

IT IS ABOUT TIME

Navigating Timelines for Adjudication, Payment Claims and Payment Responses

[2024] SAL Prac 19

This article discusses the recent cases dealing with timelines prescribed for issuance of payment claims and payment responses and making of adjudication applications. The cases' practical effect and possible unintended consequences are also highlighted in the article.

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I. Introduction

1 Three recent cases on the Building and Construction Industry Security of Payment Act 2004¹ ("SOP Act") all dealt with proper computation of time. Whether relating to the time for submission of a payment claim, time for issuance of a payment response, or time for making an adjudication application, all carried the effect that if the provisions of the SOP Act are not correctly interpreted and applied, the adjudication application and any resultant adjudication determination would be invalid and liable to be set aside by the court. The decisions also impact other aspects of practice under the SOP Act, some of which are likely to have unintended consequences.

1 2020 Rev Ed.

II. Time for applying for adjudication

2 In *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd*² (“*HP Construction*”) the issue that the Appellate Division of the High Court (“ADHC”) had to consider was whether the adjudication application had to be made within seven or eight days from the end of the dispute settlement period.³ The ADHC upheld the General Division of the High Court’s ruling that it should be eight days.

3 In arriving at its decision, the ADHC considered s 13(3)(a) of the SOP Act, which provides that the adjudication application must be made within seven days “after the entitlement of the claimant to make an adjudication application first arises under section 12”. Section 12(2) in turn provides that the claimant is entitled to make an adjudication application if the dispute is not settled or no payment response is provided *by the end of the dispute settlement period*. The ADHC reasoned that the entitlement to make an adjudication application would first arise the day after the last day (which is the end) of the dispute settlement period. Therefore, seven days *after* the day that the entitlement first arises would be the eighth day after the end of the dispute settlement period.

III. Time for issuance of adjudication determination

4 There is also another section in the SOP Act to which the same interpretation will apply.⁴ Section 17 provides the period for an adjudicator to issue his determination.

5 Sections 17(1)(a) and 17(1)(b) provide that the adjudicator must determine the adjudication application within seven or 14 days respectively (as the case may be) “after the commencement of the adjudication” under s 16 of the SOP Act. Section 16 in turn

2 [2024] 1 SLR 220.

3 This issue was in fact first raised in Tan Joo Seng, “What a Difference a Day Makes – When Does the Time for Lodging an Adjudication Application Start and End?” [2019] SAL Prac 29.

4 This was recognised in *H P Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2024] 1 SLR 220 at [34].

provides that an adjudication “commences immediately upon the expiry of the period” for the issuance of an adjudication response. The period for the issuance of an adjudication response is seven days after the receipt of the adjudication application. Thus, the adjudication would commence on the day immediately after the due date for the issuance of the adjudication response. Since the adjudicator has seven or 14 days (as the case may be under s 17(1)) “after the commencement of the adjudication”, the adjudicator may therefore issue his determination either within eight or 15 days (as the case may be, depending on whether s 17(1)(a) or 17(1)(b) applies) after the due date for the issuance of the adjudication response.

6 This decision in *H P Construction* thus brings certainty to the timeline for the making of an adjudication application after the dispute settlement period, and for the issuance of an adjudication determination.

IV. Time when payment claim is served

7 *Asia Grand Pte Ltd v A I Associates Pte Ltd*⁵ (“Asia Grand”) dealt with a situation when there was no contractual provision prescribing for when the payment claim must be served. Teh Hwee Hwee JC held that any payment claim served before the end of the calendar month is deemed to have been served on the last day of the calendar month itself. The learned judge rejected the argument that the payment claim may be considered as having been served on the actual date of its service before the end of the calendar month. This was based on a reading of ss 10(2)(a)(ii) and 10(3)(b) of the SOP Act, read with regs 5(1) and 5(3) of the Building and Construction Industry Security of Payment Regulations⁶ (“SOPR”).

5 [2023] SGHC 175. This judgment is discussed in detail in Ng Wei Ying, “A Contractor’s Entitlement to Adjudication – Judicial Interpretation of Amendments to the Building and Construction Industry Security of Payment Act 2004” [2023] SAL Prac 21.

6 2006 Rev Ed.

8 Section 10(3) of the SOP Act and reg 5(3) of the SOPR were introduced on 15 December 2019 by way of amendments to the SOP Act.⁷

9 Section 10(3)(a) was intended to ensure that any early service of a payment claim before the contractual due date for the issuance of a payment claim by a claimant would not invalidate the payment claim.⁸

10 It is less clear that s 10(3)(b) was intended to avoid a payment claim from becoming invalid; since in the absence of a contractual stipulation for the service of a payment claim, the payment claim may be served *at any time* and would not have been invalid in any event as long as only one claim is served per contractual month.⁹

11 Regulations 5(1) and 5(3) on the other hand were clearly intended to address how the term “month” was to be regarded, and to supersede the interpretation taken by the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng*¹⁰ which held that the calendar month should commence on the first day of the calendar month, rather than from the date of the contract.¹¹

12 In *Asia Grand*, it would appear that the 2019 amendment to the SOP Act, which introduced s 10(3)(b) that is read with regs 5(1) and 5(3) of the SOPR, had possibly the unintended effect of rendering the claimant’s adjudication application premature and hence invalid. The claimant, in determining the period to lodge the adjudication application, calculated from the *actual* date of service of the payment claim (which was before the end of the calendar month) rather than from the *deemed* date of service under s 10(3)(b) (which was the end of the calendar month). If the pre-2019 amendment SOP Act had applied, the claimant would

7 Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018).

8 See Chow Kok Fong *et al*, *Amendments to the SOP Act* (Sweet & Maxwell, 2019) at paras 2.019–2.022.

9 See *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401.

10 [2013] 1 SLR 401.

11 See *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 at [93] and [94].

not have had this issue, and its adjudication application would have been valid.

13 However, what has been achieved by the introduction of s 10(3)(b) of the SOP Act is that for a respondent, there is now greater certainty as to when the time for issuance of its payment response commences. In the absence of a contractual provision for the issuance of a payment claim, any payment claim issued by a claimant would always be deemed to have been served on the last day of the calendar month. The period within which a respondent must issue its payment response would then start from the last day of the calendar month. For any payment claim served before the end of the calendar month, there would not be any need for a respondent to respond any earlier than after the end of the calendar month.

14 Indeed, as the next case shows, where there is no contractual provision for the service of a payment claim, a respondent should not respond to a payment claim any earlier than after the end of the calendar month in which the payment claim is served.

V. Payment response to early payment claim is invalid

15 *Hiap Seng Building Construction Pte Ltd v Hock Heng Seng Contractor Pte Ltd*¹² (“*Hiap Seng*”) was also a case where the subcontract did not prescribe a date for the service of a payment claim. The claimant served its payment claim on 5 July 2023. Following the case of *Asia Grand*, the High Court in *Hiap Seng* therefore held that the payment claim was deemed served only at the end of the calendar month, *ie*, 31 July 2023.

16 The respondent submitted its payment response on 27 July 2023. This would have been within the timeline, if the payment claim was considered as having been served on 5 July 2023. However, this was not so; as stated above, the payment claim was deemed served only on 31 July 2023.

12 [2024] 4 SLR 940.

17 The High Court in *Hiap Seng* held that a payment response could not be served before any payment claim was considered to have been served. The payment response was therefore defective and invalid.¹³

18 This case provides a lesson for respondents. If there is no contractual provision for the issuance of a payment claim, a respondent should not respond to the payment claim based on the actual date of service of the payment claim. Rather, its deadline to serve its payment response should start running from the end of the calendar month in which the payment claim was served.

VI. Unintended pitfalls

19 From the cases of *Asia Grand* and *Hiap Seng*, it appears that in seeking to push a claimant's early service of a payment claim to the end of the calendar month where there is no contractual date prescribed for the service of a payment claim, s 10(3)(b) has created potential unintended pitfalls for both the claimant and the respondent:

(a) For the claimant, the time for adjudication application does not start to run from the actual date of service of the payment claim, but from the end of the calendar month within which the payment claim was issued.

(b) For the respondent, the time for issuance of its payment response should only start from the end of the calendar month within which the payment claim was served, rather than the actual date of service of the payment claim.

20 Section 10(3)(b) has also created the opportunity for a wily claimant to intentionally issue its payment claim at the

13 The court thereafter relied on estoppel to estop the applicant from raising the invalidity of the payment response to invalidate the adjudication determination. For the purposes of this article, this aspect of the decision will not be discussed, as the focus is on the provisions relating to time.

beginning of a calendar month, hoping for the respondent to diligently respond with its payment response to the payment claim before the end of the calendar month, and thereafter argue that the payment response is invalid because it cannot be submitted any earlier than the deemed service of the payment claim, which is at the end of the calendar month.

21 It will certainly be imperative for all parties intending to proceed with adjudication to familiarise themselves with the cases of *H P Construction*, *Asia Grand* and *Hiap Seng*. Before then, it is likely that several more will fall victim to the pitfalls highlighted.