

## NO MORE SETTING OFF PAYMENTS FROM SEPARATE CONTRACTS

Reviewing the Court of Appeal's decision in *Civil Tech Pte Ltd v  
Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584

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**TAN** Chau Yee  
*LLB (Hons) (National University of Singapore);  
Partner, Eversheds Harry Elias LLP.*

Justin **TAN**  
*LLB (Hons) (Queen Mary University of London);  
Senior Associate, Eversheds Harry Elias LLP.*

### **I. Introduction**

1 When main contractors engage the same subcontractors to work on multiple projects, these main contractors sometimes set off or deduct payments due from one project against another project. In the light of the Court of Appeal's decision in *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd*<sup>1</sup> (“*Civil Tech*”), such a practice of setting off or deducting payments between various projects may not be allowed in the context of the Building and Construction Industry Security of Payment Act<sup>2</sup> (the “SOP Act”).

### **II. Background to *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd***

2 The appellant, Civil Tech Pte Ltd, was engaged as the main subcontractor for two LTA construction contracts, the T211 Contract and the C933 Contract. Thereafter, the appellant appointed the respondent, Hua Rong Engineering Pte Ltd, as its subcontractor to supply labour for both the T211 Contract and the C933 Contract.<sup>3</sup>

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1 [2018] 1 SLR 584.

2 Cap 30B, 2006 Rev Ed.

3 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [3].

3 Pursuant to the work done under the T211 Contract, the respondent submitted a payment claim of \$601,873.40 to the appellant (the “Payment Claim”).<sup>4</sup>

4 In response, the appellant issued a payment certificate for a negative sum of \$1,571,055.66, which the parties accepted as the applicable payment response under the SOP Act (the “Payment Response”).<sup>5</sup> However, the appellant did not arrive at the figures in the Payment Response by valuing the respondent’s work done under the T211 Contract, but instead set off the sums claimed against the *other C933 Contract* on the basis that the respondent made allegedly false and fraudulent claims for the other C933 Contract.

5 The respondent filed an adjudication application in relation to its Payment Claim under the T211 Contract. In its adjudication response, the appellant maintained its argument that it was entitled to withhold payment, set off and make deductions from the Payment Claim on the basis of the appellant having satisfied the respondent’s allegedly false and fraudulent claims in the other C933 Contract.<sup>6</sup>

6 The adjudicator did not accept the appellant’s argument. In the adjudication determination, the adjudicator decided that the SOP Act did not permit the appellant to set off or deduct payments due under one contract against claims from a separate contract, rather than the contract to which the adjudication related.<sup>7</sup>

7 The adjudicator awarded the respondent the claimed sum, interest and costs as the appellant did not raise any other reasons to object to the Payment Claim.<sup>8</sup> Subsequently, the respondent obtained leave of court to enforce the adjudication determination and judgment in terms of the same.<sup>9</sup>

8 The appellant applied to the High Court to set aside the adjudication determination and judgment on essentially the same arguments canvassed at the adjudication. Further, the

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4 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [4].

5 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [5].

6 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [6].

7 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [7].

8 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [7].

9 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [8].

appellant argued that the adjudicator had made a jurisdictional error in refusing to consider that the appellant was entitled to set off the claims raised in the T211 Contract against the other C933 Contract and therefore, the adjudication determination should be set aside.<sup>10</sup>

9 The High Court dismissed the appellant's application to set aside the adjudication determination. Dissatisfied, the appellant appealed to the Court of Appeal.

### **III. Court of Appeal's decision in *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd***

10 The Court of Appeal dismissed the appellant's appeal. In summary, the court held that the appellant was not entitled to set off or deduct payments for reasons that arose from a separate construction contract. In coming to its decision, the court undertook a close analysis of the provisions in the SOP Act, as well as the purpose and scheme of the SOP Act.

#### **A. Section 17(3)(b) Building and Construction Industry Security of Payment Act prevents a party from raising set-off or deductions arising out of a separate construction contract**

11 The court noted that the other C933 Contract was a construction contract within the meaning of the SOP Act and was not excluded from its scope.<sup>11</sup> The court also found that the SOP Act made clear that an adjudicator could not have regard to the Payment Response where it dealt with issues arising from the other C933 Contract and not the T211 Contract, particularly as s 17(3)(b) of the SOP Act stated that the adjudicator could only consider "the provisions of the contract to which the adjudication application relates".<sup>12</sup>

12 Plainly, s 17(3)(b) made clear that the adjudicator could only consider the contract in relation to the Payment Claim (which was the T211 Contract).<sup>13</sup> Moreover, if the adjudicator had to consider extensive documentary materials on claims arising from other contracts, the operation of the adjudication

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10 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [9].

11 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [20].

12 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [53]-[55].

13 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [55].

regime as a quick and low-cost mechanism to resolve payment disputes would be severely hampered.<sup>14</sup>

13 Further, the court dismissed the appellant's arguments that it was entitled to raise the set-off or deductions arising from the other C933 Contract pursuant to s 15(3) of the SOP Act, which purportedly allowed the appellant to raise any cross-claim, counterclaim and set-off as long as it was stated in a timeously served payment response. In reviewing s 15(3), the court made it clear that the section did not pertain to the appellant's argument regarding the *content* that could be included, but instead dealt with the *time* within which withholding reasons had to be made, in order to be considered at the adjudication.<sup>15</sup>

***B. Purpose, scheme of Building and Construction Industry Security of Payment Act do not allow a party to raise set-off or deductions arising out of a separate construction contract***

14 The court also considered that the appellant's arguments were not consistent with the SOP Act's purpose of facilitating cash flow to downstream contractors, given that allowing a responding party to set off payments or make deductions from other construction contracts would increase the costs and delay adjudications by requiring the adjudicator to deal with these other contracts.<sup>16</sup>

15 Moreover, the court highlighted that the appellant's interpretation of the SOP Act could result in a responding party evading s 15(3)'s requirements to respond timeously to a payment claim. In particular, the appellant's interpretation could mean that where a responding party to a payment claim under Contract A failed to file a payment response timeously and lost at the adjudication, that responding party could nevertheless bring up Contract A's set-offs and/or deductions when a contractor issued a payment claim under Contract B. Such an outcome that undermined the SOP Act could not be permitted.<sup>17</sup>

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14 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [57].

15 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [50]–[52].

16 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [72].

17 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [76]–[78].

#### IV. Court of Appeal leaves open issue of “single contract interpretation”

16 Lastly, in coming to its decision, the Court of Appeal made it clear<sup>18</sup> that the SOP Act only forbids a responding party from making deductions or set-offs in a payment response for reasons that arose from a separate construction contract (bearing in mind that in the *Civil Tech* case, there was no express stipulation in the construction contract on which the payment claim was based that allows the responding party to set off or make deduction against another construction contract). The Court of Appeal left open the issue as to whether the SOP Act would only allow a respondent to rely on reasons for withholding payment that arose out of the contract on which the payment claim was based, as was decided by the High Court (the “Single Contract Interpretation”).

17 While this would seem to be a logical outcome of *Civil Tech*, this issue would have to be seen in the light of the appellant’s submission before the High Court, where it was highlighted that some construction contracts allowed for deductions to be made arising from other contracts, for example, cl 32.2(1) of the Public Sector Standard Conditions of Contract for Construction Works 2014 (7th Ed), which stated that:<sup>19</sup>

Payment certificates may include ‘deduction of any sums which might have been or may become due and payable by the Contractor to the Employer under the Contract or otherwise’. [emphasis added]

18 While this issue was left undecided by the Court of Appeal, it is humbly submitted that there is merit to the Single Contract Interpretation. For one, it would be consistent with the High Court decision in another case that an adjudication application can only be founded on a payment claim arising from one contract.<sup>20</sup> It would not be consistent for a claimant to only be able to submit a claim under one contract, but for a respondent to bring in various contracts in response to a claim. Moreover, the concerns cited by the Court of Appeal with regard to the adjudicator’s limited time and resources in

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18 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [80].

19 *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2018] 3 SLR 778 at [63].

20 *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [38].

having to decide on the validity of a payment claim arising from one contract, as well as the general thrust of the SOP Act's purpose, would support the Single Contract Interpretation.

**V. Effect of decision in *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd***

19 The decision in *Civil Tech* reinforces the Court of Appeal's clear approach of giving effect to the purpose of the SOP Act in establishing a low-cost adjudication system to resolve payment disputes and ease cash flow to downstream contractors.

20 By preventing a responding party from including deductions or set-offs arising from unrelated contracts in a payment response under the SOP Act, adjudicators will not be saddled with having to deal with a myriad of issues within a very short span of time. Such issues would be better canvassed in court or at arbitration as the parties' rights and liabilities can be exhaustively argued and finally determined at such forums. Consequently, the adjudicator will be able to spend the limited resources available to expeditiously determine the substance of a payment claim in an adjudication.

21 As such, responding parties receiving payment claims from different contracts would do well to properly process these claims separately, instead of setting off or making deductions across various contracts as they might not stand at the adjudication. Responding parties should also consider other avenues, such as a demand on a performance security, in order to protect themselves against unmeritorious claimants.