the existence of a settlement agreement. The adjudicator deliberated the respective parties' submissions on this point regarding the existence of a settlement agreement and decided that "there was no signed settlement agreement, nor anything in the material properly before me any evidence that monies were paid pursuant to the same".[40]

64 Indeed, upon reading the email correspondence between the parties which the respondent submitted to the adjudicator, it was apparent that Mr Henry Chia of the respondent had sent an email dated 19 May 2018 stating that "[t]he final amount have yet to agree (*sic*)".[41] This was one day after the

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38 Goh's 1st Affidavit at Exhibit GBL-1 pp 244 to 293.

39 Phua's 1st Affidavit at Exhibit PBK-1 pp 455 – 458, 642 – 646, 709 – 711.

40 Goh's 1st Affidavit at pp 281 – 282.

purported settlement agreement was executed.[42] I note that Mr Henry Chia had filed an affidavit in the setting aside application in which he stated that there was a settlement agreement reached on 18 May 2018. I was unable to accept this evidence because this was inconsistent with his own contemporaneous evidence cited in the aforementioned email.[43] Therefore, the adjudicator was correct in finding that there was no settlement agreement between the parties.

65 Finally, and as a general observation, the thrust of the respondent's argument on this issue was actually to invite the court to set aside the AD because the adjudicator had arrived at a conclusion different from what the respondent desired even after both parties had amply ventilated their cases before the adjudicator. This was tantamount to asking this court to review the merits of the adjudicator's decision. This, the respondent conceded, the court could not do. Hence, for the above reasons, I found that there were no patent errors in the AD and I rejected the respondent's argument on this issue.

Summary of findings

66 In summary, I made the following findings in the setting aside application:

(a) I allowed the applicant's oral application to amend the applicant's name in the OS to enforce the AA. There was no prejudice to the respondent as it was a genuine mistake and the respondent knew that it was the applicant, trading as Afone International, which brought the OS;

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41 Phua's 1st Affidavit at p 711.

42 Phua's 1st Affidavit at para 28(b).

43 Affidavit of Chia Yoke Heng dated 11 October 2018 at paras 11 to 17.

(b) SOPA does not prohibit a sole proprietorship from making a payment claim under its business name. Thus, Afone International could lodge an AA under SOPA against the respondent;

(c) The respondent intended to enter into a contract with Afone International and not with Mr Loke;

(d) Afone International fulfilled its obligations under the Contract and thus the respondent was obliged to pay Afone International for these services which the applicant had satisfactorily performed until the monies claimed under the Payment Claim;

(e) The respondent had waived its rights to raise the jurisdictional objections that there was no contract between the parties because it had the knowledge of the change in the sole proprietor of Afone International at the time of the adjudication process and had ample opportunity to raise this objection at the adjudication process. I also found that during the adjudication process, the respondent had also *admitted* that there was a contractual relationship between the parties; and

(f) There were no patent errors in the AD on the point that there was no settlement agreement between the parties which precluded the applicant's right to raise the Payment Claim. I found that the adjudicator was amply justified in coming to his finding that there was no such settlement agreement.

Conclusion

67 For the foregoing reasons, I dismissed the setting aside application and ordered that the respondent pay costs to the applicant fixed at $7,000 inclusive of disbursements.

Tan Siong Thye
Judge

Koh Yheoh Zhou Napolean Rafflesson and Chong Yi Mei (Patrick Ong Law LLC) for the applicant;
Wong Tze Roy (Goh JP & Wong LLC) for the respondent.
