

PT Panasonic Gobel Indonesia v Stratech Systems Ltd
[2008] SGHC 172

Case Number : Suit 34/2007
Decision Date : 10 October 2008
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Tan Chuan Thye, Lau Wai Ming, Gitta S Juwita, Shum Wai Keong (Wong & Leow LLC) for the plaintiff; M P Kanisan and Hariprasad Ratnagopal (M P Kanisan & Partners) for the defendant
Parties : PT Panasonic Gobel Indonesia — Stratech Systems Ltd

Civil Procedure – Pleadings – Plaintiff seeking repayment of all moneys paid under Services Agreement due to total failure of consideration – Failing to plead relief sought from court – Whether pleading all facts necessary to establish foundation of such relief sufficient

Contract – Contractual terms – Rules of construction – Pre-contractual expressions of intentions and abilities by defendant not included as contractual terms in Services Agreement – "Entire agreement" clauses in contract – Whether "entire agreement" clauses merged promises or assurances made in negotiations such that they had no contractual force save in so far as were reflected in Services Agreement

10 October 2008

Judgment reserved.

Judith Prakash J:

Introduction

1 The plaintiff, PT Panasonic Gobel Indonesia ("Panasonic"), is a company incorporated in Indonesia. It is the exclusive distributor of the Panasonic and Technics brands in Indonesia and is part of the Matsushita Electric Industrial Co., Ltd group of companies based in Japan. Currently, it has 13 branch offices and 21 service stations spread throughout the Indonesian archipelago.

2 The defendant, Stratech Systems Limited ("Stratech"), is a public company incorporated in Singapore and listed on the main board of the Singapore Exchange. It is in the business of providing consultancy and professional services relating to information technology (IT).

3 Panasonic and Stratech first came into contact some time in mid-2000 when Panasonic was looking for a company in the IT business which could revamp Panasonic's then existing information management systems. Following several meetings and presentations, Panasonic engaged Stratech to carry out a consultancy study. This was completed in December 2000 and in November 2001 Stratech and Panasonic entered into a contract (the "Services Agreement"). This was backdated to 29 June 2001. Under the Services Agreement, Stratech agreed to provide certain defined services to Panasonic.

4 In this action, Panasonic claims that it is entitled to recover damages from Stratech on two alternative bases. These are:

- (a) that it had been induced to enter into the Services Agreement with Stratech by certain misrepresentations made by Stratech before the conclusion of the Services Agreement; and

(b) that Stratech had breached its obligations under the Services Agreement in that it had failed to complete the provision, customisation and implementation of the information management system that it was supposed to provide to Panasonic; that it had failed to ensure that its system met the specifications set out in the Services Agreement; and that it had also breached clause 3.1 of the Services Agreement.

5 Apart from putting forward a defence to the claim, Stratech has also filed a counterclaim. It alleges that Panasonic was in breach of its own obligations under the Services Agreement and as a result Stratech's Implementation Schedule was delayed. In consequence, Stratech incurred loss and damage in that it had to pay for additional staff time costs, staff standby costs and additional material costs. Stratech claimed damages for these breaches.

Background

6 In 2000, Panasonic was not satisfied with the two computer systems, SIMAG and SPC 2000 (which it called the "Legacy System") which it used to manage its data. Under the Legacy System, it was not possible to electronically transfer data from one programme to another and manual re-entry was required. This situation was not satisfactory because Panasonic's head office was in Jakarta and its branches were spread over a large geographical area and, therefore, it took time to transfer data from these branches to the head office and vice versa. Panasonic was looking for an electronic business ("e-Business") solution to this problem.

7 In mid 2000, Mr Rinaldi Sjarif, then Panasonic's Director of Sales Operations and Services, met Dr David Chew, the founder of Stratech and its Executive Chairman. Having heard a description of Panasonic's business, Dr Chew informed Mr Sjarif that an Enterprise Resource Planning ("ERP") system would assist Panasonic. According to Mr Sjarif, Dr Chew recommended that Panasonic use a system known as the J.D. Edwards OneWorld Xe System (the "JDE system") which he said was an open source system suitable for Panasonic's use.

8 Shortly thereafter Stratech gave a presentation to the plaintiff on the problems faced by companies with their business processes and how e-Business solutions, built on the fundamentals of an ERP system, could resolve these problems. According to Mr Sjarif, Stratech informed Panasonic that it would only need 8 months to carry out business analysis, customisation, implementation and testing of the JDE system.

9 On 28 October 2000, Stratech provided a formal pitch to Panasonic entitled: "Transforming PT National Panasonic Gobel into a Digital Enterprise – Proposal for a Consultancy Study Leading to a Phase 1 Implementation E-Business Project" (the "Pitch document"). In the Pitch document, Stratech recommended that the Legacy System should be replaced with an ERP system. It suggested that there be a consultancy study to determine the actual cost and scope of the first project. On the face of it, Stratech was confident that the consultancy study would confirm that an ERP system was the solution for Panasonic:

"We expect the needs analysis to confirm that the first project shall be to implement an ERP system for [Panasonic]. The ERP system will establish the enterprise-wide integrated information and application e-platform on which other key e-Business systems and services will be designed and built."

10 The Pitch document also described how an ERP system would "[attempt] to integrate all departments and functions across a company onto a single computer system that can serve all those different departments' particular needs" and "[automate] the tasks involved in performing a business

process” such that the process “moves like a bolt of lightning through the organisation”.

11 Of Stratech, the Pitch document represented, amongst others, that it was “well-positioned to be [Panasonic’s] e-Business strategy and technology partner” and that it had “the knowledge and experience of its staff” that would include “relevant experiences to address the needs of [Panasonic]”.

12 Panasonic accepted Stratech’s recommendation that there be an independent consultancy study and paid Stratech the sum of \$100,000 as the consultancy fee. A month later, Stratech issued its “Enterprise Resource Planning Consultancy Phase – Section 1: Schedule and Action Plan” dated 19 December 2000 (the “Consultancy Schedule”), which set out the process and timelines under which the consultancy study was to take place. According to the Consultancy Schedule, the initial phase of the consultancy study was for Panasonic to provide written answers to the questionnaires supplied by Stratech. This was to be followed with two on-site review phases by Stratech’s personnel during which the accuracy and expectations of Stratech’s draft proposal was to be ascertained. During this time, Stratech’s personnel would be reviewing Panasonic’s business processes.

13 Consequent upon the consultancy study, Stratech issued a document entitled “Enterprise Resource Planning Consultancy Phase – Section 2: Study Result & Solution Proposal” (the “Solutions document”) on 1 February 2001. The Solutions document stated that it was the result of intensive independent study and discussion with various groups in Stratech. It also confirmed that the selection of the JDE system for Panasonic was correct because of the ease of integration with external systems and the availability of an internet access option. In the Solutions document, Stratech also stated that it would be able to customise the JDE system to meet Panasonic’s requirements. On 6 April 2001, Stratech made a presentation to Panasonic in which it summarised its findings and recommendations as set out in the Solutions document. During the presentation, Stratech gave Panasonic some slides and explanatory material (the “Presentation document”).

14 According to Mr Sjarif, as Panasonic at that time had no reason to doubt what Stratech said, it agreed to proceed on the basis of the Proposal. A second proposal was provided to Panasonic towards the end of May 2001. At that time Stratech proposed that the parties should enter into a formal contract, the Services Agreement, and a draft of the same was sent to Mr Sjarif for his review. Between May and November 2001, the parties negotiated the terms of the Services Agreement. The original proposal was for the JDE system to deal only with Panasonic’s finance and distribution requirements, but, as a result of discussions in August 2001, it was subsequently agreed that modules for Panasonic’s human resources and customer service management processes should be provided as well. To the best of Mr Sjarif’s recollection, the Services Agreement was eventually signed sometime in November 2001 but it was backdated to 29 June 2001.

15 Eventually, the contract between the parties was evidenced by three documents:

- (1) the Services Agreement which sets out the substantive terms of the contract and which provides for the implementation of two modules of the JDE system;
- (2) a Quotation, dated 16 November 2001, (the “Quotation”) which provides for the addition of two further modules of the JDE system; and
- (3) a revised project schedule, dated 12 June 2002, which extended the deadline for Stratech’s implementation of the JDE system up to October 2002.

Under the Services Agreement, as amended by the Quotation, Stratech was to provide, customise

and implement four modules of the JDE system: Finance and Distribution ("F&D module"), Purchase Sales & Inventory ("PSI module"), Customer Service Management ("CSM module") and Human Resource Management ("HRM module"). The price payable by Panasonic for the F&D and PSI modules totalled \$1,988,000 and the price payable for the other two modules came to \$788,000. It can be seen that Stratech would be earning a substantial amount in respect of its services to Panasonic.

16 The provision, customisation and implementation of the JDE system were originally scheduled to commence on 19 November 2001 and to be completed in 41 weeks *ie* by August 2002. In June 2002, however, Stratech asked for an extension of two months in which to complete the project. The parties had a meeting on 12 June 2002 during which this extension was discussed. According to the minutes of the meeting produced by Stratech, Panasonic was informed that Stratech required the extension because of the scope of the system customisation. Stratech was asked why it had not been able to estimate the scope of the system customisation earlier and it replied that this estimation could only be carried out after the completion of the business analysis phase and that had been completed only on 27 March 2002. Stratech confirmed that it was willing to complete the project at no extra charge to Panasonic and Panasonic then agreed that the deadline for completion could be postponed to October 2002.

17 Completion did not take place in October 2002, however. At that stage only the CSM module and the HRM module were put into operation. It should be noted that these were not problem free and, in July 2003, it was remarked that there were still on going issues with these modules. In the meantime, on 13 June 2003, an attempt was made for the JDE system to "go-live" *ie* to test whether the JDE system was able to function as an integrated processing system. During this time, all four modules were supposed to run concurrently. However, in Panasonic's view, the go-live attempt was a failure:

- (a) the entire JDE system ran extremely slowly, even though the JDE server was working at full capacity. This suggested that the server was exposed to the risk of crashing at any time.
- (b) there were problems with the reports produced by the modules: consolidated reports were inaccurate, and reports did not fit the designated fields on the standard forms. The printing of reports also took place at the wrong branch offices.

In Panasonic's opinion, the performance of the JDE system did not meet the promises that it would integrate Panasonic's business processes almost instantaneously and seamlessly. The go-live attempt was suspended after only nine days when fears arose that the system would crash.

18 With respect to the CSM module, Panasonic had commenced utilising it in early September 2002. In October 2002, however, problems were experienced with it and these problems continued during the go-live period. As for the HRM module, Panasonic contended that Stratech had made the decision to go-live on or around 7 October 2002, despite unresolved issues relating to that module. According to Panasonic, these unresolved issues had not been fully rectified as late as September 2003.

19 After the failure to go-live, Stratech prepared a proposal for a second go-live attempt. It suggested that the failure to go-live was caused by hardware inadequacies. Panasonic then engaged PriceWaterhouseCoopers Indonesia ("PWC"), an independent third party auditor, to evaluate and analyse: (1) the nature of the problems with the implementation of the project; and (2) whether and how these problems would be resolved. In PWC's subsequent report, it estimated that an additional US\$400,000-US\$600,000 worth of man-hours and US\$150,000-US\$250,000 worth of hardware would be required to complete the implementation of the JDE system.

20 At around the same time, Stratech furnished Panasonic with its "Proposal to Re-test and Re-launch Finance and Distribution Module" dated 18 November 2003. This proposal provided for further customisation of the JDE system and Stratech said that it required an additional payment of \$1,435,840 to complete the system. Stratech also informed Panasonic that it must pay the balance of the contract price due under the Services Agreement before Stratech would be willing to conduct the re-test and re-launch of the JDE system. Panasonic made this payment on 23 December 2003. Stratech, however, never re-commenced work on the implementation of the JDE system. The parties gave conflicting reasons as to why this was so and I will discuss these later.

The misrepresentation claim

21 Panasonic's statement of claim sets out its claim for misrepresentation in paras 34 to 38. These read as follows:

34. Further and/or in the alternative, as set out in paragraphs 8 to 9 above, [Stratech] had represented to [Panasonic], *inter alia*, that it was able to provide, implement and customise the JDE System which could:

- a. retain and apply the existing data and information that was contained in the Legacy System;
- b. match and perform the function of the Legacy System;
- c. integrate [Panasonic's] customer service management, human resource management, finance and distribution, and purchase sales and inventory planning functions, under one system;
- d. integrate the data and information from the various branch offices and the head office of [Panasonic];
- e. allow [Panasonic] to access information within the System in near real-time and instantaneously; and/or
- f. meet [Panasonic's] requirements.

35. [Stratech] further represented, *inter alia*, that:

- a. it is a leading provider for e-Business infrastructure;
- b. it is able to provide expertise and turnkey solutions to customers such as [Panasonic]; and
- c. it is staffed by employees who have knowledge and experience in implementing the ERP system.

36. In reliance of the aforesaid representations, [Panasonic] had been induced into entering into the Services Agreement with [Stratech].

37. However, the aforesaid representations were untrue, and [Stratech] was unable to implement the JDE System and/or customise the JDE System in accordance with its aforesaid representations.

38. As a result of [Stratech's] misrepresentations, [Panasonic] has suffered damage and loss.

22 It should be noted that para 34 of the statement of claim repeated the language of para 8 and that in para 8 the list of features of JDE system had been preceded by the following sentences:

... [Stratech] recommended that [Panasonic] replace the Legacy System with the ERP System, which is an integrated system that may be customized to [Panasonic's] specific needs. Pursuant to its recommendation, [Stratech] represented to [Panasonic] that it would be able to provide, customise and implement the ERP System based on J. D. Edwards OneWorld Xe software (the "JDE System"), which could, amongst others:

23 Pursuant to a request made by Stratech, on 2 November 2007, Panasonic furnished Stratech with further and better particulars of para 8 of the statement of claim. Panasonic was asked questions relating to its allegation under para 8 that Stratech had recommended that it replace the Legacy System with an ERP system and that pursuant to this recommendation Stratech had represented to Panasonic that it would be able to provide certain things. In answer to these questions, Panasonic pleaded that "the recommendation/representation" was made by Stratech in writing and identified the written document as the Presentation document.

24 In its Defence and Counterclaim (Amendment no. 3), Stratech denied paras 8, 9, 34 and 35 of the statement of claim and averred that it had not made the alleged or any representations to Panasonic. In any event, Stratech said it had not made such representations with the intention of inducing Panasonic to enter into the contract with it and that no damage to Panasonic was occasioned by the alleged representations. It further invoked clauses 9.4 and 11.6 of the Services Agreement which provided as follows:

9.4 ASIDE FROM THE PROVISIONS OF THIS AGREEMENT, STRATECH MAKES NO OTHER REPRESENTATION OR WARRANTIES TO THE CUSTOMER PURSUANT TO THIS AGREEMENT.

11.6 Entire Agreement. This Agreement, together with the Schedules is the complete and exclusive statement of the understandings [*sic*] of the parties, and it supersedes and merges all prior proposals and understandings whether oral or written, relating to the subject matter of this Agreement. This Agreement may not be modified except in writing, signed by duly authorised representatives of both parties, and expressly referring to this Agreement.

25 On the pleadings, accordingly, the issues that arise in relation to this claim are as follows:

- a. whether Stratech made misrepresentations to Panasonic;
- b. if so, whether the representations induced Panasonic to enter into the contract with Stratech;
- c. whether clauses 9.4 and 11.6 of the Services Agreement apply so as to protect Stratech from the consequences of any representations made during negotiations; and
- d. whether Panasonic suffered damage as a result of the misrepresentations.

It should be noted that some other misrepresentations were pleaded in paras 9 and 35 of the statement of claim but, in its closing submissions, Panasonic did not place any reliance on those paragraphs and therefore I do not have to deal with the matters pleaded therein.

Law relating to misrepresentation

26 Panasonic submitted that Stratech had a duty of care to it to ensure that its representations were correct. This was because Stratech had held itself out to Panasonic as a person having special knowledge and skill with the intention of inducing Panasonic to enter into a contract with it. This requirement of taking reasonable care to ensure that your representations to a party with whom you wish to contract are true is a duty that will exist during pre-contractual negotiations and will survive the making of the contract that results from the negotiations (see *Esso Petroleum v Mardon* [1976] 2 WLR 583 and *Hedley Byrne & Co v Heller & Partners* [1963] 2 All ER 575). It should also be noted that a misrepresentation is a false statement of fact. A statement of opinion may be regarded as a statement of fact if it can be proved that a person who expressed the opinion did not hold it or could not, as a reasonable man having his knowledge of the facts, honestly have held it. Thus, if a person states his opinion as something which he does not in fact believe, or which given the facts known to him he could not honestly hold, he makes a false statement of fact (see *Chitty on Contracts*, Vol. 1, General Principles (2004, 29th Edition), paras 6004-6005).

27 Stratech did not dispute the above principles. It however drew to my attention the following *dicta* of Rajendran J in *Tan Chin Seng v Raffles Town Club* [2002] SGHC 278 at page 11:

Eulogistic commendation by a salesman of the wares that he touts is a common and expected feature of the market place. Courts are therefore reluctant to rescind contracts of sale merely on account of the exuberant and exaggerated language employed by salesmen. This reluctance is reflected in the maxim "*Caveat Emptor*" or "Buyer Beware". When Chao Hick Tin J in *Bestland Development Pte Ltd v Thasin Development Pte Ltd* [unreported, 13 February 1991] described praise by a salesman promoting his goods as "a matter of puffing and pushing" that did not amount to misrepresentation, Chao J was recognizing this maxim.

It was Stratech's position that the Presentation document relied on by Panasonic was nothing more than "mere puffing and pushing". Stratech did not deny, however, that it was a person with special skills and knowledge in the field of IT or that it owed a duty of care to Panasonic not to make misrepresentations to it during the negotiation process.

28 It should also be noted that where a party is declaring an intention, that declaration is not a representation as to the matter said to be intended, because that belongs to the future and is not a matter of present or past fact. See *Halsbury's Laws of Singapore*, Vol 18, (LexisNexis, 2004 Reissue, 2004) at para 240.352. *Halsbury's* also points out that whilst a statement of intention involves a representation as to the existence of the intention which is in itself a present fact, the difficulty of proving the non existence of the intention diminishes the value of such representations.

Were there actionable misrepresentations?

29 The first point here was made by Stratech. It took the position that by its answer to the further and better particulars requested, Panasonic had identified the Presentation document as the source of all the misrepresentations pleaded in paras 8 and 34 of the statement of claim and Panasonic could, therefore, only refer to that document when seeking to prove that the misrepresentations were made. Panasonic responded that the Presentation document made clear that it was a summary of Stratech's detailed findings set out in sections 2.1 and 2.7 of the Solutions document. The Solutions document was, according to Stratech (in the document itself), the result of "several weeks of independent and intensive study of Panasonic's business". Therefore, Panasonic argued, the Presentation document had to be read together with the Solutions document and understood in the context of all of the events that had occurred prior thereto.

30 It is true that in the section of the Presentation document entitled "Conclusion", Stratech referred to its study of the Legacy System and reiterated that it had also provided a detailed "proposal on our recommendation of the ways in which [Panasonic] can proceed to reach [its] primary objective". The Presentation document was a summary of the Solutions document and Stratech had intended both to be read by Panasonic. It is therefore strongly arguable that when in its further and better particulars Panasonic referred to the Presentation document it was also referring to the Solutions document. However, that is not the only basis on which to justify references to evidence outside the Presentation document in order to establish whether the representations were made.

31 It is important to remember the actual question that Stratech asked Panasonic in relation to para 8 of the statement of claim and the actual answer given by Panasonic. These are as follows:

3. Under paragraph 8

Of "... Following the study, [Stratech] recommended that [Panasonic] replace the Legacy System with the ERP System ... Pursuant to its recommendation, [Stratech] represented to [Panasonic] that it would be able to provide ..."

Request

Please:-

a. State the person from [Stratech] who made the alleged recommendation/representation.

Answer:

[Panasonic] does not know the person from [Stratech] who made the alleged recommendation.

b. State whether the recommendation/representation was in writing or orally.

Answer:

To the best of [Panasonic's] knowledge and subject to further discovery and/or interrogatories, the recommendation was made by [Stratech] in writing.

c. If in writing, please identify the document. If orally identify the person in [Panasonic] who received the recommendation/representation.

Answer:

The document is entitled "Enterprise Resource Planning Consultancy Phase" dated 6 April 2001.

32 It can be seen that the request for further and better particulars was not well drafted. If it was intended that each question applied to each of the elements of the representation pleaded by Panasonic in para 8 of the statement of claim, then the request should have been drafted in such a way as to make this requirement clear. This was not done. As a result, it can be seen from the answers that Panasonic gave to the request that it was dealing with the questions in relation only to the recommendation that it replace the Legacy System with an ERP system. In none of its answers does it make reference to any of the components of the representation. It therefore does not assert

that the representation was contained only or mainly in the Presentation document. From the Pleadings, it appears that Stratech accepted the answers given by Panasonic and did not request it to elaborate on its particulars or assert that the particulars given were inadequate. Accordingly, in my opinion, Panasonic is not limited to the contents of the Presentation document in its efforts to prove that the representation was made but can also rely on documents to which the Presentation document had reference.

33 In its submissions, Panasonic referred to three documents that Stratech had furnished Panasonic with during the negotiation process and contended that together the statements in the documents amounted to a representation that Stratech would be able to provide, customise and implement an ERP system based on the JDE system software which had the features set out in paras 8 and 34 of the statement of claim. In this judgment, I will refer mainly to those portions of the documents that Panasonic highlighted in its submissions.

34 First, it referred to a letter dated 17 November 2000 from Stratech in which it stated that it understood Panasonic's intention to have:

... an ERP System that [would] bring together all its operating units dispersed throughout the country [and] enable [Panasonic's] management to achieve integrated and complete visibility of the key performance indicators of the company's operations.

Then it referred to the consultancy study and the Presentation document and asserted that the representations made in the Presentation document were based on Stratech's detailed findings set out in sections 2.1 to 2.7 of the Solutions document issued on 1 February 2001.

35 Going through the Solutions document, Panasonic emphasised that in section 2.1, which was a summary of the contents of the document, Stratech had assured it that Stratech's recommendations in the Solution document were based on an in-depth evaluation and selection methodology. Then section 2.2 (Current System Overview) provided Stratech's assessment of the Legacy System. Stratech noted that it was important to Panasonic to be able to (i) relay its customer's needs to the manufacturers and (ii) provide logistics and support services efficiently and effectively to its customers. Section 2.2 also set out the flow of business in Panasonic, the existing IT infrastructure, and the components of the Legacy System. Stratech had noted that there were 100 concurrent users of the Legacy System and it generated about 300 reports per month.

36 Section 2.3 of the Solutions document contained Stratech's recommendations. It recommended that the business processes be changed from manual to e-Business processes. It identified the core functions of Panasonic's business as sales/service, inventory/warehouse, marketing/planning, and financial management. Stratech stated that its assessment was that Panasonic already had fundamental IT infrastructure in place and therefore it did not anticipate a massive network re-deployment of infrastructure in order to implement the ERP system. However Stratech recommended that Panasonic should replace, and not improve on, the Legacy System. It said:

Instead of spending the available resources on revamping the existing enterprise system, we recommend [Panasonic] to partner with a reputable 3rd party ERM system provider ...

After assessing [Panasonic's] core activities, we evaluated three reputable ERM System software providers in the market, namely SAP, Oracle and [JDE]. Upon considering the various criteria discussed during the workshop, we recommend [Panasonic] to adopt [JDE] as its Enterprise Resource Management System ...

Based on Panasonic's core competencies, Stratech recommended that the JDE system's Logistic/Distribution Suite and Financial Suite should be implemented. These were the F&D module and the PSI module.

37 The recommendations in the Solutions document were summarised in the Presentation document. Panasonic emphasised that in the Solutions document it was stated that Panasonic would, using an ERP system, obtain "an integrated, near-real time instantaneous information accessibility system". Mr Sjarif testified that such a system would be an improvement on the Legacy System in which information from the branches had to be consolidated by way of periodic batch runs before the reports could be printed for management's review. In the Presentation document, Stratech stated:

Here we are proposing to lay a solid, concrete multi-adaptive type of system that will cater to your current needs as well as to prepare for future expansion program.

... This type of "Universe [sic] adaptor" is able to accept any power plugs from all over the world as compare to the previous idea of an individual adaptor for single purpose.

Likewise the solution that we are proposing is to be built [sic] a base foundation that is strong and able to accept the old application, current new application and future expansion needs.

38 Panasonic pointed out that from the Solutions document it was clear that Stratech was aware of Panasonic's unique requirements because Stratech sought to address some (and not all of them) in the preliminary gap-fit analysis. It said at Section 2.3 of the Solutions document:

... we understand that no two enterprises run their business exactly the way [i.e. the way set up in the JDE System which had best-practices business processes]. Hence, a preliminary gap/fit analysis has been performed to address some of [Panasonic]'s unique requirements. These requirements, if [sic] cannot be addressed by the standard functions, will either be manual processes or a [sic] custom built features.

39 Panasonic then briefly described the remaining sections of the Solutions document as being the proposed implementation plan (Section 2.4), pricing proposal (Section 2.5), proposed project team (Section 2.6), the sample Services Agreement (Section 2.7) and the hardware to be procured (Section 2.8). It ended off its submission on this point by contending that, together, all the statements it had referred to amounted to the representation in paras 8 and 34 of the statement of claim.

40 In its response, Stratech dealt with the questions that it had put to Mr Sjarif in cross-examination. It had asked him to co-relate the specific representations that had been pleaded with statements in the Presentation document. It submitted that he had not been able to do this and gave various examples. It noted that in relation to the assertion that the JDE system would be able to "retain and apply the existing data and information in the Legacy System", Mr Sjarif pointed to the statement "Here we are proposing to lay a solid, concrete multi-adaptive type of system that will cater to your current needs as well as to prepare for future expansion program". Then in relation to the assertion that it would "match and perform the functions of the Legacy System", he said this was what was meant by "concrete multi-adaptive type of system". In relation to the alleged representation that the system would "integrate the data and information from the various branch offices and the head office of [Panasonic]", Mr Sjarif said that this came from the following statements in the Presentation document:

"proposed solution" whether it's timeline in a project, which is basically integrated support,

automated support, enable supply chain and everything.

What we are proposing here to you here is to enhance the current situation and provide you with the state of the art instrument that you will be equipped with, to meet your challenges daily.

As for the assertion that the system would "allow [Panasonic] to access information within the System in near real time and instantaneously", Mr Sjarif said that came from the part of the document that stated "What you will get is an integrated, near real time, instantaneous information accessibility system that will be able to provide you with the ammunition that you can face the challenges in the market".

41 Overall, Stratech submitted, Panasonic had not been able to substantiate its allegations in relation to the misrepresentation by reference to specific language in the Presentation document. It was not clear how the references in the Presentation document that Mr Sjarif had cited co-related to the alleged representation. Further, the Presentation document was nothing more than mere puff and pushing and could not be relied on as misrepresentations of fact.

42 The Solutions document and the Presentation document are two of the most badly written documents that I have read. Not only do they contain elementary grammatical mistakes (which are obvious in the extracts I have quoted) but they are full of jargon and bad analogies and whole portions of them (particularly the Solutions document) make very little sense. Substantial sections of the Solutions document deal with the so called advantages of e-Business and e-Business solutions and have little to do with Panasonic's specific problems and must have been standard issue for Stratech presentations. There is a lot of puff in both documents and there are very few definite assertions that any party can cling on to. Stratech's aim was to put forward the most rosy and positive picture to support the course it wanted the customer to take. Overall, the Solutions document and the Presentation document are a mixture of puff and intentions on the part of Stratech.

43 I think that actually Panasonic recognised the essential nature of these documents. This is shown by the fact that the representation that Panasonic has pleaded is a representation that Stratech "would" be able to create an ERP system (based on the JDE system) which would be able to do certain things. Panasonic did not plead that it had been represented that there was a system that actually existed that could do those things. As a representation that Stratech would be able to achieve certain things, the representation was a representation as to intention and future performance. It was not a representation of fact and, to that extent, I consider that Panasonic's claim for misrepresentation is misconceived although I sympathise with Panasonic's anger at being sold something that was not eventually delivered. It must also be said that para 37 of the statement of claim, in which Panasonic alleged that the representations were untrue and that Stratech was not able to implement the JDE system or customise it as it had stated it would, appears to be more of a claim for breach of contract rather than for a claim for misrepresentation. Panasonic should, if its purpose was to contend that Stratech did not from the beginning have the ability to do the work that it said it was capable of, have given proper particulars of Stratech's inadequacy for the task. No such particulars were given and these allegations and the evidence that was said to support them appeared only in the closing submissions. That was too late. In any case, there was little evidence that Stratech would not have been able to finish the job eventually. The PWC report thought it could be done provided additional manpower and hardware were provided.

44 The kind of statements made by Stratech in the Solutions document and the Presentation document were statements on matters and intentions that could have been included in the Services Agreement as specifications of the system to be provided thereunder. During the negotiations

Panasonic could have requested that these specifications be included in the contract. To the extent that they did so, these pre-contractual expressions of Stratech's intentions and abilities became contractual terms and, if they were not fulfilled, Panasonic can make a claim based on breach of contract. In this case, the negotiations for the contract took several months and even though the contract was drafted by Stratech, there was nothing to prevent Panasonic from putting forward all the contractual terms it wanted included in the contract. It is worth emphasising that the parties were negotiating from positions of equivalent strength and did so at arm's length. They were both commercial enterprises and had the financial ability to obtain legal advice. That not all the things that Stratech said it would deliver were reflected in the eventual contract cannot by itself convert such statements of intention into statements of fact. It should also be noted, as would be seen from the clauses of the Services Agreement (some of which are quoted in [48] and [49] below) that quite a number of the matters that Stratech said it would do, did in fact take shape as terms of the contract.

45 In any case, bearing in mind the nature of the statements made, to the extent that they were not included as contractual terms, they would be excluded as terms upon which Panasonic could rely by the operation of clauses 9.4 and 11.6. These clauses are "whole agreement" clauses and they have merged any promises or assurances made in the course of negotiation so that the same have no contractual force save in so far as they are reflected and given effect to in the Services Agreement. In *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 357, the Court of Appeal cited with approval the following statement on the purpose and effect of an entire agreement clause made by Gavin Lightman J in *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 (at 614):

The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long-forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.

... [T]he formula used is abbreviated to an acknowledgement by the parties that the agreement constitutes the entire agreement between them. That formula is, in my judgment, amply sufficient to constitute an agreement that the full contractual terms to which the parties agreed to bind themselves are to be found in the agreement and nowhere else. That can be the only purpose of the provision.

46 Whilst in this case the statements that Panasonic seeks to rely on were not chance remarks, the explanation that Lightman J gave as to the purpose of the entire agreement clause applies equally here. This clause makes it clear to both parties that their obligations are contained entirely within the bounds of the written agreement and that they should put everything that they want to have contractual force into the agreement and not rely on anything that was said before the contract was concluded as being binding. I agree entirely with Tay Yong Kwang J's observations in *IBM Singapore Pte Ltd v UNIG Pte Ltd* [2003] SGHC 71 that such clauses ensure that the contractual relationship between the parties would be circumscribed by the signed agreements and those alone. Panasonic argued that entire agreement clauses could not operate so as to release one party from the effects of having made an actionable misrepresentation. I think that that argument is a strong one although

the issue has not yet been definitely decided. In this case however, it does not apply as I have found that the statements were not statements of fact and thus not capable of being actionable misrepresentations. In view of my findings aforesaid, I need not deal with the issues of inducement and damage either.

The claim for breach of contract

47 In order to consider the claim for breach of contract, it is necessary to go into the provisions of the contract in some detail.

48 Under clause 2.1 of the Services Agreement, Stratech is obliged to provide the services set out in Schedule 1 thereof:

... STRATECH hereby agrees to render the Services as described in Schedule 1 – Services in order to implement the System.

“Services” is defined in Schedule 1 as follows:

Stratech agrees to provide the services as stated below to implement the System, including without limitation the procurement and supply (at no extra cost to [Panasonic] of all necessary hardware and software (including all requisite licenses), installation, customisation and testing of the System together with all project management and training identified and agreed with [Panasonic] in connection with the implementation of the System (hereafter the “Services”). Without limiting the foregoing, the Services shall include the following ...”

49 Some of the services listed in paras 1 and 2 of Schedule 1 are to:

- a. derive the as-is and to-be business processes of Panasonic (paras 1(b) and (c));
- b. perform gap/fit analysis against the JDE system (para 1(d));
- c. configure/customise the JDE system to deliver the to-be business processes (para 1(e));
- d. perform data cleansing and migration (para 1(h));
- e. deploy the new JDE system to a maximum of 30 branches of Panasonic in Indonesia (para 1(i));
- f. cut-over to the new JDE system (para 1(k));
- g. provide management services which include preparation management, execution management, control and quality assurance, and termination management (para 2(d));
- h. provide analysis services for the business processes relevant to the selection software modules (para 2(e));
- i. provide configuration services to map standard business processes to the JDE system (para 2(f));
- j. provide customisation services to fit non-standard business processes to the JDE system (para 2(g));

k. deploy the JDE system to all branches that are directly affiliated with Panasonic (para 2(m)); and

l. provide the deliverables as specified in Schedule 4 (para 2(o)).

50 Schedule 4 lists the following as being “deliverables” due from Stratech:

Phases	Deliverables
Project Initiation + Deploy Hwd/Swd	<ul style="list-style-type: none">– Project Scope Document– Project Gantt Chart & WBS– Sign-off Scope and Schedule
Project Team Training + Basic Config	<ul style="list-style-type: none">– Training Manual– Sign-off of Training Completion
Business Process Analysis	<ul style="list-style-type: none">– Technical specification Documentation– Sign-off Technical specifications
Configuration/Customisation	<ul style="list-style-type: none">– Configuration Documentation– Sign-off of Configuration and Training Materials
Module/Integrated Level Testing	<ul style="list-style-type: none">– Test Scripts & Results– Sign-off of Testing Results
CRP/User Acceptance Testing	<ul style="list-style-type: none">– CRP/UA Scripts & Results– Sign-off of User Acceptance Testing
Data Cleansing/Migration + Rollout	<ul style="list-style-type: none">– Go-Live/Contingency Plan– After-Live Support Plan– Approval to Go-Live
Warranty support period (3 months)	<ul style="list-style-type: none">– Issue Logs and Resolutions– Overall Project Sign-off

51 Stratech was also obliged under clause 2.2 of the Services Agreement to “ensure that the System meets the Technical Specifications as set out in Schedule 2”.

52 Schedule 2 provides that:

The "System" means the configured enterprise resource planning system customised to meet the requirements of [Panasonic's] business processes to the satisfaction of [Panasonic], including without limitation, the hardware, software and software licenses provided hereunder.

The "Technical Specifications" of the System are those specifications determined by and mutually agreed to by [Panasonic] and Stratech following analysis and review of [Panasonic's] existing business processes and the requisite work required to the selected ERP software package to perform [Panasonic's] business processes.

53 Additionally clause 3.1 of the Services Agreement required Stratech to "provid[e] the Services and ensur[e] compliance with the Technical Specifications in relation to the implementation of the System".

54 Under the original schedule, Stratech was required to procure partial acceptance of the JDE system before the end of June 2002. It was not able to do so. In June 2004, it informed Panasonic that the customisation of the modules for the JDE system would take much longer than expected. It therefore recommended that there be an extension of time to October 2002. Panasonic agreed to this extension and the Services Agreement was amended by a Revised Project Schedule executed on 20 June 2002.

Breach of Clauses 2.1, 2.2 and 3.1

55 Panasonic's submission was that Stratech had failed to successfully launch the F&D module and the PSI module and had thereby breached its obligations under the captioned clauses. It submitted that the attempt to go-live in respect of these modules that was made in June 2003 had failed and this failure had never been overcome. Stratech had therefore most certainly failed to provide the assistance which met the Technical Specifications as required under clause 2.2 and had failed to provide the Services under clause 2.1 in order to implement the JDE system. Further, or alternatively, Stratech had breached its obligation under clause 3.1 to be responsible for all appropriate performance perimeters in all other input and related matters proposed by Stratech in relation to the JDE system.

56 Panasonic noted that in cross-examination, Ms Leong Sook Ching, the Executive Director of Stratech (and the wife of Dr Chew), had agreed that the system to be delivered under the Services Agreement was intended to allow Panasonic to receive information in real time and to have the four modules working seamlessly with one another in an integrated fashion. She also agreed that, even assuming that the CSM module had been fully completed and delivered as at June 2003, due to the nature of the JDE system, errors in the F&D module would cause errors in CSM module. Ms Leong admitted that whilst the JDE system was supposed to allow Panasonic to communicate on a real time basis with its branches from its headquarters, the JDE system was not capable of doing that in June 2003. She said at that time the JDE system was slow, there were outstanding issues and Stratech therefore did not recommend going live in June 2003. Panasonic submitted that Ms Leong was not able to give a coherent answer when asked whether or not the JDE system as a whole, could do what it was supposed to do. All that could be said by her was that two out of the four modules had been completed. However, Panasonic submitted that discrete delivery of the HRM module and the CSM module did not assist Stratech as the JDE system to be delivered was to be an integrated system. In any event, the Project Delivery Note dated 15 July 2003, which had been signed by Stratech and Panasonic, noted that although those modules had gone live from 12 October 2002, "[t]he project team is still resolving the on-going issues".

57 On the CSM module, it was submitted, Ms Leong had agreed that there were errors in print-outs from this module in 2003. She had therefore confirmed that the CSM module was not operating properly in 2003. In relation to the HRM module, Panasonic relied on the evidence of its witness Ms Revianty, a Resources Supervisor, that the on-going issues with that module were not resolved after October 2002 and remained in existence up to the time that Stratech abandoned the project in 2003. Her evidence that she was still adding unresolved issues to her list of issues as late as September 2003 had gone unchallenged by Stratech.

58 Responding to Panasonic's case, Stratech agreed that the function of an ERP system was to integrate all the departments and functions in a company onto a single computer system that could serve all the particular needs of the different departments. Each of those departments would typically have its own computer system optimised for the particular way in which the department did its work. The ERP system would be able to combine them all into a single integrated software programme that ran off a single database so that the various departments would be more easily able to share information and communicate with each other.

59 Stratech's stand was that it had only proposed a standard JDE system for Panasonic and that it had informed Panasonic as early as 24 May 2001 that without what it called "detail scoping outcome" which would be obtained during the "define phase of the implementation", it would be difficult to forecast the duration of the project and that its schedule was an estimate based on a reasonable level of customisation. As an aside, I do not understand what Stratech meant by "detail scoping outcome" and "define phase" and would be surprised if Panasonic did either. As a warning of the difficulty of implementing the project within a defined time period, it appears to me that Stratech's statement was lacking in clarity and specificity. Whether that was intended or accidental is impossible to discern. In any case, Stratech had agreed to a time schedule and could easily have proposed a longer timeline had it thought one necessary.

60 Stratech also pointed out that in the same document dated 24 May 2001, it had highlighted the importance of customisation and had advised Panasonic that customisation was one of the key factors that caused most ERP deployments to fail. In Stratech's view, the customisation process was critical to its case because customisation was the root cause of the abandonment of the go-live attempts for the F&D module and the PSI module. It pointed out that Schedule 2 of the Agreement had stated that the "Technical Specifications" of the System were those specifications determined by and agreed to by both parties following analysis and review of Panasonic's existing business processes. It further said in December 2000 it had provided certain questionnaires to Panasonic and that it depended on the accuracy and comprehensiveness of the answers to those questions to make an assessment of Panasonic's organisation. The quotation given to Panasonic was based on those replies. The replies were also critical as they were essential to determine Panasonic's requirements upon which Stratech's proposal was based.

61 It is not necessary for me to reproduce Stratech's submissions in full. What I have set out above gives a flavour of the stand that Stratech took. Its position basically was that it was not responsible for the failure of the JDE system in June 2003 because the problems that arose in the implementation of the same were due to matters that were Panasonic's responsibility and/or were due to the amount of customisation required. In relation to customisation, Stratech blamed Panasonic for not giving it adequate information on which it could make a proper assessment of the work required. It also asserted that from time to time Panasonic had asked for more and more customisation to be done. In April 2002, it found that due to additional requirements by Panasonic the amount of customisation required was very large and not covered by the initial quotation and plan. For reasons of goodwill however, it agreed to implement the changes at no extra cost. In August 2002, Panasonic requested further report customisation that it had not previously intimated it required. In mid October

2002, Panasonic also required customised reports for Accounts Receivable and Statement of Account Reports. They wanted exactly the same thing as they had then in the Legacy System. These add-ons disturbed the customisation process and caused delay to the pre-live testing for the FDI module.

62 Stratech submitted that the answers given to the questionnaires were incomplete. Based on Panasonic's responses, Stratech had taken the view that Panasonic did not require a complex ERP system. It also used these answers to assess the hardware required and determine a system that would meet Panasonic's requirements. On this basis, Stratech had determined that the hardware needed was only that required for the deployment of a standard ERP system. Stratech submitted that there had been concerns whether Panasonic's technical team and its network infrastructure were capable of supporting the ERP system. It pointed out that it was not responsible for the network infrastructure.

63 The changes in the customisation requirements also resulted in over utilisation of the enterprise servers' CPUs as they were originally intended for a standard customisation and standard ERP deployment. There was at one stage a virus infection of Panasonic's e-mail server and this caused a two week delay. Under clause 4.1 of the Services Agreement, responsibility for the proper functioning of the computer servers lay with Panasonic and therefore Panasonic was responsible for this delay and the further delay that took place in September 2002. According to Stratech, the latter delay was due to improper grounding of the servers which resulted in damage being sustained when there was a power failure.

64 In relation to the above contentions, Stratech relied not on the evidence of Ms Leong or Dr Chew (it would have been hard put to so since neither of them was personally involved in the implementation) but on reports it said had been furnished by its project manager at Panasonic's premises. This project manager, one Mr Jain, did not give evidence in court nor did any one else from Stratech's technical team. Allegations that delays were also caused by additional testing requirements by Panasonic, lack of staff from Panasonic to assist, more requests for further customisation and slowness in the data migration process that Panasonic was responsible for, were all based on such reports from the project manager. In addition, Mr Jain was alleged to have advised in April 2003 that there was a need to upgrade the enterprise server and/or terminal server. There were also, allegedly, manpower difficulties due to the SARs outbreak in 2003.

65 According to Stratech's analysis, the problem with the JDE system was its incapacity to handle the number of modules being run together. It was not correct to contend that the failure of the entire JDE system to go live arose because Stratech was not competent in its customisation process. Stratech was able to customise the HRM module and the CSM module and these two modules had gone live and ran well. The CSM module had only operated slowly when the attempt to run it together with the PSI module and the F&D module was made in June 2003. When it was decoupled from the PSI module, it had recovered its normal speed. According to Stratech, implementation of the first two modules showed that it had the ability to customise the later two modules as well.

66 To buttress its case, Stratech relied on the evidence of one Mr Khoh Chih Jeun, whom it called as an expert witness. Mr Khoh attributed the problem of going live to "scope creep". He explained that "scope creep" was a term used in IT project management to describe uncontrolled changes to a project's scope. Mr Khoh said there was scope creep at two points during implementation of the project:

- (a) The inclusion of new functional requirements on 16 August 2002, 4 months after the business analysis phase was concluded; and

(b) additional automation amounting to 120 man-days after the completion of the user acceptance test in Oct 2002.

67 In Mr Khoh's opinion, the scope creep was significant and put a strain on the infrastructure which was intended for a smaller scope of work. Mr Khoh said that prior to the implementation, Stratech had purchased the servers on the assumption that they would meet the minimal operating requirements of the original design. The additional processing and reporting required an increase in software and hardware capacity. In Mr Khoh's opinion, the failure to make this available contributed to the high CPU utilisation and frequent "system timeout" noted in the production deployment in June 2003. Stratech submitted this view was supported by the fact that in July 2003 it was noted that the go-live had been postponed whilst some technical issues were being resolved and the hardware was being upgraded.

68 In my judgment, Stratech had failed to prove its defence that the failure of the JDE system to function in the contractually agreed manner was due in any way to the default of Panasonic, whether by reason of scope creep or the lack of adequate infrastructure or in any other way.

69 I have come to this conclusion because Stratech failed to adduce admissible evidence of what happened in Jakarta and therefore is unable to prove its allegations against Panasonic. As I have remarked earlier, its only witnesses were Dr Chew and Ms Leong who were not on site and had no personal knowledge of how the implementation was effected. All the documents that Stratech relied on as to what had happened were prepared by Mr Jain and/or Stratech's project team members under Mr Jain's supervision. None of these persons testified in court. Without the maker of the documents present to give evidence, none of the documents were admissible. Stratech did not explain why it did not call the makers of the documents. Nor did it seek to adduce evidence to substantiate any argument that any of the exceptions in s 32 of the Evidence Act (Cap 97, 1997 Rev Ed) applied so as to permit the admission of the documents. It was Ms Leong's evidence that the document called the Internal Issues Log, one of the major documents relied on, was a special document prepared specifically for the project. The inference from this evidence is plain: that document and others of similar nature were not prepared in the ordinary course of business. Thus, the most likely exception to the hearsay rule did not apply in this case. In any event, Stratech did not attempt to argue that its documents were admissible under s 32(b) of the Evidence Act.

70 In the course of cross-examination, Ms Leong informed the court that her knowledge of the operational matters in her affidavit was based on weekly project meetings of Stratech's operations department which she chaired between 2001 and 2006. During those meetings, Ms Leong was furnished with reports on the status of the project that had been prepared by Mr Jain. Of course, notwithstanding her chairing the meetings, Ms Leong's knowledge was still hearsay. In addition, however, neither the minutes of the meetings nor any of the project reports were adduced as evidence despite Panasonic's request for the same. As Panasonic pointed out, Stratech had also failed to disclose other relevant documents. Among these were the stress test results, the covering e-mail attached to Mr Jain's project reports, and the business analysis reports for the F&D, PSI and CSM modules. The expert Mr Khoh was shown these reports but they were not annexed to his report nor disclosed in the proceedings.

71 Panasonic submitted that I should draw an adverse inference against Stratech, pursuant to s 116(g) of the Evidence Act, in respect of its non-disclosure of documents. It pointed out that two of the important ingredients of Stratech's defence were its allegations that (i) Panasonic failed to inform Stratech of its requirements during the business process analysis, thereby affecting the customisation of the JDE system, and (ii) Panasonic requested more customisation than what it had originally agreed to. Yet Stratech did not produce the business analysis reports for the relevant

modules to prove its case. During cross-examination, Ms Leong tried to excuse the failure as mere oversights by her or Stratech's legal department. I am, however, satisfied from the evidence that Stratech was dilatory and partial in complying with its discovery obligations. I am therefore prepared to draw the inference that the documents that were not disclosed would adversely affect Stratech's case and support Panasonic's instead.

72 I am also unable to place much weight on Mr Khoh's evidence. Some of what he said was drawing conclusions which should have been drawn by the court in its fact finding role. That I am unable to do so speaks more for the lack of evidence than for the lack of expertise. It does not appear to me that "scope creep" is a technical IT matter that lay people cannot understand and require an expert to pontificate on. What Mr Khoh was doing, in at least part of his report, was simply reading Stratech's reports, taking them at face value, and commenting on them. Whether there was scope creep or not was a question of fact which was not for Mr Khoh to assess, especially on the basis of hearsay. The court, if the requisite evidence was tendered, would, with the benefit of cross-examination, be the right body to determine whether or not scope creep actually existed in this case.

73 In any case, Mr Khoh stated in court that crucial documents were not made available to him. He accepted that Stratech had, or should have had, almost all of these documents. Thus his report, as Panasonic submitted, was made without the benefit of the full facts of the case. It is also significant that one of the documents that Mr Khoh was not given was the Services Agreement. He agreed that that document was relevant for the purposes of his report. He had asked Stratech for it but he never saw it and therefore in the end his report was produced without his being aware of the exact liabilities and obligations of each of the parties under the Services Agreement. Without sight of this contract, it was impossible for Mr Khoh to comment properly on each party's obligations in respect of the project. Whilst I note that in the re-examination, Mr Khoh retracted his earlier assertion that he had not seen the Services Agreement, not much weight can be placed on the retraction since he then went on to say that the Services Agreement "did not really register to [him]" because it had very little impact on his assessment since it did not contain technical details. It might not have contained such details but it did outline each party's responsibilities and this was very relevant to Mr Khoh's enquiry. As regards Mr Khoh's comments regarding the inability of the hardware infrastructure to support the JDE system, I accept Panasonic's submission that responsibility for this must be borne by Stratech who had made the recommendations for the hardware and from whom the hardware was purchased under the Services Agreement. Mr Khoh himself agreed that the party who made the recommendations must assume responsibility for the same.

74 Next, many of Mr Khoh's findings were made without identifying the specific documents he had relied on. He admitted that the documents he relied on may not have been attached to his report. Thus, it is difficult to precisely determine the value of his report. Further, Mr Khoh agreed that there were limitations on what information was made available to him and therefore that his report was based only on what he had. Accordingly, the probative value of Mr Khoh's report and his conclusions are equally limited.

75 I have therefore concluded that Panasonic has proved that the failure in performance of the JDE system in June 2003 was due to Stratech's default and that Stratech has not been able to provide a legally viable excuse for such failure. It follows also that Stratech has not been able to prove its counterclaim.

Mitigation

76 In its defence, Stratech pleaded that if indeed it had been in breach of contract, then Panasonic was not entitled to claim damages for the breach because it had failed to take action to

mitigate its loss. This assertion was not, however, supported by particulars and was hardly adverted to in Stratech's closing submissions. Accordingly, I do not have to deal with this issue in too much detail.

77 It is however necessary to mention Panasonic's position on mitigation. It argued that its negotiations with Stratech after the failure of the JDE system to launch successfully on 13 June 2003 were attempts by it to mitigate its losses.

78 What happened was that upon the failure of the launch of the F&D module and the PSI module, Panasonic immediately reverted to the Legacy System. This was to ensure that there was no disruption to its business processes which might caused further loss. It also employed PWC to assess the state of the project and give its assessment as to whether Panasonic should continue the project with Stratech. PWC's report was issued in December 2003. According to Mr Sjarif, Panasonic wanted Stratech to complete the project but thought it prudent to engage a third party to confirm whether this was possible. In the event, PWC concluded that successful implementation by Stratech was still possible although certain conditions had to be met in order to achieve this.

79 Based on PWC's findings, Panasonic discussed with Stratech how the matter could be proceeded with and the project completed. Stratech then informed Panasonic that it required Panasonic to make payment under the Services Agreement for the system roll out (*ie* the attempt to go live) as well as for the warranty support payment. It also wanted further money, quite apart from the contract price agreed under the Services Agreement, as a payment for the re-launch of the F&D module. Mr Sjarif testified that Panasonic considered that it would make more financial sense to complete the project with the same consultants rather than to call in new contractors. Accordingly, Panasonic paid the balance amount due under the Services Agreement upon receipt of a letter from Dr Chew dated 23 December 2003 in which he said:

This is to confirm that upon receipt of [Panasonic]'s payment of all our outstanding invoices, we will continue with the JDE ERP project in the re-testing and relaunching of the Finance and Distribution Module as discussed with [Panasonic]'s Management.

80 Thereafter, however, Stratech did not go back to work on the project and the JDE system was never re-launched by it. Stratech's reason for this was that Panasonic did not comply with the payment terms in respect of the additional work for the re-launching. What had happened was that Stratech insisted that Panasonic establish a letter of credit in its favour for the amount that would fall due. Panasonic refused to do this because the requirement for a letter of credit was not raised until after Panasonic's payment pursuant to the 23 December 2003 letter. In court, Dr Chew admitted this timing. He sought to brush it aside by arguing that a payment milestone had to be distinguished from a payment method. After Panasonic refused to establish the letter of credit, Stratech in turn refused to negotiate further with Panasonic.

81 Panasonic contended that these facts indicated that Stratech did not negotiate in good faith. It had never had any real intention of completing the project. It made the promise to continue the project so that Panasonic would pay it the rest of the contract price due under the Services Agreement. I accept this contention. Stratech did not behave in a proper manner. It was trying to obtain the maximum benefit for itself from a bad situation to which it had been the main contributory. Given Stratech's unreasonable conduct, it cannot allege that Panasonic did not try to mitigate its losses.

82 Stratech argued that Panasonic took the view that it shared responsibility for the failure of the project because Panasonic had paid the balance due under the Services Agreement and, in the

course of negotiations with Stratech for the re-launch of the project, had offered to share the costs of the same. This argument cannot be accepted. Whatever views Panasonic might have had as to the cause of the failure, it was reasonable for it to try and reduce its losses by getting Stratech to complete the project, even to the extent of agreeing to pay for a portion of the cost thereof. Secondly, Stratech could not establish that Panasonic was responsible for the failure only by making such an argument. It had to prove the facts that established its assertion and this it did not do. Thirdly, Panasonic's position was that it had not "offered" to share the costs of re-launching the project; what it had done was to demand that Stratech undertake half of such costs instead of billing all of them to Panasonic.

Damages

83 In para 22A of its Defence and Counterclaim (Amendment No 3), Stratech pleaded that even if Panasonic had suffered any loss or damage, such loss or damage was limited to the amount specified in clauses 9.2 and 9.3 of the Services Agreement. These clauses provide as follows:

9 INDEMNITY

...

9.2 EXCEPT FOR CLAIMS OF INTELLECTUAL PROPERTY INFRINGEMENT OR BREACH OF CONFIDENTIALITY OBLIGATIONS, IN NO EVENT SHALL STRATECH BE LIABLE TO THE OTHER FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES, LOSSES, CHARGES AND/OR OTHER EXPENSES OF WHATSOEVER NATURE ARISING FROM ANY CLAIM OR ACTION HOWSOEVER, INCLUDING DIRECT, INDIRECT, JOINT, SEVERAL, ACTUAL, CONTINGENT OR OTHERWISE, EVEN IF STRATECH HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

9.3 IF STRATECH SHALL BE FOUND LIABLE IN DAMAGES UNDER THIS AGREEMENT, UNDER NO CIRCUMSTANCES SHALL STRATECH BE LIABLE TO THE CUSTOMER FOR ANY AMOUNT IN EXCESS OF THE AMOUNT OF FEES PAID TO STRATECH FOR THE AMOUNT OF THE SERVICES PROVIDED PURSUANT TO SCHEDULE 3, SECTION 1 (*ie* S\$1,268,000).

84 In its closing submissions, Stratech argued that not only did clause 9.3 apply but that the limit of \$1,268,000 stated in the clause was inapplicable because of the circumstances that took place in December 2003. It argued that then, the parties expressly agreed that the cost of completing the implementation of the F&D module would be \$1,171,500 and that each party was to bear this sum on an equal basis, *ie*, \$585,750. In Stratech's view, this agreement limited Stratech's liability for any damage up to the sum of \$585,750. As this amount was specifically agreed to by the parties as the amount required to remedy the defects, this limitation must prevail over clause 9.3 of the Services Agreement. I cannot accept this limitation. Under clause 11.6 of the Services Agreement, that document cannot be modified except in writing signed by both parties which expressly referred to the Services Agreement. No such agreement was reached after the failure to go live in 2003 and thus, as Panasonic submitted, there could be no new limitation of \$585,750 imposed on the parties. In any case, the limitation clause which was drafted by Stratech for its own benefit must be read strictly and it is clear that that clause related to the original fees payable and not to additional fees accruing for extra work.

85 Stratech's other argument was that at the most the amount of damages payable was limited to \$1,268,000 because that was the amount specified in clause 9.3. Panasonic's response was that the correct limit that should be applied would be the sum representing the amount of services provided under the Services Agreement, *ie*, \$1,268,000 + \$562,000. The figure of \$1,268,000 represented only

the services provided for the F&D module and the PSI module. The figure of \$562,000 was the figure agreed to under the Quotation as payment for the HRM module and the CSM module. The parties had agreed that the Quotation would be incorporated as an addendum to the Services Agreement and that the Services Agreement had to be amended accordingly to take it into account. Therefore, clause 9.3 had to be read as including the provision of additional services and the amount of fees payable therefore. I accept this argument.

86 I hold therefore that Panasonic is entitled to claim whatever damages it can prove it has sustained by reason of Stratech's breach up to the amount of \$1,830,000 being the total cost of the services to be provided by Stratech (for all four modules) under the Services Agreement, plus interest.

87 Panasonic put in an alternative argument. This was Stratech's failure to implement and deliver the JDE system amounted to a total failure of consideration and that it was therefore entitled to seek re-payment of all moneys paid under and pursuant to the Services Agreement. Stratech's reply to that was that Panasonic had not pleaded this claim. Panasonic sought to meet that argument by stating that it had pleaded all the facts necessary to establish the claim and the consequence of establishing the claim by the evidence adduced in court was a legal consequence that did not need to be pleaded. In my judgment, Stratech's objection is well-founded. Parties are required to plead the relief that they are seeking to obtain from the court. Panasonic's claim was for damages to be assessed. It was not a claim for refund of payments made on the basis of a total failure of consideration. If it had pleaded such a relief as its main or alternative relief, Stratech would have been able to test the basis of the relief in its cross-examination, discovery exercises and submissions. It was deprived of these opportunities since no pleading to that effect was made. It is too late for Panasonic to raise that argument now.

Conclusion

88 In the result, there will be judgment for Panasonic for damages to be assessed and costs. Stratech's counterclaim is dismissed with costs.

Copyright © Government of Singapore.