

THE RESPONDENT IN ADJUDICATION PROCEEDINGS

The Unwanted Child of Administrative Law

[2018] SAL Prac 5

The recent decision of *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (“*Audi*”) is a key decision that affects the operation of the *Building and Construction Industry Security of Payment Act* (Cap 30B, 2006 Rev Ed). This article explores two key holdings of the Court of Appeal in *Audi*, and the potential issues that they raise in the operation of the Building and Construction Industry Security of Payment Act.

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1 In *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*¹ (“*Audi*”), the Singapore Court of Appeal (“SGCA”) dealt with whether:

- (a) a payment claim can be served earlier or later than the contractually stipulated date (the “Service Issue”); and
- (b) a respondent has waived objections to, or is estopped from objecting, an adjudicator’s jurisdiction or breaches of a mandatory provision by failing to provide a payment response² (the “Waiver Issue”).

1 [2018] 1 SLR 317.

2 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [62]–[67].

2 *Audi* gave rise to some disquiet among the practitioners of the Singapore construction bar and the non-legal professionals involved in the adjudication process. Hitherto, the timing of a payment claim is an important facet of the adjudication process³ and the doctrines of waiver and estoppel were not applied to mandatory provisions of the Building and Construction Industry Security of Payment Act⁴ (“SOP Act”) and/or jurisdictional issues.⁵

3 This article addresses the Service Issue and the Waiver Issue, as well as the issue of whether, in the light of *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*⁶ (“*Comfort*”), a respondent may raise any submissions to object to a payment in the absence of a payment response.⁷

3 See, eg, Quentin Loh J in *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHC 226 at [36] where Loh J stated that:

[I]f a party wishes to avail itself of this scheme [the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”)] to obtain speedy payment, then it has to ensure that its conditions and timelines are complied with. The steps, their required content and timelines are key features of this scheme and must be complied with. This is aptly illustrated in the very recent case of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] SGCA 42 ... where the Court of Appeal upheld an adjudicator’s disregard of an adjudication response which was filed two minutes out of time ...

See also, eg, the Singapore Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [3]–[4], stating that the adjudication procedure under the SOP Act is characterised by “strict time-lines”.

4 Cap 30B, 2006 Rev Ed.

5 See the line of cases cited by the Singapore Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (“*Audi*”) at [51], which have now been overruled by *Audi* and, in particular, the case of *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776, where the High Court held that there could be no estoppel arising from a respondent’s failure to object to the validity of a payment claim.

6 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979.

7 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [53].

I. The principle of legality

4 The principle of legality is a principle of statutory interpretation.⁸ Per Lord Hoffmann in *R v Secretary of State for the Home Department, Ex parte Simms*:⁹

... the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

5 The principle of legality requires that generally, short of unambiguous drafting, a statute should not be interpreted as abrogating fundamental rights like natural justice and

8 Per F A R Bennion MA, *Statutory Interpretation: A Code* (Butterworths, 4th Ed, 2002) at p 703:

This newly-coined term ‘the principle of legality’ is unfortunate because there are other areas of law to which it could equally be applied and so it is likely to lead to confusion. The true principle here is not ‘legality’ but that the courts should be slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out. There is nothing new in this: it is a well-established interpretative principle.

See also the earlier section titled “Section 269 Law should not be subject to casual change”.

We note that Asst Prof Jaclyn Neo in “‘All Power has Legal Limits’: The Principle of Legality as a Constitutional Principle of Judicial Review” (2017) 29 SAclJ 667 has stated (at para 3) that the principle of legality in Singapore is different from that in the UK. Nevertheless, as acknowledged by Asst Prof Neo, “in so far as the principle of legality is an expression of a broader commitment to the rule of law, the Singapore variant could be said to share genealogical roots with its English and Australian counterparts”.

9 [2000] 2 AC 115 at 131. Prior to *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115, this principle was also discussed in *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] 1 AC 539 at 573–574, per Lord Browne-Wilkinson.

procedural fairness. This principle is embodied in Singapore in *Goldring Timothy Nicholas v Public Prosecutor*:¹⁰

51 A crucial axiom ... is the fundamental presumption of statutory interpretation that Parliament would not have removed rights pre-existing in common law if there was no express provision or clearly evinced intention to that effect. In F A R Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) (“*Bennion*”), the learned author stated (at p 812):

Section 269. Law should not be subject to casual change

(1) *It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is.*

(2) The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that Parliament contravened the principle.

As the learned author of *Bennion* explained, the courts’ approach is as follows (at p 812):

The presumption that Parliament does not intend to make a radical change in existing law by a sidewind arises from the nature of the legislative process. It is, or should be, a serious business. Changes in the basic law, since they seriously affect everybody, are to be carefully worked out. The more fundamental the change, the more thoroughgoing and

10 [2013] 3 SLR 487 at [51]. Recently, in *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [122]–[123], the Singapore Court of Appeal (“SGCA”) distinguished *Goldring Timothy Nicholas v Public Prosecutor* [2013] 3 SLR 487 on the basis that it dealt with a situation “where there was a pre-existing common law right ... and a new statutory framework ... was overlaid upon it ... That is not the case here”; the SGCA also said (at [122]) that “Rajah JA acknowledged that, as a matter of statutory interpretation, it is presumed that Parliament would not have removed rights pre-existing in common law if there is no provision or clearly evinced intention to that effect. We do not see how this proposition, even if it were accepted as correct, would apply here”.

considered should be the provisions by which it is implemented. ...

...

Where these requirements are not met, the suspicion is raised that perhaps, although the words of the enactment seem to point that way, Parliament did not really intend a radical change in existing law. ...

[emphasis added by High Court]

6 When applying the principle of legality, the courts are giving effect to Parliament's will: Parliament would have legislated with knowledge of the common law rights.

II. The Service Issue

7 In *Audi*, the time for submitting the payment claim in the subcontract was the "20th day of each calendar month". 20 November 2016 fell on a Sunday. The claimant served the payment claim on 18 November 2016, but dated the document as 20 November 2016.¹¹

8 The respondent did not submit a payment response, but relied on the fact that s 10(2)(a) of the SOP Act was a mandatory provision and there was no compelling reason to read into the contract a provision that the 20th of the month should exclude Sundays.¹²

A. What the Singapore Court of Appeal held

9 The SGCA rejected the statement that "if a payment claim was submitted earlier ... there would be no obligation on the part of the respondent to deal with it earlier unless he chose to do so".¹³ This is because it would "introduce an unacceptable degree of uncertainty into a regime which ... places great importance on timeliness".¹⁴

11 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [6], [7] and [22].

12 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [17].

13 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [15] and [24].

14 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [24].

10 The SGCA found that the appellant had two good reasons to serve the payment claim early:¹⁵

(a) the respondent’s office was closed on Sundays; and

(b) the manner of dating made clear that the “payment claim [was] to be treated as being served and, importantly, operative only on 20 November 2016”.

11 The SGCA also stated that pursuant to the Interpretation Act¹⁶ (“IA”), had the payment claim been served on 21 November 2016, *ie*, the Monday immediately after 20 November 2016, it would have been validly served (regardless of whether it was dated 20 or 21 November 2016).

12 While the respondent’s counsel raised the point that “day” was defined in the SOP Act, the SGCA held that “we failed to see how this assisted the respondent’s case in any way because the word ‘day’ does not even feature in s 10(2)(a) of the Act”.¹⁷

13 The respondent’s counsel additionally raised the issue of the other service methods that could have been but were not utilised by the appellant, but the court “did not think that either of these contentions undermined the good reason which the appellant had for physically serving the payment claim early on 18 November 2016”.¹⁸

B. Uncertainty over a “good reason”

14 The SGCA held that there must be a “good reason” for a payment claim that is to be served outside the contractually stipulated period in order to be valid.

15 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [26].

16 Cap 1, 2002 Rev Ed.

17 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [37].

18 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [29].

15 Not every reason will be a good reason:¹⁹ this becomes a fact-intensive exercise and may invite further disputes on what is a “good reason”.²⁰

16 We submit that a bright line test would better reduce such conflicts.

C. Other modes of service?

17 It is unclear why the availability of alternative forms of service would not have resolved the Service Issue.

18 Had the respondent’s office been closed on a working day, or had the respondent refused to accept the payment claim, any form of proper service would suffice, including leaving the payment claim at the registered office,²¹ or service by e-mail.²²

19 That 20 November 2016 was a Sunday makes no difference. Since the contract required a payment claim to be served on the 20th day of the month, the respondent cannot

19 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [29].

20 The authors note that in the very recent decision of *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 (“*Benlen*”), Chan Seng Onn J applied *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 to the issue of whether a claimant’s service of a payment claim on 23 June 2017 (instead of 25 June 2017) was invalid. Chan J held that there was a “good reason” for the claimant to have submitted earlier, as 25 June 2017 was a Sunday and a public holiday, and the respondent’s premises would not have been open on weekends: *Benlen* at [37]. So the “trend” is that if the date falls on a Sunday, there can be a “good reason” if service is made on Friday. But what about service on Thursday? Is the “rule” about whether service was effected “the last working day before the weekend”? Or is it a more fact-specific (and hence, less certain) rule?

21 See s 37(1) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”), which sets out how service may be effected under the SOP Act.

22 See, in particular, the decision by Lee Sei Kin J in *Progressive Builders Pte Ltd v Long Rise Pte Ltd* [2015] 5 SLR 689, where Lee J held (at [39]) that s 37 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”) was meant to “assist parties in bringing notices and documents required under the [the SOP Act], not to shut out other modes of service ... service will be valid where the document has indeed been brought to the attention of the intended recipient”; therefore, Lee J held that service of the payment claim via e-mail was valid under the SOP Act.

assert otherwise, nor can a claimant say that it is too difficult to arrange for despatch on Sunday.²³

D. Definition of “day”

20 The SOP Act defines “day” as “any day other than a public holiday within the meaning of the Holidays Act (Cap. 126)”.²⁴

23 See, eg, *Central Provident Fund Board v Ho Bock Kee* [1981–1982] SLR(R) 84, where the Singapore Court of Appeal (“SGCA”) held, *inter alia*, that since the notice provision in cl 34 required that the notice be sent by registered post, and since no alternative mode of service was provided for, the notice in question was invalid since it was not sent by registered post; *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125, where the SGCA held that for on-demand performance bonds, strict compliance with the conditions precedent is necessary; Lord Hoffmann stated in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 1 AC 749 at 776, “[i]f the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease”.

These cases stand for the proposition that where modes of service are clearly prescribed, it is not for a party to depart from such modes.

In this regard, as *per* the SGCA in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [80], there is a “general principle that a party must be strictly held to its contractual obligations and should only be released from them where supervening events make it *impossible*, and not merely *onerous*, to fulfil them” [emphasis in original]. So, it does not lie in the respondent’s mouth to argue that service is not effective, merely because it would have been more onerous for the respondent to arrange for, say, a receptionist to accept the document on Sundays; and by parity of logic, it does not lie in the claimant’s mouth to say that he does not work on Sundays.

And *per* Andrew Phang Boon Leong JA in *Chee Siok Chin v Attorney-General* [2006] 3 SLR(R) 735 at [117] that:

[i]t is also axiomatic, commonsensical as well as just and fair that there cannot be a claim by a party for the vindication of legal rights without that party simultaneously fulfilling his or her legal responsibilities. In other words, one cannot claim one’s legal rights without fulfilling one’s legal responsibilities. The rhetoric of rights is not a licence for the unilateral appropriation of advantages without legitimate reciprocation; indeed, such conduct would be *the very antithesis* of the ideal underlying the very concept of rights as legitimately conceived” [emphasis in original].

So, it stands that for a claimant to take advantage of his rights under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”), he must demonstrate that he has fulfilled his obligations under the SOP Act.

24 For completeness, we note that s 2 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”) starts with the qualifier that the definitions in s 2 of the SOP Act applies “unless the context otherwise requires”.

21 In *UES Holdings Pte Ltd v KH Foges Pte Ltd*²⁵ (“UES”), Quentin Loh J observed that “a statutory definition may form part of the context of a contract such that a term used in the contract should be interpreted in accordance with the statutory definition” and that “when the terms of those statutory provisions are defined by that statute, then generally, if the contract uses the same terms, the terms should be interpreted in accordance with the statutory definitions”.

22 Therefore, in *UES*, Loh J held that “the word ‘days’ in Para 2h should be interpreted in accordance with the Statutory Definition unless the context indicates otherwise” as the parties had contracted with s 11 of the SOP Act in mind.²⁶

23 It is submitted that the reasoning in *UES* is equally applicable to s 10(2) of the SOP Act. Applying the contractual time stipulation in *Audi* to s 10(2) of the SOP Act:

- (2) A payment claim shall be served —
 - (a) ‘on the 20th day of each calendar month’ as specified in or determined in accordance with the terms of the contract ...

[emphasis added]

24 In the above interpretation, unless the 20th day of the relevant calendar month fell on a public holiday, it would be an operative day for the purposes of service.

25 Additionally, s 50 of the IA applies “unless the contrary intention appears”. We respectfully submit that in the case of the SOP Act, the definition of “day” in the SOP Act would render s 50(b) of the IA inapplicable to the SOP Act.

26 This proposed solution would perhaps fully allow the contractual timing for submission of payment claim(s) to be complied with under the SOP Act without more, and shifts the risk of service to the respondent.

25 [2018] 3 SLR 648. This decision does not appear to have been cited to the Singapore Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317.

26 *UES Holdings Pte Ltd v KH Foges Pte Ltd* [2018] 3 SLR 648 at [99] and [101], the “Statutory Definition” being the definition of “days” in s 2 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

III. The Waiver Issue

27 We now deal with the Waiver Issue. In *Audi*, the SGCA held that “the contract and the Act define the rights the parties have in relation to each other [under the SOP Act] ... these are rights which are in principle capable of being elected and whose exercise is capable of being forborne”.²⁷

28 A claim under a construction contract operates on two tracks: a statutory regime under the SOP Act, and a contractual regime under the subcontract in question.²⁸ A claim under the statutory regime would effectively require considerations of administrative law, the adjudication tribunal being a creature of statute²⁹ and its powers governed by the same.

A. No conferring of jurisdiction by consent or by estoppel

29 In *Koh Zhan Quan Tony v Public Prosecutor*,³⁰ the SGCA held that where “a court or tribunal does not possess the requisite jurisdiction to hear a particular case, neither party can confer the necessary jurisdiction by consent ... the doctrine of estoppel will not operate to prevent a party from pleading a lack of jurisdiction on the part of the lower court on appeal”.³¹

27 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [62].

28 See *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210, where Woo Bih Li J commented (at [25]) that “there are dual tracks for a contractor to claim payment”; *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 at [30], where Lee Sei Kin J stated that the result of Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”) is a “‘dual railroad track system’ consisting of the statutory regime under [the SOP Act] which operates concurrently with, but is quite distinct from, the contractual regime”.

29 See *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [63], where Vinodh Coomaraswamy J held that “[t]he juridical basis of adjudication in Singapore is statutory. The powers of an adjudicator under our security of payment scheme are fixed by [Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)]. The parties cannot enlarge those powers by any agreement of any kind, whether express or implied”.

30 [2006] 2 SLR(R) 830.

31 See *Koh Zhan Quan Tony v Public Prosecutor* [2006] 2 SLR(R) 830 at [20], where the Singapore Court of Appeal referred to the House of Lords decision in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808 at 820–821 and 828.

30 This appears to be at odds with *Audi*, where the SGCA held that “if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response. Reading s 15(3)(a) as requiring a respondent to raise any jurisdictional objection it has in its payment response is, again, entirely in line with the purpose of the Act ... a respondent has a duty to raise jurisdictional objections in his payment response”.³²

B. The “duty to speak”

31 Under the SOP Act, whilst the adjudication may be conducted in an inquisitorial manner,³³ as between the parties, the proceedings are adversarial. Generally, a party to legal proceedings does not have any duty to “nurse maid” his opponent by helping his opponent’s case.³⁴

32 The court in *Audi* stated that “the duty to speak” is fact-specific and dependent on the legal context,³⁵ and found that a failure to provide a payment response was an unequivocal representation for the purposes of waiving a failure to object to an adjudicator’s jurisdiction or a breach of a mandatory provision.³⁶ The court justified this by reference to the legal context as framed by s 15(3) of the SOP Act.³⁷

32 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [66].

33 Sections 16(4)(a) and 16(4)(b) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

34 See *Republic of India v India Steamship Co Ltd (No 2)* [1997] 2 WLR 538 at 551. While adjudication is a different process from litigation, there is no reason why the same principles should not apply to other forms of legal adversarial proceedings.

35 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [61].

36 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [64]–[67].

37 *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [66].

33 However, the then Minister of State made clear³⁸ that the SOP Act was intended to be fair to all parties: an aggrieved respondent has a right to a review by a review tribunal or a limited recourse to the courts; and when Parliament enacted the SOP Act, it did not require parties to be represented by lawyers to administer the process.

34 We respectfully submit that s 15(3) of the SOP Act does not mandate that a failure to do so would have the effect of waiving objections to jurisdictional objections and/or breaches of mandatory provisions, and should not be interpreted to do so.

35 In general, a statutory tribunal must identify a basis to assert jurisdiction and exercise clearly circumscribed powers.³⁹

38 See the *Building and Construction Industry Security of Payment Bill, Second Reading* (16 November 2004), vol 78 at cols 1137–1338, where then Minister of State for National Development, Mr Cedric Foo Chee Keng, stated as follows:

Sir, there are two situations here. One of which is if the adjudicator rules in favour of the claimant. When the adjudicator rules in favour of the claimant, the claimant is then entitled to the payment by a certain due date. In such a case, the respondent may feel aggrieved and opined that the adjudication determination is unfair. Therefore, we have stipulated that for amounts where the difference is larger than \$100,000, a right of review by the respondent is covered in the Bill, and this is really to be fair to all parties.

Beyond the review, I think the right of appeal to a court or to an arbitrator is always available to anyone, and it is not correct for this Bill, while trying to solve one aspect of the problem faced by the industry, to deny that right of appeal to a court of law itself. There may be other issues under Tort Law that needs to be addressed. But I would like to assure the Member that the very cost associated with litigation is a deterrent for anyone to bring about frivolous or vexatious appeals to the courts. The costs and the time needed are sufficient to deter people from doing so unless they have a genuine case which they feel strongly about and which they think they will prevail in a court of law.

39 Generally, if a statutory tribunal wrongly asserts jurisdiction and/or exceeds its circumscribed powers, there would be issues of judicial review. In this regard, *per* Eusoffe Abdoolcader J in *Mak Sik Kwong v Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175 at 177:

(*cont'd on the next page*)

Absent explicit statutory enactments to the contrary, the principle of legality⁴⁰ militates against an interpretation allowing s 15(3) of the SOP Act to confer jurisdiction on an adjudication tribunal where there was none.

36 The content of a payment response is governed by reg 6 of the Building and Construction Industry Security of Payment Regulations⁴¹ (“SOPR”): it would not be unreasonable to say that reg 6 of the SOPR was concerned with factual matters, rather than legal issues.

37 If the SOP Act was intended to be operated by non-legally trained parties on a low-cost basis, respondents should not be required to know the intricacies of jurisdictional objections and mandatory provisions, requiring them to be stated in the payment responses.

There are two types of facts: facts which an authority (a term I use to include an inferior tribunal, administrative agency or other body exercising judicial or quasi-judicial functions) has undoubted power or jurisdiction to determine; and facts which must exist before an authority can exercise jurisdiction. The latter are known as jurisdictional or collateral facts, the existence of which is a condition precedent for the application of a statutory standard or the assumption of jurisdiction by an authority to decide the case on its merits. Thus, where an authority has power to requisition a vacant house, it is a condition precedent for requisitioning the house that it must be vacant which is a jurisdictional or collateral fact.

This was cited with approval by the Singapore Court of Appeal (“SGCA”) in *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR(R) 597.

As recognised by the SGCA in *Comfort Management Pte Ltd v OGP Engineering Pte Ltd* [2018] 1 SLR 979 at [75], much ink has been spilt over the issue of “jurisdiction” in the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), and it is quite beyond the bounds of this article to embark on an in-depth analysis of what “jurisdiction” means, since it would involve a consideration of jurisdictional errors.

See, eg, *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd* [2017] 3 SLR 988 and *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503, and their contrasting positions on the applicability of administrative law decisions such as *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 on setting aside an adjudication determination because of a misdirection on a point of law by the adjudicator.

40 See paras 4–6 above.

41 Cap 30B, Rg 1, 2006 Rev Ed.

38 Being in a position of an adjudication respondent does not necessarily mean that one is always higher up in the construction industry chain. A claimant today could very well be a respondent tomorrow. Yet this same claimant, who needed only rudimentary legal knowledge (if at all) to present a payment claim, is overnight required to know issues of jurisdictional objections and breaches of mandatory provisions when he is the respondent the next day.

C. What is the extent of waiver?

39 The SGCA acknowledged that there may well be exceptions to the general proposition that breaches of mandatory provisions may be waived. In *Grouteam Pte Ltd v UES Holdings Pte Ltd*⁴² (“*Grouteam*”), the SGCA observed *obiter* that there is “at least one exception”, being “breaches of provisions which occur during the adjudication and which are not predicated purely on the acts of the parties”.⁴³

40 In *Comfort*, the Court of Appeal stated that:⁴⁴

[A] respondent has a right to the proper conduct of the adjudication proceedings ... No objection based on that right could possibly have been included in a payment response since the adjudication would not have started yet. Nor could that right be forgone by way of waiver or estoppel, as we indicated in [*Grouteam*]. [emphasis added]

41 So not all breaches can be waived, but would the following “jurisdictional defects” be waivable in the absence of a payment response?

- (a) an adjudication for a project outside Singapore;⁴⁵
- (b) a wholly oral contract;⁴⁶
- (c) a claim under a HDB flat renovation contract;⁴⁷

42 [2016] 5 SLR 1011.

43 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [66].

44 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [67].

45 In breach of s 4(2)(b)(ii) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

46 In breach of s 4 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

47 In breach of s 4(2)(a) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

(d) a claim for project financing in a construction contract;⁴⁸ and

(e) a claim for the servicing of construction equipment that are not deployed in any construction project.⁴⁹

42 It is respectfully submitted that as the abovementioned scenarios are not subject to the SOP Act, no waiver or estoppel could vest an adjudication tribunal with jurisdiction to hear the same.⁵⁰

43 We respectfully submit that the principle of legality entitles a respondent to rely on the common law principles:

48 Which does not fall within the definition of construction work or services under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

49 To elaborate, say that a claimant serves a payment claim in respect of subcontract A. In the breakdown for the payment claim, the claimant stated that the servicing of Item X is under subcontract B. The supporting documents in the payment claim also made clear that Item X was provided by the claimant to the respondent under a different contract. Can a respondent argue that the claimant has breached the requirement in the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) that only “one adjudication be founded on one payment claim which arises from one contract” [emphasis in original] as per the High Court’s decision in *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359? Or would it be regarded as a matter which the respondent could, and should, have raised in the payment response, such that the failure to do so means that the respondent has waived this breach?

50 The examples at para 41 above (save for para 41(e)) are based on s 4 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”). Prakash J in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 (“*SEF Construction*”) at [45] stated that “an application to the court under s 27(5) must concern itself with, and the court’s role must be limited to, determining the existence of the following basic requirements: (a) the existence of a contract between the claimant and the respondent, to which [the SOP Act] applies (s 4)”. While the Singapore Court of Appeal (“SGCA”) in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [74]–[75] did not affirm Prakash J’s attempt to articulate a *numerus clausus* in *SEF Construction* at [45], neither did the SGCA hold that a breach of those heads would not amount to a breach of a mandatory provision.

- (a) that burden of proof to be on the claimant;⁵¹ and
- (b) to put the claimant to strict proof.⁵²

44 As the burden is on the claimant to prove his claim,⁵³ and the adjudicator must have some “positive basis for his determination, and not simply lack a reason not to allow the claim”,⁵⁴ such “jurisdictional defects” mean that the claimant has failed to prove his entitlement to commence adjudication.

51 See also “he who alleges must prove”: this has been stated as a “general principle” by Sir Henry Bernard Eder J in *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2017] 4 SLR 38 at [59]; a “basic principle of law” by Lai Siu Chiu J in *Nyo Nyo Min v Aung Khin* [2001] SGHC 39; and a “principle of the common law” by Flaoux J at *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2017] QB 915 at 940–941. See also the Malaysian Court of Appeal, Putrajaya, decision of *China Road & Bridge Corp v DCX Technologies Sdn Bhd* [2014] 5 MLJ 1, where Hamid Sultan JCA (delivering the judgment of the court) stated at [29(a)(iv)] that “it is an elementary principle of pleadings that he who alleges must prove its case by evidence against the parties to the suit and not against non-parties. It also stands as a cardinal rule under the Evidence Act 1950”.

For the avoidance of doubt, the author notes that the Singapore Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [63] approved Coomaraswamy J’s decision in *WCS Engineering Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28 (“*WCS Engineering*”) that the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) does not require the claimant to “prove” on the balance of probabilities and adopted Coomaraswamy J’s “standard of persuasion”. However, in *WCS Engineering* at [33], Coomaraswamy J accepted that “[e]ach party who advances a proposition to the adjudicator bears the burden of persuading the adjudicator to accept that proposition in and for the purposes of the adjudication”. So, when the author uses the term “burden of proof”, this must be read in the light of *WCS Engineering*.

52 As per the Singapore Court of Appeal in *Lim Swee Khiang v Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745 at [5]:

The first matter is the submission of no case to answer. It is a trite principle that under our adversarial system of justice, each party has the right to conduct his action or his defence, as the case may be, in a way that benefits him most. It is also an accepted principle that he who asserts must prove and therefore a defendant is entitled to put the plaintiff to strict proof of everything he is alleging, without having to respond in any way to the allegations. ...

Of course, the authors accept that this interpretation must be *adapted* to the ambits of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), given that the “burden of proof” is calibrated differently pursuant to *WCS Engineering Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28.

53 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [58].

54 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [32]–[35] and [56].

45 If this is correct, s 15(3) of the SOP Act should not be interpreted as curtailing the respondent’s rights to raise these “jurisdictional defects”, absent explicit wording (which we respectfully submit is not there).

D. Right of a respondent to address a tribunal in absence of payment response

46 In *Comfort*, the SGCA stated that in the absence of a payment response, the respondent is entitled to make submissions, though “[s]uch submissions, in our judgment, must be in and only in the nature of highlighting patent errors in the material properly before the adjudicator”.⁵⁵

47 If, in the absence of a payment response, the respondent can *only* submit on patent errors, such a reading may potentially give rise to an “unjust” state of affairs for the reasons set out below.

48 Firstly, anecdotal evidence suggests that lawyers/adjudicators (as opposed to non-legally trained persons) would perhaps be readier to entertain submissions on jurisdictional issues and breaches of mandatory provisions, notwithstanding the guidance by the court in *Comfort* limiting submissions to patent errors which appear to exclude such objections.⁵⁶ This may lead to a situation of non-uniform decision-making in procedural issues.

55 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [68].

56 Indeed, notwithstanding the decision in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 that adjudicators did not have the power to decide on their own jurisdictions, many adjudication determinations (mainly by lawyers/adjudicators) nevertheless continued to decide on jurisdictional matters. This was recognised by the Singapore Court of Appeal (“SGCA”) in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 at [67], as counsel for the respondent, Mr Ian de Vaz, informed the SGCA that:

[A]djudicators do routinely rule on the validity of their appointment, as well as on arguments that mandatory provisions of the Act have been breached. In our judgment, and in the light of our observation that objections to jurisdiction and claims that a mandatory provision of [the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)] has been breached in the run-up to the adjudication should be raised expeditiously, even before the adjudicator, 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 have occurred ...

49 Secondly, it is unclear to what extent this restriction affects legal submissions. Would the following objections/submissions, not requiring reliance on the existence of a payment response, by a respondent be allowed under *Comfort*:

- (a) That the items are claimed on a re-measurement basis when the subcontract is a lump-sum contract?
- (b) That a claim for the first moiety of retention is premature given that the relevant milestone has not been reached?
- (c) That condition precedents have not been met for a claim?

50 Thirdly, if absent a payment response submissions by a respondent are limited to patent errors, by parity of logic, a tribunal exercising its powers under s 16(4)(b) of the SOP Act (of requiring submissions) must similarly be so limited due to s 15(3) of the SOP Act. If so, when a tribunal is faced with a “jurisdictional defect” like those listed above,⁵⁷ does the limitation in *Comfort* mean that the tribunal cannot hear any submissions from the respondent on such a “jurisdictional defect”, and must find that the respondent has waived any objections relating to such a “jurisdictional defect”?

51 If, however, an adjudicator’s power is not so fettered, then whether a tribunal is able to pick up jurisdictional errors or breaches of mandatory provisions (or even issues of law) is simply a matter of serendipity.

52 Further, if a respondent is to have a right to a proper conduct of the adjudication proceedings,⁵⁸ then we respectfully submit that the respondent should have the right to submit on matters limited to the admissible evidence and/or matters relating to the SOP Act, and matters which are jurisdictional and mandatory in nature. This fully accommodates s 15(3) of the SOP Act, observes the principle of legality, and does not require reliance on a payment response.

53 It is hoped that cases after *Audi* and *Comfort* will clarify the matters raised herein. As things stand, a respondent in

⁵⁷ See para 41 above.

⁵⁸ *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [67].

The Respondent in Adjudication Proceedings

adjudication proceedings under the SOP Act cannot help but feel that he is an unwanted entity in the eyes of the law.