

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 139

Originating Summons 426 of 2019

Between

(1) Lendlease Singapore Pte Ltd

... Plaintiff

And

(1) M & S Management &
Contracts Services Pte Ltd

... Defendant

GROUND OF DECISION

[Building and Construction Law] — [Timeline for lodging Adjudication Application] — [Section 13(3)(a) Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)]

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Lendlease Singapore Pte Ltd
v
M & S Management & Contracts Services Pte Ltd

[2019] SGHC 139

High Court — Originating Summons 426 of 2019
Lee Seiu Kin J
10 May 2019

30 May 2019

Lee Seiu Kin J:

1 The sole issue in this case is whether the adjudication application (“AA”) lodged by the defendant was out of time in breach of s 13(3)(a) of the Building and Construction Industry Security of Payment Act (“SOPA”). This depended on when the time for lodging the AA began to run: the date of physical service of the payment claim, or the date stated in the payment claim.

Background

2 The plaintiff is the main contractor for a project titled “Paya Lebar Quarter”,¹ and engaged the defendant to supply general labour for the project pursuant to a contract.² This contract was termed the “Labour Hire Agreement”.³

¹ Levis David Alan, 1st Affidavit at para 5.

² Levis David Alan, 1st Affidavit at para 6.

³ Manjit Singh Affidavit, para 4.

The contract provided for payment claims to be made on the 20th day of each month.

3 On 18 January 2019, the defendant served payment claim no 29 (“PC29”) on the plaintiff. This was a Friday. However, PC29 was dated 20 January 2019, which was a Sunday.

4 The plaintiff subsequently served its payment response (“PR29”) on 8 February 2019. Thereafter, the defendant served its notice of intention to apply for adjudication on 25 February 2019 and lodged the AA in SOP/AA 084 of 2019 with the Singapore Mediation Centre on 25 February 2019.⁴ The plaintiff then filed its adjudication response on 5 March 2019, detailing its objection that the AA lodged on 25 February 2019 was out of time.⁵

5 The adjudicator below dismissed the plaintiff’s jurisdictional objection in the adjudication determination (“AD”) and found that the defendant had lodged the AA within time.⁶

Parties’ cases

6 The plaintiff argued that the operative date from which the time began to run for the purpose of lodging the AA (“the operative date”) was the date on which PC29 was *physically* served. The plaintiff cited contractual terms, which in its view, showed that the operative date as the physical date of service.

⁴ Levis David Alan, 1st Affidavit at para 9.

⁵ Levis David Alan, 1st Affidavit at para 11.

⁶ Levis David Alan, 1st Affidavit at para 12.

7 Clause 7.1(c)(i) read with Annexure Part A of the contract provided for payment claims to be made on the 20th day of each calendar month. The provision reads:⁷

7.1 Payment Claim

...

c) [The defendant] must give [the plaintiff] a payment claim on account of the Fee and all other amounts then payable by [the Plaintiff] to [the Defendant] under the Agreement:

(i) at the times stated in Annexure Part A, until completion of the Services or termination of the Agreement (whichever is earlier);

...

Annexure Part A

Payment Claim Date **20th calendar day of each month**
(clause 7.1(c)(i))

[emphasis in original]

8 If the 20th day was on a non-business day, the contract required the payment claim to be given on the preceding business day. This is found in cl 1.2 which provides as follows:⁸

1.2. Interpretation

...

d) If any notice is to be given, or any other act, matter or thing is to be done on a specified day, and that day falls on a day which is not a Business Day, then it must be given or done on the preceding Business Day

9 A “Business Day” is defined under cl 1.1 as follows:⁹

⁷ Levis David Alan, 1st Affidavit at p 48; p 57.

⁸ Levis David Alan, 1st Affidavit at p 42.

⁹ Levis David Alan, 1st Affidavit at p 40.

1.1. **Business Day** means any day other than:

- a) a Saturday or Sunday;
- b) a public holiday, special holiday or bank holiday in the place where the Site is located; or
- c) 27, 28, 29, 30 and 31 December.

10 Thus, since the 20th of January 2019 was a Sunday, the plaintiff argued that the contract required that the payment claim be given on the preceding Business Day, *ie*, on 18 January 2019, a Friday.

11 The contract also specified when a payment certificate (contractually deemed to be a payment response) was to be issued. Clause 7.2(a) states:¹⁰

7.2. Payment Certificate

a) After agreeing the payment claim amount and in any case within 21 days of receiving the payment claim duly submitted pursuant to clause 7.1, [the Plaintiff] must issue a progress payment to [the Defendant] ...

12 The defendant disagreed with the plaintiff's interpretation of the contractual terms and submitted that the operative date was the date on which PC29 was *dated*. In so arguing, it relied heavily on the Court of Appeal decision in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4 ("*Audi Construction*").

13 Both parties agreed that if the operative date was on 18 January 2019, the AA would have been lodged out of time and if it was 20 January 2019, then it would have been validly lodged. Thus, the only issue to be determined was whether the operative date was on 18 or 20 January 2019.

¹⁰ Levis David Alan, 1st Affidavit at p 48 – 49.

My decision

14 In my view, the contractual terms are clear. Clause 7.1(c)(i) read with Annexure Part A provides that the defendant “must give” the plaintiff a payment claim on the 20th day of each month. Clause 1.2 provides that if any “act, matter or thing is to be done on a specified day, and that day falls on a day which is not a Business Day, then it must be ... done on the preceding Business Day”. There is no dispute that the preceding Business Day in question is 18 January 2019. Therefore, as 20 January 2019, the day that the defendant was required under the contract to “give” the plaintiff a payment claim, fell on Sunday, then cl 1.2 of the contract operates to alter that day to Friday, 18 January 2019.

15 The defendant cited the case of *Audi Construction* as authority for the proposition that the operative date is 20 January 2019, which is the date appearing on a payment claim. I did not think that *Audi Construction* was applicable, for the reasons set out below.

16 *Audi Construction* involved the question of the validity of the service of a payment claim. The contract provided for payment claims to be given on the 20th day of each month. As 20 November 2016 fell on a Sunday, the appellant served the payment claim for that month on Friday 18 November 2016 but post-dated it to 20 November 2016. The Court of Appeal held that in serving the payment claim on 18 November 2016 and post-dating it to 20 November 2016, the appellant had adopted a “practical and sensible way of complying with the parties’ contract” because it was clear from the evidence that service could not practically have been effected on a Sunday, as the respondent’s office was closed. The payment claim served on 18 November 2016 was therefore valid under s 10(2)(a) of SOPA.

17 Although the facts in *Audi Construction*, at first blush, appear similar to the present case, there is one material difference. In *Audi Construction*, there was no express contractual provision for the situation where the date for serving a payment claim falls on a Sunday. In *Audi Construction*, the Court of Appeal held at [26] that the service was valid for two reasons. Firstly, there was a “good reason” for the appellant to serve it on the preceding Friday, because it was not possible to do it on the contractual date which fell on a Sunday. Secondly, as the appellant had put the contractual date as the date of the payment claim, there could be no confusion as to the operative date of the payment claim. The Court of Appeal stated at [28] that the appellant had adopted a “practical and sensible way” of complying with the contract.

18 In the present case, the contract specifically provided for the situation where the date of service of the payment claim falls on a Sunday. In such a situation, the parties must comply with the contractual provisions as required by s 10(2)(a) of SOPA. *Audi Construction* is therefore not applicable in the circumstances of the present case. Indeed, the Court of Appeal in *Audi Construction* explicitly restricted its decision to the two factors set out in [17] above and stated as follows at [28]:

We emphasise, however that our decision in this regard was made on the basis of the combination of the two facts set out at [26] above.

19 Given the above, I could not agree with the defendant that the date of the payment claim was the operative date because the provisions of the parties’ contract clearly provide for the date of service of the payment claim for January 2019 to be 18 January as 20 January fell on a Sunday. The plaintiff had served its payment claim on that day and time would run from that day. The plaintiff’s act of post-dating it cannot have any effect on the operative date of the payment

claim.

20 As there was no dispute on the consequences that follow from this finding, I found that the AA lodged on 25 February 2019 was out of time and in breach of the mandatory provision in s 13(3)(a) of SOPA. Accordingly, I set aside the AD and ordered the defendant to pay costs to the plaintiff fixed at \$5000.

Lee Seiu Kin
Judge

Joseph Lee Sien Liang, Chew Wei Jie and Yap Pei Yin (LVM Law
Chambers LLC) for the plaintiff;
Brendon Choa Sn-Yien, Zachariah Chow Jie Rui and Milon Goh
(ACIES Law Corporation) for the defendant.
