

CASE UPDATE



Singapore Court of Appeal: Respondent may be taken to have waived the Claimant's breach of a mandatory provision of the SOP Act if no objection is raised by the time the Respondent submits its payment response.

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Introduction

1. In *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] SGCA 59, the highest court in Singapore, the Singapore Court of Appeal, found that a respondent may have waived its rights to object if the respondent did not raise its objection(s) to the claimant at the earliest possible opportunity. The respondent may be taken to have waived the claimant's breach of a mandatory provision of the Building and Construction Industry Security of Payment Act ("**SOP Act**"). The respondent may also be taken to have waived its rights to object to an adjudicator's lack of jurisdiction.
2. Any objection by a respondent should therefore be made before the respondent takes any further step which would be inconsistent with its own objection. In other words, the appropriate time to raise an objection would generally be the time at which the respondent receives a payment claim or, at the latest, by the deadline for the respondent to submit its payment response.
3. The Court of Appeal further stated that "*it ought not to be an answer that the [respondent] did not have legal advice at the relevant time*".
4. The Court of Appeal also clarified that there is no objection as a matter of principle to adjudicators considering and then ruling on whether they have jurisdiction and/or whether breaches of mandatory provisions of the SOP Act have occurred. However, the adjudicators' determination of such issues will not be final and conclusive, and will remain open to review by the court.

Facts

5. In this case, Grouteam Pte Ltd was a sub-contractor engaged by UES Holdings Pte Ltd, the main contractor.
6. Grouteam Pte Ltd ("**the Claimant**") served its payment claim on UES Holdings Pte Ltd ("**the Respondent**") on 20 April 2015. Not having received a payment response from the Respondent, the Claimant proceeded to apply for adjudication on 20 May 2015.
7. On the same day of 20 May 2015, the Respondent served its payment response. The adjudication determination was eventually issued in favour of the Claimant.

8. The Respondent then applied to the Singapore High Court to set aside the adjudication determination on the grounds that the Claimant's payment claim was not served in good time.
9. The High Court found that the payment claim, the adjudication application, and the notice of intention to apply for adjudication were indeed not served in good time by the Claimant.
10. For the contract between the Claimant and the Respondent, there were 2 conflicting provisions which purport to govern when a payment claim shall be served. The High Court examined the contract and found that the provisions in the "Preliminaries" applied instead of the provisions in the "Summary of Contract Negotiations". The Claimant, who had complied with the provisions in the "Summary of Contract Negotiations", had therefore served the payment claim out of time.
11. The High Court proceeded to set aside the adjudication determination, rendering the adjudication determination invalid. The Claimant thereafter appealed the decision of the High Court.

Breach of Section 10(2) of the SOP Act (which prescribes when a payment claim shall be served) renders an adjudication determination invalid.

12. The Court of Appeal disagreed with the High Court's decision. The key issue was the same as that in the High Court – i.e., whether the provisions in the "Preliminaries" or the "Summary of Contract Negotiations" govern when a payment claim shall be served.
13. After extensive examination of the key issue, the Court of Appeal decided that the provisions in the "Summary of Contract Negotiations" applied. The Claimant's payment claim was therefore served on time and the adjudication determination ought not to be set aside.
14. The Respondent also tried to argue that the court should not substitute its views for that of the adjudicator who had decided that the Claimant had served the payment claim on time.
15. However, the Court of Appeal clarified that the court can indeed set aside the adjudication determination if there has been a breach of a mandatory provision of the SOP Act that would warrant the invalidation of the entire proceedings. Section 10(2) of the SOP Act which prescribes when a payment claim shall be served is such a mandatory provision. A breach of Section 10(2) of the SOP Act shall render an adjudication determination invalid.

Further comments by the Singapore Court of Appeal on the SOP Act

16. Although the finding that the Claimant's payment was served on time was sufficient to dispose of the matter, the Court of Appeal went on to make the following important comments:

"...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..."

...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 opportunity..."

...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...In this regard, we think it ought not to be an answer that that party did not have legal advice at the relevant time..."

17. In other words, applying the Court of Appeal's aforesaid comments would mean that a respondent must now raise its objection(s) that a mandatory provision of the SOP Act has been breached by a claimant at the earliest opportunity. The appropriate time for the respondent to raise such an objection would generally be the time at which it receives a payment claim, or at the latest, by the deadline for the respondent to submit its payment response.
18. If the respondent does not raise an objection and the claimant decides to proceed with its adjudication application, the respondent runs the risk of being found to have waived its right to raise such an objection. As mentioned above, it is no excuse for the respondent to argue that it did not have legal advice at the relevant time.
19. However, the Court of Appeal highlighted one possible exception. The respondent may not be taken to have waived its right to object for breaches of provisions which occur during the adjudication and which are not predicted purely on the acts of the parties (such as a breach of natural justice by the adjudicator).
20. As for the claimant, when faced with an objection by the respondent that a mandatory provision of the SOP Act has been breached, the Court of Appeal opined that "*it may well save time and costs for the claimant to submit a fresh payment claim in the form of a repeat claim*".
21. Lastly, the Court of Appeal also confirmed that an adjudicator can consider and rule on whether they have jurisdiction and/or whether breaches of mandatory provisions of the SOP Act have occurred. However, their determination of such issues will not be final and conclusive, and remain open to review by the court. As such, the Court of Appeal still opined that time and costs can be saved if adjudicators confine themselves to the issues which they are required to deal with, namely, whether payment is due and if so, how much.

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