IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 46

HC/Originating Summons No 947/2016
(HC/Summons No 4806/2016)

Between

Linkforce Pte Ltd (formerly known as AMEC Group Singapore Pte Limited)

… *Applicant*

And

Kajima Overseas Asia Pte Ltd (formerly known as Kajima Singapore Pte Ltd)

… *Respondent*

GROUNDS OF DECISION

[Building and construction law] — [Dispute resolution] — [Adjudication] — [Setting aside]

Version No 2: 27 Oct 2020 (22:40 hrs)

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Linkforce Pte Ltd
v
Kajima Overseas Asia Pte Ltd

[2017] SGHC 46

High Court — Originating Summons No 947 of 2016 (Summons No 4806 of 2016)
Foo Chee Hock JC
31 October 2016, 4 November 2016; 16 January 2017

13 March 2017

Foo Chee Hock JC:

Background

1 Under a subcontract dated 1 November 2012 ("the Sub-contract"), Kajima Overseas Asia Pte Ltd ("Kajima") appointed Linkforce Pte Ltd ("Linkforce") to carry out works in relation to the "complete design, supply, installation, testing, commission and maintenance of a fire protection installation".[1]

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[1] See Cheow Chong's affidavit dated 3 October 2016 at para 5.

These works were pursuant to a main contract between Kajima and Mediacorp Pte Ltd for a project entitled, "Proposed Erection of 12 Storey Media Complex Comprising of) [*sic*] 3 Basements, Theatre, Studios, Retails and other Media Facilities at Mediapolis @ One North".[2]

2 A dispute between the parties eventually arose. Linkforce served a payment claim ("PC") on 3 June 2016 ("PC 33") and alleged that Kajima failed to provide a timely payment response. This sparked off a chain of events which ultimately led to an adjudication determination dated 5 September 2016 ("AD") by Mr Seah Choo Meng ("the Adjudicator") under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"). The Adjudicator awarded a sum of $893,751.86 and costs of $22,470 to Linkforce.[3]

3 Linkforce subsequently sought the payment of the sums from Kajima. However, Kajima did not comply with Linkforce's request.[4] On 19 September 2016, Linkforce filed Originating

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2 See Cheow Chong's affidavit dated 3 October 2016 at para 6.

3 See Cheow Chong's affidavit dated 3 October 2016 at para 10.

4 David Christopher Rowe's affidavit dated 16 September 2016 at paras 11–13.

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Summons No 947 of 2016 and obtained an Order of Court to enforce the AD against Kajima. On 3 October 2016, Kajima filed the present application (*ie*, Summons No 4806 of 2016) to set aside both the Order of Court and the AD. In the event, I granted Kajima's application on 16 January 2017, and Linkforce has now appealed against my decision.

Material facts

4 As alluded to above, the present dispute could be traced back to 3 June 2016 when Linkforce served PC 33 on Kajima for the sum of $1,198,978.14, representing work done up to 31 May 2016.[5] According to Linkforce, Kajima had to provide a payment response by 24 June 2016 by virtue of clause 27(b) of the Sub-contract, which stipulated that a payment response was to be provided within 21 days of the PC being served.[6] However, Kajima did not provide a payment response by that date.[7] This prompted Linkforce to notify Kajima on 7 July 2016 of its intention to apply for

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5 See Cheow Chong's affidavit dated 3 October 2016 at para 7.

6 Applicant's Written Submissions dated 28 October 2016 at para 7. See also s 11(1)(*a*) of SOPA and clause 32(e) of the Sub-contract.

7 David Christopher Rowe's affidavit dated 16 September 2016 at para 9.

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adjudication.[8] A day later, on 8 July 2016, Linkforce lodged an adjudication application ("AA").[9]

5 On 18 July 2016, Kajima lodged an adjudication response.[10] Therein, Kajima raised an objection to Linkforce's AA on the basis that it was lodged prematurely.[11] Highlighting clauses 32(b) and 27(a) of the Sub-contract, Kajima averred that PC 33 was served before the contractually stipulated deadline, which was stated to be the last day of each month. Therefore, PC 33 should only have been served on 30 June 2016 instead of 3 June 2016.[12] Accordingly, a payment response from Kajima was not due on 24 June 2016.[13]

6 The salient parts of the clauses were as follows:

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8 See Cheow Chong's affidavit dated 3 October 2016 at para 8.

9 David Christopher Rowe's affidavit dated 16 September 2016 at para 9.

10 See Cheow Chong's affidavit dated 3 October 2016 at para 9.

11 Adjudication Response in See Cheow Chong's affidavit dated 3 October 2016 at pp 3440–3442, paras 6–21.

12 Adjudication Response in See Cheow Chong's affidavit dated 3 October 2016 at p 3440, para 7.

13 Adjudication Response in See Cheow Chong's affidavit dated 3 October 2016 at p 3442, para 21.

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> **Clause 32(b)**[14]
>
> The Sub-Contractor shall be entitled to serve a payment claim as defined in Section 10 of the Act ***on the date for submission of applications for interim payment as set out in Clause 27 of this Sub-Contract.***
>
> **Clause 27(a)**[15]
>
> The Sub-Contractor shall make application for interim payment ***on the last day of each month (and if that falls on a Sunday or public holiday, on the next business day)*** of the amount which at the date thereof fairly represents the total value of the Sub-Contract Works completed and of any variations authorized and executed, and of materials and goods delivered upon the site for use in the Sub-Contract Works.
>
> [emphasis added]

Based on the above clauses and also on clause 32(e), Kajima argued that it had until 21 July 2016 (*ie*, 21 days after 30 June 2016) to provide a payment response, and that the AA was consequently premature.[16] On this basis, Kajima eventually provided a payment response to Linkforce on 20 July 2016.[17]

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14 The Sub-contract in See Cheow Chong's affidavit dated 3 October 2016 at p 607.

15 The Sub-contract in See Cheow Chong's affidavit dated 3 October 2016 at p 604.

16 Adjudication Response in See Cheow Chong's affidavit dated 3 October 2016 at p 3442, para 20.

17 See Cheow Chong's affidavit dated 3 October 2016 at para 18.

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7 To answer this point, Linkforce drew the Adjudicator's attention to an e-mail dated 25 August 2014 that was sent by Kajima's project manager ("the E-mail"). The E-mail, which Linkforce adduced for the first time via its supplementary claim submissions for the adjudication proceedings,[18] stated as follows:[19]

> Dear All Contractor
>
> From next your progress claim (You need to submit to us by 5th Oct 2014), you need attach supporting documentation as below:-
>
> 1. A3 size floor plan (Your shop drawing) with highlight by colour which installed and tally with your claim
>
> 2. Equipment table (floor by floor) with mention [sp] total quantity and installed
>
> Any luck [sp] of above document from next claim, we don't accept your claim
>
> (Some of contractor submitted previously)
>
> Regards
>
> Matsushita (KAJIMA)

Relying on the E-mail, Linkforce argued that Kajima had "clearly waived and varied the requirement that payment claims were to be submitted on the last day of the month."[20] It submitted that the

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18 See Cheow Chong's affidavit dated 3 October 2016 at para 22.

19 AD in See Cheow Chong's affidavit dated 3 October 2016 at p 25, para 42.

20 Supplementary Claim Submissions of the Claimant in See

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effect of such waiver and variation was that all PCs were to be served by the fifth day of each month.[21] Therefore, it followed that the AA was not lodged prematurely.

8 The Adjudicator agreed with Linkforce. He found that the AA was lodged on time and dismissed Kajima's jurisdictional objection.[22] In the Adjudicator's opinion, there was waiver or variation of the Sub-contract based on the E-mail such that the deadline for the service of PCs was the fifth day of each month.[23] He held that this conclusion was fortified by the fact that PCs prior to PC 33 were "mostly either dated or served after the last day of the month or by the 5th of the following month".[24]

9 The Adjudicator's finding that the AA was not premature led not only to his conclusion that he had jurisdiction to make a

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Cheow Chong's affidavit dated 3 October 2016 at p 8473, para 11; *ie,* in accordance with the contractually stipulated deadline in clause 27(a) of the Sub-contract.

21 Supplementary Claim Submissions of the Claimant in See Cheow Chong's affidavit dated 3 October 2016 at p 8473, para 12.

22 AD in See Cheow Chong's affidavit dated 3 October 2016 at p 29, para 52.

23 AD in See Cheow Chong's affidavit dated 3 October 2016 at pp 26–27, paras 43 and 46.

24 AD in See Cheow Chong's affidavit dated 3 October 2016 at p 27, para 45.

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determination, but also to his decision that he was precluded by s 15(3)(*a*) of SOPA from considering Kajima's payment response that was provided on 20 July 2016.[25] This meant that the Adjudicator did not consider Kajima's counterclaim in the form of backcharges for works that Linkforce allegedly did not complete.[26]

Present proceedings

10 In support of its present application to set aside the AD and Order of Court dated 19 September 2016, Kajima raised three main arguments:

> (a) The AA was lodged prematurely on 8 July 2016, thereby breaching s 13(3)(*a*) of SOPA and invalidating the AD. The Adjudicator had erred in finding that there was estoppel, variation or waiver that had the effect of altering the contractually stipulated deadline for the service of PCs; PC 33 should only have been served on 30 June 2016. Kajima thus had until 21 July 2016 to provide a payment response, and pursuant to s 12(5) of SOPA, the dispute settlement period would have ended on 28 July 2016.

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[25] See Cheow Chong's affidavit dated 3 October 2016 at para 19; AD in See Cheow Chong's affidavit dated 3 October 2016 at p 47, paras 133–135.

[26] AD in See Cheow Chong's affidavit dated 3 October 2016 at pp 46–48, paras 127–140.

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Linkforce was entitled to lodge the AA only after 28 July 2016 and therefore the AD was invalid.[27]

(b) Linkforce should not have been entitled to rely on the E-mail during the adjudication conference because the E-mail was not attached to the AA. This contravened s 13(3)(*c*) of SOPA read with reg 7(2)(*d*) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed).[28]

(c) The Adjudicator's decision not to consider Kajima's payment response (provided on 20 July 2016) and Linkforce's belated adduction of the E-mail led to a violation of natural justice. This was a breach of the Adjudicator's duties under s 16(3)(*c*) of SOPA.[29]

11 After considering the facts and parties' arguments, it became clear that the matter could be disposed of on the threshold issue of whether the AA was lodged prematurely and consequently whether the AD should be set aside. This would also involve examining

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27 Respondent's Supplementary Submissions dated 14 November 2016 at para 10.

28 Respondent's Submissions for Setting Aside Application dated 28 October 2016 at para 31.

29 Respondent's Supplementary Submissions dated 14 November 2016 at paras 16–17.

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whether the Adjudicator had erred in his decision on the effect of the E-mail and the parties' conduct on the stipulated deadline for the service of PCs under the Sub-contract.

12 With regard to the issue of whether the AA was premature, Linkforce unsurprisingly defended the Adjudicator's decision. It submitted that the contractual deadline for the service of PCs had been ***varied*** from the last day of each month (to the fifth day).[30] Further, relying on the E-mail and a number of PCs that were served prior to PC 33, Linkforce contended that Kajima had ***waived*** its right to insist that PCs were to be served on the last day of each month.[31] In the alternative, Linkforce averred that Kajima was ***estopped*** by its representation from insisting on the same.[32]

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30 Applicant's Written Submissions dated 28 October 2016 at para 44.

31 Applicant's Written Submissions dated 28 October 2016 at para 59.

32 Applicant's Written Submissions dated 28 October 2016 at para 63.

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My decision

Section 13(3)(a) of SOPA

13 The test for setting aside an adjudication determination was well established, as set out in the following passage from *Lee Wee Lick Terence* v *Chua Say Eng* [2013] 1 SLR 401 at [67]:

> Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act which is so important that ***it is the legislative purpose that an act done in breach of the provision should be invalid***, whether it is labelled as an essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid.
>
> [emphasis in original]

14 The question, therefore, was whether s 13(3)(*a*) of SOPA was such a provision, the breach of which would invalidate the AD. The answer was undoubtedly in the affirmative. This also assured me of the propriety of examining the merits of the Adjudicator's decision: see *UES Holdings Pte Ltd v Grouteam Pte Ltd* [2016] 1 SLR 312 ("*Grouteam (HC)*") at [40]. *A fortiori* when there could be a breach of natural justice caused by the wrongful exclusion of Kajima's payment response from the Adjudicator's consideration because of the premature AA (see [9] above).

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15 Returning to s 13(3)(*a*) of SOPA, it had been held on multiple occasions that an out-of-time adjudication application would invalidate an adjudication determination because the timelines under SOPA were to be strictly followed: see *eg*, *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 at [48] ("*YTL Construction*") and *Grouteam (HC)* at [43] and [51]. With regard to the last cited case, it ought to be noted that Quentin Loh J's decision in *Grouteam (HC)* was eventually overruled on the facts: see *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011. However, the Court of Appeal did not disagree with Loh J's discussion on the importance of the timelines under SOPA. On the contrary, the Court of Appeal emphasised at [54] (citing *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 at [47]) that the "time limits [were] a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment".

16 Although *YTL Construction* and *Grouteam (HC)* concerned situations where adjudication applications were lodged ***after*** the period of seven days under s 13(3)(*a*) of SOPA, the same principle applied equally to adjudication applications lodged ***before*** the same period. This was made clear in *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHC 226 ("*Newcon Builders*") at [45] where Quentin Loh J held that premature adjudication applications would invalidate an adjudication determination. The following

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passages from *Newcon Builders* put the matter beyond doubt and merited reiteration:

> 30 … Just as an adjudication application which has not been made within the seven days after the entitlement of the claimant to make an adjudication application first arises is not a valid adjudication application, an adjudication application made before the entitlement to do so arises is similarly not a valid adjudication application. Section 12 governs when the entitlement first arises. In my judgment, both premature and late adjudication applications are not valid as they do not comply with both ss 12 and 13.
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> …
>
> 44 While indeed the assistant registrar in *Shin Khai* was referring to adjudication applications which had been lodged late, the need for certainty and an unambiguous test under s 13(3)(*a*) of the Act should apply equally to premature adjudication applications.
>
> 45 I therefore find and hold first, that there is no entitlement to make an adjudication application during the dispute settlement period and any such application is an invalid adjudication application. Secondly, I find that in such an event, the court is entitled, as part of its supervisory jurisdiction, to set aside an adjudication determination which has been rendered pursuant to a premature adjudication application in breach of ss 12(2) and 13(3)(*a*) of the Act.

17 Accordingly, if Linkforce had indeed lodged its AA prematurely, the AD would be invalid. I thus agreed with Kajima's submission[33] that it was appropriate and necessary for me to

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examine the merits of the Adjudicator's decision as to whether the AA was lodged prematurely. Specifically, I had to determine whether there was estoppel, waiver or variation of the Sub-contract such that Kajima could no longer insist that PC 33 had to be served on the last day of the month.

Estoppel, waiver and variation of the Sub-contract

18 Starting with estoppel by representation, the three elements that Linkforce had to establish were, namely, a representation of fact (which could have been in the form of words or conduct), reliance and detriment: see *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [7]–[8]. Additionally, the law required that the representation had to be ***clear and unambiguous*** given "the serious consequences of establishing an estoppel by representation": see Sean Wilken QC & Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 2012) at para 9.32.

19 As for waiver, it is a potentially amorphous concept (see J W Carter, "Waiver (of Contractual Rights) Distributed" (1991) 4 JCL 59) but the discussion herein is confined to how Linkforce had argued its case. Linkforce submitted that the concept of "waiver"

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[33] Respondent's Supplementary Submissions dated 14 November 2016 at para 10.

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could be categorised into two distinct species: waiver by election and waiver by estoppel. The former operated where a party was entitled to exercise a contractual right but chose not to do so, while the latter applied where a party has made an ***unequivocal representation*** that it would not enforce its legal rights against the other party: see *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33]. The species of waiver that was invoked by Linkforce was waiver by estoppel, with Linkforce arguing that Kajima was estopped from insisting that PCs had to be served on the last day of each month.[34]

20 For present purposes, to establish either estoppel by representation or waiver by estoppel, Linkforce needed to demonstrate that the E-mail contained a ***clear and unambiguous representation*** by Kajima that it would not insist on PCs being served on the last day of each month.

21 However, Linkforce failed to clear even this preliminary hurdle. Linkforce could only latch onto a single sentence in the E-mail: "From next your progress claim (You need to submit to us by 5th Oct 2014)". But in my view, the language in the E-mail was haphazard and ambiguous. It could well be referring only to the

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[34] Applicant's Written Submissions dated 28 October 2016 at paras 59–62.

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"next" progress claim in October 2014. One must read the E-mail in its entirety. It could be seriously argued that the E-mail was concerned only with "supporting documentation" such as floor plans and equipment tables that had to be attached to the "progress claim". This was reinforced by the statement that the lack of such documentation would lead Kajima to reject the claim. The point was that the E-mail was plainly ambiguous; any decision maker would be hard-pressed to make a firm finding based on the E-mail standing on its own without other explanatory evidence. As a separate point, the above analysis was consonant with the practical consideration that Kajima was unlikely, without more, to make such a representation that would have serious consequences on its corollary obligation to provide payment responses within the requisite timelines of the Sub-contract and SOPA.

22 Nevertheless, Linkforce insisted that the representation was clear in view of Kajima's conduct. To this end, Linkforce relied on a number of PCs that it had served prior to PC 33. These were PCs 10–15, 17–21, 24–26 and 28, all of which were served within the first five days of the month.[35] These PCs were purportedly accepted by Kajima without objection, and Linkforce argued that this supported the conclusion that the E-mail was a clear representation

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[35] Applicant's Written Submissions dated 28 October 2016 at paras 59 and 76.

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that Kajima would not insist on PCs being served on the last day of each month.[36]

23 In response, Kajima argued that it was not bound to object to any PCs which were served outside of the contractually stipulated date. Instead, the PCs would simply be deemed to have been served on the last day of the month, even if Linkforce had served them early.[37]

24 In his AD, the Adjudicator took these PCs into consideration and concluded that they supported Linkforce's case. He opined that it would have been unfair for Kajima to require Linkforce to comply with the Sub-contract after Kajima had accepted these PCs that were not served on the last day of the month.[38]

25 With respect, I could not agree with the Adjudicator. Viewing Kajima's conduct in its entirety, the fact that Kajima did not object to some PCs that were not served on the last day of the month did not mean that Kajima had unequivocally represented

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36 Applicant's Written Submissions dated 28 October 2016 at paras 59 and 76.

37 Adjudication Response in See Cheow Chong's affidavit dated 3 October 2016 at p 3442 at paras 19–20.

38 AD in See Cheow Chong's affidavit dated 3 October 2016 at p 27, para 45.

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that it would not insist on clause 27(a) of the Sub-contract. Simply put, the entire context and Kajima's silence were ambiguous. Certainly, it was material that Kajima did not consistently provide payment responses to Linkforce within 21 days of PCs being served,[39] which was the stipulated deadline for the provision of payment responses under clause 32(e) of the Sub-contract.[40]

26 Unfortunately, in reaching his decision, the Adjudicator did not appear to have considered the dates of Kajima's payment responses, and their implications on the alleged representation. I also noted that the procedure adopted at the adjudication proceedings did not include direct testimony of witnesses tested by cross-examination. While I accepted that the Adjudicator was master of the procedure at the adjudication, his summary decision on this point did not assure me that the true meaning and effect of the informally and loosely drafted E-mail was to constitute a waiver or an estoppel preventing Kajima from insisting on clause 27(a).

27 In sum, I found that there was no clear and unambiguous representation from Kajima that PCs need not be served on the last

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[39] Annex A to letter from Joseph Lopez LLP dated 19 December 2016.

[40] The Sub-contract in See Cheow Chong's affidavit dated 3 October 2016 at p 607.

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day of each month. This finding was fatal to Linkforce's claim that the doctrines of estoppel by representation and waiver by estoppel applied.

28 The absence of a clear and unambiguous representation was also detrimental to Linkforce's claim that there was an agreement to vary the Sub-contract. It was trite that the variation of a contract required the elements of offer, acceptance and consideration: *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [36]. In relation to the first element, the Court of Appeal in the leading case of *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 held at [47] as follows:

> An offer, capable of being converted into an agreement by acceptance, ***must consist of a definite promise to be bound***, provided that certain specified terms are accepted.
>
> [emphasis added]

For the same reasons that I found that there was no representation giving rise to estoppel or waiver (see [21]), my reading of the E-mail did not reveal an offer to vary the deadline for the service of PCs under the Sub-contract. I did not think that the unclear words used in the E-mail evidenced an objective intent on Kajima's part or a "definite promise" from Kajima to vary the Sub-contract. If there was no offer, there could be no acceptance by Linkforce, by conduct or otherwise. The Adjudicator was thus incorrect to find

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that the Sub-contract had been varied such that PCs were no longer required to be served on the last day of each month.

29 Separately, I observed that the Adjudicator did not articulate how the discrete requirements of waiver and contractual variation were satisfied. Instead, he appeared to conflate the concepts in the AD,[41] and this did little to reveal his reasoning and assuage any concerns about the correctness of his findings.

Conclusion

30 In the premises, I found that the E-mail and the parties' conduct did not have the effect of estoppel, waiver or variation to the Sub-contract such that the deadline for the service of PCs was no longer the last day of each month. PC 33 was therefore served prematurely, resulting in a premature AA. This in turn caused Kajima's payment response to be wrongly excluded from consideration by the Adjudicator in arriving at his determination, which occasioned a breach of natural justice. For these reasons, I ordered that the AD and the Order of Court granting leave to Linkforce to enforce the AD be set aside. Costs were fixed at $10,000 to be paid by Linkforce to Kajima.

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41 AD in See Cheow Chong's affidavit dated 3 October 2016 at p 27, para 46.

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Foo Chee Hock
Judicial Commissioner

Joseph Lopez, Intan Krishanty Wirayadi and Chong Li Tang (Joseph Lopez LLP) for the applicant;
Ng Kim Beng and Zhuang WenXiong (Rajah & Tann Singapore LLP) for the respondent.

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