

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 13

Suit No 790 of 2018

Between

Min Hawk Pte Ltd

... Plaintiff

And

SCB Building Construction Pte
Ltd

... Defendant

JUDGMENT

[Building and Construction Law] — [Sub-contracts] — [‘pay when paid’
provisions]

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Min Hawk Pte Ltd
v
SCB Building Construction Pte Ltd

[2020] SGHC 13

High Court — Suit No 790 of 2018
Chan Seng Onn J
14–15 August 2019; 24 October 2019

20 January 2020

Judgment reserved.

Chan Seng Onn J:

Introduction

1 This is a dispute between a contractor and its sub-contractor on the interpretation of payment terms under a two-tranche payment agreement between both parties (“the Agreement”).

Facts

2 The plaintiff, Min Hawk Pte Ltd, was engaged by the defendant, SCB Building Construction Pte Ltd, to design, supply and install aluminium and glazing works in respect of a construction project (“the Project”).¹ Big Box Pte

¹ Statement of Claim (“SOC”) at para 3; Defence at para 3; Mr Gan King Ann’s (“Mr Gan’s”) AEIC at para 6.

Ltd (“Big Box”) is the owner of the Project, with the defendant being the main contractor and the plaintiff being the sub-contractor of the Project.²

3 The witnesses involved in the trial are as follows:

- (a) Mr Gao Xiang, a contract manager for the plaintiff (“Mr Gao”);
- (b) Ms Fang Wenfeng, a quantity surveyor for the plaintiff (“Ms Fang”); and
- (c) Mr Gan King Ann, a deputy executive director of the defendant (“Mr Gan”).

Payment issue between Big Box and the defendant

4 It is helpful to first lay out the background facts as regards the ongoing payment issue between the defendant and Big Box which resulted in the present dispute between the plaintiff and the defendant.

5 An agreement dated 27 March 2017 was reached between the defendant and Big Box for the resolution of all payment issues relating to the Project.³ The said agreement was subsequently breached as Big Box did not repay the defendant the sum of \$4,707,688.45 owed to the defendant.⁴ On 18 August 2017, the defendant took out a court application under High Court Originating Summons No 947 of 2017 (“OS 947/2017”) to enforce the terms of

² Mr Gan’s AEIC at para 7.

³ Mr Gan’s AEIC at para 16.

⁴ Mr Gao Xiang’s (“Mr Gao’s”) AEIC at para 5; Mr Gan’s AEIC at para 17.

the said agreement.⁵ On 25 January 2018, the court granted the application in terms pursuant to High Court Order of Court 720 of 2017 (“ORC 720/2017”) and Big Box was ordered to pay the defendant the sum of \$4,707,688.45.⁶

6 On 25 July 2017, OCBC issued a letter of demand to Big Box referencing a loan facility agreement, demanding the payment of an outstanding amount of \$111,305,749.96 by 5pm on 14 August 2017, reserving its rights to appoint a receiver and manager if payment was not received by that date.⁷ On 27 September 2017, OCBC appointed Ms Ee Meng Yen Angela and Mr Aaron Loh Cheng Lee as joint and several receivers and managers of all assets and properties of Big Box, pursuant to the loan facility agreement made by Big Box with OCBC.⁸

7 On 17 April 2018, the defendant enforced the order by way of a winding up application in High Court Companies Winding Up No 72 of 2018 (“CWU 72/2018”).⁹ The hearing of CWU 72/2018 was fixed on 11 May 2018 and subsequently adjourned to 29 June 2018.¹⁰ On 19 April 2018, the solicitors acting for the receivers and managers appointed by OCBC for Big Box informed the defendant that they would provide relevant updates in relation to the proposed sale of the building of Big Box.¹¹

⁵ Mr Gan’s AEIC at para 18.

⁶ Mr Gan’s AEIC at para 19 and p 55.

⁷ Mr Gan’s AEIC at p 97, para 10.

⁸ Mr Gan’s AEIC at p 97 at para 11; Defendant’s Bundle of Documents (“DBOD”) Vol 1 at p 33.

⁹ Mr Gan’s AEIC at para 21

¹⁰ Mr Gan’s AEIC at para 22.

¹¹ Mr Gan’s AEIC at para 24.

8 TT International Limited (“TTI”), a creditor and contributory holding 51% of shareholdings in Big Box, proposed to adjourn the defendant’s winding-up application in CWU 72/2018 until the sale of the Big Box building had been completed in order to facilitate the search for a buyer.¹² The defendant acceded to TTI’s request for the adjournment in order to pave the way for the completion of sale of the Big Box building.¹³ With the defendant’s consent, on 28 June 2018, TTI’s solicitors made a request to the High Court to adjourn the hearing of CWU 72/2018 fixed on 29 June 2018.¹⁴ The request was allowed.¹⁵

9 Despite the defendant’s enquiries on the status of the sale of Big Box from December 2018 to April 2019, there were no further updates provided to the defendant by the solicitors of the receivers and managers of Big Box.¹⁶

The Agreement

10 It is undisputed that the plaintiff had completed the works that the defendant had sub-contracted to it. On 27 September 2017, the parties entered into the Agreement concerning payment of an outstanding amount of \$486,641.56 owed by the defendant to the plaintiff.¹⁷ Pursuant to the Agreement, payment for the amount owed was to be made in two tranches as follows:¹⁸

¹² Mr Gan’s AEIC at para 26.

¹³ Mr Gan’s AEIC at para 31.

¹⁴ Mr Gan’s AEIC at para 32.

¹⁵ Mr Gan’s AEIC at para 32.

¹⁶ Mr Gan’s AEIC at para 34.

¹⁷ SOC at paras 4–6;

¹⁸ DBOD Vol 1 at pp 30–32.

1. [The defendant] shall pay [the plaintiff] the SUM (comprising the amount of S\$486,641.56 inclusive of GST in the following manner:-

1.1. First tranche of payment in the sum of \$200,000.00 by 30 September 2017;; [sic] and

1.2 Second tranche of payment in the sum of \$286,641.56 by 31 January 2018, *which payment is subject to and/or conditional upon [the defendant's] full resolution of all outstanding issues with Big Box Pte Ltd ("**Big Box**")*, the employer for the Project, in relation to the work done by [the defendant] and to payment payable by Big Box to [the defendant] in connection with the said work.

2. Without prejudice to the generality of the foregoing provisions, *and subject to clause 1.2 above, in the event that [the defendant] could not fully resolve with Big Box payment and/or other issues relating to the Project by 31st December 2017, the Parties shall review the terms and conditions set out herein and where necessary to extend the payment timeline and/or amend any of the said terms and conditions.* Such revision and/or amendment, upon the Parties' agreement to the same, shall be binding on the Parties.

[emphasis added in italics, emphasis in original in bold]

11 The Agreement was drafted by the defendant, and signed by both Mr Gao (on behalf of the plaintiff) and Mr Gan (on behalf of the defendant), after the terms of the Agreement were read out in English and explained in Mandarin by Mr Gan to Mr Gao.¹⁹ The plaintiff was aware of and had contemplated the defendant's payment issue with Big Box, (*ie*, that Big Box had still owed the defendant money) before signing the Agreement.²⁰ The defendant agreed to the two tranches of payment as the defendant was having difficulties making payment at the time and the parties had a long working relationship.²¹

¹⁹ Transcript 14 August 2019 at p 5.

²⁰ Transcript 14 August 2019 at p 10.

²¹ Transcript 14 August 2019 at p 9.

12 It is undisputed that the first tranche of payment of \$200,000.00 has been satisfied (“first tranche payment”). The parties are in contention over the payment date of the second tranche of payment of \$286,641.56 (“second tranche payment”) based on cl 1.2 of the Agreement.²² The parties are also in dispute as to whether the parties had discharged their obligations to review the terms of the Agreement in accordance with cl 2 of the Agreement.²³

Phone Call 1 and 19 December 2017 Email

13 On 19 December 2017 at about 12.00pm, Mr Gan called Ms Fang (“Phone Call 1”) to (i) update her on the developments of OS 947/2017 (*ie*, the defendant’s legal action to pursue payment from Big Box); and (ii) extend the second tranche payment date to 30 June 2018.²⁴ Over the phone, Ms Fang informed Mr Gan that the plaintiff did not agree to the defendant’s proposal and told Mr Gan that her “superiors had the final say with regards to their proposal”.²⁵

14 At 12.50pm, the defendant sent an email dated 19 December 2017 (“19 December 2017 Email”) to the plaintiff:²⁶

As per our tele-conversation a while ago, please be informed that our legal action to pursuing payment [*sic*] from Big Box under case OS 947 had been again postpone to be hear [*sic*] on 19 Feb 2018, while we have appeal [*sic*] to the court for an earlier date which still pending from court’s reply [*sic*]. The date specified under clauses 1.2 of our Payment Agreement dated 27

²² Plaintiff’s Closing Submissions (“PCS”) at para 2; Defendant’s Closing Submissions (“DCS”) at para 32.

²³ PCS at para 2; DCS at para 33.

²⁴ Transcript 15 August 2019 at p 36.

²⁵ Ms Fang’s AEIC at paras 28–29.

²⁶ DBOD Vol 1 at p 74.

September 2017 (the ‘Agreement’) will not be able to be achieve [sic]. Pursuant to clauses 2 [sic] of the Agreement, we hereby propose to tentatively extend the payment date to 30th June 2018 subject and/or conditional upon [the defendant’s] full resolution of all outstanding payment payable by Big Box Pte Ltd.

...

15 Thereafter, Ms Fang read the email and checked with her boss on the same day, who affirmed her decision to reject the proposal to extend the payment date to 30 June 2018.²⁷

16 It is Mr Gan’s testimony that the phone conversation took place approximately 50 minutes *before* the 19 December 2017 Email was sent.²⁸ On the contrary, it is Ms Fang’s initial testimony that the said phone conversation occurred *after* the email had been sent, although she could not recall the exact date of the phone conversation.²⁹ However, Ms Fang later changed her testimony, noting that Mr Gan did tell her about the contents of the email and “maybe” sent her an email recording the parties’ discussion over Phone Call 1 *after* Phone Call 1 had taken place.³⁰ On the balance of probabilities, I reject Ms Fang’s initial testimony on the timing of the phone conversation. The words “[a]s per our tele-conversation a while ago” in the 19 December 2017 Email squarely contradicts her averment that the phone conversation took place *after* the email. It is more likely than not that Mr Gan’s version of events is accurate (*ie*, the 19 December 2017 Email was sent *after* the Phone Call 1 and records the contents of the parties’ discussion in Phone Call 1).

²⁷ Transcript 14 August 2019 at pp 62 and 92.

²⁸ Transcript 15 August 2019 at p 36.

²⁹ Transcript 14 August 2019 at p 60.

³⁰ Transcript 14 August 2019 at p 90.

17 Based on the above sequence of events, Ms Fang had essentially verbally rejected the defendant's proposal for the time extension over Phone Call 1 before reading the 19 December 2017 Email and obtaining the confirmation from her boss. Thereafter, she retrospectively went to her boss to inform him about the defendant's proposal for a time extension, who then affirmed her decision. Thereafter, the plaintiff did not reply to the 19 December 2017 Email and did not make further communications to the defendant in relation to the 19 December 2017 Email until 12 March 2018 (see below at [23]).³¹

18 Ms Fang was also of the understanding that Mr Gao would not have answered the email as Ms Fang was the one who had to attend to the 19 December 2017 Email for the plaintiff.³² Ms Fang testified that all she had done was to tell the defendant that the plaintiff did not agree to an extended deadline of 30 June 2018.³³ In essence, the plaintiff had communicated a plain rejection of the defendant's proposal contained within the 19 December 2017 Email to extend the second tranche payment deadline to 30 June 2018 and provided no alternative dates or counter-proposals.³⁴ In the absence of a counter-proposal, the plaintiff had essentially insisted that the deadline of 31 January 2018 should still apply.³⁵

³¹ Transcript 15 August 2019 at p 37.

³² Transcript 14 August 2019 at p 104.

³³ Transcript 14 August 2019 at p 125.

³⁴ Ms Fang's AEIC at paras 28–29; Transcript 14 August 2019 at p 63.

³⁵ Transcript 14 August 2019 at p 63.

Phone Call 2

19 Ms Fang testified that she had called the defendant over the phone for payment some time in February 2018 (“Phone Call 2”) and Mr Gan had informed her over the phone that according to the contract terms of the Agreement, if the defendant did not receive payment from Big Box, the defendant would be unable to pay the plaintiff.³⁶ The purported second offer by the defendant is essentially a “pay when paid” arrangement, whereby the defendant would only pay the plaintiff when Big Box paid the defendant. I note that Ms Fang did not adduce any call logs evidencing this particular call in February 2018.³⁷ Ms Fang also made no reference to Phone Call 2 in February 2018 in her AEIC and had only first mentioned about Phone Call 2 at trial. Her explanation for not providing information about Phone Call 2 in her AEIC was that “there was no record [of the phone call]”.³⁸ This explanation is unsatisfactory, given the crucial nature of the purported offer by the defendant in Phone Call 2.

20 On the other hand, Mr Gan denied having received Phone Call 2 and proposing the “pay when paid” arrangement in February 2018 to Ms Fang.³⁹ Mr Gan testified that it would have been impossible for the defendant to have proposed such an arrangement. Prior to the signing of the Agreement, the defendant had previously proposed a “pay when paid” arrangement to Ms Fang for the *full sum* of \$486,641.56 (*ie*, the total sum of first tranche payment and

³⁶ Transcript 14 August 2019 at p 67.

³⁷ Transcript 14 August 2019 at p 70.

³⁸ Transcript 14 August 2019 at p 77.

³⁹ Transcript 15 August 2019 at pp 71 and 78.

second tranche payment) and Ms Fang had rejected such a proposal.⁴⁰ This resulted in the parties' negotiation towards a two-tranche payment arrangement that was enumerated in the Agreement.⁴¹ As such, Mr Gan's understanding was that the plaintiff would not have accepted the "pay when paid" arrangement, whether for the full or second tranche of payments and Mr Gan could not have therefore proposed such an arrangement after the Agreement. I also note that Ms Fang had previously rejected Mr Gan's proposal to extend the second tranche payment deadline to 30 June 2018 in Phone Call 1. It would be illogical for the defendant to still have made an offer (*ie*, a "pay when paid" arrangement) in Phone Call 2, which was worse than the one proposed in the 19 December 2017 Email to Ms Fang which had already been rejected by the plaintiff.

21 On the balance of probabilities, I find that the "pay when paid arrangement" was not communicated via Phone Call 2 by Mr Gan to Ms Fang in February 2018.

Correspondence from 12 March 2018 onwards

22 After the 19 December 2017 Email, there was no further correspondence between the parties until 12 March 2018, which was after the deadline for the second tranche payment of 31 January 2018 had lapsed.

23 On 12 March 2018 before 3.27pm, Ms Fang's attempted to contact Mr Gan via a phone call to request for the second tranche payment.⁴² Mr Gan did not pick up the call. At 3.27pm, Mr Gan messaged Ms Fang that he was "busy

⁴⁰ Transcript 15 August 2019 at p 71.

⁴¹ Transcript 15 August 2019 at p 71.

⁴² Ms Fang's AEIC at para 30; Bundle of Documents ("BOD") at p 5.

at the moment” and asked her to “please call [him] later”.⁴³ Thereafter, Ms Fang replied to ask Mr Gan to “please call [her] back”.⁴⁴

24 On 13 March 2018 at 4.38am, Mr Gan sent a message to Ms Fang, informing her that he was overseas and asking her to call him back on the following Thursday.⁴⁵ No further calls were made by both parties until 26 March 2018. On 26 March 2018, Ms Fang sent a message to the defendant, asking the defendant to provide a deadline for the outstanding payment and that her boss was pressuring her to chase the defendant for payment.⁴⁶ She also informed the defendant that if there was no further response from the defendant, her boss might “choose to hire a lawyer”.⁴⁷

25 On 21 May 2018, the plaintiff’s solicitor sent a letter of demand to the defendant for the payment of the second tranche payment amount, noting that if the defendant did not make payment by 28 May 2018, they would commence legal action against the defendant.⁴⁸

26 On 31 May 2018, the defendant replied to the plaintiff’s solicitor, stating that the second tranche payment was not due for payment pursuant to cl 1.2 of the Agreement and that the defendant would keep the plaintiff updated on the development of Big Box’s liquidation proceedings.⁴⁹

⁴³ Ms Fang’s AEIC at para 30; BOD at p 5.

⁴⁴ Ms Fang’s AEIC at para 30; BOD at p 5.

⁴⁵ BOD at p 5. Transcript 15 August 2019 at p 37.

⁴⁶ BOD at p 5.

⁴⁷ BOD at p 5; Transcript 14 August 2019 at p 67.

⁴⁸ Mr Gao’s AEIC at p 16.

⁴⁹ Mr Gao’s AEIC at p 17.

27 On 1 June 2018, the plaintiff's solicitors informed the defendant in a letter that the second tranche payment was due under the Agreement and that the plaintiff's entitlement to payment was not contingent on the defendant's recovery of their due payments from Big Box.⁵⁰ The plaintiff's solicitor also stated in the letter that the plaintiff had "not been kept apprised of the matter regarding [Big Box]".⁵¹ The plaintiff also noted that the defendant had filed CWU 72/2018 against Big Box on 17 April 2018 and that the defendant had failed to initiate a review with the plaintiff pursuant to cl 2 of the Agreement which had set a deadline of 31 December 2017.⁵² The plaintiff stated that they were "prepared to hear what [the defendant's] proposal [was] and review the [Agreement]" and asked to meet the defendant on 8 June 2018 for a meeting with their solicitors present.⁵³

28 On 8 June 2018, the plaintiff sent another reminder letter to the defendant, stating that as the plaintiff did not hear from the defendant in respect of their letter dated 1 June 2018, the plaintiff assumed that the defendant had no interest in resolving the matter and was instructed to demand that the second tranche payment be paid immediately.⁵⁴

29 On 12 June 2018, the defendant replied in a letter to the plaintiff, disagreeing with the assertions made by the plaintiff in its letter dated 1 June 2018 on the defendant's failure to keep the plaintiff informed, given that the defendant had sent the 19 December 2017 Email updating the progress of the

⁵⁰ Mr Gao's AEIC at p 18.

⁵¹ Mr Gao's AEIC at p 18.

⁵² Mr Gao's AEIC at p 18.

⁵³ Mr Gao's AEIC at p 18.

⁵⁴ Mr Gao's AEIC at p 19.

defendant's legal proceedings and receiving no further response from the plaintiff.⁵⁵ The defendant also stated that the second tranche payment was not due in accordance with the Agreement and proposed for an extension of the deadline of the second tranche payment to 31 December 2018.⁵⁶ The defendant also proposed to meet the plaintiff on 14 June 2018 or 27 June 2018 at the defendant's office.⁵⁷

30 On 13 June 2018, the plaintiff wrote a letter to the defendant, rejecting the latter's proposal for the deadline of the second tranche payment to be extended till 31 December 2018.⁵⁸

31 Parties agreed to meet on 27 June 2018 with their solicitors present, where the plaintiff's lawyer requested the defendant to provide documentary proof of the defendant's financial situation with Big Box.⁵⁹ However, the plaintiff's lawyers did not receive any such documentation.⁶⁰

32 On 10 July 2018, the plaintiff wrote to the defendant, stating that unless the defendant provided evidence that it was able to make payment and provide a definite deadline or schedule of payment, the plaintiff would assume that the defendant would be in breach of the Agreement and would proceed with a claim against the defendant.⁶¹

⁵⁵ Mr Gao's AEIC at p 20.

⁵⁶ Mr Gao's AEIC at p 20.

⁵⁷ Mr Gao's AEIC at p 20.

⁵⁸ Mr Gao's AEIC at p 22.

⁵⁹ Transcript 14 August 2019 at p 126.

⁶⁰ Transcript 14 August 2019 at p 126.

⁶¹ Mr Gao's AEIC at p 25.

33 On 11 July 2018, the defendant wrote a letter to the plaintiff's solicitors, informing that the plaintiff had breached cl 2 of the Agreement by failing, refusing and/or neglecting to review the terms of the Agreement and to extend the payment timeline as the defendant required the plaintiff, by way of the 19 December 2017 Email, to review the terms of the Agreement.⁶² The defendant explained that by virtue of cl 2 of the Agreement, the second tranche payment by 31 January 2018 is subject to and conditional upon the defendant's full resolution of all outstanding issues with Big Box and as the defendant had informed the plaintiff via the 19 December 2017 Email, their resolution with Big Box was pending and the defendant wanted to exercise its contractual right by requiring the payment timeline to be extended to 30 June 2018.⁶³ The defendant also stated that the plaintiff had no contractual right to presently demand that the second tranche payment to be paid by 31 January 2018, when such payment was conditional on the resolution of issues with Big Box.⁶⁴ The defendant then demanded the plaintiff to comply with cl 2 of the Agreement to review the term on the payment timeline and to extend the timeline to 31 December 2018, in order to use the extended timeline to resolve the outstanding issue with Big Box.⁶⁵

34 On 18 July 2018, the plaintiff rejected the defendant's proposal for the deadline of the second tranche payment to be extended to 31 December 2018, noting that the review under cl 2 of the Agreement would be subject to the plaintiff's agreement and the review mechanism did not absolve the defendant

⁶² Mr Gao's AEIC at p 26.

⁶³ Mr Gao's AEIC at pp 26-27.

⁶⁴ Mr Gao's AEIC at p 27.

⁶⁵ Mr Gao's AEIC at p 27.

of its liability to make payment.⁶⁶ The plaintiff also noted that the defendant had not provided sufficient information on the winding up application against Big Box and evidence that there would be surplus from the sale of the building (of Big Box) after satisfying the claims made by the secured creditors.⁶⁷ The plaintiff also enquired if the defendant would accept service of process in the plaintiff's claim if the defendant failed to make payment of the claimed amount by 31 July 2018, which would be six months since 31 January 2018 (*ie*, the original deadline stipulated in the Agreement).⁶⁸

35 On 31 July 2018, the defendant replied that the plaintiff had been apprised of the reasons for an extension of timeline by way of the 19 December 2017 Email and explained that the defendant failed to see how it could further apprise the plaintiff of the prospect of full resolution of all outstanding payment issues with Big Box (including the surplus of the sale of the building), when the legal proceedings against Big Box were still ongoing.⁶⁹

My decision

Issues

36 Parties are essentially in dispute over the following issues, which I will address in turn:

- (a) The parties' obligations under cll 1.2 and 2 of the Agreement and their respective breaches of these obligations; and

⁶⁶ Mr Gao's AEIC at p 28.

⁶⁷ Mr Gao's AEIC at pp 28-29.

⁶⁸ Mr Gao's AEIC at p 29.

⁶⁹ Mr Gao's AEIC at p 32.

- (b) When the second tranche payment is due and the date from which the interest for the second tranche payment should start accruing.

Obligations under cl 1.2 of the Agreement

37 Clause 1.2 of the Agreement requires the defendant to pay the plaintiff the second tranche payment by 31 January 2018, only subject to and conditional upon the defendant's *full* resolution of *all* outstanding issues with Big Box, in relation to two aspects:

- (a) The work done by the defendant; and
- (b) The *payment payable* by Big Box to the defendant in connection with the said work.

This means that the defendant would only be obliged to make payment of the second tranche payment to the plaintiff by 31 January 2018 if Big Box and the defendant fully resolved the payment payable by Big Box to the defendant. I now turn to analyse the meaning of the condition precedent in cl 1.2: the full resolution of all outstanding issues with Big Box in relation to the payment payable by Big Box to the defendant.

Full resolution of all outstanding issues in relation to payment payable (cl 1.2)

38 The plaintiff argues that the outstanding issues in relation to the payment payable by Big Box to the defendant would be fully resolved once the amount payable is determined. Such a determination was made pursuant to ORC 720/2017 on 25 January 2018 where the court determined the judgment sum. As such, the plaintiff submits that the defendant's obligation under cl 1.2 was operative on 25 January 2018. The second tranche payment was due by 31 January 2018 because the outstanding issues with Big Box in relation to

payment payable by Big Box had been fully resolved by 25 January 2018 when the judgment sum pursuant to ORC 720/2017 was ordered.

39 On the contrary, the defendant takes the position that the full resolution of all outstanding issues with Big Box in relation to “payment payable” must include the full enforcement of the judgment debt owed by Big Box to the defendant.⁷⁰ This would require the liquidator of Big Box to ascertain the final accounts of the sale of the Big Box building, pay off its secured creditors and notify the defendant of the final amount (if any) that the defendant would be receiving from the proceeds of the sale of the building.⁷¹

40 I agree with the defendant’s position that there was no full resolution of all outstanding issues with Big Box in relation to the payment payable to the defendant by 25 January 2018 when the judgment sum was ordered to be paid by Big Box to the defendant pursuant to ORC 720/2017. The words “*full* resolution” and “*all* outstanding issues” presupposes that the determination of the amount payable to the defendant by Big Box must be *final*. As Mr Gan rightly explained, the judgment sum ordered on 25 January 2018 was only a “milestone” for the full resolution of the judgment debt.⁷² On 25 January 2018, there was only a court determination as to how much the defendant was entitled to *before* the enforcement of the judgment sum. The enforcement of the judgment sum would take into account the success of the winding up application, the sale of the Big Box building and the payment of the secured creditors which affects the final determination of the amount of payment

⁷⁰ Transcript 15 August 2019 at p 75.

⁷¹ Transcript 15 August 2019 at p 88.

⁷² Transcript 15 August 2019 at p 90.

payable by Big Box to the defendant. I find that the judgment sum ordered under ORC 720/2017 is merely an *intermediate* determination of the payment payable by Big Box to the defendant. Mr Gan further clarified that the full resolution of outstanding issues in relation to the payment payable by Big Box did not require Big Box to actually have to pay the defendant a certain sum of money at the end of the winding up proceedings.⁷³ The defendant might well have received nil payment after the sale of the Big Box building and the payment of the secured creditors if there was nothing left for distribution to the unsecured creditors. To my mind, only at that stage can it be said that there was a *full* resolution of *all* outstanding issues with Big Box in relation to the amount of *payment payable* by Big Box to the defendant as a condition precedent required by cl 1.2 of the Agreement.

41 In any case, by 31 January 2018, the plaintiff had already breached its obligation under cl 2 which requires both parties to review the payment date in the event that the defendant could not fully resolve with Big Box payment and other issues relating to the Project by 31 December 2017. Even ORC 720/2017 in which Big Box was ordered to pay the defendant the amount of \$4,707,688.45 had not been made yet as at 31 December 2017. Clearly, the payment and other issues relating to the Project had not been fully resolved by 31 December 2017. The 31 January 2018 payment date under cl 1.2 would not have been binding on the defendant since the plaintiff had breached its obligation to review the terms of the Agreement under cl 2 of the Agreement by rejecting the defendant's initial request to review on 19 December 2017. This will be further elaborated below at [51].

⁷³ Transcript 15 August 2019 at p 91.

42 For the above reasons, I reject the plaintiff’s averment that the defendant is in breach of cl 1.2 and that the defendant was obliged to pay the second tranche payment by 31 January 2018.

Obligations under cl 2 of the Agreement

43 Clause 2 of the Agreement states that in the event that the defendant could not fully resolve with Big Box payment and/or other issues relating to the Project by 31 December 2017, *both* parties “*shall* review the terms and conditions set out” in the Agreement and where necessary, extend the payment timeline and/or amend any of the said terms and conditions. The word “*shall*” in cl 2 of the Agreement implies a mandatory obligation on both parties to review the terms and conditions of the Agreement. The words “*where necessary*” imply that cl 2 does not compel either party to extend the payment timeline or amend any of terms and conditions, but only imposes upon the parties the obligation to review. I will now turn to examine the substance of this obligation to review.

Breach of obligation to review

44 On 19 December 2017, Mr Gan made Phone Call 1 and updated the plaintiff by way of the 19 December 2017 Email on the status of the legal action pursuing payment from Big Box under OS 947/2017, which was adjourned to 19 February 2018. The defendant initiated a request for a review by making an initial proposal of extending the payment date to 30 June 2018, subject to the defendant’s full resolution of all outstanding payment payable by Big Box. The words used were “*we hereby propose*” and “*pursuant to [cl 2] of the Agreement*” (see above at [13]), which clearly indicates the defendant’s intention to initiate a review of the terms and conditions (*ie*, the payment date of 31 January 2018 for the second tranche payment) under cl 2 of the Agreement.

45 At that juncture, both parties' obligations to "review" under cl 2 had crystallised as the defendant had not fully resolved payment relating to the Project with Big Box: by 19 December 2017, the defendant had only taken out a court application under OS 947/2017 (on 18 August 2017) to enforce the terms of its agreement with Big Box (see above at [5]), and the hearing date which had been postponed to 19 February 2018 was brought forward to 25 January 2018 on 16 January 2018.⁷⁴ The condition precedent for the adherence to such a payment date had not been satisfied. As such, the defendant was not bound by the payment date of 31 January 2018 as enumerated in cl 1.2.

46 The defendant's 19 December 2017 Email was of particular significance. First, the defendant updated the plaintiff on the defendant's progress on its legal suit under OS 947/2017, providing justification for its inability to satisfy the payment date of 31 January 2018 under cl 1.2 of the Agreement. Second, the defendant made a proposal to tentatively extend the payment date to 30 June 2018, subject to the defendant's full resolution of outstanding payments by Big Box.

47 Mr Gao initially testified that the 19 December 2017 Email was a mere "request to change the payment date", but subsequently accepted that it was a "request to review" by virtue of the words "hereby propose to tentatively extend".⁷⁵ Ms Fang also initially testified that the 19 December Email was "a mere notification", rather than a "request to review" the terms and conditions of the payment agreement.⁷⁶ However, this is contradicted by her own AEIC,

⁷⁴ Registrar's Notice dated 16 January 2018 for HC/OS 947/2017.

⁷⁵ Transcript 14 August 2019 at pp 13-15.

⁷⁶ Transcript 14 August 2019 at p 54.

where she had described the 19 December 2017 Email as a “proposal”, which is more analogous to a request for review than a mere notification.⁷⁷ Ms Fang eventually conceded that the said email was a request by the defendant to extend the payment time to 30 June 2018.⁷⁸ I find that by way of Phone Call 1 and the 19 December 2017 Email, the defendant had initiated an early request for a review of the terms of the Agreement under cl 1.2 of the Agreement because it was already clear by this time that due to the postponement of the hearing of OS 947/2017 to 19 February 2018, the payment and other issues relating to the Project would not be fully resolved by 31 December 2017.

48 The plaintiff submits that by rejecting the defendant’s proposal, it had implicitly requested for the payment of the second tranche payment to be made on 31 January 2018, satisfied the condition pursuant to cl 2 of the Agreement preventing the plaintiff from demanding payment before 31 January 2018, and accordingly fulfilled its obligation to review the Agreement.⁷⁹

49 To my mind, this cannot suffice to discharge an obligation to “review” contemplated under cl 2 of the Agreement. The plaintiff demonstrated bad faith through a plain rejection of the defendant’s proposal and did not genuinely engage its obligation to review the payment date term under cl 2 of the Agreement. As found above at [18], Ms Fang had merely communicated a plain rejection of (a) the defendant’s proposal to extend the payment date to 30 June 2018; and (b) the defendant’s request to review the Agreement terms, without providing a counter-proposal such as alternative dates or a suggestion of a

⁷⁷ Transcript 14 August 2019 at p 55.

⁷⁸ Transcript 14 August 2019 at p 55.

⁷⁹ PCS at paras 46–48.

meeting to properly review the term set out in cl 1.2 concerning the payment date for the second tranche payment.

50 Further, Mr Gao sought to excuse the plaintiff's failure to reply to the defendant's proposal by alleging that he did not read the 19 December 2017 email because it was sent to his "old email address". Mr Gao testified that he did not look at the emails sent to that "old email address" everyday but only saw it a few weeks later.⁸⁰ In my view, this defence raised at trial is unsatisfactory. The fact of the matter is that Mr Gao had received emails from the defendant previously sent to that same email address and provided no other proof that he had notified the plaintiff not to email him on that "old email address".⁸¹ Mr Gao also admitted to assuming that Ms Fang would respond and did not personally ask Ms Fang to respond to the 19 December 2017 Email.⁸² In any case, Ms Fang testified that she had read the 19 December 2017 Email after rejecting the defendant's proposal in Phone Call 1. Yet the plaintiff still took no further action to communicate to the defendant about its request to review the terms of the Agreement before 31 January 2018.⁸³ As I believed the testimony of Mr Gan that Phone Call 2 did not exist (see above at [21]), the next communication between the parties occurred on 12 March 2018, when Ms Fang attempted to contact Mr Gan via a phone call. This was after the payment date of 31 January 2018 specified in cl 1.2 of the Agreement had already lapsed.

⁸⁰ Transcript 14 August 2019 at p 24.

⁸¹ Transcript 14 August 2019 at pp 40–41.

⁸² Transcript 14 August 2019 at p 23.

⁸³ Transcript 14 August 2019 at p 62.

51 It is apposite to note at this juncture that the plaintiff was under no obligation whatsoever to extend the payment date for the defendant, as the obligation to extend the payment timeline is only “where necessary” (see cl 2 of the Agreement). What the plaintiff failed to do was to discharge its obligation to review the terms and conditions set out in the Agreement in good faith, by demonstrating either a genuine interest to better understand the circumstances (eg, proposing a meeting for a review before 31 January 2018) or a counter-proposal for alternative dates (eg, a date earlier than 30 June 2018 as proposed in the 19 December 2017 Email). I find that the contractual duty to review is one whereby both parties should review the terms and conditions *together* and would minimally require the plaintiff to respond to the defendant’s initial request for a review in the 19 December 2017 Email. Instead, Ms Fang had merely rejected the defendant’s request over Phone Call 1 to initiate a review before reading the 19 December 2017 Email and after reading and checking with her boss, made no further communications to the defendant in relation to the 19 December 2017 Email until 12 March 2018. Accordingly, I find that the plaintiff was the first party to breach its obligation to review under cl 2 of the Agreement.

52 I also find that the defendant had not breached its duty to review under cl 2 of the Agreement when it did not provide supporting documents to prove to the plaintiff that it needed to extend the deadline for payment. First, the 19 December 2017 Email had updated the plaintiff on the status of the legal proceedings between the defendant and Big Box (*ie*, OS 947/2017). Second, the plaintiff also did not ask for supporting documents relating to OS 947/2017 and the winding up application in CWU 72/2018 until the plaintiff’s lawyers requested for such documentary proof on the 27 June 2018 meeting between the

plaintiff and the defendant (see above at [31]).⁸⁴ This was six months after the defendant had initiated a request for a review by way of the 19 December 2017 Email.

53 Finally, the fact that the defendant made Phone Call 1 and sent the 19 December 2017 Email to the plaintiff puts paid to the plaintiff’s pleaded case that the plaintiff “did not receive any payment on 31 January 2018 nor did the [defendant] notify the [plaintiff] of the delay nor requested for a review”.⁸⁵

Payment date for second tranche payment

54 The defendant accepts that the second tranche payment has to be paid to the plaintiff.⁸⁶ The anterior question to be answered is when the second tranche payment was due, which determines when the interest for the second tranche payment should start accruing from.

55 The parties did not agree to a variation of the Agreement in accordance to cl 2 and the defendant had not fully resolved its outstanding issues with Big Box as required by cl 1.2 of the Agreement by 31 January 2018. As such, the payment date would be set at large since the Agreement is silent on the extension of the payment date in the absence of a signed written agreement as required under cl 6 of the Agreement.⁸⁷

No variation to this Agreement (including any amendment, supplementation, addition and/or deletion, however effected) shall be valid and/or enforceable unless made in writing and signed by the Parties.

⁸⁴ Transcript 15 August 2019 at p 98.

⁸⁵ SOC at para 8.

⁸⁶ Transcript 14 August 2019 at p 111.

⁸⁷ BOD at p 2.

56 Where a contract does not specify the time for performance by a party that has undertaken to carry out such performance, an obligation to perform within a reasonable time is implied by law: *Max Master Holdings Ltd v Taufik Surya Dharma* [2016] SGHC 147 at [98]; *Naughty G Pte Ltd v Fortune Marketing Pte Ltd* [2018] 5 SLR 1208 at [148]. In the absence of an extension of time clause in the Agreement, the time to complete the contractual obligation will be set at large and the defendant has to pay the plaintiff within a reasonable time, which is a question of fact: *Fongson Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82 at [25].

57 Having holistically assessed the facts before me, I find that the second tranche payment was due on **28 May 2018**. This date is derived from the fact that on 21 May 2018, the plaintiff issued a letter of demand requiring the defendant to make payment by 28 May 2018, failing which the plaintiff would commence legal action against the defendant (see above at [25]). Reasonable time had been given to the defendant to make payment of the second tranche. The parties' earlier correspondence on 12, 13 and 26 March 2018 evidenced no counter-proposals by the plaintiff to provide a reasonable alternative payment date for the defendant for the second tranche payment, in relation to the defendant's proposal in the 19 December 2017 Email. The letter of demand dated 21 May 2018 was the first time the plaintiff had communicated a reasonable alternative payment date (*ie*, 28 May 2018) for the defendant to make the second tranche payment after rejecting the defendant's proposal for an extension of the payment date to 30 June 2018 over Phone Call 1. I also took into consideration the fact that by 28 May 2018, the defendant had already started enforcement proceedings of the judgment sum order by way of the winding application in CWU 72/2018 on 17 April 2018 (see above at [7]).

Conclusion

58 For the foregoing reasons, I hold that the defendant is liable to make payment to the plaintiff for the sum of \$286,641.56, with interest of 5.33% per annum accruing as of 28 May 2018.

59 Since the defendant already accepts that the second tranche payment has to be paid to the plaintiff at some point of time,⁸⁸ the dispute is essentially over when the interest on the judgment sum should commence. If I were to take the extreme positions of both parties (*ie*, the plaintiff's position that the interest should commence on 31 January 2018, and the defendant's position that the interest should commence on the date of judgment), the difference in the interest to be paid by the defendant at 5.33% per annum on the sum of \$286,641.56 for the difference of about two years, given the court's timeframe for disposal of cases, would be in the region of about \$30,000. I find it very difficult to comprehend why the parties would want to spend so much time and money to litigate the matter in the High Court essentially over a very small sum.

⁸⁸ Transcript 14 August 2019 at p 111.

