IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 165

Originating Summons No 130 of 2017
(Summons No 826 of 2017)

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

And

In the matter of Order 95, Rule 2 of the Rules of Court, Supreme Court of Judicature Act (Cap 322)

And

In the matter of the Adjudication Determination dated 31 January 2017 made in Adjudication Application No SOP/AA 483 of 2016

Between

AUDI CONSTRUCTION PTE LTD

… *Applicant*

And

KIAN HIAP CONSTRUCTION PTE LTD

… *Respondent*

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JUDGMENT

[Building and construction law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Premature payment claim]

[Building and construction law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act] — [Waiver]

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Audi Construction Pte Ltd
v
Kian Hiap Construction Pte Ltd

[2017] SGHC 165

High Court — Originating Summons No 130 of 2017
(Summons No 826 of 2017)
Lee Seiu Kin J
7 April 2017

11 July 2017 Judgment reserved.

Lee Seiu Kin J:

1 On 13 February 2017, the applicant in this originating summons obtained leave to enforce an adjudication determination dated 31 January 2017 ("the AD") in adjudication application no SOP/AA 483 of 2016. On 23 February 2017, the respondent filed summons no 826 of 2017 to set aside the AD and the leave to enforce. On 7 April 2017, after hearing counsel for the parties, I reserved judgment. I now give my decision and the reasons for it.

Background

2 The respondent engaged the applicant as subcontractor pursuant to a subcontract contained in a letter of award dated 2 October 2015 ("the Contract"). The Contract was for the applicant to carry out certain reinforced concrete structural works in the construction of a government-built nursing home. The present dispute arose from a payment claim which the applicant

purported to issue to the respondent on 18 November 2016 ("the PC"). The respondent did not serve any payment response in relation to the PC. The applicant then applied for adjudication. At the adjudication conference and in the respondent's adjudication response, the respondent challenged the validity of the PC. It was not disputed that the respondent's only objection in the adjudication response was that the PC was not filed on the stipulated date. In particular, the respondent did not object that the PC failed to state that it was a payment claim under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"). The adjudicator issued the AD in favour of the applicant on 31 January 2017.

Issues

3 The following four issues arise for determination:

(a) Whether the service of the PC was invalid because it was not served on 20 November 2016 as stipulated under the Contract.

(b) Whether the PC was invalid because it did not state in its header that it was a payment claim under SOPA.

(c) Whether the respondent had waived its right to object under issue (a).

(d) Whether the respondent had waived its right to object under issue (b).

Issue (a): Premature payment claim

4 The Court of Appeal in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 ("*Grouteam*") had established (at [53]) that s 10(2) of SOPA

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is a mandatory provision. This subsection 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.

The CA went on to state that an adjudication award arising from a payment claim that was served in breach of this provision would be invalid. Both parties' counsel did not dispute this point. What they disputed was the validity of the service of the PC.

5 Both counsel agreed that cl 59, read with Appendix 1 of the Contract, provides for the time of service of a payment claim. Clause 59 provides as follows:

> 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 progress claims as set out in Appendix 1. For the avoidance of doubt, the submission of a payment claim under the Act shall be separate and distinct from the progress claim submitted under Clause 16.
>
> [emphasis added]

Appendix 1 makes the following provision in relation to cl 59:

> Times for submitting progress claims (if none stated, on the 25th day of each calendar month): 20th day of each calendar month

6 The issue is whether, on a true construction of cl 59 read with Appendix 1 of the Contract, payment claims may only be served on the 20th of each month as the respondent claimed, or may be served by the 20th of the month as the applicant submitted.

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7 The present conundrum reflects a major weakness in SOPA. This is an Act that places great importance on timeliness, as indeed it should, for its *raison d'etre* is to ensure speedy resolution of payment disputes on an interim basis to ensure that cash, the lifeblood of the construction industry, is kept smoothly flowing. In this way, contractors and subcontractors down the line are able to pay their workers and suppliers so as to ensure successful completion of their projects. Timeliness is so important that breaches of certain deadlines have serious consequences. For example, if a respondent fails to serve a payment response within the time provided in s 11(1) of SOPA, he is, in effect, precluded from raising any defence to the payment claim in a subsequent adjudication because s 15(3) of SOPA prohibits the adjudication response from containing anything not included in the payment response.

8 However, the relevant provisions for time in SOPA are not tightly drafted because they permit parties to elect to specify certain time limits in their contracts. Section 10(2) of SOPA is one such example, and the same holds for a number of other provisions of SOPA. On the one hand, this gives parties the flexibility to provide for the appropriate time limits to suit their individual circumstances. However, this may also lead to disputes on interpretation of those contractual provisions and the present case is one example. Even Acts of Parliament, drafted by professional draftsmen, are sometimes the subject of disputes in court as to their exact meaning. When we have contractual provisions which may not even be drafted by a lawyer, there will be even greater scope for dispute especially when large amounts turn on those words. I foresee that this aspect of SOPA will continue to be the source of much litigation.

9 On the face of it, the words in the present case are clear enough. According to Appendix 1 of the Contract, the "time as specified in or

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determined in accordance with the terms of the contract" (to borrow the words of s 10(2)(*a*) of SOPA) is the 20th day of each calendar month. The ordinary and natural meaning of these words is that the event concerned is to take place on that day and not on any other day, neither sooner nor later. In response to this, the plaintiff's counsel, Mr Tan, submitted that there was no prejudice suffered by the respondent as the PC was served earlier than the 20th of the month and this meant that the respondent had more time to consider the PC. This is not a valid argument because of its implications. Section 11(1) of SOPA provides that the time for service of the payment response runs from the date of service. That subsection provides as follows:

> (1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days *after the payment claim is served* under section 10, whichever is the earlier; or
>
> (*b*) where the construction contract does not contain such provision, within 7 days *after the payment claim is served* under section 10.
>
> [emphasis added]

10 Under s 11(1) of SOPA, the time for service of the payment response starts running from the date "after the payment claim is served", *ie*, when it is *actually* served, as opposed to when it would have been due to be served. This stands in contrast with s 12(5) of SOPA, which refers to the dispute settlement period being the period after the payment response "is required to be provided" (see *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 at [61]-[64]).

11 It can be seen that the entire process is initiated by the service of a

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payment claim. Early service could result in the claimant being entitled to payment on an earlier date than would have been the case if the payment claim had been served on the date specified. It is therefore not true that the respondent does not suffer prejudice when a payment claim is served early. In any event, arguments based on prejudice are not helpful because the parties have specified in the Contract the time for submission of payment claim. It must be presumed that there is a basis for this. For example, a main contractor with a large number of subcontractors may have specified the dates for service in such a manner that the work in his payments department is evenly spread out over the entire month. Any deviation from the date on the part of a subcontractor may affect his ability to process the payments timeously.

12 Mr Tan also contended that 20 November 2016 fell on a Sunday and that it was impossible to serve the PC on that date. However, from the affidavits filed on behalf of the respondent, I am satisfied that it was possible to do so, whether by leaving the documents outside its office, or by email. It would not lie in the mouth of the respondent to reject service by way of deposit of the documents outside its office when it has specified service on a day that its office would be closed.

13 I therefore hold that the terms of the Contract provide that service of the PC must be done on the 20th day of the month, neither sooner nor later.

Issue (b): Failure to state in the header that the claim was under SOPA

14 Counsel for the defendant, Mr Lee, advanced an alternative ground to set aside the AD. Clause 60 of the Contract requires a payment claim to state "in the heading" that it is a payment claim under SOPA. That clause provides as follows:

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> In the event that the Sub-Contractor serves a payment claim under the Act, the payment claim shall state in the heading that it is a payment claim made under the Act and the form and contents of payment claim shall comply with the provisions in the Regulations.

15 The PC did not contain a statement in its header that it was a payment claim made under SOPA nor did it make any reference to SOPA. Mr Lee submitted that this omission had misled the respondent into believing that the claim was a progress claim under the Contract, which provides for a dual regime of claims. Mr Lee submitted that, as there were two different regimes under the Contract, it was crucial for the applicant to state that the PC was a payment claim under SOPA.

16 However, I agree with Mr Tan's submissions, which were that there is no requirement in SOPA for such a statement in a payment claim, and that parties cannot impose such a condition by contract.

17 Mr Lee agreed that SOPA does not contain such a requirement. The requirements of a payment claim are set out in s 10(3) of SOPA in the following manner:

> A payment claim —
>
> (*a*) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and
>
> (*b*) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

18 Regulation 5 of the Building and Construction Industry Security of Payment Regulations ("the Regulations") prescribes the form, manner and contents of a payment claim. There is no requirement for a payment claim to state that it is made under SOPA. This issue was in fact ventilated in *Sungdo*

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Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd [2010] 3 SLR 459 at [15]-[19]. In *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Chua Say Eng*"), the CA held that a payment claim is valid if it complies with s 10(3)(*a*) of SOPA and reg 5(2) of the Regulations. The CA stated as follows (at [78]):

> … the correct test for determining the validity of a payment claim is whether a purported [PC] satisfies all the formal requirements in s 10(3)(*a*) of [SOPA] and reg 5(2) of the SOPR. If it does, it is a valid payment claim. We accordingly agree with the Judge that PC6 is a valid payment claim under [SOPA].

19 Mr Lee submitted that cl 60 has an effect on the validity of the PC. But s 36(1) of SOPA provides as follows:

> The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement.

If, as Mr Lee submitted, cl 60 imposes a contractual requirement that a payment claim under SOPA must state in its heading that it is a payment claim under that Act, then that clause would in effect be imposing a condition that is not found in SOPA. As the PC complies with all the statutory requirements and is a valid payment claim under SOPA, by operation of s 36(1) of SOPA, cl 60 does not affect such validity.

20 A similar view was taken by Kannan Ramesh JC (as he then was) in *Hyundai Engineering & Construction Co Ltd v International Elements Pte Ltd* [2016] 4 SLR 626. There, the plaintiff main contractor engaged the defendant as subcontractor to supply, deliver, and unload stone. The contract in that case contemplated that the plaintiff would issue certification of the amount claimed by the defendant as one of the steps the parties would take in moving towards claiming under SOPA. In resisting the defendant's claim by arguing that the adjudication application was made prematurely, the plaintiff contended that

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cl 18.1 of that contract, which provides for the plaintiff's certification of the defendant's claims, was an event which needed to be satisfied before the defendant could move forward with its claim. And in a situation where the plaintiff refused to issue the certification, the subsequent steps in the process would not be triggered, with the result that there was no "due date" for payment under the SOPA, which meant that an adjudication application under s 12(3)(*a*) of SOPA could not be issued (at [28]).

21 Ramesh JC rejected this argument. He relied on ss 8(3)-(4) of SOPA, which statutorily defines the "due date" for a progress payment as the date specified in the terms of the contract, and if it is not so specified, after a certain number of days indicated in the provision (depending on the situation). Seen in this light, he found that the plaintiff's argument that cl 18.1 added an additional condition precedent to the payment process, which would suspend ultimate long-stop deadline of 60 days under s 8(3) of SOPA, would be in substance contracting out of s 8(3) itself. This was impermissible under ss 36(1)-(2) of SOPA (at [30]).

22 Accordingly, I hold that cl 60 does not affect the validity of the PC as a payment claim under SOPA.

Issue (c): Waiver of the objection on the premature payment claim

Applicant's submissions

23 Mr Tan submitted that even if the court were to accept the respondent's argument on the premature payment claim (which I have), the respondent had waived its objection to a breach of a mandatory provision, in this case,

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s 10(2)(*a*) of SOPA. Mr Tan referred to the following passages from the CA's decision in *Grouteam* to support his claim:

> 63 … In our judgment, it is in line with the legislative purpose of the Act that a party who is not in breach may waive the other party's breach of a mandatory provision of the Act, and that parties may also waive the right to object to an adjudicator's lack of jurisdiction. Allowing parties to waive the right to make such objections only serves to facilitate the speedy and efficient resolution of disputes in the building and construction industry so as to allow progress payments to be made promptly. Furthermore, all this may be countenanced because of the underlying principle of *temporary* finality.
>
> 64 We next consider *when* parties may be taken to have waived an available objection. In our judgment, it flows from the same legislative purpose of the Act that parties should not be permitted to argue that an adjudicator lacks jurisdiction or that a breach of a mandatory provision of the Act has occurred if such objections are not raised at the earliest possible opportunity. … Parties should not be allowed to keep silent at the time a mandatory provision is breached, only to throw up all forms of technical objections at the adjudication. …
>
> 65 It seems to us, therefore, that any objection of the type mentioned above should be made before the party who is entitled to raise the objection takes any further step which would be inconsistent with the objection being maintained, and that party is or ought reasonably to be taken to be aware of the grounds for objecting. …
>
> 68 … Having regard to what we have said above at [65], the appropriate time for the respondent to raise such an objection would generally be the time at which it receives that payment claim or, at the latest, by the deadline for it to submit its payment response. …
>
> [emphasis in original]

24 Mr Tan submitted that the upshot of these paragraphs was that if the respondent did not raise the matter at the time at which the payment claim was served or the time which the payment response was due to be filed, then the respondent would be deemed to have waived his objections. And since the

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objection that the PC was premature was only raised by the respondent in its adjudication response, the respondent was precluded from doing so.

25 Indeed, Mr Tan submitted that this strict regime served an important policy purpose, namely, that the adjudication process should be a speedy one. He referred to *Grouteam* at [63] to highlight that allowing parties to waive such objections if they did not raise it at the appropriate time would avoid multiple technical objections being raised at the adjudication and hence slowing down the entire process.

26 As to the fact that the respondent in this case did not submit a payment response, Mr Tan contended that this was no different from a situation in which a payment response had been submitted but the objection was not raised in the payment response. Mr Tan submitted that the crux was whether the objection had been *raised* by the time the payment response was due, and not whether a payment response had been filed *per se*. He derived this from the CA's remarks in *Grouteam* that the objection should be raised at the earliest possible opportunity (at [64]), and that a party can be found to have waived its objections not only if it knew of the existence of the breach, but if it had ought to have known of such breaches (at [65]). Mr Tan therefore submitted that the respondent's failure to make a payment response was sufficient to amount to an act of waiver, since this failure indicated that the respondent could have made its objections at that stage but "deliberately chose not to do so".

Respondent's submissions

27 Mr Lee's first position was that *Grouteam* should not even be relied on for the general proposition that a breach of s 10(2)(*a*) of SOPA can be waived.

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This was because the CA's observations in *Grouteam* were made in *obiter* and the court had made the qualification at [61] as follows:

> 61 There is more to be said, however, about the respondent's failure to object upon receiving the Payment Claim. As we have already mentioned, the respondent even proceeded to issue the Payment Response. Even at that juncture, the respondent did not take any objection to the time of service of the Payment Claim. When we questioned Mr de Vaz on this, he accepted, rightly in our view, that it was *possible* that the respondent might be said to have waived a breach of s 10(2) of the Act, although he was also quick to point out that the appellant never mounted a case based on waiver. Had we not decided that SOCN-E was the applicable clause governing the service of payment claims, we would have been minded to call for further submissions on waiver as it would then have been a live issue. As it transpired, it was not necessary for us to do so, *but we nonetheless set out our preliminary views on waiver, which we may revisit on a further occasion should the issue be directly engaged.*
>
> [emphasis added]

28 Mr Lee submitted that the CA had therefore made it clear that this was not an issue that the court had decided on and that its observations were without the benefit of legal submissions. Mr Lee further submitted that a breach of a mandatory provision like s 10(2)(*a*) of SOPA, could *not* be waived and relied on the following cases to establish this principle:

(a) In *JFC Builders Pte Ltd v LionCity Counstruction Co Pte Ltd* [2013] 1 SLR 1157 ("*JFC Builders*"), Woo J held at [43] that a breach of s 10(1) of SOPA "was not an irregularity which could be waived". This was because the matter of whether the payment claim was valid was to be "determined by the court" and was not within the role of an adjudicator (at [41]). Accordingly there could be no waiver from the failure to raise the issue before the adjudicator if he could not review the validity of the payment claim.

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(b) In *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("*Admin Construction*"), Quentin Loh J agreed with Woo J in *JFC Builders* that the CA's decision in *Chua Say Eng* "definitively clarified" that the validity of a payment claim went towards the existence of an adjudicator's jurisdiction, which was a matter for the court and not the adjudicator to decide. Hence, there was no estoppel from the failure to raise an issue relating to repeat claims at the adjudication conference (at [60]).

(c) *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142, concerned non-compliance of s 10(3) of SOPA. After considering *JFC Builders* and *Admin Construction*, Tan Siong Thye J held that a breach of s 10(3) of SOPA could not be waived given that it went to the jurisdiction of the adjudicator (at [31]-[32]).

(d) In *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2014] SGHC 254, the issue was a "repeat claim" under s 10(1) of SOPA. The court approved of *JFC Builders* and *Admin Construction* (at [30]-[33]) and found that "a party should not be estopped from challenging the validity of the payment claim when seeking to set aside the adjudication determination before the court" (at [34]).

29 In the light of these authorities, Mr Lee submitted that the CA's observations in *Grouteam* were inconsistent with a long line of cases that have established that waiver cannot apply for situations where the validity of a payment claim is being subsequently challenged in court. Mr Lee submitted that this position was also right in terms of encouraging certainty. If waiver could potentially apply to such challenges, then parties would now have to

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grapple with the possibility of having waived their rights, and the court and/or adjudicator would also have to deal with such arguments, and to do so, would have to look at the fine details of the parties' correspondence and behaviour. These "increased complexities" would undermine the certainty that characterises the SOPA regime.

30 Alternatively, Mr Lee submitted that even if the observations in *Grouteam* stood for the general proposition that waiver was possible, it was not met on the facts. Mr Lee submitted that an indispensable requirement for waiver was the presence of an unequivocal representation by the respondent, in a situation where the respondent was aware of the facts that gave rise to the rights being waived. And as to what constituted an "unequivocal representation", Mr Lee contended that mere failure to act, or silence, could not constitute such a representation because it would not be unequivocal enough. He relied on the following passage from *Mount Elizabeth Health Centre Pte Ltd v Mount Elizabeth Hospital Ltd* [1992] 3 SLR(R) 155 ("*Mount Elizabeth*"), a case that did not concern SOPA but only noted the requirements for waiver in general (which Mr Lee submitted could also be applied equally to the SOPA context):

> 48 On the element of encouragement, it is clear that there must be some positive act or duty to speak on the part of the defendants which encouraged the plaintiffs to conduct themselves in a manner inconsistent with their true rights and obligations. *Mere inaction is insufficient.* Quiescence is not acquiescence … I have no hesitation in holding that the defendants were under no duty to inform the plaintiffs that the notice was premature or that they would not take the point. *The defendants were not the plaintiffs' legal advisers.*
>
> [emphasis added]

31 Mr Lee submitted that the inaction of the respondent in not serving a payment response was insufficient to amount to waiver. He submitted that the respondent did not consider the PC to be a valid one, and therefore did not file

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a payment response. The first point in time where the respondent had the chance to respond to the PC was then the adjudication response, by which time the respondent had raised the objection that the PC was premature. Mr Lee submitted that the respondent was under no duty to inform the applicant of the potential pitfalls of its PC; to do otherwise would transform the respondent into the applicant's legal adviser in substance, which was what the court in *Mount Elizabeth* explicitly cautioned against.

32 Finally, Mr Lee also referred to *Linkforce Pte Ltd v Kajima Overseas Asia Pte Ltd* [2017] SGHC 46 ("*Linkforce*"), where Foo Chee Hock JC held that the defendant's conduct of keeping silence was equivocal. The fact that the defendant remained silent and did not object to some payment claims not being served on the last day of the month did not mean that it had unequivocally represented that it was no longer relying on its contractual rights under cl 27(a) of that contract (at [25]). Mr Lee submitted that the respondent's failure to file a payment response in this case was similarly equivocal.

My decision on whether the respondent had waived its objection to service of the PC

33 For the reasons that follow, I find that the respondent had not waived its objection to the PC being premature.

34 I do not find it necessary to resolve the apparent conflict between the four decisions of the High Court cited by Mr Lee and the decision of the CA in *Grouteam*. This is because I find that, even if it is possible to waive an objection of invalid service of a payment claim, the respondent had not done so on the facts of this case.

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35 The general requirements for waiver are relatively well-established and do not require detailed discussion. In essence, waiver can take the form of waiver by estoppel or waiver by election. The former refers to the situation where one party has (a) made a clear and unequivocal representation and (b) the other party has relied on that representation to his detriment. If both of these requirements are met it would be inequitable to allow the representing party to rely on his strict legal rights and therefore he has waived those legal rights by estoppel (see, *eg*, *Linkforce* at [19]). In contrast, waiver by election deals with the more specific situation where one party has the choice between two inconsistent rights. His conduct in choosing one over the other results in him abandoning the other right. This doctrine of waiver by election, unlike that of estoppel, is premised on choice and not inequity, and so does not require that second element of the receiving party's reliance to detriment. But both of these doctrines require an unequivocal representation and both result in the representing party's strict legal rights being given up. These similarities and differences were noted generally by the CA in *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 at [33], citing Lord Goff's seminal decision in the House of Lords case of *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391 at pp 397-399.

36 What is critical in this case is the conduct that is required to constitute an unequivocal representation under either waiver by estoppel or waiver by election. Specifically, whether the respondent's failure to lodge a payment response – in effect, its silence – is sufficiently unequivocal so as to fulfil the requirement of representation. Unsurprisingly, the parties disagreed on this point.

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37 I begin by observing that a representation does not need to take any specified form: it can be express or implied, and it can be by words or conduct. What is crucial is the degree of certainty that a reasonable person in the shoes of the recipient can expect from this representation. It follows then that it cannot be entirely foreclosed that silence may in certain circumstances be sufficiently unequivocal; it all depends on the context. However, the very nature of silence makes it difficult to be sufficiently unequivocal as there may be reasons for the silence other than the giving up of one's legal rights. This conclusion, that mere silence or inaction will not *normally* suffice because it is equivocal, is well-established in the jurisprudence. It can be found in cases such as *Fook Gee Finance Co Ltd v Liu Cho Chit* [1998] 1 SLR(R) 385 ("*Fook Gee Finance*") at [36], *Tacplas Property Services Pte Ltd v Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased)* [2000] 1 SLR(R) 159 ("*Tacplas*") at [62], and *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd* [2011] 1 SLR 449 at [45].

38 However, the cases equally establish that silence may, in exceptional circumstances, meet the requisite threshold of an unequivocal representation. For instance, the CA in *Fook Gee Finance* noted at [37] that "in certain circumstances, particularly where there is a duty to speak, mere silence may amount to a representation". The following cases illustrate the considerations in determining whether such duty has arisen:

(a) The English decision of *Greenwood (Pauper) v Martins Bank, Limited* [1933] AC 51 ("*Greenwood*"), which was referred to by the CA in *Fook Gee Finance*. There, Lord Tomlin noted (at p 57) that this was because where there is a duty to disclose, the silence becomes "significant" in those circumstances. In that case the plaintiff husband

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deliberately did not inform the defendant bank about his wife's act of forging his cheques. He was prevented from claiming against the bank for those forged cheques when his wife later passed away.

(b) In *Tacplas*, the respondent was appointed administrator of an estate and he allowed the appellants to continue incurring costs on the basis that there was an agreement between the estate and the appellants to cover costs. The respondent intended to challenge the validity of the agreement. But he continued to update the appellants about a necessary condition to be fulfilled under the agreement, giving the impression that the agreement was binding. He was not allowed to dispute the agreement's validity.

(c) In *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR(R) 1, 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 specifically stated that the plaintiff needed to bill that sum every month. The plaintiff had also chased the defendant for other unpaid bills during this period but never mentioned the missing amounts (at [71]).

(d) In *AREIF (Singapore I) Pte Ltd v NTUC Fairprice Co-operative Ltd and another* [2015] 2 SLR 630, the High Court found that continued negotiations past a contractual limitation period did not constitute a waiver of the limitation period because it was not unequivocal enough. A subsequent email that a proposal made during the extended period would be considered was also not unequivocal enough; although if a proposal made during the extended period had been accepted, then it might have been sufficient to constitute a representation (at [71]-[77]).

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39 The common factor in these cases is that while silence in certain circumstances can constitute an unequivocal representation, it is not the sole criterion. The silence must almost have been deliberately engineered to give the receiving party the impression that the former's legal rights were not being pursued. This can be in a situation where there is a "duty to speak", as noted by the CA in *Fook Gee Finance*. Or it may be in a situation where there is no *legal* duty to speak but where one would *factually* have been expected to speak up, and therefore the silence becomes "significant", as noted in *Greenwood*.

40 Seen in this light, the case of *Mount Elizabeth* cited by Mr Lee for the proposition that "[m]ere inaction is insufficient" (see [30] above) appears to be somewhat stricter compared to the authorities cited above. In *Mount Elizabeth* the plaintiff argued that the defendant's failure to inform the plaintiffs that a notice was premature constituted a waiver of that objection (at [36]). The court could have espoused a seemingly stricter rule since on those facts, the "more compelling reason" to find that there was no waiver was that at the time the notice was served, the parties were "locked in legal combat". The context did not permit the court to infer that one party had waived the objection (at [49]). I have no hesitation in finding that *Mount Elizabeth* must be read in light of the large number of cases that have come after it and in light of its specific facts. It does not stand for so categorical a rule that silence or inaction can *never* be sufficient.

41 Finally, this position is also consistent with *Grouteam*, where the CA noted that any objection should be raised at the "earliest possible opportunity" (at [64]) and before the innocent party "takes any further step which would be inconsistent with the objection being maintained" (at [65]). So if a course of conduct of the respondent would have been inconsistent with its objection being

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maintained, then in those circumstances it would be incumbent on the respondent to speak up or have its silence or inaction be taken as conspicuous in light of the inconsistency between the objection and the conduct.

42 Having said that, I do not agree with Mr Tan that the objection *must* be raised at either the time which the respondent receives the payment claim or at the deadline for the respondent to submit its payment response. Mr Tan relied on [68] of *Grouteam* to support this proposition. For convenience I reproduce the operative part of that paragraph here:

> … Having regard to what we have said above at [65], the appropriate time for the respondent to raise such an objection 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. At that stage, faced with the objection that its payment claim has not been made timeously, the claimant can opt to file a fresh claim without contesting the point, and this is likely to save time and costs compared to a lengthy dispute in court. …
>
> [emphasis added]

43 As can be seen from this paragraph, the CA did not mean to establish a rule that the objection *must* be raised at the time when the payment claim was served or when the payment response was due. It only said that this was "generally" the case. Indeed, I am of the view that this observation must be read in the context of the paragraphs preceding it, namely, that the ultimate barometer is whether a party has taken steps inconsistent with maintaining its objection and whether it was the earliest possible opportunity to raise the objection (at [64]-[65]).

44 Seen in this light, 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. However, this does not

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necessarily extend to the situation where a respondent elects not to file a payment response at all because it has taken the view that the payment claim was invalid on the ground that it was not filed in accordance within the provisions of the contract. In my view, that alone would not constitute a waiver. There must be other facts to signify that the respondent has waived the objection to the payment claim. For example, if the respondent had written a letter providing a substantive response to the payment claim in which the objection is not raised this could be inconsistent with raising it at a later stage. Indeed, those were the facts of *Grouteam*: one party had sent an email to the other and the issue was whether that constituted an unequivocal representation (at [60]).

45 In contrast, in cases such as the present, where no payment response was served at all, the uncertainty is even greater. The court ought to be slow to impose a duty in such situations where respondents routinely deal with multiple payment claims each month, time lines are short and the consequences are high when a mistake is made in a payment response. In these circumstances, there is no reason why a respondent should not be entitled to take the position that a payment claim was invalidly served and, consistent with that position, take no action on it until he is served with an adjudication application. The potential for abuse is ameliorated by the fact that the respondent takes a big risk in not serving a payment response in that if his position on invalidity is wrong, he has virtually no defence to the payment claim.

46 I turn now to the facts of the present case. There was no express act on the part of the respondent that could amount to a waiver. Mr Tan contended that the respondent's failure to serve a payment response to register the objection to service constituted a waiver by estoppel. For the reasons given above, this alone is insufficient to constitute a waiver. There was also no correspondence between

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the parties relating to the adjudication between the time the PC was served and the time the adjudication response was filed. At the first opportunity available, the respondent raised this objection in its adjudication response. Accordingly, the objection was not waived since there was no "unequivocal representation" that is sufficient to sustain either a waiver by estoppel or a waiver by election.

47 Given my finding on this, it is not necessary to consider whether there was detrimental reliance (for waiver by estoppel).

Issue (d): Waiver of the objection relating to the payment claim header

48 The parties' submissions on this issue are materially similar to the ones in issue (c) and I do not propose to reproduce them here. Suffice to say that I have rejected the respondent's contentions on issue (b) (see [22] above) and accordingly there is no need to consider whether the objection was waived by the respondent.

49 But if there had been a need to consider whether the respondent had waived this objection, I would adopt the law that I set out above in issue (c) and find that the respondent indeed waived this objection. The respondent did not raise the objection at any time during the adjudication and raised it for the first time at this hearing. This clearly subverts the CA's policy concern in *Grouteam* of ensuring speedy and efficient dispute resolution in the SOPA context. The respondent ought to have raised this objection at the first available opportunity, which was the adjudication response, but did not do so. Accordingly, I would find that the respondent had waived this objection if it had succeeded on issue (b).

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Conclusion

50 I therefore set aside the AD on the ground that the PC had not been served on time, in contravention of the mandatory provision in s 10(2)(*a*) and was not a valid payment claim. Accordingly the adjudicator had no jurisdiction to make the award.

51 I will hear parties on costs.

Lee Seiu Kin
Judge

Tan Jia Wei Justin (Trident Law Corporation) for the applicant;
Lee Peng Khoon Edwin and Amanda Koh Jia Yi (Eldan Law LLP)
for the respondent.

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