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Construction Law Practice Series

I. Introduction

This article forms part of WMH Law Corporation's practice series on Construction law, Adjudication, and the Security of Payment Act.

The case of *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317¹ had been one of the most significant decisions under construction law. Both the High Court ("the HC") and the Court of Appeal ("the CA") had to determine two issues with relation to the Building and Construction Industry Security of Payment Act ("the SOPA").²

1. Whether the service of the disputed payment claim on 18 November 2016 is valid; and
2. Whether the failure to file a payment response would waive the respondent's right to raise objection.

This case note would first expound on the present state of law by examining both the HC and the CA's decisions of *Audi v Kian Hiap*. This would then be concluded by comments on the present position.

II. Facts of *Audi v Kian Hiap*

Kian Hiap Construction Pte Ltd, ("the Respondent") engaged Audi Construction Pte Ltd ("the Appellant") for certain structural works. Pursuant to Clause 59 read with

¹ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317.

² Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

Appendix 1 of their construction contract (“**the Contract**”), it is stated that the Appellant shall be entitled to serve a payment claim on the 20th day of each calendar month. In November 2016, the Appellant realised that 20 November 2016 fell on a Sunday, and that its office would be closed. The Appellant then made the payment claim on 18 November 2016, and post-dated the claim 20 November 2016. The Respondent failed to make a payment response. The two issues were adjudicated under the SOPA, where the adjudicator found in favour of the appellant.

The Appellant then applied to the HC to enforce the adjudication determination, and the Respondent filed an opposing application to set it aside. The HC set aside the adjudication determination and allowed the Respondent’s opposing application. The Appellant then appeal in the CA against the HC’s decision, which succeeded.

Issue 1: Whether the service of the disputed payment claim on 18 November 2016 is valid

A. The starting position: The payment claim should be served on 20th of each calendar month

Before analysing the question of whether the disputed payment claim is valid, it is pertinent to set out the starting position relating to the date of service as stated in s 10(2) of the SOPA. It provides that a payment claim shall be served either “at such a time as specified in or determined in accordance with the terms of the contract” or “where the contract does not contain such provision, at such time as may be prescribed”.³

In the present case, both the HC and the CA were of the view that payment claims ought to be served *on* the 20th of each calendar, not *by* the 20th of each calendar month, given the clear wordings of the Contract. The Contract explicitly provides that the Appellant is entitled to serve a payment claim “on” the 20th of each calendar month, pursuant to Clause 59 read with Appendix 1 of the Contract.

³ Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) s 10(2).

Further, it is stated in the CA that, in the situation where the 20th of the calendar month falls on a Sunday or Public Holiday, s 50(c) of the Interpretation Act⁴ provides that where an obligation under “any written law” was to be performed on such days, the obligation could be performed on the next day.

B. The decision in the HC

In the HC, it was held that the disputed service was invalid. The HC was of the view that the words of the Contract are sufficiently clear.⁵ Further, the HC supported this conclusion by drawing reference to s 11(1) of the SOPA.

Section 11(1) of the SOPA provides that a respondent shall respond to the payment claim within 21 days after the payment claim is served. The HC was of the view that this provision would preclude the courts from construing the disputed payment claim as taking effect on 20 November 2016, since the time for service of a payment response would start running when it was served on 18 November 2016.

C. The decision of the CA

The CA set aside the decision of the HC and held that the disputed service was valid due to two reasons.

Firstly, the Appellant had a good reason for making the service on 18 November, given that their office is closed on Sundays.⁶

Secondly, there could not have been any confusion as to the payment claim’s operative date. The payment claim was dated 20 November 2016, the day on which the Contract entitled the Appellant to serve a payment claim. Further, during the oral hearing, the Court asked Mr Edwin Lee, counsel for the Respondent, regarding the Respondent’s position in the situation where the Appellant, in making the disputed service, had concurrently provided a covering letter expressing acknowledging that

⁴ Interpretation Act (Cap 1, 2002 Rev Ed) s 50(c).

⁵ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2017] SGHC 165 at [8].

⁶ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [26].

the contractual stipulated date was to be on the 20 November, but stating that although it was serving the payment claim on 18 November, it intended the claim to be operative only from 20 November, because 20 November was a Sunday. Mr Lee responded that the Respondent would not object. Such a covering letter has the same effect as the appellant's act of post-dating the claim to 20 November 2016. Therefore, the response from Mr Lee further substantiated that there could not have been any confusion.

Further, the CA dismissed the argument made by the HC regarding s 11(1) of the SOPA as "superficially attractive" and was of the view that "it was simply impossible for such an argument to be mounted".⁷

Issue 2: Whether the failure to file a payment response would waive the respondent's right to raise objection

A waiver is defined as "a voluntary or intentional relinquishment of a known right, claim or privilege".⁸ To establish waiver, two elements would have to be proved:⁹

1. Where a party has a choice between two inconsistent rights, and he chooses one over the other, which results in him abandoning that right if he has communicated his election in clear and unequivocal terms to the other party.
2. The other party has relied on that representation to his detriment.

The counsel for the Appellant asserts that the appropriate time for objections to be raised would *generally* be by the deadline of the payment response, as posited in *Grouteam Pte Ltd v UES Holdings Pte Ltd*.¹⁰ Therefore, he argues that the Respondent's failure to object in its payment response pursuant to s 11(1) of the SOPA constituted a waiver.¹¹

⁷ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [31].

⁸ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [54].

⁹ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2017] SGHC 165 at [35].

¹⁰ *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [68].

¹¹ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2017] SGHC 165 at [46].

A. The decision in the HC

The HC was of the view that the failure to file a payment response was insufficient to constitute a waiver of the Respondent's right to raise objection for two main reasons.

Firstly, the HC dismissed the argument made by counsel for the Appellant. While it acknowledged that it is the general case that objections are raised in payment responses, this does not amount to an unchangeable rule. Ultimately, the inquiry is whether a party has taken steps inconsistent with maintaining its objection and whether it was the "earliest possible opportunity" to raise the objection.¹²

Secondly, more facts are required to signify that the Respondent had waived the objection to the payment claim.¹³ For example, it would suffice if the Respondent had written a letter providing a substantive response to the payment claim in which the objection is not raised.

Accordingly, the HC found in favour of the Respondent, and the objection of invalid service could be raised notwithstanding the failure to file a payment response.

B. The decision of the CA

The CA set aside the decision of the HC. It was held that the two elements of waiver were proven in this case.

First, the Respondent's failure to file a payment response constituted "an unequivocal representation that he would not raise any objection to the payment claim".¹⁴ Generally, mere silence or inaction would not amount to unequivocal representation. However, in the present case, the SOPA suggests that the Respondent had a positive duty to provide any objections it wished to rely on in a payment response. An invalid payment claim did not remove the duty of the Respondent to file a payment

¹² *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2017] SGHC 165 at [43].

¹³ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2017] SGHC 165 at [44].

¹⁴ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2017] SGHC 165 at [71].

response.¹⁵ Further, the CA also opined that the “earliest possible opportunity” as stated in *Grouteam Pte Ltd v UES Holdings Pte Ltd* refers to the time by which the Respondent is to file his payment response.¹⁶

Second, the element of reliance was established since the Appellant relied on that representation by omitting to re-file a payment claim.

III. Conclusion

The present state of law as expounded in s 50(c) of the Interpretation Act is sufficiently clear and encompassing, since parties are free to depart from the statute by inserting provisions. If parties wish to be flexible in serving the payment claims, this could have been easily addressed in their contracts, pursuant to s 50(c) of the Interpretation Act.

The courts’ effort to elucidate the SOPA in *Audi v Kian Hiap* is commendable. However, there may be uncertainties arising from how early a payment claim may be served contrary to express contractual provisions, and what are the “good reasons” for the early service of the same. In this regard, it is proposed that the Parliament should also take an active step in amending the SOPA to clear the doubts to facilitate "a fast and low cost adjudication system to resolve payment disputes".¹⁷

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¹⁵ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [68].

¹⁶ *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [67].

¹⁷ *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1113.

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