IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 4

Civil Appeal No 136 of 2017

Between

Audi Construction Pte Ltd

… *Appellant*

And

Kian Hiap Construction Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and construction law] — [Dispute resolution]
[Contract] — [Waiver]
[Equity] — [Estoppel] — [Promissory estoppel]
[Statutory interpretation] — [Interpretation Act]

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Audi Construction Pte Ltd
v
Kian Hiap Construction Pte Ltd

[2018] SGCA 4

Court of Appeal — Civil Appeal No 136 of 2017
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
13 November 2017

22 January 2018

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 The Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the "Act") was passed to establish "a fast and low cost adjudication system to resolve payment disputes": *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1113 (Cedric Foo Chee Keng, Minister of State for National Development). This was in recognition of the need to ensure that contractors and subcontractors in the construction industry receive timely payments for work done and materials supplied. Notwithstanding the salutary aims of the Act, disputes relating to the Act continue to be referred to our courts for determination.

2 A number of disputes over the interpretation of the Act have reached this court for final determination. On one level, this may suggest that the Act is not

achieving its intended purpose. Nonetheless, it would be fair to say that the decisions of this court have helped to resolve a number of issues. This has, in turn, facilitated the adjudication process. Thus, leading commentators in the field have opined that this court's decision in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*"), for example, "settled many of the interpretive issues on the operation of [s 15(3) of the Act, which concerns the matters an adjudicator should consider] and is particularly valuable for its extensive inquiry into the policy considerations for its insertion in the [Act]": Chow Kok Fong & Philip Chan Chuen Fye, "Building and Construction Law" (2013) 14 SAL Ann Rev 113 at para 7.49.

3 This appeal concerned yet another dispute over the interpretation of the Act. Under s 10(2)(*a*) of the Act, a payment claim shall be served "at such time as specified in or determined in accordance with the terms of the contract". In the present case, the parties' contract specified that payment claims were to be served on the 20th day of each calendar month. The 20th day of November 2016, however, fell on a Sunday. The appellant decided therefore to serve its payment claim for that month on 18 November 2016, a Friday, but dated it 20 November 2016. The respondent did not reply with a payment response.

4 The payment claim thus proceeded for adjudication. There, the respondent for the first time challenged its validity on the basis that it had not been served "on" 20 November 2016, as the parties' contract had required. The adjudicator rejected this argument and issued the adjudication determination (the "AD") in the appellant's favour. The respondent then applied to the High Court to set aside the AD, and the Judge set it aside. He ruled that the Act required the payment claim to be served *on* (and not *by*) 20 November 2016, "neither sooner nor later".[1] The appellant then appealed to us against that

decision. We heard and allowed the appeal on 13 November 2017, noting that we would explain our decision in due course. This we do now.

5 The appeal raised a number of interesting issues which we will address here to provide greater clarity and certainty to the adjudication process under the Act. In particular, we will explain how the Interpretation Act (Cap 1, 2002 Rev Ed) (the "IA") resolves the issue of how parties can perform their obligations when they fall due on a Sunday or a public holiday. We will also explain whether an omission or failure to file a payment response can constitute a waiver of a party's right to raise an objection to the adjudicator's jurisdiction or on a breach of a mandatory provision, or estop him from later exercising that right.

Facts

6 The facts of the case were straightforward and not in dispute. In October 2015, the respondent engaged the appellant as a subcontractor. Under their contract, the appellant was to carry out structural works in the construction of a nursing home.[2] By cl 59 of their contract, the appellant was entitled to serve a payment claim on the date for submission of progress claims as set out in Appendix 1 of the contract.[3] Appendix 1 of the contract, in turn, stipulated the "[t]imes for submitting progress claims" as the "20th day of each calendar month".[4]

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1 Judgment at [9].

2 Judgment at [2].

3 Agreed Bundle of Documents Vol 1 at p 88.

4 Agreed Bundle of Documents Vol 1 at p 89.

7 The 20th day of November 2016, however, fell on a Sunday. The appellant thought that it would not be feasible to serve a payment claim that day, not least because the payment claim was voluminous and because the respondent's office was closed. Sensibly, the appellant decided to serve a payment claim two days earlier on the Friday of that week, *ie* 18 November 2016, but dated the payment claim 20 November 2016.[5] The payment claim was not met with any payment response from the respondent. In the event, the appellant applied for adjudication.

8 Before the adjudicator, the respondent challenged the validity of the payment claim on the basis that it had not been filed on the 20th of the month as the contract required.[6] The adjudicator rejected this argument and issued the AD in favour of the appellant in January 2017.[7] In February 2017, the appellant applied for and was granted leave to enforce the AD. In the same month, the respondent applied to the High Court to set aside both the AD and the order granting leave to enforce. The Judge heard the respondent's application in April 2017 and gave judgment for the respondent in July 2017 in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2017] SGHC 165 (the "Judgment").

Decision below

9 The Judge identified four issues for decision: (a) whether the service of the payment claim was invalid because it had not been served on 20 November 2016; (b) whether the payment claim was invalid because it did not state in its header that it was a payment claim under the Act; (c) whether the respondent

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5 Agreed Bundle of Documents Vol 1 at p 273.

6 Judgment at [2].

7 Judgment at [2].

had waived its right to object under issue (a); and (d) whether the respondent had waived its right to object under issue (b).[8] As the present appeal concerned only issues (a) and (c), we will focus on the Judge's decision on these issues.

10 The Judge thought that issue (a) essentially came down to whether, on a true construction of cl 59 read with Appendix 1 of the parties' contract, the appellant was entitled to serve a payment claim only *on* the 20th of each month (as the respondent argued) or was entitled to serve a payment claim *by* the 20th of each month (as the appellant argued).[9] The Judge held that the ordinary and natural meaning of the words in Appendix 1 was that the event concerned was to take place on the specified day and not on any other day, "neither sooner nor later".[10]

11 The appellant argued that the respondent would suffer no prejudice if a payment claim were to be validly served before the 20th of the month because that allowed the respondent more time to consider the payment claim. The Judge rejected this argument because by s 11(1) of the Act, early service may result in a claimant being entitled to payment on a date earlier than would have been the case if the payment claim had been served on the date specified, given that time for serving a payment response runs from the date a payment claim is served.[11] The Judge found arguments based on prejudice unhelpful in any event because the parties had specified the time for submission of payment claims in their contract, and it had to be presumed that there was a reason for this.[12] The Judge

8 Judgment at [3].

9 Judgment at [6].

10 Judgment at [9].

11 Judgment at [9]–[11].

12 Judgment at [11].

was also not persuaded by the appellant's contention that it was impossible to serve a payment claim on a Sunday.[13] So the Judge concluded that service of the payment claim had to be done on the 20th day of the month, "neither sooner nor later".[14]

12 On issue (c), the Judge found that the respondent had not waived its right to object to the premature service of the payment claim.[15] The Judge did not find it necessary to resolve the apparent conflict between four decisions of the High Court cited by the respondent (*ie*, *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 ("*JFC Builders*"); *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("*Admin Construction*"); *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 ("*YTL Construction*"); and *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 ("*LH Aluminium*")) on the one hand, and our decision in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 ("*Grouteam*") on the other.

13 The Judge then considered that even if it were possible to waive an available objection to the invalid service of a payment claim, the respondent had not done so on the facts.[16] The Judge thought that it would generally be the case that filing a payment response without raising the objection to service would be inconsistent with any subsequent position that the service was invalid. But the Judge also considered that this did not necessarily extend to the situation where a respondent elects not to file a payment response at all because it has taken the

[13] Judgment at [12].

[14] Judgment at [13].

[15] Judgment at [33].

[16] Judgment at [34].

view that the payment claim was invalid for not having been filed in accordance with the provisions of the contract. The Judge saw no reason that a respondent should not be entitled to take such a position and, consistently with it, take no action until he is served with an adjudication application.[17] On the facts, the Judge found that the objection was not waived since there was no unequivocal representation that was sufficient to sustain either a waiver by estoppel or a waiver by election.[18]

14 As for the remaining issues, the Judge found in favour of the appellant in respect of issue (b)[19] and there was therefore no need to consider issue (d).[20] However, the Judge observed that if there had been such a need, he would have found that the respondent had indeed waived the objection relating to the payment claim header.[21] In the premises, the Judge set aside the AD on the ground that the payment claim had not been served on time in contravention of the mandatory provision in s 10(2)(*a*) of the Act. The payment claim was not a valid payment claim and the adjudicator accordingly had no jurisdiction to make the award. The appellant then brought this appeal, although its notice of appeal expressly excluded [14]–[22] of the Judgment, which related to issue (b).

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17 Judgment at [45].

18 Judgment at [46].

19 Judgment at [22].

20 Judgment at [48].

21 Judgment at [49].

Parties' submissions on appeal

Appellant's submissions

15 The appellant first submitted that the applicable date to serve the payment claim was by (and not on) 20 November 2016. To this end, it was argued that the Judge should have taken a "purposive interpretation" of the contractual date for service instead of an "overly formalistic" one that did not accord with common sense and sound commercial practice.[22] It appeared that this "purposive interpretation" entailed reading cl 59 with Appendix 1 of the contract as providing that: (a) a payment claim was to be served by the 20th of each month; but (b) if a payment claim was submitted earlier than the 20th of the month, there would be no obligation on the part of the respondent to deal with it earlier unless he chose to do so.[23] The appellant further relied on the decision of the High Court in *Linkforce Pte Ltd v Kajima Overseas Asia Pte Ltd* [2017] SGHC 46 ("*Linkforce*") and argued that it supported its submissions regarding the proper contractual interpretation. It was said that the Judge's reasoning that early service would prejudice the respondent by entitling the appellant to earlier payment was flawed as this was not a case where the appellant had intended the payment claim's effective date of service to run from the date of physical delivery.[24] Alternatively, it was contended that a term should be implied that a payment claim could be physically delivered before the 20th day of each month, but deemed to take effect only from that day. The appellant also added that there was no uncertainty because it had made the effective date

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22 Appellant's submissions at para 26.

23 Appellant's submissions at paras 30–31.

24 Appellant's submissions at para 39.

of the payment claim clear by stating, in accordance with the contract, that 20 November 2016 was the date of the payment claim.[25]

16 The appellant's second main submission was that even if the appellant had breached the contract by serving the payment claim prematurely, the respondent had waived its right to object to the payment claim's allegedly premature service. The appellant submitted that *Grouteam* made it clear that a party is taken to have waived the other party's breach if the innocent party does not object at the earliest possible opportunity (*ie*, by the deadline for serving a payment response). Accordingly, the mischief identified in *Grouteam* had occurred in the present case.[26] The appellant further highlighted that the legislative purpose of the Act was to support downstream contractors facing financial problems due to delays in payment, and added that the Judge's decision created an outcome contrary to the legislative intent of the Act. The appellant also argued that to the extent that *Grouteam* departed from the general principles of waiver, such an exceptional approach is justified by the purposes of the Act.[27]

Respondent's submissions

17 The respondent's first submission was that given the express contractual provision that a payment claim was to be served on the 20th of each month, a payment claim served prior to that would be invalid.[28] The respondent emphasised the mandatory nature of s 10(2)(*a*) of the Act[29] and argued that the

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25 Appellant's reply at paras 4–5.

26 Appellant's submissions at paras 62–63.

27 Appellant's submissions at para 72.

28 Respondent's submissions at para 7.

fact that 20 November 2016 was a Sunday could not be a reason not to comply with the Act.[30] To the respondent, it was clear from a plain reading of the contract that parties had intended for payment claims to be served on (and not by) the 20th day of each month and this created certainty for the parties.[31] Furthermore, the fact that the respondent's office was closed on Sundays did not prevent the appellant from serving the payment claim as there were other modes of service available.[32] It was also said that there was no compelling reason to read into the contract a provision that the 20th of the month should not include Sundays.[33]

18 Second, the respondent submitted that waiver did not apply.[34] It was argued that notwithstanding *Grouteam*, a breach of s 10(2) of the Act could not be waived[35] in the light of the decisions of the High Court in *JFC Builders*,[36] *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 ("*Australian Timber Products*"),[37] *Admin Construction*[38] and *LH Aluminium*.[39] It was said that these cases established that the effect of applying waiver in the context of a breach of a mandatory or

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29 Respondent's submissions at para 12.

30 Respondent's submissions at para 19.

31 Respondent's submissions, paras 26–27.

32 Respondent's submissions, paras 20 and 31.

33 Respondent's submissions at para 35.

34 Respondent's submissions at para 7.

35 Respondent's submissions at para 39.

36 Respondent's submissions at paras 40–42.

37 Respondent's submissions at paras 43–44.

38 Respondent's submissions at paras 45–46.

39 Respondent's submissions at para 48.

legislatively important provision would be to create or confer jurisdiction that did not previously exist and would be akin to the parties conferring jurisdiction on the adjudicator when none existed.[40] Waiver should be limited to situations where the irregularities did not go to the jurisdiction of the adjudicator.[41] In addition, the respondent also highlighted that allowing for waiver in this context would be inconsistent with the spirit of s 36 of the Act,[42] undermine the certainty that the Act called for,[43] and lead to practical difficulties.[44] In any event, the respondent did not waive its objections to the payment claim.[45] There was no obligation to respond because there was no payment claim made under s 10 of the Act.[46] Moreover, mere silence or inaction could not constitute waiver[47] and the appellant also did not comply with the contractual requirement to state in the heading that the payment claim was a payment claim under the Act.[48]

Issues to be determined

19 In our view, there were two broad issues to be determined in this appeal:

(a) whether the payment claim was validly served; and

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40 Respondent's submissions at para 50.

41 Respondent's submissions at para 50.

42 Respondent's submissions at para 52.

43 Respondent's submissions at para 54.

44 Respondent's submissions, para 57.

45 Respondent's submissions at para 7.

46 Respondent's submissions at para 63.

47 Respondent's submissions at para 64.

48 Respondent's submissions at para 76.

(b) if the payment claim was not validly served, whether the respondent had waived its right to object to the payment claim's invalid service or was estopped from raising such an objection.

20 We examine each issue below.

Issue 1: Validity of service of payment claim

21 To begin, there was at the outset no doubt that s 10(2) of the Act is a mandatory provision, breach of which would render an adjudication determination invalid: *Grouteam* at [53]. This point was duly noted by the Judge.[49] Section 10(2) provides as follows:

> (2) A payment claim shall be served —
>
> (*a*) at such time as specified in or determined in accordance with the terms of the contract; or
>
> (*b*) where the contract does not contain such provision, at such time as may be prescribed.

22 In the present case, s 10(2)(*a*) of the Act was the applicable subsection because the parties' contract, by cl 59 read with Appendix 1, specified the time for the service of payment claims. Whether there was compliance with s 10(2)(*a*) therefore turned on whether there was compliance with those provisions in the contract. To recapitulate, cl 59 of the contract entitled the appellant to serve a payment claim "on" the date for submission of progress claims as set out in Appendix 1 of the contract.[50] Appendix 1 in turn, specified the "[t]imes for submitting progress claims" as the "20th day of each calendar month".[51]

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49 Judgment at [4].

50 Agreed Bundle of Documents Vol 1 at p 88.

23 In our judgment, where the parties' contract provides for the service of payment claims *on* a stipulated date, this means service *on* that date and not service *by* that date. In this regard, we agreed wholly with the Judge that the words in the parties' contract were "clear enough".[52] The starting point, therefore, was that the payment claim in this case ought to have been served on 20 November 2016.

24 The appellant submitted, on the authority of several adjudication determinations, that we should take a "purposive interpretation" of the contractual date for service of a payment claim.[53] We rejected the notion that a purposive interpretation would have the effect that the appellant contended for. In so far as this submission suggested a departure from the ordinary principles of contractual interpretation, we could not agree with it. In any event, such an approach would introduce an unacceptable degree of uncertainty into a regime which, as the Judge correctly noted, places great importance on timeliness.[54] Indeed, we reaffirm our earlier observation in *Grouteam* (at [54]) that certainty is *vital* in the context of an abbreviated process of dispute resolution such as that which is established by the Act.

25 In addition, we were unable to see how *Linkforce* supported the appellant's submission that cl 59 of the contract entitled it to serve a payment claim *by* the 20th day of each month. The court in *Linkforce* was concerned with the question whether the respondent, having in the past accepted payment claims served early, had waived its right to insist on service of a payment claim

51 Agreed Bundle of Documents Vol 1 at p 89.

52 Judgment at [9].

53 Appellant's submissions, paras 26–33.

54 Judgment at [7].

on and only on the contractually stipulated date or was estopped from so insisting (at [22]). Obviously, there would be no necessity to speak of waiver or estoppel unless the premature service was thought to be invalid in the first place. And the court, having found no waiver and estoppel, set aside the adjudication determination on the ground that the adjudicator was wrong to have proceeded on the basis that early service of the payment claim had validly accelerated the deadline for filing an adjudication application (at [30]). Thus, it was implicit in the court's reasoning that the early payment claim was considered to have been invalidly served. Nothing in *Linkforce* suggests that the court regarded the contractually-stipulated date for service of a payment claim simply as a deadline in advance of which a payment claim may be served, contrary to the appellant's submission in the present case.

26 Nevertheless, we were of the view that the payment claim, having been physically served two days before the specified day in the contract, was validly served. This is due to the combination of two facts. First, the plaintiff had a good reason for effecting service of the payment claim before 20 November 2016. That day was a Sunday, and there was no dispute that the respondent's office was closed on Sundays.[55] Second, there could not have been any confusion as to the payment claim's operative date. The payment claim was correctly dated 20 November 2016, the day on which the contract entitled the appellant to serve a payment claim.[56] In our judgment, it was clear and obvious to the respondent from this manner of dating that the appellant intended for the payment claim to

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55 Appellant's submissions at para 8; Respondent's submissions at para 31; Appellant's reply at para 9.

56 Agreed Bundle of Documents Vol 1 at p 273.

be treated as being served and, importantly, operative only on 20 November 2016.

27 During the oral hearing, we asked Mr Edwin Lee, counsel for the respondent, what the respondent's position would have been if the appellant in serving the payment claim early had concurrently provided a covering letter expressly acknowledging the contractually stipulated date to be 20 November 2016, but stating that it was serving the payment claim on 18 November 2016 intending for it to be operative only from 20 November 2016, and stating further that it was doing so only because 20 November 2016 was a Sunday. Mr Lee accepted that the respondent would have had no valid objection.[57] Although the appellant did not write to the respondent in those terms, it was clear that the appellant's act of post-dating the payment claim to 20 November 2016 had exactly the same effect and would have left absolutely no doubt in the respondent's mind as to when service of the payment claim was intended to take effect. Indeed, there was no evidence of any confusion in that respect on the respondent's part.

28 The fact is that the appellant in serving the payment claim on 18 November 2016 but dating it 20 November 2016 simply adopted a practical and sensible way of complying with the parties' contract. By doing so, the appellant in our view did comply with cl 59 read with Appendix 1 of the parties' contract and did correspondingly also comply with s 10(2)(*a*) of the Act. We emphasise, however, that our decision in this regard was made on the basis of the combination of the two facts set out at [26] above.

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[57] Oral recording, 3.11pm–3.12pm.

29 Therefore, if there is no good reason for serving a payment claim early, we would not consider such service to be valid service. For instance, if the payment claim in this case had been served on 10 November 2016 and dated 20 November 2016, this would not have constituted valid service because, short of evidence to the contrary, there would have been no good reason for serving it this far in advance. Our decision in this appeal therefore does not entail that a payment claim may be served as early as a claimant wishes so long as he dates it correctly. In its written submissions, the appellant highlighted the respondent's evidence to the effect that the latter's office was open on Saturdays.[58] Presumably, this meant that the payment claim could have been served on 19 November 2016. The respondent also pointed out that the payment claim could have been served on 20 November 2016 by fax, by email, or by leaving it at the respondent's registered office or usual place of business.[59] However, we did not think that either of these contentions undermined the good reason which the appellant had for physically serving the payment claim early on 18 November 2016.

30 Similarly, if serving a payment claim early might cause confusion as to its operative date, we would also not consider such service to be valid. For instance, if the payment claim in this case was not only physically served on but also dated 18 November 2016, that would likely be invalid service because, short of a contrary indication from the appellant, the respondent would reasonably be confused about the operative date of the payment claim.

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58 Appellant's submissions, para 51.

59 Respondent's submissions, para 20.

31 We make three further observations at this juncture. First, we accepted that s 11(1) of the Act provides that the time for providing a payment response runs from the date a payment claim is *served* (as opposed to when a payment claim is *dated*). It may therefore be argued that s 11(1) precludes us from construing the payment claim as having taken effect on 20 November 2016. This argument is only superficially attractive, for its weakness is revealed by simply asking whether it would be possible for the appellant in this case to insist that, although the payment claim was dated 20 November 2016, it actually took effect on 18 November 2016. In our judgment, it was simply impossible for such an argument to be mounted. Accordingly, we did not think that s 11(1) precluded us from construing the payment claim as taking effect on 20 November 2016.

32 Second, the appellant repeatedly emphasised that its earlier physical service of the payment claim gave the respondent more time to deal with the payment claim.[60] With respect, we did not find this argument helpful. Whether the respondent was given more time to deal with the payment claim shed no light on whether there was *compliance* with cl 59 read with Appendix 1 of the parties' contract, which was the relevant issue at hand.

33 Third, in the light of what we will say below concerning how the IA may assist parties in discerning how to perform their obligations when they fall due on a Sunday or a public holiday for the purpose of the Act, we do not expect a dispute similar to the present case to arise in the future.

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[60] Appellant's submissions, paras 42–43; Appellant's reply, para 6.

Applicability of the IA

34 In the interest of providing guidance for future cases, we turn now to discuss the IA. Section 50(*c*) read with s 50(*b*) of the IA provides as follows:

> **Computation of time**
>
> **50.** In computing time for the purposes of any written law, unless the contrary intention appears —
>
> …
>
> (*b*) if the last day of the period is a Sunday or a public holiday (which days are referred to in this section as excluded days) the period shall include the next following day not being an excluded day;
>
> (*c*) when any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
>
> …

35 Pursuant to s 50(*c*) of the IA, if an obligation under the Act is to be performed on an "excluded day" (which is defined in s 50(*b*) of the IA as a Sunday or a public holiday), that obligation may be performed the next day. Regard should be had to this provision when parties face a similar situation in the future. Thus, if the appellant had served the payment claim on 21 November 2016, that is, on the following Monday, we would have had no hesitation in holding that the payment claim had been validly served. This would be so irrespective of whether the payment claim was dated 20 or 21 November 2016. If parties in future adopt the solution in s 50(*c*), there should be no need for them to be unnecessarily "creative" in their attempts to comply with the contractually-specified date, as the appellant appears to have been in this case through early service of a post-dated payment claim.

36 It will be observed that s 50 of the IA opens with the words "[i]n computing time for the purposes of any written law". Section 2 of the IA defines "written law" to mean "the Constitution and all previous Constitutions having application to Singapore and all Acts, Ordinances and enactments by whatever name called and subsidiary legislation made thereunder for the time being in force in Singapore". There is therefore no doubt that the Act constitutes "written law" under the IA. However, counsel for the appellant, Mr Justin Tan, pointed out that s 10(2)(*a*) of the Act provides for the time of service of a payment claim with reference to the terms of the contract.[61] As we understood it, his point was that the IA did not apply because the validity of service was governed by the parties' contract. We did not agree. The applicability of the IA is not precluded because what is ultimately being given effect to here is the *statutory* obligation under s 10(2)(*a*). It is that obligation which the respondent claimed the appellant had breached. The modality of that obligation is no doubt the parties' contract, but that does not make it any less a statutory obligation in substance.

37 On a related note, the respondent highlighted that the Act did not exclude Sundays as relevant days.[62] In support of this, the respondent referred to s 2 of the Act, which defines "day" to mean "any day other than a public holiday within the meaning of the Holidays Act (Cap. 126)". With respect, we failed to see how this assisted the respondent's case in any way because the word "day" does not even feature in s 10(2)(*a*) of the Act.

38 Finally, the applicability of the IA also provided our reason for rejecting the appellant's argument that a term should be implied that a payment claim

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61 Oral recording, 2.56pm–2.57pm.

62 Respondent's submissions, paras 19 and 32.

could be physically delivered before the deadline, but deemed to take effect only from the deadline. In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193, we held at [101] that the question whether a term should be implied is to be approached in three steps:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

39 The appellant's implied term argument faced problems at every step. At the first step, s 50(*c*) of the IA meant that there was no gap in the parties' contract. At the second step, s 50(*c*) of the IA meant that it would not be necessary in the business or commercial sense to imply a term in order to give the contract efficacy. At the third step, even if a term were to be implied, such a term would likely be in the terms of s 50(*c*) of the IA, and not in the terms suggested by Mr Tan, and would therefore not have assisted the appellant. When we pointed out some of these difficulties to Mr Tan at the hearing, he rightly conceded that an implied term analysis "would not be so appropriate".[63]

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63 Oral recording, 3.04pm.

Conclusion on the first issue

40 To conclude, we found that there was compliance with cl 59 read with Appendix 1 of the contract and therefore compliance with s 10(2)(*a*) of the Act. In respect of the first issue, therefore, we found that the payment claim was validly served. On this basis, we allowed the appeal.

Issue 2: Waiver and estoppel

41 The second issue was whether, if the payment claim had not been validly served, the respondent had waived its right to object to the payment claim's invalid service or was estopped from raising such an objection. In the light of our decision on the first issue, the second issue did not strictly arise for our consideration. Nevertheless, we proceed to set out our views on this issue given the existence of conflicting authorities on it and given the benefit we have had of the parties' full submissions on it.

42 As we have noted, we decided in *Grouteam* (at [53]) that s 10(2) of the Act is a mandatory provision, breach of which would render an adjudication determination invalid. Specifically, such a breach would invalidate the substantive basis of an adjudicator's jurisdiction (as opposed to the jurisdiction he has by virtue of being properly appointed): *Grouteam* at [49]. If, therefore, the payment claim in this case was served in breach of s 10(2)(*a*) of the Act, then that breach would have gone towards the substantive jurisdiction of the adjudicator. Nevertheless, the appellant submitted that the respondent had waived its right to object to that breach by failing to file a payment response.

43 This submission raises the question whether a party may in fact waive his right to object to a breach which goes towards the substantive jurisdiction of

the adjudicator. In *Grouteam*, we answered this question in the affirmative (at [63]). We also considered there to be no objection as a matter of principle to adjudicators considering and then ruling on whether they have jurisdiction or on whether breaches of mandatory provisions have occurred (at [67]). In so doing, we consciously departed from the *obiter* remarks to the opposite effect which we had made in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal)* [2013] 1 SLR 401 ("*Chua Say Eng*") (at [36] and [64]). Finally, we also considered in *Grouteam* (at [64]) that a party should be regarded as having waived an available right to object to an adjudicator's lack of jurisdiction or on a breach of a mandatory provision if he fails to raise that objection at the earliest possible opportunity. Nevertheless, our views in *Grouteam* were expressed as being preliminary because the issue of waiver was not directly engaged in that case (at [61]).

44 This appeal therefore presented us with an opportunity to elaborate on those preliminary views, which we shall do here in two parts. First, we will consider whether an adjudicator has the power to decide matters which go towards his jurisdiction. On this issue, *Chua Say Eng* (as we have mentioned) and a number of subsequent High Court decisions (which the respondent in this case cited (see [12] above)) are inconsistent with *Grouteam*, and we will in these grounds address those cases. The issue is an important one because if an adjudicator has no power to decide matters which go towards his jurisdiction, then it may not be sensible to speak of raising before him an objection concerning his jurisdiction. Second, we will examine in greater detail the question when a party may be said to have forgone his right to raise a jurisdictional objection, whether by having waived that right or by being estopped from exercising it.

Does an adjudicator have the power to decide matters which go towards his jurisdiction?

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 the Act which governs the scope of matters which he is entitled to decide, and nothing in the Act takes jurisdictional matters out of that scope. In fact, s 17(3)(*c*) of the Act 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 the Act, 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. We now elaborate on this view. As it will be seen, it is useful to begin with a consideration of the contrary position taken in *Chua Say Eng*.

46 In *Chua Say Eng*, this court had to decide whether a payment claim was invalid and whether it had been served out of time. The court held that the payment claim was neither and, therefore, the adjudication determination which proceeded from it had to stand. Significant to the present case is the court's opinion (at [64]) that an adjudicator's "only functions" are: (a) to decide whether the adjudication application in question is made in accordance with s 13(3)(*a*), (*b*) and (*c*) of the Act (see s 16(2)(*a*) of the Act); and (b) to determine the adjudication application (see s 17(2) of the Act). Thus, it was held that the adjudicator in that case "need not and should not have decided" whether the payment claim in that case had been validly served and whether it had been served out of time. The court appears to have had two reasons for taking this view, although this is unfortunately not entirely clear from the court's judgment.

First, the court might be read as having relied on *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 ("*Chase Oyster*"), a decision of the New South Wales Court of Appeal, to support the view that an adjudicator cannot deal with jurisdictional challenges: see *Chua Say Eng* at [54]–[55]. We address *Chase Oyster* first. The second appears to be an argument from policy, which we address below at [50].

47 In *Chase Oyster*, one of the issues was whether the notice of an intention to file an adjudication application had been served out of time contrary to s 17(2)(*a*) of the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (the "1999 NSW Act"). The court held that it had indeed been served out of time contrary to that provision, and that the adjudicator had erred in concluding the opposite. That error was a jurisdictional error because compliance with s 17(2)(*a*), a legislatively important provision within the scheme of the 1999 NSW Act, was to be regarded as a jurisdictional fact: *Chase Oyster* at [222] *per* McDougall J. The court also held that the adjudicator did not in fact have the power to decide whether s 17(2)(*a*) had been complied with. Significantly, this was not because compliance with s 17(2)(*a*) was a jurisdictional fact, contrary to what appears to be suggested in *Chua Say Eng* at [54]–[55] where *Chase Oyster* is quoted. Rather, it was simply because compliance with s 17(2)(*a*) was not a matter that the 1999 NSW Act, by s 22(2), allowed the adjudicator to decide: *Chase Oyster* at [36] *per* Spigelman CJ, [98]–[101] *per* Basten JA, and [183] *per* McDougall J.

48 Specifically, s 22(2) of the 1999 NSW Act is the provision which defines the scope of matters an adjudicator under the New South Wales regime is entitled to decide, and it does not include adjudication applications within that scope. By contrast, its counterpart in Singapore, s 17(3) of the Act, provides by

sub-section (*c*) that not only is the adjudication application within the adjudicator's power to consider, so too is the "the payment claim to which the application relates". Therefore, the reasoning in *Chase Oyster* on s 22(2) of the 1999 NSW Act, which we accept, actually implies that an adjudicator under our Act is competent to decide whether a payment claim is valid or has been validly served. This must be correct in principle because the proper remit of an adjudicator's task is governed by statute and, if so, there can be no *a priori* exclusion of an adjudicator's power to rule on challenges to his jurisdiction or on the breach of mandatory provisions. We now reproduce s 17(3)(*c*) of the Act:

> (3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:
>
> …
>
> (*c*) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto …

49 In our judgment, this provision is a clear indication that an adjudicator may consider the validity as well as validity of service of a payment claim. This view of s 17(3)(*c*) is consistent with, and indeed advances, the legislative purpose of the Act, which is to facilitate cash flow in the building and construction industry through, among other things, the speedy and efficient resolution of payment disputes. That purpose entails that objections to jurisdiction and on breaches of mandatory provisions should be raised expeditiously. It is therefore sensible for adjudicators to be able to consider and rule on such objections. In any event, their determination of such issues remains open to review by the court, which alone has the power to decide them finally and conclusively. This was the reasoning we adopted in *Grouteam* (at [64] and [67]), and which we now affirm with greater specificity by reference to s 17(3)(*c*).

50 We turn now to the second reason this court in *Chua Say Eng* appears to have had for taking the view that an adjudicator cannot deal with jurisdictional challenges. The reason is essentially that regardless of the adjudicator's decision on the jurisdictional challenge in question, either party may end up referring the issue to court for determination. Therefore, he should leave the issue to the court (*Chua Say Eng* at [36]). We note that the immediate context in which this was said concerned the jurisdiction an adjudicator has by virtue of being properly appointed, but it would seem that the reasoning applies equally in the context of an adjudicator's substantive jurisdiction. In any event, we respectfully depart from this reasoning. If the concern is that parties will end up in court anyway, it is surely important to ensure that they do not do so unnecessarily. Allowing the adjudicator to decide matters on his jurisdiction achieves that aim because it compels parties to ventilate their jurisdictional disputes at an early stage, which will give them an opportunity to resolve those issues and hopefully avoid the need to come to court. Thus, in the present case, if the respondent's objection had been raised in a payment response, the appellant could have either: (a) written to confirm that the payment claim was to be treated as served on 20 November 2016, as indicated by the date marked on the payment claim; or (b) served a fresh payment claim on either 20 November 2016 or even 20 December 2016, which would have been permitted: *Grouteam* at [58] and [68]. If the appellant had done either of these things, the respondent could not reasonably have objected later to the early physical service of the payment claim. The undesirable outcome of allowing the respondent to raise such an objection only at the adjudication speaks for itself. We note, parenthetically, that even if the adjudicator was not entitled to decide matters on his jurisdiction, this would nonetheless have been a compelling reason for the respondent to have raised its objection in a payment response.

51 Accordingly, we consider that the High Court decisions which have been cited by the respondent should no longer be followed in so far as their reasoning is premised on an adjudicator's inability to rule on challenges to his jurisdiction. These decisions include: (a) *JFC Builders*, which (at [40]) followed *Chua Say Eng* in considering that an adjudicator's role did not extend to reviewing the validity of a payment claim; (b) *Australian Timber Products*, where the court reasoned (at [36]) that no estoppel could arise from a respondent's failure to object to the validity of a payment claim under s 10(3) of the Act before the adjudicator because the adjudicator was not entitled to decide that objection; (c) *Admin Construction*, where the court (at [58]–[60]) approved the reasoning adopted in *JFC Builders* and *Australian Timber Products* on the estoppel issue; (d) *YTL Construction*, where the court (at [31]–[32]) approved the reasoning adopted in *Admin Construction* on the same issue; and (e) *LH Aluminium*, where the court (at [30]–[34]) approved the reasoning adopted in *JFC Builders, Australian Timber Products* and *Admin Construction* on the same issue.

52 We have thus far considered an adjudicator's right to rule on challenges to his substantive jurisdiction, specifically, on challenges to a payment claim's validity and validity of service. But what about challenges to his jurisdiction based on his appointment? This issue did not strictly arise in the present case because the respondent did not at any point seek to raise such a challenge. Nevertheless, it is our view that an adjudicator would also be entitled to rule on such a challenge. It is significant that nothing in the Act expressly precludes him from doing so. In fact, returning to s 17(3) of the Act, it will be observed that s 17(3)(*h*) provides that an adjudicator must consider "any other matter that the adjudicator reasonably considers to be relevant to the adjudication". Again, reading this provision purposively, we find it eminently sensible, for the reasons stated at [49]–[50] above, to say that the provision is sufficiently wide to

empower adjudicators to rule on such challenges. In fact, as we observed in *Grouteam* (at [67]), they routinely do. Of overriding importance to the scheme of the Act is the expeditious resolution of payment disputes, and there is no reason to allow respondents to withhold jurisdictional objections of any nature only to spring them on the claimant in court. In our judgment, the Act advances this policy by contemplating that an adjudicator may rule on challenges both to his substantive jurisdiction and to his jurisdiction by virtue of his appointment.

When may a respondent be taken to have forgone his right to raise a jurisdictional objection?

53 We turn to the issue of waiver and estoppel. It is appropriate to begin the discussion here with the general principles, which will set the context for the proper analysis of what is needed to demonstrate that a respondent has waived an available objection to the adjudicator's jurisdiction or on a breach of a mandatory provision, or is estopped from raising such an objection. Also, to rationalise our preliminary observation in *Grouteam* (at [64]) that a failure to raise an objection at the earliest possible opportunity may amount to a waiver of the right to raise it later, we will examine the principles on when mere silence may found a waiver or an estoppel. To this analysis we now turn.

General principles on waiver and estoppel

54 As Lord Goff of Chieveley observed in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 ("*The Kanchenjunga*") at 397 col 2, "the expression 'waiver' is one which may, in law, bear different meanings" and "[i]n particular, it may refer to a forbearance from exercising a right or to an abandonment of a right". In the true sense of the word, however, waiver means a voluntary or intentional relinquishment of a known right, claim or privilege: Sean Wilken QC and Karim

Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("*Wilken and Ghaly*") at para 3.14. On this definition, the only form of waiver that befits that label is waiver by election. This doctrine concerns a situation where a party has a choice between two inconsistent rights. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see *The Kanchenjunga* at 397–398, which was approved by this court in *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 at [33].

55 On waiver by election, it has been argued that "the so-called right of election is not a right in the strict sense with a corresponding duty in another, but a power": K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2nd Ed, 2016) at para 14-002. The learned author explains:

> Alternative and inconsistent rights typically exist when a transaction is voidable or events occur which give rise to a right, strictly a power, in one party to terminate a valid transaction or reject a non-contractual tender of performance. … In each situation new information comes to the attention of the putative elector. … The putative elector must decide what he will do in the light of the new information. …
>
> It will be seen that the so-called right of election is not a right in the strict sense with a corresponding duty in another, but a power. An elector has the power to change the legal rights and duties of another vis-à-vis himself or a third person with a corresponding liability of the first to submit to the change. An election does not involve a choice between two sets of rights which presently co-exist but between an existing set of rights and a new set which does not yet exist. The power is to

> terminate one and create the other, and the default position is that the existing rights remain in force. …

56 We consider this explanation of waiver by election to be persuasive and to be a useful analytical tool, and we will later adopt its terms at [63] below when we analyse the nature of the argument that a respondent has waived an available objection to the adjudicator's jurisdiction or on a breach of a mandatory provision.

57 Waiver by election is often distinguished from what is sometimes called waiver by estoppel: see, for example, *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882H–883C *per* Lord Diplock. This refers to the doctrine of equitable (or promissory) estoppel. It requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation: *The Kanchenjunga* at 399 col 2. It is important to note that the requisite representation is different as between waiver by election and equitable estoppel. A party making an election is communicating his choice whether or not to exercise a right which has become available to him. By contrast, a party to an equitable estoppel is representing that he will in future forbear to enforce his legal rights. And as the Judge observed, this doctrine is premised on inequity, not choice, hence the requirement of reliance.[64] Strictly speaking, therefore, it is not a form of waiver. Indeed, several leading treatises eschew that terminology, preferring instead to call it the doctrine of equitable forbearance: Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 14th Ed, 2015) at para 3-069;

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[64] Judgment at [35].

Chitty on Contracts vol 1 (H G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 4-086; *Wilken and Ghaly* at para 3.13.

58 Next, it is well established that mere silence or inaction will not normally amount to an unequivocal representation: *Fook Gee Finance Co Ltd v Liu Cho Chit and another appeal* [1998] 1 SLR(R) 385 ("*Fook Gee Finance*") at [36]. However, as we also observed in *Fook Gee Finance* (at [37]), "in certain circumstances, particularly where there is a duty to speak, mere silence may amount to [such] a representation". Lord Wilberforce put the matter in similar terms in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 (at 903B, in a dissenting speech that is nevertheless authoritative on this point):

> … In order that silence or inaction may acquire a positive content it is usually said that there must be a duty to speak or to act in a particular way, owed to the person prejudiced, or to the public or to a class of the public of which he in the event turns out to be one. …

59 The cases which examine and apply this principle are generally cases concerning equitable estoppel, but there is no reason why it should not also apply to waiver by election in the appropriate circumstances, since both doctrines require an unequivocal representation.

60 To rationalise the circumstances in which a duty to speak arises, it is important first to appreciate the variety of contexts in which such a duty may arise. This is illustrated by the following cases, some of which were referred to by the Judge:

(a) In *Greenwood (Pauper) v Martins Bank, Limited* [1933] AC 51 ("*Greenwood*"), the plaintiff husband deliberately chose not to inform the defendant bank that his wife had been forging cheques which were

being drawn on his sole account. After his wife died, he sued the bank to recover the sums paid out on those cheques. The House of Lords held that he was estopped from claiming against the bank. On the requirement of representation, Lord Tomlin held (at 57–58) that the plaintiff had a duty to disclose the forgeries to the bank, and that his deliberate failure to do so produced the very effect which it in fact was intended to produce, namely, leaving the bank in ignorance of the true facts so that no action might be taken by them against his wife.

(b) In *Tradax Export SA v Dorada Compania Naviera SA* (*The "Lutetian")* [1982] 2 Lloyd's Rep 140 ("*The Lutetian*"), the vessel had been off-hire for repairs. When the charterers in good faith paid the wrong amount, the owners withdrew the vessel without warning. The issue arising from the charterers' action was whether the owners were entitled to withdraw the vessel on account of the charterers' failure to pay the full sum of hire due under the charter at the correct time. Bingham J held (at 158 col 1) that there was a duty not to conduct oneself in such a way as to mislead. The owners in that case knew that the charterers believed they had paid the right amount and, therefore, had a duty acting honestly and responsibly to raise the question with the charterers, and their omission to do so led the charterers to think that no objection would be taken to the calculation. They were thereby estopped by their silence.

(c) In *Tacplas Property Services Pte Ltd v Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased)* [2000] 1 SLR(R) 159 ("*Tacplas*"), the respondent was appointed administrator of an estate. He allowed the appellants to continue incurring costs on the

faith of the validity of an agreement between the estate and the appellants to cover costs. The respondent intended to challenge the validity of that agreement, but he did not. This court held (at [66]) that he was under a duty to inform the appellants that he did not intend to ratify the agreement, taking into account the fact that he was at all material times represented by solicitors. His failure to take any step to that effect, after he was appointed as the estate's administrator, was therefore "a clear representation that everything was in order". He was estopped from asserting that the agreement did not bind the estate.

(d) In *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR(R) 1 ("*T2 Networks*"), the plaintiff did not bill a certain number of minutes it was entitled to for providing international communications services. This inaction was found to constitute a waiver since the relevant clause in its contract with the defendant specifically required the plaintiff to bill for those services every month. The plaintiff had also chased the defendant for other unpaid bills during this period but never mentioned the missing amounts. The court therefore held (at [69]–[71]) that the plaintiff had waived its right to claim those amounts, although the court did not analyse the principles of waiver (or estoppel) on which it had relied.

(e) In *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 ("*ING Bank*"), the claimant bank was engaged to assist the defendant in its search for an investor who would subscribe for additional capital for its business. The terms of its engagement, as construed by the court, entitled the bank to a very large success fee calculated on a particular basis. But the parties had earlier exchanged estimates of the transaction costs

> which presupposed a much lower fee and which had been calculated on a different basis. The English Court of Appeal held that the bank was estopped from claiming the larger fee. Carnwath LJ observed (at [71]) that the bank and the defendant were engaged in a joint project in which each was entitled to assume that the other would act consistently, and would not knowingly conceal information of significance to the project or their relationship in it. The bank had a duty, acting honestly and responsibly, to do more than simply acquiesce in the defendant's continued use of a calculation which it believed, or had reason to believe, was wrong.

61 In our judgment, these cases illustrate the proposition that whether there is a duty to speak is a question which must be decided having regard to the facts of the case at hand and the legal context in which the case arises. The importance of context, especially the legal context, must be emphasised, for it is apparent that the court in finding a duty to speak in each of the cases mentioned above had regard to factors such as a customer's relation to a bank (*Greenwood*), a vessel owner's relationship to his charterer (*The Lutetian*), the responsibility of an estate's administrator (*Tacplas*), the specific contractual obligations between the parties (*T2 Networks*) and the parties' being engaged in a joint project (*ING Bank*). The expression "duty to speak" does not refer to a legal duty as such, but to circumstances in which a failure to speak would lead a reasonable party to think that the other party has elected between two inconsistent rights or will forbear to enforce a particular right in the future, as the case may be. We emphasise that this is not the subjective assessment of the other party but an objective assessment made by reference to how a reasonable person apprised of the relevant facts would view the silence in the circumstances, though unsurprisingly, the parties' relationship and the applicable law which governs it

will be a critical focus of the court's assessment of whether those circumstances exist.

Waiver and estoppel in the context of adjudication under the Act

62 On the footing of the above principles, we turn now to consider the nature of the argument that a respondent has waived an available objection to an adjudicator's jurisdiction or on a breach of a mandatory provision. In our judgment, this argument may in principle be analysed under both waiver by election and equitable estoppel. In the context of an adjudication under the Act, a claimant and respondent are parties to a contract, on which the regime of the Act is superimposed. The contract and the Act define the rights the parties have in relation to each other. In our view, these are rights which are in principle capable of being elected and whose exercise is capable of being forborne.

63 We illustrate this using the example of an invalid payment claim, although this analysis would apply to a case involving an invalidly-served payment claim as well. When a claimant serves a payment claim, a respondent is entitled to raise an objection to that claim through a payment response. If the respondent communicates his election not to raise an objection to the payment claim's validity, he may in principle be said to have waived his right to make that objection before the adjudicator. In this respect, Handley's analysis of waiver by election (see [55] above) elucidates the waiver's precise mechanism. The respondent, upon realising that the payment claim is invalid, acquires the power to change his rights in relation to the claimant by objecting to the validity of the payment claim. If the respondent exercises that power by raising that objection in a payment response, he establishes for himself the right to raise that objection before a tribunal or a court as a ground for not having to make payment to the claimant. If, however, the respondent elects not to exercise that

power by failing to file a payment response containing the objection, then he will not have any right to rely on that objection before a tribunal or court; indeed, he will have lost the opportunity to establish that right by the time the payment response should have been filed, and will therefore have to be content with the default obligation to pay under the payment claim in so far as no other form of objection has been raised.

64 The respondent may also communicate his intention to forbear to exercise his right to object to the payment claim's validity. The claimant, in turn, may in reliance on that communication omit to re-file a payment claim which rectifies the filed payment claim's defect, if any. If the respondent later attempts to impugn the validity of the filed payment claim, the claimant may by then, to his detriment, have missed the opportunity to re-file a rectified payment claim. Indeed, the claimant may have decided not to re-file because the respondent had acted consistently with the position that the payment claim was valid. In such a case, the respondent may in principle be estopped from raising that objection. The foregoing example makes sense of the usual facts involved following a failure to file a payment response.

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 an 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 the Act. By that provision, the Act 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 the Act, 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*, 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 added]

68 One of the respondent's arguments which went towards the premise of the duty to speak which we have identified was that there is no legal obligation to issue a payment response in response to an invalid payment claim. This is because, the respondent said, such payment claim is not a "payment claim" as defined by s 2 of the Act and therefore cannot give rise to the obligation under s 11 to file a payment response upon receipt of a payment claim.[65] We rejected this argument for three reasons. First, s 2 does not define a payment claim as one which complies with s 10. Instead, it defines a payment claim as one which is "made … under section 10". On the natural meaning of these words, it seemed to us that a payment claim which fails to comply with s 10 is not same as one that is not "made" under s 10. Second, for the reasons given at [69] below, such a technical reading of s 2 would not comport with the purpose of the Act, which would be better served by obliging the respondent to raise any objection to a payment claim it may have, jurisdictional or otherwise, so that the claimant has the opportunity to rectify it if he so chooses. Third, a respondent who receives a payment claim may not in fact be able to tell, though it must take a position without being able to determine conclusively, whether it is valid or has been validly served. He may wrongly conclude that it is invalid or invalidly served, like the respondent in this case did, in which event he would, on the respondent's construction of s 2, have to serve a payment response. *Ex hypothesi*, if he is right, then of course he would be justified in not serving a payment response. But therein lies the arbitrariness: it is not sensible for the obligation to serve a payment response to depend on such uncertainties. For these reasons, we

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[65] Respondent's submissions at para 63.

rejected the respondent's contention that an invalid payment claim does not give rise to an obligation to serve a payment response. Accordingly, s 15(3)(*a*) and the scheme of the Act together remain a legitimate basis for the duty to speak we have identified.

69 Next, the respondent argued that this position would place an undue burden on respondents in general to dignify the claimant with a response to payment claims which they believe to be clearly invalid. We did not agree with this argument for two reasons. First, if the respondent knows he will have to raise a jurisdictional objection when the payment claim goes to adjudication anyway, he cannot be said to be unduly burdened now to have to raise that objection to the claimant's attention. More importantly, if he raises it now, the claimant would have the opportunity to rectify the invalidity by sending a new payment claim, which would potentially save both parties the trouble of going before an adjudicator or before a court subsequently. Second, as the appellant contended, the position otherwise would be that a respondent who is not diligent and does not provide a payment response will be able to obtain a better outcome by setting aside the entire adjudication determination on purely technical grounds, as opposed to one who takes the trouble to provide a payment response.[66] This would not only be anomalous but would also offend the very purpose of s 15(3) of the Act. As we observed in *W Y Steel* at [33]:

> … In our judgment, s 15(3) is jurisdictional in the sense that it curtails the power of an adjudicator to allow a respondent to raise new grounds for withholding payment that were not included in his payment response and, for that matter, an adjudicator's power even to consider such grounds at all. This is literally what the provision provides and we should, in our view, give proper effect to it. In view of the scheme of the Act, it is clear that W Y Steel's argument – *viz*, that s 15(3) applies to

66 Appellant's submissions at para 70.

> exclude consideration of matters not contained in a payment response only where a payment response, albeit an incomplete one, has been filed and not otherwise – cannot be right. This reading would, as the Assistant Registrar in *Chip Hup Hup Kee (AR)* ([27] *supra*) astutely pointed out, perversely favour a respondent who did not file a payment response at all over one who did and, thus, would incentivise conduct that defeats the very purpose of the Act.

70 The respondent argued that requiring a payment response for payment claims which are believed to be invalid or invalidly served would be unduly onerous also because the respondent in the payment response would have to record not only his jurisdictional objection but also any objection on the merits it may have, to secure his position in the event that his jurisdictional objection is found to be invalid.[67] We did not accept this argument either. If a respondent wishes to take an all-or-nothing approach by objecting only on jurisdictional grounds in his payment response, then that is his choice. The scheme of the Act and s 15(3)(*a*), however, imposes on him a duty to speak by way of fully spelling out his reasons for withholding payment so that the claimant is not caught by surprise at the adjudication (see [66] above). If the respondent fails to discharge that duty to speak, or misjudges the payment claim by placing all his eggs in the single basket of jurisdictional challenge, then he can only have himself to blame if his jurisdictional objection proves to be misplaced. And if he has a genuine objection on the items of payment in the payment claim, he would have had to raise those objections anyway had the payment claim been valid and validly served.

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67 Oral recording at 3.51pm–3.54pm.

Application to the facts and conclusion on the second issue

71 In the present case, the respondent failed to file a payment response. Applying the principles above, this constituted an unequivocal representation that he would not raise any objection to the payment claim, whether as to jurisdiction or as to the merits. The appellant relied on that representation by omitting to re-file a payment claim. When the matter came before the adjudicator, the respondent objected to the validity of the service of the payment claim. In our judgment, it was by that time estopped from raising that objection, just as it was estopped from raising it in the High Court and before us. In respect of the second issue, therefore, if the payment claim was not validly served, we would have found that the respondent was estopped from raising an objection to the payment claim's invalid service. However, as we have already noted at [41] above, this was not the case because the payment claim was, in fact, validly served.

Conclusion

72 In light of the above, we allowed the appeal. At the conclusion of the hearing, Mr Tan asked for $20,000 in costs plus $3,475 in disbursements.[68] Although Mr Lee did not object to this,[69] we fixed costs at $20,000 *inclusive* of disbursements. As we explained to Mr Tan, directions were given for only the essential documents to be filed. Instead, the appellant ended up filing a total of six agreed bundles of documents, to which minimal reference was made during the hearing and in the parties' submissions, without applying any thought as to whether the documents were essential for the purposes of the appeal. In

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68 Oral recording, 4.27pm–4.28pm.

69 Oral recording, 4.28pm.

Grouteam, we emphasised (at [69]) that parties should try as far as possible to give effect to the speedy and efficient system of dispute resolution established by the Act. Given also that the facts of this appeal were not in dispute and fairly uncomplicated, we did not find the voluminous documents before us helpful.

Sundaresh Menon	Tay Yong Kwang	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

Tan Jia Wei, Justin (Trident Law Corporation) for the appellant;
Lee Peng Khoon Edwin, Poonaam Bai d/o Ramakrishnan Gnanasekaran, Amanda Koh Jia Yi and Chow Jia Yao (Eldan Law LLP) for the respondent.