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PREMATURE SERVICE OF PAYMENT CLAIMS UNDER THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT

Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd[1]

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In *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*, the Singapore Court of Appeal considered a payment claim to have been validly served although it was served earlier than the contractually stipulated date. This was because the service of the payment claim was "effective" only from the contractually stipulated date, and the claimant had had a "good reason" to serve the payment claim early. This note critically examines the reasoning in *Audi* vis-à-vis the existing law, the principle of freedom of contract, and the intentions of the parties in that case. In the absence of future judicial elaboration on the "effective service" and "good reason" doctrines, there is a risk that, in future, respondents may draw on these doctrines to delay or frustrate the attempts of claimants to recover payments rightly due to them. Moreover, given that the Court had found that the doctrine of estoppel would have operated in favour of the Claimant anyway, the creation of the "effective service" and "good reason" principles was not necessary.

I. INTRODUCTION

There are two important policy considerations behind the *Building and Construction Industry Security of Payment Act*.[2] First, the *SOP Act* was intended to create a "fast and low cost adjudication system to resolve payment disputes".[3] Second, according to the Court of Appeal, "certainty is vital in the context of an abbreviated process of dispute resolution such as that set out in the Act."[4] This includes certainty as to time

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1 [2017] SGHC 165 [*Audi (HC)*]; [2018] 1 SLR 317 (CA) [*Audi (CA)*] [collectively, *Audi*].

2 (Cap 30B, 2006 Rev Ed Sing) [*SOP Act*].

3 Sing, *Parliamentary Debates: Official Report*, vol 78, col 1113 at cols 1112-1138 (16 November 2004), cited in *Audi (CA)*, *supra* note 1 at para 1.

4 *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 (CA) [*Grouteam*] at para 54.

limits for serving the payment claim and payment response:

> The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. It is commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value.[5]

These two policies can come into tension. For example, the ideal of certainty could be used to justify the existence of exacting technical requirements imposed on claimants. If the claimant does not comply with such requirements to the letter, its claim, even if wholly meritorious, will fail, hence creating delays and increasing costs.

This tension lay at the heart of the case of *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd*.[6] This case concerned section 10(2)(a) of the *SOP Act*, which provides: "A payment claim shall be served—at such time as specified in or determined in accordance with the terms of the contract." Kian Hiap Construction Pte Ltd ("the Respondent") had engaged Audi Construction Pte Ltd ("the Claimant") as a sub-contractor. According to the contract between the parties, the Claimant was "entitled to serve a payment claim as defined in Section 10 of the Act on the date for submission of progress claims as set out in Appendix 1."[7] Appendix 1 stated that the date "for submitting progress claims" was the "20th day of each calendar month".[8] On 18 November 2016, the Claimant served on the Respondent a payment claim dated 20 November 2016.[9] Its reason for not serving the payment claim on the 20th was that the 20th was a Sunday and the Respondent's office was closed.[10]

The Respondent did not serve a payment response on the Claimant. Therefore, the Respondent was not allowed to raise before the Adjudicator "any reason for withholding any amount",[11] and was instead constrained to argue that the Adjudicator had no jurisdiction to begin with. Accordingly, when the matter went to adjudication, the Respondent disputed that the payment claim was valid, on the grounds that it had not been served *on* the 20th.[12] The Adjudicator rendered an adjudication determination in favour of the Claimant;[13] he agreed with the Claimant that, on a "purposive approach" to contractual interpretation, the contract required the Claimant to "serve a payment claim *by* the 20th day of each calendar month and if the 20th was a Sunday or public holiday, on the last working day immediately preceding the 20th".[14]

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5 *Chase Oyster Bar v Hamo Industries* (2010) 272 ALR 750 (NSWCA) at para 47, cited in *ibid*.

6 *Supra* note 1.

7 *Audi (HC)*, *supra* note 1 at para 5.

8 *Ibid*.

9 *Audi (CA)*, *supra* note 1 at para 3.

10 *Ibid* at para 7.

11 *SOP Act*, *supra* note 2, s 15(3).

12 *Audi (HC)*, *supra* note 1 at para 2.

13 *Ibid*. At the time of writing, the award has not been published in the Singapore Construction Adjudication Review.

14 Adjudication Application No SOP/AA483 of 2016—*Adjudication Determination* at paras 45, 46 [emphasis added] [*Adjudication Determination*], which appears in the Agreed Bundle of Documents in CA/Civil Appeal No 136 of 2017, vol 1, at p 46ff (located in the *Case File*). For completeness, it may be noted that the Respondent had also sought to argue that part of the payment claim had been "made fraudulently"; but the Adjudicator rejected this contention, adding that this objection "could have been set out in a payment response" instead: *Adjudication Determination* at paras 74, 80.

A. *The High Court's Decision*

Because the Respondent had not paid the adjudicated amount to the Claimant,[15] it was not entitled to apply for review of the adjudication determination.[16] Therefore, all the Respondent could do, short of making payment to the Claimant, was to apply to the High Court to set the adjudication determination aside on grounds, *inter alia*, that the payment claim had not been served *on* the contractually stipulated date, which was the 20th.[17] The Claimant retorted that the contract, properly interpreted, meant that the payment claim was to be served *by* the 20th.[18] The Claimant also argued that, in any event, the Respondent had waived its right to object to the premature service of the payment claim.

The High Court set aside the adjudication determination. It reasoned that "the words [of the contract] are clear enough":[19] "the terms of the Contract provide that service of the [payment claim] must be done on the 20th day of the month, neither sooner nor later."[20] Because the payment claim had been served prematurely, it had not been a valid payment claim.[21] While it was unclear whether as a matter of law the Respondent could waive its objection (or could be estopped from making it),[22] the High Court found that no waiver or estoppel could have been made out on the facts.[23]

For completeness, it should be noted that the Respondent also sought to argue that the payment claim was invalid because it did not, on its face, state explicitly that it was a claim made under the *SOP Act*.[24] However, the High Court held that this was of no relevance.[25]

B. *The Court of Appeal's Decision*

The Claimant appealed to the Court of Appeal, which allowed the appeal and restored the outcome of the Adjudicator's determination.

The Court of Appeal agreed with the High Court's interpretation of the contract: "where the parties' contract provides for the service of payment claims *on* a stipulated date, this means service *on* that date and not service *by* that date."[26] The Court of Appeal added that this result was justified by the requirement of "certainty" in a "regime which. . . places great importance on timeliness".[27] However, it found that

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15 This is evident from the fact that the Respondent's application in *Audi (HC)*, *supra* note 1, was made in response to the Claimant's application to enforce the adjudication determination: *Audi (CA)*, *supra* note 1 at para 8.

16 *SOP Act*, *supra* note 2, s 18(3).

17 *Audi (HC)*, *supra* note 1 at para 3(a).

18 *Ibid* at para 6.

19 *Ibid* at para 9.

20 *Ibid* at para 13.

21 *Ibid* at para 50.

22 *Ibid* at para 34.

23 *Ibid* at paras 46, 47.

24 *Ibid* at paras 14, 15.

25 *Ibid* at paras 16-22.

26 *Audi (CA)*, *supra* note 1 at para 23.

27 *Ibid*.

the doctrines of waiver and estoppel were available as a matter of law;[28] and that, on the facts, the Respondent was "estopped from raising an objection to the payment claim's invalid service" because the Respondent did not serve a payment response on the Claimant setting out its objections.[29]

This note will accept that all this was correct. This would have sufficed to dispose of the appeal in favour of the Claimant. However, this was not the main reason why the Court of Appeal allowed the Claimant's appeal. Instead, the Court of Appeal held that, in the first place, the payment claim *had* been validly served.[30] This was because:

> First, the [Claimant] had a good reason for effecting service of the payment claim before 20 November 2016. That day was a Sunday, and there was no dispute that the [R]espondent's office was closed on Sundays. Second, there could not have been any confusion as to the payment claim's operative date. The payment claim was correctly dated 20 November 2016, the day on which the contract entitled the [Claimant] to serve a payment claim. In our judgment, it was clear and obvious to the [R]espondent 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.[31]

This note critically considers the Court of Appeal's reasoning in the passage just cited, in which the Court of Appeal has introduced two new ideas:

(a) the idea that a payment claim has an "operative date" which may be different from the date on which the payment claim is served; and
(b) the idea that there can be a "good reason for effecting service of the payment claim" at a time other than that stipulated in the contract.

II. The Distinction Between "Effective" or "Operative" Service on the One Hand, and Service on the Other

The Court of Appeal's reasoning rests on the assumption that a payment claim has such a thing as an "operative date", before which the payment claim, though "physically served",[32] does not "take effect".[33] It is not clear how this distinction between effective or operative service on the one hand and service *simpliciter* on the other may be squared with the existing law or with the intentions of the parties in *Audi*. Moreover, there is a risk that it could create practical difficulties.

A. *The Distinction vis-à-vis the* SOP Act

First, the aforementioned distinction is not located in the *SOP Act*. The *SOP Act* makes no reference to such concepts as "effective" service or an "operative date".

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28 *Ibid* at para 62.
29 *Ibid* at para 71.
30 *Ibid* at para 26.
31 *Ibid*.
32 *Ibid*.
33 *Ibid* at para 27.

Indeed, the *SOP Act* (and the associated *Building and Construction Industry Security of Payment Regulations*)[34] does not even require the payment claim to bear any date at all. By contrast, other documents, such as the adjudication application, are explicitly required to be dated,[35] which suggests a clear intention by the framers of the *SOP Regulations* (made pursuant to the *SOP Act*) that no significance be attached to the date which the payment claim bears. Instead, the only relevant date relating to payment claims mentioned in the *SOP Act* is the *date of service*: for example, as the High Court pointed out,[36] section 11 of the *SOP Act* defines the deadline for service of the payment response by reference to a number of "days after the payment claim is served under section 10".[37]

Where, then, did the doctrine of "effective" or "operative" service come from, if not the *SOP Act*? Though the Court of Appeal in *Audi (CA)* did not cite any authorities for it, an examination of the submissions[38] shows that the Claimant had cited, by way of analogy, part of the following passage from the previous Court of Appeal case of *Lee Wee Lick Terence v Chua Say Eng*:

> [W]e do not agree. . . that a payment claim which satisfies all the statutory requirements is not a payment claim if it is expressly stated not to be a payment claim, and that it would be absurd for the court to accept it as a payment claim. . . In our view, the claimant in such a case is merely saying that the payment claim is *not operative as a payment claim*. It is no different from saying to the respondent: 'You do not need to pay this claim until I give you further notice'. Another example would be the claimant saying to the respondent that: 'You need only pay this claim by [a stated date]', and that date has not passed. 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.[39]

It is not clear whether the Court of Appeal in *Audi (CA)* had been influenced by the italicised words in the preceding passage. It is submitted that those words do not support the conclusion in *Audi (CA)*. The Court of Appeal in *Chua Say Eng* did *not* state that there exists a distinct legal concept of "operative service" such that a payment claim can be served on one date (A) but be "operative" with effect only from a later date (B). It merely stated that the *claimant* can be *estopped* from relying on the claim prior to date B; if the claimant were to rely on the claim prior to date B, the respondent would be able to raise this estoppel as a defence. But it cannot be that this estoppel—which is brought about by the *claimant's unilateral* act of post-dating the payment claim—has an impact on the *respondent's* position so as to oblige the respondent to treat the payment claim as having been served on date B. To hold otherwise, as is the effect of the Court of Appeal's decision in *Audi (CA)*, is

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34 *Building and Construction Industry Security of Payment Regulations 2005* (S 2/2005, 2006 Rev Ed Sing) [*SOP Regulations*], made pursuant to the *SOP Act*, *supra* note 2, s 41.

35 *Ibid*, r 7(1)(c)(iii).

36 *Audi (HC)*, *supra* note 1 at para 11 read with para 9.

37 *SOP Act*, *supra* note 2, ss 11(1)(a), 11(1)(b).

38 Appellant's Submissions dated 27 September 2017 at para 41; Appellant's Reply Submissions dated 25 October 2017 at para 5 (located in the *Case File*).

39 *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 (CA) [*Chua Say Eng*] at para 73 [emphasis added].

not only to turn estoppel from a 'shield' into a 'sword', but to place this 'sword' into the hands of the *claimant* rather than the *respondent*.

Moreover, such an argument would neglect another key passage from *Chua Say Eng*, which alludes to the law's placing significance of the fact of service, regardless of what the claimant intends or what the respondent understands by such service. According to *Chua Say Eng*, the scheme of the *SOP Act* is such that:

> [T]he legislated formal requirements for payment claims are designed to ensure that specified items of information are made available to the respondent before the claimant's rights under the Act are engaged. *The emphasis is therefore not on the claimant's intention but on the respondent being given notice* of certain information about the claim (such as the amount claimed, the contract under which the claim is made and a breakdown of the items constituting the claim). As for the mode of giving notice, *Parliament has stopped short of requiring the information to be personally communicated to the respondent*. This can be seen from the service requirements in s 37(1) of the Act: that provision states that documents 'may be served' by personal delivery (s 37(1)(a)), by leaving the document at the respondent's usual or last known place of business (s 37(1)(b)), or by posting or faxing it to that place (s 37(1)(c)). Other modes of service may also be possible. *There is no requirement that the respondent actually needs to understand or even read the payment claim for the service requirement to be met*.[40]

In other words, the point of the *SOP Act* is that, as the High Court in *Audi (HC)* put it, "the entire process is initiated by the service of a payment claim."[41] It should therefore be possible to tell whether the process has begun without asking what, if anything, the respondent has understood by that which had been served. The Court of Appeal's decision in *Audi (CA)* is not in line with this principle.

B. *The Distinction Vis-à-vis the Parties' Intentions*

When they entered into the contract, the parties in *Audi* did not contemplate any distinction between "effective"/"operative" service and service. There was simply no mention of such concepts anywhere in the contractual documents.[42] In fact, the contract clearly stated: "The Contractor [*ie* the Respondent] shall be entitled to serve a payment response as defined in Section 11 of the Act *within 21 days of service* of the payment claim by the Sub-Contractor [*ie* the Claimant]."[43] In other words, the parties had evidently chosen to attach significance *only* to the date of service, and *not* to the date of "effective" or "operative" service.

The Court of Appeal also remarked that effecting service on the 18th was a "practical and sensible way of complying with the parties' contract".[44] There are two

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40 *Ibid* at para 74 [emphasis added].

41 *Audi (HC)*, *supra* note 1 at para 11.

42 The documents constituting the contract appear in the Agreed Bundle of Documents, vol 1, at 76ff (located in the *Case File*).

43 Clause 61 of the "Conditions of Sub-Contract No: KHC/AMKNH/C-42/15" dated 2 October 2015, appearing in the Agreed Bundle of Documents, vol 1, at 88 (located in the *Case File*) [emphasis added].

44 *Audi (CA)*, *supra* note 1 at para 28.

problems with this. First, it is difficult to see how the Court of Appeal could have considered doing so to have been an act of "complying with the parties' contract", given that the Court of Appeal had explicitly made a finding that the proper interpretation of the "parties' contract" was that: "where the parties' contract provides for the service of payment claims *on* a stipulated date, this means service *on* that date and not service *by* that date."[45]

Second, and more fundamentally, the question is not whether the service of the payment claim was in accordance with the *contract*, but rather whether it was in accordance with the *SOP Act*. This was a point which the Court of Appeal itself made (albeit in a different context):

> [W]hat is ultimately being given effect to here is the statutory obligation under s 10(2)(a). It is that obligation which the [R]espondent claimed the [Claimant] had breached. The modality of that obligation is no doubt the parties' contract, but that does not make it any less a statutory obligation in substance.[46]

The requirement as to the timing of service of a payment claim arises from section 10(2) of the *SOP Act*. The relevant parts of section 10(2) read: "A payment claim shall be served—(a) at such time as specified in or determined in accordance with the terms of the contract". According to the Court of Appeal, the terms of the contract state that service is to take effect *on* the 20th. It must therefore follow that the Court of Appeal's new doctrine of "effective service" purports to be a doctrine that takes effect not *in accordance with*, but rather *despite*, the terms of the contract. One may therefore question the relevance of whether service which has taken place is "effective" or "operative", given that section 10(2) states that the permissible time at which a payment claim may be served is to be determined only according to the "terms of the contract" and nothing more. Perhaps it would have been preferable for the Court of Appeal to have based its decision on the notion that, on the proper interpretation of the contract, "on" meant "on or by"; or that the concept of "effective service" had been implied in the contract. This would have reached the same result, but in a manner more clearly coherent with section 10(2) of the *SOP Act*.

C. *The Distinction May Create Practical Problems*

The law and the parties' intentions aside, there is a good practical reason for the law to focus on the fact of service, without reference to whether or not such service is "effective" or "operative". Focusing on the fact of service creates a bright line: it is perfectly easy to tell when service has taken place, for that is a simple question of fact. Legal practitioners are familiar with simple techniques used to prove this fact, such as keeping fax transmission receipts and email transmission receipts; requesting that the recipient of physically delivered documents sign a form to acknowledge receipt; and taking time-stamped photographs to prove that documents have been left at a particular location. By contrast, the decision in *Audi (CA)* may risk blurring this bright line by permitting parties to formulate (indefinitely complex) rules as to when

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45 *Ibid* at para 23 [emphasis in original].

46 *Ibid* at para 36.

service has taken place but is said not to be "effective", which could then raise a potentially complex question of interpretation of these rules.

It is worth noting the implications of the above for the adjudication process. Consider the situation in which the adjudicator has to deal with a preliminary challenge to his/her jurisdiction on the ground that the payment claim has not been validly served.[47] If the validity of service turns only on the *fact* of service, such a preliminary challenge may be disposed of relatively swiftly, in line with the *SOP Act*'s aims of providing a *quick* dispute resolution system—the adjudicator only needs to determine whether and when service has taken place. This was perfectly straightforward in *Audi*: the Respondent had stamped a copy of the payment claim with the words "RECEIVED 18 NOV 2016" and provided a signature to acknowledge receipt;[48] and neither the Adjudicator, nor the High Court, nor the Court of Appeal had ever been in doubt that service had taken place on the 18th.[49] By contrast, according to the Court of Appeal in *Audi (CA)*, the validity of service turns on whether the service is "effective" or "operative", which in turn depends on the content of the payment claim. Following this latter approach, the preliminary challenge would require the adjudicator to enter into a potentially extensive inquiry as to the parties' intentions. This would not only increase costs, but also invite even more disputes over the interpretation of the contract and of the payment claim in the course of applications to court to enforce or set aside the adjudication determination.

III. The "Good Reason" Test

The Court of Appeal's decision that the date of "effective" or "operative" service may be different from the date of service, taken to its logical conclusion, would mean that a payment claim could be served weeks or even months in advance so long as the date written on it is the date on which, according to the contract, service is to take place. However, the Court of Appeal attempted to remove this possibility by stating that early service of the payment claim would only be valid if the claimant had a "good reason for serving [the] payment claim early".[50] Therefore, said the Court, "[o]ur decision in this appeal therefore does not entail that a payment claim may be served as early as a claimant wishes so long as he dates it correctly."[51] This reasoning raises several issues.

First, there is simply no such principle in contract law as a warrant to one party to depart from the clear terms of a contract for a "good reason". It is for the parties, in the exercise of their freedom of contract, to define for themselves, through express contractual stipulation, what they consider to be a good reason to allow or not allow something to be done in a particular way. It is generally not for the courts to formulate a notion of what they consider objectively to be a "good reason" and to impute this notion to the parties. Therefore, if the Court of Appeal had a reason, specific to

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47 The validity of service of the payment claim goes toward the adjudicator's jurisdiction: *Audi (CA)*, *supra* note 1 at para 42.

48 Copy of Claim No 12, Agreed Bundle of Documents, vol 1, at 273 (located in the *Case File*).

49 *Adjudication Determination* at para 57 (located in the *Case File*).

50 *Audi (CA)*, *supra* note 1 at para 29.

51 *Ibid*.

construction law, to do so, it would have been much clearer had this been articulated explicitly.

Second, given the terms of the contract, it is not at all clear why the existence of a "good reason" should have mattered. The Court of Appeal agreed with the Respondent that "the payment claim could have been served on 20 November 2016 by fax, by e-mail, or by leaving it at the respondent's registered office or usual place of business."[52] However, it elliptically stated that this did not "undermin[e] the good reason which the [Claimant] had for physically serving the payment claim early on 18 November 2016."[53] This is potentially confusing because the Court of Appeal had earlier held that, according to the terms of the contract, the payment claim was to be served on the 20th.[54] If it had been perfectly possible for the Claimant to do what the contract said was to be done, how can it be said that the Claimant had had a "good reason" for failing to do so?

Third, the Court of Appeal's judgment does not squarely address the question of what a "good reason" might be. The only "good reason" identified by the Court of Appeal was the fact that the 20th "was a Sunday, and there was no dispute that the [R]espondent's office was closed on Sundays."[55] However, the relevance of this fact is unclear. If the principle is that the claimant ought to serve the payment claim on the Respondent on a day on which the Respondent's office was open, then one would think that there would only have been a "good reason" to serve the payment claim on Saturday the 19th (on which the Respondent's office was open).[56] Surely service on the 19th would come closer to what the contract stipulated (*viz* service on the 20th), compared to service on the 18th. Yet the Court of Appeal held that there was a "good reason" to effect service on the 18th. If that was so, one might ask: would there not have been a "good reason" to effect service on the 17th or even earlier? Yet the Court of Appeal said:

> [I]f the payment claim in this case had been served on 10 November 2016 and dated 20 November 2016, this would not have constituted valid service because, short of evidence to the contrary, there would have been no good reason for serving it this far in advance.[57]

It is not clear exactly how "far in advance" would be considered acceptable.

One might also think that an example of a "good reason" for early service would be a desire to ease business relations between the parties, for example by making it easier for the respondent to process the payment claim. However, the Court of Appeal held that, *even if* the "earlier physical service of the payment claim gave the respondent more time to deal with the payment claim",[58] this "shed no light

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52 *Ibid*.

53 *Ibid*.

54 *Ibid* at para 23.

55 *Ibid* at para 26.

56 *Ibid* at para 29.

57 *Ibid*.

58 *Ibid* at para 32. In truth, early service would not have given the respondent more time because the time limit for serving the payment response started to run from the date of service of the payment claim. This was stipulated in the *SOP Act*, *supra* note 2, s 11(1) (as explained in *Audi (HC)*, *supra* note 1 at paras 10, 11), and also expressly provided for in the contract (Clause 61 of the "Conditions of Sub-Contract

on whether there was compliance with [the contract]"[59]. One may ask: why should a desire to help the other party not constitute a "good reason"? It would appear that the only acceptable "good reason" for the applicant to effect early service is a self-interested one.

Finally, as the Court of Appeal rightly pointed out, the payment claim could simply have been served on Monday the 21st because of section 50(c) of the *Interpretation Act*, which provides that:

> [W]hen any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be [a Sunday or a public holiday], the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day.[60]

This being so, it is not clear why the Court of Appeal considered that there had been a "good reason" to depart from a contractual obligation that was not only possible to perform according to its terms, but for which a statute had provided a permissible alternative. Indeed, the Court of Appeal's decision risks stultifying the legislative intention as to the timing of performance of obligations which would otherwise have to be performed on Sundays.

To this last point, the Court of Appeal also added:

> If parties in future adopt the solution in s 50(c) [of the *Interpretation Act*], there should be no need for them to be unnecessarily 'creative' in their attempts to comply with the contractually-specified date, as the [Claimant] appears to have been in this case through early service of a post-dated payment claim.[61]

With respect, the decision in *Audi* may be seen as having allowed the parties to engage in such unnecessary "creativ[ity]". As the Court of Appeal itself had acknowledged, it had been perfectly possible for the Claimant to "comply with the contractually-specified date" without any sort of creativity at all by effecting service "by fax, by e-mail, or by leaving it at the respondent's registered office or usual place of business".[62] Moreover, if the need for certainty in upholding the clear terms of the contract were not a sufficient reason for the Court of Appeal to refrain from giving its blessing to service of the payment claim on a day other than what the contract provided for, surely the need to uphold the clear meaning of the *SOP Act* read with section 50(c) of the *Interpretation Act* is.

Perhaps matters would have been different if it had been impossible or virtually impossible to comply with the timeline stipulated in the contract, such as, hypothetically, if the contract were to state that the payment claim was to be served during a particular hour: in that case, the Court of Appeal's decision would be easier to understand.[63] However, these were simply not the facts in issue in *Audi*. Even if the

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No: KHC/AMKNH/C-42/15" dated 2 October 2015, appearing in the Agreed Bundle of Documents, vol 1, at 88) (located in the *Case File*).

59 *Audi (CA),* supra note 1 at para 32 [emphasis omitted].

60 *Interpretation Act* (Cap 1, 2002 Rev Ed Sing) [*Interpretation Act*], cited in *Audi (CA)*, *supra* note 1 at paras 34-36.

61 *Audi (CA)*, *supra* note 1 at para 35.

62 *Ibid* at para 29.

63 I am grateful to an anonymous reviewer for this point.

Court of Appeal had intended to scuttle such attempts at the use of unduly onerous contractual provisions to make it difficult for claimants to claim payment, one may question whether this was a good justification for applying the "good reason" doctrine to the facts in *Audi*, where it was both possible to effect service as required by the contract and legally permissible to effect service a day after that.

IV. Conclusion

The Court of Appeal's conclusion is practically sensible, but its reasoning could have been expressed a lot more clearly. The Court said: "where the parties' contract provides for the service of payment claims *on* a stipulated date, this means service *on* that date and not service *by* that date."[64] The contract so provided.[65] Contrary to this provision, the payment claim was served on a day other than *on* the 20th. Yet the Court of Appeal ended up concluding that "there was compliance with [the terms of] the contract and therefore compliance with section 10(2)(a) of the Act."[66] With respect, it must be incorrect to say that non-compliance with clearly worded contractual terms can turn into compliance because there is a "good reason"[67] for the non-compliance, or because even though a document is served on one day, "it was clear and obvious to the [R]espondent from [the] manner of dating that the [Claimant] intended for the payment claim to be treated as being served and, importantly, operative"[68] on another day.

The Court of Appeal's approach might be better justified had the Court explicitly attributed it to the parties' intentions by holding that the proper interpretation of the contract was that service could be effected a few days before the 20th, or that there was an implied term to this effect. However, the High Court rejected the former view,[69] and the Court of Appeal rejected the latter;[70] in other words, both courts held that the parties did *not* intend such a result. Yet the Court of Appeal went on to impose the very same result on the parties by creating new doctrines whose basis, and whose relation to the parties' intentions, were not clear. After all, it had not been impossible or unduly onerous to comply with the terms of the contract: to the contrary, it *had* been possible to serve the payment claim on the 20th,[71] as the contract required. Therefore, in the absence of further judicial elaboration on the principles on *Audi*, there is a risk that disputants in future may draw on those principles in a manner that detracts from the policy objective of certainty and undermines the terms of the contract. Indeed, given that the Court had found that the doctrine of estoppel would have operated in favour of the Claimant anyway, the creation of the "effective service" and "good reason" principles was not necessary.

Had the Court of Appeal not created the doctrines of "effective service" and "good reason", the case would have been straightforward, and there would have been but

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64 *Audi (CA)*, *supra* note 1 at para 23.
65 *Ibid* at para 22.
66 *Ibid* at para 40.
67 *Ibid* at para 26.
68 *Ibid*.
69 *Audi (HC)*, *supra* note 1 at para 11.
70 *Audi (CA)*, *supra* note 1 at paras 38, 39.
71 *Audi (HC)*, *supra* note 1 at para 12; *ibid* at para 29.

three simple and sensible lessons to draw from it:

(a) When parties stipulate deadlines in their contracts, clear and unambiguous allowance should be made for weekends and public holidays.
(b) Parties should be aware of the provisions in relevant legislation, such as section 50(c) of the *Interpretation Act*, which affect the calculation of days and deadlines.
(c) If a would-be respondent receives what purports to be a payment claim and disagrees that the payment claim is valid or has been validly served, that would-be respondent should immediately write to the purported claimant to place on record its objections, in order to avoid being estopped from raising those objections later on.

These practical tips will no doubt create greater commercial certainty for parties in future. However, the new doctrines of "effective service" and "good reason" risk creating countervailing *un*certainty. It is hoped that these concepts will not prove to be technicalities which parties will draw on, contrary to the wording and spirit of the *SOP Act*, to delay or frustrate the attempts of claimants under the *SOP Act* to recover payments rightly due to them.[72]

It may be that this particular problem may eventually go away due to legislative reform. In June 2018, the Ministry of National Development and the Building and Construction Authority conducted a public consultation exercise on, *inter alia*, a proposal that the *SOP Act* be amended to:

> [A]llow claimant[s] to serve their payment claims on or before the specified day or fixed period under the contract, but these payment claims will be deemed to have been served only on the contractual date or last day of the period.[73]

If eventually implemented, this would deal with the problem which gave rise to the dispute in *Audi* in the first place.

Even then, though, a broader problem raised by the Court of Appeal's decision will remain: to what extent do the policy considerations behind the *SOP Act* justify departure from the parties' intentions, and might similar policy considerations even apply in other statutory or even non-statutory contexts? It is hoped that the Court of Appeal will provide more clear guidance on this point in future.

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[72] The first case applying *Audi (CA)*, *supra* note 1, is *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61. In that case, the contract stipulated that payment claims were to be served on the 25th of each month; as 25 June 2017 was a public holiday, the claimant had served the payment claim on 23 June 2017. The High Court held that there was a "good reason" to effect service on the 23rd (at para 37), but that the respondent would "reasonably be confused about the operative date" as the payment claim had been dated 23 June 2017 (at para 38).

[73] Building and Construction Authority, *Public Feedback Sought on Proposed Amendments to the Building and Construction Industry Security of Payment Act (SOPA)*, Annex A, S/No 11, online: Building and Construction Authority <https://www.bca.gov.sg/SecurityPayment/review.html> [emphasis in original].