IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 61

Originating Summons No 1002 of 2017
(Summons No 4475 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 (Cap 322, R 5)

And

In the matter of the Adjudication Determination dated 23 August 2017 made in Adjudication Application No 211 of 2017 between Benlen Pte Ltd as Claimant and Authentic Builder Pte Ltd as Respondent

Between

BENLEN PTE LTD

… *Applicant*

And

AUTHENTIC BUILDER PTE LTD

… *Respondent*

Version No 1: 27 Oct 2020 (22:40 hrs)

JUDGMENT

[Building and Construction Law] — [Dispute resolution] — [Adjudication] — [Premature payment claim] — [Section 10(2) Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)]

[Building and Construction Law] — [Dispute resolution] — [Adjudication] — [Setting aside of adjudication determination] — [Waiver]

[Contract] — [Variation]

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Benlen Pte Ltd
v
Authentic Builder Pte Ltd

[2018] SGHC 61

High Court — Originating Summons No 1002 of 2017 (Summons No 4475 of 2017)
Chan Seng Onn J
23 October 2017

19 March 2018 Judgment reserved.

Chan Seng Onn J:

Introduction

1 Summons No 4475 of 2017 is an application taken out by Authentic Builder Pte Ltd ("Authentic"), the respondent in Originating Summons No 1002 of 2017 ("OS 1002/2017"), to set aside ("the Setting Aside Application"):

(a) the adjudication determination dated 23 August 2017 ("the Adjudication Determination") in Adjudication Application No 211 of 2017 ("the Adjudication Application"); and

(b) the order of court dated 5 September 2017 ("the Order of Court") obtained by Benlen Pte Ltd ("Benlen"), the applicant in OS 1002/2017, granting Benlen leave to enforce the Adjudication Determination.

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2 The main controversies that lie at the heart of the Setting Aside Application are twofold. First, there is the question of the manner in which the obligation under s 10(2) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOPA") to serve a payment claim (also known as a progress claim) in accordance with the time specified in a contract may be met by parties seeking to rely on the adjudication mechanism under the SOPA to resolve their payment disputes. Second, there is also the question of whether any objection to a defect in the fulfilment of this obligation has been waived by the respondent to the claim or, put another way, whether the respondent is estopped from raising any objection to the validity of the service of the payment claim, having not raised such objection earlier.

3 Having heard the submissions of the parties, I reserved judgment. I now set out my decision and the accompanying reasons.

Background

4 This dispute arose out of a contract for the construction of a condominium development at Faber Walk. Authentic was the main contractor engaged by the developer of the project, World Class Land Pte Ltd, while Benlen was engaged by Authentic as a subcontractor for the project. Specifically, Authentic had engaged Benlen, pursuant to a letter of award dated 2 June 2015, to supply, install and maintain the mechanical ventilation and air-conditioning system for the project ("the Subcontract").[1]

[1] Ler Peh Choo's 1st Affidavit dated 27 September 2017, paras 5–7.

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5 The two most pertinent clauses under the Subcontract are cll 8 and 14. Clause 8 states as follows:[2]

> **8. PAYMENT**
>
> 8.1 The Sub-Contractor ***shall submit progress claims to the Contractor at the times set out in Appendix 1*** in the form directed by the Contractor.
>
> 8.2 The Contractor shall issue an Interim Payment Certificate certifying the value of each progress claim to the Sub-Contractor within the time limit set out in Appendix 1.
>
> 8.3 The Interim Payment Certificate shall indicate the amounts accepted for payment by the Contractor, less retention monies to be deducted at the rate set out in Appendix 1 and any sums to be set off by the Contractor. The aggregate retention monies to be deducted shall not exceed the maximum amount stipulated in Appendix 1.
>
> 8.4 The Contractor shall pay to the Sub-Contractor the sum certified in the Interim Payment Certificate within the time limit set out in Appendix 1.
>
> 8.5 The retention monies shall be released at such times as set out in Appendix 1.
>
> [emphasis added in bold italics]

Appendix 1 in turn provides that the time for submitting progress claims pursuant to cl 8.1 shall be the "25th day of [every] Calendar Month", while the time limit for the issuance of an interim payment certificate pursuant to cl 8.2 shall be 21 days.[3] As for cl 14, it states as follows:[4]

> **14. ENTIRE AGREEMENT**
>
> 14.1 This Sub-Contract sets out the entire agreement of the parties and supersedes all prior agreements, warranties, representations, and undertakings, whether made verbally or in writing.

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2 Ler's 1st Affidavit, exh LPC-1, Tab 2A, p 59.

3 Ler's 1st Affidavit, exh LPC-1, Tab 2A, Appendix 1, p 64.

4 Ler's 1st Affidavit, exh LPC-1, Tab 2A, p 61.

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> 14.2 This Sub-Contract ***shall be varied or modified only with prior written consent from both parties***.
>
> [emphasis added in bold italics]

6 On 30 December 2015, Benlen served on Authentic Payment Claim 1, which was dated 12 November 2015.[5]

7 On 23 September 2016, Ms Shirley Foong ("Ms Foong"), a former employee of Authentic, sent the following email, titled "Faber Walk - Progress Claim Submission 23-25th Every Month (REMINDER)" to all 12 of its subcontractors, including Benlen ("the 23 September Email"):[6]

> Dear All,
>
> Gentle ***Reminder*** that kindly submit your Original Progress Claim to our Office ***23-25th Every Month*** attached with proper breakdown and drawings duly certified work done only by my Project Manager Mr William Lim / Project Engineer Mr Guhul / Architectural Coordinator Ms Karen.
>
> Early or Late Submission will not be accept[ed]. Your Cooperative is prompt appreciated [*sic*].
>
> Thank you.
>
> Best regards,
>
> Shirley Foong
>
> Senior QS
>
> [emphasis in original removed; emphasis added in bold italics]

8 Subsequently, Benlen went on to serve the following payment claims on the following dates:[7]

(a) Payment Claim 9, dated 23 September 2016, on 28 September 2016;

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5 Ler's 1st Affidavit, exh LPC-1, Tab 8, pp 593–595.

6 Ler's 1st Affidavit, exh LPC-1, Tab 7, p 590 and Tab 9, p 684.

7 Ler's 1st Affidavit, exh LPC-1, Tab 8, pp 596–647.

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(b) Payment Claim 10, dated 22 October 2016, on 25 October 2016;

(c) Payment Claim 11, dated 22 November 2016, on 23 November 2016;

(d) Payment Claim 12, dated 23 December 2016, on 29 December 2016;

(e) Payment Claim 13, dated 23 January 2017, on 25 January 2017;

(f) Payment Claim 14, dated 23 February 2017, on 23 February 2017;

(g) Payment Claim 15, dated 22 March 2017, on 29 March 2017; and

(h) Payment Claim 16, dated 22 April 2017, on 24 April 2017.

9 On 23 June 2017, Benlen served on Authentic Payment Claim 19 ("PC 19"), which was dated 23 June 2017, for "works done during the period of August 2015 to March 2017" for the sum of S$262,262.35 (including GST).[8]

10 On 10 July 2017, Authentic served on Benlen its payment response to PC 19 for the sum of S$61,048.85. In this payment response, Authentic certified that the entire work done of S$1.3m had been completed, acknowledged that there were retention sums and previous certified payment, but disputed PC 19 by way of a cross-claim for liquidated damages for S$228,000. Authentic's payment response did not mention any issue in relation to the date of service of PC 19.[9]

11 On 25 July 2017, Benlen served on Authentic Payment Claim 20.[10]

8 Ler's 1st Affidavit, exh LPC-1, Tab 2E, pp 113–114; Tab 8, pp 648–656.

9 Ler's 1st Affidavit, exh LPC-1, Tabs 2H and 2I, pp 134 and 136–138.

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Procedural history

12 On 27 July 2017, Benlen decided to dispute Authentic's payment response to PC 19, and thus commenced the Adjudication Application by serving its notice of intention to apply for adjudication on Authentic.[11] Immediately thereafter, Benlen lodged the Adjudication Application with the Singapore Mediation Centre ("SMC").[12] In its written submissions accompanying the Adjudication Application, Benlen expressly referred to the fact that PC 19 was served on 23 June 2017 even though cl 8.1 read with Appendix 1 of the Subcontract provides that payment claims should be submitted on the 25th of every month, and explained that Authentic had, by the 23 September Email, varied the date on which payment claims could be served to between the 23rd and 25th of every month.[13]

13 The Adjudication Application was served on Authentic by the SMC on 28 July 2017. On 31 July 2017, the SMC informed the parties that Mr Tan Kian Hoon JP was appointed as the adjudicator for the dispute ("the Adjudicator").[14]

14 On 7 August 2017, Authentic filed its adjudication response with the SMC.[15] In its adjudication response, Authentic submitted that the only two issues for the consideration of the Adjudicator in the Adjudication Application were:[16]

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10 Ler's 1st Affidavit, exh LPC-1, Tab 8, pp 662–666.

11 Ler's 1st Affidavit, exh LPC-1, Tab 2G, pp 129–132.

12 Ler's 1st Affidavit, exh LPC-1, Tab 2, pp 34–39.

13 Ler's 1st Affidavit, exh LPC-1, Tab 2, pp 42–43, paras 5–12.

14 Ler's 1st Affidavit, exh LPC-1, Tab 1, p 18, para 13.

15 Ler's 1st Affidavit, exh LPC-1, Tab 3, pp 315–330.

16 Ler's 1st Affidavit, exh LPC-1, Tab 3, pp 319, para 2.

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> (a) Whether [Authentic is] entitled to include, and the [A]djudicator is obliged to consider, the liquidated damages of $228,000.00 stated in [the payment response to PC 19].
>
> (b) On what legal and factual basis [is Authentic] entitled to deduct a sum of $228,000.00 as liquidated damages from the claimed amount in [PC 19].

Once again, Authentic did not mention any issue in relation to the date of service of PC 19 in its adjudication response.

15 On 15 August 2017, the parties attended an adjudication conference as directed by the Adjudicator.[17] At the conference, Benlen served its reply written submissions.[18]

16 On 23 August 2017, the Adjudicator issued the Adjudication Determination, deciding that Authentic was liable to pay Benlen the adjudicated amount of S$262,262.35 (inclusive of GST) and to bear the costs of the adjudication of S$8,346 (comprising the Adjudication Application fee of S$642 and the Adjudicator's fee of S$7,704).[19]

17 On 24 August 2017, Benlen wrote to Authentic to demand payment of a total sum of S$278,954.35, comprising: (a) S$262,262.35, being the adjudicated amount; (b) S$8,346, being the costs of adjudication; (c) S$642, being the Adjudication Application fee; and (d) S$7,704, being the costs of the Adjudicator.[20] Authentic did not respond.

18 On 4 September 2017, Benlen filed OS 1002/2017, seeking an order of court granting it leave to enforce the Adjudication Determination in the same

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17 Ler's 1st Affidavit, exh LPC-1, Tab 1, p 19, para 16.

18 Ler's 1st Affidavit, exh LPC-1, Tab 4, pp 377–387.

19 Ler's 1st Affidavit, exh LPC-1, Tab 1, pp 15–32.

20 Ler's 1st Affidavit, exh LPC-1, Tab 6, p 578

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manner as a judgment, *ie*, the Order of Court. On 5 September 2017, Benlen obtained the Order of Court.[21]

19 On 5 September 2017 and 8 September 2017, Benlen again wrote to Authentic to demand payment of the adjudicated amount.[22] Authentic failed to respond to any of the letters.[23]

20 On 14 September 2017, Benlen issued a statutory demand pursuant to s 254 of the Companies Act (Cap 50, 2006 Rev Ed) seeking payment from Authentic of S$278,954.35..[24] On 15 September 2017, Authentic responded to the statutory demand, claiming to "dispute the validity of the Adjudication Determination" and announcing its intention to set aside the Adjudication Determination.[25] Benlen subsequently agreed to withdraw its statutory demand unconditionally if Authentic filed its application to set aside the Adjudication Determination by 28 September 2017.[26]

21 On 27 September 2017, Authentic filed the Setting Aside Application.

The parties' submissions

22 Moving on now to the parties' respective arguments canvassed before me, Authentic's main reason for asserting that the Adjudication Determination should be set aside is that PC 19 is invalid as it was served prematurely and out

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21 Ler's 1st Affidavit, exh LPC-1, Tab 5, p 576.

22 Ler's 1st Affidavit, exh LPC-1, Tab 6, p 579; Ho Teck Beng's 1st Affidavit dated 17 October 2017, exh HTB-1, p 12.

23 Ho's 1st Affidavit, p 4, para 26.

24 Ler's 1st Affidavit, exh LPC-1, Tab 6, p 581.

25 Ler's 1st Affidavit, exh LPC-1, Tab 6, pp 583–584.

26 Ler's 1st Affidavit, exh LPC-1, Tab 6, pp 585–58.

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of time. Hence, as the Adjudicator had no jurisdiction to issue the Adjudication Determination, the Adjudication Determination should be set aside.[27]

23 Benlen relies on the following two main contentions in response:

(a) First, Authentic is not entitled to object to the validity of the service of PC 19, given that Authentic had waived its right to raise jurisdictional objections, and should now be estopped from doing so.[28]

(b) Second, the 23 September Email sent by Ms Foong on behalf of Authentic to all 12 of Authentic's subcontractors amounted to a variation of the Subcontract, such that Benlen is in fact entitled to serve a payment claim on Authentic any time between the 23rd and the 25th (and not only on the 25th) of every month. PC 19 is thus valid.[29]

24 Authentic in turn provides the following two ripostes:

(a) First, the 23 September Email was not sufficient to amount to a variation of the Subcontract. PC 19 is thus invalid for being served prematurely and out of time.[30]

(b) Second, Authentic is not estopped from objecting to the invalid service of PC 19 because the defence of estoppel is not available in respect of jurisdictional challenges and in any event, there was no waiver on the facts.[31]

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27 Respondent's Submissions dated 20 October 2017, paras 8–12.

28 Applicant's Submissions dated 20 October 2017, paras 46–66.

29 Applicant's Submissions, paras 67–85.

30 Respondent's Submissions, paras 13–34.

31 Respondent's Submissions, paras 35–71.

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Issues to be determined

25 Based on the parties' submissions, and as I have alluded to earlier (at [2] above), the main issues that arise for my determination in this application may be summarised as:

(a) whether PC 19 was validly served ("the Validity of Service Issue"); and

(b) even if PC 19 was not validly served, whether Authentic had waived its right to object to the invalid service of PC 19 or was estopped from raising such an objection ("the Waiver and Estoppel Issue").

My decision

26 In my judgment, PC 19 was invalidly served. However, Authentic had waived its right to object to Benlen's invalid service, and is now estopped from raising such an objection. Accordingly, I dismiss the Setting Aside Application.

The Validity of Service Issue

27 In my view, Benlen's service of PC 19 was invalid. Benlen had acted in breach of cl 8.1 read with Appendix 1 of the Subcontract by serving PC 19 on 23 June 2017. Also, PC 19 had not been varied by the 23 September Email, such that Benlen was still obliged to serve PC 19 on Authentic only on the 25th of every month.

28 The starting position in respect of this issue must, of course, be the language of the applicable provision in the governing statute, which is s 10(2) of the SOPA. Section 10(2) provides for the obligation of timely service of payment claims in the following manner:

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> **Payment claims**
>
> **10.**— …
>
> (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.
>
> …

Section 10(2)(*a*) is the applicable subsection in this case because the time for the service of payment claims is specified in the terms of the Subcontract. Specifically, cl 8.1 read with Appendix 1 of the Subcontract provides that Benlen "shall submit progress claims to [Authentic]" on the "25th day of [every] Calendar month". It is thus necessary, based on the language of s 10(2)(*a*) read with cl 8.1 and Appendix 1 of the Subcontract, for Benlen to serve its payment claims on the 25th day of every month.

29 The effect of a breach of s 10(2) of the SOPA is that even though the appointment of the adjudicator may be valid (*ie*, the adjudicator has jurisdiction at the threshold), the entire proceedings would be rendered invalid such that the adjudicator's determination would nonetheless be liable to be set aside (*ie*, the adjudicator lacks substantive jurisdiction). This is because, as explained by the Court of Appeal in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 ("*Grouteam*"), s 10(2) is a mandatory provision, the breach of which renders the adjudication determination invalid. See *Grouteam* at [49]–[50] and [53], cited with approval by the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction (CA)*") at [21] and [42].

30 But all of this only takes us to the point where the parties begin to diverge from the common ground they share on this issue. Authentic insists that

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Benlen's service of PC 19 on 23 June 2017 was invalid as it was premature and thus in breach of cl 8.1 read with Appendix 1 of the Subcontract, and accordingly, s 10(2)(*a*) of the SOPA. In contrast, Benlen takes the position that its service of PC 19 was valid because Authentic had, by the 23 September Email, varied the terms of the Subcontract to allow Benlen to serve its payment claims any time between the 23rd and the 25th of every month (see [22]–[23] above). There are thus two discrete questions here:

(a) First, was Benlen's service of PC 19 in breach of cl 8.1 read with Appendix 1 of the Subcontract?

(b) Second, had cl 8.1 read with Appendix 1 of the Subcontract been varied by the 23 September Email?

31 I will now proceed to consider both sub-issues in turn.

Whether Benlen's service of PC 19 was in breach of cl 8.1 read with Appendix 1 of the Subcontract

32 In my view, the service of PC 19 on 23 June 2017 was in breach of cl 8.1 read with Appendix 1 of the Subcontract.

33 Authentic submits that s 10(2)(*a*) of the SOPA requires Benlen to have served PC 19 on exactly 25 June 2017, and not 23 June 2017. To this end, Authentic relies on the High Court decision of *Audi Construction Pte Ltd v Kian Hup Construction Pte Ltd* [2017] SGHC 165 ("*Audi Construction (HC)*") to argue that Benlen had the obligation to serve PC 19 on 25 June 2017, neither sooner nor later.

34 In *Audi Construction (HC)*, the respondent contractor engaged the applicant subcontractor pursuant to a subcontract. By cl 59 read with Appendix

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1 of that subcontract, the applicant was required to serve its payment claims on the 20th day of each calendar month. However, the applicant served one of its payment claims on the respondent on 18 November 2016, but dated the payment claim 20 November 2016. The applicant's reason for having done so was that 20 November 2016 fell on a Sunday, and that it would not have been feasible to serve a payment claim on that day. The respondent did not serve any payment response in relation to this payment claim. Before the adjudicator, the respondent challenged the validity of the payment claim on the basis that it had not been served on the 20th day of the month as required under the subcontract. The adjudicator disagreed with the respondent, and ruled in favour of the applicant. The respondent applied to the High Court to set aside the adjudication determination. Lee Seiu Kin J set aside the adjudication determination on the ground that as the payment claim had not been served on time, it was in contravention of the mandatory provision under s 10(2)(*a*) of the SOPA and was thus not a valid payment claim (at [50]). Lee J rejected the applicant's reasons for serving the payment claim on 18 November 2016, and held that service of the payment claim should have taken place on 20 November 2016 because "the terms of the [c]ontract provide that service of the [payment claim] must be done on the 20th day of the month, *neither sooner nor later*" [emphasis added] (at [13]).

35 But that is not all as far as the relevant case law is concerned. In the period since I reserved my judgment in this matter on 23 October 2017, the decision in *Audi Construction (HC)* has since been brought on appeal before the Court of Appeal. On 13 November 2017, the Court of Appeal heard and allowed the appeal. The apex court has since issued its grounds of decision on 22 January 2018. In *Audi Construction (CA)*, the Court of Appeal accepted that the *starting point* was that the payment claim in that case ought to have been served on 20 November 2016, because where the parties' contract provides for the service of

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payment claims *on* a stipulated date, this meant service of the payment claim *on* that date; it could not mean service *by* that date (at [23]). But the court crucially went on to hold that the payment claim, having been physically served on 18 November 2016, *ie*, two days before the specified day in the contract, was nevertheless validly served for the following two reasons (at [26]):

> … 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. 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. 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 be treated as being served and, importantly, operative only on 20 November 2016.
>
> [emphasis added in italics and bold italics]

In the court's view, if there is no good reason for serving a payment claim early, early service of a payment claim would not be considered to be valid service (at [29]). Also, if serving a payment claim early might cause confusion as to its operative date, such service would likewise not be considered valid (at [30]).

36 In my judgment, the key principles that may be distilled from the Court of Appeal's decision in *Audi Construction (CA)* in this regard are that a payment claim that was not served on a date stipulated in the parties' contract could be considered to have been validly served, even though it was served early, if: (a) the claimant had good reason for serving the payment claim early; and (b) the early service of the payment claim did not cause any confusion as to the payment claim's operative date. Having said all that, I do not think that the Court of Appeal's reversal of the High Court's decision in *Audi Construction (HC)* has any impact on my ultimate finding on this issue.

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37 Here, Benlen claims to have served PC 19 on 23 June 2017 because 25 June 2017 was a Sunday and was also a designated public holiday on account of Hari Raya Puasa. Benlen thus claims that it would not have been feasible for it to serve PC 19 on 25 June 2017, given that Authentic's office premises would not have been open on weekends, much less public holidays.[32] Since the Court of Appeal considered the applicant in *Audi Construction (CA)* to have had good reason for effecting service of the payment claim on 18 November 2016 (instead of 20 November 2016), on the ground that it was not feasible to serve the payment claim on 20 November 2016, which was a Sunday, it should *a fortiori* stand to reason that Benlen can be considered to similarly have had good reason for serving PC 19 on 23 June 2017 in this case.

38 As for the need for the early service of the payment claim to not cause any confusion as to the payment claim's operative date, I take the view that it is at this juncture where Benlen's submission falls just short. The applicant in *Audi Construction (CA)* had correctly dated its payment claim as 20 November 2016 even though it had physically served the payment claim on 18 November 2016. This, according to the Court of Appeal, made it clear and obvious to the respondent there that the applicant had intended for the payment claim to be treated as being served and operative only on 20 November 2016. The same could not be said for PC 19 in the present case. Benlen served PC 19, which was dated 23 June 2017, on 23 June 2017, even though PC 19 was contractually required to be served on the 25th of every month. In *Audi Construction (CA)*, the Court of Appeal had expressly stated thus (at [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***

[32] Ho's 1st Affidavit, p 8, paras 44–45.

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> *because,* ***short of a contrary indication from the appellant****, the respondent would reasonably be confused about the operative date of the payment claim.*
>
> [emphasis added in italics and bold italics]

There was no evidence of any contrary indication from Benlen in this case that it had intended PC 19 to be operative from 25 June 2017 (and not 23 June 2017). Authentic would thus, borrowing the words of the Court of Appeal in *Audi Construction (CA)*, "reasonably be confused about the operative date of [PC 19]". It therefore seems clear to me that PC 19 had been invalidly served in this case.

39 At this juncture, I should however pause to highlight the availability of a commercially practicable and eminently sensible solution for all future claimants seeking to resolve their disputes arising out of construction contracts by way of adjudication under the SOPA who might be confronted by a situation similar to that faced by Benlen in this case. In this respect, the Court of Appeal in *Audi Construction (CA)* held that pursuant to s 50(*c*) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the Interpretation Act"), if an obligation under the SOPA is to be performed on an "excluded day" (which is defined in s 50(*b*) of the Interpretation Act as a Sunday or a public holiday), that obligation may be performed the next day (at [35]). The relevant provisions read 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

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> 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;
>
> …

40 Applying this principle to the facts of the present case, it would thus have been open for Benlen to have served PC 19 on Authentic on 27 June 2017. As mentioned earlier, 25 June 2017 was not only a Sunday, but *also* a public holiday on account of Hari Raya Puasa (see [37] above). With Hari Raya Puasa falling on a Sunday, the next day, 26 June 2017, was also a public holiday. This means that the very first day following the Hari Raya Puasa on 25 June 2017 that would *not* be considered an excluded day would be the Tuesday falling on 27 June 2017. Benlen would accordingly have been entitled pursuant to s 50(*c*) read with s 50(*b*) of the Interpretation Act to fulfil its statutory obligation of timely service of payment claims under s 10(2) of the SOPA by serving PC 19 *two days after* 25 June 2017, *ie*, on 27 June 2017. In addition, service of the payment claim on 27 June 2017 in such a context would have been valid irrespective of whether the payment claim was dated 25 June 2017 or 27 June 2017.

41 Unfortunately, Benlen appeared to not be cognizant of, and was hence unable to adopt, the solution in s 50(*c*) of the Interpretation Act that was proposed by the Court of Appeal in *Audi Construction (CA)* when serving PC 19 on Authentic. I thus find that PC 19 had been served in breach of cl 8.1 read with Appendix 1 of the Subcontract.

42 I now turn to consider Benlen's alternative submission, which is that Authentic had, by the 23 September Email, varied the terms of the Subcontract to allow Benlen to serve its payment claims any time between the 23rd and the 25th of every month.

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Whether cl 8.1 read with Appendix 1 of the Subcontract had been varied by the 23 September Email

43 I do not think that cl 8.1 read with Appendix 1 of the Subcontract had been varied by the 23 September Email. Specifically, I find that there has been no variation of the Subcontract, be it by way of the variation mechanism specifically provided for under cl 14.2 of the Subcontract, or by way of the formation of a collateral contract to vary the Subcontract.

(1) Variation in writing pursuant to cl 14.2 of the Subcontract

44 I begin my analysis by first having regard to cl 14.2 of the Subcontract, which states that the Subcontract "shall be varied or modified only with *prior written consent* from *both* parties" [emphasis added]. The effect of this clause is that the Subcontract is in fact an agreement permitting variation. In this regard, I find the following extract from Sean Wilken QC and Karim Ghaly's seminal treatise, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("*Wilken and Ghaly*") (at paras 2.42–2.43), to be instructive:

> A rigid formal adherence to the requirements of variation creates difficulties in practice. Such difficulties have been mitigated by two *mechanisms for variation of a contract* ***without*** *the express consent of the parties to, or* ***consideration for, that variation***. The first mechanism is clearly established and involves construing certain agreements as if the parties had agreed to permit certain types of variation to those agreements. …
>
> The common law allows agreements permitting variation in two cases. First, *when the parties incorporate within the contract a set of rules themselves providing for their own variation or amendment.* … Second, *where the parties have either expressly or impliedly agreed that one or both of them should have the power to vary the agreement … that party will have that power.*
>
> [emphasis added in italics and bold italics]

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Applying these principles to the present arrangement under the Subcontract, cl 14.2 of the Subcontract makes it possible to vary the Subcontract even if no additional consideration is provided, where both parties provide prior written consent to the proposed variation.

45 In the light of that observation, it is immediately evident that Authentic's contention that the Subcontract could not have been varied by way of the 23 September Email because there was no consideration provided for the variation through the mechanism under cl 14.2 of the Subcontract, must be rejected.[33] It is immaterial in this regard if the purported variation conferred a benefit on Benlen by allowing Benlen to submit payment claims on three possible dates each month (*ie*, the 23rd, 24th or 25th) instead of just a single date (*ie*, the 25th), but no benefit appeared to have been gained by Authentic and no detriment appeared to have been suffered by Benlen in return. No consideration is required for there to be any variation of the Subcontract made pursuant to and in compliance with cl 14.2 of the Subcontract.

46 Having said all that, I ultimately take the view that the Subcontract had not been varied pursuant to the variation mechanism specified under cl 14.2 of the Subcontract because the requirement that there be *prior written consent* from *both* parties had not been met. In this regard, I agree with Authentic that there had only been written consent on the part of itself in favour of any variation, in the form of the 23 September Email, but there is no evidence whatsoever of any written consent on the part of Benlen to the purported variation by way of the 23 September Email.[34]

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33 Respondent's Submissions, paras 26–28.

34 Respondent's Submissions, paras 21–23.

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(2) Variation by collateral oral agreement

47 Next, I direct my mind to the possibility of variation of the Subcontract by way of the formation of a collateral contract to vary the Subcontract. In the first place, this is a necessary enquiry because cl 14.2 is insufficient to exclude the possibility of there being any variation of the Subcontract just because there is no evidence of any written consent from Benlen to the purported variation by way of the 23 September Email. Indeed, it is still possible for there to have been a variation of the Subcontract if there had been a separate *oral* agreement to vary the Subcontract. In support of this view, it has been recognised by the English courts that a term of the contract which states that the contract can only be varied in writing will *not* preclude the possibility of there being an *oral* variation: see *Globe Motors Inc and others v TRW LucasVarity Electric Steering Ltd and another* [2016] EWCA Civ 396 at [95]–[113] *per* Beatson LJ, affirmed in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [34] *per* Kitchin LJ. As the learned authors of *Wilken and Ghaly* put it, the effect of a term requiring variation to be in writing is, at best, not to prohibit consensual oral variation but to raise a rebuttable presumption that, in the absence of writing, there had been no variation, and that this presumption will be rebutted only by strong evidence that both parties intended to orally vary the terms of the contract (at footnote 131 to p 26, citing *Spring Finance Ltd v HS Real Company LLC* [2011] EWHC 57 (Comm) at [53] *per* Judge Mackie QC). The upshot of this observation is that it is not enough for Authentic to simply rely on cl 14.2 of the Subcontract and assert that there can be no variation of the Subcontract just because there is no written evidence of any consent from Benlen to the arrangement reflected in the 23 September Email. It is necessary for me to look at the overall facts and circumstances surrounding the parties' correspondence to also consider whether there was any collateral oral agreement to vary the Subcontract.

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48 Authentic advances, to my mind, two arguments in favour of its position that the Subcontract had not been varied by way of a collateral oral agreement. First, Authentic submits that there was no variation by way of a collateral oral agreement because there was no consideration provided.[35] Second, Authentic submits that there was no intention on the part of the parties to regard the 23 September Email as a variation of the Subcontract because there was nothing prior to or subsequent to the 23 September Email to suggest that the 23 September Email was intended to vary the obligation of Benlen to serve payment claims on the 25th day of every month.[36] To my mind, whereas I find the former contention unpersuasive, I consider the latter contention to be dispositive of this sub-issue in favour of Authentic. I will deal with both in turn.

49 First, regarding Authentic's argument on the supposed lack of consideration, I do not think that it could be said that there was no consideration provided for any variation in this case. In the High Court decision of *S Pacific Resources Ltd v Tomolugen Holdings Ltd* [2016] 3 SLR 1049, Chua Lee Ming JC (as he then was) made the following astute observations regarding the requirement of consideration in the context of the variation of contracts (at [14]–[15]):

> 14 … It has been said that, where variations of contracts are concerned, dispensing with the doctrine of consideration will bring the law in line with commercial expectations and promote certainty: Lee Pey Woan, "Consideration" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 4.059–4.060. The desirability of reforming the law of consideration has also been acknowledged by Singapore courts: *Halsbury's Laws of Singapore* vol 7 (LexisNexis, 2014 Reissue) at para 80.081. *However, the doctrine of consideration remains an established part of the law in Singapore*: *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [117].

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35 Respondent's Submissions, paras 26–28.

36 Respondent's Submissions, paras 17–20, 24 and 25.

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> 15 That said, ***the modern approach in contract law is for courts to be more ready to find the existence of consideration***: *Woo Kah Wai v Chew Ai Hua Sandra* [2014] 4 SLR 166 at [97], citing *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 and *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594.
>
> [emphasis added in italics and bold italics]

In the earlier High Court decision of *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409, Vinodh Coomaraswamy J also usefully summarised the relevant principles in the following manner (at [36]):

> A variation of a contract, like the contract itself, requires offer, acceptance and consideration: *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR(R) 305 at [28]–[29]. ***A factual or practical benefit suffices to satisfy the requirement of consideration. This means that it is generally very easy to locate some element of consideration between contracting parties, especially in a transaction of a commercial nature***: see the decisions of V K Rajah JC (as he then was) in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139], Andrew Phang Boon Leong J (as he then was) in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [28]–[30], and the Court of Appeal in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 at [100]–[101].
>
> [emphasis added in bold italics]

It is thus abundantly clear from the law as it currently stands that, for transactions conducted in a commercial context, it is not difficult to find that the requirement of consideration has been satisfied.

50 In this case, I am of the view that there was valid consideration in the form of a factual or practical benefit enjoyed by Authentic from the new arrangement. In the affidavit of Ms Ler Peh Choo dated 27 September 2017, Ms Ler revealed the following:[37]

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37 Ler's 1st Affidavit, p 8, paras 29–30.

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> 29 … [Ms Foong] had always 'complained' to me that *all our subcontractors for the Project seldom submit their payment claims on time and this caused problems in processing their progress claims at the end of every month*. Save for two (2) subcontractors who were contractually required to submit their payment claims from the 25th – 27th of each month, all other subcontractors (including [Benlen]) were required to submit their payment claims on the 25th day of each calendar month.
>
> 30 As such, I had suggested to [Ms Foong] that she write to all of [Authentic's] subcontractors to *get them to submit their payment claims a few days earlier so as to give some allowance against the effect of 'late' claims submitted*. …
>
> [emphasis added]

From this, I consider the factual or practical benefit enjoyed by Authentic, in exchange for allowing Benlen to serve its payment claims between the 23rd and 25th (instead of only on the 25th) of every month, to be that Authentic could increase the likelihood of it receiving Benlen's payment claims on time, so that it could process the payment claim expeditiously every month. Insofar as Authentic insists that it has to be shown that it enjoys a *legal* benefit as a result of the arrangement, that is not the law. It suffices that Authentic can be shown to enjoy a mere *factual or practical* benefit as a result of the purported variation.

51 Having said all that, I find Authentic's second contention regarding the lack of any intention on the part of the parties to agree to a variation of cl 8.1 read with Appendix 1 of the Subcontract to be a valid objection to Benlen's assertion that the Subcontract had been varied. In *Wilken and Ghaly*, the learned authors state (at para 2.14) that:

> … unless there is a specific provision which permits it, *a party cannot unilaterally vary the terms of a contract; there has to be acceptance of the variation of the contract, that acceptance being more than 'mental acceptance or mere acquiescence'*. Therefore, in the same way as there must be offer and acceptance at the formation of the contract, the parties to the contract must agree to the variation, must agree to all material aspects of the variation and must intend to vary the contract. …

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[emphasis added]

To my mind, the foregoing passage succinctly encapsulates what is absent from the present facts of the case that would otherwise go towards establishing a variation of the Subcontract. Whereas Benlen suggests that the 23 September Email constitutes a variation of the Subcontract, it is not clear from the 23 September Email itself that it is meant to encapsulate an agreement to vary the Subcontract, instead of a mere unilateral notification by one party to the other (see [7] above). Neither is there anything prior to the 23 September Email to suggest that the 23 September Email was intended to be an offer made by Authentic to vary the obligation of Benlen under the Subcontract to serve payment claims only on the 25th day of every month, which Benlen could accept.

52 Benlen submits that: (a) Ms Foong's usage of the word "reminder" suggests that the 23 September Email was not the first time that Authentic had informed its subcontractors of the variation of the service dates for the payment claims; and (b) Benlen's representative, Mr Ho Teck Beng ("Mr Ho"), had also received a call from one of Authentic's staff prior to receiving the 23 September Email, confirming the variation.[38] I agree with Authentic that the onus is on Benlen, which asserts the existence of the earlier emails and the call made to Mr Ho, to adduce evidence to that effect.[39] Presently, those suggestions remain bare assertions. Benlen's submission in this regard is thus untenable.

53 Even if the 23 September Email was indeed intended to be an offer to vary the Subcontract, there is nothing subsequent to the 23 September Email that shows that this offer had been accepted by Benlen. It is trite that acceptance

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38 Ho's 1st Affidavit, p 6, paras 35 and 36.

39 Ler Peh Choo's 2nd Affidavit dated 19 October 2017, pp 2–3, paras 3 and 5.

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in a contractual setting can be signified orally, in writing or by conduct, and that when there is a history of negotiations and discussions, the court will look at the whole continuum of facts in concluding whether a contract exists: *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [48] *per* V K Rajah JC (as he then was). Here, there was no evidence that showed that the offer from Authentic (assuming it was one) had been accepted by Benlen, be it orally or by way of conduct. A perusal of the dates in which the rest of Benlen's payment claims were served on Authentic following the 23 September Email does not show that there was any agreement to vary the date of service of the payment claim. There was no obvious trend of Benlen strictly serving its payment claims between the 23rd and 25th of every month (see [8] above). Granted, those dates of service also do not suggest that Benlen was adhering to the more stringent date of service specified under cl 8.1 read with Appendix 1 of the Subcontract. But that is immaterial, for the most that could be said of the subsequent conduct of Benlen is that it is of neutral probative value.

54 Accordingly, I am of the view that there was simply no intention on the part of the parties for the 23 September Email to vary the obligation enshrined under cl 8.1 read with Appendix 1 of the Subcontract for Benlen to serve its payment claims on the 25th day of every month. This thus means that PC 19, which was served on 23 June 2017, had been invalidly served.

Conclusion on the Validity of Service Issue

55 For all of the reasons canvassed earlier, I find that Benlen, by serving PC 19 on 23 June 2017, had not validly served PC 19 because it was contrary to the contractually stipulated date of service provided for under cl 8.1 read with Appendix 1 of the Subcontract. Also, Authentic had not, by way of the 23

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September Email, varied cl 8.1 read with Appendix 1 of the Subcontract to allow Benlen to serve its payments claims between the 23rd and 25th day of every month. PC 19 was thus served in breach of s 10(2)(*a*) of the SOPA, and had been invalidly served.

56 This, in turn, makes it necessary for me to proceed to consider the Waiver and Estoppel Issue in order to determine if the Adjudication Determination should ultimately be set aside on the ground of Benlen's invalid service of PC 19.

The Waiver and Estoppel Issue

57 In my view, although PC 19 had indeed been invalidly served, Authentic had waived its right to object to Benlen's invalid service of PC 19, and is now estopped from raising any such objections.

58 Authentic contends in this regard that it should not be estopped from raising objections to Benlen's invalid service of PC 19 at this stage of the proceedings for the following two reasons:

(a) First, a party may not waive his right to object to a breach of a provision of the SOPA that goes towards the substantive jurisdiction of the adjudicator.[40]

(b) Second, in any event, Authentic had not waived its rights to object to Benlen's breach of s 10(2) of the SOPA, which is a breach that went towards the substantive jurisdiction of the Adjudicator.[41]

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40 Respondent's Submissions, paras 42–65.

41 Respondent's Submissions, paras 66–71.

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59 To my mind, both of Authentic's contentions are unsustainable, especially in the light, once again, of the most recent Court of Appeal decision in *Audi Construction (CA)*.

60 I begin with Authentic's first argument that objections to breaches of provisions of the SOPA that go towards the substantive jurisdiction of the adjudicator may not be waived. Whereas the law was previously relatively unclear in relation to whether a party may in fact waive his right to object to a breach of a provision of the SOPA that goes towards the substantive jurisdiction of the adjudicator, this cloud of uncertainty has most definitely been lifted with the incisive observations encapsulated within the *Audi Construction (CA)* decision. There, the Court of Appeal answered this question unreservedly in the affirmative.

61 To this end, the court in *Audi Construction (CA)* first clarified (at [45]) that an adjudicator has the power to decide matters that go towards his jurisdiction, thereby affirming the preliminary views expressed in the affirmative in this regard by the Court of Appeal in *Grouteam* (at [67]). In arriving at this conclusion in *Audi Construction (CA)*, the Court of Appeal respectfully departed from its previous decision 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 (where the Court of Appeal held that an adjudicator *cannot* deal with jurisdictional challenges). The court considered s 17(3)(*c*) of the SOPA to be a clear indication that an adjudicator has the power to consider whether a payment claim is valid and whether it has been validly served, and also found that this reading of s 17(3)(*c*) comports with the legislative purpose of the SOPA, which is to facilitate cash flow in the building and construction industry through, *inter alia*, the speedy and efficient resolution of payment disputes. See *Audi Construction (CA)* at [46]–[50].

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62 Crucially, the *Audi Construction (CA)* court went on to expressly hold that the High Court decisions which reasoning had been premised on an adjudicator's inability to rule on challenges to his jurisdiction should no longer be followed. These meant that the decisions in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157, *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776, *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609, *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 and *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 were no longer good law (see *Audi Construction (CA)* at [51]). Accordingly, insofar as Authentic relies on these authorities to buttress its submission that no estoppel could arise from its failure to object to the validity of Benlen's service of PC 19, its submission must surely fail. The same could also be said of Authentic's reliance on the decision of *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 in its submissions, insofar as this decision follows the positions taken in the aforementioned High Court decisions that have since been rejected.

63 As for Authentic's second argument that there was no waiver on the facts, it is useful once again to have regard to the Court of Appeal's decision in *Audi Construction (CA)*. In that case, the Court of Appeal set out the general principles of waiver by election and equitable estoppel (at [54]–[61]), and applied these principles to the context of adjudication under the SOPA (at [62]–[64]). The court then went on to hold that a respondent's failure to object to a breach of a mandatory provision (the breach of which goes to the jurisdiction of the adjudicator) may be regarded as an unequivocal representation for the purpose of waiver by election and equitable estoppel, because s 15(3)(*a*) of the SOPA requires a respondent to include a jurisdictional objection in his payment response if he wants to raise a jurisdictional objection (at [65]–[66]).

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64 It would be helpful at this juncture to take a closer look at s 15(3)(*a*) of the SOPA, from which the Court of Appeal had inferred the duty to raise a jurisdictional objection at an early stage of the adjudication process in order to rely on it subsequently. Section 15(3)(*a*) of the SOPA states as follows:

> **Adjudication Responses**
>
> **15.**— …
>
> (3) The respondent shall not include in the adjudication response, and *the adjudicator shall not consider, any reason for withholding any amount*, including but not limited to any cross-claim, counterclaim and set-off, *unless* —
>
> > (*a*) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant;
> >
> > …
>
> [emphasis added]

The effect of this provision is, as observed by Tan Siong Thye J in *AES Façade Pte Ltd v WYSE Pte Ltd* [2017] 5 SLR 640 at [26], that "any reasons for withholding payment should be stated in the payment response; they cannot be held back and raised for the first time in adjudication". Otherwise, the adjudicator would lack the power or jurisdiction to consider such reasons. In this regard, I find the following explanation by Tan J (at [51]) to be instructive:

> … the object and purpose of the [SOPA] is to protect cash flow in the construction industry and to create a quick and efficient means of providing temporary finality to any disputes that may arise. The intended result is for employers to 'pay first, argue later', so that subcontractors would not be held up waiting till the end of a long-drawn dispute … for payment … One of the mechanisms by which this is intended to be achieved is enshrined in s 15(3), which clearly states that *any reasons for withholding payment … must be included in the payment response or be wholly disregarded by the adjudicator.* Such a strict requirement is necessary because of the tight timelines imposed under the [SOPA]; without s 15(3), a claimant might not have sufficient time to prepare himself for the case he was to meet at the adjudication. This in turn would lead to either

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> difficulties for the claimant's case, or a delay of the adjudication in order to allow the claimant to respond. *By including s 15(3), Parliament nipped such problems in the bud by requiring strict compliance before a set-off (or any other reason for withholding payment) could be raised at all.*
>
> [emphasis added]

65 When then would it be necessary for the respondent to register his or her objection to the breach of a mandatory provision? In *Audi Construction (CA)*, the Court of Appeal made it clear that a failure to object would amount to an unequivocal representation of a decision to forgo one's right to raise that objection *at the time by which the respondent is to file his payment response* (at [67], citing *Grouteam* at [68]). Accordingly, to summarise the foregoing discussion, the principles of waiver by election and equitable estoppel impose on the respondent a duty to speak, so to speak, by raising any objection that it might have regarding any matter that might affect the threshold or substantive jurisdiction of the adjudicator by the deadline for the respondent to submit its payment response.

66 Applying these principles to the facts of the present application, it is evident that Authentic's submission that there was no waiver on the facts is of absolutely no merit. Pursuant to s 15(3)(*a*) of the SOPA, Authentic was obliged to point out the defect in the date of service of PC 19 when it was submitting its payment response to PC 19, but it failed to do so (see [10] above). On this basis alone, it could be said that Authentic's failure to raise its objection at that instance amounted to an unequivocal representation of its decision to forgo its right to raise that objection subsequently. But that was not the full extent of Authentic's failure to object to Benlen's purported breach of a mandatory provision. Authentic also failed to file its objection to the invalidity of Benlen's service of PC 19 when filing its adjudication response (see [14] above). This was surely another point of time in the proceedings when Benlen would have

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reasonably expected Authentic to air its objections to the validity of the service of PC 19, if any, especially given that Benlen had also expressly referred, in its written submissions accompanying its Adjudication Application, to the fact that it had served PC 19 on 23 June 2017, and not on 25 June 2017 (see [12] above).

67 Accordingly, I find that Authentic had waived its right to object to the validity of Benlen's service of PC 19, and it was estopped from raising such an objection in the proceedings before me.

Conclusion

68 For the reasons aforesaid, although I find that PC 19 had *not* been validly served, I find that Authentic had waived its right to object to any invalidity of service of PC 19, and is estopped from raising any such objection at this stage of the proceedings. In the result, I dismiss the Setting Aside Application.

69 I shall hear the parties on costs within two weeks if the parties are not able to agree on costs.

Chan Seng Onn
Judge

Lazarus Nicholas Philip and Toh Yee Lin Jocelyn (Justicius Law Corporation) for the applicant;
Ong Kok Seng Patrick and Chong Yi Mei (Patrick Ong Law LLC) for the respondent.

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