IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 232

Suit No 65 of 2013

Between

Royal Melbourne Institute of Technology

… *Plaintiff*

And

(1) Stansfield College Pte Ltd
(2) TSG Investments Pte Ltd

… *Defendants*

JUDGMENT

[Civil Procedure] — [Pleadings]
[Contract] — [Discharge] — [Breach]
[Contract] — [Misrepresentation] — [Statements of intention]
[Contract] — [Waiver]
[Restitution] — [Mistake] — [Mistake of law]
[Restitution] — [Unjust enrichment] — [Failure of consideration]

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Royal Melbourne Institute of Technology
v
Stansfield College Pte Ltd and another

[2018] SGHC 232

High Court — Suit No 65 of 2013
Quentin Loh J
19, 23–26 May, 25, 28 September 2017; 1 December 2017

24 October 2018 Judgment reserved.

Quentin Loh J:

Introduction

1 Suit No 65 of 2013 is the plaintiff's claim for sums purportedly owed by the defendants under a contract and, in the alternative, reasonable remuneration on a *quantum meruit* basis for services it provided to the defendants. In its defence, the first defendant claims that its contractual liability was discharged by its acceptance of what it claims were repudiatory breaches on the plaintiff's part. The first defendant also counterclaims damages for these breaches; sums of money which it paid to the plaintiff under a purported mistake of law; damages for misrepresentation; and reasonable remuneration on a *quantum meruit* basis for services it provided to the plaintiff.

2 By consent of the parties, the trial was bifurcated and this judgment deals only with the issue of liability.[1] Having considered the evidence and the parties'

submissions, I allow the plaintiff's claim and dismiss the first defendant's counterclaims save that I find that the plaintiff breached one clause in the contract (see [74] below). Damages for the breach will be assessed separately.

The parties

3 The plaintiff is the Royal Melbourne Institute of Technology ("RMIT"), a university situated in Melbourne, Australia.[2] It was founded in 1887 and presently has campuses in Australia, Asia and Europe. The plaintiff offers its programmes in Singapore through private education institutions, including (in this case) the defendants.[3]

4 The first defendant, Stansfield College Pte Ltd (previously known as Stansfield College Group Pte Ltd), is a company incorporated in Singapore on 25 January 2005 whose business includes providing private education, including teaching courses in collaboration with overseas universities.[4] It also trades under the name "Stansfield College", which is separately registered as a sole proprietorship with the first defendant as its current owner. The key directors of the first defendant at all material times were Kannappan Karuppan Chettiar ("Mr Chettiar") and his wife, Cenobia Majella ("Ms Majella").[5]

5 The second defendant, TSG Investments Pte Ltd (formerly known as The Stansfield Group Pte Ltd), is a limited exempt private company

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1 HC/ORC 2405/2017; HC/SUM 4872/2016.

2 Statement of Claim (Amendment No 3) at para 1.

3 Mr Crighton's affidavit of evidence-in-chief ("AEIC") at paras 5–6.

4 First Defendant's Opening Statement at para 1; Agreed Bundle of Documents ("ABD") 260.

5 Statement of Claim (Amendment No 3) at para 2; Plaintiff's Opening Statement at para 2.

incorporated in Singapore and founded by Mr Chettiar.[6] The second defendant was wound up on 25 January 2013.[7]

6 Another company which is relevant to these proceedings, though not a party, is SIC College of Business and Technology Pte Ltd ("SCBT"), previously known as SIC Education Group Pte Ltd ("SEGP"), a limited private company incorporated on 27 January 2005.[8] Mr Chettiar had management and control of this company at all material times.[9]

The facts

7 From 2006 to around 2012, the plaintiff contracted with a number of different entities to teach its courses in Singapore. All these entities were represented by Mr Chettiar. I first set out a timeline showing the changes to the contracting parties, before explaining in detail how these changes came about:

Date	Contracting parties
2 January 2006 – 14 July 2008	Plaintiff Second defendant
15 July 2008 – 15 December 2009	Plaintiff Second defendant and SEGP
16 December 2009 – 22 March 2011	Plaintiff SEGP with second defendant as guarantor
23 March 2011	Plaintiff

6 Statement of Claim (Amendment No 3) at para 3; Plaintiff's Opening Statement at para 2.

7 First Defendant's Opening Statement at para 3.

8 ABD 247.

9 Plaintiff's Closing Submissions ("PCS") at para 4.

onwards	SCBT and first defendant, with second defendant as guarantor

The 2006 Agreements

8 The relationship between the plaintiff and the second defendant began in 2005, when the plaintiff needed to find a new education institution in Singapore to take over 37 students of mechanical engineering who were midway through the plaintiff's mechanical engineering course with another school, Auston School of Management and Technology.[10] The plaintiff therefore approached the second defendant in around September 2005 to negotiate a collaborative venture.[11]

9 On or around 2 January 2006, the plaintiff entered into an agreement with the second defendant for the latter to offer the plaintiff's Bachelor of Engineering (Mechanical Engineering) Programme ("BME Programme") in Singapore. This was effected by way of two contracts, one titled "Singapore Services Agreement" and the other "Australian Services Agreement" (together "the 2006 Agreements"). The terms of the 2006 Agreements allowed the second defendant to take in new students for the BME Programme up to 2009.[12] The 2006 Agreements are not the subject of the present suit.

10 In July 2008, the parties agreed to join SEGP as a party to the 2006 Agreements. The first defendant says that this was because of an internal restructuring within the second defendant.[13] It was also necessary for SEGP to

10 Mr Crighton's AEIC at paras 10–11.

11 Mr Crighton's AEIC at para 8; Defence and Counterclaim (Amendment No 4) at para 8; Reply to Defence and Counterclaim (Amendment No 7) at para 6.

12 ABD 58–59, 75–76, 84 at Cl 4.1.

13 DBAEIC 13 at para 20; Defence and Counterclaim (Amendment No 4) at para 8(b).

be joined as a party because, even though the second defendant was the counterparty under the 2006 Agreements, the Ministry of Education had given approval for SEGP (and not the second defendant) to administer the BME Programme in Singapore[14] and the courses were being marketed under SEGP[15].

11 On 15 July 2008, Mr Chettiar signed and returned a letter to the plaintiff acknowledging that SEGP agreed to be a party to the 2006 Agreements and be bound by all the terms and conditions thereof, and that the obligations of the second defendant and SEGP under the 2006 Agreements would be joint and several. On 1 August 2008, the board of directors of SEGP passed a resolution resolving the same.[16] SEGP accordingly became jointly and severally bound by the terms of the 2006 Agreements together with the second defendant.[17] SEGP was the sole proprietor of a business registered on 27 October 1988 under the name "Singapore Institute of Commerce"[18], and administered the BME Programme through that business.

The 2009 Agreements

12 The 2006 Agreements only permitted the second defendant and SEGP to accept new intakes for the plaintiff's BME Programme up to 2009. This required the parties to enter into a new set of contracts thereafter for their collaborative venture to continue.

13 On or around 16 December 2009, the plaintiff and SEGP entered into

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14 Mr Crighton's AEIC at para 19; Plaintiff's Bundle of AEICs ("PBAEIC") 115.

15 DBAEIC 13 at para 20.

16 PBAEIC 111–114.

17 Plaintiff's Opening Statement at para 7.

18 First Defendant's Bundle of Documents ("DBD") 3051.

another agreement for the latter to offer the plaintiff's BME Programme, as well as another four of the plaintiff's programmes: (1) Bachelor of Engineering (Aerospace Engineering); (2) Master of Engineering (International Automotive Engineering); (3) Master of Engineering (Management); and (4) Master of Engineering (Integrated Logistics Management) (together "the Five Programmes").[19] The arrangements took effect by way of two contracts, titled "Singapore Services Agreement" and "Australian Services Agreement", not to be confused with the two identically-titled agreements constituting the 2006 Agreements. I will refer to these as "the SSA" and "the ASA" respectively. The ASA and SSA were entered into as two separate contracts so as to distinguish between income earned in Singapore and income earned in Australia for tax purposes.[20] They were signed by the plaintiff, SEGP (referred to in the ASA and SSA as "Organisation"), and the second defendant (as guarantor for SEGP's obligations).[21] As was typical of the plaintiff's contracts with overseas partners[22], the ASA and SSA contained the general key terms for the relationship between the plaintiff and SEGP, while the details of the programmes to be taught (such as pricing, payment, location and the relevant subjects) were specified in annexures to the two agreements. Only two of these annexures (the "ASA-Annexure" and "SSA-Annexure" respectively; together "the Annexures") are relevant to the present suit. They concern the BME Programme and were executed on 2 December 2009. The ASA, SSA and the Annexures are collectively referred to as "the 2009 Agreements"[23] and are governed by the

19 ABD 333, 433, 443; Defence and Counterclaim (Amendment No 4) at para 18; NE (19 May 2017) at p 13 lines 15–22.

20 Plaintiff's Opening Statement at para 9; Mr Crighton's AEIC at para 14.

21 ABD 133 and 153.

22 Defence and Counterclaim (Amendment No 4) at para 8; Reply and Defence to Counterclaim (Amendment No 7) at para 6.

23 Plaintiff's Opening Statement at para 8.

laws of the State of Victoria, Australia.[24] It is important to note that though the ASA and SSA were stated to "continue for the minimum period of candidature of all students enrolled in intakes for the years 2010 to 2015 (inclusive)", the Annexures covered student intakes from 2010 to 2012 only.[25]

14 Under the 2009 Agreements, SEGP was to *inter alia* market the programmes, prepare promotional materials, collect application forms and fees from students, review application forms to ensure the students' eligibility, send the forms to the plaintiff for each intake, and provide the infrastructure for running the programmes at SEGP's campus, located at 1192 Upper Serangoon Road. SEGP was also to coordinate visits by the plaintiff's staff to conduct programme quality reviews, exam preparations and any other workshops.[26] The plaintiff was to enrol the students in RMIT, maintain student records, and provide course guides and learning packages to students. It also set the method and content of any assessment, marked and moderated assessment materials, forwarded SEGP the students' final examination results, and issued degrees or awards to students upon their completion of the programmes.[27]

The Amending Agreements

15 In November 2010, the first defendant obtained EduTrust certification from the Council for Private Education ("CPE"), now known as the Committee for Private Education, a body constituted under the Private Education Act (Cap 247A, 2011 Rev Ed). Mr Chettiar and his associate, one Ken Yeo Poh Siah ("Mr Yeo"), suggested that registration of the plaintiff's courses be transferred from

24 ABD 132 and 152 (see Cl 18.1).

25 ABD 126 at Cl 4.1; ABD 146 at Cl 4.1; ABD 161 at Cl 3.1; ABD 175 at Cl 3.1.

26 Plaintiff's Opening Statement at para 12; Mr Crighton's AEIC at paras 30–32.

27 Plaintiff's Opening Statement at para 13.

the Singapore Institute of Commerce to the first defendant for the future intakes of the plaintiff's courses, for the reason that EduTrust certification would enhance student recruitment efforts locally and overseas.[28] It was therefore decided in early 2011 to make the first defendant a party to the 2009 Agreements.[29]

16 The parties accordingly signed two amending agreements dated 23 March 2011, one in respect of the SSA and the other in respect of the ASA (individually "the SSA Amending Agreement" and "the ASA Amending Agreement"; together "the Amending Agreements").[30] The effect of the Amending Agreements was to add the first defendant as a party to the 2009 Agreements. Pursuant to Cl 1.1 of the Amending Agreements, the entity described as "Organisation" in the 2009 Agreements henceforth comprised SEGP, the first defendant and SCBT. In actual fact this was only two companies, because SEGP and SCBT were one and the same (SEGP changed its name to SCBT on 12 March 2010[31]). Pursuant to Cl 4 of the Amending Agreements, the second defendant's obligations as guarantor under the ASA and SSA were also extended to the obligations of the first defendant. The ASA and SSA were also stated to "[remain] in full force and effect".[32]

17 Although the 2009 Agreements and the Amending Agreements refer to "SIC Education Group Private Pte Ltd", it is not disputed that the parties intended this to refer to SIC Education Group Pte Ltd (*ie*, SEGP).

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28 Mr Crighton's AEIC at para 42; PBAEIC 243; Mr Chettiar's AEIC at paras 29 and 37; DBAEIC 250.

29 Defence and Counterclaim (Amendment No 4) at para 18.

30 ABD 191 and 194.

31 ABD 252.

32 ABD 191–192 and 194–195.

18 Throughout the parties' relationship only one of the Five Programmes was conducted, *ie*, the BME Programme. There were no intakes for any of the other programmes covered by the annexures.[33]

Termination of the 2009 Agreements

19 Fault lines soon began to surface in the parties' relationship. A month after the Amending Agreements were signed, the plaintiff had started discussions with other private education institutions with a view to having them take over the courses which were the subject of the 2009 Agreements.[34] By 2012, the plaintiff says, the first defendant was late with payments, had changed the location of its campus without informing the plaintiff beforehand, and was experiencing a low take-up for the BME Programme (and no take-up for the other four courses).[35] The first defendant, on the other hand, alleges that the plaintiff entered into the Amending Agreements with the primary purpose of saddling the first defendant with SEGP's debts, and was not interested in maintaining a long-term relationship with the first defendant thereafter.[36] It also alleges that the plaintiff promised to contribute S$70,000 towards its advertising costs but reneged on this promise.[37]

20 On 20 July 2012, the plaintiff sent the first defendant a letter to "clarify a key contractual requirement that [would] apply" to the final intake of students later that year. [38] Pursuant to Cl 9.3 of the Annexures, the first defendant was

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33 Plaintiff's Opening Statement at para 14; Mr Crighton's AEIC at para 38.

34 Plaintiff's Bundle of Documents ("PBD") 384; NE (24 May 2017) at p 1 lines 13–29.

35 Mr Crighton's AEIC at para 75.

36 1DCS at para 3.

37 Defence and Counterclaim (Amendment No 4) at para 32B(a)(iv).

38 ABD 475.

required to pay the plaintiff fees for a minimum number of 15 students per trimester for each of the two Bachelor's courses, even if the actual enrolments were fewer in number. I hereafter refer to this as the "minimum payment obligation". Clause 9 of the SSA-Annexure states:[39]

> **9. FEES FOR SINGAPORE SERVICES**
>
> 9.1 Allocation of Fees for Singapore Services
>
> The fee payable to RMIT University for services provided in Singapore is AUD $480 per 12 credit point course per student (of a total of AUD$1000).
>
> 9.2 Fee income will be subject to review in November of each year and will be subject to 5% increase each year unless otherwise agreed by both parties.
>
> 9.3 In the event of total enrolments in a course in any trimester being less than 15, [SEGP] agrees to pay RMIT for 15 enrolments per course offered in the trimester.
>
> …

21 Clause 9 of the ASA-Annexure is worded in nearly identical terms.[40]

22 Prior to 2012, notwithstanding the minimum payment obligation, the plaintiff had consistently charged its fees on the basis of the number of *actual* enrolments. In its letter of 20 July 2012, for the first time, the plaintiff declared its intention to enforce the minimum payment obligation "for all courses delivered in each program".[41] The plaintiff further stated its willingness "to negotiate terms with [the first defendant] for the cessation of further student intakes and the teach-out of current students that would be in the interests of both parties".[42]

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39 ABD 163.

40 ABD 177–178.

41 NE (26 May 2017) at p 80 lines 19–20; NE (24 May 2017) at p 54 lines 25–28.

42 ABD 474–475.

23 The first defendant replied on 27 July 2012. It construed the plaintiff's letter as an attempt to "intimidate" it into ceasing the upcoming intake. The letter concluded, "Kindly therefore confirm if you wish to repudiate the contract. If we do not hear from you by close of business on 31 July 2012, we will assume that your letter of 20 July 2012 was intended to repudiate the contracts with us."[43]

24 On 30 July 2012, the first defendant sent the plaintiff the following letter:[44]

> Our records indicate that you have yet to settle our Debit Note No. 05/2012/013 for S$70,000 towards cost of advertising for RMIT Engineering Programmes.
>
> Kindly settle the said amount immediately failing which, we have no other alternative but to issue a Notice of Default. Your prompt attention to the above is appreciated.

25 On 2 August 2012, the first defendant e-mailed the plaintiff as follows:[45]

> As we have not heard from you in response to our letter dated 30 July 2012, we will accept that RMIT has repudiated the contract. Accordingly, we will cease all marketing and admission activities in relation to the RMIT programmes for the upcoming intakes unless we hear to the contrary by close of business today.

26 On 3 August 2012, the plaintiff replied. It denied the assertions contained in the first defendant's letter of 27 July 2012 and denied that it had repudiated the agreement.[46]

27 The first defendant reiterated its acceptance of the plaintiff's purported

43 ABD 481–482.

44 DBD 1145–1146.

45 ABD 484.

46 ABD 489.

repudiation on three more occasions: two e-mails to the plaintiff on 25 August 2012 and 5 September 2012, and verbally during a teleconference between Ms Majella and Scott Crighton, a representative of the plaintiff ("Mr Crighton").[47] Nevertheless, the first defendant continued to teach the BME Programme until 2014.[48]

The plaintiff's claim

28 On 23 January 2013, the plaintiff commenced the present suit, by which it claims unpaid fees pursuant to seven invoices issued under the ASA and SSA. Following the trial, the plaintiff revised the sums which it claims to be entitled to, as follows:[49]

No.	Date	Invoice no.	Amount (A$)	Description
1	30 July 2012	100089643	207,375 (revised from 217,744)	For Semester 1 of 2012
2	30 July 2012	100089644	192,150 (revised from 201,758)	For Semester 2 of 2012
3	30 October 2012	100091299	158,025 (revised from 165,926)	For Semester 3 of 2012
4	05 March 2013	100093168	115,762.50	For Trimester 1 of 2013
5	30 July 2013	100095237	102,532.50	For Trimester 2 of 2013
6	3 April	100097909	100,327.50	For Trimester 3

47 Defence and Counterclaim (Amendment No 4) at para 32B(b); ABD 493; PBAEIC 582.

48 NE (26 May 2017) at p 61 lines 2–4; NE (24 May 2017) at p 36 line 26.

49 Plaintiff's Opening Statement at para 4; ABD Tabs 17–23; PCS at paras 30–32.

	2014			of 2013
7	3 April 2014	100097906	66,150	For Trimester 1 of 2014
Total			**A$942,322.50 (revised from A$970,200.50)**	

29 The sums stated in these invoices are based on payment for a minimum number of 15 students for each course delivered in each trimester as part of the BME Programme (save for courses which only had one or two students, in which case the plaintiff charged based on the actual numbers as a gesture of goodwill), pursuant to the minimum payment obligation.[50] The sums also factor in a 5% increase in fees per year pursuant to Cl 9.2 of the Annexures. The plaintiff claims that it did not enforce the 5% increase in 2011 as a gesture of goodwill, but has applied it to its invoices from 2012 onwards.[51]

30 The plaintiff claims that, even if the first defendant is not contractually liable for the invoices, the plaintiff is entitled to reasonable remuneration from the first defendant on a *quantum meruit* basis for the services which it provided to the students enrolled by the first defendant in the BME Programme from 2012 to 2014.[52] The plaintiff avers that the first defendant has benefited from the fees paid by the students which it taught at the plaintiff's expense, *ie*, by relying on the plaintiff's degree programme curriculum, course materials and the contributions of the plaintiff's academic staff.[53]

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50 PCS at para 27; ABD 217–246.

51 PCS at paras 25–26.

52 Statement of Claim (Amendment No 3) at paras 23–25.

53 Reply to Defence and Counterclaim (Amendment No 7) at para 24.

31 The first defendant initially denied that it was contractually liable under the 2009 Agreements to pay the plaintiff's invoices. On 18 October 2013, the parties agreed to appoint a Neutral Evaluator qualified to advise on the laws of Victoria, Australia to determine the following questions on a binding and final basis, his decision to apply *mutatis mutandis* in respect of the ASA, ASA-Annexure and ASA Amending Agreement:[54]

> (a) In respect of the SSA, SSA-Annexure and SSA Amending Agreement, was the plaintiff under any obligation to the first defendant, SEGP or SCBT to issue any further annexures for the duration of the agreement (*ie*, 2010–2015)?
>
> (b) Was the first defendant liable to pay the plaintiff under the SSA, SSA-Annexure and SSA Amending Agreement?
>
> (c) Under the terms of the SSA Amending Agreement, would the first defendant be liable for any indebtedness of SEGP? If so, to what extent?

32 The Neutral Evaluator, Mr Neil Young QC, issued a written opinion on 3 March 2014, in which he answered the questions as follows:[55]

> (a) The plaintiff was not under an obligation to issue further annexures for the duration of the SSA.
>
> (b) The SSA and the SSA Amending Agreement do not impose any retrospective liability on the first defendant to pay amounts that SEGP

54 ABD 1071; ABD 631, para 10(a); Plaintiff's Opening Statement at paras 23–24; Reply to Defence and Counterclaim (Amendment No 7) at paras 25–26.

55 ABD 643 at para 66; ABD 647 at para 86; ABD 648 at para 90; Reply to Defence and Counterclaim (Amendment No 7) at para 27.

(renamed SCBT) incurred in relation to the SSA-Annexure prior to 23 March 2011. However, the first defendant is prospectively liable to pay amounts incurred by SEGP/SCBT under the SSA-Annexure in the period following 23 March 2011.

(c) The first defendant would not be liable for any indebtedness incurred by SEGP/SCBT in relation to the SSA-Annexure prior to 23 March 2011. But if SCBT became indebted to the plaintiff after 23 March 2011, the first defendant would be liable therefor. (I add that the seven invoices which form the subject of the plaintiff's claim relate to debts incurred after 23 March 2011.[56])

33 Given the Neutral Evaluator's opinion, the first defendant no longer denies that it is contractually liable under the terms of the 2009 Agreements to pay the plaintiff's invoices.[57] Its defence is threefold:[58]

(a) The first defendant's obligation to pay five of the seven invoices was discharged on 2 August 2012 (see [25] above) when it accepted the plaintiff's repudiation of the 2009 Agreements.[59]

(b) The quantum claimed in the seven invoices is incorrect. They should not be based on the minimum payment obligation but on the actual number of students enrolled in each of the courses and the unit price of A$1,000 per student per course.[60]

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56 Plaintiff's Opening Statement at para 26.

57 NE (19 May 2017) at p 20 line 17 – p 21 line 9.

58 1DCS at para 4.

59 Defence and Counterclaim (Amendment No 4) at paras 32A and 32B.

60 Defence and Counterclaim (Amendment No 4) at para 36.

(c) The plaintiff's claim for reasonable remuneration for the goods and services provided from 2012 to 2014 on a *quantum meruit* basis is unsupported by the evidence.

34 As regards [33(a)], the first defendant alleges that the plaintiff repudiated the 2009 Agreements in the following ways:[61]

(a) breaching Cl 11.2 of the 2009 Agreements;

(b) breaching Cll 4.1 and 20 of the 2009 Agreements read with Cl 3 and Schedules 1B and 2B of the Annexures;

(c) breaching Cl 3.3(a) of the ASA and Cll 11.9 and 11.10 of the ASA-Annexure;

(d) breaching Cl 3.2(m) of the ASA and Cl 3.2(c) of the SSA;

(e) sending its letter dated 20 July 2012 to the first defendant (see [20] above);[62] and

(f) wrongfully issuing various Notices of Default against the first defendant between 30 June 2011 and 4 October 2012, which threatened to immediately terminate the SSA and ASA.[63]

35 The plaintiff denies breaching the 2009 Agreements.[64] It claims that even if it breached them, the first defendant accepted the breach and treated the 2009

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61 Defence and Counterclaim (Amendment No 4) at paras 32A and 32B; 1DCS at para 17.

62 Defence and Counterclaim (Amendment No 4) at para 32B(a)(v).

63 Defence and Counterclaim (Amendment No 4) at para 32B(a)(vi).

64 Plaintiff's Opening Statement at para 41.

Agreements as continuing even after August 2012 by continuing to teach the BME Programme and receiving services from the plaintiff.[65] Moreover, besides the plaintiff's failure to pay S$70,000 for advertising costs, the first defendant never raised any of the other breaches until this action was commenced.[66]

The first defendant's counterclaim

36 The first defendant counterclaims the following:[67]

(a) loss and damage for the plaintiff's alleged repudiatory breaches of the 2009 Agreements, including but not limited to:[68]

(i) loss of profits suffered as a result of being unable to accept new student intakes for the Five Programmes (including the BME Programme), from around August 2012 onwards;

(ii) losses suffered for refund of the sum of S$36,805 to students who had signed up for the September 2012 intake for the BME Programme; and

(iii) loss of profits suffered in being unable to attract students to enrol in the first defendant's Diploma and Advanced Diploma in Engineering courses, as these students could no longer progress to the BME Programme and the Bachelor of Engineering (Aerospace Engineering) programme;

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65 Reply to Defence and Counterclaim (Amendment No 7) at para 23L.

66 Plaintiff's Opening Statement at para 48.

67 1DCS at para 4(b).

68 Defence and Counterclaim (Amendment No 4) at paras 38A and 59(iii).

(b) two sums (altogether S$905,054.88) that the first defendant claims it paid to the plaintiff under a mistake of law, but which the plaintiff claims were paid by SEGP/SCBT;

(c) damages to be assessed with respect to the plaintiff's failure to issue further annexures to the first defendant, including damages for misrepresentation pursuant to s 2 of the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the Misrepresentation Act"); and

(d) reasonable remuneration on a *quantum meruit* basis for the costs it incurred in marketing and advertising the plaintiff's courses and promoting the plaintiff's brand name.[69]

Issues

37 The issues that fall to be decided are as follows. In relation to the plaintiff's claim against the defendants:

(a) Was the first defendant's contractual liability to pay the plaintiff's invoices discharged by the alleged repudiatory breaches on the plaintiff's part and the first defendant's acceptance of the same?

(b) If the answer to (a) is no, do the seven invoices correctly calculate the fees which the plaintiff is contractually entitled to charge the first defendant?

(c) If the answer to (a) is yes, is the plaintiff entitled to reasonable remuneration on a *quantum meruit* basis for services which it provided to the first defendant from 2012 to 2014? In addition, is the first

[69] Defence and Counterclaim (Amendment No 4) at paras 44, 45 and 59(vi).

defendant entitled to damages in respect of the plaintiff's repudiatory breaches?

38 The counterclaim further raises the following issues:

(a) Is the first defendant entitled to damages on the basis that the plaintiff misrepresented that further annexures would be issued?

(b) Was the payment to the plaintiff of two sums totalling S$905,054.88 made by SEGP/SCBT or by the first defendant? If the latter, is the first defendant entitled to return of those sums in the law of restitution?

(c) Is the first defendant entitled to reasonable remuneration on a *quantum meruit* basis for costs which it incurred in marketing and advertising the plaintiff's courses and promoting the plaintiff's brand name?

Issue 1: The plaintiff's alleged repudiatory breaches

General principles

39 I first set out the general principles regarding repudiatory breach before turning to the individual breaches alleged by the first defendant. It is well-established that a repudiatory breach arises in the following scenarios:

(a) First, "where the contract clearly and unambiguously states that, in the event of a certain event or events occurring, the innocent party will be entitled to terminate the contract" (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [91]). This was described in *RDC Concrete* as "Situation 1".

(b) Secondly, "where a party, by his words or conduct, simply renounces its contract inasmuch as it clearly conveys to the other party to the contract that it will not perform its contractual obligations at all" [emphasis omitted] (*RDC Concrete* at [93]). This was described in *RDC Concrete* as "Situation 2".

(c) Thirdly, where the term breached is what is often described as a "condition", *ie*, one which the parties intended "to designate … as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract" [emphasis omitted] (*RDC Concrete* at [97]). This was described in *RDC Concrete* as "Situation 3(a)".

(d) Fourthly, where the breach gives rise to "an event which will deprive the party not in default … of substantially the whole benefit which it was intended that he should obtain from the contract" [emphasis omitted] (*RDC Concrete* at [99], citing *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26). In other words, the nature and consequences of the breach are so serious that the breach may be described as one going "to the root of the contract" or a "fundamental breach" (*RDC Concrete* at [99], citing *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 and *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827). This was described in *RDC Concrete* as "Situation 3(b)".

Whether the first defendant may rely on the pleaded breaches

40 The first defendant's position is that the repudiatory breach which it purported to accept by its letter of 2 August 2012 was the plaintiff's letter dated

20 July 2012.[70] The plaintiff submits that the purported breach in question was really the plaintiff's failure to pay S$70,000, and that the first defendant may not rely on any of the purported breaches at [34] above with the exception of [34(d)] and possibly [34(e)] because the first defendant did not cite any of those breaches at the time that it purported to accept the plaintiff's repudiation, thereby depriving the plaintiff of an opportunity to rectify the same.[71]

41 The law in this area is settled. Although the innocent party must justify an election to terminate for breach of contract by the other party, any ground of termination which existed at the time of election may subsequently be relied upon, unless one of the two exceptions to this rule applies (*Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 ("*Alliance Concrete*") at [63]; *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2017] 2 SLR 940 ("*CAA Technologies*") at [31]). First, where the innocent party's conduct was such that it would be unfair or unjust for him to later rely on a different ground for termination. This exception is premised on the traditional doctrines of wavier and estoppel (*CAA Technologies* at [31]). Secondly, where the party in breach could have rectified the situation had it been afforded the opportunity to do so (*Alliance Concrete* at [67]).

42 The plaintiff relies on the second of these exceptions. However, it has not adduced any evidence to substantiate this, beyond a bare assertion that it could have rectified the situation had it been given an opportunity to do so.[72] In any event, as will be seen, it is not necessary for me to consider this in relation

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70 1DCS at para 19.

71 PCS at paras 35–36.

72 PCS at para 39.

to any of the alleged breaches because I find that the plaintiff did not commit any repudiatory breaches of the 2009 Agreements.

Alleged breach of Cl 11.2 of the ASA and SSA

43 Clause 11.2 of the ASA and SSA states:[73]

> RMIT agrees that during the term of this agreement or any extension thereof RMIT will not enter into any arrangement with any other person to provide in the Location the Program or any other course of studies similar to the Program, except where agreed by both parties.

44 "Location" was defined in the ASA and SSA to mean "the countries and cities that programs are operated in", *ie*, Singapore.[74] The term of the 2009 Agreements was from 2010 to 2015 (inclusive).[75]

45 The plaintiff is alleged to have breached Cl 11.2 of the 2009 Agreements by (1) entering in early June 2011 into discussions, negotiations and/or arrangements with other persons to provide the Five Programmes in Singapore without the first defendant's agreement; and (2) informing the first defendant on or around 4 November 2011 that it wanted to negotiate an exit agreement with the first defendant so that it could move its courses to another private education institution in Singapore.[76] The first defendant further submits that this breach was repudiatory in that it fell within the two situations described at [39(b)] and [39(d)] above.[77]

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73 ABD 130 and 149–150.

74 ABD 121 and 142.

75 ABD 126, Cl 4.1; ABD 146, Cl 4.1.

76 Defence and Counterclaim (Amendment No 4) at para 32B(a)(i).

77 1DCS at para 31.

46 The plaintiff admits that it entered into such discussions in or around June 2011, but avers that the term "arrangement" in Cl 11.2 refers to an agreement or contract, whereas these discussions did not materialise in any agreement with other institutions while the first defendant was conducting the BME Programme.[78] The plaintiff denies repudiating the SSA or ASA on 4 November 2011.[79] The first defendant, on the other hand, submits that Cl 11.2 prohibits a range of conduct falling short of a contract, such as discussions and/or negotiations, because the 2009 Agreements use the words "agreement" and "contract" elsewhere and so the parties must have intended "arrangement" to mean something else; and because the ordinary meaning of "arrangement" is a measure taken or plan made in advance of some occurrence, or an agreement or settlement of details made in anticipation.[80]

47 I agree that if Cl 11.2 was meant to prohibit the plaintiff from *contracting* with another private education institution, it could have used "contract" instead of "arrangement". However, I do not think that Cl 11.2 prohibits the plaintiff from merely *discussing* the future provision of the Five Programmes with other private education institutions. Had that been the case, they could easily have substituted the word "arrangement" with the word "discussion" or "negotiation". Moreover, a "discussion" may be tentative, preliminary or superficial, and may not lead to any agreement. It is very different from an "arrangement", which at the very least implies some sort of consensus or agreement, even if falling short of the level of certainty and completeness required for a legally binding contract. Whether the plaintiff's

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78 Reply to Defence and Counterclaim (Amendment No 7) at paras 23B and 23D; Plaintiff's Opening Statement at para 36.

79 Reply to Defence and Counterclaim (Amendment No 7) at para 23E.

80 1DCS at para 34.

discussions with other institutions had attained such a level of detail and certainty as to constitute an "arrangement" is a question of fact.

48 One of the plaintiff's arguments is that it is not commercially sensible to interpret "arrangement" to include mere discussions because that would prevent the plaintiff from negotiating with other institutions during the term of the 2009 Agreements even as regards the provision of such courses after 2015, *ie*, after the 2009 Agreements had come to an end. In other words, the plaintiff would have to wait until the 2009 Agreements had expired before it could begin negotiations with other institutions.[81] While this would certainly be a grave inconvenience to the plaintiff, I do not think that makes this interpretation absurd or implausible. Such a provision could, for example, have been intended to incentivise the plaintiff to continue its collaboration with the first defendant after 2015. I nevertheless reject the first defendant's interpretation of "arrangement" for the reasons in the preceding paragraph.

49 The first defendant referred to the plaintiff's negotiations with three other institutions: the Singapore Institute of Management ("SIM"), the Singapore Manufacturers' Association ("SMa") and the East Asia Institute of Management ("EAIM"). I find that the plaintiff's discussions with SIM (but not SMa or EAIM) had indeed advanced to the point that they could be considered "arrangements" for the purposes of Cl 11.2 even though no contract was ultimately entered into.[82]

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81 NE (26 May 2017) at p 95 lines 1–5, p 96 lines 1–3; PCS at para 62; Plaintiff's Reply Submissions at para 7.

82 PCS at para 72.

Discussions with SIM

50 The plaintiff had made contact with SIM before 11 April 2011.[83] There is also evidence that the plaintiff wished to exit its contractual relationship with the first defendant at that time. On 10 April 2011 – less than a month after the Amending Agreements were signed – the plaintiff's Stephen Connelly ("Mr Connelly") wrote to Mr Crighton, "[W]hich begs the question why we are persisting with Stansfield. What is our exit strategy?"[84] The next day, Mr Connelly wrote, "I need you to map out an exit strategy which takes into account our contractual obligations but also takes into account any breach of contract by Stansfield … what triggers can we use[?]".[85] During cross-examination, Mr Crighton agreed that the plaintiff's "real intention" in contacting SIM and SMa in April 2011 "was because they already had Stansfield College to take on the liabilities of SEGP and they were keen to exit the partnership at the same time".[86]

51 However, the fact that the plaintiff subjectively desired to exit the contract with the first defendant does not mean that it breached or repudiated the same. In fact it is clear from an e-mail which Mr Crighton wrote to Mr Connelly on 11 April 2011 that the plaintiff had not, as of that date, entered into any arrangements with other institutions:[87]

> As you know, the possibility of moving one or more programs over to SIM has been (at least informally) flagged on several occasions but *we have obviously not progressed anything to date*. …

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83 NE (23 May 2017) at p 76 lines 5–7.

84 PBD 384.

85 PBD 383.

86 NE (24 May 2017) at p 3 lines 27–32.

87 PBD 383.

> Mechanical [Engineering] is more difficult, given that we have cohorts of students in place and would most likely lose accreditation status if we moved this to another provider. There are of course back up plans to manage the student pipeline should we choose to exit from Stansfield, but *no alternative provider is in place at the moment.*
>
> Would recommend that you don't pull any punches about the seriousness of the situation when you meet with [Mr Chettiar] this morning and see if he is able to give you any confidence. Also, might be a good idea to informally sound SIM out again when you are there today as to whether they are still interested in taking on any of these Engineering programs.
>
> [emphasis added]

52 Mr Crighton explained at trial that the "sounding out" related to checking with SIM if it was still interested in taking on the engineering programmes, including the BME Programme.[88] The fact that the plaintiff had "not progressed anything to date", that "no alternative provider [was] in place at the moment" and that SIM had to be sounded out indicates that the plaintiff had not made plans with SIM or any other institution to provide these courses.

53 On 19 May 2011, Lee Kwok Cheong ("Mr Lee") from SIM wrote to the plaintiff saying, "I look forward to receiving more info on lab and other facilities required for SIM to run RMIT engineering courses. With this info, we can move from in principle agreement to implementation."[89] Again, on 1 June 2011, Mr Lee wrote to the plaintiff saying, "We would very much like to hear what are the facilities needed to run RMIT engineering [programmes], as we are in the midst of space planning & allocation."[90] Mr Connelly did not specifically address either of these queries. The description of an "in principle agreement"

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88 NE (23 May 2017) at p 80 lines 12–21.

89 PBD 402.

90 PBD 401.

was, according to Mr Crighton, "overstated"; the plaintiff and SIM never put anything on paper.[91]

54 From May to July 2011, the plaintiff attempted to progress discussions with SIM so that it could transfer students from the first defendant to SIM. On 24 May 2011, Mr Crighton wrote to Mr Connelly: "Have been discussing program details with Mary [from SIM] - but keeping it unofficial and the trick will be getting this to the next stage." Mr Connelly also wrote to his colleague on the same date:[92]

> Stansfield is playing funny buggers with our payments and we need to do something about it. I have had a preliminary chat with [Mr Lee] and in principle SIM is prepared to take these programs on, as [l]ong as they understand the facilities and equipment requirements and financials notw[i]thstanding.

55 Mr Crighton agreed, on the basis of this e-mail, that "[t]here was an in principle understanding" between SIM and the plaintiff "based on discussions that could happen", although there were "key issues" (such as facilities, equipment requirements and financials) that had to be finalised.[93]

56 On 29 May 2011, Mr Connelly asked Mr Crighton to contact their colleague, Prof Subic, "as a matter of urgency to develop a transition plan for our engineering programs in Singapore". When his colleague asked, "So I take it this means we are pulling out of Stansfield and switching to SIM?" Mr Connelly replied:[94]

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91 NE (23 May 2017) at p 82 lines 1–2.

92 PSBD 32.

93 NE (23 May 2017) at p 86 lines 10–16.

94 PBD 400.

> [W]e are getting our ducks lined up, but hopefully that will be possible
>
> I need to be in a position … to put pressure on Stansfield to pay us all outstanding monies, but SEH does not want to press until we have a few more details lined up – engineering accreditation, more detailed agreement [with] SIM.

57 On 30 May 2011, Mr Crighton wrote:[95]

> … I talked to [Prof Subic] on Friday at some length. He is I think convinced that we would be better off with SIM, but does have concerns (accreditation is a main one). Have a further phone meeting with Mary at SIM organised for Wed (she is away Mon & Tues), and am also meeting [Prof Subic] that same day. Will keep you updated on progress.

58 Matters seem to have progressed fairly quickly thereafter. An e-mail from Mr Crighton on 26 June 2011, reporting on his meeting with SIM on 24 June 2011, records that "SIM are agreeable to take on the existing Mechanical Engineering program, but unsurprisingly there are a number of things that need to be worked out".[96] First, SIM and the plaintiff were not agreed over what the market price of the programme should be. Secondly, SIM wished to invest in some equipment for its prospective students and wanted to send some of its IT personnel to the plaintiff for training and information. Thirdly, Mr Crighton "had been pushing [to start intakes in] 1st semester 2012" but recognised that this "may be difficult to pull off" and it was more "realistic … to start intakes in the second half of 2012". Notably, he added:

> If, however, we are in a position where we need to move students from Stansfield to SIM we will have to find ways to move more quickly. My personal view is we see the students through with Stansfield, but appreciate that we may not necessarily be able to do this.

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95 PBD 400.

96 PSBD 36.

59 Mr Crighton's e-mail concluded with a reference to "how fast things are now moving". However, there was still no written agreement as of 7 July 2011, when Mr Crighton wrote to Prof Subic:[97]

> I … am worried what will happen if the worst happens and we need to be able to move existing students over to SIM in the short to medium term. We need to get some kind of agreement on paper with SIM ASAP I feel, but SIM is obviously wanting all of the details before this can happen. …

60 On 12 July 2011, Mr Crighton wrote that it was "increasingly looking like" the plaintiff would have to move students from the first defendant to SIM "by late August so we have very little time to waste".[98] The plaintiff hoped to have transition arrangements ready by the end of August. An e-mail from Mr Crighton on 8 July 2011 records that "SIM … wants to know these details [about two pieces of equipment] before committing"[99], which can only mean that SIM *had not yet committed* to delivering the plaintiff's courses.

61 An e-mail from Mr Connelly to a colleague on 26 August 2011 states that he had "discussed the option of transferring the engineering programs to SIM with [Mr Lee]" the night before, and that they were "progressing those discussions over the next two weeks".[100] The e-mail appended a file named "Engineering Transition Plan (Singapore) 2011-08-26" which forecast the signing of programme agreements with SIM on 9 September 2011 and the commencement of a new intake at SIM from 22 August 2011 to 2 January 2012.[101]

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97 PBD 407.

98 PBD 406.

99 PBD 407.

100 PBD 409.

101 PBD 411.

62 An internal briefing note of the plaintiff's, also dated 26 August 2011, shows that the plaintiff aimed to exit its contractual bargain with the first defendant. The note states that the plaintiff had set a deadline of 2 September 2011 for payment of the first defendant's outstanding debt of $420,650. If the deadline was breached then "RMIT [would] have reason to terminate the contracts and can seek to move the programs to another provider in time for the start of Trimester 2 in September 2011". On the other hand, if payment was made within time, "RMIT will seek a negotiated exit and partnership termination. This will be easiest if [the first defendant is] not able to recruit the minimum numbers required for any of the programs for the Trimester 3 intake."[102] Mr Crighton agreed, on the basis of the note, that the plaintiff wanted to exit the arrangement with the first defendant *even if* it made payment and had "great doubts" about their relationship.[103] In other words, the plaintiff was casting about for an excuse to terminate the contract.

63 The note also shows that the plaintiff's discussions with SIM had progressed to an advanced stage:[104]

> It is believed that the existing [BME Programme] can be moved as/if required, and that the main challenges in moving this program can be satisfactorily addressed.
>
> While termination of agreements may be possible following the 2 September deadline, it is recommended not to terminate the agreements until at least 8 September to ensure that all trimester two activities can be completed for the [BME Programme] and that final agreement is obtained from an alternative provider to take this program and the existing cohorts of students on.

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102 PBD 413–414.

103 NE (23 May 2017) at p 98 lines 27–30, p 99 line 11.

104 PBD 413–414.

> Advanced discussions with an alternative provider have taken place that have covered facilities and equipment requirements, staffing and other resourcing issues. Possible business models have also been discussed and in-principle agreement to take the existing program on has been obtained[.]

64 However, the note also states that the plaintiff would have to "[o]btain clear commitment from the alternative provider to take the existing [BME Programme] on, including the transfer of existing students in that program". The note cautioned that the plaintiff should not terminate the 2009 Agreements "until this [was] achieved".[105]

65 On 4 November 2011, the plaintiff's Mr Connelly met with the first defendant's Ms Majella. The plaintiff's briefing note prepared in advance of that meeting states, "An internal decision has already been made by RMIT not to renew any of the contracts beyond 2012 intakes. This has not yet been communicated to Stansfield College."[106] The plaintiff was conscious that arrangements with an alternative provider after 2012 would involve a breach of Cl 11.2; the section titled "Preferred negotiation positions and outcomes" states: "Negotiation of exit arrangements should include the overriding of the Restraint clause in the Umbrella agreement, giving RMIT the ability to progress with intakes with a different provider after 2012 (if not earlier)."[107]

66 Ms Majella says she was "shocked" when Mr Connelly told her at the meeting on 4 November 2011 that the plaintiff "would not be renewing the contract" (*ie*, not allowing the first defendant to accept further intakes of

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105 PBD 414.

106 PBD 426.

107 PBD 427.

students after 2012).[108] The 4 November 2011 meeting is recounted in a report by the plaintiff dated 28 April 2012:[109]

> As a result of these and other ongoing partnership issues, RMIT notified Stansfield in November 2011 of its intention not to renew contracts after they expire at the end of 2012. This step was made following commitments made by the SIM CEO [Mr Lee] and other senior SIM staff to take on the [BME Programme], and possibly the Bachelor of Engineering (Aerospace) program.

67 According to Mr Crighton, these words overstated the strength of the commitment from SIM and there was only, at that stage, an in-principle discussion regarding SIM taking on the BME Programme.[110] He nevertheless agreed that the plaintiff "had a strong inclination towards" ending its business relationship with the first defendant forthwith.[111]

68 On 1 December 2011, SIM met with the plaintiff to discuss the proposed transfer of the BME Programme to SIM.[112] The briefing note prepared by the plaintiff for this meeting stated:[113]

> Detailed planning in relation to facilities and equipment requirements, staffing and other resourcing has been advanced with SIM. Business models and contract arrangements have also been discussed and an in-principle agreement to take on the existing [BME Programme] has been obtained.
>
> There is, however, some reluctance on the part of SIM to take on the pipeline of students, especially if in doing so they become embroiled in a dispute between RMIT and Stansfield College. Current commitment to taking on the RMIT programs also only

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108 NE (26 May 2017) at p 30 lines 1–7; PBD 436 under section 1.2; see also DBD 963.

109 DBD 957.

110 NE (24 May 2017) at p 5 lines 5–12.

111 NE (24 May 2017) at p 8 lines 23–29.

112 PBD 435.

113 PBD 435.

> extends to the [BME Programme], and possibly the Bachelor Aerospace program at a later date. …

69 Although SIM had reservations about taking on students who had already begun being taught by the first defendant (*ie*, those already in the pipeline), it appears to have agreed to teach *new* intakes. The plaintiff's discussion points for the 1 December 2011 meeting state:

> - Update SIM … that Stansfield have been advised that RMIT does not intend to contract with them for new intakes after 2012.
> - Timelines for moving the [BME Programme] to SIM. If there is to be a January 2013 start, what needs to be done and by when?
> - The possibility of SIM taking on the existing pipeline of students. Currently it is expected that current students will continue with Stansfield, at least into 2012. However, if the relationship with Stansfield further deteriorates it is important that SIM is prepared to allow the transfer of these students over to SIM.

70 These briefing notes show that SIM agreed to take on new students for the BME Programme; the only ambiguity was whether SIM would accept transfers from the first defendant. The plaintiff also observed that it was "unlikely" for SIM to launch the BME Programme in 2012 and wanted "discussions … regarding a 2013 start".[114]

71 The minutes of the 1 December 2011 meeting record:[115]

> **1. Engineering programs**
>
> - Provided an update on RMIT's partnership with Stansfield College. RMIT informed SIM that there will be no more intakes after 2012.

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114 PBD 438.

115 PBD 458–459.

> - A proposal was put forward for SIM to consider accepting future intakes onto [BME Programme] from 2013. This would also include pipelining current students at Stansfield College towards SIM to complete the award.
>
> …
>
> ***Actions:***
>
> (a) SIM to consider accepting future intakes onto [BME Programme] from Stansfield College for 2013 …
>
> (b) RMIT to manage marketing material being distributed by Stansfield College …
>
> …
>
> (d) All contract and documentation need to be in place for the launch of engineering programs in 2013 (TNE? by July 2012).

72 In March 2012, notwithstanding that SIM had previously indicated what the plaintiff described as a "very strong commitment to taking on the [BME Programme]", SIM aborted this plan due to unfavourable market conditions for the BME Programme in Singapore. The plaintiff's attempts to get it to reconsider were unsuccessful.[116] A briefing note prepared by the plaintiff for a meeting with SIM, dated 3 April 2012, recounts the advances that had been made towards SIM taking over the BME Programme:[117]

> … RMIT notified Stansfield in November 2011 of its intention not to renew contracts after they expire at the end of 2012. This step was made following commitments made by the SIM CEO [Mr Lee] and other senior SIM staff to take on the RMIT [BME Programme] …
>
> Significant work was undertaken with SIM throughout 2011 in relation to the transition of the [BME Programme] to them, including the detailing and pricing of equipment, the identification of Singapore suppliers, and clearly establishing facility and software requirements.

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116 PBD 473.

117 PBD 467.

> Work was also undertaken in 2011 in the preparation of draft agreements with SIM, and discussions took place regarding contract terms – but progression of these agreements and detailed negotiations has been constrained by the fact that RMIT was (and still is) contracted to run the Engineering programs with [Stansfield].

73 A fairly clear picture emerges from the documentary evidence of the plaintiff trying to migrate the BME Programme from the first defendant to SIM from as early as April 2011 (see [51] above). Mr Crighton agreed that the plaintiff had a change of heart early in its relationship with the first defendant and entered into "advanced discussions and negotiations" with other institutions "to begin student intakes as early as September 2011 and to also consider taking on pipeline students currently taught by [the first defendant]".[118] The plaintiff's discussions with SIM started out "informal" and "unofficial", but matured into an in-principle agreement for SIM to run the plaintiff's engineering courses possibly by May 2011 (see [53]–[55] above) and certainly by June 2011, though there were still matters to be worked out such as pricing, equipment and timelines (see [58] above). By August 2011, the plaintiff's discussions with SIM had progressed to an advanced stage, covering facilities and equipment requirements, staffing and resourcing issues, although the plaintiff had not obtained "clear commitment" from SIM to take over the BME Programme (see [63] and [64] above). Notably, the plaintiff only informed the first defendant that it would not issue further annexures past 2012 after it had obtained "commitments" from SIM to provide the BME Programme (see [66] and [72] above). The plaintiff's briefing note prepared for the 1 December 2011 meeting stated that SIM had committed to taking on the BME Programme, and there appear to have been discussions on draft agreements with SIM, but SIM was uncomfortable taking over the first defendant's students for fear of being

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118 NE (23 May 2017) at p 100 line 25 – p 101 line 5.

embroiled in a dispute between the plaintiff and the first defendant (see [68], [71] and [72] above). The BME Programme was to commence at SIM from 2013 (see [71] above).

74 In my judgment, the plaintiff's discussions with SIM were sufficiently advanced to constitute an "arrangement" with SIM to provide the BME Programme. SIM had agreed to teach the BME Programme to new intakes of students, if not also to existing students being taught by the first defendant, and that gave the plaintiff confidence to tell the first defendant that it would not continue their relationship past 2012. The plaintiff was clearly intent on transferring the BME Programme from the first defendant to SIM during the term of its contract with the first defendant, which it knew would constitute a breach of Cl 11.2 (see [65] above). Discussions between the plaintiff and SIM were "advanced" and detailed, including the detailing and pricing of equipment, the identification of Singapore suppliers, the establishing of facility and software requirements, business models, contract arrangements, staffing and other resourcing issues (see [63], [68] and [72] above). Although no written contract had been executed even by end 2011, the main reason for this appears to be that the plaintiff could not extricate itself from the contract with the first defendant (see [72] above), and not because SIM was not keen on providing the BME Programme. It was only in March 2012 that SIM decided not to deliver the BME Programme, because market conditions had by that point become unfavourable. The plaintiff therefore breached Cl 11.2.

75 As for the meeting on 4 November 2011, which the first defendant relies on as the second breach of Cl 11.2 of the ASA and SSA (see [45] above), I do not find that this constituted a breach of the ASA and SSA. The plaintiff did not say at the meeting that it was repudiating the 2009 Agreements, nor did it say

that it would cease performing its contractual obligations. The plaintiff merely expressed a desire to negotiate an exit agreement, as it was unhappy with the first defendant, but this did not amount to a breach of contract.

Discussions with SMa and EAIM

76 After SIM withdrew from the discussions to take over the BME Programme, the plaintiff discussed this with alternative partners, namely SMa and EAIM. However, I do not find that any of these discussions amounted to an arrangement.

77 The plaintiff had previously met with the SMa in April 2011, although there is little evidence of what was discussed then.[119] As of April 2012, the plaintiff was exploring having SMa take over the existing students taught by the first defendant.[120] Briefing notes prepared for Mr Connelly in advance of his meeting with SMa on 18 April 2012 state that "further exploration" was needed with SMa to "gauge [its] interest" in running the BME Programme.[121] The plaintiff's report after the meeting, dated 28 April 2012, states that there were "extensive ongoing discussions and planning undertaken with SMa to identify and establish new RMIT programs with them".[122] The report also delineates further steps for the plaintiff to re-establish its engineering programmes with a different local partner, including:[123]

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119 PBD 479 and 480.

120 NE (24 May 2017) at p 48 line 30 – p 49 line 1.

121 PBD 483.

122 DBD 961.

123 DBD 962.

> 1. Refresh the due diligence for potential alternative partners – starting with SMa and EAIM[.] This will include a desk due diligence (Complete by 14 May 2012), which should then be followed by a visit for the detailed assessment of facilities, equipment, administrative systems, etc (Complete by end June 2012)
>
> 2. Finalise decision on which alternative partner to progress the RMIT Engineering programs with (end May 2012, but contingent on facilities assessment)
>
> 3. Progress discussions and planning with partner on delivery model, program design, transfer of students in the pipe-line and other key matters (ongoing, from end May).
>
> …
>
> 9. Program start: January/February 2013.
>
> In addition to the above, further negotiations will be required with Stansfield to ensure RMIT's ability to contract with another provider during the teach-out period from 2012. Of particular importance is addressing the current restraint clause. Based on current contract conditions, RMIT (or Stansfield) are not allowed to enter into any agreement with another provider during the term of the agreement, which is until the end of 2015 (see Restraint clauses 11.1 to 11.3).

78 The foregoing extract shows that – at least as of 28 April 2012 – the plaintiff had not chosen an alternative partner, much less progressed discussions with that partner to the point of confirming key details such as the delivery model and programme design. In other words, there was no "arrangement".

79 The plaintiff's report from the 18 April 2012 visit stated that EAIM had "expressed a strong interest in running Engineering programs with RMIT, including [the BME Programme] and Aerospace Engineering Bachelor programs".[124] Mr Crighton agreed that the plaintiff's meetings in April 2012 with EAIM and SMa were "promising" and "positive", but were "only at an

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124 DBD 961.

early level of discussion".[125] There is no evidence of any more concrete agreement between the plaintiff and either of these entities. The plaintiff eventually contracted with Kaplan Singapore in 2015 to run the BME programme in Singapore.[126]

Breach was not repudiatory

80 I have found that the plaintiff had breached Cl 11.2 of the ASA and SSA by virtue of its discussions with SIM. However, I do not find that this breach was a repudiatory one under Situations 2 or 3(b) of *RDC Concrete*. I therefore do not find that the breach of Cl 11.2 entitled the first defendant to terminate the 2009 Agreements.

81 First, the discussions with SIM did not amount to a renunciation of the contract for the purposes of Situation 2 of *RDC Concrete* (see [39(b)] above). This type of repudiatory breach may arise from the promisor's communication to the promisee via words or conduct of the promisor's deliberate intent not to perform the contract or not to go on with the contract (Andrew Phang Boon Leong, *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*Phang*") at para 17.012). The test is to "ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions" (*San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20]).

82 In this case, the plaintiff's breach of Cl 11.2 cannot have constituted a clear communication to the first defendant that the plaintiff would not perform

125 NE (24 May 2017) at p 50 lines 19–25.

126 DBAEIC 574 at para 39(b).

the contract, for the simple reason that its breach was *not made known to the first defendant*. Although a ground for termination may be retrospectively relied on if it existed at the time of termination (see [41] above), the essence of *RDC Concrete* Situation 2 is a *clear communication* by the repudiating party *to the innocent party* that the former will not perform its contractual obligations at all (*RDC Concrete* at [93]). Without such communication of intent, the ground for termination simply does not exist. A secret breach of contract, unknown and undisclosed to the innocent party, cannot in my view amount to a *renunciation* of contract and does not entitle the innocent party to terminate unless it can be shown that the breach falls within the other grounds for termination in *RDC Concrete*. Had the plaintiff told the first defendant of its attempts to transfer the latter's current students to SIM, that might arguably have amounted to a renunciation, but these discussions were kept secret from the first defendant. All that the plaintiff told the first defendant was that it would not issue further annexures after 2012. However, the plaintiff was not contractually obliged to issue further annexures in any event (see [32(a)] above), so its decision not to do so cannot reasonably have been construed by the first defendant as an intention not to perform the 2009 Agreements at all.

83 Secondly, the plaintiff's breach of Cl 11.2 did not deprive the first defendant of substantially the whole benefit which it was intended that it should obtain from the contract (see [39(d)] above). Situation 3(b) of *RDC Concrete* requires the court to focus on "what exactly constituted the benefit that it was intended the innocent party should obtain from the contract", and then "examin[e] very closely the actual consequences which have occurred as a result of the breach at the time [of termination] in order to ascertain whether the innocent party was, in fact, deprived of substantially the whole benefit of the contract that it was intended that the innocent party should obtain" [emphasis

omitted] (*Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 ("*Sports Connection*") at [62]). Regard should be had only to the *actual* consequences and events resulting from the breach (*ibid*). In determining whether the breach falls within Situation 3(b), the court may consider the nature of the contract, the relationship it creates, the nature of the term, the kind and degree of breach, and the consequences of breach for the innocent party (*Sports Connection* at [63] and [64], citing *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115 at [54]).

84 In this case, the benefit which the first defendant was intended to obtain from the 2009 Agreements was financial gain from running the plaintiff's programmes in Singapore, such courses to be agreed by way of the annexures issued pursuant to the ASA and SSA. I do not find that the parties agreed for the first defendant to run the plaintiff's courses all the way until the expiry of the 2009 Agreements in 2015, because the 2009 Agreements do not oblige the plaintiff to issue annexures up to 2015 (see [32(a)] above). The ASA and SSA merely set out broad terms governing the parties' rights and duties in relation to the courses provided by the first defendant; these courses were to be agreed on by way of annexures issued pursuant to the ASA and SSA.

85 One of the consequences of the plaintiff's breach of Cl 11.2 was a business decision not to issue further annexures to the first defendant. The rate at which the plaintiff's discussions with SIM were advancing, and the stage to which they had advanced, gave the plaintiff confidence to inform the first defendant that it would not issue further annexures during the 4 November 2011 meeting. The plaintiff's report recounts that this step was taken "*following commitments* made by [SIM] to take on the RMIT [BME Programme]" (see [66] and [72] above). Consequently, the first defendant accepted no new intakes past

August 2012 (after the Annexures had expired). However, the plaintiff continued to perform its contractual obligations *vis-à-vis* the students who had already been enrolled in the BME Programme through the first defendant. It continued to provide services in respect of the BME Programme so that the students could complete their courses, for example by teaching part of the course, moderating students' grades, conducting pre-exam workshops, conducting revision classes and issuing degrees.[127] The first defendant continued to teach the BME Programme from 2012 to 2014[128] and to collect payment from students[129]. I therefore do not find that the plaintiff's breach of Cl 11.2 deprived the first defendant of substantially the whole benefit that it was intended to obtain.

86 The first defendant submits that the plaintiff's breach of Cl 11.2 caused it to go into "exit mode" *vis-à-vis* the first defendant, as a result of which it "did not provide … assistance and support in important aspects of the parties' partnership", such as advertising and accreditation.[130] For reasons which I state at [95]–[96] below, I do not think that the plaintiff's conduct in respect of accreditation breached its contractual obligations. In any event, any lack of co-operation as regards advertising and accreditation on the plaintiff's part did not deprive the first defendant of substantially the whole benefit described at [84] above. I therefore find that the plaintiff did not commit a repudiatory breach of the 2009 Agreements by breaching Cl 11.2 of the ASA and SSA, although the

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127 NE (26 May 2017) at p 73 line 8 – p 76 line 29.

128 NE (24 May 2017) at p 36 lines 24–28; First Defendant's Reply Submissions at para 33(b).

129 NE (26 May 2017) at p 76 line 30 – p 77 line 1.

130 1DCS at para 39(b).

first defendant will be entitled to claim such damages as it may be able to prove at the assessment of damages tranche in respect of that breach (see [2] above).

Alleged breach of Cll 4.1 and 20 of the ASA and SSA

87 Clauses 4.1 and 20 of the ASA and SSA read with Cl 3 and Schedules 1B and 2B of the SSA-Annexure and ASA-Annexure required the parties to arrive at a consensus regarding the feasibility of proceeding with an intake in the event that there were fewer enrolments than the minimum (*ie*, 15 students for each of the Bachelor's courses). Clause 20 of the ASA and SSA states:[131]

> Before the commencement of any intake for a Program, if it is determined that the number of [s]tudents for that particular [i]ntake is less than the number referred to in the relevant Annexure, RMIT and Organisation jointly undertake to arrive at a consensus regarding the feasibility of proceeding with that [i]ntake.

88 According to the first defendant, the plaintiff informed CPE in April 2012 that the BME Programme would be changed to run on a "teach-out" basis, which meant that the first defendant could no longer accept any new student intakes.[132] The first defendant theorises that the plaintiff must have told CPE this at its meeting with CPE on 19 April 2012 – one day after its meeting with EAIM and SMa on 18 April 2012 – as part of its ongoing "campaign to force the [first defendant] into agreeing to the early exit of the partnership".[133] The plaintiff denies this and asserts that it merely informed CPE verbally on or around 19 April 2012 that it intended to teach out the BME Programme *after* the intakes scheduled in the SSA-Annexure and ASA-Annexure had expired.[134]

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131 ABD 133 and 152.

132 Defence and Counterclaim (Amendment No 4) at para 32B(a)(iii).

133 1DCS at para 89.

134 Reply to Defence and Counterclaim (Amendment No 7) at para 23G.

89 The first defendant tendered a printout dated 8 March 2013 of its profile on CPE's website. The BME Programme is listed next to the words "(TEACH OUT)", and marked with an asterisk to denote, "This is a teach-out course. [Private education institution] is not recruiting new students for this course."[135] Although the printout is dated 8 March 2013, Ms Majella claimed that she first found out about this change to the first defendant's profile in around May or June 2012. She also claimed to have had an earlier printout of that page, but misplaced it, and therefore she had to reprint another copy in March 2013.[136] Ms Majella also said that she contacted CPE to ask why they had indicated "teach-out" on their website, and was told that the plaintiff had informed CPE that the first defendant was already in teach-out mode.[137]

90 I do not find that the plaintiff breached Cll 4.1 and 20 of the ASA and SSA. First, it is not clear that CPE reflected the BME Programme as a teach-out course prematurely. The programme would have been taught out from the last trimester of 2012, for which 28 September 2012 was the last day to add classes.[138] The printout of CPE's website was obtained nearly half a year later, when the first defendant would in fact have been in the course of teaching out the programme. Secondly, even if CPE had made this change to its website in 2012, I would not be persuaded on a balance of probabilities that this was the plaintiff's fault. The plaintiff claims that it verbally informed CPE that the course would be taught out *after* the intakes scheduled in the SSA-Annexure and ASA-Annexure.[139] The first defendant has not adduced any evidence to

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135 ABD 1195.

136 Ms Majella's AEIC at para 50; NE (26 May 2017) at p 59 lines 27–31.

137 NE (26 May 2017) at p 54 lines 30–32.

138 ABD 668.

139 Reply to Defence and Counterclaim (Amendment No 7) at para 23G.

controvert this claim, save Ms Majella's evidence that CPE told her that it had been told by the plaintiff that the course would be taught out with immediate effect. However, there is no documentary evidence of Ms Majella's communications with CPE. Ms Majella also confirmed that she did not write to the plaintiff about this incident.[140] She could not even remember if she had raised this with the plaintiff by phone.[141] Ms Majella agreed during cross-examination that, if this statement on CPE's website had seriously upset her and Mr Chettiar, they would have written to the plaintiff about it.[142] If this misleading statement on CPE's website was so severe that it "severely jeopardized, if not brought about the cessation of, the enrolment for future intakes" of the BME Programme, as the first defendant claims[143], its failure to raise this with the plaintiff is inexplicable.

Alleged breach of Cl 3.3(a) of the ASA and Cll 11.9 and 11.10 of the ASA-Annexure

91 Clause 3.3(a) of the ASA states that the plaintiff must "use its best endeavours" to "maintain the accreditation, quality and reputation of the Award for the program". "Award" is defined in Cl 1.1 of the ASA as an RMIT award conferred pursuant to the Royal Melbourne Institute of Technology Act 1992 (Vic).[144] Clause 1 of the Annexures states, under "RMIT Awards", the BME Programme and the Bachelor of Engineering (Aerospace Engineering) programme.[145] Clause 11.9 of the ASA-Annexure states that the plaintiff "will

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140 NE (26 May 2017) at p 57 lines 26–27.

141 NE (26 May 2017) at p 56 lines 4–16, p 57 lines 26–32.

142 NE (26 May 2017) at p 56 lines 22–27.

143 1DCS at para 90.

144 ABD 141, 145.

145 ABD 160, 174.

provide [SEGP] with documentation and support required for local government registration and in-country professional accreditation of the program". Clause 11.10 of the ASA-Annexure states that "RMIT will be responsible for maintaining professional accreditation of the programs with Engineers Australia".

92 The first defendant alleges that the plaintiff breached these clauses in respect of accreditation by Engineers Australia ("EA") and by the Institution of Engineers Singapore ("IES"). I find that the clauses were not breached.

Accreditation with IES

93 The first defendant accuses the plaintiff of breaching the clauses in question in relation to IES accreditation in two ways:

(a) by furnishing erroneous information to IES regarding the BME Programme, giving it the erroneous impression that "Singapore Institute of Commerce" was the entity to be accredited;[146] and

(b) by failing to either make a fresh application for IES accreditation in the first defendant's name or inform the first defendant of the possibility of doing so[147].

94 I address these in turn. In my view, the first allegation is true as a matter of fact but does not amount to a breach of the 2009 Agreements. The plaintiff does not deny that it submitted the application for IES accreditation under the name "Singapore Institute of Commerce".[148] However, it contends that

146 Defence and Counterclaim (Amendment No 4) at para 32B(a)(ii); 1DCS at para 111(b).

147 1DCS at paras 112 and 123.

148 Plaintiff's Reply Submissions at para 29; ABD 304.

responsibility for the acquisition of IES accreditation lay with the first defendant by virtue of Cl 12.14 of the SSA-Annexure, which states, "SIC [*ie*, SEGP] will be responsible for local government registration and in-country professional accreditation of the programs".[149] The plaintiff claims it was obliged only to provide SEGP with the documentation and support required to obtain such accreditation, which it did.[150] The first defendant does not take issue with the plaintiff's interpretation of Cl 12.14 of the SSA-Annexure. Its reply is that "the party applying for the IES accreditation (i.e. the Plaintiff) must bear the responsibility of ensuring that accurate information is provided to the IES, regardless of whether the responsibility for making the application lies with the Plaintiff or the 1st Defendant".[151] The first defendant relies on what it says was an admission on the part of the plaintiff's Caryn Nery ("Ms Nery") during cross-examination that the plaintiff should have checked with Mr Chettiar to confirm its impression that "Singapore Institute of Commerce" and SEGP were the same entity.[152] However, Ms Nery appears to have *disagreed* with this proposition; at best her response is ambiguous.

95 According to Cl 12.14 of the SSA-Annexure with Cl 3.3(a) of the ASA and Cl 11.10 of the ASA-Annexure, SEGP (rather than the plaintiff) bore contractual responsibility for IES accreditation. Whether or not the first defendant acquired that responsibility from SEGP following the Amending Agreements, it is clear that the 2009 Agreements do not place that obligation upon the plaintiff. The fact that the plaintiff took it upon itself to apply for IES

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149 ABD 165; PCS at para 78.

150 Reply to Defence and Counterclaim (Amendment No 7) at para 23F.

151 First Defendant's Reply Submissions at para 38(b).

152 1DCS at para 121; First Defendant's Reply Submissions at para 38(b); NE (25 May 2017) at p 66 line 31 – p 67 line 4.

accreditation – notwithstanding its unwise decision not to confirm the identity of the entity to be accredited with Mr Chettiar – cannot affect its contractual rights and duties under the 2009 Agreements. Moreover, the application for IES accreditation was made *before* the Amending Agreements, and cannot be a repudiatory breach thereof.[153] I therefore do not find that the plaintiff breached the 2009 Agreements in relation to its application for IES accreditation.

96 The second allegation (see [93(b)] above) was not pleaded.[154] In any event it would fail for the same reason. Though the plaintiff's e-mail to the first defendant on 12 December 2011 did not apprise the latter of the possibility of applying afresh for IES accreditation, the plaintiff was not contractually obliged to do so, and its failure to do so cannot constitute a breach of contract.[155]

97 Finally, even if the plaintiff's conduct in relation to IES accreditation amounted to a breach of contract, I do not think such breach would be repudiatory:

> (a) As regards [39(d)] above, the first defendant submits that the lack of IES accreditation adversely affected the appeal of the programmes and the enrolment of students, thereby depriving the first defendant of the benefit under the 2009 Agreements.[156] While I can accept that the lack of IES accreditation may have affected the number of enrolments, I do not see how it can have deprived the first defendant of "substantially the whole benefit" of the 2009 Agreements,

153 Plaintiff's Reply Submissions at para 28.

154 Defence and Counterclaim (Amendment No 4) at para 32B(a)(ii); Plaintiff's Reply Submissions at para 28.

155 ABD 437.

156 1DCS at para 124(c)(i).

particularly when the first defendant accepted students in 2011 and 2012 and continued to teach out the course until 2014.

(b) As regards [39(b)] above, the first defendant submits that the plaintiff's provision of inaccurate information to IES and subsequent inaction on the fresh application for IES accreditation demonstrated its intention not to perform the contract.[157] I disagree. There is no evidence that the plaintiff *deliberately* misinformed IES about the entity to be accredited. That would have amounted to shooting itself in the foot, since it stood to benefit financially from the first defendant enrolling more students. Moreover, at the time of the accreditation application, SEGP ran the school under the name "Singapore Institute of Commerce". "Singapore Institute of Commerce" was also stated in Cl 10.1 of the SSA-Annexure as the approved location for the delivery of the programme, and described as SEGP's trading name in Mr Yeo's e-mail to the plaintiff dated 16 November 2009.[158] The first defendant's prospectus in 2011 stated the school name as "Stansfield College incorporating Singapore Institute of Commerce".[159] Moreover, as Mr Chettiar confirmed, CPE would register the *schools* and not the businesses that operated them.[160] The plaintiff may therefore have simply made an honest mistake in submitting the application to IES under "Singapore Institute of Commerce" instead of SEGP.

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157 1DCS at para 124(c)(ii).

158 ABD 164 and DBD 142.

159 Ms Neryn's AEIC at para 28.

160 NE (28 September 2017) at p 38 line 28.

Accreditation with EA

98 The first defendant alleges that the plaintiff furnished erroneous information to EA, giving it the erroneous impression that the first defendant and SEGP were the same entity.[161] The plaintiff avers that it maintained accreditation with EA for the BME Programme throughout the term of the Annexures.[162]

99 On 8 December 2015, the first defendant wrote to EA observing that it was listed as "formerly SIC College of Business and Technology [*ie*, SCBT], formerly Singapore Institute of Commerce" on EA's website.[163] This information was inaccurate because the first defendant and SCBT are different entities. EA's reply to the first defendant suggests that this information was supplied by the plaintiff. It stated:[164]

> We have been in contact with [the plaintiff] in regard to the issues you raise in it.
>
> Accreditation is initiated by the education provider, in this case [the plaintiff], and it is the responsibility of the provider to supply factually correct information. Nevertheless, we do note your concern about the naming of [the first defendant] in the accreditation listing and we have specifically requested [the plaintiff] to clarify the situation with both [the first defendant] and Engineers Australia.

100 Mr Crighton agreed that the plaintiff may have provided EA with information which gave it the impression that "Stansfield College" was the new name for SEGP, for example by submitting an application with SEGP's name in it.[165] However, there is no evidence that the plaintiff *told* EA in terms that the

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161 1DCS at para 111(a).

162 Reply to Defence and Counterclaim (Amendment No 7) at para 23F.

163 ABD 649 and 1135.

164 ABD 651.

first defendant was SEGP/SCBT. Even if the plaintiff caused EA to have the mistaken impression that the first defendant and SEGP/SCBT were the same entity, this would not constitute a breach of the clauses in question. As the plaintiff points out, these clauses only required the plaintiff to obtain accreditation under the first defendant's name, which it in fact did.[166] Moreover, I do not see how causing EA to reflect the first defendant as "formerly [SCBT], formerly Singapore Institute of Commerce" on its website can have at all diminished the benefit which the first defendant received under the 2009 Agreements, or demonstrated the plaintiff's intention not to perform its contractual obligations. The first defendant did not adduce any evidence that it had sustained any loss or damage in practical terms as a result of this inaccuracy on EA's website.

Alleged breach of Cl 3.2(m) of the ASA and Cl 3.2(c) of the SSA

101 Clause 3.2(m) of the ASA and Cl 3.2(c) of the SSA state that the plaintiff must "as mutually agreed provide support for promotional events deemed beneficial to a Program".[167] The first defendant submits that this "mutual agreement" took the form of a commitment from the plaintiff to contribute S$70,000 towards the first defendant's advertising costs. The plaintiff denies that it was contractually obliged to contribute to the costs of promotional events pertaining to the course.[168] It says that at most it considered paying for two full-page advertisements in a local newspaper, but did not agree to contribute S$70,000, and subsequently decided not to contribute towards the advertising

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165 NE (25 May 2017) at p 16 line 19 – p 17 line 9.

166 PCS at para 83.

167 ABD 126 and 145.

168 Reply to Defence and Counterclaim (Amendment No 7) at para 23H.

costs because of the sums owed to it by the first defendant.[169] In any event, any contribution from the plaintiff would be subject to its prior approval of the costs of the promotional materials.[170]

102 I do not find that the plaintiff breached these clauses. The plaintiff never agreed to contribute a fixed sum of S$70,000 towards the first defendant's advertising cost. It simply agreed to contribute towards the cost of two full-page newspaper advertisements. This was attested to by Mr Crighton and Ms Nery[171] and is borne out by the documentary evidence. On 1 March 2011, Mr Chettiar wrote to the plaintiff's Mark Shortis that the plaintiff and first defendant were "putting up 3 full page advertisements in the Straits Times sometime during the end of March or early April".[172] Mr Chettiar met Mr Connelly on 11 or 12 April 2011 to discuss various matters, including marketing and advertising.[173] A list of key points from that meeting, sent from Mr Crighton to Prof Subic, records that "SAMME [School of Aerospace, Mechanical and Manufacturing Engineering] will pay for two full page ads and will visit Singapore for info evenings when ads are run".[174] Prof Subic sought clarification on 27 April 2011. He thought that they had previously agreed for the plaintiff to fund two advertisements, one funded by SAMME and the other funded by the International and Development department.[175] Notably, their discussion centred solely on *who*, *ie*, which department within RMIT should fund the two

169 Plaintiff's Opening Statement at para 31; PCS at para 46.

170 Reply to Defence and Counterclaim (Amendment No 7) at para 36; NE (25 September 2017) at p 37 lines 2–4; NE (23 May 2017) at p 53 lines 21–28.

171 NE (23 May 2017) at p 57 lines 8–10; NE (25 May 2017) at p 81 lines 1–4.

172 ABD 322.

173 NE (25 September 2017) at p 13 lines 4–8.

174 ABD 552.

175 ABD 551.

advertisements, not whether such funding should take place. They do not mention any pledge of support in purely monetary terms.

103 On 24 May 2011, Ms Nery wrote to the first defendant requesting a quote for the cost of a full-page advertisement in the *Straits Times* so she could "put it through for approval".[176] When Mr Chettiar was shown this e-mail, he accepted that the plaintiff was not aware of the cost of the advertisement.[177] This supports the plaintiff's case that it had agreed to sponsor a newspaper advertisement, rather than pledge a specific sum of money. The first defendant replied on 23 June 2011 with quotations for advertisements in the *Straits Times*, the *Today Paper* and *The New Paper*.[178] The cost of a *Straits Times* advertisement was about S$35,000, such that two advertisements would have cost about S$70,000. But that is merely incidental to the plaintiff's agreement to sponsor the advertisements. Moreover, the parties appear to have discussed placing advertisements in other papers besides the *Straits Times*. This is shown by the plaintiff's internal briefing notes dated 30 May 2011: "In May two ads were approved. The first was for Engineering programs at Stansfield, and the second was a full page ad advertising Stansfield College programs in the Straits Times, The New Paper and the Today paper for the week commencing 30 May."[179] The total cost of these advertisements is unknown.

104 Mr Chettiar's own letter to the plaintiff on 6 December 2011 shows that the plaintiff only agreed to contribute to two full-page advertisements:[180]

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176 ABD 380.

177 NE (25 September 2017) at p 19 lines 6–28.

178 ABD 379.

179 PSBD 34.

180 ABD 435.

> Although *we were reassured on several occasions that RMIT would contribute to 2 full page adverts*, we have been recently made aware by Mr Scott Crighton that RMIT does not intend to honour this understanding. … As you are aware, you have represented on several occasions that *RMIT will place the 2 full page advertisements* which we estimate will cost about $70,000. [emphasis added]

105 I note that the first defendant's minutes of its meeting with the plaintiff on 19 April 2012 record that Mr Connelly confirmed that there had been an agreement to contribute S$70,000 towards the first defendant's advertisement costs.[181] However, I do not accept those notes as accurate, given that they were unilaterally prepared by the first defendant. The plaintiff's internal notes of that meeting did not state any such agreement; in fact they stated that the plaintiff was to confirm its approval for a particular advertisement.[182] Moreover, Mr Crighton took issue with many aspects of the first defendant's minutes; his e-mail to Ms Majella of 5 May 2012 states that "there was no formal agreement for RMIT to contribute to advertising costs, and … any informal agreement was contingent on certain important conditions".[183] It therefore appears that by this stage the parties were edging away from their original agreement, probably due to the breakdown in their relationship, and I therefore place greater weight on the earlier correspondence as evidence of what was or was not agreed.

106 I also note that the plaintiff did not rebut the assertion in the first defendant's letter dated 4 February 2012, and e-mail of 25 August 2012, that the plaintiff had agreed to contribute S$70,000 to the first defendant's advertising costs.[184] However, this is inconclusive because the plaintiff did not

181 DBD 951.

182 DBD 955.

183 DBD 980.

184 See 1DCS at paras 107(c)–107(d); ABD 458–461; ABD 493; NE (23 May 2017) at p 61 lines 22–28 and p 66 lines 1–3.

agree with or accept this assertion either. There could be other reasons for the plaintiff's silence on this point. It may, for example, have interpreted that assertion as a reference to the agreement to sponsor two advertisements, and felt that it could not honestly deny having made such a commitment.

107 There is no other documentary evidence of the plaintiff agreeing to contribute S$70,000 towards the first defendant's advertising costs. Besides Mr Crighton's agreement that Prof Subic might *possibly* have agreed to contribute to the first defendant's advertising costs[185] (which is inconclusive), the only evidence of this is Mr Chettiar's recollection of his discussions with the plaintiff. I found his oral evidence in this respect imprecise and unconvincing:

(a) When he was asked during cross-examination what exactly were the terms of the plaintiff's agreed contribution, Mr Chettiar was unable or unwilling to answer directly. After recounting various discussions with persons from RMIT, and upon being repeatedly questioned by counsel for the plaintiff, Mr Chettiar simply said that the arrangement was that "RMIT will support us"[186].

(b) Mr Chettiar then said that the plaintiff had agreed to contribute S$70,000 for two full-page advertisements[187], and that whatever remained of the S$70,000 could be used in a discretionary manner with the plaintiff's approval.[188] However, Mr Chettiar acknowledged that his affidavit of evidence-in-chief ("AEIC") did not state that the S$70,000 was to be used at the first defendant's will and discretion.[189] In addition,

185 NE (23 May 2017) at p 43 lines 6–9.

186 NE (25 September 2017) at p 9 lines 1–4.

187 NE (25 September 2017) at p 9 lines 17–28.

188 NE (25 September 2017) at p 11 lines 1-4.

> upon further questions from the court, Mr Chettiar said that the S$70,000 was not limited to the two full-page advertisements but could be applied towards the first defendant's advertisement costs generally, with the plaintiff's approval.[190] But Mr Chettiar did not refer to any documentary evidence of such an agreement. He said only that he had discussed and proposed a contribution of this nature during his meeting with Mr Connelly on 11 April 2011, and in the absence of any objection from Mr Connelly, took it that the plaintiff agreed.[191]

108 Moreover, Mr Chettiar's evidence was not consistent with the documentary evidence. He claimed that the plaintiff pledged at the 11 April 2011 meeting to contribute S$70,000 towards the first defendant's advertising costs, but this is contradicted by the plaintiff's internal e-mails on 27 April 2011 (see [102] above). When these e-mails were brought to his attention, Mr Chettiar agreed that they had discussed full-page advertisements in the newspapers during that meeting.[192]

109 On the evidence, I find that the plaintiff never agreed to contribute S$70,000 towards the first defendant's advertising costs – only to sponsor two full-page advertisements, such advertisements being subject to the plaintiff's approval. The first defendant's reply submissions appear to concede this.[193] Such an agreement does not, in my view, fall within Cl 3.2(m) of the ASA and Cl 3.2(c) of the SSA. I do not think that "support for promotional events" can

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189 NE (25 September 2017) at p 37 lines 22–26.

190 NE (25 September 2017) at p 11 line 23 – p 12 line 14.

191 NE (28 September 2017) at p 72 lines 16–23.

192 NE (25 September 2017) at p 17 lines 1–10.

193 First Defendant's Reply Submissions at paras 15–17.

be reasonably interpreted as requiring the plaintiff to sponsor newspaper advertisements. Mr Chettiar agreed during cross-examination that Cl 3.2(m) of the ASA did not use the word "advertisement", that "promotional events" would include things like educational fairs and recruitment roadshows, and that the plaintiff had "always provided" support in "open talks and other events".[194]

110 On the contrary, the SSA requires the *first defendant* to bear the costs of such advertisements. Clause 2.1(a) of the SSA states that "Organisation" (meaning SEGP/SCBT and the first defendant) must, "at its own expense":[195]

> undertake marketing to generate applications for the Program and prepare a promotional brochure and other agreed media to advertise the Program, the form and content of which must be agreed between RMIT and Organisation prior to distribution and which will provide the basis of all advertising material for the Program …

111 Compared to "support for promotional events" in Cl 3.2(m) of the ASA and Cl 3.2(c) of the SSA, which cannot be reasonably interpreted to include the placement of print advertisements, the newspaper advertisements would clearly fall within the terms "marketing", "promotional brochure", "other agreed media" and "advertising material". I therefore find that the plaintiff's agreement to sponsor two approved advertisements was not part of its contractual obligations under the ASA and SSA. If anything it was a collateral agreement regarding advertising costs in particular, a breach of which could not have constituted a repudiation of the 2009 Agreements. However, this is not an issue that arises on the pleadings.

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194 NE (25 September 2017) at p 31 lines 9–26.

195 ABD 123.

112 Even if I am wrong, and such an agreement does fall within the terms of Cl 3.2(m) of the ASA and Cl 3.2(c) of the SSA, I would not have found a breach thereof. Mr Chettiar agreed unequivocally during cross-examination that the plaintiff would not be obliged to contribute towards any advertising initiatives unless it had approved the advertising materials.[196] However, the first defendant concedes that there is no evidence to show that two full-page advertisements were actually placed with the plaintiff's approval.[197]

113 Finally, even if I am wrong on both counts and the plaintiff *did* breach Cl 3.2(m) of the ASA and Cl 3.2(c) of the SSA by failing to sponsor two full-page advertisements, I do not see how such a breach could be a repudiatory one:

(a) As regards [39(d)] above, the first defendant submits that advertising "would enhance the appeal of the programs" and the number of enrolments, such that the plaintiff's non-contribution would have "deprived the [first defendant] of the benefit which it expected to obtain from the 2009 Agreements".[198] As I said above, even if the lack of advertising affected the number of enrolments, I do not see how it can have deprived the first defendant of "substantially the whole benefit" of the 2009 Agreements when the first defendant accepted students in 2011 and 2012 and continued to teach out the course until 2014.

(b) As regards [39(b)] above, the first defendant submits that the plaintiff's non-contribution demonstrated its intention not to perform the contract.[199] In my view there is no evidence to support such a conclusion.

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196 NE (25 September 2017) at p 11 lines 4–5; p 12 lines 11–14; p 43 lines 12–14; p 45 lines 14–26.

197 PCS at para 48; First Defendant's Reply Submissions at para 17.

198 1DCS at paras 110(a) and 110(c)(i).

> The correspondence from the plaintiff shows that it declined to contribute to advertising not because it wished to repudiate its contractual obligations under the 2009 Agreements, but because it considered that the *first defendant* was behind in payment.[200]

Demanding payment by way of letter dated 20 July 2012

114 The first defendant claims that the stance taken by the plaintiff in its 20 July 2012 letter at [20] above was "clearly aimed at exerting financial pressure on the [first defendant]" to dissuade it from accepting a final batch of students for the final trimester of 2012 and continuing to teach existing students.[201] In other words, the plaintiff was trying to incentivise the first defendant to agree to terminate their contractual relationship by hinting at the "significant financial implications" of continuing.[202]

115 Even if that is true, I do not find that this constituted a repudiatory breach of the 2009 Agreements. Nowhere in the 20 July 2012 letter is it stated or implied that the plaintiff will not continue with its contractual obligations under the 2009 Agreements. On the contrary, the letter states unambiguously that the plaintiff "is prepared to honor its contractual obligations" and requests the first defendant to confirm whether or not it wishes to proceed with the final intake for the contracted programmes.[203] Though the plaintiff may well have hoped that this letter would persuade the first defendant to agree to a termination, that does not make it a breach – much less a repudiatory breach – of the contract.

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199 1DCS at para 110(c)(ii).

200 ABD 402 and 469.

201 1DCS at para 93.

202 ABD 475.

203 ABD 475.

Moreover, though the plaintiff had not previously enforced the minimum payment obligation, its declaration of its intent to do so henceforth cannot have been a breach of contract. It was contractually entitled to do so under Cl 9 of the Annexures.

116 The first defendant also asserts that the plaintiff's threat to enforce the minimum payment obligation was "wrongful" because Ms Majella's evidence is that the parties understood that the obligation "would only apply to a new cohort of students, as opposed to every trimester".[204] However, that is unsupported by any other evidence and is contradicted by the wording of Cl 9.3 (see [20] above).

Issuance of Notices of Default from 30 June 2011 to 4 October 2012

117 The first defendant submits that the plaintiff issued five notices of default between 30 June 2011 and 4 October 2012 with the aim of exerting financial pressure upon the first defendant, so as to "force" it to agree to an early exit from the contractual relationship. Two of these, dated 30 June 2011 and 26 July 2011, pertained to student intakes conducted by SEGP prior to the Amending Agreements.[205] The first defendant submits that it is clear from the Neutral Evaluator's opinion that these two notices of default ought not to have been issued to the first defendant because the first defendant was not liable for the invoices to which they relate.[206]

118 I do not find that the issuance of the notices of default constituted a breach of contract. The first defendant has not identified any contractual term

204 1DCS at para 94.

205 ABD 405–406, 411–412, 438–439, 465–466, 512–513.

206 1DCS at paras 97–99.

that was breached by the issuance of those notices. Nor do the notices purport to terminate the 2009 Agreements; they simply warn that the plaintiff "*will* … terminate" [emphasis added] the ASA and SSA "and pursue recovery against SEGP, [the first defendant], SCBT and [the second defendant]" if the sums are not paid within 30 days.[207] In the end, the plaintiff never terminated or purported to terminate the 2009 Agreements; the first defendant was the one that did so.

Acceptance of repudiatory breaches

119 For the foregoing reasons, I find that the plaintiff did not commit a repudiatory breach of the 2009 Agreements. This means that the first defendant was not entitled to terminate the 2009 Agreements on 2 August 2012 by purporting to accept the plaintiff's repudiation of contract. Its first defence against the plaintiff's invoices therefore fails. This obviates any need for me to consider the plaintiff's *quantum meruit* claim, which was pleaded in the alternative to its contractual entitlement to payment (see [30] above).[208]

Issue 2: Whether invoices were correctly calculated

120 The second issue is whether the plaintiff's invoices correctly calculate the fees to which it is entitled under the 2009 Agreements. The invoices are calculated on the basis of Cll 9.2 and 9.3 of the Annexures, *ie*, for the minimum number of students (save for courses which only had one or two students, in which case the plaintiff charged based on the actual numbers as a gesture of goodwill) and with an increase of 5% per year.[209]

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207 ABD 405–406, 411–412, 438–439, 465–466, 512–513.

208 Statement of Claim (Amendment No 3) at para 23.

209 PCS at para 27; ABD 217–246.

121 The first defendant submits that, given the parties' previous course of dealing under the 2009 Agreements, the plaintiff had waived its right to now enforce Cll 9.2 and 9.3 of the Annexures.[210] The plaintiff accepts that it had, prior to the invoices in question, charged SEGP and the first defendant on the basis of the actual number of students enrolled. The plaintiff's Mr Crighton explained that this was done as a gesture of goodwill as the plaintiff was keen on maintaining good business relations with SEGP and the first defendant.[211] However, the plaintiff denies that this disentitles it from enforcing the minimum payment obligation in the present suit and emphasises that the first defendant did not plead waiver.[212]

122 I first address the objection that the first defendant did not plead waiver. All that is said in the defence and counterclaim on this subject is that "the quantum of the Plaintiff's claim is incorrect as: (a) it should be based on the actual number of students enrolled in each of the courses; (b) the unit price for each student for each of the courses was incorrect and should have been AUD$1,000".[213] The plaintiff did not plead the doctrine of waiver by election *or* the material facts establishing waiver (*ie*, that the plaintiff had not previously sought to enforce Cll 9.2 or 9.3 of the Annexures in the history of its relationship with the first defendant).

123 The general rule is that parties are bound by their pleadings, but the law permits departure from this rule "in limited circumstances, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for

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210 1DCS at para 134.

211 Mr Crighton's AEIC at para 71.

212 PCS at para 19; Plaintiff's Reply Submissions at para 38.

213 Defence and Counterclaim (Amendment No 4) at para 36.

the court not to do so" (*V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [40]). The court may permit an unpleaded point to be raised if no injustice or irreparable prejudice will be occasioned to the other party, and evidence given at trial can (where appropriate) overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced (*V Nithia* at [40], citing *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18]). However, cases where it is clear that no prejudice will be caused by reliance on an unpleaded cause of action or issue that has not been examined at trial are likely to be uncommon (*V Nithia* at [41]). In *V Nithia*, the High Court found in favour of the plaintiff on the basis of proprietary estoppel, which had not been pleaded. While the Court of Appeal accepted that the precise words "proprietary estoppel" did not have to be specifically pleaded, it stated that the pleadings "should at the very least disclose the material facts which would support such a claim, so as to give the opponent fair notice of the *substance* of such a case" [emphasis in original] (at [43]).

124 In this case, I find that the first defendant's failure to plead the doctrine of waiver and the material facts required to establish the same is fatal to this aspect of its defence. A waiver is, by its very nature, fact-dependent and pleading the material facts is an indispensable foundation upon which a plea of waiver rests. I disagree that no prejudice was caused to the plaintiff by this failure. Because waiver was not pleaded in the defence and counterclaim, the plaintiff's reply and defence to counterclaim likewise did not address this issue. It merely denied the assertion in the defence and counterclaim quoted at [122] above and cited Cll 9.2 and 9.3 of the Annexures.[214] Mr Chettiar's AEIC made

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214 Reply to Defence and Counterclaim (Amendment No 7) at para 24A.

no mention of the minimum payment obligation. Ms Majella's AEIC did refer to the minimum payment obligation, but took the position that it did not bind the first defendant as it was not a party to or named in the Annexures.[215] This is clearly a different argument from waiver. While Mr Crighton's AEIC explained the plaintiff's past non-enforcement of the minimum payment obligation, and both he and Ms Nery were asked during cross-examination to confirm the same, counsel for the plaintiff, Mr Liow, decided not to traverse these points in re-examination.[216] He might have decided otherwise had the defence of waiver been pleaded.

125 Mr Liow may also have approached his cross-examination of the first defendant's witnesses differently had waiver been pleaded. Mr Liow's cross-examination of Ms Majella regarding the minimum payment obligation focused on the fact that Cl 9.3 of the Annexures entitled the plaintiff to charge for a minimum of 15 enrolments. Ms Majella's initial response to this was that the Annexures did not bind the first defendant. It was only when Mr Liow exposed the difficulties with that position that Ms Majella then countered that the plaintiff had not previously sought to enforce that clause.[217] Mr Liow expressly chose to leave that point aside and continued to stress the plain meaning of Cl 9.3.[218] He adopted the same approach for Cl 9.2.[219] Mr Liow did not broach the subject of the minimum payment obligation with Mr Chettiar in cross-examination.

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215 Ms Majella's AEIC at para 73.

216 Mr Crighton's AEIC at paras 71 and 77; NE (24 May 2017) at p 54 lines 25–28; NE (25 May 2017) at p 41 lines 17–19.

217 NE (26 May 2017) at p 78 line 20 – p 81 line 3.

218 NE (26 May 2017) at p 81 line 6 – p 84 line 20.

219 NE (26 May 2017) at p 84 line 24 – p 86 line 15.

126 Even if it were open to me to consider this defence on its merits, I would reject it. First, the plaintiff's past non-enforcement of Cll 9.2 and 9.3 is properly characterised (if at all) as waiver by estoppel (also called "equitable forbearance") rather than waiver by election. In *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*"), the Court of Appeal explained (at [54]) that the doctrine of waiver by election:

> … concerns a situation where a party has a choice between two inconsistent rights. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. … Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see [*Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The "Kanchenjunga")* [1990] 1 Lloyd's Rep 391] at 397–398, which was approved by this court in *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33].

127 On the other hand, waiver by estoppel "requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation" (*Audi Construction* at [57]). While both doctrines require an unequivocal representation (*Audi Construction* at [59]), the requisite representation in each of the two doctrines is different. "A party making an election is communicating his choice whether or not to exercise a right which has become available to him", whereas a party to an estoppel "is representing that he will in future forbear to enforce his legal rights" (*Audi Construction* at [57]). Under the doctrine of waiver by election, in electing between distinct legal positions, the electing party is not *promising* to exercise (or not to exercise) his legal rights in some fashion in future; the election is *itself* an exercise of the right which has become available to him (see *Phang* at para 18.088).

128 The electing party's "right" of election – more accurately described as a power to alter the legal rights and duties of another *vis-à-vis* himself or a third person – can only be exercised once, and is thereafter final and binding (*Audi Construction* at [54] and [55]). But the plaintiff's entitlement to charge fees under the 2009 Agreements was recurring, and the plaintiff merely seeks to enforce its contractual right to charge fees in accordance with Cll 9.2 and 9.3 of the Annexures from 2012 onwards. The plaintiff has not sought to reverse or undo a choice which it previously made, for example by claiming further payments in respect of *past* invoices which had already been charged on the basis of the number of actual enrolments.[220] The gravamen of the first defendant's complaint, although not expressed in these words, is that it is unfair and inequitable for the plaintiff to abruptly enforce these clauses *despite having never before enforced them*. This complaint falls squarely within the terms of the doctrine of waiver by estoppel. Since the first defendant neither pleaded nor submitted on this doctrine, I need not consider it.

129 In any event, neither waiver by election nor waiver by estoppel is established on the facts, given the lack of an unequivocal representation on the plaintiff's part. The mere fact that the plaintiff had not hitherto enforced Cll 9.2 and 9.3 of the Annexures could not by itself constitute an unequivocal representation not to do so in future. This is all the more so given that the first defendant only entered into a contractual relationship with the plaintiff in March 2011. Although the plaintiff had contracted with SEGP and the second defendant in the past, these were different entities from the first defendant. This means that the plaintiff's non-enforcement of these clauses *vis-à-vis* the first defendant only lasted for about a year. It is not difficult to believe Mr Crighton's

220 Plaintiff's Reply Submissions at para 42.

evidence that the plaintiff *initially* decided not to enforce these clauses "as a gesture of goodwill". This did not amount to a clear and unequivocal representation that the plaintiff would never henceforth seek to enforce them. I therefore find that the invoices are correctly calculated.

Issue 3: Counterclaim for sums paid pursuant to the 1st and 2nd NODs

130 The first defendant counterclaims the sum of S$905,054.88, which it paid to the plaintiff pursuant to two notices of default. The first Notice of Default ("the 1st NOD"), issued by the plaintiff on 30 June 2011, required the first defendant to pay A$322,200, comprising the fees for Semester 1 of 2010 and Semester 1 of 2011. The second notice ("the 2nd NOD"), issued by the plaintiff on 26 July 2011, required the first defendant to pay A$420,650, comprising the fees for Semesters 2 and 3 of 2010.[221] Though the two NODs refer to "SIC Education Group Private Pte Ltd", it is not disputed that they meant to refer to SIC Education Group Pte Ltd (*ie*, SEGP).[222] The first defendant claims that it paid both NODs via two payments of S$371,010.03 on or around 20 July 2011 and S$534,044.85 on 25 August 2011. It counterclaims these sums on two bases:[223]

(a) First, the first defendant paid these sums under a mistake of law, wrongly believing that it was liable to pay the plaintiff for SEGP's indebtedness accruing prior to 23 March 2011 (the date of the Amending Agreements). The plaintiff admits that there was no such liability.[224]

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221 ABD 406 and 412; Defence and Counterclaim (Amendment No 4) at para 15.

222 In respect of the 1st NOD, see NE (26 May 2017) at p 18 line 30 – p 19 line 10.

223 Defence and Counterclaim (Amendment No 4) at paras 48–50.

224 Reply to Defence and Counterclaim (Amendment No 7) at para 13.

(b) Secondly, and in the alternative, the first defendant is entitled to return of these sums in restitution for unjust enrichment.

131 Although the first defendant pleaded mistake of law *as an alternative to* a claim in restitution for unjust enrichment, mistake is simply one possible unjust factor among many (see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [131]–[134]). Another unjust factor, cited in the first defendant's closing submissions, is that of failure of consideration.[225] The requirements for a successful claim in unjust enrichment are as follows: (a) that the defendant has been benefited or enriched; (b) that the enrichment was at the claimant's expense; (c) that the enrichment was unjust; and (d) that there are no defences (*Anna Wee* at [98]–[99]).

132 The plaintiff avers that the payments in respect of the 1st and 2nd NODs were paid not by the first defendant, but by SEGP/SCBT.[226] The plaintiff further avers that estoppel by representation prevents the first defendant from claiming the sum of S$905,054.88 or any part thereof, because the first defendant expressly represented that it would pay the debts owed by SEGP and/or indemnify the plaintiff and/or guarantee the debts owed by SEGP, with the intention that the plaintiff should act on such representations, and the plaintiff did in fact act on those representations.[227]

133 The following issues arise in turn:

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225 1DCS at para 238.

226 Reply to Defence and Counterclaim (Amendment No 7) at para 33A.

227 Reply to Defence and Counterclaim (Amendment No 7) at para 39; Plaintiff's Reply Submissions at para 72.

(a) Were the sums in fact paid by the first defendant or by SCBT?

(b) Is the first defendant entitled to repayment of those sums on the basis that (i) they were paid under a mistake of law and/or (ii) that there has been a total failure of consideration?

(c) If so, is the first defendant estopped from claiming those sums?

Who paid the sums

134 The plaintiff asserts that the two sums were paid by SCBT (formerly known as SEGP) and not the first defendant, as evidenced by three letters:[228]

(a) SCBT sent a letter to the plaintiff dated 22 July 2011 in respect of the 1st NOD. It described the 1st NOD as "defective" because the invoices in respect of the 1st NOD had been wrongly issued to the first defendant and not to SCBT. Nevertheless, SCBT's letter enclosed payment of A$322,200 "on a strictly without prejudice basis" and "on the condition that [the plaintiff] reissue the [relevant] invoices in the name of [SCBT] within the next 7 days".[229]

(b) The first defendant sent a letter to the plaintiff on 26 July 2011, also referring to the 1st NOD. It stated that SCBT, and not the first defendant, had conducted the plaintiff's courses in 2010. The letter stated that the invoices issued to the first defendant for the first to third semesters of 2010 were "therefore incorrect and certainly not due or payable by [the first defendant]", and the first defendant had been

228 PCS at para 120; Plaintiff's Reply Submissions at para 68.

229 ABD 407.

"wrongly billed". The first defendant requested that the plaintiff withdraw the invoices.[230]

(c) SCBT sent another letter to the plaintiff on 25 August 2011 in response to the 2nd NOD. It stated that the 2nd NOD was "defective" because it had been issued to the first defendant instead of to SCBT. SCBT enclosed payment of A$420,650 "on a strictly without prejudice basis" and "on the condition that [the plaintiff] reissue invoices … in the name of [SCBT] within the next 7 days".[231]

135 These letters clearly show that SCBT and the first defendant were aware that SCBT, rather than the first defendant, was liable in respect of the 1st and 2nd NODs. For this reason they insisted that the plaintiff re-issue the invoices in SCBT's name. I return to this later in my analysis of the unjust factors.

136 I find that the 1st NOD was paid by SCBT, not by the first defendant, and the first defendant can have no claim to it. The sum of A$322,200 was withdrawn by way of demand draft from SCBT's bank account on 21 July 2011.[232] That sum appears to have been credited into SCBT's account by the first defendant the day before.[233] However, contrary to what Mr Chettiar said at trial, it is not reflected in any of the first defendant's accounts as an advance to the plaintiff.[234] Mr Chettiar agreed that the first defendant "banked in the money into [SCBT] so that [SCBT] could buy this cashier's order".[235] He explained that

230 ABD 410.

231 ABD 417.

232 ABD 407, 408 and 413.

233 ABD 413: "Quick Cheque Deposit 'from Stansfield'"; ABD 415–416.

234 NE (25 September 2017) at p 54 lines 21–29; NE (28 September 2017) at p 14 line 30, p 18 line 31 – p 19 line 3.

the first defendant did not wish to admit liability for courses which it had never conducted, but wanted to ensure that the plaintiff received payment. At the same time, the payments could not be lawfully made from SCBT because it was facing insolvency at the time.[236] The first defendant submits that, though payment for the 1st NOD was made out of SCBT's bank account, the first defendant was in reality the source of the bulk of the funds in SCBT's bank account.[237] In other words, Mr Chettiar deliberately orchestrated the transactions such that *SCBT* would pay the plaintiff (because the first defendant was not liable on the invoices), using funds obtained from the first defendant (so that SCBT could not be accused of disposing of its own assets while insolvent). It was therefore SCBT that paid the A$322,200 in discharge of its liability to the plaintiff under the 2009 Agreements. The fact that it obtained those funds from the first defendant, whether by way of loan or gift or some other arrangement, is irrelevant.

137 The circumstances of the payment of the 2nd NOD were different. Although the letter at [134(c)] above was sent by SCBT, the cashier's orders it appended (dated 25 August 2011) were purchased by the first defendant directly.[238] They correspond to two demand draft applications, dated 24 August 2011, for A$196,150 and A$224,500 (total A$420,650), which list the first defendant as the applicant and the plaintiff as the beneficiary.[239] There is also a payment voucher from the first defendant to the plaintiff in respect of the plaintiff's two invoices for Semesters 2 and 3 of 2010.[240] (Though the payment

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235 NE (25 September 2017) at p 47 lines 4–6.

236 NE (25 September 2017) at p 48 lines 1–4, p 50 lines 11–25.

237 1DCS at para 235(b).

238 DBD 735 and 738; ABD 416 and 418.

239 DBAEIC 393d and 393g.

voucher is dated 19 August 2011, it must have been pre-dated, because it reflects the Singapore dollar values of the sums transferred, which would only have been known on 25 August 2011.[241] However, I do not think that makes it unreliable.) It therefore appears that payment for the 2nd NOD was made by the first defendant directly to the plaintiff. The plaintiff also issued receipts dated 29 August 2011 for these two invoices to the first defendant, not to SCBT.[242]

138 On the other hand, I note that the plaintiff subsequently issued revised invoices (dated 16 June 2011) for Semesters 2 and 3 of 2010 in SCBT's name.[243] However, this does not change the fact that *the first defendant paid the A$420,650*, though it may have done so in discharge of SCBT's debt. The first defendant essentially admitted this in a letter to the plaintiff dated 6 December 2011, which stated: "Although the amount was due to you from [SCBT], you insisted that payment be made by Stansfield College. We therefore duly made payment …"[244] The plaintiff's reply on 12 December 2011 did not dispute that the first defendant had made payment.[245] I therefore find that the first defendant paid the sum demanded in the 2nd NOD.

Whether there was an unjust factor

139 The next question is whether the first defendant is entitled to the sum of A$420,650 in unjust enrichment. The first defendant claims that it made this

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240 DBAEIC 393A.

241 NE (25 September 2017) at p 57 line 30 – p 58 line 7.

242 Exhibit C, pp 8 and 9.

243 ABD 419; Exhibit C, pp 6–7.

244 ABD 435.

245 ABD 437; NE (24 May 2017) at p 83 lines 7–9.

payment "under a mistake of law relating to its liability to pay the Plaintiff for SEGP's indebtedness to the Plaintiff accruing prior to 23 March 2011".[246]

140 The parties agree that the first defendant was not contractually liable to pay any liabilities incurred by SEGP/SCBT prior to 23 March 2011 (see [32(b)] above).[247] However, this does not necessarily mean that the first defendant paid the plaintiff A$420,650 under a mistake of law. The letters sent by SCBT and the first defendant (see [134] above) from July to August 2011 show that these two companies were under no illusion as to the first defendant's contractual liability. Mr Chettiar agreed that the first defendant's letter on 26 July 2011 denied liability for the invoices because it had not conducted the plaintiff's courses.[248] Had the first defendant truly believed that it was liable to pay the fees SEGP/SCBT incurred in 2010, it would not have described the invoices issued to the first defendant as "not due or payable by us" or "wrongly billed". The first defendant's witnesses did not explain at trial how the position that it took in its letter could be reconciled with its alleged mistake of law. On the contrary, Mr Chettiar clearly testified that he "chose to make payments" through the first defendant in order to placate the plaintiff, not because he believed the first defendant was contractually obliged to do so. At the same time, Mr Chettiar sought to protect the first defendant by requesting the plaintiff to reissue invoices in SCBT's name, because he was conscious that "if Stansfield College accept the liability for courses which it never conducted, then it means that there is an admission. So we didn't want to admit."[249] Mr Chettiar "wanted to make

246 Defence and Counterclaim (Amendment No 4) at para 50.

247 1DCS at para 221, Reply to Defence and Counterclaim (Amendment No 7) at para 13.

248 NE (25 September 2017) at p 50 lines 4–5.

249 NE (25 September 2017) at p 50 lines 11–25.

sure that RMIT agreed with [his] perspective that Stansfield College was not liable for those invoices".[250]

141 I note that the first defendant did previously represent to the plaintiff that it would pay SEGP's/SCBT's 2010 liabilities, but not because of a mistake of law. On 29 March 2011, *after* the date of the Amending Agreements, Mr Chettiar "agreed that Stansfield College will take over the liability of [SEGP/SCBT] for 2010 payments", to be paid in two instalments.[251] Nowhere in Mr Chettiar's e-mail does he suggest that the first defendant was bound *by the terms of the 2009 Agreements* to pay SEGP's/SCBT's liabilities. Had he thought it was, there would have been no need for him to agree *again* specifically for the first defendant to take over SEGP's/SCBT's liabilities for 2010. His explanation of this e-mail is telling:[252]

> Q Mr Chettiar … you had referred to an email that you sent on 29th of March 2011. Do you recall that, Mr Chettiar?
>
> A Yes, I do, Your Honour.
>
> Q And in this email, in---according to your evidence, you said that you were giving some proposals on the repayment. Do you remember that?
>
> A Yes, Your Honour.
>
> Q Mr Chettiar, can you explain to the Court why and the thinking behind making these proposals? Why did you make these proposals? What did you seek to achieve?
>
> A My intention, Your Honour, *was to build a relationship of trust*. As I've said in my email, that was very important to me because the programme came to us from another organisation in 2005. I've always been excited for the engineering programme and RMIT's reputation was one that convinced me that it's a partnership worth having. So it was incumbent, I felt,

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250 NE (25 September 2017) at p 53 lines 28–31.

251 ABD 357.

252 NE (28 September 2017) at p 82 line 25 – p 83 line 12.

> personally upon me that I need to resolve this problem and not burn my relationship with RMIT personally, and *I sought to do that by ensuring that they were happy*, even though I wasn't going to make a profit in running the programme for the next 2 or 3 years.
>
> [emphasis added]

142 I therefore find that the first defendant paid the A$420,650 *not* because it mistakenly thought it was legally obliged to do so as a result of the 2009 Agreements, but so as to maintain a good relationship with the plaintiff.

143 Since the first defendant made the payment voluntarily, the unjust factor of failure of consideration also does not apply. For reasons which I state at [149]–[157] below, I find that the plaintiff did *not* promise to issue further annexures to the first defendant after 2012. While the first defendant may have *hoped* that the plaintiff would do so, and that its payment of SEGP's/SCBT's liabilities would therefore be offset by potential gains following 2012, this was a gamble. The first defendant made a business decision to pay SEGP's/SCBT's liabilities for 2010, even though it knew it was not contractually obliged to, in order to preserve its business relationship with the plaintiff and prevent the plaintiff from terminating the contract.[253] With the benefit of hindsight, that may have been a poor bargain or a miscalculation; but it cannot be said that the *basis* for the plaintiff's payment has totally failed, particularly given that the first defendant did in fact benefit from the contractual relationship by commencing new intakes under the existing Annexures and teaching these students until 2014.

144 My dismissal of the counterclaim obviates any need to decide on the plaintiff's argument of estoppel.

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253 NE (25 September 2017) at p 50 lines 21–25.

Issue 4: Counterclaim for plaintiff's failure to issue further annexes

145 The first defendant claims that Mr Crighton verbally represented to Mr Chettiar on around 10 or 11 March 2011 that the plaintiff would provide separate annexures in respect of the Five Programmes upon the first defendant signing the Amending Agreements.[254] These representations allegedly induced the first defendant to enter into the Amending Agreements. In or around June to August 2011, after the Amending Agreements were signed, Mr Crighton allegedly told Mr Chettiar that the separate annexures would be issued upon the first defendant making the payments which were the subject of the 1st and 2nd NODs.[255] In reliance on the plaintiff's representations, the first defendant developed a new business plan, a new prospectus and spent capital expenditure to support the new partnership agreement with the plaintiff's approval.[256] It incurred costs of around S$240,000 developing various prospectuses to market the plaintiff's courses and promote the plaintiff's brand name in Singapore.[257] However, the plaintiff failed and/or refused to issue further annexures in the first defendant's name.

146 The plaintiff denies that it made any such representations or was obliged by the 2009 Agreements to provide or issue any further annexures to extend or expand the programme under the existing Annexures. Nor did the first defendant ever request replacement annexures; on the contrary, it commenced new intakes pursuant to the existing Annexures.[258]

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254 Defence and Counterclaim (Amendment No 4) at para 39; DBAEIC 29–30 at para 50.

255 Defence and Counterclaim (Amendment No 4) at para 42A.

256 Defence and Counterclaim (Amendment No 4) at para 42.

257 Defence and Counterclaim (Amendment No 4) at para 44.

258 Reply to Defence and Counterclaim (Amendment No 7) at paras 20, 30 and 34.

147 The parties do not dispute the legal principles relating to misrepresentation. The elements are satisfied when a party relies on a false representation in entering into the contract with the representor (*Straits Colonies Pte Ltd v SMRT Alpha Pte Ltd* [2018] 2 SLR 441 at [33]).

148 I dismiss the first defendant's counterclaim in misrepresentation. First, I am unable to find that the plaintiff represented that it would issue further annexures. Secondly, even if it had made such a representation, this was a statement of intention rather than a misrepresentation as to fact. Thirdly, even if this was an actionable misrepresentation, I do not think that it induced the first defendant to enter into the Amending Agreements.

No representation to issue further annexures

149 First, the first defendant has not proved that such a misrepresentation was made. Mr Crighton denied that he had made any representations to Mr Chettiar, or anyone from the first defendant, that further annexures would be issued to it. In his AEIC, Mr Crighton stated that there was "no discussion and/or request for new annexures at that time" and that it was understood that the first defendant would be able to teach and/or accept new intakes pursuant to the existing Annexures.[259] During his evidence-in-chief, however, Mr Crighton said that was not entirely accurate. According to his recollection, "there may have been some discussion" with Mr Chettiar prior to the signing of the Amending Agreements, probably in March 2011 or slightly earlier. Mr Crighton said it was "possible there was discussion about the possibility of discussing the possibility of new annexures after the signing of the amending agreement".[260] His evidence was as follows:[261]

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259 PBAEIC 46–47 at paras 127 and 129.

> Q: In your recollection … what was discussed?
>
> A: Only that from my recollection … the possibility or the request for issuing new annexures may have been made.
>
> Q: What was your response or RMIT response as you know to that request?
>
> A: My response---and my response would always have been that the progression of the amending agreement was to tie the---the different Stansfield entities to the existing agreements rather than there being a need for new annexures, that the possibility of new annexures would be further down the line once the existing agreements were completed.

150 When it was suggested to Mr Crighton that Mr Chettiar had requested further annexures after 11 March 2011, Mr Crighton said he "[could not] be sure but [he] believe[d] that that may have happened".[262]

151 The first defendant submits that this change in Mr Crighton's evidence renders his evidence unreliable and Mr Chettiar's account should be preferred.[263] However, the fact that Mr Crighton amended his AEIC, bringing it closer to Mr Chettiar's account, does not mean that his evidence is unreliable. If anything, it suggests to me that he honestly attempted to recount the events as they really happened. I also note that Mr Crighton was no longer employed by RMIT at the time of the trial, which further reinforced the credibility of his testimony.

152 Besides Mr Chettiar's and Ms Majella's assertions there is no evidence of Mr Crighton saying that further annexures would be issued.[264] Given how

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260 NE (23 May 2017) at p 5 lines 30–32.

261 NE (23 May 2017) at p 6 lines 6–15.

262 NE (23 May 2017) at p 25 lines 4–10.

263 1DCS at para 187.

264 NE (28 September 2017) at p 45 lines 10–22, p 48 lines 1–3; NE (26 May 2017) at p 49 lines 24–28, p 41 lines 4–7; First Defendant's Reply Submissions at para 70(b).

important the issuance of further annexures appears to be to the first defendant, I find it odd that there is no documentary evidence of the alleged representation or of the first defendant confronting the plaintiff regarding its failure to issue further annexures, and that no such promise was incorporated as a contractual term.

153 Mr Chettiar says he requested further annexures on several occasions. First, on 11 March 2011, when the Amending Agreements were being discussed, Mr Crighton allegedly said that the plaintiff would hold off on issuing the further annexures in the first defendant's name until the latter was able to confirm the city campus location for the future delivery of the plaintiff's courses.[265] Secondly, at the 11 April 2011 meeting with Mr Connelly, Mr Chettiar "had the opportunity of discussing the annexures with Mr Stephen Connelly". Subsequent to that discussion, the parties "signed the new agreement to take new premises, because [Mr Chettiar] was assured that [the plaintiff] would be supporting [him]". However, it is not clear what exactly was discussed between Mr Chettiar and Mr Connelly, and Mr Chettiar did not say that Mr Connelly agreed to issue further annexures. Rather, Mr Chettiar said, rather elliptically, that he "did not feel a need … to remind [the plaintiff] of [its] contractual obligations" because it had always acted honourably towards him.[266] Finally, Mr Chettiar claimed that he requested further annexures during "other instances up to the point when [he] handed over the operations to [Ms Majella]", though he did not elaborate on these instances.

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265 DBAEIC 30 at para 50(c); NE (28 September 2017) at p 81 lines 12–14; 1DCS at para 184(b).

266 NE (28 September 2017) at p 81 lines 14–23.

154 I found Mr Chettiar not to be an entirely credible witness. His responses during cross-examination were often indirect and irrelevant (see, *eg*, [107] above) and he claimed not to understand fairly simple questions.[267] I received the impression that he was deliberately evasive and sought to turn the cross-examination to his advantage when a simple "yes" or "no" response would have sufficed.[268] Given my doubts about the reliability of Mr Chettiar's evidence, I am unable to find on the basis of his testimony alone that the plaintiff represented that it would issue further annexures. While Mr Chettiar may have *hoped* and perhaps even *expected* the relationship between the parties to be a long-term one[269], that does not *ipso facto* entitle him to damages for misrepresentation.

155 The first defendant offers two other reasons why I should accept Mr Chettiar's evidence. First, the Annexures expired in 2012, meaning that there would be three years between the last student intake under the Annexures and the expiry of the ASA and SSA in 2015. For these three years, Cl 11.2 of the ASA and SSA would prevent the plaintiff from delivering its programmes through other private education institutions. The first defendant says this would be "commercially illogical and would have been unacceptable to the parties".[270] I disagree. The plaintiff may have preferred to reserve its decision whether to issue further annexures until the expiry of the Annexures. If the first defendant proved an unsatisfactory business partner it might have made more sense for the plaintiff simply to forgo accepting new intakes in the three years between the

267 NE (25 September 2017) at p 7 lines 12–25, p 8 line 4 – p 9 line 4, p 10 lines 9–30, p 14 lines 2–7 and 22–31, p 30 lines 27–31.

268 See, *eg*, NE (25 September 2017) at p 19 lines 2–28, p 20 line 19 – p 22 line 1, p 35 line 3 – p 36 line 27, p 38 lines 13–30.

269 1DCS at para 199(b).

270 1DCS at paras 189–191.

last student intake under the Annexures in 2012 and the expiry of the ASA and SSA in 2015. In fact that was precisely what happened: the plaintiff declined to issue any further annexures after 2012 and new intakes for the BME Programme only resumed in 2015 through an alternative institution. If the plaintiff had intended the first defendant to accept intakes for the BME Programme all the way until 2015, it could easily have provided for the Annexures to expire in 2015 instead of 2012.

156 Secondly, the parties contemplated in early 2011 that there would be a change in delivery location in the future. The first defendant therefore submits that Mr Crighton would have promised to issue further annexures with a view to reflecting the new delivery location in the new annexures.[271] But this would have simply required an amendment to the existing Annexures, not the issuance of new annexures for a longer term.[272]

157 I deal briefly with Ms Majella's evidence. As she only took over responsibility for the management of the plaintiff's programmes conducted by the first defendant around August 2011[273], her evidence related to discussions *after* execution of the Amending Agreements. Any representations made after that date cannot have induced the first defendant to enter into the Amending Agreements. Ms Majella had no first-hand knowledge of such representations being made before the Amending Agreements, save what she had been told by Mr Chettiar.[274] Moreover, her evidence does not show that the plaintiff unequivocally agreed to issue further annexures. Though she requested Mr

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271 1DCS at paras 193–194.

272 NE (23 May 2017) at p 24 line 20 – p 25 line 3.

273 DBAEIC 558 at para 8.

274 NE (26 May 2017) at p 53 lines 18–26.

Crighton to issue further annexures on or around 7 September 2011, Mr Crighton merely "assured [her] that the outstanding issue of annexures would be sorted out when he visited Singapore in October 2011".[275] Ms Majella also said that various issues – such as the change of address, the fees and the intake schedules – remained to be discussed at the meeting on 4 November 2011, and if they were not agreed upon, no annexures would be issued.[276] This makes it even less likely that the plaintiff promised to issue further annexures in the first defendant's name, since the issuance of such annexures would have been contingent upon their ability to agree on these terms.

Not an actionable misrepresentation

158 Even if Mr Crighton had said that the plaintiff would issue further annexures, this would constitute a future promise rather than an actionable misrepresentation. As stated by the Court of Appeal in *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 ("*Tan Chin Seng*") at [21], citing Andrew Phang's *Law of Contract (Second Singapore and Malaysian Edition)* (Butterworths Asia, 1998) at pp 444–445:

> A representation, as we have seen, relates to some existing fact or some past event. It implies a *factum*, not a *faciendum*, and since it contains no element of futurity it must be distinguished from a statement of intention. An affirmation of the truth of a fact is different from a promise to do something *in futuro*, and produces different legal consequences. This distinction is of practical importance. If a person alters his position on the faith of a representation, the mere fact of its falsehood entitles him to certain remedies. If, on the other hand, he sues upon what is in truth a promise, he must show that this promise forms part of a valid contract. The distinction is well illustrated by *Maddison v Alderson* [(1883) 8 App Cas 467], where the plaintiff, who was prevented by the Statute of Frauds from enforcing an oral promise to devise a house, contended that the promise to

275 DBAEIC 563–564 at para 18.

276 NE (26 May 2017) at p 52 line 11 – p 53 line 3.

> make a will in her favour should be treated as a representation which would operate by way of estoppel. The contention, however, was dismissed, for:
>
> > The doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts. [see (1883) 8 App Cas 467 at 473].

159 *Phang* states at para 11.029:

> A statement as to something that will happen in the future is not a statement of a present or past fact. Neither is a statement as to what the maker will or intends to do in the future. …
>
> However, as such statements are essentially *promises*, they will attract liability if they are included in a contract as terms of the contract. In the words of Sir Mellish LJ [in *Beattie v Lord Ebury* (1872) LR 7 Ch App 777 at 804]:
>
> > [T]here is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise.

160 The first defendant refers to the principle that a misstatement of a man's intention or state of mind *is* a misrepresentation of fact (*Tan Chin Seng* at [12], citing *Edgington v Fitzmaurice* (1885) 29 Ch D 459 ("*Edgington*") at 483 *per* Bowen LJ).[277] However, as *Tan Chin Seng* goes on to state at [13], this was "further elucidated" by Tudor Evans J in *Wales v Wadham* [1977] 2 All ER 125 at 136 in the following terms:

> A statement of intention is not a representation of existing fact, unless the person making it does not honestly hold the intention he is expressing, in which case there is a

277 1DCS at para 176.

> misrepresentation of fact in relation to the state of that person's mind.

161 *Phang* therefore states the principle as follows at para 11.040: "[I]f it can be shown that, at the time the statement of intention was made, the person who made it had no intention of doing what he asserted he would do, there would be a misrepresentation of that person's state of mind." At para 11.041, *Phang* highlights as an example the facts in *Edgington*, in which the directors of a company issued a prospectus inviting subscriptions for debentures, stating that the object of the issue of debentures was to raise funds for alterations to buildings owned by the company, the purchase of horses and vans, and for the development of the company's business, whereas in fact the real object was to enable the directors to pay off the company's pressing liabilities. To show that there was a *misrepresentation of fact as to Mr Crighton's mind*, the first defendant would have to prove that Mr Crighton made a promise to issue further annexures while intending *not* to do so. There is no evidence of this.

No inducement

162 I also accept the plaintiff's argument[278] and find that Mr Chettiar was the one who suggested that the first defendant be party to the 2009 Agreements for his own reasons, and was not induced into entering the Amending Agreements by any representation on the plaintiff's part to issue further annexures. It was Mr Yeo who, in mid-December 2010, first proposed transferring the BME Programme from the Singapore Institute of Commerce to the first defendant for the reason that the latter had obtained EduTrust certification.[279] Mr Chettiar reiterated this suggestion in an e-mail to Prof Subic on 7 January 2011, in which

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278 PCS at paras 141–147.

279 Mr Crighton's AEIC at para 42; PBAEIC 243.

he said he was "personally keen on re-branding the RMIT Engineering qualifications in Singapore".[280] Mr Chettiar mentioned that the first defendant had been awarded EduTrust certification and that enrolment numbers had declined due to the plaintiff's higher fees compared to previous years. Mr Chettiar wrote that these fees could only be "sustained by a complete re-branding with our superior Stansfield College brand", and said that his "value proposition [was] for RMIT to be directly conducted under Stansfield College".[281]

163 On 21 February 2011, Mr Chettiar prompted Mr Crighton to decide whether to migrate the plaintiff's courses to the first defendant. Mr Chettiar's e-mail strongly emphasised that, unless the courses were migrated, "RMIT will lose out on the international market as there is no EduTrust guarantee" and pressed the plaintiff for a decision "by end of the day".[282] The impetus to transfer the plaintiff's programmes to the first defendant clearly came from the first defendant. The e-mails do not mention the issuance of further annexures. Mr Chettiar agreed during cross-examination that moving the plaintiff's programmes from the Singapore Institute of Commerce to the first defendant was "very important to [him]".[283] It is also noteworthy that Mr Chettiar wanted the plaintiff to give a firm indication that it was agreeable to the delivery of its programmes through the first defendant *by 21 February 2011*, *before* the alleged representation that the plaintiff would issue further annexures. If that is so, any promise to issue further annexures cannot have played a real and substantial part in inducing the first defendant to enter into the Amending Agreements.

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280 Mr Chettiar's AEIC at paras 29 and 37; DBAEIC 250–251.

281 ABD 293–294.

282 ABD 318.

283 NE (28 September 2017) at p 43 line 30.

Issue 5: Counterclaim for marketing and advertisement costs

164 Finally, I dismiss the first defendant's counterclaim in unjust enrichment regarding the marketing and advertising services which it provided to the plaintiff. The first defendant submits the following:[284]

(a) The plaintiff was enriched by the first defendant's marketing and advertising of the plaintiff's courses and promotion of the plaintiff's brand name, between April 2011 and July 2012, which enhanced the attractiveness of the plaintiff's programmes to students in Singapore.

(b) This enrichment was at the expense of the first defendant, which expended approximately S$240,000 on advertising and promoting the plaintiff's courses and brand name.

(c) This enrichment was unjust in that the plaintiff had failed to provide consideration in respect of this enrichment. The plaintiff neither subsidised the costs of marketing and advertising nor issued further annexures.

165 The plaintiff counters that the marketing and advertising benefited both the plaintiff and the first defendant, and that there was no unjust factor.[285]

166 I accept that the first defendant provided marketing and advertising services. However, I dismiss this counterclaim for want of an unjust factor. The unjust factor of failure of consideration requires the failure to be *total* (*Goff & Jones: The Law of Unjust Enrichment* (Charles Mitchell *et al*, eds) (Sweet & Maxwell, 9th Ed, 2016) at para 12-16). As I stated at [110] above, Cl 2.1(a) of

284 1DCS at paras 210–214.

285 Plaintiff's Reply Submissions at para 64.

the SSA required the *first defendant* to "undertake marketing to generate applications for the Program". Mr Chettiar agreed that, reading this clause as it stood, the advertising and promotional expenses were to be borne by "the organisation" (*ie*, SEGP/SCBT and the first defendant).[286] The first defendant was therefore contractually obliged to bear the costs of marketing and advertising, along with its other contractual obligations under the 2009 Agreements, in consideration of the various benefits it would acquire under those agreements (*ie*, the services to be rendered by the plaintiff). Since the first defendant *did* receive the services promised by the plaintiff (see [85] above), any failure of consideration or basis cannot be total.

167 Separately, though there is no need for me to decide this, I am not sure it can be said that the plaintiff benefited *at the first defendant's expense*. The principle underlying an unjust enrichment claim is that "the claimant … *lost a benefit* to which she is legally entitled or which forms part of her assets and *which is reflected in the recipient's gain*" [original emphasis omitted; emphasis added in italics] (*Anna Wee* at [128]; see also [108]). In this case, however, the marketing and advertisement of the plaintiff's courses would have benefited both the plaintiff *and the first defendant*, as both parties stood to gain from an increase in enrolments. In other words, the first defendant's loss does not correspond solely to the plaintiff's gain; the first defendant would *also* have benefited from the costs it incurred. The logic of an unjust enrichment claim therefore does not seem to apply, or at least not to apply to the entire expense incurred by the first defendant. However, given my dismissal of the counterclaim, the proper approach in such cases may be left to another day.

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286 NE (25 September 2017) at p 25 lines 8–10.

Conclusion

168 For the foregoing reasons, I allow the plaintiff's claim against the first defendant for A$942,322.50 (see [28] above). I also find that the plaintiff breached Cl 11.2 of the ASA and SSA by making arrangements with SIM to offer the plaintiff's courses (see [74] above). The quantum of damages for such breach is to be assessed separately. I will hear the parties on costs.

Quentin Loh
Judge

Joseph Liow Wang Wu, Charlene Cheam Xuelin and Celine Liow (Straits Law Practice LLC) for the plaintiff;
Gregory Vijayendran Ganesamoorthy, Cheng Jin Edwin, Pradeep Nair and Tan Tian Hui (Rajah & Tann Singapore LLP) for the first defendant;
the second defendant unrepresented, absent.