IN THE APPELATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 36

Civil Appeal No 47 of 2022

Between

Wong Kee Wah t/a The Education Future Hub

… *Appellant*

And

Sng Boon Chye

… *Respondent*

In the matter of Suit No 1062 of 2020

Between

Wong Kee Wah t/a The Education Future Hub

… *Plaintiff*

And

Sng Boon Chye

… *Defendant*

EX TEMPORE JUDGMENT

[Contract — Contractual terms — Interpretation]

Wong Kee Wah (trading as The Education Future Hub)
v
Sng Boon Chye

[2022] SGHC(A) 36

Appellate Division of the High Court — Civil Appeal No 47 of 2022
Woo Bih Li JAD, Debbie Ong Siew Ling J and Aedit Abdullah J
25 October 2022

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Woo Bih Li JAD (delivering the judgment of the court *ex tempore*):

Introduction

1 This is a dispute between two individuals in respect of commissions earned on various programmes.

2 The plaintiff (or appellant in this appeal), Wong Kee Wah ("P"), is the sole proprietor of The Education Future Hub which is in the business of marketing programmes offered by Approved Training Organisations ("ATOs") to the public. It receives a commission for each eligible student successfully enrolled in selected programmes. The ATOs in question are:

(a) Click Academy Asia Pte Ltd ("CAA"),

(b) The Leadership Institute Pte Ltd ("TLI"), and

(c) The Baking Industry Training College Pte Ltd ("BITC").

3 The ATOs receive funding from government-linked agencies such as the Institute of Banking and Finance ("IBF") and Skills Future SG ("SSG").

4 The defendant (or respondent in this appeal), Sng Boon Chye ("D"), is one of P's sub-contractors and he, in turn, receives a commission from P for each student who is successfully enrolled in the selected programmes.

5 On 1 January 2019, P and D signed an MOU ("the MOU").[1]

Decision Below

6 In *Wong Kee Wah (trading as The Education Future Hub) v Sng Boon Chye* [2022] SGHC 95 ("the Judgment") at [27], the Judge found that D is liable to P for the following:

(a)	School fees collected by D which should have been paid to P	$290,310.75
(b)	Advance commission paid by P to D for CAA programmes in April 2020	$15,298.55
(c)	Loan extended by P to D	$40,000.00
	Total:	**$345,609.30**

7 The Judge also found that P is liable to pay D $763,035.80 as D's commission for promoting CAA, TLI and BITC programmes from April to July 2020. The breakdown of the commission is as follows:

[1] ACB (Vol II) dated 2 Aug 2022 at 49–50.

(a)	Commission for CAA programmes	$682,305.00
(b)	Commission for TLI programmes	$64,780.00
(c)	Commission for BITC programmes	$15,950.80
	Total:	**$763,035.80**

Consequently, the net sum payable by P to D was $763,035.80 – $345,609.30 = $417,426.50. Based on the Judgment at [26]–[27], it is not entirely clear whether the Judge took the view that of the $763,035.80 in commission owed, $15,298.55 in advance commission had already been paid by P to D. On appeal, parties do not dispute that this is the view which should be taken. Therefore, arguably, the Judge should have simply reduced the $763,035.80 by $15,298.55 and excluded the latter from the amounts to be paid by D to P.

8 P has appealed but D has not. The Judge's main reason for finding P liable to D for $763,035.80 in commission is that the MOU applies only to Leadership People Management ("LPM") and Service Leadership ("SL") programmes. As it is undisputed that the programmes offered by CAA, TLI and BITC were not LPM and SL programmes, the MOU did not apply to the programmes offered by CAA, TLI and BITC.

9 Even if the MOU applies, the Judge was of the view that P was not entitled to rely on cl 3 to withhold payment to D. Clause 3 provides for P to pay D, "14 working days upon receiving disbursement of fund for completed [programmes] … and all terms stated on schedule1 being full filled" [*sic*]. In the present dispute, P alleged that he has not received his commission from

CAA but he has received them from TLI and BITC.[2] In this appeal, P says that it is undisputed that P has not received the CAA commission in question.[3] The Judge took the view that cl 3 referred to the time of payment rather than P's obligation to make payment. The Judge found that if P sought to exonerate himself from his contractual obligation to pay commissions to D in the event that he does not receive disbursement of funds from the ATOs, he needed to draft such terms clearly and expressly. Applying the rules of *contra proferentem*, the Judge interpreted cl 3 against P.

10 The Judge was of the view that it was not necessary for him to decide whether D actually breached the marketing guidelines. P did not plead damages for breach of contract and the Judge had found that D's entitlement to commission was not conditional upon his compliance with marketing guidelines.

Our decision

11 P's appeal covers two main areas:

(a) the CAA commission; and

(b) the TLI and BITC commissions.

12 On the latter, P's appeal is only in respect of the quantum which the Judge ordered P to pay D. P argues that the Judge overlooked some payments that he had already made to D and the correct sums payable by P are:[4]

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2 Plaintiff's Reply and Defence to Counterclaim (Amnd No 1) ("RDCC") dated 28 Jul 2021 at [15]; Plaintiff's AEIC dated 18 Nov 2021 at [57], [61], [66] and [68].

3 Appellant's Case at [21].

4 Appellant's Case at [8]–[9] and [100]–[104]; Appellant's Reply at [26]–[27].

(a)	TLI programmes ($64,780.00 – $21,916.00)	$42,864.00
(b)	BITC programmes ($15,950.80 – $2,375.60)	$13,575.20

D does not address P's argument in detail and simply denies that the Judge had erred.[5] There are also WhatsApp chat records supporting the fact that the said payments have already been made to D.[6] In any event, the reduced quantum as mentioned by P for the TLI and BITC programmes exceed the quantum claimed by D in his Reply to Defence to Counterclaim. Therefore, the commissions due from P to D in respect of TLI and BITC programmes should be reduced to $42,864.00 and $13,575.20 respectively.

13 In respect of the main dispute regarding the CAA commission, P now alleges that there is no discernible basis to impose an obligation on P to pay D the CAA commission, although this was not P's main argument below. P argues that D did not plead nor establish any contract alternative to the MOU which would entitle D to payment of commissions.[7] We are of the view that it is important not to conflate pleadings and evidence. Notwithstanding the lack of elaboration and poor drafting, the Defence and Counterclaim (Amendment No 1) ("DCC") does plead a contractual claim although not based on the MOU.[8] Although DCC at [28] refers to the Statement of Claim (Amendment No 1) ("SOC") at [2] and [4] and SOC at [4] in turn refers to the MOU as the contractual basis, it is quite clear from the other paragraphs of DCC that D does not accept that the MOU applies. In the circumstances, it is clear from D's

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5 Respondent's Case at [28]–[29].

6 ACB (Vol II) dated 2 Aug 2022 at 38; Record of Appeal ("RA") Vol IV(I) 87, 90.

7 Appellant's Case at [25].

8 Defence and Counterclaim (Amnd No 1) ("DCC") dated 24 Dec 2020 at [4], [6] and [28].

pleadings that D is relying on a contract other than the MOU. Therefore, D did plead a contractual entitlement. The question of evidence will be addressed later.

14 P argues that D did not elaborate on matters such as when the other contract was made. While this is true, it is not fatal to D's claim because P himself proceeded below on the basis that there was a contract applicable to the initial LPM/SL programmes and the programmes from the three ATOs in question. It is just that P's case was that the MOU was the contract or, at least, that the terms of the MOU apply to the contract. Furthermore, P's affidavit of evidence-in-chief ("AEIC") elaborated on the commission structure (for the programmes from the three ATOs) between P and D.[9] This structure was not based on *quantum meruit* but obviously on some sort of oral agreement between the parties which neither party elaborated upon.

15 In the circumstances, it is too late for P to now argue on appeal that there was no contract at all between P and D in respect of the programmes from the three ATOs.

16 The next question is whether:

(a) the MOU applies as initially entered into; or

(b) was extended by the parties through their conduct to cover the programmes from the three ATOs; or

(c) some contract, other than the MOU, applied.

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9 Plaintiff's AEIC at [19]–[20].

17 In this appeal, P does not elaborate as to why the MOU should apply if there was a contract between parties in respect of the programmes from the three ATOs. P simply assumes that the MOU applies and goes on to submit that cl 3 is applicable to defer P's obligation to pay D until CAA pays P.[10] The Judge seems to have proceeded on the premise that P has not yet received such payment from CAA as alleged by P. D has no knowledge of this and does not dispute it as such. Accordingly, we accept that P has not received payment from CAA.[11] As mentioned, the Judge decided that the MOU did not apply or, alternatively, cl 3 did not preclude D's claim (see [8]–[9] above).

18 Based on the terms of the MOU, we agree with the Judge that the terms do not explicitly cover the programmes from the three ATOs. In reaching this conclusion, we consider the question of whether it can be said that the reference in the fourth paragraph of the MOU to "SFC" programmes (meaning Skills Future Credits) applies to programmes from the three ATOs. We note that "SFC" is not actually a programme. It is a credit that may be used for programmes. Notwithstanding the poor drafting of the MOU, the question is whether SFC could be used for CAA programmes and if so, whether this means that the MOU applies to CAA programmes.

19 The Judge did not deal with this point. In P's Reply and Defence to Counterclaim (Amendment No 1), P alleges that the MOU covers SFC programmes and the CAA (and LTI and BITC) programmes are SFC applicable.[12] In P's AEIC, P alleges that students were entitled to use SFC for

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10 Appellant's Case at [38]–[39].

11 Appellant's Case at [38]–[39].

12 Plaintiff's RDCC at [5].

CAA programmes.[13] In D's Reply to P's Defence to Counterclaim, D does not specifically deny that SFC may be used for CAA programmes although there is a general denial of P's Defence to Counterclaim. D's AEIC also does not deny that SFC may be used for CAA programmes. In addition, D did not challenge P's evidence when P was cross-examined by D. However, D is a lay person and too much should not be made about the absence of a challenge when D in his own oral evidence had denied that SFC could be used for CAA programmes funded by IBF. While P's counsel challenged D on this,[14] he (and P) did not adduce objective evidence to establish that SFC could be used for CAA programmes funded by IBF.

20 In the circumstances, there is insufficient evidence to establish that SFC could be used for CAA programmes funded by IBF.

21 Since P fails on the argument that the MOU applies because SFC could be used for CAA programmes, the MOU as initially drafted does not extend to the programmes from the three ATOs including CAA.

22 Although the MOU states that it will be in effect from the date of signing till both parties agree to cease collaboration by written notice, this does not help P because the anterior question is whether, at inception, the MOU applies to CAA programmes.

23 The second and third questions (see [16] above) may be considered together.

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13 Plaintiff's AEIC at [24].

14 RA Vol III(D) 42–45 (10/2/2022 NE 12–15).

24 P's pleadings are vague. They say that the MOU applies but there is no elaboration as to whether it applies at inception or was extended by oral agreement or conduct to the programmes from the three ATOs. Nevertheless, we are of the view that P's pleadings are wide enough to allow the court to consider whether the MOU was subsequently extended by the parties to such programmes orally or by conduct. Nevertheless, we find that there is no prejudice to D because D knew that P was arguing that the MOU applies (by whichever route).

25 It appears that subsequent to the MOU, parties orally agreed that P would pay D commissions for the students successfully enrolled in these programmes. Even the commission structure was agreed. This is set out in P's AEIC at [20] and is not disputed by D (see also [14] above).

26 It should be borne in mind that the MOU does say that the contents of the MOU may be modified in writing between the parties. But we do not think that this precludes P from arguing that parties had orally agreed to or proceeded on the basis that the MOU was extended to the programmes in question.

27 The better view is that this term was intended to apply only if parties intend to modify the existing terms in the MOU, but not if the existing terms were to be extended to other programmes. Extending the MOU to other programmes was not inconsistent with the MOU which did not specifically say that it was to be confined to LPM and SL programmes. In fact, the purpose of the MOU appeared to be much broader. It was described as "a working agreement between the parties for the marketing of WSQ and SFC programs that will be offered by the Providers".

28 In P's AEIC, he says that at inception he told D that the MOU was to apply to other programmes not limited to LPM and SL programmes.[15] In D's AEIC, he disagrees.[16] Unfortunately for P, his SOC does not mention this conversation and that it was expressly orally agreed that the MOU would apply to other programmes.

29 Based on the conduct of the parties, it seems to us that parties had proceeded on the basis that the terms in the MOU, including cl 3, apply to the other programmes. Otherwise, no terms are applicable except for the commission structure mentioned by P. It seems more likely that parties had assumed and acted on the basis that the MOU terms also applied to the other programmes, rather than to have no other terms apply at all.

30 This is supported by a series of WhatsApp messages dated 4 July 2020.[17] P informed D that any advance payment subject to IBF funding was subject to claw back if funding was rejected. D did not disagree. This suggests that D knew that he was not entitled to payment of commission from P unless P first received payment from an ATO.

31 D was questioned on this message.[18] He said he did not disagree with P because their collaboration had already broken up, but this explanation did not make sense.

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15 Plaintiff's AEIC at [12]–[13].

16 Defendant's AEIC dated 17 Nov 2021 at [10].

17 RA Vol III(B) 66–68 (WhatsApp Messages dated 4/7/2020 – 11:32:20, 13:50:23 and 13:50:43).

18 RA Vol III(D) 90–92 (10/2/2022 NE 60–62).

32 In this appeal, P highlights a WhatsApp message of 3 July 2020 from D to P.[19] This message says, "Funds anyway must wait for tg I will rush ibf". According to P's submission for the appeal, "tg" means training grant.

33 While this message could be used to support P's position that D is not entitled to payment until P himself receives payment of his own commission from an ATO, the message itself is not entirely clear. It is not even clear that the funds D was referring to were his own commission, less still that D was alluding to some agreement on payment of his commission. Furthermore, D was not cross-examined on it and therefore he was not given a chance to explain the WhatsApp message. Hence, it is unsafe to rely on it to D's detriment.

34 In this appeal, P also further highlights a WhatsApp message dated 4 August 2020.[20] It says, "Strictly according to our agreement signed, Comm is payable from disbursements …". The message seems to suggest that according to an agreement signed by the parties, any commission payable to D is to be paid after the commission is paid by the ATOs to P and is consistent with P's position. However, after some other messages between the parties, there is a message from D to P about 12 minutes later saying, "Now u forcing people To settle things where is not agreed". It is unclear just from the series of messages whether D was disagreeing with P that according to the signed agreement (which must be the MOU as this is the only agreement signed by the parties), D is entitled to payment only after P receives his own commission. Therefore, as

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19 Appellant's Reply at [11(b)]; Appellant's Second Core Bundle of Documents ("ASCB") dated 12 Sep 2022 at 18 (WhatsApp Message dated 3/7/2020 – 10:32:34).

20 Appellant's Reply at [22(d)]; ASCB dated 12 Sep 2022 at 19 (WhatsApp Message dated 4/8/2020 – 11:17:01 and 11:29:29).

D was not cross-examined on this message, it is also unsafe to accept P's submission and rely on it to D's detriment.

35 Nevertheless, in the circumstances and bearing in mind the WhatsApp message of 4 July 2020 and D's omission to disagree with it, we find that the Judge had erred. The MOU applies to the programmes from the three ATOs, including the CAA programmes in question. With respect, although the Judge mentioned that the fundamental assumption of P's case was that the MOU extends to these programmes, he had focused on whether the terms of the MOU applied at inception and not so much as to whether they were subsequently extended to the programmes. There was only a short reference by the Judge to such extension. He had also not mentioned the WhatsApp message of 4 July 2020 although it was raised in the cross-examination of D.

36 The parties having proceeded and arranged their affairs on the common assumption that the MOU extended to these other programmes, it would be unjust for either party to be allowed to resile from this assumption.

37 We now come to the interpretation and application of cl 3 given our view that the MOU applies to the programmes from the three ATOs. In the Judgment at [18], the Judge said that the provision seems to be referring to the time of payment rather than P's obligation to make payment. If P wanted to exonerate himself from liability to pay commission to D in the event P does not receive his own commission, P needed to draft this in clear and express terms. Applying the rules of *contra proferentem*, the Judge interpreted cl 3 against P.

38 In our view, the Judge erred because he proceeded on the basis that the time for payment was different from P's obligation to pay D. With respect, the two are inter-connected. If the time for payment from P to D does not arise until

P himself receives payment of his commission, then P's obligation to pay D has not yet arisen, *ie*, P is not yet in default. It is quite clear from cl 3 (although not well-drafted) that payment to D is deferred until P receives his own commission. P then has to pay within 14 days.

39 Significantly, apart from asserting that the Judge did not err in saying that cl 3 referred to the time of payment,[21] D does not engage with P's argument, *ie*, that cl 3 is clear and unambiguous in saying that D is not entitled to be paid unless P receives his own commission. The rule of *contra proferentem* applies only if there is ambiguity.

40 In the circumstances, it is unnecessary for us to address P's allegations about D having violated the marketing guidelines.

Conclusion

41 The appeal is therefore **allowed**. Hence, the end result is that:

(a)	D is to pay P $345,609.30 under [27] of the Judgment which D has not appealed against	$345,609.30
(b)	Under [12] above, P is to pay D $42,864.00 and $13,575.20 in respect of TLI and BITC programmes respectively.	$56,439.20
	Balance:	**$289,170.10**

42 As for costs, P claims for $50,000.00 from D as costs of the appeal plus disbursements. D has suggested that P pay $60,000.00 plus disbursements. Bearing in mind P's poor pleadings and the distracting argument that D has no contractual entitlement to claim commissions for the programmes of the three

[21] Respondent's Case at [22].

ATOs, we grant P 50% of his costs plus disbursements. Taking 100% of his costs as $50,000.00, we award P as costs the sum of $25,000.00 in respect of the appeal, together with reasonable disbursements as agreed. In default of agreement, parties may write into the court to fix the disbursements. The usual consequential orders shall apply.

43 As for costs of the trial, we take into account the poor pleadings and the less than satisfactory manner which P ran his case. D is to pay 50% of such costs. Taking 100% to be $100,000.00, 50% is $50,000.00 which D is to pay P as costs of the trial plus reasonable disbursements to be agreed or fixed by the court.

Woo Bih Li
Judge of the Appellate Division

Debbie Ong Siew Ling
Judge of the High Court

Aedit Abdullah
Judge of the High Court

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