

Comment

REASONABLE CONFUSION

What *Audi* Did to Audi

Audi Construction Pte Ltd v Kian Hup Construction Pte Ltd
[2018] 1 SLR 317

This article is a commentary of the recent Court of Appeal case of *Audi Construction Pte Ltd v Kian Hup Construction Pte Ltd* [2018] 1 SLR 317. In this case, the Court of Appeal adjudged on two principal issues that are central to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), namely the proper date for service of a payment claim; and the consequences of a failure to submit a payment response. This commentary looks at the case against the backdrop of decisions both prior to and in the wake of it and examines the ramifications of the Court of Appeal's decision.

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1 In January this year, the Court of Appeal released a clearly seminal decision in *Audi Construction v Kian Hup*¹ (“*Audi*”). The judgment both clarified yet departed from precedent case law on the application of aspects of the Building and Construction Industry Security of Payment Act² (“SOP Act”). Given the practical and legal

1 [2018] 1 SLR 317.

2 Cap 30B, 2006 Rev Ed.

significance of the principles laid down in *Audi*, it behoves us to take a closer look at the judgment set out by the Court of Appeal.

2 The facts of *Audi* are straightforward. The claimant/appellant was engaged by the respondent (and respondent in the appellate court) as a subcontractor to carry out structural works in the construction of a nursing home. It was not disputed that the relevant terms of the subcontract stipulated that the claimant was to serve a payment claim on the 20th day of each calendar month. Things were, however, complicated by the fact that 20 November 2016 fell on a Sunday. In the premises, and for reasons addressed below, the claimant chose to serve the payment claim two days earlier, on the Friday of that week, that is, 18 November 2016. The respondent did not issue a payment response in respect of the payment claim.

I. Adjudicator's decision

3 The claimant commenced adjudication proceedings under the SOP Act and the respondent unsurprisingly challenged the validity of the payment claim on the ground that the claimant's payment claim had not been filed in compliance with the contracted date for submission of payment claims under the contract, which would have been 20 November 2016 in the specific instance. The adjudicator rejected this argument and found for the claimant.

II. High Court's decision

4 Unsurprisingly, the respondent applied to the High Court to set aside the adjudication decision. The High Court in *Audi Construction Pte Ltd v Kian Hiap Construction*³ agreed with the respondent's contention and set aside the determination on the ground that the payment claim had not been served on time in contravention of s 10(2)(a) of the SOP Act and, consequently, that the payment claim was invalid.

III. Court of Appeal's decision

5 The claimant then appealed to the Court of Appeal. In finding for the claimant, the Court of Appeal overturned the decision of the High Court. Two key issues came before the apex court, namely:

3 [2017] SGHC 165.

- (a) whether the payment claim was validly served; and
- (b) if not, whether waiver or estoppel prevented the respondent from raising any objections to the validity of the payment claim.

IV. Validity of service of payment claim

6 A welcomed and refreshing clarification to the mechanism of payment claims made in *Audi* is that where the parties' contract provides for service of payment claims to be made on a contractually specified or identified date, service has to be effected *on* that date and not *by* that date. Thus, payment claims served early would not (in the ordinary) be valid. In arriving at its conclusion, the Court of Appeal rejected the claimant's argument that a "purposive interpretation" should be taken in relation to the contractual date of service of payment claims, rightly making clear that the ordinary principles of contractual interpretation must apply.

7 However, after having rejected the claimant's argument and taken the position that timeliness is of great importance to the adjudication regime, the Court of Appeal then proceeded to introduce an exception by finding that the claimant's payment claim was nevertheless validly served for two (hopefully) conjunctive factors. First, the claimant had "good reason" for serving the payment claim earlier than the contractually agreed and stipulated date. Secondly, there was no uncertainty as to the operative date for the relevant payment claim because the claimant had post-dated the payment claim served on 18 November 2016 to 20 November 2016 and this post-dating served to remove any reasonable confusion as to the operative date of the payment claim.⁴ Despite the clarity in the Court of Appeal's finding on the date for service of payment claims, the exception introduced alongside adds another layer of complexity in an area of law that continues to struggle with certainty or clarity.

A. "Good reason" exception

8 The Court of Appeal found that the claimant had good reason for submitting its payment claim early as "that day was a Sunday, and there was no dispute that the respondent's office was closed on Sundays".⁵ The difficulty that presents itself here is that the court

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

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

recognised the respondent's arguments that service of the payment claim could have been effected by e-mail or fax; or that the claimant could have served it on 20 November 2016 by leaving the payment claim at the registered address of the respondent.⁶ Notwithstanding, the court does not really appear to account for the claimant's somewhat puzzling refusal to use any of these possible alternatives in its judgment other than saying that the existence of these alternative means of service did not undermine the "good reason which the [claimant] had for physically serving the payment claim early on 18 November 2016".⁷

9 Given that it was open to the claimant to properly effect service of the payment of claim in a number of ways on 20 November 2016, and it was nevertheless found that the claimant had "good reason" to submit the payment claim prematurely, the probable conclusion to be drawn is that the "good reason" exception is in effect confined to the actual contractual date of service of the payment claim falling on a non-working day such as a Sunday or public holiday.

10 Yet, it remains that the creation and operation of such an exception seems incongruous with recent developments in civil procedure permitting service via e-mail, fax, WhatsApp or even Twitter.⁸ If one is entitled to serve a document electronically or through other means (and this has been established to be so for payment claims), then to insist on the right to physical service on a particular date that is entirely inconsistent with the express provision of a contract (and possibly a statute) seems rather out of date and challenges the foundation of good reason. On a societal (and perhaps national) level, this seems somewhat anomalous with the growing drive to recognise and embrace technology.

11 Further, if the claimant was so fixated with personal service, it is not unreasonable to suggest that the claimant simply submit another payment claim in the following month or payment period instead.

12 That is not to say that the "good reason" exception has no application or place within the four corners of the SOP Act. Imagine, if you will, a crafty contractor who expressly and unequivocally specifies that payment claims must be served at 12.00 noon on the third day of every month. Such a requirement is perfectly legitimate as s 10(2) of the SOP Act states that service of a payment claim shall be "at such *time*" [emphasis added] as specified or prescribed. Literally taken, this gives a

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

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

8 *Storey, David Ian Andrew v Planet Arkadia Pte Ltd* [2016] SGHCR 7.

claimant a window of just 60 seconds to serve a payment claim, failing which the claimant is in breach of s 10(2), either for being too early or too late. The chances of a claimant submitting a valid payment claim would be very low indeed. It may be possible that in precisely this sort of circumstance the court will deploy the “good reason” exception to justify a payment claim that is served before the specified hour, as opposed to specified date.

B. Absence of confusion

13 In addition to finding a “good reason” justifying early and out of date service, the Court of Appeal also accepted the claimant’s post-dating of the payment claim. In relation to the claimant post-dating the payment claim by two days, the court found that “it was clear and obvious to the [respondent] from this manner of dating that the [claimant] intended for the payment claim to be treated as being served, and importantly, operative only on 20 November 2016”.⁹ To the court, this was a “practical and sensible” way of complying with the parties’ contract.¹⁰

14 This second aspect to the exception to the rule that a payment claim must be served on the date that the contract so specified was then caveated. The Court of Appeal was sufficiently cautious to limit the operation of this exception of post-dating. The court said that not every post-dated payment claim would be accepted as valid.¹¹ It compared the claimant’s post-dated payment claim of two days to one that was served ten days earlier than the contractually specified date and then post-dated to operate only ten days later. The court found that the latter form of post-dating would not be acceptable.

15 This then solicits the question – when is it *too early* to file a payment claim? It seems reasonably clear that a period of seven days or more would clearly be *too early*. That said, would a three-day-long public holiday period be considered too long a stretch of time to justify the post-dating of a payment claim? If a claimant were notified and aware that the respondent’s offices will be shut for four or five days for the Lunar New Year, would this be good reason for a four- or five-day post-dated payment claim? Uncertainty may yet arise as to where a post-dated payment claim would fall to be recognised as valid on the

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

10 *Audi Construction Pte Ltd v Kian Hup Construction Pte Ltd* [2018] 1 SLR 317 at [28].

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

timescale set out in *Audi*. It would indeed be interesting to see how the courts will adjudge the acceptable extent of post-dated payment claims in future by reason of this decision.

C. Alternatives to post-dating payment claim

16 The Court of Appeal prescribed another method to address the situation where the contractual date of service of payment claims falls on a non-working day. Making reference to the Interpretation Act,¹² the Court of Appeal held that it would have “no hesitation” in declaring a payment claim valid, where, for example, the claimant in this case had served it on Monday, 21 November 2016.¹³

17 If this were the answer or solution to getting around a situation where the submission date for a payment claim fell on a non-working day, then it raises the question of the need for a somewhat Gordian exception in the form of “good reason” and post-dating to regularise an early and *prima facie* invalid payment claim.

V. Whether respondent had waived its right to object to invalid service of payment claim or was estopped from raising such an objection

18 In perhaps a shift from the law as it seemed to be previously understood, the Court of Appeal in *Audi* found that the respondent had indeed waived its right to make jurisdictional arguments relating to the validity of the payment claim (and, naturally, the jurisdiction of the adjudicator) by virtue of not having filed a payment response. The Court of Appeal held that the failure to raise such an argument in the payment response would in effect be a failure to raise it at the earliest possible opportunity open to a respondent, and hence constitutes a waiver of a respondent’s right to raise any such argument later on at the adjudication. The corollary of this is that respondents must without fail issue a payment response whenever faced with a payment claim, regardless of whether or not a payment claim is intended by the claimant to be an operative one.

19 With this decision in *Audi*, it appears that the Court of Appeal has begun to harden its stance against respondents who fail to file a payment response and then engage in jurisdictional challenges, departing from the perhaps more permissive perspective taken in earlier

12 Cap 1, 2002 Rev Ed.

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

authorities.¹⁴ The position taken in *Audi* is, as the Court of Appeal itself recognised, an affirmation and extension of its position in the earlier, and recent, Court of Appeal decision in *Grouteam Ptd Ltd v UES Holdings Pte Ltd*¹⁵ (“*Grouteam*”). The complications arising from this are explored below.

VI. Earlier authorities and advent of patent error

20 It is apparent from the earlier decisions that the courts were less exacting on respondents who had failed to furnish a valid payment response and who then made a jurisdictional challenge against an adjudication determination. In *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd*¹⁶ (“*JFC Builders*”), the High Court acknowledged that while a respondent’s objection to a payment claim should be raised as soon as possible, it was a “far cry from saying that the absence of a payment response precludes a respondent from challenging an adjudication decision on any ground”.¹⁷ The High Court there found that there are irregularities in respect of payment claims that cannot be waived by a respondent (in that instance, a payment claim that breached s 10(1) of the SOP Act).

21 Following *JFC Builders*, the High Court in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd*¹⁸ found that it would still be proper for the court to conduct inquiries relating to objections that were not taken in the payment response or before the adjudicator. In the absence of a payment response, a respondent ought not to be estopped from challenging the validity of a payment claim, and an estoppel argument in connection with an absent valid payment response must fail.

22 In *W Y Steel Construction v Osko*¹⁹ (“*W Y Steel v Osko*”), the court found that s 15(2) of the SOP Act does not bar a respondent who has failed to file a payment response from making any submission whatsoever before an adjudicator, where there are patent errors in the payment claim before it. The Court of Appeal in *W Y Steel v Osko* said:²⁰

14 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401; *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2012] 1 SLR 1157; *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648.

15 [2016] 5 SLR 1011.

16 [2013] 1 SLR 1157.

17 *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2012] 1 SLR 1157 at [39].

18 [2015] 1 SLR 648.

19 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380.

20 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [51]–[52].

... even where no response has been filed, an adjudicator must make a determination, and in doing so, it is incumbent on him to consider the material which is properly before him and which he is permitted and, indeed, obliged to consider ...

In our judgment, an adjudicator is *bound* to consider the payment claim before him and cannot make his determination as if the fact that the respondent has not filed a response obviates the need for him to consider the material properly before him. The adjudication does not become a mere formality. The adjudicator is obliged to adjudicate, and in discharging this obligation, he must consider the material properly before him and make an independent and impartial determination in a timely manner ...

[emphasis added]

This in turn invites the question: Is an incorrect submission date a patent error? Or is it now the case that a respondent who has failed to file a payment response is estopped from raising patent errors before the adjudicator as well? Is the adjudicator required to disregard any such submission by the respondent?

23 If for some reason the patent or manifest error of the incorrect date of submission of a payment claim or any similar jurisdictional error is noticed by the adjudicator (but not raised by the respondent), is the adjudicator then obliged to ignore such an error pursuant to *Audi* (and on the premise of a deemed waiver) or is he required to apply the court's direction in *W Y Steel v Osko*? Some of these questions are answered in the even more recent decision of the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*²¹ ("*Comfort Management*"), which is discussed at greater length below.²²

VII. Estoppel in *Lee Wee Lick Terence v Chua Say Eng*

24 The operation of estoppel as identified in *Audi* perhaps does not also dovetail neatly with the other landmark Court of Appeal decision in *Lee Wee Lick Terence v Chua Say Eng*²³ ("*Chua Say Eng*"). In the latter decision, the Court of Appeal considered estoppel that operated against the claimant. *Chua Say Eng* examined the situation where a claimant submitted a payment claim that was not intended to be one (an example, apart from those cited in *Chua Say Eng*,²⁴ may include occasions where a claimant represents to the respondent that a payment claim is not meant to be a payment claim but merely for "procedural", "administrative" or

21 [2018] 1 SLR 979.

22 See paras 36–41 below.

23 [2013] 1 SLR 401.

24 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [73].

“accounting” purposes” and that no payment response is required; another scenario common in the construction industry is where the main contractor is attempting to provide an accurate amount for any deductions and the subcontractor agrees to permit the main contractor time to do so but would nevertheless be required to provide a payment claim for reasons such as audit compliance, International Organization for Standardization (ISO) compliance, compliance with financial covenants *etc*). In *Chua Say Eng*, the Court of Appeal said that in such a situation a claimant could well be estopped from later asserting that the relevant payment claim was an operative one; the court seemed to indicate that a respondent may be wiser to not respond in such circumstances:²⁵

A claimant who has made such a representation is estopped from asserting in court that his payment claim is operative as a payment claim until the referenced event occurs. *If a respondent in such a case is wary enough to prevent prejudice to himself by submitting a payment response, he may be taken to have waived any objections to the payment claim being treated as an operative payment claim.* [emphasis added]

The wording of *Chua Say Eng* appears to suggest that where a respondent who was aware of the irregularities, such as the misrepresentation or estoppel, but nevertheless proceeded to provide a payment response (without raising the irregularities in the payment response) in a surfeit of caution, then he or she might well be seen or taken to have waived or lost his right to raise objections that the claimant had no right to seek adjudication on the offending payment claim. In other words, a respondent “wary enough to prevent prejudice to himself” and who submits a payment response in such a situation may be taken to recognise this “inoperative” payment claim as operative or valid and would be taken to have waived or lost his right to object to the payment claim being an operative or valid one should the claimant seek to adjudicate the claim.

25 While it appears from the decision of *Chua Say Eng* that the Court of Appeal seemed to say that it would be preferable for a respondent to not submit a payment response in such circumstances, given the decision in *Audi*, this would now be a highly risky, if not outright dangerous, course for a respondent to take.

VIII. Shift in the law and *Audi*

26 The shift to the arguably stricter approach toward challenging irregularities in payment claims perhaps began in *Grouteam*, where the

25 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [73].

Court of Appeal opined that the appropriate time for a respondent to raise any *jurisdictional* objections would generally be the time at which it receives a payment claim or, at the very latest, by the deadline to submit its payment response. The Court of Appeal in *Grouteam* raised, perhaps *obiter*, the possibility of a respondent waiving his right to raise jurisdictional objections or challenges where these objections were not previously raised in a payment response.

27 The opportunity to affirm and elaborate on this new stricter approach arose in *Audi*, and the Court of Appeal duly availed itself and held that a respondent who had failed to file a payment response would be considered to have waived his right to or had made “an unequivocal representation that he would not raise”²⁶ any jurisdictional objections thereafter. The court underscored its position by finding that “the scheme of the Act and s 15(3)(a) ... imposes on [a respondent] a duty to speak”.²⁷ It would seem that this duty to speak now outweighs any right of a respondent to challenge irregularities, which hitherto were thought to be non-waivable by a respondent.²⁸

28 The imposition of a duty to speak (or to be taken to have waived or be estopped from raising jurisdictional objections if one keeps silent) in such broad or unconfined terms arguably raises another possible issue. Taking the reasoning laid down in *Audi* to its logical conclusion, it is certainly arguable that a respondent in these circumstances (that is, failing to respond to a previous payment claim and being in breach of the duty to speak) may well be estopped from raising objections to any matters raised by a claimant in its previous payment claims, even where such matters are reclaimed under a subsequent or new payment claims. The ramifications of this could be far reaching and contribute to the paradigm shift in how adjudication is to be approached.

29 Imagine the not uncommon situation where a respondent is presented with Payment Claim No 1 and chooses not to issue a payment response. The claimant then proceeds to reissue its claims under Payment Claim No 1 together with new claims, in the following Payment Claim No 2. Since the respondent had breached his duty to speak or misjudged and kept silent for Payment Claim No 1, is the respondent estopped from raising objections only to Payment Claim No 1 *simpliciter* (that is, he retains his right to and can still raise any objections in its response to the subsequent Payment Claim No 2), or is the respondent also estopped from raising objections to any of the

26 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [71].

27 *Audi Construction Pte Ltd v Kian Hup Construction Pte Ltd* [2018] 1 SLR 317 at [70].

28 See *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2012] 1 SLR 1157 and *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380.

matters or claims raised or made in Payment Claim No 1, whenever these matters reappear in any subsequent payment claims?

30 *Audi* would appear to mandate that respondents raise any and all objections to both the validity and merits of a payment claim from the earliest as well as subsequently in each and every payment response. Essentially this means that technical legal arguments must be articulated and raised right at or from the outset or the “earliest possible opportunity”, the very first payment response if need be.

31 While there may be some possible rationale to contend that a respondent should be estopped from raising objections to the merits of the payment claim (disputing its quantum due to set-off, counterclaims *etc*), it is more difficult to see that the same should apply in respect of jurisdictional arguments for which a vast majority of respondents may not readily be aware, given that most respondents are generally not legally schooled, nor do they have much understanding of the law or changes to the law.

32 Coupled with the reality that timelines are extremely tight under the SOP Act and parties are often in a rush to deal with payment matters, a broad and unrestrained application of the “duty to speak” may tilt the balance against respondents.

33 The issue of estoppel has just as great an impact on how adjudicators are to exercise their powers. Following *Audi*, the challenges facing adjudicators may not be merely confined to the rock and deep blue sea dilemma apparently arising from a simple application of the somewhat differing positions in *Audi* and *W Y Steel v Osko* relating to patent or manifest error as mentioned above.²⁹ There is also the quandary of reconciling the findings of *Audi* with the express provisions of the SOP Act. *Audi* has now made clear that a payment claim that is not filed on the date specified in the contract is invalid. In such a case, it is entirely possible (if not likely) for a claimant who has filed a payment claim two days early to lodge the adjudication application two days too early as well.

34 How then is such a situation to be addressed under the SOP Act and by *Audi*? Section 13(3)(a) of the SOP Act provides that an adjudication application:

... shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12.

29 See paras 22–23 above.

More importantly, s 16(2) of the SOP Act provides that an adjudicator:

... shall reject —

- (a) any adjudication application that is not made in accordance with section 13(3)(a), (b) or (c) ...

[emphasis added]

In this instance and in the light of the decision in *Audi*, and assuming a respondent raises an objection in the adjudication proceedings as to the early lodgement of the adjudication application, does the adjudicator apply the provisions of the SOP Act and reject the adjudication application, or does the adjudicator apply the reasoning of *Audi* and proceed with a determination (largely in favour of the claimant) on the basis that the respondent is estopped from raising any objections?

35 Would the position be any different if the respondent raises *no* objection but the adjudicator notices the anomaly of his own accord? Does the adjudicator proceed to reject the adjudication application as he is, on the face of the provisions, obliged to under the SOP Act, or is he bound by the decision of *Audi* and obliged to find in favour of a claimant as the absence of any challenge to the validity of a payment claim must mean that the payment claim is valid given the operation of estoppel against the respondent in such circumstances?

IX. Patent error and duty to adjudicate

36 Any discourse relating to *Audi* must now also involve a consideration of the requisite part of the very recent Court of Appeal decision in *Comfort Management*. In *Comfort Management*, the court provided welcome and clear guidance on the adjudicator's duty to adjudicate and the concept of "patent error".

37 On the duty to adjudicate, the Court of Appeal said that s 17(3) of the SOP Act "both *prescribes* the matters that an adjudicator must consider in determining an adjudication and *restricts* his consideration for that purpose to those matters only" [emphasis in original].³⁰ The Court of Appeal elucidated that an adjudicator must not simply rubber-stamp an unchallenged payment claim and must have at least a "positive" premise for the determination.³¹ Interestingly, and also significantly, the Court of Appeal in *Comfort Management* made clear that "an adjudicator has an *independent* duty to address his mind to and

30 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [52].

31 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [56].

consider the true merits of a payment claim”³² and that “an adjudicator’s duty to adjudicate is *conceptually distinct* from a respondent’s entitlement to make submissions before him” [emphasis added].³³

38 Having acknowledged this conceptual dissimilitude, the court then proceeded to reconcile the two well-founded principles, saying:³⁴

... the only meaningful path between these two sets of principles, each of which is well founded in the Act, therefore, is to allow the respondent to make submissions before the adjudicator to ensure that the adjudicator complies with his overriding duty to adjudicate, but no more than that, so that the teeth of the restriction in s 15(3)(a) or of any waiver or estoppel arising under the *Audi Construction* analysis are not significantly blunted. Such submissions, in our judgment, must be in and only in the nature of highlighting patent errors in the material properly before the adjudicator.

On the matter of patent error, the Court of Appeal stated that:³⁵

In essence, a patent error is an error that is obvious, manifest or easily recognisable. It refers to an error that is in the material before the adjudicator for the purpose of his adjudication.

On a plain reading, it does appear that a “patent error” may very well include errors involving jurisdictional issues such as a breach by a claimant of the requirements of the SOP Act.

39 Reading the two decisions of the Court of Appeal together, it seems that an adjudicator must consider all the matters prescribed in s 17(3) of the SOP Act, including any matters not raised in the payment response, although the respondent in an adjudication who has not provided a payment response can only submit on patent errors on the material that is properly before the adjudicator for the purpose of the adjudication.

40 Although this appears to be a neat solution in theory, it may not be so easy to apply practically. If a respondent who has not served a payment response were to make submissions or raise issues contained in the material before the adjudicator which fall within s 17(3) of the SOP Act and which material shows a breach of the provisions of the SOP Act by a claimant, then following the decision of *Audi* the adjudicator is obliged, in principle, to disregard the submissions. Yet, as decided in *Comfort Management*, the adjudicator has at the same time a separate,

32 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [34].

33 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [34].

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

35 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [22].

distinct and independent duty to consider these very matters on his own. Is the adjudicator then expected to wipe clear the respondent's submissions from her or his mind and then consider the matters prescribed in s 17(3) of the SOP Act afresh as if the respondent had never raised them? Or is the adjudicator constrained by the "duty to speak" estoppel identified in *Audi* and prevented from considering the issue separately, distinctly and independently?

41 This supposition is not as irrational as it may appear at first blush. Take, for example, the scenario mentioned earlier where there is neither a payment response nor an adjudication response. Following the decision in *Comfort Management*, an adjudicator who notices that a payment claim is not served validly is probably expected to make a determination accordingly, that is, dismissing the adjudication application. If so, it stands to reason that a respondent who identifies a "patent error" that impairs the adjudication proceedings jurisdictionally and raises it should not be worse off than a respondent who does nothing.

X. Is there place for a "prejudice test"?

42 A discussion about *Audi* and the sister decision of *Comfort Management* requires looking at the argument of "no prejudice" that was promulgated by the claimant before the judge at the first instance in *Audi*³⁶ in an attempt by the claimant to avoid a finding of invalidity in relation to the early service of the payment claim. The judge rejected any possibility of applying such a test or threshold. The issue seems not to have been articulated in the arguments before the Court of Appeal in *Audi* and if it were, the Court of Appeal appears to have thought it unnecessary to make any substantive comments in relation to any such argument. In the circumstances in *Audi*, the decision to reject or leave aside the "no prejudice" argument is probably correct.

43 While seemingly rudimentary and often perceived as a futile argument of the guileless, to say that there can never be any place for the "no prejudice" test may be precipitate, even rash. Earlier in this article, the authors mentioned the possibility of a shrewd contractor who specifies a fixed time of 12.00 noon for service of a payment claim and the possibility of applying the "good reason" exception raised in *Audi* to address the difficulties of a subcontractor claimant having (*in extremis*) a window of only 60 seconds to serve a payment claim. It may well be that the "no prejudice" test could, apart from the "good reason"

36 *Audi Construction Pte Ltd v Kian Hup Construction Pte Ltd* [2018] 1 SLR 317 at [11].

exception, provide a suitable recourse to permit service of a payment claim minutes or the hour or two earlier.

XI. In sum

44 All things considered, the decision in *Audi* seems to indicate that the Court of Appeal is now more inclined to grant a claimant greater leeway in deviating from the express provisions of a construction contract than it would a respondent who fails to serve a payment response. The courts have now turned firmly away from respondents who fail to provide a payment response.

45 This then brings us back to the question asked earlier in this article – is there a special canon about personal service by hand of a payment claim that trumps nearly all other modes of service and leads to the creation of new dispensations as well as the practically unpardonable sin of silence? On a plain reading of *Audi*, this does appear to be so.

46 It may well be fair to say that the SOP Act, often described as or associated with “rough justice”, is now quite the much rougher for respondents, especially the silent ones. The “pay now, argue later” philosophy that underpinned the conception of the SOP Act³⁷ seems to have over time evolved into a rule of “speak now or forever hold your peace”.

37 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [20].