IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 12

Civil Appeal No 153 of 2017

Between

Civil Tech Pte Ltd

… *Appellant*

And

Hua Rong Engineering Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] — [Statutes and regulations]

Civil Tech Pte Ltd
v
Hua Rong Engineering Pte Ltd

[2018] SGCA 12

Court of Appeal — Civil Appeal No 153 of 2017
Sundaresh Menon CJ, Tay Yong Kwang JA and Steven Chong JA
19 January 2018

2 March 2018

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 The appellant, Civil Tech Pte Ltd ("Civil Tech"), appealed against the decision of the Judge below to dismiss its application to set aside an adjudication determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). The central question in this appeal was whether under the Act, a respondent to a payment claim may withhold payment based on a claim or asserted set-off which does not arise from the contract on which the payment claim is based ("the Payment Claim Contract"), but from a separate construction contract regulated by the Act.

2 The Judge below answered this question in the negative. Civil Tech then brought this appeal against the Judge's decision. After hearing the appeal, we dismissed it, indicating that we would issue detailed grounds of decision given the importance of the issue at hand. We now deliver the grounds of our decision.

Facts

The parties

3 Civil Tech and the respondent, Hua Rong Engineering Pte Ltd ("Hua Rong"), are Singapore-incorporated companies in the business of building and construction. Civil Tech was engaged as the main sub-contractor for two construction projects by the Land Transport Authority, the T211 project for the construction of the Bright Hill MRT station and the C933 project for the construction of the Jalan Besar MRT station. By two separate contracts ("the T211 Contract" and "the C933 Contract"), Civil Tech engaged Hua Rong as its sub-contractor to supply labour for each of these projects.

The background to the dispute

4 On 6 December 2016, Hua Rong submitted a payment claim ("the Payment Claim") in the sum of $601,873.40 to Civil Tech for work under the T211 Contract.

5 On 21 December 2016, Civil Tech issued a payment certificate, which the parties accepted served as a payment response ("the Payment Response"), certifying a negative sum of $1,571,055.66. In other words, by the Payment Response, Civil Tech claimed that far from being liable to Hua Rong, the latter owed it a substantial sum of money. According to Civil Tech, Hua Rong had made fraudulent payment claims under the *C933 Contract*, not the T211 Contract, which claims Civil Tech had satisfied and which it contended it was entitled to recover. Civil Tech sought to raise a set-off to the Payment Claim on this basis, and indicated this in the Payment Response.

6 Hua Rong subsequently filed an adjudication application in relation to the Payment Claim. In its adjudication response, Civil Tech again claimed that

it had satisfied fraudulent payment claims made by Hua Rong under the C933 Contract, and was entitled to withhold payment of the Payment Claim on this basis.

7 On 15 February 2017, the adjudicator ("the Adjudicator") released his determination ("the Adjudication Determination"). The Adjudicator held that the Act did not permit the respondent in an adjudication application to set-off claims arising under another contract against monies due to a claimant under the contract to which the adjudication relates. In the absence of any other asserted defence, the Adjudicator therefore determined that Hua Rong was entitled to the claimed sum of $601,873.40, interest and costs.

8 In March 2017, Hua Rong applied for and obtained leave to enforce the Adjudication Determination, and judgment in terms of the same.

9 On 4 April 2017, Civil Tech applied to court to set aside the Adjudication Determination, and the order of court granting Hua Rong leave to enforce the Adjudication Determination and judgment in terms of the same. In gist, Civil Tech argued that the respondent to a payment claim under the Act is entitled to raise any claim or set-off to withhold payment, as long as the payment response makes mention of that claim or set-off. The Adjudicator had thus erred in refusing to consider the set-off that Civil Tech had raised based on the C933 Contract. This was a jurisdictional error, and the Adjudication Determination should therefore be set aside.

The decision below

10 After hearing Civil Tech's application on 15 and 30 May 2017, the Judge dismissed the application on 24 July 2017 in *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179 ("the Judgment"). The Judge held that in

an adjudication under the Act ("a SOPA adjudication"), a respondent to a payment claim may only rely on reasons for withholding payment ("withholding reasons") arising out of the Payment Claim Contract. We will refer to this interpretation of the law as "the Single Contract Interpretation".

11 The Judge began his analysis by stating the purpose of the Act, drawing on our judgment in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*"). The Judge noted that Parliament had introduced the Act "to provide the construction industry with a low-cost, efficient and quick process for the adjudication of payment disputes" (Judgment at [22]). While a SOPA adjudication delivers "roughshod" justice, an adjudication determination enjoys only temporary finality, that is, finality until and unless the dispute is reopened in a "more thorough and deliberate forum" (*W Y Steel* at [20], cited in the Judgment at [24]). Yet one aspect of the philosophy of temporary finality was that "payments, and therefore cash flow, should not be held up by counterclaims and claims for set-offs that may prove to be specious at the end of lengthy and expensive proceedings" (*W Y Steel* at [20]). A SOPA adjudication was meant to be a simplified process where a provisional determination was made, which would be final and binding unless and until proceedings were later brought for a final determination of the parties' rights and obligations. Given their nature and purpose, the proceedings could not encompass all matters that parties were entitled to raise in court or in arbitration.

12 The Judge then turned to the provisions of the Act and the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the Regulations"). He noted that in *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 ("*Rong Shun*"), the High Court had held that an adjudication application had to be founded on a single payment claim that arose out of a single contract ("the 'one

payment claim, one contract' rule"). The High Court in *Rong Shun* had reached this conclusion based on the consistent use of the phrase "a contract", and variations thereof adopting the singular form, in the Act and the Regulations (Judgment at [28]). While the issue before the Judge was different from that which was decided in *Rong Shun*, the Judge considered that it would be "curious" if notwithstanding the "one payment claim, one contract" rule affirmed in *Rong Shun*, the respondent to a payment claim could rely on any other contract (or a non-contract-based reason) to withhold payment (Judgment at [31]).

13 The Judge proceeded to analyse ss 15(3) and 17(3) of the Act, which he considered "especially germane" to the issue before him (Judgment at [8]). The Judge noted that both these provisions used the singular articles, referring to "a" or "the" contract (Judgment at [34]). The Judge held on this basis that the language of ss 15(3) and 17(3) supported the Single Contract Interpretation.

14 The Judge then reasoned that "a convincing reason of policy" supported the Single Contract Interpretation (Judgment at [35]). If respondents to payment claims could rely on withholding reasons that did not arise out of the Payment Claim Contract, adjudications would become prolonged and complicated because the merits of those reasons would have to be investigated and determined. The cost of an adjudication and the time needed to complete the same would be increased. That could not have been Parliament's intention. Civil Tech's interpretation of the law would "cut against the statute's purpose of offering a contained and expedited means of giving temporary finality to payment disputes" (Judgment at [39]). The Judge also opined that permitting the respondent to a payment claim to raise any claim or set-off that was raised in the payment response as a withholding reason was not realistic, given two

features of SOPA adjudications: strict timelines had to be adhered to, and not all adjudicators were legally trained (Judgment at [38]–[39]).

15 The Judge concluded that the text of the Act and the Regulations, and their underlying object and purpose, required the court to adopt the Single Contract Interpretation (Judgment at [40]). The Judge then considered and rejected Civil Tech's arguments against the Single Contract Interpretation. In particular, the Judge addressed Civil Tech's submission that respondents to payment claims in some foreign jurisdictions had been held to be entitled to withhold payment, under security of payment legislation similar to the Act, on the basis of a claim arising from a contract other than the Payment Claim Contract (a "Cross-Contract Claim"). The Judge examined the authorities cited by Civil Tech and found that there was no clear case where a foreign court had held that Cross-Contract Claims could constitute valid grounds for withholding payment. Rather, it seemed that the legislative and judicial attitude in foreign jurisdictions was one of suspicion towards Cross-Contract Claims (Judgment at [61]–[62]).

16 The Judge then held that the Adjudicator did not breach s 17(3)(*d*) of the Act in refusing to consider Civil Tech's defence in its payment response and adjudication response. Section 17(3)(*d*) was subject to s 15(3), which in the Judge's view restricted the withholding reasons that a respondent to a payment claim could raise in a SOPA adjudication (Judgment at [75]). Since s 15(3) precluded a respondent to a payment claim from raising Cross-Contract Claims as a basis for withholding payment, the Adjudicator had not breached s 17(3)(*d*) in refusing to consider Civil Tech's claim based on the C933 Contract, which was a Cross-Contract Claim.

17 Finally, the Judge observed that it was unnecessary for him to make findings on the merits of Civil Tech's allegations regarding the C933 Contract (Judgment at [79]).

The parties' submissions on appeal

18 On appeal, Civil Tech made the following submissions:

(a) First, on a plain reading of the Act, the respondent in a SOPA adjudication is entitled to rely on any reason for withholding payment, so long as the reason was raised timeously in accordance with the Act:

(i) Sections 11 and 15 of the Act "clearly provide[d] the respondent with the statutory right to assert any counterclaim or set-off", so long as it was raised timeously.

(ii) In any case, even if ss 11 and 15 were ambiguous, the presumption of statutory interpretation that Parliament would not have removed pre-existing common law rights without express provision or a clearly evinced intention applied in this case. At common law, the respondent to a payment claim could raise grounds that did not arise from the Payment Claim Contract to withhold payment. The Act did not expressly depart from the common law position. The Act should therefore be interpreted consistently with the common law position.

(b) Second, the Judge did not distinguish between (1) the general purpose of the Act and (2) the specific purpose of ss 11 and 15, and failed to see that both supported Civil Tech's position:

(i) The general purpose of the Act was to facilitate cash flow in the construction industry. However, the concept of cash flow

required *bona fide* cross-claims to be accounted for, regardless of whether they derived from the Payment Claim Contract, since true cash flow reflected the net position between the parties. The general aim of the Act thus supported Civil Tech's case that the respondent to a payment claim was entitled to raise Cross-Contract Claims as a basis for withholding payment.

(ii) The specific purpose of ss 11 and 15 was in harmony with the general aim of the Act. The aim of these provisions was to impose strict timelines which had to be complied with if a respondent to a payment claim sought to raise claims or set-offs to withhold payment. Given the limited purpose of these provisions, ss 11 and 15 did not restrict the *content* of the withholding reasons that a respondent to a payment claim could rely on under the Act, contrary to what the Judge found.

(c) Third, the Single Contract Interpretation gave rise to legal, practical and policy problems.

19 Hua Rong on the other hand submitted that the statutory language and general purpose of the Act supported the Single Contract Interpretation:

(a) In relation to the statutory language, Hua Rong emphasised that s 11(3), which refers to "[a] payment response provided in relation to *a construction contract*" [emphasis added] (see [59] below), indicates that the only valid withholding reasons under the Act are those which arise from the Payment Claim Contract.

(b) In relation to the general purpose of the Act, Hua Rong submitted that allowing a respondent to rely on any reason to withhold payment,

regardless of whether it arose from the Payment Claim Contract, would undermine the Act's general purpose of expediting cash flow to sub-contractors. This was because a main contractor would often be able to formulate some Cross-Contract Claim to justify withholding payment to sub-contractors.

Our decision

20 On the facts, Civil Tech sought to withhold payment to Hua Rong based on asserted claims under the C933 Contract. Importantly, the C933 Contract was not simply a different contract from the Payment Claim Contract. It was a contract for the supply of labour to carry out *construction work* (see [3] above). The C933 Contract was therefore a construction contract within the meaning of the Act (under the second limb of the definition of "construction contract" in s 2 read with the fourth limb of the definition of "services" in s 3(1)). The C933 Contract was also not excluded from the scope of the Act under s 4(2). Accordingly, the provisions of the Act applied to the C933 Contract. This much was accepted before us.

21 The narrow issue of law before us was therefore whether under the Act, a respondent to a payment claim may withhold payment based on a claim or asserted set-off which does not arise from the Payment Claim Contract, but from a separate construction contract that is also governed by the Act. We will refer to such a claim or set-off as a "Cross-Construction Contract Claim". It was not necessary for us to decide the broader question of whether the Single Contract Interpretation – the view that the only valid withholding reasons under the Act are those arising from the Payment Claim Contract (see [10] above) – was correct.

22 In our judgment, the answer to the question at hand turned on the true interpretation of the relevant statutory provisions. We did not derive much assistance from the foreign authorities which were brought to our attention. As the Judge noted (see [15] above), there was no case where a court had held, in interpreting provisions similar to those in the Act, that Cross-Construction

Contract Claims are valid withholding reasons. We focused on interpreting the Act in the light of its purpose and scheme, and it is to these that we now turn.

The purpose of the Act

23 It was undisputed that the general purpose of the Act is to facilitate cash flow in the construction industry (*W Y Steel* at [18]). The Judge below held, and the respondent argued on appeal, that the general purpose of the Act supported the Single Contract Interpretation (see [14] and [19(b)] above). Counsel for Civil Tech, Mr Tan Tian Luh ("Mr Tan"), did not deny that the purpose of the Act was to facilitate cash flow in the construction industry. Rather, he argued that the concept of cash flow, correctly understood, supported his case. Mr Tan submitted that "true" cash flow reflected and gave effect to the net financial position between the parties (see [18(b)(i)] above). Therefore, as between a main contractor and a sub-contractor, facilitating cash flow required accounting for their mutual rights and liabilities across all the contracts between them. The general purpose of the Act could thus only be fulfilled if a respondent to a payment claim was entitled to raise grounds that did not arise from the Payment Claim Contract to withhold payment. If this were not the law, the Act would not give effect to the net financial position between the parties.

24 We did not agree with this submission. In our judgment, it was founded on a notion of cash flow which is foreign to the purpose of the Act. It is essential to appreciate the position before the Act was enacted, because that sheds light on the purpose of the Act and the concept of cash flow that lies at its heart.

25 Before the Act was enacted, where a contractor or sub-contractor (a "downstream party") sought interim payment for work done or goods supplied, an employer or a main contractor (an "upstream party") could readily withhold payment. This position can be traced to the decision of the House of Lords in

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689 ("*Gilbert-Ash*"), which has been followed by our courts in cases such as *Kum Leng General Contractor v Hytech Builders Pte Ltd* [1996] 1 SLR(R) 310 and *Hiap Tian Soon Construction Pte Ltd and another v Hola Development Pte Ltd and another* [2003] 1 SLR(R) 667 ("*Hiap Tian Soon*").

26 In *Gilbert-Ash*, it was held that a respondent to a payment claim was entitled to rely on its remedies at common law, including the right of set-off, to withhold payment of the sum certified as otherwise falling due under the construction contract, unless such remedies had been clearly excluded by contract. The House of Lords in *Gilbert-Ash* overruled the decision of the Court of Appeal in *Dawnays Ltd v F G Minter Ltd and Trollope and Colls Ltd* [1971] 1 WLR 1205, in which Lord Denning MR had famously held at 1209H that an interim certificate was "to be regarded virtually as cash", and thus to be honoured by full payment unless the contract expressly allowed payment to be withheld. Interim certificates in short enjoyed a form of temporary finality: an upstream party could not resist paying the sum certified, unless the contract entitled it to do so, until such time as the certificate was opened up and reviewed in proceedings that finally settled the rights of the parties. In *Gilbert-Ash*, however, the House of Lords held that interim certificates did not have any such status. Rather, the starting point was that a respondent to a payment claim was entitled to rely on all of its common law rights to withhold payment, unless those rights had been clearly whittled down by contract: see *Gilbert-Ash* at 718D–E.

27 The effect of *Gilbert-Ash* was that an upstream party could readily withhold payment to a downstream party by asserting a set-off or cross-claim. It should be noted that this commonly arose in the context of an application for summary judgment in respect of certified sums. In that context, as long as the

upstream party could show that its asserted cross-claim or set-off raised a triable issue, judgment would not be entered on the claim. The downstream party would then be held out of its cash flow until such time as the respective rights and liabilities were finally settled, generally after a protracted, time-consuming and expensive process. Thus, for example, a main contractor could withhold payment by alleging defective work or by claiming that it had a claim for damages for delay. Following *Gilbert-Ash*, it became more difficult to challenge the upstream party's right to raise such cross-claims or set-offs unless this had been clearly excluded by contract: see *Hiap Tian Soon* at [32]. The ultimate validity of the set-off or cross-claim would thus turn on complex and disputed factual issues, which as has been noted would only be resolved after lengthy and expensive proceedings in court or in arbitration. The upshot was that a downstream party might only receive payment long after payment was due, and only after possibly specious cross-claims or set-offs raised by an upstream party had been found to be invalid. Further, legal costs might significantly diminish the value of any successful claim. Indeed, the upstream party may have become insolvent in the interim, further reducing the value of any successful claim against it.

28 The injustice of this was palpable. It was the downstream parties who had incurred the cost of the works they performed and the goods they supplied. Yet they ended up carrying the risk of upstream financial difficulties which led some upstream parties to withhold payment. It was little answer to say that they had chosen to accept this risk by contract. Downstream parties had little bargaining power to protect themselves against exposure to this risk. In reality, they were often compelled to accept unfavourable payment terms: see Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 1.3.

29 It was *this* problem of delayed payment or non-payment which the Act sought to address. This is clear from the speech of the then Minister of State for National Development ("the Minister"), Mr Cedric Foo Chee Keng, at the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004) ("the 2004 Bill") (see *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1112–col 1113):

> Sir, the construction industry is going through a difficult time. … *The financial problems affecting some construction firms have in turn affected sub-contractors and suppliers further downstream along the construction value chain.* ***They face delays or non-payments*** *for work done or materials supplied.*
>
> Sir, whilst the Security of Payment (SOP) Bill will not resolve the structural problem of overcapacity in the construction industry, ***it will address payment problems***. The SOP Bill will create a more conducive operating environment and ***a level playing field*** for all parties in the industry. …
>
> Progress payments are made periodically throughout the project's duration. *Parties lower down the value chain usually fund their work in advance and collect payments thereafter. These downstream players will therefore be adversely affected if those upstream fail to make prompt payment for work done or materials supplied.* Contractual terms also tend to favour those higher up the chain. For example, parties downstream are subject to the "pay when paid" clause, whereby they get paid only when those upstream have been paid. …
>
> *The SOP Bill will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also facilitates cash flow by establishing a fast and low cost adjudication system to resolve payment disputes.* …
>
> [emphasis added in italics and bold italics]

30 The purpose of the Act is also clear from the long title of the Act:

> An Act *to facilitate payments* for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith. [emphasis added]

31 Similarly, the explanatory statement relating to the 2004 Bill states that "[t]he object of the [Act] is to improve cash-flow by *expediting payment* in the building and construction industry" [emphasis added].

32 In short, the purpose of the Act is to ensure that downstream parties are timeously paid for work done or materials supplied. The Act promotes cash flow by facilitating prompt payments down the chain of contractors involved in any given construction project. In our judgment, it is this conception of cash flow – the flow of monies from upstream parties to downstream parties, that is, cash flow in a literal sense – which is reflected in the Act, not the notion of giving effect to the net financial position between the parties which Mr Tan suggested (see [23] above). Therefore, we did not accept Mr Tan's account of the general purpose of the Act, and the argument that he advanced based on that account (see [18(b)(i)] above).

33 In any event, Mr Tan's argument was incomplete. Even if facilitating cash flow meant giving effect to the net financial position, would this be the net position across all contracts or the net position for each specific contract? Mr Tan's argument presupposed that it was the former. But as we observed during the hearing, each construction project has its own set of accounts. Each project may involve different subcontractors, and will give rise to different liabilities. We found it difficult to believe that the Act was intended to give effect to the net financial position between the parties across all contracts. Thus, even if we accepted Mr Tan's account of cash flow, his argument would have fallen short.

34 Returning to the purpose of the Act, as we noted in *W Y Steel* at [18], the Act facilitates cash flow in two principal ways:

(a) First, it confers on downstream parties a statutory right to receive progress payments. This is the subject of Part II of the Act, which creates the right (s 5) and defines it with provisions addressing the amount due (ss 6 and 7) and the deadline for payment (s 8).

(b) Second, the Act creates a regime of statutory adjudication for the swift determination of payment disputes on a provisional basis. These determinations bind the parties unless and until the payment dispute is finally resolved. This is the subject of Part IV of the Act.

35 In this appeal, our focus was on the second pillar of the Act, the regime of statutory adjudication. It may be useful here to identify precisely how the regime facilitates cash flow. Prior to the Act, an upstream party could delay payment by simply *asserting* a cross-claim or a set-off. It could then withhold payment until the merits of its withholding reasons were finally determined in court or in arbitration (see [27] above). That course of action is no longer open to an upstream party who receives a payment claim governed by the Act. Its assertions are now subject to a provisional review by an adjudicator, a qualified and independent third party with a background in the construction industry. It is only if those assertions pass muster that an upstream party may withhold payment of the claimed sum. If they do not, and the payment claim is substantiated, the adjudicator will determine that the claimed sum is due, and the upstream party will be required to pay the adjudicated amount.

36 Further, the entire adjudication process is geared towards a swift resolution of the payment dispute albeit on a provisional basis. First, the adjudicator is required to decide the dispute within very short timelines as prescribed under s 17(1) of the Act. Second, once the adjudicator determines the dispute, the upstream party will then only have a short time to pay the

adjudicated amount, as provided for under s 22 of the Act. The Act therefore facilitates cash flow by requiring swift payment to the downstream party in accordance with the adjudication determination, which is itself rendered very quickly after the commencement of adjudication.

37 Having elaborated on the purpose of the Act and how the adjudication regime advances its purpose, we now turn to the scheme of the Act.

The scheme of the Act

38 Three aspects of the scheme of the Act were pertinent in this appeal.

39 First, the Act provides for *each* contract falling under its scope to have a separate payment framework:

(a) Part II of the Act provides for each contract to set out a payment framework applicable to progress payments arising under that contract addressing the amount which is due at a given time (ss 6 and 7) and the deadline for payment (s 8), albeit that mandatory rules apply if the contract is silent and long-stop dates apply regarding the deadline for payment.

(b) Similarly, Part III of the Act does not set out fixed timelines for the service of a payment claim or a payment response. It provides for each contract to determine these timelines, albeit that again certain long-stop dates apply to the service of payment responses and prescribed periods engage if the contract is silent.

40 In our judgment, this feature of the Act – that each contract has its own payment framework – is central to its scheme. *Any interpretation of the Act that*

would enable a party to evade the payment framework which applies to a specific contract would not be consistent with the framework of the Act.

41 Second, the Act only entitles downstream parties to start the adjudication process. This is clear from ss 12(1) and 13(1) of the Act, which state:

> **Entitlement to make adjudication applications**
>
> **12.**—(1) Subject to subsection (2), a ***claimant*** who, in relation to a construction contract, ***fails to receive payment*** by the due date of the response amount which he has accepted *is entitled to make an adjudication application* under section 13 in relation to the relevant payment claim.
>
> …
>
> **Adjudication applications**
>
> **13.**—(1) *A* ***claimant*** *who is entitled to make an adjudication application under section 12* may, subject to this section, apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body.
>
> [emphasis added in italics and bold italics]

42 This aspect of the adjudication regime is unsurprising. The aim of the Act is to facilitate payment to downstream parties (see [32] above). The Act thus provides downstream parties with access to the adjudication regime which facilitates swift payment to them (see [35]–[36] above). The Act was not intended to provide upstream parties with an avenue to bring claims against downstream parties. Importantly, where a payment dispute arises, the upstream party does not generally require recourse because, as we pointed out to Mr Tan during the hearing, the money is in its pocket. It can simply withhold payment, asserting a set-off or cross-claim as the basis for doing so. The upstream party will generally have the means of protecting its position pending the determination of the payment dispute, whereas the downstream party will not. The Act seeks to temper this asymmetry: as the Minister observed at the second reading of the 2004 Bill, it sought to create "a level playing field" (see [29]

above). It does so by granting downstream parties the right to commence an adjudication.

43 In our judgment, it is significant that the Act only entitles downstream parties to apply for adjudication. This implies that under the Act, an upstream party may only raise claims against the downstream party in adjudication proceedings as a shield rather than as a sword. We return to this point below.

44 Third, the Act applies to two categories of contracts: construction contracts and supply contracts. Different provisions apply depending on which category of contract applies. For example, s 8 stipulates different timelines for the payment of progress payments for construction contracts (ss 8(1) and 8(2)) and supply contracts (ss 8(3) and 8(4)). Notably, the mode of the payment response also depends on whether the payment claim is based on a construction contract or a supply contract: in the former case, a written response is required (s 11(1) and 11(3)); in the latter case, the only response envisioned by the Act is payment or non-payment of the sum claimed (s 11(2)). This dichotomy between construction contracts and supply contracts pervades the language of the Act. In our judgment, a textual analysis of the Act must be undertaken in this light.

45 Having set out the purpose and the scheme of the Act, we now address the issue at hand. Under the Act, is a respondent to a payment claim entitled to withhold payment based on Cross-Construction Contract Claims? We concluded that the answer was in the negative for the following two reasons:

(a) First, a plain reading of the relevant provisions indicated that Cross-Construction Contract Claims are not valid withholding reasons.

(b) Second, permitting a respondent to a payment claim to raise Cross-Construction Contract Claims to withhold payment would not be consistent with the purpose and the scheme of the Act.

46 We now elaborate on these reasons in turn.

The relevant statutory provisions

Section 15(3) of the Act

47 We begin with s 15(3) of the Act. Section 15(3) states:

> **Adjudication responses**
>
> **15.**— …
>
> (3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, *any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off*, unless —
>
> (*a*) where the adjudication *relates to a construction contract*, the reason was included in the relevant payment response provided by the respondent to the claimant; or
>
> (*b*) where the adjudication *relates to a supply contract*, the reason was provided by the respondent to the claimant on or before the relevant due date.
>
> [emphasis added]

48 The Judge considered that the language of s 15(3) supported the Single Contract Interpretation. On appeal, Civil Tech argued that on the contrary, the text of s 15(3) supported its position. We first considered the Judge's reasoning.

49 The Judge noted that ss 15(3)(*a*) and 15(3)(*b*) refer to "*a* construction contract" and "*a* supply contract" respectively. According to the Judge, this indicated that Parliament intended that a respondent to a payment claim would only be entitled to rely on withholding reasons arising from a single contract.

This would be the Payment Claim Contract (because the adjudication would have to relate to that contract, since the payment claim is made under that contract).

50 With respect, in our judgment, the words "a construction contract" and "a supply contract" in ss 15(3)(*a*) and 15(3)(*b*) do not bear the significance placed on them by the Judge. As we have noted, the Act applies to two types of contracts – construction contracts and supply contracts – and some provisions prescribe different rules for these two types of contracts (see [44] above). Section 15(3) is one such provision. In gist, it requires a respondent to a payment claim to give its withholding reasons at an early stage. But different rules must apply in this context, depending on whether a construction contract or a supply contract is involved. This is because in the case of a construction contract, s 11 provides for the payment response to be in a written form, and s 11(3)(*c*) further requires the respondent to state its withholding reasons (if any) in that written response. But in the case of a supply contract, the payment response is not a written response (see [44] above) and thus cannot include the respondent's withholding reasons. Therefore, s 15(3), which deals with the provision of withholding reasons to a claimant, must state different rules for construction contracts and supply contracts. The opening clauses of ss 15(3)(*a*) and 15(3)(*b*) accordingly distinguish the two different rules laid down in s 15(3). In our judgment, that is their sole import. It is not plausible to glean a legislative intent to implement the Single Contract Interpretation from the mere fact that the singular article is used in those clauses.

51 Civil Tech emphasised the reference to "*any*" cross-claim, counterclaim and set-off in s 15(3) and submitted that this indicated that "all reasons raised in defence are in, provided that they are raised timeously". We do not agree. The word "any" in s 15(3) simply indicates that the rule against considering

withholding reasons which are not timeously raised applies to all cross-claims, counterclaims and set-offs which a respondent may raise, and not just to some cross-claims, counterclaims and set-offs. As we observed in *W Y Steel* at [38]:

> … The words "any reason for withholding any amount" in s 15(3) of the Act are wide enough in themselves to cover *any type of situation where a respondent does not meet a payment claim*. … In our judgment, the purpose of these provisions generally and of s 15(3) of the Act in particular is *to prevent a respondent from ambushing a claimant by raising* ***any grounds for withholding payment*** *which have not already been set out in his payment response*, whether or not these amount to reasons entitling him to withhold payment by way of a cross-claim, set-off or counterclaim. *Litigation by ambush is almost always likely to delay the resolution of any dispute as the ambushed party would be forced to review the new material, regroup and, only then, possibly regain its momentum*. To permit this would fly in the face of what the scheme of statutory adjudication sets out to achieve. [emphasis added in italics and bold italics]

52 We conclude our analysis of s 15(3) with the following point. Section 15(3) pertains to the *time* at which withholding reasons are raised, not the *content* of the withholding reasons. This is because its purpose is to prevent litigation by ambush (*W Y Steel* at [38], cited at [51] above), the gravamen of which is the springing of claims and materials on the opposing party in a dispute at the eleventh hour, rather than the content of those claims and materials. In this light, we did not consider that s 15(3) was material to the issue before us, which concerns the *content* of the reasons a respondent may raise to withhold payment.

Section 17(3) of the Act

53 Section 17(3) of the Act provides as follows:

> **Determination of adjudicator**
>
> **17.**— …
>
> (3) Subject to subsection (4), in determining an adjudication application, *an adjudicator shall only have regard to the following matters*:
>
> (*a*) the provisions of this Act;
>
> (*b*) the ***provisions of the contract to which the adjudication application relates***;
>
> (*c*) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;
>
> (*d*) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;
>
> (*e*) *the results of any inspection carried out by the adjudicator of any matter to which the adjudication relates*;
>
> (*f*) *the report of any expert appointed to inquire on specific issues*;
>
> (*g*) the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication; and
>
> (*h*) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.
>
> [emphasis added in italics and bold italics]

54 Section 17(3) exhaustively sets out the matters an adjudicator may have regard to in determining an adjudication application. In our judgment, it was pertinent because the matters which an adjudicator is entitled to consider in a SOPA adjudication should be aligned with the matters the respondent to a payment claim is entitled to raise in its payment response. Having carefully perused s 17(3), we concluded that it does not permit an adjudicator to have regard to Cross-Construction Contract Claims for the following reasons.

55 First, if an adjudicator were entitled to consider Cross-Construction Contract Claims, he or she would be required to refer to the contracts upon which those claims are based. Yet s 17(3)(*b*) suggests that an adjudicator is not entitled to refer to such contracts. Under s 17(3)(*b*), an adjudicator may only consider "the provisions of *the contract* to which the adjudication application relates" [emphasis added]. The singular article "the" indicates that the adjudicator may only consider *one* contract. This would be the Payment Claim Contract, which founds the payment claim that is disputed and referred to adjudication. Section 17(3)(*b*) does not entitle an adjudicator to consider other contracts, on which Cross-Construction Contract Claims might be based.

56 When we put this to Mr Tan during the hearing, he drew our attention to s 17(3)(*d*). Mr Tan submitted that since s 17(3)(*d*) provides that an adjudicator may have regard to the payment response, the adjudicator may consider withholding reasons stated there, regardless of whether they arise from the Payment Claim Contract. However, in our judgment, neither s 17(3)(*d*) nor s 17(3)(*h*) – which provides for the adjudicator to consider matters he or she reasonably considers relevant – assisted Mr Tan for the following reasons:

(a) First, as we pointed out to Mr Tan, there is a logic to the sequence of the provisions in s 17(3). They provide for an adjudicator to have regard to the Act, and then the contract, and then the payment claim and so on. Critically, s 17(3)(*b*) directly addresses which contractual provisions an adjudicator should have regard to. It *expressly* provides for the adjudicator to consider one contract, the Payment Claim Contract. Unlike s 17(3)(*b*), s 17(3)(*d*) does *not* concern the contractual provisions that an adjudicator may consider. It addresses an entirely distinct source of information, namely the payment response, adjudication response and accompanying documents. In this light, we

did not accept that it was legitimate to interpret s 17(3)(*d*) so as to allow the adjudicator to refer to other construction contracts governed by the Act aside from the Payment Claim Contract in considering the payment response. For similar reasons, we did not think that s 17(3)(*h*), a catch-all provision, could be interpreted to allow an adjudicator to refer to such contracts.

(b) Second, s 17(3)(*d*) allows the adjudicator to consider the payment response but does not state what the payment response may include. Mr Tan's argument presupposes that Cross-Construction Contract Claims can properly be raised as withholding reasons in the payment response in the first place. However, for the reasons given at [62] below, we held that Cross-Construction Contract Claims could not be raised as withholding reasons in a payment response under s 11. Thus, s 17(3)(*d*) did not assist Mr Tan because the Payment Response should not have referred to Civil Tech's claims under the C933 Contract to begin with.

57 Moreover, ss 17(3)(*e*) and 17(3)(*f*) provide for an adjudicator to have regard to the results of inspections and expert reports. If Cross-Construction Contract Claims were valid withholding reasons, an adjudicator would have to consider inspection results and expert reports pertaining to those claims; for example, in relation to claims for defective work. We did not accept this for two reasons. First, an adjudicator is appointed to determine a single payment dispute arising out of the Payment Claim Contract. In our judgment, appointment for this limited purpose is not consistent with the adjudicator having to review potentially extensive documentary material on claims arising under other contracts. Second, if an adjudicator were required to consider such material, this would add to the length of adjudication proceedings, and hamper the operation

of the adjudication regime as a swift procedure for resolving payment disputes (see [36] above).

58 For these reasons, we concluded that s 17(3) of the Act does not permit an adjudicator to consider Cross-Construction Contract Claims in a SOPA adjudication. Since the matters an adjudicator is entitled to consider in a SOPA adjudication should be aligned with those which may be raised in a payment response (see [54] above), this suggested that a respondent to a payment claim may not raise Cross-Construction Contract Claims in a payment response. We concluded that this was indeed the effect of s 11 of the Act, to which we now turn.

Section 11 of the Act

59 Section 11 provides as follows:

> **Payment response, etc.**
>
> **11.**—(1) A respondent named in a payment claim served *in relation to a construction contract* shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (*a*) by the date as specified in or determined in accordance with the terms of ***the construction contract***, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
>
> (*b*) where ***the construction contract*** does not contain such provision, within 7 days after the payment claim is served under section 10.
>
> (2) A respondent named in a payment claim served *in relation to a supply contract* may respond to the payment claim by paying to the claimant the claimed amount, or such part of the claimed amount as the respondent agrees to pay, by the due date.
>
> (3) A payment response provided ***in relation to a construction contract*** —
>
> (*a*) shall identify the payment claim to which it relates;
>
> (*b*) shall state the response amount (if any);

> (*c*) shall state, where the response amount is less than the claimed amount, *the reason for the difference and the reason for any amount withheld*; and
>
> (*d*) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.
>
> …
>
> [emphasis added in italics and bold italics]

60 For the reasons given at [50] above, we did not think that the words "in relation to *a* construction contract" and "in relation to *a* supply contract" in ss 11(1), 11(2) and 11(3) were material in and of themselves. The language here is similar to the language used in ss 15(3)(*a*) and 15(3)(*b*). As we explain above, the mere fact that the singular article "a" is used does not connote a legislative intent to implement the Single Contract Interpretation.

61 Mr Tan emphasised that s 11(3)(*c*) provides for payment responses to include withholding reasons (if any) without expressly restricting the content of those reasons. He submitted that this indicated that all claims and set-offs, regardless of whether they arise from the Payment Claim Contract, are valid withholding reasons under the Act, so long as they are raised timeously.

62 We accept that s 11(3)(*c*) does not *expressly* limit the class of valid withholding reasons under the Act. However, in our judgment, this did not assist Mr Tan, because, conversely, there is nothing in s 11 which suggests that a respondent to a payment claim *can* withhold payment on the basis of a Cross-Construction Contract Claim. We found the silence in s 11 in this regard significant for two reasons.

(a) First, as we have noted (see [39] above), the Act provides for each contract which it governs to have its own payment framework. As we explain at [76] below, if a respondent to a payment claim could raise

a Cross-Construction Contract Claim to withhold payment, it could evade the payment framework that applies to the contract under which the Cross-Construction Contract Claim is made. This would undermine the statutory scheme. In this light, in our judgment, if Parliament *had* intended this curious result, it would have made this clear by *expressly* conferring upon a respondent to a payment claim the right to withhold payment on the basis of a Cross-Construction Contract Claim. However, the Act, and s 11 in particular, does not expressly confer any such right on the respondent.

(b) Second, as explained at [57] above, it would be remarkable if adjudicators under the Act, who are appointed to determine a dispute over a payment claim arising out of the Payment Claim Contract, were required to consider and determine claims by an upstream party under an altogether different contract. In this light, we again considered that Parliament would have *expressly* empowered a respondent to a payment claim to withhold payment based on a Cross-Construction Contract Claim if that was indeed its intention. Yet Parliament did not do so.

63 For these reasons, we concluded that in a payment response under s 11(1) of the Act, the respondent may not refer to a Cross-Construction Contract Claim. Since s 15(3)(*a*) prevents a respondent from including, and an adjudicator from considering, withholding reasons that are not included in the payment response (see [47] above), it follows that in a SOPA adjudication, a respondent to a payment claim may not raise, nor is an adjudicator entitled to consider, Cross-Construction Contract Claims as withholding reasons.

Other relevant provisions of the Act

64 In our judgment, other provisions of the Act and the Regulations were also relevant. We will first set out these provisions before explaining why they indicate that a respondent to a payment claim is not entitled to rely on Cross-Construction Contract Claims to withhold payment under the Act.

65 Section 2 of the Act defines a "progress payment" as "a payment to which a person is entitled … under *a* contract" [emphasis added]. Similarly, s 5 confers a statutory right to a progress payment to one "who has carried out any construction work, or supplied any goods or services, under *a* contract" [emphasis added].

66 Section 10 of the Act states:

> **Payment claims**
>
> **10.**—(1) A claimant may serve one payment claim in respect of a progress payment on —
>
> (a) one or more other persons who, *under the contract concerned*, is or may be liable to make the payment; or
>
> (b) such other person as specified in or identified in accordance with the terms of *the contract* for this purpose.
>
> [emphasis added]

67 Regulation 5 of the Regulations states:

> **Payment claims**
>
> **5.**—...
>
> (2) Every payment claim shall —
>
> …
>
> (*b*) identify ***the contract to which the progress payment that is the subject of the payment claim relates***; and

[emphasis added in bold italics]

68 These provisions concern progress payments and payment claims. They are significant because they indicate that for the purposes of a progress payment and a payment claim, only *one* contract is material: the Payment Claim Contract. Pertinently, a progress payment is the subject of a payment claim (see s 10(1) of the Act), which is in turn the subject of an adjudication under the Act (see s 12(1) of the Act). In this light, in our judgment, given that a progress payment and a payment claim centre on one contract, the Payment Claim Contract, the aforementioned provisions indicate that a SOPA adjudication also centres on that one contract. They thus suggest that the inquiry in a SOPA adjudication relates to the claimant's entitlement under the Payment Claim Contract, and not to its entitlement taking into account separate Cross-Contract Claims.

Conclusion

69 In summary, for all the above reasons, the relevant statutory provisions indicated that under the Act, a respondent to a payment claim is not permitted to rely on Cross-Construction Contract Claims to withhold payment.

70 In this light, the premise of Civil Tech's alternative submission – that the provisions of the Act were ambiguous and should therefore be interpreted consistently with the common law position (see [18(a)(ii)] above) – fell away. In any event, we considered that the presumption of statutory interpretation that Civil Tech invoked (that Parliament would not have removed pre-existing common law rights without express provision, or a clearly evinced intention to that effect) did not apply. That presumption concerns the removal of pre-existing common law rights. However, in enacting the Act, Parliament was not removing common law rights. It was creating an entirely new statutory regime,

which was superimposed onto the position at common law, to ensure that downstream parties are timeously paid what is due to them (see [32] above).

Consistency with the purpose and scheme of the Act

71 Moreover, in our judgment, it would not be consistent with the purpose and scheme of the Act for a respondent to be permitted to raise Cross-Construction Contract Claims to withhold payment.

72 First, in relation to the purpose of the Act, we agreed with the Judge that allowing a respondent to rely on Cross-Construction Contract Claims to withhold payment would increase the costs of and delay in adjudication (see [14] above). That would not cohere with the Act's purpose of facilitating cash flow to downstream contractors (see [32], [36] and [57] above).

73 During the hearing of the appeal, however, Mr Tan argued that it might be consistent with the purpose of the Act for a respondent to a payment claim to be entitled to raise Cross-Construction Contract Claims to withhold payment. He invited us to consider a case where a sub-contractor hoodwinked a main contractor about works under a contract, but where no adjudication proceedings were commenced regarding that contract. He argued that in such a case, the main contractor should be entitled to raise its set-off in adjudication proceedings involving a different contract. If this were not the law, the main contractor would have no recourse against the sub-contractor under the Act. Mr Tan submitted that the Act would therefore not give effect to the net financial position between the parties, contrary to its aim of facilitating cash flow.

74 This argument was flawed because, for the reasons given at [32] above, we did not accept the account of cash flow that Mr Tan advanced. In any event, however, there were further difficulties with Mr Tan's argument:

(a) First, in our judgment, in Mr Tan's example, the main reason why the main contractor would have no recourse under the Act is that upstream parties are not entitled to commence adjudication proceedings under the Act, for the reasons given at [42] above. If upstream parties were so entitled, the main contractor in Mr Tan's case could commence adjudication proceedings against the sub-contractor alleging, for example, that payments had been made pursuant to claims that were fraudulent and that ought therefore to be recovered. Yet the Act does not entitle upstream parties to commence adjudications. It envisions that upstream parties may only raise claims against downstream parties in adjudication proceedings as a shield rather than as a sword (see [43] above). It is this feature of the Act which principally explains why, in Mr Tan's example, the main contractor would have no recourse against the sub-contractor.

(b) Second, in any event, in such a case, the main contractor *does* have recourse against the sub-contractor. It is entitled to bring its claims against the sub-contractor in arbitration or in court, and to fully ventilate its grievances in those proceedings. In this light, we did not consider that it would be unjust if the main contractor did not have recourse against the sub-contractor in adjudication proceedings under the Act.

75 Furthermore, in our judgment, Civil Tech's interpretation of the law was not consistent with the scheme of the Act. The following example illustrates this point. Suppose that a respondent to a payment claim under a contract ("Contract A") fails to file a payment response within the timelines applicable to Contract A, and thus fails to state a set-off for defective works it was aware of at this juncture. The dispute proceeds to adjudication. The adjudicator duly does not consider the set-off and determines that the full sum claimed is due to the

claimant. The respondent pays the full sum to the claimant. The latter then issues another payment claim to the respondent under a different contract ("Contract B"). The respondent then seeks to raise the set-off for defective works under Contract A in its payment response to this payment claim. We put this example to Mr Tan during the hearing and he candidly accepted that, on Civil Tech's interpretation of the law, the respondent would be entitled to do so.

76 In our view, this demonstrated that Civil Tech's position could not be correct. Under the payment framework applicable to Contract A, the respondent should have raised the set-off in its payment response to the payment claim under Contract A. However, the respondent failed to file a payment response by the deadline applicable to claims arising out of Contract A. The Act provides a sanction for this: the respondent is then unable to raise the set-off in the adjudication involving Contract A. In our judgment, however, this sanction would be hollow if the respondent were entitled to raise its set-off to withhold payment in respect of payment claims arising out of Contract B. As we have explained, the Act provides for each contract which falls within its scope to have a separate payment framework (see [39] above). If a respondent could raise Cross-Construction Contract Claims to withhold payment, it would be able to evade the deadlines which the Act prescribes for the contract(s) on which such claims were based. In our judgment, such a result would cut against the statutory scheme (see [40] above).

77 We put this point to Mr Tan during the appeal. In reply, he submitted that if the subsequent payment claim were made under Contract A instead of Contract B, the respondent could raise its set-off in the subsequent payment response, notwithstanding that it could and should have raised the set-off earlier. In our judgment, this submission may be correct as a matter of law (although we express no final view on the point). Proceeding on the basis that it was

correct, we did not think, however, that it supported Mr Tan's case. A subsequent payment claim under Contract A would at least be subject to the same payment framework that Contract A provides for payment claims arising out of that contract. A payment claim under Contract B would engage an entirely different payment framework. Therefore, even if the Act permits a respondent to raise a set-off under the same contract which it could have raised in an earlier payment response but did not raise until a subsequent payment response, this simply does not suggest that Cross-Construction Contract Claims are valid withholding reasons.

78 In sum, the relevant provisions of the Act, along with its purpose and scheme, demonstrated that Cross-Construction Contract Claims are not valid withholding reasons under the Act, and we so held.

Conclusion

79 In this appeal, Civil Tech sought to withhold payment based on claims arising under the C933 Contract, which were Cross-Construction Contract Claims. For all the foregoing reasons, we found that Civil Tech was not entitled to do so. We therefore dismissed the appeal. We awarded costs to the respondent fixed at $15,000 with disbursements of $400.

80 In conclusion, we reiterate that the only issue before us in this appeal was whether Cross-Construction Contract Claims are valid withholding reasons under the Act. It was not necessary for us to decide whether the Single Contract Interpretation is correct (see [21] above). In this regard, we note that although endorsing the Single Contract Interpretation might expedite payment to downstream contractors, the Act only regulates construction contracts and supply contracts. With these remarks, we leave the question of whether the

Single Contract Interpretation is correct for another day.

Sundaresh Menon	Tay Yong Kwang	Steven Chong
Chief Justice	Judge of Appeal	Judge of Appeal

Tan Tian Luh, Ngo Wei Shing and Yap Pei Yin (Chancery Law Corporation) for the appellant;
Ho Chye Hoon (KEL LLC) for the respondent.